
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
VOLUME 9 OF 9
PAGES 4001 – 4261**

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STATE COURT RECORD

Transcript Dated May 17, 2002 – Jury Selection/Jury Trial	JA1
OPENING STATEMENT BY MR. BAILEY	JA1
OPENING STATEMENT BY MR. CUMMINGS	JA14
TESTIMONY	
WILLIAM HENRY KOGER	
Direct Examination.....	JA28
Cross Examination.....	JA35
JOSEPH F. FOGLE	
Direct Examination.....	JA37
Cross Examination.....	JA42
KEITH RIVERS	
Direct Examination.....	JA43
Cross Examination.....	JA47
CAROLYN L. BROWN	
Direct Examination.....	JA53
Cross Examination.....	JA57
Redirect Examination	JA68
Recross Examination	JA70
EDWARD WATERS	
Direct Examination.....	JA72
Cross Examination.....	JA82
YOLAND S. BOWMAN	
Direct Examination.....	JA89
Cross Examination.....	JA101
Transcript Dated May 18, 2002- Jury Trial	JA112

KATRINA WEST

Direct Examination.....	JA116
Cross Examination.....	JA121

DENNIS JUDY

Direct Examination.....	JA129
Cross Examination.....	JA149

GORDON B. NEWHOUSE

Direct Examination.....	JA153
Cross Examination.....	JA158

PERRY CHINNERS

Direct Examination.....	JA161
Cross Examination.....	JA166

JAMES P. KICKLIGHTER

Direct Examination.....	JA174
Cross Examination.....	JA178

ALVIN COKER

Direct Examination.....	JA184
Cross Examination.....	JA197

EDWARD A. PORTER

Direct Examination.....	JA202
Cross Examination.....	JA216
Redirect Examination	JA228
Recross Examination	JA228

JAMES HELMS

Direct Examination.....	JA229
Cross Examination.....	JA268
Redirect Examination	JA285
Recross Examination	JA286

DENNIS JUDY

Direct Examination.....	JA287
-------------------------	-------

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

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

MARK SHEETZ

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

CATHERINE M. SALLEY

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

ALVIN COKER

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

ALLYSON GREER

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

SALLY M. BOOKHART

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

JAMES HELMS

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

EDWARD PORTER

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

GRADY A. LAYTON

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

DAVID J. COLLINS

Direct Examination.....JA662

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

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

KENDRA BROWN

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

DOROTHY BOWMAN

Direct Examination.....	JA1105
-------------------------	--------

MARGARET A. BAUGHMAN

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

JEFFERY J. YUNGMAN

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

FRANKIE MARTIN

Direct Examination.....	JA1185
-------------------------	--------

JAMES E. AIKEN

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

SHARON J. BRANCH

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

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

ENRIQUE BADILLO

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

TRAVIS D. FELDER

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

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

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

RICKY DAVIS

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

DAVID COLLINS (Excerpt)

Direct Examination by Mr. Brown	JA1874
---------------------------------------	--------

HIRAM JOHNSON

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

TRAVIS FELDER

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

ALVIN COKER (Excerpt)

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

NORBERT CUMMINGS

Direct Examination by Mr. Brown	JA2042
---------------------------------------	--------

MARVA HARDEE-THOMAS (Excerpt)

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

NORBERT CUMMINGS (con't)

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

WALTER BAILEY (Excerpt)

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

PCR EXHIBITS

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

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

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

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

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

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

base its decision on “an irrelevant concern.” Rather, the court addressed the claim as raised by Petitioner.

Even so, Petitioner further argues that the PCR court erred in finding that Gadson did not subjectively fear the death penalty. Petition, p. 19. Petitioner cites Gadson’s testimony during the PCR evidentiary hearing where he discussed early correspondence that he filed in his murder case asking for a second attorney to be appointed:

Q All right. And in there don’t you say things like you want to know when you’re going to get a second attorney in this death penalty case?

A Yes, because that is what I was being charged.

Q Okay. So, you thought you could get death, you feared death?

A Yes.

(R.p. 5851). Those letters, where Gadson referred to his case as a capital case, were from July and October of 2001. (R.pp. 8940-43). However, Petitioner’s claim that the PCR court erred in finding that Gadson subjectively did not fear the death penalty is based on an oversimplification of the PCR court’s findings. See Response in Opposition to Motion for Summary Judgment (“Response”), pp. 6-7. The PCR court did not find that Gadson never feared the death penalty but, rather, that the evidence did not show that Gadson believed he was avoiding the death penalty *by entering into a plea agreement*. Indeed, Gadson’s testimony showed that his concerns about potentially facing a death sentence evolved. Initially, he sent the aforementioned letters, which were drafted by a jailhouse lawyer and signed by Gadson, and which indicated that he was facing a capital charge. However, Gadson testified that he was not threatened with the death penalty. (R.pp. 5850, 5873). He also testified that he was advised about “the hand of one is the hand of all” around the time of his plea

negotiations, and was told that he would not get *life* in prison if he testified against Petitioner. (R.pp. 5900-02, 5916). Petitioner’s arguments seem to rely on considering a portion of Gadson’s testimony in a vacuum and disregarding his other testimony, which was found credible by the PCR court. Cf. Watkins v. Rubenstein, 802 F.3d 637, 643 (4th Cir. 2015) [“Section 2254 requires a federal court conducting collateral review of a state court adjudication to do so through a ‘highly deferential lens.’” (quoting DeCastro v. Branker, 642 F.3d 442, 449 (4th Cir. 2011))]. The PCR court’s finding is supported by the record and addresses the issue raised in the PCR application.

Petitioner also disagrees with the PCR court’s Strickland analysis. After referencing trial counsel’s testimony at the PCR evidentiary hearing, he quotes Cummings’ testimony as to why he did not ask Gadson about a death sentence. Specifically, Petitioner quotes the following exchange between PCR counsel and Cummings about Cummings’ cross-examination of Gadson:

Q Now, when you cross-examined Tawain Gadson, one of the things you talked about was what sentence he would get pursuant to the plea deal, twenty years?

A Yes.

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.

(R.pp. 7723-24). Based on that testimony, Petitioner asserts that Cummings admitted his deficiency.

Petition, p. 21. Petitioner then argues that trial counsel’s deficiency prejudiced him because had the jury known that Gadson faced the death penalty if he broke his plea agreement, it “would have shown that Gadson was motivated—literally to save his life—to please the state in his testimony.” Petition, p. 21. Petitioner further asserts that the threat of the death penalty against Gadson would have further impeached the State’s case generally. Petition, pp. 21-22.

However, as referenced earlier, the PCR court’s findings are a result of the claim that was presented by PCR counsel—that Gadson expressly bargained to avoid a potential death sentence and that trial counsel should have pointed that out during cross-examination. (See R.pp. 9471-72). The PCR court found, and the record supports, that Gadson was *not* facing the death penalty prior to entering his plea agreement. Now, instead of positing that trial counsel should have “inform[ed] the jury that Gadson expressly bargained to avoid the death penalty[,]” (R.p. 9471), Petitioner now argues that trial counsel were deficient for failing “to impeach Gadson with the fact that he faced the death penalty . . . [.]” Petition, p. 20. However, although Cummings recognized during his testimony that there was more that he could have done in cross-examining Gadson about the benefit of his plea bargain, that recognition does not render his performance constitutionally deficient. The record shows that when Cummings cross-examined Gadson, Solicitor Bailey had already questioned Gadson about being charged with murder and that he had entered a plea agreement to plead guilty to accessory after the fact and misprision of a felony in exchange for his testimony. (R.pp. 3980-82). The first matter that Cummings then covered in his cross-examination was Gadson’s plea agreement and that he was facing fifteen years and five years incarceration for two lesser charges instead of facing a murder charge. (R.pp. 4022-24). All of this took place in front of the jury. Furthermore, despite having been unable to interview Gadson before his testimony, Cummings asked Gadson if

he had been served a death notice. (R.p. 4024). Cummings also followed up on his cross-examination of Gadson during closing arguments, when he asked the jury to think about Gadson's potential bias and pointed out that Gadson's testimony against Petitioner enabled him to face only twenty years for lesser charges. (R.p. 4494). Therefore, Petitioner has failed to demonstrate that the PCR court misapplied Strickland by finding that trial counsel were not deficient.

As for the PCR court's prejudice analysis, again, the PCR court focused on the claim as it was presented by Petitioner in his PCR action. The PCR court found credible Gadson's testimony at the PCR evidentiary hearing that he believed he was avoiding a life sentence, not the death penalty, by entering a plea agreement. (See R.p. 9836). It follows that, had trial counsel attempted to argue that Gadson had avoided the death penalty by testifying under a plea agreement, such an argument would not have been successful in the PCR court's view because the credible evidence did not support that specific argument. Petitioner has not shown that the PCR court unreasonably applied Strickland in finding Petitioner failed to demonstrate prejudice.

For all of the above reasons, Petitioner has failed to meet his burden under 28 U.S.C. § 2254 regarding his claim that trial counsel were ineffective for failing to question Gadson about facing the death penalty.

Failure to Question Gadson About Firing the Murder Weapon

Gadson was asked on cross-examination about whether he had ever purchased a High Power .380, and he indicated that he had purchased one in 2000. (R.p. 4031). However, Gadson was never asked whether he had ever fired Petitioner's gun. In Petitioner's PCR action, he asserted that trial counsel were ineffective for failing to question Gadson about whether, weeks before the murder, he had fired the same gun that the State alleged was the murder weapon. (R.pp. 9451, 9474-75). In

reviewing the relevant facts, the PCR court referenced the following evidence, which supported the fact that Gadson had fired Petitioner's gun two weeks before 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 R. 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}.

(R.pp. 9844-45 (emphasis in original)). After briefly reviewing Cummings' testimony regarding that potential line of questioning, the PCR court found that trial counsel were not deficient and that Petitioner was not prejudiced by trial counsel's decision not to question Gadson about that event. (R.p. 9845).

Petitioner now asserts that the PCR court erred in finding that Cummings had a

strategic reason for not presenting that information. Petition, p. 23. Petitioner argues that “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.” Id. However, while Petitioner correctly points out that Cummings initially testified that he had no strategy or reason for not telling the jury about the fact that Gadson had shot the murder weapon (see R.pp. 7410-11, 7426-27), later in his testimony he explained why he did not introduce such evidence, testifying, “this lady said Marion gave Tawain the gun to shoot up in the air. I didn’t want that said[,]” (R.p. 7434). The PCR court apparently credited Cummings’ explanation (that he did not want evidence identifying the murder weapon as belonging to his client) as a strategy, despite Cummings’ earlier statement that he had no strategic reasons for not introducing such evidence. (See R.p. 9845 (citing R.pp. 7434-35)). Thus, the PCR court found that trial counsel were not deficient in deciding not to question Gadson about this incident (R.p. 9845), a decision based, in part, on credibility findings, which are entitled to great deference by this court in a habeas action. Wilson v. Ozmint, 352 F.3d 847, 858-860 (4th Cir. 2003); see also Marshall v. Lonberger, 459 U.S. 422, 434 (1983)[“28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court”].

While a district court may, in an appropriate case, reject the factual findings and credibility determinations of a state court, Miller-El v. Cockrell, 537 U.S. 322, 340 (2003); the Court may not substitute its own credibility determinations for those of the state court simply because it may disagree with the state court’s findings (assuming that were to be the case). See Cagle v. Branker, 520 F.3d 320, 324 (4th Cir. 2008) [“[F]or a federal habeas court to overturn a state court’s credibility judgments, the state court’s error must be stark and clear Indeed, ‘federal habeas

courts [have] no license to redetermine credibility issues of witnesses whose demeanor has been observed by the state trial court, but not by them.” (quoting Marshall, 459 U.S. at 434)]. Further, Petitioner has not shown that the state court’s findings were unreasonable under § 2254(d), nor has Petitioner overcome the presumption accorded the PCR court’s findings. See Pondexter v. Dretke, 346 F.3d 142, 147-49 (5th Cir. 2003) [finding that the district court “failed to afford the state court’s factual findings proper deference” by “rejecting the state court’s credibility determinations and substituting its own views of the credibility of witnesses”]; Evans, 220 F.3d at 312; see also Seymour v. Walker, 224 F.3d 542, 553 (6th Cir. 2000)[“Given the credibility assessment required to make such a determination and the deference due to state-court factual findings under AEDPA, we cannot say that the trial court’s finding was unreasonable under § 2254(d)(2).”].

Petitioner additionally asserts that “Cummings did not have all of the relevant information” because he “admitted that he ‘didn’t know it was the Edisto River gun.’” Petition, p. 23 (quoting R.p.7727); see also Response, p. 8-9. However, Cummings’ testimony shows that he believed that the gun Gadson fired was the murder weapon found in the Edisto River. (See R.p. 7435 [“[T]his is the gun from the river?” “In my humble opinion.”]). Again, Petitioner takes isolated statements from the record to support his contention that the PCR court’s order is unreasonable. However, when Cummings’ statement is considered with his other testimony, the record supports the PCR court’s deficiency analysis.

Turning to the prejudice inquiry, according to Petitioner,

The PCR court speculated that this information would have had “minimal benefit.” App. 9845. 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.

Petition, pp. 23-24. While Petitioner obviously disagrees with the PCR court’s prejudice conclusion, he has failed to show that the PCR court’s conclusion was unreasonable. In order to show prejudice, Petitioner is required to “show . . . a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694. The undersigned does not find that introducing evidence that Gadson had fired the gun weeks before the murder would have resulted in a reasonable probability of a different outcome. Therefore, Petitioner has failed to show that the PCR court’s prejudice determination was unreasonable.

Overwhelming Evidence of Guilt

Petitioner also asserts that the PCR court erred in relying on overwhelming evidence of guilt as part of its prejudice analysis in light of “all of trial counsel’s failures regarding Gadson” Petition, p. 25. However, as discussed above, Petitioner has failed to meet his burden of showing that the PCR court unreasonably found trial counsel not to be deficient in how they handled Gadson’s testimony. Furthermore, while Gadson’s testimony was undoubtedly important to the State’s case for guilt, as he was the only witness who testified to what occurred during the victim’s murder, there was other overwhelming evidence of Petitioner’s guilt apart from Gadson’s testimony,¹⁰ which included statements by Petitioner to multiple people, where he first threatened to

¹⁰ This evidence, as outlined by the South Carolina Supreme Court in Petitioner’s appeal, is set forth in detail above. See discussion, infra. The PCR court also outlined the following evidence as indicative of the State’s overwhelming case of guilt against Petitioner:

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

(continued...)

kill the victim and then later admitted to killing the victim. Furthermore, to the extent that Petitioner's argument relies upon cumulative error, that theory is not recognized by the Fourth Circuit. See Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998) [holding that ineffective assistance of counsel claims "must be reviewed individually, rather than collectively" and previously noting that "[h]aving just determined that none of counsel's actions could be considered constitutional error, . . . it would be odd, to say the least, to conclude those same actions, when considered collectively, deprived [the defendant] of a fair trial"]. For all of these reasons, the undersigned does not find that the PCR court erred in relying, in part, on overwhelming evidence of guilt in deciding that Petitioner was not prejudiced by any alleged errors by trial counsel regarding their handling of Gadson's cross-examination.

¹⁰(...continued)

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 that he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to [sic] 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 [sic] 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.

(R.pp. 9832-33).

Failure to Question Gadson About Inconsistencies Between His Statements and his Trial

Testimony

Petitioner asserts that trial counsel were ineffective for failing to cross-examine Gadson about prior inconsistent statements made during his polygraph examination. Petition, pp. 22-23. Initially, it should be noted that it is difficult to ascertain the specifics of this claim because Petitioner only refers to these inconsistent statements generally in his discussion, and merges his argument regarding this claim with his argument concerning trial counsel's failure to cross-examine Gadson about having previously shot Petitioner's gun. See Petition, pp. 22-25. The inconsistent statements Petitioner appears to reference in his argument concern whether Gadson "was involved in the shooting of Kandee Martin" and whether Petitioner played a part in the shooting. See R.pp. 7491-94. However, Respondents argue that this claim is procedurally barred, as it was not raised to and ruled upon by the PCR court, nor was it raised in Petitioner's Rule 59(e) motion to alter or amend the judgment. See Return, p. 48. The undersigned agrees.

Because Petitioner did not properly raise and preserve this issue in his state court proceedings, it is barred from further state collateral review; Whiteley v. Warden, Wyo. State Penitentiary, 401 U.S. 560, 562 n.3 (1971); Wicker v. State, 425 S.E.2d 25 (S.C. 1992); Ingram v. State of S.C., No. 97-7557, 1998 WL 726757 at *1 (4th Cir. Oct. 16, 1998); Josey v. Rushton, No. 00-547, 2001 WL 34085199 at * 2 (D.S.C. March 15, 2001); Aice v. State, 409 S.E.2d 392, 393 (S.C. 1991)[post-conviction relief]; see also White v. Burtt, No. 06-906, 2007 WL 709001 at *1 & *8 (D.S.C. Mar. 5, 2007)(citing Pruitt v. State, 423 S.E.2d 127, 127-28 (S.C. 1992)[issue must be raised to and ruled on by the PCR judge in order to be preserved for review]); cf. Cudd v. Ozmint, No. 08-2421, 2009 WL 3157305 at * 3 (D.S.C. Sept. 25, 2009)[Finding that where Petitioner attempted to

raise an issue in his PCR appeal, the issue was procedurally barred where the PCR court had not ruled on the issue and Petitioner's motion to alter or amend did not include any request for a ruling in regard to the issue]; Sullivan v. Padula, No. 11-2045, 2013 WL 876689 at * 6 (D.S.C. Mar. 8, 2013)[Argument not raised in PCR appeal is procedurally barred]; and as there are no current state remedies for Petitioner to pursue this particular claim, it is otherwise fully exhausted. Coleman v. Thompson, 501 U.S. 722, 735 (1991); Teague v. Lane, 489 U.S. 288, 297-98 (1989); George v. Angelone, 100 F.3d 353, 363 (4th Cir. 1996) ["A claim that has not been presented to the highest state court nevertheless may be treated as exhausted if it is clear that the claim would be procedurally defaulted under state law if the petitioner attempted to raise it at this juncture."], cert. denied, 117 S. Ct. 854 (1997); Aice, 409 S.E.2d at 393; Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997) ["To satisfy the exhaustion requirement, a habeas petitioner must fairly present his claim[s] to the state's highest court . . . the exhaustion requirement for claims not fairly presented to the state's highest court is technically met when exhaustion is unconditionally waived by the state ... or when a state procedural rule would bar consideration if the claim[s] [were] later presented to the state court."], cert. denied, 522 U.S. 833 (1997); Ingram, 1998 WL 726757 at *1.

Indeed, in his response to the motion for summary judgment, Petitioner does not deny that this particular claim is procedurally defaulted. See Response, p.5 n.5. Therefore, even though otherwise exhausted, because this claim was not *properly* pursued and exhausted by Petitioner in the state court, federal habeas review of the claim is now precluded absent a showing of cause and prejudice, or actual innocence. See Coleman, 501 U.S. at 750 ["In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate

cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage or justice.”]. Petitioner “requests a hearing to prove that PCR counsel were ineffective in failing to present this evidence prior to the appeal of the denial of PCR in order to prove cause and prejudice to overcome the procedural default pursuant to Martinez v. Ryan, 566 U.S. 1, 14 (2012).” See Response, p. 5, n. 5.

As discussed in further detail with respect to Grounds Eleven and Twelve of the instant petition, ineffective assistance of PCR counsel can serve as cause and prejudice to overcome the procedural default of an ineffective assistance of trial counsel claim. See Martinez, 566 U.S. at 14 [indicating that a petitioner must demonstrate both that collateral counsel was ineffective under Strickland and that the underlying claim “has some merit” in order to overcome the procedural default]. However, Petitioner’s bare assertion that his trial counsel was ineffective, coupled with his poor articulation of exactly what this underlying ineffective assistance of trial counsel claim consists of, is insufficient to meet his burden of demonstrating cause and prejudice due to PCR counsel error. Nor is Petitioner entitled to an evidentiary hearing on this issue. Schiro v. Landrigan, 550 U.S. 465, 474 (2007) [“In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition’s factual allegations, which, if true, would entitle the applicant to federal habeas relief.”]. Accordingly, this claim is procedurally barred from consideration by this Court, and should be dismissed.

II.

(Ground Two: Alleged Ineffective Assistance of Counsel for Failure to Investigate and Prepare for and Then Effectively Cross-Examine Travis Felder)

In Ground Two Petitioner contends that trial counsel were ineffective for failing to impeach Travis Felder regarding having purchased the gasoline used to burn the victim's car and regarding his original charges and inconsistent statements. In their return, Respondents argue that the PCR court did not err in denying Petitioner's PCR claims regarding how trial counsel cross-examined Felder.

Failure to Confront Felder with the Fact that He Purchased the Gasoline Used to Burn the Victim's Car

Based on the evidence presented at trial, Felder was not present when the victim was murdered. However, he was the only witness who testified as to how her body was placed in the trunk of her car and that the car was then burned. (R.pp. 4092-100). While testifying during the guilt phase, Felder did not tell the jury that he purchased the gasoline that was used to set the victim's car on fire. (See R.pp. 4092-94). In his PCR action, Petitioner argued trial counsel was ineffective for failing to question Felder about that fact during the guilt phase. (R.pp. 9494-96). However, the PCR court disagreed, finding as follows:

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.

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}. [FN2] 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 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.

[FN2] This testimony was also confirmed during Cummings' cross examination and is supported by the trial record. {PCR Tr. 1290-91, see R. 4911-26}.

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 Kande 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.

(R.pp. 9861-62).

Petitioner asserts that the PCR court erred in finding that trial counsel had a strategic reason for not impeaching Felder with the fact that he purchased the gasoline. Petition, p. 34. According to Petitioner, the trial record "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." Id. at 34 (citing R.p. 4622). The record confirms that Petitioner asked the trial court if the jury could be shown the videotape showing Felder purchasing gasoline at the gas station. (R.p. 4622). However, Cummings explained to the court that there was an issue with the chain of custody for the tape. (R.p.

4622). He further stated,

My client wanted to address Your Honor this morning about stating that he wants the tape shown and the tape shown in part of his mitigation case today. And I told him that he was going to stand up in front of Her Honor and say what he wanted to say. And I would not prohibit that to make sure the record shows 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.

(R.p. 4623). Subsequently, during the mitigation phase, and consistent with Petitioner's request, trial counsel presented Felder as a witness. (R.pp. 4911-28). The jury was also able to view the tape of Felder purchasing gas from the gas station. (R.pp. 4914-15). Cummings also cross-examined Felder as to why he had not told the jury that he purchased gas when he initially testified during the guilt phase. (R.pp. 4917-21). At the PCR evidentiary hearing, Cummings testified that he received the gas station tape in discovery, and while it was difficult to determine who was on the tape, Petitioner identified Felder as the person purchasing the gasoline. (R.p. 7013). Cummings stated that he knew Felder purchased the gasoline before he testified. (R.p. 7018). He also indicated that he and Petitioner disagreed about using the tape that showed Felder buying the gas. (R.pp. 7019-20). Cummings recalled what he had told Petitioner about the tape:

I told him because it is a double edged sword, it can cut both ways, God bless him, I said this is your life, strategy wise I was scared to death of that tape so the jury would see one of his friends bought the gasoline and of course Marion asked him to go buy the gasoline, was Travis' testimony.

(R.p. 7021). Thus, contrary to Petitioner's assertions, the record supports the PCR court's finding that Cummings had a strategic reason for keeping out Felder's testimony about buying the gas and the accompanying video, but he eventually proceeded against his own plans because, in Cummings' own words, "We're in the penalty phase, I'm trying to save his life, he wants that in there." (R.p. 7021). Accordingly, Petitioner has failed to show by clear and convincing evidence that the PCR

court's factual findings on this issue were unreasonable.

Petitioner nonetheless argues that trial counsel's strategy was unreasonable. Petition, pp. 34-35. In particular, Petitioner highlights part of Cummings' testimony where he indicated 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.'" Petition, pp. 34-35 (quoting R.p. 7006). Petitioner asserts that Cummings' thinking was incorrect, as his "claim that nothing tied Petitioner to the burning of the car ignores what Felder told the jury he saw at Nursery Road." Petition, p. 35. However, Petitioner's argument takes Cummings' statement out of context, as it is clear from reading the entirety of his answer that he believed that the tape corroborated Felder's story about what happened the night of the victim's murder. (R.p. 7006 ["I'm not going to play the tape to show that it might corroborate my poor kid being involved with this plan to murder, burn this little girl and the car."]). According to Petitioner, "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." Petition, p. 35. However, Petitioner's absence from the video is explained by Felder's testimony, as Felder testified that Petitioner asked him to get the gas and provided a gas can to him. (See R.pp. 4922-24). Moreover, other parts of Felder's testimony were corroborated by another witness. Valorna Smith testified that Felder went with her to her apartment after leaving the club, but that soon after they arrived, Petitioner showed up and asked Felder to come with him. (R.pp. 4116-18, 4120). According to Smith's testimony, Felder was gone for a short period of time and then returned. (R.pp. 4120-21).

Furthermore, the video showing Felder purchasing the gasoline, coupled with his explanation as to why he did so, fits a pattern demonstrated throughout Petitioner's trial, where

Petitioner involved others in his crimes while orchestrating their participation. (See R.pp. 3959-61 [testimony that Petitioner gave Gadson, Sr. money to purchase gloves for him]; 3992-4014 [testimony that Petitioner directed Gadson to get in the victim’s car before he told the victim where to drive and then shot her]; 4064-67 [testimony that Petitioner admitted to stealing the victim’s car and that he drove himself and others to the club where he attempted to sell the car]; 4092-101 [testimony that Petitioner told Felder to help him park a car and then directed Felder as to what to do once he parked the car]). Cummings’ testimony reveals that he elected not to introduce the videotape based, in part, on his recognition of the double-edged nature of that evidence. Petitioner has failed to show that the PCR court unreasonably found trial counsel’s strategic reason for not questioning Felder about the gas to be reasonable.

Finally, Petitioner argues that “Cummings ultimately admitted he had no strategic reason for not impeaching Felder[,]” and thus the PCR court erred in finding to the contrary. Petition, p. 35. In support of this argument, Petitioner cites to a portion of Cummings’ testimony from December 19, 2008. Petition, pp. 35-37. During that testimony, Cummings indicated that he did not know why he did not question Felder about purchasing the gas when Felder was initially called to testify during the guilt phase. (See R.pp. 7665-67). However, other answers that Cummings gave when questioned about Felder provided reasons for his failure to impeach him. For example, in his answer immediately following the portion of the transcript that Petitioner excerpts, Cummings gave the following explanation for not wanting to question Felder about certain facts:

I was not going to call Travis in my case in chief, obviously, or Gadson, so I wasn’t going to try to put some helping information in through Gadson that everybody thinks would help and in my opinion might hurt Marion because there he is buying the gas for who, who told him to do it, who told him why? And if you believed everybody else’s conversations throughout this case that he came back, got Felder out of an

apartment, had a party late in the morning, early in the morning, and then asked him for some help. I knew what the help was for. I didn't want that wonder what the help was for to come out. I did not.

(R.p. 7668).

In finding that Cummings' strategy was reasonable, the PCR court referenced other portions of Cummings' testimony where he provided additional reasoning for not questioning Felder about the gas purchase. (R.p. 9861 (citing R.p. 7006)). Petitioner asserts that the portion of testimony that he excerpts in his petition "conclusively shows that the PCR court's findings that Cummings strategically failed to impeach Felder is not based on any evidence." Petition, p. 37. However, Petitioner is incorrect. The record indicates that Cummings' testimony at the PCR evidentiary hearing spanned many days over the course of several months, and that Cummings testified on September 30, December 18, and December 19, 2008, which could explain the differences in Cummings' testimony when remembering his thinking from trial at some points and not at others. In any event, the PCR court credited the portions of Cummings' testimony where he gave an explanation as to why he did not impeach Felder, as opposed to where he stated he did not know what his reasoning was. See Devier v. Zant, 3 F.3d 1445, 1456 (11th Cir. 1993) ["Findings by the state court concerning historical facts and assessments of witness credibility are . . . entitled to the same presumption accorded findings of fact under 28 U.S.C. § 2254(d)."]; see also Grimsley v. Luttrell, No. 91-7225, 1993 WL 53150, at *2 (4th Cir. Mar. 2, 1993) ["A factfinder's choice between two plausible but contradictory versions of the facts is virtually never clear error. Factual findings premised on credibility determinations are entitled to even greater deference, given the trial court's special ability to observe witness demeanor." (internal citations omitted)]. Petitioner has failed to meet his burden of showing that the PCR court's determination was unreasonable. Smith,

528 F.2d at 809 [Petitioner bears the burden of proving his allegations when seeking a writ of habeas corpus].

Petitioner further argues that he was prejudiced by trial counsel’s failure to impeach Felder as to his purchase of the gasoline that was used to burn victim’s body and car. According to Petitioner, “[t]his failure to impeach Felder left his testimony unchallenged and gave the jury the impression that Petitioner essentially acted alone in Martin’s murder.” Petition, p. 37. However, as the PCR court recognized, there was no evidence connecting Felder’s omission regarding the gas purchase to the murder of victim. (R.p. 9862). Felder was only implicated as a participant in the arson. Furthermore, even to the extent that Felder’s credibility could have been damaged by his failure to disclose that he purchased the gas in his initial testimony, the PCR court found that “Felder’s testimony clearly indicated that Bowman directed the arson to cover his crime.” (R.p. 9862). Thus, as Cummings testified, the testimony was a double-edged sword. Petitioner has failed to show that the PCR court either made unreasonable factual findings or unreasonably applied federal law in finding that Petitioner failed to show prejudice.

Failure to Impeach Felder with His Original Charges

Petitioner next argues that the PCR court erred in denying and dismissing his claim that trial counsel were ineffective in failing to impeach Felder with the fact that he was originally charged as an accessory to murder and arson. The PCR court addressed this claim as follows:

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 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. [FN1] 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.

[FN1] Strickland is clear that the Court must "presume . . . that the judge or jury acted according to law", and [sic] "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 [sic] entitlement to the luck of a lawless decisionmaker." Id.

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 that 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.

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.

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.

(R.pp. 9858-61).

Petitioner disagrees with the PCR court’s conclusion that trial counsel was reasonable in not cross-examining Felder about his initial charges. According to Petitioner, “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[,]” but “[s]uch a notion cannot form the basis of reasonable trial strategy because it is not based on an accurate understanding of the rulings at trial.” Petition, p. 38. Initially, the undersigned notes that the PCR court did not find that Petitioner’s statements *would* come into evidence if trial counsel asked Felder about his initial charges, but that they *could* come into evidence. (R.p. 9860).

