

NO. 20-12

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

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

Trial counsel acknowledges further that the admission of the DNA evidence solidifies for this small town jury in Dorchester county that an African American man and a Caucasian white female had been having sex. And he also recognized the fact that the Applicant was married to an African American female at the time he was having sex with the Caucasian victim in this case.

See PCR trial, p. 1752, l. 4-16:

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

A: It is.

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

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

And Applicant's trial counsel confirmed his awareness of the very conservative nature of the Dorchester County jurors and what should have been ample reason for him to exclude any evidence of the irrelevant, prejudicial consensual sex between Mr. Bowman and Kandee Martin:

Q: And your assessment of Dorchester County juries in general was?

A: Very conservative jurors.¹⁰

PCR trial, p. 1819, l.1-3.

Q: Is that your understanding of what the allegation of aggravation was here?

A: I want to say this out loud and with Marion, what are you doing on Nursery Road at that time in the morning with a white female and African American males in Dorchester County? Really. This is 2001 but what good are you doing out there on a dirt road?

PCR, p. 1396, l. 7-14.

¹⁰Applicant is further concerned that perhaps his trial counsel actually shared the same small town beliefs that his jury did when he witnessed the unresponsive statement by his trial counsel at the PCR hearing found on page 1396 lines 7-14.

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Finally, trial counsel possessed information which demonstrated that the sex occurred prior to any visit to Nursery Road. Thus, this evidence was not part of the *res gestae* of the crime. See Plaintiff's 65. Frankie Martin told law enforcement that Bowman and Martin had sex at his apartment the afternoon before the night of the murder. Martin was accessible to counsel as he testified in the penalty phase of the trial. Knowing this, counsel should have excluded the sex evidence because this was irrelevant, inflammatory, and improper character evidence. Had counsel done so, there is a reasonable probability that Marion Bowman would not have been convicted of murder and arson.

Improper Admission of Irrelevant and Prejudicial Petroleum Evidence-Ground E

Applicant was denied the effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. In Article One, Section Three 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 the Applicant. Strickland v. Washington, 466 US 68 (1984).

Trial counsel should have objected to the introduction of any evidence pertaining to the petroleum product found on the pants seized at the time of his arrest, because although a pair of pants was sent to the State Law Enforcement Division laboratory and a product was found on the pants, that product did not match the gasoline used to burn the victim and her car. The Applicant could have stipulated that the pants were sent to SLED, examined and nothing of evidentiary value was obtained. Having done so in advance, the State could not then have been able to introduce the forensic examiner's testimony to show that it "had done everything it should have in the

investigation". (PCR trial, p. 2136, l. 14-20)

Q: While you were trying to make sure that you could not be accused of not doing a full and fair investigation with regard to the accelerant, that was because that was actually related to the actual cause and results of this particular crime. Correct?

A: As relates to the arson charge, yes.

Applicant's trial counsels' failure to object to the introduction of the testimony of Grady A. Layton, SLED arsenic examiner, was compounded when Solicitor Bailey was allowed to asked the expert on direct examination:

Q: Would you state whether or not you detected petroleum accelerant in those jeans?

A: Okay. One second. I found the presence of a heavy petroleum product on these jeans. (Trial p. 4298, l. 2-5)

Before the jury, in an arson case, the Solicitor questioned whether an accelerant was found on pants purportedly worn by the Applicant, and the expert's answer was in the affirmative.

Under SCRE Rule 702, expert testimony is only allowed if the "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Evidence that there was a heavy petroleum product on the Applicant's pants, could only stand to confuse the jury as opposed to assist them in understanding the evidence.

Under SCRE Rule 403, "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury." The petroleum product which turned out to be kerosene and completely unrelated to the case at hand did not even meet the first prong of this Rule, because it was not even relevant. And again, allowing the Solicitor to pointblank ask whether there was a petroleum accelerant on the Applicant's pants could do nothing more then unfairly prejudice the applicant and confuse and mislead the jury. Because the evidence contained on the pants was not relevant, it should have been

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excluded by SCRE Rule 402.

Plea deals of Family/Bolstering Prior to Impeachment-Ground B

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteen Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including South Carolina Code Section 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to improper testimony regarding a conspiracy to secrete a firearm wherein no evidence linked Applicant to this conspiracy. Also in violation of South Carolina Rules of Evidence Rule 102, 103, and 104, and Strickland v. Washington, 466 US 668 (1984).

During the verdict phase of the trial the Solicitor elicited information pending to establish the existence of a conspiracy among several of the Applicant's relatives to secrete the firearm where there was no evidence to link the Applicant to this conspiracy. And even though there was no evidence whatsoever linking the applicant to the conspiracy to secrete the weapon, when Applicant's trial counsel failed to object to the actual charges the Applicant's relatives were facing and the plea agreements they had entered into, it left the jury with the impression that not only was the defendant already guilty of a murder that had yet to be proven, but that he was somehow part of this conspiracy, as well.

With every one of the Applicant's family members, the Solicitor artfully establishes their familial relationship to the applicant and then the very next question is, "Do you have charges pending against you for Accessory After the Fact to Murder?" In the original trial transcript on direct examination, page 3734, lines 18-22, the first questions asked by the Solicitor of the Applicant's sister, Yolanda Shanique Bowman, are as follows:

- Q. Okay. And are you related to the defendant in this case, Marion Bowman, Jr.?
A. Yes.
Q: Okay. How are you related?
A: He's my brother.

Then after having the witness identify her brother in court, the very next question from the Solicitor was (Trial p. 3735, l. 5-7):

- Q: Ms. Bowman, I want you to tell the jury whether or not you have criminal charges pending against you for accessory after the fact of murder?
A: Yes.

Well, the defendant is the one on trial for murder and logically, at least in the eyes of the jury, one could not possibly be allowed to plead guilty to accessory after the fact to murder unless a murder had occurred and unless he or she was aiding or assisting the murderer. This testimony was offered without objection by the Appellant's trial counsel, and clearly indicated not only that his sister was involved in a conspiracy to secrete the murder weapon but also that she had entered into a plea agreement with the State of South Carolina wherein she would get probation on the charge of accessory after the fact of murder. The admission of this plea agreement and the charges that she would be pleading guilty to effectively established that the Applicant had committed the offense of murder (because how could she plead guilty to accessory after the fact to murder unless there had been a murder), and that she was an accessory after the fact to murder (i.e., assisting the murderer) by virtue of her role in disposing of the murder weapon for him.

Trial counsel failed to object to the introduction to the jury of the actual charge Ms. Bowman would be pleading guilty to. The jury should have simply been advised that she was pleading to a related felony and the amount of time she was facing for the related felony.

This error by trial counsel was compounded when the identities of the parties to the

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conspiracy are never identified either in direct or cross-examination, leaving no doubt in the jury's mind that the Applicant was one of the members of the conspiracy.

When Yolanda Bowman was called back to the stand, the Solicitor further contrived the conspiracy as a family affair, the center of which was Marion Bowman, in his direct examination of Ms. Bowman. Trial transcript page 4182, lines 14-25 and trial transcript page 4183, lines 1-14:

- Q: Ms. Bowman, you testified earlier in the trial that you're Marion Bowman's sister; is that correct?
- A: Yes, sir.
- Q: Kendra Bowman is your sister?
- A: Yes, sir.
- Q: Okay. And I want to call your attention to shortly after your brother's arrest and I'm going to ask whether or not you saw your sister, Kendra?
- A: Yes.
- Q: Okay. And on that same date did you also see your father, Marion Bowman, Sr.?
- A: Yes.
- Q: Okay. And where did you three get together?
- A: At the Zion Cemetery.
- Q: And before you got to Zion Cemetery, where were you?
- A: To my mother's house.
- Q: Okay. So you and Kendra and your father where at your mother's house?
- A: Uh-uh (affirmative response).
- Q: Alright.
- The Court: Is that a yes?
- A: Yes, sir.

Dorothy May Bowman

When the Applicant's wife testified, Solicitor Bailey continued in the creation of the fiction that a conspiracy existed among the applicant's relatives to secrete a firearm and that the conspiracy included the applicant, while there was no evidence to support such a conspiracy. In the trial transcript on page 4161, line 13, after establishing Dorothy May Bowman as the defendant's wife, Solicitor Bailey next asked,

- Q: Alright. Now I want you to tell the jury whether or not you are presently charged with

accessory after the fact of murder?

A: Yes, sir.

This testimony was offered again without objection by Applicant's attorney wherein it would have been far more prudent to offer evidence that Ms. Bowman was pleading guilty to a related felony rather than the charge of accessory after the fact to murder.

Applicant's trial counsel compounded his own error and omission by bringing up before the jury that which the defendant's own wife had been charged with and was pleading guilty to in his cross-examination of her. See the trial transcript page 4213, lines 1-7 when Applicant's trial counsel asks Ms. Bowman:

Q: They locked you up for what?

A: For two weeks, that's how I told it.

Q: I know, but for what crime, ma'am please?

A: For accessory after the fact of murder.

Q: And that's when you told them about the gun, is that right?

A: Yep.

During this exchange, it must have appeared to the jury that the defendant's wife came clean about the conspiracy after she was charged with accessory after the fact of murder, wherein again there was no evidence that the Applicant himself was ever a participant in the conspiracy or that a conspiracy even existed.

Kendra Bowman

Yet another witness was paraded before the jury to establish the existence of a conspiracy to secrete a firearm wherein no evidence linked the Applicant to this conspiracy. See the following testimony relative to the defendant's sister, Kendra Bowman in the trial transcript page 4167, lines 12-23:

Q: Are you related to the defendant in this case, Marion Bowman, Jr.?

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- A: Yes, sir.
Q: Okay. For the record, is that Marion Bowman seated in the shirt with no coat seated beside the gentleman on the end over here?
A: Yes, sir.
Q: That's your brother?
A: Yes, sir.
Q: Okay. And are you charged with accessory after the fact of murder in this case?
A: Yes, sir.

Thus, counsel was ineffective for failing to object to such extrajudicial proceedings as involved the "guilt" of other family members to a conspiracy to secrete a firearm. While factual information was certainly relevant, the prosecution presented such evidence in a way to suggest that Marion Bowman's guilt could be presumed from the guilt of his immediate family members. But for this deficient performance by counsel, there is a reasonable likelihood that the outcome of the proceedings would have been different.

Improper Admission of Ballistics Evidence-Grounds O & P

_____ Marion Bowman deserves a new trial because his attorney failed to object to the improper admission of ballistics opinion. As noted by an expert presented at the PCR, this testimony is based upon two faulty assumptions: 1) that firearms produce unique and reproducible markings and 2) that such markings can be quantified in such a manner as to give an expert opinion equating to a statistical probability of 100 percent certainty. Such challenges were being made in other jurisdictions and have been successful in preventing the type of opinion offered in this trial. See Plaintiff's 78.

In Bowman's trial, the state presented the testimony of a SLED agent who testified as a ballistics expert that the casings found at the scene of the crime were fired by a gun secreted by Bowman's family members to "the exclusion of all other firearms." Trial, p. 4316, l. 2-3. This statement is one of absolute statistical probability. This statement eliminated all possibility, however remote, that another firearm, even of the same make and model, was used in this killing.

This statement overstated this certainty. At PCR, the SLED agent, who now works in a different law enforcement agency, proclaimed that this statement was not accurate. Instead, he conceded that there was a possibility that another firearm could have expelled these casings. He did, again, attempt to quantify this possibility by proclaiming that his certainty made it "practically impossible that these particular items could have been fired by another firearm." PCR, p. 341, l. 1-3.

However, he admitted that he did not tell the jury there was a possibility that the items were fired by another gun. PCR, p. 341, l. 10- p. 342, l. 23. He further conceded that his testimony could "lead to an opinion of certainty in some people, but that is not the manner in which it was coming from me." PCR, p. 341, l. 10-13. Finally, he notes that there is "no statistical basis for this" opinion

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and that ballistics is “all subjective. That portion of the examination where you actually render the conclusion is subjective.” PCR, p. 348, l. 1 & p. 319, l. 5-7.

None of this was presented to the jury. Instead, the jury only heard that the government witness was an expert who matched these items to the gun attributed to Marion “to the exclusion of *all* other firearms.” Trial, p. 4316, l. 2-3. In this case, the defense argued at closing that Tawain Gadson owned an identical make and model firearm. This meant that the “remote impossibility” was statistically different because the Bowman gun and Gadson gun possessed the same class and subclass characteristics.

Other courts have also recognized the problems with this “exclusionary” statement. Most importantly, a court recently ruled, pre-trial, to exclude exactly such a statement by holding that “ballistics opinions offered at the [defendant’s] retrial may be stated in terms of ‘more likely than not’ but nothing more” because ballistics comparison “lacks defining standards to a degree that exceeds most other kinds of forensic expertise.” US v. Glynn, 578 FSupp2d 567, at 574-575 (SDNY 2008). The Glynn Court relied heavily upon the report generated by the National Resource Council and National Academies entitled Ballistics Imagining. Court’s Exhibit 1 and Plaintiff’s 28.

This same NRC report was offered at the PCR hearing and portions of this were admitted by the PCR court. Plaintiff’s 26 & 28. Further, the expert testimony of one of the authors of this report was offered at PCR. This expert, Dr. Marc DeGraef, is a professor of materials science and engineering with heavy educational background and experience in statistics. Plaintiff’s 27.

DeGraef participated in the National Resource Council study which was sponsored by the US Department of Justice. Further, he reviewed the bench notes and testimony related to the State’s presentation in Bowman’s trial. DeGraef opined that the underlying assumption of ballistics that

firearms produced unique markings which were reproducible had not yet been established. He further noted that the evidence, bench notes, and opinion of the state's expert at trial relied upon no statistical basis. Finally, he opined that there was nothing scientific about such testimony because this testimony was not based upon science at all, but instead was subjective.

As this trial testimony served to eliminate the very defense theory espoused by defense counsel, that Gadson used his gun to kill Kandee Martin, the prejudice from the improper statistical statement of exclusion is high. Thus, but for the deficient performance of trial counsel in allowing such incorrect testimony and statistical statement to be made, there is a reasonable likelihood that Marion Bowman would not have been convicted of the murder and arson of Kandee Martin. Further, due process is violated by a conviction and death sentence which rests upon such incorrect statistical evidence and testimony.

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Improper Consideration of Arbitrary Factor-Ground H

During the penalty phase, trial counsel called James E. Aiken, a prison consultant, to testify that the South Carolina Department of Corrections can safely protect society from the Applicant for the rest of his life. However, during cross-examination of Aiken by the Solicitor, Aiken was allowed to testify that the Applicant would not be in super maximum security, and he would be able to work and earn a small amount of money. Aiken testified that Applicant would most likely have certain opportunities in prison, such as Bible study, continuing his education, participating in anger management programs, playing basketball, exercising, reading books, and watching movies and possibly television. See the original trial transcript pages 4849-4862.

On direct appeal the Applicant (then Appellant) argued before the South Carolina Supreme Court that these arbitrary factors should not have been presented to the jury during the sentencing phase, however, the South Carolina Supreme Court ruled that the Applicant's trial counsel did not preserve this issue for review because Applicant's trial counsel did not raise this issue in trial court before the testimony was presented and did not make a contemporaneous objection when the testimony was actually elicited. Without that contemporaneous objection, the trial court did not and could not rule on this issue subsequently raised by the Appellant/Applicant. During the Post Conviction Relief Hearing Applicant's counsel was asked:

- Q: What strategy would exist for failing to object to the introduction of an arbitrary sentencing factor?
 A: There is no strategy to that other than what Mr. Bailey (the prosecutor) is going to argue and fight over, that I got to come back with, and that is what I did.
 (PCR trial, p. 1720, l. 23-25 & p. 1721, l. 1-3)

At the PCR, applicant's trial counsel admitted his mistake:

- Q: Well, now, hold on, that is not my question. My question is why didn't you object

when Mr. Bailey brought it out so he couldn't talk about it at all anymore?

A: Maybe I just didn't remember to do that because we were still fighting with each other by the side of the table, or the judge, and you have to read what I was doing.

Q: That's fine, I'm just asking if you had a reason.

A: There is no reason why a lawyer misses an objection, he misses it.
 (PCR trial, p. 1721, l. 15-25 & p. 1722, l. 1)

Following the direct appeal in Bowman's case, the South Carolina Supreme Court took the opportunity to review the introduction of arbitrary factors such as good prison conditions in State v. Burkhardt, 640 SE2d 450 (SC 2007). In Burkhardt, the Court reaffirmed the longstanding rule that evidence admitted in the sentencing phase of a capital trial must be limited to either character evidence of the Defendant or the circumstances of the crime. The Burkhardt court continued by noting that a sentencing jury may not impose a penalty when influenced by an arbitrary factor. Id. at 453 (citing SC Code Section 16-3-25(c)(1)). The plurality reversed without conducting any harmless error analysis. A third justice concurred and specifically explained that the "Court should not apply a standard of review for constitutional errors to statutory violations" and that "harmless error is unnecessary because by definition, evidence that implicates an arbitrary factor is prejudicial." Burkhardt, at 454.

But for Applicant's trial counsel's "miss" the jury would have considered an arbitrary factor such as "good" prison conditions when deciding that death was a better verdict than life.

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Failure to Challenge the Kidnaping Aggravator-Ground V

Applicant was denied the effective assistance of counsel when his trial counsel failed to successfully challenge the allegations of kidnaping as an aggravating factor during the penalty phase of the trial below. Although counsel moved for a directed verdict at trial and this motion was denied, counsel should have presented Gadson to testify in the penalty phase, as he did at PCR, that no inveiglement occurred because, as he states, there was actually a plan to commit a burglary on Nursery Road. Had counsel submitted such testimony, there is a reasonable likelihood that the judge would have granted a directed verdict at the close of the defense case in the penalty phase and the jury would not have found the existence of such an aggravating circumstance. Finally, to allow such a death verdict to rest upon such a vague claim of inveiglement resting upon such an inadequate factual predicate as presented by the trial record violates due process.

According to the testimony and evidence presented to the original trial jury, as confirmed by the testimony of Applicant's counsel and Taiwan Gadson at the Post Conviction Relief hearing, there was no evidence presented that Kandee Martin was kidnaped and taken to Nursery Road. Page 1397 of the PCR trial transcript reads as follows, lines 14-22:

- Q: Okay. I want to make sure I understand. Taiwan never testified that they went out there and tricked her to go?
- A: Right, you're absolutely correct, sir.
- Q: There was no testimony from Taiwan that Kandee was tricked or inveigled or decoyed to the road.
- A: Well, I can grasp that from the testimony but he used those words, no.

The PCR trial testimony goes on to confirm the trial testimony that the three of them, Kandee Martin, Taiwan Gadson, and the Bowman, all went out to Nursery Road to commit a burglary. Trial counsel further testified at the PCR hearing page 1643 lines 9-23:

Q: Now, let me ask you, would the drug use not be relevant to the issue of her state of mind in the penalty phase, for the kidnaping aggravator, right, it wasn't actually a grabbing kidnaping?

A: Yes, sir. We have the broadest kidnaping statute in the country as I'm aware of.

Q: Sure.

A: And further, if you want to argue the state of mind, they were going there to do a job, that is another thing that was coming out, so-called burglary, you have got people burglarizing houses in the neighborhood in Dorchester County. Any way I turned on this thing I was stepping on a landmine, and I knew that.
 But again, if I made an error I apologize....

So under the evidence presented there was no reasonable inference that could be drawn that Kandee Martin was kidnaped even under a theory of inveiglement. Trial counsel failed to adequately note to the court that no evidence supported this aggravating circumstance that was submitted to the jury during the penalty phase of the trial.

Although Taiwan Gadson might have said in his statement to the police that he knew Marion was going to kill Kandee before they got to Nursery Road, he admitted during the Post Conviction Relief application that he never testified as such. See PCR, page 139 lines 16-22. As an aside, Taiwan Gadson admitted in the Post Conviction relief hearing that at trial he never mentioned that he knew Kandee was going to be killed when they got to Nursery Road. (See page 145 lines 18-25). And on page 146, lines 1-13 Taiwan Gadson admitted that by omitting that testimony from the original trial that he breached his plea agreement.

But more significantly, Taiwan Gadson's ultimate position is that there never was a kidnaping committed with the intent to take Kandee out into the country to kill her. This position, taken at the PCR Hearing confirmed his prior testimony at the deposition taken in anticipation of the PCR hearing. See page 147 of the PCR trial transcript where he confirms that he did not know Kandee Martin was going to be murdered until Marion Bowman started shooting (lines 1-13.) And

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page 148, lines 5-20:

- Q: So, did you know before you got to Nursery Road there was going to be a killing or not?
- A: No.
- Q: So, you lied in this statement about that finger pointing?
- A: Yes.
- Q: You didn't know that until you got out there, until you saw the bullets being fired?
- A: Yes.
- Q: And let's talk about that. You believed there was going to be a robbery?
- A: Yes.
- Q: Kandee believed there was going to be a robbery?
- A: Yes.
- Q: You thought there was going to be a robbery?
- A: Yes.
- Q: You really did believe that?
- A: Yes.

Page 183 lines 16-25 and 184 lines 1-20 talk about the different ways Taiwan Gadson was gesticulating during the PCR hearing with one hand pointing like it was a gun and at another time pointing out the window with three fingers.

Upon a review of Taiwan Gadson's original trial testimony pages 3980- 4038, there is no mention of any inveigling, deception or otherwise from which a jury could infer that Kandee Martin was kidnapped. And as such, the jury should never have been allowed to deliberate on the kidnapping aggravator.

Failure to Investigate, Develop or Present Mitigation Evidence-Grounds-G (2),(3),(4),(5) &(6) I. & W

To begin, the US Supreme Court clearly states that trial counsel are duty bound to investigate the background of a capital defendant to discover any fact which may urge the jury to return a sentence of less than death.¹¹ This is true even if the counsel has delegated this duty to other members of the defense team. In other words, the buck stops with the trial attorneys themselves and not any members of the defense team, such as mitigation specialists, testifying social workers, or even the defendant.

In Marion Bowman's trial, counsel failed to present significant and available mitigation information. This information included the testimony of family members, a psychologist, work documents, and evidence from witnesses who testified for the government. However, upon examination of correspondence between the defense team and defense counsel, it appears that a complete breakdown in the adversarial system occurred where Bowman's mitigation strategy was essentially planned, prepared and presented by non-lawyers, without any guidance from counsel. This breakdown equated to a constructive denial of counsel such that prejudice is presumed. As for the ineffective nature of the lawyering which did occur, there exists no justification for these failures and but for this deficiency, the outcome of the trial would have been different.

Constructive absence of counsel during the preparation, strategic planning and presentation of evidence as accumulated by the mitigation specialist and presented by the testifying social worker

Applicant's right to counsel, as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina

¹¹1 ABA Standards for Criminal Justice (2d ed. 1982 Supp.), Wiggins v. Smith, 539 US 510 (2003), and Rompilla v. Beard, 125 S.Ct. 2456 (2005).

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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) and Frett v. State, 298 S.C. 54, 378 S.E.2d 249 (1988).

Pursuant to U.S. v. Cronin, prejudice is presumed in a Sixth Amendment violation scenario when there is a complete denial of counsel, when the defense completely fails to subject the prosecution's case to adversarial testing or when circumstances are such that no lawyer could provide effective assistance. U.S. v. Cronin, 466 U.S. 648 (1984). The Cronin court noted uniform findings of "constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." Cronin, at 659, n. 25.

Significant for Bowman's mitigation case and in keeping with other death penalty cases, counsel employed both a mitigation specialist and a testifying social worker. These two team members took notes of the lack of preparation and instruction from defense counsel. Both of these persons noted a complete failure of counsel to inform them of trial strategy.

In fact, the testifying social worker indicated the same in a letter to counsel. Plaintiff's 51. The mitigation worker wrote of a panic rising over her. Plaintiff's 57. Both of these defense team members were well seasoned veterans in their profession. Both were non-lawyers at the time. Both now regret the product of their unguided efforts.

The testifying social worker presented a narrative at trial. He essentially was asked no questions of counsel to direct his testimony. He indicated that he had no meetings with counsel to

prepare him for his testimony.

Instead he stated that he made a strategic decision to present negative aspects of Bowman's life in lieu of testimony concerning positive traits. Part of this foregone testimony included information about Bowman's capacity to be of emotional value to others as demonstrated by his good parenting and involvement with his child, step-children, and nephews. Other foregone information included Bowman's relatively complete history of legitimate and gainful employment in the construction industry, alongside the family of the deceased.

Instead, and without any indication that this evidence would otherwise be presented, the social worker informed the jury that Bowman dealt drugs. Trial, 4800, l. 15-17. Further, he indicated that Bowman beat a schoolmate with a tree limb. Trial, 4798, l. 20-21. Finally, he told the jury that no excuse could be offered for Bowman's actions in killing Kandee Martin, even though Marion Bowman has steadfastly maintained his innocence as the shooter of Kandee Martin from the time of his arrest until the present day. Trial, p. 4809, l. 10-20.

The social worker understands that his presentation was inadequate. He offers no justification for the failure to present this good information. He offers no justification for the failure to present a mitigation strategy which is consistent with defense in the guilt phase.

Instead, the social worker offers an explanation at PCR stating that : "Somebody has to decide, and because I was getting no guidance from the attorneys, that was a decision I made, I assume." PCR, p. 1093, l. 13-15. He continues to state that he "never" once met with the attorneys to "sit down and go over [his] proposed testimony." PCR p. 1093, l. 20-24. Further, he later repeats this assertion by responding to a question about whether "they never once sat down and went over your testimony as an expert witness" with the response "no, sir." PCR, p. 1094, l. 7-9.

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Thus, Marion Bowman deserves a new penalty proceeding because there existed a complete absence of counsel during the preparation, strategic planning and presentation of the mitigation as investigated by the mitigation specialist and presented at trial by the testifying social worker.

Failure to Present Testimony of Family Members or Other Evidence regarding Bowman's Capacity to be of Emotional Value-Ground (2)

Trial counsel failed to present meaningful penalty phase testimony of Marion's wife, Dorothy Mae Bowman, or his sister, Kendra Bowman. Both of these witnesses could have provided information concerning Marion's capacity to be of emotional value if given a life sentence in prison. Further, counsel failed to develop this issue through the testifying social worker. Finally, counsel failed to employ the services of a family psychologist who could have provided an expert opinion on this issue.

It is clear that any evidence supporting a sentence of less than death is admissible. See Lockett v. Ohio, 438 US 586 (1978). An example of such evidence of defendant's good character includes an inmate's ability to adapt to prison life. Skipper v. South Carolina, 476 US 1 (1986). Other evidence of a defendant's character has been found to include his capacity to be of emotional value to others. Oregon v. Stevens, 879 P2d 172 (OR 1994).

In Stevens, the Supreme Court of Oregon found that a "rational juror could infer from the witness's testimony that she believed that her daughter would be affected adversely by defendant's execution because of something positive about his relationship with his daughter and because of something positive about defendant's character or background." Stevens, at 168. The Court noted that a rational juror could "infer that there are positive aspects about defendant's relationship with his daughter that demonstrate that defendant has the capacity to be of emotional value to others."

Id. The Court concluded that because of this inference, a juror might find justification for a sentence less than death due to this aspect of the defendant's character. Id.

In the case at trial, defense counsel only presented limited testimony from Marion's mother and sister. This testimony only comprises 18 pages out of a 5500 page trial transcript. None of this testimony concerned Marion's good parenting skills. Defense counsel was made aware of this positive attribute of Marion's character before trial. PCR, p. 1226, l. 15-22 & Plaintiff's 52, § 7.

Kendra Bowman did take the stand. However, as indicated in an affidavit provided at the PCR hearing, she could have testified about Marion's positive character trait as a "father figure" to his nephew. See Plaintiff's 53, § 5. Further, Dorothy could have testified about Marion's actions to his own daughter and his nephew from his other sister, Yolanda. Finally, Kendra could have provided first hand information about his role as a "pied piper" to other children in the neighborhood. A sentence of incarceration would not have extinguished this positive trait, as Kendra indicated that Marion still provides her son with "advice" and emotional support even from prison. Marion's execution will extinguish this positive trait and have a negative impact upon the children. PCR, p. 1196, l. 3-5. The jury did not hear this information. No strategy reason could justify this failure. PCR, p. 1960, l. 12-19.

Evidence could also have been presented through Marion's wife, Dorothy Mae Bowman. She did not testify in the penalty phase of the trial. However, if called, she could have presented evidence of Marion's genuine concern for his wife and unborn child, as evidenced in letters writtent to her from Marion during his pre-trial incarceration.

These letters are a part of the record on appeal in the direct appellate proceedings, thus were available to trial counsel. Trial, p. 5375-5383. These letters were also marked separately as

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Plaintiff's 56 at the PCR hearing. No matter what these letters may contained regarding the issue of Marion's guilt or innocence, they clearly contained candid instances of concern of Marion towards his wife and step-children. Further, these letters express concern for Marion's then, un-born child.

There is no reason to not present this information to the jury. Obviously, at the penalty phase, Marion has already been convicted of the crimes of Murder and Arson. Further, Marion never expected these letters to be confiscated by law enforcement, therefore, they capture his genuine feelings in a way which could not be questioned.

Defense counsel was made acutely aware of this positive trait of Marion's character. To begin, counsel possessed the letters contained in Plaintiff's 56. Further, counsel's agents interviewed his mother, wife, and both sisters before trial. PCR, p. 1224, l. 14-19. Finally, the mitigation specialist and the testifying social worker both discussed this positive character trait as documented by an internal defense memo. See Plaintiff's 52, § 7 ("Parenting-Marion insisted he was a good father who spent "quality time" with his stepchildren. If there is no information to the contrary, it would be good to touch on what effect a death sentence would have on the children.")

The defense did present the testimony of the testifying social worker. He was made aware of this positive trait through this internal memo. However, at PCR and in documents prepared and sent to defense counsel before trial, he notes that defense counsel failed to adequately prepare his testimony or even provide him with some idea of the defense trial strategy. See Plaintiff's 51. The social worker described this failure by stating: "In every other case I said went to trial I at least had some idea what was going on so that they are supposed to dovetail the guilt phase and the penalty phase, and in this case I had no idea." PCR, p. 1058, l. 12-23. This social worker had been previously involved in 26 death penalty cases before Marion Bowman's. PCR, 1060, l. 10.

It appears that the failure to present the parenting information was a deliberate decision. However, this decision was not made by trial counsel, but instead by the testifying social worker. PCR, p. 1092-1094. Even though this failure by trial counsel amounts to a complete breakdown in the adversarial process, as condemned by the US Supreme Court in Cronic,¹² this fairly is also deficient performance and prejudicial to Bowman's penalty phase result.

In fact, the social worker clearly indicated at the PCR that: "Somebody has to decide, and because I was getting no guidance from the attorneys, that was a decision I made, I assume." PCR, p. 1093, l. 13-15. He continued to state that he "never" once met with the attorneys to "sit down and go over [his] proposed testimony." PCR p. 1093, l. 20-24. Further, he later repeated this assertion by responding to a question about whether "they never once sat down and went over your testimony as an expert witness" with the response "no, sir." PCR, p. 1094, l. 7-9.

This panic and disorder is echoed by documents prepared by the mitigation specialist. One document is entitled a "panic memo" in which she details her angst concerning the lack of trial preparation of the lay and expert witnesses. Plaintiff's 57. She also wrote a detailed letter noting defense counsel's "who cares" approach to mitigation and specifically the testimony of the social worker. Plaintiff's 58. Finally, she documented the good parenting of Marion through her notes of her interview with Marion's mother, who testified. These notes indicated that "Dorothy [the wife] had two sons from a previous relationship when they married. Marion is good to her kids and they love him." Plaintiff's 62.

Also, this information was available for presentation through the employment of a family

¹²In Cronic, the United States Supreme Court presumed prejudice when there was a complete breakdown in the adversarial process because this situation was akin to the constructive denial of counsel. See new claim W

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psychologist. Here, counsel knew how to hire and receive funding for expert witness testimony. Further, the employment of such an expert was known by the mitigation specialist and was not novel to this case. PCR p. 1456, l. 4-8.

As presented by the PCR testimony of Dr. Bill Kissiah, evidence supported the expert opinion that Marion "has significant emotional value both to his own family members--well, obviously to his daughter, he' carried that role out with his stepsons from his wife's previous marriage, he's carried that out with his sisters', with his nieces and nephews, both family members, and kids in the neighborhood." PCR p. 1192, l. 18-25 & p. 1193, l. 1-6. Dr. Kissiah indicated that had he been called to testify in May, 2002 at Marion's trial, he would have "testified exactly the same. I see no difference in his motivation now than I would have seen then. I think, I think he wants to be a father, I think his desire for that is no less now than it was then." PCR p. 1193, l. 18-25 & p. 1194, l. 1-4.

Dr. Kissiah continued to speak to the loss which would occur upon Marion's execution. He opined that "here is a man who wants to and is capable of providing a positive influence on his family. I think a death sentence obviously takes away the opportunity for that and casts a pall upon his memory...that would have a negative impact" on the rest of the family. PCR, p. 1195, l 14- p. 1196, l. 6. He characterized this as "violence answered with violence."

There was no reason not to present this evidence. The failure is particularly exacerbated by the failure to present any evidence regarding his good parenting. Instead, based upon a decision made solely by a non-lawyer witness, without consultation with counsel, the defense presented evidence which focused on the "more negative aspects of his life" even though this witness agreed that his goal was to make the jury "think he is not a monster." PCR, p. 1092, l. 25- 1093, l. 9.

Considered in light of the 18 pages of scant testimony presented by persons who knew Marion personally, there is a reasonable likelihood that the outcome of the penalty phase would have been different but for this deficient performance. Further, no prejudice need be demonstrated due to the complete breakdown in the adversarial process presented by the constructive absence of counsel during the presentation of mitigation for this aspect of Marion's life. Finally, given the other penalty phase issues and lingering doubt and error from the guilt phase, the entire penalty proceeding is suspect and due process is violated by the imposition of a sentence of death under these circumstances.

Failure to Present Marion's Work Record-G(5)

Another complete failure of counsel to present a positive character of Marion to support a sentence of less than death involves Marion's positive work history. This information was within the hands of the mitigation specialist and testifying social worker, but was not presented to the jury. Given the "negative" aspects of Marion's life presented by the defense at trial, there is no justification for this failure. However, this failure may be attributable to the constructive absence of counsel in the preparation of the testimony of mitigation.

As condensed into the information contained in Plaintiff's 55 & 76, Marion held many construction related jobs from the age of thirteen to the time of his arrest at the age of 20. The information contained on the application for employment with Moody Mechanical was also possessed pre-trial by the mitigation specialist. PCR, p. 1478-1480. The testifying social worker also possessed similar work information from his interviews with Marion. PCR, p. 1083. Finally, circumstantial information supports the proposition that Marion attended the restitution center until he completed his restitution obligation. PCR, p. 1460.

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Neither this information nor any other information concerning Marion's legitimate employment was presented to the jury. The restitution information is particularly probative for mitigation purposes because it details his ability to adjust to prison life and continue to be a productive citizen even if given a life sentence. This suggests a character trait which mitigates in favor of a sentence less than death.

Instead, a defense witness presented negative employment information including Marion's drug dealing. Trial, p. 4800, l. 14-17. This information was not documented by any criminal conviction, but was instead presented as part of the "negative" aspect of his life which the testifying social worker chose to present without any advice or guidance from counsel. This negative information provided ripe fodder for cross examination by the Solicitor. Trial, p. 4817, l. 11-25.

There is a reasonable likelihood that had this positive information been presented, that Marion would have received a sentence less than death. Further, this deficiency likely occurred because of the complete breakdown in the adversarial process as noted by the panic memo and testimony from the social worker. Finally, a death sentence under these circumstances violates the Eighth Amendment.

Failure to Correct Information Concerning Kandee's Character-G(4)

While Applicant's trial counsel thought it would be of some benefit to let the jury know in the sentencing phase of the trial that the applicant sold drugs as a juvenile and assaulted a fellow student with a tree limb in high school, Applicant's trial counsel did not see any benefit in rebutting the victim impact evidence offered by the State.

Accordingly, the jury never heard that the victim regularly smoked crack with the Applicant, and in fact, had some in her system at the time of her death. Even the PCR Trial Judge expressed

surprise that the autopsy results, showing the cocaine metabolite in her system, were not introduced at any time during the trial. (See PCR transcript page 1632 lines 19-24 and page 1633 lines 1-6)

See also PCR transcript page 1633 lines 14-25 and 1634 lines 1-4 wherein the victim's drug use or reputation as a prostitute were never before the trial jury.

When Applicant's trial counsel was asked during the PCR hearing why it didn't come out that Kandee Martin used drugs, his response was "I didn't want to add another felony or bad character to my client, that he was selling drugs to Kandee. I did what I chose to do at that time. (PCR Trial transcript page 1636, Lines 1-6)

However it was during the Applicant's case in chief during the penalty phase that Applicant's counsel chose to put a social worker up to introduce to the jury for the first time that his client, the Applicant, sold drugs.

Kandee Martin's drug use certainly could have been used to negate the victim impact offered by the State; and Applicant's trial counsel confirmed as much during the Post Conviction Relief hearing. See page 1637 lines 6-19.

- Q: My question is this. Does it not present a forward context of her mothering to show that she was a crack addict?
- A: Again, I guess I could sit back and play Monday morning quarterback now and say, you know, attack the victim, the jury has already found him guilty, you know, I could sit here and say that. If I made an error, I apologize. If I didn't vigorously cross-examine to help Marion, then I made a mistake and I apologize, but I flowed with the case how I thought I should have done it. Whether our courts want to call it strategy or a choice not to attack the victim anymore than we did, she's dead.

Trial counsel acknowledged during the PCR hearing that the introduction of Kandee Martin's drug use could and probably should have been used to minimize the kidnaping aggravator with respect to the victim's state of mind. PCR p. 1643 l. 9-14. Trial counsel subsequently admitted his

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mistake on page 1643 line 23 through page 1644 line 2., "but again, if I made an error, I apologize, I tried that case and in the penalty phase the best I thought I could get out of the mileage with what was happening, every time we turned around, even before Jeff Yungman got killed on the stand."

One further interesting note about the victim impact and Kandee Martin's parenting skills, was learned early on by Applicant's trial counsel, and that was that Kandee Martin had another child somewhere that had been given away or done something else with. Applicant's trial counsel admitted as much on page 1637 lines 20-22. "We also learned she had another child somewhere that was given away or done something else with."

Failure to object to trial court's limitation upon allocution Ground I

Applicant was denied the effective assistance of counsel 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. See the original trial transcript page 4943-4944.

THE COURT: All right. You understand that if you make the last argument, Mr. Bowman, that obviously like the other people who are making final arguments, you must be bound by the evidence and you could not testify in effect before the jury. You could simply make an argument within the record that is established in the case. Do you understand that?

MR. BOWMAN: Yes, ma'am.

THE COURT: In other words, you are to stick to the facts and inferences which can reasonably be drawn from those facts. You understand that?

MR. BOWMAN: Yes, ma'am.

Trial counsel failed to object to this improper limitation by the trial judge, and there can be no doubt such a limiting instruction from the bench overrode any conversation between the Applicant and his trial counsel. In fact, when Applicant's trial counsel was specifically asked at the PCR hearing, he acknowledged the possibility that Mr. Bowman may not have fully understood his

right to allocution,

Q: I'm asking you about your own personal conversation. Did Mr. Bowman ever say to you, "Well, I was going to speak to the jury but then they told me I was limited to evidence in the record and I decided I wasn't going to"?

A: No sir. I don't think, you know, looking at everything there, everybody knew what the judge said, but again, if I made an error I apologize, I hope you folks correct it. (PCR Trial, p. 1889, l. 15-23)

Because the court advised Marion Bowman that the only allocution he could make would be limited to the facts within the trial, the Applicant chose not to present such an allocution, chose not to argue anything before the trial jury, and as a result thereof, the trial jury sentenced him to death. But for trial counsel's deficient performance, the outcome of the trial proceedings would have been different.

Failure to Present Evidence of Marion's Intoxication-G(3)

Further, attorney deficiency relates to failure of counsel to elicit evidence of his intoxication on the night of Kandee's killing. While there is a plethora of evidence in the record which supports voluminous drinking by Marion's associates on February 16, 2001 and the fact that Marion was an alcoholic, the State Supreme Court decided as a factual matter that the trial record was devoid of information supporting the inference that Marion "was actually intoxicated at the time of the crime." State v. Bowman, 623 SE2d 378, at 383 (SC 2005), rehearing denied (2006).

However, evidence was available which demonstrated that Marion was not only "drinking all day" but that he was intoxicated the night of February 16, 2001. As mentioned earlier, James Tawain Gadson testified as a State's witness during the guilt phase of Marion's trial. He was clearly available to testify at the penalty phase, due in part to his incarceration.

Gadson recalled Marion's state of intoxication during the PCR testimony. The questioning

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of Gadson at the PCR hearing indicates:

Q: You thought he was tipsy?
A: Yes.
Q: Meaning that there was some effect from the alcohol?
A: Yes.
Q: You thought he was affected by the alcohol?
A: I guess.
Q: Alcohol influenced him to the point where you saw it?
A: Yes.
Q: Okay. And if you were questioned about that fact in May of 2002, at the trial would you have testified the same way?
A: Yes.
PCR, p. 156, l. 1-5 & p. 157, l. 12-25.

Other information was developed at the PCR indicating that Marion drank beer everyday. PCR, p. 153, l. 24-25. Further, Marion was drinking for four or five hours on the day of the murder. PCR, p. 152, l. 22-25 & p. 153, l. 1-14. Also, Gadson testified that Marion drank liquor on the day of the killing. PCR, p. 155, l. 4-9.

While other witnesses also provided evidence consistent with Gadson's testimony, the failure to present Gadson's testimony alone is deficient. This evidence of voluntary intoxication is mitigating to a charge of capital murder, because the death penalty is reserved for the most-heinous crimes. While voluntary intoxication does not negate the mens rea for capital murder, it is recognized as a mitigating factor by the law and by logic.

Counsel's deficiency in failing to elicit this evidence was not related to any reasonable trial strategy. Instead this deficiency was directly related to counsel's misconception that intoxication was an aggravating factor. As documented at the PCR, counsel indicated, when asked why he did not ask Gadson about this intoxication as a basis for mitigation, that "I didn't do it, I would never have put that man on the stand." PCR, p. 1758, l. 10-11. However, Gadson had already testified

before the jury and already provided all the negative evidence the solicitor sought to develop during the guilt phase.

Also, counsel could not explain why he did not ask Gadson these questions about Bowman's intoxication during the guilt phase as it would have suggested no evidence of guilt and offered a possible segway into the penalty phase, if necessary. Counsel responded that: "I don't ask co-defendants to help or hurt him..." PCR, p. 1759, l. 17- p. 1760, l. 1. Further, when confronted with the fact that Gadson said Marion was intoxicated, counsel responded that: "Voluntary intoxication is going to do what? I mean, I worked for the man, I don't want..." PCR, p. 1758, l. 5-15. Counsel concluded with his demonstration of his misunderstanding of the mitigating nature of this testimony when he declared: "I don't want to call my client a drunk." PCR, p. 1757, l. 13.

This misapprehension is compounded by his misunderstanding regarding exclusion of statements found to be have been involuntarily obtained. Counsel suggested he feared introduction of the evidence of intoxication would open the door to introduction of a statement excluded by the trial court because it was the product of improper coercion and duress. Counsel stated: "It is against the rules of evidence if it is suppressed, exactly as it states, but if there is anything brought out that would differ from what is written in that statement, they would have a right to impeach him. That is my understanding." PCR, p. 1964, l. 24- p. 1965, l. 6. Counsel further confirmed that he believed an involuntary statement could be used for impeachment purposes and this misunderstanding of the law served as the strategy basis for his failure to elicit various questions, including those regarding Marion's intoxication. PCR, p. 1965, l. 7-25.

Counsel's strategy is based upon a misconception, as the law is clear that an involuntary statement may never be used for any purpose. Mincey v. Arizona, 437 US 385 (1978). This is

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directly related to the fact that involuntary statements are considered to be unreliable as evidence because of the nature of their production. The ultimate role of the Court is to sift through evidence to see that unreliable evidence is not presented to the jury. The Court in this trial made this determination when the statement was ruled involuntary and this ruling was never reversed or appealed and is now firmly the law of this case.

Thus, Marion's death sentence is suspect because but for this deficiency in introducing evidence of intoxication, there is a reasonable probability that the jury would have returned a verdict of less than death. Further, due process is violated when a sentence of death is returned under these conditions. This is true even in the absence of a jury instruction as the evidence alone is mitigating.

Failure to Request a Charge in Mitigation re Intoxication-L(1-4)

Finally, Bowman deserves a new sentencing because his counsel failed to request a jury instruction regarding intoxication. Due process is violated when a death sentence is imposed given such a failure. Armed with the evidence in the portion of the brief above, counsel could have either requested a statutory mitigating instruction or a non-statutory mitigation instruction that would instruct the jury to fact that voluntary intoxication may serve to mitigate criminal conduct.

Unfortunately for Marion Bowman, his trial counsel labored under the mistaken belief that voluntary intoxication was an aggravating factor. Such a misconception belies any claim of reasonable trial strategy. But for this deficient performance, there is a reasonable likelihood that the outcome of the trial would have been different.

To begin, the trial court is required to submit a statutory mitigating instruction, found at SC Code Section 16-3-20(C)(b)2, 6, & 7, anytime there is evidence of a defendant's intoxication at the time of a capital murder. See State v. Bowman, 623 SE2d 378 (SC 2005) rehearing denied, (2006) internal citations omitted. Because counsel may possess concern that a statutory mitigator may raise issues of mental health capacity which would allow admission of otherwise inadmissible mental health information, counsel may also wish to present this claim of mitigation in the form of a non-statutory mitigator.

The South Carolina Supreme Court has found that such a non-statutory mitigator may serve the same functions as a statutory mitigator. See State v. Plemmons, 370 SE2d 871 (SC 1988). In Plemmons, complaint was made that the court did not sufficiently charge the very same statutory mitigators at issue here in relation to the evidence of the defendant's intoxication. The Court denied relief on this claim stating that the "statutory mitigating circumstances (2), (6), and (7) are required

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when there is evidence of intoxication only in the absence of a specific charge regarding intoxication as a mitigating circumstance.” Thus, Plemmons holds that a specific non-statutory mitigator concerning intoxication may be as sufficient for mitigation purposes as the statutory mitigator.

Such a non-statutory mitigator would not carry any “door opening” concerns related to Bowman’s mental health evaluation as expressed by defense counsel during the PCR testimony. The instruction would serve to channel the jury to an understanding that intoxication evidence may be considered as mitigating, even if defense counsel never understood this concept. Such a mitigation instruction was necessary given the evidence presented and the available evidence which was not presented.

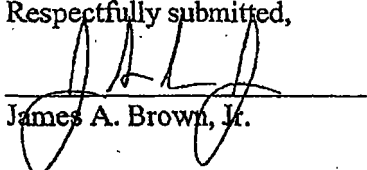
Such evidence is listed above, but primarily consists of Gadson’s testimony that Bowman was “tipsy” and that he observed the physical manifestations of this intoxication just as one would expect following an alcoholic’s four or five hour consumption of both liquor and beer.

Given the available evidence and evidence already presented at trial, there is a reasonable probability that but for the deficiency of counsel in failing to request the statutory mitigator or the non-statutory mitigator, the jury would have given a sentence of less than death. This is especially so considering the non-existent evidence of kidnaping and the lingering doubt concerning Bowman’s identity as the killer of Kandee Martin. Finally, both due process and the Eighth Amendment are violated by a death sentence which is imposed under these facts.

Conclusion

Thus Marion Bowman's trial and sentencing are wrought with errors. These errors range from uncorrected false testimony and withheld evidence concerning the culpability of others in the death of Kandee Martin and arson of her car to the inadequate representation of Marion Bowman on these same issues. Further, expert ballistic opinion testimony offered at trial is no longer considered as reliable as previously thought. Also, trial counsel operated under conflicting interests and divided loyalties, as well as grave misconceptions of the law. When it mattered most, counsel completely abdicated their duties in a manner which amounted to either the deprivation of effective counsel or the complete denial of counsel. Finally, given the available mitigation contrasted with the errors related to the aggravation, this Court should scrutinize both the conviction and sentence and provide Marion Bowman a new trial worthy of confidence in the outcome.

Respectfully submitted,


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	)	
COUNTY OF DORCHESTER	)	
	)	
Marion Bowman, Jr., #6006	)	C/A No. 2006-CP-18-569
	)	
Applicant,	)	POST-TRIAL BRIEF IN OPPOSITION
v.	)	TO APPLICATION FOR POST-CONVICTION
	)	RELIEF
The State of South Carolina,	)	(Capital Case)
	)	
Respondent.	)	

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Respondent, above-named, hereby make the following arguments in opposition to the Application for Post-Conviction Relief ("APCR"), filed by Marion Bowman, Jr. ("Applicant"). This APCR stems from a murder conviction and death sentence.

PROCEDURAL HISTORY

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

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

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

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

- (1) Murder was committed while in the commission of criminal sexual conduct.

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(2) Murder was committed while in the commission of kidnapping.

(3) Murder was committed while in the commission of larceny with the use of a deadly weapon.

(4) Murder was committed while in the commission of robbery while armed with a deadly weapon.

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

(1) The defendant has no significant history of prior criminal convictions involving the use of violence against another person.

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

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

{R. 5032}.

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

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

(1) The court erred by refusing to instruct the jury on the statutory mitigating circumstance that the capacity of the

defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, since there was expert testimony of appellant's substance abuse problem, and evidence the parties were heavily drinking throughout the day.

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

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

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

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

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

Oral argument in the case was held before the state supreme court on October 6th, 2005. The South Carolina Supreme Court issued an opinion affirming the convictions and

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death sentence on November 28th, 2004. State v. Bowman, 623 S.E.2d 378 (S.C. 2005). A petition for rehearing was denied by that court on January 6th, 2006.

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

While his certiorari petition before the United States Supreme Court was pending, Applicant filed this APCR on April 7th, 2006. On August 4th, 2006, Applicant filed with the state supreme court a Petition to Appoint Post-Conviction Relief Judge. The State filed a Return on August 18th, 2006, and a Motion to Set Execution Date on August 22nd, 2006. On August 28th, 2006, Petitioner filed a Motion for a Stay of Execution, or, in the Alternative to Appoint a Post-Conviction Relief Judge. The State filed a Return to the latest motion on August 29th, 2006. The State filed its initial Return, Motion to Dismiss, and Motion for Summary Judgment dated August 31st, 2006. The South Carolina Supreme Court issued an Order dated September 7th, 2006, in which it stayed the execution for this PCR and appointed this Court.

Applicant filed his First Amended Application, and his Second Amended Application prior to the evidentiary hearing in this beginning. He filed his Thlrd Amended Application a week before the evidentiary hearing began in September 2008. The hearing took place over the course of various days in September, October, and December 2008. He filed his Fourth Amended Application in June 2009, some six months after the evidentiary hearing

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in this case had concluded. He also filed his Amended Brief Supporting Application for Post-Conviction Relief.

This Respondent's Brief in Opposition follows.

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STATEMENT OF EVIDENCE PRESENTED AT TRIAL

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

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

After a neighbor heard an explosion, officers and firefighters found a burned Ford Escort in a field off a rural road. Inside the trunk was the charred body of Kandee Martin. {R. 3801-02; 3807-3810; 3814-16; 3819-22; 3875-78}. The Ford Escort's license tag was registered to Kandee and her mother. {R. 3829-31}. Kandee had been shot to death by two bullets, each equally fatal, with one to the back of the head, and another to the left back. {R. 3944-49}. Her lungs were clear, indicating that Kandee was dead before the fire started. {R. 3954-55}. Officers concluded the fire was intentionally set. {R. 3889-90}.

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

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

After receiving information that Applicant had been with Kandee the night before, officers arrived at Dorothy's trailer on the Saturday morning of February 17th, 2001. After

Dorothy consented to a search, officers found Applicant hiding alongside a bed in a child's room down the hall, and he was promptly arrested and Mirandized. {R. 4125-29; 4139-42; 4144-45; 4191-95; 4208; State's Exhibit #27}.

In Applicant's black jeans, officers found a brown lady's watch in the pocket. {R. 4129-32; 4142; 4150-52; 4195-98; 4207-08}. Kande's mother identified at trial the watch as belonging to her daughter. {R. 4164-65}.

C. Applicant's friends and relatives come clean about his involvement in Kande's murder

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

1. The argument over the gun

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

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

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4058-60; 4077-78}.

2. Unpaid debts and threats to kill

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

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

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

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

3. Tywan Gadsden describes Kande's murder

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

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

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

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

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

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

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

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

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

5. Travis Felder describes the car fire

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

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

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

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

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

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

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

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

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

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

E. The DNA match

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

F. The State's sentencing phase case

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

Next to testify were Joseph Wimberly and David Thompson – the two victims from

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

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

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

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

G. The defense's sentencing case

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

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

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grade, but he would help his mother out after she became disabled. {R. 4750-59}.

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

A forensic social worker named Jeffrey Youngman also testified in Applicant's mitigation presentation. Generally, Youngman theorized Applicant's functioning was negatively impacted by his upbringing and environment, which led him to make poor choices. {R. 4791-4805}.

Corrections consultant and former South Carolina prisons official James Aiken was called to the stand next for the defense. He was qualified as an expert in future dangerousness and prison adaptability issues. According to Aiken, if Applicant was given life, he would never leave again from a South Carolina prison for any reason whatsoever. He noted the South Carolina Department of Corrections could easily manage and incapacitate Applicant for the rest of his life, with the prison's fences, gun towers, and trained guards. Aiken also opined that Applicant would adapt well to prison life. {R. 4832-45}.

Dorchester County Detention Center guard Sharon J. Branch testified that Applicant has "attitude", he never made her feel threatened or raised his hand. As his death penalty trial approached, Applicant started behaving "calmer" and "better". {R. 4882-88}.

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

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

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

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ARGUMENT

Respondent in the following brief addresses the issues in the order they are addressed in Applicant's brief. However, Respondent should point out, as it did throughout the proceedings, that it objects to any issues after the Second Amended Application. Respondent also asserts that Applicant is limited to the issues he asserts in his brief. Because Applicant raised so many new issues during the course of the hearing, he expressly agreed to the briefing structure so that the State would have fair notice of what his claims are and how he is asserting them (although the State continues to object to allowing him to raise new claims after the evidentiary hearing concluded). Applicant cannot now contend he is preserving more issues than those addressed in his brief, as the brief was for the very purpose of setting forth exactly why he thinks he is entitled to relief.

I. James Tawain Gadson, Jr.

A. The Prosecution Did Not Violate Brady By Not Disclosing Gadson's William S. Hall Institute Psychiatric Report

Applicant contends that the First Circuit Solicitor's Office failed to properly disclose a copy of his co-defendant's psychiatric evaluation from the William S. Hall Psychiatric Institute to Applicant pursuant to Brady v. Maryland, 373 U.S. 83 (1963). At the PCR hearing, Solicitor Bailey testified that he did not believe they provided defense counsel with a copy of the William S. Hall Psychiatric Institute report for Tawain Gadson. {PCR Tr. 2120}. Cummings also testified that he did not recall receiving a copy of the psychiatric evaluation for Gadson. {PCR Tr. 1647}. Applicant asserts the State should have provided him with the report because it contained information that could have been used for impeachment purposes in cross-examining Gadson at trial.

"A Brady violation occurs when the government fails to disclose evidence materially favorable to the accused." Youngblood v. West Virginia, 547 U.S. 867, 869, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006). Evidence that is not disclosed is suppressed for Brady purposes even when it is "known only to police investigators and not to the prosecutor." Kyles v. Whitley, 514 U.S. 419, 438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Evidence is favorable if it is either exculpatory or impeaching. See, e.g., Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (internal quotation marks omitted). However, a " 'showing of materiality does not require demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal,' " id. (quoting Kyles, 514 U.S. at 434, 115 S.Ct. 1555), but only a "'showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict,'" Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (quoting Kyles, 514 U.S. at 435, 115 S.Ct. 1555). The assessment of materiality is made in light of the entire record. United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006) (citing Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); Gibson v. State, 334 S.C.

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515, 514 S.E.2d 320 (1999). If a Brady violation is found to have occurred, PCR must be granted. Gibson, supra.

[T]he Brady rule does not apply if the evidence in question is available to the defendant from other sources; thus, when defense counsel could have discovered the evidence through reasonable diligence, there is no Brady violation if the Government fails to produce it." U.S. v. Kelly, 35 F.3d 929, 937 (4th Cir. 1994)(internal quotations omitted). "[W]here evidence is equally available to the accused, the obligation on the part of the State to furnish such evidence to the accused is relieved." Anderson v. Leeke, 271 S.C. 435, 439, 248 S.E.2d 120, 122 (1978).

First, Applicant fails to establish a Brady claim in this situation because defense counsel had other means by which it could obtain Gadson's psychiatric report. Gadson's psychiatric evaluation was done by order of the court. **{See Applicant's 8 & 31}**. The court order was clearly public record. Thus, the fact that Gadson was evaluated could easily have been discovered by trial counsel upon examination of court records in the Clerk of Court's office. Counsel was well aware that the Department of Mental Health provided the court with a psychiatric report when ordered to conduct such an evaluation. The Department had done so in Applicant's case. **{See Respondent's 29}**. Thus, had counsel reviewed the clerk of court records for Applicant's co-defendant Gadson, he would have clearly been aware that a psychiatric report to the court would have been available. Counsel could have easily filed a subpoena to obtain a copy of Gadson's psychiatric report from the court. Since this information could have been requested by counsel by other

means, Applicant has failed to establish there was a Brady violation. Kelly, supra; Leeke, supra.

Second, Applicant fails to establish a Brady violation because he fails to establish Gadson's psychiatric report was favorable to Applicant's guilt or was impeaching evidence. Applicant argues that the psychiatric report "revealed serious mental health concerns and questions about Gadson's ability to recall events." {Applicant's Brief, p. 4}. This argument is not supported by the report. First, contrary to Applicant's argument, the report does not call into question Gadson's short and long term memory. Specifically, the report found "no evidence of long or short-term memory impairment." {Applicant's 8 & 31, at p. 3}. Further, the report indicates that "[o]n the Repeatable Battery for the Assessment of Neuropsychological Status, he exhibited some mild impairment of verbal memory, but verbal learning was good." {Applicant's 8 & 31, at p. 3}. Overall, the report does not indicate that Gadson suffered from any mental illness other than cannabis dependence. Since there was no indication that Gadson suffered from any type of memory impairment that would have affected his ability to recall what occurred in this case, the report would have had no impeachment value in that regard.

The report was also not material. The William S. Hall report does not indicate that Gadson suffered any memory issues as a result of his seizures. In fact, based on the details provided about the seizures, it appears that he was able to recall what occurred before the seizures (i.e. his food consumption, use of marijuana, etc.). Thus, the argument that he may have blacked out at the scene does nothing to mitigate the fact that he recalled seeing Applicant shoot the victim. More importantly, however, is that the argument

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Applicant suggests could have been made was not supported by the record. Neither Gadson nor any other witness testified that Gadson suffered a seizure on Nursery Road at the time of the shooting. Further, no witness testified at either trial or the PCR hearing that Gadson smoked marijuana on the day of the shooting. Gadson did admit at trial that he drank alcohol all day on the day of the murder. {R. 3992-93; 4021; 4031}. Absent additional probative evidence that Gadson suffered a blackout on the scene, trial counsel could not have argued Gadson suffered a blackout merely because he messed in his pants a little bit.

Further, the overwhelming evidence of guilt in this case clearly shows that this evidence would not have undermined the confidence in the verdicts at trial. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when

Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. Overall, even without Gadson's testimony, there was a very strong circumstantial case against Applicant. Second, Gadson's credibility had already been impeached by his testimony regarding his drinking. United States v. Amiel, 95 F.3d 135, 145 (2nd Cir. 1996) ("Suppressed evidence is not material when it merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable."). In light of the fact that the limited impeachment value of Gadson's psychiatric report and the overall strength of the case against Applicant, Applicant has failed to prove by a preponderance of the evidence that the confidence in the verdicts in this case was undermined by the nondisclosure of Gadson's psychiatric report. As a result, Applicant has failed to sustain his burden of establishing there was a Brady violation in the handling of Gadson's William S. Hall report. As a result, this claim for relief should be dismissed.

B. Trial Counsel Was Not Ineffective In Addressing Gadson's Plea Deal and/or Any Possible Bias that May Have Resulted Therefrom

Applicant has asserted that trial counsel were ineffective because they failed to investigate, impeach, and introduce evidence of Gadson's plea deal and his true bias to avoid a death sentence. In essence, Applicant asserts that Gadson was threatened by the

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Solicitor's Office with a death sentence in the plea agreement if he failed to testify as they wished. As a result, according to Applicant, the jury was not given a fair impression of the sentence that was avoided by Gadson as a result of his plea agreement. Further, Applicant asserts the jury was left with the incorrect impression that Gadson would serve twenty years in prison under his plea agreement. Applicant's claims should be dismissed because they are not supported by the record.

To establish a claim that counsel was ineffective, a PCR applicant must show that (1) counsels representation fell below an objective standard of reasonableness and (2) but for counsels errors, there is a reasonable probability that the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068.

When reviewing a counsel's performance, there is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066. Consequently, courts apply a "highly deferential" standard of review. Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. Counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy. Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (citations omitted). Counsel's strategy will be reviewed under "an objective standard of reasonableness." Id.

First, Applicant's allegation that Gadson expressly bargained to avoid a death sentence is not supported by the record. At no point in time did the First Circuit Solicitor's

Office file a Notice of Intent to Seek Death Penalty against Gadson. Gadson testified the neither he nor his counsel were ever served with a Notice of Intent to Seek the Death Penalty at trial and at the PCR hearing. {R. 4024, PCR Tr. 121, 185}. Applicant's argument relies upon the clause in paragraph 9(b) of Gadson's plea agreement which states that the State may reinstate the murder charges and seek the death penalty if Gadson did not comply with the terms of the plea agreement. Applicant's reliance upon this language in the agreement is misplaced. First, the language in the agreement does not constitute a Notice of Intent to Seek the Death Penalty. It merely outlines the fact that if Gadson did not tell the truth at trial, the State could reinstate the murder charge against Gadson. As a consequence of that, the State could seek the death penalty if it thought the facts would support a conviction. There was no evidence that Gadson plea bargained to avoid the death penalty. When Gadson pled guilty, he was not facing a death sentence. Thus, to the extent that Applicant has alleged ineffective assistance of counsel for not pointing out Gadson avoided a death sentence by pleading guilty should be dismissed because Applicant has failed to show that trial counsel was deficient.

Even if trial counsel was deficient in not crossing Gadson about whether he avoided a death sentence by pleading guilty, Applicant has failed to show that he was prejudiced as a result. First, Applicant has not presented any testimony or evidence that indicated that Gadson actually believed that he was avoiding a death sentence with his plea agreement. In fact, Gadson's testimony at the PCR hearing clearly demonstrated the opposite was true. Gadson noted in his testimony that he was never threatened with the death penalty. {PCR Tr. 121}. He noted that his attorney informed him after receiving the

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Indictments that Gadson could get life for shooting and killing someone. {PCR Tr. 209}. He did not see that as being the same as the death penalty. Id. Applicant cannot establish that the result at trial would have been different had counsel raised this issue at trial. Even without Gadson's testimony, there was overwhelming evidence presented of Applicant's guilt. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. Clearly, there was a strong circumstantial case establishing Applicant's guilt. Since there was overwhelming evidence of Applicant's guilt, the result at trial would not have differed had trial counsel cross-examined Gadson about whether he

avoided a death sentence with the plea agreement. Thus, this claim of ineffective assistance of counsel should be dismissed.

C. Trial Counsel Did Correct Gadson's Testimony At Trial Regarding his Twenty Year Sentence

Applicant also fails to establish trial counsel was ineffective for not correcting Gadson's testimony at trial indicated that he would serve twenty (20) years in prison.

At trial, Solicitor Bailey asked Gadson if he was testifying pursuant to a plea agreement:

Q. Okay. And through Mr. Dukes, through his representation, you ahve entered into a plea agreement with the State of South Carolina; have you not?

A. Yes, sir.

Q. Okay. And would you tell the Court and the jury waht that agreement is, your understanding of that agreement?

A. Accessory after the fact and misprision of a felony.

Q. All right, sir. And are you going to get a negotiated sentence of 20 years for that?

A. Yes, sir.

Q. Okay. And in exchange for that, dropping the murder charge and allowing you to plead to accessory after the fact of murder and misprision of a felony and receiving a 20-year sentence, have you agreed to testify truthfully in this case?

A. Yes, sir.

{R. 3981, 17-25}. During cross examination, trial counsel asked Gadson about the plea bargain he made with the State. Gadson testified that he was set to receive a fifteen (15) year sentence for accessory after the fact to murder. {R. 4023}. He was also set to receive a five (5) year sentence for misprision of a felony. {R. 4023}.

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Applicant has failed to establish that trial counsel was ineffective in cross examining Gadson on how much time he would serve in prison. First, there was no testimony that indicated that Gadson would serve 20 years in prison at trial. The testimony clearly indicated only what his sentence would be.

Furthermore, Applicant fails to establish that he was prejudiced if trial counsel was deficient in the cross-examination on this issue. First, there was no testimony offered at the PCR hearing that Gadson was aware at trial that he could serve substantially less than twenty years confinement under his plea agreement. See Moss v. Hofbauer, 286 F.3d 851, 864-65 (6th Cir. 2002) (speculation as to possible lines of cross-examination insufficient where no evidence presented how witness would have testified had the cross-examination been pursued); Zettlemoyer v. Fulcomer, 923 F.2d 284,298 (3rd Cir. 1991) (applicant cannot show deficiency "based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense"; rather, facts must be presented). Since there was no evidence establishing that Gadson was aware he would actually serve substantially less than 20 years in prison when he testified at trial, Applicant cannot establish that his testimony was biased as a result. Second, Applicant did not show that the outcome at trial would have differed but for counsel's deficiency because there was overwhelming evidence of Applicant's guilt in the murder of the victim. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he

killed the victim. {R. 4068}. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. Thus, even if Gadson's testimony was impeached by the fact that he would be eligible for parole early in his twenty (20) year sentence, there was still overwhelming evidence of Applicant's guilt. As a result, Applicant fails to show that the result at trial would have been different but for counsel's failure to impeach Gadson on his parole eligibility. Thus, this claim for relief should be dismissed.

D. Trial Counsel Was Not Ineffective Because It Chose Not to Attempt to Introduce Arrest Warrants and Indictments As Evidence Gadson Was the Shooter.

Applicant also asserts trial counsel was ineffective for not presenting evidence to the jury that the State had asserted that Gadson was the one who shot the victim in other court proceedings. Applicant fails to show by a preponderance of the evidence that counsel was ineffective in this regard.

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First, Applicant fails to show that trial counsel was deficient in not presenting evidence that the State believed Gadson was the one who shot the victim. In this claim, Applicant basically argues that the State once believed Tawain Gadson was the actual shooter. He relies upon the fact that the lead detective in the investigation, Alvin Coker, submitted a sworn affidavit for Gadson's arrest warrant that indicated there was evidence Gadson was the shooter. The affidavit states that there was probable cause to believe that Gadson murdered Kandee Martin. **{Applicant's 4}**. The affidavit clearly notes that the basis for the belief there was probable cause was a statement given by Applicant:

Investigation lead Officers to interview a co-defendant (Marion Bowman Jr. (AKA: "Black" or "Jr."), who provided a written statement wherein he stated that between the incident time aforementioned, that the defendant and a co-defendant approached him while driving the victims car. The defendant and co-defendant had socks on their hands and confided in him that the defendant and co-defendant had shot and killed the victim (Kandee Martin). The defendant and codefendant then recruited Marion Bowman Jr. to assist them in moving the victims body and destroying the car and other evidence by burning them.

{Applicant's 4}. Applicant also relies upon the fact that Gadson was also indicted for murder in this case. **{See Applicant's Brief at p. 9}**.

At the PCR hearing, Coker testified that the affidavit to the arrest warrant was based upon the information and evidence the police had at that time. **{PCR Tr. 890}**. That information consisted of the statement provided by Marion Bowman. As for the murder indictment against Gadson, Coker testified that he was the sole witness presented to the grand jury in this case. **{PCR Tr. 862}**. He testified to the facts as he knew them. **Id.** Coker testified that he told the grand jury that the evidence they had at the time indicated Gadson was present when the murder occurred, but Applicant was the one who fired the fatal shot. **{PCR Tr. 863-64}**.

Applicant's claim that trial counsel was ineffective in not showing that the State believed Gadson was the shooter should be dismissed because Applicant has failed to prove counsel was ineffective by a preponderance of the evidence. Applicant has not established that trial counsel was deficient. First, "[i]t is well settled in this jurisdiction that affidavits are inadmissible in criminal cases." State v. Alexander, 303 S.C. 408, 409, 401 S.E.2d 167, 168 (1991) (citing State v. Stewart, 288 S.C. 232, 341 S.E.2d 789 (1986); State v. Lathan, 275 S.C. 550, 273 S.E.2d 772 (1981); State v. Smith, 230 S.C. 164, 94 S.E.2d 886 (1956)). Trial counsel cannot be found deficient for not introducing inadmissible evidence. See generally Strickland, *supra*. Thus, to the extent that Applicant asserts that Gadson's arrest warrant should have been introduced at trial, his claim should be dismissed. More importantly, however, is the fact that the arrest warrant affidavit in no way indicates the State believed Gadson was the one who fired the fatal shot. All the arrest warrant affidavit shows is that the police believed there was probable cause to believe that Gadson may have been the shooter. Further, Gadson's arrest warrant was drafted very early in the investigation. It was sworn out by Coker on February 17, 2001, the same day the victim's car and body were found. {Applicant's 4}. Also, the arrest warrant affidavit was based upon the second statement provided to police by Applicant. Trial counsel provided a valid, strategic reason for not wanting any of Applicant's statements entered into evidence. He did not ask the question because he knew the response would be that they relied upon Applicant's statements in making the arrest. {PCR Tr. 1914}. That was not a road that he wanted to take at trial. Id. Further, Cummings pointed out that arrest warrants do not count any way, and that they can be

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amended and changed. {PCR Tr. 1914}. Furthermore, indictments supersede arrest warrants. Id. Thus, to the extent Applicant has alleged that trial counsel was ineffective for not presenting evidence from the arrest warrant affidavit at trial, this claim should be dismissed because trial counsel was not deficient.

Trial counsel was also not deficient in not introducing the indictment against Gadson as evidence that the State once believed Gadson was the shooter. First, the indictment was not evidence that the State believed was the shooter. Under South Carolina law, "one who is present, aiding and abetting the commission of a crime is a principal, and may be convicted on an indictment charging him alone as such." State v. Cox, 258 S.C. 114, 118, 187 S.E.2d 525, 528 (1972)(internal citation omitted). Solicitor Bailey testified that Gadson was charged as a principal first and could have been convicted as such under alternative theories of him either being the trigger man or him being present and abetting Applicant. {PCR Tr. 2139-40}. He also noted that their practice was to charge as principal first with the understanding that they could convict as a principal second on the theory of hand of one, hand of all. {PCR Tr. 2140}. There was no reason to specify exactly what part of the law they were relying upon because he could be convicted under any of the three theories under the indictment. {PCR Tr. 2140}. Bailey also indicated that the indictment was done that way to keep the options open in case later evidence took them in a different direction in the case. Id. Bailey also pointed out that Gadson's true billed indictment does not mean Coker told the grand jury that Gadson was the one who shot the victim. Id. Bailey did not want to speculate as to what Coker may or may not have told the grand jury, but the only concern in the grand jury is whether there is sufficient evidence to continue prosecution

under some legally valid theory. {PCR Tr. 2140-41}. Since the language of the indictment does not mean the State believed Gadson was the shooter, counsel cannot be found deficient in presenting it as evidence of such a belief. Overall, Applicant has failed to show that trial counsel was deficient in not presenting the indictment as evidence the State believed that Gadson was the shooter.

Applicant has also failed to establish that he was prejudiced as a result of trial counsel not presenting either the arrest warrant affidavit or the indictment as evidence of Gadson being the shooter. First, contrary to Applicant's assertions, the jury was informed that at one point in time the State appeared to believe that Gadson was the one who killed the victim. At the outset of Gadson's direct testimony at trial, Gadson testified that his murder charge in this case was being reduced to accessory after the fact to murder and misprision of a felony in exchange for truthful testimony. {R. 3980-81}. The jury would have had reason to believe that at some point in time, the police thought Gadson was the killer. Second, there was overwhelming evidence of Applicant's guilt in the murder of Kande Martin. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put

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her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. In light of the overwhelming evidence of Applicant's guilt, Applicant has failed to establish that the result at trial would have been different but for trial counsel not presenting the arrest warrant affidavit and indictment as evidence the State believed Gadson was the one who shot and killed Kandee Martin. Since Applicant has failed to show that trial counsel was either deficient or that he prejudiced as a result of the alleged deficiency, this claim for relief should be dismissed.

E. Trial Counsel was Not Ineffective in Not Presenting Alleged Evidence of Confession from Ricky Davis and Wayne Mood

It appears that Applicant has also alleged that trial counsel was ineffective in not presenting evidence that Gadson confessed to killing Kandee Martin while in prison. Applicant points to the fact that one inmate, Ricky Davis, drafted a handwritten note indicating that Gadson told him he was the one who shot and killed Kandee Martin. As explained in greater detail in Section IV, trial counsel made a reasonable strategic decision not to call Ricky Davis at trial. Davis had indicated to Applicant's defense team that he would testify that Bowman gave him the information for the statement and Bowman insisted he write the statement. Thus, for the reasons stated in Section IV, this claim should be dismissed.

Applicant also asserts that trial counsel should have presented the testimony of Wayne Mood, a jailhouse informant interviewed by the State about this case. According to the notes from Solicitor Bailey's interview with Wayne Mood, Gadson told Mood and another man that both he and Bowman shot Kandee Martin. {Applicant's 68}. The notes indicate that both Bowman and Gadson told Mood a similar story. They were with Kandee Martin and were planning to rob a house. *Id.* Bowman gave the victim some crack. At some point in time, the victim became afraid and ran towards Bowman. They argued. Bowman mentioned to Mood that the victim was supposedly wired. According to the statement, the initial story was Gadson shot her in the back first. The victim ran until she ran out of breath. She then begged for mercy. Shortly thereafter, Bowman shot her in the head. The note also indicates that Bowman threatened to kill Gadson if he told anyone, and it mentioned that Gadson defecated on himself. The notes also indicate that later on, Bowman and Felder went back to the scene, put the body in the trunk of the victim's car, and set the car on fire. It appears that Gadson's initial version had Bowman shooting first. However, the Wayne Mood notes also indicate that Gadson later admitted he shot the victim first.

Applicant has failed to show that trial counsel was deficient in not presenting the testimony of Wayne Mood at trial. First, Applicant did not call Wayne Mood to testify at the hearing. Thus, there is no evidence on the record as to what Wayne Mood would have said if he was called to testify at trial. *See also Moss v. Hofbauer*, 286 F.3d 851, 864-65 (6th Cir. 2002) (speculation as to possible lines of cross-examination insufficient where no evidence presented how witness would have testified had the cross-examination been pursued); *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 298 (3rd Cir. 1991) (applicant cannot

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show deficiency "based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense"; rather, facts must be presented).

Further, trial counsel gave a reasonable strategic reason for not calling Wayne Mood to testify. Cummings testified that he contacted Mood's attorney shortly after receiving the notes from Solicitor Bailey. {PCR Tr. 1366-67; see Applicant's 70}. Mood's counsel would not allow the defense to talk with Mood. Overall, in assessing the value of Mood's potential testimony, Cummings noted that parts of what he was saying about Bowman had to do with Bowman shooting the victim in the back. {PCR Tr. 1367-68}. He did not want to put up a witness that was going to possibly implicate Applicant for any reason. {PCR Tr. 1368}. He did not even want to present testimony that would have indicated he was at the scene with Gadson with Gadson being the shooter. Id. He was concerned that presenting testimony that put Applicant at the scene could backfire. Id. Clearly, counsel's explanation for not calling Wayne Mood was reasonable trial strategy. As a result, Applicant failed to establish trial counsel was deficient in this regard. Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial). See generally Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective

assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

Applicant also fails to establish that he was prejudiced as a result of counsel not presenting Wayne Mood's testimony. First, if Mood testified in accordance with the Solicitor's notes, then Mood's testimony would not have been exculpatory. The notes clearly detail that Bowman admitted to Mood he was the one who shot Kandee Martin in the head after she begged for her life. The forensic pathologist who testified at trial indicated that both the head wound and the wound to the back were fatal wounds. {R. 3945, 3949}. The notes on Mood also indicated that Gadson later allegedly agreed he was the one who fired the first shot in the victim's back. Thus, the notes indicate Mood's testimony would clearly incriminate Applicant as a murderer. Second, there was overwhelming evidence of Applicant's guilt in the murder at trial. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants

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pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. Thus, even if trial counsel was deficient in not calling Wayne Mood to testify about Gadson's admission that he shot the victim, trial counsel was not ineffective because the result at trial would not have differed as a result of trial counsel's alleged deficiency. As a result, this claim for relief should be dismissed.