Essentially, the PCR court found that it was valid for trial counsel to be concerned that asking Felder about his initial charges might propel the State to introduce Petitioner’s statements to law enforcement, since Felder’s charges were apparently based on one of those statements. (See R.p. 8975, 9860). Cummings indicated that he tried to keep all of Petitioner’s statements out, which is confirmed by the trial court record. (R.pp. 7734-36; see also R.pp. 1356-58). While Petitioner admits that he gave a number of statements after his arrest, his arguments only seem to recognize the potential damage of such statements to the extent they inculcate him in any crimes, discounting the negative impact that the statements could have had based on the variability between those statements and, as the PCR court notes, how those statements “attempt to deflect blame by implicating others.”¹¹ (R.p. 9860). According to the record, Petitioner gave at least three oral statements and four written statements to law enforcement, and the trial court found all of those statements to be admissible except for the fourth written statement. (R.pp. 1334-58). Petitioner’s claims about what occurred the night of the victim’s death and who was responsible for her death varied from statement to statement. For example, in his first and second written statements, Petitioner implicated Terry Kelly as the killer. (See R.pp. 9214-19). In his third written statement, Petitioner implicated both Gadson and Kelly. (See R.pp. 9220-21). In his second oral statement, Petitioner indicated that Gadson shot the victim. (R.p. 482). In his final oral statement, Petitioner first stated that Charlie Fralick shot the victim, but when he was confronted with his prior statements and statements by his co-defendants, Petitioner indicated “that he and Mr. Gadson actually got together inside the jail and had decided to come up with the story about Charlie Fralick to try to take the heat off themselves.” (R.p. 516; see

¹¹ While being questioned at the PCR evidentiary hearing, Cummings demonstrated how questions about the basis of a warrant could become unflattering to Petitioner. (See R.p. 7645).

also 529-30). Petitioner then identified Gadson as the shooter. (R.p. 529-30).

Furthermore, to the extent Petitioner argues that trial counsel erroneously believed that Petitioner's fourth written statement, which the trial court had deemed involuntary, could be rendered admissible if trial counsel somehow opened the door to that information, there is some support for that argument in the record. Cummings was specifically questioned about his understanding of the admissibility of statements that had been deemed involuntary:

Q But your understanding, the door can be opened to use an involuntarily, coerced statement to impeach the defendant?

A I believe Judge Goodstein had a hard time suppressing that statement and the State argued, as you guys have read, every chance he got to open that back in because that would have been the nail in the coffin, and I was cautioned by the judge in chambers, I was cautioned don't give Mr. Bailey the chance to bring it back out, I followed it. So, that is what I did.

....

Q And I want to make sure I understand. Was it your understanding of evidence and law regarding the use of involuntary statements altered by the judge in her instructions to you or did you always believe that it could be used for impeachment?

A I thought once it was ruled inadmissible for violations of our protections both in federal and state constitutions that it would not be admissible. Then I was cautioned that it could be if I opened the door, and I said okay, and we talked about it. There ain't no way in heck I was going to open up the door for those statements.

(R.pp. 7696-97). Petitioner correctly notes that the belief that an involuntary statement could be rendered admissible is based on a mistake of law. See Petition, p. 39 (citing Mincey v. Arizona, 437 U.S. 385, 397-98 (1978); New Jersey v. Portash, 440 U.S. 450, 459 (1979)). However, the PCR court in its order of dismissal did not base its decision on that testimony in finding that trial counsel had articulated a valid strategy for not questioning Felder about his initial charges. (R.pp. 9858-61). Cf.

Harich v. Duggar, 844 F.2d 1464, 1470-71 (11th Cir. 1988) [concluding, without an evidentiary hearing on whether counsel’s strategy arose from his ignorance of the law, that trial counsel’s performance was competent because hypothetical competent counsel reasonably could have taken action at trial identical to actual trial counsel], overruling on separate grounds recognized in Davis v. Singletary, 119 F.3d 1471, 1481-82 (11th Cir. 1997). Thus, trial counsel’s mistaken belief is of no moment when considering the factual findings and application of law in the order of dismissal.

Petitioner argues that “the PCR court’s ruling is not based on any evidence produced at the PCR hearing.” Petition, p. 39. However, as set forth above, and as referenced in the order of dismissal, there was evidence presented at the PCR evidentiary hearing, particularly through Cummings’ testimony, to support the PCR court’s conclusion that trial counsel was not deficient for failing to cross-examine Felder about his initial charges. Petitioner references a number of facts regarding Felder’s plea deal, but he fails to recognize that, as the PCR court noted in its order of dismissal, Felder was no longer facing accessory to murder at the time of his plea deal, as he had been indicted for third degree arson and accessory after the fact to murder in June 2001. (R.p. 9858). Furthermore, the record indicates that the lessening of the charges had nothing to do with Felder’s cooperation, but was the result of further police investigation, since “[b]y 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.” (R.p. 9858). The record also reflects that Cummings did attempt to question Felder about the time he was potentially facing by entering a plea agreement, but Felder did not know what his sentence could be as a result of his cooperation. (R.pp. 4108-4109). This claim is without merit.

Failure to Impeach Felder with Inconsistent Statements

Petitioner also asserts that trial counsel should have impeached Felder with inconsistencies between the proffer letter and his polygraph statement and his testimony at trial. Petition, p. 40. Specifically, Petitioner notes that Felder’s proffer letter omitted the fact that he purchased the gas and that he saw Petitioner put the victim’s body in the trunk of her car. Petition, p. 32 (citing R.p. 9118). Additionally, in his polygraph statement, Felder denied having seen the victim’s body placed in her car. Id. (citing R.p. 8973).¹² While this claim was not dealt with directly by the PCR court, some of the other findings by the PCR court are applicable to whether trial counsel were ineffective. For instance, the PCR court found that the proffer letter could not be used for impeachment purposes, as “[i]t 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.” (R.p. 9856). Furthermore, the PCR court found that “[a]ny minor differences in the proffer letter and the trial testimony do not overcome the overwhelming evidence of Applicant’s guilt presented in this case” (R.p. 9856). As for Felder’s polygraph examination denial of having seen the victim’s body put into the car, Cummings admitted that he failed to impeach Felder with that prior inconsistent statement, and that he had no strategic reason for that failure. (R.pp. 7038-48). However, that testimony does not necessarily render trial counsel’s performance constitutionally deficient.¹³ Moreover, had Cummings questioned Felder regarding that statement as a prior

¹²However, the polygraph results also indicated deception as to that issue. Id. (citing R.p. 8973).

¹³ The Eleventh Circuit described the applicable standard as follows:

We look at the acts or omissions of counsel that the petitioner alleges are
(continued...)

inconsistent statement, the State could have asked to introduce evidence that Felder’s response to that question indicated deception. See State v. Council, 515 S.E.2d 508, 519-520 (S.C. 1999) [“This Court has consistently held the results of polygraph examinations are generally not admissible because the reliability of the tests is questionable. . . . However, in light of the adoption of the SCRE, admissibility of this type of scientific evidence should be analyzed under Rules 702 and 403, SCRE and the Jones factors.” (internal citations omitted)]. If the State had been able to introduce that the polygraph showed deception when he denied having seen the victim’s body being put in her trunk, that could have been detrimental to Petitioner’s case. In any event, Petitioner has failed to show that, had trial counsel attempted to impeach Felder with the inconsistent statements from his proffer letter or from his polygraph examination, there is a reasonable probability that the result of the proceeding would have been different. See Strickland, 466 U.S. at 694 [“Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect.”]. Therefore, this claim is without merit.

¹³(...continued)

unreasonable and ask whether some reasonable lawyer could have conducted the trial in that manner. Because the standard is an objective one, that trial counsel (at a post-conviction evidentiary hearing) admits that his performance was deficient matters little. See Tarver v. Hopper, 169 F.3d 710, 716 (11th Cir. 1999) (noting that “admissions of deficient performance are not significant”); see also Atkins v. Singletary, 965 F.2d 952, 960 (11th Cir. 1992) (“[I]neffectiveness is a question which we must decide, [so] admissions of deficient performance by attorneys are not decisive.”).

Chandler v. United States, 218 F.3d 1305, 1315 n.16 (11th Cir. 2000).



III.

(Ground Three: Alleged Ineffective Assistance of Counsel for Failure to Investigate and Prepare for and Then Effectively Cross-Examine Hiram Johnson)

In Ground Three, Petitioner alleges that trial counsel was ineffective for failing to cross-examine Hiram Johnson on the fact that he omitted from his written statement to the police the fact that Petitioner had confessed to killing the victim. Petitioner further claims that the PCR court's denial of that same claim is based on unreasonable factual findings and is contrary to, or an unreasonable application of, Strickland v. Washington. Petition, p. 45. Respondents argue that the PCR court was not unreasonable in denying the ineffective assistance of counsel claim relating to trial counsel's handling of Johnson's cross-examination. The undersigned agrees.

During his testimony at Petitioner's trial, Johnson testified to being with Petitioner on February 16, 2001, at Hank Koger's house. (R.pp. 4057-58). While there, Petitioner confronted Gadson about moving a gun from a barrel where Petitioner had hidden it, but Johnson intervened and said that he had moved Petitioner's gun to an apartment. (R.pp. 4058-60). Johnson testified that he then saw Petitioner put the gun in his pants after retrieving it. (R.p. 4060). Johnson testified that he saw Petitioner again later that evening when he went with Petitioner to the Horizon EZ Store, where Petitioner asked James Gadson, Sr. to buy four pairs of gloves. (R.pp. 4060-63). Petitioner, Johnson, Taiwan Gadson, and Darian Williams then wore the gloves when they went to the Allen Murray Club in the victim's car. (R.pp. 4064-65). According to Johnson, Petitioner directed everyone to wear the gloves and told them that he had stolen the car. (R.p. 4065). Johnson testified that Petitioner attempted to sell the car at the club. (R.pp. 4066-67). The four eventually left the club in the victim's car, and Petitioner then stated, "'I killed Kandee, heh, heh, heh.'" (R.p. 4068). Johnson testified that

Petitioner had his gun in his lap on the way back from the club. (R.p. 4068).

Johnson gave multiple statements to the police. He first spoke with them on February 22, 2001. (R.p. 6657). At the PCR evidentiary hearing, Alvin Coker with the Dorchester County Sheriff's Office testified that Johnson provided the following information in that first statement:

According to my notes he said he had gone to the club with Marion, Tawain and Darien and that he had seen Marion with a gun in his lap while Marion was driving to the club and that Marion told, had told Trina West about killing Kandee Martin and he was not clear on the time frame as to when Marion told Trina West or how he knew Marion told her.

(R.p. 6659). On that same day, Johnson turned over a pair of brown cotton gloves to police. (R.pp. 6663-64). On April 5, 2001, Johnson provided a one-page written statement to police. (R.pp. 6659-60, 9053-54). That one-page statement includes details about the purchase of the gloves and about going to the Allen Murray Club in the victim's car. (R.p. 9054). In his written statement, Johnson also indicated that Petitioner confessed to having stolen the car, but he did not indicate that Petitioner confessed to killing the victim. (R.p. 9054).

The PCR court found that Petitioner failed to meet either prong of Strickland with regard to his claim that trial counsel was ineffective for failing to question Johnson about omitting Petitioner's murder confession, finding:

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 nor 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 Kandee 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 overwhelming evidence of guilt, as detailed before. This claim for relief is denied.

(R.pp. 9869-70).

Petitioner fails to identify how the PCR court made unreasonable factual findings based on the evidence. Rather, he disagrees with the Court's conclusion that it was a valid strategic decision for Cummings to decide not to impeach Johnson in order to avoid Johnson mentioning Petitioner's confession again. See Petition, pp. 45-46. Petitioner argues, "It was impossible for the jury to overlook such a damaging piece of evidence as a confession." Petition, p. 45; see also Response, pp. 11-12. He further asserts, "Given the damaging nature of this evidence, it was unreasonable not to cross-examine Johnson on the serious omission in his written statement." Petition, p. 45. Notably, neither Cummings nor the PCR court indicated that the jury might *overlook* the confession. Cummings characterized Petitioner's statement to Johnson as "the worst evidence in the world" (R.p. 7117). And, when asked if Johnson had referenced that statement before his trial testimony, Cummings stated, "No, but I darned sure didn't want him to ask him twice 'Did you run a redlight' on direct and then cross him and get him to say he ran a redlight again." (R.p. 7117). Petitioner argues that trial counsel's strategy did not make sense. Response, p. 11. However, trial counsel is not deficient for failing to cross-examine a witness about an issue that counsel does not want to emphasize. See Bryant v. Brown, 873 F.3d 988, 996 (7th Cir. 2017) ["A 'decision not to

impeach a particular witness is normally considered a strategic choice within the discretion of counsel.”]; Cancer v. Ercole, Civ. No. 9:07-CV-808 (TJM/RFT), 2010 WL 1729103 at *5 (N.D.N.Y. Feb. 5, 2010) [finding counsel’s decision not to impeach with a prior inconsistent statement was reasonable and that counsel had otherwise vigorously cross-examined the witness and challenged the witness’s credibility and, thus, was not ineffective] Report and Recommendation adopted, 2010 WL 1729344 (N.D.N.Y. Apr. 29, 2010); Dunham v. Travis, 313 F.3d 724, 732 (2d Cir. 2002) [agreeing with a state court that counsel’s strategic decision not to impeach with earlier statements was reasonable, particularly where counsel did not want to bring certain evidence to the factfinder’s attention]. The undersigned cannot find that the PCR court unreasonably applied federal law in finding that Cummings articulated a valid, strategic reason for not cross-examining Johnson on Petitioner’s statement where he clearly did not want that statement further emphasized.

Petitioner also argues that “it confounds belief that such an important piece of evidence was omitted.” Petition, p. 46. It is unclear why Johnson omitted the confession from his written statement because he remembered very little about his discussions with police by the time of the PCR evidentiary hearing. (See R.pp. 6252-56, 6265-69). However, as the PCR court noted, the impeachment value of Johnson’s omission was limited, particularly since he had indicated in his first statement to police that he overheard Petitioner confess to the murder. (See R.pp. 9869-70). Johnson also indicated in his PCR testimony that he believed Petitioner was kidding when he confessed, both because Johnson did not know that the victim was dead and because Petitioner always “joke[d] around.” (R.pp. 6294-95, 6298). Johnson also agreed that during his deposition, he had made the following observations about Petitioner generally— that “there is no telling what Marion Bowman would do” and that “he had a pretty rough reputation and nobody wanted to cross him” (R.p.

6297). Petitioner has failed to demonstrate that the PCR court unreasonably applied Strickland in finding that Petitioner failed to show either deficiency or prejudice with regard to the ineffective assistance of counsel claim raised in Ground Three.

Finally, Petitioner disagrees with the PCR court's reliance on the overwhelming evidence of guilt against Petitioner based on his contention that trial counsel erred in cross-examining Gadson, Felder, and Johnson. Response, p. 12. However, as already discussed herein, the PCR court did not find that trial counsel was deficient in handling the cross-examination of any of those three witnesses, and Petitioner has failed to show that the PCR court's order was unreasonable as to those issues. Since Petitioner has failed to show error, he cannot rely upon cumulative error for the prejudice analysis. See Moore v. Reynolds, 153 F.3d 1086, 1113 (10th Cir. 1998) ["Cumulative error analysis applies where there are two or more actual errors; it does not apply to the cumulative effect of non-errors."]. Furthermore, the undersigned notes that multiple state courts have commented on the overwhelming evidence of guilt against the Petitioner, which not only includes the direct evidence of his guilt provided through the testimony of Gadson, Felder, and Johnson, but which also includes indirect evidence provided through the testimony of other witnesses. (See R.pp. 9832-33); see also Bowman, 809 S.E.2d at 246 n.8 ["Evidence pointing to Petitioner as the murderer was overwhelming, including eyewitness testimony and other evidence linking Petitioner to the murder and arson."]. This claim is without merit.

IV.

(Ground Four: Alleged Brady Violations)

In Ground Four, Petitioner alleges three separate Brady violations by the State, all of which were raised in his PCR action, and all of which were denied by the PCR court. The

undersigned addresses each of the alleged Brady violations, in turn, below.

The United States Supreme Court has provided the following guidance on what constitutes a Brady violation:

A Brady violation occurs when the government fails to disclose evidence materially favorable to the accused. See [Brady v. Maryland,] 373 U.S. [83,] 87 [(1963)]. This Court has held that the Brady duty extends to impeachment evidence as well as exculpatory evidence, United States v. Bagley, 473 U.S. 667, 676 (1985), and Brady suppression occurs when the government fails to turn over even evidence that is “known only to police investigators and not to the prosecutor,” Kyles [v. Whitley], 514 U.S. [419,] 438 [(1995)]. See id. at 437 (“[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”). “Such 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,’” Strickler v. Greene, 527 U.S. 263, 280 (1999) (quoting Bagley, supra at 682 (opinion of Blackmun, J.)), although a “showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal,” Kyles, 514 U.S. at 434. The reversal of a conviction is required upon 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.” Id. at 435.

Youngblood v. West Virginia, 547 U.S. 867, 869-70 (2006). Thus, there are three components to a Brady violation—(1) evidence must be favorable; (2) evidence must have been suppressed by the government; and (3) evidence must be material.

Failure to Disclose the Sam Memo

The so-called “Sam Memo” is a memorandum that was prepared by Sam Richardson, an investigator who worked for the Solicitor’s Office, in which Richardson detailed an interview he conducted with Ricky Davis. (See R.pp. 9122, 9871-72). Based on the evidence presented at the PCR evidentiary hearing, Davis had written a note indicating that Gadson had told him “that he was the one that shot [th]e Girl and gave Bowman back the gun” (R.p. 8966). Davis’s handwritten note further referenced that Petitioner’s family had gotten caught with the gun and that the police had

indicated that Gadson could blame Petitioner. (See R.p. 8966). Based on the Sam Memo, when Richardson interviewed Davis, Davis provided greater detail regarding the context in which Gadson had confessed to the shooting. (R.p. 9122). Davis also told Richardson about a conversation he had with Petitioner, in which Davis told Petitioner what Gadson had said, and Petitioner encouraged Gadson to “write it down” (Id.) Davis further reported to Richardson that he and Petitioner also discussed the events surrounding the victim’s murder, but Petitioner never admitted to shooting anyone. (Id.) Davis told Richardson that he spoke with Gadson again after his conversation with Petitioner, and Gadson then said that Petitioner shot the victim. (Id.)

At the PCR evidentiary hearing, Davis testified that he could not remember if Gadson told him that he shot the victim. (See R.pp. 5992-94). Davis testified that he was “pretty sure” that Gadson had not told him the information memorialized in the note, and he further confirmed that he and Gadson had not really spoken about the case when Davis wrote the note. (See R.pp. 6002, 6005-06). Rather, Davis testified that Petitioner told him the information in the handwritten note. (See R.pp. 5994-95, 6004-05).

Cummings testified at the PCR evidentiary hearing that trial counsel had been provided a copy of Davis’s handwritten note, but they did not have a copy of the Sam Memo. (R.pp. 7058-65). According to Cummings, trial counsel sent an investigator to interview Davis and, at that time, Davis recanted the statement. (R.pp. 7066-67). Nevertheless, Cummings subpoenaed Davis during Petitioner’s trial, thus making him available even though “he told [the defense team] he was not going to help us in any way.” (R.p. 7068). Cummings testified that his investigator told him that if he put Davis on the stand “he would say that Marion told him to do this, Marion had it created.” (R.p. 7071). Cummings testified that he ultimately did not call Davis as a witness, and he agreed with

the statement that if Davis testified that he did not know anything about the murder and that Petitioner had told him to write the note, that would show that Petitioner “was trying to get somebody to lie for him and say somebody else was the shooter . . . kind of make him look devious and ultimately confirm his guilt . . .” (R.p. 7626). Cummings testified that he would have liked to have had the Sam Memo prior to trial, and it might have led him or his investigators to do more investigation, but he also agreed that if he had the Sam Memo in addition to the other information he already had about Davis—the handwritten note and the defense investigator’s interview with Davis—he “would still be in the same boat . . .” (R.pp. 7631-33).

The PCR court found that the State did not violate Brady by not disclosing the Sam Memo for multiple reasons. First, the PCR court concluded that Petitioner failed to show that the State had suppressed favorable evidence. (R.pp. 9872-73). As part of that conclusion, the PCR court noted that “‘evidence’ that is inadmissible is not evidence at all, and thus cannot affect the outcome of trial.” (R.p. 9872 (citing Wood v. Bartholomew, 516 U.S. 1, 6 (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])). Accordingly, the PCR court concluded that “[a]t best, the notes could be considered evidence that could be used to impeach Ricky Davis if he testified at trial.” (R.p. 9872). The PCR court then noted that Davis would not have been a good witness based on the defense team’s investigation, and that Cummings testified that he would have been in the “same boat” even with the Sam Memo. (R.pp. 9872-73). The PCR court further concluded that “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 . . .” (R.p. 9873). As such, the PCR court ultimately

found “there was no suppression of favorable evidence.” (R.p. 9873).

Second, the PCR court found that the Sam Memo was not material, based on the following analysis:

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 above.

(R.p. 9874).

Petitioner contends that the PCR court erred in finding that the Sam Memo was not favorable, arguing that it was relevant to guilt or innocence as it recounts the confession of a co-defendant, and that it constitutes impeachment evidence as “it directly contradict[s] the only eyewitness to the murder.” *Id.* at 51. As noted, the PCR court handled the issues of whether the Sam Memo was favorable and whether it was suppressed together. While the PCR court did not explicitly find that the Sam Memo was not favorable, to the extent that the order of dismissal seems to fail to recognize how the Sam Memo was favorable, the undersigned agrees with Petitioner that such a finding would be incorrect. Furthermore, it does appear that the analysis used by the PCR court conflates the standards for favorability and materiality. (See R.p. 9872). According to the United States Supreme Court, both “[i]mpeachment evidence . . . [and] exculpatory evidence . . . fall[] within the Brady rule.” *United States v. Bagley*, 473 U.S. 667, 676 (1985). The evidence in the Sam Memo is exculpatory as it relates to an alleged confession by Gadson that he shot the victim. However, the order of dismissal discounts the exculpatory nature of the Sam Memo since the memorandum itself

presumably would be inadmissible as evidence. But the issue of the admissibility of the evidence, or how it could be used by the defense, is one of materiality, not favorability. See Wood, 516 U.S. at 6 [discussing inadmissible evidence as part of the determination of whether evidence was material under Brady]. The Sam Memo could also arguably be the basis for a question to Gadson on cross-examination regarding whether he had ever confessed to Davis that he shot the victim. Thus, it could serve as the basis for impeachment of one of the State’s witnesses.

Rather than separately address whether the Sam Memo was favorable, the order of dismissal finds “there was no suppression of favorable evidence” based, in part, on the fact that the information in the Sam Memo was essentially already provided to the defense team by way of Davis’s handwritten note. (R.p. 9873). It was not unreasonable for the PCR court to find that favorable evidence was not suppressed since the defense team was already aware of Gadson’s alleged confession to Davis by way of Davis’s handwritten note. Cf. Owens v. Guida, 549 U.S. 399, 417 (6th Cir. 2008) [“Brady does not apply when the defendant ‘knew or should have known the essential facts permitting him to take advantage of any exculpatory information.’” (quoting Coe v. Bell, 161 F.3d 320, 344 (6th Cir. 1998))]. Thus, trial counsel could have asked Gadson whether he told Davis that he shot the victim even without the Sam Memo, as trial counsel already possessed that information by way of Davis’ handwritten note.

As to the PCR court’s determination that the Sam Memo was not material, Petitioner asserts that that finding was erroneous because “[t]he 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.” Id. at 52. However, the PCR court never found that Cummings would not have called Davis or would not have changed his strategy—instead, the PCR court focused on

Cummings’ testimony, noting that Cummings *did not testify* that he would have called Davis as a witness had he had the Sam Memo, and that he would have been “in the same boat” if he had had the Sam Memo in addition to the other information he already knew about Davis from his own investigation. (See R.p. 9873 n.6). Therefore, the PCR court’s order is consistent with Cummings’ testimony at the PCR evidentiary hearing.

In any event, having heard Davis’ testimony, the PCR court found that the Sam Memo was not material—that is, it did not undermine confidence in the outcome of the trial. Strickler, 52 U.S. at 280. Davis’ testimony was not helpful to Petitioner. Rather than testifying that Gadson confessed to shooting the victim, Davis instead testified that Petitioner gave him the information that he recorded in his handwritten note and that he wrote the note at Petitioner’s request. (R.pp. 5992-95). In addition, no one even asked Davis at the PCR evidentiary hearing whether he had told Richardson the information in the Sam Memo. (See R.pp. 5978-6020). When Gadson testified at the PCR evidentiary hearing, he denied ever having told Davis that he killed anyone. (R.pp. 5854-55 [“I know him as Crab. I don’t know him by his real name. . . . I remember seeing his face but I ain’t never told him I killed nobody.”]). Petitioner gives great weight to Cummings’ testimony that he would have called Richardson as a witness if he had been provided the Sam Memo. See Petition, p. 52 (quoting R.p. 7069); Response, p. 13. However, Richardson was not called as a witness at the PCR evidentiary hearing. Thus, it is unclear what his testimony would have been. Moreover, even assuming that Richardson’s testimony would have been consistent with his memo, had counsel attempted to question Richardson about the information included in the Sam Memo, presumably that would have been objected to as hearsay, absent some denial by Davis at trial that he told Richardson that information. See Rule 801(c) & (d)(1), SCRE [defining hearsay and identifying a prior

inconsistent statement by a witness as “not hearsay”]. Thus, it seems that in order for Richardson to have testified to the information in his memo, trial counsel would have had to present Davis as a witness, and Davis would have had to deny telling Sam the information recorded in the memo. As already discussed above, Davis’ testimony was particularly detrimental to Petitioner’s case because it not only did not support that Gadson was the shooter, but instead implicated Petitioner in trying to create evidence to shift blame from himself. Therefore, based on the information provided to the PCR court, it was not unreasonable for the court to conclude that the Sam Memo was not material under the standard set forth by Brady. Strickler, 52 U.S. at 280 [Evidence is “material” if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the trial would have been different].

Failure to Disclose Gadson’s Mental Health Report

Petitioner also claims that the State committed a Brady violation by failing to provide the defense team with a copy of a report detailing a psychiatric evaluation of Gadson that was prepared pursuant to a court order. The PCR court found that there was no Brady violation for a number of reasons—(1) trial counsel could have obtained the psychiatric report through other means, (2) the psychiatric report was not favorable, and (3) the psychiatric report was not material. (R.pp. 9831-32). Petitioner disagrees with all of the reasons provided by the PCR court. Petition, pp. 53-54.

In a footnote, Petitioner asserts that the PCR court incorrectly stated the law when it found that he failed to meet his burden under Brady because trial counsel could have obtained the psychiatric report by other means. Petitioner relies upon the following excerpt from Kyles v. Whitley:

[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.

514 U.S. at 437-38. In his response to the motion for summary judgment, Petitioner asserts that “[c]ontrary to the PCR court’s order, the Supreme Court has never embraced a rule that the prosecution has no obligation to produce evidence otherwise available to defense counsel.” Response, p. 15. However, the applicable standard is not whether the Supreme Court has *embraced* the reasoning employed by a state court, but whether the decision by a state court “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d). While Petitioner believes it is contrary to Supreme Court precedent to reason that Brady is not violated where defense counsel could have obtained information by other means, Petitioner had not identified a case that specifically addresses that issue. Cf. United States v. Agurs, 427 U.S. 97, 109 n. 16 (1976) [footnoting a concurring opinion by Justice Fortas that states “This is not to say that convictions ought to be reversed on the ground that information merely repetitious, cumulative, or embellishing of facts otherwise known to the defense or presented to the court, or without importance to the defense for purposes of the preparation of the case or for trial was not disclosed to defense counsel” (quoting Giles v. Maryland, 386 U.S. 66, 98 (1967) (J. Fortas, concurring))].

Indeed, other circuits have recognized that evidence is not “suppressed” where it is otherwise available to a defendant, with the PCR court specifically relying upon one such case from the Fourth Circuit. See (R.pp. 9830-31 (quoting United States v. Kelly, 35 F.3d 929, 937 (4th Cir. 1994) [“[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.” (internal quotations

omitted)))). While Petitioner faults the PCR court for relying on a case decided prior to the Supreme Court’s 1995 opinion in Kyles v. Whitley; see Response, p. 15; the Fourth Circuit as well as other federal courts of appeals have applied the same reasoning post-Kyles. See United States v. Graham, 484 F.3d 413, 417 (6th Cir. 2007) [“Brady is concerned only with cases in which the government possesses information which the defendant does not. Further, there is no Brady violation if the defendant knew or should have known the essential facts permitting him to take advantage of the information in question, or if the information was available to him from another source.” (quoting Carter v. Bell, 218 F.3d 581, 601 (6th Cir. 2000))]; Ienco v. Angarone, 429 F.3d 680, 683 (7th Cir. 2005) [“Evidence is suppressed for Brady purposes when (1) the prosecution failed to disclose the evidence in time for the defendant to make use of it, and (2) the evidence was not otherwise available to the defendant through the exercise of reasonable diligence.” (citing United States v. O’Hara, 301 F.3d 563, 569 (7th Cir. 2002))]; Fullwood v. Lee, 290 F.3d 663, 686 (4th Cir. 2002) [“The Brady rule ‘does not compel the disclosure of evidence available to the defendant from other sources, including diligent investigation by the defense.’ Thus, ‘[n]ondisclosure . . . does not denote that no exculpatory evidence exists, but that the government possesses no exculpatory evidence that would be unavailable to a reasonably diligent defendant.’ (internal citations omitted)]. Petitioner has failed to establish that the PCR court’s conclusion is either contrary to or an unreasonable application of the law as set forth by the Supreme Court as to whether the psychiatric report was suppressed.

Petitioner additionally disagrees with the PCR court’s conclusion that the information in the psychiatric report was not favorable. See Response, p. 16. The PCR court rejected Petitioner’s Brady claim, in part, based on a finding that Petitioner failed to show that the psychiatric report was impeaching or favorable since “the report [did] not call into question Gadson’s short and long term

memory[,]” and “the report [did] not indicate that Gadson suffered from any mental illness other than cannabis dependence.” (R.pp. 9831-32). Ultimately, the PCR court concluded that “[s]ince 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.” (R.p. 9832). However, as noted, Gadson was diagnosed as having Cannabis Dependence in the psychiatric report. (See R.p. 9051). Additionally, there was information in the psychiatric report that Gadson reported “that he hears a voice and ‘a little beeping noise.’” (Id.) The order of dismissal does not acknowledge the impeachment value of such information, choosing instead to focus on whether there was information in the psychiatric report regarding Gadson’s ability to recall the murder. (See R.pp. 9831-32). However, the Supreme Court has not placed such strict limits on what can be considered impeachment evidence. Cf. Giglio v. United States, 405 U.S. 150, 154 (1972) [“When the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility falls within this general rule.” (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959))]. Indeed, later in the order of dismissal, the PCR court seems to recognize that there was at least some impeachment value to the psychiatric report. (R.p. 9834 [comparing “the *limited* impeachment value of Gadson’s psychiatric report [to] the overall strength of the case against Applicant”]) (emphasis added). Again, the order of dismissal seems to conflate the favorability and materiality requirements of Brady. Accordingly, the undersigned agrees with the Petitioner that the PCR court incorrectly found that the psychiatric report was not favorable or impeaching. Even so, as the evidence was not suppressed (see, discussion, supra), this finding does not afford Petitioner any relief.

Finally, Petitioner argues that the PCR court erroneously found that the information

in the psychiatric report was not material. The order of dismissal notes that the “report does not indicate that Gadson suffered any memory issues as a result of his seizures.” (R.p. 9832). Furthermore, after comparing the overwhelming evidence of Petitioner’s guilt to the “limited impeachment value” of the psychiatric report, the PCR court concluded that Petitioner “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.” (R.p. 9834). The undersigned cannot say that the PCR court’s decision is based on unreasonable factual findings or is contrary to or an unreasonable application of federal law. Evans, 220 F.3d at 311-312 [“We . . . accord state court factual findings a presumption of correctness that can be rebutted only by clear and convincing evidence.”]. Petitioner asserts that “[h]ad the jury heard that [Gadson] had memory problems, blackouts, heard voices and beeping noises, it would have undermined Gadson’s credibility.” Petition, p. 54. However, while a cross-examination that explored Gadson’s statements during his psychiatric evaluation may have impacted the jury’s view on his credibility,¹⁴ it was not unreasonable for the PCR court to describe the impeachment value of the psychiatric report as “limited.” As the PCR court noted, there was no evidence that Gadson had used marijuana the day of the murder or that he had blacked out or had a seizure that day. (See R.p. 9832). There were also no issues with Gadson’s long- or short-term memory according to the psychiatric report. (R.p. 9051). Moreover, there is no support for Petitioner’s claim that the psychiatric report “would have supported a defense theory that Gadson was the murderer.” See Petition, p. 54. Petitioner has therefore failed to show that the PCR court unreasonably found that there was no reasonable probability that the result of the

¹⁴ As Gadson was not asked about the information in the psychiatric report during his PCR testimony, the undersigned can only hypothesize that he would have agreed with the information therein.

proceeding would have been different had Petitioner’s counsel had the information in Gadson’s psychiatric report.

In sum, while the PCR court incorrectly found the psychiatric report as having no favorable or impeaching information, the other findings by the PCR court were not based on unreasonable factual findings and were not contrary to or based on an unreasonable application of federal law. Those other findings—that the report was not suppressed because it was available to the defense and that the report was not material—bar relief on this Brady claim. Hence, Petitioner has failed to show that he is entitled to relief.

Failure to Disclose Johnson’s Pending Charges

Petitioner also claims that the State committed a Brady violation when it failed to disclose Hiram Johnson’s charges of receiving stolen goods less than \$1000, burglary – second degree, and grand larceny, which were all pending at the time of Petitioner’s trial. Petition, pp. 54-57. The PCR court rejected that argument, finding that Petitioner failed to establish materiality; first, due to the overwhelming evidence of Petitioner’s guilt and, second, due to the limited value of the impeachment evidence. (See R.pp. 9864-65). Petitioner argues that the United States Supreme Court has disapproved the approach used by the PCR court. Petition, p. 56. However, the case cited by Petitioner, Holmes v. South Carolina, 547 U.S. 319 (2006), does not concern a Brady violation. Instead, in that case the Supreme Court considered “whether a criminal defendant’s federal constitutional rights are violated by an evidence rule under which the defendant may not introduce proof of third-party guilt if the prosecution had introduced evidence that, if believed, strongly supports a guilty verdict.” 547 U.S. at 321. Petitioner fails to articulate how the PCR court’s order is contrary to Holmes, and it is not otherwise apparent as the Supreme Court does not discuss either

Brady or Strickland in that opinion. While, in Holmes, the Court stated “that, by evaluating the strength of only one party’s evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt[,]” 547 U.S. at 331, it does not appear that the PCR court took such an approach in this case. Rather, the PCR court specifically found that “[i]n 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.” (R.p. 9865). Thus, the PCR court compared the strength of the State’s case with the limited value of the impeachment information in determining materiality. As such, and contrary to Petitioner’s argument, the PCR court’s approach appears to comport with the Supreme Court’s guidance on how courts should determine materiality. See United States v. Bagley, 473 U.S. at 682 [“We find the Strickland formulation of the Agurs test for materiality sufficiently flexible to cover the ‘no request,’ ‘general request,’ and ‘specific request’ cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.”].

Petitioner disagrees with the PCR court’s assessment of the impeachment evidence as having limited value and highlights the Solicitor’s closing arguments where he mentioned that Johnson lacked any reason for bias. See Petition, p. 56 (quoting R.p. 4474 [“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.”]). However, Petitioner has failed to show by clear and convincing evidence that the PCR court’s determination was based on unreasonable factual

findings, particularly in light of the extensive and varied evidence of guilt, which was provided through multiple witnesses. See supra, n. 10.

Cumulative Effect of Failures to Disclose

Finally, Petitioner asserts that the PCR court should have considered the materiality of the suppressed evidence collectively in accordance with the Supreme Court's jurisprudence on Brady violations. However, during the PCR action Petitioner did not object to the PCR court's findings based on a failure to consider the alleged Brady violations cumulatively. (See R.pp. 9951-68). Although Respondents have not addressed this argument or whether it is procedurally barred in their Return (see Return, pp. 80-90), based on the PCR court's findings, the Sam Memo and the psychiatric report were not suppressed favorable evidence, even if the information contained within those documents was material. With the PCR court determining that other necessary elements of a Brady violation were not met for both of those documents, it was not necessary for the PCR court to consider the materiality of such evidence along with the details about Johnson's criminal charges. Cf. Fisher, 163 F.3d at 852 ["Having just determined that none of counsel's actions could be considered constitutional error, . . . it would be odd, to say the least, to say that those same actions, when considered collectively, deprived [the defendant] of a fair trial." (internal citations omitted)].

Furthermore, the undersigned would note that Petitioner has overstated the effect of the evidence. For example, there is no support in the record for Petitioner's allegation that "[t]he state suppressed the fact that its star witness had confessed to a police investigator." Petition, p. 57. Rather, Ricky Davis, who did not testify for the State, and who trial counsel elected not to call because his testimony was ultimately detrimental to Petitioner, told a police investigator that Gadson had confessed to him while the two men were incarcerated. As discussed above, neither Gadson's

nor Davis' testimony at the PCR evidentiary supported the fact that such a confession had ever occurred. Therefore, even when considered collectively, the effect of the evidence that could have been presented is not enough that it creates a reasonable probability that the outcome of the trial would have been different.

For all of the foregoing reasons, Petitioner has failed to show that he is entitled to habeas relief as to any of the various Brady violation allegations he raises in his petition. Accordingly, he is not entitled to relief on his Ground Four.

V.

(Ground Five: Alleged Conflict of Interest)

In Ground Five, Petitioner asserts that he received ineffective assistance of counsel because trial counsel Hardee-Thomas represented Petitioner even though she had a conflict of interest. Specifically, Petitioner believes that Hardee-Thomas represented both him and Davis at the same time, and that she failed to call Davis as a witness at trial due to the conflict of interest created by her simultaneous representation of the two. The PCR court found that Petitioner failed to establish that Hardee-Thomas represented Petitioner while under an actual conflict of interest (see R.pp. 9876-81), and the Petition fails to identify how the PCR order of dismissal reflects either unreasonable factual findings or an unreasonable application of Supreme Court law.

In his Petition, Petitioner argues generally that "[t]he PCR court erred in determining that the actual conflict of interest of Petitioner's Bowman's co-trial counsel, Marva Hardee-Thomas did not amount to ineffective assistance of counsel." Petition, p. 58. In seeking summary judgment on this claim, Respondents assert that "Petitioner's claim is wholly without merit", as the PCR court's order "is reasonable as to both law and fact" Return, p. 90. Significantly, Petitioner did not

respond to the motion for summary judgment as to this ground. See Eady v. Veolia Transp. Servs., Inc., 609 F. Supp. 2d 540, 560-61 (D.S.C. 2009) [“The failure of a party to address an issue raised in summary judgment may be considered a waiver or abandonment of the relevant cause of action.” (citations omitted)]. Even so, he has also not specifically abandoned this claim. Therefore, out of an abundance of caution, the undersigned has considered and addressed Petitioner’s Ground Five below.

It is well-established that the Sixth Amendment guarantees a criminal defendant the effective assistance of counsel. Strickland, 466 U.S. at 685-86. To provide effective assistance, counsel should be free from conflicts that will hinder their representation and ultimately prejudice their clients. However, the United States Supreme Court has also held “that the possibility of a conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer’s performance.” Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). Further, “until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.” Id. In contrast to the normal burden under Strickland, however, in which a defendant must show both deficiency and prejudice, “a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not [also] demonstrate prejudice in order to obtain relief.” Id. at 349-50.

The PCR court found that Petitioner failed to show an actual conflict of interest. The record reflects that Hardee-Thomas had initially been appointed to represent Davis on April 23, 2001, on two armed robbery charges. (R.p.9876). On October 16, 2001, Davis was tried by a jury and convicted of one count of armed robbery, and on October 18, 2001, the second count of armed

robbery was nol prossed by the State with a right to restore (apparently because the victim of that armed robbery could not be located). (R.pp. 9876-77). The PCR court found that Hardee-Thomas's representation of Davis thereafter concluded on October 24, 2001, when she filed a Notice of Appeal on Davis's behalf. (R.pp. 9877-79). Therefore, according to the PCR court,

[W]hen 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.

(R.p. 9879). The PCR court further concluded that even if there was a potential conflict of interest, it never developed into an actual conflict of interest because Petitioner's interests and Davis's interests were never adverse. (Id.) Moreover, the PCR court also determined that Petitioner had failed to meet his burden of establishing that trial counsel did not call Davis as a witness due to a conflict of interest, noting its earlier finding that "the credible evidence disclose[d] a reasonable strategic decision that Davis was not a reliable witness and his testimony was likely to be damaging to Applicant's case." (R.pp. 9880-81).

Petitioner disagrees with the PCR court's finding that, at the time trial counsel learned about Davis's statement, Hardee-Thomas no longer actively represented Davis. Petitioner argues that Hardee-Thomas's "obligations to Davis did not cease because the solicitor certainly retained discretion on whether to recharge Davis for the matter that was *nol prossed*." Petition, p. 61. However, Petitioner cites no authority for that statement,¹⁵ while the PCR court addressed the

¹⁵ Petitioner later cites the South Carolina case of Mackey v. State, 595 S.E.2d 241, 242 (S.C. 2004), for the proposition that there is no bar to a charge that is nol prossed being pursued at a later time, as long as the nolle prosequi is entered prior to the jury being sworn. See Petition, p. 62.

(continued...)

argument that Davis' nol prossed charge could be reinstated as follows:

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.

(R.p. 9880). There is also support in the record for the PCR court's finding that Hardee-Thomas's active representation of Davis concluded as of the date she filed the notice of appeal. For example, Hardee-Thomas testified that even if the armed robbery charge were to be restored within a few months of the time it was nol prossed, another public defender could be assigned to the case. (R.p. 7287). Petitioner has failed to show by clear and convincing evidence that the PCR court's conclusion that Hardee-Thomas's representation of Davis concluded on October 24, 2001 was based on unreasonable factual findings.

Petitioner's argument that Hardee-Thomas had an actual conflict of interest that adversely affected her performance is predicated on his belief that Hardee-Thomas decided not to call Davis as a witness due to her prior representation of Davis. However, Petitioner offers no probative facts or evidence to support that belief. Indeed, Petitioner ignores the evidence presented at the evidentiary hearing, which was found credible by the PCR court, that Davis was not called as a witness because his statement that Gadson confessed to killing the victim was not credible. (See

¹⁵(...continued)

However, the issue is not whether the dismissed charge could be pursued at some later date. Indeed, the PCR court recognized during the hearing that "almost any of them could restore. They could always go back to the grand jury. If they didn't say leave to restore they could go back to the grand jury." (R.p. 7287). Rather, the issue is what obligations Hardee-Thomas owed to Davis after his charge was nol prossed, and whether her responsibilities to Davis were directly adverse to her responsibilities to Petitioner at the time she represented Petitioner.

R.pp. 9880-81). The PCR court also cited Cummings’ testimony that Davis was not a credible witness. (See id. (citing R.pp. 7065 “[W]e sent Mr. Walter Mitchell up there to go check with Ricky Davis and Ricky Davis denied his signature, denied giving the statement.”), 7625-26 [Cummings testifying that the defense investigator told counsel “It’s not going to do us any good” to call Davis and, further, Cummings agreeing with the statement “[y]ou ultimately made the strategic decision it was not worth it to call Ricky Davis”], 7632-33)). Hardee-Thomas also confirmed in her testimony that it was Cummings who made the decision not to call Davis. When asked if she had any strategic reason for not calling Davis, she responded, “I don’t. That would be something for the . . . head person in the death penalty case on the defense side, Norbert Cummings.” (R.p. 7302). Petitioner has failed to rebut the presumption of correctness by clear and convincing evidence. Therefore, the PCR court’s factual findings underlying the conclusion that trial counsel reasonably decided not to call Davis are entitled to deference in this case. See 28 U.S.C. § 2254(d)(1).

Finally, it is noted that much of Petitioner’s argument that Hardee-Thomas had an actual conflict of interest is based upon speculation and reliance on isolated statements from the state court record without regard to the full context of those statements. However, the United States Supreme Court has made clear that “‘an actual conflict of interest’ mean[s] precisely a conflict *that affected counsel’s performance*—as opposed to a mere theoretical division of loyalties.” Mickens v. Taylor, 535 U.S. 162, 171 (2002). While Petitioner speculates that Hardee-Thomas “likely felt that there was a potential for retribution if Davis was called” (Petition, p. 63), that statement is wholly unsupported by the record. Indeed, Hardee-Thomas testified that Cummings must have made the decision about whether to call Davis because she did not make the decision. (R.p. 7303). Petitioner’s arguments also detail a theoretical division of loyalties, which appears to be based primarily on

speculation, as opposed to trial counsel’s testimony as to why Davis was not called as a witness. However, the PCR court found “[t]here was no probative evidence at trial that indicated that any potential conflict of interest played a role in the decision making process.” (R.p. 9881).

Petitioner has failed to show that the PCR court’s conclusion was the result of either unreasonable factual findings or an unreasonable application of Supreme Court law. Therefore, he has failed to meet his burden under 28 U.S.C. § 2254 as to Ground Five, and this claim should be dismissed.

VI.

(Ground Six: Alleged Ineffective Assistance of Trial Counsel for Failure to Object to Prison Conditions Evidence)

In Petitioner’s Ground Six, he argues that trial counsel was ineffective for failing to object to testimony elicited by the State from one of Petitioner’s expert witnesses during his mitigation presentation. That testimony was given by James Aiken, a prison adaptability expert, and it concerned prison conditions and other aspects of prison life, which Petitioner argues was inadmissible. The PCR court considered and rejected Petitioner’s claim of ineffective assistance of counsel, and the same issue was considered by the South Carolina Supreme Court on appeal, which found no deficiency and no prejudice. Petitioner asserts that the court’s rejection of his claim is based on unreasonable factual findings and an unreasonable application of federal law.

The South Carolina Supreme Court issued a very thorough and well-reasoned opinion on this issue. The Court began by summarizing the evidence presented during the guilt phase of Petitioner’s trial regarding the victim’s murder and Petitioner’s involvement. Bowman, 809 S.E.2d at 234-37. The Court then described the evidence presented during the sentencing phase of Petitioner’s trial. Id. at 237-39. The Court went into great detail about Aiken’s testimony:

Aiken opined that Petitioner had adjusted well to prison in the past, and relayed the security measures at correctional facilities—including gun towers, fences, bars, concrete structures, constant supervision, and no possibility of parole. Aiken did not believe Petitioner would pose a risk of future dangerousness. On cross-examination, the Solicitor elicited testimony from Aiken about the various levels of security that exist within a prison environment (i.e. minimum, medium, maximum, and “super max”) and that inmates may be assigned to less restrictive environments within prison as an incentive for their good behavior. Aiken acknowledged that while in prison, Petitioner would have the ability to move within the facility, including to perform work duties and access secure outdoor recreation areas; however, Aiken explained that, due to the seriousness of the offense of which Petitioner had been convicted, he would never be eligible for work release and would never be permitted to leave the prison facility.

In response to the Solicitor’s question regarding what incentive Petitioner would have to follow the rules, Aiken explained,

The incentive that he has is . . . that the management of that prison system has authority to ensure that his behavior is appropriate. And that’s anywhere from sanctioning him . . . [to] using lethal force against that individual . . . We are not in the business of motivation when you deal with a life without parole [sentence]. Our business is incapacitation. We’re not preparing you to go anywhere. You’re going to stay with us as long as you are breathing, so we’re not talking about trying to prepare you for anything. What we’re talking about is that we do a good job of keeping you behind bars and behind fences and in gun towers for the remainder of your life.

On redirect examination by defense counsel, Aiken gave a more detailed description of super max confinement and testified that Petitioner would not be going to “kiddy camp” or a place where he would be “mollycoddled” or have “picnic lunches outside the gate.” Aiken explained that all inmates are expected to work to perform cheap labor to reduce the burden on taxpayers and repay society and reiterated, “I don’t care how well he does, he will never get out of that prison.” Nevertheless, Aiken explained that Petitioner could salvage the rest of his young life and have some redeeming qualities.

On re-cross, the Solicitor attempted to elicit information about how often inmates generally escape from prison, but defense counsel’s objections to this irrelevant evidence was sustained. Following a curative charge by the judge as to the escape question, the Solicitor elicited from Aiken testimony about general prison conditions, asking “what is he adapting to, what is going on there?” Aiken described the daily routine an inmate would likely have including going to work, eating meals, and sleeping, cautioning “you have to understand that this is in a prison environment

and this is not in a community environment It's just like the police being in your home and writing you up for any violation." Aiken explained that inmates are under 24-hour supervision and inmates are cited for administrative violations such as speaking too loudly, being disrespectful, or disobeying a direct order. Then the Solicitor asked:

Q. And are there recreational facilities available?

A. Yes, sir.

Q. What type of recreational facilities?

A. 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.

Q. 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?

A. Yes, sir. As guaranteed by the constitution.

Q. Are there movies they can watch?

A. Yes, sir.

Q. Television?

A. In some instances, yes, sir.

Q. Softball, do they play softball?

A. I don't know. It's some type of recreation such as that.

Q. Thank you. That's all I have.

It is counsel's failure to object to this particular prison-conditions exchange upon which Petitioner's ineffective assistance of counsel claim is based.

Id. at 238-39.

The South Carolina Supreme Court then discussed the Strickland standard and the following

considerations:

At the intersection of Petitioner’s claims, we find three factors present. First, we acknowledge the wide path extended to a capital defendant to introduce mitigation evidence pursuant to the Eighth Amendment to the United States Constitution.

Second, we must recognize our state law that draws a sharp admissibility dividing line between prison adaptability evidence and general prison condition evidence. Third, we must consider the practical, strategy decisions made by trial counsel.

Id. at 239.

The Court then summarized parts of Cummings’ testimony from the PCR evidentiary hearing that were relevant to his decision-making regarding the presentation of Aiken as a witness and his handling of the prison conditions evidence elicited during trial. Id. at 240-41. In particular, the Court noted that

Counsel explained that he put James Aiken on the stand to show that there were sufficient security measures in prison such that Petitioner would never pose a threat to society again if Petitioner did not receive the death penalty. Counsel stated that the strategy was to show the jury that “this is going to be so horrible the rest of his life that this is going to be sufficient punishment and you don’t have to give him death.”

Id. at 240. The Court also referenced Cummings’ PCR testimony that he had considered what testimony the Solicitor might elicit in response to Aiken’s testimony that prison was a horrible environment, but he believed the trade-off was worth it. See id. Cummings had further noted that, at the time of Petitioner’s trial, the law had changed and “life without parole charges were mandatory in every death penalty case, so we’re kind of on the frontier in dealing with that and how it could be litigated and used by both the State and the defense in the sentencing phase of the capital trial.” Id. The Court noted that the PCR court had found trial counsel’s strategy to be reasonable. Id. at 241.

The South Carolina Supreme Court then went into a very in depth analysis of “the

constitutional framework surrounding the admissibility of mitigating evidence in the sentencing phase of a capital case.” Id. Following various citations to Supreme Court precedent, the Court summarized, “In short, the Eighth Amendment demands that a capital defendant be given wide latitude to present any relevant evidence of potentially mitigating value that might convince the jury to impose a sentence of life in prison instead of death.” Id. However, the Court further acknowledged a particular facet of South Carolina law—“the unique distinction South Carolina jurisprudence has drawn between evidence of prison adaptability, which we have held is relevant and admissible, and evidence of general prison conditions, which we have held is not.” Id. The Court explained, “The rationale we have offered for excluding evidence of general prison conditions is that it does not ‘bear on a defendant’s character, prior record, or the circumstances of his offense.’” Id. (quoting State v. Koon, 298 S.E.2d 769, 774 (S.C. 1982) [affirming the exclusion of evidence of future adaptability to prison life as irrelevant to the jury’s sentencing determination], abrogated by Skipper v. South Carolina, 476 U.S. 1 (1986) [holding evidence of adjustability to life in prison in constitutionally relevant], as recognized by Chaffee v. State, 362 S.E.2d 875, 877 (S.C. 1987)).

The South Carolina Supreme Court recognized the fine line between what is constitutionally required and what state law had deemed inadmissible, noting “the United States Supreme Court has characterized this distinction as ‘elusive’ and stated its precise meaning and practical significance’ are ‘difficult to assess,’ [yet] we have nevertheless clung to this division.” Id. at 242 (quoting Skipper, 476 U.S. at 7). The Court explained that the State’s general exclusion of prison conditions evidence was rooted in United States Supreme Court precedent requiring that capital sentencing schemes be designed to avoid the death penalty being administered in an arbitrary or unpredictable manner. See id. 242-43. However, the United States Supreme Court itself had not

created such boundaries around what was admissible in the sentencing phase of a capital trial. See id. For example, as the South Carolina Supreme Court noted in the Bowman opinion,

[T]he Court flatly rejected a challenge to the “wide scope of evidence and argument allowed” during the sentencing phase and found “[s]o long as the evidence introduced and the arguments made at the [sentencing] hearing do not prejudice a defendant, it is preferable not to impose restrictions. *We think it is desirable for the jury to have as much information before it as possible when it makes the sentencing decision.*” Gregg v. Georgia, 428 U.S. 153,] 203-04 (emphasis added).

Thus, the character of the defendant and the circumstances of the crime are certainly a part of the individualized sentencing hearing the Eighth Amendment demands. However, there is nothing in the constitution or federal jurisprudence that forbids the consideration of anything which might serve as a mitigating circumstance. Skipper, 476 U.S. at 4 (“[T]he sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence” (emphasis added)); Caldwell v. Mississippi, 472 U.S. 320, 330-31 (1985) (observing a capital defendant has a constitutional right to the consideration of “those compassionate or mitigating factors stemming from the diverse frailties of humankind,” including a plea for mercy (quoting Woodson v. North Carolina, 428 U.S. 280,] 304)).

Id. at 243. After reviewing United States Supreme Court jurisprudence, the South Carolina Supreme Court reaffirmed the distinction that had been made under state law rendering evidence of prison conditions inadmissible. Id. Nevertheless, the Court recognized that the general rule was not without exception, particularly to the extent that evidence of general prison conditions was intertwined with some other evidence that a defendant was constitutionally permitted to present. Id.

Finally, the South Carolina Supreme Court reviewed the PCR court’s determination as to both prongs of Strickland. The Court noted that under state law “otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence.” Id. (quoting State v. Page, 663 S.E.2d 357, 360 (S.C. Ct. App. 2008) (citations omitted)). If such evidence is presented by a solicitor once the door is opened by the defendant, then the presentation of that evidence is considered an invited response and is appropriate unless it unfairly prejudices a

defendant. Id. at 243-44. Furthermore, according to the South Carolina Supreme Court, defense counsel is not deficient for failing to object to the evidence unless the solicitor's response is inappropriate or unfairly prejudicial. Id. The Court ultimately affirmed the PCR court's determination that trial counsel was not deficient, noting

While we acknowledge that a close question is presented, in light of the state of the law at the time of Petitioner's trial and the narrowly tailored scope of the prison conditions evidence elicited, we find there is evidence in the record to support the PCR court's finding. There is evidence that counsel articulated a valid reason for employing this strategy, and because the State's response was proportional and confined to the topics to which counsel had opened the door, we affirm the finding that counsel was not deficient in failing to object to the State's line of questioning.

Id. at 244 (citations omitted).

The Court also chose to examine prejudice since there was some overlap between the deficiency and prejudice prongs in Petitioner's case. Id. at 245 ["Indeed, woven into the PCR court's finding of no deficient representation is counsel's calculus of the potential benefits and risks associated with his strategic decision."]. The Court clarified an issue of state law regarding whether a harmless error analysis was appropriate when an arbitrary factor had been introduced to the jury, and holding that it was, the Court then turned to whether any prejudice resulted from the introduction of prison conditions evidence in Petitioner's case. Id. at 245-46. The Court concluded as follows:

[T]he PCR court found there was "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." We agree. See Franklin v. Catoe, 552 S.E.2d 718 (2001) (finding ineffective assistance of counsel claims based on statutory violations in capital sentencing procedures are subject to both the deficiency and the prejudice prongs of the Strickland analysis). Because the evidence of guilt and aggravating factors is overwhelming,^[FN] there is ample evidence to support the PCR court's determination that Petitioner failed to establish prejudice. Cf. Humphries v. State, 570 S.E.2d 160, 168 (2002) (finding petitioner was not prejudiced by solicitor's improper comments in the sentencing phase of a capital murder trial where there was strong evidence of guilt and the petitioner presented a full mitigation case).

[FN] The facts of the crime are especially heinous, as described above. Evidence pointing to Petitioner as the murderer was overwhelming, including eyewitness testimony and other evidence linking Petitioner to the murder and arson.

Id. at 246.

Petitioner suggests that federal law prohibits the sort of prison conditions evidence that was elicited by the State in this action. See Petition, pp. 73-74. However, while he cites to cases which indicate that a death sentence should be “based on factors related to the offender as an individual including the background, character, mental state, and the crime itself[,]” id. at 73, he fails to identify any Supreme Court precedent that specifically forbids evidence, such as prison conditions, in the sentencing phase of a capital trial. As discussed in detail in the South Carolina Supreme Court’s decision, United States Supreme Court precedent seems to favor few restrictions on the evidence that can be introduced to a jury during a capital sentencing phase, leaving the decision as to what is inadmissible largely up to the states. See Bowman, 809 S.E.2d at 243 (quoting Gregg, 428 U.S. at 203-04 [“[S]o long as the evidence introduced and the arguments made at the [sentencing] hearing do not prejudice a defendant, it is preferable not to impose restrictions. *We think it is desirable for the jury to have as much information before it as possible when it makes the sentencing decision.*” (emphasis added)]).

As Petitioner correctly notes, and as the State Supreme Court addressed in the PCR appeal, South Carolina law did prohibit prison conditions evidence from being introduced during the sentencing phase of a capital trial when Petitioner’s case was tried. See id. at 244. However, state case law also indicated that the admission of such inadmissible evidence was not reversible error where defense counsel had opened the door to its introduction. See id. (citing State v. Plath, 313 S.E.2d 619, 627-28). Furthermore, in January 2002, just a few months before Petitioner’s trial began,

the United States Supreme Court had decided Kelly v. South Carolina, 534 U.S. 246 (2002), holding that due process required that a jury in a capital case must be informed that a life sentence meant life without parole. The South Carolina Supreme Court took into account the state of the law—both state and federal—when it found that trial counsel was not deficient in failing to object to the State’s line of questioning regarding prison conditions. Bowman, 809 S.E.2d at 245.

Petitioner compares trial counsel’s actions in this case to those of trial counsel in State v. Burkhart, 640 S.E.2d 450 (S.C. 2007), asserting as follows:

In 2000, prior to Petitioner’s trial, and before the decision in Petitioner’s direct appeal, trial counsel for Troy Alan Burkhart objected to favorable prison conditions evidence presented during the penalty phase of Burkhart’s capital trial. The trial judge overruled the objection and Burkhart was convicted and sentenced to death. On direct appeal, the South Carolina Supreme Court stated in no uncertain terms that “[w]e have *long held* that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime.” State v. Burkhart, 640 S.E.2d 450, 453 (S.C. 2007) (emphasis added) (citing State v. Copeland, 300 S.E.2d 63 (S.C. 1982)). Despite the fact that the case was tried before the ruling in Bowman I, the court applied its reasoning “because it is consistent with *our long-standing rule*” and held that “evidence of general prison conditions” was inadmissible. Burkhart, 640 S.E.2d at 453 (emphasis added). Because Burkhart’s trial attorneys properly understood South Carolina law and objected to the admission of prison condition evidence, the Supreme Court reversed Burkhart’s death sentence. See Burkhart, 640 S.E.2d at 453 (“Here, unlike Bowman, appellant objected to the State’s evidence regarding general prison conditions.”). Burkhart was subsequently resentenced to life imprisonment.

Response, p. 19.¹⁶ Essentially, Petitioner argues that Burkhart’s trial counsel were not deficient

¹⁶ It is noted that the timeline Petitioner has presented of his and Burkhart’s trials is incorrect. Burkhart was initially tried and sentenced to death in March 2000, and his convictions and sentences were overturned in June 2002 based on an error in the jury instructions during the guilt phase. See State v. Burkhart, 565 S.E.2d 298 (S.C. 2002). Petitioner was tried, convicted, and sentenced to death in May 2002. See supra, pp. 2-3. Burkhart was retried in March 2004. See Burkhart, 640 S.E.2d 450. Petitioner’s convictions and sentence were affirmed by the South Carolina Supreme Court in November 2005. Bowman, 623 S.E.2d 378. Thereafter, in January 2007, Burkhart’s sentence was reversed, and his case was remanded for resentencing due to the improper introduction of prison

(continued...)

because they objected to prison conditions evidence, while his own trial counsel were deficient for their failure to do so in light of the established law in South Carolina. However, that two sets of counsel handled an issue differently does not render one set’s performance reasonable and one set’s performance deficient. See Strickland, 466 U.S. at 689 [“There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.”]. Furthermore, the South Carolina Supreme Court considered the state of the law at the time of Petitioner’s trial—in particular, balancing the long-standing precedent set by state law with the potential that the landscape of the law might change—when it assessed trial counsel’s performance. See Bowman, 809 S.E.2d at 243-45. While “acknowledg[ing] that a close question [was] presented”, the Court ultimately affirmed the PCR court’s finding of no deficiency. Id. at 244. The fact that Burkhardt’s counsel achieved a different outcome with a different strategy does not render Petitioner’s trial counsel’s strategy unreasonable.¹⁷

Petitioner further argues that “there is no reason trial counsel could not have objected even though they offered some evidence related to prison conditions.” Response, p. 21. Again, this

¹⁶(...continued)

conditions evidence during the sentencing phase. See Burkhardt, 640 S.E.2d 450. Petitioner’s description of the timeline does not properly convey that Burkhardt was tried twice—once before Petitioner’s trial and once after Petitioner’s trial—although both trials occurred prior to the decision in Petitioner’s direct appeal.