F. Trial Counsel Was Not Ineffective In Handling Evidence that Gadson Had Access To Applicant's Gun.

Applicant also asserts trial counsel was ineffective for not presenting evidence that Gadson had fired the gun used to kill the victim two weeks prior to the victim's murder. According to the police statement given by Tiara Coleman, she and Gadson were walking around the Villas when Coleman got into an argument with someone else. {Applicant's 30}. Applicant gave Gadson a gun, which he shot into the air. *Id.* The casings from that shooting were recovered by another resident in the Villas, Margaret Hawkins. {Applicant's 29}. Those casings were fired by the same gun that killed the victim. {R. 4315}. At the PCR hearing, Gadson corroborated the sequence of events contained in Coleman's statements. {PCR Tr. 161-62}. He noted that Bowman let him borrow the gun for that shooting. {PCR Tr. 195-96}.

Q Which .380 were you firing at the Villas that they were asking about?

A The one Marion bought from the dude in Orangeburg.

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 Bowman was there?

A Yes, he was there.

{PCR Tr. 195}. Cummings testified that he did not want the information about the shooting at the Villas in evidence. {PCR Tr. 1704}. He noted that while Coleman and Hawkins showed Gadson had fired the gun, they also indicated that Bowman gave him the gun. {PCR Tr. 1705}.

Trial counsel was not deficient in not cross-examining Gadson about the fact he had access to the gun. Such a cross-examination would not have assisted in proving Applicant was innocent of the crime. While Gadson would have testified that he was given access to Applicant's gun at the Villas shooting a few weeks before the murder, his testimony would have clearly indicated that the only reason he had access to the gun then was because Applicant gave it to him. Thus, any cross-examination questions on this issue would have had minimal benefit to Applicant.

Further, Applicant did not establish that he was prejudiced by trial counsel's decision not to introduce evidence of the shooting at the Villas. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. Travis Felder also

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testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. As already noted, the impact of introducing evidence of this shooting would at best be minimal. Thus, Applicant could not establish that the result at trial would have been different had counsel introduced the evidence. As a result, this claim of ineffective assistance of counsel should be dismissed.

G. Trial Counsel was Not Ineffective In Addressing the Fact Gadson Lied to Police about Owning a .380 Handgun.

Applicant also asserts trial counsel was ineffective for not pointing out that Gadson had lied about owning a .380 High Point firearm. In essence, Applicant asserts that the jury was led to believe that only Bowman owned a weapon that would produce the characteristics consistent with the casings linked to Martin's death.

Applicant's claim lacks merit. First, Applicant cannot establish that trial counsel was deficient in handling the issue of whether Gadson owned a High Point .380. At trial, Cummings asked Gadson if he owned a high powered .380 pistol. {R. 4026}. Over the

State's objection, Gadson was allowed to answer. {R. 4027-31}. He admitted that he had purchased a .380 pistol in July 2000, and the pistol he purchased was the same color as Applicant's. {R. 4031}. Clearly, the jury was made aware that Gadson also had a weapon that could have been used in the murder. Thus, trial counsel was not deficient in presenting information that Gadson had lied about owning a .380 pistol.

Applicant also fails to show that he was prejudiced by trial counsel's handling of this issue. As already noted, the jury was informed of the fact that Gadson owned a .380. Thus, Applicant's argument that the jury did not know is not supported by the record. Further, there was overwhelming evidence of Applicant's guilt. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also,

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Applicant's DNA was found in the victim at the scene. {R. 4381}. Since Applicant has failed to establish that he was prejudiced as a result of trial counsel's handling of this issue, he has failed to prove trial counsel was ineffective. As a result, this ground for relief should be dismissed.

II. Travis Felder

A. The Prosecution Did Not Fail to Correct False Testimony in Regards to Felder Purchasing the Gasoline.

Applicant's first claim involving Travis Felder alleges the State failed to correct false testimony when Felder omitted the fact that he was the one who purchased the gasoline that was used to burn the victim's car. During the guilt phase of trial, Felder testified that after leaving the apartments in Branchville, he followed Applicant down McElhaney Road to Nursery Road. {R. 4092-94}. However, during the sentencing phase, Felder was recalled to the stand by Applicant. During his second stint on the stand, Felder testified that he was the one who purchased the gasoline used to burn the victim's car on February 17. {R. 4915-16}. He testified that Applicant gave him a gas jug and asked that he purchase gasoline to assist him in "parking a car." {R. 4916, 4922}. Felder also indicated that he understood he was supposed to tell the truth the first time he was on the stand, but he omitted that part of the truth. {R. 4926}.

A state "denies a defendant due process by knowingly offering or failing to correct false testimony." Basden v. Lee, 290 F.3d 602, 614 (4th Cir.2002) (citing Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)). Furthermore, "[a] Napue claim requires a showing of the falsity and materiality of testimony." Id. False testimony is "material" when "there is any reasonable likelihood that the false testimony could have

affected the judgment of the jury.' " Boyd v. French, 147 F.3d 319, 329-30 (4th Cir.1998) (quoting Kyles v. Whitley, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)).

First, Applicant fails to establish that the State knowingly offered false testimony. At the PCR hearing, Solicitor Walter Bailey testified that he did not know that Felder was the one who purchased the gasoline. {PCR Tr. 2037}. He testified that he never specifically asked Felder any questions about purchasing gasoline, and none of the versions of the facts provided to him by Felder included Felder's purchase of the gasoline. Id. Bailey noted that Felder had omitted that fact in both meetings he had with Felder and his attorney and in the proffer letter that was submitted by Felder's attorney. {PCR Tr. 2040}. Bailey recalled that he first heard that Felder was the one who purchased the gasoline from trial counsel. {PCR Tr. 2037}. Bailey reiterated several times that he never knew that Felder was the one who purchased the gasoline. {PCR Tr. 2047}. He could not correct the omission because he did not know there was an omission. {PCR Tr. 2047-48}. At the PCR hearing, Felder testified that he could not remember if he told Bailey he was the one who bought the gasoline. {PCR Tr. 706, 711}. He did agree that he said he told Bailey when he was deposed for these proceedings. {PCR Tr. 671}. However, he also noted that he could not say for sure that he told Solicitor Bailey. {PCR Tr. 714}. Overall, Felder testified that he did not have a specific memory of telling Bailey that he was the one who purchased the gasoline. {PCR Tr. 729}. Without specific information from Felder, the State could not know for certain that Felder was the one who purchased the gasoline used in the arson. At best, they only knew that Felder had purchased a small amount of gasoline around 3:14 a.m. on the morning of the arson. There was no mention of Felder

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being the one who purchased the gasoline in the proffer letter sent to Solicitor Bailey by Felder's counsel. **{See Applicant's 64}**. Also, Felder's role as the one who purchased the gasoline was not an issue he was questioned about during his polygraph. **{See Applicant's 15}**. It is also not mentioned in Solicitor's Bailey's outline for Felder's testimony. **{Applicant's 82}**. In light of the fact that neither Felder nor Bailey could recall Felder telling Bailey he was the one who purchased the gasoline, Applicant has failed to show by a preponderance of the evidence that Bailey knowingly presented false testimony in allowing Felder to omit the fact he was the one who purchased the gasoline. As a result, this claim for relief should be dismissed.

Second, Applicant failed to show that the allegedly false statement by Felder was material. As already noted, false testimony is "material" when " 'there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' " Boyd v. French, 147 F.3d 319, 329-30 (4th Cir.1998) (quoting Kyles v. Whitley, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). Here, there is no reasonable likelihood that Felder's omission could have affected the judgment of the jury. First, the omitted testimony did not indicate that Applicant was any less guilty of the crimes for which he was convicted. In fact, the omitted testimony further confirms that Applicant was guilty in the arson. At trial, Felder testified that he purchased the gasoline at Applicant's request. **{R. 4922-24}**. He further testified that Applicant was the one who provided the jug that was used. **{R. 4922}**. Felder confirmed that he purchased the gasoline at Applicant's request at the PCR hearing. **{PCR Tr. 699-700}**. Contrary to Applicant's assertions, there was no evidence that Felder was involved in the planning to burn or burning of the car. He testified that all

he did was purchase the gasoline. **{See PCR Tr. 699-700}**. Felder has consistently maintained that he thought the gasoline was needed so that Bowman could go "park a car." **{PCR Tr. 699-700; R. 4092}**. Applicant offers no other probative evidence to show that Felder knew Bowman was going to burn the car. Furthermore, no other witness testified that Felder assisted in the planning or participated in the burning of the car. In fact, at least two witnesses confirm that Felder was at a friend's apartment when Bowman came to him about the issue. Carolyn Brown testified that Applicant stopped by the Boloma Smith's apartment and asked Felder for a ride home. **{R. 3711, 4045}**. Boloma Smith testified that Applicant stopped by her apartment and asked Felder to come out and speak with him. **{R. 4117}**. She also noted that Felder left, and he came back later. **{R. 4117-18}**.

Furthermore, even without Felder's testimony, there was overwhelming evidence of Applicant's guilt in this case. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. **{R. 3726, 3739-3744, 3764-66}**. Gadson saw Applicant shoot the victim. **{R. 4000-02}**. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. **{R. 4012}**. Applicant then dragged her body into the woods. **Id.** Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. **{R. 4018}**. They all wore gloves. **Id.** Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. **{R. 4065}**. He also testified that he heard Applicant admit to he killed the victim. **{R. 4068}**. The victim's watch was recovered from Applicant's pants pocket when he was arrested. **{R. 4126-30; 4164-65}**. Applicant's family got rid of the gun that was used in the murder. **{R. 4177,**

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4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. In light of the overwhelming evidence of Applicant's guilt, it is highly unlikely that the testimony omitted by Felder would have resulted in a different outcome. Overall, Applicant has failed to establish that the fact that Felder was the one who purchased the gasoline was material to the arson case against Bowman. Thus, this claim for relief should be dismissed.

Finally, if this Court finds that the State knowingly allowed Felder to present false testimony and that testimony was material, relief for the violation can only be granted on the arson conviction. Felder's testimony was only relevant to the arson charge. There were no allegations that the victim died as a result of the fire. Thus, only the arson conviction would have been affected by any failure to correct false testimony. Overall, Applicant has failed to meet his burden of proof for this claim. As a result, it should be denied and dismissed.

B. The State Did Not Fail to Correct Felder Regarding How Many Times He Met with the State in Preparation for His Testimony at Trial

Applicant's second claim under the failure to correct is that the State failed to properly correct Felder's testimony on the number of times he spoke with someone from the State. This claim should be dismissed because it completely mischaracterizes the testimony at trial and is not supported by the record. Solicitor Bailey properly corrected Felder's testimony in response to the question that was asked at trial.

At issue in this claim is whether the State properly corrected Felder's testimony to the following exchange between trial counsel Cummings and Felder:

Q. Mr. Felder, it wasn't until last week, and I want to go back over it again, how many times have ou met with anybody representing the State to go over your testimony today?

A. Excuse me?

Q. How many times have you met with anybody to go over your testimony today

A. Once.

Q. -- with the State? One time.

{R. 4109}. Clearly, the questions asked at trial pertained only to how many times Felder talked with someone from the State about **his testimony at trial**.

During redirect, Solicitor Bailey clearly corrected Felder's testimony regarding how many times they met in preparation for his testimony at trial.

Q. Travis, we met in your lawyer's office a couple weeks ago, right?

A. Yes.

Q. And this morning we also talked, is that correct?

A. Yes.

Q. So you've actually talked to me two times?

A. Yes, sir.

{R. 4110}. Contrary to Applicant's assertions, there were no other meetings between representatives of the State with Felder regarding his testimony at trial. The other interactions that Felder had with state officials regarding his testimony. The first three meetings cited by Applicant were clearly interactions Felder had with law enforcement as they investigated the case. The first was when he was initially questioned by police. The second occurred when he was arrested. The third meeting occurred when Felder was

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polygraphed. Only in the last two meetings between Felder and Bailey did he actually discuss his testimony at trial. Thus, Bailey did properly correct Felder's testimony regarding how many times he met with a representative of the State regarding his testimony. As a result, Applicant's claim is not supported by the record and should be dismissed with prejudice.

C. The Prosecution Did Not Commit Any Brady Violations with Evidence Relating to Travis Felder

Applicant asserts that the State failed to provide the defense with information and evidence favorable to Applicant in violation of Brady v. Maryland, 373 U.S. 83 (1963). Each Brady claim alleged by Applicant should be dismissed because Applicant has failed to prove by a preponderance of the evidence that the State violated the disclosure requirements established by Brady.

"A Brady violation occurs when the government fails to disclose evidence materially favorable to the accused." Youngblood v. West Virginia, 547 U.S. 867, 869, 126 S.Ct. 2188 (2006). Evidence that is not disclosed is suppressed for Brady purposes even when it is "known only to police investigators and not to the prosecutor." Kyles v. Whitley, 514 U.S. 419, 438, 115 S.Ct. 1555 (1995). Evidence is favorable if it is either exculpatory or impeaching. See, e.g., Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936 (1999). Evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (internal quotation marks omitted). However, a "showing of materiality does not require demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted ultimately in the

defendant's acquittal," id. (quoting Kyles, 514 U.S. at 434, 115 S.Ct. 1555), but only a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (quoting Kyles, 514 U.S. at 435, 115 S.Ct. 1555). The assessment of materiality is made in light of the entire record. United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392 (1976).

An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006) (citing Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); Gibson, 334 S.C. 515, 514 S.E.2d 320 (1999)). If a Brady violation is found to have occurred, PCR must be granted. Gibson, *supra*.

D. The State Did Properly Disclose Evidence that Felder Purchased Gasoline on the Morning of the Arson.

Applicant asserts that the State failed to provide trial counsel with evidence that Felder was the one who purchased the gasoline. This Brady claim is without merit. Applicant has failed to establish that the State suppressed any evidence identifying Felder as one who purchased gasoline from the EZ Horizon convenience store on the morning of the arson. Also, Applicant fails to show that evidence Felder purchased the gasoline was favorable to Applicant's case. Furthermore, Applicant does not establish that the fact Felder purchased gasoline on the morning of the arson was material to Applicant's case. Overall, Applicant does not prove by a preponderance of the evidence that the State

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violated Brady by not providing the defense with evidence Felder purchased the gasoline used in the arson. As a result, this claim should be dismissed.

First, as already noted in Section II, A, it is not clear that the State had evidence that Felder purchased the gasoline used to burn the victim's car. At the PCR hearing, Solicitor Bailey consistently testified that he was not aware that Felder was the one who purchased the gasoline. **{PCR Tr. 2037, 2047-48}**. While Felder testified at the PCR hearing that he did say he told Solicitor Bailey he purchased the gasoline at his deposition, Felder indicated that he did not have a specific memory of whether or not he did tell Bailey. **{See PCR Tr. 729}**. He was unable to confirm if he was telling the truth about telling Bailey at the deposition because he simply could not remember. **{PCR Tr. 706, 714, 729}**. While the State had circumstantial evidence that it was Felder who purchased the small amount of gasoline from the EZ Horizon convenience store, they did not have any evidence indicating that the gasoline purchased by Felder was the gasoline used in the arson until Felder testified to as much during the penalty phase at trial. The proffer letter that was sent to Bailey did not include any discussion about Felder purchasing gasoline. **{Applicant's 64}**. Felder's polygraph report indicates Felder did not mention anything about purchasing the gasoline. **{Applicant's 15}**. Most telling, however, is the fact that Solicitor's Bailey's notes created in preparation for Felder's testimony also include no mention of Felder purchasing the gasoline. Clearly, the State would have had no reason not to present such testimony. Based on Felder's testimony during the penalty phase and at the PCR hearing, it would have assisted the State's case because Felder clearly testified that he purchased the gasoline on Applicant's instruction. **{R. 4922-24; PCR Tr. 699-700}**.

None of the evidence presented at the PCR hearing indicated that the State had evidence connecting the gasoline purchased by Felder to the arson. Thus, Applicant has not pointed to any evidence that was suppressed by the State in regards to Felder purchasing the gasoline used in the arson.

Furthermore, the State did provide the defense with the evidence it did have regarding the gasoline purchase. Cummings testified that they received a copy of the video surveillance from the EZ Horizon convenience store. {PCR Tr. 1933-34; Respondent's 34}. Also, the investigative file contains a note denoting the times on the video that the police thought was significant in their initial review. {See Applicant's 42/Court's 2}. Applicant has neither presented nor pointed to any evidence regarding the purchase of the gasoline that was not provided to defense counsel. As a result, he has failed to establish any favorable evidence in this regard was suppressed. Thus, this claim for relief should be dismissed.

To the extent Applicant relies upon Detective Coker to establish the State knew Felder purchased the gasoline used in the arson, that reliance is not supported by the record. Coker testified that the video tape from EZ Horizon was of very poor quality. {PCR Tr. 900-01}. He could not recognize anyone on the video. {PCR Tr. 901}. The video was sent to SLED, and SLED made a few still photos. Id. Coker did not recall if he interviewed Felder, showed him the video, or asked if he was on it. Id. Coker also could not recall Felder's response to questions about him being on the video tape. {PCR Tr. 902}. Noticeably absent from his testimony at the PCR hearing is any indication the State knew that gasoline purchased from the EZ Horizon convenience store was used in the arson.

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Obviously the investigation looked for gasoline purchases at the EZ Horizon store because they had statements indicating Gadson may have purchased gasoline for the arson. **{See Applicant's 36}**. It is also clear that law enforcement reviewed the tape for any small purchases of gasoline. However, at no point at trial did the State present any evidence that indicated they knew who purchased the accelerant used in the arson and from where it was purchased.

Second, Applicant has failed to show that any evidence that Felder purchased the gasoline was favorable to his case. Felder testified that he purchased the gasoline at Applicant's request. **{R. 4922-24, PCR Tr. 699-700}**. According to Felder's testimony at trial, Applicant provided the container used to hold the gasoline. **{R. 4916, 4922}**. He has consistently testified that when he purchased the gasoline, he thought he was doing so to assist Applicant "park a car." **{R. 4916-4924; PCR Tr. 699-700}**. Applicant fails to show how this testimony is favorable to his defense on the arson charge. Cummings testified that while they could not tell if Felder was on the tape, Applicant informed him that Felder was on the tape at 3:14 a.m. purchasing the gasoline. **{PCR Tr. 1287}**. He did not want Felder testifying about the fact that he purchased the gasoline because of the implication of Applicant's involvement in the planning of the arson. **{PCR Tr. 1289-90}**. At best, the information could have had very limited impeachment value. However, based upon the testimony Felder provided during the sentencing phase and at the PCR hearing, it does not appear that the omission indicated Felder was any more culpable than what he was charged with doing.

Third, Applicant has failed to show that Felder's purchasing the gasoline used to burn the car was material evidence. Even if the evidence of Felder's purchase in the State's possession was not turned over to the defense, the State's failure to do so would not have undermined the confidence in the verdict at trial. It is clear from the testimony of trial counsel Norb Cummings that Applicant was well aware that Felder was the one who purchased the gasoline. {PCR Tr. 1287}. Cummings testified it was Applicant who informed him that Felder purchased the gasoline. Id. Thus, Applicant could have presented the omission during the guilt phase at trial if he wished to do so. Second, there was overwhelming evidence of Applicant's guilt in the murder and arson presented at trial. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. Thus,

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Applicant cannot show beyond a preponderance of the evidence that the result at trial would have differed had evidence of Felder purchasing the gasoline was turned over. Nor can he establish that confidence in the verdict was undermined. Thus, Applicant does not establish the allegedly suppressed evidence was material. As a result, this claim should be dismissed.

Finally, if this Court finds that the State committed a Brady violation, relief for the violation can only be granted on the arson conviction. Felder's testimony was only relevant to the arson charge. There were no allegations that the victim died as a result of the fire. Thus, only the arson conviction would have been affected by any failure to correct false testimony. Overall, Applicant has failed to meet his burden of proof in establishing this claim. As a result, it should be denied and dismissed.

E. The State Did Not Violate Brady When It Did Not Disclose the Proffer Letter from Felder's Attorney.

Applicant has failed to establish by a preponderance of the evidence that the State did not properly provide the defense with a letter from Felder's attorney containing a proffer of what Felder would say at trial. The proffer letter dated March 27, 2002 was not evidence that could have been used at trial or lead to other admissible evidence. Further, the proffer letter was not favorable to Applicant. Finally, Applicant fails to show that the proffer letter was material evidence.

Solicitor Bailey testified that he received a letter from Felder's counsel during their negotiations regarding a possible plea agreement. {See PCR Tr. 2109}. The letter contained a proffer of what Felder could testify to if called upon at trial. {PCR Tr. 2109, Applicant's 64}. The letter indicated that Felder had seen Applicant, Gadson, Williams,

and Johnson at the Allen Murray Club that night. {Applicant's 64}. The letter indicated Felder went to his girlfriend's apartment after returning from the Allen Murray Club. Id. About fifteen minutes later, Applicant stopped by and asked Felder for some assistance in parking a car. Id. According to the letter, Felder then followed Bowman down McAlhaney Road. Id. The letter noted that Bowman pulled up into a field, got out, and then the car was on fire. Id. Felder did not recognize the car; instead, according to the letter, he assumed it was one of Bowman's sister's car. Id. Bailey testified that he did not necessarily believe the contents of the proffer letter. {PCR Tr. 2109}. As a result, he had Felder take a polygraph examination to verify the veracity of Felder's statements. Id. Bailey testified that to the best of his recollection, he forwarded a copy of the proffer letter to defense counsel. {PCR Tr. 2110}. He also forwarded the results of the polygraph report to defense counsel after it was completed. {PCR Tr. 2110, Respondent's 36}. At the PCR hearing, Norb Cummings testified that he did not recall receiving a copy the proffer letter sent by Felder's attorney to Solicitor Bailey. {PCR Tr. 1319}.

Applicant has failed to establish that the State violated Brady by not providing the defense with a copy of the letter. First, Applicant has failed to establish by a preponderance of the evidence that the proffer letter was favorable to Applicant. The letter offers no exculpatory evidence for Applicant's case. Outside of the testimony regarding seeing the body in the car, it was consistent with Felder's testimony at trial during the guilt phase. Further, the evidence could not be used for impeachment purposes. It was not a statement made by Felder. It was simply a reflection of what Felder's attorney provided the solicitor's office as it opened negotiations for a plea agreement.

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Second, Applicant fails to show the proffer letter was material. clearly wasn't the final agreement between the State and Felder. Felder and the State came to a verbal agreement just before trial. {PCR Tr. 1295; see Applicant's 14}. There is no evidence that Applicant was not provided with any information about what Felder was going to say at trial. Cummings testified that a few days before trial he got a phone call from the solicitor's office informing him Felder was going to testify. {PCR Tr. 1294}. He also recalled that he received a letter or fax that confirmed Felder was going to cooperate with the state. {PCR Tr. 1294}. Applicant presented no evidence establishing what was known by trial counsel at the time of trial in regards to what Felder's proffered testimony. In light of the fact that counsel did know what Felder was going to say and the fact that counsel was aware Felder had lied in the past about seeing the victim's body being put in the trunk of the car, Applicant has not shown how this proffer statement is material to this case. As a result, this claim should be dismissed.

Furthermore, the information in the proffer letter does not undermine the confidence in the verdict in Applicant's convictions and death sentence. First, the information in the letter could not have undermined the confidence in the death sentence. There was overwhelming circumstantial evidence of Applicant's guilt presented in this case. the overwhelming evidence of guilt in this case clearly shows that this evidence would not have undermined the confidence in the verdicts at trial. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again,

but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. Even in a worst case scenario, Felder's testimony could not undermine the confidence in the murder conviction and death sentence because Felder's testimony was relevant primarily to the arson charge. Since Applicant's death sentence was on the murder conviction, the fact that the proffer letter was allegedly suppressed would not impact that verdict. Thus, the proffer letter could only possibly be material to the arson conviction. Overall, Applicant has failed to establish a Brady claim in this instance. As a result, this claim should be dismissed.

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F. There Was No "Wink Wink" Deal Between the State and Felder

Applicant has asserted that the State withheld evidence there existed a "wink wink" deal for Felder's testimony. This claim is not supported by the evidence presented at the PCR hearing. Simply stated, there was no "wink wink" deal between the State and Felder. Since there was no "wink wink" deal for Felder's testimony, the State could not have violated Brady in not disclosing the existence of such a deal. As a result, this claim for relief should be dismissed.

Applicant's complaint derives from the fact that Felder received the benefit of his signed plea agreement with the State even though he omitted the fact he purchased the gasoline during his guilt phase testimony. At the PCR hearing, Solicitor Bailey testified that he was surprised to learn that Felder had purchased the gasoline used in the burning of the victim's car. {PCR Tr. 2040}. The State and Felder reached a verbal agreement for Felder's testimony shortly before trial. {PCR Tr. 1295, Applicant's 14}. When Felder initially testified, Bailey noted they only had a verbal agreement. {PCR Tr. 2045}. The written agreement had been drafted and sent to Felder's attorney. Id. However, when Felder testified during the guilt phase, Bailey had not received the signed copy of the agreement from Felder's attorney. Id. The plea agreement was signed when Felder returned to testify during the penalty phase of trial. {PCR Tr. 2128}. Bailey noted that the verbal agreement would not have contained all of the specific terms that were included in the written agreement. {PCR Tr. 2043}.

Bailey explained that the plea agreement with Felder provided the State with the option to void the agreement. {PCR Tr. 2042-43}. He ultimately decided not to void the

agreement because he felt that it was not worth it as far as utilizing court time and for whatever marginal benefit the State might have received with an increased sentence. {PCR Tr. 2126-27}. Further, Bailey indicated it may have been difficult to void the agreement because Felder did not tell an outright lie. {PCR Tr. 2044}. Bailey noted that neither he nor Cummings asked any questions that would have specifically elicited the testimony regarding Felder's purchase of the gasoline. {PCR Tr. 2044}. Ultimately, Felder did tell the jury of his involvement in purchasing the gasoline. {PCR Tr. 2127}. While Bailey wished that information would have come out the first time Felder testified, there was not much that he could do about it. {PCR Tr. 2127}.

To the extent that Applicant relies upon the fact that the State did not disclose the fact that Felder had lied in his attempt to garner the plea agreement, that claim is not supported by the record. Bailey provided trial counsel with Felder's polygraph report by letter dated April 24, 2002. {Respondent's 33, 44}. On May 10, 2002, Bailey informed trial counsel that the State had reached an agreement with Bailey for his testimony. {Res. Ex. 32}. Clearly, Applicant was on notice that Felder was receiving a plea agreement despite the fact he had lied to the State at some point in time. {See PCR Tr. 2144-46}.

Overall, Applicant has failed to establish that there existed a "wink wink" deal between Felder and the State. Since Applicant cannot show there existed such a deal, he cannot prove that the alleged deal was suppressed by the State. As a result, he cannot establish the State violated Brady by not disclosing the alleged deal. Since he cannot show Brady was violated, this claim for relief should be dismissed.

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Finally, if this Court finds that the State violated Brady in this claim, relief for the violation can only be granted on the arson conviction. Felder's testimony was only relevant to the arson charge. There were no allegations that the victim died as a result of the fire. Thus, only the arson conviction would have been affected by any failure to correct false testimony.

G. Trial Counsel Was Not Ineffective for not Presenting Evidence of Felder's Original Arrest/Charge

Applicant contends that trial counsel was ineffective for not cross-examining Felder on the fact that he was originally arrested in this case for accessory before the fact in the murder. This claim lacks merit. Counsel was not deficient because there was absolutely no evidence that indicated this original charge was reduced as a result of Felder's cooperation in this case. Furthermore, Applicant cannot show that he was prejudiced as a result. This claim should be dismissed.

To establish a claim that counsel was ineffective, a PCR applicant must show that (1) counsel's representation fell below an objective standard of reasonableness and (2) but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068.

When reviewing a counsel's performance, there is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

Consequently, courts apply a "highly deferential" standard of review. Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. Counsel may avoid a finding of Ineffectiveness if he articulates a valid reason for using a certain strategy. Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (citations omitted). Counsel's strategy will be reviewed under "an objective standard of reasonableness." Id.

In this claim, Applicant asserts trial counsel was ineffective for not exposing the fact that Felder was initially arrested and charged with Accessory to Murder/Arson and Arson, Third Degree. According to the arrest warrant affidavit, the evidence utilized to establish probable cause for the charges consisted of a statement provided by Applicant. **{Applicant's 17 & 18}**. According to Applicant's statement, Gadson and Felder were the ones who shot the victim and burned the car, **{See Applicant's 17 & 18}**. After he was arrested, Felder did not give a statement to police. Instead, he invoked his right to counsel. **{See Applicant's 16}**. By all accounts, Felder did not have any contact with law enforcement or the solicitor's office until his attorney contacted the solicitor's office about a plea in March 2002. **{See Applicant's 64, PCR Tr. 2107-2110}**. During June 2001, Felder was indicted for Third Degree Arson and Accessory After the Fact to the murder. **{Applicant's 43, 44}**.

Applicant argues that trial counsel was ineffective for not pointing out that Felder was once charged with accessory before the fact to the murder and that the State could have sought the death penalty for such a charge. First, to the extent that Applicant has alleged that trial counsel should have cross examined Felder on the fact that before his plea agreement, he was exposed to a possible death sentence as an accessory before the

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fact should be dismissed because it lacks merit. There is no evidence that supports the implication that the accessory before the fact to the murder charge was reduced as a result of Felder's cooperation. In fact, the evidence clearly points to the contrary. The charge was reduced to Accessory After the Fact when Felder was indicted in June 2001. At that point, Felder had not given any statement to law enforcement other than his initial denial of all involvement. Had trial counsel attempted to imply that Felder's cooperation at trial was to avoid being charged with accessory before the fact, counsel would have been presenting false evidence. Furthermore, counsel expressed a valid strategic reason for not getting into the initial charges from Felder. Cummings testified that it was his understanding that Felder was initially charged with murder based upon a statement given to police from Applicant. {PCR Tr. 1971}. He noted on several occasions that he did not want any of Applicant's statements to come into evidence.

Second, trial counsel did attempt to elicit testimony from Felder regarding how much time he was facing under his plea agreement. Counsel asked Felder "[h]ave you been told a possible sentence?" {R. 4108}. Felder responded, "[n]o sir." Id. At the PCR hearing, Felder testified that he was not aware of the potential time he faced for accessory after the fact to arson. According to Felder, his attorney did not inform him of the possible maximum sentence for accessory after the fact to arson. {PCR Tr. 693}. In light of the fact that counsel did attempt to show Felder was biased by asking how much time he faced, counsel should not be found deficient in that regard. Counsel's pursuit of that avenue of questioning was clearly limited by the fact that Felder testified he did not know how much time he could receive.

Third, to the extent that Applicant asserts that the State had a long-held belief that Gadson and Felder were the ones who killed the victim and burned the car, Applicant's claim should be dismissed. Applicant's position relies solely upon the arrest warrant affidavits. First, the arrest warrant affidavits only indicate that the State believed there was probable cause for Felder to be arrested for Accessory to Murder and Arson, Third Degree. All that means is there was evidence that aroused suspicion that he may have committed those crimes. As already noted, the only evidence the police had that indicated he was guilty of being an accessory before the fact and a third degree-arsonist was the statement from Applicant. Those arrest warrants were drafted on the same day as the victim's body was found. It was very early in the investigation. Clearly, it was not a long-held belief of the State that Felder was an accessory before the fact; he was indicted for being an accessory after the fact in June 2001.

Furthermore, Cummings testified that he did not want any of Applicant's statements admitted into evidence, and he was surprised that the State did not present those statements.

Applicant's reliance upon State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002), is misplaced. In Mizzell, the South Carolina Supreme Court reversed a conviction because the trial court improperly restricted the defendant's ability to cross-examine a state's witness about the potential sentence he could receive as part of his plea agreement. Id. at 335-36, 563 S.E.2d at 319-20. The witness, who was the defendant's co-defendant, pled guilty to the same charges for which the defendant was on trial. Id. at 330, 563 S.E.2d at 316-17. Mizzell basically holds that a defendant can ask a witness testifying pursuant to a guilty plea about the range of potential sentences he faces. However, Mizzell

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does not require that trial counsel pursue such a line of cross-examination or create an expectation that trial counsel will do so in all cases. Its holding merely insures that if trial counsel chooses to pursue that line of questioning, the trial court cannot prohibit him from doing so. It is still the decision of trial counsel to decide whether or not such questioning fits within the defense's trial strategy. Thus, counsel cannot be found deficient just because he did not question a witness about his potential sentence.

Finally, Applicant fails to establish his ineffective assistance of counsel claim because he fails to show that he was prejudiced as a result of trial counsel not cross-examining Felder on the earlier charges. The result at trial would not have differed but for the proposed testimony. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R.

4381}. As a result, Applicant has failed to prove by a preponderance of the evidence that trial counsel was ineffective for not cross examining Felder on his arrest for accessory before the fact and arson, third degree. This claim for relief should be dismissed.

Finally, if this Court finds trial counsel was ineffective in this claim, relief for the violation can only be granted on the arson conviction. Felder's testimony was only relevant to the arson charge. There were no allegations that the victim died as a result of the fire. Thus, only the arson conviction would have been affected by any failure to correct false testimony.

H. Trial Counsel was not Ineffective in Not Presenting Evidence Felder Was the One Who Purchased the Gasoline During the Guilt Phase at Trial.

Applicant fails to establish trial counsel was ineffective in not presenting evidence that Felder purchased the gasoline. Counsel elicited a valid and reasonable strategic reason explaining why he did not ask Felder about purchasing the gasoline. Further, Applicant has failed to show that there was a reasonable probability that the outcome at trial would have been different had counsel presented evidence and testimony that Felder purchased the gasoline during the guilt phase.

To establish a claim that counsel was ineffective, a PCR applicant must show that (1) counsel's representation fell below an objective standard of reasonableness and (2) but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). "A reasonable

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probability is a probability sufficient to undermine confidence in the outcome" of the trial. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068.

When reviewing a counsel's performance, there is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066. Consequently, courts apply a "highly deferential" standard of review. Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. Counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy. Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (citations omitted). Counsel's strategy will be reviewed under "an objective standard of reasonableness." Id.

As noted in response to Applicant's argument that the State failed to provide Applicant with information regarding Felder's purchase of the gasoline, trial counsel knew Felder had purchased the gasoline. At the PCR hearing, Cummings testified that he did not want the video of Felder purchasing the gasoline coming into evidence. {PCR Tr. 1276}. While he did not know why the State had not entered the video into evidence, he did not want it in because he felt it would corroborate Applicant's involvement in the plan to burn the car. {PCR Tr. 1276}. Cummings also testified that the entry of the video into evidence during the sentencing phase was done at Applicant's insistence and was not in line with his strategy. {See PCR Tr. 1290}.¹ This fear was well placed, as illustrated by Felder's testimony during the sentencing phase. Felder testified that he purchased the gasoline after being instructed to do so by Applicant. {R. 4916-24}. He also testified that

¹This testimony was also confirmed during Cummings' cross examination and is supported by the trial record. {PCR Tr. 1290-91, see R. 4911-26}.

Applicant provided the gas jug to be used in the purchase. Id. Clearly, trial counsel articulated a valid, reasonable strategic reason for not presenting the evidence of Felder purchasing the gasoline. As a result, this claim should be dismissed.

Applicant has also failed to establish that he was prejudiced by trial counsel's decision not to introduce evidence that Felder purchased the gasoline during the guilt phase of trial. First, Applicant presents no evidence to support its contention that Felder's omission that he was the one who purchased the gasoline indicated he was involved in the murder of Kandee Martin. Outside of Applicant's statement, there is no credible evidence linking Felder to the murder of Kandee Martin. Second, Felder's testimony regarding the omission during the sentencing phase and during the PCR hearing clearly shows that cross-examination on this issue during the guilt phase would have done nothing to exculpate Bowman from being a participant in the arson. To the contrary, Felder's testimony clearly indicated that Bowman was highly involved in the arson. Third, the result at trial would not have been different but for trial counsel's alleged deficiency because there was overwhelming evidence of Applicant's guilt in both the murder and the arson. To be clear, Felder's testimony regarding the purchase of the gasoline was only relevant to the arson charge. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's

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car. {R. 4018}. They all wore gloves. Id. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}.

I. Trial counsel Was Not Ineffective for not Filing a Rule 29 Motion for a New Trial; Counsel Was Aware that Felder Was the One Who Purchased the Gasoline at Trial

This claim should be dismissed because it is without merit. Applicant's claim fails because the factual predicate for the claim is not supported by the record. Applicant asserts trial counsel was ineffective for failing to file a Rule 29(b) Motion for a New Trial because he learned Felder was the one who purchased the gasoline after the guilt phase was complete. This claim is not supported by the testimony at the PCR hearing. Trial counsel testified that he knew Felder was the one who purchased the gasoline before Felder testified during the guilt phase. Specifically, counsel testified that he knew because Applicant told him Felder purchased the gasoline when they viewed the video. Further, counsel indicated that the defense team debated whether to present the video of Felder purchasing the gasoline during the guilt phase. In the end, for strategic reasons, counsel did not present the video from the EZ Horizon convenience store during the guilt phase of trial. It was only presented during the sentencing phase because Applicant insisted upon

its presentation. Since there was clear testimony that indicates trial counsel knew Felder had purchased the gasoline before the conclusion of the guilt phase of trial, counsel would not have had a factual basis for a motion for a new trial based upon newly discovered evidence. As a result, this claim should be dismissed.

III. Hiram Johnson

A. The State Did Not Violate Brady in Not Disclosing Hiram Johnson's then Pending Charges

Applicant's first Brady claim in reference to Hiram Johnson concerns Johnson's criminal charges. On May 29, 2001, Johnson was served with arrest warrants for Receiving Stolen Goods Less than \$1000, Burglary - Second Degree, and Grand Larceny. {Applicant's 48, 71}. The Receiving Stolen Goods Less than \$1000 charge stemmed from an incident on November 2, 2000. {Applicant's 48}. The Burglary charge and the Grand Larceny charge resulted from an incident in Orangeburg County on September 26, 2000. {Applicant's 71}. Applicant asserts that the prosecution violated Brady because it failed to disclose these charges to trial counsel. This claim should be dismissed because it lacks merit. Applicant has not shown by a preponderance of the evidence that Johnson's pending charges were material. As a result, this claim for relief should be dismissed.

Applicant fails to establish that the pending charges were material. Specifically, Applicant has failed to establish that the confidence in the outcome at trial was undermined by the fact that Johnson was not cross-examined on his then pending charges in Orangeburg County. First, there was overwhelming evidence of Applicant's guilt presented at trial outside of Hiram Johnson's testimony. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day

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of the murder. {R. 3726, 3739-3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}.

Second, the impeachment value of Johnson's pending charges was limited. The record clearly indicates that Johnson did not get any special consideration for his charges. As indicated by Solicitor Bailey's testimony at the PCR hearing, he was actually unaware of the fact that Johnson had pending charges. Further, Johnson was impeached on whether he could remember what occurred as a result of his head injury. {R. 4071}. The charges were unrelated to Applicant's trial. In light of the overwhelming evidence of Applicant's guilt in this case, coupled with the limited impact of an impeachment on the

suppressed charges, Applicant has failed to establish that the verdict was undermined if Johnson's charges were suppressed by the State. As a result, Applicant has failed to prove by a preponderance of the evidence this Brady claim. Thus, this claim should be dismissed.

B. There Was No Undisclosed Wink Wink Deal Between the State and Johnson

In Applicant's second Brady claim, he asserts that the prosecution failed to provide Applicant's counsel with evidence there existed a "wink wink" deal between the State and Hiram Johnson for his testimony. This claim should be dismissed because there is no evidence there existed a "wink wink" deal.

In this claim, Applicant essentially asserts that the Solicitor's Office attempted to use Hiram Johnson's pending charges for Burglary and Grand Larceny from a September 2000 incident, and charges for Receiving Stolen Goods less than or equal to \$1000 from a November 2, 2000 incident as leverage to obtain testimony favorable testimony from Johnson. Specifically, Applicant asserts that Solicitor Bailey used those pending charges to get Johnson to testify that Bowman admitted he killed Kandee Martin.

This Brady claim is not supported by the record. Applicant's claim consists of nothing but mere conjecture. Applicant's premise is not supported by the record. The defense was clearly provided with evidence that Johnson had heard Bowman confess to killing the victim. At the PCR hearing, Detective Alvin Coker testified that he interviewed Hiram Johnson twice in this case. In reviewing his notes from the first interview, Coker noted that Johnson said he had gone to the club with Bowman, Gadson, and Darian Williams on the night of the murder. {PCR Tr. 929}. Johnson told police that he saw

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Bowman with a gun in his lap while Bowman was driving. Id. Also, he told police that Bowman told Trina West about killing Kandee Martin. Id. Coker testified that Johnson was not clear on the time frame or how he knew Bowman told West. Id. Detective Coker's notes were provided to Applicant's trial counsel. {See PCR Tr. 1285}. Trial counsel was provided with evidence that Johnson had indicated Bowman had confessed to killing the victim. Since the State had information from Johnson that indicated he heard Bowman confess that he killed the victim, it would have had no reason to set up a "wink wink" deal with Johnson to testify about that fact.

Second, there was no testimony or evidence presented at the PCR hearing that indicated Solicitor Bailey was actually aware that Hiram Johnson had pending charges against him in Orangeburg County. Detective Coker testified that he was not aware that Johnson had pending charges when he interviewed him.² {PCR Tr. 927, 942}. Bailey testified that he was not aware of any charges against Johnson when he dealt with him in this case. {See PCR Tr. 2133}. Bailey noted why there was no plea agreement with Johnson: to their knowledge, there were no charges against Johnson and Johnson just agreed to testify. {PCR Tr. 2134}.

Third, there is no evidence in the record that indicates Johnson's charges were dismissed as a result of his cooperation with the Solicitor's Office in Bowman's case. In fact, the progression of those charges after Bowman's trial indicates that his cooperation with the Solicitor's office had no effect on those charges. Johnson was indicted by the

²Coker also testified that he did not know that Johnson later filed a lawsuit against Orangeburg County deputies until later informed by Chief Walters from the Orangeburg County Sheriff's Department. {PCR Tr. 942-43}.

Orangeburg County Grand Jury on the all three charges during the April 14, 2003 term of the Orangeburg County Court of General Sessions. {Applicant's 48, 71}. While the Burglary and Grand Larceny indictments were later not pressed because of a lack of credible evidence, those indictments remained pending for over one and one-half years before disposition. {See Applicant's 48, 71}. Resolution of Johnson's criminal charges were clearly not related to the Bowman case. {See also Respondent's 39-42}. As a result, Applicant has failed to establish there was a "wink wink" deal between the State and Hiram Johnson. Since there was no "wink wink" deal between the two, the prosecution could not have violated Brady by not turning over details of such a deal. Thus, this claim for relief should be dismissed.

C. Trial Counsel Was Not Ineffective in Not Cross Examining Johnson on the Absence of Bowman's Alleged Confession in Johnson's Prior Statements.

Applicant argues that trial counsel was ineffective because Cummings did not cross-examine Hiram Johnson on the fact that none of Johnson's prior statements indicated Applicant had confessed to killing Kandee Martin. Applicant has failed to establish by a preponderance of the evidence that trial counsel was ineffective in this regard.

As has been noted: "In hindsight, there are few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would pass muster." Willis v. United States, 87 F.3d 1004, 1006 (8th Cir. 1996). The extent of examination and cross-examination of witnesses is an area of trial tactics left to the discretion of counsel. Yarrington v. Davies, 779 F.Supp. 1304, 1308 (D. Kan. 1991). Counsel is not required to raise every

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conceivable issue or pursue every avenue of inquiry, but is required only to exercise normal skill, judgment, and diligence. Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980).

At trial, Hiram Johnson testified that on the night of the murder, he went to the Allen Murray Club with Bowman, Gadson, and Darlan Williams. {R. 4064}. They rode in the victim's Ford Escort. Id. Johnson testified that Applicant said he stole the car, and Bowman made them all wear gloves. {R. 4065}. At the Allen Murray Club, Johnson sat in the victim's car in the parking lot while Applicant walked around the parking lot. {R. 4066}. Johnson also testified that Applicant attempted to sell the car in the parking lot. {R. 4067}. At some point during the evening, Johnson heard Applicant admit that "I killed Kandee, heh, heh, heh." {R. 4068}. At the PCR hearing, Johnson testified that he could not remember if he told police that Bowman said he had killed Kandee Martin. {PCR Tr. 558-559}. He also noted that he thought Applicant was kidding when he said it. {PCR Tr. 560, 565}. He did not know that the victim was dead when Applicant made the statement. {PCR Tr. 565}.

Detective Coker testified at the PCR hearing that he spoke with Johnson on two occasions. The first was on February 22, 2001 at the Branchville Police Department. {PCR Tr. 927}. According to Coker's notes, Johnson indicated he had gone to the club with Bowman, Gadson, and Darlan Williams. {PCR Tr. 929}. The notes also indicated that Johnson saw Applicant with the gun in his lap while Applicant was driving, and that Johnson knew Applicant had admitted to Trina West that he killed the victim. Id. As noted above, trial counsel was provided with a copy of Detective Coker's notes as part of the Rule 5 discovery. {See PCR Tr. 1285}. Coker interviewed Johnson a second time on April

5, 2001. {PCR Tr. 929}. He testified that interview began at approximately 1:40 p.m. {PCR Tr. 929}. The interview was held at Johnson's father's fish market in Branchville. {PCR Tr. 929-30}.

Cummings testified that at trial, Johnson testified he overheard a confession from Applicant about killing Kandee Martin. {PCR Tr. 1372}. He also noted that the confession Johnson overheard was not included in his written statement from April 5, 2001. {PCR Tr. 1386}. Cummings noted that the testimony including the confession was not inconsistent with the written statement. {PCR Tr. 1386}. Cummings testified that he did not cross-examine Johnson on the statement because he did not want to have Johnson repeat the statement during cross-examination. {PCR Tr. 1387-88}. Cummings also indicated that the first time he heard about the confession was at trial. {PCR Tr. 1387}.

Applicant cannot establish trial counsel was ineffective in not crossing Johnson on why any mention of a Bowman confession was not in his prior statements because trial counsel gave a valid, strategic reason for not crossing Johnson on this issue. Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial). See generally Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy). Counsel noted that Johnson's testimony was not inconsistent with the

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statement that he had given police. Cummings noted that written statements tend to be an outline of what a witness will say at trial. More importantly, Cummings indicated that he did not want to risk having Johnson repeat the statement in front of the jury. Cummings noted it was the worst thing that Johnson said about Applicant at trial. {PCR Tr. 1386}. Clearly, that counsel provided a valid, strategic reason for not cross-examining Johnson on this issue. Since counsel had a valid, strategic reason for not cross-examining Johnson on this issue, he cannot be found deficient in this regard. See Moss v. Hofbauer, 286 F.3d 851, 865 (6th Cir. 2002) (reviewing court must consider potential risk that cross-examination would have led to damaging testimony being repeated).

Furthermore, Applicant fails to establish that counsel was deficient in not pointing out that Johnson had not indicated Bowman had confessed to killing Kandee Martin in any statements to police. Counsel was not deficient because Johnson had clearly indicated to police that he knew Bowman had confessed to killing Kandee Martin. Detective Coker noted as much in his investigative notes regarding his first interview with Hiram Johnson. {See Applicant's 47}. Since Johnson had indicated to police that he heard Bowman confess he killed Kandee Martin, trial counsel could not be deficient in not asking Johnson why he did not tell police he heard Bowman confess.

Finally, Applicant has not established that prejudiced as a result of trial counsel not asking the question. Applicant does not establish that the result at trial would have been different but for trial counsel not asking the question. There was overwhelming evidence of Applicant's guilt. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-

3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. As a result, this claim for relief should be dismissed.

D. Trial Counsel Was Not Ineffective for Not Cross-Examining Johnson on the Fact he was Not Charged with Possession of Stolen Vehicle.

Applicant also fails to establish by a preponderance of the evidence that trial counsel was ineffective for not cross-examining Hiram Johnson on the fact he was not charged with possession of a stolen vehicle. In this claim, Applicant alleges that trial

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counsel should have attempted to impeach Johnson on the fact that he was not charged with possession of a stolen vehicle based upon his constructive possession of the victim's car. In essence, Applicant asserts that Johnson provided favorable testimony to avoid the charge.

Applicant did not establish that trial counsel was deficient in not asking Hiram Johnson whether he knew he could potentially be charged with possession of a stolen vehicle in Applicant's case. First, there was no testimony introduced at the hearing to support a finding that Hiram Johnson was aware that he could be charged with possession of a stolen vehicle. Detective Coker testified that he did not recall having any discussions with Hiram Johnson about charging him with possession of a stolen vehicle. {PCR Tr. 937}. Coker also noted that he did not have an explanation for why Johnson was not charged with possession of a stolen vehicle. {PCR Tr. 938}. He surmised that it was likely because their focus was on getting more information about the murder and arson. Id. Solicitor Bailey recalled that Hiram Johnson was not charged with possession of a stolen vehicle. {PCR Tr. 2104}. Bailey explained that no charge was filed because there were so many other individuals in the case that had already been charged with more serious offenses. Id. Bailey asserted that he did not feel that such a charge was warranted in Johnson's case. Id. Hiram Johnson was asked if he was aware that he could have been charged with possession of a stolen vehicle in this case. {PCR Tr. 539}. Hiram Johnson never responded to the question.³ {See PCR Tr. 539-46}. Since there was no evidence

³The State objected to the question, and the court asked Applicant's counsel how the question was relevant. (PCR Tr. 539). After the discussion about the specific question regarding a potential charge of possession of a stolen vehicle, the objection argument

that Johnson was aware that he could be charged with possession of a stolen vehicle, Applicant has failed to show that such a method of impeachment would have been successful at trial. As a result, Applicant has failed to establish that trial counsel was deficient in not questioning Johnson in this regard.

Applicant also fails to establish that he was prejudiced as a result of trial counsel not attempting to impeach Johnson on whether he knew he could have been charged with possession of a stolen vehicle. First, failure to impeach Johnson in this regard would not have resulted in a different outcome because there was overwhelming evidence of Applicant's guilt. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he

moved on to whether Applicant's counsel was aware of the claim involving Johnson's other pending charges before they filed the third amended application. (PCR Tr. 544-550). At no point did counsel ever return to the question of whether Johnson knew he could be charged with possession of a stolen vehicle.

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killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. Second, as already noted, a cross-examination on this line of questioning would not have benefitted Applicant in any way because there was no evidence that Johnson testified to avoid a possession of a stolen vehicle charge. Since Applicant has failed to establish that trial counsel was deficient and that Applicant was prejudiced as a result of that deficiency, he has failed to meet his burden in establishing this claim of ineffective assistance of counsel. As a result, this claim for post-conviction relief should be dismissed.

IV. Ricky Davis

A. The Prosecution Did Not Violate Brady in Not Disclosing the "Sam Memo"

Applicant asserts that the prosecution violated Brady v. Maryland, 373 U.S. 83 (1963), by not providing Applicant with a copy of typed notes drafted by Sam Richardson, an investigator for the First Circuit Solicitor's Office. The notes, which Applicant has dubbed the "Sam Memo," appears to reflect the contents of an interview that Richardson conducted with Ricky Davis at Lieber Correctional Institution in response to Davis' handwritten note. {Applicant's 67; see Applicant's 11}.

At the PCR hearing, Solicitor Bailey testified that he was familiar with the Sam Memo. {PCR Tr. 2021}. He confirmed that it was prepared by Sam Richardson and noted

that from the context of the notes, it appeared that it was prepared late in the proceedings. Id. Bailey did not recall providing seeing anything in his file that indicated he sent the Sam memo to defense counsel. {PCR Tr. 2130}. He also testified that he considered the Sam memo to be work product. Id. Typically, he did almost all of his own work in preparation for a death penalty trial except for typing his handwritten notes. Id. Ordinarily, he would have interviewed Ricky Davis personally. Id. However, he delegated the task of interviewing Davis to Sam Richardson because it was getting close to trial and so much other stuff was going on at that time. Id. Since Richardson interviewed Ricky Davis on Bailey's behalf in preparation for trial, Bailey considered his notes to be protected by attorney-client privilege. Id. Furthermore, Bailey testified that he did not think the Sam memo presented any inconsistency with the handwritten Ricky Davis statement. {PCR Tr. 2130-31}. Bailey noted that he would have disclosed any information that was inconsistent. {PCR Tr. 2131}. He also testified that the notes would have been in the Solicitor's file and trial counsel could have seen them in the file under the office's open file policy. Id.

"A Brady violation occurs when the government fails to disclose evidence materially favorable to the accused." Youngblood v. West Virginia, 547 U.S. 867, 869, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006). Evidence that is not disclosed is suppressed for Brady purposes even when it is "known only to police investigators and not to the prosecutor." Kyles v. Whitley, 514 U.S. 419, 438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Evidence is favorable if it is either exculpatory or impeaching. See, e.g., Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Evidence is material if "there

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is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (internal quotation marks omitted). However, a " 'showing of materiality does not require demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal,' " id. (quoting Kyles, 514 U.S. at 434, 115 S.Ct. 1555), but only a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (quoting Kyles, 514 U.S. at 435, 115 S.Ct. 1555). The assessment of materiality is made in light of the entire record. United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006)(citing Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999). If a Brady violation is found to have occurred, PCR must be granted. Gibson, *supra*.

This claim for relief should be dismissed. Applicant has failed to show by a preponderance of the evidence that the prosecution violated Brady by not disclosing the Sam memo. First, the memo is not favorable evidence. Second, the information contained in the notes were not material. As a result, this claim should be dismissed.

Applicant fails to establish that the Sam memo was favorable evidence to his case. First, the memo itself was inadmissible as evidence at trial. The Supreme Court has noted that "evidence" that is inadmissible is not evidence at all, and thus cannot affect the outcome of trial. Wood v. Bartholomew, 516 U.S. 1, 6, 116 S.Ct. 7 (1995) (per curiam). At best, the notes could be considered evidence that could be used to impeach Ricky Davis if he testified at trial. However, Ricky Davis did not testify at trial. Cummings testified at the PCR hearing that he did not call Davis because Davis told the defense's investigator that his handwritten statement was false.⁴ {PCR Tr. 1335-37}. Second, the information contained in the Sam memo was not inconsistent with Applicant's guilt. While Applicant relies upon the fact that the Sam memo indicates that Ricky Davis allegedly heard Gadson say he was the one who shot Kandee Martin, Applicant seemingly ignores the fact that the notes also points out that Gadson changed his story and stated Bowman was the one who shot Kandee Martin when Davis allegedly confronted Gadson about the matter later. {App. Ex. 67}. Thus, all the Sam memo evidences is Gadson may have given a fellow inmate inconsistent information about his involvement in the murder.

Second, contrary to Applicant's assertions, the Sam memo is not material evidence. Again, the Sam Memo was not admissible and not subject to disclosure under Brady. Wood v. Bartholomew, 516 U.S. 1, 6, 116 S.Ct. 7, 133 L.Ed.2d 1 (1995) (per curiam)

⁴Trial counsel never stated that he would have called Ricky Davis to testify had he known about the information in the Sam memo. Cummings noted that he tried to do more investigation into Ricky Davis based on the information he had, and nothing else came up in the defense's investigation. {PCR Tr. 1901}. He also agreed that he would still be in the same boat in deciding whether to call Ricky Davis because the defense's investigator indicated that Ricky Davis would not testify to what was in the handwritten document. {PCR Tr. 1901-02}.

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(holding that inadmissible materials that are not likely to lead to the discovery of admissible exculpatory evidence are not subject to disclosure under Brady). Furthermore, it does not matter that the notes in the Sam memo may be consistent with Ricky Davis' handwritten statement.⁵ Ricky Davis testified at the PCR hearing that the handwritten statement was not true, and Bowman was the one who gave him all of the information for the handwritten note. {PCR Tr.263-64}. Davis further professed that he did not know anything about this case. {PCR Tr. 264}. The Sam memo makes no mention of Gadson using Bowman's gun. Also, the discussion about the victim being killed because she was wired is completely inconsistent with the notes in Coker's narrative that indicated the victim was killed because she owed two other men money. Overall, the Sam memo does not undermine the confidence in Applicant's murder conviction or death sentence. There was overwhelming evidence presented at trial to support both the murder conviction and the death sentence. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Hiram Johnson testified that Applicant said he

⁵The Sam memo only presents two consistencies with the August 6, 2001 handwritten note from Ricky Davis. Both indicate that Gadson and Davis were on A-Side in the Dorchester County Detention Center. Both also indicate Gadson admitted he shot Kandee Martin. Outside of those two similarities, the two documents share no other consistent information.

stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}.

Applicant's assertion of materiality is inconsistent how materiality is measured in Brady claims. In essence, Applicant claims that he is entitled to relief under Brady because of the impact the undisclosed notes would have had on his defense strategy had the Sam memo been disclosed. The United States Supreme Court has warned against such treatment.

It has been argued that the standard should focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, rather than the materiality of the evidence to the issue of guilt or innocence. See Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defense, 74 Yale L.J. 136 (1964). Such a standard would be unacceptable for determining the materiality of what has been generally recognized as "Brady material" for two reasons. First, that standard would necessarily encompass incriminating evidence as well as exculpatory evidence, since knowledge of the prosecutor's entire case would always be useful in planning the defense. Second, such an approach would primarily involve an analysis

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of the adequacy of the notice given to the defendant by the State, and it has always been the Court's view that the notice component of due process refers to the charge rather than the evidentiary support for the charge.

U.S. v. Agurs, 427 U.S. 97, 112 n.20, 96 S.Ct. 2392, 2401 n.20 (1976). Overall, Applicant has failed to establish he is entitled to relief upon this claim. As a result, this Brady claim should be denied and dismissed.

B. Trial Counsel was Not Ineffective in Not Presenting Ricky Davis' Testimony Regarding Tawain Gadson's Confession

Applicant has alleged trial counsel was ineffective for not presenting evidence related to Gadson's alleged confession to Ricky Davis. At some point during the investigation, the State was provided with a handwritten note from Ricky Davis, now an inmate in Lieber Correctional Institution for armed robbery. The statement, dated August 6, states "I Rickie Davis was on A side with Gadson and he said that he was the one that shot the girl and he gave Bowman back the gun that was used and He said that it didn't mater[sic] because Blak[sic] famile[sic] had got caught with the gun He also that the police all[sic] he got to do is say Blak did it." {Applicant's 11, Respondent's 30}. At the PCR hearing, trial counsel Cummings testified that he received the statement from the Solicitor's Office. He sent an investigator, Walter Mitchell, to Lieber Correctional Institution to interview Mr. Davis regarding the handwritten note. {PCR Tr. 1328, 1673-74}. According to Cummings, the investigator informed him that Mr. Davis denied his signature and denied the contents of the statement. {PCR Tr. 1335, 1341}.

Court: In talking with him what is your understanding of what he [Ricky Davis] told the investigator?

Cummings: That he did not do this and basically it was junk.

Court: Did your investigator let you know whether or not if he was on the stand he could be a witness against Mr. Bowman in any way?

Cummings: Yes, sir, that he would say that Marion told him to do this, Marion had it created.

Court: So, your understanding was that Mr. Davis was going to deny making the statement and say that - - apparently he must be admitting he make the statement if he's going to say Bowman made him say it?

Cummings: Right.

Court: And, so, your information was he was going to say, "I said it but Mr. Bowman made me?"

Cummings: Right, that would have been the statement. It was proved he gave the statement but Marion made him do it. Mr. Mitchell said he was not going to be a helpful person at all to us, he was facing time and Marion was trying to get him involved in this.

{PCR Tr. 1340-1341}. Clearly, Cummings testified he made a strategic decision to not put Ricky Davis on the stand to testify about the statement. {PCR Tr. 1342}.

Applicant's ineffective assistance of counsel claim should be dismissed because counsel has clearly demonstrated that his decision not to present Ricky Davis as a witness was a reasonable strategic decision based upon the investigation that counsel conducted. Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial). See generally Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove

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ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

Applicant has further failed to establish that trial counsel was deficient in not calling Ricky Davis. At the PCR hearing, Applicant called Ricky Davis to testify. During cross-examination, Davis testified that he did not know anything about this case other than what Applicant told him. {PCR Tr. 264}. He also testified that at the deposition, he testified he did not recall hearing anything about Applicant's case from Gadson. Id. He further noted that Gadson did not tell him anything that was included in the handwritten note. Id. Applicant was the one who provided Davis with the information. Id. During re-direct, Davis again reasserted that Bowman was the one who told him what to write. {PCR Tr. 265}. Clearly, Davis' testimony would have been damaging to Applicant's case. It would have presented the jury with additional evidence that Applicant was attempting to cover up his involvement in the murder of Kande Martin. In light of the extensive damaging nature of Davis' testimony and the significantly limited benefit that would have resulted if Davis was called to testify, Applicant has failed to show by a preponderance of the evidence that trial counsel was deficient in not presenting his testimony at trial. As a result, this claim of ineffective assistance of counsel should be dismissed with prejudice.

Also, Applicant has failed to show that Applicant was prejudiced by counsel's decision not to call Ricky Davis at trial. As already noted, any benefit from Davis' testimony was extremely limited because Davis would have denied any knowledge of Gadson's involvement in the case. Further, there was overwhelming evidence of Applicant's guilt in both the murder and arson presented at trial. Several witnesses, including one of

Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. Since Applicant was not prejudiced by counsel not calling Ricky Davis to testify, Applicant has failed to prove by a preponderance of the evidence that trial counsel was ineffective in this regard. As a result, this claim should be dismissed.

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C. Trial Counsel was Not Ineffective in Not Presenting Gadson's Location on A-Side or Detective Coker's Notes Confirming Gadson and Davis Together on A-Side

Applicant asserts two more claims of ineffective assistance of counsel in relation to Ricky Davis. In both, Applicant asserts trial counsel was ineffective in not presenting evidence that Tawain Gadson was on A-side at the Dorchester County Detention Center at the same time as Ricky Davis. Both of these claims should be dismissed because they lack merit. The only reason to present any evidence about Gadson being located on A-Side of the Dorchester County Detention Center is if Ricky Davis was called to testify about his handwritten note. As noted above, trial counsel made a reasonable strategic decision not to call Davis to testify about his statement. Since Davis did not testify at trial, the fact that Gadson was once held on A-Side in the Dorchester County Detention Center was not relevant to any issue at Applicant's trial. Thus, trial counsel could not be found deficient for not presenting irrelevant evidence.

Further, Applicant does not establish that he was prejudiced as a result. As noted, this evidence is only relevant if Ricky Davis testifies. Thus, for the reasons stated in Section IV, Applicant has failed to establish he was prejudiced by trial counsel's decision not to present evidence Gadson was on A-side in the Dorchester County Detention Center or Coker's note indicated Gadson and Davis were on the same side at the Dorchester County Detention Center. As a result, these claims of ineffective assistance of counsel should be dismissed.

V. Alvin Coker

A. Trial Counsel Was Not Ineffective in Not Asking Coker About Gadson Lying About Owning a .380

Applicant's first claim in this section is that trial counsel was ineffective because they did not cross examine Detective Coker about the fact that Gadson lied about owning a High Point .380. This claim should be dismissed because it lacks merit. Applicant has failed to establish trial counsel was deficient in not asking Coker about Gadson's misrepresentation about owning a .380. Further, Applicant did not show that he was prejudiced as a result of trial counsel's decision not to cross Coker on this issue.

First, trial counsel was not deficient in not asking Coker about Gadson's misstatement about owning a .380. At the PCR hearing, Cummings testified that he recalled finding out that the gun found in the river did not have the same serial number as Gadson's gun. {PCR Tr. 1920}. He wanted the jury to hear that Gadson also had a .380 High Point, but understood that if the fact there were two different serial numbers came out, it would mute the benefit of informing the jury that Gadson had the same type of gun. Id. Thus, Cummings explained, that is why he deliberately stopped at that level when asking Gadson if he owned a .380. Id. That would also explain why counsel did not ask Coker any questions regarding Gadson's initial misstatements about owning a .380. Had counsel gone into that line of questioning, there was a substantial risk that Coker would testify that law enforcement learned the gun found in the river was not Gadson's gun. At the PCR hearing, Coker testified that he thought the gun they pulled from the river was Gadson's gun until he learned the serial numbers did not match. {PCR Tr. 1002}. Counsel clearly expressed valid, reasonable strategic reasons for approaching the Gadson gun

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issues in the way that he did. As a result, Applicant has failed to establish trial counsel was deficient in not crossing Coker on the issue.

Second, Applicant was not prejudiced as a result of trial counsel not asking about Coker about Gadson lying about owning a .380. At trial, Cummings asked Gadson if he owned a high powered .380 pistol. {R. 4026}. Over the State's objection, Gadson was allowed to answer. {R. 4027-31}. He admitted that he had purchased a .380 pistol in July 2000, and the pistol he purchased was the same color as Applicant's. {R. 4031}. Clearly, the jury was made aware that Gadson also had the same type of weapon that could have been used in the murder. Furthermore, whether Gadson had his own .380 was of no consequence in this case. David Collins testified at trial that the gun found in the river conclusively matched five of the six cartridge casings collected at the scene. Also, several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a

body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. In light of the overwhelming evidence of guilt, It is highly unlikely that Coker's testimony on Gadson's lying about owning a .380 would have resulted in a different outcome at trial. As a result, this claim should be dismissed.

B. Trial Counsel was not Ineffective in Not Bringing Out Statements Heard by Bruce McLean.

Applicant next asserts that trial counsel was ineffective in not cross-examining Coker about the EZ Horizon video evidence in which Bruce McLean states he overheard some people at the fuel pumps talking about killing a girl and disposing of her body. Applicant fails to show that trial counsel was deficient in not cross-examining Coker on this issue. Further, Applicant fails to show that he was prejudiced as a result.

First, Applicant did not establish that trial counsel was deficient in not cross-examining on the statements by Bruce McLean. As has been noted: "In hindsight, there are few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would pass muster." Willis v. United States, 87 F.3d 1004, 1006 (8th Cir. 1996). The extent of examination and cross-examination of witnesses is an area of trial tactics left to

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the discretion of counsel. Yarrington v. Davies, 779 F.Supp. 1304, 1308 (D. Kan. 1991). Counsel is not required to raise every conceivable issue or pursue every avenue of inquiry, but is required only to exercise normal skill, judgment, and diligence. Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980). Cummings testified that he followed up with the lead from the EZ Horizon video. {PCR Tr. 1943}. He sent Mitchell to Orangeburg to look for the Jamaican boyfriend, but nothing came of the search. Id. Based on the testimony presented at trial, it appeared counsel had good reason to believe that a line of questioning concerning Bruce McLean would not be fruitful. Thus, counsel was not deficient for not choosing to explore the line of questioning now proposed by Applicant.

Second, Applicant fails to show that he was prejudiced as a result. At the PCR hearing, Applicant's counsel asked Coker about Bruce McLean. Detective Coker testified that they tried to get in contact with Octavia Legree and Bruce McLean, her Jamaican boyfriend. {PCR Tr. 982}. Coker noted they had set up several meetings to meet with McLean's girlfriend who was the clerk at the EZ Horizon that night. {PCR Tr. 924}. Coker further indicated that they could never catch anyone home. Id. He also notes that they even had a meeting scheduled with them through the Orangeburg County Sheriff's Office. Id. However, McLean and Legree did not show. Id. Coker was not surprised if Mr. McLean was still listed as being a resident in Branchville, SC. {PCR Tr. 924}. Thus, all that would have resulted from asking Coker about McLean's statements would be that law enforcement could not get in contact with the witness. Also, there was overwhelming evidence of Applicant's guilt in this case. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder.

{R. 3726, 3739-3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. It is highly unlikely that Coker's testimony would have resulted in a different outcome at trial had trial counsel cross-examined him about Bruce McLean. As a result, this claim for relief should be dismissed.

C. Trial Counsel was Not Ineffective in not Cross-Examining Detective Coker About Felder Being the One Who Purchased Gasoline

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This claim should be dismissed because it lacks merit. This is essentially the same claim that was raised by Applicant in Section II, A. Thus, for the reasons stated in response to Section II, A, this claim should be dismissed.

As an additional note, Applicant's assertion that presenting this evidence that Felder purchased the gasoline was exculpatory does not fit with other evidence that was presented at trial. For instance, two witnesses identified Applicant as the one who stopped by Felder's girlfriend's apartment after 3:00 a.m. {R. 4044-4045; 4117-4120}. Both also testified that Felder's girlfriend was loosening his braids when Applicant stopped by to ask for a ride. *Id.* Both indicated that Felder left with Applicant and returned fifteen minutes later. {R. 3712, 4120}.

D. Trial Counsel was Not Ineffective in Crossing Coker About the Sworn Statements to Other Tribunals

In this claim, Applicant essentially reasserts the same claim that was raised in Sections I, D and II, E. Thus, for the reasons stated in those sections of this Brief, Respondent asserts this claim should be dismissed. Statements made in arrest warrants based on then-existing investigatory information, and in indictments based on concepts of accomplice liability and the fact that indictment as a principal supports conviction as an accomplice, do not amount to the sort of issues for which cross-examination is warranted or would create a reasonable probability of a different result. All are easily explainable.

VIII. Conflicts of Interest:**A. Applicant Failed to Establish Hardee-Thomas Operated Under An Actual Conflict of Interest As a Result of Her Former Representation of Ricky Davis and Then Active Representation of Applicant**

Marva Hardee Thomas was appointed to represent Ricky Davis on April 23, 2001. {Applicant's 12}. At the time, Davis faced two charges for armed robbery. {Applicant's 12, 19, 21}. On October 16, 2001, Davis was tried by a jury and convicted of one count of armed robbery. {See Applicant's 20}. He was sentenced to twenty (20) years confinement by the Honorable Diane Goodstein, Circuit Court Judge. Id. The second indictment against Ricky Davis was nol prossed with a right to restore on October 18, 2001.⁶ {See Respondent's 14}. Marva Hardee-Thomas filed a Notice of Appeal on Ricky Davis' behalf on October 24, 2001. {Respondent's 14}.

Marva Hardee-Thomas was appointed to represent Applicant. At the PCR hearing, Hardee-Thomas testified that she did not recall receiving the handwritten note written by Ricky Davis. {PCR Tr. 1564}. She did identify the notary block as being in her handwriting. Id. However, she did not recall seeing the statement and noted that the notary block was not witnessed by anyone. Id. She did not have any independent recollection of talking with Ricky Davis about the handwritten note. {PCR Tr. 1601}. She testified that she would not have had a discussion directly with Davis about the document. {PCR Tr. 1602}.

Counsel was served with a copy of Ricky Davis' handwritten note on or about January 2, 2002. {See Respondent's 36}. At the PCR hearing, Hardee-Thomas testified.

⁶It appears that the victim in the second armed robbery could not be located.

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that she did not know why Ricky Davis did not testify. {PCR Tr. 1572}. She did not have a strategic reason for not calling Ricky Davis, but noted that the decision to call Davis to the stand would be one left to the lead attorney in a death penalty case. Id. In Applicant's case, Cummings was the lead attorney. Hardee-Thomas guessed that Cummings made the decision to not call Ricky Davis as a witness because she did not make that decision. {PCR Tr. 1573}.

"The Sixth Amendment right to counsel attaches upon initiation of adversarial judicial proceedings and at all critical stages of a criminal trial." State v. Sterling, 377 S.C. 475, 479, 661 S.E.2d 99, 101 (2008). "To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance." Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001). "An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007).

"[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980) (citing Holloway v. Arkansas, 435 U.S. 475, 487-491 (1978). "But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Cuyler, 446 U.S. at 350 (citation omitted). "[A]n actual conflict of interest occurs:

when a defense attorney places himself in a situation inherently conducive to divided loyalties.... If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) (quoting Zuck v. State of Alabama, 588 F.2d 436, 439 (5th Cir.1979)).

"The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." State v. Gregory, 364 S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005). Additionally, the fact that counsel does not advise a defendant of the potential conflict of interest does not affect the constitutionality of the conviction. Jackson v. State, 329 S.C. 345, 355, 495 S.E.2d 768, 773 (1998). Moreover, the "Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction." Langford v. State, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993).

Applicant fails to establish that Hardee-Thomas acted under a conflict of interest in representing Applicant in this case. First, Applicant fails to establish there was a potential conflict of interest as a result of Ricky Davis' handwritten note. Hardee-Thomas' representation of Ricky Davis ended on October 24, 2001, the date she filed his Notice of Appeal with the circuit court. Rule 602(e)(3), SCACR (public defender automatically relieved after filing of Notice of Appeal to conviction). At that time, his second armed robbery charge had already been not prossed by the Solicitor's Office. **{See Applicant's 22}**. Thus, when counsel was presumably made aware that Davis had written a statement regarding Bowman's case on or around January 2, 2002, she did not represent Ricky Davis. At that point, she owed no duty to Ricky Davis other than to maintain his

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confidences from her representation of him on the two armed robbery charges. As a result, Applicant cannot establish that a potential conflict of interest existed as a result of the statement written by Davis. Since there was not a potential conflict of interest, Hardee-Thomas was not obligated to obtain a waiver from either Bowman or Davis. Thus, Applicant's claim that a waiver was warranted should be dismissed.

Even if Hardee-Thomas' representation of Ricky Davis constituted a potential conflict of interest with her representation of Applicant, Applicant has failed to establish that the potential conflict developed into an actual conflict of interest. At no point were Ricky Davis' interests adverse to Applicant's interests. First, Davis' handwritten statement, if established to be true, would have benefitted Applicant because it indicated that Gadson, Applicant's co-defendant, was the one who killed Kandee Martin. Further, contrary to Applicant's assertions, there was no evidence presented at in this PCR Action that indicated Ricky Davis' interests would have been at odds with Applicant's had he testified at trial. Applicant asserts that Ricky Davis would not testify because the solicitor's office could still restore the nolle prossed charge against him as leverage. Applicant presented no evidence to show that the solicitor's office either used the nolle prossed indictment in such a fashion or that it could. Clearly, the disposition sheet on Ricky Davis' nolle prossed charge indicates that the case was dismissed because the State could not find the victim. {Applicant's 22}. There was no evidence presented at the PCR hearing that circumstances had changed, or that the solicitor's office was in a position to re-present the indictment to the grand jury. Thus, Applicant never established that Davis' interests were in a position contrary to Applicant's.

Applicant also failed to present credible evidence that Hardee-Thomas spoke to Davis about Applicant. The only person who testified that Hardee-Thomas met with Davis to talk about Applicant's case is Davis.⁷ {PCR Tr. 251}. Cummings testified that he sent Walt Mitchell to speak with Ricky Davis about Applicant. {PCR Tr. 1328}. Hardee-Thomas indicated she did not recall talking with Ricky Davis about the note and that she thought an investigator was sent out to talk to Davis about his handwritten note. {PCR Tr. 1603-04}. Further, Hardee-Thomas testified that she could not recall when she the signature block she put on the handwritten note. {PCR Tr. 1601}. She noted that she likely would have received the paper from a guard at the jail. {PCR Tr. 1602}.

Overall, Applicant has failed to establish that trial counsel did not call Ricky Davis to testify as the result of an actual conflict of interest due to Hardee-Thomas' former representation of Ricky Davis. To be clear, Ricky Davis was not called to testify and his statement was not entered into evidence because after investigation of his statement, the defense team decided he was not a reliable witness and his testimony was likely to be damaging to Applicant's case. Cummings testified that Davis was not called because he had indicated to investigator Walter Mitchell that the handwritten statement was false. {PCR Tr. 1335, 1894-95, 1901-02}. There was no probative evidence at trial that indicated that any potential conflict of interest played a role in the decision making process. In fact, the testimony at the PCR hearing from Hardee-Thomas clearly notes that the decision on whether Davis would testify was Cummings to make. Since Applicant has failed to prove

⁷His testimony indicates that he was not sure if she was the one from the defense team who spoke with him. {PCR Tr. 251}.

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by a preponderance of the evidence that trial counsel acted under an actual conflict of interest, this claim for relief should be dismissed.

B. There was no Conflict of Interest As a Result of the Fact that Gene Dukes Represented Applicant's Co-Defendant Tawain Gadson

Applicant's second conflict of interest claim derives from the fact that Hardee-Thomas represented Applicant while the Chief Public Defender for Dorchester County represented a co-defendant. As already noted, Marva Hardee-Thomas, Esquire, a Dorchester County Public Defender, was appointed to represent Applicant. Gene Dukes, Esquire, another Dorchester County Public Defender, was appointed to represent Taiwan Gadson, Applicant's co-defendant who later testified against him at trial. {Applicant's 77}. At the PCR hearing, Marva Hardee-Thomas testified that the Dorchester County Public Defender's Office was essentially a conglomeration of independent contractors. {See PCR Tr. 1535, 1548}. Gene Dukes was listed as the Chief Public Defender because he had the most seniority. {PCR Tr. 1540}. According to Hardee-Thomas, the Public Defenders did not share an office. {PCR Tr. 1541-43}. They each worked from their own separate office. {PCR Tr. 1541}. They were not full-time Public Defenders, so they each had their own separate practices. {See PCR Tr. 1535, 1550}. The public defender corporation did have one employee, Kathy Rogers, who was responsible for assigning cases. {PCR Tr. 1537}. The only common space the Dorchester County Public Defenders shared was a small conference room in the Dorchester County Courthouse in Saint George. {See PCR Tr. 1541, 1553}. Hardee-Thomas also testified that they would never have co-defendants in the conference room at the same time. {PCR tr. 1607}. They did not share personnel. {PCR Tr. 1554}. There was no investigator for the Public Defender Corporation. Id.

Instead, each public defender had to petition the Court for funds if an investigator was needed. {PCR Tr. 1554}. The head of the Public Defender Corporation signed checks for both. Id.

Applicant has failed to establish that trial counsel Marva Hardee-Thomas acted under a conflict of interest due to the fact that Gene Dukes represented Applicant's co-defendant. "[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980) (citing Holloway v. Arkansas, 435 U.S. 475, 487-491 (1978)). "But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Cuyler, 446 U.S. at 350 (citation omitted).

"The Sixth Amendment right to counsel attaches upon initiation of adversarial judicial proceedings and at all critical stages of a criminal trial." State v. Sterling, 377 S.C. 475, 479, 661 S.E.2d 99, 101 (2008). "To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance." Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001). "An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). This Court has further stated that an actual conflict of interest occurs:

when a defense attorney places himself in a situation inherently conducive to divided loyalties.... If a defense attorney owes duties to a party whose interests are

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adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) (quoting Zuck v. State of Alabama, 588 F.2d 436, 439 (5th Cir.1979)).

"The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." State v. Gregory, 364 S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005). Additionally, the fact that counsel does not advise a defendant of the potential conflict of interest does not affect the constitutionality of the conviction. Jackson v. State, 329 S.C. 345, 355, 495 S.E.2d 768, 773 (1998). Moreover, the "Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction." Langford v. State, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993).

Applicant has failed to establish that there was an actual conflict of interest in this case. Applicant essentially argues there was a conflict of interest because both Gene Dukes and Marva Hardee-Thomas were Public Defenders. There was no evidence presented that indicated they discussed Applicant's case or any of the related cases. Further, there was no evidence presented that indicated they worked in concert in representing individual clients, or that they shared the confidences of individual clients with one another. This claim parallels a similar claim made the applicant in Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). In Jackson, the Applicant argued he was entitled to a new trial because of a conflict of interest because his co-defendant was represented by another public defender in the Richland County Public Defender's Office: Id. at 347-48, 495 S.E.2d at 769. The PCR Court found trial counsel was ineffective because he

operated under a conflict of interest, among other things. Id. at 348, 495 S.E.2d at 769.

On appeal, the South Carolina Supreme Court reversed.

In our opinion, respondent did not show any actual conflict of interest resulted from counsel's representation of him while others in counsel's office represented respondent's co-defendants. All respondent showed and the PCR judge found was a potential conflict of interest because counsel worked in the same office with the attorneys who represented the co-defendants. Counsel testified no conflict existed, and respondent could not point to an actual conflict. Thus, this potential conflict never ripened into an actual conflict. Nothing in the record suggests the potential conflict caused counsel to treat respondent's case in such a manner as to obtain more favorable consideration for respondent's co-defendants. Further, the fact that counsel never advised respondent of the potential conflict of interest does not affect the constitutionality of the conviction. See Langford v. State, 310 S.C. 357, 360, 426 S.E.2d 793, 794 (1993).

Id. at 354-55, 495 S.E.2d at 773. Here, as in Jackson, there was no evidence presented at the PCR hearing that an actual conflict of interest existed. There was no evidence that any potential conflict caused Marva Hardee-Thomas to treat respondent's case in such a manner as to obtain more favorable consideration for Gadson. Applicant has pointed to no evidence there existed an actual conflict of interest. Since there was no evidence there was an actual conflict of interest resulting from the fact that Gene Dukes and Marva Hardee-Thomas were both public defenders for Dorchester County, Applicant has failed to prove by a preponderance of the evidence he is entitled to relief upon this claim. As a result, this ground for relief should be dismissed.

VII. Ineffective Assistance Regarding Evidence Admitted in Guilt Phase

Applicant next asserts counsel was ineffective in his handling of a number of items of evidence in the guilt phase.

A. Failure to move to exclude evidence of Bowman's DNA found in the victim's vagina

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SLED DNA analyst Fitts found human blood and semen in the vaginal swabs taken from Kandee at autopsy. While the mixture of female and male secretions in the vaginal swabs complicated identification, Agent Fitts was able to match Applicant to a probability of 1 in 5300. {R. 4370-72; 4379-87}. Applicant now contends his counsel was ineffective for failing to move to exclude this match from evidence.

1. There was no valid objection to this testimony.

As an initial matter, Applicant cannot show either deficiency or prejudice as there was no sustainable objection that could be made to the DNA match. Regardless of Applicant's complaints that there was no testimony that Applicant and Kandee had sex out at the Nursery Road location, this evidence is undoubtedly relevant to and confirmatory of the identity of Applicant as the murderer, as it places Applicant in close presence of Kandee during the time period at issue. See Rule 401, SCRE (evidence is relevant if it would make a fact in issue more probable or less probable).

Admissibility is not affected by the fact that the DNA match might not necessarily establish the exact point when Applicant had sex with the victim, or because James Gadsden claimed he did not observe any sexual contact at the Nursery Road scene. As noted in State v. Benjamin, 345 S.C. 470, 480, 549 S.E.2d 258, 263 (S.C. 2001):

All that is required is that the fact shown tends to make more or less probable some matter in issue and to bear directly or indirectly thereon. It is not required that the inference sought should necessarily follow from the fact proved. Evidence is relevant if it makes the desired inference more probable than it would be without the evidence.

(Emphasis added). Here, the DNA match is objective scientific evidence that the victim and Applicant were in very close contact around the relevant time period of the murder,

and this point alone is sufficient to make it admissible in trial – even if it only provides objective and indisputable corroboration to witness testimony that they were together at some point during the day Kandee was killed. Given the issues Applicant raised with the credibility of the fact witnesses, this indisputable scientific evidence aids a finding of identity, which was especially relevant in this case, where Applicant pled not guilty and put the State to its proof. See generally State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300, 311-12 (S.C. 2001) (finding letters were relevant to show identity as murderer inasmuch as they referred to a safe and a safe was present at the murder scene, and rejecting claim that they were inadmissible because it was not established that the safe referenced in the letters was at the barbershop, where the incident referred to in the letter fit the general time frame of the barbershop killings); State v. Benjamin, 345 S.C. 470, 480, 549 S.E.2d 258, 263 (S.C. 2001) (evidence defendant was willing active participant in later robbery was relevant to rebut claim of duress at earlier robbery, even though robbery being tried occurred later); State v. Daniels, 252 S.C. 591, 167 S.E.2d 621 (1969) (held evidence of a prior robbery admissible to show identity because it placed the defendant together with his alleged accomplice); State v. Varvil, 338 S.C. 335, 526 S.E.2d 248 (S.C. App. 2000) (in unlawful use of telephone prosecution, evidence defendant rode by victim's office and home was relevant to show his intent to harass her with his phone calls).

Applicant contends the proof of sex is an inadmissible "bad act" pursuant to Rule 404(b), SCRE, which provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." First, though, is

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the point that the mere fact Applicant and Kandee had sex – which is all the seminal evidence proves by itself – is not a “bad act” in the legal sense. See Rule 404(b), SCRE. Although Applicant contends that fornication is criminal in South Carolina, that law is not enforced, and sex out of wedlock is not considered “criminal” or a “bad act” in the legal sense by modern social standards.

The same goes for Applicant’s contention that interracial sex between Applicant and the victim is a bad act or is unduly prejudicial. Applicant cannot assume racism on the part of the jury, which was subject to extensive *voir dire* and instructions from the judge on their ability to be fair and decide the case apart from bias or prejudice. There is no proof that the jury was racially biased in this case, and the mere fact the sex was interracial simply does not constitute a “bad act” under contemporaneous moral values.

Even if adultery or interracial sex could be considered a “bad act”, though, as noted before, “bad acts” under Rule 404(b) are still admissible if they show identity, which the DNA match does in this case. Thus, even if the sexual contact is a bad act, it would still be admissible. And, given that identity was the main issue in the case, it was more probative than prejudicial. See State v. Simmons, 310 S.C. 439, 427 S.E.2d 175 (1993) (where intent was contested on burglary charge, the probative value of defendant’s prior attacks on elderly women outweighed the prejudicial effect); State v. Ford, 334 S.C. 444, 513 S.E.2d 385 (Ct. App. 1999) (because defendants disputed state’s allegations about their motive and intent, evidence of prior robbery of victim was “highly probative”); State v. Waddle, 873 P.2d 171 (Idaho Ct. App. 1994) (where defendant denies being the perpetrator, evidence tending to establish identity is always relevant). See generally State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990) (Lyle evidence was not just admissible when

"necessary", but is admissible whenever it is "relevant"); State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981) (evidence of other crimes admissible even though appellant's confession to the crimes was also admitted); State v. Green, 261 S.C. 366, 371, 200 S.E.2d 74, 77 (1973) (evidence logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused's guilt of another crime).

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

2. Counsel had a valid strategic reason for admitting the testimony.

Even if there was a valid objection, there is no basis for relief because counsel had a valid strategic reason for admitting the intimate contact.

At the PCR hearing, counsel Cummings testified that he did not elicit from Gadsden that he observed no sex between Applicant and Kandee because:

[H]ere is my theory and this is what I want to show. Marion and Kandee were friends; they were intimate friends, if I can use the words. I wanted to show that this man would not hurt this little girl because he cared about her and she was an intimate friend of Mr. Bowman's.

{PCR Tr. 1750}. Counsel stated that while he considered a Dorchester County jury to be a "small town jury", and while he was aware of concerns about adultery and interracial sex, he still wanted to show "they were intimate friends and . . . he had no ill motive or reason to kill this lady". {PCR Tr. 1752}. Counsel pointed out that since the DNA expert could not

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testify as to precisely when the DNA was put there, he wanted to "clean . . . up" any attempts of the State to sully the relationship, thus showing "he had no malice to this lady, had no reason to hurt her". Indeed, counsel hired his own DNA expert to verify that it could not be precisely determined when the Applicant deposited his semen into the victim. {PCR Tr. 1753-54; 1792; 1955; 1980-81}. Counsel stated he did not want to elicit that Kandee was around Applicant to get drugs, as that would obviously "dirty up" his attempt to show an intimate friendship. {PCR Tr. 1755}.

On cross by the State, counsel reiterated that he wanted to show Applicant and Kandee were friends and Applicant would not have killed her, and added that he was not afraid of the DNA evidence because Applicant was not charged with criminal sexual conduct ("CSC") in the guilt phase, and counsel did not believe the State could prove CSC in the sentencing phase. He added that since Gadsden never testified there was any sex at the Nursery Road scene, he saw no reason to broach the subject. {PCR Tr. 1866-67}.

Thus, counsel elicited a valid strategic reason for not objecting to the DNA evidence. He was not at all scared of it as he did not think CSC could be proven (especially since he had Applicant's statement suppressed in which Applicant talked of sexual contact with the victim's corpse), and he thought it could be used to undermine any motive to kill since Applicant and Kandee were lovers. Counsel accordingly was not deficient simply because the strategy did not work, particularly given the overwhelming evidence facing counsel in this case. See Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor

definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

3. There was no prejudice.

In any event, there was no reasonable probability of a different result. The evidence of identity was overwhelming even if the DNA match was excluded. The victim's watch was found in Applicant's pants at his arrest the next morning. {R. 4129-32; 4142; 4150-52; 4195-98; 4207-08}. A number of witnesses heard Applicant threaten to kill the victim the afternoon of her murder. {R. 3725-27; 3765-66; 3742-45}. Tywan Gadsden described witnessing Applicant murder the victim. {R. 3990-4035}. Multiple witnesses observed Applicant driving the victim's car after her murder, and Applicant tried to sell the car at a club that night. He admitted killing the victim. {R. 4017-22; 4063-69; 4081}. Travis Felder described going with Applicant when he dragged the victim's body from the woods, put it in her car, and set it afire. {R. 4042-4120}. And, the gun Applicant's family threw into the river was matched to the casings found at the scene.

Moreover, as argued before, contemporary social values towards extramarital sex and interracial relationships preclude any *per se* finding of undue prejudice from those issues.

Therefore, Applicant has not met his burden of showing prejudice. Reed v. Norris, 195 F.3d 1004 (8th Cir. 1999) (failure to raise Batson issue not prejudicial under Strickland given overwhelming evidence).

B. Failure to move to exclude petroleum evidence

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Applicant next asserts counsel failed to object to introduction of Applicant's pants, because the accelerant present on the pants – a "heavy" accelerant – was not the same as the substance used to ignite Kandee's car – which was gasoline, or a "medium" petroleum accelerant.

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

Solicitor Bailey pointed out at PCR that the SLED arson expert had done a complete report, so he introduced testimony on all aspects of the report to avoid allowing the defense to assert or imply the State had not done a full and fair investigation. {PCR Tr. 2026; 2136}.

1. There was no valid basis for objection.

Given this evidence, as an initial matter there could be no deficiency for failure to object nor prejudice as there was no valid basis for objection. The pants themselves were undoubtedly relevant to identity, as they were consistent with and corroborative of what people said Applicant was wearing the night of the murders, and Applicant asked for them the next morning when he was arrested. More importantly, the pants contained Kandee's

watch, which was very relevant to the identity of the murder. See Rule 401, SCRE (evidence is relevant if it would make a fact in Issue more probable or less probable).

As to the accelerant, counsel had no valid objection. It goes without saying that within reason a solicitor is certainly entitled to introduce evidence the complete investigation done by police, even if not necessarily incriminating, to avoid any defense contention that the State rushed to judgment or failed to fully investigate the case. The classic example, as this Court pointed out during argument {PCR Tr. 2249}, would be calling the fingerprint expert to testify no prints were found despite investigation, in order to avoid later defense argument that the State failed to look for prints or that the lack of prints constitutes reasonable doubt. This is even more important in this post-“CSI” world, given that many jurors watch that TV show and expect such forensic evidence. See United States v. Fields, 483 F.3d 313, 355 n. 39 (5th Cir.2007) (citing an article discussing the “CSI effect” on jurors, and stating: “Some have claimed that jurors who see the high-quality forensic evidence presented on CSI raise their standards in real trials, in which actual evidence is typically more flawed and uncertain.”).

As to any concern that the mention of an accelerant might confuse the jury and was substantially more prejudicial than probative under Rule 403, SCRE, no such prejudice occurred. The SLED agent was clear that while there was a heavy accelerant on Appellant's pants, it was NOT gasoline, and there is a difference. {R. 4297-98; 4301-05}. Counsel also elicited that Dorothy used kerosene to heat her house. {R. 4831}. And, the solicitor in argument never mentioned the accelerant on the pants or claimed it was

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indicative of anything. {R. 4461; 4476}. Thus, there is no indication this evidence was unfairly prejudicial or confusing to the jury, or that the State misused it.

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

2. Counsel had a valid strategic reason for admitting the testimony.

Even if there was a valid objection to the testimony, Applicant cannot establish a valid claim for relief because counsel articulated a valid strategic reason for wanting the testimony to be admitted.

At PCR, counsel Cummings testified that he tried to suppress the seizure of the jeans, but that was overruled. He noted he did get family to say they used kerosene to heat the house, and he got the expert to say the accelerant on the jeans was not gasoline. {PCR Tr. 1706-07}. Counsel stated he did not consider objecting to any evidence about the petroleum accelerant found on the pants, because the expert was going to and indeed did testify that the accelerant was not gasoline, but kerosene like that which Applicant's wife used to heat the house. Counsel stated that had the solicitor not called the SLED arson expert, counsel probably would have to elicit that only kerosene was found on Applicant's pants. Counsel felt he needed to do this to counter the fact that the victim's watch was found in his pants and witnesses were saying Applicant burned the car. {PCR Tr. 1708-09; 1711-14}.

On cross by the State, counsel noted he had his crime scene expert review the arson report. The expert advised counsel that if all the State had was that a heavy accelerant was on the pants, that was good for the defense. Counsel strategically decided to bring out that Applicant only had kerosene and not gasoline on his pants, and felt was had successfully taken a state's witness and "made him mine". Counsel pointed out he also elicited from Applicant's wife Dorothy that they used kerosene in the home, and of course Dorothy's home is where the pants were found. {R. 4831; PCR Tr. 1845-46; 1854-55}.

Thus, counsel had a valid reason for allowing the evidence – it allowed him to use a State's expert to establish that nothing on Applicant's clothes forensically linked him with the crime, even though the State asserted those were the pants Applicant was wearing when he killed Kandee. Counsel accordingly was not deficient simply because the strategy did not work, particularly given the overwhelming evidence facing counsel in this case. See Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

3. There was no prejudice.

In any event, there was no reasonable probability of a different result. The evidence of identity was overwhelming. The victim's watch was found in Applicant's pants at his arrest the next morning. {R. 4129-32; 4142; 4150-52; 4195-98; 4207-08}. A number of

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witnesses heard Applicant threaten to kill the victim the afternoon of her murder. {R. 3725-27; 3765-66; 3742-45}. Tywan Gadsden described witnessing Applicant murder the victim. {R. 3990-4035}. Multiple witnesses observed Applicant driving the victim's car after her murder, and Applicant tried to sell the car at a club that night. He admitted killing the victim. {R. 4017-22; 4063-69; 4081}. Travis Felder described going with Applicant when he dragged the victim's body from the woods, put it in her car, and set it afire. {R. 4042-4120}. The gun Applicant's family threw into the river was matched to the casings found at the scene. And, Applicant's DNA was found within Kandee.

Moreover, as argued before, the evidence introduced at trial was clear that the accelerant on the pants did not match the accelerant used to burn the car, and the solicitor in argument never contended otherwise. Given these circumstances, as a matter of law description of the accelerant on the pants could not possibly have been so prejudicial to create a reasonable probability of a different result.

Therefore, Applicant has not met his burden of showing prejudice. Reed v. Norris, 195 F.3d 1004 (8th Cir. 1999) (failure to raise Batson issue not prejudicial under Strickland given overwhelming evidence).

C. Failure to object to evidence of conspiracy to secrete Applicant's gun and examination on plea agreements

Applicant contends his counsel was ineffective for failing to object to evidence his relatives were engaging in a conspiracy to "secrete" a firearm, by arguing there is no evidence of such a conspiracy nor any evidence Applicant was connected to it. He also asserts counsel was ineffective in failing to object to the solicitor's examination on plea agreements Applicant's family had with the State.

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

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

Applicant's murder weapon was found after police managed to get information in May and June 2001 from Applicant's wife Dorothy and his sisters Yolanda and Kendra, all of whom testified at trial with plea agreements to accessory to the fact of murder. The solicitor elicited from each of them the existence of the plea agreement. {R. 3735-36; 4161; 4167-68}.

Dorothy testified that a few days after the murder Hiram Johnson told her the gun was hidden in the sleeper sofa at her trailer on Lockett Street. She found the pistol hidden a "cuff" or "sleeve" of the couch, put it in her pocketbook, and went over to see Kendra at Applicant's grandmother's house. {R. 4198-4202; 4210-12}.

While Dorothy claimed she talked with Kendra and then left the gun at Kendra's in the clothes hamper, Kendra testified that she and Dorothy went to meet Applicant's father

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Marion Bowman, Sr. at the EZ shop. Marion Sr. took the gun and put it in the middle console of his truck. {R. 4168-73; 4203-04; 4211-12; 4358}.

The next day, Kendra and Yolanda met with Marion Sr., and then followed him out to the graveyard at the Zion AME church. Applicant's father brought the pistol from out of the nearby woods, and they wrapped it in a towel and put it in Yolanda's trunk. Kendra and Yolanda drove out to the Old Cope Road bridge and threw the gun over the side into the Edisto River. {R. 4174-78; 4183-87}.

On May 28th, 2001, a police diver recovered the black and grey High Point .380 semiautomatic in the river bottom about 25 to 30 feet from the bridge. {R. 4220-29}. The gun was matched by SLED firearms examiner David Collins to five of the six Winchester .380 shell casings found at the Nursery Road scene. While the sixth casing and spent bullet could not be matched to Applicant's .380, they were of course consistent. {R. 4315-20}.

1. There was no valid objection to the conspiracy.

As an initial matter, counsel could not have been deficient nor Applicant prejudiced as there was no valid objection to be made to the evidence of concealment of the weapon by Applicant's family.

First, the weapon was obviously relevant to identity. It shows Applicant's possession of a firearm matched with or at least consistent with the gun used to kill the victim during the time period that the victim was killed. See State v. Braxton, 343 S.C. 629, 634, 541 S.E.2d 833, 836 (2001) (testimony that witness knew appellant possessed a nine millimeter pistol was relevant because it tended to identify appellant as the possessor of

the murder weapon, also nine millimeter pistol); State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001) (prior murder was admissible to establish appellant's identity in the prosecution of the current murder, where the same weapon was used in both murders).

Moreover, there was ample evidence from which the gun and its subsequent concealment could be tied to Applicant. Applicant was identified by his friends in possession of such a gun prior to the crime, and Dorothy testified that on the night of the incident Applicant came in and slept in the chair where she later found the gun. {R. 4193-94; 4198-99}. It is certainly a reasonable inference from the evidence that Applicant hid the gun there, and at Applicant's request through his own communications or through Hiram Johnson, his wife, sisters, and father subsequently attempted to permanently hide or destroy the gun to protect Applicant. Again, Applicant overlooks that evidence can be relevant not just by what it directly shows, but also by reasonable inferences from the evidence. See State v. Benjamin, 345 S.C. 470, 480, 549 S.E.2d 258, 263 (S.C. 2001) ("It is not required that the inference sought should necessarily follow from the fact proved. Evidence is relevant if it makes the desired inference more probable than it would be without the evidence.").

Destruction of evidence is relevant to identity, and of course any admissions that Applicant made to his family about the gun – whether expressly testified to or implicit in the subsequent actions of the family – would be substantively admissible. See Rule 801(d)(2), SCRE (admissions of party opponent). See also State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) (destruction of evidence and evidence of flight relevant as incriminating.

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circumstance, and to show guilty knowledge and intent); State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (evidence of flight admissible to show guilty knowledge and intent); State v. Ezell, 321 S.C. 421, 468 S.E.2d 679 (Ct. App. 1996) (in case where defendant ran and vial of crack was found nearby, evidence of flight shows guilty knowledge and intent). See also United States v. Robinson, 161 F.3d 463 (7th Cir. 1998) (evidence of flight shows consciousness of guilt under Rule 404(b)); United States v. Jackson, 886 F.2d 838 (7th Cir. 1989) (evidence of flight and concealment is probative of guilty consciousness under Rule 404(b)).

Moreover, the gun and the events surrounding its recovery would still be admissible even if there was no evidence tying the attempt to conceal it to Applicant. The description of how the gun was recovered was part of the *res gestae*, as it was necessary to tell the complete story of how the gun was recovered to show its link to Applicant and its relevance to this crime. In State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996), the court quoted with approval the Fourth Circuit's expression of the *res gestae* rule:

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

United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980), quoted in Adams, 322 S.C. at 122, 470 S.E.2d at 370-71. Moreover, "the jury is entitled to know the 'setting' of the case.

It cannot be expected to make its decision in a void – without knowledge of the time, place, and circumstances of the acts which form the basis of the charge.” United States v. Roberts, 548 F.2d 665, 667 (6th Cir. 1977), cited in Rebecca Smith, 309 S.C. at 453, 424 S.E.2d at 502 (Toal, J., dissenting).

Obviously, the jury was entitled to know the circumstances surrounding the police's discovery of the murder weapon – particularly since the State had to explain why the firing pin broke during examination by Agent Collins, likely due to its long submergence in the river. Indeed, counsel testified at PCR he did not see any valid objection for keeping out the evidence as to how the gun was found by police. {PCR App. 1849}. Counsel was correct in this assessment.

Further, had counsel tried to exclude the evidence of the attempt to conceal the gun by arguing a lack of evidence tying it to Applicant, the State would have easily overcome that objection by introducing one of Applicant's letters to his wife, admitted at PCR as Applicant's 56. In it, Applicant asks Dorothy to tell her lawyer she only found the gun after someone broke into her house and put blood in there (obviously to try to then claim the gun was planted by the “real killer”) {R. 4360}, and goes on to ask her to tell Hiram to say he only saw Applicant with a .32 or .38 revolver (which is different from the murder weapon). Even assuming loose ends existed as to whether Applicant had knowledge of or instigated the concealment of the weapon, they would have more than been tied up by this letter. Counsel was adamant he in no way wanted this letter in evidence given all the incriminating admissions within it {PCR Tr. 1838-39}, as it clearly shows Applicant's attempt to encourage perjury and obstruct justice. Indeed, he also goes on to ask Dorothy

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to tell Travis Felder not to say anything, and to tell Travis Applicant told his lawyer Travis had nothing to do with the crime and would clear him in court. {Applicant's 56}.

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

2. There was no prejudice from admission of the testimony as to how the gun was discovered.

Even if there was somehow a valid objection to introduction of how police discovered the gun, there was no prejudice. As set forth in subsections A and B, *supra*, the evidence of guilt was overwhelming. Even if the story of how police found the gun was excluded, the gun itself combined with all the other evidence of identity would preclude a reasonable probability of a different result in the guilt phase. Therefore, Applicant has not met his burden of showing prejudice. Reed v. Norris, 195 F.3d 1004 (8th Cir. 1999) (failure to raise Batson issue not prejudicial under Strickland given overwhelming evidence).

3. There was no valid objection to the solicitor's reference to the plea agreements.

Next, there was no valid objection to be made to the solicitor's questioning of Dorothy, Yolanda, and Kendra on the plea agreements; thus, counsel could not have been deficient nor Petitioner prejudiced by the failure to make such an objection.

The law is clear that codefendants may testify even though they have agreed to a plea agreement, and additionally a plea or plea agreement is admissible not as substantive evidence of the defendant's guilt or innocence, but to support or attack the credibility of a testifying codefendant. See, e.g. U.S. v. Gray, 491 F.3d 138 (4th Cir. 2007) (testimony of codefendants testifying pursuant to a plea agreement or immunity agreement still admissible where product of free will, albeit a hard choice); State v. Moore, 337 S.C. 104, 522 S.E.2d 354, 355 n.2 (S.C. Ct. App. 1999) (while a codefendant's plea is not admissible as substantive evidence of the defendant's guilt or innocence, it is admissible to support or attack the credibility of a testifying codefendant).

Additionally, the law is clear that the State may elicit plea agreements on direct examination to avoid the perception it was hiding something when the defense inevitably cross-examines the witness on his or her deal with the State. See State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (S.C. 2001) ("Initially, it was not error for the Solicitor to introduce the plea agreement on direct examination because the Solicitor was entitled to anticipate the inevitable cross examination of a federal inmate and to dispel any notion he was hiding something from the jury."). Indeed, counsel Cummings pointed out that he was the trial attorney in the Shuler case, and thus saw no basis for objecting to the questioning. {PCR Tr. 1849-52}.

Since the questioning was permissible, then counsel could not have been deficient nor Applicant prejudiced as a matter of law. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (Ineffective assistance claims based on failure to object is tied to the admissibility

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

4. Counsel had a valid strategic reason for not objecting.

Although counsel did testify he did not see a valid objection to the plea agreements, he also expressed a valid strategic reason for wanting the plea agreements admitted into evidence. Counsel stated he "wanted the rest of the stuff about how they went after his whole family to get him", and "wanted everybody to know that everybody was charged, everybody, and the only one they went after was him". {PCR Tr. 1702, 1704}. Indeed, if counsel had NOT engaged in such common and basic impeachment as examining the State's witnesses on their deals with the State, surely then the allegation now would be ineffectiveness for failing to do so. The fact that Applicant's present counsel may have treated the issue differently is irrelevant as it is precisely the kind of hindsight Strickland forbids. See Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack).

5. There was no prejudice from admission of the plea agreements.

Even if there was somehow a valid objection to introduction of the plea agreements, there was no prejudice. As set forth in subsections A and B, *supra*, the evidence of guilt was overwhelming. All the evidence of identity would preclude a reasonable probability of a different result in the guilt phase. Indeed, had counsel precluded testimony about the deals with the State, that might have enhanced the credibility of the family members in the absence of such a common method of impeachment. Therefore, Applicant has not met his burden of showing prejudice. Reed

v. Norris, 195 F.3d 1004 (8th Cir. 1999) (failure to raise Batson issue not prejudicial under Strickland given overwhelming evidence).

VII. Failure to Object to Admission of Ballistics Evidence

Applicant next contends his counsel was ineffective for failing to object to admission of the opinion of the SLED firearms examiner that the casings at the scene matched Bowman's .380 to the exclusion of all other firearms.

Of course, after Applicant's sisters confessed to throwing Applicant's pistol in the river, a police diver recovered the black and grey High Point .380 semiautomatic in the river bottom about 25 to 30 feet from the bridge. {R. 4220-29}. The gun was matched "to the exclusion of all other firearms" by SLED firearms examiner David Collins to five of the six Winchester .380 shell casings found at the Nursery Road scene. While the sixth casing and spent bullet could not be conclusively matched to Applicant's .380, they were of course consistent. {R. 4315-20}.

A. Counsel was not deficient.

Despite having the gun transported to Atlanta for review by his expert for these PCR proceedings, Applicant presented no evidence that Collins's conclusion as to the match was invalid. His only attack goes to the validity itself of the discipline of firearms and toolmark examination, and the ability of that discipline to make an exclusive match.

However, even assuming the present validity of an attack on the discipline of firearms and toolmark identification or the relative conclusiveness of a match, counsel was not deficient. Two relevant principles for analyzing claims of ineffectiveness come into play here. First is the point that there is no constitutional claim of ineffective assistance of an

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expert witness. See Wilson v. Greene, 155 F.3d 396, 401 (4th Cir. 1998) ("The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness. To entertain such claims would immerse federal judges in an endless battle of the experts to determine whether a particular psychiatric examination was appropriate."); Waye v. Murray, 884 F.2d 765, 766-67 (4th Cir. 1989). Lawyers are entitled to reasonably rely on their experts, and they are not required to second-guess their expert's conclusions or "expert shop" until they find one who will testify favorably. See Wilson v. Greene, 155 F.3d 396 (4th Cir. 1998); Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992). To be actionable, the failure must be of counsel in failing to obtain or present the expert testimony; the fact that the testifying expert did not identify "every possible malady or argument" is not a basis for relief. Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992).

Second is the principle that the reasonableness of counsel's actions must be viewed in the context of the time period they took place, and not in hindsight. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (S.C. 1985) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.") (quoting Strickland); Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (S.C. 2006) ("Though hindsight may provide a different view of counsel's actions, Simpson is not entitled to a new trial for the sole purpose of presenting a 'fancier' case."). See also Harden v. State, 360 S.C. 405, 602 S.E.2d 48 (S.C. 2004) ("An attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction.").

When these principles are considered, it is clear counsel could not have been deficient for failing to challenge the underlying discipline of firearms examination at the time of a trial in May 2002. Counsel testified he hired a recognized firearms examiner, Cleon Mauer, to review the State's firearms evidence. {PCR Tr. 1794; 5316-17}. Counsel stated that Mauer concurred with the State's findings of a match, and never once advised him that he should challenge the entire discipline of firearms identification or have a match excluded from evidence. {PCR Tr. 1684; 1847-49}. Counsel noted that "at the time of trial" he understood firearms examination to be a "recognized science". Counsel testified he had an sheriff's investigator bring all the evidence to his expert so that the expert could conduct his own examination, and the expert also found a match. {PCR Tr. 1681-85}. While counsel agreed that a ballistics examiner might have an vested interest in protecting the discipline, he relied on his expert to tell him the truth. {PCR Tr. 1688; 1690}. Counsel stated he cross-examined the State's expert Collins as best he could with questions suggested to him by his own expert, by eliciting that the firing pin was broken, and that the State could not match the weapon to the actual projectile that killed Kandee. {PCR Tr. 1684; 1699}.

Since: (1) counsel here hired and relied upon a firearms expert who did not advise him to make a challenge to the underlying discipline – which would not be actionable even if the expert was at fault in not knowing of such a challenge – and (2) defense lawyers were not making challenges to the underlying discipline of firearms examination in South Carolina at the time of trial in 2002, but instead considered it a "recognized" discipline, then counsel could not have been deficient for failing to challenge the validity of the discipline.

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Further, Applicant's Exhibit 78 would not change this conclusion and somehow make counsel deficient for not raising a fundamental challenge to firearms identification. Applicant's 78 reflects a motion made to a federal court in Massachusetts in 2000 to exclude for various reasons a firearms examination finding a match. First, of course, is the fact that this Court excluded Applicant's 78 from evidence, so Applicant's citation to it in his brief is inappropriate. {PCR Tr. 1692-94}.

However, even if it is considered, it does not establish that counsel here did not meet the minimum level of competence for South Carolina lawyers. Applicant offered no proof whatsoever that defense lawyers *in South Carolina* were routinely making such challenges as a matter of course, and counsel was therefore deficient for not meeting this supposed minimum standard of competence. Simply because one lawyer in Massachusetts had filed the motion does not mean that counsel here would be ineffective when such an attack was not commonly (or indeed – ever) done by criminal defense attorneys in South Carolina in 2002, particularly since counsel consulted an expert in the field and was not advised to make such a challenge.

Indeed, Applicant primarily relies on the "Ballistic Imaging" study that did not come out in final form until August of 2008 {PCR Tr. 412; 423} – over six years after trial and three weeks before the PCR hearing began. These issues are just now percolating into the courts, and counsel cannot be held deficient for failing to raise a challenge for which the basis did not arise until years after Applicant's trial. See, e.g. Gentry v. Sinclair, 576 F.Supp.2d 1130 (W.D. Wash. 2008) (counsel's decision to attack reliability of DNA science and not the results was reasonable, as reasonableness the decision must be considered

at the time it took place, in 1991, when DNA was still "cutting edge"); McDonald v. State, 952 So.2d 484 (Fla. 2006) (holding that counsel was not ineffective for failing to request a Frye hearing because there was general acceptance in the scientific community of the particular science at issue at the time of the defendant's 1995 trial).

As noted before, counsel is not required to second guess his expert, and indeed, Applicant's claim essentially depends on the premise that counsel himself should have had more of an expertise on the cutting edge issues in firearms examination than his own firearms expert did. The law plainly does not require that. See, e.g. Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995) (to impose a duty on the attorney to gather background information for an expert independent of any request from that expert would defeat the whole purpose of hiring the expert, as understanding what information is needed is an integral part of the expert's skill, and requiring an attorney to review the trustworthiness of the expert's conclusions would make the expert superfluous); Green v. Koerner, 312 Fed.Appx. 105 (10th Cir. 2009) (defendant charged with arson was not denied effective assistance of counsel due to counsel's failure to foresee future developments in fire investigation science that occurred after date she entered her plea).

Indeed, Applicant's "flat earth" discussion confirms the very point. At PCR, Applicant pointed out to counsel that it would "seem reasonable" for an expert prior to Columbus to advise that the earth was flat, but that later after ships sailed around the world it was found not to be flat. {PCR Tr. 1691-92}. Counsel cannot be found deficient because at the time he was not more ahead of the scientific curve than most of the rest of the world, including his own qualified hired expert.

Counsel was not deficient.

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B. There was no prejudice.

In any event, Applicant has not shown prejudice for a number of reasons.

First, the evidentiary showing Applicant made at PCR was insufficient to completely undermine the discipline of firearms examination and create a reasonable probability of a different result had it been presented to the jury.

Again, there has been no evidence presented that David Collins was incorrect in finding a match pursuant to the accepted standards in the profession of firearms identification. Applicant's only contention goes to the underlying validity of the premise that firearms make distinguishing marks upon casings and projectiles that can be used to match them to a particular firearm to the exclusion of other firearms.

In support of his claim, Applicant called Dr. Marc DeGraef, who was on a committee that authored the report, "Ballistic Imaging", which marked as Court's Exhibit 1 but excluded from evidence. {PCR Tr. 477-78}. This report was a study of the feasibility of creating a national computer database of images of all new firearms that could be searched for matches to evidence from crime scenes. {PCR Tr. 406-08; 454}. Dr. DeGraef admitted his expertise, and thus his basis for inclusion in the committee, was only in imaging and imaging analysis, and that was the extent to which he was qualified as an expert at the PCR hearing. Dr. De Graef conceded that none of the studies on his CV involved analysis of ballistics or projectiles, that he had never conducted a firearms or toolmark analysis, and that he had never independently researched or studied the uniqueness of toolmarks. Indeed, he even pointed out that none of the other committee members had actually performed a study involving the uniqueness of firearms or toolmark

identification. {PCR Tr. 414-23}. Finally, Dr. De Graef conceded he had not reviewed the specific evidence in this case. {PCR Tr. 442-43}.

Because of his lack of expertise with anything specifically relating to firearms or toolmark examination, Dr. De Graef was limited to testifying that the discipline was not a "science" because no statistical quantification of an error rate has occurred. {PCR Tr. 435-38; 441-42; 451-52}. Dr. De Graef also criticized any use of subjectivity in science, {PCR Tr. 444-45}, and complained Collins's notes were not as detailed as a scientist would like {PCR Tr. 448-50}. He asserted that a statement of exclusivity imported an error rate of zero to a subjective determination. {PCR Tr. 474-75}.

On cross, Dr. De Graef admitted that the "Ballistic Imaging" report only questioned whether uniqueness of toolmarks had been fully demonstrated, and conceded the report expressly did not challenge the validity of firearms identification or take any position on whether such evidence was admissible in court. Moreover, Dr. De Graef conceded that the report accepted the prospect that the same gun would produce the same marks as having a "baseline level of credibility" given "existing research" and its acceptance as evidence in courts for years. He ultimately admitted that assessing the validity of the assumptions behind the discipline were not within the scope of the report, and the only conclusion of the report was that further study was warranted. {PCR Tr. 453-58; 470-72}. Dr. De Graef further conceded that the only independent study conducted for the report did not at all assess the question of uniqueness, and Dr. De Graef had no idea whether Agent Collins had correctly or incorrectly identified a match in accordance with then-existing standards. {PCR Tr. 463-66; 472}. Finally, Dr. De Graef admitted that he did not even

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write the portion of the report which questioned whether uniqueness had been established, but instead wrote portions addressing how various imaging systems might be applied to a firearms database. {PCR Tr. 466-67}.

The expert who testified as to the match at trial, David Collins, is a member of the Association of Firearms and Toolmark Examiners (AFTE) with a long career of experience in the field. {PCR Tr. 367-70}. He testified as to how sufficient agreement is found for a match. He noted that the observation of the various markings on a subject item and a test item is very objective, and agreed though that the ultimate conclusion of whether those markings proved a match did have a subjective component, based on the experience and training of the examiner. {PCR Tr. 296-99}. Collins testified that in his opinion firearms leave individual markings that are unique to that firearm. {PCR Tr. 307}. He noted he used rules of matching that have been accepted and used throughout the world and in place since the 1920s. {PCR Tr. 314-16; 321; 388}. Collins also pointed out that he personally has participated in as well as reviewed studies in which trained examiners were able to distinguish firearms that had been consecutively manufactured, thus proving the validity of the premise of uniqueness. {PCR Tr. 317-18; 321; 397-99; 481-86; 497-98}. Finally, he noted that he has never failed a proficiency test and is not aware that anyone else at SLED failed one while he was there. {PCR Tr. 336; 383}.

As to his specific finding in this case, Collins testified he found the possibility that the marks were made by a firearm other than Applicant's to be so remote and infinitesimal as to be a practical impossibility. He again pointed out that studies had confirmed this finding of uniqueness. {PCR Tr. 339-41; 349; 385-88}. Collins agreed his "exclusion"

language might indicate complete certainty, but stated he was just trying to express his opinion that it was a practical impossibility another gun made the same markings. He agreed though, that at this time there was no way to put a statistical number on the conclusion like is done with DNA, for example. {PCR Tr. 341-50; 499-500}.

Given this testimony, no Strickland prejudice could result even if it is assumed that counsel should have called Dr. De Graef to attempt to exclude or undermine firearms identification testimony. Applicant simply did not provide sufficient evidence to preclude the firearms identification from being entered into evidence. All he offered was a general and *possible* criticism of the statement of exclusivity from someone who had no experience with firearms and toolmarks analysis, and had never actually conducted a study assessing the uniqueness of such marks. Thus, nothing concrete was offered to actually disprove the premise of the discipline that toolmarks were not unique.

To the contrary, the "Ballistic Imaging" report specifically noted that assessing the premise of uniqueness was beyond its scope, and it accepted the premise that the same gun would produce the same marks as having a baseline level of credibility – while just recommending further study. A generalized criticism and request for additional study simply does not establish that uniqueness of firearms does not exist. Indeed, the only person testifying before the Court who actually had participated in a study assessing uniqueness was Agent Collins, and he noted examiners were able to distinguish individual firearms even though they had been consecutively manufactured. Applicant's attack on the validity of the firearms discipline itself was simply insufficient to preclude a type of testimony that has been routinely accepted in the courts since the 1920s. See Overton v.

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State, 976 So.2d 536 (Fla. 2007) (no prejudice from failure of counsel to challenge testing procedures of lab, where testimony showed that any such challenge would likely have been unsuccessful). See generally Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985) (In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief); Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3rd Cir. 1991) (applicant cannot show deficiency "based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense"; rather, facts must be presented).

Inasmuch as Applicant makes the lesser contention that counsel should have examined Collins on his "exclusion of all other firearms" language, again no prejudice could result. Collins testified that he was simply trying to convey the concept of "practical impossibility" with such language, and that he remained sure the casings came from the subject firearm. Thus, had counsel probed the manner, Collings' answers would have been more than satisfactory and would not have created a reasonable probability of a different result.

Even if counsel had successfully reduced Collings' testimony to no more than the fact that the marks on the casings matched marks on known casings fired from the firearm, without any testimony as to the exclusive significance of that match, there still would be no reasonable probability of a different result. Collings still at a minimum would be able to testify the casings matched and thus could have come from the firearm, even if he was precluded from testifying the match was exclusive. This evidence still would make a fact in issue more likely than not, see Rule 401, SCRE, and would be akin to the serology evidence common before DNA, which was admissible even though millions of people have

the same blood type. See generally Adams v. State, 794 So.2d 1049 (Miss. Ct. App. 2001) (Southwick, J., concurring) (inconclusiveness of mitochondrial DNA testing did not make it inadmissible where it could not exclude defendant but could exclude most of general population; while it does not confirm identity it makes it more probable than not). When the fact that the markings physically match is combined with the fact that Applicant's family conspired to hide the gun in the river, the gun would remain strong evidence indeed.

And, there was other conclusive evidence of identity without reference to an "exclusive" ballistics match. The victim's watch was found in Applicant's pants at his arrest the next morning. {R. 4129-32; 4142; 4150-52; 4195-98; 4207-08}. A number of witnesses heard Applicant threaten to kill the victim the afternoon of her murder. {R. 3725-27; 3765-66; 3742-45}. Tywan Gadsden described witnessing Applicant murder the victim. {R. 3990-4035}. Multiple witnesses observed Applicant driving the victim's car after her murder, and Applicant tried to sell the car at a club that night. He admitted killing the victim. {R. 4017-22; 4063-69; 4081}. Finally, Travis Felder described going with Applicant when he dragged the victim's body from the woods, put it in her car, and set it afire. {R. 4042-4120}.

Given all this evidence of identity, it cannot be said that a mere challenge to the exclusivity of the State's ballistics result would have created a reasonable probability of a different result. Indeed, given this evidence, even if the match were excluded in its entirety the evidence was still overwhelming. There was no prejudice. Reed v. Norris, 195 F.3d 1004 (8th Cir. 1999) (failure to raise Batson issue not prejudicial under Strickland given

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overwhelming evidence); Simmons v. Taylor, 195 F.3d 346 (8th Cir. 1999) (failure to object to jail clothing not prejudicial under Strickland given the state's overwhelming evidence).

IX. Failure to object to arbitrary factor of "good" prison conditions

Applicant next contends his counsel was ineffective for failing to object to the solicitor's questioning of defense prison expert James Aiken on so-called "good" prison conditions, which he asserts introduced an arbitrary fact into his sentencing proceeding. As will be seen, since the defense opened the door on the issue and thus the solicitor's subsequent questioning was permissible as a matter of law, counsel could not have been deficient nor Applicant prejudiced. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial).

A. Events at trial

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

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

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

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

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

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

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

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

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

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

B. Plath, Bowman, Burkhardt, and Bryant

The reason evidence about "good" prison conditions is problematic stems from four South Carolina cases – one that was in existence prior to this case and three that were handed down after Applicant's trial, including Applicant's on direct appeal.

In State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984), the Court addressed the state's cross-examination of a professor who generally testified that life imprisonment was a punishment superior to the death penalty. During his direct examination, the professor testified about conditions of life imprisonment at CCI, and called life imprisonment "a form of slavery" – which the state supreme court concluded was "to demonstrate the permanence and deprivation entailed in life imprisonment". The Court very strongly rebuked sentencing phase defenses which "sought to portray life imprisonment as preferable to capital punishment as a matter of social policy", or "drew a picture of life imprisonment as slavery, a condition of irretrievable loss". Plath, 281 S.C. at 14, 313 S.E.2d at 626-27. The court stated that such defenses improperly "invite[d] the jury to intrude upon the strictly legislative function of determining the nature of crime and punishment". Plath, 281 S.C. at 14-15, 313 S.E.2d at 627.

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

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

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

Despite these admonitions, the Plath Court returned to how the State's challenged questioning was only proper response to what that court considered at the time to be improper sentencing phase defenses on the alleged lack of utility of capital punishment:

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

Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28 (emphasis added).

Two decades later, the state supreme court decided Applicant's direct appeal in State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005). There, Applicant contended that the solicitor's questioning about movies, television, and books was irrelevant under the South Carolina Supreme Court's decision in Plath, and violative of the constitutional due process mandate in Gardner v. Florida, 430 U.S. 349 (1977), that a death sentence cannot be based "on information the defendant had no opportunity to deny or explain". The State argued, *inter alia*, that the issue was not preserved as the arguments made on appeal were not made to the trial court. The South Carolina Supreme Court agreed the issue was not preserved, but added a cautionary instruction to both sides that evidentiary presentations along these lines are improper:

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

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

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

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confinement "invited the jury to speculate about irrelevant matters" and injected an arbitrary factor in the proceedings in violation of S.C. Code Ann. § 16-3-25(C)(1) (2003).

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

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

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

C. Applicability of a *Strickland* analysis to this issue

The first hurdle that must be crossed is whether a normal Strickland analysis applies to this claim that counsel did not object to introduction of an alleged arbitrary factor. Unlike Burkhart, Bowman, or Bryant, which were direct appeals, this case is in PCR, and on

collateral attack Applicant must establish his claims through the constitutional vehicle of ineffective assistance of counsel. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal can not be raised in a PCR application absent a claim of ineffective assistance of counsel). Of course, the familiar standard in Strickland v. Washington that applies to claims of ineffective assistance of counsel requires a showing of *both* deficient performance *and* prejudice – a reasonable probability of a different result at trial.

In the sentencing phase, prejudice is phrased somewhat differently. In Jones v. State, 332 S.C. 329, 504 S.E.2d.822 (1998), the South Carolina Supreme Court restated the "prejudice" prong in a capital sentencing proceeding as being established when "there is a reasonable probability that, absent [counsel's] errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death," citing Strickland.

There are only limited exceptions where prejudice is presumed – none of which apply here. In Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878 (2006), our state supreme court outlined these limited exceptions:

In Cronic, the [United States Supreme] Court identified three distinct situations in which a presumption of prejudice is appropriate. First, prejudice is presumed when the defendant is completely denied counsel "at a critical stage of his trial." Cronic, 466 U.S. at 659. Second, per-se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer "entirely fails to subject the prosecution's case to meaningful adversarial testing," thus making "the adversary process itself presumptively unreliable." Id. Third, the Court identified certain instances "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the

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actual conduct of the trial." Id. (citing Powell v. Alabama, 287 U.S. 45 (1932)). A finding of per-se prejudice under any of these three prongs is "an extremely high showing for a criminal defendant to make." Brown v. French, 147 F.3d 307, 313 (4th Cir.1998).

The supreme court in Nance pointed out that these situations of presumed prejudice are rare, and concluded with this instruction:

Absent these narrow circumstances of presumed prejudice under Chronic, defendants must show actual prejudice under Strickland.

Nance, 367 S.C. at 552, 626 S.E.2d at 880.

Obviously these limited exceptions of presumed prejudice do not apply here. Counsel was present at all critical stages of Applicant's trial, so the first exception is inapplicable. The third exception is clearly not viable either, as it applies only when extreme circumstances external to counsel would prevent anyone from providing effective representation. The classic case, discussed in Chronic, is Powell v. Alabama, 287 U.S. 45 (1932), where in 1930's Alabama black youths were charged with a horrible crime. Hostile sentiment pervaded the community. Only on the day of trial was a lawyer appointed, and he was not only unprepared but also was from a different state and unfamiliar with local procedure. Obviously, Applicant's trial nowhere approaches the inherently prejudicial circumstances of Powell.

Finally, the second exception – where counsel "entirely fails to subject the prosecution's case to adversarial testing" – is also inapplicable. An example of this exception is Nance itself – where lead counsel was hampered by alcoholism, drug intake, and health issues affecting his memory, and co-counsel was a new lawyer who had only been practicing for eighteen months. The lawyers only interviewed one family member in preparation, and the mental expert was not provided with any requested background

information. The lawyer told the jury in opening argument that he did not ask for the case; counsel only called three witnesses in the guilt phase during which they elicited prejudicial information; they failed to even qualify their expert; and they called the sister at the last minute without any preparation. The defense sentencing phase case only lasted seven minutes, and during closing co-counsel did not plead for his client's life, but instead described him as a "sick" man who did "sick" things. Nance, 367 S.C. at 554-58, 626 S.E.2d at 881-84.

Such a woeful description is of course nothing like the representation that Applicant received in this case, where he had two lawyers, including one who is one of the more experienced criminal defense litigators in the State. Whether or not they made an individual mistake during the course of the representation, counsel in this case certainly endeavored to challenge the State's case throughout the proceedings. Clearly, this is not a Nance-type situation where counsel "entirely failed to subject the prosecution's case to any meaningful adversarial testing." Thus, where as here there was a sufficient effort overall, then any alleged individual mistakes are properly adjudged through Strickland's normal process, which includes the prejudice analysis.

This conclusion is consistent with the language of Strickland itself, despite our state supreme court's view in Burkhart of conditions of confinement evidence as an arbitrary factor for which it did not perform a prejudice analysis on direct appeal. Unlike a case on direct appeal – where the conviction is not yet considered final – during collateral attack concerns of finality are of "profound importance". See generally Strickland, 466 U.S. at 693-94 (discussing concerns of finality when deciding the appropriate standard for prejudice). Hence, on collateral attack it is appropriate to filter claims through a prejudice

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analysis to ensure that the extreme social cost of reversing final convictions and sentences is only borne by society where the alleged error had a reasonable probability of affecting the result of the proceedings.

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

And that last statement precisely raises the final point why a prejudice analysis is appropriate to a claim that counsel failed to object to evidence of conditions of confinement. While Burkhart phrases its issue as a statutory one – that introduction of evidence of conditions of confinement injects an arbitrary factor under S.C. Code Ann. § 16-3-25(C)(1) – Applicant here in PCR is raising, as he must, a *constitutional* issue – that he was effectively denied his Sixth Amendment right to counsel based on counsel's

omission. Applicant must filter his statutory claim through the constitutional one – as a fundamental and legal matter, the claim he pled before this Court is constitutional. As Franklin specifically notes, this overriding constitutional claim upon which the statutory claim depends is subject to a harmless error analysis – – like any other constitutional claim.⁸

D. Counsel was not deficient in handling the issue.

In his brief, Applicant cites some isolated passages from counsel Cummings' testimony under questioning by Applicant to assert that counsel simply "missed" the issue by failing to object. {PCR App. 1720-22}. However, when one explores counsel's testimony more carefully, it is clear that the fact of the matter is counsel was operating in one of the vanguard cases after LWOP became a mandatory charge in every case, and was strategically using the burdensome "without parole" aspect of that sentence as the centerpiece of the defense strategy. Since neither Bowman, Burkhart, or Bryant had been issued yet, counsel's strategy was reasonable, including his (and the judge's) determination that the solicitor's responsive question was permissible given the evidence elicited by the defense.

In his testimony on cross during PCR, counsel Cummings explained that his strategy was to portray life in prison without parole as a particularly horrible fate that it amounted to sufficient punishment for a young man like Applicant. He noted he wanted to "paint a

⁸ It is also worth noting that Justice Pleicones is but one vote of five in expressly rejecting a harmless error analysis in Burkhart, as the majority made no such express analysis and the dissent clearly disagreed with Justice Pleicones's view. Moreover, even Justice Pleicones was not analyzing the issue in the context of PCR, where the necessary constitutional overlay of ineffective assistance would have had to be addressed.

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picture, paint it nasty for [the jury]". {PCR Tr. 1876-80}. Counsel noted that he has successfully objected when the solicitor attempted to talk about escape, but knew that once he had questioned the witness on some of the harsh conditions of prison he fully expected the solicitor to ask Aiken about "whether or not they get to eat in prison". Since Bowman, Bryant, and Burkhart were not out yet, he did not see a valid objection outside of the solicitor "talking about things that were outside the scope – that being escape". Counsel added, "I knew it was coming; I took a calculated risk; I made a decision"; and agreed that he knew full well that "by going down the road of saying life in prison is so horrible that it's good enough punishment for Marion Bowman", the solicitor was going to try to show that it was not as bad as all that. {PCR Tr. 1882-84}. While of course counsel later stated he was not strategically trying to introduce what the law determined was an arbitrary factor {PCR App. 1986-87}, on cross, counsel stated he made a "calculated risk" in eliciting the evidence on the toughness of prison from Aiken. He noted he "made that choice to try to give the jury an alternative", asking rhetorically, "why do we give the jury a LWOP choice if we're not going to let them know what prison is like?". He agreed he was willing to take on the issue of prison conditions because he thought he could use it to his client's benefit. {PCR App. 1884-85}. Finally, counsel agreed that at the time they were on the "frontier" of how to litigate a capital case with the mandatory LWOP charge, and he "did try to push the envelope". {PCR App. 1885-86}.

Given counsel's testimony, it is clear that counsel was not deficient when one considers the time period and the then-existing state of the law in which counsel operated.

Kelly v. South Carolina, 534 U.S. 246 (2001), which ended the debate about charging

LWOP and essentially required such charges in every case, had come out just a few months before Applicant's trial. Knowing that he was going to get a LWOP charge, and given Applicant's relatively young age, counsel decided to attempt to portray through Aiken the conditions of LWOP as so severe that it was a sufficient alternative to death for the conservative Dorchester County jury to choose. Given the time period and the state of the law when this trial took place, with Kelly being freshly decided and Bowman, Bryant, and Burkhardt not issued yet, counsel was reasonable in deciding to use the LWOP charge to his advantage in this manner. Strickland plainly does not require counsel to anticipate changes and developments in the law. See Schneider v. Day, 73 F.3d 610 (5th Cir. 1996) (holding that while Victor v. Nebraska, 511 U.S. 1 (1994) is retroactive, counsel cannot be ineffective for failing to foresee changes in the law subsequent to the Petitioner's trial); Walker v. Jones, 10 F.3d 1569 (11th Cir. 1994) (trial counsel not ineffective for failing to object to reasonable doubt charge where petitioner's trial took place four years before Cage v. Louisiana, 498 U.S. 39 (1990), and state courts at that time had affirmed use of such charges).

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

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the solicitor's own limited questioning on conditions – except when the solicitor went outside the "scope" into questioning about escape, to which counsel successfully did object.

Given the state of the law when this trial took place – in Plath that "the State was entitled to make this response" to defense evidence on conditions – then counsel was correct that, based on his own questioning, he would not have had a valid objection to the solicitor's limited responsive questioning. See Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28 (although defendants should not have entered the forbidden field of penology, once they did, State was entitled to respond and show "life imprisonment was not the total abyss which [the defendant] portrayed it to be"); State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991) (proper for solicitor to respond that victim's family could only visit him at the grave after defendant's sister testified she would visit him in prison at Christmas); State v. Thibodeaux, 750 So.2d 916 (La. 1999) (defendant opened the door to prosecution questioning of its corrections expert on recreational activities at prison).

Thus, counsel was not deficient: (1) in strategically deciding to enter to confinements issue as part of his strategy to portray LWOP as a particularly harsh sentence and viable punitive alternative, and (2) in acquiescing to the solicitor's limited responsive questioning on the same subject. Simply because the State was then able to score a few points back on cross – as is the case for any party during almost any examination – does not mean that counsel was somehow ineffective in deciding on this strategy. Trial counsel has to take the good with the bad, and in almost every case a prosecutor will be able to score points off of the defense's presentations. The fact of such an inevitable response does not make counsel deficient for eliciting it for his beneficial purposes. To find deficiency would be

precisely the type of hindsight Strickland forbids. See generally Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

E. There was no prejudice.

Regardless, there was no prejudice warranting reversal. Again, in the sentencing phase, Applicant must show "there is a reasonable probability that, absent [counsel's] errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Jones, 504 S.E.2d at 823-824 (citing Strickland).

Here, the defense was able to score a lot of points with its presentation as to the harshness of life without parole. Indeed, the main thrust of the defense in the sentencing phase was the concept that the "without parole" portion of a life sentence in harsh conditions makes life without parole sufficiently severe enough punishment to be appropriate retribution for the crime, without the need to impose death. See {R. 4982} (defense derisively refers to prosecutor's argument as "reward-a-prison"); {R. 4991} (defense states its "easy to try to paint prison as a reward", and argues: "The line forms back there if anybody wants to spend the rest of their life behind bars."); {R. 4991} (defense argues it is "wrong" and an "Injustice" if the jury thinks a life sentence is a "reward"); {R. 4996-97} (defense implies that a life sentence is worse than death for a

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

Given the defense's extensive exploration of the harshness of prison, it cannot be said that a much smaller amount of fair and accurate comment the other way would create a reasonable probability of a different result. Indeed, given the extensive focus of the defense on the retributive sufficiency of the "without parole" aspect of a life sentence, it cannot be said that a little further accurate information about life without parole to complete the picture was so far out of bounds as to necessitate a new sentencing hearing. Applicant cannot show prejudice simply because he was not allowed to create a one-sided and inaccurate perspective.

There is no reasonable probability of a different result if a few pages of questioning on this issue during a multi-day sentencing hearing had been excluded, in a case where the defense had their own full comment on the issue.

X. Failure to object to submission of kidnapping aggravator

Applicant next contends his counsel were ineffective for failing to call James Tywan Gadsden during the sentencing phase to refute the kidnapping aggravator, by having him testify that there Kandee willingly went with Applicant to help him burglarize a house. He

also asserts that the testimony of inveiglement was too vague and thus submission of the aggravator violated due process.

A. Events at trial and in PCR

In one statement to police, Gadsden said that stated that when he got in the Kandee's car with Applicant and Kandee, Applicant said he was going to "pull a caper", and when Gadsden asked what caper, Applicant said he was going to "rob somebody". Kandee then said she needed gas money. Gadsden then claimed he had them take him home. **{Applicant's Exhibit 5}**. In his other statement to police, Gadsden said Applicant said he was going to "pull a caper". Kandee then said she would do anything for a hit of crack. Gadsden said that while they were riding to Nursery Road, Applicant made a gun with his fingers and pointed it at Kandee's head. He also stated that Applicant said he was going to kill Kandee because she had been "wired" by police when she bought drugs from Applicant. **{Applicant's Ex. 6}**.

In his trial testimony, though, while Gadsden did note that after they left the car Applicant said he was going to kill Kandee because she was wearing a wire **{R. 3998}**, he did not mention on direct the plan to rob a house or the gesture of a gun to the back of Kandee's head. On cross, when counsel asked Gadsden why Kandee was afraid when a car was coming down the road, and the three of them then jumped in the woods, Gadsden stated it was because Applicant said he was going "to pull a caper". Counsel quickly moved on and there was no explanation of what "pulling a caper" meant. **{R. 4035}**.

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Prior to the beginning of the sentencing phase, counsel moved for a directed verdict of life, arguing against all of the possible aggravating factors. As part of that, he asserted no evidence has been presented of kidnapping. The court found the motion premature, but counsel argued that it would be prejudicial to allow the evidence in during the sentencing phase if the court ultimately ruled an aggravator was not valid. {R. 4611-17}.

At the close of the State's evidence in the sentencing phase, counsel again asked for a directed verdict on the aggravating circumstances. He argued that Gadsden's testimony that all three of them jumped in the bushes when the car passed meant that Kandee was no under anyone's control, and contended there was no testimony establishing the weapon was ever used to keep Kandee in a particular place. Counsel contended that testimony Kandee was given directions where to go did not amount to inveiglement, and that the testimony was she was shot without any warning. {R. 4711-12}.

The solicitor responded that Kandee was certainly being held at gunpoint and not free to go between the first and second shots when she was begging for her life. The solicitor also cited cases, such as State v. Plath and Arnold, supporting the contention that the inveigle and decoy elements of kidnapping were met when one invites another into a car with a formed intent to murder the person, or where one is promising to get aid for the victim, or makes the victim think they are going somewhere to commit a crime together. Counsel responded that too much time had passed from Applicant's threats to kill Kandee made to others earlier in the day and the actual crime, and that there was no actual proof of anything Applicant said to inveigle or decoy Kandee. {R. 4713-17}.

The trial court found this case to be similar to Plath inasmuch as the victim was lured after Applicant had formed an intention to kill, and allowed the aggravator. {R. 4731-32}. Counsel renewed his argument on kidnapping at the close of evidence, but the judge affirmed her prior ruling. {R. 4930-31}.

At PCR, Gadson admitted, as he related to police in Applicant's 6, that he knew beforehand Applicant was planning to kill Kandee, but did not mention that in his testimony. Gadson then backtracked and said he only knew there was going to be a killing when Applicant started shooting Kandee. Gadson stated that he and Kandee thought they were heading out to Nursery Road to rob someone else. {PCR App. 144-47}. On cross by the State, Gadson stated they were looking for a home to rob, and claimed he did not know when Applicant pointed at Kandee's head whether he was making a gun-like gesture or merely pointing to a house to rob. {PCR Tr. 181-84}.

Counsel Cummings testified in PCR that he did not want to elicit evidence that Applicant was planning a nighttime burglary of a residence, and pointed out that such evidence "didn't get out" during the trial. Counsel stated that he "walked the tight rope as tight as he could" with this aggravating evidence, and based on experience he wanted to make the State prove its case rather than portray Applicant as "the reason why she's dead, dope, sex, drugs". He noted that it would have done no good anyway if the jury found that Kandee was tricked into going with Applicant with the ruse that they were heading to a house to rob, as that might meet the "inveigle" or "decoy" version of kidnapping. Counsel pointed out that South Carolina had what he referred to as one of the broadest kidnapping statutes in the nation. {PCR Tr. 1395-96}.

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Later, when asked if Kandee's crack use at the scene of her murder "might be relevant to the issue of her state of mind in . . . for the kidnapping aggravator", counsel again noted that South Carolina had an extremely broad kidnapping statute. He stated "if you want to argue the state of mind, they were going there to do a job", and pointed out and "any way I turned on this thing I was stepping on a land mine". {PCR Tr. 1643-44}.

On cross by the State, when asked about impeaching Gadsden for leaving out of his trial testimony things in his statement such as that Applicant "was going to pistol whip another girl who owed him crack money, that they of course were looking for houses to rob when they went out to the Nursery Road location, that [Applicant] made a gun sign to the back of the victim's head on the way out there, that he said he was going to kill the victim and that he gave the victim crack before killing her", Cummings testified he was "shocked" those things did not come out on direct and did not want to open the door to them. Cummings noted that whatever value might be gained in impeachment was more than outweighed by the egregious nature of those facts. He also stated that he saw no value in eliciting those egregious facts from Gadsden, since being tricked into going with Applicant could still support kidnapping as well. {PCR Tr. 1923-25}.

B. Failure to call Gadsden in sentencing phase

Applicant's first contention now is that had counsel called Gadsden back during the penalty phase and elicited testimony that Kandee went willingly with Applicant as part of a supposed plan to rob a house, then the trial court would have granted a directed verdict as to the kidnapping aggravators since Kandee was not inveigled.

As an initial matter, counsel could not have been deficient nor Applicant prejudiced because testimony of a plan to rob houses (or even to smoke crack) out on Nursery Road would not have precluded a kidnapping aggravator under South Carolina law. As counsel repeatedly pointed out, kidnapping in South Carolina is very broad and is satisfied if the person is seized, confined, inveigled, or decoyed, "by any means whatsoever". S.C. Code Ann. § 16-3-910 (Rev. 2003). In interpreting this statute, the state supreme court held "specious" an argument that the evidence did not support the aggravator of kidnapping, "where the victim was invited into the appellants' car [and went willingly], after they had formed and expressed the intention to carry away and murder her". State v. Plath, 281 S.C. 1, 18, 313 S.E.2d 619, 629 (S.C. 1984). Additionally, in State v. Ray, 310 S.C. 431, 427 S.E.2d 171 (S.C. 1993), the Court found that while the evidence was conflicting as to when the defendant formed the intention to kill the victim, a finding of kidnapping was supported by the evidence where the defendant supposedly agreed to take the victim to the hospital after shooting her, but in fact took her somewhere else to finish her off, during which she resisted. Finally, most relevant is State v. Stokes, 345 S.C. 368, 548 S.E.2d 202 (S.C. 2001), in which the Court found no error in redaction of a portion of a letter showing that the victim was tricked into going into the woods under the premise that they were going to kill someone else, by finding that rather than disproving kidnapping by showing the victim went willingly, rather would in fact go to proving the "inveigle" and "decoy" forms of kidnapping. See Stokes (quoting, *inter alia*, United States v. Hughes, 716 F.2d 234, 239 (4th Cir.1983), "nothing in the policy of the ... kidnapping statute justifies rewarding the kidnapper simply because he is ingenious enough to conceal his true motive from his victim until he is able to transport her ... [to another location]").

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As the prosecutor pointed out, the evidence had already shown that Applicant had threatened to kill Kandee before the day was out – and this evidence came from Applicant's own sister Yolanda, his own cousin Katrina, and Eddie Waters. {R. 3726; 3744; 3766}. Additionally, had counsel called Gadsden to elicit the plan to burglarize houses, the prosecutor most assuredly would have cross-examined him on Applicant's 6, wherein Gadsden told police that Applicant made the gun gesture to Kandee's head before they arrived at Nursery Road. From this evidence a jury could have concluded that Applicant had already formed the intention to kill her when he invited her along on the supposed plan to burglarize houses – or even just to go somewhere to smoke crack. Just like the victim's belief in Stokes that she was going in the woods to kill someone else, the fact that Kandee thought she was willingly participating in an illegal scheme would not prevent a finding of kidnapping, where the scheme was merely Applicant's ruse to get Kandee in a location where he could kill her.

As such, counsel could not have been deficient nor Petitioner prejudiced from failing to call Gadsden, as his testimony about the scheme to rob would not have required a directed verdict on kidnapping. Indeed, even if Gadsden had claimed, as he did (at times) in PCR, that he did not know Applicant was planning on killing Kandee, this would not preclude the kidnapping charge, since independent evidence of Applicant's intention to kill came from Yolanda, Katrina, and Eddie. Further, a jury could also have believed the clear import of Gadsden's more direct version in Applicant's 6 as to the "gun gesture", over his subsequent claim in PCR that he did not know what the gesture meant. Regardless of how presented, there was clearly sufficient evidence to survive directed verdict on kidnapping.

Regardless, counsel was clear that he did not want to elicit in detail egregious facts that had been left out of Gadsden's statement, such as the fact that they were looking to burglarize a residence. Although Gadsden did briefly mention Applicant's desire to "pull a caper" in response to one of counsel's questions, counsel quickly moved on and did not have Gadsden explain to the jury what that meant – for the obvious reason that it would only harm his client. Indeed, calling Gadsden back in the penalty phase would have been extremely risky, as the prosecutor might then elicit on cross some of the other egregious facts from the statement, such as Applicant's providing of crack to Kandee, and Applicant's threat to pistol whip another woman who owed him money. Counsel's strategic decision to avoid as best as possible any reference to Applicant's plan to burglarize houses is certainly reasonable and sustainable under Strickland – especially when one considers, as argued above, that eliciting such testimony from Gadsden would not have precluded a kidnapping aggravator anyway. See Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance).

Finally, Applicant cannot show prejudice even if counsel could have done something to ensure a directed verdict on the kidnapping aggravator. South Carolina is a "consider" state, in that juries are not instructed to "weigh" aggravators and mitigators. Thus, the subsequent overturning on appeal of one aggravator does not affect the validity of a death sentence as long as one valid aggravator remains. See State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (S.C. 2004) (finding invalidation of armed robbery aggravator did not require reversal of death sentence where other aggravators remained, and citing (citing Zant v. Stephens, 462 U.S. 862 (1983)); State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984) (citing Zant)). The jury in this case found two aggravators: the murder was committed in the

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commission of kidnapping, and larceny with the use of a deadly weapon. Accordingly, Appellant's death sentence would not be compromised even if this Court were to find counsel ineffective in not achieving a directed verdict on the kidnapping aggravator.

C. Lack of proof in record supporting kidnapping aggravator

Applicant next makes the freestanding contention that there was no evidence in the trial record to support the kidnapping aggravator. He asserts that Gadsden never testified to anything Applicant did to inveigle or decoy Kandee Martin.

As an initial matter, this freestanding claim is procedurally improper in PCR. As noted before in the preceding subsection, counsel argued that a directed verdict should be granted on the kidnapping aggravator, but the trial court declined, accepting the solicitor's argument that the victim was lured after Applicant had formed an intention to kill. {R. 4731-32}. Any freestanding claim could have been raised at trial or on direct appeal if preserved at trial, and as such the present freestanding claim is improper for PCR. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal can not be raised in a PCR application absent a claim of ineffective assistance of counsel).

Regardless, even if this Court could "overrule" Judge Goodstein's decision on the directed verdict motion at trial, it is clear that she was correct. As argued before, Yolanda, Katrina, and Eddie all testified that Applicant threatened to kill Kandee before the day was out. {Tr. 3726; 3744; 3766}. Gadsden testified that Applicant was telling Kandee where to turn and led her to drive out to Nursery Road where she was murdered. {R. 3994-96}.

And, Gadsden testified Applicant wanted to pull a caper {R. 4035}, and stated Applicant

said he wanted to kill Kandee because she was wearing a wire {R. 3998}. From this a jury could reasonably conclude that Applicant had the preexisting intention of killing Kandee and inveigled and decoyed her by leading her out to the deserted stretch of rural road where he killed her. There is no error.

Regardless, as argued before, even if the kidnapping aggravator was unsupported reversal is still not warranted given that South Carolina is a "consider" state and not a "weighing" state, and the larceny aggravator is unaffected. See State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (S.C. 2004) (finding invalidation of armed robbery aggravator did not require reversal of death sentence where other aggravators remained, and citing (citing Zant v. Stephens, 462 U.S. 862 (1983)); State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984) (citing Zant).

It is respectfully submitted that the issue should be denied.

XI. Alleged ineffective investigation and presentation of mitigation case

Applicant next contends his counsel were ineffective in their investigation and presentation of the case in mitigation.

A. Alleged constructive absence and the presumption of prejudice

Applicant first contends his counsel constructively absented themselves from the preparation and presentation of the mitigation case, thus mandating a presumption of prejudice under the doctrine of United States v. Cronic, 466 U.S. 648 (1984).

1. Cronic is not applicable to this case.

As an initial matter, the narrowly and rarely applied Cronic doctrine, allowing a presumption of prejudice when counsel is constructively absent, is simply not applicable

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to the circumstances this case. Although already described with the conditions of confinement issue, the constructive absence form of Cronic occurs where counsel "entirely fails to subject the prosecution's case to adversarial testing".

In the only opinion where the South Carolina Supreme Court has presumed prejudice pursuant to the "constructive absence" form of Cronic, the lead counsel was hampered by alcoholism, drug intake, and health issues affecting his memory and capacity. Co-counsel was a new lawyer with no death penalty experience who had only been practicing for eighteen months. The lawyers only interviewed *one* family member in preparation, and the mental expert was not provided with *any* requested background information. The lawyer told the jury in opening argument that he did not ask for the case but had been appointed; counsel only called *three* witnesses in the guilt phase during which they elicited prejudicial information; they failed to even qualify their expert; and they called the sister at the last minute without any preparation. The defense sentencing phase case only lasted *seven* minutes, and during closing co-counsel did not plead for his client's life, but instead described him as a "sick" man who did "sick" things. Nance, 367 S.C. at 554-58, 626 S.E.2d at 881-84.

Indeed, the United States Supreme Court and the federal appellate courts have repeatedly pointed out how rare and narrow the Cronic exception to prejudice is, occurring only when there is a overwhelmingly complete breakdown of counsel in all aspects of the representation rather than mere deficiencies in trying the case. In Bell v. Cone, 543 U.S. 447 (2005), the Court reversed the Sixth Circuit Court of Appeals, which had concluded that Cronic's presumption of prejudice analysis applied because counsel did not ask for

mercy after the prosecutor's final argument. Bell, 535 U.S. at 693. The United States Supreme Court stressed that Cronic's exception is very narrow, and stated:

When we spoke in Cronic of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that *the attorney's failure must be complete*. We said "if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing."

Respondent's argument is not that his counsel failed to oppose the prosecution throughout the sentencing proceeding *as a whole*, but that his counsel failed to do so at specific points. For purposes of distinguishing between the rule of Strickland and that of Cronic, this difference is not of degree but of kind."

535 U.S. at 696-97 (emphasis added). See also Wright v. Van Patten, 128 S.Ct. 743, 746 (2008) (same). Finally, the Court in Bell held that "[t]he aspects of counsel's performance challenged by respondent – *the failure to adduce mitigating evidence* and the waiver of closing argument – are plainly of the same ilk as other specific attorney errors we have held subject to Strickland's performance and prejudice components." *Id.* at 698 (emphasis added).

In Florida v. Nixon, 543 U.S.175 (2004), the Court reversed the Florida Supreme Court and held that counsel's concession of guilt in a capital murder trial, made after consultation, did not constitute deficient performance where counsel's strategy was reasonable. The Court found that the equation of trial counsel's strategy to a guilty plea had led the Florida Supreme Court to erroneously presume deficient performance and, then, misapply the presumption of prejudice that Cronic had clearly reserved for situations in which counsel has entirely failed to function as the client's advocate. The Court emphasized that Cronic is a *very narrow* exception to Strickland's prejudice requirement. The Court found that counsel's strategy in Nixon did not "rank as a 'fail[ure]' to function in

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any meaningful sense as the Government's adversary." 543 U.S. at 189-92. See also Mickens v. Taylor, 535 U.S. at 166 (clarifying that Cronic is limited to cases where the magnitude of counsel's error is such that the verdict is almost certain to be unreliable) (citing Cronic, 466 U.S. at 659 & n. 26); Williams v. Taylor, 529 U.S. 362, 391, 396-97 (2000) (examining a claim under the Strickland standard where the petitioner's "trial lawyers failed to investigate and to present substantial mitigating evidence to the sentencing jury").

Other lower federal and state courts have also recognized that the Cronic doctrine is only to be applied in "very rare", "extraordinary", and "exceptional" circumstances, upon an "extremely high showing" of deficient performance – and inapplicable where an otherwise incompetent counsel at least provided *some* representation to the client. E.g. Young v. Catoe, 205 F.3d 750, 762-63 (4th Cir. 2000) (applied only in "rare cases" and "extraordinary" situations); Childress v. Johnson, 103 F.3d 1221, 1228 (5th Cir. 1997) (for Cronic to apply, counsel must not be merely incompetent, but inert); Scarpa v. DuBois, 38 F.3d 1 (1st Cir. 1994) (analogizing the Cronic exception to harmless error doctrine, in that a lawyer's "maladroit performance " is a trial error, where a "non-performance" is a structural error); Toomey v. Bunnell, 898 F.2d 741, 744 n. 2 (9th Cir. 1990) (applied "very sparingly").

With this review of the law in mind, It is clear Cronic simply does not apply, even if everything Dale Davis said is taken at face value. The woeful description of the representation in Nance is of course nothing like the representation that Applicant received in this case, where one of his lawyer is an extremely experienced criminal defense litigator in the state. Whether or not they made an individual mistake during the course of the

representation, counsel in this case certainly endeavored to challenge the State's case throughout the proceedings. For example, counsel engaged in an extensive suppression hearing for various pieces of evidence over the course of multiple days, which ultimately resulted in the suppression of Applicant's very incriminating and egregious fourth statement to police, in which he speaks of post-mortem sexual contact with the victim. This was a huge victory after a hearing that took over 1000 pages of transcript, and alone would preclude a finding that counsel was so completely "inert" that Cronic would apply. {R. 313-1322}.

Counsel Cummings also testified to the extensive preparation they did, including hiring and consulting with Robert Minter, an investigator; Walt Mitchell, another investigator; Donald Girndt, a crime scene expert; Jeff Hollifield, a forensic scientist; Cleon Mauer, a firearms examiner; Dale Davis, a mitigation investigator; Jeff Yungman, a forensic social worker; Dr. Harold Morgan, a psychiatrist; Dr. Brian West, a psychologist; Dr. Clay Nichols, a forensic pathologist; Ronald Ostnowski, a DNA expert; Frank Bloomingburg, a polygrapher; and Sally Hayden, a speech and reading teacher who assessed Applicant and found he could read and write just fine (despite his lies to the trial court and apparently to counsel that he could not). {PCR Tr. 1784-98}. Counsel also made scores of other pre-trial motions, including motions to reveal the deal, to exclude photographs, and to declare the death penalty unconstitutional. {R. 70-314}. Counsel conducted extensive capital voir dire, which encompasses over 2000 pages of transcript. {R. 1383-3492}. Counsel cross-examined every single one of the fifty-two state's witnesses in the guilt and sentencing phases – save only the victim's mother in the sentencing phase, and of course it is not

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unusual for capital defense attorneys to stay away from the potential and unpredictable bombshell of grieving family members testifying as to victim impact. Counsel presented a mitigation case in which he hired and called in mitigation family members, jail guards, jail education teachers, and a corrections and adaptability expert. {R. 4742-4928}. And, regardless of what Dale Davis and Jeff Yungman want to say in hindsight, counsel hired and called a forensic social worker who testified in detail during the mitigation case about the psychosocial assessment he conducted of Applicant's life. Finally, counsel gave pointed and relevant closing arguments, including an impassioned plea for a sentence of life without parole in which he argued that for Applicant it was a fate worse than death. {R. 4979-5011}.