¹⁷ The undersigned additionally notes that, around the time of Petitioner’s trial, counsel in other capital cases in South Carolina also did not object to favorable prison conditions evidence. See, e.g., Bryant v. Stirling, No. 13-2665, 2019 WL 1253235 at *30-*32 (D.S.C. Mar. 19, 2019) [indicating that state court found trial counsel were not deficient for failing to object to prison conditions evidence]. Again, the strategy employed by another set of counsel is not indicative of whether Petitioner’s counsel provided effective representation. However, to the extent that Petitioner suggests his counsel were alone in believing the prison conditions evidence was not strictly prohibited based on the state the law, that is not the case.

suggested alternative strategy does not render trial counsel’s performance constitutionally deficient. There’s also no reason to believe that trial counsel would have been successful after first presenting evidence of prison conditions and then objecting when the State attempted to do the same. See Plath, 313 S.E.2d at 627 [“[D]efendants 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.”]; see also Guarascio v. United States, 996 F. Supp. 2d 406, 412 (E.D.N.C. 2014) [“By definition, the Sixth Amendment does not require counsel to raise a meritless argument.”]. Petitioner compares his situation to Burkhart, but it appears that, unlike in Petitioner’s case, the State, not Burkhardt, first introduced the prison conditions evidence to the jury. Burkhart, 640 S.E.2d 452-53. Thus, the comparison is not on all fours.

Finally, Petitioner asserts that the record contradicts the state court’s finding that trial counsel had a strategy. Despite Cummings’ testimony that it was part of his strategy to show that a sentence of life in prison was not a reward, (see R.pp. 7607-17), Petitioner believes that because Cummings did not ask about harsh prison conditions during his direct examination of Aiken, that was not actually the case. See Response, pp. 22-23. However, the PCR court found Cummings’ testimony to be credible, (see R.pp. 9915-19), and Petitioner’s own interpretation of the record is not enough to rebut the state court’s factual findings. See 28 U.S.C. § 2254(e)(1) [“[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.”]. Trial counsel could have always planned to make the point about prison being sufficient punishment after cross-examination, or trial counsel’s strategy could have changed based on the nature of the State’s cross-

examination. Furthermore, contrary to Petitioner’s suggestion that Cummings asked only two questions about the harsh realities of prison life, Cummings asked more questions about the potential future that Petitioner faced if he were to receive a life sentence, and he highlighted that it was a particularly bleak outcome for a man as young as Petitioner. (See R.pp. 4865-67 [asking about super max, eliciting that Petitioner would “be around predator, dangerous, violent inmate population”]). Cummings also stressed that prison was not a reward during his closing arguments. (R.p. 4991, 4996-97). Therefore, for all of the above reasons, Petitioner has failed to show that the state court’s decision on the deficiency prong of Strickland is contrary to, or an unreasonable application of, established Supreme Court precedent.

The Petition also takes issue with the South Carolina Supreme Court’s determination that Petitioner was not prejudiced by the limited evidence regarding prison conditions that was admitted during the sentencing phase of Petitioner’s trial. Petitioner’s arguments rely primarily on speculation that the prison conditions evidence must have heavily factored into the jury’s sentencing decision. See Petition, p. 74 [“[T]he jury surely would have considered whether it was appropriate to sentence Petitioner to a life where he could be paid for his work, and allowed recreational privileges. By sentencing petitioner to life in prison, the jury must have believed they would be ‘rewarding’ him with educational and work opportunities. 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.”]. However, the state court viewed the evidence differently, noting that the prison conditions evidence was limited in comparison to the entirety of evidence introduced during the sentencing hearing and, further, that “the evidence of guilt and aggravating factors [was] overwhelming.” Bowman, 809 S.E.2d at 246. Petitioner’s speculation is not clear and

convincing *evidence* to overcome the factual findings by the state court. See 28 U.S.C. § 2254(e)(1).

Petitioner also argues that “the state court asked the wrong question—whether the outcome of the trial (not the appeal) would have been different had trial counsel objected.” Response, p. 23. Again, Petitioner compares his case to Burkhart’s case, positing that if counsel had objected at his trial, then his appeal would have been granted like Burkhart’s was. Id. However, Petitioner does not acknowledge that the posture of his counsel’s objection would have been different from that of Burkhart’s counsel’s since the State was the first to introduce evidence of prison conditions in Burkhart’s case, and it was Petitioner’s own counsel who first introduced such evidence at his trial. While the South Carolina Supreme Court had cautioned counsel from both sides not to “enter the forbidden field of social policy and penology” in Plath, 313 S.E.2d at 627, that case also demonstrated that when defense counsel opens the door to such evidence, he could not also benefit by then arguing that the State introduced an arbitrary factor the jury, id. at 626-28. It is not evident that the outcome of Petitioner’s trial would have been the same had trial counsel objected, and indeed, the South Carolina Supreme Court specifically referenced the concept of “opening the door” in its consideration of Petitioner’s case. Bowman, 809 S.E.2d at 243-44.

Therefore, as outlined above, Petitioner has failed to show how the state court’s finding on the prejudice prong of Strickland is either contrary to, or an unreasonable application of, clearly established federal law. For all of the above reasons, Petitioner has failed to meet his burden as to his Ground Six.

VII.

(No Ground Seven)

VIII.

(Ground Eight: Alleged Trial Court Error for Refusal to Instruct Jury as to Statutory Mitigating Circumstance)

In Ground Eight, Petitioner argues that the trial court erred in denying his request to instruct the jury as to the statutory mitigating circumstance of whether “[t]he 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.” See S.C. Code Ann. 16-3-20(C)(b)(6); see also, Petition, pp. 76-77. Although the trial court’s decision not to give that particular charge was affirmed by the South Carolina Supreme Court in Petitioner’s direct appeal, Petitioner asserts that the state court’s decision is the result of an unreasonable application of federal law and is based on unreasonable factual findings. Petition, p. 78. Respondents, on the other hand, assert that this ground is not cognizable because the issue raised to the state supreme court was solely a matter of state law. Return, p. 107. Moreover, to the extent a federal claim is raised, Respondents assert that it is procedurally barred. Id. Finally, because they contend that the state supreme court’s decision was reasonable as to both law and fact, Respondents argue that Petitioner’s Ground Eight is wholly without merit. Id. In his response in opposition to the motion for summary judgment, Petitioner does not respond to Respondents’ arguments as to the cognizability or the procedural default of this ground.¹⁸ See Eady, 609 F. Supp. 2d at 560-61 [“The failure of a party to address an issue raised in summary judgment may be considered a waiver or abandonment of the relevant cause of action.” (citations omitted)].

¹⁸ The petition itself only perfunctorily addresses the exhaustion of this claim, and it does not address the particular arguments raised in Respondents’ return. See Petition, p. 78. Notably, Respondents made similar cognizability and procedural default arguments as to Petitioner’s Ground Ten, which Petitioner did argue against in his response in opposition to the motion for summary judgment. See Response, pp. 25-27.

However, because he has not withdrawn this ground, out of an abundance of caution, the undersigned considers it below.¹⁹

In the Petition, Petitioner almost verbatim copies the argument he raised in his direct appeal concerning the trial court’s refusal to charge the jury with the statutory mitigating circumstance in S.C. Code Ann. 16-3-20(C)(b)(6). See Petition, pp. 75-77; see also R.pp. 5448-50. He then adds a paragraph quoting the South Carolina Supreme Court’s holding on this issue, and he includes the following paragraph:

The trial court denied Petitioner’s right to have the jury meaningfully consider the mitigation he offered in defense of his life. See Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982). The South Carolina Supreme Court unreasonably applied clearly established federal law as determined by the United States Supreme Court, and was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d)(1), (2).

Petition, p. 78.

However, the undersigned agrees with Respondents that the above issue—whether the trial court properly refused to give a particular jury charge—appears to be one of state, not federal, law. Generally speaking, claims of violation of state law are not cognizable on a petition for federal habeas corpus relief. Stuart v. Wilson, 442 F.3d 506, 513 n. 3 (6th Cir.2006)(citing Walker v. Engle, 703 F.2d 959, 962 (6th Cir.1983)); Estelle v. McGuire, 502 U.S. 62, 67–68, 112 S.Ct. 475, 116 L.Ed.2d

¹⁹But compare, also Rodriguez-Reyes v. Molina-Rodriguez, 21 F. Supp. 3d 143, 145-46 (D.P.R. 2014):

Due to plaintiffs’ failure to engage in any type of legal discussion regarding defendants’ insufficiency of the evidence argument, the Court is left “to do counsel’s work, create the ossature for the argument, and put flesh on its bones.” United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990). The Court declines to do so, not only because “judges are not expected to be mind-readers,” id. at 17, but also because perfunctory arguments deserve little attention when a party engages in lazy lawyering.

385 (1991)[“It is not the province of a federal habeas court to re-examine state-court determinations on state-law questions.”]; Scott v. Jones, 915 F.2d 1188, 1190 (8th Cir.1990) [State law questions are not very often the basis of constitutional error under habeas review.”]. Thus, this claim not cognizable in this action. See 28 U.S.C. § 2254(a) [indicating that habeas corpus relief can only be based “on the ground that [a petitioner] is in custody in violation of the Constitution or laws or treaties of the United States”].

To the extent Petitioner now attempts to reframe the instant claim as one of federal law by tacking on a conclusory paragraph including federal case law citations (with no discussion as to how such cases are applicable to this issue), this ground was not presented to the state courts as such. Therefore, even if cognizable, Petitioner’s Ground Eight is procedurally defaulted in this habeas corpus matter. As Petitioner has failed to show cause or prejudice for the default, this claim is barred from consideration by this Court. Coleman, 501 U.S. at 750.

Furthermore, even if not defaulted, the undersigned can find no federal violation in the record. Other than citing to a Supreme Court decision, the Petitioner has made no arguments to show any federal violation with regard to this issue. Even with regard to the one federal case cited, Petitioner has not shown any connection between that case and the facts in his case. Federal courts must afford the states deference in their determinations regarding evidence and procedure; cf. Crane v. Kentucky, 476 U.S. 683, 690; and it is well-established that “a state court’s misapplication of its own law [even if that were found to be the case] does not generally raise a constitutional claim. The federal courts have no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.” Smith v. Horn, 120 F.3d 400, 414 (3d Cir.1997) (citations omitted), cert. denied, 522 U.S. 1109 (1998); Hannah v. Hendricks, No. 04–2497, 2006 WL

83106, *15 (D.N.J. Jan.11, 2006). In other words, federal habeas relief can be granted only “if the alleged error was so conspicuously bad that it fatally infected the trial and rendered it fundamentally unfair.” Troupe v. Groose, 72 F.3d 75, 76 (8th Cir.1995). Hence, the issue before this federal court is not whether the trial court erred in failing to give this charge, but whether the Court's ruling resulted in a trial so fundamentally unfair as to deny Petitioner due process of law. Cf. Rainer v. Dep't of Corrections, 914 F.2d 1067, 1072 (8th Cir.1990), cert. denied, 489 U.S. 1099 (1991). No such evidence has been presented in this case. “To carry that burden, the petitioner must show that there is a reasonable probability that the error complained of affected the outcome of the trial-i.e., that absent the alleged impropriety the verdict probably would have been different.” Anderson v. Goeke, 44 F.3d 675, 679 (8th Cir.1995).

The only evidence Petitioner cites²⁰ to, regarding his drinking, includes Youngman's testimony that Petitioner had a history of substance abuse (R.pp. 4789, 4794-4800, 4824), that early in the morning on the day of the murder Gadson testified that he saw Petitioner “put his beer out of the bag and put it [the gun] in the bag (R.pp. 3985-3986), and that Petitioner went to get more beer after he claimed Petitioner shot the victim (R.pp. 4015-4016). Petitioner also references other individuals' drinking, including Petitioner's mother and Gadson. (R.pp. 3992-3993, 4794-4800, 4824). However, the South Carolina Supreme Court found as follows:

The trial court must submit for the jury's consideration any statutory mitigating circumstances supported by the evidence. State v. Vazquez, 364 S.C. 293, 613 S.E.2d 359 (2005). The trial judge must make an initial determination of which statutory mitigating circumstances have evidentiary support and then allow the defendant to request any additional statutory mitigating circumstances supported in the record. Id. Absent a request by counsel to charge the mitigating circumstances, the issue is not

²⁰Since Petitioner did not address this issue in his memorandum in opposition, the undersigned has used all the evidence he referenced in his Petition.

preserved for review. Id. However, when there is evidence the defendant was intoxicated at the time of the crime, the trial court is required to submit the mitigating circumstances in § 16–3–20(C)(b)(2), (6), and (7). Id. (citing State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002) (holding trial court is required to submit mitigating circumstances if there is evidence of intoxication regardless of whether they are requested)); see also State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986)4 (evidence of voluntary intoxication is proper matter for consideration by jury in mitigation of punishment). Where there is evidence the defendant was extremely intoxicated during the commission of the crime, the failure to instruct the jury on statutory mitigating circumstances (2), (6), and (7)5 is not harmless error. State v. Stone, supra.

In the present case, there was evidence presented that appellant possessed beer at different points in the day but none of the evidence indicated appellant was drinking the beer. There was evidence appellant had a history of alcohol and drug abuse; however, his history is irrelevant to whether he was in fact intoxicated on the day of the murder. Appellant presented no evidence he was actually intoxicated at the time of the crime. The evidence indicated appellant may have been drinking that day, but this is not enough to warrant a charge to the jury for the mitigating factor outlined in § 16–3–20(C)(b)(6). See, e.g., State v. Vazquez, supra (holding that even though drinking was admitted, there was no evidence defendant was intoxicated at time crime was committed; therefore, court did not err by failing to charge the jury on mitigating circumstances relating to intoxication); State v. Drayton, 293 S.C. 417, 361 S.E.2d 329 (1987), cert. denied, 484 U.S. 1079, 108 S.Ct. 1060, 98 L.Ed.2d 1021 (1988) (same). Cf. State v. Young, 305 S.C. 380, 409 S.E.2d 352 (1991) (where there is evidence defendant was intoxicated at time of crime, trial judge required to submit mitigating circumstances relating to intoxication). Therefore, the trial court's decision not to charge the jury on the mitigating circumstances relating to intoxication was not in error.

State v. Bowman, 623 S.E.2d 378, 383 (S.C. 2005), abrogated by State v. Evans, 371 S.C. 27, 637 S.E.2d 313 (2006)[The Court in Evans discussed whether it was necessary for trial counsel to make a motion in order to preserve the issue].

Petitioner has not shown how evidence of him getting more beer after shooting the victim would affect his capacity “to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired” at the time when he shot the victim. Further, while Petitioner has presented evidence that others saw him in possession of alcohol, he has not presented any evidence to show that he was intoxicated at the time of the victim’s death.

Therefore, Petitioner has not shown that even if this charge had been presented that there is a reasonable probability that the outcome of his trial would have been different, or that the trial Court's ruling resulted in a trial so fundamentally unfair as to deny him due process. Rainer, 914 F.2d at 1072; Evans, 220 F.3d at 312 [Federal habeas relief will not be granted on a claim adjudicated on the merits by the state court unless it resulted in a decision that was contrary to clearly established federal law or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding]; Williams v. Taylor, supra. Therefore, this claim is without merit and should be dismissed.

IX.

(No Ground Nine)

X.

(Ground Ten: Alleged Trial Court Error for Refusal to Grant Mistrial After Question Regarding Possible Escape)

In Ground Ten, Petitioner argues that the trial court erred in failing to grant a mistrial when the Solicitor asked James Aiken a question regarding prison escape. Petition, pp. 78-79. As Petitioner acknowledges, the trial court sustained trial counsel's objection to the question and gave a curative instruction to the jury directing them to disregard the question because it was improper; however, the trial court denied Petitioner's motion for a mistrial. Id. at 79. On appeal, the state supreme court affirmed the trial court's denial of the mistrial. Petitioner claims that, in so doing, the South Carolina Supreme Court unreasonably applied federal law and made unreasonable factual findings. Id. at 81. Respondents disagree. Respondents argue that Petitioner's Ground Ten is not cognizable as the issue raised to the state supreme court was not one of federal law, and to the extent it could be interpreted as a federal issue, this ground is procedurally defaulted because the Supreme

Court relied on state law in affirming the trial court. Return, pp. 110-14. Additionally, even if the instant ground was preserved for this Court's review, Respondents argue that the state Supreme Court's decision was reasonable, and Petitioner is, therefore, not entitled to habeas relief.

The issue presented to the South Carolina Supreme Court in Petitioner's direct appeal was whether the trial court erred in denying a mistrial when the Solicitor asked Aiken about escapes by inmates during Aiken's time with the South Carolina Department of Corrections. (See R.pp. 5456-59); see also Bowman, 623 S.E.2d at 383-85. In South Carolina, "[a] mistrial should be ordered only when an incident is so grievous that prejudicial effect cannot be removed." State v. Vazsquez, 613 S.E.2d 359, 362 (S.C. 2005), abrogated on other grounds by State v. Evans, 637 S.E.2d 313 (S.C. 2006). The undersigned agrees with Respondents that this ground is not cognizable in federal habeas corpus, as there is no corresponding federal standard as to when a mistrial should be granted that is applicable to the states. Thus, except to the extent the failure to grant a mistrial may rise to the level of a due process violation, the question of whether a mistrial should have been granted is a matter of state law. See Estelle, 502 U.S. at 67-68 "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."]. While Petitioner does cite federal cases in his direct appeal brief (Response, p. 25), his mere citation to federal law does not render the issue one of federal law. Petitioner cites two United States Supreme Court cases to support his statements that an attempted escape is relevant to a defendant's character and ability to adapt to prison and that a defendant is entitled to introduce evidence that he can adapt to prison.²¹ (R.p. 5458).

²¹ Petitioner also relies upon federal case law to support his contention that "evidence related to other inmates escaping was inadmissible because Petitioner has no escape history himself." Response, p. 26. However, both the trial court and the state Supreme Court agreed with Petitioner on that issue. Where those courts disagreed with Petitioner was on the issue of whether a mistrial was
(continued...)

However, the operative question presented to the South Carolina Supreme Court, and the question that the court ruled upon, was whether the trial court violated state law in refusing to grant a mistrial. That ground is not a cognizable federal habeas grounds or relief.

To the extent Petitioner asserts that his right to due process was violated by the trial court's refusal to grant a mistrial, that is a different ground than was presented in Petitioner's direct appeal. Thus, to the extent that Petitioner raises a cognizable claim in Ground Ten, that claim is procedurally defaulted. As Petitioner has failed to allege either cause or prejudice for the default, he is not entitled to federal habeas relief. Coleman, 501 U.S. at 750. Moreover, even if not defaulted:

“As [the Supreme Court] held in Romano v. Oklahoma, 512 U.S. 1, 114 S. Ct. 2004, 129 L. Ed. 2d 1 (1994), it is not the role of the Eighth Amendment to establish a special ‘federal code of evidence’ governing ‘the admissibility of evidence at capital sentencing proceedings.’ ” Kansas v. Carr, 136 S. Ct. 633, 644 (2016)(quoting Romano, 512 U.S. at 11-12). “Rather, it is the Due Process Clause that wards off the introduction of ‘unduly prejudicial’ evidence that would render the trial fundamentally unfair.” Id. (quoting Payne v. Tennessee, 501 U.S. 808, 825 (1991); citing Brown v. Sanders, 546 U.S. 212, 220-21 (2006))(footnote added; internal quotations omitted). Therefore, [the defendant] may not challenge the admission of collateral-act evidence at his sentencing proceeding under the Eighth Amendment. “The test prescribed by Romano for a constitutional violation attributable to evidence improperly admitted at a capital-sentencing proceeding is whether the evidence ‘so infected the sentencing proceeding with unfairness as to render the jury’s imposition of the death penalty a denial of due process.’ ” Id. at 644-45 (quoting Romano, 512 U.S. at 12).

The issue for this court is whether the admission of the collateral-act evidence – admitted during either the guilt phase, the sentencing phase, or both – violated Perkins’s right to due process by so infecting his proceedings with unfairness as to deny him a fundamentally fair trial.

Perkins v. Dunn, No. 14-1814, 2019 WL 4538737, at *36 (N.D. Ala. Sept. 19, 2019).

Here, based upon the trial judge’s immediate curative instruction, the statement at

²¹(...continued)
properly denied, which is a matter of state law.

issue, and the evidence in the case, Petitioner has not shown that the statement infected his sentencing proceeding with unfairness to render the jury's imposition of the death penalty a denial of his due process rights. The statement was isolated and immediately objected to by defense counsel, following which a curative instruction was given to the jury. Greer, 483 U.S. at 766 n.8 (quoting Richardson, 481 U.S. at 208; Bruton, 391 U.S. at 136; United States v. Lewis, 719 F. App'x at 218; United States v. Weinstein, 762 F.2d 1522, 1542 (11th Cir. 1985), modified and reh'g denied, 778 F.2d 673 (11th Cir. 1985))["a prejudicial remark may be rendered harmless by curative instructions to the jury.'], cert. denied, 475 U.S. 1110 (1986); Adams v. Wainwright, 709 F.2d 1443, 1447 (11th Cir. 1983)[A curative instruction purges the taint of a prejudicial remark because "a jury is presumed to follow jury instructions.'], cert. denied, 464 U.S. 1063 (1984). Furthermore, a crucial assumption underlying our constitutional jury system is that jurors carefully follow instructions, and juries are presumed to follow their instructions. Cf. United States v. Love, 134 F.3d 595, 603 (4th Cir.1998), cert. denied, 524 U.S. 932 (1998); Weeks v. Angelone, 528 U.S. 225, 234 (2000)[“A jury is presumed to follow its instructions.”]; United States v. Bryant, 655 F.3d 232, 252 (3d Cir. 2011)[“[W]e generally presume that juries follow their instructions.”].

For the above reasons, Respondents' motion for summary judgment should be granted as to Ground Ten.

XI.

(Ground Eleven: Alleged Ineffective Assistance of Counsel for Failure to Object to the State's Nexus Argument)

In Ground Eleven, Petitioner asserts that trial counsel was ineffective for failing to object to the following portion of the Solicitor's closing argument:

Now, as far as Marion Bowman's background, who has a perfect background?

I mean, you see “Leave it to Beaver”, Ward and June, and you see “The Bill Cosby Show.” None of us have a background like that. But, again, where is the connection? Where is the connection, anybody who’s gotten up here and drawn a line between anything involving Marion Bowman’s background or family or mentality and the murder of Kandee Martin. There’s just no connection.

Petition, pp. 83-84 (quoting R.p. 4964). In his response in opposition to the motion for summary judgment, Petitioner additionally quoted the following portions of the Solicitor’s closing argument:

Ladies and gentlemen, I ask you based on what you’ve heard here, what does all that stuff that happened to Marion during his youth have to do with Kandee Martin? How is she in any way involved in the fact that he sold drugs, that he did drugs, that he drank liquor, that he wasn’t a good student, that he was an adolescent, that his grandfather died, and all the other stuff, what has it got to do with it? Nothing. He knows right from wrong.

....

Everybody was a child at one time. That’s got nothing to do with the man he turned into and the conduct he engaged in after that.

Response, pp. 27-28 (quoting R.pp. 4962-63, 4967). Petitioner believes that all of the above arguments were improper because they suggested that there had to be a causal nexus between the mitigation evidence and the crime, and the Supreme Court has rejected the notion that such a causal connection must exist for a circumstance to be mitigating. See Petition, p. 84 (citing Tennard v. Dretke, 542 U.S. 274 (2004)). Accordingly, Petitioner argues that trial counsel was ineffective for failing to object to the Solicitor’s argument.

In their return, Respondents assert that Petitioner’s Ground Eleven is procedurally defaulted, and Petitioner has failed to meet his burden under Martinez v. Ryan, *supra*. Return, pp. 114-15. Thus, Respondents argue that the procedural default of this ground cannot be excused, and summary judgment should be granted. Petitioner admits that his Ground Eleven is procedurally barred, as it was not raised to or ruled upon by the state courts in his PCR proceedings. However,

Petitioner asserts that PCR counsel were ineffective in failing to raise this ground. Thus, he contends that the procedural default should be excused.

Because this claim was not *properly* pursued and exhausted by Petitioner in the state court, federal habeas review of the claim is now precluded absent a showing of cause and prejudice, or actual innocence. State v. Powers, 501 S.E.2d 116, 118 (S.C. 1998); Martinez, 566 U.S. at 9-10; Wainwright v. Sykes, 433 U.S. 72 (1977); Waye v. Murray, 884 F.2d 765, 766 (4th Cir. 1989), cert. denied, 492 U.S. 936 (1989).

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman, 501 U.S. at 750. As to Petitioner’s explanation for the procedural default of this ground, the United States Supreme Court has held that “if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State . . . Ineffective assistance of counsel, then, is cause for procedural default.” Murray, 477 U.S. at 488; see also Coleman v. Thompson, supra; McCleskey v. Zant, 499 U.S. 467, 494 (1991); Noble v. Barnett, 24 F.3d 582, 586, n.4 (4th Cir. 1994)[“[C]onstitutionally ineffective assistance of counsel is cause per se in the procedural default context”]; Smith v. Dixon, 14 F.3d 956, 973 (4th Cir. 1994)(en banc). However for the reasons set forth below, Petitioner has failed to show the necessary “cause” to overcome the procedural bar.

With respect to Petitioner’s PCR counsel, while ineffective assistance of counsel can constitute “cause” for a procedural default, it will only constitute “cause” if it amounts to an independent violation; Ortiz v. Stewart, 149 F.3d 923, 932 (9th Cir. 1998); Bonin v. Calderon, 77

F.3d 1155, 1159 (9th Cir. 1996); and ineffective assistance of *PCR counsel* (as opposed to trial or direct appeal counsel) does not amount to an independent constitutional violation, and ordinarily does not therefore constitute “cause” for a procedural default. Murray v. Giarratano, 492 U.S. 1, 13 (1989) [O’Connor, J., concurring] “[T]here is nothing in the Constitution or the precedents of [the Supreme] Court that requires a State provide counsel in postconviction proceedings. A postconviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the State to provide such proceedings, . . . nor does . . . the Constitution require [] the States to follow any particular federal model in those proceedings.”]; Mackall v. Angelone, 131 F.3d 442, 447-49 (4th Cir. 1997); Ortiz, 149 F.3d at 932; Pollard v. Delo, 28 F.3d 887, 888 (8th Cir. 1994); Lamp v. State of Iowa, 122 F.3d 1100, 1104-05 (8th Cir. 1997); Parkhurst v. Shillinger, 128 F.3d 1366, 1371 (10th Cir. 1997); Williams v. Chrans, 945 F.2d 926, 932 (7th Cir. 1992); Gilliam v. Simms, No. 97-14, 1998 WL 17041 at *6 (4th Cir. Jan. 13, 1998).

However, in Martinez v. Ryan, the Supreme Court did carve out a “narrow exception” that modified

“the unqualified statement in Coleman that an attorney’s ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default.” Martinez, 566 U.S. at ___, 132 S. Ct. at 1315. [F]or three reasons. First, the “right to the effective assistance of counsel at trial is a bedrock principle in our justice system Indeed, the right to counsel is the foundation for our adversary system.” Id. at ___, 132 S. Ct. at 1317.

Second, ineffective assistance of counsel on *direct appellate review* could amount to “cause”, excusing a defendant’s failure to raise (and thus procedurally defaulting) a constitutional claim. Id. at ___, 132 S. Ct. at 1316, 1317. But States often have good reasons for initially reviewing claims of ineffective assistance of trial counsel during state collateral proceedings rather than on direct appellate review. Id. at ___, 132 S. Ct. at 1317-18. That is because review of such a claim normally requires a different attorney, because it often “depend[s] on evidence outside the trial record,” and

because efforts to expand the record on direct appeal may run afoul of “[a]bbreviated deadlines,” depriving the new attorney of “adequate time . . . to investigate the ineffective-assistance claim.” Id. at ___, 132 S. Ct. at 1318.

Third, where the State consequently channels initial review of this constitutional claim to collateral proceedings, a lawyer’s failure to raise an ineffective assistance of counsel claim during initial-review collateral proceedings, could (were Coleman read broadly) deprive a defendant of any review of that claim at all. Martinez, supra at ___, 132 S. Ct. at 1316.

We consequently read Coleman as containing an exception, allowing a federal habeas court to find “cause,” thereby excusing a defendant’s procedural default, where (1) the claim of “ineffective assistance of trial counsel” was a “substantial” claim; (2) the “cause” consisted of there being “no counsel” or only “ineffective” counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the “initial” review proceeding in respect to the “ineffective-assistance-of-trial-counsel claim”; and (4) state law *requires* that an “ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding.” Martinez, supra at ___, 132 S. Ct. at 1318-19, 1320-21.

Trevino v. Thaler, 569 U.S. 413, 422-23 (2013); see also Gray v. Pearson, 526 F. App’x 331, 333 (4th Cir. June 7, 2013) [“The Supreme Court had previously held in Coleman that because a habeas petitioner has no constitutional right to counsel in state post-conviction proceedings, the ineffectiveness of post-conviction counsel *cannot* establish ‘cause’ to excuse a procedural default. Coleman, 501 U.S. at 757. The Court established an exception to that rule in Martinez.”].

Therefore, because, under South Carolina law, a claim of ineffective assistance of trial or appellate counsel is raised in an APCR; cf. State v. Felder, 351 S.E.2d 852 (S.C. 1986); Bryant v. Reynolds, No. 12-1731, 2013 WL 4511242, at *19 (D.S.C. Aug. 23, 2013); Gray, 526 F.App’x at 333 fn *; a petitioner’s claim of ineffective assistance of PCR counsel as “cause” for his default may be considered under the revised standard of Martinez and Trevino. Even so, under the first requirement of the Martinez exception, the Petitioner must “demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the [petitioner] must demonstrate that

the claim has some merit.” Gray, 526 F.App’x at 332. Petitioner has failed to do so.