Clearly, this is not a Nance-type situation where counsel "entirely failed to subject the prosecution's case to any meaningful adversarial testing." Essentially, the entire claim Applicant makes here is that counsel did not spend enough time talking with and giving guidance to mitigation investigator Dale Davis and social worker Jeff Yungman – although it is undisputed he did talk with them some. Given all the work counsel undisputably did, the claim that counsel did not talk to Dale Davis and Jeff Yungman enough for the tastes of Applicant's present counsel is not a *complete* failure of counsel, and is certainly a claim "of the same ilk" as other specific attorney errors the United States Supreme Court has held are "subject to Strickland's performance and prejudice components." See Cone, 535 U.S. at 698; Nixon, 543 U.S. at 189-92.

Where as here there was such an overall effort that counsel could not be said to have been completely inert, then any alleged individual mistakes are properly adjudged

through Strickland's normal process, which includes the prejudice analysis. Cronic is inapplicable and Applicant must show prejudice.

2. Counsel did not absent themselves from the mitigation preparation, whether in the context of applying Cronic or assessing deficiency.

Regardless, whether in the context of attempting to justify Cronic or simply in analysis of deficiency, it is respectfully submitted that the evidence does not justify a finding counsel completely absented themselves from preparation of the mitigation case.

Testifying social worker Jeff Yungman complained that he did not have much contact with the attorneys, and Applicant introduced a letter in which Yungman complained to counsel that trial was upcoming and he did not know the strategy. {PCR Tr. 1056-58}. However, Yungman also admitted he had worked on 26 prior death penalty cases and had been qualified as an expert in 12-15, and knew what he was looking for in a social history. {PCR Tr. 1057; 1062; 1113-15}. He explained what he was looking for in mitigation, and admitted there was not that much difference in how one handles a case where guilt was conceded as opposed to one where it was not. The point was still to use the person's life experiences to find factors that might explain their behavior. {PCR Tr. 1062-65; 1077}. He admitted Dale Davis gave him a great deal of information. {PCR Tr. 1076}. Yungman did complain, though, that he did not feel counsel properly prepared him for testimony. {PCR Tr. 1093-94}.

On cross, Yungman displayed his expertise in knowing what issues to address in conducting a mitigation analysis, and conceded there was no question he knew what he was hired to do, and indeed it was a common analysis he had done in all his prior cases.

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He agreed counsel hired him to put the social information together in a coherent form for trial, and they relied on his expertise in looking at the information to determine what was significant and relevant. He also conceded he had a lot of contact with Dale Davis during the process. {PCR Tr. 1120-25; 1142-43}. Finally, he agreed his report was submitted to the attorneys prior to trial. {PCR Tr. 1127-29; Respondent's 11}.

Of course, Dale Davis testified that Cummings was not particularly responsive to her attempts to contact him, so she began to keep a secret log of things he did she did not like to give to Applicant's attorneys in PCR. She did not tell Cummings or Hardee-Thomas she was keeping this secret log and essentially setting them up for down the road. She also conceded that she did have some contact, just not as much as she would have liked. {PCR Tr. 1227-41; 1515}. Davis also testified on direct that she was an "expert in mitigation", that when you begin gathering the social history you do not know where it will lead you, and that she was hired by the attorney "to lead the investigation and coordinate the investigation" into mitigation. {PCR Tr. 1220-21}.

On cross, Davis was led on an discussion where she talked at length and in great detail about all the various issues and the information supporting it that arise in social history mitigation. She testified as to why a case in mitigation was important, and what the defense would try to show in such a case. {PCR Tr. 1426-28}. She noted she seeks all records {PCR Tr. 1417}, and testified that she has the training and expertise to know what to look for – which is why the attorneys hire her in the first place {PCR Tr. 1426-28}. The State at PCR introduced her time log, which showed all of the work she did on the case, including interviewing 30 people, and she brought to the hearing the large amount of

records and other information she gathered in the case. {PCR Tr. 1432-35; 1440-44; Respondent's 12; Respondent's 13}. She agreed she gave all this information to Jeff Yungman. {PCR Tr. 1435}. Finally, Davis conceded she had no problem faxing memorandums and the like to counsel during the representation, and conceded under questioning by this Court that Marva Hardee-Thomas took her calls without problem and would then contact Cummings' office. {PCR Tr. 1442-43; 1494}.

Most importantly, after allowing Davis to speak at length on her knowledge of how to do a mitigation investigation and why certain information was important, she conceded she had not needed an attorney sitting next to her to provide guidance as to how to answer those questions. While she complained the information was not presented well, she admitted she knew how to gather the information herself, and she did in fact gather it and present it to Yungman and counsel. {PCR Tr. 1445-47}. She also conceded she suggested Yungman and knew he had done these cases in the past. {PCR Tr. 1445-47}.

Under questioning by this Court, Davis could not give one specific example of anything she told Cummings but he ignored {PCR Tr. 1483-84}, and conceded there was nothing wrong with the information in Yungman's report {PCR App. 1484-85}. She also admitted they discussed the mitigation case after the conclusion of the guilt phase, and while she complained Cummings did not talk to the lay witnesses beforehand, admitted she talked with them about their testimony. {PCR App. 1486-93}.

Counsel in large measure refuted the claims of Dale Davis. Marva Hardee-Thomas noted she was shocked when she got the "panic memo" from Davis. With regard to Davis's complaints she could not contact counsel, Thomas testified "she didn't know where

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that was coming from", as she never refused to return calls from Davis and felt the complaint was "out of the blue". She also testified Dale Davis was known for "turning on" attorneys in PCR. {PCR App. 1591-93; 1609-10}. Counsel Thomas also remembered talking with the sisters and the mother. {PCR App. 1614-15}.

Counsel Cummings testified that Dale Davis was the mitigation specialist the defense hired and relied upon to have have the expertise to gather the social history. He noted she suggested Yungman. {PCR App. 1789-90; 1806-07}. Cummings admitted he had some disagreements with Davis towards the end of trial, but felt she had been sabotaging his relationship with Applicant. Cummings denied ever refusing phone calls from Davis or making himself unavailable to her. Counsel denied there was ever any "panic", and stated matter of factly, "we had what we had to work with". {PCR Tr. 1807-08; 1816}. Counsel denied he ever refused to look at any information Davis sent, and never refused to discuss the case with her, and pointed out she never told him she was keeping a log of things he was doing she did not like. He pointed out everything always seemed to be a crisis with Davis. {PCR Tr. 1808-09}.

Counsel also specifically remembered meeting with Yungman and discussing his testimony. Counsel felt Yungman was properly prepped and wanted him to testify freely, as opposed to a situation where it was perceived counsel was pulling everything out of him. He felt Yungman's testimony would give reasons for why Applicant did what he did. He did not recall Yungman ever calling and saying he needed additional information. {PCR Tr. 1809-12; 1873}. Counsel also noted that he was impressed by Yungman's experience and

resume and his prior employment as a police officer, which he thought would aid Yungman's credibility. {PCR Tr. 1814-16}.

Counsel noted he did not think that some of Davis's suggested witnesses would work well with a Dorchester jury, and stated he fundamentally relied on her to gather the social history. Counsel discussed meeting with Applicant's mother and family but stated they were not particularly helpful. {PCR Tr. 1816-21; 1826}.

Finally, counsel was clear that he made a strategic decision to introduce Yungman's testimony as to what caused Applicant to commit the crime rather than hold on to some amorphous concept of residual doubt; he noted that the jury had already convicted Applicant and residual doubt was not a valid mitigator anyway, so he felt like he had to address causation head on. {PCR Tr. 1870-73}.

Thus, counsel's testimony refutes Ms. Davis's claim that they refused to contact her and refused to discuss the case with her. Indeed, Ms. Davis's credibility is suspect and her biases obvious, as are proven by her reprehensible conduct in keeping a secret log of counsel's alleged faults for use later at a PCR. Regardless, counsel is not required to personally like the expert or involve her in his ultimate strategy discussions; by all accounts counsel hired a recognized mitigation expert to gather the records and that is what Davis did, and counsel hired a recognized forensic social worker to testify as to what was in the social history and that is what Yungman did. While Yungman and Davis might have wanted more guidance, counsel was clear he met with Yungman prior to trial and discussed the testimony, and also stated as a strategic matter he wanted Yungman's testimony to flow more freely from the heart than to be robotically elicited. This was a

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reasonable decision, and counsel, Davis, and Yungman were all clear that Davis got all the information she could find, and she delivered it all to Yungman, and counsel got a copy of Yungman's final report in anticipation of testimony.

Again, lawyers are entitled to reasonably rely on their experts, and they are not required to second-guess their expert's conclusions or "expert shop". See Wilson v. Greene, 155 F.3d 396 (4th Cir. 1998); Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992). Here, counsel reasonably relied on his hired experts to do their jobs, and cannot be faulted for not micro-managing the very areas in which those experts had the expertise and for which they were hired in the first place. See, e.g. Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995) (to impose a duty on the attorney to gather background information for an expert independent of any request from that expert would defeat the whole purpose of hiring the expert, as understanding what information is needed is an integral part of the expert's skill, and requiring an attorney to review the trustworthiness of the expert's conclusions would make the expert superfluous).

Thus, counsel's testimony generally refutes any contention they were not involved in the sentencing phase, whether in the context of application of Cronic or an assessment of deficiency under Strickland.

B. Alleged failure to present evidence of Applicant's emotional value to others

Applicant can show neither deficiency nor prejudice with regard to the alleged failure to present evidence of Applicant's emotional value to others.

As his first specific allegation of evidence counsel supposedly failed to present in mitigation, Applicant contends counsel failed to present evidence of his capacity to ber of

emotional value to others. He contends this could have come from sister Kendra, wife Dorothy, and an expert in family psychology.

1. Counsel were not deficient.

As an initial matter, counsel were not deficient with regard to this issue. Four factors are most important here. First, as set forth in the discussion above, counsel hired recognized experts in the mitigation field and relied upon them to identify the important mitigation issues in counsel's life. Indeed, Davis suggested and counsel hired psychiatrist Dr. Morgan and psychologist Dr. West {PCR Tr. 1449; 1791}, but there was no evidence that they or Yungman advised counsel to present a family psychologist or lay witnesses on Applicant's capacity to be of emotional value to others. Indeed, although he tried to blame it on counsel, Yungman – the expert in the field – testified that he apparently made the decision to focus more on Applicant's difficult upbringing and negative influences, since they did not have enough good information on Applicant's parenting skills. {PCR Tr. 1093}. And, Yungman was clear he spoke with Kendra. {PCR Tr. 1163}. If the experts failed to identify an issue, it is not counsel's fault and is not actionable. See Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992) (counsel entitled to rely on experts, and the fact that the testifying expert did not identify "every possible malady or argument" is not a basis for relief).

Second is the fact that the family was generally reluctant to testify and to help counsel. This made counsel's job difficult, and counsel testified he had to beg Applicant's mother to testify on his behalf. {PCR Tr. 1801; 1819-21; 1825}. Indeed, counsel also referred to the "great reluctance of the family" at Applicant's trial. {R. 4547}. Any

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assessment of counsel's supposed failure to present one aspect or another of Applicant's relationship with his family must be assessed in the context of the circumstances in which counsel was operating – including this general reluctance of the family to be involved. See generally Collins v. Francis, 728 F.2d 1322 (11th Cir. 1984) (counsel was not ineffective for failing to investigate witnesses about whom defendant did not tell him).

Third is the fact that as a strategic matter counsel was clear that in no way would he want to present the letters Applicant wrote to Dorothy after his arrest. While those letters did start with some pleasantries to Dorothy, they also go on and try to get her to lie to police, to cover up evidence, to get others to lie, and to refuse to cooperate with authorities. **{Applicant's 56}**. Counsel was clear he did not want this egregious information coming before the jury, showing Applicant's attempts to suborn perjury or commit obstruction of justice. **{PCR Tr. 1838-41; 1950}**. This strategic decision is certainly reasonable and unassailable.

Fourth is the fact that counsel did present lay testimony from Applicant's family, including evidence from Kendra that he used to cook for the family and play with his mother's godson, Dominique. **{R. 4743}**. Applicant's mother testified at trial as to how he would cut grass to help the family, and that he was always willing to help out. **{R. 4753}**. Applicant's mother also noted Applicant had a daughter during her appeal for mercy. **{R. 4760}**. Counsel also elicited from Yungman that Applicant was helpful to his family and was good to his stepchildren and to Kendra's child. **{R. 4806}**. This, of course, was all Yungman identified for counsel in his report. **{Respondent's 11 p. 8}**.

When these four factors are considered, it is clear counsel was not deficient. Counsel relied upon their experts to identify and advise him of the relevant issues. There is no mention in Yungman's report of "capacity for emotional value to others", and there was no testimony at PCR that Dr. West offered to testify as Dr. Kissiah did at PCR, but counsel just failed to call him. There is no testimony any of the experts suggested calling a witness like Dr. Kissiah, but counsel ignored it. Moreover, despite a difficult family, counsel did elicit information as to Applicant's value to his family and his young daughter. Counsel was not deficient. See Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006) (Trial counsel did not render deficient performance by failing to fully investigate defendant's medical, mental, social, and familial history for purposes of penalty phase of capital murder trial, as element of ineffective assistance claim; counsel interviewed a number of witnesses about defendant's childhood and life, counsel hired a private investigator to go and gather background information on defendant, counsel called several witnesses, including three experts, to offer mitigating evidence, and counsel testified that information gathered about defendant's background was available to the experts). See also, e.g. Tucker v. Ozmint, 350 F.3d 433 (4th Cir. 2003) (where defendant claimed that counsel failed to submit early reports of sexual abuse to the trial expert, the case was unlike Wiggins in that there was no deficiency, as counsel presented a substantial mitigation case including lay witnesses and expert testimony on abuse and ASPD issues); Byram v. Ozmint, 339 F.3d 203 (4th Cir. 2003) (where counsel hired a psychologist, psychiatrist, social worker, and investigator for mitigation, and prepared extensively, investigation was reasonable despite claim counsel failed to present evidence of background, fetal alcohol syndrome, and brain damage; moreover, case was different from Wiggins on the prejudice prong in that here the jury did

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

2. There was no prejudice.

In any event, Applicant has not shown prejudice under Strickland. In Jones v. State, 332 S.C. 329, 504 S.E.2d.822 (1998), the South Carolina Supreme Court restated the "prejudice" prong in a capital sentencing proceeding as being established when "there is a reasonable probability that, absent [counsel's] errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death," citing Strickland. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Jones, 504 S.E.2d at 823-824. Accord, Plath v. Moore, 130

F.3d 595 (4th Cir. 1997) ("given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and hence, the sentence imposed." Thus, in weighing the omitted evidence against that actually used to convict and sentence Plath, the mitigating evidence seems insufficient to shift the balance in Plath's favor.").

Moreover, for claims counsel failed to investigate and present evidence, an applicant must *actually present* in PCR the evidence he claims was missed, in order for the reviewing court to accurately assess whether counsel was deficient for failing to present it, and whether its absence was prejudicial in that it creates a reasonable probability of a different result. It is not enough simply to offer criticisms of counsel's performance or to point to problems as to how counsel investigated and presented the case – the applicant must actually present into evidence the "case that should have been". See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) (state's failure to object to hearsay testimony as to what another witness's testimony might have been does not relieve applicant of burden of producing admissible testimony, in accordance with the rules of evidence, of that which counsel supposedly failed to present). See also Beaver v. Thompson, 93 F.3d 1186, 1995 (4th Cir. 1996) (rejecting claim that counsel was ineffective for failing to present mitigation evidence family members, where there was no proffer of this testimony); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990) (petitioner's allegation that attorney did ineffective investigation does not support relief absent proffer of the supposed witness's favorable testimony); Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3rd Cir. 1991) (applicant cannot show deficiency "based on vague and conclusory allegations that some unspecified

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and speculative testimony might have established his defense"; rather, facts must be presented).

Applicant has wholly failed to show prejudice under these standards. First is the point that it is inappropriate for Applicant to rely on Applicant's 53, the Kendra affidavit, because it was never admitted into evidence. Dr. Kissiah testified he did not rely on the affidavit, and ultimately it was not admitted with Applicant's present counsel stating he would call Kendra to testify, which never happened. {PCR Tr. 1090; 1188; 1506}. Since Applicant did not present the Kendra information in an admissible fashion, it cannot be considered in a prejudice analysis. See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

Second is the fact that even if the Kendra affidavit and Dr. Kissiah's testimony are considered, it is not the type of testimony that would call the entire sentencing phase into question and create a reasonable probability that the sentencer would re-assess the aggravating and mitigating factors. In cases where such prejudice has been found, the omitted information was stark and extensive. In Williams v. Taylor, 529 U.S. 362 (2000), trial counsel only presented a "scant" mitigation case, which included introduction of a short written report from a psychiatrist. Counsel there ignored a wealth of information regarding the defendant's "nightmarish" background, including the fact that his parents were jailed for neglect, records showed an extremely unkept house, the defendant was beaten by his father and foster parents, the defendant was borderline retarded, and he had favorable prison records from previous commitments. 529 U.S. at 395-96. The Court concluded that the graphic mitigation case regarding the defendant's background, when combined

with the defendant's adaptability to prison and the trial presentation of his remorse, might well have affected the jury's verdict sufficient for a finding of prejudice. 529 U.S. at 397-98.

In Wiggins v. Smith, 123 S.Ct. 2527 (2003), trial counsel failed at all to have a social history performed prior to trial. While counsel did have some psychological reports demonstrating limited intellect and some adaptable traits, he did not have anything regarding the defendant's background save rudimentary information. The PCR evidence was the defendant's mother was an alcoholic, he was often left alone with no food, he was exposed to sexual activity by his mother, and he was physically and sexually abused in his mother's and foster care. 123 S.Ct. at 2532-33, 2536. The Court stated that "in assessing the reasonableness of an attorney's presentation, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further". It found counsel there was deficient for obtaining only the most superficial knowledge about the background before stopping his investigation, and concluded the reports should have alerted that further exploration was necessary. 123 S.Ct. at 2536-39. Finally, it found prejudice, ruling that "this entirely unrepresented class of evidence about the defendant's background might have swayed the jury's assessment of his culpability". 123 S.Ct. at 2542-44.

In Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004), the trial psychiatrist testified at PCR that had he been provided with available medical and psychiatric records, he could have made a much more severe diagnosis. The trial social worker testified that she had an only rudimentary meeting about the defendant's history with the trial psychiatrist prior to the start of the case. Another psychiatrist who had extensively examined Petitioner found, by incorporating his family history, are far more serious

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depressive condition than mere adjustment reaction disorder – to the point that his altered mental state made the murder *non-volitional*. 360 S.C. 598, 602 S.E.2d 738. There, the state supreme court found that the attorneys' failure to present crucial medical records and related information available at the time of trial prevented accurate diagnosis of the defendant. Id.

Other cases also have reversed where stark, compelling, and extensive evidence was entirely ignored. Rosemond v. Catoe, --- S.E.2d ---, 2009 WL 1851377 (S.C. June 29, 2009) (counsel ineffective where they did not present evidence of schizophrenia based on mistaken belief that finding of competence precluded it; inmate was prejudiced as his counsel only presented limited information from pastor and family and one expert, and no evidence was presented of his "troubling mental health issues"); Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008) (counsel ineffective where he only presented limited testimony in mitigation from defendant's mother; for example, counsel failed to hire a social history investigator and relied on investigator with no social work training, started the investigation late in the process, provided only limited records to the expert and only met with him a month before trial, failed to get family history records, and would have been put on notice by the records he did have that "powerful mitigating evidence" was available).

Such is not the circumstance here with the relatively tame and limited information from Kendra's affidavit and Dr. Kissiah's testimony. Counsel did elicit some testimony as to Applicant's involvement with Dominique, as well as the fact that Applicant had a young daughter and was always willing to help out the family. It cannot be said that a little more information on this subject – particularly from a cold affidavit – would create a reasonable

probability of a different result given the other information presented and the extremely egregious and cold-hearted manner in which this crime was committed.

As to Dr. Kissiah, again, not only was some information presented on the subject, but an assessment of prejudice would also have to include the damaging information that would have been elicited by focusing on Applicant's post-arrest letters to his wife. The State extensively cross-examined Dr. Kissiah on the fact that the expressions of love in the letters appeared to be nothing but manipulative in an attempt to get Dorothy to help obstruct justice and lie to police to cover up Applicant's crime – as the discussion in those letters quickly moved to that subject. {Applicant's 56}. Aside from the fact that the letters would also bring before the jury the attempts to obstruct justice and encourage perjury, a jury likely would find any expressions of love to be purely manipulative. Additionally, the letter refers to Applicant's claim he was not unfaithful to Dorothy, and did not have other girls "suck his dick", but the evidence of course shows Applicant's DNA was found in Kandee. This lie would be far more aggravating than any mitigating inference in the letters. Applicant also asks Dorothy for money, which shows an ulterior motive. Given the cross-examination done by the State at PCR, which would have been done at trial, Dr. Kissiah and the letters would likely have done more to condemn Applicant than aid him. Indeed, a "fancier mitigation case" is simply not enough, and Dr. Kissiah's testimony was hardly even fancier. See Jones v. State, 332 S.C. 329, 504 S.E.2d.822 (1998). It certainly cannot be said this testimony alone would have cause the jury to reassess the evidence in aggravation and mitigation.

Applicant simply has not shown prejudice. See Byram v. Ozmint, 339 F.3d 203 (4th Cir. 2003) (where counsel hired a psychologist, psychiatrist, social worker, and investigator

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for mitigation, and prepared extensively, investigation was reasonable despite claim counsel failed to present evidence of background, fetal alcohol syndrome, and brain damage; moreover, case was different from Wiggins on the prejudice prong in that here the jury did hear testimony about the background, and this was not a case where the jury was "completely in the dark as to the defendant's alleged mental problems).

C. Failure to present evidence of work record

Applicant next contends his counsel was ineffective for failing to present evidence of Applicant's work record.

1. There was no deficiency.

As an initial matter, counsel was not deficient. Again, counsel hired a qualified mitigation specialist to get all the records, and indeed counsel stated he specifically relied on Davis to do her job and get relevant work records. {PCR Tr. 1870}. Counsel also hired a qualified forensic social worker to review the records and social history and identify issues of consequence for testimony, and Yungman provided to counsel a final report detailing his findings. {PCR Tr. 1127-29; Respondent's 11}. That report only mentions that Applicant was able to maintain employment, and that fact was elicited during Yungman's testimony at trial. {R. 4806}.

Dale Davis testified she had some employment records {PCR Tr. 1478-81}, and Yungman testified he was aware of some of Applicant's employment history from what Applicant told him. However, Applicant did not tell Yungman that he worked at the Naval Weapons Station while he was discharging his responsibilities at the restitution center

following his prior incarceration. Yungman was not aware that Applicant supposedly worked at Hood Construction. {PCR Tr. 1082-85}.

Regardless, if the mitigation specialist failed to get the records, or if the testifying social worker decided not to put emphasis on them in his expert analysis of Applicant's social history, that is the fault of the expert, not counsel, and is not actionable. See Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992) (counsel entitled to rely on experts, and the fact that the testifying expert did not identify "every possible malady or argument" is not a basis for relief). Counsel elicited what the expert found in this case. Again, counsel is not required to second guess his expert's report or have a greater understanding of the expert field than the expert does. See, e.g. Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995) (to impose a duty on the attorney to gather background information for an expert independent of any request from that expert would defeat the whole purpose of hiring the expert, as understanding what information is needed is an integral part of the expert's skill, and requiring an attorney to review the trustworthiness of the expert's conclusions would make the expert superfluous). Moreover, if Applicant failed to disclose his entire work history to Yungman, that is not a basis for a later action of ineffective assistance. See Collins v. Francis, 728 F.2d 1322 (11th Cir. 1984) (counsel was not ineffective for failing to investigate witnesses about whom defendant did not tell him); Primeaux v. Leapley, 502 N.W.2d 265, 268 (S.D. 1993) ("Where [defendant] did not give information to counsel, counsel could neither investigate it or pass it on to the expert.").

Counsel was not deficient.

2. There was no prejudice.

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Regardless, Applicant cannot show prejudice. The only evidence of work history actually admitted was Applicant's 76, which was a one-page employment application to Moody's Mechanical. Again, consideration of anything else not properly admitted is improper in a prejudice analysis, Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998), and clearly this one page application would not create a reasonable probability the sentencer would re-weigh the aggravators and mitigators and conclude a sentence of death was not warranted.

However, even if Applicant's 55 and 76 are considered, along with an "inference" that Applicant completed his restitution obligations, it still could not be said "there is a reasonable probability that, absent [counsel's] errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." See Jones v. State, 332 S.C. 329, 504 S.E.2d.822 (1998). Supporting the unchallenged statement elicited at trial that Applicant maintained a good employment history with an application or pay stubs is precisely the "fancier" kind of mitigation case that Jones has held is insufficient for relief. Indeed, documentary evidence of Applicant's employment record in and of itself is simply not akin to the kind of stark, extensive, and moving evidence of mental illness or a nightmarish background, the absence of which was found to be prejudicial in Wiggins, Williams, and Von Dohlen.

Applicant has not shown prejudice.

D. Failure to challenge evidence of Kandee's good character

Applicant next contends his counsel was ineffective for failing to challenge and rebut the State's victim impact evidence as to Kandee Martin and the effect of her death on her family.

Of course, the State called the victim's mother, who described her "wonderful" relationship with her daughter, and Kandee's relationship with her son. She noted that the effect of Kandee's death had been traumatic for the young boy, and has torn apart the relationship between her and her husband. {R. 4692-4702}. Kandee's father testified similarly. {R. 4703-07}. Counsel asked Kandee's father if Kandee had another child, but he stated no, and refused to say who the father was on Kandee's child. {R. 4707-08}.

Applicant now contends counsel should have elicited that Kandee was a crack addict and a prostitute. However, counsel was clear that as a strategic matter he saw nothing to be gained from eliciting before the jury that the victim was a crack addict, noting that from his prior experience in the Joseph Gardner trial "it didn't sit well with the jury" to elicit that the victim might have been selling her body for drugs. Counsel stated he thought that would "hurt [Applicant] more", and distinguished testimony from Yungman in the sentencing phase as to Applicant's own crack use, by noting they were trying to show he had been "kicked to the curb at a young age and he would do what he had to do to survive". {PCR Tr. 1631-37; 1821-25}. Counsel stated he heard she had another child, but despite investigation could not get any proof of it. {PCR Tr. 1637-41}. Counsel was also clear that a landmine he wanted to avoid (and indeed was able to avoid) was any inference that Applicant killed Kandee because she owed him money for drugs or was going to rat him out to police. {PCR Tr. 1642-43}.

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Thus, counsel set forth a reasonable strategic basis for avoiding any testimony Kande was a crack addict or a prostitute, as he saw nothing to be gained from that but felt it could potentially prejudice the jury against him and his client to attack the victim. His decision in this regard was in part guided from a negative experience in a prior case. This decision is reasonable and precludes a finding of deficiency. See generally Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

Regardless, Applicant cannot show prejudice. For the defense to call the victim a crack addict or prostitute would raise a significant possibility of offending the jury, but the fact that she was a crack addict would do little to rebut the fact that she loved her parents and son and they loved her. For whatever crack use might say about her parenting skills, the testimony was that she loved to play with her son and they had a special bond, and nothing about being a crack addict or a prostitute rebuts that. It simply cannot be said that this attack on the victim would create a reasonable probability of a different result in the whole sentencing phase.

E. Failure to object to instruction on allocution

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

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

At PCR, counsel testified that he repeatedly "begged [Applicant] to beg for his life" before the jury. Counsel noted that Judge Goodstein extensively went over Applicant's right to testify but Petitioner refused. Counsel stated he told Applicant that during allocution he could "stand in front of the jury and talk", and "beg for [his] life in simple plain words". Counsel stated he did not hear Judge Goodstein say anything to Petitioner that violated the law. {PCR Tr. 1735-38}. Later, counsel reviewed the passages and flatly stated he saw nothing objectionable in Judge Goodstein's comments, pointing out that she specifically advised Petitioner he could talk freely about penalty. Counsel also stated he talked with Applicant about the fact that he could ask the jury for mercy, and denied that Applicant ever said to him that he was going to give argument or allocution until Judge Goodstein told him he could not argue facts outside the record. Counsel also stated that there was *never* a point, during the guilt phase or the sentencing phase, that Applicant expressed a desire to testify or address the jury, despite counsel's attempts to get him to speak in sentencing phase argument. {PCR Tr. 1887-90}.

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Respondents deny that counsel were deficient or Applicant prejudiced, because there was no valid basis for objection to the trial court's instructions. Like any lawyer, a defendant would be limited in argument to arguing only within the evidence presented and its reasonable inferences – South Carolina Supreme Court decisions are clear that the closing argument right is NOT an unfettered opportunity for the defendant to give unsworn testimony to the jury, free of cross-examination from the State. See State v. Davis, 306 S.C. 246, 411 S.E.2d 220 (S.C. 1991) ("Although, of course, the trial judge may prohibit a defendant from offering unsworn testimony in his statement to the jury, a defendant may present argument regarding facts that are in evidence to direct the jury's attention to the circumstances of the crime or the defendant's own characteristics since these are proper sentencing considerations."). See also State v. Moore, 357 S.C. 458, 593 S.E.2d 608 (2004) (in description of the facts, quoting the trial court's admonition to a capital defendant during argument that he could not testify or go beyond comment on the evidence admitted at trial, and concluding that a defendant in the guilt phase could not stress something irrelevant like the fact that his life was at stake).

Here, the trial court properly limited Applicant from giving unsworn testimony, but allowed him to discuss the proper penalty "freely". Since the instructions were correct, counsel could not have been deficient nor Applicant prejudiced. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial).

Applicant also has not shown prejudice under Strickland. Even if the instructions were improper, Applicant put forth no proof that absent those instructions he would have given closing argument in the sentencing phase. Indeed, the evidence goes the other way, as counsel was adamant that despite their pleas Applicant never expressed any interest whatsoever in addressing the jury in any fashion – whether by testifying or giving argument. Specifically counsel, testified that Applicant never stated that he wanted to give argument but decided he would not because the judge told him he would not be able to offer unsworn testimony to the jury. {PCR Tr. 1887-90}. Applicant has not established that but for counsel's alleged deficiency in failing to object to the instruction, he would have given closing argument.

And that does not end the analysis, as Applicant did not testify in PCR as to what he would have said had he given closing argument in the sentencing phase. Without his testimony as to what he would have said, this Court cannot judge whether the failure to give argument would create a reasonable probability of a different result in sentencing. See, e.g. Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001) (finding no prejudice from the failure to advise the capital defendant about his right to personally argue to the jury, "because the evidence of guilt was overwhelming and because the jury had already heard him arguing for his innocence when [he] testified"); Cooper v. Moore, 351 S.C. 207, 569 S.E.2d 330 (2002) (finding prejudice from the failure to advise of argument right, where the evidence was not overwhelming, no testimony or exculpatory version was presented in any respect from the defendant, and "Respondent wanted to tell the jury he was not guilty of the charged crimes and to show them he was not a 'crazy person'").

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Applicant has not met his burden of showing a reasonable probability of a different result from the limitation on argument, and thus the claim should be denied.

F. Failure to present evidence of intoxication

Applicant next contends his counsel was ineffective for failing to elicit evidence Applicant was intoxicated at the time he committed the crime.

On direct appeal, Applicant contended that he should have received instructions on statutory mitigators in S.C. Code Ann. § 16-3-20(C)(b)(2), (6) & (7) (Supp. 2000), due to his voluntary intoxication. The state supreme court held that while there was ample evidence Applicant had been drinking that day and in the past, there was no evidence he was actually intoxicated at the time of the crime. Accordingly, the court found no error in failing to charge the mitigators. State v. Bowman, 623 S.E.2d 378 (S.C. 2005).

At PCR, James Gadsden testified that Applicant drank every day and had been drinking four or five hours that day. He said Bowman was tipsy. {PCR Tr. 149-56}. On cross, though, he defined "tipsy" as the lowest level, where one is NOT staggering, or slurring, or displaying any of the effects of alcohol. He stated Applicant was not a "stone cold drunk". {PCR Tr. 190-94}.

Counsel, though, was clear that he saw no value in eliciting in the guilt phase that Applicant was drunk, as it would do him no good and potentially prejudice his client before the jury. While counsel elicited evidence from Yungman during the social history that Applicant had alcohol abuse, it was because he "had to try it at the end [the sentencing phase]". Counsel testified as a strategic matter he would never have called Gadsden back during the sentencing phase to elicit whether Applicant was drunk when he killed Kandee,

because of the risk of what else Gadsden might say, including reiterating how Applicant killed Kandee. Counsel was adamant he never would call a co-defendant to the stand for that purpose. {PCR Tr. 1757-59}.

On cross, counsel added an additional reason – he also noted that he was avoiding any testimony that might raise a mental health mitigator and possibly open the door to the solicitor's use of the William S. Hall report, in which Applicant also mentioned post-mortem sexual contact with Kandee. He noted he had successfully prevented that information from coming before the jury with the suppression motion, and wanted to be careful not to open the door another way and allow it to come in by way of the Hall report. Since his psychiatric expert had offered him nothing of value, counsel did not want to open the door with something of little use like voluntary intoxication. {PCR Tr. 1827-38}. Indeed, the counsel at trial halfheartedly requested a charge on mitigator (2) – mental or emotional disturbance – but he virtually conceded that the record was devoid of any evidence to support such a charge. Again, this was because the defense as a tactical matter did not want to raise mental health issues as they would "place [Appellant] in greater jeopardy" based on "certain issues that were part of the preliminary matters" – referring to the fact that the State could point out Appellant's statement to the Hall Institute during his evaluation that Kandee's vagina was fondled after her death. {R. 350-51; 960-64; 1107; 1244}

It is clear counsel was not deficient. Counsel strategically saw no value in eliciting that Applicant was drunk during the guilt phase, as voluntary intoxication is not a legal defense and it would potentially be prejudicial to his client. However, while he felt he

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needed to try anything in the sentencing phase, including eliciting the full social history that showed Applicant's alcohol abuse from an early age, he never would have under any circumstances called Gadsden back to testify Applicant was drunk when he killed Kandee – for fear of what other damaging information Gadsden might offer or reiterate. These decisions were reasonable. See generally Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

Regardless, Applicant cannot show prejudice. Calling Gadsden to say Applicant was merely tipsy and not showing any outward effects of alcohol would have little if any mitigating value, and certainly cannot be said to create “a reasonable probability that, absent [counsel's] errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” See Jones v. State, 332 S.C. 329, 504 S.E.2d.822 (1998). This relatively tame evidence of drinking is in no way akin to the stark, extensive, and moving evidence of mental illness or a nightmarish background, the complete absence of which was found to be prejudicial in Wiggins, Williams, and Von Dohlen.

Further, any freestanding due process claim could have been raised at trial or on direct appeal if preserved at trial, and as such the present freestanding claim is improper for PCR. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have

been raised at trial or on direct appeal can not be raised in a PCR application absent a claim of ineffective assistance of counsel).

XII. Failure to request mitigating instructions on voluntary intoxication

Based on the previous allegation with regard to the failure to call James Gadsden back during the sentencing phase to testify that Applicant was tipsy when he killed Kande, Applicant finally contends his counsel were ineffective for failing to request either the specific mitigators in S.C. Code Ann. § 16-3-20(C)(b)(2), (6) & (7) (Supp. 2000), or a specific non-statutory mitigator specifically related to voluntary intoxication.

Applicant is correct that evidence of intoxication at the time the crime was committed entitles one to *either* the three statutory mitigators, or a specific instruction as to intoxication. See State v. Plemmons, 296 S.C. 76, 370 S.E.2d 871 (S.C. 1988). And, the state supreme court held in this case that the mitigators are not required unless there is actual evidence the defendant was intoxicated at the time the crime was committed. State v. Bowman, 623 S.E.2d 378 (S.C. 2005).

The basis for rejecting this claim has been previously discussed in the preceding subsection and is incorporated here. Counsel strategically would not have called Gadsden back for such a purpose for the risk of what else he might say, and counsel was also concerned about opening any door to the State's use of the Hall report with its damaging information. See Buchanan v. Kentucky, 483 U.S. 402 (1987) (the Court specifically noted that if a defendant "requests an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested").

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Moreover, some evidence that Applicant was "tipsy" is simply not the kind of evidence that would create a reasonable probability of a different result, particularly if it had opened the door to the Hall report.

Further, any freestanding due process claim could have been raised at trial or on direct appeal if preserved at trial, and as such the present freestanding claim is improper for PCR. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal can not be raised in a PCR application absent a claim of ineffective assistance of counsel).

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CONCLUSION

For the foregoing reasons and the reasons argued at the evidentiary hearing, it is respectfully submitted that the application should be denied.

Respectfully submitted,

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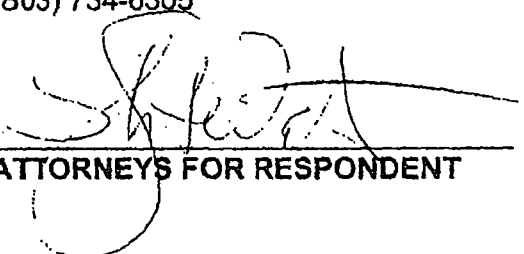
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August 10, 2008

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	
	)	
Marion Bowman, Jr., #6006	)	C/A No. 2006-CP-18-569
	)	
Applicant,	)	
v.	)	CERTIFICATE OF SERVICE
	)	
The State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

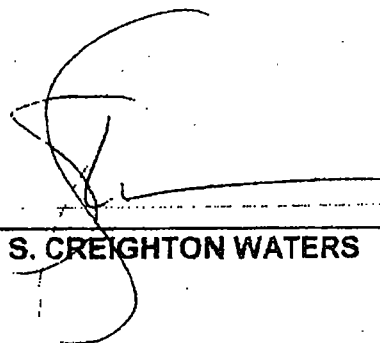
I, S. Creighton Waters, counsel for the Respondent, certify that I have served the following documents: ***Respondent's Post-Trial Brief*** by depositing one copy of the same in the United States mail, first-class postage prepaid, and addressed as follows on the following:

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And

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This 10th day of August, 2009.



S. CREIGHTON WATERS

JA 3237

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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.)

APPLICANT'S REPLY TO
RESPONDENT'S BRIEF IN
OPPOSITION

STATE OF SOUTH CAROLINA)

Respondent.)

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Introduction

To begin, this reply only purports to respond to issues raised in Respondent's Brief in Opposition to the Application for Post-Conviction relief. As referenced in the Applicant's Brief and Amended Brief, the actual Fourth Amended Application as supported by the evidence submitted in the form of various trial and PCR exhibits and the trial and PCR testimony is the most inclusive statement of the claims made by Marion Bowman. However, counsel does suggest that the state's reply on more than one occasion suggest deficient performance by either trial counsel or appellate counsel in response to claims otherwise couched by applicant's current counsel.

Further, a number of corrections still need to be included despite the submission of the Applicant's Amended Brief. To begin, on page 23, line 7 of the Amended brief, the sentence should indicate that Plaintiff's 42 is the videotape of Felder's purchase of gasoline. Further, on page 26, the sentence beginning on the 13th line should indicate the falsehood was not revealed to the defense by the state. Finally, on page 39 at line 5, the brief should refer to Johnson's testimony.

Finally, even though not mentioned at all in the State's Brief in Opposition, the errors reviewed in a post-conviction claim are correctly assessed for not only individual impact but also for the cumulative nature of the prejudice. Therefore, the State's repeated isolation of the analysis of the issues raised while continuing to cite "overwhelming evidence" is a red herring to the true impact of the infirmities in the proceedings at the trial level.

The issues in Reply will be discussed topically in response to the Brief in Opposition

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Tawain Gadson

Mental Health Report-Brady

Contrary to the State's assertion, it is not public knowledge that a mental health report regarding Gadson was ever issued. In fact, Gadson denied that he ever had a mental health hearing related to his criminal case. The only public knowledge was that the evaluation was ordered.

Further, there was no public knowledge the report contained impeachment material. In fact the contents were only available to Gadson's counsel and solicitor. Further, a subpoena would not necessarily have produced a report because of privacy concerns. In fact, the State asserted the same during the merits hearing in defense to the Brady claim. It is interesting that now the State understands the weakness of the privacy claim in relation to the Brady obligation that it desires to declare this report and its contents were somehow public.

To the merits of the value of the report, Gadson did suffer verbal memory impairment. Further, he also heard a voice and a beeping noise. The ultimate arbiter of the impact of this impairment's effect on Gadson's recall of events is the jury who was deprived of this information by the State.

Also, Gadson testified at the merits hearing he smoked marijuana everyday. Gadson also testified that he only assumed he suffered a blackout or seizure after he awoke, not that he was "aware" of any seizures or blackouts while occurring.

Plea Deal-IAC¹

Regarding Gadson's plea deal, he clearly was threatened with death penalty as the

¹IAC refers to the claims of ineffective assistance of counsel.

prosecutor claimed that he was guilty of capital murder under a hand of one hand of all theory and the written plea agreement specifically waived all objections to the imposition of a death sentence by the state. Further, Gadson testified in his deposition that he feared death regarding this charge and this is reflected in the pro se motions he filed seeking a second attorney.

And there was not overwhelming evidence apart from Gadson's testimony. The other main evidence included a threat and the recently fabricated statements of Hiram Johnson and Felder concerning Bowman's alleged confessions which were not subject to proper challenge. The gun match to the casings are not conclusive or even scientific. The DNA evidence offered no probative evidence of the identity of the killer, but instead constituted improper character evidence.

20 Year Sentence-IAC

At trial, the jury only heard Gadson's expected sentence of 20 years followed by cross exam that the sentences were broken down to sentences of 15 and 5 years on two separate charges. The jury never learned that he was eligible for parole at 1/4 of the sentence down from the exposure to the death penalty. (In fact, inexplicably, Gadson served about 4 years total-less than he was even eligible for given his parole eligibility).

Failure to Introduce evidence Gadson was the Shooter-IAC

Prior inconsistent statements on the very issue at heart in a trial are admissible in evidence. As the state concedes, at a minimum the information contained in the affidavits establish "probable cause to believe that Gadson may have been the shooter." The jury could have weighed this information to decide this ultimate issue in the guilt phase or the penalty phase.

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There is no valid strategy reason to introduce the information contained in the warrants (not the actual warrants or indictments themselves).

Ricky Davis-IAC

Applicant's trial team was ineffective for not presenting the testimony about Gadson's confession to Davis as the defense team clearly misconstrued the idea that Bowman supplied the substance of the Ricky Davis memo from the truth that Bowman merely encouraged Davis to write down the substance of the confession, as corroborated by the Sam memo.

Gadson's access to the alleged murder weapon-IAC

Given the State's theory, this evidence would have provided corroboration for the defense theory that Gadson was the shooter and offered an explanation to the SLED agent's testimony about the casings matching the gun.

Gadson owned a High Point .380-IAC

The most important piece of information unsolicited about Gadson High Point .380 was that Gadson lied to the police about owning this weapon. Instead he falsely told them that he owned a 9 MM. The jury never heard about this lie. Also, the jury was never informed that the gun was an identical make and model as that attributed to Bowman. Instead they heard it was a "high powered" .380 not a "High Point."

Further, the shell casings exhibited class characteristics which matched "High Point" .380 weapons like that owned by Gadson.

Travis Felder

Gas Purchase-Napue

The state concedes that any correction of this testimony occurred during the sentencing phase, days after the jury rendered a conviction to the murder and arson charges. Further, the state concedes that the State knew that "Felder had purchased a small amount of gasoline around 3:14 on the morning of the arson." State's Brief in Opposition, page 41. No "correction" ever occurred by the State, as due process requires.

Felder continued to lie in the sentencing phase when he testified that he thought he was "parking a car." It is not credible that Felder believed there was going to be "parking" of the car given Bowman's alleged earlier threat ("You didn't believe I would do it") or the circumstances of Bowman's possession of a white woman's car at 3:00 in the morning after the same threat.

Notwithstanding Solicitor Bailey's assertion that he did not know Felder purchased the gas, he should have known so and a reasonably competent adversary, such as Bailey, would have given the circumstances. Not only did Felder indicate at a deposition that he told Bailey about his gas purchase, but lead detective Coker testified without hesitation or qualification that he knew Felder bought the gas and that he told Bailey all of this information. PCR, 671 & 899-905.

Contrary to the assertion about a lack of materiality, the evidence about Felder's lie (as characterized by Solicitor Bailey at the PCR hearing) is that Felder is the only witness to Bowman's involvement in the arson, just as Gadson is the only witness to any involvement in the death. The jury would certainly have found any information impeaching these witnesses to be material to their judgement of the credibility of the state's evidence.

Finally, it would be an absurd result for the prosecution to jointly try murder and arson

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charges, joined under a *res gestae* theory, bolstered by the knowing presentation of false testimony but that any partial outcome of this trial would be considered reliable in the face of such a due process violation.

Meetings with "Anybody Representing the State"-Napue

Felder never told the jury the correct number of times he met with anybody representing the state. Even assuming the State's qualification is correct and the question at trial only referenced the number of meetings to discuss the impending trial testimony, Felder lied and the prosecutor failed to correct this falsehood. Felder met at least 3 times, not 2, with representatives of the state to discuss his trial testimony.

The last two of these meetings are detailed to the jury. One is the day of his testimony, May 19, 2001. The preceding meeting occurs "a couple of weeks" before the testimony in Felder's attorney's office.

However, there is clearly a meeting which occurs on April 17, 2001 between Felder and a representative of the state to discuss his trial testimony. Specifically, Felder meets with Detective Van Doran and is administered a polygraph reviewing the assertions detailed in a proffer letter from Felder's attorney to Solicitor Bailey. The proffer letter, Applicant's 64, is dated March 27, 2001 and the polygraph occurs on April 17, 2001.

This meeting is clearly related to this testimony as prosecutor Bailey confirms in his PCR testimony. At the PCR, Bailey indicates this polygraph was scheduled to alleviate his concerns about the truthfulness of the proffered testimony. Significantly, Felder admitted to lying at this meeting on April 17, 2001. This meeting did not occur either in Felder's attorney's office or "a couple of weeks" before the trial.

Thus, Felder lied about his number of meetings with "anybody representing the state" even if this is limited to discussions about trial testimony. The State knew this was a lie.

To conclude, this lie about these meetings is eerily similar to that condemned by the Court in Riddle v. Ozmint. 631 SE2d 70 (SC 2006). There, the state hid information about prior statements in which a state's witness provided inconsistencies to the government. That conviction and death sentence was reversed.

Felder as Gas Purchaser-Brady

Notwithstanding Solicitor Bailey's PCR assertions, Detective Coker knew that Felder purchased the gas. There is a post-it note affixed to Felder's booking report in Coker's file written in Coker's handwriting, denoting the time Felder purchased the gas from the EZ Horizon store. Felder confirms this is the gas purchased to burn Kandee's body and car.

Felder met at least three times to discuss his trial testimony. He told the state he bought chips and dip. He bought the gas minutes later, clearly wearing the same clothing at the same store. The store clerk even confirms this by noting that Felder returned so soon after the purchase of the chips and dip. In fact, there were few, if any, intervening customers.

Finally, the impeachment about Felder's lie about the arson also undercuts his testimony about Bowman's alleged confession about killing Kandee. The State repeatedly in the Brief in Opposition cites this as part of the "overwhelming evidence" of Bowman's guilt on the murder count. Thus, the prejudice from this due process violation spills over to invalidate both convictions.

Felder Proffer-Brady

The proffer letter from Felder's attorney clearly possesses impeachment value regarding

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the State's case. The State presents Felder as a truthful witness. However, Felder lied multiple times in an effort to minimize his involvement and liability for Kandee's death and the burning of her car.

This is confirmed by Solicitor Bailey. In fact, the polygraph results are only correctly placed in context with the proposed testimony contained in the proffer letter. Bailey used the polygraph to attempt to validate this information.

Trial counsel never had the proffer letter, but only the polygraph results. Thus, the State hid the entire context in which Felder lied to curry favor. Bailey confirms he never disclosed Felder's pattern of falsely minimizing his involvement in efforts to strike a deal with the State.

Finally, the letter is likely admissible as a statement of a party opponent, pursuant to Rule 801 (d)(2)(A), (C), or (D). Felder was clearly a party to this litigation who could have been tried jointly with Bowman had the state so chosen and he was clearly an opponent of Bowman.

Wink Wink Deal-Brady

Establishing the existence of a wink-wink deal is like establishing mens rea in a criminal case; there is rarely any direct proof but one knows it when he sees it. Here, it is incredible to believe that Felder actually received the full benefit of his written plea deal, with the State's blessing, when he admittedly committed perjury at the trial and lied various times pre-trial. Thus, the circumstances suggest the existence of a deal whereby Felder benefits from the State's leniency if his testimony benefits the State's theory. This is without regard to the veracity of this testimony.

As noted above, the State concedes Felder's testimony was crucial to establish Bowman's guilt and the existence of the wink wink deal was not disclosed.

Felder's original charges-IAC

Felder was clearly charged at the beginning of the case under the section of law regarding accessory before the fact to murder. The murder of Kandee carried a possible death sentence. Accessory before the fact is punishable the same as the underlying offense.

The jury never heard that Felder faced a death sentence pursuant to the theory once held by the State and its investigating agencies. The mere fact that the State's theory continued to evolved until the very month of trial is alone impeaching of the confidence in the State's evidence. The court's have traditionally given great latitude to defense counsel on cross examination of cooperating witness because of the possibility of testimony bent to curry favor. Here, trial counsel failed applicant in this regard.

Felder as Gas Purchaser-IAC

Trial counsel should have demonstrated that Felder was the gas purchaser at the conclusion of his direct testimony. This would have informed the jury that Felder lied to them in the guilt phase, direct testimony. This also could have shown that Felder lied to the prosecution. Felder's sentencing phase testimony that applicant put him up to the purchase is not confirmed by any details on the video and is no more damning than the testimony that Applicant burned Kandee's body. Thus, the purported reason to not elicit this testimony is more appropriately viewed as an *ad hoc* justification put forth by trial counsel because of his deficient performance at the trial level.

Rule 29(b)-IAC

The State offers no factual support for its reply in this regard. Instead, the state offers uncited assertions that trial counsel knew about Felder's identity pre-verdict in the guilt phase and

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that this was "debated" by the "defense team" during the guilt phase. It is unclear who is on the defense team to participate in this debate, but clearly it was not co-counsel Thomas.

Thomas indicates that she believes the video shows either Bowman or Gadson purchasing the gasoline and that she does not recall any discussions about Felder's testimony. Further, she indicates that if she had discussed something as significant as Felder providing false testimony, then she would have written it down (and she did not do so). PCR, 1596-1597.

Finally, the thrust of Applicant's argument in this regard is that Felder lied and this lie was never revealed as such either to the jury, pre-verdict, or the court in a request to challenge the convictions. There is no strategic reason to decline to reveal the false testimony of a state's witness or to fail to challenge a client's conviction if doing so would produce a favorable result.

Hiram JohnsonPending Charges-Brady

The State does not contest that it possessed information which should have been disclosed to Applicant's trial counsel. However, the State believes that this information was not material. However, information is material if it undermines confidence in the outcome. Here, Hiram's testimony is offered as part of the state's recitation of the overwhelming evidence of Applicant's guilt.

In fact, Solicitor Bailey specifically emphasizes the purported confession heard by Hiram to the jury during his closing argument by noting that the jury heard no evidence "that Hiram Johnson had any kind of charge against him or ...any reason to say something wasn't true." Trial, 4474. It strains credulity to believe the non-disclosed items would not have made a difference given this argument. Thus, the non-disclosure undermines confidence in the outcome of Bowman's trial.

Wink Wink Deal-Brady

The evidence of a wink-wink deal is proven circumstantially. Here, Johnson was charged with several crimes as the case against Bowman developed. These charges were resolved favorably after Bowman's conviction. The existence of these charges was not provided to the defense. Instead, the prosecution falsely emphasized the lack of charges to the jury. This is proof of a wink wink deal not disclosed to Applicant's counsel for consideration by the jury.

Failure to Impeach-Absence of Bowman Confession-IAC

The State emphasized Applicant's purported confession to Hiram Johnson during the closing of the guilt/innocence phase of the trial. However, trial counsel never informed the jury

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through cross examination or argument that this recollection was not contained in the written statement provided to the police. Instead, coupled with the inaccurate portrayal regarding Johnson's lack of pending charges, the state presented, in acquiescence with trial counsel deficiency, Johnson's testimony regarding the alleged confession to bolster the weak case for guilt. These errors combine to produce a reasonably likelihood that the outcome would have been different had the performance been up to snuff.

Ricky DavisSam memo-Brady

The State incorrectly isolates the statements of trial counsel regarding the use of the Sam memo and the testimony of Ricky Davis. Based upon the interview of Ricky Davis without knowledge of the Sam memo, trial counsel testified that a decision was made to not present Ricky Davis as a witness to Gadson's confession which exculpates Applicant in the murder. However, trial counsel was not aware of the interview of Ricky Davis conducted by Sam Richardson and memorialized in the Sam memo.

Had counsel been so apprized of this more thorough statement detailing Gadson's confession and exculpating Bowman, the trial strategy would have been different. To begin, counsel could have called Sam Richardson. PCR, 1339. However, for this to have been procedurally possible, counsel would have obviously had to call Ricky Davis first. Assuming Ricky Davis denied knowledge of Gadson's confession, then Sam Richardson could have provided a prior inconsistent statement of Ricky Davis, memorialized in the Sam memo, to exculpate Bowman and impeach Gadson and the state's case.

Ricky Davis presentation-IAC

Counsel should have presented Ricky Davis' testimony because it both impeached Tawain Gadson and excuplated Marion Bowman. Obviously, Ricky Davis did not wish to be involved with this case. However, he gave a statement to Sam Richardson which proves his handwritten notes to be reliable. Counsel should have presented the information contained in the confession of Gadson to the jury to weigh against the otherwise weak evidence of Bowman's guilt. This is particularly true given the contents of the Sam memo.

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Alvin Coker

Many of the items discussed in the claims regarding Alvin Coker deal with indirect impeachment of other state witnesses or evidence inferentially exculpating the applicant. These claims were made with regard to both Coker and the underlying state's witness because such introduction may have been proper according to responses elicited at trial had counsel made such inquiries. Therefore, Applicant's counsel requests that the Court examine the reply made in the other portions of this document with a view that the admissibility may have been proper as a prior inconsistent statement according to the answer provided had proper cross been made.

Conflicts of Interest

Counsel for Ricky Davis-Marion Bowman

Marva Hardee Thomas handwrote the notary block on the Ricky Davis document which was then, somehow, provided to Detective Alvin Coker and appears in the Dorchester County Sheriff's Department file. Thomas' discussions with Ricky Davis occurred prior to his trial and sentencing as he was then transferred to the Department of Corrections and never again spoke with Ms. Thomas. Ricky Davis never found out that his other armed robbery charge was dismissed. In fact, it does not appear that Ms. Thomas was actually aware of the dismissal of this charge either.

However, Thomas knew that Ricky Davis' testimony against the State was not in his own interests. In fact, criminal defense attorneys are acutely aware of the benefits of currying favor with the state. Thus, one must assume that Thomas provided advice consistent with this conventional wisdom.

Thus, her conversation with Ricky Davis, again, prior to Ricky Davis' conviction, would likely have contained an admonishment to not anger the state. This is contrary to Bowman's interests in evidence supporting his innocence.

Counsel for Tawain Gadson-Marion Bowman

Counsel for both Marion Bowman and his accuser, Tawain Gadson were conflicted because of three facts beyond dispute: they both worked under the title "Dorchester County Public Defender", they both received assignments from the same screener and used the same meeting room while litigating at the Dorchester County Courthouse, and, most importantly, they both responded to the same boss who controlled their pay, retention, promotion and demotion.

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The only wall separating these attorneys was the fact they literally practiced in a different building from each other. Nonetheless, one public defender's client avoided death by assisting the state in convicting and sentencing another public defender's client to death for this same killing.

Improper Admission of Evidence in the Guilt/Innocence Phase-IAC

There are several errors complained of in this phase and while Applicant's counsel certainly asserts that these errors standing alone are worthy of relief, counsel also urges the court to consider the cumulative effect of these errors.

DNA

During the trial, the State admitted information showing that Marion Bowman had sexual intercourse with a woman of another race, out of wedlock, and while he was married to another woman. This evidence had no bearing upon the ultimate question of identity of the perpetrator of the killing on Nursery Road as the State's only purported eyewitness never relayed any information about sex. In fact, when questioned at both the deposition and the PCR hearing, Gadson confirmed that he never saw any sexual intercourse between Bowman and Kandee Martin. And he was specifically asked whether they were ever out of his sight after being picked up that evening, according to his story.

To the contrary of the State's assertion in the Brief in Opposition, as acutely demonstrated by two recent events in the national news, society's moral values have not readily accepted either adultery or racial equality. Just in the months between the briefing of this case, the matter involving Governor Mark Sanford's adulterous relationship and the arrest of Professor Gates of Harvard both vividly remind us of society's aversion to such concerns. When specifically mixed into an accusation that Marion Bowman, a six foot- four African American man, had sexual relations with a much smaller white woman to whom he was not married and while married to another woman clearly was more prejudicial to Bowman than it was probative

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to the issue of the identity of the killer. This is especially true when no evidence provided to the jury linked any sexual activity to the killing.

Again, trial counsel's spontaneous utterances during the PCR best demonstrate the opinion of the local moray's of Dorchester County when he proclaimed to Applicant at the merits hearing: "I want to say this out loud and with Marion, what are you doing on Nursery Road at that time in the morning with a white female and African American males in Dorchester County? Really. This is 2001 but what good are you doing out there on a dirt road?" Trial counsel is a white male who lives in Dorchester County.

As far as trial strategy, obviously there is some benefit to showing Bowman's lack of animosity towards Kandee which is exactly what should have been demonstrated through the cross examination of the family members who testified in the guilt phase concerning the threats. The cold testimony of a SLED DNA analyst who testifies as the last witness before jury deliberations is not the proper witness and he would not have testified about the vaginal DNA sample but for counsel's deficient performance.

Petroleum

Likewise the petroleum testimony could have been excluded altogether with an understanding that counsel would open the door if they challenged the State's investigation regarding the lack of analysis regarding petroleum products. Instead the jury was presented with testimony which only described the finding of an accelerant. It was left to trial counsel to mitigate otherwise inadmissible testimony by distinguishing the accelerant on the pants from that used in the arson. Had trial counsel properly objected, this effort to correct the State's misleading expert testimony would not have been necessary.

Plea Agreements

While applicant concedes that cross examination into bias created by a plea bargain is appropriate when cross examining cooperating witnesses, the courts are acutely aware of the problems created when the jury learns of the convictions of co-defendants. This is exactly why the Supreme Court of the South Carolina prevents a defendant from calling a co-defendant for the sole purpose of testifying that he pled guilty to the same crime for which the defendant is on trial. Likewise, the federal courts limit situations when the jury may learn of co-defendant's convictions. Here, the prejudice from the prosecution's solicitation of the fact that several of Applicant's family members were pleading guilty to murder related charges serves more to blur the line of individualized guilt than to provide competent evidence of Applicant's identity as the killer. The clear implication is that the killing is a family endeavor. A side effect is to insulate Applicant's family from trial counsel and to weaken any mitigation testimony. Thus, the prosecution's elicitation of the family member's pleas on direct and prior to impeachment was improper and trial counsel's deficiency likely effected the outcome of this trial.

Ballistics

The State correctly notes that the conventional wisdom is evolving regarding the validity of ballistic imaging. Unfortunately for the State, these revelations indicate the infirmity of such ballistic conclusions as those offered in Applicant's trial. Because the defense relied heavily on the assertions that Gadson possessed a similar make and model gun, the false assertion of a ballistic match "to the exclusion of all other firearms" must be condemned.

While the debate over a fair trial certainly involves such incredible assertions as the statement that due process may be satisfied even if an innocent person is convicted, the majority

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of jurists believe that such fundamental errors can not be overlooked. To accept the government position that trial counsel was not deficient in correcting the SLED analyst's admittedly false conclusion of exclusivity in the gun match is to assert that error is ok if everyone at the time was equally deficient. This is an absurd result and the State can offer no substantive justification for upholding a conviction based upon incorrect expert assumptions on such a significant issue.

Luckily for Mr. Bowman, science evolved to reveal the erroneous nature of this statement prior to the exhaustion of his legal challenges to his conviction, allowing the state the opportunity to try him in a fair proceeding without this faulty testimony. This fairness satisfies society's concerns for a just legal system more than finality of an infirm conviction.

Arbitrary Factor

Counsel admitted that he missed the opportunity to object to the prosecution's admission of evidence of an arbitrary factor during the solicitor's cross examination of James Aiken. He offered no strategic reason for this "miss." Instead, the State argues this error was strategic because trial counsel was not yet up on the law as well as other death penalty lawyers. This is definition of deficient performance; performance which is below a reasonable level. Bowman did not benefit from the testimony concerning the arbitrary factor. Instead, trial counsel falsely believed that his success on direct trumped the state's cross into improper matters. Had trial counsel objected, the testimony would have been excluded and there is a reasonable probability that Applicant would have received a life sentence.

In addition, it appears that the introduction of this arbitrary factor is a plain due process violation because the jury was allowed to impose a sentence outside of the statutory scheme allowing for capital punishment. The failure of trial counsel to properly limit the jury's sentencing to accord with the statutory empowerment provide by the general assembly violates due process and is deficient performance.

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Kidnaping Aggravator

While there is evidence of prior threats made by Applicant to the deceased, these alone do not constitute evidence of a plan to inveigle or decoy. Instead, there is no such evidence presented at the trial. As demonstrated at the PCR hearing, the State's star witness would have testified that he knew of no information which supported either his prior knowledge of her killing or his knowledge of any plan to inveigle or decoy the deceased. As far as he knew and still knows today, there was a real plan to burglarize a house. To believe otherwise invites speculation and conjecture. A claim in an aggravator is subject to a directed verdict, just as a criminal charge, when the evidence only raises suspicion.

Further, the reply by the State invites a suggestion that this claim should properly be viewed as a failure of appellate counsel to raise this issue on direct appeal or trial counsel's failure to preserve the matter at trial for such direct appeal. If that is true, then the court should consider whether either of those deficiencies deprived Applicant of the effective assistance of counsel.

Finally, the citation to State v. Simmons, 599 SE2d 448 (SC 2004), for the proposition that invalidation of an aggravator will not provide sentencing relief is misinterpreted. See State's reply 159. Instead, Simmons involved the invalidation of one aggravator but affirmance of a murder conviction and four other aggravating circumstances. In the case at bar, the kidnaping aggravator was one of only two found by the jury which specifically rejected two other aggravators. Further, the prejudice from the error should be considered along with the other mitigation deficiencies.

Mitigation Deficiencies

Absence of the Guiding Hand of Counsel

Contrary to the State's position, counsel completely failed to present a competent mitigation case. The most telling point, in direct contradiction to the State's portrayal of an "experienced criminal defense litigator" who consulted with "a mitigation investigator" and a "forensic social worker" is that both Dale Davis and Jeff Yungman describe a complete lack of guidance as to the presentation of the mitigation case. Multiple exhibits demonstrate "real time" concern about the lack of guidance from counsel. Yungman specifically states that he made the strategy decisions because counsel would not do so.

Finally, the State attempts to shore up trial counsel's deficiencies by relying upon Yungman's expertise. This is exactly the problem suffered by Applicant from the failings of his trial counsel: trying to equate the performance of a testifying social worker with that of counsel. Finally, Marva Hardee Thomas, currently under suspension for some unknown reason, clearly offered no assistance, according to her own testimony.

No testimony about Applicant's emotional value

There was no testimony presented that gave the jury a basis to find that Bowman would continue to be an asset to society if his life was spared. The passing reference to his love for his daughter was not linked to the ability to develop this relationship because of the willingness of the family to allow the contact to continue. Contrary to the assertions of the State, the family willingly met with Dale Davis, but obviously this was not cognizant to trial counsel who failed to meet with Davis or Yungman to discuss the case; self-serving statements to the contrary notwithstanding. Finally, the information contained in the affidavit prepared by Katrina West

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was introduced by confirmation of Jeff Yungman that this information was in his possession at the time of his testimony but that no one asked him to present this type mitigation case. PCR

Finally, there is no strategic reason to fail to present some positive information about the Applicant in the sentencing phase, especially in light of the admission of the negative information about Marion's upbringing and his family's complicity in the secretion of a firearm.

Regarding the weak mitigation, this case is similar to the recent capital PCR involving Donney Council. Council v. State, 670 SE2d 356 (SC 2008). There the court found that the presentation of limited testimony from the petitioner's mother was insufficient given the available mitigation evidence. Such is the case here, where a plethora of information existed regarding Bowman's genuine emotional value but virtually none was presented either by way of an expert or otherwise.

No testimony about Bowman's Positive Work Record

Likewise, there was only scant or negative work information presented to the jury for consideration. The State cannot rely upon the claim that deficiencies of non-lawyer, experts are not appropriate for IAC analysis and at the same time challenge the Cronic claim. Either, counsel was deficient for not presenting this information in some manner or, more likely, counsel completely abdicated their duty to provide any consultation, guidance, or strategy to the mitigation investigator or social worker. Trial counsel can not abdicate their duties and then be found to have provided competent counsel because the unguided experts were the ones who actually committed the deficiencies.

Given the contrast between the mitigation information presented which focused on the negative and the positive attributes not presented, the prejudice is obvious. The contrast is just to

great to ignore.

Evidence Regarding Kandee Martin's True Character

To begin, the State is incorrect when it claims that counsel successfully avoided any inference relating Kandee and Applicant through drug dealing. Instead, Tawain Gadson testified that Applicant said she was wearing a wire. Further, the defense presented the only testimony about Applicant's drug involvement even though this information was not otherwise discoverable by the State.

There was nothing left to lose by providing an accurate description of Kandee's complicated life as a prostitute, teen mother, and crack addict. The gain would have been the presentation of a more realistic view of the loss suffered by the family following her death. While the death of a loved one is traumatic no matter the life involved, it strains credulity to assert that all persons are viewed equally in this respect. The courts recognize as much when they allow the presentation of "victim impact" evidence. If all losses were equal, then this evidence would be superfluous.

Allocution

The instruction on allocution given by the trial court was incorrect because it improperly limited allocution to less than allowed by South Carolina law. Further, counsel did not speak with Applicant about the trial court's instructions so that any discourse between counsel and client must be considered tainted by this improper limitation. An objection would have led to a correct statement of the allocution rights.

Because the evidence, if properly challenged and with regard to the now exposed infirmities, was not overwhelming, this limitation likely tipped the scales towards death.

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Intoxication

Evidence of intoxication serves to mitigate the defendant's culpability for a criminal act committed while under such an influence. Trial counsel's *ad hoc* justifications can not be given credence because trial counsel to this very day holds a belief which is contrary to South Carolina law on the mitigating nature of intoxication. Further, counsel could have elicited the intoxication information from Gadson while he was on the stand in the guilt/innocence phase of the trial. The jury already heard an enormous amount of evidence about the consumption of alcohol so the jury would not have generated any further misgivings in the first phase by the evidence about Bowman's intoxication. The evidence from this phase was later incorporated in the sentencing phase.

Finally, the evidence from Gadson alone, that Bowman was "tipsy," included his testimony that he could visually observe the effects of alcohol on Bowman. Tipsy, on any scale, is synonymous with intoxicated as indicated by the billboards across South Carolina proclaiming that "Buzzed Driving is Drunk Driving." Even without an instruction, such evidence is mitigating, the failure to present such evidence is deficient and this deficiency likely effected the outcome of the trial.

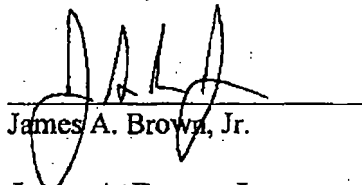
Jury Instruction

The evidence of Bowman's tipsy state would have provided him with entitlement to either the three specific mitigators or a specific instruction. No valid reason justifies not utilizing available evidence to produce a mitigating charge warranting a life sentence.

Conclusion

Thus, the Court should not accept the assertions of the State's Brief in Opposition at face value but consider the actual testimony and the evidence introduced. Further, the prejudice from the deficiencies should be considered for both the individual effects and for the cumulative impact upon the trial proceedings. Having done so, the Court should grant Applicant's request for post-conviction relief and reverse the convictions and sentences in this proceeding.

Respectfully submitted,



September 16, 2009

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STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF DORCHESTER)

Marion Bowman, Jr., #6006)

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

Applicant,)

ORDER DENYING APPLICATION
FOR POST-CONVICTION RELIEF

v.)

The State of South Carolina,)

(Capital Case)

Respondent.)

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DORCHESTER COUNTY

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Before this Court is an Application for Post-Conviction Relief ("APCR"), filed by Marlon Bowman, Jr. ("Applicant"). This APCR stems from a murder conviction and death sentence. For the following reasons, this Court denies and dismisses the APCR.

PROCEDURAL HISTORY

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

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

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

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

On May 23rd, 2002, Applicant's jury found the existence of two of the four aggravating factors: the murder was committed in the commission of kidnapping, and in

the commission of larceny with the use of a deadly weapon. It recommended a sentence of death. {R. 5051}. Judge Goodstein sentenced Applicant to death for murder and ten years for arson.

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A timely Notice of Appeal was filed and served with the South Carolina Supreme Court on May 24th, 2002. Assistant Appellate Defender Robert M. Dudek, of the South Carolina Office of Appellate Defense, was appointed to represent Applicant during his direct appeal. On July 6th, 2005, Dudek filed with the state supreme court a Final Brief of Appellant. The State, through Assistant Attorney General S. Creighton Waters, filed its Final Brief of Respondent on July 7th, 2005. Dudek followed with a Final Reply Brief of Appellant also dated July 6th, 2005.

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

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

While his certlorari petition before the United States Supreme Court was pending, Applicant filed this APCR on April 7th, 2006. On August 4th, 2006, Applicant filed with the state supreme court a Petition to Appoint Post-Conviction Relief Judge. The State filed a

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Return on August 18th, 2006, and a Motion to Set Execution Date on August 22nd, 2006. On August 28th, 2006, Petitioner filed a Motion for a Stay of Execution, or, in the Alternative to Appoint a Post-Conviction Relief Judge. The State filed a Return to the latest motion on August 29th, 2006. The State filed its initial Return, Motion to Dismiss, and Motion for Summary Judgment dated August 31st, 2006. The South Carolina Supreme Court issued an Order dated September 7th, 2006, in which it stayed the execution for this PCR and appointed this Court.

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Applicant filed his First Amended Application, and his Second Amended Application prior to the evidentiary hearing. He also filed his Third Amended Application a week before the evidentiary hearing began in September 2008. The hearing took place over the course of various days in September, October, and December 2008. He filed his Fourth Amended Application in June 2009, some six months after the evidentiary hearing in this case had concluded. He also filed his Amended Brief Supporting Application for Post-Conviction Relief. The Respondent filed a Brief in Opposition. The Applicant then filed a Reply.

This Order of Dismissal follows.

ANALYSIS

Based on the factual findings and legal analysis set forth as follows for each issue, this Court denies relief.

I. James Tawain Gadson, Jr.

Applicant first raises a number of issues with regard to testifying witness James Tawain Gadson, who was at the scene when Kandee Martin was killed.

A. The Prosecution Did Not Violate Brady By Not Disclosing Gadson's William S. Hall Institute Psychiatric Report



Applicant contends that the First Circuit Solicitor's Office failed to properly disclose a copy of his co-defendant's psychiatric evaluation from the William S. Hall Psychiatric Institute to Applicant pursuant to Brady v. Maryland, 373 U.S. 83 (1963). At the PCR hearing, Solicitor Bailey testified that he did not believe they provided defense counsel with a copy of the William S. Hall Psychiatric Institute report for Tawain Gadson. {PCR Tr. 2120}. Lead trial counsel Cummings also testified that he did not recall receiving a copy of the psychiatric evaluation for Gadson. {PCR Tr. 1647}. Applicant asserts the State should have provided him with the report because it contained information that could have been used for impeachment purposes in cross-examining Gadson at trial.

"A Brady violation occurs when the government fails to disclose evidence materially favorable to the accused." Youngblood v. West Virginia, 547 U.S. 867, 869, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006). Evidence that is not disclosed is suppressed for Brady purposes even when it is "known only to police investigators and not to the prosecutor." Kyles v. Whitley, 514 U.S. 419, 438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Evidence is favorable if it is either exculpatory or impeaching. See, e.g., Strickler v. Greene, 527

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U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (internal quotation marks omitted). However, a " 'showing of materiality does not require demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal,' " id. (quoting Kyles, 514 U.S. at 434, 115 S.Ct. 1555), but only a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (quoting Kyles, 514 U.S. at 435, 115 S.Ct. 1555). The assessment of materiality is made in light of the entire record. United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

#5
A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 514 S.E.2d 320, 324 (1999) (citing Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). If a Brady violation is found to have occurred, PCR must be granted. Gibson, supra.

[T]he Brady rule does not apply if the evidence in question is available to the defendant from other sources; thus, when defense counsel could have discovered the evidence through reasonable diligence, there is no Brady violation if the Government fails to produce it." U.S. v. Kelly, 35 F.3d 929, 937 (4th Cir. 1994)(internal quotations omitted).

"[W]here evidence is equally available to the accused, the obligation on the part of the State to furnish such evidence to the accused is relieved." Anderson v. Leeke, 271 S.C. 435, 439, 248 S.E.2d 120, 122 (1978).

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Here, this Court finds that Applicant has failed to establish a Brady claim in this situation. First, defense counsel had other means by which it could obtain Gadson's psychiatric report. Gadson's psychiatric evaluation was done by order of the court. {See Applicant's 8 & 31}. The court order was clearly public record. Thus, the fact that Gadson was evaluated could easily have been discovered by trial counsel upon examination of court records in the Clerk of Court's office. Counsel was well aware that the Department of Mental Health provided the court with a psychiatric report when ordered to conduct such an evaluation. The Department had done so in Applicant's case. {See Respondent's 29}. Thus, had counsel reviewed the clerk of court records for Applicant's co-defendant Gadson, he would have clearly been aware that a psychiatric report to the court would have been available. Counsel could have easily filed a subpoena to obtain a copy of Gadson's psychiatric report from the court. Since this information could have been requested by counsel by other means, Applicant has failed to establish there was a Brady violation. Kelly, supra; Leeke, supra.

Second, Applicant's claim is rejected because he failed to establish Gadson's psychiatric report was favorable or impeaching evidence. Applicant argues that the psychiatric report "revealed serious mental health concerns and questions about Gadson's ability to recall events." {Applicant's Brief, p. 4}. This argument is not supported by the report. First, contrary to Applicant's argument, the report does not call into question

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Gadson's short and long term memory. Specifically, the report found "no evidence of long or short-term memory impairment." {Applicant's 8 & 31, at p. 3}. Further, the report indicates that "[o]n the Repeatable Battery for the Assessment of Neuropsychological Status, he exhibited some mild impairment of verbal memory, but verbal learning was good." {Applicant's 8 & 31, at p. 3}. Overall, the report does not indicate that Gadson suffered from any mental illness other than cannabis dependence. Since there was no indication that Gadson suffered from any type of memory impairment that would have affected his ability to recall what occurred in this case, the report would have had no impeachment value in that regard.



The report was also not material. The William S. Hall report does not indicate that Gadson suffered any memory issues as a result of his seizures. In fact, based on the details provided about the seizures, it appears that he is able to recall what occurred before his seizures (i.e. his food consumption, use of marijuana, etc.). Regardless, neither Gadson nor any other witness testified that Gadson suffered a seizure on Nursery Road at the time of the shooting. Further, no witness testified at either trial or the PCR hearing that Gadson smoked marijuana on the day of the shooting. Gadson did admit at trial that he drank alcohol all day on the day of the murder. {R. 3992-93; 4021; 4031}. Absent some actual evidence that Gadson suffered a blackout on the scene, trial counsel could not have argued Gadson suffered a blackout.

Further, the overwhelming evidence of guilt in this case clearly shows that this evidence would not have undermined the confidence in the verdicts at trial. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten

to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. Overall, even without Gadson's testimony, there was a very strong case against Applicant.

Moreover, Gadson's credibility had already been impeached by his testimony regarding his drinking. United States v. Amiel, 95 F.3d 135, 145 (2nd Cir. 1996) ("Suppressed evidence is not material when it merely furnishes an additional basis on

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which to impeach a witness whose credibility has already been shown to be questionable."). In light of the fact that the limited Impeachment value of Gadson's psychiatric report and the overall strength of the case against Applicant, Applicant has failed to prove by a preponderance of the evidence that the confidence in the verdicts in this case was undermined by the nondisclosure of Gadson's psychiatric report. As a result, Applicant has failed to sustain his burden of establishing there was a Brady violation in the handling of Gadson's William S. Hall report. As a result, this claim for relief is denied.