Initially, the undersigned notes that Petitioner has provided very little support or argument for his claim that PCR counsel were ineffective for failing to raise this ground. In his petition, he briefly asserts that PCR counsel were ineffective at the beginning of his discussion of his unexhausted grounds. See Petition, pp. 82-83. He then later mentions an affidavit by one of the attorneys who served as PCR counsel, James Brown, Jr. Petition, p. 94. The portion of Brown’s affidavit that is relevant to this ground states as follows:

I did not raise the issue of trial counsel’s rendering ineffective assistance of counsel for failing to object to the Solicitor’s arguing to discount Bowman’s mitigation because there was no “nexus” between Petitioner’s proffered mitigation and the crime. I did not have any strategic reason for not doing so.

(Court Docket No. 36-12, ¶ 4). In his response in opposition to the motion for summary judgment, Petitioner again only briefly references PCR counsel’s performance and the affidavit from Brown. See Response, p. 30. However, based on the evidence submitted, Petitioner has failed to show that PCR counsel were deficient for failing to raise this issue in the PCR action.

Taking as true Brown’s statement that he did not have a strategic reason for not raising this issue, that evidence may be sufficient to rebut the presumption that PCR counsel’s actions might have been strategic, but a lack of a strategy by one of Petitioner’s PCR attorneys does not constitute per se deficient performance. See United States v. Diaz-Rivera, No. 11-500, 2013 WL 4763830 at *2 (E.D. Pa. Sept. 5, 2013) [“[O]vercoming the strategic presumption does not, in itself, entitle [the defendant] to relief. It merely gives him the opportunity to show that counsel’s conduct fell below objective standards of attorney conduct. In other words, the petitioner must still establish that counsel’s performance was objectively unreasonable.” (quoting Thomas v. Varner, 428 F.3d 491, 501 (3d Cir. 2005))]. Hence, the applicable standard is still whether counsel’s performance fell within the

wide range of constitutionally reasonable attorney performance. See Richter, 562 U.S. 86, 110 [“Representation is constitutionally ineffective only if it ‘so undermined the proper functioning of the adversarial process’ that the defendant was denied a fair trial. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.” (internal citations omitted)]; see also Roe v. Flores-Ortega, 528 U.S. 470, 481 (2000) [“The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.”]. Petitioner offers very little on that issue, and has failed to establish deficient performance by PCR counsel. Furthermore, as discussed in further detail below, due to the lack of merit on the underlying claim, PCR counsel was not deficient for failing to raise this ground during the PCR action. See Hood v. United States, 342 F.3d 861, 865 (8th Cir. 2003) [“[Counsel’s] representation of [Defendant] was not deficient for failing to advance a defense that was devoid of legal merit.”]; cf. Jones v. Barnes, 463 U.S. 745, 751-52 (1983) [“Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.”].

As previously noted, while ineffective assistance of PCR counsel can constitute the necessary cause to excuse a procedural default, under the first requirement of the Martinez exception, the Petitioner must “demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the [petitioner] must demonstrate that the claim has some merit.” Gray, 526 F. App’x at 333. Petitioner has failed to meet this requirement. As made clear by Supreme Court precedent, “counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Strickland, 466

U.S. at 690. Petitioner bears the burden to overcome this presumption, but he has offered only conclusory allegations and arguments that trial counsel were ineffective for failing to raise an objection in support of this claim. See Petition, pp. 83-85; see also Burt v. Titlow, 571 U.S. 12, 22-23 (2013) [“It should go without saying that the absence of evidence cannot overcome the ‘strong presumption that counsel’s conduct [fell] within the wide range of professional assistance.’” (quoting Strickland, 466 U.S. at 689)].

As to whether competent counsel would have objected to the Solicitor’s arguments, Respondents correctly point out in their return that the case Petitioner relies upon as the basis for the objection that he believes trial counsel should have made, Tennard v. Dretke, was decided after Petitioner’s trial. Thus, trial counsel could not have relied upon that particular case as a basis for an objection to the Solicitor’s argument. Indeed, in his response, Petitioner concedes that trial counsel could not have used Tennard to support an objection, but asserts that other Supreme Court holdings that pre-date Petitioner’s trial established “that ‘[t]he Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence offered by petitioner.’” Response, p. 28 (quoting Boyde v. California, 494 U.S. 370, 377-78 (1990)). However, the question of whether trial counsel was constitutionally deficient for failing to object to the Solicitor’s arguments is somewhat intertwined with the viability of the objection—that is, whether the Solicitor’s arguments precluded the jury from considering any mitigation evidence. Petitioner argues that “the solicitor’s arguments misstated the law regarding what mitigating evidence should or should not be considered by the jury in rendering its sentencing decision.” Response, p. 29. Respondents, on the other hand, assert that “Petitioner mischaracterizes the arguments of the solicitor as a statement of law, which the record demonstrates is not what was conveyed to the jury. The solicitor’s argument was simply

that—*an argument*.” Reply to Petitioner’s Response in Opposition (“Reply”), p. 7 (emphasis in original).

While the cases Petitioner references regarding this claim primarily concern what instructions a court gives to a jury regarding their consideration of mitigating evidence, some of the cases indicate that arguments by the prosecution could influence the jury’s perception of the scope of their review. For example, in Boyde the United States Supreme Court stated,

[A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, . . . and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law. Arguments of counsel which misstate the law are subject to objection and to correction by the court. This is not to say that prosecutorial misrepresentations may never have a decisive effect on the jury, but only that they are not to be judged as having the same force as an instruction from the court. And the arguments of counsel, like the instructions of the court, must be judged in the context in which they are made.

494 U.S. at 384-85 (internal citations omitted). With that directive in mind, based on what the Solicitor argued to the jury, the undersigned does not find that the Solicitor’s argument misstated the law.

As other federal courts have recognized, “as long as the jurors are not told to ignore or disregard mitigators, a prosecutor may argue, based, on the circumstances of the case, that they are entitled to little or no weight.” United States v. Johnson, 495 F.3d 951, 978 (8th Cir. 2007), cert. denied 555 U.S. 828 (2008). In the context of Petitioner’s case, the challenged arguments were just that—part of the Solicitor’s contention that the jury should give little or no weight to some of the mitigation evidence that had been presented to them. The fuller context in which the statements were made bears that out. For example, when the Solicitor argued, “[W]hat does all that stuff that happened to Marion during his youth have to do with Kandee Martin? . . . [W]hat has it got to do with

it? Nothing. He knows right from wrong[,]” (R.pp. 4962-63), he did not tell the jury to ignore the mitigation evidence. Rather, he argued that the mitigation evidence did not lessen Petitioner’s culpability. Moreover, immediately prior to that argument, the Solicitor had discussed the testimony of one of Petitioner’s experts, who, according to the Solicitor, had testified “that Marion Bowman had a problem making choices, that there was a bridge he had to cross to make those choices and that these things were affecting his ability to reach the right decision.” (R.p. 4962). The full context thus demonstrates that the Solicitor was not stating that the jury should ignore the mitigating circumstance. He was instead arguing about the weight the jury should give to the testimony that had been presented to them.

In another part of the argument that Petitioner now challenges, the Solicitor indicated that no one had a perfect background and asserted “[W]here is the connection? . . . [A]nybody who’s gotten up here and drawn a line between anything involving Marion Bowman’s background or family or mentality and the murder of Kandee Martin. There’s just no connection[,]” before stating, “He made his choices, to murder and burn that body beyond recognition.” (R.p. 4964). That additional statement provides greater context to the Solicitor’s argument—again, not as a limitation on the jury’s consideration of the mitigating evidence, but as an argument that Petitioner made a choice in killing the victim and then burning her body. Other courts have found that such arguments do not run afoul of the Constitution or Tennard. See Allen v. United States, 2011 WL 1770929, at *40 (E.D. Mo. May 10, 2011) [“[P]rosecutors are free to argue that a given mitigator should not be given any weight in the circumstances of the case, so long as the prosecutor does not argue or assert that jurors are forbidden from considering it.” (citing Abdul-Kabir v. Quarterman, 550 U.S. 233, 259 n.21 (2007) [“A jury may be precluded from [having a ‘meaningful basis to consider the relevant qualities’ of a

defendant’s proffered evidence] not only as a result of the instructions it is given, but also as a result of prosecutorial argument dictating that such consideration is forbidden.” (citations omitted)]; Johnson, 495 F.3d at 978 [“The prosecutor was not arguing that the jurors could choose to ignore the mitigators or exclude them from consideration, but rather that they were insufficient to outweigh the gravity of the offense”)]; United States v. Rodriguez, 581 F.3d 775, 799 (8th Cir. 2009) [“The . . . challenged remarks do not direct jurors to disregard mitigating factors because no nexus links them to the killing. Rather, the prosecutor argued that, despite [the defendant]’s troubled past, ‘he is capable of choosing for himself’ and has free will. This argument is permissible.” (citing Johnson, 495 F.3d at 979 [finding no error when “[t]he prosecutor was arguing . . . that she [the defendant] had free will and an opportunity to make the right choices, her difficult childhood notwithstanding”])].

Petitioner asserts that the Solicitor improperly stated, “Everybody was a child at one time. That’s got nothing to do with the man he turned into and the conduct he engaged in after that.” See Response, p. 28. But, again, the full context in which that statement was made sheds light on the greater argument that the Solicitor was making. Immediately prior to the statement, the Solicitor stated, “They showed some pictures of Marion Bowman as a child, some school pictures to get your sympathy. The judge will instruct you that you cannot make your decision based on passion, prejudice, sympathy, or any undue factor.” (R.pp. 4966-67). Thus, the challenged statement was not part of some improper statement of the law in the context in which it was made.

In addition to the Solicitor’s arguments being the type of statements that are not disallowed by Supreme Court precedent, the Solicitor told the jury many times during his closing argument that the judge would instruct them on the law and that they could and should consider the mitigating circumstances that had been presented. (R.p. 4961 [“I’m going to talk about the mitigating

circumstances. And the judge will instruct you to consider mitigating circumstances. And you should consider them. Look at them, you decide what significance to give them if you find that they, in fact, exist.”], 4966 [“Judge Goodstein in her instructions is going to tell you that you can consider any mitigating circumstance or anything else that you want to consider in determining the appropriate penalty. . . . You look at everything.”], 4972 [“The judge will instruct you that you can bring back a life sentence for any reason or no reason at all as an act of mercy. And that’s what the defense will ask you to do. And that’s within your power, you can do that. For any reason or no reason at all you can come back and extend mercy to this defendant.”)]. The portions of the Solicitor’s closing argument that Petitioner now challenges are even more clearly arguments as to what weight the jury should give Petitioner’s mitigating evidence, as opposed to misstatements of the law, when compared to what the Solicitor said about the law during his closing argument. For all of the above reasons, Petitioner has failed to show that trial counsel was deficient for failing to raise an objection that the Solicitor had improperly stated there had to be some nexus between the mitigating evidence and the crime for the jury to consider such evidence. See Moody v. Polk, 408 F.3d 141, 151 (4th Cir. 2005) [holding counsel was under no duty to make a frivolous motion].

Petitioner has also failed to make a substantial showing as to prejudice for many of the reasons discussed above—the jury was never misinformed about whether they could consider and give effect to the mitigation evidence that Petitioner presented. Additionally, the trial court properly instructed the jury that it should consider the mitigation evidence that had been presented, (see R.pp. 5029-34), and the trial court told the jury that it was free to recommend a life sentence “for any reason, or for no reason at all[,]” (R.p. 5033). Therefore, based on the state court record, Petitioner has not shown that, even if trial counsel were deficient in failing to object to the Solicitor’s closing

argument, there was a reasonable probability of a different outcome if the objection had been sustained and the trial court had issued additional instructions that there need not have been a “nexus” between the mitigating evidence and the murder in order for the jury to consider it.

As Petitioner has failed to meet his burden as to any of the requirements of Martinez, he has failed to overcome the procedural bar of his Ground Eleven. Therefore, this claim is without merit.

XII.

(Ground Twelve: Alleged Ineffective Assistance of Counsel for Failure to Call Additional Witnesses as Part of Mitigation Presentation)

In his final ground for relief, Petitioner asserts that trial counsel were ineffective for failing to present additional mitigation evidence during their presentation at the sentencing phase of his trial. According to Petitioner, “[t]rial counsel offered only a small glimpse into the hectic life of Petitioner during the mitigation phase of Petitioner’s trial.” Petition, p. 85. Respondents disagree, arguing that “[t]he state court record demonstrates that there is substantial mitigation evidence addressing the same life circumstance theme that Petitioner suggest was not thoroughly explored.” Reply, p. 12.

As with Ground Eleven, Petitioner has provided little evidence to support his contention that PCR counsel were ineffective for failing to raise this claim in Petitioner’s PCR action. Aside from the affidavit from one attorney who represented Petitioner in PCR, indicating that he had no strategic reason for not raising this issue, Petitioner has offered little evidence that PCR counsel’s representation fell outside the “wide range of reasonable professional assistance” Strickland, 466 U.S. at 689. Additionally, as discussed in further detail below, based on the merits of the underlying ineffective assistance of trial counsel claim, the undersigned does not find that PCR

counsel was ineffective in failing to raise this claim.

In order for Petitioner to meet his burden under Martinez, he must show that there is some merit to his claim that trial counsel were ineffective for failing to present additional mitigation evidence. For this ground, the undersigned first examines whether Petitioner has made a substantial showing that Petitioner was prejudiced by trial counsel's failure to introduce the additional mitigation evidence. See Strickland, 466 U.S. at 697 ["If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."].

Trial counsel presented the following witnesses to testify about Petitioner's life before his crimes²²:

Kendra Bowman, Petitioner's older sister, testified that she and Petitioner were very close growing up, and that when her mother became disabled, Kendra and Petitioner were left to do the cleaning and cooking around the house. (R.pp. 4742-43). Kendra testified that their father, Marion Bowman, Sr., was never home, but her "stepfather, Joseph Sims . . . played the daddy part." (R.p. 4744). According to Kendra, Sims treated the children as his own, taking them on trips, "show[ing them] what a father supposed to do, . . . help[ing] discipline [them]" (Id.) Kendra testified that Bowman, Sr. was very abusive to her mother and the two separated when she was around

²² In addition to the witnesses discussed, trial counsel called the following additional witnesses during their mitigation presentation: Margaret Baughman, a teacher at Dorchester County Detention Center (R.pp. 4760-68); Frankie Martin, a witness who saw Petitioner and the victim together before the murder (R.pp. 4830-31); James Aiken, an expert in prison classification relative to future dangerousness and prison adjustment issues (R.pp. 4832-82); Sharon Branch, an officer at the Dorchester County Detention Center (R.pp. 4882-90); Enrique Badillo, an officer at the Dorchester County Detention Center (R.pp. 4902-05); and Travis Felder, Petitioner's co-defendant (R.pp. 4911-28). None of these witnesses testified to details concerning Petitioner's childhood or early adolescence. As such, their testimony has not been summarized.

one. (R.p. 4748).

Dorothy Bowman, Petitioner's mother, testified that she and Bowman, Sr. got divorced when her youngest child was eighteen months old. (R.p. 4751). According to Dorothy, "[c]hild support wasn't an issue because he wouldn't pay it, so I had to take care of my kids myself. Then once Marion got big enough to mow grass, he mowed grass to make ends meet." (*Id.*) Dorothy testified that Petitioner had difficulty in school and only finished ninth grade. (R.pp. 4751-52). Dorothy testified that Petitioner was close with her family members, particularly his aunt, Lorraine Johnson, stating "When she need him he was always there. Well, anybody need him he was always there, he was a very helpful person." (R.p. 4753). Dorothy testified that she had debilitating back problems that required her to have help getting out of bed and getting dressed, and that she would stay in the bed until her children got back from school. (R.p. 4754). Dorothy conveyed that Petitioner tried to have a relationship with his father, but Bowman, Sr. was very unreliable. (R.p. 4755). Dorothy testified that she did not have school pictures of Petitioner because she did not have the money to purchase them. (R.p. 4756). Dorothy testified that Sims treated her children as a father would, and Petitioner "looked up at [Sims] like a real dad because . . . he was the only one took up a lot of time with him." (R.p. 4758).

Trial counsel also presented Jeffrey Youngman, M.A., who was qualified as an expert in the field of forensic psychosocial assessment. (R.p. 4786). As part of his assessment, Youngman interviewed Petitioner's mother, grandmother, sister, four aunts, two teachers, a principal, and the family doctor.²³ (R.p. 4789). Youngman also reviewed Petitioner's school records, medical records,

²³ There were some witnesses who Youngman testified he "could not talk to[.]" including Petitioner's wife. (R.p. 4782). Youngman also did not talk to Petitioner's sister, Yolanda Bowman, (continued...)

group counseling records, sheriff's office records, social services records, and a psychiatric evaluation of Petitioner. (Id.) Youngman testified that Petitioner's "functioning both social and emotional was affected by trauma that occurred in his childhood." (R.p. 4791). Youngman then gave a very detailed description of Petitioner's life from birth to around the time of his crimes - Youngman's narrative spans approximately thirteen pages of the record. (R.pp. 4791-804). Youngman testified that Bowman, Sr. was very abusive to Petitioner's mother, and gave a graphic description of some of her injuries. (R.p. 4792). Youngman also described how Petitioner desired to have a relationship with his father, to no avail. (R.pp. 4792-93). Youngman testified that Petitioner's family lived in poverty and that relatives described Petitioner and his sisters as being "deprived, they were dirty, they were wearing tattered clothes and they never had stuff like other kids had" (R.p. 4793). Youngman testified that Petitioner's mother was very strict and beat the children daily. (R.p. 4794). Additionally, according to Petitioner's relatives, his mother "was known to drink, also suspected of using drugs and she testified she was arrested once for possession of drugs." (Id.) Youngman testified that Petitioner "did pretty good in first, second, third grades", but began having problems in the fourth grade. (R.p. 4795). Youngman relayed an incident when Petitioner defecated in his pants after being refused a bathroom break at school and then being made to sit with feces in his pants all day. (Id.) Youngman testified that Petitioner's mother "went back the next day and put the pants on the teacher's desk and they had words." (Id.) Youngman testified that, after that incident, Petitioner had a number of problems with teachers or the school, but Petitioner's mother always took his side and refused to listen to the teachers or take the side of the school. (R.pp. 4795-96). Youngman

²³(...continued)
or his friend, Hiram Johnson. (Id.)

testified that Petitioner's mother became bedridden when he was around nine years old, and he and his sisters began providing for the household. (R.p. 4796). As described by Youngman,

[I]t really fell on those three kids and especially the two oldest, Marion and Kendra, to provide for their mother. They had to change her when she used the bathroom, they had to feed her, they had to clean the house, they had to do everything. They sometimes missed school because of this, sometimes they were late for school because of this.

(R.p. 4797). Youngman testified that Sims moved into Petitioner's home in 1990, and he changed how things were handled with Petitioner's disciplinary problems at school—"[Sims] would go to the school, he would listen to what the school would say, he would hold the kids accountable, he would be cooperative with the school, but he was a long distance truck driver so . . . he was on the road a lot." (Id.) Youngman testified that Petitioner began to experiment with alcohol in fourth grade. (R.pp. 4797-98). Petitioner had behavior problems in fourth grade (which he had to repeat), in sixth grade, and in seventh grade. (R.pp. 4797-99). Following a run-in with Bowman, Sr. in which Petitioner realized that his father would never support the family, Petitioner began making money by mowing lawns, but he also used that money to buy and sell drugs, and he began drinking regularly on weekends. (R.p. 4800). Youngman testified that when Petitioner was in ninth grade, his mother was notified twice that Petitioner was in danger of failing due to his grades, and he dropped out of school before finishing tenth grade. (R.pp. 4800-01). Youngman described the deaths of two of Petitioner's cousins, which were greatly distressing to Petitioner during his youth. (R.pp. 4801-02). Petitioner's cousin Orin fell and hurt his arm at school, but he died after he was taken to the hospital and given the wrong medication. (R.p. 4801). Then, Petitioner's cousin Patrick shot himself with a gun that Petitioner had stolen and had made available to Patrick, and Petitioner reported feeling responsible for Patrick's death. (R.pp. 4801-02). The same year that Patrick committed suicide, Sims

moved out. (R.p. 4802). Youngman testified that Petitioner was briefly incarcerated for third degree burglary, and when he was released, he held “a succession of construction and rebar jobs. He remained essentially employed most of that time until his most recent arrest.” (Id.) Youngman also testified that Petitioner was very helpful to his relatives when he was growing up. (R.pp. 4802-03). Youngman testified that Petitioner married Dorothy Mae Williams, who already had two children, and Petitioner “had a very good relationship with [the children] and who reportedly love him.” (R.p. 4803). Youngman testified that Dorothy Mae and Petitioner had a daughter in 2001, as well. (Id.)

In addition to giving a summary of Petitioner’s experiences as a child and young adult, Youngman listed the following factors as affecting Petitioner’s ability to make decisions: domestic violence in the home, abandonment by his father, financial difficulties at home, mother’s incapacitation or invalid status, family history of alcohol abuse, mother’s drug use and conviction for selling drugs, mother’s uncooperativeness with school, trauma of various family members dying, “his chaotic, deprived childhood,” and lack of school intervention. (R.pp. 4807-08). Youngman also testified that he was “astounded” that there were so few pictures of Petitioner and his sisters growing up because, even having worked with “some of the most deprived people that exist[,]” Youngman had not encountered so little photographic documentation of children’s lives. (R.p. 4810). Youngman concluded from what he had found that “the family didn’t really care much for the kids if they weren’t going to keep pictures of them.” (R.pp. 4810-11).

Finally, trial counsel also introduced an affidavit by Mary Johnson, Petitioner’s aunt, who was disabled. (See R.pp. 4803, 4905-06).

Petitioner describes trial counsel’s mitigation case as “sparse.” Response, p. 32. He has submitted affidavits with additional mitigation evidence from the following witnesses: Joseph

Sims, Kendra Bowman, Dorothy Bowman (mother), Glenn Miller, Sr., Oretta Miller, Tyler Dufford, Jennifer Thompson, Velma Young, Tiffany Grimmage, and Dorothy Bowman (wife). (Court Docket Nos. 36-1 through 36-10). Petitioner also describes the additional mitigation evidence that he believes trial counsel should have presented, which he asserts presents “a dramatically different account of Petitioner’s family environment and childhood.” Response, p. 33. The additional mitigation evidence can be generally categorized as evidence regarding Petitioner’s mother’s behavior and her relationship with Sims, evidence regarding Petitioner’s family’s significant poverty, evidence regarding the burden placed on Petitioner and his sisters due to his mother’s disabilities, and evidence regarding Petitioner’s school experience. See Response, pp. 33-35. The affidavits also include some evidence that falls outside of those general categories, such as Oretta Miller’s recollection that Petitioner brought her wildflowers on two occasions and that Petitioner was “so thoughtful and kind for a kid that age” (Court Docket No. 36-5 at 4).

In his response in opposition to the motion for summary judgment, Petitioner highlights some of the specific evidence that he believes trial counsel should have presented. For example, Sims’ affidavit states that when he met Petitioner’s mother, “[s]he was essentially a prostitute—she had sex in exchange for money or things she needed.” (Court Docket No. 36-1, ¶ 4). In his affidavit, Sims further describes Petitioner’s mother as “a gold digger”, states that she “liked cocaine”, and that she “constantly had different men, in and out of the house.” (Court Docket No. 36-1 at ¶¶ 3, 5, 12). He indicates that he never loved her, but “[s]he served a need,” and he “kept seeing [her] for as long as [he] did because of the children. [He] was very fond of them and wanted to try to help improve their situation.” (Court Docket No. 36-1, ¶¶ 4, 6, 10). Petitioner further provides anecdotal evidence relating to “the significant poverty suffered by Petitioner’s family when

he was growing up.” Response, pp. 33-34. Petitioner emphasizes the burdens placed on him at a young age as a result of his mother’s disability. Response, pp. 34-35. With regard to the evidence pertaining to his school experiences, Petitioner points to statements from Sims’ affidavit and Glenn Miller, Sr.’s affidavit, which indicate that black children and white children were treated differently at the time Petitioner was in school. Response, p. 35.

Having reviewed all of the mitigation evidence that Petitioner has submitted through affidavits, the undersigned agrees with Respondents that, by and large, “[t]he evidence referenced by Petitioner amounts to cumulative evidence already presented through various witnesses.” Reply, p. 17. While Petitioner now minimizes how his mother was portrayed during trial counsel’s mitigation presentation, the jury heard much more than that she was “a mother who merely did not discipline Petitioner and did not take his picture.” Response, p. 36. As outlined above, the jury heard from Kendra, Dorothy, and Youngman about the extensive burdens placed on Petitioner and his sisters as a result of his mother’s advanced disability. The jury also heard about Petitioner’s mother’s use of and involvement with drugs and alcohol. And they heard that she beat her children. The jury heard that Petitioner’s mother handled his behavioral issues at school inappropriately and that Sims took a more rational approach to such problems when he became a part of Petitioner’s life, a sentiment echoed by the affidavits Petitioner now submits from his former teachers and principal. Multiple witnesses testified to the significant poverty in which Petitioner’s family lived, and that evidence was not just referenced generally. Youngman testified that Petitioner and his sisters were described as “deprived, . . . dirty, [and] wearing tattered clothes and [that] they never had stuff like other kids had” (R.p. 4793). Petitioner’s mother testified that she did not even have enough money to order Petitioner’s school pictures, and Youngman, who indicated that he had worked with extremely

impoverished individuals, conveyed that the lack of photographs was indicative of Petitioner not being cared about. Many of the themes that Petitioner argues should have been explored by trial counsel during their mitigation phase were explored, albeit sometimes through different witnesses or anecdotal evidence. To the extent the evidence in the affidavits was already presented to the jury by way of trial counsel's mitigation presentation, Petitioner cannot meet his burden as to the prejudice prong of Strickland.

Even so, Petitioner is correct that some of the specifics from the affidavits now presented by Petitioner were not provided to the jury in trial counsel's mitigation presentation. For example, the jury did not hear that Petitioner's mother was essentially a prostitute. They did not hear that children were treated differently in the Branchville school system based on their race (although Youngman did indicate that the schools did not properly intervene to help Petitioner, a problem that appeared to have been compounded by Petitioner's mother's anti-authoritarian views regarding school). However, to the extent Petitioner's affidavits provide additional evidence about Petitioner's life and the adversity he faced, the undersigned disagrees with Petitioner about the impact that such evidence would have had. Having reviewed the new and previously presented mitigating evidence, in conjunction with the aggravating evidence, the undersigned does not find that Petitioner has met his burden of showing a reasonable probability that the jury would have returned with a different sentence had they heard the evidence in these affidavits. See Strickland, 466 U.S. at 694 ["The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."]; see also Wiggins v. Smith, 539 U.S. 510 (2003) ["In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence."]. Trial counsel presented a thorough mitigation case—extensively

covering Petitioner's background, addressing his ability to adapt to prison life, and even attempting to lessen some of the particularly aggravating circumstances of Petitioner's crimes. However, the details and circumstances of Petitioner's crimes, as presented by the State, were very aggravating. When considered with the totality of evidence presented to the jury, the "[t]he evidence that [Petitioner] says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented to the [jury]." See Strickland, 466 U.S. 699-700. Accordingly, Petitioner has failed to meet his burden under Martinez as to the prejudice prong of his underlying ineffective-assistance-of-trial-counsel claim.

Petitioner has similarly failed to meet his burden with respect to the deficiency prong of Strickland. Petitioner primarily focuses his arguments in the Petition and in his response in opposition to the motion for summary judgment on the substance of the evidence that was and was not introduced to the jury. See Petition, pp. 85-94; Response, pp. 30-37. Petitioner asserts that "trial counsel were deficient in failing to investigate and present the evidence that has now been collected by undersigned counsel." Response, p. 35. However, Petitioner has failed to identify any testimony by trial counsel in the state court record, nor has he presented any new evidence by way of affidavits from or depositions of trial counsel, to demonstrate what their strategy was for investigating and presenting mitigation evidence. Instead, Petitioner relies upon statements by various service providers, who were retained by trial counsel, regarding their experience in being a part of the defense team and their perceptions as to trial counsel's performance. For example, Petitioner has attached to his Petition a copy of an affidavit from Robert Minter, one of two investigators who were part of the defense team. (R.pp. 7516-17). As described by Petitioner, in Minter's affidavit "he relates how he was never given any direction on the case, and was never provided with any specific investigative

tasks. He never interviewed any of the fact witnesses, and has no recollection of discussing the facts of the case with Petitioner.” Petition, pp. 93-94; (see also Court Docket No. 36-11). In his response in opposition to the motion for summary judgment, Petitioner also references the PCR testimony of Dale Davis, who served as a mitigation investigator for the defense team, and Youngman. According to Petitioner,

Davis described a lack of communication and direction from the trial attorneys in preparing Petitioner’s case. Davis stated she “didn’t know how he wanted [her] to proceed, [she] didn’t know if there were certain things that he wanted [her] to do.” App. 6960; see also American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.4.B (2003) (“Lead counsel bears overall responsibility for the performance of the defense team, and should allocate, direct, and supervise its work in accordance with [the ABA] Guidelines and professional standards.”). Davis further testified that lead counsel Cummings ignored most of her work and said any information he would need he would “get from the State.” App. 7213. The forensic social worker, Jeffrey Youngman, who testified at trial, testified in PCR that he never met with trial counsel about his proposed testimony and that there was no discussion of what testimony should or should not be presented. App. 6823.

Response, pp. 35-36.

However, it must be noted that Petitioner’s deficiency argument is not particularized to the evidence that he now presents to this court—he argues (as PCR counsel did at PCR) that trial counsel failed to properly prepare and present mitigation evidence,²⁴ with support for that argument based largely on the testimony of Davis and Youngman. The PCR court already thoroughly examined that issue, and the undersigned finds the PCR court’s conclusions to be highly relevant to the deficiency analysis of Petitioner’s Ground Twelve:

²⁴While Petitioner concedes that he did not raise the issue in his PCR proceeding regarding the mitigation evidence set forth in Brown’s affidavit [Court Docket No. 36-12], he did raise the issue in this PCR proceedings of trial counsel not presenting other mitigation evidence [see Court Docket No. 11-27, pp. 66-76].

Counsel Cummings . . . 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 Youngman, 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 Bloominburg, 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 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 Youngman 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. . . .

Clearly, this is not a . . . 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 Youngman—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 United States Supreme Court has held are "subject to Strickland's performance and prejudice components." See [Bell v.] Cone, 535 U.S. [685,] 698 [(2002)]; [Florida v.] Nixon, 543 U.S. [175,] 189-92 [(2004)].

. . . .

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 Youngman complained that he did not have much contact with the attorneys, and Applicant introduced a letter in which Youngman complained to counsel that trial was upcoming and he did not know the strategy. {PCR Tr. 1056-58}. However, Youngman 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, Youngman 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 keeping 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}**.

On cross, Davis was led on an [sic] 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 Youngman. **{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 information herself, and she did in fact gather it and present it to Youngman and counsel. **{PCR Tr. 1445-47}**. She also conceded she suggested Youngman to counsel 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 Youngman'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 [sic] the expertise to gather the social history. He noted she suggested Youngman. {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 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 Youngman and discussing his testimony. Counsel felt Youngman 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 Youngman's testimony would give reasons for why Applicant did what he did. He did not recall Youngman ever calling and saying he needed additional information. {PCR Tr. 1809-12; 1873}. Counsel also noted that he was impressed by Youngman's experience and resume and his prior employment as a police officer, which he thought would aid Youngman'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}.