B. Trial Counsel Was Not Ineffective In Addressing Gadson's Plea Deal and/or Any Possible Bias that May Have Resulted Therefrom

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Applicant has asserted that trial counsel were ineffective because they failed to investigate, impeach, and introduce evidence of Gadson's plea deal and his true bias to avoid a death sentence. Applicant asserts the plea agreement threatened Gadson with a death sentence. Further, Applicant asserts the jury was left with the incorrect impression that Gadson would serve twenty years in prison under his plea agreement. Applicant's claims are denied because they are not supported by the record.

To establish a claim that counsel was ineffective, a PCR applicant must show that (1) counsel's representation fell below an objective standard of reasonableness and (2) but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068.

When reviewing a counsel's performance, there is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066. Consequently, courts apply a "highly deferential" standard of review. Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. Counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy. Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (citations omitted). Counsel's strategy will be reviewed under "an objective standard of reasonableness." Id.

First, Applicant's allegation that Gadson expressly bargained to avoid a death sentence is not supported by the record. At no point in time did the First Circuit Solicitor's Office file a Notice of Intent to Seek Death Penalty against Gadson. Gadson testified the neither he nor his counsel were ever served with a Notice of Intent to Seek the Death Penalty at trial and at the PCR hearing. {R. 4024, PCR Tr. 121, 185}.

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Applicant's argument relies upon the clause in paragraph 9(b) of Gadson's plea agreement which states that the State may reinstate the murder charges and seek the death penalty if Gadson did not comply with the terms of the plea agreement. Applicant's reliance upon this language in the agreement is misplaced. The language in the agreement does not constitute a Notice of Intent to Seek the Death Penalty. It merely outlines the fact that if Gadson did not tell the truth at trial, the State could reinstate the murder charge in its entirety against Gadson. There was no evidence that Gadson plea bargained to avoid the death penalty, and when Gadson pled guilty, he was not facing a death sentence. Thus, Applicant has failed to show that trial counsel was deficient.

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Moreover, Applicant has failed to show prejudice. Applicant has not presented any testimony or evidence that indicated that Gadson actually believed that he was avoiding a death sentence with his plea agreement. In fact, Gadson's testimony at the PCR hearing clearly demonstrated the opposite was true. Gadson noted in his testimony that he was never threatened with the death penalty. {PCR Tr. 121}. He noted that his attorney informed him after receiving the indictments that Gadson could get life for shooting and killing someone. {PCR Tr. 209}. He did not see that as being the same as the death penalty. Id.

Moreover, even without Gadson's testimony, there was overwhelming evidence presented of Applicant's guilt, as set forth in the preceding subsection. Thus, this claim of ineffective assistance of counsel is denied.

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[Signature]
C. Trial Counsel Did Correct Gadson's Testimony At Trial Regarding his Twenty Year Sentence

Applicant also failed to establish trial counsel was ineffective for not correcting Gadson's testimony at trial indicating that he would serve twenty (20) years in prison. At trial, Solicitor Bailey asked Gadson if he was testifying pursuant to a plea agreement:

Q. Okay. And through Mr. Dukes, through his representation, you have entered into a plea agreement with the State of South Carolina; have you not?

A. Yes, sir.

Q. Okay. And would you tell the Court and the jury what that agreement is, your understanding of that agreement?

A. Accessory after the fact and misprision of a felony.

Q. All right, sir. And are you going to get a negotiated sentence of 20 years for that?

A. Yes, sir.

Q. Okay. And in exchange for that, dropping the murder charge and allowing you to plead to accessory after the fact of murder and misprision of a felony and receiving a 20-year sentence, have you agreed to testify truthfully in this case?

A. Yes, sir.

{R. 3981, 17-25}. During cross examination, trial counsel asked Gadson about the plea bargain he made with the State. Gadson testified that he was set to receive a fifteen (15) year sentence for accessory after the fact to murder. {R. 4023}. He was also set to receive a five (5) year sentence for misprision of a felony. {R. 4023}.

Applicant has failed to establish that trial counsel was deficient in cross examining Gadson on how much time he would actually serve in prison. First, there was no testimony that indicated that Gadson would actually serve 20 years in prison at trial. The testimony indicated only what his sentence would be.

Furthermore, Applicant fails to establish prejudice. First, there was no testimony offered at the PCR hearing that Gadson was aware at trial that he could serve substantially less than twenty years confinement under his plea agreement. See Moss v. Hofbauer, 286 F.3d 851, 864-65 (6th Cir. 2002) (speculation as to possible lines of cross-examination insufficient where no evidence presented how witness would have testified had the cross-examination been pursued); Zettlemoyer v. Fulcomer, 923 F.2d 284,298 (3rd Cir. 1991) (applicant cannot show deficiency "based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense"; rather, facts must be presented).

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Second, Applicant can not show prejudice because of the overwhelming evidence of guilt, as set forth in the preceding sections. Thus, this claim for relief is denied.

D. Trial Counsel Was Not Ineffective Because It Chose Not to Attempt to Introduce Arrest Warrants and Indictments As Evidence Gadson Was the Shooter.

Applicant asserts trial counsel was ineffective for not presenting evidence to the jury that the State had asserted that Gadson was the one who shot the victim in other court proceedings. Applicant has failed to meet his burden in this regard.

First, Applicant relies upon the fact that the lead detective in the investigation, Alvin Coker, submitted a affidavit for Gadson's arrest warrant that indicated there was evidence Gadson was the shooter. The affidavit states that there was probable cause to believe that Gadson murdered Kandee Martin. {Applicant's 4}. The affidavit clearly notes that the basis for the probable cause was a statement that *Applicant himself* gave to police, blaming the crime on others:

Investigation lead Officers to interview a co-defendant (Marion Bowman Jr. (AKA: "Black" or "Jr."), who provided a written statement wherein he stated that between the incident time aforementioned, that the defendant and a co-defendant approached him while driving the victims car. The defendant and co-defendant had socks on their hands and confided in him that the defendant and co-defendant had shot and killed the victim (Kandee Martin). The defendant and codefendant then recruited Marion Bowman Jr. to assist them in moving the victims body and destroying the car and other evidence by burning them.

{Applicant's 4}. Applicant also relies upon the fact that Gadson was also indicted for murder in this case. {See Applicant's Brief at p. 9}.

At the PCR hearing, Coker credibly testified that the affidavit to the arrest warrant was based upon the information and evidence the police had at that time. {PCR Tr. 890}. That information consisted of the statement provided by Marion Bowman. As for the

murder indictment against Gadson, Coker testified that he was the sole witness presented to the grand jury in this case. {PCR Tr. 862}. He testified to the facts as he knew them. Id. Coker testified that he told the grand jury that the evidence they had at the time indicated Gadson was present when the murder occurred, but Applicant was the one who fired the fatal shot. {PCR Tr. 863-64}.

Applicant has not established that trial counsel was deficient. First, "[i]t is well settled in this jurisdiction that affidavits are inadmissible in criminal cases." State v. Alexander, 303 S.C. 408, 409, 401 S.E.2d 167, 168 (1991) (citing State v. Stewart, 288 S.C. 232, 341 S.E.2d 789 (1986); State v. Lathan, 275 S.C. 550, 273 S.E.2d 772 (1981); State v. Smith, 230 S.C. 164, 94 S.E.2d 886 (1956)). Trial counsel cannot be found deficient for not introducing inadmissible evidence. See generally Strickland, supra. Thus, to the extent that Applicant asserts that Gadson's arrest warrant should have been introduced at trial, his claim is denied.

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More importantly, however, is the fact that the arrest warrant affidavit in no way indicates the State believed Gadson was the one who fired the fatal shot. All the arrest warrant affidavit shows is that early in the investigation the police thought there was probable cause to believe that Gadson may have been the shooter. Indeed, the arrest warrant was sworn out by Coker on February 17, 2001, the same day the victim's car and body were found. {Applicant's 4}.

Also, the arrest warrant affidavit was based upon the second statement provided to police by Applicant. Trial counsel provided a valid, strategic reason for not wanting any of Applicant's statements entered into evidence. He did not ask the question because he

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knew the response would be that they relied upon Applicant's (obviously self-serving) statements in making the arrest. {PCR Tr. 1914}. That was not a road that he wanted to take at trial. Id. Further, Cummings pointed out that arrest warrants do not count any way, and that they can be amended and changed. {PCR Tr. 1914}. Furthermore, indictments supersede arrest warrants. Id. Thus, this claim is denied because trial counsel was not deficient.

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AG

Trial counsel was also not deficient in not introducing the indictment against Gadson as evidence that the State once "believed" Gadson was the shooter. First, the indictment was not evidence that the State believed was the shooter. Under South Carolina law, "one who is present, aiding and abetting the commission of a crime is a principal, and may be convicted on an indictment charging him alone as such." State v. Cox, 258 S.C. 114, 118, 187 S.E.2d 525, 528 (1972)(internal citation omitted). Solicitor Bailey credibly and accurately testified that Gadson was charged as a principal first and could have been convicted as such under alternative theories of him either being the trigger man or him being present and abetting Applicant. {PCR Tr. 2139-40}. He also noted that their practice was to charge as principal first with the understanding that they could convict as a principal second on the theory of hand of one, hand of all. {PCR Tr. 2140}. There was no reason to specify exactly what part of the law they were relying upon because he could be convicted under any of the three theories under the indictment. {PCR Tr. 2140}. Bailey also indicated that the indictment was done that way to keep the options open in case later evidence took them in a different direction in the case. Id. Bailey also pointed out that Gadson's true billed indictment does not mean Coker told the grand jury that Gadson was

the one who shot the victim. Id. Bailey did not want to speculate as to what Coker may or may not have told the grand jury, but the only concern in the grand jury is whether there is sufficient evidence to continue prosecution under some legally valid theory. {PCR Tr. 2140-41}. Since as a legal and practical matter the language of the indictment does not mean the State believed Gadson was the actual shooter, counsel cannot be found deficient. Overall, Applicant has failed to show deficiency.

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Applicant has also failed to establish prejudice. Not only was the jury informed Gadson's murder charge in this case was being reduced to accessory after the fact to murder and misprision of a felony in exchange for truthful testimony {R. 3980-81}, but there was overwhelming evidence of Applicant's guilt as set forth in the preceding subsections. Indeed, the supposed subjective "belief" of one officer or prosecutor at one time or another is not what is important and relevant in a criminal trial – what is important is what the jury believes after hearing actual evidence related to the crime itself. Since Applicant has failed to show deficiency or prejudice, this claim for relief is denied.

E. Trial Counsel was Not Ineffective in Not Presenting Alleged Evidence from Wayne Mood

Applicant asserts that trial counsel should have presented the testimony of Wayne Mood, a jailhouse informant interviewed by the State about this case. According to the notes from Solicitor Bailey's interview with Wayne Mood, Gadson told Mood and another man that both he and Bowman shot Kandee Martin. {Applicant's 68}. The notes indicate that both Bowman and Gadson told Mood a similar story. They were with Kandee Martin and were planning to rob a house. Id. Bowman gave the victim some crack. At some point in time, the victim became afraid and ran towards Bowman. They argued. Bowman

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mentioned to Mood that the victim was supposedly wired. According to the statement, the initial story was Gadson shot her in the back first. The victim ran until she ran out of breath. She then begged for mercy. Shortly thereafter, Bowman shot her in the head. The note also indicates that Bowman threatened to kill Gadson if he told anyone, and it mentioned that Gadson defecated on himself. The notes also indicate that later on, Bowman and Felder went back to the scene, put the body in the trunk of the victim's car, and set the car on fire. It appears that Gadson's initial version had Bowman shooting first. However, the Wayne Mood notes also indicate that Gadson later admitted he shot the victim first.

#17
Applicant has failed to show that trial counsel was deficient in not presenting the testimony of Wayne Mood at trial. First, Applicant did not call Wayne Mood to testify at the hearing. Thus, there is no evidence on the record as to what Wayne Mood would have said if he was called to testify at trial. See also Moss v. Hofbauer, 286 F.3d 851, 864-65 (6th Cir. 2002) (speculation as to possible lines of cross-examination insufficient where no evidence presented how witness would have testified had the cross-examination been pursued); Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3rd Cir. 1991) (applicant cannot show deficiency "based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense"; rather, facts must be presented).

Further, trial counsel gave a reasonable strategic reason for not calling Wayne Mood to testify. Cummings testified that he contacted Mood's attorney shortly after receiving the notes from Solicitor Bailey. {PCR Tr. 1366-67; see Applicant's 70}. Mood's counsel would not allow the defense to talk with Mood. Overall, in assessing the value of

Mood's potential testimony, Cummings noted that parts of what he was saying about Bowman had to do with Bowman shooting the victim in the back. {PCR Tr. 1367-68}. He did not want to put up a witness that was going to possibly implicate Applicant for any reason. {PCR Tr. 1368}. He did not even want to present testimony that would have indicated he was at the scene with Gadson with Gadson being the shooter. Id. He was concerned that presenting testimony that put Applicant at the scene could backfire. Id. Clearly, counsel's explanation for not calling Wayne Mood was reasonable trial strategy. As a result, Applicant failed to establish deficiency. Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial). See generally Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

Applicant also fails to establish prejudice. First, if Mood testified in accordance with the Solicitor's notes, then the testimony would not have been exculpatory. The notes clearly detail that Bowman admitted to Mood he was the one who shot Kandee Martin in the head after she begged for her life. The forensic pathologist who testified at trial indicated that both the head wound and the wound to the back were fatal wounds. {R. 3945, 3949}.

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Second, there was overwhelming evidence of Applicant's guilt, as set forth in Section I, *supra*. This claim for relief is denied.

F. Trial Counsel Was Not Ineffective In Handling Evidence that Gadson Had Access To Applicant's Gun.

Applicant also asserts trial counsel was ineffective for not presenting evidence that Gadson had fired the murder weapon two weeks prior to the victim's murder. According to the police statement given by Tlara Coleman, she and Gadson were walking around the Villas when Coleman got into an argument with someone else. {Applicant's 30}. Applicant gave Gadson a gun, which he shot into the air. *Id.* The casings from that shooting were recovered by another resident in the Villas, Margaret Hawkins. {Applicant's 29}. Those casings were fired by the same gun that killed the victim. {R. 4315}. At the PCR hearing, Gadson corroborated the sequence of events contained in Coleman's statements. {PCR Tr. 161-62}. He noted that Bowman let him borrow the gun for that shooting. {PCR Tr. 195-96}.

- #19
- Q Which .380 were you firing at the Villas that they were asking about?
- A The one Marlon bought from the dude in Orangeburg.
- 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 Bowman was there?
- A Yes, he was there.

{PCR Tr. 195}.

Cummings testified that he did not want the information about the shooting at the Villas in evidence. {PCR Tr. 1704}. He noted that while Coleman and Hawkins could testify Gadson had fired the gun, they also indicated that Bowman handed him the gun immediately beforehand. {PCR Tr. 1705}.

Trial counsel was not deficient in not presenting this information that Gadson had access to the gun, as such testimony would have clearly indicated that the only reason he had access to the gun was because Applicant had it concealed on his person and just handed it to Gadson. Any cross-examination questions on this issue would have had minimal benefit to Applicant.

#20
Further, Applicant did not establish that he was prejudiced by trial counsel's decision not to introduce evidence of the shooting at the Villas, given the overwhelming evidence as set forth in Section I, *supra*, and the minimal benefit this evidence could have had. This claim of ineffective assistance is denied.

G. Trial Counsel was Not Ineffective with Regard to Gadson's ownership of a .380 Handgun.

Applicant also asserts trial counsel was ineffective for not pointing out that Gadson had lied about owning a .380 High Point firearm. In essence, Applicant asserts that the jury was led to believe that only Bowman owned a weapon that would produce the characteristics consistent with the casings linked to Martin's death.

Applicant's claim lacks merit. First, Applicant did not establish deficiency. At trial, Cummings asked Gadson if he owned a high powered .380 pistol. {R. 4026}. Over the State's objection, Gadson was allowed to answer. {R. 4027-31}. He admitted that he had

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purchased a .380 pistol in July 2000, and the pistol he purchased was the same color as Applicant's. {R. 4031}. Clearly, the jury was made aware that Gadson also had a weapon of the same caliber as the one used in the murder.

Applicant also failed to show prejudice. As already noted, the jury was informed of the fact that Gadson owned a .380. Further, there was no evidence that Gadson's gun was connected in any way to the murder. Gadson had legally purchased his gun, and although he claimed it had since been stolen, the gun Gadson bought a different serial number from the gun found in the river which was matched to the murder scene. {PCR Tr. 195-96; 338; 991-1003; 1919-21}. Finally, there was overwhelming evidence of Applicant's guilt, as set forth in Section I, *supra*. This ground for relief is denied..

II. Travis Felder

A. The Prosecution Did Not Fail to Correct False Testimony in Regards to Felder Purchasing the Gasoline.

Applicant's first claim involving Travis Felder alleges the State failed to correct false testimony when Felder omitted the fact that he was the one who purchased the gasoline that was used to burn the victim's car. During the guilt phase of trial, Felder testified that after leaving the apartments in Branchville, he followed Applicant down McEllhaney Road to Nursery Road. {R. 4092-94}. However, during the sentencing phase, Felder was recalled to the stand by Applicant. During his second stint on the stand, Felder testified that he was the one who purchased the gasoline used to burn the victim's car on February 17. {R. 4915-16}. He testified that Applicant gave him a gas jug and asked that he purchase gasoline to assist him in "parking a car." {R. 4916, 4922}. Felder also indicated

that he understood he was supposed to tell the truth the first time he was on the stand, but he omitted that part of the truth. {R. 4926}.

A state "denies a defendant due process by knowingly offering or failing to correct false testimony." Basden v. Lee, 290 F.3d 602, 614 (4th Cir.2002) (citing Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)). Furthermore, "[a] Napue claim requires a showing of the falsity and materiality of testimony." Id. False testimony is "material" when " 'there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' " Boyd v. French, 147 F.3d 319, 329-30 (4th Cir.1998) (quoting Kyles v. Whitley, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)).

First, Applicant failed to establish that the State knowingly offered false testimony.

#23
At the PCR hearing, Solicitor Walter Bailey testified that he did not know that Felder was the one who purchased the gasoline. {PCR Tr. 2037}. He testified that he never specifically asked Felder any questions about purchasing gasoline, and none of the versions of the facts provided to him by Felder included Felder's purchase of the gasoline. Id. Bailey noted that Felder had omitted that fact in both meetings he had with Felder and his attorney and in the proffer letter that was submitted by Felder's attorney. {PCR Tr. 2040}. Bailey recalled that he first heard that Felder was the one who purchased the gasoline from trial counsel Cummings. {PCR Tr. 2037}. Bailey reiterated several times that he never knew that Felder was the one who purchased the gasoline. {PCR Tr. 2047}. He could not correct the omission because he did not know there was an omission. {PCR Tr. 2047-48}.

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At the PCR hearing, Felder testified that he could not remember if he told Bailey he was the one who bought the gasoline. {PCR Tr. 706, 711}. He did agree that he said he told Bailey when he was deposed for these proceedings. {PCR Tr. 671}. However, he also noted that he could not say for sure that he told Solicitor Bailey. {PCR Tr. 714}. Overall, Felder testified that he did not have a specific memory of telling Bailey that he was the one who purchased the gasoline. {PCR Tr. 729}.

#23
JY
Without specific information from Felder, the State could not know for certain that Felder was the one who purchased the gasoline used in the arson. There was no mention of Felder being the one who purchased the gasoline in the proffer letter sent to Solicitor Bailey by Felder's counsel. {See Applicant's 64}. Also, Felder's role as the one who purchased the gasoline was not an issue he was questioned about during his polygraph. {See Applicant's 15}. It is also not mentioned in Solicitor's Bailey's outline for Felder's testimony. {Applicant's 82}. In light of the fact that neither Felder nor Bailey could recall Felder telling Bailey he was the one who purchased the gasoline, Applicant has failed to show by a preponderance of the evidence that Bailey knowingly presented false testimony in allowing Felder to omit the fact he was the one who purchased the gasoline. As a result, this claim for relief is denied.

Second, Applicant failed to show materiality. As already noted, false testimony is "material" when "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Boyd v. French, 147 F.3d 319, 329-30 (4th Cir.1998) (quoting Kyles v. Whitley, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). Here, there is no reasonable likelihood that Felder's omission could have affected the

judgment of the jury. First, the omitted testimony did not indicate that Applicant was any less guilty of the crimes for which he was convicted. In fact, the omitted testimony further confirms that Applicant was guilty in the arson. At trial, Felder testified that he purchased the gasoline at Applicant's request. {R. 4922-24}. He further testified that Applicant was the one who provided the jug that was used. {R. 4922}. Felder confirmed that he purchased the gasoline at Applicant's request at the PCR hearing. {PCR Tr. 699-700}. Felder consistently maintained that he thought the gasoline was needed so that Bowman could go "park a car." {PCR Tr. 699-700; R. 4092}. Applicant offers no other probative evidence to show that Felder knew Bowman was going to burn the car.

Furthermore, no other witness testified that Felder assisted in the planning or participated in the burning of the car. In fact, at least two witnesses confirm that Felder was at a friend's apartment when Bowman came to him about the issue. Carolyn Brown testified that Applicant stopped by Boloma Smith's apartment and asked Felder for a ride home. {R. 3711, 4045}. Boloma Smith similarly testified that Applicant stopped by her apartment and asked Felder to come out and speak with him. {R. 4117}. She also noted that Felder left, and he came back later. {R. 4117-18}.

Even without Felder's testimony, there was overwhelming evidence of Applicant's guilt in this case. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode

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with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. In light of the overwhelming evidence of Applicant's guilt, it is highly unlikely that the testimony was material. The claim is denied.

B. The State Did Not Fail to Correct Felder Regarding How Many Times He Met with the State in Preparation for His Testimony at Trial

#25
Applicant next contends that the State did not correct Felder's testimony as to the number of times he spoke with someone from the State. This claim is denied as it is not supported by the record. Solicitor Bailey properly corrected Felder's testimony in response to the question that was asked at trial.

At issue is the following exchange between trial counsel Cummings and Felder:

- Q. Mr. Felder, it wasn't until last week, and I want to go back over it again, how many times have you met with anybody representing the State to go over your testimony today?
- A. Excuse me?
- Q. How many times have you met with anybody to go over your testimony today
- A. Once.

Q. -- with the State? One time.

{R. 4109}. Clearly, the questions asked at trial pertained only to how many times Felder talked with someone from the State about *his testimony at trial*.

During redirect, Solicitor Bailey clearly corrected Felder's testimony as to the total number of meetings he had with Felder.

Q. Travis, we met in your lawyer's office a couple weeks ago, right?

A. Yes.

Q. And this morning we also talked, is that correct?

A. Yes.

Q. So you've actually talked to me two times?

A. Yes, sir.

#26
JEF
{R. 4110}.

Contrary to Applicant's assertions, there were no other meetings between representatives of the State with Felder regarding his testimony at trial. The other interactions that Felder had with state officials regarding preparation of actual testimony for trial. The first three meetings cited by Applicant were clearly interactions Felder had with law enforcement as they investigated the case. The first was when he was initially questioned by police. The second occurred when he was arrested. The third meeting occurred when Felder was polygraphed. Only in the last two meetings between Felder and Bailey did he actually discuss his testimony at trial. Thus, Bailey did properly correct Felder's testimony regarding how many times he met with a representative of the State

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regarding his testimony. As a result, Applicant's claim is not supported by the record and is denied.

Regardless, given the other strong evidence in the case detailed before and the jury was apprised the State had met with Felder and that Felder had a plea agreement, Applicant has not established materiality.

C. The Prosecution Did Not Commit Any Brady Violations with Evidence Relating to Travis Felder

Applicant next asserts that the State failed to provide the defense with Brady information regarding Travis Felder. As will be seen, each one of these contentions is denied.

1. The State Did Properly Disclose Evidence that Felder Purchased Gasoline on the Morning of the Arson.

#27
Applicant asserts that the State failed to provide trial counsel with evidence that Felder was the one who purchased the gasoline. This Brady claim is without merit. Applicant has failed to establish that the State suppressed any evidence identifying Felder as one who purchased gasoline from the EZ Horizon convenience store on the morning of the arson. Also, Applicant fails to show that evidence Felder purchased the gasoline was favorable to Applicant's case. Furthermore, Applicant does not establish that the fact Felder purchased gasoline on the morning of the arson was material to Applicant's case. Overall, Applicant does not prove by a preponderance of the evidence that the State violated Brady by not providing the defense with evidence Felder purchased the gasoline used in the arson. As a result, this claim is denied.

First, as already noted in Section II, A, it is not clear that the State had evidence that Felder purchased the gasoline used to burn the victim's car. At the PCR hearing, Solicitor Bailey consistently testified that he was not aware that Felder was the one who purchased the gasoline. {PCR Tr. 2037, 2047-48}. While Felder testified at the PCR hearing that he did say he told Solicitor Bailey he purchased the gasoline at his deposition, Felder indicated at the hearing that he did not have a specific memory of whether or not he did tell Bailey. {See PCR Tr. 729}. He was unable to confirm about telling Bailey because he simply could not remember. {PCR Tr. 706, 714, 729}.

#28
AL

Next, while the State had circumstantial evidence that it was Felder who purchased the small amount of gasoline from the EZ Horizon convenience store, they did not have any evidence indicating that the gasoline purchased by Felder was the gasoline used in the arson until Felder testified to as much during the penalty phase at trial. The proffer letter that was sent to Bailey did not include any discussion about Felder purchasing gasoline. {Applicant's 64}. Felder's polygraph report indicates Felder did not mention anything about purchasing the gasoline. {Applicant's 15}. Most telling, however, is the fact that Solicitor's Bailey's notes created in preparation for Felder's testimony also include no mention of Felder purchasing the gasoline. Clearly, the State would have had no reason not to present such testimony. Based on Felder's testimony during the penalty phase and at the PCR hearing, it would have assisted the State's case because Felder clearly testified that he purchased the gasoline on Applicant's instruction. {R. 4922-24; PCR Tr. 699-700}. None of the evidence presented at the PCR hearing indicated the State had evidence connecting the gasoline purchased by Felder to the arson.

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indicated they knew who purchased the accelerant used in the arson and from where it was purchased.

Indeed, Cummings testified that while they could not tell if Felder was on the tape, *Applicant informed him that Felder was on the tape at 3:14 a.m. purchasing the gasoline.* {PCR Tr. 1287}. Cummings did not want Felder testifying about the fact that he purchased the gasoline because of the implication of Applicant's involvement in the planning of the arson. {PCR Tr. 1289-90}. Defense counsel had the tape and was aware of the evidence.

Second, Applicant has failed to show that any evidence that Felder purchased the gasoline was favorable. Felder testified that he purchased the gasoline at Applicant's request. {R. 4922-24, PCR Tr. 699-700}. According to Felder's testimony at trial, Applicant provided the container used to hold the gasoline. {R. 4916, 4922}. He has consistently testified that when he purchased the gasoline, he thought he was doing so to assist Applicant "park a car." {R. 4916-4924; PCR Tr. 699-700}. At best, the information could have had very limited impeachment value.

Third, Applicant has failed to show that Felder's purchasing the gasoline used to burn the car was material evidence. There was overwhelming evidence of Applicant's guilt, as detailed before in previous sections, and whether Felder was the one who actually made the purchase of the gas to later burn the car does not rise to the level of materiality. {R. 3711, 4117-18; 4045}. This claim is denied.

2. The State Did Not Violate Brady When It Did Not Disclose the Proffer Letter from Felder's Attorney.

Applicant has failed to establish by a preponderance of the evidence that the State did not properly provide the defense with a proffer letter from Felder's attorney.

Solicitor Bailey testified that he received a letter from Felder's counsel during their negotiations regarding a possible plea agreement. **{See PCR Tr. 2109}**. The letter contained a proffer of what Felder could testify to if called upon at trial. **{PCR Tr. 2109, Applicant's 64}**. The letter indicated that Felder had seen Applicant, Gadson, Williams, and Johnson at the Allen Murray Club that night. **{Applicant's 64}**. The letter indicated Felder went to his girlfriend's apartment after returning from the Allen Murray Club. Id. About fifteen minutes later, Applicant stopped by and asked Felder for some assistance in parking a car. Id. According to the letter, Felder then followed Bowman down McAlhaney Road. Id. The letter noted that Bowman pulled up into a field, got out, and then the car was on fire. Id. Felder did not recognize the car; instead, according to the letter, he assumed it was one of Bowman's sister's car. Id. Bailey testified that he did not necessarily believe the contents of the proffer letter. **{PCR Tr. 2109}**. As a result, he had Felder take a polygraph examination to verify the veracity of Felder's statements. Id. Bailey testified that to the best of his recollection, he forwarded a copy of the proffer letter to defense counsel. **{PCR Tr. 2110}**. He also forwarded the results of the polygraph report to defense counsel after it was completed. **{PCR Tr. 2110, Respondent's 36}**. At the PCR hearing, Norb Cummings testified that he did not recall receiving a copy the proffer letter sent by Felder's attorney to Solicitor Bailey. **{PCR Tr. 1319}**. Cummings did recall that a few days before trial he got a phone call from the solicitor's office informing him Felder was going to testify. **{PCR Tr. 1294}**. He also recalled that he received a letter or fax that confirmed Felder was going to cooperate with the state. **{PCR Tr. 1294}**.

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Applicant has failed to establish that the State violated Brady by not providing the defense with a copy of the letter. First, this Court credits Solicitor Bailey's testimony that the proffer letter was sent to the defense. Suppression has not been established.

Next, Applicant has failed to establish by a preponderance of the evidence that the proffer letter was favorable to Applicant. The letter offers no exculpatory evidence for Applicant's case. Outside of the testimony regarding seeing the body in the car, it was consistent with Felder's testimony at trial during the guilt phase. More importantly, the evidence could not be used for impeachment purposes. It was not a statement made by Felder. It was simply a reflection of what Felder's attorney provided the solicitor's office as it opened negotiations for a plea agreement.

#32
CJ
Third, Applicant fails to show the proffer letter was material. Any minor differences in the proffer letter and the trial testimony do not overcome the overwhelming evidence of Applicant's guilt presented in this case, as set forth in prior subsections. The claim is denied.

3. There Was No "Wink Wink" Deal Between the State and Felder

Applicant contends there was an undisclosed "wink wink" deal for Felder's testimony. This Court finds there was no "wink wink" deal between the State and Felder, and thus the State could not have violated Brady in this regard.

Applicant's complaint derives from the fact that Felder received the benefit of his signed plea agreement with the State even though he omitted the fact he purchased the gasoline during his guilt phase testimony. At the PCR hearing, Solicitor Bailey testified that he was surprised to learn that Felder had purchased the gasoline used in the burning of

the victim's car. {PCR Tr. 2040}. The State and Felder reached a verbal agreement for Felder's testimony shortly before trial. {PCR Tr. 1295, Applicant's 14}. When Felder initially testified, Bailey noted they only had a verbal agreement. {PCR Tr. 2045}. The written agreement had been drafted and sent to Felder's attorney. Id. However, when Felder testified during the guilt phase, Bailey had not received the signed copy of the agreement from Felder's attorney. Id. The plea agreement was signed when Felder returned to testify during the penalty phase of trial. {PCR Tr. 2128}. Bailey noted that the verbal agreement would not have contained all of the specific terms that were included in the written agreement. {PCR Tr. 2043}.

#33
CJH
Bailey explained that the plea agreement with Felder provided the State with the option to void the agreement. {PCR Tr. 2042-43}. He ultimately decided not to void the agreement because he felt that it was not worth it as far as utilizing court time and for whatever marginal benefit the State might have received with an increased sentence. {PCR Tr. 2126-27}. Further, Bailey indicated it may have been difficult to void the agreement because Felder did not tell an outright lie. {PCR Tr. 2044}. Bailey noted that neither he nor Cummings asked any questions that would have specifically elicited the testimony regarding Felder's purchase of the gasoline. {PCR Tr. 2044}. Ultimately, Felder did tell the jury of his involvement in purchasing the gasoline. {PCR Tr. 2127}. While Bailey wished that information would have come out the first time Felder testified, there was not much that he could do about it. {PCR Tr. 2127}.

To the extent that Applicant relies upon the fact that the State did not disclose the fact that Felder had lied in his attempt to garner the plea agreement, that claim is not

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supported by the record. Bailey provided trial counsel with Felder's polygraph report by letter dated April 24, 2002. **{Respondent's 33, 44}**. On May 10, 2002, Bailey informed trial counsel that the State had reached an agreement with Bailey for his testimony. **{Res. Ex. 32}**. Clearly, Applicant was on notice that Felder was receiving a plea agreement despite the fact he had lied to the State at some point in time. **{See PCR Tr. 2144-46}**.

Overall, this Court credits Bailey's testimony and specifically finds that Applicant has not established the existence of a "wink wink" deal between Felder and the State. Since Applicant prove such a deal, his Brady claim for relief is denied.

D. Trial Counsel Was Not Ineffective for not Presenting Evidence of Felder's Original Arrest/Charge

#34
VAP
In this claim, Applicant asserts trial counsel was ineffective for not exposing the fact that Felder was initially arrested and charged with Accessory to Murder/Arson and Arson, Third Degree. According to the arrest warrant affidavit, the evidence utilized to establish probable cause for the charges consisted of a statement provided by Applicant. **{Applicant's 17 & 18}**. According to Applicant's statement, Gadson and Felder were the ones who shot the victim and burned the car. **{See Applicant's 17 & 18}**. After he was arrested, Felder did not give a statement to police. Instead, he invoked his right to counsel. **{See Applicant's 16}**. During June 2001, Felder was indicted for Third Degree Arson and Accessory After the Fact to the murder. **{Applicant's 43, 44}**. By all accounts, Felder did not have any contact with law enforcement or the solicitor's office until his attorney contacted the solicitor's office about a plea in March 2002. **{See Applicant's 64, PCR Tr. 2107-2110}**.

Applicant argues that trial counsel was ineffective for not pointing out that Felder was once charged with accessory before the fact to the murder and that the State could have sought the death penalty for such a charge. First, it should be pointed out that the South Carolina Supreme Court has held that one indicted for accessory before the fact *cannot* be eligible for the death penalty. State v. Bixby, 373 S.C. 74, 644 S.E.2d 54 (2007). Even though this decision came out after Applicant's trial, it was merely interpreting statutes on the books when Applicant was tried. This Court cannot assume that had the issue been raised to Applicant's trial judge he would have gotten it wrong.¹ Since the death penalty would not have been on the table, counsel cannot have been deficient nor Petitioner prejudiced for not cross-examining on it.

#35
Regardless, there is no evidence that supports the implication that the accessory before the fact to the murder charge was "reduced" to accessory after the fact as a result of Felder's cooperation. In fact, the evidence clearly points to the contrary. The charge was reduced to Accessory After the Fact when Felder was indicted in June 2001. At that point, Felder had not given any statement to law enforcement other than his initial denial of all involvement. Thus, since there was no basis to imply that Felder's cooperation at trial was to avoid being charged with accessory before the fact, counsel could not have made the inference. It was accurately brought out to the jury, however, that Felder's charges were reduced to a single accessory to Arson 3rd based on his cooperation. {R. 4085-86; 4108-09}. There was no deficiency.

¹ Strickland is clear that the Court must "presume . . . that the judge or jury acted according to law", and "and assessment of the likelihood of result must exclude the possibility of arbitrariness, whimsy, caprice, nullification, or the like". 466 U.S. at 695. "A defendant has not entitlement to the luck of a lawless decisionmaker." Id.

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Additionally, counsel expressed a valid strategic reason for not getting into the initial charges from Felder. Cummings testified that it was his understanding that Felder was initially charged based upon a statement given to police by Applicant. {PCR Tr. 1971}. Counsel noted on several occasions that he did not want any of Applicant's statements to come into evidence. {PCR Tr. 1827-29; 1834-37; 1908-14; 2004-05}. Obviously, questioning along this line could elicit that the charge was based on Applicant's attempt to deflect blame by implicating others.

Second, trial counsel did attempt to elicit testimony from Felder regarding how much time he was facing under his plea agreement. Counsel asked Felder "[h]ave you been told a possible sentence?" {R. 4108}. Felder responded, "[n]o sir." Id. Counsel did attempt to show bias in this regard, and thus counsel cannot be deficient.

#36
As to claims that counsel should have somehow raised that fact that the State had "a long-held belief" that Gadson and Felder were the ones who killed the victim and burned the car, the claim is without merit. Applicant's position relies solely upon the arrest warrant affidavits, which of course refer only to probable cause. However, this probable cause was based solely in the fact of the statement from Applicant trying to deflect blame to other people. It was very early in the investigation. Cummings testified that he did not want any of Applicant's statements admitted into evidence, and he was surprised that the State did not present those statements. Obviously, there was little to be gained from such an examination, and this strategic decision was reasonable.

Finally, Applicant fails to establish prejudice, given the overwhelming evidence as set forth in the prior subsections, the extent of cross-examination and impeaching

information otherwise elicited at trial, and the minimal value and potentially harmful character of the initial charges given that the jury could conclude they stem from Applicant's attempt to blame others for his crimes. This claim for relief is denied.

E. Trial Counsel was not ineffective in Not Presenting Evidence Felder Was the One Who Purchased the Gasoline During the Guilt Phase at Trial.

Applicant fails to establish trial counsel was ineffective in not presenting evidence that Felder purchased the gasoline. Counsel elicited a valid and reasonable strategic reason explaining why he did not ask Felder about purchasing the gasoline. Further, Applicant has failed to show that there was a reasonable probability that the outcome at trial would have been different had counsel presented evidence and testimony that Felder purchased the gasoline during the guilt phase.

#37
As noted in response to Applicant's argument that the State failed to provide Applicant with information regarding Felder's purchase of the gasoline, trial counsel knew Felder had purchased the gasoline. At the PCR hearing, Cummings testified that he did not want the video of Felder purchasing the gasoline coming into evidence. {PCR Tr. 1276}. While he did not know why the State had not entered the video into evidence, he did not want it in because he felt it would corroborate Applicant's involvement in the plan to burn the car. {PCR Tr. 1276}. Cummings also testified that the entry of the video into evidence during the sentencing phase was done at Applicant's insistence and was not in line with his strategy. {See PCR Tr. 1290}.² This fear was well placed, as illustrated by Felder's testimony during the sentencing phase. Felder testified that he purchased the

² This testimony was also confirmed during Cummings' cross examination and is supported by the trial record. {PCR Tr. 1290-91, see R. 4911-26}.

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gasoline after being instructed to do so by Applicant. {R. 4916-24}. He also testified that Applicant provided the gas jug to be used in the purchase. Id. Clearly, trial counsel articulated a valid, reasonable strategic reason for not presenting the evidence of Felder purchasing the gasoline. As a result, this claim is denied.

Applicant has also failed to establish prejudice. First, Applicant presents no evidence to support its contention that Felder's omission that he was the one who purchased the gasoline indicated he was involved in the murder of Kandee Martin. Second, Felder's testimony regarding the omission during the sentencing phase and during the PCR hearing clearly shows that cross-examination on this issue during the guilt phase would have done nothing to exculpate Bowman from being a participant in the arson. To the contrary, Felder's testimony clearly indicated that Bowman directed the arson to cover his crime. Third, as noted before, there was overwhelming evidence of Applicant's guilt in both the murder and the arson. Given this overwhelming evidence and the potentially harmful inferences from the gasoline evidence, the prejudice standard is simply not met.

F. Trial counsel Was Not Ineffective for not Filing a Rule 29 Motion for a New Trial; Counsel Was Aware that Felder Was the One Who Purchased the Gasoline at Trial

Applicant asserts trial counsel was ineffective for failing to file a Rule 29(b) Motion for a New Trial because once Felder testified was the one who purchased the gasoline after the guilt phase was complete.

This claim is denied. Indeed, Applicant in fact filed a motion for a new trial in General Sessions Court on September 8, 2008, which Judge Goodstein denied by Order filed January 21, 2010. Specifically, Judge Goodstein ruled that the defense was well

aware of Felder's actions at the time of trial and thus the evidence was not "new" under the test for after-discovered evidence.

Such a finding has support in the record. Cummings testified at PCR that the defense received a copy of the video surveillance from the EZ Horizon convenience store. {PCR Tr. 1933-34; Respondent's 34}. It is also clear from the testimony of Cummings that Defendant was well aware that Felder was the one who purchased the gasoline. {PCR Tr. 1274-76; 1287-88}. Cummings testified it was Defendant who informed him that Felder purchased the gasoline. Id. At the PCR hearing, Cummings testified that he strategically did not want the video of Felder purchasing the gasoline coming into evidence. {PCR Tr. 1276}. Cummings stated did not want it in because he felt it would corroborate Defendant's involvement in the plan to burn the car. {PCR Tr. 1276}. Cummings added that the entry of the video into evidence during the sentencing phase was done at Defendant's insistence and was not in line with counsel's strategy. {See PCR Tr. 1290}.³ Counsel's fear was well placed, as illustrated by Felder's testimony during the sentencing phase, which did nothing to exculpate Defendant other than by the impeaching nature of its inconsistency on one point.

This Court agrees that trial counsel was aware at the time of trial that Felder purchased the gasoline and that counsel made a reasonable strategic decision not to present the evidence during the guilt phase. As such, counsel would not have had a factual basis for a motion for a new trial based upon newly discovered evidence. The claim is denied.

³ This testimony was also confirmed during Cummings' cross examination and is supported by the trial record. {PCR Tr. 1290-91, see R. 4911-26}.

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III. Hiram Johnson

A. The State Did Not Violate Brady in Not Disclosing Hiram Johnson's then Pending Charges

Applicant's first Brady claim in reference to Hiram Johnson concerns Johnson's criminal charges. On May 29, 2001, Johnson was served with arrest warrants for Receiving Stolen Goods Less than \$1000, Burglary - Second Degree, and Grand Larceny. {Applicant's 48, 71}. The Receiving Stolen Goods Less than \$1000 charge stemmed from an incident on November 2, 2000. {Applicant's 48}. The Burglary charge and the Grand Larceny charge resulted from an incident in Orangeburg County on September 26, 2000. {Applicant's 71}. Applicant asserts that the prosecution violated Brady because it failed to disclose these charges to trial counsel.

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Applicant failed to establish materiality. First, there was overwhelming evidence of Applicant's guilt presented at trial outside of Hiram Johnson's testimony. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in

the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim. {R. 4381}.

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Second, the impeachment value of Johnson's pending charges was limited, particularly in view of the overwhelming evidence of guilt detailed above. There is no evidence Johnson actually got any special consideration for his charges due to testimony, and the charges were completely unrelated to the murder of Kandee Martin. Moreover, Johnson was impeached on whether he could remember what occurred as a result of his head injury, and on the fact that his head injury occurred after he was shot by a police officer. {R. 4071}. In light of the overwhelming evidence of Applicant's guilt in this case, coupled with the limited impact of an impeachment on the suppressed charges, Applicant has failed to establish this Brady claim. It is denied.

B. There Was No "Wink Wink" Deal Between the State and Johnson

In Applicant's second Brady claim, he asserts that the prosecution failed to provide Applicant's counsel with evidence of a "wink wink" deal between the State and Hiram Johnson for his testimony.

In this claim, Applicant essentially asserts that the Solicitor's Office attempted to use Hiram Johnson's pending charges for Burglary and Grand Larceny from a September 2000 incident, and charges for Receiving Stolen Goods less than or equal to \$1000 from a

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November 2, 2000, incident as leverage to obtain testimony favorable testimony from Johnson. Specifically, Applicant asserts that Solicitor Bailey used those pending charges to get Johnson to testify that Bowman admitted he killed Kandee Martin.

This Brady claim is not supported by the record. There was no testimony or evidence presented at the PCR hearing that indicated Solicitor Bailey or the police officers made a "wink wink" deal with Hiram Johnson. Detective Coker testified that he was not aware that Johnson had pending charges when he interviewed him.⁴ {PCR Tr. 927, 942}. Bailey credibly testified there was no plea agreement with Johnson: to their knowledge, there were no charges against Johnson and Johnson just agreed to testify. {PCR Tr. 2134}.

#42
Indeed, the progression of those charges after Bowman's trial also indicates that his cooperation with the Solicitor's office had no effect on those charges. Johnson was indicted by the Orangeburg County Grand Jury on the all three charges during the April 14, 2003 term of the Orangeburg County Court of General Sessions. {Applicant's 48, 71}. While the Burglary and Grand Larceny indictments were later not prossed because of a lack of credible evidence, those indictments remained pending for over one and one-half years before disposition. {See Applicant's 48, 71}. Resolution of Johnson's criminal charges were clearly not related to the Bowman case. {See also Respondent's 39-42}. Applicant has failed to establish there was a "wink wink" deal between the State and Hiram

⁴ Coker also testified that he did not know that Johnson later filed a lawsuit against Orangeburg County deputies until later informed by Chief Walters from the Orangeburg County Sheriff's Department. {PCR Tr. 942-43}.

Johnson. Since there was no "wink wink" deal between the two, the prosecution could not have violated Brady by not turning over details of such a deal. The claim is denied.

C. Trial Counsel Was Not Ineffective In Not Cross Examining Johnson on the Absence of Bowman's Alleged Confession in Johnson's Prior Statements.

Applicant argues that trial counsel was ineffective because Cummings did not cross-examine Hiram Johnson on the fact that none of Johnson's prior statements indicated Applicant had confessed to killing Kandee Martin. Applicant has failed to establish ineffectiveness in this regard.

As has been noted: "In hindsight, there are few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would pass muster." Willis v. United States, 87 F.3d 1004, 1006 (8th Cir. 1996). The extent of examination and cross-examination of witnesses is an area of trial tactics left to the discretion of counsel. Yarrington v. Davies, 779 F.Supp. 1304, 1308 (D. Kan. 1991). Counsel is not required to raise every conceivable issue or pursue every avenue of inquiry, but is required only to exercise normal skill, judgment, and diligence. Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980).

#43
At trial, Hiram Johnson testified that on the night of the murder, he went to the Allen Murray Club with Bowman, Gadson, and Darian Williams. {R. 4064}. They rode in the victim's Ford Escort. Id. Johnson testified that Applicant said he stole the car, and Bowman made them all wear gloves. {R. 4065}. At the Allen Murray Club, Johnson sat in the victim's car in the parking lot while Applicant walked around the parking lot. {R. 4066}. Johnson also testified that Applicant attempted to sell the car in the parking lot. {R.

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4067}. At some point during the evening, Johnson heard Applicant admit that "I killed Kandee, heh, heh, heh." {R. 4068}. At the PCR hearing, Johnson testified that he could not remember if he told police that Bowman said he had killed Kandee Martin. {PCR Tr. 558-559}. He also noted that he thought Applicant was kidding when he said it. {PCR Tr. 560, 565}. He did not know that the victim was dead when Applicant made the statement. {PCR Tr. 565}.

#44
Detective Coker testified at the PCR hearing that he spoke with Johnson on two occasions. The first was on February 22, 2001 at the Branchville Police Department. {PCR Tr. 927}. According to Coker's notes, Johnson indicated he had gone to the club with Bowman, Gadson, and Darian Williams. {PCR Tr. 929}. The notes also indicated that Johnson saw Applicant with the gun in his lap while Applicant was driving, and that Johnson knew Applicant had admitted to Trina West that he killed the victim. Id. As noted above, trial counsel was provided with a copy of Detective Coker's notes as part of the Rule 5 discovery. {See PCR Tr. 1285}. Coker interviewed Johnson a second time on April 5, 2001. {PCR Tr. 929}. He testified that interview began at approximately 1:40 p.m. {PCR Tr. 929}. The interview was held at Johnson's father's fish market in Branchville. {PCR Tr. 929-30}.

Cummings testified that at trial, Johnson testified he overheard a confession from Applicant about killing Kandee Martin. {PCR Tr. 1372}. He also noted that the confession Johnson overheard was not included in his written statement from April 5, 2001. {PCR Tr. 1386}. Cummings noted that the testimony including the confession was not inconsistent with the written statement. {PCR Tr. 1386}. Cummings testified that he did not cross-

examine Johnson on the statement because he did not want to have Johnson repeat the statement during cross-examination. {PCR Tr. 1387-88}. Cummings also indicated that the first time he heard about the confession was at trial. {PCR Tr. 1387}.

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Trial counsel gave a valid strategic reason for not crossing Johnson on this issue. Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial). See generally Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy). Cummings indicated that he did not want to risk having Johnson repeat the statement in front of the jury. Cummings noted it was the worst thing that Johnson said about Applicant at trial. {PCR Tr. 1386}. Counsel cannot be found deficient in this regard. See Moss v. Hofbauer, 286 F.3d 851, 865 (6th Cir. 2002) (reviewing court must consider potential risk that cross-examination would have led to damaging testimony being repeated).

Finally, Applicant has not established prejudice. Johnson had indicated to police that he knew Bowman had confessed to killing Kande Martin. Detective Coker noted as much in his investigative notes regarding his first interview with Hiram Johnson. {See Applicant's 47}. Thus, any impeachment would be limited, particularly in view of the

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overwhelming evidence of Applicant's guilt, as detailed before. This claim for relief is denied.

D. Trial Counsel Was Not Ineffective for Not Cross-Examining Johnson on the Fact he was Not Charged with Possession of Stolen Vehicle.

Applicant also fails to establish ineffectiveness with regard to cross-examining Hiram Johnson on the fact he was not charged with possession of a stolen vehicle for riding with Applicant in Kande's car.

Applicant did not establish that trial counsel was deficient in not asking Hiram Johnson whether he knew he could potentially be charged with possession of a stolen vehicle in Applicant's case. First, there was no testimony introduced at the hearing to support a finding that Hiram Johnson was aware that he could be charged with possession of a stolen vehicle. Detective Coker testified that he did not recall having any discussions with Hiram Johnson about charging him with possession of a stolen vehicle. {PCR Tr. 937}. Coker also noted that he did not have an explanation for why Johnson was not charged with possession of a stolen vehicle. {PCR Tr. 938}. He surmised that it was likely because their focus was on getting more information about the murder and arson. Id. Solicitor Bailey recalled that Hiram Johnson was not charged with possession of a stolen vehicle. {PCR Tr. 2104}. Bailey explained that no charge was filed because there were so many other individuals in the case that had already been charged with more serious offenses. Id. Bailey asserted that he did not feel that such a charge was warranted in Johnson's case. Id. Hiram Johnson was asked if he was aware that he could have been charged with possession of a stolen vehicle in this case. {PCR Tr. 539}. Hiram Johnson

never responded to the question.⁵ {See PCR Tr. 539-46}. Since there was no evidence that Johnson was aware that he could be charged with possession of a stolen vehicle, Applicant has failed to show that such a method of impeachment would have been successful at trial. As a result, Applicant has failed to establish that trial counsel was deficient in not questioning Johnson in this regard.

Applicant also fails to establish prejudice given the minimal value of any impeachment and the overwhelming evidence of guilt as detailed before. The claim is denied.

IV. Ricky Davis

A. The Prosecution Did Not Violate Brady in Not Disclosing the "Sam Memo"

#47
Applicant asserts that the prosecution violated Brady v. Maryland, 373 U.S. 83 (1963), by not providing Applicant with a copy of typed notes apparently drafted by Sam Richardson, an investigator for the First Circuit Solicitor's Office. The so-called "Sam Memo" appears to reflect the contents of an interview that Richardson conducted with Ricky Davis at Lieber Correctional Institution. {Applicant's 67; see Applicant's 11}.

At the PCR hearing, Solicitor Bailey testified that he was familiar with the Sam Memo. {PCR Tr. 2021}. He confirmed that it was prepared by Sam Richardson and noted that from the context of the notes, it appeared that it was prepared late in the proceedings.

⁵ The State objected to the question, and the court asked Applicant's counsel how the question was relevant. (PCR Tr. 539). After the discussion about the specific question regarding a potential charge of possession of a stolen vehicle, the objection argument moved on to whether Applicant's counsel was aware of the claim involving Johnson's other pending charges before they filed the third amended application. (PCR Tr. 544-550). At no point did counsel ever return to the question of whether Johnson knew he could be charged with possession of a stolen vehicle.

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Id. Bailey did not recall seeing anything in his file that indicated he sent the Sam Memo to defense counsel. {PCR Tr. 2130}. He also testified that he considered the Sam Memo to be work product. Id. Typically, he did almost all of his own work in preparation for a death penalty trial except for typing his handwritten notes. Id. Ordinarily, he would have interviewed Ricky Davis personally. Id. However, he delegated the task of interviewing Davis to Sam Richardson because it was getting close to trial and so much other stuff was going on at that time. Id. Since Richardson interviewed Ricky Davis on Bailey's behalf in preparation for trial, Bailey considered his notes to be protected by attorney-client privilege. Id. More importantly, Bailey testified that he did not think the Sam Memo was inconsistent with the handwritten Ricky Davis statement. {PCR Tr. 2130-31}. Bailey noted that he would have disclosed any information that was inconsistent. {PCR Tr. 2131}. He also testified that the notes would have been in the Solicitor's file and trial counsel could have seen them in the file under the office's open file policy. Id.

Given these facts, the claim for relief is denied. First, Applicant fails to establish suppression of favorable evidence to his case. The Supreme Court has noted that "evidence" that is inadmissible is not evidence at all, and thus cannot affect the outcome of trial. Wood v. Bartholomew, 516 U.S. 1, 6, 116 S.Ct. 7 (1995) (per curiam) (holding that inadmissible materials that are not likely to lead to the discovery of admissible exculpatory evidence are not subject to disclosure under Brady). At best, the notes could be considered evidence that could be used to impeach Ricky Davis if he testified at trial. Here, the defense was aware of Ricky Davis's handwritten note which contained the crucial fact that Ricky claimed Gadson said he shot Kandee, but the defense did not call Davis

because Davis told the defense's investigator that his handwritten statement was false and Applicant put him up to it. Counsel also stated that he would still be in the "same boat" based on his investigator's assessment of Ricky even if he had the Sam Memo.⁶ {PCR Tr. 1335-37; 1339}. Since in substance the Sam Memo did not contain anything the defense was not already provided, and the Sam Memo merely represented nothing more than the prosecution's trial preparation interview based on their possession of the handwritten statement, then there was no suppression of favorable evidence.

Second, the Sam Memo is not material. Evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (internal quotation marks omitted). Moreover, Applicant is incorrect that materiality is measured by the supposed impact the undisclosed notes on defense strategy:

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 It has been argued that the standard should focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, rather than the materiality of the evidence to the issue of guilt or innocence. See Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defense, 74 Yale L.J. 136 (1964). Such a standard would be unacceptable for determining the materiality of what has been generally recognized as "Brady material" for two reasons. First, that standard would necessarily encompass incriminating evidence as well as exculpatory evidence, since knowledge of the prosecutor's entire case would always be useful in planning the defense. Second, such an approach would primarily involve an analysis of the adequacy of the notice given to the defendant by the State, and it has always been the Court's view that the notice component of due process refers to the charge rather than the evidentiary support for the charge.

⁶ Trial counsel never stated that he would have called Ricky Davis to testify had he known about the information in the Sam Memo. Cummings noted that he tried to do more investigation into Ricky Davis based on the information he had, and nothing else came up in the defense's investigation. {PCR Tr. 1901}. He also agreed that even with the Sam Memo he would still be in the same boat in deciding whether to call Ricky Davis, because the defense's investigator indicated that Ricky Davis would not testify to what was in the handwritten document, and assessed that Davis was "full of bunk". {PCR Tr. 1901-02}.

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U.S. v. Agurs, 427 U.S. 97, 112 n.20, 96 S.Ct. 2392, 2401 n.20 (1976).

Here, as noted before, Ricky Davis told the defense investigator at the time of trial and testified at the PCR hearing that the handwritten statement was not true, and Bowman was the one who gave him all of the information for the handwritten note. {PCR Tr. 263-64}. Davis further professed that he did not know anything about this case. {PCR Tr. 264}. Assuming that Davis had been called, testified as he did at PCR, and then was impeached with the Sam Memo, it simply cannot be said that a reasonable probability of a different result would occur from such impeachment, especially when the defense already possessed the statement written in Davis's own hand, and could have called him and impeached him with that but decided against it. Said another way, the difference between possible impeachment with the disclosed handwritten statement in Davis's own hand, and impeachment with the Sam Memo or testimony from Sam, is not so great that it undermines confidence in the verdict under the standard for materiality. This is especially so given the overwhelming evidence of guilt, as detailed before.

Overall, Applicant has failed to establish he is entitled to relief upon this claim. As a result, this Brady claim is denied.

B. Trial Counsel was Not Ineffective in Not Presenting Ricky Davis' Testimony Regarding Tawain Gadson's Confession

Applicant alleges trial counsel was ineffective for not presenting evidence related to Gadson's alleged confession to Ricky Davis. At some point, the State was provided with a handwritten note from Ricky Davis, now an inmate in Lieber Correctional Institution for armed robbery. The statement, dated August 6, states "I Rickle Davis was on A side with Gadson and he said that he was the one that shot the girl and he gave Bowman back the

on cross-examination about it. Mr. McLean did not testify in PCR, and there has been no evidence presented that Mr. McLean could have been located at the time of trial, or that had he been located he would have testified in a manner favorable to Applicant.⁷

Indeed, given the overwhelming evidence detailed before and the lack of any detail as to what McLean heard and from whom, it cannot be said that the absence of any cross of Coker on the subject rises to the level of Strickland prejudice.

C. Trial Counsel was Not Ineffective in not Cross-Examining Detective Coker About Felder Being the One Who Purchased Gasoline

This is essentially the same claim that was raised by Applicant in Section II, particularly E and F. Thus, for the reasons stated there, this claim is denied.

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As an additional note, Applicant's assertion that presenting this evidence that Felder purchased the gasoline was exculpatory does not fit with other evidence that was presented at trial. For instance, two witnesses identified Applicant as the one who stopped by Felder's girlfriend's apartment after 3:00 a.m. {R. 4044-4045; 4117-4120}. Both also testified that Felder's girlfriend was loosening his braids when Applicant stopped by to ask for a ride. Id. Both indicated that Felder left with Applicant and returned fifteen minutes later. {R. 3712, 4120}.

⁷ See Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990) (petitioner's allegation that attorney did ineffective investigation does not support relief absent proffer of the supposed witness's favorable testimony); Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) (state's failure to object at PCR to hearsay testimony as to what another witness's testimony might have been does not relieve PCR applicant of burden of producing admissible testimony in accordance with the rules of evidence). Indeed, it is speculative as to whom McLean would have described discussing the incident, or whether those persons had actual knowledge of the events on Nursery Road. Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3rd Cir. 1991) (applicant cannot show deficiency "based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense"; rather, facts must be presented).

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D. Trial Counsel was Not Ineffective in Crossing Coker About the Sworn Statements to Other Tribunals

In this claim, Applicant essentially reasserts the same claim that was raised in Sections I, D and II, D. For the reasons stated in those sections, the claim is denied. Counsel articulated valid strategic reasons in this regard, as Applicant was the source of information for early actions in the investigation, and eliciting such evidence would be damning in that it would show Applicant's connection to the crimes as well as his attempt to cover up his involvement and blame others. Counsel also did not want to elicit evidence of Applicant's earlier statements to police after the confession was excluded and the State elected not to put in any of Applicant's statements. {PCR Tr. 1272-78; 1367-69; 1909-14}. Moreover, because of these explanations, statements made in arrest warrants based on then-existing investigatory information, and in indictments based on concepts of accomplice liability do not amount to a reasonable probability of a different result. All are easily explainable.

VI. Conflicts of Interest:

A. Applicant Failed to Establish Hardee-Thomas Operated Under An Actual Conflict of Interest As a Result of Her Former Representation of Ricky Davis and Then Active Representation of Applicant

Marva Hardee Thomas was appointed to represent Ricky Davis on April 23, 2001. {Applicant's 12}. At the time, Davis faced two charges for armed robbery. {Applicant's 12, 19, 21}. On October 16, 2001, Davis was tried by a jury and convicted of one count of armed robbery. {See Applicant's 20}. He was sentenced to twenty (20) years confinement by the Honorable Diane Goodstein, Circuit Court Judge. Id. The second indictment against Ricky Davis was nol prossed with a right to restore on October 18,

2001.⁸ **{See Respondent's 14}**. Marva Hardee-Thomas filed a Notice of Appeal on Ricky Davis' behalf on October 24, 2001. **{Respondent's 14}**.

Marva Hardee-Thomas was appointed to represent Applicant. At the PCR hearing, Hardee-Thomas testified that she did not recall receiving the handwritten note written by Ricky Davis. **{PCR Tr. 1564}**. She did identify the notary block as being in her handwriting. Id. However, she did not recall seeing the statement and noted that the notary block was not witnessed by anyone. Id. She did not have any independent recollection of talking with Ricky Davis about the handwritten note. **{PCR Tr. 1601}**. She testified that she would not have had a discussion directly with Davis about the document. **{PCR Tr. 1602}**.

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Counsel was served with a copy of Ricky Davis' handwritten note on or about January 2, 2002. **{See Respondent's 36}**. At the PCR hearing, Hardee-Thomas testified that she did not know why Ricky Davis did not testify. **{PCR Tr. 1572}**. She did not have a strategic reason for not calling Ricky Davis, but noted that the decision to call Davis to the stand would be one left to the lead attorney in a death penalty case. Id. In Applicant's case, Cummings was the lead attorney. Hardee-Thomas guessed that Cummings made the decision to not call Ricky Davis as a witness because she did not make that decision. **{PCR Tr. 1573}**.

"The Sixth Amendment right to counsel attaches upon initiation of adversarial judicial proceedings and at all critical stages of a criminal trial." State v. Sterling, 377 S.C. 475, 479, 661 S.E.2d 99, 101 (2008). "To establish a violation of the Sixth Amendment

⁸ It appears that the victim in the second armed robbery could not be located.

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right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance." Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001). "An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007).

"[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980) (citing Holloway v. Arkansas, 435 U.S. 475, 487-491 (1978)). "But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Cuyler, 446 U.S. at 350 (citation omitted). "[A]n actual conflict of interest occurs:

when a defense attorney places himself in a situation inherently conducive to divided loyalties.... If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) (quoting Zuck v. State of Alabama, 588 F.2d 436, 439 (5th Cir.1979)).

"The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." State v. Gregory, 364 S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005). Additionally, the fact that counsel does not advise a defendant of the potential conflict of interest does not affect the constitutionality of the conviction. Jackson v. State,

329 S.C. 345, 355, 495 S.E.2d 768, 773 (1998). Moreover, the "Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction." Langford v. State, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993).

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Applicant has failed to establish that Hardee-Thomas acted under a conflict of interest in representing Applicant in this case. Hardee-Thomas' representation of Ricky Davis ended on October 24, 2001, the date she filed his Notice of Appeal with the circuit court. Rule 602(e)(3), SCACR (public defender automatically relieved after filing of Notice of Appeal to conviction). At that time, his second armed robbery charge had already been not prossed by the Solicitor's Office. {See Applicant's 22}. Thus, when counsel was presumably made aware that Davis had written a statement regarding Bowman's case on or around January 2, 2002, she did not represent Ricky Davis. At that point, she owed no duty to Ricky Davis other than to maintain his confidences from her representation of him on the two armed robbery charges. Since there was not a potential conflict of interest, Hardee-Thomas was not obligated to obtain a waiver from either Bowman or Davis.

Even if Hardee-Thomas' representation of Ricky Davis constituted a potential conflict of interest with her representation of Applicant, Applicant has failed to establish that the potential conflict developed into an actual conflict of interest. At no point were Ricky Davis' interests adverse to Applicant's interests. First, Davis' handwritten statement, if established to be true, would have benefitted Applicant because it indicated that Gadson, Applicant's co-defendant, was the one who killed Kandee Martin. Further, contrary to Applicant's assertions, there was no evidence presented in this PCR Action that indicated Ricky Davis' interests would have been at odds with Applicant's had he testified at trial. Applicant asserts that Ricky Davis would not testify because the solicitor's office could still

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restore the nolle prossed charge against him as leverage. Applicant presented no evidence to show that the solicitor's office either used the nolle prossed indictment in such a fashion or that it could. Clearly, the disposition sheet on Ricky Davis' nolle prossed charge indicates that the case was dismissed because the State could not find the victim. **{Applicant's 22}**. There was no evidence presented at the PCR hearing that circumstances had changed, or that the solicitor's office was in a position to re-present the indictment to the grand jury. Thus, Applicant never established that Davis' interests were in a position contrary to Applicant's.

Applicant also failed to present credible evidence that Hardee-Thomas spoke to Davis about Applicant. The only person who testified that Hardee-Thomas met with Davis to talk about Applicant's case is Davis.⁹ **{PCR Tr. 251}**. Cummings testified that he sent Walt Mitchell to speak with Ricky Davis about Applicant. **{PCR Tr. 1328}**. Hardee-Thomas indicated she did not recall talking with Ricky Davis about the note and that she thought an investigator was sent out to talk to Davis about his handwritten note. **{PCR Tr. 1603-04}**. Further, Hardee-Thomas testified that she could not recall when she drafted the signature block she put on the handwritten note. **{PCR Tr. 1601}**. She noted that she likely would have received the paper from a guard at the jail. **{PCR Tr. 1602}**.

Overall, Applicant has failed to establish that trial counsel did not call Ricky Davis to testify as the result of an actual conflict of interest. Indeed, as noted before the credible evidence discloses a reasonable strategic decision that Davis was not a reliable witness and his testimony was likely to be damaging to Applicant's case. **{PCR Tr. 1335, 1894-5,**

⁹ His testimony indicates that he was not sure if she was the one from the defense team who spoke with him. **{PCR Tr. 251}**.

1901-02}. There was no probative evidence at trial that indicated that any potential conflict of interest played a role in the decision making process. Applicant has failed to prove his claim and it is denied.

B. There was no Conflict of Interest As a Result of the Fact that Gene Dukes Represented Applicant's Co-Defendant Tawain Gadson

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Applicant's second conflict of interest claim derives from the fact that Hardee-Thomas represented Applicant while the Chief Public Defender for Dorchester County represented a co-defendant. As already noted, Marva Hardee-Thomas, Esquire, a Dorchester County Public Defender, was appointed to represent Applicant. Gene Dukes, Esquire, another Dorchester County Public Defender, was appointed to represent Gadson, Applicant's co-defendant who later testified against him at trial. {Applicant's 77}. At the PCR hearing, Marva Hardee-Thomas testified that the Dorchester County Public Defender's Office was essentially a conglomeration of independent contractors. {See PCR Tr. 1535, 1548}. Gene Dukes was listed as the Chief Public Defender because he had the most seniority. {PCR Tr. 1540}. According to Hardee-Thomas, the Public Defenders did not share an office. {PCR Tr. 1541-43}. They each worked from their own separate office. {PCR Tr. 1541}. They were not full-time Public Defenders, so they each had their own separate practices. {See PCR Tr. 1535, 1550}. The public defender corporation did have one employee, Kathy Rogers, who was responsible for assigning cases. {PCR Tr. 1537}. The only common space the Dorchester County Public Defenders shared was a small conference room in the Dorchester County Courthouse in Saint George. {See PCR Tr. 1541, 1553}. Hardee-Thomas also testified that they would never have co-defendants in the conference room at the same time. {PCR tr. 1607}. They did not share personnel.

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{PCR Tr. 1554}. There was no investigator for the Public Defender Corporation. Id. Instead, each public defender had to petition the Court for funds if an investigator was needed. {PCR Tr. 1554}.

Applicant has failed to establish there was an actual conflict of interest in this case. Applicant essentially argues there was a conflict of interest because both Gene Dukes and Marva Hardee-Thomas were Public Defenders. There was no evidence presented that indicated they discussed Applicant's case or any of the related cases. Further, there was no evidence presented that indicated they worked in concert in representing individual clients, or that they shared the confidences of individual clients with one another. This claim parallels a similar claim made the applicant in Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). In Jackson, the Applicant argued he was entitled to a new trial because of a conflict of interest because his co-defendant was represented by another public defender in the Richland County Public Defender's Office. Id. at 347-48, 495 S.E.2d at 769. The PCR Court found trial counsel was ineffective because he operated under a conflict of interest, among other things. Id. at 348, 495 S.E.2d at 769. On appeal, the South Carolina Supreme Court reversed.

In our opinion, respondent did not show any actual conflict of interest resulted from counsel's representation of him while others in counsel's office represented respondent's co-defendants. All respondent showed and the PCR judge found was a potential conflict of interest because counsel worked in the same office with the attorneys who represented the co-defendants. Counsel testified no conflict existed, and respondent could not point to an actual conflict. Thus, this potential conflict never ripened into an actual conflict. Nothing in the record suggests the potential conflict caused counsel to treat respondent's case in such a manner as to obtain more favorable consideration for respondent's co-defendants. Further, the fact that counsel never advised respondent of the potential conflict of interest does not affect the constitutionality of the conviction. See Langford v. State, 310 S.C. 357, 360, 426 S.E.2d 793, 794 (1993).

Id. at 354-55, 495 S.E.2d at 773. Here, as in Jackson, there was no evidence presented at the PCR hearing that an actual conflict of interest existed. As a result, this ground for relief is denied.

VII. Ineffective Assistance Regarding Evidence Admitted in Guilt Phase

Applicant next asserts counsel was ineffective in his handling of a number of items of evidence in the guilt phase.

A. Failure to move to exclude evidence of Bowman's DNA found in the victim's vagina

SLED DNA analyst Fitts found human blood and semen in the vaginal swabs taken from Kandee at autopsy. While the mixture of female and male secretions in the vaginal swabs complicated identification, Agent Fitts was able to match Applicant to a probability of 1 in 5300. **{R. 4370-72; 4379-87}**. Applicant now contends his counsel was ineffective for failing to move to exclude this match from evidence.

1. There was no valid objection to this testimony.

As an initial matter, Applicant did not show either deficiency or prejudice as there was no sustainable objection that could be made to the DNA match. Regardless of Applicant's complaints that there was no testimony that Applicant and Kandee had sex out at the Nursery Road location, this evidence is undoubtedly relevant to and confirmatory of the identity of Applicant as the murderer, as it places Applicant in close presence of Kandee during the time period at issue. See Rule 401, SCRE (evidence is relevant if it would make a fact in issue more probable or less probable).

Admissibility is not affected by the fact that the DNA match might not necessarily establish the exact point when Applicant had sex with the victim, or because James

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Gadson claimed he did not observe any sexual contact at the Nursery Road scene. As noted in State v. Benjamin, 345 S.C. 470, 480, 549 S.E.2d 258, 263 (2001):

All that is required is that the fact shown tends to make more or less probable some matter in issue and to bear directly or indirectly thereon. *It is not required that the inference sought should necessarily follow from the fact proved.* Evidence is relevant if it makes the desired inference more probable than it would be without the evidence.

(Emphasis added).

Here, the DNA match is objective scientific evidence that the victim and Applicant were in very close contact around the relevant time period of the murder, and this point alone is sufficient to make it admissible in trial – even if it only provides objective and indisputable corroboration to witness testimony that they were together at some point during the day Kandee was killed. Given the issues Applicant raised with the credibility of the fact witnesses, this indisputable scientific evidence aids a finding of identity, which was especially relevant in this case, where Applicant pled not guilty and put the State to its proof.¹⁰

Applicant contends the proof of sex is an inadmissible “bad act” pursuant to Rule 404(b), SCRE. First, though, is the point that the mere fact Applicant and Kandee had sex – which is all the semen evidence proves by itself – is not a “bad act” in the legal sense.

See Rule 404(b), SCRE. Although Applicant contends that fornication is criminal in South

¹⁰ See generally State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300, 311-12 (2001) (finding letters were relevant to show identity as murderer inasmuch as they referred to a safe and a safe was present at the murder scene, and rejecting claim that they were inadmissible because it was not established that the safe referenced in the letters was at the barbershop, where the incident referred to in the letter fit the general time frame of the barbershop killings); State v. Benjamin, 345 S.C. 470, 480, 549 S.E.2d 258, 263 (2001) (evidence defendant was willing active participant in later robbery was relevant to rebut claim of duress at earlier robbery, even though robbery being tried occurred later); State v. Daniels, 252 S.C. 591, 167 S.E.2d 621 (1969) (held evidence of a prior robbery admissible to show identity because it placed the defendant together with his alleged accomplice); State v. Varvill, 338 S.C. 335, 526 S.E.2d 248 (Ct. App. 2000) (in unlawful use of telephone prosecution, evidence defendant rode by victim's office and home was relevant to show his intent to harass her with his phone calls).

Carolina, that law is not enforced, and sex is not considered "criminal" or a "bad act" in the legal sense by modern social standards simply because it is out of wedlock.

The same goes for Applicant's contention that interracial sex between Applicant and the victim is a bad act or is unduly prejudicial. Applicant cannot assume racism on the part of the jury, which was subject to extensive *voir dire* and instructions from the judge on their ability to be fair and decide the case apart from bias or prejudice. There is no proof that the jury was racially biased in this case, and the mere fact of interracial sex does not constitute a "bad act" under contemporaneous values.

Even if adultery or interracial sex could be considered a "bad act", though, as noted before, "bad acts" under Rule 404(b) are still admissible if they show identity, which the DNA match does in this case. Thus, even if the sexual contact is a bad act, it would still be admissible. And, given that identity was the main issue in the case, it was more probative than prejudicial.¹¹

Since the evidence was admissible, then counsel could not have been deficient nor Applicant prejudiced as a matter of law. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility

¹¹ See State v. Simmons, 310 S.C. 439, 427 S.E.2d 175 (1993) (where intent was contested on burglary charge, the probative value of defendant's prior attacks on elderly women outweighed the prejudicial effect); State v. Ford, 334 S.C. 444, 513 S.E.2d 385 (Ct. App. 1999) (because defendants disputed state's allegations about their motive and intent, evidence of prior robbery of victim was "highly probative"); State v. Waddle, 873 P.2d 171 (Idaho Ct. App. 1994) (where defendant denies being the perpetrator, evidence tending to establish identity is always relevant). See generally State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990) (Lyle evidence was not just admissible when "necessary", but is admissible whenever it is "relevant"); State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981) (evidence of other crimes admissible even though appellant's confession to the crimes was also admitted); State v. Green, 261 S.C. 366, 371, 200 S.E.2d 74, 77 (1973) (evidence logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused's guilt of another crime).

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

2. Counsel had a valid strategic reason for admitting the testimony.

Even if there was a valid objection, there is no basis for relief because counsel had a valid strategic reason for admitting the intimate contact. At the PCR hearing, counsel Cummings testified that he did not elicit from Gadson that he observed no sex between Applicant and Kandee because:

[H]ere is my theory and this is what I want to show. Marion and Kandee were friends; they were intimate friends, if I can use the words. I wanted to show that this man would not hurt this little girl because he cared about her and she was an intimate friend of Mr. Bowman's.

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{PCR Tr. 1750}. Counsel stated that while he considered a Dorchester County jury to be a "small town jury", and while he was aware of concerns about adultery and interracial sex, he still wanted to show "they were intimate friends and . . . he had no ill motive or reason to kill this lady". {PCR Tr. 1752}. Counsel pointed out that since the DNA expert could not testify as to precisely when the DNA was put there, he wanted to "clean . . . up" any attempts of the State to sully the relationship, thus showing "he had no malice to this lady, had no reason to hurt her". Indeed, counsel hired his own DNA expert to verify that it could not be precisely determined when the Applicant deposited his semen into the victim. {PCR Tr. 1753-54; 1792; 1955; 1980-81}. Counsel stated he did not want to elicit that Kandee was around Applicant to get drugs, as that would obviously "dirty up" his attempt to show an intimate friendship. {PCR Tr. 1755}.

On cross by the State, counsel reiterated that he wanted to show Applicant and Kandee were friends and Applicant would not have killed her. He added that he was not

afraid of the DNA evidence because Applicant was not charged with criminal sexual conduct ("CSC") in the guilt phase, and counsel did not believe the State could prove CSC in the sentencing phase. Counsel stated that since Gadson never testified there was any sex at the scene, he saw no reason to broach the subject. {PCR Tr. 1866-67}.

Thus, counsel elicited a valid strategic reason for not objecting to the DNA evidence. He was not at all scared of it as he did not think CSC could be proven (especially since he had Applicant's statement suppressed in which Applicant talked of sexual contact with the victim's corpse), and he thought it could be used to undermine any motive to kill since Applicant and Kandee were lovers. Counsel accordingly was not deficient simply because the strategy did not work, particularly given the overwhelming evidence facing counsel in this case. See Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

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[Signature]

3. There was no prejudice.

In any event, there was no reasonable probability of a different result. The evidence of identity was overwhelming even if the DNA match was excluded, as set forth in preceding subsections. Moreover, as argued before, contemporary social values towards extramarital sex and interracial relationships preclude any *per se* finding of undue prejudice from those issues. Therefore, Applicant has not met his burden of showing prejudice.

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Reed v. Norris, 195 F.3d 1004 (8th Cir. 1999) (failure to raise Batson issue not prejudicial under Strickland given overwhelming evidence).

B. Failure to move to exclude petroleum evidence

Applicant next asserts counsel failed to object to introduction of Applicant's pants, because the accelerant present on the pants – a "heavy" accelerant – was not the same as the substance used to ignite Kandee's car – which was gasoline, or a "medium" petroleum accelerant.

At trial, SLED chemist Grady Layton identified a medium petroleum accelerant on Kandee's pocketbook, and Layton was able to conclusively identify the presence of gasoline on the shirt, paper material, belt, and miscellaneous debris found in her car. {R.

4298-4299}. SLED Agent Helms concluded the fire was intentionally set. {R: 3889-90}.

Layton also found the presence of a heavy petroleum accelerant, but not gasoline, on Applicant's black Levi's – and a number of Appellant's friends testified at trial he was wearing black jeans the day before. {R: 3763; 4058; 4093; 4193; 4297-98}.

Solicitor Bailey pointed out at PCR that the SLED arson expert had done a complete report, so he introduced testimony on all aspects of the report to avoid allowing the defense to assert or imply the State had not done a full and fair investigation. {PCR Tr. 2026; 2136}.

1. There was no valid basis for objection.

Given this evidence, as an initial matter there could be no deficiency for failure to object nor prejudice as there was no valid basis for objection. The pants themselves were undoubtedly relevant to identity, as they were consistent with and corroborative of what

people said Applicant was wearing the night of the murders, and Applicant asked for them the next morning when he was arrested. More importantly, the pants contained Kandee's watch, which was very relevant to the identity of the murderer. See Rule 401, SCRE (evidence is relevant if it would make a fact in issue more probable or less probable).

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As to the accelerant, counsel had no valid objection. It goes without saying that within reason a solicitor is certainly entitled to introduce evidence the complete investigation done by police, even if not necessarily incriminating, to avoid any defense contention that the State rushed to judgment or failed to fully investigate the case. A classic example, as this Court pointed out during argument {PCR Tr. 2249}, is calling the fingerprint expert to testify no prints were found despite investigation, in order to avoid later defense argument that the State failed to look for prints or that the lack of prints constitutes reasonable doubt. This is even more important in this post-"CSI" world, given that many jurors watch that TV show and expect such forensic evidence. See United States v. Fields, 483 F.3d 313, 355 n. 39 (5th Cir.2007) (citing an article discussing the "CSI effect" on jurors, and stating: "Some have claimed that jurors who see the high-quality forensic evidence presented on CSI raise their standards in real trials, in which actual evidence is typically more flawed and uncertain.").

As to any concern that the mention of an accelerant might confuse the jury and was substantially more prejudicial than probative under Rule 403, SCRE, no such prejudice occurred. The SLED agent was clear that while there was a heavy accelerant on Appellant's pants, it was NOT gasoline, and there is a difference. {R. 4297-98; 4301-05}. Counsel also elicited that Dorothy used kerosene to heat her house. {R. 4831}. And, the

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solicitor in argument never mentioned the accelerant on the pants or claimed it was indicative of anything. {R. 4461; 4476}. Thus, there is no indication this evidence was unfairly prejudicial or confusing to the jury, or that the State misused it.

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

2. Counsel had a valid strategic reason for admitting the testimony.

Even if there was a valid objection to the testimony, Applicant cannot establish a valid claim for relief because counsel articulated a valid strategic reason for wanting the testimony to be admitted.

At PCR, counsel Cummings testified that he tried to suppress the seizure of the jeans, but that was overruled. He noted he did get family to say they used kerosene to heat the house, and he got the expert to say the accelerant on the jeans was not gasoline. {PCR Tr. 1706-07}. Counsel stated he did not consider objecting to any evidence about the petroleum accelerant found on the pants, because the expert was going to and indeed did testify that the accelerant was not gasoline, but kerosene like that which Applicant's wife used to heat the house. Counsel stated that had the solicitor not called the SLED arson expert, counsel probably would have to elicit that only kerosene was found on Applicant's pants. Counsel felt he needed to do this to counter the fact that the victim's watch was found in his pants and witnesses were saying Applicant burned the car. {PCR Tr. 1708-09; 1711-14}.

On cross by the State, counsel noted he had his crime scene expert review the arson report. The expert advised counsel that if all the State had was that a heavy

accelerant was on the pants, that was good for the defense. Counsel strategically decided to bring out that Applicant only had kerosene and not gasoline on his pants, and felt was had successfully taken a state's witness and "made him mine". Counsel pointed out he also elicited from Applicant's wife Dorothy that they used kerosene at home, and of course Dorothy's home is where the pants were found. {R. 4831; PCR Tr. 1845-46; 1854-55}.

Thus, counsel had a valid reason for allowing the evidence – it allowed him to use a State's expert to establish that nothing on Applicant's clothes forensically linked him with the crime, even though the State asserted those were the pants Applicant was wearing when he killed Kandee. Counsel accordingly was not deficient simply because the strategy did not work, particularly given the overwhelming evidence facing counsel in this case. See Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, trial tactics are not ineffective because they were unsuccessful).

3. There was no prejudice.

In any event, there was no reasonable probability of a different result. The evidence of identity was overwhelming, as previously detailed before in this Order. Moreover, the evidence introduced at trial was clear that the accelerant on the pants did not match the accelerant used to burn the car, and the solicitor in argument never contended otherwise. Given these circumstances, it could not possibly have been so prejudicial to create a reasonable probability of a different result. Applicant has not met his burden of showing prejudice. Reed v. Norris, *supra*. The issue is denied.

C. Failure to object to evidence of conspiracy to secrete Applicant's gun and examination on plea agreements

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Applicant contends his counsel was ineffective for failing to object to evidence his relatives were engaging in a conspiracy to "secrete" the murder weapon, by arguing there is no evidence of such a conspiracy or Applicant's connection to it. He also asserts counsel was ineffective in failing to object to the solicitor's examination on plea agreements Applicant's family had with the State.

As noted before, at a party the day Kandee disappeared, Applicant took out from his waistband a grey and black High Point .380 semiautomatic pistol – which he had bought a couple of weeks earlier – wrapped it in a paper bag, and put it into the barrel in Koger's yard. {R. 3675-77; 3683-84; 3700; 3750-51; 3983-89; 4031-32; 4057-59; 4077-78; 4101}. When Applicant returned, a number of people, including trial witnesses Koger, Fogle, and Carolyn Brown – saw Applicant get upset at Tywan because someone had taken his gun. However, Hiram Johnson interceded, and told Applicant he had taken the gun back to Katrina West's apartment in the projects. Applicant went across the street and got the gun, and put it back in his pants. {R. 3677-79; 3684-85; 3690-91; 3701; 3985-90; 4058-60; 4077-78}.

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

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

The next day, Kendra and Yolanda met with Marion Sr., and then followed him out to the graveyard at the Zion AME church. Applicant's father brought the pistol from out of the nearby woods, and they wrapped it in a towel and put it in Yolanda's trunk. Kendra and Yolanda drove out to the Old Cope Road bridge and threw the gun over the side into the Edisto River. {R. 4174-78; 4183-87}.

On May 28th, 2001, a police diver recovered the black and grey High Point .380 semiautomatic in the river bottom about 25 to 30 feet from the bridge. {R. 4220-29}. The gun was matched by SLED firearms examiner David Collins to five of the six Winchester .380 shell casings found at the Nursery Road scene. While the sixth casing and spent bullet could not be matched to Applicant's .380, they were consistent. {R. 4315-20}.

1. There was no valid objection to the conspiracy.

As an initial matter, counsel could not have been deficient nor Applicant prejudiced as there was no valid objection to be made to the evidence of concealment of the weapon by Applicant's family. First, the weapon was obviously relevant to identity. It shows Applicant's possession of a firearm matched with or at least consistent with the gun used to kill the victim during the time period that the victim was killed. See State v. Braxton, 343 S.C. 629, 634, 541 S.E.2d 833, 836 (2001) (testimony that witness knew appellant possessed a nine millimeter pistol was relevant because it tended to identify appellant as

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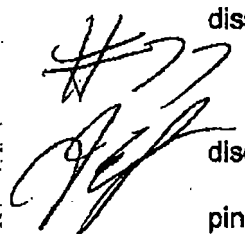
the possessor of the murder weapon, also nine millimeter pistol); State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001) (prior murder was admissible to establish appellant's identity in the prosecution of the current murder, where the same weapon was used in both murders).

Moreover, there was ample evidence from which the gun and its subsequent concealment could be tied to Applicant. Applicant was identified by his friends in possession of such a gun prior to the crime, and Dorothy testified that on the night of the incident Applicant came in and slept in the chair where she later found the gun. {R. 4193-94; 4198-99}. It is certainly a reasonable inference from the evidence that Applicant hid the gun there, and at Applicant's request through his own communications or through Hiram Johnson, his wife, sisters, and father subsequently attempted to permanently hide or destroy the gun to protect Applicant. Again, Applicant overlooks that evidence can be relevant not just by what it directly shows, but also by reasonable inferences from the evidence. See State v. Benjamin, 345 S.C. 470, 480, 549 S.E.2d 258, 263 (S.C. 2001) ("It is not required that the inference sought should necessarily follow from the fact proved. Evidence is relevant if it makes the desired inference more probable than it would be without the evidence.").

Destruction of evidence is relevant to identity, and of course any admissions that Applicant made to his family about the gun – whether expressly testified to or implicit in the subsequent actions of the family – would be substantively admissible.¹²

¹² See Rule 801(d)(2), SCRE (admissions of party opponent). See also State v. Beckham, 334 S.C. 302, 513 S.E.2d 806 (1999) (destruction of evidence and evidence of flight relevant as incriminating circumstance, and to show guilty knowledge and intent); State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (evidence of flight admissible to show guilty knowledge and intent); State v. Ezell, 321 S.C. 421, 468 S.E.2d 679 (Ct. App. 1996) (in case where defendant ran and vial of crack was found nearby, evidence of

Moreover, the gun and the events surrounding its recovery would still be admissible even if there was no evidence tying the attempt to conceal it to Applicant. The description of how the gun was recovered was part of the *res gestae*, as it was necessary to tell the complete story of how the gun was recovered to show its link to Applicant and its relevance to this crime. See State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) ("One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence 'furnishes part of the context of the crime' or is necessary to a 'full presentation' of the case"). "[T]he jury is entitled to know the 'setting' of the case. It cannot be expected to make its decision in a void – without knowledge of the time, place, and circumstances of the acts which form the basis of the charge." United States v. Roberts, 548 F.2d 665, 667 (6th Cir. 1977), cited in Rebecca Smith, 309 S.C. at 453, 424 S.E.2d at 502 (Toal, J., dissenting).



Obviously, the jury was entitled to know the circumstances surrounding the police's discovery of the murder weapon – particularly since the State had to explain why the firing pin broke during examination by Agent Collins, likely due to its long submergence in the river. Indeed, counsel testified at PCR he did not see any valid objection for keeping out the evidence as to how the gun was found by police. {PCR App. 1849}. Counsel was correct in this assessment.

Further, had counsel tried to exclude the evidence of the attempt to conceal the gun by arguing a lack of evidence tying it to Applicant, the State would have easily overcome that objection by introducing one of Applicant's letters to his wife, admitted at PCR as

flight shows guilty knowledge and intent). See also United States v. Robinson, 161 F.3d 463 (7th Cir. 1998) (evidence of flight shows consciousness of guilt under Rule 404(b)); United States v. Jackson, 886 F.2d 838 (7th Cir. 1989) (evidence of flight and concealment is probative of guilty consciousness under Rule 404(b)).

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Applicant's 56. In it, Applicant asks Dorothy to tell her lawyer she only found the gun after someone broke into her house and put blood in there (obviously to try to then claim the gun was planted by the "real killer") {R. 4360}, and goes on to ask her to tell Hiram to say he only saw Applicant with a .32 or .38 revolver (which is different from the murder weapon). Even assuming loose ends existed as to whether Applicant had knowledge of or instigated the concealment of the weapon, they would have more than been tied up by this letter. Counsel was adamant he in no way wanted this letter in evidence given all the incriminating admissions within it {PCR Tr. 1838-39}, as it clearly shows Applicant's attempt to encourage perjury and obstruct justice. Indeed, he also goes on to ask Dorothy to tell Travis Felder not to say anything, and to tell Travis that Applicant told his lawyer Travis had nothing to do with the crime and would clear him in court. {Applicant's 56}.

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

2. There was no prejudice.

Even if there was somehow a valid objection to introduction of how police discovered the gun, there was no prejudice. As set forth previously, the evidence of guilt was overwhelming. Even if the story of how police found the gun was excluded, the gun itself combined with all the other evidence of identity would preclude a reasonable probability of a different result. Therefore, Applicant has not met his burden of showing prejudice. Reed v. Norris, supra.

3. There was no valid objection to the solicitor's reference to the plea agreements.

Next, there was no valid objection to be made to the solicitor's questioning of Dorothy, Yolanda, and Kendra on the plea agreements; thus, counsel could not have been deficient nor Petitioner prejudiced by the failure to make such an objection.

The law is clear that codefendants may testify even though they have agreed to a plea agreement, and additionally a plea or plea agreement is admissible not as substantive evidence of the defendant's guilt or innocence, but to support or attack the credibility of a testifying codefendant. See, e.g. U.S. v. Gray, 491 F.3d 138 (4th Cir. 2007) (testimony of codefendants testifying pursuant to a plea agreement or immunity agreement still admissible where product of free will, albeit a hard choice); State v. Moore, 337 S.C. 104, 522 S.E.2d 354, 355 n.2 (Ct. App. 1999) (while a codefendant's plea is not admissible as substantive evidence of the defendant's guilt or innocence, it is admissible to support or attack the credibility of a testifying codefendant).

Additionally, the law is clear that the State may elicit plea agreements on direct examination to avoid the perception it was hiding something when the defense inevitably cross-examines the witness on his or her deal with the State. See State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (S.C. 2001) ("Initially, it was not error for the Solicitor to introduce the plea agreement on direct examination because the Solicitor was entitled to anticipate the inevitable cross examination of a federal inmate and to dispel any notion he was hiding something from the jury."). Indeed, counsel Cummings pointed out that he was the trial attorney in the Shuler case, and thus saw no basis for objecting. {PCR Tr. 1849-52}.

Since the questioning was permissible, then counsel could not have been deficient nor Applicant prejudiced as a matter of law. See Hough v. Anderson, supra.

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4. Counsel had a valid strategic reason for not objecting.

Although counsel did testify he did not see a valid objection to the plea agreements, he also expressed a valid strategic reason for wanting the plea agreements admitted into evidence. Counsel stated he "wanted the rest of the stuff about how they went after his whole family to get him", and "wanted everybody to know that everybody was charged, everybody, and the only one they went after was him". {PCR Tr. 1702, 1704}. Indeed, if counsel had NOT engaged in such common and basic impeachment as examining the State's witnesses on their deals with the State, surely then the allegation now would be ineffectiveness for failing to do so. The fact that Applicant's present counsel may have treated the issue differently is irrelevant as it is precisely the kind of hindsight Strickland forbids. See Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack).

5. There was no prejudice from admission of the plea agreements.

Even if there was somehow a valid objection to introduction of the plea agreements, there was no prejudice. As previously set forth, the evidence of guilt was overwhelming. Indeed, had counsel precluded testimony about the deals with the State, that might just as well have enhanced the credibility of the family members in the absence of such a common method of impeachment. Therefore, Applicant has not shown prejudice. Reed v. Norris, *supra*.

VIII. Failure to Object to Admission of Ballistics Evidence

Applicant next contends his counsel was ineffective for failing to object to admission of the opinion of the SLED firearms examiner that the casings at the scene matched Bowman's .380 to the exclusion of all other firearms.

Of course, after Applicant's sisters confessed to throwing Applicant's pistol in the river, a police diver recovered the black and grey High Point .380 semiautomatic in the river bottom about 25 to 30 feet from the bridge. {R. 4220-29}. The gun was matched "to the exclusion of all other firearms" by SLED firearms examiner David Collins to five of the six Winchester .380 shell casings found at the Nursery Road scene. While the sixth casing and spent bullet could not be conclusively matched, they were consistent. {R. 4315-20}.

A. Counsel was not deficient.

 Despite having the gun transported to Atlanta for review by his expert for these PCR proceedings, Applicant presented no evidence that Collins's conclusion as to the match was invalid. His only attack goes to the validity itself of the discipline of firearms and toolmark examination, and the ability of that discipline to make an exclusive match.

However, even assuming the present validity of an attack on the discipline of firearms and toolmark identification or the relative conclusiveness of a match, counsel was not deficient. Two relevant principles for analyzing claims of ineffectiveness come into play here. First is the point that there is no constitutional claim of ineffective assistance of an expert witness. See Wilson v. Greene, 155 F.3d 396, 401 (4th Cir. 1998) ("The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness. To entertain such claims would immerse federal judges in an endless battle of the experts to determine whether a particular psychiatric examination was appropriate.");

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Waye v. Murray, 884 F.2d 765, 766-67 (4th Cir.1989). Lawyers are entitled to reasonably rely on their experts, and they are not required to second-guess their expert's conclusions or "expert shop" until they find one who will testify favorably. See Wilson v. Greene, 155 F.3d 396 (4th Cir. 1998); Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992). To be actionable, the failure must be of counsel in failing to obtain or present the expert testimony; the fact that the testifying expert did not identify "every possible malady or argument" is not a basis for relief. Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992).

Second is the principle that the reasonableness of counsel's actions must be viewed in the context of the time period they took place, and not in hindsight. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.") (quoting Strickland); Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006) ("Though hindsight may provide a different view of counsel's actions, Simpson is not entitled to a new trial for the sole purpose of presenting a 'fancier' case."). See also Harden v. State, 360 S.C. 405, 602 S.E.2d 48 (2004) ("An attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction.").

When these principles are considered, it is clear counsel could not have been deficient for failing to challenge the underlying discipline of firearms examination at the time of a trial in May 2002. Counsel testified he hired a recognized firearms examiner, Cleon Mauer, to review the State's firearms evidence. {PCR Tr. 1794; 5316-17}. Counsel stated that Mauer concurred with the State's findings of a match, and never once advised

him that he should challenge the entire discipline of firearms identification or have a match excluded from evidence. {PCR Tr. 1684; 1847-49}. Counsel noted that "at the time of trial" he understood firearms examination to be a "recognized science". Counsel testified he had an sheriff's investigator bring all the evidence to his expert so that the expert could conduct his own examination, and the expert also found a match. {PCR Tr. 1681-85}. While counsel agreed that a ballistics examiner might have an vested interest in protecting the discipline, he relied on his expert to tell him the truth. {PCR Tr. 1688; 1690}. Counsel cross-examined the State's expert Collins as best he could with questions suggested to him by his own expert, by eliciting that the firing pin was broken, and that the State could not match the weapon to the actual projectile that killed Kandee. {PCR Tr. 1684; 1699}.

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Since: (1) counsel here hired and relied upon a firearms expert who did not advise him to make a challenge to the underlying discipline – which would not be actionable even if the expert was at fault in not knowing of such a challenge – and (2) defense lawyers were not making challenges to the underlying discipline of firearms examination in South Carolina at the time of trial in 2002, but instead considered it a "recognized" discipline, then counsel could not have been deficient for failing to challenge the validity of the discipline.

Further, Applicant's Exhibit 78 would not change this conclusion and somehow make counsel deficient for not raising a fundamental challenge to firearms identification. Applicant's 78 reflects a motion made to a federal court in Massachusetts in 2000 to exclude for various reasons a firearms examination finding a match. First, of course, is the fact that this Court excluded Applicant's 78 from evidence, so Applicant's citation to it in his brief is inappropriate. {PCR Tr. 1692-94}.

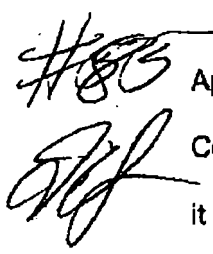
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However, even if this Court was to consider it, it does not establish that counsel here did not meet the minimum level of competence for South Carolina lawyers. Applicant offered no proof whatsoever that defense lawyers in *South Carolina* were routinely making such challenges as a matter of course, and counsel was therefore deficient for not meeting this supposed minimum standard of competence. Simply because one lawyer in Massachusetts had filed the motion does not mean that counsel here would be ineffective when such an attack was not commonly (or indeed – ever) done by criminal defense attorneys in South Carolina in 2002, particularly since counsel consulted an expert in the field and was not advised to make such a challenge.

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Indeed, Applicant primarily relies on the "Ballistic Imaging" study that did not come out in final form until August of 2008 {PCR Tr. 412; 423} – over six years after trial and three weeks before the PCR hearing began. These issues are just now percolating into the courts, and counsel cannot be held deficient for failing to raise a challenge for which the basis did not arise until years after Applicant's trial. See, e.g. Gentry v. Sinclair, 576 F.Supp.2d 1130 (W.D. Wash. 2008) (counsel's decision to attack reliability of DNA science and not the results was reasonable, as reasonableness the decision must be considered at the time it took place, in 1991, when DNA was still "cutting edge"); McDonald v. State, 952 So.2d 484 (Fla. 2006) (holding that counsel was not ineffective for failing to request a Frye hearing because there was general acceptance in the scientific community of the particular science at issue at the time of the defendant's 1995 trial).

As noted before, counsel is not required to second guess his expert, and indeed, Applicant's claim essentially depends on the premise that counsel himself should have had

more of an expertise on the cutting edge issues in firearms examination than his own firearms expert did. The law plainly does not require that. See, e.g. Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995) (to impose a duty on the attorney to gather background information for an expert independent of any request from that expert would defeat the whole purpose of hiring the expert, as understanding what information is needed is an integral part of the expert's skill, and requiring an attorney to review the trustworthiness of the expert's conclusions would make the expert superfluous); Green v. Koerner, 312 Fed.Appx. 105 (10th Cir. 2009) (defendant charged with arson was not denied effective assistance of counsel due to counsel's failure to foresee future developments in fire investigation science that occurred after date she entered her plea).

 Indeed, Applicant's "flat earth" discussion confirms the very point. At PCR, Applicant pointed out to counsel that it would "seem reasonable" for an expert prior to Columbus to advise that the earth was flat, but that later after ships sailed around the world it was found not to be flat. **{PCR Tr. 1691-92}**. Counsel cannot be found deficient because at the time he was not more ahead of the scientific curve than most of the rest of the world, including his own qualified hired expert. Counsel was not deficient.

B. There was no prejudice.

In any event, Applicant has not shown prejudice. First, the evidentiary showing Applicant made at PCR was insufficient to completely undermine the discipline of firearms examination and create a reasonable probability of a different result had it been presented to the jury.

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Again, there has been no evidence presented that David Collins was incorrect in finding a match pursuant to the accepted standards in the profession of firearms identification. Applicant's only contention goes to the underlying validity of the premise that firearms make distinguishing marks upon casings and projectiles that can be used to match them to a particular firearm to the exclusion of other firearms.

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In support of his claim, Applicant called Dr. Marc DeGraef, who was on a committee that authored the report, "Ballistic Imaging", which was marked as Court's Exhibit 1 but excluded from evidence. {PCR Tr. 477-78}. This report was a study of the feasibility of creating a national computer database of images of all new firearms that could be searched for matches to evidence from crime scenes. {PCR Tr. 406-08; 454}. Dr. DeGraef admitted his expertise, and thus his basis for inclusion in the committee, was only in imaging and imaging analysis, and that was the extent to which he was qualified as an expert at the PCR hearing. Dr. De Graef conceded that none of the studies on his CV involved analysis of ballistics or projectiles, that he had never conducted a firearms or toolmark analysis, and that he had never independently researched or studied the uniqueness of toolmarks. Indeed, he even pointed out that none of the other committee members had actually performed a study involving the uniqueness of firearms or toolmark identification. {PCR Tr. 414-23}. Finally, Dr. De Graef conceded he had not reviewed the specific evidence in this case. {PCR Tr. 442-43}.

Because of his lack of expertise with anything specifically relating to firearms or toolmark examination, Dr. De Graef was limited to testifying that the discipline was not a "science" because no statistical quantification of an error rate has occurred. {PCR Tr. 435-

38; 441-42; 451-52}. Dr. De Graef also criticized any use of subjectivity in science, {PCR Tr. 444-45}, and complained Collins's notes were not as detailed as a scientist would like {PCR Tr. 448-50}. He asserted that a statement of exclusivity imported an error rare of zero to a subjective determination. {PCR Tr. 474-75}.

On cross, Dr. De Graef admitted that the "Ballistic Imaging" report only questioned whether uniqueness of toolmarks had been fully demonstrated, and conceded the report expressly did not challenge the validity of firearms identification or take any position on whether such evidence was admissible in court. Moreover, Dr. De Graef conceded that the report accepted the prospect that the same gun would produce the same marks as having a "baseline level of credibility" given "existing research" and its acceptance as evidence in courts for years. He ultimately admitted that assessing the validity of the assumptions behind the discipline were not within the scope of the report, and the only conclusion of the report was that further study was warranted. {PCR Tr. 453-58; 470-72}. Dr. De Graef further conceded that the only independent study conducted for the report did not at all assess the question of uniqueness, and Dr. De Graef had no idea whether Agent Collins had correctly or incorrectly identified a match in accordance with then-existing standards. {PCR Tr. 463-66; 472}. Finally, Dr. De Graef admitted that he did not even write the portion of the report which questioned whether uniqueness had been established, but instead wrote portions addressing how various imaging systems might be applied to a firearms database. {PCR Tr. 466-67}.

The expert who testified as to the match at trial, David Collins, is a member of the Association of Firearms and Toolmark Examiners (AFTE) with a long career of experience

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in the field. {PCR Tr. 367-70}. He testified at PCR as to how sufficient agreement is found for a match. He noted that the observation of the various markings on a subject item and a test item is very objective, and agreed though that the ultimate conclusion of whether those markings proved a match did have a subjective component, based on the experience and training of the examiner. {PCR Tr. 296-99}. Collins testified that in his opinion firearms leave individual markings that are unique to that firearm. {PCR Tr. 307}. He noted he used rules of matching that have been accepted and used throughout the world and in place since the 1920s. {PCR Tr. 314-16; 321; 388}. Collins also pointed out that he personally has participated in as well as reviewed studies in which trained examiners were able to distinguish firearms that had been consecutively manufactured, thus proving the validity of the premise of uniqueness. {PCR Tr. 317-18; 321; 397-99; 481-86; 497-98}. Finally, he noted that he has never failed a proficiency test and is not aware that anyone else at SLED failed one while he was there. {PCR Tr. 336; 383}.

As to his specific finding in this case, Collins testified he found the possibility that the marks were made by a firearm other than Applicant's to be so remote and infinitesimal as to be a practical impossibility. He again pointed out that studies had confirmed this finding of uniqueness. {PCR Tr. 339-41; 349; 385-88}. Collins agreed his "exclusion" language might indicate complete certainty, but stated he was just trying to express his opinion that it was a practical impossibility another gun made the same markings. He agreed though, that at this time there was no way to put a statistical number on the conclusion like is done with DNA, for example. {PCR Tr. 341-50; 499-500}.

Given this testimony, no Strickland prejudice could result even if it is assumed that counsel should have called Dr. De Graef to attempt to exclude or undermine firearms identification testimony. Applicant simply did not provide sufficient evidence to preclude the firearms identification from being entered into evidence. All he offered was a general and *possible* criticism of the statement of exclusivity from someone who had no experience with firearms and toolmarks analysis, and had never actually conducted a study assessing the uniqueness of such marks. Thus, nothing concrete was offered to actually disprove the premise of the discipline that toolmarks are unique.

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To the contrary, the "Ballistic Imaging" report specifically noted that assessing the premise of uniqueness was beyond its scope, and it accepted the premise that the same gun would produce the same marks as having a baseline level of credibility – while just recommending further study. A generalized criticism and request for additional study simply does not establish that uniqueness of firearms does not exist. Indeed, the only person testifying before the Court who actually had participated in a study assessing uniqueness was Agent Collins, and he noted examiners were able to distinguish firearms even though they had been consecutively manufactured. Applicant's attack on the validity of the discipline itself was simply insufficient to preclude a type of testimony that has been routinely accepted in the courts since the 1920s. See Overton v. State, 976 So.2d 536 (Fla. 2007) (no prejudice from failure of counsel to challenge testing procedures of lab, where testimony showed that any such challenge would likely have been unsuccessful). See generally Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985) (In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief); Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3rd Cir. 1991) (applicant cannot show deficiency "based on

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vague and conclusory allegations that some unspecified and speculative testimony might have established his defense"; rather, facts must be presented).

Inasmuch as Applicant makes the lesser contention that counsel should have examined Collins on his "exclusion of all other firearms" language, again no prejudice resulted. Collins testified that he was simply trying to convey the concept of "practical impossibility" with such language, and that he remained sure the casings came from the subject firearm. Thus, had counsel probed the manner, Collings' answers would have been more than satisfactory and would not have created a reasonable probability of a different result.

Even if counsel had successfully reduced Collings' testimony to no more than the fact that the marks on the casings matched marks on known casings fired from the firearm, without any testimony as to the exclusive significance of that match, there still would be no reasonable probability of a different result. Collings still at a minimum would be able to testify the casings matched and thus could have come from the firearm, even if he was precluded from testifying the match was exclusive. This evidence still would make a fact in issue more likely than not, see Rule 401, SCRE, and would be akin to the serology evidence common before DNA, which was admissible even though millions of people have the same blood type. See generally Adams v. State, 794 So.2d 1049 (Miss. Ct. App. 2001) (Southwick, J., concurring) (inconclusiveness of mitochondrial DNA testing did not make it inadmissible where it could not exclude defendant but could exclude most of general population; while it does not confirm identity it makes it more probable than not). When the fact that the markings physically match is combined with the fact that Applicant's family conspired to hide the gun in the river, the gun would remain strong evidence indeed.

And, there was other conclusive evidence of identity without reference to an "exclusive" ballistics match, as previously detailed. Given all this evidence of identity, it cannot be said that a mere challenge to the exclusivity but not the match of the State's ballistics result would have created a reasonable probability of a different result. Indeed, given this evidence, even if the match were excluded it its entirety the evidence was still overwhelming. There was no prejudice. Reed v. Norris, 195 F.3d 1004 (8th Cir. 1999) (failure to raise Batson issue not prejudicial under Strickland given overwhelming evidence); Simmons v. Taylor, 195 F.3d 346 (8th Cir. 1999) (failure to object to jail clothing not prejudicial under Strickland given the state's overwhelming evidence).

IX. Failure to object to arbitrary factor of "good" prison conditions

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Applicant next contends his counsel was ineffective for failing to object to the solicitor's questioning of defense prison expert James Aiken on so-called "good" prison conditions, which he asserts introduced an arbitrary factor into his sentencing proceeding. As will be seen, since the defense opened the door on the issue and thus the solicitor's subsequent questioning was permissible as a matter of law, counsel could not have been deficient nor Applicant prejudiced. See Hough v. Anderson, *supra*.

A. Events at trial

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

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

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

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

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

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

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

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

Applicant next called jail guard Sharon Branch, who stated that while Applicant displayed some "attitude" and had a recent difficulty with authorities over going to church, he never made her feel physically threatened. The defense elicited that Applicant was

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allowed "one hour of rec per day". {R. 4882-88}. Finally, jail guard Enrique Badillo testified that Applicant displayed a very polite and cooperative attitude in jail. {R. 4902-05}.

B. Plath, Bowman, Burkhart, and Bryant

The reason evidence about "good" prison conditions is problematic stems from four South Carolina cases – one that was in existence prior to this case and three that were handed down after Applicant's trial, including Applicant's on direct appeal.

In State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984), the court *affirmed* a death sentence despite issues related to the State's cross-examination and evidence responsive to a defense presentation "[demonstrating] the permanence and deprivation entailed in life imprisonment". Plath, 281 S.C. at 12, 313 S.E.2d at 626. In doing so, the court rebuked sentencing phase defenses which "sought to portray life imprisonment as preferable to capital punishment as a matter of social policy", or "drew a picture of life imprisonment as slavery, a condition of irretrievable loss". Plath, 281 S.C. at 14, 313 S.E.2d at 626-27.

The court stated that such defenses improperly "invite[d] the jury to intrude upon the strictly legislative function of determining the nature of crime and punishment", and concluded that "determinations as the time, place, manner, and conditions of execution or incarceration, as well as the matter of parole are reserved by statute and our cases to agencies other than the jury." Plath, 281 S.C. at 14-15, 313 S.E.2d at 627. However, the Plath court concluded the State's challenged questioning was only proper response to the defense presentation which brought up the subject matter in the first place. Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28.

Nearly two decades later, and four months *before* Applicant's trial, the United States Supreme Court issued Kelly v. South Carolina, 534 U.S. 246 (2002), which so broadly defined "future dangerousness" that it effectively ended years of litigation in South Carolina over whether a capital inmate could have the specific charge that a life sentence would be without parole. Indeed, shortly after Kelly, the General Assembly passed a law requiring life without parole to be charged in all death penalty cases. 2002 Act. No. 278 § 1. Regardless, Kelly as a practical matter ensured Applicant at trial would get a charge that his life sentence would be without parole. It was in this new legal setting that Applicant went to trial a mere few months later.

Subsequently, the state supreme court decided Applicant's direct appeal in State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005). There, Applicant contended that the solicitor's questioning was improper about movies, television, and books in prison. The Court found the issue was not preserved, but added a cautionary instruction to both sides:

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

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

Subsequent to Bowman, the South Carolina Supreme Court addressed a case where the *solicitor* preemptively called a witness who extensively testified as to the

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

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

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

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

C. Counsel was not deficient in handling the issue.

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In his brief, Applicant cites some isolated passages from counsel Cummings' testimony under questioning by Applicant to assert that counsel simply "missed" the issue by failing to object. {PCR App. 1720-22}. However, when one explores counsel's testimony more carefully, it is clear that the fact of the matter is counsel was operating in one of the vanguard cases after LWOP became a mandatory charge in every case, and was strategically using the burdensome "without parole" aspect of that sentence as the centerpiece of the defense strategy. Since neither Bowman, Burkhart, or Bryant had been issued yet, counsel's strategy was reasonable, including his (and the judge's) determination that the solicitor's responsive question was permissible given the evidence elicited by the defense.

In his testimony on cross during PCR, counsel Cummings explained that his strategy was to portray life in prison without parole as a particularly horrible fate that it amounted to sufficient punishment for a young man like Applicant. He noted he wanted to "paint a picture, paint it nasty for [the jury]". {PCR Tr. 1876-80}. Counsel noted that he has

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successfully objected when the solicitor attempted to talk about escape, but knew that once he had questioned the witness on some of the harsh conditions of prison he fully expected the solicitor to ask Aiken about "whether or not they get to eat in prison". Since Bowman, Bryant, and Burkhart were not out yet, he did not see a valid objection outside of the solicitor "talking about things that were outside the scope – that being escape". Counsel added, "I knew it was coming; I took a calculated risk; I made a decision", and agreed that he knew full well that "by going down the road of saying life in prison is so horrible that it's good enough punishment for Marion Bowman", the solicitor was going to try to show that it was not as bad as all that. {PCR Tr. 1882-84}. While of course counsel later stated he was not strategically trying to introduce what the law determined was an arbitrary factor {PCR App. 1886-87}, on cross, counsel stated he made a "calculated risk" in eliciting the evidence on the toughness of prison from Aiken. He noted he "made that choice to try to give the jury an alternative", asking rhetorically, "why do we give the jury a LWOP choice if we're not going to let them know what prison is like?". He agreed he was willing to take on the issue of prison conditions because he thought he could use it to his client's benefit. {PCR App. 1884-85}. Finally, counsel agreed that at the time they were on the "frontier" of how to litigate a capital case with the mandatory LWOP charge, and he "did try to push the envelope". {PCR App. 1885-86}.

Given counsel's testimony, it is clear that counsel was not deficient when one considers the time period and the then-existing state of the law in which counsel operated. Kelly v. South Carolina, 534 U.S. 246 (2001), which ended the debate about charging LWOP and essentially required such charges in every case, had come out just a few

months before Applicant's trial. Knowing that he was going to get a LWOP charge, and given Applicant's relatively young age, counsel decided to attempt to portray through Aiken the conditions of LWOP as so severe that it was a sufficient alternative to death for the conservative Dorchester County jury to choose. Given the time period and the state of the law when this trial took place, with Kelly being freshly decided and Bowman, Bryant, and Burkhart not issued yet, counsel was reasonable in deciding to use the LWOP charge to his advantage in this manner. Strickland plainly does not require counsel to anticipate changes and developments in the law. See Schneider v. Day, 73 F.3d 610 (5th Cir. 1996) (holding that while Victor v. Nebraska, 511 U.S. 1 (1994) is retroactive, counsel cannot be ineffective for failing to foresee changes in the law subsequent to the Petitioner's trial); Walker v. Jones, 10 F.3d 1569 (11th Cir. 1994) (trial counsel not ineffective for failing to object to reasonable doubt charge where petitioner's trial took place four years before Cage v. Louisiana, 498 U.S. 39 (1990), and state courts at that time had affirmed use of such charges).

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

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outside the "scope" into questioning about escape, to which counsel successfully did object.

Given the state of the law when this trial took place – in Plath that "the State was entitled to make this response" to defense evidence on conditions – then counsel was correct that, based on his own questioning, he would not have had a valid objection to the solicitor's limited responsive questioning. See Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28 (although defendants should not have entered the forbidden field of penology, once they did, State was entitled to respond and show "life imprisonment was not the total abyss which [the defendant] portrayed it to be"); State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991) (proper for solicitor to respond that victim's family could only visit him at the grave after defendant's sister testified she would visit him in prison at Christmas); State v. Thibodeaux, 750 So.2d 916 (La. 1999) (defendant opened the door to prosecution questioning of its corrections expert on recreational activities at prison).

Thus, counsel was not deficient: (1) in strategically deciding to enter to confinements issue as part of his strategy to portray LWOP as a particularly harsh sentence and viable punitive alternative, and (2) in acquiescing to the solicitor's limited responsive questioning on the same subject. Simply because the State was then able to score a few points back on cross – as is the case for any party during almost any examination – does not mean that counsel was somehow ineffective in deciding on this strategy. Trial counsel has to take the good with the bad, and in almost every case a prosecutor will be able to score points off of the defense's presentations. The fact of such an inevitable response does not make counsel deficient for eliciting it for his beneficial purposes. To find deficiency would be precisely the type of hindsight Strickland forbids. See generally Sexton v. French, 163

F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

There was no deficiency.

D. Applicability of a Strickland analysis to this issue

A normal Strickland analysis still applies to a claim that counsel did not object to introduction of conditions evidence. Unlike Burkhart, Bowman, or Bryant, which were direct appeals, this case is in PCR, and on collateral attack Applicant must establish his claims through the constitutional vehicle of ineffective assistance of counsel. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal can not be raised in a PCR application absent a claim of Ineffective assistance of counsel). Of course, the familiar standard in Strickland v. Washington that applies to claims of ineffective assistance of counsel requires a showing of *both* deficient performance *and* prejudice – a reasonable probability of a different result at trial.

In the sentencing phase, prejudice is phrased somewhat differently. In Jones v. State, 332 S.C. 329, 504 S.E.2d.822 (1998), the South Carolina Supreme Court described it as "a reasonable probability that, absent [counsel's] errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death," citing Strickland.

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There are only limited exceptions where prejudice is presumed under Strickland – none of which apply here. See Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878 (2006) (rare three exceptions are: (1) denial of counsel at critical stage; (2) failure of counsel to subject case to meaningful adversarial testing; and (3) extremely prejudicial circumstances surrounding trial where no lawyer could be effective). Nance concluded that “[a]bsent these narrow circumstances of presumed prejudice under Chronic, defendants must show actual prejudice under Strickland.” Id. at 880.

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The conclusion that a prejudice analysis applies is consistent with the language of Strickland itself, despite Burkhart's view of conditions of confinement evidence as an arbitrary factor for which it did not perform a prejudice analysis on direct appeal. Unlike a case on direct appeal – where the conviction is not yet considered final – during collateral attack concerns of finality are of “profound importance”. See generally Strickland, 466 U.S. at 693-94 (discussing concerns of finality when deciding the appropriate standard for prejudice). Hence, on collateral attack it is appropriate to filter claims through a prejudice analysis to ensure that the extreme social cost of reversing final convictions and sentences is only borne by society where the alleged error had a reasonable probability of affecting the result.

An example of this principle is found in Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001). There, the court held that a prejudice analysis should be applied to claims that the defendant was not advised of and thus did not waive his right to personally give closing argument in the guilt phase of a capital trial – despite the fact that prior cases had not engaged in a prejudice analysis. Franklin noted the general rule that claims under Strickland include a prejudice analysis, and went on to conclude that since *in favorem vitae*

review had been abolished and a PCR system of collateral attack established to explore such issues, a finding of *per se* reversible error was no longer warranted. Franklin, 346 S.C. at 571-74; 552 S.E.2d at 723-24. Finally, the Court noted that it and the United States Supreme Court have repeatedly held that "a harmless error analysis is appropriate where a capital defendant has suffered a deprivation of a *constitutional right*". Franklin, 346 S.C. 563 at 575 n.8, 552 S.E.2d at 725 n.8 (emphasis original).

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And that last statement precisely raises the final point why a prejudice analysis is appropriate to a claim that counsel failed to object to evidence of conditions of confinement. While Burkhart phrases its issue as a statutory one – that introduction of evidence of conditions of confinement injects an arbitrary factor under S.C. Code Ann. § 16-3-25(C)(1) – Applicant here in PCR is raising, as he must, a *constitutional* issue – that he was effectively denied his Sixth Amendment right to counsel based on counsel's omission. Applicant must filter his statutory claim through the constitutional one – as a fundamental and legal matter, the claim he pled is constitutional. As Franklin specifically notes, this overriding constitutional claim upon which the statutory claim depends is subject to a harmless error analysis – like any other constitutional claim.

E. There was no prejudice.

There was no prejudice warranting reversal. Here, the defense was able to score a lot of points with its presentation as to the harshness of life without parole. Indeed, the main thrust of the defense in the sentencing phase was the concept that the "without parole" portion of a life sentence in harsh conditions makes life without parole sufficiently severe enough punishment to be appropriate retribution for the crime, without the need to

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overturning on appeal of one aggravator does not affect the validity of a death sentence as long as one valid aggravator remains. See State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (2004) (finding invalidation of armed robbery aggravator did not require reversal of death sentence where other aggravators remained, and citing (citing Zant v. Stephens, 462 U.S. 862 (1983)); State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984) (citing Zant). The jury in this case found two aggravators: the murder was committed in the commission of kidnapping, and larceny with the use of a deadly weapon. Accordingly, Appellant's death sentence would not be compromised even if this Court were to find counsel ineffective in not achieving a directed verdict on the kidnapping aggravator.

C. Lack of proof in record supporting kidnapping aggravator

Applicant next makes the freestanding contention that there was no evidence in the trial record to support the kidnapping aggravator. He asserts that Gadson never testified to anything Applicant did to inveigle or decoy Kandee Martin.

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As an initial matter, this freestanding claim is procedurally improper in PCR. As noted before in the preceding subsection, counsel argued that a directed verdict should be granted on the kidnapping aggravator, but the trial court declined, accepting the solicitor's argument that the victim was lured after Applicant had formed an intention to kill. {R. 4731-32}. Any freestanding claim could have been raised at trial or on direct appeal if preserved at trial, and as such the present claim is improper for PCR. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal can not be raised in a PCR application absent a claim of ineffective assistance of counsel).

Regardless, even if this Court could "overrule" Judge Goodstein's decision on the directed verdict motion at trial, it is clear that she was correct. As argued before, Yolanda, Katrina, and Eddie all testified that Applicant threatened to kill Kandee before the day was out. {Tr. 3726; 3744; 3766}. Gadson testified that Applicant was telling Kandee where to turn and led her to drive out to Nursery Road where she was murdered. {R. 3994-96}. And, Gadson testified Applicant wanted to pull a caper {R. 4035}, and stated Applicant said he wanted to kill Kandee because she was wearing a wire {R. 3998}. From this a jury could reasonably conclude that Applicant had the preexisting intention of killing Kandee and inveigled and decoyed her by leading her out to the deserted stretch of rural road where he killed her. There is no error.

Regardless, as argued before, even if the kidnapping aggravator was unsupported reversal is still not warranted given that South Carolina is a "consider" state and not a "weighing" state, and the larceny aggravator is unaffected. See State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (2004) (finding invalidation of armed robbery aggravator did not require reversal of death sentence where other aggravators remained).

The issue is denied.

XI. Alleged ineffective investigation and presentation of mitigation case

Applicant next contends his counsel were ineffective in their investigation and presentation of the case in mitigation.

A. Alleged constructive absence and the presumption of prejudice

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Applicant first contends his counsel constructively absented themselves from the preparation and presentation of the mitigation case, thus mandating a presumption of prejudice under the doctrine of United States v. Cronic, 466 U.S. 648 (1984).

1. Cronic is not applicable to this case.

As an initial matter, the narrowly and rarely applied Cronic doctrine, allowing a presumption of prejudice when counsel is constructively absent, is simply not applicable to the circumstances this case. The constructive absence form of Cronic occurs where counsel "entirely fails to subject the prosecution's case to adversarial testing".

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In the only opinion where the South Carolina Supreme Court has presumed prejudice pursuant to the "constructive absence" form of Cronic, the lead counsel was hampered by alcoholism, drug intake, and health issues affecting his memory and capacity. Co-counsel was a new lawyer with no death penalty experience who had only been practicing for eighteen months. The lawyers only interviewed *one* family member in preparation, and the mental expert was not provided with *any* requested background information. The lawyer told the jury in opening argument that he did not ask for the case but had been appointed; counsel only called *three* witnesses in the guilt phase during which they elicited prejudicial information; they failed to even qualify their expert; and they called the sister at the last minute without any preparation. The defense sentencing phase case only lasted *seven* minutes, and during closing co-counsel did not plead for his client's life, but instead described him as a "sick" man who did "sick" things. Nance, 367 S.C. at 554-58, 626 S.E.2d at 881-84.

Indeed, the United States Supreme Court and the federal appellate courts have repeatedly pointed out how rare and narrow the Cronic exception to prejudice is, occurring only when there is a overwhelmingly complete breakdown of counsel in all aspects of the representation rather than mere deficiencies in trying the case. In Bell v. Cone, 543 U.S. 447 (2005), the Court reversed the Sixth Circuit Court of Appeals, which had concluded that Cronic's presumption of prejudice analysis applied because counsel did not ask for mercy after the prosecutor's final argument. Bell, 535 U.S. at 693. The United States Supreme Court stressed that Cronic's exception is very narrow, and stated:

When we spoke in Cronic of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that *the attorney's failure must be complete*. We said 'if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing.'

535 U.S. at 696-97 (emphasis added). See also Wright v. Van Patten, 128 S.Ct. 743, 746 (2008) (same). Finally, Bell held that "[t]he aspects of counsel's performance challenged by respondent – the failure to adduce mitigating evidence and the waiver of closing argument – are plainly of the same ilk as other specific attorney errors we have held subject to Strickland's performance and prejudice components." *Id.* at 698.¹³

Other lower federal and state courts have also recognized that the Cronic doctrine is only to be applied in "very rare", "extraordinary", and "exceptional" circumstances, upon

¹³ See also Florida v. Nixon, 543 U.S. 175 (2004) (concession of guilt in a capital trial was reasonable and did not "rank as a 'fail[ure] to function in any meaningful sense as the Government's adversary.") See also Mickens v. Taylor, 535 U.S. at 188 (clarifying that Cronic is limited to cases where the magnitude of counsel's error is such that the verdict is almost certain to be unreliable) (citing Cronic, 466 U.S. at 659 & n. 26); Williams v. Taylor, 529 U.S. 362, 391, 396-97 (2000) (examining a claim under the Strickland standard where the petitioner's "trial lawyers failed to investigate and to present substantial mitigating evidence to the sentencing jury").

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an "extremely high showing" of deficient performance – and inapplicable where an otherwise incompetent counsel at least provided *some* representation to the client.¹⁴

With this review of the law in mind, it is clear Cronic simply does not apply, even if everything Dale Davis said is taken at face value. The woeful description of the representation in Nance is of course nothing like the representation that Applicant received in this case, where one of his lawyer is an extremely experienced criminal defense litigator in the state. Whether or not they made an individual mistake during the course of the representation, counsel in this case certainly endeavored to challenge the State's case throughout the proceedings. For example, counsel engaged in an extensive suppression hearing for various pieces of evidence over multiple days, which ultimately resulted in the suppression of Applicant's very incriminating and egregious fourth statement to police, in which he speaks of post-mortem sexual contact with the victim. This was a huge victory after a hearing that took over 1000 pages of transcript, and alone would preclude a finding that counsel was so completely "inert" that Cronic would apply. {R. 313-1322}.

Counsel Cummings also credibly testified to the extensive preparation they did, including hiring and consulting with Robert Minter, an investigator; Walt Mitchell, another investigator; Donald Girndt, a crime scene expert; Jeff Hollifield, a forensic scientist; Cleon Mauer, a firearms examiner; Dale Davis, a mitigation investigator; Jeff Yungman, a forensic social worker; Dr. Harold Morgan, a psychiatrist; Dr. Brian West, a psychologist; Dr. Clay Nichols, a forensic pathologist; Ronald Ostrowski, a DNA expert; Frank Bloomingburg, a

¹⁴ E.g. Young v. Catoe, 205 F.3d 750 (4th Cir. 2000) (applied only in "rare cases" and "extraordinary" situations); Childress v. Johnson, 103 F.3d 1221 (5th Cir. 1997) (for Cronic to apply, counsel must not be merely incompetent, but inert); Scarpa v. DuBois, 38 F.3d 1 (1st Cir. 1994) (a lawyer's "maladroit performance" is a trial error, where a "non-performance" is a structural error); Toomey v. Bunnell, 898 F.2d 741, 744 n. 2 (9th Cir. 1990) (applied "very sparingly").

polygrapher; and Sally Hayden, a speech and reading teacher who assessed Applicant and found he could read and write just fine (despite his lies to the trial court and apparently to counsel that he could not). {PCR Tr. 1784-98}. Counsel also made scores of other pre-trial motions, including motions to reveal the deal, to exclude photographs, and to declare the death penalty unconstitutional. {R. 70-314}. Counsel conducted extensive capital voir dire, which encompasses over 2000 pages of transcript. {R. 1383-3492}. Counsel cross-examined every single one of the fifty-two state's witnesses in the guilt and sentencing phases – save only the victim's mother in the sentencing phase, and of course it is not unusual for capital defense attorneys to stay away from grieving family members testifying as to victim impact. Counsel presented a mitigation case in which he hired and called in mitigation family members, jail guards, jail education teachers, and a corrections and adaptability expert. {R. 4742-4928}. And, regardless of what Dale Davis and Jeff Yungman want to say in hindsight, counsel hired and called a forensic social worker who testified in detail during the mitigation case about the psychosocial assessment he conducted of Applicant's life. Finally, counsel gave pointed and relevant closing arguments, including an impassioned plea for a sentence of life without parole in which he argued that for Applicant it was a fate worse than death. {R. 4979-5011}.

Clearly, this is not a Nance-type situation where counsel "entirely failed to subject the prosecution's case to any meaningful adversarial testing." Essentially, the entire claim Applicant makes here is that counsel did not spend enough time talking with and giving guidance to mitigation investigator Dale Davis and social worker Jeff Yungman – although it is undisputed he did talk with them some. Given all the work counsel undisputably did, Applicant's present claim is certainly "of the same ilk" as other specific attorney errors the

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United States Supreme Court has held are "subject to Strickland's performance and prejudice components." See Cone, 535 U.S. at 698; Nixon, 543 U.S. at 189-92.

Cronic is inapplicable and Applicant must show prejudice.

2. Counsel did not absent themselves from the mitigation preparation, whether in the context of applying Cronic or assessing deficiency.

Next, this Court concludes that the evidence does not justify a finding counsel completely absented themselves from preparation of the mitigation case.

Testifying social worker Jeff Yungman complained that he did not have much contact with the attorneys, and Applicant introduced a letter in which Yungman complained to counsel that trial was upcoming and he did not know the strategy. {PCR Tr. 1056-58}. However, Yungman also admitted he had worked on 26 prior death penalty cases and had been qualified as an expert in 12-15, and knew what he was looking for in a social history. {PCR Tr. 1057; 1062; 1113-15}. He explained what he was looking for in mitigation, and admitted there was not that much difference in how one handles a case where guilt was conceded as opposed to one where it was not. The point was still to use the person's life experiences to find factors that might explain behavior. {PCR Tr. 1062-65; 1077}. He admitted Dale Davis gave him a great deal of information. {PCR Tr. 1076}.

On cross, Yungman displayed his expertise in knowing what issues to address in conducting a mitigation analysis, and conceded there was no question he knew what he was hired to do, and indeed it was a common analysis he had done in all his prior cases. He agreed counsel hired him to put the social information together in a coherent form for trial, and they relied on his expertise in looking at the information to determine what was

significant and relevant. He also conceded he had a lot of contact with Dale Davis during the process. {PCR Tr. 1120-25; 1142-43}. Finally, he agreed his report was submitted to the attorneys prior to trial. {PCR Tr. 1127-29; Respondent's 11}.

Of course, Dale Davis testified that Cummings was not particularly responsive to her attempts to contact him, so she began to keep a secret log of things he did she did not like to give to Applicant's attorneys in PCR. She did not tell Cummings or Hardee-Thomas she was keeping this secret log to use against them in the current process. She also conceded that she did have some contact with the attorneys, just not as much as she would have liked. {PCR Tr. 1227-41; 1515}. Davis also testified on direct that she was an "expert in mitigation", that when you begin gathering the social history you do not know where it will lead you, and that she was hired by the attorney "to lead the investigation and coordinate the investigation" into mitigation. {PCR Tr. 1220-21}.

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Jef On cross, Davis was led on an discussion where she talked at length and in great detail about all the various issues and the information supporting it that arise in social history mitigation. She testified as to why a case in mitigation was important, and what the defense would try to show in such a case. {PCR Tr. 1426-28}. She noted she seeks all records {PCR Tr. 1417}, and testified that she has the training and expertise to know what to look for – which is why the attorneys hire her in the first place {PCR Tr. 1426-28}. The State at PCR introduced her time log, which showed all of the work she did on the case, including interviewing 30 people, and she brought to the hearing the large amount of records and other information she gathered in the case. {PCR Tr. 1432-35; 1440-44; Respondent's 12; Respondent's 13}. She agreed she gave all this information to Jeff

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Yungman. {PCR Tr. 1435}. Finally, Davis conceded she had no problem faxing memorandums and the like to counsel during the representation, and conceded under questioning by this Court that Marva Hardee-Thomas took her calls without problem and would then contact Cummings' office. {PCR Tr. 1442-43; 1494}.

Most importantly, after allowing Davis to speak at length on her knowledge of how to do a mitigation investigation and why certain information was important, she conceded she had not needed an attorney sitting next to her during her testimony to provide guidance as to how to answer those questions. While she complained that she did not think the information at trial was presented well, she admitted she knew how to gather the information herself, and she did in fact gather it and present it to Yungman and counsel. {PCR Tr. 1445-47}. She also conceded she suggested Yungman to counsel and knew he had done these cases in the past. {PCR Tr. 1445-47}.

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Under questioning by this Court, Davis could not give one specific example of anything she told Cummings but he ignored {PCR Tr. 1483-84}, and conceded there was nothing wrong with the information in Yungman's report {PCR App. 1484-85}. She also admitted they discussed the mitigation case after the conclusion of the guilt phase, and while she complained Cummings did not talk to the lay witnesses beforehand, admitted she talked with them about their testimony. {PCR App. 1486-93}.

Aside from these telling admissions, counsel in large measure credibly refuted the claims of Dale Davis. Marva Hardee-Thomas noted she was shocked when she got the "panic memo" from Davis. With regard to Davis's complaints she could not contact counsel, Thomas testified "she didn't know where that was coming from", as she never

refused to return calls from Davis and felt the complaint was "out of the blue". She also testified Dale Davis was known for "turning on" attorneys in PCR. {PCR App. 1591-93; 1609-10}. Counsel Thomas also remembered talking with the sisters and the mother. {PCR App. 1614-15}.

Counsel Cummings also credibly testified. He said that Dale Davis was the mitigation specialist the defense hired and relied upon to have have the expertise to gather the social history. He noted she suggested Yungman. {PCR App. 1789-90; 1806-07}. Cummings admitted he had some disagreements with Davis towards the end of trial, but felt she had been sabotaging his relationship with Applicant. Cummings denied ever refusing phone calls from Davis or making himself unavailable to her. Counsel denied there was ever any "panic", and stated matter of factly, "we had what we had to work with".

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{PCR Tr. 1807-08; 1816}. Counsel denied he ever refused to look at any information Davis sent or to discuss the case with her, and pointed out she never told him she was keeping a log of things he was doing she did not like. He testified everything always seemed to be a crisis with Davis. {PCR Tr. 1808-09}.

Counsel also specifically remembered meeting with Yungman and discussing his testimony. Counsel felt Yungman was properly prepped and wanted him to testify freely, as opposed to a situation where it was perceived counsel was pulling everything out of him. He felt Yungman's testimony would give reasons for why Applicant did what he did. He did not recall Yungman ever calling and saying he needed additional information. {PCR Tr. 1809-12; 1873}. Counsel also noted that he was impressed by Yungman's experience and

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resume and his prior employment as a police officer, which he thought would aid Yungman's credibility. {PCR Tr. 1814-16}.

Counsel noted he did not think that some of Davis's suggested witnesses would work well with a Dorchester jury, and stated he fundamentally relied on her to gather the social history. Counsel discussed meeting with Applicant's mother and family but stated they were not particularly helpful. {PCR Tr. 1816-21; 1826}.

Finally, counsel was clear that he made a strategic decision to introduce Yungman's testimony as to what caused Applicant to commit the crime rather than hold on to some amorphous concept of residual doubt; he noted that the jury had already convicted Applicant and residual doubt was not a valid mitigator anyway, so he felt like he had to address causation head on. {PCR Tr. 1870-73}.

Thus, counsel's testimony credibly refutes Ms. Davis's claim that they refused to contact her and discuss the case with her. Indeed, Ms. Davis's credibility is suspect and her biases obvious, as proven by her conduct in keeping a secret log of counsel's alleged faults for use later at a PCR. Regardless, counsel is not required to personally like the expert or involve her in his ultimate strategy discussions; by all accounts counsel hired a recognized mitigation expert to gather the records and that is what Davis did, and counsel hired a recognized forensic social worker to testify as to what was in the social history and that is what Yungman did. While Yungman and Davis might have wanted more guidance, counsel was clear he met with Yungman prior to trial and discussed the testimony, and also stated as a strategic matter he wanted Yungman's testimony to flow more freely from the heart than be robotically elicited. This was a reasonable decision, and counsel, Davis,

and Yungman were all clear that Davis got all the information she could find, and she delivered it all to Yungman, and counsel got a copy of Yungman's final report in anticipation of testimony.

Again, lawyers are entitled to reasonably rely on their experts, and they are not required to second-guess their expert's conclusions or "expert shop". See Wilson v. Greene, 155 F.3d 396 (4th Cir. 1998); Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992). Here, counsel reasonably relied on his hired experts to do their jobs, and cannot be faulted for not micro-managing the very areas in which those experts had the expertise and for which they were hired in the first place. See, e.g. Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995) (to impose a duty on the attorney to gather background information for an expert independent of any request from that expert would defeat the whole purpose of hiring the expert, as understanding what information is needed is an integral part of the expert's skill, and requiring an attorney to review the trustworthiness of the expert's conclusions would make the expert superfluous).

Whether in the context of application of Cronic or an assessment of deficiency under Strickland, the issue is denied.

B. Alleged failure to present evidence of Applicant's emotional value to others

Applicant can show neither deficiency nor prejudice with regard to the alleged failure to present evidence of Applicant's emotional value to others.

As his first specific allegation of evidence counsel supposedly failed to present in mitigation, Applicant contends counsel failed to present evidence of his capacity to be of

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emotional value to others. He contends this could have come from sister Kendra, wife Dorothy, and an expert in family psychology.

1. Counsel were not deficient.

As an initial matter, counsel were not deficient with regard to this issue. Four factors are most important here. First, as set forth in the discussion above, counsel hired recognized experts in the mitigation field and relied upon them to identify the important mitigation issues in counsel's life. Indeed, Davis suggested and counsel hired psychiatrist Dr. Morgan and psychologist Dr. West {PCR Tr. 1449; 1791}, but there was no evidence that they or Yungman advised counsel to present a family psychologist or lay witnesses on Applicant's capacity to be of emotional value to others. Indeed, although he tried to blame it on counsel, Yungman – the expert in the field – testified that he apparently made the decision to focus more on Applicant's difficult upbringing and negative influences. {PCR Tr. 1093}. And, Yungman was clear he spoke with Kendra. {PCR Tr. 1163}. If the experts failed to identify an issue, it is not counsel's fault and is not actionable. See Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992) (counsel entitled to rely on experts, and the fact that the testifying expert did not identify "every possible malady or argument" is not a basis for relief).

Second is the fact that the family was generally reluctant to testify and to help counsel. This made counsel's job difficult, and counsel testified he had to beg Applicant's mother to testify on his behalf. {PCR Tr. 1801; 1819-21; 1825}. Corroborative of this is the fact that counsel even mentioned "great reluctance of the family" at Applicant's trial. {R. 4547}. Any assessment of counsel's supposed failure to present one aspect or

another of Applicant's relationship with his family must be assessed in the context of the circumstances in which counsel was operating – including this general reluctance of the family. See generally Collins v. Francis, 728 F.2d 1322 (11th Cir. 1984) (counsel was not ineffective for failing to investigate witnesses about whom defendant did not tell him).

Third is the fact that as a strategic matter counsel was clear that in no way would he want to present the letters Applicant wrote to Dorothy after his arrest. While those letters did start with some pleasantries to Dorothy, they also go on and try to get her to lie to police, to cover up evidence, to get others to lie, and to refuse to cooperate with authorities. {Applicant's 56}. Counsel was clear he did not want this egregious information coming before the jury, showing Applicant's attempts to suborn perjury or commit obstruction of justice. {PCR Tr. 1838-41; 1950}. This strategic decision is certainly reasonable and thus unassailable under Strickland.

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Fourth is the fact that counsel did present lay testimony from Applicant's family, including evidence from Kendra that he used to cook for the family and play with his mother's godson, Dominique. {R. 4743}. Applicant's mother testified at trial as to how he would cut grass to help the family, and that he was always willing to help out. {R. 4753}. Applicant's mother also noted Applicant had a daughter during her appeal for mercy. {R. 4760}. Counsel also elicited from Yungman that Applicant was helpful to his family and was good to his stepchildren and to Kendra's child. {R. 4806}. This, of course, was all Yungman identified for counsel in his report. {Respondent's 11 p. 8}.

When these four factors are considered, it is clear counsel was not deficient. Counsel relied upon their experts to identify and advise him of the relevant issues. There

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is no mention in Yungman's report of "capacity for emotional value to others", and there was no testimony at PCR that Dr. West offered to testify as Dr. Kissiah did at PCR, but counsel just failed to call him. There is no testimony that any of the hired experts suggested calling a witness like Dr. Kissiah, but counsel ignored it. Moreover, despite a difficult family, counsel did elicit information as to Applicant's value to his family and his young daughter.¹⁵ Counsel was not deficient and the issue is denied.

2. There was no prejudice.

In any event, Applicant has not shown prejudice under Strickland. Again, in Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998), the South Carolina Supreme Court restated the "prejudice" prong in a capital sentencing proceeding as being established when "there is a reasonable probability that, absent [counsel's] errors, the sentencer – including an

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¹⁵ See Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006) (Trial counsel did not render deficient performance by failing to fully investigate defendant's medical, mental, social, and familial history for purposes of penalty phase of capital murder trial, as element of ineffective assistance claim; counsel interviewed a number of witnesses about defendant's childhood and life, counsel hired a private investigator to go and gather background information on defendant, counsel called several witnesses, including three experts, to offer mitigating evidence, and counsel testified that information gathered about defendant's background was available to the experts). See also, e.g., Tucker v. Ozmint, 350 F.3d 433 (4th Cir. 2003) (where defendant claimed that counsel failed to submit early reports of sexual abuse to the trial expert, the case was unlike Wiggins in that there was no deficiency, as counsel presented a substantial mitigation case including lay witnesses and expert testimony on abuse and ASPD issues); Byram v. Ozmint, 339 F.3d 203 (4th Cir. 2003) (where counsel hired a psychologist, psychiatrist, social worker, and investigator for mitigation, and prepared extensively, investigation was reasonable despite claim counsel failed to present evidence of background, fetal alcohol syndrome, and brain damage; moreover, case was different from Wiggins on the prejudice prong in that here the jury did hear testimony about the background, and this was not a case where the jury was "completely in the dark as to the defendant's alleged mental problems"); Wilson v. Ozmint, 352 F.3d 847 (4th Cir. 2004) (counsel not deficient in investigating family members, given their substantial investigation into the defendant's family life and the large amount of evidence introduced at the plea hearing); Davis v. State, 875 So.2d 359 (Fla. 2004) (rejecting claim that counsel was ineffective for failure to present a "qualified" expert on the relationship between sexual abuse and PTSD, where, unlike Wiggins, counsel conducted an investigation into background and presented three mental health experts, with a number of diagnoses; relief is not warranted simply because PCR counsel can later find a "more favorable" expert report); Ringo v. State, 120 S.W.3d 743 (Mo. 2003) (en banc) (no deficiency in investigation where counsel hired four experts; while one trial expert merely noted a high score on the PTSD scale but did not diagnose it, and a PCR expert later actually diagnosed PTSD, counsel's hiring of four experts was sufficient and reasonable investigation, making this case different from Wiggins).

appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death,” citing Strickland.

Moreover, for claims counsel failed to investigate and present evidence, an applicant must *actually present* in PCR the evidence he claims was missed, in order for the reviewing court to accurately assess whether counsel was deficient for failing to present it, and whether its absence was prejudicial. It is not enough simply to offer criticisms of counsel's performance – the applicant must actually present into evidence the “case that should have been”.¹⁶

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Applicant has wholly failed to show prejudice. First is the point that it is inappropriate for Applicant to rely on Applicant's 53, the Kendra affidavit, because it was never admitted into evidence. Dr. Kissiah testified he did not rely on the affidavit, and ultimately it was not admitted with Applicant's present counsel stating he would call Kendra to testify, which never happened. {PCR Tr. 1090; 1188; 1506}. The Kendra information thus cannot be considered in a prejudice analysis. See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

¹⁶ See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) (state's failure to object to hearsay testimony as to what another witness's testimony might have been does not relieve applicant of burden of producing admissible testimony, in accordance with the rules of evidence, of that which counsel supposedly failed to present). See also Beaver v. Thompson, 93 F.3d 1186, 1995 (4th Cir. 1998) (rejecting claim that counsel was ineffective for failing to present mitigation evidence family members, where there was no proffer of this testimony); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990) (petitioner's allegation that attorney did ineffective investigation does not support relief absent proffer of the supposed witness's favorable testimony); Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3rd Cir. 1991) (applicant cannot show deficiency “based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense”; rather, facts must be presented).

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Second is the fact that even if the Kendra affidavit and Dr. Kissiah's testimony are considered, it is not the type of testimony that would call the entire sentencing phase into question and create a reasonable probability that the sentencer would re-assess the aggravating and mitigating factors. In cases where such prejudice has been found, the omitted information was stark and extensive.¹⁷

Such is not the circumstance here with the relatively tame and limited information from Kendra's affidavit and Dr. Kissiah's testimony. Counsel did elicit some testimony as to Applicant's involvement with Dominique, as well as the fact that Applicant had a young daughter and was always willing to help out the family. It cannot be said that a little more information on this subject – particularly from a cold affidavit – would create a reasonable probability of a different result given the other information presented and the extremely egregious manner in which this crime was committed.

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17 See Williams v. Taylor, 529 U.S. 362 (2000) (trial counsel only presented a "scant" mitigation case, and ignored a wealth of information regarding the defendant's "nightmarish" background, including the fact that his parents were jailed for neglect, records showed an extremely unkept house, the defendant was beaten by his father and foster parents, the defendant was borderline retarded, and he had favorable prison records from previous commitments); Wiggins v. Smith, 123 S.Ct. 2527 (2003) (trial counsel failed at all to have a social history performed, and did not have anything regarding the defendant's background save rudimentary information, overlooking that the defendant's mother was an alcoholic, he was often left alone with no food, he was exposed to sexual activity by his mother, and he was physically and sexually abused in his mother's and foster care); Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004) (trial psychiatrist testified at PCR that he had not been provided with available medical and psychiatric records, and another psychiatrist who had extensively examined Petitioner found, a far more serious depressive condition to the point that his altered mental state made the murder *non-volitional*); Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009) (counsel ineffective where they did not present evidence of schizophrenia based on mistaken belief that finding of competence precluded it; inmate was prejudiced as his counsel only presented limited information from pastor and family and one expert, and no evidence was presented of his "troubling mental health issues"); Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008) (counsel ineffective where he only presented limited testimony in mitigation from defendant's mother; for example, counsel failed to hire a social history investigator and relied on investigator with no social work training, started the investigation late in the process, provided only limited records to the expert and only met with him a month before trial, failed to get family history records, and would have been put on notice by the records he did have that "powerful mitigating evidence" was available).

As to Dr. Kissiah, again, not only was some information presented on the subject, but an assessment of prejudice would also have to include the damaging information that would have been elicited by focusing on Applicant's post-arrest letters to his wife. The State extensively cross-examined Dr. Kissiah on the fact that the expressions of love in the letters could be construed as manipulative in an attempt to get Dorothy to help obstruct justice and lie to police to cover up Applicant's crime. {Applicant's 56}. Additionally, the Applicant lies in the letter by stating that he was not unfaithful to Dorothy, and did not have other girls "suck his dick", when the evidence of course shows Applicant's DNA was found in Kande. Applicant also asks Dorothy for money, which shows an ulterior motive. Thus, Dr. Kissiah and the letters would likely have done more to condemn Applicant than aid him.

Applicant simply has not shown prejudice. See Byram v. Ozmint, note 14, *supra*.

C. Failure to present evidence of work record

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Applicant next contends his counsel was ineffective for failing to present evidence of Applicant's work record.

1. There was no deficiency.

As an initial matter, counsel was not deficient. Again, counsel hired a qualified mitigation specialist to get all the records, and indeed counsel stated he specifically relied on Davis to do her job and get relevant work records. {PCR Tr. 1870}. Counsel also hired a qualified forensic social worker to review the records and social history and identify issues of consequence for testimony, and Yungman provided to counsel a final report detailing his findings. {PCR Tr. 1127-29; Respondent's 11}. That report only mentions

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that Applicant was able to maintain employment, and that fact was elicited during Yungman's testimony at trial. {R. 4806}.

Dale Davis testified she had some employment records {PCR Tr. 1478-81}, and Yungman testified he was aware of some of Applicant's employment history from what Applicant told him. However, Applicant did not tell Yungman that he worked at the Naval Weapons Station while he was discharging his responsibilities at the restitution center following his prior incarceration. Yungman was not aware that Applicant supposedly worked at Hood Construction. {PCR Tr. 1082-85}.

Regardless, if the mitigation specialist failed to get the records, or if the testifying social worker decided not to put emphasis on them in his expert analysis of Applicant's social history, that is the fault of the expert, not counsel, and is not actionable. See Poyner v. Murray, supra. Counsel elicited what the expert found in this case. Again, counsel is not required to second guess his expert's report or have a greater understanding of the expert field than the expert does. See, e.g. Hendricks v. Calderon, supra. Moreover, if Applicant failed to disclose his entire work history to Yungman, that is not a basis for ineffective assistance. See Collins v. Francis, 728 F.2d 1322 (11th Cir. 1984) (counsel was not ineffective for failing to investigate witnesses about whom defendant did not tell him); Primeaux v. Leapley, 502 N.W.2d 265, 268 (S.D. 1993) ("Where [defendant] did not give information to counsel, counsel could neither investigate it or pass it on to the expert.").

Counsel was not deficient.

2. There was no prejudice.

Regardless, Applicant has not shown prejudice. The only evidence of work history actually admitted was Applicant's 76, which was a one-page employment application to Moody's Mechanical. Again, consideration of anything else not properly admitted is improper in a prejudice analysis, Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998), and clearly this one page application would not create a reasonable probability the sentencer would re-weigh the aggravators and mitigators and conclude a sentence of death was not warranted. Jones v. State, *supra*.

However, even if Applicant's 55 and 76 are considered, along with an "inference" that Applicant completed his restitution obligations, it still would not arise to the prejudice standard. Supporting the unchallenged statement elicited at trial that Applicant maintained a good employment history with an application or pay stubs is precisely the "fancier" kind of mitigation case that Jones has held is insufficient for relief. Indeed, documentary evidence of Applicant's employment record in and of itself is simply not akin to the kind of stark, extensive, and moving evidence of mental illness or a nightmarish background, the absence of which was found to be prejudicial in Wiggins, Williams, and Von Dohlen.

Applicant has not shown prejudice.

D. Failure to challenge evidence of Kandee's good character

Applicant next contends his counsel was ineffective for failing to rebut the State's victim impact evidence as to Kandee Martin and the effect of her death on her family.

Of course, the State called the victim's mother, who described her "wonderful" relationship with her daughter, and Kandee's relationship with her son. She noted that the effect of Kandee's death had been traumatic for the young boy, and has torn apart the

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relationship between her and her husband. {R. 4692-4702}. Kandee's father testified similarly. {R. 4703-07}. Counsel asked Kandee's father if Kandee had another child, but he stated no, and refused to say who the father was on Kandee's child. {R. 4707-08}.

Applicant now contends counsel should have elicited that Kandee was a crack addict and a prostitute. However, counsel was clear that as a strategic matter he saw nothing to be gained from eliciting before the jury that the victim was a crack addict, noting that from his prior experience in the Joseph Gardner trial "it didn't sit well with the jury" to elicit that the victim might have been selling her body for drugs. Counsel stated he thought that would "hurt [Applicant] more", and distinguished testimony from Yungman in the sentencing phase as to Applicant's own crack use, by noting they were trying to show he had been "kicked to the curb at a young age and he would do what he had to do to survive". {PCR Tr. 1631-37; 1821-25}. Counsel stated he heard Kandee had another child, but despite investigation could not get any proof of it. {PCR Tr. 1637-41}. Counsel was also clear that a landmine he wanted to avoid (and indeed was able to avoid) was any inference that Applicant killed Kandee because she owed him money for drugs or was going to rat him out to police. {PCR Tr. 1642-43}.

Thus, counsel credibly set forth a reasonable strategic basis for avoiding any testimony Kandee was a crack addict or a prostitute, as he felt it could potentially prejudice the jury against his client, based in part from his negative experience in a prior case. This decision is reasonable and precludes a finding of deficiency. See generally *Sexton v. French*, *supra*; *Bell v. Evatt*, *supra*.

Regardless, Applicant has not shown prejudice. For the defense to call the victim a crack addict or prostitute would raise a significant possibility of offending the jury, but the fact that she was a crack addict would do little to rebut the fact that she loved her parents and son and they loved her. For whatever crack use might say about her parenting skills, it does little to rebut testimony was that she loved to play with her son and they had a special bond. It simply cannot be said that this attack on the victim would create a reasonable probability of a different result in the whole sentencing phase.

E. Failure to object to instruction on allocution

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

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

At PCR, counsel credibly testified that he repeatedly "begged [Applicant] to beg for his life" before the jury. Counsel noted that Judge Goodstein extensively went over Applicant's right to testify but Petitioner refused. Counsel stated he told Applicant that during allocution he could "stand in front of the jury and talk", and "beg for [his] life in simple

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plain words". Counsel stated he did not hear Judge Goodstein say anything to Petitioner that violated the law. {PCR Tr. 1735-38}. Later, counsel reviewed the passages and flatly stated he saw nothing objectionable in Judge Goodstein's comments, pointing out that she specifically advised Petitioner he could talk freely about penalty. Counsel also stated he talked with Applicant about the fact that he could ask the jury for mercy, and denied that Applicant ever said to him that he was going to give argument or allocution until Judge Goodstein told him he could not argue facts outside the record. Counsel also stated that there was *never* a point, during the guilt phase or the sentencing phase, that Applicant expressed a desire to testify or address the jury, despite counsel's attempts to get him to speak in sentencing phase argument. {PCR Tr. 1887-90}.

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Counsel were not deficient nor was Applicant prejudiced. Like any lawyer, a defendant would be limited in argument to arguing only within the evidence presented and its reasonable inferences – South Carolina Supreme Court decisions are clear that the closing argument right is NOT an unfettered opportunity for the defendant to give unsworn testimony to the jury, free of cross-examination from the State.¹⁸ Here, the trial court properly limited Applicant from giving unsworn testimony, but allowed him to discuss the proper penalty "freely". Since the instructions were correct, counsel could not have been deficient nor Applicant prejudiced. See Hough v. Anderson, supra.

¹⁸ See State v. Davis, 306 S.C. 246, 411 S.E.2d 220 (1991) ("Although, of course, the trial judge may prohibit a defendant from offering unsworn testimony in his statement to the jury, a defendant may present argument regarding facts that are in evidence to direct the jury's attention to the circumstances of the crime or the defendant's own characteristics since these are proper sentencing considerations."). See also State v. Moore, 357 S.C. 458, 593 S.E.2d 608 (2004) (in description of the facts, quoting the trial court's admonition to a capital defendant during argument that he could not testify or go beyond comment on the evidence admitted at trial, and concluding that a defendant in the guilt phase could not stress something irrelevant like the fact that his life was at stake).

Applicant also has not shown prejudice under Strickland. Even if the instructions were improper, Applicant put forth no proof that absent those instructions he would have given closing argument in the sentencing phase. Indeed, the evidence goes the other way, as counsel was adamant that despite their pleas Applicant never expressed any interest whatsoever in addressing the jury in any fashion – whether by testifying or giving argument. There was no evidence that Applicant stated that he wanted to give argument but decided he would not because the judge told him he would not be able to offer unsworn testimony to the jury. {PCR Tr. 1887-90}. Applicant has not established prejudice.