....

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 Youngman did. While Youngman and Davis might have wanted more guidance, counsel was clear he met with Youngman prior to trial and discussed the testimony, and also stated as a strategic matter he wanted Youngman's testimony to flow more freely from the heart than be robotically elicited. This was a reasonable decision, and counsel, Davis, and Youngman were all clear that Davis got all the information she could find, and she delivered it all to Youngman, and counsel got a copy of Youngman'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).

(R.pp. 9926-33).

Petitioner argues that "[b]ecause trial counsel did not consider or discuss their plans for trial, it cannot be said that trial counsel made a strategic decision to not present the evidence described above." Response, p. 36. That argument is a non sequitur. What some members of the defense team experienced is not determinative of whether trial counsel performed deficiently in this case, particularly in light of the evidence in the state court record concerning trial counsel's

preparation and investigation. Cummings testified at the PCR evidentiary hearing that Davis had already been retained as part of the defense team when he was appointed. (R.p. 7537). He described her role as follows:

They're social workers. They go out and try to find out about the life of a the client, they know where to go get school records, hospital records, and that is what you pay them to do. You go, you tell them to go see the family, go get pictures, photographs, how they grew up.

....

And you try to find what you can find out about the defendant and, you know, you are basically learning about their life.

(Id.) Cummings testified that trial counsel relied on Davis' expertise as to where to gather information about Petitioner's background, and they provided support to her when she requested it. (R.pp. 7537-40). The defense team also retained Jeffrey Youngman as part of the defense team, but he was hired as an expert to testify to the information that had been discovered in the mitigation investigation. (R.pp. 7541-43). As for trial counsel's strategy in the mitigation phase, Cummings indicated that they attempted to "paint the picture like they do for the victim, they grew up, there is a high school photo, here is the confirmation photo, here is the baptismal photo, try to do the same thing with Marion, paint him as a human being." (R.p. 7603). In portraying the "picture" of Petitioner's life, there was some negative information, such as Petitioner's drug-dealing, that was introduced, but as Cummings explained, "The only way to get his background in at that point in mitigation was to try and show that . . . he was basically kicked to the curb at a young age and he would do what he had to do to survive." (R.p. 7365). Cummings also explained that trial counsel was somewhat limited in their presentation based on the circumstances of Petitioner's case and Petitioner's own wishes. Cummings testified that "everybody in [Petitioner's] family was charged."

(R.p. 7550). Petitioner’s mother “wouldn’t meet with [trial counsel,]” and his wife “was reluctant to talk to [Cummings] in the courtroom.” (R.pp. 7550-51). Petitioner also “expressed great concern about [calling his family members], didn’t want his family hurt. . . . [H]e wanted [his wife and children] protected and he wanted them not to be hurt and not to hurt his family. He loved his family.” (R.p. 7551).

In sum, the record shows that trial counsel hired appropriate service providers to investigate and present mitigating evidence for purposes of the sentencing phase. Davis had previously worked for the Charleston County Public Defender’s Office as a mitigation investigator for capital cases, and at the time of her PCR testimony, she had worked on about thirty cases. (R.pp. 7133-35). She interviewed numerous witnesses during her mitigation investigation, with quite a bit of overlap between the witnesses she interviewed and those whose affidavits Petitioner now relies upon. For example, based on her PCR testimony, Davis interviewed Joseph Sims, Dorothy Bowman (mother), Dorothy Bowman (wife), Kendra Bowman, Jennifer Thompson, and Tyler Dufford. (R.pp. 7164-65). Whether she discovered the same information that Petitioner now asserts should have been presented to the jury is unclear from the evidence before this court. However, Petitioner has failed to identify any evidence indicating that a failure on Davis’ part to discover the mitigating evidence that Petitioner now presents can be attributed to trial counsel. As the PCR court acknowledged, trial counsel hired Davis for her expertise in gathering mitigating evidence—she did not need an attorney micromanaging her work or telling her what evidence was mitigating. Essentially, Petitioner is asking this court to reevaluate whether trial counsel deficiently managed the mitigation investigation based on the same evidence that was already considered and rejected by the PCR court. The only new evidence Petitioner presents on this issue is the affidavit from Minter, which is of little relevance

compared to the evidence presented at the PCR evidentiary hearing from trial counsel and the members of the defense team who were a part of the mitigation investigation. Petitioner has failed to meet his burden under Martinez of showing that there is some merit to his claim that trial counsel were deficient in their investigation, preparation, and presentation of mitigating evidence during the sentencing phase of trial.

For all of the above reasons, Petitioner has failed to show that the procedural default of his Ground Twelve should be excused pursuant to Martinez. Accordingly, this claim is without merit.

XIII.

(Request for Evidentiary Hearing)

Petitioner has “request[ed] an evidentiary hearing so this Court can assess the evidence of both trial counsel and post-conviction relief counsel’s ineffectiveness.” Petition, p. 94. As this Court and others have recognized, it is sometimes appropriate to expand the record or grant an evidentiary hearing when considering whether there is cause and prejudice to excuse the procedural default of a claim in federal habeas corpus. See, e.g., Fielder v. Stevenson, No. 12-412, 2013 WL 593657, at *3 (D.S.C. Feb. 14, 2013) [“[C]ourts have held that § 2254(e)(2) does not . . . constrain the court’s discretion to expand the record to establish cause and prejudice to excuse a petitioner’s procedural defaults.” (citing Cristin v. Brennan, 281 F.3d 404, 416 (3d Cir. 2002))]. “In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition’s factual allegations, which, if true, would entitle the applicant to federal habeas relief.” Schriro, 550 U.S. at 474.

Here, however, Petitioner has failed to make such factual allegations. Indeed, as

discussed in detail above, for purposes of the summary judgment motion, even though the undersigned has considered the evidence presented by Petitioner as true, he has failed to meet his burden under Martinez of demonstrating that his underlying ineffective assistance of trial counsel claims have “some merit” or that PCR counsel were ineffective under Strickland. Cf. Brizendine v. Parker, 644 F. App’x 588, 596-97 (6th Cir. 2016) [granting an evidentiary hearing where Petitioner “established, for purposes of overcoming the procedural default of his first ineffective assistance of trial counsel claim, that there [was] ‘some merit’ to his arguments that his trial counsel’s performance was defective and that such performance prejudiced him” and where Petitioner also “established that his post-conviction counsel was ineffective” but denying an evidentiary hearing where the underlying ineffective assistance of trial counsel claim was “without merit”].²⁵ Accordingly, Petitioner’s motion for an evidentiary hearing should be denied.

²⁵ The undersigned also finds the Fifth Circuit’s reasoning in Segundo v. Davis, 831 F.3d 345 (5th Cir. 2016) to be instructive as to whether an evidentiary hearing is warranted in light of the evidence before the Court:

[T]here “must be a viable constitutional claim, not a meritless one, and not simply a search for evidence that is supplemental to evidence already presented.” Ayestas [v. Stephens], 817 F.3d 888,] 896 [(5th Cir. 2016), judgment vacated on other grounds by Ayestas v. Davis, 138 S. Ct. 1080 (2018)]. The decision to grant an evidentiary hearing “rests in the discretion of the district court.” See Schriro v. Landrigan, 550 U.S. 465, 468 (2007) (“It follows that if the record refutes the applicant’s factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing.”); see also McDonald v. Johnson, 139 F.3d 1056, 1060 (5th Cir. 1998) (“The district court had sufficient facts before it to make an informed decision on the merits . . . and, accordingly, did not abuse its discretion in refusing to hold an evidentiary hearing.”). . . . Given the extent of the factual development during trial and during the state habeas proceedings, the district court did not abuse its discretion in determining it had sufficient evidence and declining to hold a hearing.

831 F.3d at 351.

Conclusion

Based on the foregoing, it is recommended that the Respondents' motion for summary judgment be **granted**, and that the Petition be **dismissed**, with prejudice.

The parties are referred to the Notice Page attached hereto.



Bristow Marchant
United States Magistrate Judge

December 10, 2019
Charleston, South Carolina

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. “[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must ‘only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.’” *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee’s note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume
United States District Court
Post Office Box 835
Charleston, South Carolina 29402

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Marion Bowman, Jr., #6006,	)	
	)	
Petitioner,	)	
	)	Case No.: 9:18-cv-00287-TLW
vs.	)	
	)	
Bryan Stirling, Director, SCDC,	)	
and Willie D. Davis, Warden,	)	
Kirkland Correctional Institution,	)	
Respondents.	)	
_____	)	

PETITIONER’S OBJECTIONS TO REPORT AND RECOMMENDATION

Petitioner Marion Bowman is a South Carolina death-sentenced inmate who filed a Petition for Writ of Habeas Corpus (“habeas petition”) on January 10, 2019 pursuant to 28 U.S.C. § 2254. ECF No. 36. On December 10, 2019, Magistrate Judge Bristow Marchant issued a Report and Recommendation (“R&R”) (ECF No. 75) recommending the district court grant Respondents’ Motion for Summary Judgment (ECF No. 57) on all grounds and deny Petitioner’s request for an evidentiary hearing. Petitioner now files the following objections to the Magistrate Judge’s recommendations.

I. STANDARD OF REVIEW

When a party files written objections to proposed findings and recommendations of the Magistrate Judge, the district judge “shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which the objection is made.” 28 U.S.C. § 636(b)(1).

[T]he Court is not required to review, under a de novo or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the report and recommendation to which no objections are addressed. While the level of scrutiny entailed by the Court's review of the Report thus depends on whether or not objections have been filed, in either case the Court is free, after review, to accept, reject, or modify any of the magistrate judge's findings or recommendations.

Wallace v. Housing Auth. Of Columbia, 791 F. Supp. 137, 138 (D.S.C. 1992) (citations omitted).

II. OBJECTIONS TO RECOMMENDATION ON GROUND I (TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN THEIR CROSS-EXAMINATION OF TAIWAN GADSON)¹

Petitioner objects to the Magistrate Judge’s holding relative to the claim that trial counsel rendered ineffective assistance of counsel by failing to cross examine the Taiwan Gadson – the sole eyewitness to the crime – about his understanding of his exposure to the death penalty. The Magistrate Judge rejected Petitioner’s interpretation of the state post-conviction relief (“PCR”) court holding, stating the PCR court “did not find that Gadson never feared the death penalty but, rather, that the evidence did not show that Gadson believed he was avoiding the death penalty *by entering into a plea agreement.*” R&R 8 (emphasis in order). The Magistrate Judge then found the PCR court’s finding was supported by the record. R&R 19.

Petitioner submits the Magistrate Judge failed to acknowledge that trial counsel could have used Gadson’s belief in his exposure to the death penalty to impeach his testimony. Petitioner has never claimed that Gadson was actually served with a death notice. There is no question but that the plea agreement existed – requiring Gadson to testify truthfully in Petitioner’s trial or the State was free to withdraw the plea and seek the death penalty – and that trial counsel should have cross-examined Gadson about it. *See Hale v. Lockhart*, 903 F.2d 545, 550-51 (8th Cir. 1990) (“The threat of the death penalty is a powerful incentive . . . regardless of whether the risk of receiving it is perceived to be great or small”). It was up to the jury to decide whether Gadson believed he was avoiding the death penalty by entering into it.²

¹ A complete discussion of the facts and legal arguments relevant to this claim can be found on pages 7-25 of Petitioner’s habeas petition and on pages 5-9 of Petitioner’s Traverse and Response in Opposition to Respondents’ Motion for Summary Judgment (“traverse”) (ECF No. 70).

² The Magistrate Judge also appears to find Petitioner’s framing of this issue is defaulted because it was not raised in the same way by PCR counsel. R&R 20. If this Court agrees with that finding,

Petitioner also objects to the finding that he was not prejudiced by counsel's substandard performance because Solicitor Bailey had already elicited that Gadson was charged with murder and had agreed to plead guilty to accessory after the fact and misprision of a felony in exchange for his testimony. *See* R&R 20. Testimony that Gadson pled guilty to a lesser charge does not convey the magnitude of the incentive created by the possibility of avoiding a death sentence – literally the plea agreement and testimony against Petitioner was (at least in Gadson's mind) the difference between Gadson's life and death. As the Supreme Court has consistently emphasized, the death penalty is a punishment of a different kind, not merely of degree, from a life sentence. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (“[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long.”). To fully appreciate Gadson's willingness to assist the state (and thus test his credibility), the jury needed to be able to consider a defendant's (Gadson's) exposure to a life sentence versus the fear of being put to death.

Regarding the issue of trial counsel's failure to cross-examine Gadson about his access to, and use of, the murder weapon prior to the murder in this case, the Magistrate Judge found that “the PCR court apparently credited [trial counsel] Cummings' explanation (that he did not want evidence identifying the murder weapon as belonging to his client) as a strategy, despite Cummings' earlier statement that he had no strategic reasons for not introducing such evidence.” R&R 23. Petitioner disagrees with the Magistrate Judge's findings on this claim. A fair reading of the state court record shows that trial counsel did not have any reason not to question Gadson about his access to and use of the murder weapon prior to the murder. Specifically, trial counsel's explanation that he “didn't want that said” and did not want to tie the gun to Petitioner does not

Petitioner asks the Court to grant an evidentiary hearing to show that PCR counsel were ineffective in failing to present this claim to the South Carolina Supreme Court. *See Martinez v. Ryan*, 566 U.S. 1, 14 (2012).

hold up against the multiple other witnesses who tied the gun to Petitioner. *See, e.g.*, App. 3677 (William Koger testimony about Petitioner’s pistol); App. 3684 (Joseph Fogle testifying about Petitioner’s gun); App. 3986 (Gadson testimony about Petitioner purchasing a gun); App. 4101-02 (Travis Felder testimony about Petitioner purchasing a gun). Given this testimony already in the record, crossing Gadson about having possession of the weapon would not have done more to tie the gun to Petitioner; it would only have served to show that Petitioner was not the only person with access to and possession of the weapon. Trial counsel’s later claim that he “didn’t want that said,” R&R 23, appears to have been a post-hoc rationalization offered later during the PCR hearing. *See Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003) (finding a decision unreasonable where it relied on “more a *post hoc* rationalization of counsel’s conduct than an accurate description of their deliberations prior to sentencing”); *Robertson v. Pichon*, 849 F.3d 1173 (9th Cir. 2017) (“Trial counsel’s post-hoc explanation that his decision was based on a legal error is not dispositive, because *Strickland* ‘calls for an inquiry into the objective reasonableness of counsel’s performance, not counsel’s subjective statement of mind.’” (quoting *Richter v. Harrington*, 562 U.S. 86, 110 (2011))).

There can be no question that it would have been exceedingly helpful to Petitioner for the jury to have realized that Gadson – the only other person who could have murdered the victim – also had knowledge of, and access to, the murder weapon. Trial counsel’s claim that he kept this evidence from the jury because he did not want a witness to state that she knew Marion gave Gadson the gun to use on a prior occasion, is illogical and the PCR court was unreasonable in crediting it.

Regarding prejudice, the Magistrate Judge reviewed the instances of trial counsel’s failure to cross examine Gadson separately; however, Petitioner raised the general claim that trial counsel

were ineffective for failing to investigate and impeach Gadson, *see* Habeas Petition at 7, and argued there were several ways trial counsel could have impeached Gadson. The Magistrate Judge, therefore, should have considered all of the possible impeachment of Gadson in determining prejudice. The Magistrate Judge also erroneously agreed with the state PCR court that there was “overwhelming evidence” of Petitioner’s guilt even without Gadson’s testimony. R&R at 25-27. Relying on the state court, the Magistrate Judge then listed significant testimony from Gadson as a significant part of that “overwhelming evidence,” including that “Gadson saw Applicant shoot the victim,” “[a]ccording to Gadson, the victim begged Applicant not to shoot her again,” and “Gadson later rode with applicant.” R&R at 25-26, n.10. Had trial counsel competently impeached Gadson – the only other person who could have murdered the victim – by demonstrating that he had incentive to state Petitioner was the murder (not him) in order to avoid the death penalty and he had access to and possession of the murder weapon, Gadson’s testimony would have substantially less weight and the prejudice review should be conducted without reference to Gadson’s self-serving testimony. Without Gadson, the evidence of guilt is far from overwhelming and Petitioner was prejudiced by trial counsel’s failure to impeach him with available impeaching evidence.

III. OBJECTIONS TO RECOMMENDATION ON GROUND II (TRIAL COUNSEL WERE INEFFECTIVE IN THEIR CROSS-EXAMINATION OF TRAVIS FELDER).³

The Magistrate Judge ignored key arguments made by Petitioner in finding the PCR court was not unreasonable in denying Petitioner’s claim that trial counsel were ineffective in failing to adequately investigate and cross examine Travis Felder. In crediting the state court’s finding that trial counsel had a strategic reason for not cross-examining Felder about the videotape that showed

³ A complete discussion of the facts and legal arguments relevant to this claim can be found on pages 26-41 of the habeas petition and pages 9-11 of the traverse.

he was the person who purchased the gasoline to burn the victim's car (not Petitioner), the Magistrate Judge failed to acknowledge that the strategy was unsound. Contrary to Felder's testimony, the videotape would have demonstrated to the jury that Felder (not Petitioner) committed the arson himself or, at the very least, that they shared culpability for the action. The Magistrate Judge and the state court asserted that the impeachment of Felder on this point was a "double-edged" sword because it would also indicate that Petitioner directed Felder to purchase the gas. This finding ignores that the testimony actually in the record from Felder indicated Petitioner directed him to drive Petitioner to commit the arson and that Petitioner was solely responsible for the arson. Thus, the evidence that Felder purchased the gas (and lied about it) would show more than one person was involved and reduce Petitioner's culpability relative to the arson regardless of whose plan it was to commit the arson. Had trial counsel shown, at the appropriate time, that Felder lied about his involvement in the arson (especially if counsel had also undermined the credibility of the other key witnesses), the jury would have had evidence that could reduce Petitioner's actual culpability in the events and, at the very least, one juror could have struck a different balance at the penalty phase and voted to spare Petitioner's life. *See Wiggins v. Smith*, 539 U.S. 510, 537 (2003). For these reasons and for the reasons presented in Petitioner's habeas petition and traverse, Petitioner objects to the Magistrate Judge's recommendation on this ground.

IV. OBJECTIONS TO RECOMMENDATION ON GROUND III (TRIAL COUNSEL WERE INEFFECTIVE IN THEIR CROSS-EXAMINATION OF HIRAM JOHNSON).⁴

Petitioner objects to the Magistrate Judge's finding that the PCR court was not unreasonable in finding that trial counsel articulated a valid, strategic reason for not cross-examining Johnson on the fact that his prior written statement did not include an allegation that

⁴ A complete discussion of the facts and legal arguments relevant to this claim can be found on pages 41-46 of the habeas petition and pages 11-12 of the traverse.

Petitioner confessed to the crime. Trial counsel testified he did not do so because he wanted to avoid Johnson's mentioning Petitioner's confession again. In crediting counsel's stated "strategy," the Magistrate Judge ignored Petitioner's argument that trial counsel should have predicted that the State would emphasize the confession testified to by Johnson, which it did twice in its summation. The only valid strategic decision in this regard was to undermine Johnson's damning testimony regarding the confession. At least then, trial counsel could have countered the State's arguments based on the alleged confession. For these and the reasons stated in Petitioner's Traverse, trial counsel's "strategy" lacks logic and was not valid, Traverse at 12, trial counsel's performance was substandard, and Petitioner was prejudiced.

V. OBJECTIONS TO RECOMMENDATION ON GROUND IV (PETITIONER IS ENTITLED TO A NEW TRIAL BECAUSE THE STATE WITHHELD *BRADY* MATERIAL)⁵

Petitioner objects to the R&R's finding that Petitioner's *Brady v. Maryland*, 373 U.S. 83 (1963), claim is without merit. The record evidence establishes that the State suppressed favorable, material information.

The "Sam Memo"

The "Sam Memo," as the Magistrate Judge correctly noted, was a memorandum prepared by Sam Richardson, who worked for the Solicitor's office, and recounted an interview Richardson conducted with Ricky Davis. Davis told Sam Richardson that Gadson confessed to the murder for which Petitioner was facing capital prosecution. This memo was not provided to defense counsel. Trial counsel, at the PCR hearing, testified that he had been provided a copy of Davis's handwritten note stating Gadson confessed to Davis, but not a copy of the Sam Memo. Trial counsel sent an investigator to speak to Davis about the handwritten note, and Davis recanted the statement.

⁵ A complete discussion of the facts and legal arguments relevant to this claim can be found on pages 46-58 of the habeas petition and pages 12-17 of the traverse.

The Magistrate Judge determined that it was not unreasonable for the PCR court to find that favorable evidence (the Sam Memo) was not suppressed because the defense team was already aware of Gadson's confession through its copy of Davis's handwritten note.⁶ R&R 53. This finding ignores Petitioner's argument that the value of the Sam Memo is not simply in conveying that Davis said Gadson confessed to him; there is additional value in the fact that Davis repeated this information to a State investigator. *See* Traverse 14. Without the Sam Memo, trial counsel had no way to know Davis repeated the statement more than once, which would have impacted their decision on whether or not to call Davis or Richardson as a witnesses. *See* App. 7072 (trial counsel testifying that he made the decision not to put Davis on the stand without the knowledge of Richardson's interview with Davis).

The Magistrate Judge also found that the Sam Memo was not material because testimony from Richardson about the memo would only have been admissible if Davis testified and Davis's testimony "was particularly detrimental to Petitioner's case." R&R 55. This finding overlooks the fact that the value of Ricky Davis's testimony—that he heard Taiwan Gadson (the witness who admitted to being at the murder but accused Petitioner of being the perpetrator) confess to the murder – would have been exponentially heightened had it been corroborated by the revelation that he also told the Investigator to the Solicitor's Office that same critical information. *See* Traverse 14. Further, the Magistrate Judge's finding overstates the detriment of Davis's testimony at the PCR hearing. Davis repeatedly testified that he "can't remember" if Gadson told him that he was the one to kill the victim. App. 5992-93, 6002. Even when the Assistant Attorney General

⁶ The Magistrate Judge correctly found that to the extent the PCR court "seems to fail to recognize how the Sam Memo was favorable . . . such a finding would be incorrect." R&R at 52-53 (finding that *Wood v. Bartholomew*, 516 U.S. 1 (1995), is a question of materiality (not favorability) and the Sam Memo could "arguably be the basis for a question to Gadson on cross-examination regarding whether he had ever confessed to Davis that he shot the victim.").

pressed him to clarify that “James Gadson never once told you the stuff that is in this letter,” Davis wavered stating: “Not that I can remember.” App. 5994. Davis’s wavered testimony on the topic of what he actually heard from Gadson combined with cross-examination on the fact that he wrote a statement that Gadson confessed to the murder *and* told a State investigator the same thing would have given the jury additional evidence that Gadson may have actually been responsible for the murder and created a reasonable doubt as to Petitioner’s guilt. The Sam Memo was, therefore, material and it violated *Brady* for the state to withhold it from the defense. *See Strickler v. Greene*, 527 U.S. 263, 280 (1999) (“[E]vidence 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.”).

Gadson’s Mental Health Report

The Magistrate Judge erred when he approved of the PCR court’s holding that the State’s withholding of Gadson’s mental health report from Petitioner was not suppressed because Petitioner could have secured this evidence by other means. R&R 56. The Supreme Court of the United States and numerous federal courts of appeal have rejected the Magistrate Judge’s analysis. The Supreme Court has specifically stated that its precedent “lend[s] no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed.” *Banks v. Dretke*, 540 U.S. 668, 695 (2004). The duty to disclose under *Brady* is absolute—it does not depend on defense counsel’s actions. *United States v. Agurs*, 427 U.S. 97, 107 (1976) (“[I]f the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made.”). It is for this reason that defense counsel are entitled to presume that prosecutors have “discharged their official duties.” *Banks*, 540 U.S. at 696 (quoting *Bracy v. Gramley*, 520 U.S. 899, 909 (1997)). The Court, in *Banks* stated the constitutional command most

succinctly: “[a] rule...declaring ‘a prosecutor may hide, defendant must seek,’ is not tenable in a system constitutionally bound to accord defendants due process.” *Id.*; see also *United States v. Tavera*, 719 F.3d 705, 712 (6th Cir. 2013) (recognizing that “the clear holding in *Banks*” does away with any belief that *Brady* imposes a due diligence requirement on defense counsel); *Dennis v. Secretary, Pennsylvania Dep’t of Corrections*, 834 F.3d 263, 290 (3d Cir. 2016) (“*Brady*’s mandate and its progeny are entirely focused on prosecutorial disclosure, not defense counsel’s diligence.”). The PCR court rejection of this bedrock principle was contrary to and an unreasonable application of clearly established federal law.

Johnson’s Pending Charges

Regarding the State’s failure to disclose Hiram Johnson’s pending charges, Petitioner objects to the Magistrate Judge’s conclusion that Petitioner failed to show by clear and convincing evidence that the PCR court’s determination was based on unreasonable factual findings. The PCR court simply determined these charges were not material because of the “overwhelming evidence of Petitioner’s guilt.” App. 9864. As Petitioner indicted in his traverse, Traverse at 3, Petitioner was convicted almost entirely on the unchallenged testimonies of the State’s three key witnesses and, due to trial counsel’s ineffectiveness, the jury never heard evidence undermining their credibility. The evidence was not “overwhelming.” The Magistrate Judge additionally erred by not considering the use the Solicitor made of this point during his closing argument. 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 (emphasis added).

Petitioner also objects to the Magistrate Judge’s finding that Petitioner “defaulted” the claim that the PCR court erred in not considering the cumulative effect of the *Brady* violations.

R&R at 62. Considering the cumulative effect of the errors is simply how a court is to regard the evidence, as the Supreme Court made clear in *Kyles*—that the materiality of withheld evidence must be “considered collectively, not item by item.” *Kyles v. Whitley*, 514 U.S. 419, 436 (1995). It is not a claim, it is a legal standard courts must comply with. The Supreme Court recently reiterated the principle that state courts are required to evaluate the materiality of suppressed evidence cumulatively. *Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (“[T]he state postconviction court improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively.”).

VI. OBJECTIONS TO RECOMMENDATION ON GROUND VI (TRIAL COUNSEL WERE INEFFECTIVE IN FAILING OBJECT TO IMPROPER PRISON CONDITIONS TESTIMONY).

In finding that the PCR court rejection of Petitioner’s ineffectiveness claim arising from trial counsel’s failure to object to general prison condition evidence was not unreasonable, the Magistrate Judge misinterpreted long-standing South Carolina evidentiary principles barring such evidence and erroneously credited an unsupported “strategic” reason.⁷ Both the state court and the Magistrate Judge also improperly discounted the arbitrary factor the evidence injected into the jury’s sentencing determination and minimized the fact that the South Carolina Supreme Court vacated a death sentence due to the exact same error less than a year later in a case where there was an appropriate defense objection. *See State v. Burkhart*, 640 S.E.2d 450, 453 (S.C. 2007) (“Here, unlike *Bowman*, appellant objected to the State’s evidence regarding general prison conditions. . . . [T]his entire subject matter injected an arbitrary factor into the jury’s sentencing considerations.”).

⁷ A full description of the testimony relevant to prison conditions can be found on pages 65-72 of the habeas petition. Petitioner’s Traverse contains a complete discussion of the applicable law and arguments related to this issue on pages 17-24.

On the question of deficient performance, the Magistrate Judge failed to recognize that the state court deviated from its long-standing pronouncement that evidence presented at the penalty phase of a capital trial must be relevant to “the circumstances of the crime and characteristics of the defendant,” which, in turn, underlies the established South Carolina evidentiary rule that prison evidence must be “narrowly tailored to demonstrate the defendant’s personal behavior in those conditions” and may not veer into “evidence regarding general prison conditions.” *Id.*; *State v. Johnson*, 360 S.E.2d 317, 321 (S.C. 1987); *State v. Plath*, 313 S.E.2d 619, 627 (S.C. 1984); *State v. Koon*, 298 S.E.2d 769, 774 (S.C. 1982). The South Carolina Supreme Court has explicitly warned both the State and defense against presenting general prison condition evidence as it introduces an arbitrary factor into the jury’s sentencing consideration. *Burkhart*, 641 S.E.2d at 453; *State v. Bowman [Bowman I]*, 623 S.E.2d 378, 385 (S.C. 2005). Despite this long-standing prohibition, the South Carolina Supreme Court unreasonably credited trial counsel’s testimony that he made a reasonable strategic decision to admit evidence related to general prison conditions and, thus, not to object when the solicitor did the same. *Bowman v. State [Bowman II]*, 809 S.E.2d 232, 240 (S.C. 2018).

Furthermore, neither the PCR court nor Magistrate Judge acknowledged that trial counsel did not actually have a strategy to admit evidence related to general prison conditions. *See* R&R at 78; Traverse at 22-23. Instead, the “strategic decision” invoked to justify counsel’s failure to object was “a *post hoc* rationalization of counsel’s conduct [and not] an accurate description of their deliberations prior to sentencing.” *Wiggins*, 539 U.S. at 526-27. The record reveals that trial counsel did not in fact ask the defense prison expert or other defense witnesses about general prison

conditions on his direct examination.⁸ See App. 4838-4844. Had demonstrating the harsh realities of prison actually been trial counsel's strategy and goal, the only way to do so would be through the witnesses the defense presented. They did not.

At the PCR hearing, trial counsel testified that he wanted to "paint it nasty for them" and show that: "I don't know how long his natural life is going to be but every day you're in a six by eight cell, you can't go get an ice cream cone when you want one and you darn sure are not going to enjoy any of the benefits of this earth." App. 7611. This is potentially sound in the abstract if actually implemented, but it was not. Trial counsel's perfunctory questioning on prison conditions elicited that prison is not "kiddy camp," Petitioner would not be someplace where "they have picnic lunches outside the gates" or be "mollycoddled," and that prison is not a reward. This is hardly "painting it nasty."

The Magistrate Judge also incorrectly concluded that "[t]rial counsel could have always planned to make the point about prison being sufficient punishment after cross-examination, or trial counsel's strategy could have changed based on the nature of the State's cross-examination." R&R at 78-79. This determination is both illogical and lacking any support in the record. First, no competent trial lawyer would plan to broach the new subject of deplorable prison conditions for the first time on redirect examination as the scope of redirect examination is generally limited

⁸ The direct examination, instead, elicited testimony (1) reviewing Petitioner's prior jail and incarceration records, App. 4838-40; (2) that Petitioner would never walk out of prison if he were to get a life sentence, App. 4841; (3) that Petitioner was an individual who has adjusted to incarceration well and the Department of Corrections has the ability to keep people locked up, App. 4842; and (4) that Petitioner was fairly young and with proper confinement and structure, he could do positive things like his previous assistance to the teacher in the detention center. App. 4843-44. Trial counsel also called three additional witnesses to testify about Petitioner's ability to adapt – a teacher from the detention center and two detention center officers. App. 4760-68, 4882-4890, 4901-4905. Trial counsel did not elicit any information from any of these witnesses regarding harsh prison conditions.

by the scope of the cross-examination.⁹ *State v. Stroman*, 316 S.E.2d 395, 399 (S.C. 1984) (“The scope of redirect rests in the discretion of the trial court.”); *see also State v. Barrs*, 184 S.E.2d 708, 711 (S.C. 1971) (recognizing the trial judge has discretion to allow or disallow redirect examination when the redirect examination goes beyond the scope of the cross-examination). If it were truly counsel’s strategy to present poor prison conditions, he would have done so on direct examination of the various witnesses he called to discuss prison adaptability.

Overall, trial counsel’s negligible questioning and commentary on prison conditions demonstrates that it was not trial counsel’s strategy to elicit evidence regarding how horrible prison would be for Petitioner. Even if it was, the strategy would not have been reasonable because such evidence is improper when admitted by either the state or the defense. *See Ingle v. State*, 560 S.E.2d 401, 402 (S.C. 2002) (requiring counsel “articulate a *valid* reason for employing a certain strategy” to avoid a finding of deficient performance); *Bowman I*, 623 S.E.2d at 385.

In crediting trial counsel’s strategy as valid, the Magistrate Judge and the state court improperly relied on *Kelly v. South Carolina*, 534 U.S. 246 (2002), which held that a jury must be explicitly informed that life imprisonment means life without parole. Nothing in *Kelly* disturbed South Carolina’s long-held principle “that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime.” *Burkhart*, 640 S.E.2d at 453 (citing *State v. Copeland*, 300 S.E.2d 63 (S.C. 1982)).

Ignoring the long-standing nature of the evidentiary bar, the Magistrate Judge found competent counsel at the time of Petitioner’s trial would not necessarily have known that general prison condition evidence was improper. However, around the same time, another capital

⁹ Further, if something in the solicitor’s cross-examination opened the door or began the discussion of general prison conditions, trial counsel would have been ineffective in failing to make the objection on cross-examination as the solicitor’s questions would have been improper.

defendant's counsel did object to the introduction of general prison condition evidence resulting in reversal of his death sentence.¹⁰ *Id.* at 450. In reversing, the South Carolina Supreme Court unambiguously stated that “[w]e have *long held* that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime” so general prison condition evidence “injected an arbitrary factor into the jury’s sentencing considerations.” *Id.* at 453. Had Petitioner’s counsel properly understood the law (like Burkhart’s counsel) and objected (like Burkhart’s counsel), his case likewise would have been reversed on direct appeal.¹¹ *See Bowman II*, 623 S.E.2d at 385 (finding the prison condition issue was not preserved for appellate review).

Rather than conduct his own review of South Carolina evidentiary law, the Magistrate Judge merely stated that the South Carolina Supreme Court “considered the state of the law at the time of Petitioner’s trial.” R&R at 77. The determination is not supportable given that established South Carolina law before, during, and after Petitioner’s trial makes clear that any attorney should have been aware, as Burkhart’s counsel were, that such evidence was objectionable as injecting an arbitrary factor.¹² *See American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* 10.8, commentary (2003) (“One of the most fundamental duties of an attorney defending a capital case at trial is the preservation of any and all

¹⁰ Burkhart was subsequently resentenced to life imprisonment.

¹¹ The fact that Petitioner’s appellate counsel understood the law to bar general prison condition evidence and raised this clearly unpreserved issue on appeal is additional evidence that a competent attorney would have objected at trial.

¹² The Magistrate Judge’s conclusion that “[t]here’s also no reason to believe that trial counsel would have been successful after first presenting evidence of prison conditions and then objecting when the State attempted to do that same” ignores that the South Carolina Supreme Court admonished both the State and defense that admission of prison conditions was improper by either side. *Bowman I*, 623 S.E.2d at 385.

conceivable errors for each stage of appellate and postconviction review.”); *see also Hinton v. Alabama*, 571 U.S. 263 (2014) (finding counsel deficient for failure to seek funding where the failure was based on a mistake believe not any strategic choice).

As to the prejudice prong, the Magistrate Judge erroneously stated that Petitioner’s arguments “rely primarily on speculation that the prison conditions evidence must have heavily factored into the jury’s sentencing decision.” R&R at 79. Again, this is not the case; Petitioner did not rely on speculation, but emphasized that the state court was unreasonable in finding “there was 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,” *Bowman II*, 809 S.E.2d at 246, because the trial included more than a few pages of questioning on the issue. In addition to the testimony, this issue became a focal point of the state’s penalty phase summation; the solicitor emphasized the testimony in his closing argument, asserting:

I asked [Aiken] 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. 4965-66. Based on the tranquil experience the solicitor described, he further urged the jury not to “reward [Petitioner] with a life sentence.” App. 4970. Given the Solicitor’s questioning and emphasis made on prison conditions in his summation, it is likely this improper arbitrary factor poisoned the jury’s sentencing decision. *See Hall v. Catoe*, 601 S.E.2d 335, 341 (S.C. 2004) (finding prejudice where trial counsel failed to object to the solicitor’s closing remarks balancing the value of the victim’s life against that of the defendant because the solicitor’s comments “directed the jurors to conduct an arbitrary balancing of worth”); *see also State v. McClure*, 537 S.E.2d 273, 275 (S.C. 2000) (recognizing evaluating the consequences of an error in the sentencing phase of a capital trial is more difficult given the wide discretion given to a sentencing jury).

The prejudice to Petitioner is not negated by the Magistrate Judge and the PCR court's reliance on a determination that "the evidence of guilt and aggravating factors [was] overwhelming." R&R at 79. As Petitioner pointed out, the evidence of guilt and aggravation seemed similarly overwhelming in *Burkhart* where the defendant's death sentence was set aside even though he had been convicted of killing three people execution style and hiding the bodies. 640 S.E.2d at 451. Petitioner was convicted of killing only one victim and the jury rejected two of the four aggravating circumstances submitted to them by the trial court. If evidence of general prison conditions inserted an arbitrary factor that "may be viewed as *influencing* the jury's decision" in *Burkhart*, it is unreasonable to find the same did not occur in Petitioner's case.¹³ *Bowman II*, 809 S.E.2d at 245.

Petitioner would have been prejudiced even if trial counsel objected and the trial judge still allowed the solicitor to elicit evidence of general prison conditions because the objection would have preserved the issue for appeal. *See Burkhart*, 640 S.E.2d at 453 ("Here, unlike *Bowman*, appellant objected to the State's evidence regarding general prison conditions."). The Magistrate Judge incorrectly found that the outcome of an appeal would not have been different because Petitioner's counsel first introduced evidence related to prison conditions. R&R at 80. This ignored the principle discussed above that the South Carolina Supreme Court warned both "the State and the defense" against the admission of such evidence. *Bowman I*, 623 S.E.2d at 385. This Court

¹³ The Supreme Court of South Carolina has similarly found prejudice in other capital cases involving overwhelming evidence of guilt and aggravating factors. *See, e.g., Rosemond v Catoe*, 680 S.E.2d 5 (S.C. 2009) (finding prejudice despite overwhelming evidence of guilt and aggravating factors where the defendant was convicted of killing his girlfriend and her ten-year-old daughter); *Hall*, 601 S.E.2d at 337, 341 (finding prejudice despite overwhelming evidence that Hall first robbed and sexually assaulted a surviving victim and then shot and killed two teenage girls in front of witnesses without provocation).

should, therefore, reject the Magistrate Judge's recommendation and find the state court unreasonably denied Petitioner's claim of ineffective assistance of counsel.

VII. OBJECTIONS TO RECOMMENDATION ON GROUND X (THE TRIAL COURT ERRED IN REFUSING TO GRANT A MISTRIAL WHEN THE SOLICITOR ASKED AN IRRELEVANT AND PREJUDICIAL QUESTION ABOUT PRISON ESCAPES).

The Magistrate Judge correctly recognized that the solicitor's question regarding prison escapes unrelated to Petitioner was improper, but erroneously deemed it to have been raised on appeal only as an error state law.¹⁴ See R&R at 87. Contrary to the Magistrate Judge's finding this issue is not procedurally barred; state appellate counsel made more than "mere citation to federal law." R&R at 87. In addition to specifically citing to *Woodson v. North Carolina*, 428 U.S. 280 (1976) and *Skipper v. South Carolina*, 476 U.S. 1 (1982), appellate counsel relied heavily on state court opinions that applied the *Woodson* standard. As expressed by the Supreme Court in *Woodson*, the Eighth Amendment requires a capital sentencing hearing be tailored to capital defendants as "uniquely individual human beings" and to consideration of "the character and record of the individual offender and the circumstances of the particular offense." 428 U.S. at 304. This principle underlies the state law cases cited in the direct appeals briefs and opinion. *Plath*, 313 S.E.2d at 15; see also *State v. Woomer*, 299 S.E.2d 317 (S.C. 1982) (citing *Woodson*, 428 U.S. at 304). Thus, Petitioner's claim is not defaulted and there is no need for Petitioner to demonstrate cause and prejudice for this Court to consider the issue. See *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) ("To provide the State with the necessary opportunity [to correct violations of a prisoners' federal rights], the prisoner must fairly present his claim . . . thereby alerting that court to the federal nature of the claim.") (internal quotation marks omitted); *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997) ("[F]air presentation contemplates that both the operative facts and the

¹⁴ A full discussion of this claim can be found on pages 78-81 of Petitioner's habeas petition (ECF No. 36) and pages 25-27 of petitioner's traverse (ECF No. 70).

controlling legal principles must be presented to the state court.”) (internal quotation marks omitted).

The Magistrate Judge further erred in finding that the escape question did not violate Petitioner’s due process rights because it was isolated and a curative instruction was given. R&R at 89. This ignores the fact that the question presumed the answer that “many inmates have escaped,” App. 4869, and was emphasized by the immediate objection by defense counsel and a lengthy conference to discuss the issue. App. 4870, 4877 (indicating the jury left the courtroom for nearly ten minutes before the court issued the curative instruction). In addition, the prejudice was exacerbated by the fact that, immediately following the curative instructions about the escape question, the solicitor elicited testimony regarding favorable prison conditions and the possibility of Petitioner moving to a “lower level of control.” App. 4878. The solicitor then further emphasized the favorable prison conditions in his closing argument. App. 4965-66. Given all of these factors, the South Carolina Supreme Court unreasonably determined the jury disregarded the escapes question.

VIII. OBJECTIONS TO RECOMMENDATION ON DEFAULTED GROUND I (TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO OBJECT TO THE SOLICITOR’S ARGUMENT TO DISCOUNT MITIGATION EVIDENCE BECAUSE IT HAD NO NEXUS TO THE CRIME).

Petitioner objects to the Magistrate Judge’s finding that he failed to overcome the procedural default of his ineffective assistance claim arising from trial counsel’s failure to object to the solicitor telling the jury it could disregard mitigation evidence if it had no nexus to the crime.¹⁵ A federal court may consider the merits of a procedurally defaulted claim if the petitioner can show “cause” and “prejudice.” *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). In *Martinez*,

¹⁵ A full discussion of this claim can be found on pages 83-85 of petitioner’s habeas petition (ECF No. 36) and pages 27-30 of the traverse (ECF No. 70).

the Court held that inadequate assistance of state post-conviction counsel satisfies the “cause” requirement if the petitioner establishes that post-conviction counsel’s performance was deficient and that the underlying claim is “substantial,” *i.e.*, that the claim has “some merit.” *Martinez v. Ryan*, 566 U.S. 1, 14 (2012); *see also Gray v. Pearson*, 526 F. App’x 331, 333 (4th Cir. 2013) (recognizing a claim is substantial if it has some merit); *Rodriguez v. Padula*, No. 0:11-cv-01297-RBH, 2014 WL 1912345, at *7 (D.S.C. May 12, 2014) (federal habeas court should find “‘cause’ in relation to excusing a procedural default” where the claim is substantial and counsel was ineffective during state collateral review).

The Magistrate Judge stated that “Petitioner offers very little on that issue, and has failed to establish deficient performance by PCR counsel.” R&R at 95. On the contrary, in addition to sufficiently pleading PCR counsel’s inadequate assistance, Petitioner presented the affidavit of PCR counsel explicitly stating he did not have a strategic reason for challenging trial counsel’s effectiveness for failing to object to the solicitor’s nexus argument; Petitioner also requested a hearing on the issue of PCR counsel’s ineffectiveness to provide additional proof of deficient performance. Habeas Petition at 94-95; Aff. Of James Arthur Brown, Jr. ¶ 4 (Jan. 8, 2019) (ECF No. 36-12); Traverse at 30; *see also* American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.8, commentary (2003) (“One of the most fundamental duties of an attorney defending a capital case at trial is the preservation of any and all conceivable errors for each stage of appellate and postconviction review.”).

The factual allegations and affidavit satisfied the requirement that a habeas petitioner must only provide “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Thus, the Magistrate Judge erred in requiring that Petitioner provide more than the relevant rule requires. *See* Rules Governing 2254 Cases 7, 8 (allowing for expansion of

the record and an evidentiary hearing). Many federal district courts, including in the District of South Carolina, have found expansion of the record and an evidentiary hearing necessary to consider claims raised under *Martinez* – like Petitioner’s – in order to consider evidence and make an appropriate determination of PCR counsel’s ineffectiveness. *See, e.g., Mangal v. Warden*, No. 6:18-cv-00106-RBH, 2019 WL 1517141 (Apr. 8, 2019); *Stokes v. Stirling*, No. 1:16-cv-00845-RBH, 2018 WL 4678578 (Sept. 28, 2018); *Green v. Stephens*, No. 4:13-cv-1899, 2017 WL 1929358, at *2 (S.D. Tex. May 10, 2017); *Carpenter v. Davis*, No. 3:02-CV-1145, 2017 WL 2021415, at *2 (N.D. Tex. May 12, 2017); *Thomas v. Kelley*, No. 6:14-CV-6038, 2017 WL 1239148, at *15 (W.D. Ark. March 31, 2017); *Jones v. Ryan*, No. CV-01-00592, 2017 WL 264500, at *12, *17 (D. Ariz. Jan. 20, 2017); *Row v. Beauclair*, No. 1:98-cv-00240, 2015 WL 1481416, at *19-20 (D. Idaho, March 31, 2015); *Weber v. Sinclair*, No. C08-1676RSL, 2014 WL 1671508, at *9 (W.D. Wash. April 28, 2014); *Quintero v. Carpenter*, No. 3:09-cv-00106, 2014 WL 7139987, *81 (M.D. Tenn. Dec. 12, 2014).

The Magistrate Judge further erred in finding that, even if PCR counsel were ineffective, the claim did not have “some merit” based on a misinterpretation of the solicitor’s summation statements. During his sentencing phase closing argument, the solicitor repeatedly, and improperly, told the jury that Petitioner’s mitigating evidence was not worthy of consideration because there was “no connection” to the offense. The solicitor started by arguing:

Ladies and gentlemen, I ask you based on what you’ve heard here, what does all that stuff that happened to Marion during his youth have to do with Kandee Martin? How is she in any way involved in the fact that he sold drugs, that he did drugs, that he drank liquor, that he wasn’t a good student, that he was an adolescent, that his grandfather died, and all the other stuff, what has it got to do with it? Nothing. He knows right from wrong.

App. 4962-63. After further discussing the mitigation offered by Petitioner, the solicitor again improperly implored the jury to disregard the evidence:

Now, as far as Marion Bowman's background, who has a perfect background? I mean, you see "Leave it to Beaver", Ward and June, and you see "The Bill Cosby Show." None of us have a background like that. But, again, where is the connection? Where is the connection, anybody who's gotten up here and drawn a line between anything involving Marion Bowman's background or family or mentality and the murder of Kandee Martin. There's just no connection.

App. 4964. In a final misstatement of the law related to mitigation evidence, the solicitor asserted: "Everybody was a child at one time. That's got nothing to do with the man he turned into and the conduct he engaged in after that." App. 4967. The Magistrate Judge misconstrued these arguments as a "contention that the jury should give little or no weight to some of the mitigation evidence presented to them" and as an argument "that the mitigation evidence did not lessen Petitioner's culpability." R&R 97-98. On the contrary, the solicitor told the jury if the evidence had no connection to the crime it was not worthy of any consideration. This is a misstatement of the law, which requires that all mitigation evidence be considered by the jury, regardless of its connection to the crime itself. *See Boyde v. California*, 494 U.S. 370, 377-78 (1990) ("The Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence offered by petitioner.") (citing *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982)); *see also Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007) ("A careful review of our jurisprudence in this area makes clear that well before our decision in *Penry I* [in 1989], our cases had firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual."). Based on the Magistrate Judge's misinterpretation of the law and facts relevant to this claim, this Court should reject the R&R and order a hearing to determine if PCR counsel were ineffective and Petitioner can overcome the procedural default of this claim.

IX. OBJECTIONS TO RECOMMENDATION ON DEFAULTED GROUND II (TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO CALL AVAILABLE MITIGATION WITNESSES TO TESTIFY REGARDING PETITIONER’S DYSFUNCTIONAL CHILDHOOD).

In reviewing this second procedurally defaulted claim, the Magistrate Judge (again) misapplied the pleading requirement by finding that Petitioner “failed to identify any testimony by trial counsel in the state court record, nor has he presented any new evidence by way of affidavits from or depositions of trial counsel, to demonstrate what their strategy was for investigating and presenting mitigating evidence.” R&R at 110. Petitioner more than met the pleading requirements regarding trial and PCR counsel’s ineffectiveness by (1) alleging (and supporting with an affidavit) that PCR counsel did not have a strategic reason for not raising a claim that trial counsel were ineffective in failing to investigate and present mitigating evidence, Habeas Petition at 94; Traverse 37; Brown Aff. ¶ 5 (ECF No. 36-12), and (2) pleading information about the trial counsel’s failure to coordinate or direct the investigation as required of lead counsel.¹⁶ Habeas petition 93-94; Traverse 35-36; *see also* American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.4.B (2003) (“Lead counsel bears overall responsibility for the performance of the defense team, and should allocate, direct, and supervise its work in accordance with [the ABA] Guidelines and professional standards.”). The rules require only that a habeas petitioner provide “a short and plain statement

¹⁶ The Magistrate Judge faulted Petitioner for relying on the trial investigators’ statements regarding their experience in working with trial counsel as opposed to presenting testimony from trial counsel. R&R 15. However, the investigators’ testimony is relevant to how trial counsel prepared (or failed to prepare) for trial. Investigator Dale Davis has decades of experience in capital cases and described trial counsel as failing to direct the investigation or communicate with her regarding the mitigation investigation, contrary to the prevailing professional norms requiring lead counsel to guide the entire defense team. *See* App. 6960, 7213.

of the claim showing that the pleader is entitled to relief.”¹⁷ Fed. R. Civ. P. 8(a)(2). Because Petitioner did that, the Magistrate Judge erred in denying Petitioner a hearing.

The Magistrate Judge also erred in finding this claim had no merit without affording Petitioner an evidentiary hearing. Petitioner presented affidavits from multiple witnesses with information regarding Petitioner’s upbringing the jury never heard detailing: (1) that Petitioner’s mother was “essentially a prostitute” who “enjoyed cocaine;” Sims Aff. ¶¶ 4, 5, 12, (2) stories demonstrating the extent to which Petitioner’s family suffered in poverty (i.e. Petitioner’s mother “and the kids were living in a trailer that was so awful – the floors were rotting out and it smelled terrible”); Sims Aff. ¶ 12, or (3) that the schools seemed to “treat the black kids differently than the white kids” and “[t]he teachers directed their efforts at white students.” Sims Affidavit ¶ 15. This evidence is not exhaustive but is representative of what Petitioner would present at a hearing on the merits of his ineffective assistance of counsel claim to demonstrate that “there is a reasonable probability that at least one juror would have struck a different balance” and voted for a life sentence if they had heard all of the available mitigating evidence. *See Wiggins*, 539 U.S. at 537; *see also Porter v. McCollum*, 558 U.S. 30, 41 (2009) (“Had Porter’s counsel been effective, the judge and jury would have learned of the ‘kind of troubled history we have declared relevant to assessing a defendant’s moral culpability.’”) (quoting *Wiggins*, 539 U.S. at 535). This Court should, therefore, decline to adopt the R&R and order a hearing on Petitioner’s ineffective assistance of counsel claim.

¹⁷ Petitioner’s evidence and allegations were collected through the PCR and trial transcripts and voluntary interviews conducted as part of the pre-petition habeas investigation. Without the process provided by an evidentiary hearing, Petitioner has not had (and cannot have) an opportunity to subpoena all relevant witnesses to provide all evidence relevant to the ineffective assistance of counsel claim. Nevertheless, he presented sufficient evidence to demonstrate a genuine issue of materials fact to survive summary judgment. Fed. R. Civ. P. 56.

CONCLUSION

For the reasons discussed above, the Magistrate Judge misapplied legal precedent and misinterpreted the state court record relevant to many of Petitioner's claims for habeas relief. This Court should correct these errors and overrule the Magistrate Judge's Report and Recommendation, grant Petitioner an evidentiary hearing (on Petitioner's procedurally defaulted claims), and, ultimately, grant habeas relief in favor of Petitioner.

Respectfully submitted,

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Counsel for Petitioner

February 14, 2020.

JA 4130

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Marion Bowman, Jr., #6006	)	C/A No. 9:18-cv-00287-TLW-BM
	)	
Petitioner	)	
	)	RESPONDENTS' REPLY TO
v.	)	PETITIONER'S OBJECTIONS TO
	)	THE REPORT AND
	)	RECOMMENDATION
	)	
Bryan Stirling, Director, SCDC,	)	
And Willie D. Davis, Warden,	)	
Kirkland Correctional Institution	)	
	)	
Respondent	)	
	)	

On December 10, 2019, the Honorable Bristow Marchant, United States Magistrate Judge, issued a Report and Recommendation finding that Petitioner had not met his burden for federal habeas relief and that the action should be dismissed. (ECF #75). Petitioner filed Objections to this Report and Recommendation on February 14, 2020. (ECF #81). Respondent now offers this brief Reply to Petitioner's Objections to the Report and Recommendation.

I. Reply to Petitioner's Section II

In section I of his Objections to the Report and Recommendation, Petitioner raises issue with the findings relative to the claim that trial counsel rendered ineffective assistance of counsel by failing to cross-examine Taiwan Gadson regarding his exposure to the death penalty and his access to the murder weapon weeks prior to the murder. Petitioner requests that a hearing be conducted in this matter. However, Petitioner has failed to set forth a substantial claim for relief in this matter. Critically, Petitioner has also failed to identify the evidence that could be set forth at hearing that was not available for presentation to the state courts. See *Wood v. Stirling*, No.

0:12-CV-3532-DCN-PJG, 2018 WL 4701388, at *53 (D.S.C. Oct. 1, 2018), report and recommendation adopted, No. 0:12-CV-3532-DCN, 2019 WL 4257167 (D.S.C. Sept. 9, 2019).

Discussing the specifics of Petitioner's claims under Section II, Petitioner's claims regarding the cross-examination of Taiwan Gadson rely upon a factually unproven premise. The record is clear, as stated by the Report and Recommendation, that Gadson was never facing the death penalty, was not threatened with the death penalty, and believed he was avoiding a life sentence. (ECF #75, at 20-21; R. p. 9836). Likewise, the record supports the PCR court's finding of sound strategy to not cross-examine Gadson on his brief handling of the murder weapon two weeks prior to the murder when the testimony would also demonstrate that Petitioner was the individual who provided the gun to Gadson in the first place. (ECF #75, at 21). The Report and Recommendation thoroughly addresses these matters and correctly concludes that the PCR Court's findings were not unreasonable.

II. Reply to Petitioner's Section V.

Petitioner asserts that the alleged *Brady* violations must be considered cumulatively. As the Court articulates in its Report and Recommendation, the record establishes that this particular application of law was never raised directly to the PCR Court and was likewise never raised in the Rule 59(e) motion following the absence of a ruling from the PCR Court. (See ECF #75, at 62; App., p. 9953-9968). Respondent would indeed argue that this claim is procedurally barred on that basis. *Plyler v. State*, 309 S.C. 408, 424 S.E.2d 777 (1992) (issue must be both raised and ruled upon by the PCR Court to be preserved for appellate review); Rule 59(e), SCRCPP (providing avenue for any party to move to alter or amend judgment); see *Bostick v. Stevenson*, 589 F.3d 160, 164 (4th Cir. 2009) (acknowledging same applied consistently and regularly in South Carolina after *Marlar v. State*, 375 S.C. 407, 653 S.E.2d 266 (2007)); See also *In Re*

Estate of Brown, 427 S.C. 138, 146, 828 S.E.2d 789, 793 (Ct. App. 2019)(noting that an unappealed ruling, right or wrong, constitutes the law of the case.). However, the Magistrate did not recommend dismissal on the basis of default. (ECF #75, at 62). Petitioner references *Wearry v. Cain*, 136 S.Ct. 1002, 1007 (2016).¹ This opinion simply offers a restatement of the rule that wrongfully withheld evidence should be viewed cumulatively by a PCR court. However, the case offers nothing by way of explanation as to why the claim would not be procedurally barred, and likewise offers nothing for why the PCR court’s finding (as reviewed by the Magistrate) would be in error. The simple answer to Petitioner’s claim for cumulative evaluation is that there first must be *multiple* suppressions of favorable evidence to actually accumulate. The Report and Recommendation already acknowledges the fact that the PCR Court’s findings do not provide a basis for cumulative effect, therefore explaining its lack of ruling on this legal concept. (ECF #75, at 62).

The lack of applicability for cumulative effect can be demonstrated by a brief review of the PCR Court’s findings, and the Report and Recommendation’s discussion of those findings.

As articulated by the Report and Recommendation, *the “Sam Memo” was found by the PCR Court to not constitute favorable evidence suppressed by the state.* (App., p. 9872-9873). The PCR Court noted that the crucial information already provided to defendant via Davis’s handwritten statement, the “Sam Memo” represented nothing more than “the prosecution’s trial preparation interview based on their possession of the handwritten statement. . .” (App., p. 9873). Petitioner even concedes that the pertinent information was already available to the defense, but merely claims value in the idea that the witness had reiterated the content of the handwritten letter in an interview with Investigator Richardson. This is a hollow argument given that the

¹ Of particular distinction between *Wearry* and the matter at hand, *Wearry* was not an AEDPA claim and therefore did not face the double deference standard applied in federal habeas matters.

defense team's own efforts to interview Davis resulted in Davis making clear to defense counsel that the content of his note was false and that he would recant in full against Petitioner if put on the stand to testify.

The PCR Court *also* concluded that the "Sam Memo" was not material and denounced the argument that materiality can be judged on the effect of defense strategy, as opposed to the proper measure of weighing upon guilt and innocence. See *United States v. Agurs*, 427 U.S. 97, 113, 96 S. Ct. 2392, 2402, 49 L. Ed. 2d 342 (1976), holding modified by *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). Therein, the "Sam Memo" failed to satisfy the elements necessary under *Brady* and the record fails to demonstrate how those elements could be met having fully examined Mr. Davis at hearing.

Similarly, Petitioner argues that the state committed a *Brady* violation for failing to provide Gadson's mental health report. However, the PCR Court found no violation of *Brady* and the Report and Recommendation agreed, finding no suppression on the part of the state a reasonable conclusion. Petitioner's objections to this finding suggest a strained interpretation that one party's duty to disclose (which referenced specifically evidence "so clearly supportive of a claim of innocence", a standard for which the mental health report falls woefully short), dispels any obligation for due diligence on the part of a defendant. Such is not the law, and as was pointed out by both the PCR Court and the Magistrate, this information could have been obtained by other means in the process of due diligence. See *U.S. v. Kelly*, 35 F.3d 929, 937 (4th Cir. 1994)(holding *Brady* does not apply if the evidence in question is available to a defendant from other sources). (App., p. 9831-32; ECF #75, at 60). The Report and Recommendation therefore properly finds the PCR Court's denial of relief not unreasonable in light of the state court record.

Last, Petitioner fails to satisfy *Brady* regarding Johnson’s pending charges. The PCR Court found that the pending charges were unrelated to the claim, had no indication that he received special consideration for his testimony, and were otherwise not material in light of the substantial evidence of guilt. Addressing Petitioner’s objection directly, it was accurate assertion by the solicitor that there is no evidence that Mr. Johnson had any kind of deal with the state in exchange for his testimony and no reason to say something untrue. This was conclusively addressed by the PCR Court as well, finding nothing within the record to support the premise that an unspoken deal existed between the state and Mr. Johnson. (App., p. 9865-66). In light of the state court record this is a reasonable finding by the PCR court, and as such the Report and Recommendation properly found no basis for federal habeas relief.

In order to establish a *Brady* violation a defendant must show that the prosecution suppressed evidence favorable to the defendant, and that such evidence was material to either guilt or punishment, irrespective of whether the prosecution’s actions were in good faith or bad faith. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1197, 10 L. Ed. 2d 215 (1963). The first step in addressing an alleged *Brady* violation requires a finding of suppressed favorable evidence. The second step discerns materiality. The application of “cumulative effect” comes into play when the court finds that the prosecution has suppressed *multiple* items of favorable evidence, *that were individually not material*. The legal doctrine of cumulative effect allows these multiple “immaterial suppressions” to *potentially* establish materiality when compared to the entire record. *United States v. Agurs*, 427 U.S. 97, 112, 96 S. Ct. 2392, 2402, 49 L. Ed. 2d 342 (1976), holding modified by *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 1567, 131 L. Ed. 2d 490 (1995).

Addressing the matter of cumulative effect for Petitioner’s collective allegations of *Brady* violations, the Report and Recommendation thoroughly and properly addresses the claim. Here, the PCR Court found that there was no suppression for two out of the three *Brady* claims raised by Petitioner; specifically, the mental health evaluation and the “Sam Memo”. The PCR Court found the third claim, Johnson’s pending charges, to be immaterial. As a result, the case lacks the multiple favorable evidence suppressions necessary to apply the cumulative effect doctrine. As was found by the Report and Recommendation, the PCR Court’s findings were reasonable in light of the record and case law, and thus, there were no *Brady* violations in the eyes of the PCR Court for which cumulative analysis could be applied.

III. Respondent relies upon Return and Memorandum

For any matters not addressed specifically herein, Respondent hereby denies such allegations and relies upon the arguments and content of its Return and Memorandum of Law in Support of Motion for Summary Judgment. The Report and Recommendation is proper and summary judgment is warranted.

CONCLUSION

WHEREFORE, having made this Reply, Respondent submits that the Report and Recommendation is proper and that the action should be summarily dismissed as the record conclusively shows Petitioner is not entitled to any relief for all the foregoing reasons. Respondent is entitled to summary judgment in his favor as a matter of law.