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And that does not end the analysis, as Applicant did not testify in PCR as to what he would have said had he given closing argument in the sentencing phase. Without his testimony as to what he would have said, this Court cannot judge whether the failure to give argument would create a reasonable probability of a different result in sentencing. See, e.g. Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001) (finding no prejudice from the failure to advise the capital defendant about his right to personally argue to the jury, “because the evidence of guilt was overwhelming and because the jury had already heard him arguing for his innocence when [he] testified”); Cooper v. Moore, 351 S.C. 207, 569 S.E.2d 330 (2002) (finding prejudice from the failure to advise of argument right, where the evidence was not overwhelming, no testimony or exculpatory version was presented in any respect from the defendant, and “Respondent wanted to tell the jury he was not guilty of the charged crimes and to show them he was not a ‘crazy person’”).

Applicant has not met his burden of showing a reasonable probability of a different result from the limitation on argument, and thus the claim should be denied.

F. Failure to present evidence of intoxication

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Applicant next contends his counsel was ineffective for failing to elicit evidence Applicant was intoxicated at the time he committed the crime.

On direct appeal, Applicant contended that he should have received instructions on statutory mitigators in S.C. Code Ann. § 16-3-20(C)(b)(2), (6) & (7) (Supp. 2000), due to his voluntary intoxication. The state supreme court held that while there was ample evidence Applicant had been drinking that day and in the past, there was no evidence he was actually intoxicated at the time of the crime. Accordingly, the court found no error in failing to charge the mitigators. State v. Bowman, 623 S.E.2d 378 (S.C. 2005).

At PCR, James Gadson testified that Applicant drank every day and had been drinking four or five hours that day. He said Bowman was tipsy. {PCR Tr. 149-56}. On cross, though, he defined "tipsy" as the lowest level, where one is NOT staggering, or slurring, or displaying any of the effects of alcohol. He stated Applicant was not a "stone cold drunk". {PCR Tr. 190-94}.

Counsel, though, was clear that he saw no value in eliciting in the guilt phase that Applicant was drunk, as it would do him no good and potentially prejudice his client before the jury. While counsel elicited evidence from Yungman during the social history that Applicant had alcohol abuse, it was because he "had to try it at the end [the sentencing phase]". Counsel credibly testified as a strategic matter he would never have called Gadson back during the sentencing phase to elicit whether Applicant was drunk when he killed Kandee, because of the risk of what else Gadson might say, including reiterating how Applicant killed Kandee. Counsel was adamant he never would call a co-defendant to the stand for that purpose. {PCR Tr. 1757-59}.

On cross, counsel added an additional credible reason – he also noted that he was avoiding any testimony that might raise a mental health mitigator and possibly open the door to the solicitor's use of the William S. Hall report, in which Applicant also mentioned post-mortem sexual contact with Kandee. He noted he had successfully prevented that information from coming before the jury with the suppression motion, and wanted to be careful not to open the door another way and allow it to come in by way of the Hall report. Since his psychiatric expert had offered him nothing of value, counsel did not want to open the door with something of little use like voluntary intoxication. {PCR Tr. 1827-38}. Indeed, counsel at trial halfheartedly requested a charge on mitigator (2) – mental or emotional disturbance – but he virtually conceded that the record was devoid of any evidence to support such a charge. Again, this was because the defense as a tactical matter did not want to raise mental health issues as they would "place [Appellant] in greater jeopardy" based on "certain issues that were part of the preliminary matters" – referring to Appellant's statement to the Hall Institute during his evaluation that Kandee's vagina was fondled after her death. {R. 350-51; 960-64; 1107; 1244}

Counsel was not deficient. Counsel strategically and reasonably saw no value in eliciting that Applicant was drunk during the guilt phase, as voluntary intoxication is not a legal defense and it would potentially be prejudicial to his client. However, while he felt he needed to try anything in the sentencing phase, including eliciting the full social history that showed Applicant's alcohol abuse from an early age, he never would have under any circumstances called Gadson back to testify Applicant was drunk when he killed Kandee

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– for fear of what other damaging information Gadson might offer or reiterate. These decisions were reasonable. See generally Sexton v. French, supra; Bell v. Evatt, supra.

Regardless, Applicant cannot show prejudice. Calling Gadson to say Applicant was merely tipsy and not showing any outward effects of alcohol would have little if any mitigating value, and certainly cannot be said to create a reasonable probability that the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. See Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998). This relatively tame evidence of drinking is in no way akin to the stark, extensive, and moving evidence of mental illness or a nightmarish background, the complete absence of which was found to be prejudicial in Wiggins, Williams, and Von Dohlen.

Further, any freestanding due process claim could have been raised at trial or on direct appeal if preserved at trial, and as such the present freestanding claim is improper for PCR. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal can not be raised in a PCR application absent a claim of ineffective assistance of counsel).

XII. Failure to request mitigating instructions on voluntary intoxication

Based on the previous allegation with regard to the failure to call James Gadson back during the sentencing phase to testify that Applicant was tipsy when he killed Kandee, Applicant finally contends his counsel were ineffective for failing to request either the specific mitigators in S.C. Code Ann. § 16-3-20(C)(b)(2), (6) & (7) (Supp. 2000), or a specific non-statutory mitigator specifically related to voluntary intoxication.

Applicant is correct that evidence of intoxication at the time the crime was committed entitles one to *either* the three statutory mitigators, or a specific instruction as to intoxication. See State v. Plemmons, 296 S.C. 76, 370 S.E.2d 871 (S.C. 1988). And, the state supreme court held in this case that the mitigators are not required unless there is actual evidence the defendant was intoxicated at the time the crime was committed. State v. Bowman, 623 S.E.2d 378 (S.C. 2005).

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The basis for rejecting this claim has been previously discussed in the preceding subsection and is incorporated here. Counsel strategically and reasonably would not have called Gadson back for such a purpose for the risk of what else he might say, and counsel was also concerned about opening any door to the State's use of the Hall report with its damaging information. See Buchanan v. Kentucky, 483 U.S. 402 (1987) (the Court specifically noted that if a defendant "requests an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested").

Moreover, some evidence that Applicant was "tipsy" is simply not the kind of evidence that would create a reasonable probability of a different result, particularly if it had opened the door to the Hall report.

Further, any freestanding due process claim could have been raised at trial or on direct appeal if preserved at trial, and as such the present freestanding claim is improper for PCR. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal can not be raised in a PCR application absent a claim of ineffective assistance of counsel).

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CONCLUSION

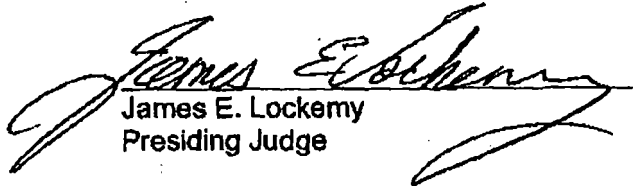
For the foregoing reasons, Applicant's APCR is denied and dismissed with prejudice.

Applicant is hereby advised that if he wishes to appeal this Order, a notice of intent to appeal must be filed within thirty (30) days of the receipt of this Order. Applicant's attention is also directed to Rules 203, 206, and 227 of the South Carolina Appellate Court Rules for appropriate procedures to follow after notice of Intent to appeal has been timely filed.

Therefore, it is ORDERED that:

1. The application for post-conviction is denied and dismissed with prejudice.
2. Applicant is remanded to the custody of the State of South Carolina.

This 27 day of February, 2012.


James E. Lockemy
Presiding Judge

Dillon, South Carolina

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STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

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

MARION BOWMAN, #6006)

Petitioner,)

v.)

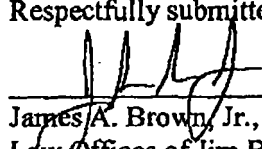
STATE OF SOUTH CAROLINA)
Respondent.)

MOTION TO ALTER OR AMEND
JUDGEMENT, PURSUANT TO
RULE 59

FILED - RECORDED
MAR 19 PM 4:01
CLERK OF COURT
DORCHESTER COUNTY

PETITIONER MOVES THE COURT for an Order altering and amending the
Judgement in this case, received by undersign counsel from the Clerk of Court on March 12,
2012. Petitioner will file a separate memorandum in support of this motion.

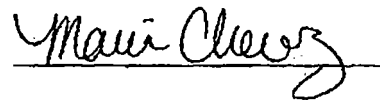
Respectfully submitted,


James A. Brown, Jr.,
Law Offices of Jim Brown, PA
1600 Burnside St., Suite 100, PO Box 592
Beaufort, SC 29901
(843) 470-0003

March 16, 2012
Beaufort, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing
pleading was mailed to all litigants of record in
this proceeding this 16th day of March, 2012



JA 3398

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STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF DORCHESTER)

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

MARION BOWMAN, #6006)

Applicant,)

v)

STATE OF SOUTH CAROLINA)

Respondent.)

**MEMORANDUM IN SUPPORT OF
APPLICANT'S MOTION TO ALTER
OR AMEND JUDGEMENT PURSUANT
TO RULE 59**

FILED - RECEIVED
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CLERK
DORCHESTER

The below-listed counsel for the Applicant respectfully provide the following:

Memorandum in support of Applicant's Motion to Alter or Amend Judgement Pursuant to Rule 59.

Introduction

This matter involved litigation stretching over the better part of six years. The PCR merits hearing alone involved testimony taken over parts of four different months during the fall of 2008. The transcripts, pleadings and exhibits from both the trial and the merits hearing constitute over 10,000 pages of documents.

For this reason, undersigned counsel respectfully incorporate all claims, issues, and assertions appearing in the record into this memorandum. It is only within this context that any meaningful request to alter or amend judgement can be made. However, some items appearing in the signed Order merit specific attention.

These important items are contained in the table below. This table is taken nearly verbatim from Applicant's objections to the proposed Order previously submitted to this Court.

JA 3399

This table is being replicated because review suggests the content of the signed Order is identical to the content of the proposed Order.

Specific Objections

Page	Statement/Finding/Conclusion	Problem(s)
6	Objection is made to the finding that the psychiatric report of Gadson was equally available to the Applicant and the government.	The <u>Brady</u> material is the information contained in the report, not necessarily the report itself. Further, the report was generated by a state agency, falling under the same use of the term "state" as that prosecuting Applicant. When this material contains impeachment value, then the state must provide this material, even in the absence of a request. In this case, the state obtained this report internally, from one agency to another, without litigation or subpoena. This report was not publicly available. The contents were protected by privilege, subject to court order. Applicant's trial counsel did not possess the information in the report or have any knowledge of the existence of any impeachment material as Gadson was ruled competent. The state did not provide it to Applicant's trial counsel.
6-7	Objection is made to the finding that Gadson's report did not contain impeachment material.	In fact, the report indicated Gadson exhibited "some mild impairment of verbal memory," habitually used cannabis including smoking 6 blunts a day, and experienced blackouts where he would lose control over his bodily functions. He claimed he lost control over his bodily functions on Nursery Road the night Kandee Martin was killed.

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7	Objection is made to the finding that this suppressed evidence was not material.	Gadson claimed to be the only eye-witness to the killing. Impeachment of his testimony was necessary to rebut the state's case. The suppression of this impeachment material undermines confidence in the verdict.
10	Objection is made to the finding that Gadson did not avoid exposure to the death penalty by reaching a plea bargain to act as a state's witness.	Gadson was charged with Murder. Twice the state asserted he was the shooter. In fact, Solicitor Bailey suggested he could be charged as a principle just as Mr. Bowman. Death is a possible penalty for a principal in a murder case, whether or not he is the triggerman. See <u>Tison v Arizona</u> , 481 US 137 (1987). This agreement eliminated Gadson's exposure to the death penalty through his cooperation. The jury did not know this information; but instead, heard that he would receive twenty years.
11	Objection is made to the findings regarding the prior statements of Coker alleging Gadson was the shooter.	Detective Coker swore under oath that Gadson shot Kandee Martin. He swore to this assertion in the arrest warrant and indictment. If he did not, then those documents are the result of some type of fraud or collusion as they speak for themselves. Counsel for a capital defendant who is challenging guilt as the shooter is obligated to test the state's case by challenging that assertion. These statement contradict the assertion Bowman was the shooter. This does not open the door to any involuntary statements.

JA 3401

14	Objection is made to the Order's finding that the arrest warrant affidavit "in no way indicates the State believed Gadson was the one who fired the fatal shot."	The arrest warrant affidavit reads: "...there is probable cause to believe that the defendant named above (Gadson) did commit the crime(s) set forth (murder), and that such probable cause is based on the <u>FOLLOWING FACTS</u> (Emphasis added): That...James Tawain Gadson...did shoot and kill one Kandee Martin..." A jury should determine whether the old or new position of the state is correct.
15	Objection is made to the internally inconsistent position regarding Gadson's exposure to the death penalty.	On page 10, the Order indicates that Gadson never faced the death penalty. However, page 15 of the Order indicates that Solicitor Bailey "credibly and accurately testified that Gadson was charged as a principal first and <u>COULD HAVE BEEN CONVICTED AS SUCH</u> ..."(Emphasis added).
15	Objection is made to the Court's finding that the true billed indictment, Plaintiff's 1, did not mean "Coker told the grand jury that Gadson was the one who shot the victim."	In fact, Coker is listed as the only witness to appear before the grand jury. The body of the indictment is pre-typed and submitted under the signature of the Solicitor (as an officer of the court) and the grand jury found the assertion accurate without correction or amendment. <i>A fortiori</i> , Coker told the grand jury that "...Gadson did...kill one Kandee Martin by means of shooting the victim in the head..." See Plaintiff's 1.
16	Objection is made to the finding of no prejudice regarding the state's assertion that Gadson was the shooter.	There is a reasonable probability that the outcome would have been different if the jury heard the state previously hummed a different tune than the version it was peddling at trial.

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20	Objection is made to the treatment of the claim Applicant raises concerning Gadson's lie about gun ownership.	In fact, the "essence" of Applicant's assertion is not that the jury didn't know that Gadson owned a similar make and model gun as the one attributed to Applicant. The essence is that Gadson is a liar, he lied about his gun being stolen and he did so because of his guilt in the shooting. (The issue of whether the gun attributed to Applicant was "matched to the murder scene" will be discussed later in the application.)
22	Objection is made to the finding that the state did not "knowingly offer false testimony." This finding intentionally misconstrues the nature of the violation asserted.	Applicant's claim is one of a violation of due process. This may occur when the state presents testimony which it knows or "should have known" was false. See <u>Chavis v NC</u> , 637 F2d 213, at 222 (4 th Cir 1980). Here, Felder's testimony omitting the gasoline purchase is false. Through viewing of the video and the knowledge of Lead Detective Coker, the state should have known this testimony was false by omission. Coker testified that Felder would not have been charged with the Arson if he wasn't identified as the purchaser of the gasoline on the video. PCR, p. 899, l. 6- p. 900, l. 5.
23	Objection is taken the gross mis-characterization which occurs when the proposed order implies Bailey did not know Felder was the gas purchaser.	In fact, Detective Coker knew Felder bought the gas, sat at the table with the prosecutor, and "conveyed to the prosecutor" this information. PCR, p. 899, l. 6- p. 900, l. 5.
23	Objection is made to the finding that the "state could not know for certain that Felder was the one who purchased the gasoline used in the arson."	Detective Coker knew this and used this information to prosecute Felder through Arrest Warrant and Indictment. Coker sat at the table with the prosecutor and specifically told him that Felder purchased the gas. The assertions in the order can only be accurate if Detective Coker's sworn PCR testimony is false.

24	Objection is made to the finding that: "At trial, Felder testified that he purchased the gasoline at Applicant's request."	In fact, Felder omitted the gasoline purchase information during the guilt/innocence trial. Instead the defense had to correct this falsehood, at Applicant's insistence, during Applicant's sentencing, and well after pronouncement of the verdict in the trial.
24	Objection is made to the spelling of Valorna Smith's name as Bolorna Smith.	See Trial, p. 4112-4124.
27-28	Objection is made to the finding that the state discloses evidence that Felder purchased the gasoline used in the Arson.	The assertion that the state did not know Felder purchased the gasoline for the purposes of the <u>Napue</u> claim and the assertion that the state "...had circumstantial evidence that it was Felder who purchased the small amount of gasoline..."are mutually exclusive. These two positions can not both be true. In fact, they can both be false. The record, in fact, supports the proposition that the state did not disclose the identity of Felder as the gasoline purchaser if review of the video does not reveal Felder as the purchaser. But there is no dispute that Detective Coker conveyed this information to Bailey and not the defense team.
28	Objection is made to the Order's finding that "None of the evidence presented at the PCR hearing indicated the State had evidence connecting the gasoline purchased by Fedler to the Arson.	In fact, Detective Coker testified at the PCR hearing that Felder would not have been charged with the Arson if he had not been identified on the video purchasing gasoline. Coker testified that he told Bailey this information and that "everything we had in the case was given to the Solicitor's office." P. 899, l. 6- p. 900, l. 5.

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30	Objection is made to the Order's implication that trial strategy was involved when Cummings declined to inform the jury of Felder's identity as the purchaser of the gasoline because it would incriminate Applicant.	In fact, physical evidence identifying Felder as the gasoline purchaser does not make Felder's claim that Bowman committed the arson any more or less true. But the fact Felder lied about this purchase by omitting this fact does call into question his veracity as a witness in the very matter before the trial jury. Felder already testified Applicant committed the arson.
30-32	Objection is made to the Order's characterization of the <u>Brady</u> claim regarding the Felder proffer letter and polygraph.	The issue Applicant presents is not whether the proffer letter and polygraph were disclosed, but whether the prosecutor ever informed Applicant's trial counsel that Felder lied through the proffer letter to get a deal. See <i>Gibson v. St.</i> , 514 SE2d 320, at 323 (SC 1999) ("Only in its full form did the information constitute evidence with exculpatory or impeachment value.") Trial counsel was never informed that this letter triggered the request for a polygraph, in which Felder again lied to get a deal. The prosecution's awareness of the material change in Felder's statements is impeachment material triggering <u>Brady</u> concerns.
32	Objection is made to the findings that the differences in the proffer letter and the trial testimony were minor.	Felder is a liar. He lied in the proffer letter. He lied during the polygraph. He lied at trial. He testified against Applicant. His repeated lying and the state's willingness to consider perjury and false statements as deserving of reward is a material concern regarding the veracity of the state's allegations against Applicant. The jury never heard about even one instance of Felder's lies.

33	Objection is made to the Court's finding that there was no "wink wink" deal where the state would reward Felder regardless of the veracity of his testimony.	Bailey recalled multiple occasions when Felder lied to get a deal. In fact, he agreed there was "no other way to characterize" Felder's information except as a lie. PCR, p. 2109-2114. Bailey admits he did not reveal these lies for leniency. Bailey admits he had no concern about rewarding Felder for lying multiple times. There is no other way to describe this except as a deal struck through an unspoken understanding. See <i>St v. Starling</i>, 2010 WL 2861824 (Del. Superior Court) (Unpublished) (2010) (defining "wink wink" as an <i>understanding</i>).
35	Objection is taken to the assertion that the state could not have sought the death penalty against Felder given the sufficiency of the evidence to charge him as an accessory before the fact to murder.	As indicated by Chief Justice Toal in her dissent in <i>Bixby</i>, there is no practical difference to the charge of accessory before the fact to murder and murder. The evidence to support one charge will necessarily support the other. Using the information of Felder's involvement as an accessory before the fact to murder, Felder faced a potential death sentence as an accomplice to murder.
36	Objection is made to the finding that Applicant's trial counsel expressed a "valid strategic reason" for not examining Felder regarding the original charges and penalties to which he was exposed.	In fact, Detective Coker provided information regarding Felder's purchase of gas as a basis for his original charges. See PCR, p 899, l. 6- p. 900, l. 5. Applicant's trial counsel did not know Coker's basis for charging Felder so his "strategy" was not valid. In fact, trial counsel obviously did not interview Coker to learn the basis of Felder's original charges. This lack of knowledge corroborates the deficiency of trial counsel; not valid trial strategy.

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36	Objection is made to the Order's findings that the information in the arrest warrant is only "probable cause."	In fact, the information is only "probable cause" that Felder committed the crime. But this probable cause is based upon a sworn statement asserting Coker possessed the "following facts" of Felder's guilt. See Plaintiff's 17 & 18.
38	Objection is made to the finding that Applicant's trial counsel expressed a valid trial strategy.	In fact, Felder lied by omission regarding the gasoline purchase. This does not corroborate Applicant's involvement in any way. Instead, this corroborates Felder's willingness to lie to escape his own liability.
40	Objection is made to the lack of a finding that the non-disclosed information concerning Hiram Johnson constituted impeachment material and was suppressed by the state.	The existence of charges pending against a cooperating witness is impeachment material. See <u>St v. Mizzell</u> , 563 SE2d 315 (SC 2002) and <u>St v. Jones</u> , 541 SE2d 813 (SC 2001).
40-41	Objection is made to the finding that the suppressed information was not material as defined by the <u>Brady</u> line of cases.	There are only two witnesses who provided direct testimony concerning Applicant's guilt. One is Tawain Gadson, who claimed to be an eyewitness and the other is Johnson who claimed, for the first time at trial, to have heard Applicant confess. The prosecutor argued that Gadson's testimony was subject to scrutiny as biased but that there were no charges against Johnson. That was untrue and was emphasized by the state.
41	Objection is made to the finding that the five casings at the murder scene were conclusively matched to a gun linked to Applicant.	It is bewildering that this statement would be included in the order drafted by the state when the state's own expert witness now concedes the evidence of a "conclusive" match from his testimony at trial was overstated. See p. 340 l. 20-21 ("Theoretically, there is a possibility... that you might find one in 300 billion down the road that produced the same markings.")

48	Objection is made to the findings that Applicant did not establish the "Sam memo" was suppressed.	Applicant's trial counsel clearly indicated they did not receive this information. PCR, p. 1339, l. 6-11. The solicitor couldn't demonstrate he provided this information. PCR p2150
48	Objection is made to the findings that the "Sam memo" was not favorable evidence.	The US Supreme Court states that when reviewing a <u>Brady</u> claim "a reviewing court may consider "any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case." See <u>US v. Bagley</u> , 473 US 667, at 683 (1985). Provision of this memo would provide defense counsel a mechanism to demonstrate that Davis maintained the truth of Gadson's confession even when questioned by the prosecution. This evidence would be admissible as a prior consistent statement. See SCRE Rule 801(d)(1)(B).
49	Objection is made to the finding that the material contained in the "Sam memo" was not material.	The only defense theory was that Marion was not the person who shot Kandee. At trial, the defense suggested the killer was Gadson. This information exculpated Bowman and impeached Gadson. As the only purported eye witness to the killing, it is hard to comprehend how there is not a reasonable probability that disclosure would have resulted in a different result in the proceeding. Again, the US Supreme Court states that when reviewing a Brady claim "a reviewing court may consider "any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case." See <u>US v. Bagley</u> , 473 US 667, at 683 (1985).

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50	Objection is made to the findings that the difference between impeachment with only the handwritten statement as opposed to impeachment with both Ricky Davis' handwritten statement.	The fact Davis wrote his handwritten note and then confirmed the same to the solicitor's office is so significant that trial counsel expressed shock and disappointment that this information was not disclosed. See PCR, p. 1339, l. 6-11. Further, the "Sam memo" clarifies that Bowman told Ricky to write down what Gadson told him. Not that Applicant told him to fabricate a statement. See Applicant's 67.
50	Trial counsel was not ineffective for not presenting Rickie Davis' testimony regarding Taiwan Gadson's confession.	The note is in Rickie Davis' handwriting and reads, "I Rickie was on A-side with Gadson and he said he shot the girl and gave Bowman back the gun that was used..." Bigger problem: Rickie Davis repeated this same confession by Gadson in greater detail to an investigator from the Solicitor's office. A criminal friend of Gadson's, housed with Gadson, who has a change of heart when it appears he will actually be called to testify at the trial of Bowman: no matter what Davis would have testified to (and we'll never know because trial counsel didn't call him), no reasonable juror would not be concerned about who really shot Kandee Martin, <i>especially</i> in light of the fact that, <i>if</i> Rickie Davis testified in a manner different from his handwritten statement. (Applicant's 11) See Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 44-46.
53	Trial counsel was not ineffective for not ineffective in not presenting Gadson's location on A-side along with Rickie Davis.	Detective Coker would have been a witnesses from the prosecution team to corroborate Rickie Davis' prior inconsistent statement <i>if</i> Rickie Davis actually testified differently from his own handwritten statement (Applicant's 11). See DCDC records, (Applicant's 41) and Det. Coker's notes, (Applicant's 45) See Applicant's Amended Brief Supporting the Fourth

		Amended Application for Post Conviction Relief 41-46.
54	Trial counsel was not ineffective in not asking Detective Coker about Gadson's lying about owning a .380	If the defense theory was that Gadson shot Kandee Martin, why would any competent lawyer not ask about Gadson's lies relating to a weapon of the same make and model as the suspected murder weapon? (PCR trial, p.911, l.1-6) See Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 47-48.
55	Trial counsel was not ineffective in not asking Detective Coker about statements heard by Bruce McLean	Defense counsel never cross-examined Coker about <i>videotaped</i> present sense impressions and excited utterances involving people talking about killing a girl and wanting to dispose of her body at a gas pump the Applicant was never at. PCR Trial, p. 922, l. 2-13. See Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 48-49.
57	Trial counsel was not ineffective in not cross-examining Detective Coker about Felder being the one who purchased the gasoline.	Under what theory would defense counsel NOT be ineffective for failing to bring to the jury's attention blatant lies committed by the State's witnesses who were given sweetheart deals in exchange for their cooperation? (PCR Trial, p.685, l. 15-19 and PCR trial, p. 2114, l. 7-15) See Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 49-51.
58-62	Applicant failed to establish Hardee-Thomas acted under an actual conflict of interest as a result of her former representation of Ricky Davis and then active representation of Applicant.	At the time Rickie Davis wrote the memo (Plaintiff's 11) in August 2001, Hardee-Thomas was actively representing both Davis and Applicant. (Plaintiff's 19-23 and Defendant's 17) Such joint representations of conflicting interests are inherently suspect. <u>Mickens v. Taylor</u> , 535 U.S. 162, at 166 (2002), <u>Holloway v. Arkansas</u> , 435 U.S. 475 (1978). <u>Wheat v. U.S.</u> , 486 U.S. 153. There was no valid waiver of this conflict of interest. <u>U.S. v. Ellison</u> ,

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		798 F.2d 1102, at 1108 (7 th Cir. 1986). 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. See <u>Cronic</u> at 658-659; also see <u>Geders v. United States</u> , 425 U.S. 80, at 91 (1976) and <u>Gideon v. Wainwright</u> , 372 U.S. 335, 344-345 (1963). See Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 53-63.
65	There were no sustainable objections to exclude the DNA match between Applicant and deceased... "...this evidence is confirmatory of the identity of the Applicant as the murderer..."	The State's own expert testified that there was no way to put a date or time on the sex. (Trial, p.4393, l. 9-19) There were a host of sustainable objections, pursuant to SCRE 402,403 & 404(b) and <u>Strickland v Washington</u> . see Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 65-72.
70-72	There was no valid basis for objecting to the arson expert's testimony that a heavy petroleum product was found on Applicant's pants and that "the solicitor in argument never mentioned the accelerant on the pants"	The Solicitor knew the difference between a petroleum product and an accelerant and yet, in front of the jury was allowed to ask his expert without objection, "Would you state whether or not you detected petroleum <i>accelerant</i> in those jeans." (Trial p. 4298, l. 2-5) There were ample grounds for valid objections to this evidence under <u>Strickland</u> , SCRE 402, 403 and 702. see Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 72-74.
79	There was no valid objection to the introduction of the Applicant's relatives' plea agreements	SCRE 102, 103, 104 and <u>Strickland</u> objections and a redaction of the charges the relatives pled to could have eliminated the introduction of

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		the highly prejudicial implication that Applicant somehow participated in the conspiracy to dispose of the murder weapon. <i>see</i> Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 74-78.
81-91	Counsel was not deficient for not objecting to a SLED firearms examiner testifying that the casings at the scene of the murder matched the firearm attributed to the Applicant "to the exclusion of all other weapons."	There was no statistical basis for this expert opinion at the time of the trial, and Applicant's trial counsel argued to the jury that Taiwan Gadson killed Kandee Martin with his gun of the same make and model, after the very expert testimony he failed to object to eliminated this as a possibility. <i>see</i> Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 79-81.
100	Counsel was not deficient in failing to object to the solicitor's cross-examination of Applicant's witness as to "good" prison conditions	Applicant flat out admitted he missed that objection, thereby failing to preserve that issue for Applicant/Appellant's direct appeal, PCR Trial, p.1721, l.15-25 & p. 1722., l.1; thereby allowing the introduction and consideration by the jury of arbitrary factors in violation of SC Code Section 16-3-25 (c)(1). <i>See</i> Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 82-83.
105-112	Counsel was not deficient for failing to challenge the allegations of kidnapping as an aggravating factor during the penalty phase.	Upon a review of Taiwan Gadson's testimony at Appellant's original trial, (Trial pgs 3980-4038) there was no mention of any inveigling, deception or otherwise from which a jury could infer that Kandee Martin was kidnapped. <i>See</i> Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 84-86.
113-117	Applicant's trial counsel did not constructively absent themselves from the preparation and presentation of the mitigation case.	Trial counsel "never once" met with the social worker to "sit down and go over his proposed testimony" (PCR p.1093, l. 20-24 and PCR, p. 1094, l. 7-9). Both the social worker and psychologist hired by trial counsel noted a complete failure of counsel to inform them of trial strategy (Plaintiff's 51 & 57) The testifying social worker, without any

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		guidance from trial counsel (PCR, p.1093, l. 13-15) was left to make critical decisions as to which evidence to present, and as such, failed to present existing evidence of Appellant's capacity to be of emotional value to others and his long history of legitimate and gainful employment. Instead, the social worker testified Applicant was a drug dealer and beat a schoolmate with a tree limb and although Appellant <i>to this day</i> steadfastly denies being the person who shot Kandee Martin, the social worker testified in his expert opinion that no excuse could be offered for Bowman's actions in killing Kandee Martin. (Trial, p. 4809, l. 10-20). <u>U.S. v Cronin</u>, 466 U.S. 648 (1984), <u>Brooks v Tennessee</u>, 406 U.S. 605 (1972) and <u>Frett v. State</u>, 298 S.C. 54, 378 S.E.2d 249 (1988). See Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 87-90.
122	Applicant can show neither deficiency nor prejudice with regard to the alleged failure to present evidence of Applicant's emotional value to others.	Trial counsel knew of this positive character trait (Plaintiff's 52 & 62) and knew how to hire and elicit this evidence from a family psychologist (PCR p. 1456, l.4-8), but because of the complete breakdown in the adversarial process, as condemned in <u>Cronin</u>, the testifying social worker was left to make the decision to focus on the "more negative aspects of his life". (PCR, p. 1092, l. 25 – p. 1093, l. 9). See Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 90-95.
129	If the testifying social worker decided not to put emphasis on Applicant's extensive work history and successful completion of his time in the restitution center, that is the fault of the expert, not counsel.	Applicant's work history and successful completion of the restitution center were available to trial counsel, (Plaintiff's 55 & 56 and PCR, p. 1478-1480) and is further evidence of the complete breakdown between counsel and the hired experts, and thus, the adversarial process, amounting to a constructive absence from the trial

		preparation and presentation in violation of <u>Cronic</u> and Applicant's right to counsel guaranteed by the Sixth Amendment of the U.S. Constitution and Article 1, Section 14 of the S.C. Constitution, as well as South Carolina law, including S.C. Code Sections 16-3-26 (B)(1) and 17-23-60. See Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 95-96.
134-137	Counsel was not deficient for failing to present evidence of intoxication.	The S.C. Supreme Court ruled in Applicant/Appellant's direct appeal the trial court was correct in deciding not to charge intoxication as a mitigating circumstance because the trial record was devoid of information that Applicant "was actually intoxicated at the time of the crime." <u>State v. Bowman</u> , 623 SE2d378, at 383 (SC 2005), rehearing denied (2006). This lack of evidence could easily have been cured by trial counsels' decision to inquire of witnesses that did testify of Applicant's level of intoxication on the day of the killing. (James Taiwan Gadson testified at the Post Conviction Relief trial that Marion Bowman was drinking for four to five hours on the day of the murder. PCR transcript page 152 lines 22-25 and page 153 lines 1-14. He also testified that the Applicant drank beer everyday. See page 153 lines 24-25 and 154 lines 1-7, wherein he testified that the Applicant drank Old English 800 everyday. Taiwan Gadson further testified that the Applicant was drinking liquor that day. See page 155 line 4-9. And most significantly, Taiwan Gadson testified that the Applicant was intoxicated on the day of the murder. See page 156 lines 1-5 and 157 lines 12-25.
137	Counsel was not deficient for failing to request either the specific mitigators in S.C. Code Ann, Section 16-3-20 (C)(b)(2), (6) & (7)	Applicant's trial counsel labored under the mistaken belief that voluntary intoxication was an aggravating factor. For that reason, he failed to elicit

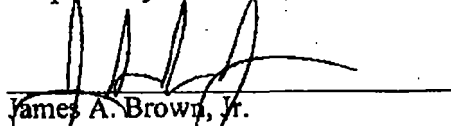
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	(Supp.2000) or a specific non-statutory mitigator specifically related to voluntary intoxication.	evidence of intoxication, harbored an erroneous belief that the introduction of such evidence would somehow result in the introduction of Applicant's mental health report and failed to request either the specific mitigators in S.C. Code Ann, Section 16-3-20 (C)(b)(2), (6) & (7) (Supp.2000) or a specific non-statutory mitigator specifically related to voluntary intoxication. <u>State v. Plemmons</u> , 370 SE2d 871 (SC 1988). See Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 103-104.

Conclusion

For the reasons expressed above and in light of the entire record and all pleadings, briefings and applications, the Court should alter or amend its judgement in accordance with Rule 59.

Respectfully submitted,



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JA 3415

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April 30, 2012

The Honorable James E. Lockemy
South Carolina Court of Appeals
P.O. Box 750
Dillon, SC 29536

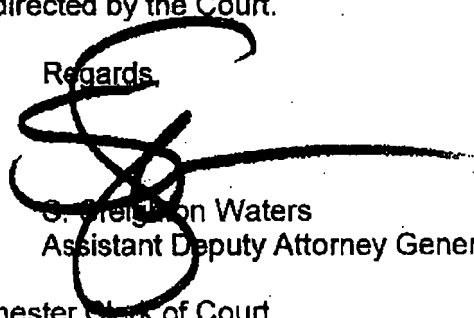
Re: Marion Bowman v. State, 06-CP-18-569

Dear Judge Lockemy,

I am in receipt of Applicant's memorandum in support of his Rule 59(e) motion. Please accept this letter in lieu of a formal response. From a review of the arguments made in the memorandum, it appears that they are an exact reiteration of the arguments Applicant made in support of his Objections to the proposed order. Those arguments were a reiteration of the arguments Applicant made at the conclusion of the evidentiary hearing and in the post-trial briefing process. The State of course would be happy to formally respond if the Court desires, but Applicant's points were already specifically addressed in the State's post-trial brief which this Court found persuasive.

Of course, please do not hesitate to contact me with any questions or concerns, and I stand ready to provide anything further as directed by the Court.

Regards,


S. Breighton Waters
Assistant Deputy Attorney General

cc: The Honorable Cheryl Graham, Dorchester Clerk of Court
Jim Brown, Esquire
John Sinclair, III, Esquire

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STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON
PLEAS

COUNTY OF DORCHESTER)

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

MARION BOWMAN, #6006,)

Applicant,)

ORDER

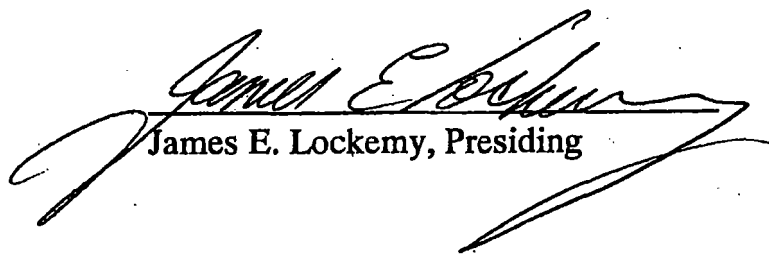
v.)

STATE OF SOUTH CAROLINA,)

Respondent.)

CERTIFIED COPY
2012 NOV -5 AM 10:35
JAMES E. LOCKEMY
CLERK OF COURT
DORCHESTER COUNTY

After careful consideration of Applicant's motion to alter or amend judgment pursuant to Rule 59(e), SCRCP, the motion is denied.


James E. Lockemy, Presiding

October 31, 2012

JA 3417

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dorchester County
James E. Lockemy, Circuit Court Judge

RECEIVED

APR 30 2014

S.C. Supreme Court

MARION BOWMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213468

AMENDED PETITION FOR WRIT OF CERTIORARI

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2. Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to investigate and prepare for the impeachment of Travis Felder and by failing to impeach the testimony of Travis Felder in any meaningful way, including impeaching Felder with a videotape that would have shown Felder lied to the jury about buying the gas to burn the decedent's car, impeaching Felder on bias with his original charges, and impeaching Felder with his prior inconsistent statements	31
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ISSUES PRESENTED

1.

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

2.

Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to investigate and prepare for the impeachment of Travis Felder and by failing to impeach the testimony of Travis Felder in any meaningful way, including impeaching Felder with a videotape that would have shown Felder lied to the jury about buying the gas to burn the decedent's car, impeaching Felder on bias with his original charges, and impeaching Felder with his prior inconsistent statements?

3.

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

4.

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

5.

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

6.

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

7.

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

STATEMENT OF FACTS

The state's key witnesses against Petitioner Marion Bowman at trial were James Gadson, Travis Felder and Hiram Johnson. Superficially, the case presented through these witnesses by the solicitor appeared rather straightforward. As will be seen infra powerful impeaching evidence against each of these three witnesses existed that defense counsel did not use because of incompetence or because the solicitor withheld impeaching evidence from them.

The state's theory at trial was that petitioner and the decedent, Kandee Martin¹, were friends. Gadson testified that on the day decedent was shot he had been drinking gin for most of the day, and he was "feeling in good shape." App. 3992, l. 11 – 3993, l. 25. Gadson said he was with petitioner and the decedent that evening. The decedent was driving. They went to the Horizon E-Z shop where they pumped gas, and then drove away without paying. App. 3994, l. 3 – 3995, l. 2.

Gadson claimed petitioner told the decedent where to drive and that she drove onto Nursery Road. "She stopped, cut the car off, cut the lights off, we got out." App. 3995, ll. 3-21.

Gadson maintained petitioner walked away from the car and that petitioner said he was going to kill the decedent "because she was wearing a wire." App. 3998, l. 4 – 3999, l. 3. Gadson testified that a car drove by and they "jumped in the woods." App. 3999, ll. 16-21.

After the vehicle passed by, the decedent started walking back to the car and petitioner followed her. Gadson claimed he heard a gunshot and saw the decedent running back towards him. Gadson claimed petitioner shot at the decedent two times and "she fell to the ground," then petitioner dragged her body into the woods. App. 4001, l. 5 – 4012, l. 24.

¹ Kandee is also spelled "Candee" in other places in the record. For ease of reference she is consistently referred to as "Kandee."

Later that night Gadson went to the Allen Murray Club with petitioner, Hiram Johnson, and another man in the decedent's car. Hiram Johnson would later testify that petitioner was trying to sell the decedent's car at the Allen Murray Club late that night. App. 4017, l. 4 – 4018, l. 17; App. 4067, ll. 3-20.

The state presented evidence that Travis Felder was with petitioner when petitioner burned the decedent's car. Felder claimed that petitioner came to the Villa Apartments and told him "I need to park this car." Felder testified that he only followed petitioner while petitioner drove the decedent's automobile to Nursery Road. App. 4092, l. 6 – 4096, l. 19.

Felder maintained when they arrived at Nursery Road, petitioner pulled the decedent's dead body out of the woods, put it in the trunk, and set the car on fire. App. 4096, l. 13 – 4100, l. 14.

Hiram Johnson's role during the trial was to testify that petitioner was trying to sell the decedent's car that evening, and that on the way back from the Allen Murray Club petitioner told him: "I killed Kandee, heh, heh, heh." Johnson claimed petitioner had a gun in his lap at the time. App. 4067, l. 25 – 4068, l. 18.

Marva Hardee-Thomas, ("Thomas") who is presently suspended from the practice of law by this Court, represented petitioner along with Norbert Cummings ("Cummings"). Thomas later acknowledged during PCR that she did not know what the guilt phase strategy was, and she referred any questions about it to Cummings. As to the penalty phase strategy she again stated: "You're going to have to ask Mr. Cummings." App. 7307, l. 5 – 7308, l. 10; App. 7325, ll. 6-23. The defense's mitigation investigator and social work expert testified they had no idea what the strategy was for the penalty phase. App. 6962, ll. 3-7; App. 6786, ll. 7-23. Thomas even wrote a letter to the jail, while she was a Dorchester County Public Defender, stating petitioner could call the Public

Defender's Office collect between "8:45 - 9:00" "concerning his capital case" but she added "[h]e is not allowed to contact me on a daily basis." App. 9170.

At the time Thomas represented petitioner, as will be seen infra, she also had an attorney-client relationship with Ricky Davis. Davis wrote a statement in 2001 that Gadson had confessed to Davis that he killed the decedent. In this statement Davis said Gadson admitted or bragged: "[T]hat he was the one that shot the girl and gave Petitioner the gun that was used and he said it didn't matter because Black [petitioner's nickname] family had got caught with the gun [anyway]." App. 8966.

As will be seen infra, Thomas candidly admitted a conflict of interest existed in her representation of both petitioner and Davis. Thomas explained the dual representation had her "trying to help Mr. Bowman but not hurt my aspect with Mr. Davis because I still had an ethical responsibility with him also." App. 7330, l. 18 – 7333, l. 6.

The defense failed to call Davis as a witness during petitioner's trial even though Davis was brought to the courthouse. Thomas did not remember even discussing Ricky Davis with petitioner, much less detailing the former attorney-client relationship she had with Davis to petitioner. App. 7294, l. 11 – 7296, l. 18. As will also be seen infra, Davis, after leaving the jail and when he was away from petitioner and Gadson, gave an additional statement to Solicitor Bailey's investigator, Sam Richardson, in which Davis stated that Gadson confessed in jail to "killing a girl." Davis told Richardson that petitioner never admitted shooting anyone, but Davis said Gadson later went back on his confession and claimed Petitioner shot her. App. 9122.

This statement was not turned over to the defense prior to trial. Bailey first tried to claim this statement was subject to the "attorney-client privilege." He then attempted to characterize the Richardson memorandum as work product. App. 7860, l. 12 – 7879, l. 18.

Solicitor Bailey also admitted he did not provide the defense with Gadson's mental health evaluation, and trial counsel Cummings confirmed he never received it. This report stated that Gadson reported hearing "voices" and "a little beeping noise." The report also recorded the fact that Gadson's testing showed he had memory problems which was not unusual given his admission of smoking "six blunts of cannabis on a daily basis." App. 8960.

As seen above, Travis Felder testified during petitioner's trial that he went to the crime scene and saw petitioner pull the decedent's dead body out of the woods, put her body in the trunk, and set the decedent's car on fire. During the PCR hearing testimony was adduced to show that Cummings failed to impeach Felder's story at trial, and he also failed to impeach Felder with the fact that Felder faced and feared the death penalty if he violated his plea agreement at the time of his trial testimony. Cummings admitted he knew at the time Felder testified during the state's case-in-chief that Felder purchased gasoline alone at the E-Z shop prior to the decedent's car being set on fire. Cummings had watched the videotape of Felder purchasing the gasoline with petitioner. Yet he did not impeach Felder with this serious omission where Felder claimed he was just a bystander. App. 7017, l. 15 – 7021, l. 21.

After petitioner had been convicted of murder, Cummings called Felder as a witness during the sentencing phase, when guilt was no longer an issue, to testify that he did purchase the gasoline that evening. When Felder was asked why he did not tell the jury that fact earlier, he told the solicitor: "You didn't ask." App. 4925, ll. 17-25.

When Felder was interviewed by the police he denied any knowledge of the decedent's murder. App. 6381, l. 17 – 6384, l. 16. After Felder was charged with murder and arson in 2001, he hired Charles Williams as his attorney. During plea negotiations, Felder's attorney sent a proffer letter to Solicitor Bailey. The proffer letter omitted both the fact that Felder bought the gasoline that

evening, and his claim that he saw petitioner put the decedent's body in the trunk of the car. App. 6384, l. 25 – 6390, l. 6; App. 9118.

At the PCR hearing, Cummings testified that he did not find out about Felder "cutting a deal" until just before the trial. The plea agreement allowed the solicitor to reinstate all of Felder's charges and seek the maximum penalty [death], "*and the defendant hereby waives any objection to the state seeking of the maximum penalty*" if Felder did not tell the "absolute truth." App. 8971. (emphasis added). Cummings apologized at PCR for not cross-examining Felder on the issue of Felder of his sentencing exposure of death or life imprisonment, particularly where Felder never even went to prison. App. 7029, l. 10 – 7034, l. 25. Cummings also apologized for not impeaching Felder with his prior inconsistent statements and omissions. App. 7045, ll. 1-10.

As seen, Hiram Johnson testified at trial that petitioner confessed to him that he "killed Kandee, heh, heh, heh." However, the jury never learned Johnson was a biased witness because of his pending charges -- from the same solicitor's office -- that were not disclosed by Solicitor Bailey. App. 4068, ll. 4-18. Further, at the PCR hearing it was revealed that nowhere in Hiram Johnson's earlier statement to Detective Coker on April 5, 2001, did he claim Petitioner said "I killed Kandee, heh, heh, heh." App. 9054. Johnson belatedly testified at PCR he thought petitioner was kidding when he said he killed the decedent, but he did not tell the jury during his testimony he thought petitioner was kidding. App. 6290, l. 10 – 6298, l. 10.

As will also be seen infra, Defense Counsel Cummings mistakenly thought that the penalty phase of petitioner's trial could focus on whether life imprisonment was really a harsh punishment or whether inmates lived rather relaxing lives in prison. Cummings reacted sarcastically when told that this Court had long held such evidence was improper: "Isn't that nice of them, but how else do

you argue about somebody having a chance to live in prison? I mean, I don't argue academically." App. 7449, l. 21 – 7450, l. 22.

When asked a question about the aggravating circumstance of kidnapping Cummings responded with a lecture to the petitioner:

Mr. Cummings: I want to say this out loud and with Marion [present], what are you doing on Nursery Road at that time of the morning with a white female and African American males in Dorchester County? Really. This is 2001 but what good are you doing out there on a dirt road? Okay. And we have all the homeowners calling us saying they heard shots, then they come out and they find a burning car. So, that's the way this thing portrayed. The fire department comes out, as you know. I have read this file backward and forward. If he's there he's a principal, if he's in the car. If he's not there, how does all these facts get known, how are all these facts to be told?

App. 7126, ll. 7-25.

ARGUMENT

1.

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

Introduction

Taiwan Gadson (“Gadson”) was the chief witness against petitioner at the trial. Gadson claimed that he witnessed petitioner shoot the decedent and drag her body into the woods. App. 4011, l. 20 – 4012, l. 2. Gadson’s version of events went essentially unchallenged by the defense. The jury never heard that Gadson gave inconsistent statements to the police, that he had previously fired the pistol the state alleged was the murder weapon, and that Gadson was threatened with the death penalty. Had trial counsel not been ineffective and impeached Gadson with this information, there is a reasonable probability that Gadson would not have been believed and the outcome of the trial would have been different.

1. What the Jury Heard at Trial from Gadson

In order to understand the vast importance of any evidence that could be used to impeach Gadson, it is important to understand the centrality of his testimony to the state’s case. Without Gadson, the state had very little evidence against petitioner.

At the time of his testimony, Gadson was twenty-three years old. App. 3980, ll. 8 – 9. He had lived in Branchville his whole life. App. 3980, ll. 12 – 13. He was in jail at the time of his

testimony. App. 3980, ll. 19 – 21. The state initially charged him with the decedent’s murder. App. 3980, ll. 22 – 24.

Gadson testified that the first time he saw petitioner on the day of the murder was early that morning. App. 3983, ll. 13 – 16. Petitioner was in the car with his sister, Yolanda Bowman, on their way to a meat market in St. George. App. 3983, ll. 17 – 21. Gadson went with Yolanda Bowman and petitioner to the meat market. App. 3984, ll. 2 – 3. Afterwards, they returned to Branchville to petitioner's house. App. 3984, ll. 14 – 17. Petitioner came out of the house “with a little limp.” App. 3984, ll. 18 – 25. Petitioner said he was walking that way because he had a gun in his pants and the gun was cold. App. 3985, ll. 1 – 9. Gadson saw the gun. App. 3985, ll. 10 – 12. Petitioner had a beer and a bag, took the beer out of the bag and put the gun in it. App. 3985, ll. 10 – 15.

Gadson claimed that he was with petitioner when petitioner purchased the gun. App. 3985, ll. 21 – 24. According to Gadson, petitioner purchased the gun approximately two weeks before the murder. App. 3986, ll. 1 – 3. The gun was a gray and black .380 High Point automatic pistol. App. 3986, ll. 6 – 8. Petitioner bought the gun from a “dude in Orangeburg.” App. 3986, ll. 12 – 13. A gun, state’s Exhibit 42, looked the same to Gadson as the one petitioner had on the day of the murder. App. 3987, ll. 5 – 10. Gadson never said anything about Felder being present when petitioner supposedly bought this gun. App. 3985, l. 19 – 3986, l. 25. Trial counsel failed to point out this inconsistency. App. 4101, ll. 9 – 15.

Yolanda Bowman then took them to the Villa Apartments in Branchville. App. 3987, ll. 11 – 25. They went to Hank Koger's house and started drinking. App. 3988, ll. 1 – 12. Gadson saw petitioner put his gun in a trash barrel. App. 3988, ll. 18 – 20. After petitioner returned from the store, petitioner started an argument with him about the gun. App. 3989, ll. 4 – 8. The

argument ended when Hiram Johnson retrieved the gun from nearby woods. App. 3989, ll. 16 – 20.

Gadson's claims about the gun at Hank Koger's house conflicted with the testimony of Hiram Johnson. Johnson testified that he hid the gun at Katrina West's house. App. 4060, ll. 5 – 8. Johnson testified that petitioner went to Katrina West's house, got his gun, and came back to Koger's house. App. 4060, ll. 12 – 19. Trial counsel failed to point out this inconsistency to the jury.

Gadson remained at Hank Koger's house. App. 3990, ll. 16 – 18. He next saw petitioner at approximately 7:30 PM. App. 3990, ll. 19 – 23. Petitioner was in the decedent's car. App. 3991, ll. 4 – 7. The decedent was driving. App. 3991, ll. 23 – 24. Gadson described her car as a "green Ford Escort." App. 3991, ll. 13 – 14. Petitioner supposedly called Gadson over and told him to get in the car. App. 3992, ll. 4 – 10. Gadson had been drinking gin and beer since 1:00 PM. App. 3992, l. 20 – 3993, l. 20. Gadson admitted he had drunk "a good little bit" of gin and "about five" beers. App. 3993, ll. 2 – 20. Gadson was intoxicated and "feeling in good shape." App. 3993, ll. 21 – 25.

Gadson got in the backseat of the decedent's car and they went to the Horizon EZ Shop. App. 3994, ll. 3 – 7. They stole some gasoline. App. 3994, ll. 8 – 11. They left the store and the decedent drove them down Highway 78. App. 3994, ll. 12 – 14. Petitioner was telling the decedent where to turn. App. 3994, ll. 19 – 24. They eventually made their way to Nursery Road where petitioner told her to turn around near a yellow road sign. App. 3995, ll. 7 – 15. The decedent stopped the car, turned off the ignition, turned off the lights, and they all got out of the car. App. 3995, ll. 18 – 21. Gadson later changed this version and said that it was only he and petitioner who got out of the car. App. 3997, ll. 17 – 19.

Gadson and petitioner walked down the road while the decedent stayed in the car. App. 3997, l. 20 – 3998, l. 3. On this walk, petitioner told Gadson “he was going to kill her because she was wearing a wire.” App. 3998, ll. 4 – 7. The decedent came down the road and grabbed petitioner by his right arm and told him she was scared. App. 3998, ll. 14 – 17. A car came by and they “jumped off in the woods.” App. 3999, ll. 11 – 13.

The decedent left the woods and started towards her car. App. 3999, l. 23 – 4000, l. 2. Petitioner followed the decedent down the road. App. 4000, ll. 5 – 9. Gadson stayed at the spot where they jumped into the woods. App. 4000, ll. 21 – 22. Gadson next saw “three fires come from a gun” and heard gunshots. App. 4001, ll. 5 – 13.

Gadson saw “[the decedent] come running down the road” towards him. App. 4002, ll. 4 – 11. The decedent stopped when she got close to Gadson then turned around to face petitioner. App. 4002, ll. 12 – 21. The decedent told petitioner, “Please, Black, don’t shoot me no more, I have a child to take care of.” App. 4011, ll. 16 – 19. Petitioner shot the decedent two times, she fell to the pavement, and petitioner dragged her in the woods. App. 4011, l. 20 – 4012, l. 2.

Gadson then “messed” his pants and got in the car. App. 4013, ll. 2 – 10. When petitioner got in the car, he said, “I shot that bitch in the head.” App. 4013, ll. 21 – 23.

Petitioner drove them back to Branchville. App. 4014, ll. 5 – 24. Petitioner supposedly parked the decedent's car in a wooded area and then told Gadson he would blow his brains out if he told anyone what happened. App. 4015, ll. 3 – 11. Gadson got out of the car and went to Hank Koger's house. App. 4015, ll. 19 – 23. Petitioner got Yolanda Bowman's car and the two of them drove to the Horizon EZ Shop to get beer. App. 4016, ll. 2 – 15. They proceeded to the house of someone named “Fred.” App. 4016, ll. 20 – 21. At Fred's house, they talked to Travis

Felder. App. 4016, ll. 22 – 25. They then returned to the Villa Apartments and Gadson went back to Hank Koger’s house. App. 4016, l. 22 – 4017, l. 3.

Later that evening, Gadson saw petitioner and Hiram Johnson leaving in Yolanda Bowman's car. App. 4017, ll. 4 – 15. Gadson next saw petitioner again at the Villa Apartments just before they left to go to the Allen Murray Club. App. 4017, ll. 18 – 24. Gadson, Darian Williams, Hiram Johnson, and petitioner drove the decedent’s car to the Allen Murray Club, with petitioner behind the wheel. App. 4018, ll. 3 – 10.

Once they got in the car, petitioner handed out four pairs of brown gloves. App. 4018, ll. 18 – 23. All four of them put on the gloves. App. 4019, ll. 6 – 8. They arrived at the Allen Murray Club at approximately midnight. App. 4019, ll. 18 – 20.

Gadson and Darian Williams went inside the club. App. 4019, l. 21 – 4020, l. 4. Hiram Johnson and petitioner stayed outside in the car. App. 4019, l. 24 – 4020, l. 1. Travis Felder was also in the club. App. 4020, ll. 5 – 6. They were inside the club for approximately one hour. App. 4020, ll. 7 – 8. When Gadson came out of the club, petitioner was still sitting in Yolanda Bowman's car. App. 4020, ll. 12 – 16. Gadson got in the backseat of Yolanda Bowman's car and lay down because he was drunk. App. 4020, l. 24 – 4021, l. 12. They left in the decedent's car with petitioner driving and Darian Williams and Hiram Johnson also as passengers. App. 4021, ll. 13 – 22. They returned to the Villa Apartments. App. 4021, l. 25 – 4022, l. 2. Gadson went to the apartment of a woman named “Meeka.” App. 4022, ll. 3 – 4.

In an effort to reduce the sting of impeachment, the solicitor had Gadson admit on direct that he gave a false statement to police on February 18, 2001, in which he claimed he did not know anything. App. 4022, ll. 5 – 7. When asked why he provided a false statement, Gadson said it was because he was scared. App. 4022, ll. 12 – 13.

Cummings' cross-examination served only to confirm Gadson's direct testimony. He simply re-asked many of the same questions asked by the solicitor and received the same answers. App. 4021, l. 21 – 4038, l. 9. Excluding argument on a state's objection, trial counsel's cross-examination of the state's chief witness in a capital case only encompasses approximately ten pages in the trial transcript. App. 4021, l. 21 – 4038, l. 9. The main focus of Cummings' questions was the recentness of Gadson's plea deal and that in 2000, Gadson purchased a High Point .380 pistol that was black and gray just like the pistol the state entered into evidence as the purported murder weapon. App. 4031, ll. 5 – 11. Cummings also placed considerable emphasis on where Gadson claimed he was standing on Nursery Road, to no effect. App. 4036, l. 5 – 4037, l. 21.

2. What the Jury Did Not Hear Because of Trial Counsel's Ineffective Cross-Examination

a. The Jury Never Heard that Gadson Faced the Death Penalty

During the state's presentation, Gadson admitted that he had entered into a plea agreement. App. 3981, ll. 7 – 11. The solicitor had Gadson agree that he was charged with murder. App. 3980, ll. 22 – 24. Gadson testified that his understanding of the agreement was that he would be charged with "accessory after the fact and misprision of a felony." App. 3981, ll. 12 – 16. The solicitor asked him, "All right, sir. And are you going to get a negotiated sentence of twenty years for that?" to which Gadson responded, "Yes, sir." App. 3981, ll. 17 – 19.

Cummings failed to emphasize that Gadson was testifying to avoid the death penalty. Rather, Cummings only confirmed the false impression that Gadson did not face the death penalty. App. 4024, ll. 18 – 20. Cummings asked the leading question, "You were never served

the notice of death penalty on you at all, were, you?” App. 4024, ll. 18 – 20. Gadson replied, “No, sir.” App. 4024, ll. 18 – 20.

The details of Gadson’s plea agreement, which the jury never heard, required him to “truthfully cooperate” with the solicitor’s office in petitioner’s prosecution. App. 8945. He was required to give the solicitor’s office a “complete debriefing.” App. 8945. The plea agreement also required that in his testimony, Gadson was required to be truthful and was unable to “omit facts.” App. 8947. Most critically, the plea agreement stated that if Gadson failed to cooperate in the investigation and prosecution of petitioner, “The state may, in its option, reinstate the murder charge and seek the death penalty against [Gadson] and [Gadson] hereby waives any objection to the state’s seeking of the death penalty.” App. 8946.

Gadson testified at the PCR hearing that he feared the death penalty. App. 5851, ll. 15 – 17. He knew that his agreement meant that he could get the death penalty and he was afraid of getting the death penalty. App. 5851, ll. 15 – 17. Gadson ultimately served less than five years in prison. App. 5937, ll. 13 – 15.

b. The Jury Never Heard the Details of Gadson’s Inconsistent Statements

Trial counsel failed to explore in detail Gadson’s prior inconsistent statements. All the jury heard was that Gadson denied knowing anything about the crime to police because he was “scared.” App. 4022, ll. 12 – 13.

Gadson’s first written statement was given to the police on February 18, 2001. App. 5861, l. 24 – 5862, l. 1. In his first statement, Gadson said that he was dropped off after petitioner and the decedent obtained gasoline without paying for it at the EZ Horizon store. App. 5862, ll. 2 – 5; App. 8950 – 8953. In the statement, he also talked about the disagreement he had with petitioner over the gun and claimed that petitioner found the gun in a brown paper bag

“over near the woods.” App. 8951. This claim was directly contradicted by Hiram Johnson’s testimony. App. 6296, ll. 1 – 10. Gadson’s statement talks about an “old raggedy gun” and does not mention the grey and black .380 pistol allegedly bought from the “dude in Orangeburg.” App. 8950. Gadson does not say that he saw the decedent get shot. App. 8950-51. He never said that he saw Travis Felder. App. 5862, ll. 9 – 11. He never said that he saw petitioner on Nursery Road or that petitioner threatened to blow his brains out. App. 5862, ll. 15 – 20.

Gadson admitted he lied in this statement. App. 5863, ll. 16 – 17.

Gadson also admitted being questioned by a police officer named Tim Stephenson. App. 5864, ll. 5 – 7. He admitted changing his story after speaking with Officer Stephenson. App. 5865, ll. 21 – 24. Gadson also admitted that he changed his story after being shown a warrant for his arrest for murder. App. 5867, ll. 11 – 14.

Later on February 18, 2001, Gadson gave a second written statement. App. 5868, ll. 12 – 15; App. 8954 – 8955. It was in this statement that he first claimed he saw petitioner shoot the decedent. App. 8955. The statement does not say that Gadson went to the Allen Murray club after the shooting. App. 5868, l. 23 – 5869, l. 1. It does not mention any threats from petitioner. App. 5869, ll. 8 – 10. Gadson admitted at the PCR hearing that the first time he claimed that petitioner had “threatened to blow his brains out” was during his testimony at trial. App. 5870, ll. 5 – 7. Gadson again admitted that he changed his story after signing the plea agreement. App. 5873, ll. 13 – 15. Gadson also stated in the PCR hearing that he lied in his statement about petitioner pointing a finger at the decedent as if he was going to shoot her. App. 5876, l. 23 – 5877, l. 7. He claimed, as he did at trial, that he did not know there was going to be a killing before he got to Nursery Road. App. 5877, ll. 2 – 7. Gadson stated that had he been asked those questions at trial he would have answered the same. App. 5879, ll. 5 – 14.

Officer Tim Stephenson testified that he ran a polygraph test on Gadson on February 18, 2001. App. 6486, ll. 6 – 12. Stephenson asked Gadson whether he shot the decedent and whether he was withholding any information about the shooting of the decedent. App. 8956. Gadson responded “no” to these questions. App. 6505, ll. 2 – 7. Stephenson's report indicated deception in Gadson's answers. App. 8956. While the polygraph results would not be admissible, Gadson's lie about withholding information would have served to impeach his credibility.

c. The Jury Never Heard that Gadson Fired the Murder Weapon

The jury never heard that Gadson fired the pistol the state contended was the murder weapon. Margaret Hawkins (“Hawkins”) gave a statement to police on February 22, 2001. App. 9046. She said that she was in her apartment two weeks before the murder and heard four gunshots. She walked outside and picked up four shell casings and put them in her kitchen drawer. App. 9046. She turned the shell casings over to SLED. App. 9046. Tiara Coleman also gave a statement on February 22, 2001. She also stated that two weeks before the murder Gadson shot a gun given to him by petitioner into the air. App. 9047. She also stated that Gadson fired his own gun in the air. App. 9047. The shell casings left from this incident were the same ones turned over to SLED by Hawkins. App. 9046.

David Collins (“Collins”) was the state's firearms expert at trial. Collins testified (and the state did not dispute) that the shell casings picked up by Hawkins were fired by the pistol retrieved from the Edisto River. App. 6085, l. 8 – 6095, l. 16; App. 9046. The state claimed that pistol was the murder weapon and shell casings from the crime scene were matched by Collins to the pistol at trial. The shell casings picked up by Hawkins were entered into evidence as Exhibit

46 and 49 at trial. App. 6090, l. 4 – 6092, l. 11. Cummings never told the jury that these casings came from shots fired by Gadson.

3. The PCR Court's Ruling

Petitioner raised the above grounds in his applications and in his post-hearing brief. App. 9467-76. The PCR Court denied petitioner's application on all of these issues. Supp. App. III 14-31. Regarding the failure to impeach Gadson with the fact that he had been threatened with the death penalty, the PCR court based its denial on the fact that the state never served a notice of intent to seek the death penalty. Supp. App. III 20. It also held that no evidence was presented that Gadson feared the death penalty and petitioner was not prejudiced because of the "overwhelming" evidence of petitioner's guilt. Supp. App. III 20-21.

As for Gadson's prior inconsistent statements and the fact that he fired the gun, the PCR court agreed with the facts presented by petitioner, but reached a different conclusion. Supp. App. III 29-30. The PCR court credited trial counsel with making a reasonable strategic decision in failing to present to the jury that the only other suspect had fired the murder weapon. Supp. App. III 30. The PCR court, as it did for virtually every ground raised by petitioner, also found no prejudice because of "overwhelming evidence" of petitioner's guilt. Supp. App. III 30.

4. Discussion

a. The PCR Court Erred in Finding that Gadson Was Not Threatened with the Death Penalty

The PCR court erred because it based its conclusion on an irrelevant concern: whether Gadson was served with a death notice. This finding ignores the incontrovertible language of Gadson's plea agreement that **explicitly threatens him with the death penalty**. App. 8946. The plea agreement's threat could not be any more clear. It states: "The state may, in its option, reinstate the murder charge and seek the death penalty against [Gadson] and [Gadson] hereby

waives any objection to the state's seeking of the death penalty." App. 8946. Not only did the state explicitly threaten him with the death penalty, it forced Gadson to waive any objection to the death penalty. App. 8946. This waiver is extraordinary and it is hard to imagine greater evidence of a witness's bias than the fact that he has waived the right to attempt to save his own life. Because of trial counsel's deficiency, the jury never heard this extraordinary fact.

The PCR court also erred in its finding that Gadson did not subjectively fear the death penalty. Gadson testified at the PCR hearing that he feared the death penalty. App. 5851, ll. 15 – 17. He knew that his agreement meant that he could get the death penalty and he was afraid of getting the death penalty. App. 5851, ll. 15 – 17.

Trial counsel's failure to impeach Gadson with the fact that he faced the death penalty constituted deficient performance that prejudiced petitioner. Strickland v. Washington, 466 U.S. 668, 686 (1984). When asked whether it would be important for the jury to know that Gadson faced the death penalty, Thomas offered the meager answer, "Could, but I'm not the jury." App. 7311, l. 14 – 7312, l. 14. Cummings was initially unsure whether he ever saw Gadson's plea agreement prior to trial. App. 7383, l. 11 – 7387, l. 21. If Cummings failed to cross-examine Gadson because he did not review the plea agreement, that would constitute deficient performance for failure to investigate and failure to prepare. Von Dohlen v. State, 360 S.C. 598, 608, 602 S.E.2d 738, 743 (2004). However, on cross-examination, Cummings agreed that Bailey said he provided him with a copy of the plea agreement based on a statement made by Bailey during the trial, but could not remember what date. App. 7635, ll. 2 – 7636, l. 23. Tellingly, the Attorney General did not ask Cummings the obvious follow-up question of whether Cummings ever read the plea agreement. App. 7636, l. 24 – 7640, l. 9.

The magnitude of this error is amplified by the fact that Gadson was threatened by the state for the death penalty when none of the state's evidence showed he would be eligible for such a sentence. Even though Gadson's plea agreement required him to provide complete and truthful testimony, nothing in his testimony indicated he could be convicted of murder. At best, Gadson's testimony showed that he was present at a crime scene with some knowledge that a crime might occur. Both Cummings and Solicitor Bailey agreed that Gadson's actual trial testimony could only form the basis of a conviction of misprision of a felony. App. 7389, ll. 1 – 11; App. 7018, ll. 3 – 25. This meant that the state threatened a witness with the death penalty without any evidentiary or legal basis.

Solicitor Bailey could not give specific details about what information he had that would support a murder charge against Gadson as a principal. App. 7816, l. 14 – 7817, l. 19. Bailey admitted that their knowledge of Gadson's actions only amounted to misprision. App. 7018, ll. 3 – 25. When asked what would merit death for Mr. Gadson, Bailey responded, "You're asking a hypothetical. I mean I don't know at this point or at that point in time." App. 7824, ll. 3 – 6. Nothing about PCR counsel's question was "hypothetical." The plea agreement drafted by Solicitor Bailey explicitly threatened Gadson with the death penalty. Neither Solicitor Bailey—nor the evidence as presented by the state at trial—supported such a drastic threat.

Had trial counsel informed the jury that the state was willing to threaten a witness with the death penalty when it was also telling them that Gadson had nothing to do with the crime, it would have impeached not only Gadson's credibility, but the state's entire presentation. Cummings agreed that it would impeach Gadson's credibility to show the state was threatening him with the death penalty, but that Gadson's actual trial testimony did not show he did anything

to merit such a threat. App. 7394, l. 25 – 7395, l. 4. Cummings admitted that was a threat to a witness. App. 7395, ll. 5 – 13. The following questioning occurred:

Q. Okay. Why didn't you tell, cross-examine him about the fact that he faced a death sentence?

A. You asked me that before. I cross-examined him, it was murder, I didn't know if the Solicitor had ever served the death penalty notice on him.

Q. They threatened him with it?

A. They threatened.

Q. Why didn't you tell the jury he had been threatened with his life?

A. I guess it didn't flow from my brain at that time, I'm sorry, no strategy, clearly.

App. 7724, ll. 1 – 11. Cummings admitted his performance was deficient and that he had no strategy in not impeaching both Gadson and the state with evidence of the state's baseless threat.

Petitioner was prejudiced by this failure. Had the jury known this vastly important fact, it would have shown the full extent of Gadson's bias. It would have shown that Gadson was motivated—literally to save his life—to please the state in his testimony. It also would have further impeached the state's case because it would have shown the lengths to which the state was willing to go to obtain favorable testimony. No evidence presented at trial supported a capital charge against Gadson, yet the state threatened him with the death penalty. Gadson's plea agreement required complete and truthful testimony, but nothing in his testimony supported a charge more serious than misprision of a felony. Had the jury heard this important evidence of bias by Gadson and witness intimidation by the state, the result at trial likely would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989).

b. Petitioner was Prejudiced by Trial Counsel's Failure to Impeach Gadson with his Prior Inconsistent Statements and Evidence He Fired the Murder Weapon

Cummings could not articulate any strategy as to why he did not impeach Gadson with his prior inconsistent statements, including his statements during the polygraph examination. App. 7492, l. 5 – 7493, l. 5; App. 7494, ll. 10 – 14. Cummings responded, defensively, “I didn't ask the question, okay?” App. 7494, ll. 10 – 14. Cummings’ deficient performance prejudiced petitioner. The failure to impeach a witness with prior inconsistent statements is deficient performance that prejudices a defendant. Driscoll v. Delo, 71 F.3d 701, 710-11 (8th Cir. 1995); Berryman v. Morton, 100 F.3d 1089, 1097 (trial counsel failed to impeach with inconsistent eyewitness identifications). In Driscoll, defense counsel’s failure to impeach an eyewitness with prior inconsistent statements was held prejudicial. Id. The defendant was sentenced to death for stabbing a prison guard. Trial counsel failed to impeach a prosecution witness who claimed at trial that the defendant confessed to the murder with a prior statement omitting the confession. Id. at 709-12. The centrality of the witness’s testimony was an important factor in the court’s consideration. Id. Here, Gadson was the central witness in the trial and failure to impeach his testimony could not have been more prejudicial. See also Peebles v. State, 958 S.W.2d 533, 536-37 (Ark. 1998) (holding that defendant was prejudiced by trial counsel’s failure to impeach a witness with a prior denial that a crime occurred); Delarosa v. State, 24 So.3d 741, 741-42 (Fla. Ct. App. 2009) (remanding case for prejudice inquiry because of trial counsel’s failure to impeach police officer with prior statement claiming he was attacked by three Mexicans when same officer testified at trial he was only attacked by defendant).

The PCR court erred in finding that Cummings had a strategic reason for not presenting this information. Supp. App. III 30. At the PCR hearing, Cummings admitted he had no

strategic reason for not informing the jury that Gadson had been seen shooting the same gun that the state claimed was the murder weapon. App. 7410, l. 18 – 7411, l. 3; App. 7427, ll. 5 – 13. Cummings admitted the jury never heard that Gadson had fired the gun that came from the Edisto River. App. 7435, l. 24 – 7436, l. 3. On cross-examination, Cummings initially claimed that he did not want this evidence before the jury because it tied petitioner to the murder weapon. App. 7654, ll. 8 – 19. However, Cummings later admitted that he “didn't know it was the Edisto River gun.” App. 7727, ll. 5 – 9. Trial counsel can only be credited with a reasonable trial strategy if they conduct a full investigation and are aware of all the facts. Wiggins v. Smith, 539 U.S. 510, 521-22 (2003). The evidence at the hearing contradicts the PCR court’s finding, which not only is not based on any evidence, but also constitutes a legal error because Cummings did not have all of the relevant information.

This failure prejudiced petitioner. The PCR court speculated that this information would have had “minimal benefit.” Supp. App. III 30. This finding ignored that the only evidence the jury heard was that petitioner controlled the murder weapon and was the only one who ever fired it. The only way to lessen the harmful impact of Gadson's testimony was to show that he also had access to the gun and had fired it. This places the murder weapon in Gadson’s hands and gives the jury yet another reason to doubt the state’s version of events and Gadson’s credibility.

In State v. Poe, 822 N.W.2d 831, 835 (Neb. 2012), a witness in a murder case testified that the defendant confessed to the victim’s murder. The defense theory was that the witness was complicit in the crime. Id. at 838. The court found that trial counsel could be held ineffective for failing to impeach the witness with a prior statement to a third party that the defendant did not commit the crime and he was being pressured to lie by the police. Id. at 848-50.

In Bryant v. State, ___ So.3d ___, 2011 WL 339585, *20 (Ala. Crim. App. 2011), a capital case, the state's key witness's trial testimony differed from his prior statement by omitting the presence of a third party when the victim's body was moved. The witness also previously denied helping the defendant move a car. The witness also previously admitted holding the gun. The court found that the failure to cross-examine the witness regarding these prior inconsistencies entitled the defendant to an evidentiary hearing. Id. See also Gabaree v. State, 290 S.W.3d 175, 181 (Mo. Ct. App. 2009) (defendant entitled to remand where trial counsel failed to cross-examine victim on prior inconsistent description of crime).

In People v. Lee, 541 N.E.2d 747 (Ill. Ct. App. 2009), the defendant was charged with murder in the course of an arson. Id. at 750. The prosecution's key witness, a co-defendant, testified that he assisted the defendant in starting the fire. Id. at 750. Prior to trial, the witness gave three different versions of his story. Id. at 758-59. Like Gadson, the witness initially denied any involvement in the crime. Id. The court noted that trial counsel only asked three questions regarding the prior statements, one of which was "Didn't you tell me you weren't there that night?" Id. The court held that the previous statements should "have been used much more extensively." Id. The court also held that counsel violated a cardinal rule of cross-examination: "don't repeat the direct examination[.]" Id. at 759. Cummings also violated this rule. Cummings' cross-examination parroted the solicitor's questioning on direct in the same fashion criticized by the court in Lee. The Lee court reversed and, in part, based its decision on the accumulation of errors by counsel in handling impeachment evidence. Id. at 763.

Finally, respecting all of trial counsel's failures regarding Gadson, the PCR court erred in finding no prejudice resulted because of "overwhelming" evidence of petitioner's guilt. The state's entire case against petitioner was based on witnesses who had been charged by the state in

connection with the crime and cut deals to save themselves. Gadson was the central witness in the trial. He was the only witness who claimed he saw petitioner commit the crime. Without Gadson, the state's case was drastically weaker. Had the jury disbelieved Gadson's testimony, the result likely would have been different. No evidence supports any other conclusion.

2.

Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to investigate and prepare for the impeachment of Travis Felder and by failing to impeach the testimony of Travis Felder in any meaningful way, including impeaching Felder with a videotape that would have shown Felder lied to the jury about buying the gas to burn the decedent's car, impeaching Felder on bias with his original charges, and impeaching Felder with his prior inconsistent statements.

Introduction

Travis Felder lied during his direct examination. Felder told the jury he followed petitioner from the Villa Apartments to Nursery Road, saw petitioner drag the decedent's body from the woods and put it in the trunk of her car, and then watched petitioner set the decedent's car on fire. Felder omitted a crucial fact: that he was the one that bought the gasoline. When Felder lied about his role, trial counsel failed to impeach him with a videotape from the gas station that showed Felder buying gasoline at 3:14 AM. Petitioner did not appear on this videotape. Trial counsel recognized this error after the jury rendered its verdict and tried to use the videotape **during the penalty phase**, but of course, by that time, the jury had already found petitioner guilty. Trial counsel also failed to impeach Felder with his original charge as accessory before the fact to murder and with his prior inconsistent statements. These deficiencies prejudiced petitioner. This Court should reverse and grant petitioner a new trial.

1. What the Jury Heard from Travis Felder During the Guilt Phase of the Trial.

Felder claimed he got home from work at approximately 6:30 PM on the day of the murder. App. 4087, ll. 2 – 6. He took a nap. App. 4087, ll. 7 – 8. He woke up from his nap at approximately 8:30 PM. App. 4087, ll. 9 – 11. He went to Fred's house where he drank beer. App. 4087, ll. 12 – 20. He saw petitioner at Fred's house. App. 4087, l. 21 – 4088, l. 2.

Petitioner asked Felder if he was going to the club. App. 4088, ll. 1 – 2. Petitioner told Felder that if he decided to go to the club, to come to the Villa Apartments. App. 4088, ll. 3 – 7.

Felder then saw a friend of his named Tyrone Smith and they proceeded to “Club Get It Get It” in Bamberg. App. 4088, ll. 11 – 19. When they left the club, they returned to Fred's house, split up their beer, and Felder returned to the Villa Apartments. App. 4088, l. 20 – 4089, l. 1. At the Villa Apartments he saw Valorna Smith. App. 4089, ll. 2 – 4. Felder and Valorna Smith decided to go to the Allen Murray Club. App. 4089, ll. 7 – 10. They first went to the store to get ice. App. 4089, ll. 11 – 18. When they got to the store, the seating arrangements changed and Valorna Smith got out of Felder's car and Carolyn Brown got in. App. 4089, ll. 11 – 18. Felder and Carolyn Brown arrived at the Allen Murray Club around midnight. App. 4089, ll. 19 – 25.

When he got to the club, Felder saw petitioner, Hiram Johnson, Darian Williams, and Taiwan Gadson. App. 4090, ll. 5 – 8. Darian Williams and James Gadson came into the club, but Hiram Johnson and petitioner did not. App. 4090, ll. 9 – 19. Felder was at the club for approximately two and one-half hours. App. 4090, ll. 20 – 23. He left the club with Carolyn Brown and Valorna Smith. App. 4091, ll. 2 – 7. They stopped at the EZ Horizon Store and Felder bought some chips. App. 4091, ll. 8 – 13. This fact was confirmed by Detective Alvin Coker's review of the videotape from the store that showed Felder buying chips at 2:56 AM. App. 6718, ll. 18 – 24.

They returned to the Villa Apartments and went to Valorna Smith's apartment. App. 4091, ll. 17 – 21. Felder said they sat around “and watched a couple of movies.” App. 4091, ll. 22 – 25. Valorna Smith worked on Felder's braids. App. 4091, ll. 22 – 25. Petitioner knocked on the door at approximately 3:00 AM. App. 4092, ll. 6 – 18. Petitioner asked Felder to come

speak with him outside. App. 4092, ll. 6 – 22. Petitioner supposedly said, “Come here, I need to park this car.” App. 4092, l. 23 – 4093, l. 1.

Felder Omits His Purchase of the Gasoline

Petitioner got in a Ford Escort and Felder followed petitioner in his own car. App. 4093, ll. 9 – 23. Solicitor Bailey asked Felder, “And did you leave the town of Branchville?” App. 4094, ll. 3 – 4. Felder responded, “Yes.” App. 4094, l. 5. Solicitor Bailey then asked Felder, “Tell the jury where [petitioner] went, where you followed him.” App. 4094, ll. 6 - 7. Felder responded, “We went out down McAlhany Road, then went out to Nursery Road.” This answer was a lie because it omitted the fact that Felder went to the EZ Horizon Store and bought gasoline. App. 7017, ll. 5 – 7.

What Felder Told the Jury He Saw at Nursery Road

Omitting the key fact that he alone bought the gasoline, Felder told the jury he followed petitioner to Nursery Road. App. 4094, ll. 6 – 13. Petitioner stopped the car, went into the woods, and returned dragging the decedent's body by her feet. App. 4096, ll. 13 – 19. Petitioner put the decedent's body in the trunk of her car. App. 4097, ll. 3 – 10. Petitioner said, “You didn't think I did it, did you?” App. 4098, ll. 2 – 11. Felder replied, “Did what?” Petitioner supposedly replied, “I killed Kandee Martin.” App. 4098, ll. 12 – 16. Felder never got out of his car. App. 4098, ll. 19 – 23.

Petitioner told him to drive down the road and turn around. App. 4099, ll. 2 – 6. Felder saw petitioner “get out of the car, he lit something, threw it in the car, the car was on fire.” App. 4100, ll. 10 – 14. Petitioner got in Felder's car. App. 4100, ll. 15 – 18. Felder told petitioner, “Man, I don't want nothing to do with this.” App. 4100, ll. 22 – 24. Petitioner allegedly replied, “Travis, I ain't get you involved with it, don't worry about it, everything is taken care of.” App.

4100, l. 25 – 4101, l. 2. Felder then took petitioner home. App. 4101, ll. 3 – 4. Felder said from the time petitioner came to the apartment to the time he dropped him off at his house, it took approximately forty minutes. App. 4101, ll. 5 – 8.

Felder admitted that it was his face on the videotape buying gas after 3:00 AM. App. 6442, ll. 3 – 10. Detective Coker testified that he knew Felder was on the videotape buying gasoline at 3:14 AM. App. 7017, ll. 5 – 7. Coker testified that he informed the solicitor’s office that Felder purchased the gasoline. App. 6630, ll. 1 – 5. Coker regarded videotape as “a crucial piece of evidence regarding the arson charge.” App. 6633, ll. 22 – 24.

During his deposition, Felder said he told Solicitor Bailey in his pre-trial debriefing that he had purchased the gasoline to burn the decedent’s car. App. 6401, ll. 2 – 16. Interestingly, Solicitor Bailey denied knowing this key fact and claimed he was surprised to learn after the verdict that Felder bought the gasoline. App. 7768, ll. 17 – 18. App. 7782, l. 18 – 7783, l. 2. Solicitor Bailey certainly did nothing to correct Felder’s testimony. App. 4094, ll. 6 – 13.

At the PCR hearing, Felder admitted that in his trial testimony, he “left out” that he had purchased the gasoline used to burn the decedent’s car. App. 6406, l. 24 – 6407, l. 3. At his deposition, Felder testified that the reason why he did not mention the gasoline purchase was because, “I had a lot of stuff on the table, I was scared. I was scared, I was in jail for three months and, you know what I’m saying, I lost my job, I ain’t had nothing.” App. 6412, ll. 8 – 15. He admitted that when he was asked by the solicitor where he went when he left the Villa Apartments and he answered that he and petitioner went to Nursery Road, that testimony was a lie. App. 6415, ll. 15 – 19.

2. What the Jury Did Not Hear in the Guilt Phase Because of Counsel's Errors

a. Petitioner Himself is the First Person to Point out Felder's Lie about the Gasoline

Cummings failed to impeach Felder with the fact that he lied about purchasing the gasoline. It was not until after the beginning of the sentencing phase that this fact was brought to light. Neither Cummings nor Thomas caught Felder's lie—petitioner did. Before the sentencing phase commenced, Cummings told the trial judge that petitioner had something he wanted to tell her. App. 4590, ll. 13 – 18. After defense motions, Thomas introduced petitioner. App. 4621, l. 25 – 4622, l. 1. Petitioner said:

Ma'am, I was going through some of my paperwork, right, I noticed that in some of my information I had wrote down that I would like the jury to see the videotape that Detective Coker and Agent Helms took from the gas station showing that Travis Felder after he dropped me off home went to the gas station and bought a dollar worth of gasoline.

App. 4622, ll. 3 – 10. Cummings then says, “The tape is in evidence.” App. 4622, ll. 11 – 13. Cummings says, “[M]y client is asking us to show a portion of the tape in his mitigation case as to giving the jury something to consider along the lines of mitigation, also about possible issue of testimony. I'll leave it at that.” App. 4622, ll. 20 – 24. Cummings also said, “And I would not prohibit that to make sure the record knows that we are not at odds with Mr. Bowman or that we are not prohibiting him from presenting any mitigation facts that would be presented to the jury, Ma'am.” App. 4623, ll. 10 – 15. Of course, this impeachment evidence did not belong in the mitigation case, but in the guilt phase.

b. Felder's Original Charges and the Changing of his Story Immediately Before Trial

The jury never heard that the state had originally charged Felder with accessory before the fact to the decedent's murder. The jury also never heard that Felder lied to police immediately before trial.

When Felder was first interviewed by the police, he told them he did not know anything about the decedent's death. App. 6381, ll. 17 – 25. He was told on Monday, February 19, that Dorchester County had a warrant for his arrest so Felder turned himself in and was jailed. App. 6382, ll. 5 – 14. He was given a Miranda waiver. App. 6382, ll. 19 – 24. App. 8974. Felder once again denied any knowledge of the decedent's murder to the police. App. 6384, ll. 7 – 16.

On February 19, 2001, Detective Coker swore out an affidavit charging Felder with accessory to felony murder/arson. App. 8975. The warrant was served on Felder the same day. App. 6384, l. 25 – 6385, l. 5. At the PCR hearing, Felder testified that in 2001, he knew he was charged with murder and arson. App. 6387, ll. 11 – 14. Felder hired an attorney, Charles Williams. App. 6389, l. 24 – 6390, l. 1. Charles Williams advised Felder he was facing either life in prison or the death penalty on the murder charge. App. 6390, ll. 2 – 6.

Felder never gave a written statement to the police. App. 6392, ll. 3 – 5. On March 27, 2002, during plea negotiations, Felder's attorney sent a proffer letter to Solicitor Bailey. App. 9118. The proffer letter omits two important items. App. 9118. The proffer letter omits that Felder bought the gasoline. App. 9118. It also omits Travis Felder's claim at trial that he saw petitioner put the decedent's body in the trunk of the car. App. 9118. Cummings admitted that the version in the proffer letter was different from Felder's trial testimony. App. 7050, ll. 4 – 19.

On April 16, 2002, a month before petitioner's trial, Officer Van Doran administered a polygraph examination to Felder. App. 8973. During the examination, Felder was asked if he saw the decedent's body placed into the trunk of her car. App. 8973. Felder answered no. App. 8973. The polygraph results indicated deception. App. 8973. At the PCR hearing, Felder stated he could not remember taking the polygraph exam. App. 6392, l. 6 – 6393, l. 21. Cummings admitted that he had a copy of Felder's polygraph report. App. 7037, l. 22 – 7038, l. 2.

Subsequent to the failed polygraph examination and after talking with his attorney, Felder decided to enter into a plea agreement. App. 6396, l. 4 – 6397, l. 10. Felder had a debriefing with Solicitor Bailey. App. 6398, ll. 10 – 13.

Felder's plea agreement was executed on May 23, 2002, which was during the sentencing phase of petitioner's trial. App. 8969 – 8972. In his plea agreement, Felder agreed to plead guilty to the offense of accessory after the fact of arson in exchange for his testimony. App. 8969. His indicted charges of accessory after the fact of murder and arson third-degree would be dismissed. App. 8969 – 8972. The plea agreement allowed the solicitor to reinstate all of Felder's charges and seek the maximum penalty. App. 8971. The new charge carried a maximum sentence of five years in prison. App. 6423, ll. 17 – 20. Felder was ultimately sentenced to three years' imprisonment suspended to three years' probation. App. 6424, ll. 10 – 14.

3. The PCR Court's Ruling

The PCR court ruled that Cummings had a valid strategic reason for failing to expose Felder as a liar. The PCR court found that Cummings did not want the videotape entered into evidence because it would "corroborate Applicant's involvement in the plan to burn the car." Supp. App. III 47. The court further held that exposing Felder as a liar would not have influenced the outcome of the trial. Supp. App. III 47-48. The PCR court based this conclusion on Felder's after-the-fact claims during the PCR hearing and during the sentencing phase that petitioner instructed him to buy the gas and that petitioner did not appear on the tape because he waited around the corner. App. 6430, ll. 13 – 17. Petitioner presented these claims in his applications and in his post-trial brief. App. 9477-97.

4. Discussion

a. Counsel's Failure to Impeach Felder with His Lie about the Gasoline Purchase was Deficient and Prejudiced Petitioner

The PCR court erred in finding that Cummings had a strategic reason for not impeaching Felder with his lie about the gasoline. First, the evidence at trial seemed to suggest that Cummings did not even realize that Felder had lied about the purchase of the gasoline. Petitioner was the first person to mention it. App. 4622, ll. 3 – 10. After petitioner brought Felder's lie to everyone's attention, Cummings called Felder as a witness in the penalty phase and impeached him with the videotape. App. 4911, l. 19 – 4929, l.10. Cummings introduced the videotape into evidence during Felder's penalty phase testimony and played it for the jury. App. 4929, ll. 1 – 8; Defendant's Ex. 19. Cummings' penalty phase impeachment of Felder directly contradicts the PCR court's conclusion that he made a strategic decision to keep it out because **he actually introduced it, but too late.**

At the PCR hearing, Cummings initially claimed that he knew Felder had purchased the gasoline before trial. App. 7004, l. 18 – 7005, l. 7. Cummings said "there was no question that Travis had bought the gasoline later that evening." App. 7004, ll. 21 – 24. Cummings first maintained that he was "very frightened of that tape." App. 7005, ll. 5 – 7. Cummings complained that he was frightened of the tape because "there was no evidence against Marion that he bought the gasoline, that he poured the gasoline, that he did anything about burning this young white female in Dorchester County." App. 7006, ll. 1 – 5.

This backpedaled assertion of strategy is an astounding claim in the face of Felder's damaging testimony at trial about petitioner burning the car. Even if Cummings actually possessed such a strategy, it was unreasonable in light of the fact that it was completely

incorrect. Cummings' claim that nothing tied petitioner to the burning of the car ignores what Felder told the jury he saw at Nursery Road. Furthermore, any strategy that the tape would corroborate that petitioner was involved with the plan to burn the car is unreasonable because the tape did not show petitioner. App. 7006, ll. 12 – 16.

Regardless of the unreasonableness of such a strategy, the PCR court also erred because Cummings ultimately admitted he had no strategic reason for not impeaching Felder. During the Attorney General's questioning **and during questioning by Judge Lockemy**, Cummings confessed he lacked any strategy regarding his handling of Felder. App. 7664, l. 25 – 7666, l.

23. The Attorney General asked:

Q. All right. So, when Travis testified during the guilt phase and did not mention purchasing the gas beforehand why did you decide not to elicit that from him at the time?

A. **I don't know.** I can't sit here and tell you why I didn't do it. I don't know. Maybe I didn't want how he purchased the gas or for whom.

MR. BROWN: Your Honor, I object to that speculation.

THE COURT: If you don't know you don't know.

Q. You don't recall saying you saw no good in that coming in, it was ultimately confirmatory of what Felder had said?

A. I just said a moment ago I don't recall, I didn't remember if I chose not to. To answer the question, I must have had a reason at that time and it would be hurting, but again I really can't say that today, I can't. I'm trying to go back and think. I know I didn't choose certain lines of questions in this case, I chose not to do that, and we have been over that now for three days. To answer your question in particular about that, **I don't recall specifically the reason why, I don't, other than I tried the case as I thought appropriate.**

Q. So, you don't remember, you don't remember expressing to me a strategic reason for that?

MR. BROWN: Your Honor, this is some kind of vouching or bolstering here. Now he is going into a conversation they have had.

MR. WATERS: I did not –

THE COURT: He asked if he remembered. If he doesn't remember he doesn't remember.

THE WITNESS: I really don't, sorry, sir.

THE COURT: He doesn't remember.

MR. WATERS: Okay.

BY MR. WATERS:

Q. So, you don't recall ever saying you saw no good in, that you saw no good in it coming in, that you held it back in the guilt phase because it cuts both ways but that ultimately you –

THE COURT: He says he doesn't remember. Let's proceed.

MR. WATERS: I was trying to refresh his recollection.

MR. BROWN: With a conversation they had.

THE COURT: Do you remember anything, Mr. Cummings?

THE WITNESS: No, I don't. No, sir, I don't.

THE COURT: He doesn't remember.

THE WITNESS: I don't know what to say.

BY MR. WATERS:

Q. Okay. Do you recall whether or not it was an intentional decision at this point? I'm asking you if you recall.

THE COURT: That's a different area.

A. **I don't believe it was intentional.** I don't believe I would not have asked something or if I thought at the time something else was going to come out about it. There was no gasoline on my client's pants, I didn't want anybody tying him to Felder, for Marion telling him to go buy the gas. I would say that with open heart. So, if I, when I was meeting with you I said something **I don't recall it, I don't remember. I don't.**

App. 7665, l. 6 – 7667, l. 20 (emphasis added). This testimony conclusively shows that the PCR court's finding that Cummings strategically failed to impeach Felder is not based on any evidence.²

This error severely prejudiced petitioner. Had trial counsel exposed Felder as a liar—not just in a prior statement, but under oath before the jury—Felder's credibility would have been severely damaged. The jury would have realized that Felder deliberately obscured his role in the burning of the car. Felder already testified that petitioner burned the car, so petitioner was already linked to the gasoline and the arson.

This failure to impeach Felder left his testimony unchallenged and gave the jury the impression that petitioner essentially acted alone in the decedent's murder. Felder would have been the second state's witness to be shown as a liar on the stand and telling an unbelievable story that they were merely innocently present at the scene of a horrific crime. Had Felder been exposed as a liar and his role in the arson been shown to the jury, the outcome of the trial would likely have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989).

² This exchange between the Court and Cummings also bears on Issue 7 of this petition concerning the wholesale adoption of proposed orders submitted by the state. At the hearing, Judge Lockemy clearly credited Cummings' testimony that he had no strategy, but the state's proposed order contradicts Judge Lockemy's finding. The fact that the final order does not express Judge Lockemy's findings shows the due process errors that arise from this condemned practice.

b. Petitioner was Prejudiced by Cummings' Failure to Impeach Felder with his Original Charges and Inconsistent Statements.

The PCR court erred in finding that Cummings did not perform deficiently when he failed to impeach Felder with his original charges. Supp. App. III 44-47. First, the PCR court's order contains no assertion that Cummings informed the jury that Felder was originally indicted as an accessory before the fact. Supp. App. III 44-47. Instead, the PCR court credits Cummings with a reasonable trial strategy based on the idea that if he cross-examined Felder about his original charges, that petitioner's written statements would come into evidence. Supp. App. III 46.

Such a notion cannot form the basis of reasonable trial strategy because it is not based on an accurate understanding of the rulings at trial. The state was in possession of four written statements purportedly given by petitioner. App. 9214-26. The first two of these statements contain no inculpatory statements. App. 9214-26. The third statement inculcates Gadson. Petitioner said that Gadson drove him into the woods and showed him the decedent's dead body and confessed to murdering her. App. 9214-26. The fourth alleged statement, written in the hand of Orangeburg County Sheriff Larry Williams, was suppressed as involuntary by Judge Goodstein. App. 1333, l. 14 – 1355, l. 2. Judge Goodstein found that Sheriff Williams coerced this statement from petitioner and suppressed it. App. 1352, l. 7 – 1355, l. 2. Solicitor Bailey did not use petitioner's other three statements during the trial likely because they helped petitioner's case or would create a possible appellate issue. Regardless of Solicitor Bailey's reasons, the state could have used the first three statements at any time. It is difficult to grasp how impeaching a state's witness for bias due to lenient treatment is the evidentiary predicate for admission of a defendant's statements, particularly one obtained by the Sheriff's coercion.

Cummings also claimed that evidence that was involuntarily produced could still be introduced if an attorney made a mistake and opened up the door. App. 7007, l. 19 – 1278, l. 3. This was a mistake of law by Cummings. Involuntary statements are not allowed to be used against a criminal defendant for impeachment purposes. Mincey v. Arizona, 437 U.S. 385 (1978); New Jersey v. Portash, 440 U.S. 450 (1979). The PCR court unfortunately adopted Cummings' legal error in its own ruling. Therefore, the credited trial strategy was unreasonable and Cummings performed deficiently. Cummings should have cross-examined Felder about his original charges.

Furthermore, the PCR court's ruling is not based on any evidence produced at the PCR hearing. Cummings said he did not find out Felder was cutting a deal until the eve of trial. App. 7024, l. 22 – 7025, l. 2. Cummings said he did not have Felder's plea agreement until after the trial. App. 7026, ll. 19 – 24. He admitted that Felder had been charged with accessory to murder and would have been as guilty as the principal. App. 7029, ll. 10 – 17. Felder avoided a potential life sentence or the death penalty and never served a day in prison. App. 7030, ll. 2 – 9. Cummings called Felder's deal a "sweetheart deal" and the magnitude of the reduction in his charges was relevant to bias. App. 7030, ll. 22 – 23. App. 7034, ll. 16 – 25. Cummings ultimately **apologized** for not cross-examining Felder on this issue. App. 7030, ll. 10 – 15.

The PCR court also erred in finding that trial counsel was not deficient in failing to impeach Felder with his inconsistent statements made immediately before he agreed to testify against petitioner. Supp. App. III 40-47. Driscoll v. Delo, 71 F.3d 701, 710-11 (8th Cir. 1995); Berryman v. Morton, 100 F.3d 1089, 1097; Peebles v. State, 958 S.W.2d 533, 536-37 (Ark. 1998); Delarosa v. State, 24 So.3d 741, 741-42 (Fla. Ct. App. 2009) State v. Poe, 822 N.W.2d 831, 835 (Neb. 2012); Bryant v. State, ___ So.3d ___, 2011 WL 339585, *20 (Ala. Crim. App.

2011); Gabaree v. State, 290 S.W.3d 175, 181 (Mo. Ct. App. 2009); People v. Lee, 541 N.E.2d 747 (Ill. Ct. App. 2009). Cummings apologized that he didn't impeach Felder with the inconsistencies between the proffer letter and polygraph statements and Felder's trial testimony. App. 7045, ll. 1 – 10. When questioned by Judge Lockemy, Cummings said he had no strategic reason for not impeaching Felder. App. 7045, ll. 16 – 25. Cummings admitted that Felder's repeated assertions that he had nothing to do with the murder and then changed his story to accuse petitioner after cutting a "sweetheart" deal should have been used on cross-examination. App. 7046, ll. 14 – 25.

This deficient performance prejudiced petitioner. Had the jury known Felder was originally charged as an accessory before the fact, the magnitude of the deal received by Felder in exchange for his testimony against petitioner would have shown the extent of his bias and placed his inconsistent statements in their proper context. At the time of the trial, Felder faced the death penalty on the accessory before the fact of murder charge. It was not until 2007 that this Court decided that a defendant charged with accessory before the fact could not receive the death penalty. State v. Bixby, 373 S.C. 74, 644 S.E.2d 54 (2007). Felder testified that his attorney told him he was facing either life in prison or the death penalty on the murder charge. App. 6390, ll. 2 – 6. Had the jury heard that Felder faced and feared the death penalty, then it would have seen his motivation to fabricate testimony favorable to the state. The fact that Felder changed his story only weeks before trial would have further undermined his credibility. Trial counsel's deficient performance in these areas prejudiced petitioner and he is entitled to a new trial.

3.

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

Introduction

The solicitor portrayed Hiram Johnson as one of the state's best witnesses because he seemed to be unbiased. As will be shown in Issue 4, Johnson was, in fact, a biased witness because he had pending charges against him that were not disclosed by the state. Johnson was an important witness for the state, primarily because he testified that petitioner confessed to the murder. Had trial counsel impeached Johnson with available evidence, there is a reasonable probability that the outcome of the trial would have been different.

1. What the Jury Heard at Trial from Johnson

Hiram Johnson testified that Taiwan Gadson was his cousin. App. 6251, ll. 16 – 17. He had known petitioner and Gadson his entire life. App. 4057, ll. 4 – 10. He knew the decedent. App. 4057, ll. 11 – 12.

In the early afternoon on the day of the murder, Johnson was at Hank Koger's house. App. 4057, ll. 20 – 23. Johnson overheard an argument between petitioner and Gadson about the gun being moved. App. 4059, ll. 9 – 12. Johnson told petitioner that he had moved the gun. App. 4059, ll. 22 – 24. Johnson removed the gun from a barrel at Koger's house and took it to Katrina West's house. App. 4060, ll. 5 – 8. Petitioner retrieved his gun and came back to

Koger's house. App. 4060, ll. 12 – 19. Johnson's testimony contradicted Gadson, who said Johnson retrieved the gun from the woods. App. 3989, ll. 16 – 20.

Later that evening, petitioner came to Katrina West's house and asked Johnson if he wanted to go downtown. App. 4061, ll. 15 – 18. Johnson claimed that he and petitioner took Yolanda Bowman's car to the Horizon EZ Shop where Johnson saw petitioner ask Gadson's father to buy four pairs of gloves. App. 4062, ll. 3 – 22.

After buying the gloves, they went back to the Villa Apartments and later decided to drive to the Allen Murray Club. App. 4063, l. 15 – 4064, l. 6. Johnson claimed that petitioner drove the decedent's car with him, Gadson, and Darian Williams as passengers. App. 4064, ll. 7 – 20. Johnson claimed that petitioner made the three men put on gloves and said he had stolen the decedent's car. App. 4065, ll. 1 – 17.

When they got to the Allen Murray Club, petitioner walked around the parking lot trying to sell the car. App. 4066, l. 18 – 4067, l. 8. Johnson remained in the car. App. 4066, ll. 12 – 17. They were at the club about an hour and left at approximately 1:00 AM.. App. 4066, l. 24 – 4067, l. 11. Johnson claimed that on the way back from the club, petitioner said "I killed Kandee, heh, heh, heh." App. 4068, ll. 4 – 6. Johnson saw a gun sitting on petitioner's lap. App. 4068, ll. 17 – 18.

On cross-examination, Cummings clumsily asked Johnson about giving a statement to Alvin Coker on February 22. App. 4073, ll. 5 – 9. Cummings attempted to impeach him with the statement but was unable to do so. App. 4076, ll. 21 – 24. Solicitor Bailey objected and Cummings dropped his impeachment attempt. App. 4076, l. 21 – 4077, l. 6.

2. What the Jury Did Not Hear Because of Trial Counsel's Ineffective Cross-Examination

In fact, Johnson gave a written statement to Detective Coker on April 5, 2001. App. 9054. Nowhere in this written statement does Johnson claim that petitioner made the devastating admission, "I killed Kandee, heh heh heh." App. 9054. At the PCR hearing, Johnson could not even remember whether he ever told the police about petitioner's supposed confession. App. 6289, ll. 7 – 13. Next he said at PCR that he thought petitioner was kidding when he said that he had killed the decedent. App. 6290, ll. 10 – 14. He did not tell the jury that he thought petitioner was kidding. App. 6290, ll. 15 – 17. Johnson testified that his response to petitioner was, "Man, stop playing." App. 6298, ll. 3 – 10.

Cummings did not ask Johnson any questions about the April 5, 2001, statement, much less the glaring omission that petitioner had confessed to the murder. At the PCR hearing, Cummings admitted that Johnson needed to be impeached because he claimed he heard petitioner confess to the killing. App. 7114, ll. 20 – 23. Cummings admitted that the confession was not in Hiram Johnson's written statement. App. 7116, ll. 12 – 15. He described Hiram Johnson's testimony about petitioner's alleged confession as "the worst evidence in the world." App. 7117, ll. 2 – 4. Cummings could not explain why he did not cross-examine Johnson on whether or not Johnson thought petitioner was kidding when he said, "I killed Kandee, heh heh heh." App. 7677, ll. 13 – 20.

3. The PCR Court's Ruling

The PCR court held that Cummings gave a valid strategic reason for not cross-examining Johnson about the inconsistency between his written statement and his trial testimony. The PCR court credited Cummings as saying he did not want the statement repeated in front of the jury. Supp. App. III 55.

4. Discussion

The PCR court's conclusion was erroneous. It was impossible for the jury to overlook such a damaging piece of evidence as a confession. The solicitor already had Johnson repeat this testimony twice on direct-examination. App. 4067, l. 25 – 4068, l. 6. A reasonable trial lawyer would certainly know the solicitor would emphasize such a damaging piece of evidence in closing argument, which Solicitor Bailey certainly did. App. 4474, ll. 12- 21. Solicitor Bailey told the jury in his closing argument that petitioner laughed about the murder. App. 4474, ll. 12- 21. He repeated the alleged confession twice. App. 4474, ll. 12- 21. Solicitor Bailey also said, "And Hiram Johnson's a friend of [petitioner's] with no reason to lie about it. App. 4474, ll. 12- 21. As will be seen in Issue 4, this was a deliberate misrepresentation to the jury because Johnson had pending charges which the solicitor did not disclose to the defense.

Given the damaging nature of this evidence, it was unreasonable not to cross-examine Johnson on the serious omission in his written statement. The failure to impeach a witness with prior inconsistent statements is deficient performance that prejudices a defendant. Driscoll v. Delo, 71 F.3d 701, 710-11 (8th Cir. 1995); Berryman v. Morton, 100 F.3d 1089, 1097; Peebles v. State, 958 S.W.2d 533, 536-37 (Ark. 1998); Delarosa v. State, 24 So.3d 741, 741-42 (Fla. Ct. App. 2009); State v. Poe, 822 N.W.2d 831, 835 (Neb. 2012); Bryant v. State, ___ So.3d ___, 2011 WL 339585, *20 (Ala. Crim. App. 2011); Gabaree v. State, 290 S.W.3d 175, 181 (Mo. Ct. App. 2009); People v. Lee, 541 N.E.2d 747 (Ill. Ct. App. 2009). Considering the detail of the written statement, it confounds belief that such an important piece of evidence was omitted. Had the jury known that petitioner's alleged confession was a courtroom invention, it would have called Johnson's credibility into question, especially considering that, as far as the jury knew, Johnson

had not been charged and was petitioner's "friend." Cummings' failure to cross-examine Johnson on this issue constituted deficient performance that prejudiced petitioner.

4.

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

Introduction

The state withheld three key pieces of evidence from the defense. The state failed to disclose that it had interviewed Ricky Davis, who heard Gadson confess to the murder and that he had framed petitioner. The state failed to disclose Gadson's mental health evaluation that showed he heard voices, suffered from blackouts, heard beeping noises, and smoked six blunts of marijuana a day. Finally, the state failed to disclose charges pending in the same judicial circuit against one of its key witnesses, Hiram Johnson. Each of these pieces of evidence was material to the defense and their suppression meant that petitioner did not receive a fair trial.

Discussion

The state's duty to disclose evidence favorable to the defendant is addressed by the United States Supreme Court in Brady v. Maryland, 373 U.S. 83 (1963) "The suppression by the [state] of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." Brady, 373 U.S. at 87. Consequently, an individual asserting a Brady violation must demonstrate that the evidence: (1) was favorable to the accused; (2) was in the possession of or known by the prosecution; (3) was suppressed by the state; and (4) was material to the accused's guilt or innocence or was impeaching. Kyles v. Whitley, 514 U.S. 419, 432-42 (1995); State v. Moses, 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010); Riddle

v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006).

Brady evidence includes both exculpatory and impeachment evidence. United States v. Bagley, 473 U.S. 667, 676 (1985); Kyles, 514 U.S. at 436-40. When assessing whether to overturn a case because of the state’s failure to disclose evidence, “[t]he question is not whether petitioner would more likely have been acquitted had this evidence been disclosed, but whether, without this impeachment evidence, he received a fair trial ‘resulting in a verdict worthy of confidence.’ ” Riddle, 369 S.C. at 45, 631 S.E.2d at 73 (quoting Kyles, 514 U.S. at 434)).

In this case, the Court need not address two of Brady’s four prongs. For each of the three violations, the PCR court found that the state was in possession of the evidence and did not disclose it to the defense. Therefore, the Court’s analysis will turn on whether the evidence was favorable to petitioner and material.

1. Ricky Davis – The Sam Memo

Ricky Davis was housed at the Dorchester County Detention Center with Gadson. App. 5978, ll. 14 – 22. Ricky Davis testified that they were housed on “A Side.” App. 5978, ll. 21 – 22. Officer Van Doran interpreted the jail records introduced at the PCR hearing. App. 6529, l. 8 – 6532, l. 23; App. 9064 – 66. Officer Van Doran confirmed that Gadson was housed on “A Side.” App. 9065; App. 6532, LL. 6 – 9. The jail records did not indicate where Ricky Davis was housed. App. 6532, ll. 18 – 21. Officer Van Doran testified that petitioner was housed in the maximum security “C Side” pod. App. 6532, LL. 10 – 17; App. 9066. Petitioner’s cell is shown as “C-8”. App. 9066.

On August 6, 2001, Ricky Davis wrote the following note which recounted a confession made by Gadson to the decedent’s murder:

I Rickie Davis was on A side with Gadson and he said that he was the one that shot the girl and gave petitioner back the gun that was used and He said that it

didn't mater because Blak famile had got caught with the gun. He also that the police all he got to do is say Blak did it.

App. 8966 (errors in original). Ricky Davis confirmed in his testimony at the PCR hearing that the note was in his handwriting. App. 5979, ll. 2 – 4. Ricky Davis testified that he wrote this note on August 6, 2001. App. 5979, l. 23 – 5980, l. 4.

Eighteen months before the PCR hearing, PCR counsel subpoenaed the prosecutor's file. App. 6769, ll. 4 – 24. PCR counsel did not get the prosecutor's file until approximately one month before the PCR hearing began. App. 6769, ll. 4 – 24. In the file, PCR counsel found notes written by an investigator in the solicitor's office named Sam Richardson ("Sam"). App. 6773, l. 12 – 6774, l. 9. The notes were from an interview Sam conducted with Ricky Davis. App. 6773, l. 12 – 6774, l. 9. These notes became known at the hearing as the "Sam Memo."

The text of the Sam Memo confirms Ricky Davis' handwritten note and adds detail:

RICKY DAVIS INTERVIEW

CONDUCTED BY SAM AT LIEBER CORRECTIONAL INSTITUTION.

RICKY DAVIS STATES THAT HE AND JAMES TAIWAN GADSON ALONG WITH 4 OR 5 OTHERS WERE SITING AT A TABLE ON THE A-SIDE. GADSON WAS TALKING TO THE GROUP WHEN HE SAID SOMETHING ABOUT KILLING A GIRL. HE STATED THAT THEY WERE GOING TO ROB SOMEONE. THEY THOUGHT SHE WAS WIRED AND HE SHOT HER IN THE HEAD WITH A .380.

THIS CONVERSATION OCCURRED ABOUT 3 WEEKS BEFORE HE WROTE THE LETTER. (AUGUST 6, 2001).

AFTERWARDS, DAVIS WAS PLAYING CHESS WITH MARION BOWMAN IN CELL 8. DAVIS TOLD MARION BOWMAN ABOUT THE CONVERSATION HE HAD WITH JAMES GADSON. BOWMAN SAID "IF YOU HEARD ALL THIS, WRITE IT DOWN." BOWMAN SHOWED HIM A PICTURE OF THE DEAD GIRL. HE ALSO SHOWED HIM A FILE FROM HIS ATTORNEY.

BOWMAN SAID HE HAD BEEN SMOKING DOPE THAT DAY. HE SAID IT WAS HIM, JAMES GADSON AND THE GIRL AT THE SCENE. THE GIRL WAS SUPPOSE TO HELP THEM ROB A HOUSE TO GET DRUGS AND MONEY. BOWMAN KNEW THE INTENDED VICTIM.

BOWMAN NEVER ADMITTED HE SHOT ANYONE.

SUBSEQUENT TO THIS, DAVIS TALKED TO JAMES GADSON AGAIN. AT THIS TIME, GADSON SAID THAT BOWMAN SHOT HER.

App. 9122.

Solicitor Bailey initially claimed that he could not recall whether the Sam Memo was provided to the defense. App. 7860, ll. 12 – 16. Bailey then alleged that the Sam Memo was subject to the attorney-client privilege because he viewed Sam Richardson as his “alter ego.” App. 7861, ll. 17 – 25. Bailey then attempted to characterize the Sam Memo as work product. App. 7878, l. 3 – 7879, l. 18. Bailey made the extraordinary inference that unless something was produced by an agency outside of the solicitor’s office, such as law enforcement or the Department of Corrections, it was protected by the work product privilege. App. 7878, l. 23 – 7879, l. 6.

Even though Ricky Davis was brought to the courthouse during petitioner’s trial, Cummings and Thomas elected not to call him as a witness. App. 5980, ll. 5 – 15. Ricky Davis recalled Thomas meeting with him in the holding cell. App. 5980, l. 16 – 5981, l. 16. He told Thomas he wrote the August 6, 2001, note. App. 5981, ll. 4 – 22. As will be seen in Issue 5, Thomas had a conflict of interest because she represented Davis on other charges while she represented petitioner. Thomas admitted that the unsigned notary block on the August 6, 2001, note was her handwriting. App. 7294, ll. 23- 24. Thomas never told Cummings she represented Davis. App. 7059, ll. 4 – 6.

Cummings testified that the first time he ever saw the Sam Memo was when it was handed to him at the PCR hearing. App. 7061, l. 17 – 7063, l. 7. The only thing Cummings recalled learning about Ricky Davis was the handwritten note that was signed by Davis. App. 7062, ll. 17 – 24. Cummings was familiar with the solicitor's investigator, Sam Richardson. Investigator 7062, ll. 4 – 9. He did not know that Sam Richardson had interviewed Ricky Davis. App. 7062, ll. 17 – 24. Cummings admitted the knowledge that Gadson and Davis were in a cell together would have been very helpful. App. 7065, ll. 6 – 16. Cummings said he sent his own investigator to check with Ricky Davis and Davis told the investigator that he denied giving the statement. App. 7065, ll. 17 – 24.

The PCR court did not find that the Sam Memo was disclosed to the defense, but instead found, erroneously, that the Sam Memo was not favorable to the defense or material under Brady. Supp. App. III 57-60. First of all, the Sam Memo is clearly relevant to guilt or innocence. It recounts a co-defendant confessing to the crime. It is hard to imagine any piece of evidence that could be more material to guilt or innocence. The Sam Memo also constitutes impeachment evidence. It directly contradicted the only eyewitness to the murder. Sam's interview took place at Lieber where Davis had no contact with petitioner and nothing to fear from petitioner. It was also an interview conducted by the state and the jury was likely to be favorably disposed to a witness' testimony that had been confirmed by law enforcement.

Furthermore, the PCR court's ruling is based on a legal error. The PCR court's order inaccurately states that Cummings would not have called Ricky Davis as a witness or changed his strategy had he known about the Sam Memo. Supp. App. III 59-60. The question is not whether Cummings' strategy would have changed, but whether the evidence is material for guilt or innocence or impeachment. Also, Cummings' statements are irrelevant if they conflict with

the actions that would be taken by a reasonable attorney. Wiggins v. Smith, 539 U.S. 510, 521-22 (2003). Considering the seriousness of the charges and the necessity of impeaching the state's sole witness to the crime, not calling Ricky Davis or Sam Richardson would be an unreasonable act.

Furthermore, the PCR court's order mischaracterizes Cummings' testimony. Cummings testified that had he known about the second interview by law enforcement, "I would put Mr. Richardson up on the stand if I had known about it." App. 7069, ll. 6 – 11. Cummings admitted that he made the decision not to put Ricky Davis on the stand without the benefit of the knowledge of Sam's interview of Ricky Davis. App. 7072, ll. 5 – 7. Cummings stated that if he had known of the interview it "would have really shed a different light." App. 7627, ll. 2 – 4. Cummings said that the Sam Memo meant that he "would have known the state thought he was of evidentiary value early on." App. 7627, ll. 9 – 17. Cummings testified, "I don't think Sam would make anything up." App. 7728, l. 16.

Under these circumstances, the PCR court's ruling that the Sam Memo was not material under Brady is erroneous. See Conyers v. State, 790 A.2d 15 (Md. 2002) (reversing death sentence in part because prosecution violated Brady when it failed to disclose impeachment evidence on a jailhouse informant). Its omission renders the trial's outcome unworthy of confidence and resulted in an unfair trial for petitioner. Therefore, the PCR court's ruling must be reversed.

2. Gadson's Mental Health Evaluation

Bailey admitted that he did not provide the defense with Gadson's mental health evaluation. App. 7851, ll. 20 – 24. Cummings testified that he never received Gadson's mental evaluation. App. 7377, ll. 16 – 23. Based on this testimony, the PCR court did not rule that

Gadson's mental health evaluation was provided to the defense. Instead, the PCR court found that the evaluation was not favorable and not material.³

Gadson's evaluation was completed on September 10, 2001. App. 8957. It diagnosed Gadson with "Cannabis Dependence" and "History of Seizure Disorder." App. 8957. In the report, Gadson told the doctors that he suffered from blackouts. App. 8959. Gadson said he smoked "six blunts of cannabis on a daily basis." App. 8960. The report states, "He does report that he hears a voice and 'a little beeping noise.'" App. 8960. The report also noted that Gadson's testing showed he had memory problems. App. 8960.

The PCR court's finding that this information was not material is erroneous. The information in the report could have been used to impeach Gadson. Had the jury heard that he had memory problems, blackouts, heard voices and beeping noises, it would have undermined Gadson's credibility. It also would have supported a defense theory that Gadson was the murderer. Cummings admitted that hearing beeping noises, voices, consuming drugs, having blackouts would've been relevant to Gadson's credibility. App. 7378, ll. 14 – 22. Cummings admitted that failure to cross-examine Gadson on anything in the mental evaluation would not have been trial strategy. App. 7378, l. 23 – 7379, l. 13. Even Solicitor Bailey admitted there would be impeachment value to the mental health evaluation. App. 7852, ll. 11 – 14. Under

³ The PCR court inexplicably found that trial counsel could have obtained the mental health evaluation and that relieved the state from the burden of producing it. Even if this were a correct statement of the law, then trial counsel were ineffective for not obtaining the report and using it to impeach Gadson. It is not, however, a correct statement of the law, since, as stated by the United States Supreme Court in Kyles, "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation . . . the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." Kyles, 514 U.S. at 437-38.

these circumstances, the Court should find that the state violated Brady by not disclosing Gadson's evaluation to the defense.

3. Hiram Johnson's Pending Charges

Hiram Johnson had pending charges in Orangeburg County at the time of his testimony and petitioner's case. App. 6263, l. 18 – 6265, l. 14. The warrant for Johnson for receiving stolen goods was sworn on November 13, 2000 and served on him May 29, 2001. App. 9074. Johnson claimed he did not remember what the charges were. App. 6265, ll. 9 – 14. The warrant was served and pending. App. 7102, ll. 13 – 20. Johnson also had pending charges for second degree burglary and grand larceny. Supp. App. III 50. The charges pending in Orangeburg were dismissed. App. 6276, l. 17 – 6277, l. 42. They were dismissed by the same solicitor's office that prosecuted petitioner. App. 6277, ll. 11 – 23. Johnson claimed he could not remember why the charges were dismissed. App. 6277, ll. 3 – 5.

Solicitor Bailey admitted he had no recollection of providing any information to Cummings or Thomas about Johnson's pending burglary charges. App. 7832, ll. 1 – 8. Bailey admitted this evidence would be relevant to bias. App. 7832, ll. 17 – 22. Bailey first attempted to suggest that the Attorney General's office would have handled Hiram Johnson's pending charges in Orangeburg County. App. 7833, l. 13 – 7834, l. 1. Bailey then was forced to admit that an assistant solicitor with his office actually prosecuted the case. App. 7834, l. 2 – 7835, l. 3. Bailey agreed that unless Johnson's charges appeared on his rap sheet, it was unlikely that information was conveyed to petitioner's attorneys. App. 7834, ll. 2 – 23. Interestingly, Detective Coker testified that rap sheets usually show pending charges statewide. App. 6740, ll. 3 – 7.

Cummings testified that according to the rap sheet he received, there were no pending charges against Johnson in the first judicial circuit. App. 7100, ll. 4 – 24. Johnson was arrested May 29, 2001. App. 7100, l. 25 – 7101, l. 2. Johnson was not indicted until April 17, 2003, after the trial. App. 7100, l. 25 – 7101, l. 2. Cummings said that the only thing shown on Johnson's rap sheet was a conviction for unlawful possession of a pistol. App. 7101, ll. 17 – 23. It did not show the pending warrant. App. 7101, l. 24 – 7102, l. 4.

Cummings admitted the pending charge could have been used to impeach Johnson for bias. App. 7103, ll. 6 – 8. Cummings would have asked questions about Johnson's pending charges had he known about them. App. 7106, l. 21 – 7107, l. 4. Cummings agreed that Hiram Johnson need to be impeached because he claimed he heard petitioner confessed to the killing. App. 7114, ll. 20 – 23.

The PCR court did not find that the charges were disclosed to the defense, but inexplicably held that they were not material because of the “overwhelming evidence of Applicant's guilt.” Supp. App. III 50. This patently erroneous approach to analyzing evidence was disapproved by a unanimous United States Supreme Court in Holmes v. South Carolina, 547 U.S. 319 (2006). This holding ignores the rules regarding Brady evidence and imposes the higher Strickland standard on a Brady claim. It cannot be disputed that Johnson's pending charges were impeachment information. See also Giglio v. United States, 405 U.S. 150 (1972); Reutter v. Solem, 888 F.2d 578, 580-82 (8th Cir. 1989) (finding a Brady violation where prosecutors failed to disclose that key witness had pending petition for commutation of his sentence). Furthermore, the absence of a deal on pending charges is even more prejudicial impeachment evidence because it “suggests the witness will testify more favorably to the State's position.” State v. Mizzell, 349 S.C. 326, 332-33, 563 S.E.2d 315, 318 (2002). It is reasonable

to believe that a witness would “have felt that the quality of his cooperation would determine the degree of benefit he would later receive.” Id.

The importance of this information is highlighted by Solicitor Bailey’s closing argument. Chaffee v. State, 294 S.C. 88, 91-92, 362 S.E.2d 875, 877 (1987). Solicitor Bailey falsely told the jury, **“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.”** App. 4474. ll. 3 – 11. The solicitor’s emphasis on Johnson’s neutrality demonstrates beyond cavil the materiality of this evidence. Without this impeachment evidence, petitioner did not receive a fair trial resulting in a verdict worthy of confidence. Kyles, 514 U.S. at 434.

The Brady Errors Must be Considered in the Aggregate

The PCR court also failed to consider the cumulative effect of the state’s failure to disclose these key pieces of evidence. When considering Brady materiality, the suppressed evidence must be “considered collectively, not item by item.” Kyles, 514 U.S. at 436-37. “[A] showing of materiality does not require demonstration by a preponderance that disclosure would have resulted ultimately in the defendant’s acquittal.” Id. at 434. “A defendant need not demonstrate that after discounting the inculpatory evidence, there would not have been enough left to convict.” Id. at 434-35.

When these three key pieces of evidence are considered together, the cumulative effect is that no confidence can be had that petitioner received a fair trial. The state suppressed the fact that its star witness had confessed to a police investigator. The state suppressed the fact that its star witness had blackouts, memory problems, and heard voices and beeping noises. Finally, the solicitor suppressed the fact that a witness it told the jury had no pending charges was, in fact, being prosecuted by his office. This misrepresentation to the jury should greatly concern this

Court. It is disturbing that the state's conduct shows a pattern of concealing evidence, threatening witnesses, and claiming that it did not know about the untruths in its primary witnesses' testimony. Enforcing the Brady rule in this case "will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." Id. at 440. The Court should reverse the PCR court's ruling and grant petitioner a new trial.

5.

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

The PCR court erred in determining that the actual conflict of interest of Petitioner Bowman's co-trial counsel, Marva Hardee-Thomas did not amount to ineffective assistance of counsel. At the time she represented petitioner, Thomas also had an attorney-client relationship with Ricky Davis ("Davis"). App. 8967. Davis executed a written statement, stating Davis heard James Tawain Gadson confess to shooting the victim and handing the murder weapon over to petitioner. App. 8966. Davis executed the statement prior to turning state's evidence and accepting a plea deal in this matter from the State. Id. Despite this critical, exculpatory evidence on behalf of petitioner, Thomas failed to call Davis as a witness at trial. App. 7302. Thomas failed to present this critical testimony because of a conflict of interest created by her representation of Davis and petitioner.

Counsel's simultaneous obligations to both petitioner and Davis constituted an actual conflict of interest that affected her performance. "To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance." Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001) (citing Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 773 (1998)). As this Court has explained, "[a]n actual conflict of interest occurs where an attorney owes a duty to

a party whose interests are adverse to the defendant's." Id. at 143-44, 551 S.E.2d at 256 (citing Jackson, 329 S.C. at 354, 495 S.E.2d at 773).

"The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client" [citation omitted] Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008). A defendant does not need to show prejudice if there is an actual conflict of interest. Id. See, also, Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) (quoting Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir. 1979)).

The case of State v. Gregory, 364 S.C. 150, 612 S.E.2d 449 (2005) is instructive on the situation involved here. In Gregory, this Court found counsel, who was representing the defendant on criminal sexual conduct with a minor charges, had a conflict because he represented an assistant solicitor in her divorce action; the assistant solicitor had initially prosecuted the case even though by the time of trial, the solicitor had been replaced. Still, this Court found:

The question in this case is whether defense counsel owed duties to a party whose interests were adverse to Gregory. Under this Court's holding in Duncan[281 S.C. at 438, 315 S.E.2d at 811 (1984)], and the case cited therein, Zuck v. Alabama, we find that he did. In Zuck v. Alabama, the Fifth Circuit Court of Appeals held that where the law firm retained to represent the defendant in a murder trial also represented the state prosecutor in an unrelated civil trial, there was an actual conflict of interest, and the conflict rendered the trial fundamentally unfair. The court noted that "the basis of these decisions is our belief that the sixth amendment requires that **a defendant may not be represented by counsel who might be tempted to dampen the ardor of his defense in order to placate his other client. . . . This possibility is sufficient to constitute an actual conflict as a matter of law.**" 588 F.2d at 440 (emphasis in original).

Where an actual conflict is shown, the aggrieved party “need not demonstrate prejudice in order to obtain relief.” Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980); Holloway v. Arkansas, 435 U.S. 475, 487-91 (1978).

An actual conflict of interest can undoubtedly arise when an attorney represents two parties simultaneously. Courts from around the country hold that simultaneous representation of both the criminal defendant and a defense witness may give rise to an actual conflict of interest. See, e.g., United States v. Moscony, 927 F.2d 742, 750 (3d Cir. 1991) (“Conflicts of interest arise whenever an attorney’s loyalties are divided and an attorney who cross-examines former clients inherently encounters divided loyalties”) (citations omitted)); Louisiana v. M.M., 802 So. 2d 43, 68 (La. Ct. App. 2001) (“Nevertheless, [conflicting loyalties] may also arise when an attorney has to cross-examine a State witness or call a defense witness who the attorney represents in another litigation”); Massachusetts v. Walter, 487 N.E.2d 513, 517 (Mass. 1986) (“We nevertheless agree that where an attorney simultaneously represents both a criminal defendant and a possible defense witness, the potential for a serious conflict does exist.”); Tennessee v. Franklin, No. W2009-01087-CCA-R3-CD, 2010 Tenn. Crim. App. LEXIS 457, 23 (Tenn. Crim. App. June 3, 2010) (“[A] conflict of interest may arise not only in simultaneous representation cases but also in cases of successive representation ‘when an attorney who once represented a co-defendant or witness currently represents the accused.’” (citation omitted)).

This is precisely the situation in this matter. An actual conflict existed because trial counsel represented petitioner and Davis. As noted, Thomas had an attorney-client relationship with Ricky Davis. Counsel was appointed to represent Davis on two separate armed robbery charges in 2001. App. 8967. In October of 2001, Davis was tried by jury, convicted of one count of armed robbery, and sentenced to twenty years. App. 8980. His second indictment was

nol prossed on October 18, 2001. App. 9291-92. Thomas filed a notice of appeal on Davis's behalf on October 24, 2001. App. 9306. Nevertheless, her obligations to Davis did not cease because the solicitor certainly retained discretion on whether to recharge Davis for the matter that was nol prossed. Thomas admitted this concern in her testimony at the PCR hearing. App. 7288-89.

Without contraction, Thomas admitted a conflict between petitioner and Davis existed. When asked whether she thought there would have been a conflict had she spoken to Davis and had he confirmed that his statement was true, Thomas admitted that "there is a bigger conflict that would arise with regard to representation of Marion [Bowman]." App. 7332. As she explained, the dual representation would have led to "trying to help Mr. Bowman but not hurt my aspect with Mr. Davis because I still have an ethical responsibility with him also." App. 7333. When asked if she "would not have decided not to call Ricky Davis to protect him, to the detriment of Mr. Bowman, you didn't do that, did you? Thomas answered: "No, I wouldn't put anybody in that predicament." App. 7334.

Regardless, Davis was not called as a witness at petitioner's trial. Thomas failed to do so despite the exculpatory nature of the statement.⁴ When asked why Davis did not testify that he heard Gadson confess to shooting the victim, counsel testified: "I don't know." App. 7302. Counsel also acknowledged she did not have any strategic reason for not putting Ricky Davis on the stand to testify that he had heard Gadson's confession. App. 7302.

Despite the exculpatory written statement, Thomas did not even recall speaking to Davis directly. App. 7331. In fact, not only did Thomas fail to call Davis, Thomas could not

⁴ Thomas acknowledged, in her testimony at the PCR hearing, that her handwriting was on the notary block, which was not filled out. App. 7294, 7331.

remember even discussing Ricky Davis with her capital client, petitioner, much less detailing the former attorney-client relationship with petitioner. App. 7294. This constituted ineffective assistance of counsel.

Thomas' conflict stemmed from the fact that she had legitimate concerns about Davis's second armed robbery charge which was nol processed. As the Supreme Court of South Carolina has explained, when a charge is nol processed it is extinguished. Mackey v. State, 357 S.C. 666, 668, 595 S.E.2d 241, 242 (2004). However, "'if the nolle prosequi is entered prior to the jury being empanelled and sworn, there is no bar to future prosecution for the same offense because the innocence or the guilt of the defendant would not have been adjudicated.'" Id. (quoting State v. Patrick, 318 S.C. 352, 457 S.E.2d 632 (1995)). Therefore, in situations where charges are nol prossed before a jury has not been empanelled and sworn, the solicitor would be free to bring the charges against the defendant again. Davis' situation presented that exact scenario.

First, if Thomas had called Davis to testify at petitioner's trial, she ran the risk of the solicitor seeking to impeach Davis regarding his armed robbery conviction. The very real chance also existed that Davis may have discussed the second charge⁵ instead of his conviction and stated something detrimental on the stand that could be used against him by the solicitor in deciding whether to re-file the charge. As the Mackey case explains, the solicitor clearly maintained that right to charge Davis again. Counsel had already assisted Davis in avoiding this charge once, and there would be a strong motivation to keep Davis off the stand regardless of the context to avoid any chance of it being brought again. Second, counsel likely felt that there was

⁵ The conviction and the second charge were disposed of around the same time; hence, the chance that Davis could testify as to the second charge.

a potential for retribution if Davis was called. Davis was a potentially exculpatory witness who made a clear statement that petitioner was not the shooter and that the state's primary witness against Bowman was actually the murderer. App. 8966. There was certainly the potential that the solicitor would simply recharge Davis if he was called at petitioner's trial. Counsel had a duty to keep Davis from testifying or helping the defense in any way, as it could have resulted in renewed charges being brought against him. This is in direct conflict with her duty to zealously represent petitioner and provide effective counsel. Such an inherent conflict undoubtedly had a negative impact on her performance at trial, evidenced by the complete failure to call Davis.

Ricky Davis was convicted of one armed robbery charge and had the second nol processed. The second charge was dropped on October 18, 2001. Thomas represented Davis in both instances. Not long after, she was also appointed to defend petitioner at trial. As shown above, these clients' interests were adverse to one another. As the recognized by the above-authority, Thomas's dual representation of petitioner, and a potential defense witness, Davis, sufficiently established an actual conflict of interest. It is evident that the standard for establishing prejudicial conflict has been met in this case. If petitioner had been made aware of the prior attorney-client relationship and advised of the adverse interests, he would have likely objected to Thomas's representation. Due to the existence of an actual conflict, petitioner should not be required to show prejudice resulting from this conflict.

However, even if this Court were to require a prejudice analysis, petitioner was prejudiced due to counsel's reluctance to call Davis and failure to advise petitioner of the attorney-client relationship. The conflict of interest, whether actual or potential, related directly to the heart of the case and cannot constitute harmless error. Our Supreme Court very recently

held that error related directly to the central issue of a case cannot constitute harmless error. In Sulton v. Health South, 400 S.C. 412, 734 S.E.2d 641 (2012), the Court addressed an erroneous jury charge that incorrectly elevated the duty of care owed by a hospital on the seminal issues of the case. The Supreme Court held that, despite the harmless error approach to review of jury instructions, the error could not be harmless because it went to the heart of the case. The court held remand was warranted because the error on the key issue caused the defendant to suffer prejudice. Id. at 418, 734 S.E.2d at 644-45.

This matter is analogous to the court's logic and rationale in Sulton. The identity of the shooter constituted the critical issue in this matter. Whether petitioner's counsel excluded potentially exculpatory testimony due to a conflict of interest directly affected that critical issue in the matter. If counsel should not have represented petitioner, as was the case, his right to effective counsel was violated. It was critical that the trial court, and the PCR court, hear Davis' exculpatory testimony to ensure that petitioner received adequate representation, especially in light of the fact that the state sought the death penalty against petitioner. Thomas's improper representation of petitioner prejudiced him significantly. Accordingly, Thomas provided ineffective assistance of counsel, and the PCR court should have granted petitioner post-conviction relief.

6.

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

Correctional Consultant James E. Aiken was qualified as an expert witness for the defense in the fields of prison adjustment and future dangerousness. App. 4832, l. 22 – 4838, l. 10. On cross-examination, the solicitor questioned Aiken about petitioner having received a youthful offender act (YOA) sentence in the past. Aiken acknowledged that the purpose of a YOA sentence was to rehabilitate the youthful offender, and that petitioner had “flunked out” because he was unable to comply with the mandates of the program. App. 4847, l. 1 – 4848, l. 3. Aiken also admitted there was a “use of force” report regarding a fight petitioner had while serving his YOA sentence was being served at Stevenson Correctional Institution. App. 4848, l. 8 – 4849, l. 2.

The solicitor had Aiken acknowledge that inmates can work while inside the correctional facility. The solicitor also asked Aiken to also admit that inmates were allowed to leave the correctional facility and pick up trash on the side of the road. This drew an objection from defense counsel because “that’s clearly not available here and it’s not proper.” App. 4857, l. 22 – 4858, l. 6.

The solicitor then asked Aiken to admit that even an inmate serving a life without parole sentence could still work. Aiken answered, “If you’re going to be in prison, you’re going to work.” App. 4862, l. 2 – 4864, l. 11. On re-direct examination, Aiken said there was not any way a person serving a life without parole sentence would be allowed outside the prison to pick up trash. App. 4864, l. 16 – 4869, l. 3.

Immediately on re-cross examination, the solicitor focused on escape and prison conditions. The solicitor noted that Aiken had said petitioner would never get out of prison and he then asked him how many inmates had escaped during the time he was affiliated with the South Carolina Department of Corrections. Defense counsel’s objection to this escape testimony was sustained. App. 4869, l. 13 – 4970, l. 11.

The solicitor then requested permission to question Aiken about “conditions of general population, the work conditions he’s already gotten into.” The defense’s only objection was that such questioning would occur on re-cross examination. Defense counsel did not object on the grounds that such prison conditions evidence was inadmissible. App. 4873, l. 21 – 4874, l. 19.

The solicitor then questioned Aiken extensively about what an inmate’s “routine” in prison. Aiken then admitted to the solicitor that inmates not in “super max” were able to work, and they were compensated for their work. When the solicitor asked how much inmates were paid, Aiken said he thought they made three dollars, four dollars, or five dollars, but he admitted he was not exactly sure how much they were paid for their work. App. 4878, ll. 11-24.

The solicitor then questioned Aiken about an inmate did in prison when he was not working. Aiken answered that inmate got up in the morning, had breakfast, then went to work, took a recess break “in the middle of the day, lunch break, to eat as provided by the constitution, and of course go back to work and then eat in the evening. And a person can involve himself in

bible study, a person can involve himself in education, a person can involve himself in anger management and other things that are provided within the correctional environment. That's one routine." App. 4878, l. 11 – 4880, l. 14.

Aiken then attempted to explain that inmates were constantly being watched during their activities, and they were written up for administrative violations. The solicitor objected: "Your Honor, I think he's not being responsive to my question. I was simply asking him about conditions of the prison that he had testified about and he's going off into a speech. I would like him to respond. So I've tried to ask simple questions and get direct answers." App. 4878, l. 11 – 4880, l. 14.

Defense Counsel Cummings responded: "I think the gentleman was trying to answer, Judge." The judge partially agreed: "I think he is trying to answer" but instructed Aiken to listen to the question and answer it fully "but if you could be mindful to remember brevity I would appreciate it." App. 4880, ll. 14-25. The following exchange then occurred with Aiken and the solicitor:

Mr. Aiken: I'll just answer the question like this. I gave the daily routine, but you have to understand that you are doing it around very dangerous people that use violence to resolve issues. And that gives a better picture of what it means living in prison.

Mr. Bailey: All right, sir. And are there recreational facilities available?

Mr. Aiken: Yes, sir.

Mr. Bailey: What type of recreational facilities?

Mr. Aiken: An inmate can play basketball, an inmate can exercise, you know, on his own, but to understand, again, to give it in a complete context as briefly as I can, you're doing it around very dangerous predator people.

Mr. Bailey: My question is related to the recreational facilities and we understand prison is dangerous people. In addition to that are there libraries they go to, to read books?

Mr. Aiken: Yes, sir. As guaranteed by the constitution.

Mr. Bailey: Are there movies they can watch?

Mr. Aiken: Yes, sir.

Mr. Bailey: Television?

Mr. Aiken: In some instances, yes, sir.

Mr. Bailey: Softball, do they play softball?

Mr. Aiken: I don't know. It's some type of recreation such as that.

Mr. Bailey: Thank you. That's all I have.

App. 4881, l. 1 – 4882, l. 3.

In his closing argument the solicitor reminded the jurors about the testimony of James Aiken. The solicitor said Aiken was “a very knowledgeable person, I had some trouble getting him to answer some questions, but I would concede he's very knowledgeable, he's an expert in prison adjustment. The solicitor noted that Aiken did say that petitioner could adjust well to prison. App. 4965, ll. 3-15. However, the solicitor urged the jury what its focus should be based on Aiken's testimony:

But when you're talking about adaptability to prison environment, you need to know what that environment is like. And he told you all a little bit about it, Mr. Aiken. I asked him about the prison environment, you work, you get paid some degree of money, some amount of money for working, that after work there are recreational opportunities available, he said **they could play basketball, they had a library where they could read books, movies, television. In the meantime, Kandee Martin's in her grave and she'll be there forever.**

App. 4965, l. 16 – 4966, l. 2. (emphasis added).

On direct appeal to this Court, undersigned counsel argued the following on direct appeal regarding this issue:

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

In State v. Bowman, 366 S.C. 485, 498-499, 623 S.E.2d 378, 385 (2005) this Court held the issue was procedurally barred – the only objection was improper re-cross examination -- but again warned the bench and bar that such prison conditions evidence was improper:

Appellant argues the trial court erred by allowing the State, on re-cross examination, to ask Aiken about prison conditions.

We find this issue is not preserved for review because appellant did not raise this issue to the trial court before the testimony was presented and did not make a contemporaneous objection when the testimony was actually elicited. Further, the trial court did not rule on this issue as now stated by appellant. See State v. Moore, 357 S.C. 458, 593 S.E.2d 608 (2004) (to be preserved for appeal, issue must be raised to and ruled on by trial court); State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997) (party cannot argue one ground below and then argue different ground on appeal). See also State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005) (to preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court).

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

In his application for post-conviction relief filed April 7, 2006, petitioner Bowman alleged his attorney was ineffective for failing to object to inadmissible “good prison conditions” evidence, and to preserve the issue for direct appeal. App. 1571. Petitioner continued to assert the failure to object to this prison conditions issue evidence as a PCR issue in subsequent pleadings. App. 5681-5682; App. 5694-5695; App. 5715-5716.

PCR counsel questioned defense counsel about the prison conditions evidence during the evidentiary hearing. Defense counsel stated that “it’s been the same argument throughout the last ten years in this state, what are its present conditions, and the Supreme Court is coming out telling the solicitor to stop it, and defense attorneys, you can’t sell it to the jury anymore, that it ain’t the life of a picnic anymore.” Trial counsel added:

For God’s sake, we have all tried to show LWOP means life without possibility of parole, and every Solicitor, and **I would do it myself if I was still prosecuting**, *he gets to watch TV, Kandee is dead, he gets to eat, she doesn’t, and he gets to have recreation in the yard, she doesn’t*, and then in the heat of that stuff, Mr. Bailey and I were going at it, you read the transcript. You should have been there.

App. 7450, ll. 3-12. (emphasis added).

When PCR counsel reminded trial counsel that this Court had held this very evidence introduced an arbitrary factor into the sentencing proceeding, counsel responded: “Isn’t that nice of them, but how else do you argue about somebody having a chance to live in prison? I mean, I don’t argue academically.” App. 7449, l. 21 – 7450, l. 22.

PCR counsel then asked trial counsel why he did not object to the prison conditions evidence:

Mr. Brown: [M]y question is why didn’t you object when Mr. Bailey brought it out so he couldn’t talk about it at all anymore?

Mr. Cummings: Maybe I just didn't remember to do that because we were still fighting with each other by the side of the table, or the judge, and you have to read what I was doing.

Mr. Brown: That's fine, I'm just asking if you had a reason.

Mr. Cummings: *There is not reason that a lawyer misses an objection, he misses it.*

App. 7451, l. 15 – 7452, l. 1. (emphasis added).

After this question, a colloquy occurred between the assistant attorney general and PCR counsel and the court. PCR counsel argued that trial counsel was ineffective for failing to preserve this issue for appeal “because it would have been reversed” if they had preserved the issue. App. 7453, l. 1 – 7460, l. 19. Trial counsel then responded: “It was on re-cross and again, if I made an error, if I made a mistake, that man, respectfully, should get the benefit, I just want to apologize.” App. 7462, ll. 18-21.

The assistant attorney general attempted to distinguish this case from State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007), by arguing that defense counsel in this case “opened the door” to the prison conditions evidence. Obviously recognizing that Burkhart decided the prison conditions evidence introduced an impermissible arbitrary factor into the case, he urged: “I think in the context of ineffective assistance we still have a prejudice prong as well.” App. 7460, l. 24 – 7461, l. 12.

In petitioner's brief supporting his fourth amended application for post-conviction relief, which the judge permitted counsel to file as a post-hearing brief, counsel again made a succinct argument on the prison conditions issue. App. 9546 - 9547. Counsel noted the trial prison conditions evidence and the fact defense counsel did not make a contemporaneous objection to this impermissible evidence. Counsel also pointed out the fact that defense counsel during PCR hearing did not offer any strategic reason for his failure to object. App. 9546 – 9547. Counsel

noted “in Burkhart, the Court *reaffirmed the long standing rule that evidence admitted in the sentencing phase of a capital trial must be limited to either character evidence of the defendant or the circumstances of the crime.*” App. 9547. (emphasis added). Counsel noted that petitioner’s jury sentenced him to death while considering the arbitrary factor of this “good” prison conditions evidence . . .” App. 9547.

In his order denying petitioner’s application for post-conviction relief filed March 12, 2012, the judge found that the defense “opened the door” to the good prison conditions evidence. Supp. App. III 101-121. The order acknowledged that this Court procedurally barred this issue in State v. Bowman, 366 S.C. 45, 623 S.E.2d 378 (2005), but sought to distinguish it from State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007), by arguing the solicitor called a witness in his case in chief in Burkhart about prison conditions. Supp. App. III 105-107. The order of dismissal continued to make the Attorney General’s argument that seemingly because of Kelly v. South Carolina, 534 U.S. 246 (2002), and the two cases that preceded it, Simmons v. South Carolina, 512 U.S. 154 (1994) and Shafer v. South Carolina, 532 U.S. 36 (2001), which held that evidence of future dangerousness as a matter of due process mandated a jury instruction that life meant “life without parole” constituted a “new legal setting” that allegedly now allows the admission of evidence on the “routine” of daily prison life to counter adaptability evidence in some way. Supp. App. III 105.

The order also found defense counsel had a “strategic” reason not to object to this evidence because he wanted to emphasize “the harsh conditions of prison” to the jury and he fully expected the solicitor to respond with the good conditions in prison. Supp. App. III 107-109. As petitioner demonstrates infra, trial counsel’s reasons are in error. This Court has consistently emphasized that penalty phase evidence must concentrate on the character of the

defendant and the circumstances of his crime. Consequently, the ruling that defense counsel here “opened the door” to evidence of general prison condition evidence is actually an additional finding of ineffectiveness. This is not a direct appeal. This ruling reinforces the admitted ineffectiveness of counsel, and his demonstrated lack of awareness concerning long-standing binding precedents of this Court. It ignores the fact such evidence has nothing to do with petitioner’s character or the circumstances of his crime, or any matter within his control and it is inadmissible.

For this and other reasons, petitioner now seeks a writ of certiorari from this Court.

Discussion

Defense counsel testified at the PCR hearing that if he was still prosecuting cases he would have done exactly what the solicitor in this case did. He would have presented evidence and argued that Marion Bowman would be allowed to watch television, have recreation, go the library and have other amenities while the victim was dead in her grave as a result of the murder. “He gets to eat, she doesn’t, and he gets to have recreation in the yard, she doesn’t,” as defense counsel testified at the PCR hearing. App. 7450, ll. 3-12. Defense counsel had no appreciation of the fact that this Court has long held that evidence of prison conditions and execution did not constitute proper jury considerations. State v. Atkinson, 253 S.C. 531, 172 S.E.2d 111, 112 (1970); State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984).

In Plath, this Court noted that the Department of Corrections controls the conditions of imprisonment and not the defendant. “This determination as to the time, place, manner, and condition of execution or incarceration . . . are reserved by statute . . . to agencies other than the jury. As we have repeatedly stated, the sole function of the jury in a capital sentencing trial is the individualized selection of one or the other penalty, based on the circumstances of the crime

and the characteristics of the individual defendant.” State v. Plath, 281 S.C. at 15, 313 S.E.2d at 627.

This Court in petitioner’s case on direct appeal in State v. Bowman procedurally barred this prison conditions issue as seen supra, and reminded the bench and bar that evidence such as that offered during petitioner’s trial was improper. Defense counsel’s only objection at trial was that the evidence was being offered on re-cross examination. Evidence offered on re-cross examination is within the sound discretion of the judge where the objection should have been, as a matter of law, that the evidence the solicitor intended to elicit was improper and inadmissible. While objecting only on the basis that the solicitor was presenting the prison condition evidence on re-cross examination, defense counsel framed the issue as simply one vested to the sound discretion of the trial court since the right to, and scope of, re-cross examination is purely a discretionary matter. See Liberty Mutual Insurance Company v. Gould, 266 S.C. 521, 533, 224 S.E.2d 715, 720 (1976); State v. Singleton, 179 S.C. 184, 183 S.E. 910 (1936).

As the Chief Justice, while arguing against automatic reversal based upon the arbitrary statutory factor, wrote in her dissent in State v. Burkhart, 371 S.C. 482, 494, 640 S.E.2d 450, 456 (2007)::

Our pronouncement disfavoring this evidence in Bowman was nothing new. See Plath, 281 S.C. at 15, 313 S.E.2d at 627 (“It should not be necessary in the near future ... to remind the bench and bar of the strict focus to be maintained in the course of a capital sentencing trial.”); and Smart, 278 S.C. at 526, 299 S.E.2d at 692-93 (“While this Court approves zealous representation ... it is important in capital cases to maintain strict focus upon the particular characteristics of the specific crime and the unique attributes of the defendant.”). In reversing this case, I believe we treat the disapproval of this type of evidence as though it were a novel development, and that we unnecessarily depart from an established course of analysis that is easily tied to defined doctrines. In my view, reversing Appellant’s sentence uses Bowman to propagate a rule that inappropriately presumes prejudice in many cases and is unjustified given the existing constitutional framework.

State v. Burkhart, 371 S.C. 482, 494, 640 S.E.2d 450, 456 (2007).

As seen above, defense counsel belatedly admitted at the PCR hearing that there could not be any excuse, reason or strategic reason to justify his failure to object to this prison condition evidence if it was inadmissible. Regardless, it is clear defense counsel erroneously thought that petitioner's day to day life in prison routine was a proper matter for the jury's consideration.

Counsel's failure to understand the law in this area allowed the solicitor to capitalize on the prison condition evidence that was admitted without objection to argue that petitioner would enjoy playing basketball and watching television in prison while the victim remained dead in her grave. That was a powerful argument and it is improper. As early as State v. Atkinson, 253 S.C. 531, 172 S.E.2d 111, 112 (1970), this Court held:

The legislature committed to the jury the responsibility to decide in the first instance whether the punishment should be life or death. It charged another agency with the responsibility of how a life sentence should be executed. The jurors perform their task completely when they decide the matter assigned to them upon the evidence before them. *What happens thereafter is of no concern of theirs.* (emphasis added).

The solicitor painted the jury a picture here of life in prison as a relaxing experience where inmates work, play basketball, watch television and go to the library. That certainly would not sound like severe punishment to many jurors for a murderer.

However, as this Court has repeatedly held, punishment in a death penalty trial must be focused on the character of the defendant and the circumstances of his crime. Sentencing a defendant to death based upon the jury's perception of what life imprisonment is like behind the prison walls introduces an impermissible arbitrary factor into the sentencing phase. See State v. Burkhart, supra.

The state in this case continued to urge upon the PCR court that if the defendant introduces evidence that the defendant can adapt to prison that this opens the door to introduce evidence and argument that the defendant is allegedly adapting to a relaxing prison life and routine. That was a fallacious argument.

Skipper v. South Carolina, 476 U.S. 1 (1986) held that evidence that a particular defendant can adapt to prison must be allowed because it is evidence in mitigation that a jury must be allowed to consider as a reason to impose a sentence of less than death. See Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

While the refusal to allow prison adaptability in the lower court in Skipper was based upon the precedent at the time, State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982), there should be no serious argument that Skipper v. South Carolina prison adaptability mitigating evidence relating to a particular defendant on trial “opened the door” to evidence of favorable prison conditions and a relaxing daily routine in prison in response. This Court has long held such inadmissible. Such evidence simply is irrelevant to the character of the defendant or the circumstances of his crime.

Further, a death sentence imposed where a defendant has no opportunity to explain or deny information which forms the basis for that sentence - - here the changing rules and regulations of the Department of Corrections under which inmates must live - - denies the defendant his right to due process. See Gardner v. Florida, 430 U.S. 349 (1977). Petitioner had and has no control over the conditions in prison that he must live by as a result of his conviction. Those rules, as petitioner argued in his procedurally barred argument on direct appeal, are often left to the discretion of the Director of the Department of Corrections in power at the time, and perhaps public sentiment at the time. See Brief of Appellant at Supp. App. 27.

Had trial counsel made the proper objection to the prison condition evidence and argument at trial there is no reason to believe that petitioner would not have been granted a new sentencing trial in his appeal, State v. Bowman, 326 S.C. 485, 623 S.E.2d 378 (2005), where this issue was procedurally barred instead. Petitioner submits that this prison conditions evidence presented an arbitrary factor into the case that mandates a new sentencing trial in the same manner as if the issue had been preserved for direct appeal. See State v. Burkhardt, *supra*.

However, should the court conduct a prejudice analysis beyond the arbitrary factor, petitioner strongly asserts that under Strickland v. Washington, 466, U.S. 668 (1984) that this highly prejudicial evidence that the solicitor fully capitalized on during his closing argument mandates a new sentencing hearing. As this Court held in State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000), the evaluation of the consequences of an error in the sentencing phase of a capital trial is more difficult because of the wide discretion that is given to the sentencing jury. A capital jury can recommend a life sentence **for any reason or no reason at all**.

The solicitor's examination of Dr. Aiken successfully painted the erroneous picture that life imprisonment is a tranquil experience because an inmate, here petitioner, would be able to work, have recreation, watch television, go to the library, and play basketball. It is hardly a leap to assert that this evidence and the solicitor's powerful argument capitalizing on it was a factor in at least one juror's decision to not choose a life sentence. See Chaffee v. State, 294 S.C. 88, 362 S.E.2d 875 (1987)(Solicitor took advantage of evidentiary error in closing argument in a capital sentencing proceeding, error was not harmless). This Court should respectfully grant certiorari on this issue.

7.

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

The PCR court adopted the state's proposed order with no changes. Compare Supp. App. 142 – 286 with Supp. App. III 5-149. Petitioner noted this problem in his Rule 59(e) motion. App. 9953. The last date the PCR court heard testimony was December 22, 2008. App. 7749. The state's proposed order was submitted on June 17, 2011. Judge Lockemy signed it on February 27, 2012. Supp. App. III 149. The Court should note that the only change appears to be overwriting "2011" with "2012." Supp. App. III 149.

This Court has on two occasions warned PCR judges against wholesale adoption of proposed orders. In Pruitt v. State, the Court stated:

We take this opportunity to express our concern with the increasing number of orders in PCR proceedings that fail to address the merits of the issues raised by the applicant. . . . Counsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to the issuance of the order, and the PCR judge should carefully review the order prior to signing it.

310 S.C. 254, 255-56, 423 S.E.2d 127, 128 (1992). Despite the Court's admonishment in Pruitt, the practice continued. This Court again was forced to address this issue in Hall v. Catoe, stating:

Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, we also acknowledge that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency.

360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004).

Just like this Court, the United States Supreme Court recognizes that wholesale adoption of proposed orders in capital cases raises serious questions about the fairness of the process and a trial court's factual findings. Jefferson v. Upton, ___ U.S. ___, 130 S.Ct. 2217, 2223 (2010). In Jefferson, the state PCR court adopted an *ex parte* proposed order verbatim.⁶ Id. at 2222. The Supreme Court remanded the case based solely on the impropriety of the PCR court's actions. Id. at 2223. The Court stated, "Although we have stated that a court's 'verbatim adoption of findings of fact prepared by the prevailing parties' should be treated as findings of the court, we have also criticized that practice." Id. (quoting Anderson v. Bessemer City, 470 U.S. 564, 572 (1985)).

Other state courts also expressly disapprove of the verbatim adoption of proposed orders in capital cases. "We cannot . . . in this post-conviction case involving a review of the propriety of a death sentence, condone the wholesale adoption by the post-conviction court of an advocate's brief." Commonwealth v. Williams, 732 A.2d 1167, 1176 (Pa. 1999); see also Dobyne v. State, 805 So.2d 733, 741 (Ala. Crim. App. 2000) (criticizing practice and quoting Anderson); Dukes v. State, 621 N.W.2d 246, 258-59 (Minn. 2001) (criticizing practice).

A state PCR court must engage in a "probing and fact-specific analysis" in capital cases. Sears v. Upton, ___ U.S. ___, 130 S.Ct. 3259, 3266 (2010). Just as in Jefferson, and in violation of this Court's strictures concerning proposed orders, the verbatim adoption of a proposed order demonstrates petitioner did not receive a full and fair hearing as required by the Eighth and Fourteenth Amendments.

The proper remedy in this case is a *de novo* review of the evidence in this case or, in the

⁶ The proposed order in this case was not solicited or provided *ex parte*, but this should not change the Court's analysis.