Respectfully submitted,

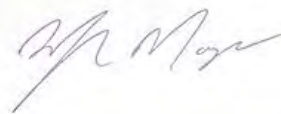
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February 28, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

Marion Bowman Jr.,

PETITIONER

v.

Bryan P. Stirling, *Commissioner, South
Carolina Department of Corrections*;
Willie D. Davis, *Warden, Kirkland
Correctional Institution*,

RESPONDENTS

Case No. 9:18-cv-00287-TLW

Order

This is a capital habeas corpus action brought pursuant to 28 U.S.C. § 2254 by Petitioner Marion Bowman Jr. against Respondents Bryan P. Stirling and Willie D. Davis (collectively, the State). For the reasons set forth below, the Court grants the State's motion for summary judgment and denies Bowman's habeas petition.

I. Factual and Procedural History

A. Trial and Sentencing

The South Carolina Supreme Court summarized the facts of Bowman's case as follows:

On February 17, 2001, Kandee Martin's [] body was found in the trunk of her burned car. She had been shot to death before being placed in the trunk.

The previous day, several people gathered at Hank Koger's house to socialize and drink alcohol. [Bowman], who was wearing black pants, arrived at Koger's house around 11:00 a.m. that day. He subsequently left to purchase meat. When [Bowman] returned, he became upset

because his gun had been moved. He accused James Tywan Gadson [] of taking the gun out of the trash barrel located on Koger's property. Hiram Johnson intervened and told [Bowman] he had moved the gun. The gun was a .380 caliber pistol that [Bowman] had purchased a few weeks before in the presence of Gadson and Travis Felder. After retrieving his gun, [Bowman] left Koger's house.

Later that afternoon, [Bowman] was riding in the car of his sister, Yolanda Bowman, with another woman, Katrina West. [Bowman], who had a gun in his back pocket, was sitting in the back seat. He instructed Yolanda to park beside [Martin's] car. At the time, [Martin] was speaking to a man. [Bowman] tried to get [Martin's] attention, but she indicated to him that he should wait a moment. The man, Yolanda, and Katrina testified as to what [Bowman] said next. The man stated that [Bowman] said, "Fuck waiting a minute. I'm about to kill this bitch." Yolanda stated that [Bowman] said, "Fuck it, that bitch. That bitch be dead by dark." Katrina stated that [Bowman] said, "Fuck that ride. That bitch be dead by dark fall." After [Bowman's] comments, Yolanda drove away and [Bowman] informed her [Martin] owed him money.

Around 7:30 p.m. that evening, [] Gadson saw [Bowman] riding with [Martin] in her car. They stopped and [Bowman] told Gadson to get in. Gadson had been drinking alcohol since 1:00 and was "feeling in good shape." [Martin] stopped for gas and they drove off without paying. [Bowman] allegedly instructed [Martin] where to drive and instructed her to stop on Nursery Road. Gadson and [Bowman] then exited the vehicle and walked down the road while [Martin] remained in the car. [Bowman] told Gadson he was going to kill [Martin] because she had on a wire. [Martin] then came down the road, grabbed [Bowman's] arm and stated she was scared. At this point, a car drove by and they all jumped into the woods. Then, [Martin] started walking to the car with [Bowman] following her. [Bowman] allegedly shot his gun three times. Gadson stated [Martin] ran toward him and then stopped and faced [Bowman] and told him to please not shoot her anymore because she had a child to take care of. Gadson stated [Bowman] shot two more times. [Martin] fell to the ground and [Bowman] dragged her body into the woods. Gadson stated he jumped into the car.

Afterwards, [Bowman] and Gadson parked [Martin's] car and later retrieved Yolanda's car. They then went to a store to purchase beer and went back to Koger's house around 8:00 p.m. Later, Gadson stayed at Koger's house and [Bowman] left. Around 11:30 p.m., [Bowman] and Hiram Johnson approached James Gadson, Gadson's father. [Bowman] gave him money to buy four pairs of gloves.

[Bowman], Gadson, Hiram Johnson, and Darian Williams, then drove to Murray's Club in [Martin's] car. [Bowman] handed out the gloves for the occupants to wear and stated he had stolen the car. They reached the club around midnight. Once at the club, [Bowman] tried to sell [Martin's] car. [Bowman], according to Hiram Johnson, said, "I killed Kandee, heh, heh, heh." [Bowman] had a gun with him while at the club. They left the club an hour or two after arriving there.

Three people, Carolyn Brown, Valorna Smith, and [] Felder, left the club together. They stopped by a gas station about 3:00 a.m. before proceeding to Valorna's home. Not long after they were there, [Bowman] knocked on the door and asked for [Felder]. [Felder] left and came back after a few minutes. He seemed normal upon his return.

[Felder] testified [Bowman], who was wearing black jeans at the time, stated he needed [Felder's] help to park a car which turned out to be [Martin's] car. [Felder] followed [Bowman] to Nursery Road. [Bowman] parked the car, went into the woods and pulled [Martin's] body out by her feet. [Bowman] then put her body in the trunk. While putting her body in the trunk, [Felder] saw a gun tucked into appellant's waist. [Bowman] allegedly told [Felder], "you didn't think I did it, did you?" [Felder] testified [Bowman] also stated, "I killed Kandee Martin." [Bowman] lit the car on fire. [Felder] then took [Bowman] to his home and went back to Valorna's house.

A resident of Nursery Road who had previously heard gunshots was awakened late in the night by a loud noise. He investigated and discovered a car on fire. The fire was reported at 3:54 a.m. There were .380 Winchester cartridge casings found not far from the scene. The casings, a blood stain, and a shoe were located with the help of a man who had driven by and seen [Martin's] car stopped on the road around 8:00 p.m. the previous evening.

The next day, police arrested [Bowman] at his wife's house and seized his black pants. His wife testified he had been wearing the pants when he arrived at the house. They found a wristwatch belonging to [Martin] in [Bowman's] pants.

After the police left, [Bowman's] wife [] found [Bowman's] gun in a chair in her home. She allegedly gave the gun to [Bowman's] father. The next day, [Bowman's] father, Yolanda, and [Bowman's] other sister, Kendra, took the gun and dropped it off a bridge into the Edisto River. It was later retrieved from the Edisto River and determined to be the gun that was used in the murder.

The arson investigator testified there was the presence of a heavy petroleum product on [Bowman's] jeans, but the product was not gasoline. The items found in the car had gasoline on them indicating that was the product used to start the fire.

While the following evidence did not come out during the guilt phase, during the sentencing phase, a video was introduced during [] Felder's testimony. The video showed [Felder] purchasing gasoline in a gasoline can at about 3:14 a.m. [Bowman] was not with him on the video. [Felder] stated [Bowman] gave him the can for the gas and told him he needed \$2–3 worth. When [Bowman] set fire to [Martin's] car, he retrieved the gas can from [Felder's] car.

State v. Bowman (Bowman I), 623 S.E.2d 378, 380–82 (S.C. 2005) (footnotes omitted).

Bowman was indicted in June 2001 for murder and arson, third degree. He was represented by Norbert Cummings Jr. and Marva Hardee-Thomas in a jury trial that began on May 17, 2002. The jury returned a guilty verdict on both counts.

During the trial's sentencing phase, after hearing evidence and argument, the jury returned a recommendation of death on the murder conviction, finding as aggravating circumstances that the murder was committed while in the commission of kidnapping and while in the commission of larceny with the use of a deadly weapon. The presiding judge sentenced Bowman to death on the murder conviction and ten years on the arson conviction.

B. Direct Appeal

Bowman timely appealed and was represented on appeal by Robert Dudek, Assistant Appellate Defender with the South Carolina Office of Appellate Defense. On appeal, he raised issues relating to the trial court's jury instructions, evidentiary

rulings, denial of a mistrial, jurisdiction, and denial of a suppression motion. The South Carolina Supreme Court affirmed Bowman's conviction and sentence. *Bowman*, 623 S.E.2d at 387. He then submitted a petition for rehearing, which was denied.

After Bowman's petition for rehearing was denied, he filed a petition for a writ of certiorari from the United States Supreme Court, which was denied. *Bowman v. South Carolina*, 547 U.S. 1195 (2006).

C. PCR Action

While awaiting the United States Supreme Court's decision on his petition for a writ of certiorari, Bowman submitted an application for post-conviction relief (PCR). He was initially represented in the PCR action by James Brown Jr. and Charlie Johnson Jr., though Johnson was later replaced by John Sinclair III. PCR counsel eventually submitted a fourth amended application raising numerous grounds for relief. After briefing and an evidentiary hearing, the PCR court denied his petition. He then filed a motion to alter or amend, which was also denied.

D. PCR Appeal

On appeal to the South Carolina Supreme Court, Bowman was represented by Robert Dudek, Chief Appellate Defender, and David Alexander, Appellate Defender, both with the South Carolina Commission on Indigent Defense, as well as Michael Anzelmo with Nelson Mullins Riley & Scarborough. Bowman's amended petition for a writ of certiorari raised the following issues:

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?

ECF No. 12-17 at 6–8.

The South Carolina Supreme Court granted the petition as to Question 6 and denied it as to the rest. After briefing and argument, the court affirmed the PCR court. *Bowman v. State (Bowman II)*, 809 S.E.2d 232, 246 (S.C. 2018).

E. Federal Habeas Action

Bowman commenced this action by filing a motion for a stay of execution and a motion to appoint counsel. ECF No. 1. The Court stayed his execution pending appointment of counsel. ECF No. 6. Bowman's appointed counsel then filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. ECF No. 17. The Court stayed his execution pending resolution of his habeas petition. ECF No. 24. He later filed an amended petition, which raises the following issues:

Ground 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.

Ground 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.

Ground 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.

Ground 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.

- Ground 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.
- Ground 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 evidence interjected an arbitrary factor into Petitioner’s trial and violated his right to due process.
- Ground 8: The trial 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 Petitioner’s substance abuse problem, and evidence the parties were drinking alcohol throughout the day. The South Carolina Supreme Court’s opinion, holding there was no evidence that Petitioner was intoxicated on the day of the murder, is based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.
- Ground 10: The court erred by refusing to grant a mistrial where the solicitor attempted to question James Aiken about the possibility of escape, since the solicitor injected an improper consideration and an arbitrary factor into the sentencing phase. The jury’s attention is properly focused on the penalties of death and life without parole, and not speculative matters beyond Petitioner’s control. Defense counsel correctly argued that the judge could not remove the taint through a curative instruction once escape was raised by the state as an issue.
- Ground 11: Trial counsel rendered ineffective assistance of counsel for failing to object to the Solicitor’s arguing to discount Petitioner’s mitigation because there was no “nexus” between Petitioner’s proffered mitigation and the crime.
- Ground 12: Trial counsel rendered ineffective assistance of counsel by failing to call a number of witnesses who were available to

trial counsel, and who would have provided the jury with highly mitigating evidence of Petitioner's dysfunctional childhood that the jury did not otherwise here.

ECF No. 36 at 7–8, 26, 41–42, 46, 58, 65, 75, 78, 83, 85.¹ The State filed a return to the amended petition and a motion for summary judgment. ECF Nos. 56, 57. Bowman filed a response in opposition to the summary judgment motion, ECF No. 70, and the State filed a reply, ECF No. 74.

With briefing complete, the magistrate judge issued a Report and Recommendation (Report), in which he recommended granting the State's summary judgment motion and denying the habeas petition. ECF No. 75. Bowman filed objections to the Report, ECF No. 81, and the State filed a reply to those objections, ECF No. 82.

This matter is now ripe for decision.

II. Standards of Review

A. Report and Recommendation

The magistrate judge issued his Report in accordance with 28 U.S.C. § 636(b)(1) and Local Civil Rule 73.02(B)(2)(c) (D.S.C.). The Report is a recommendation to the Court and has no presumptive weight. The responsibility to make a final determination rests with the Court. *See Mathews v. Weber*, 423 U.S.

¹ The petition does not include a Ground 7 or Ground 9, but the Court, like the magistrate judge, has maintained the numbering used in the petition. However, the Court, again like the magistrate judge, has renumbered the two additional grounds, which are found in his petition under the heading of "Unexhausted Claims," as Grounds 11 and 12.

261, 270–71 (1976). The Court conducts a *de novo* determination of any portion of the Report to which a specific objection is made, and the Court may accept, reject, or modify, in whole or in part, the magistrate judge’s recommendation, or may recommit the matter to the magistrate judge with instructions. 28 U.S.C. § 636(b)(1). In the absence of an objection, the Court is not required to give any explanation for adopting the recommendation. *See Camby v. Davis*, 718 F.2d 198, 200 (4th Cir. 1983). The district court reviewed the cited transcripts, and references to transcripts included in the Report in evaluating the issues raised and addressed in this order. The Court also notes that the Report is 121 pages long, with significant detailed discussion of the positions taken by counsel for the parties, the PCR court’s analysis, caselaw, and the many issues raised.

B. Summary Judgment

Summary judgment is appropriate when the materials in the record show that “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The Court must view the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A fact is material if it “might affect the outcome of the suit under the governing law.” *Id.* at 248.

The party seeking summary judgment bears the initial burden of demonstrating to the Court that there is no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this

threshold showing, in order to survive summary judgment, the nonmoving party must demonstrate that specific, material facts exist that give rise to a genuine issue. *See id.* at 324.

C. Habeas Corpus Review

1. *Deference to state courts*

Any claim in a § 2254 petition that was adjudicated on the merits in a state court proceeding may not be granted unless the state court’s adjudication of the claim

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

28 U.S.C. § 2254(d).

To meet this standard, the state court must have “arrive[d] at a conclusion opposite to that reached by [the Supreme] Court on a question of law or . . . decide[d] a case differently than [the United States Supreme] Court has on a set of materially indistinguishable facts.” *Williams v. Taylor*, 529 U.S. 362, 413 (2000). “[A] federal habeas court may overturn a state court’s application of clearly established federal law only if it is so erroneous that there is no possibility fairminded jurists could disagree that the state court’s decision conflicts with [the Supreme] Court’s precedents.” *Nevada v. Jackson*, 569 U.S. 505, 508–09 (2013). “[A] federal court hearing a § 2254 petition may not substitute ‘its independent

judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.” *Tyler v. Hooks*, 945 F.3d 159, 166 (4th Cir. 2019) (quoting *Williams*, 529 U.S. at 411). This is a “highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt.” *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (citations omitted). “The Supreme Court has ‘often emphasized that this standard is difficult to meet because it was meant to be.’” *Tyler*, 945 F.3d at 167 (quoting *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2558 (2018)).

2. *Ineffective assistance of counsel*

Criminal defendants have a constitutional right to the assistance of counsel. U.S. Const. amend. VI. “[T]he right to counsel is the right to the effective assistance of counsel.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citation omitted).

To prevail on an ineffective assistance claim, a petitioner must show that (1) counsel’s acts or omissions fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *See id.* at 687–88, 694. Failure of proof on either prong ends the matter. *United States v. Roane*, 378 F.3d 382, 404 (4th Cir. 2004). There is “a strong presumption that counsel’s conduct falls within the wide range of professional assistance,” and a petitioner has the burden of overcoming this presumption. *Strickland*, 466 U.S. at 689. “Even under *de novo* review, the standard for judging counsel’s representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of

materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (citing *Strickland*, 466 U.S. at 689). "The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Id.* (citing *Strickland*, 466 U.S. at 690). An ineffective assistance of counsel allegation requires the submission of specific facts in support of the claim. *See United States v. Witherspoon*, 231 F.3d 923, 926 (4th Cir. 2000).

When *Strickland* is applied in the federal habeas context, it is an even taller hurdle to overcome. "The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so." *Harrington*, 562 U.S. at 105 (citations omitted). "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id.* Thus, relief would be appropriate only if the petitioner demonstrates that there is no reasonable argument that counsel satisfied *Strickland*.

3. *Exhaustion and procedural default*

A habeas petitioner may not obtain relief in federal court unless he has exhausted his state court remedies. 28 U.S.C. § 2254(b)(1)(A). "To satisfy the exhaustion requirement, a habeas petitioner must fairly present his claim to the state's highest court." *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997),

abrogated on other grounds by Miller-El v. Dretke, 545 U.S. 231 (2005). “To exhaust a claim, the petitioner must present the state court with ‘both the operative facts and the controlling legal principles.’” *Gray v. Zook*, 806 F.3d 783, 798 (4th Cir. 2015) (quoting *Winston v. Kelly*, 592 F.3d 535, 549 (4th Cir. 2010)).

A petitioner’s failure to raise in state court a claim asserted in a § 2254 petition “implicates the requirements in habeas of exhaustion and procedural default.” *Gray v. Netherland*, 518 U.S. 152, 161 (1996). “[A] habeas petitioner who has failed to meet the State’s procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance,” and has therefore procedurally defaulted those claims. *Coleman v. Thompson*, 501 U.S. 722, 732 (1991). “[T]he procedural bar that gives rise to exhaustion provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice for the default.” *Gray*, 518 U.S. at 162.

In general, a federal court will not entertain a procedurally defaulted claim as long as the state’s procedural requirement barring the court’s review is adequate to support the judgment and independence of federal law. *See Martinez v. Ryan*, 566 U.S. 1, 9–10 (2012). However, “[t]he doctrine barring procedurally defaulted claims from being heard is not without exceptions. A prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law.” *Id.* at 10.

A federal habeas petitioner cannot claim ineffective assistance of counsel in state post-conviction proceedings to establish cause for default because there is no constitutional right to counsel in state post-conviction proceedings. *See Coleman*, 501 U.S. at 752. However, the Supreme Court has recognized a “narrow exception” to *Coleman*, specifically that “[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial.” *Martinez*, 566 U.S. at 9. The Fourth Circuit has summarized the *Martinez* exception as follows:

[A] federal habeas petitioner who seeks to raise an otherwise procedurally defaulted claim of ineffective-assistance-of-trial-counsel before the federal court may do so only if: (1) the ineffective-assistance-of-trial-counsel claim is a substantial one; (2) the “cause” for default “consists of there being no counsel or only ineffective counsel during the state collateral review proceeding”; (3) “the state collateral review proceeding was the initial review proceeding in respect to the ineffective-assistance-of-trial-counsel claim”; and (4) state law “requires that an ineffective-assistance-of-trial-counsel claim be raised in an initial-review collateral proceeding.”

Fowler v. Joyner, 753 F.3d 446, 461 (4th Cir. 2014) (cleaned up) (quoting *Trevino v. Thaler*, 569 U.S. 413, 423 (2013)). Essentially, if initial-review collateral counsel was constitutionally ineffective in failing to raise the constitutional ineffectiveness of trial counsel, collateral counsel’s ineffectiveness may excuse the petitioner’s procedural default of a substantial claim of trial counsel’s ineffectiveness.

III. Discussion

The Court will address each ground for relief that Bowman raised in his habeas petition.

A. Ground 1 – Ineffective assistance re: Taiwan Gadson

Ground 1 of the petition is as follows:

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.

ECF No. 36 at 7–8.

1. *Bowman's claims*

Gadson was a significant witness in the State's case. He was with Bowman at various times before, during, and after the murder. He saw Bowman with a gun prior to the murder. He was the only witness who testified as to how the murder occurred. He rode in Martin's car with Bowman after the murder. At trial, he testified that he had been charged with Martin's murder, but that he had entered into an agreement with the State in exchange for his testimony at Bowman's trial. The agreement called for the murder charge to be dropped and for him to plead guilty to charges of accessory after the fact of murder and misprision of a felony, with a negotiated sentence of twenty years imprisonment.

Bowman asserts that counsel was ineffective regarding Gadson by failing to question him about his own exposure to the death penalty, by failing to confront him with evidence that he fired the murder weapon prior to the day of the murder,

and by failing to press him on inconsistencies in various statements he made to police regarding the murder.

As to Gadson's exposure to the death penalty, Bowman argues that counsel was ineffective for failing to specifically inform the jury that Gadson made a plea deal with the State to avoid a capital murder charge. This argument is primarily based on his plea agreement, which provides that if he did not cooperate against Bowman, then the State could move to vacate Gadson's plea and could "reinstate the murder charge and seek the death penalty against [him]." R. p. 1946 (ECF No. 11-23 at 196). Bowman argues that counsel was ineffective in "fail[ing] to emphasize that Gadson was testifying to avoid the death penalty." ECF No. 36 at 14.

As to Gadson's previous use of the murder weapon, Bowman argues that counsel was ineffective in failing to present evidence indicating that Gadson had fired the murder weapon about two weeks before the murder.

As to Gadson's inconsistencies, Bowman argues that counsel was ineffective in failing to cross-examine Gadson regarding inconsistencies in several statements he made to police regarding the murder.

2. *PCR order*

Importantly, regarding Bowman's claim of ineffective assistance regarding Gadson's death penalty exposure, the PCR court rejected that argument because "[Bowman's] allegation that Gadson expressly bargained to avoid a death sentence is not supported by the record." R. p. 9835 (ECF No. 11-27 at 65). Specifically, the

PCR court concluded that he did not bargain to avoid the death penalty, as the State never served him with a death notice. *Id.* The PCR court also determined that Bowman failed to establish prejudice based in part on its conclusion that Gadson credibly testified at the PCR hearing that he thought he was avoiding a potential life sentence, not a death sentence. *See id.* at 9836 (ECF No. 11-27 at 66).

Regarding Bowman's claim of ineffective assistance regarding evidence that Gadson had previously fired the murder weapon, the PCR court rejected that argument because Bowman had given Gadson the gun to fire, and counsel was not deficient in declining to introduce evidence that would indicate to the jury that Bowman had control of the murder weapon shortly before the murder. *See id.* at 9845 (ECF No. 11-27 at 75).

Regarding Bowman's claim of ineffective assistance regarding inconsistencies in Gadson's prior statements, the PCR court did not rule on this issue.

3. *Report*

In the Report, the magistrate judge concluded that the PCR court did not unreasonably apply federal law on either *Strickland* prong regarding Gadson's death penalty exposure. In particular, the magistrate judge noted that the PCR court evaluated the claim as "presented by PCR counsel—that Gadson expressly bargained to avoid a potential death sentence and that trial counsel should have pointed that out during cross-examination," ECF No. 75 at 20, not the slightly different claim asserted now—that Gadson should have been impeached "with the fact that he faced the death penalty," ECF No. 36 at 20. The magistrate judge also

noted that there was testimony before the jury that Gadson agreed to a twenty-year sentence on two lesser charges instead of facing a murder charge, and that counsel did ask the jury during closing to consider Gadson's bias as a result of the plea agreement. Finally, the magistrate judge noted the PCR court's determination that Gadson credibly testified at the PCR hearing that he thought he was avoiding a potential life sentence, not a death sentence, by entering into the plea agreement.

Regarding Gadson's prior use of the murder weapon, the magistrate judge concluded that the PCR court did not unreasonably apply federal law when it concluded that counsel was not ineffective in declining to pursue that line of questioning. The magistrate judge further concluded that the PCR court did not unreasonably apply federal law in determining that Bowman was not prejudiced by counsel's decision.

Regarding inconsistencies in Gadson's prior statements, the magistrate judge concluded that this argument was not properly raised and preserved in Bowman's state court proceedings, so it was procedurally barred. To the extent that he is seeking to bring this claim under *Martinez*, the magistrate judge also concluded that Bowman did not meet his burden of proving cause and prejudice in order to overcome the procedural default.

4. *Objections*

In Bowman's objections, he argues that counsel should have cross-examined Gadson about the provision in the plea agreement that provided that if he did not cooperate, the State could reinstate the murder charge and pursue the death

penalty. Bowman says that it should have been up to the jury to determine whether Gadson believed he was avoiding the death penalty by entering into the plea agreement. Bowman also argues that “[t]estimony that Gadson pled guilty to a lesser charge does not convey the magnitude of the incentive created by the possibility of avoiding a death sentence.” ECF No. 81 at 3.

As to Gadson’s prior use of the murder weapon, Bowman objects that counsel did not, in fact, have any reason not to question Gadson about his access to and use of the murder weapon prior to trial in light of other witnesses tying the gun to Bowman.

Bowman did not object to the magistrate judge’s conclusion that his claim regarding Gadson’s prior inconsistencies was procedurally defaulted.

5. *Analysis*

At the outset, the Court notes the deferential standard of review in this matter as set forth in the caselaw. The question is not whether counsel could have or should have more vigorously or thoroughly cross-examined Gadson. Instead, “[t]he question is whether there is any reasonable argument that counsel satisfied *Strickland’s* deferential standard” by cross-examining Gadson the way that they did. *Harrington*, 562 U.S. at 105. The Court answers that question in the affirmative.

Regarding Gadson’s plea agreement, as the magistrate judge recognized, the jury was informed that Gadson received the benefit of a plea agreement to twenty years as a result of his cooperation and counsel addressed this potential source of

bias in his closing argument. Hence, it is clear that the jury knew that Gadson was testifying in light of a plea offer and possible lessened sentence. Additionally, the PCR court made the credibility determination that Gadson did not think he was avoiding a death sentence, and that credibility determination is entitled to substantial deference by this Court. *See* 28 U.S.C. § 2254(e)(1); *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983). The fact that counsel could have explored this topic more specifically as asserted does not mean that the decision not to focus on it “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland*, 466 U.S. at 686. Furthermore, Bowman was not prejudiced by counsel’s failure to cross-examine Gadson about the plea deal because, based on the PCR court’s factual determination, he would have testified that he thought he was avoiding a potential life sentence, not a death sentence. This finding by the PCR court undermines the strength of Bowman’s argument.

Regarding Gadson’s prior use of the murder weapon, counsel testified at the PCR hearing that he did not want to invite evidence tying the murder weapon to Bowman. Bowman’s response that there was other evidence in the record tying him to the gun is merely an indication that counsel could have pursued a different strategy. But that response does not overcome the presumption that this tactical decision “might be considered sound strategy.” *Strickland*, 466 U.S. at 689 (citation omitted). As the PCR court determined, putting the gun in Gadson’s hand for a

brief period of time two weeks prior to the murder would have had minimal benefit, as he only had the gun because Bowman gave it to him.

Regarding Gadson's inconsistent statements, the Court concludes that this claim is procedurally defaulted for the reasons set forth by the magistrate judge and Bowman did not meet his burden of proving cause and prejudice in order to overcome the procedural default.²

For these reasons, Bowman has failed to establish that the PCR court's denial of his claims in Ground 1 was contrary to or involved an unreasonable application of clearly established federal law, or was the result of unreasonable factual findings. *See* 28 U.S.C. § 2254(d); *Harrington*, 562 U.S. at 101. Accordingly, the Court concludes that he has not met his burden and is therefore not entitled to relief on Ground 1.

B. Ground 2 – Ineffective assistance re: Travis Felder

Ground 2 of the petition is as follows:

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.

ECF No. 36 at 26.

² As noted above, Bowman did not object to the magistrate judge's conclusions on this issue.

1. *Bowman's claims*

Bowman asserts that counsel was ineffective regarding Felder by failing to question him about him purchasing the gasoline that was used to burn Martin's car, about his original charges, and about his inconsistent statements.

Regarding Felder's gasoline purchase, Bowman argues that counsel was ineffective in not questioning Felder during the guilt phase of the trial about his purchase of the gasoline that was used to burn Martin's car. Bowman claims that leaving this out gave the jury the false impression that he acted alone in Martin's murder and that if the jury knew that Felder was involved in the crime, the outcome of the trial likely would have been different.

Regarding Felder's original charges, Bowman argues that counsel was ineffective in failing to impeach Felder regarding his original charge of accessory to murder / arson. After he testified at Bowman's trial, Felder was allowed to plead to accessory after the fact of arson, for which he received a sentence of three years imprisonment suspended to three years probation.

Lastly, Bowman argues that counsel was ineffective in failing to impeach Felder regarding prior inconsistent statements that he had given to police, specifically a proffer letter written by his attorney and a statement given during a polygraph examination.

2. *PCR order*

Regarding Bowman's claim of ineffective assistance about Felder's gasoline purchase, the PCR court rejected that argument, crediting counsel's explanation that "he did not want it in because he felt it would corroborate [Bowman's] involvement in the plan to burn the car." R. p. 9861 (ECF No. 11-27 at 91). The PCR court also noted that the evidence was eventually introduced during the sentencing phase, but that this "was done at [Bowman's] insistence and was not in line with [counsel's] strategy." *Id.* When Felder testified about this incident during sentencing, he said that he purchased the gasoline at Bowman's direction and that Bowman provided the gasoline jug. *Id.* at 9861–62 (ECF No. 11-27 at 91–92). Thus, the PCR court concluded that counsel had "a valid, reasonable strategic reason" for not presenting this evidence of the purchase of gasoline by Felder for Bowman during the guilt phase and therefore denied the claim. *Id.* at 9862 (ECF No. 11-27 at 92). The PCR court also concluded that Bowman failed to establish prejudice because Felder's omission did not indicate that he was involved in Martin's murder, because cross-examination on this issue would not have exculpated Bowman from being a participant in the arson, and because there was overwhelming evidence of his guilt of both the murder and the arson. *Id.*

Regarding Felder's original charges, the PCR court concluded that "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." *Id.* at 9859 (ECF No. 11-27 at 89). The PCR court also determined

that counsel had a strategic reason for not discussing Felder’s initial charges: that his original charges were based on statements that Bowman gave to police, which could be used to further the theme that he tried to deflect blame by implicating others. *Id.* at 9860 (ECF No. 11-27 at 90). As to prejudice, the PCR court determined that there was no prejudice in light of the minimal benefit to be gained and the potentially harmful response to that line of inquiry. *Id.* at 9860–61 (ECF No. 11-27 at 90–91).

Regarding Felder’s prior inconsistent statements, that claim was not directly addressed by the PCR court. However, the PCR court did note elsewhere that the proffer letter could not be used for impeachment purposes because it was not written by Felder. *Id.* at 9856 (ECF No. 11-27 at 86). The PCR also concluded that “[a]ny minor differences in the proffer letter and the trial testimony do not overcome the overwhelming evidence of [Bowman’s] guilt presented in this case” *Id.*

3. *Report*

In the Report, the magistrate judge concluded that the PCR court did not unreasonably apply federal law on either *Strickland* prong regarding Felder’s gasoline purchase. The magistrate judge concluded that the record supported the PCR court’s determination that counsel had a strategic reason for keeping out Felder’s testimony during the guilt phase of the trial and that he only introduced it during the sentencing phase due to Bowman’s insistence. The magistrate judge also noted that the video, combined with Felder’s testimony about why he bought the gasoline, fit a pattern throughout the trial where Bowman involved others in the

crime and directed their participation. As to prejudice, the magistrate judge determined that the PCR court did not make unreasonable factual findings or unreasonably apply federal law in finding no prejudice, due primarily to Felder's testimony that he was directed to purchase the gasoline by Bowman.

Regarding Felder's original charges, the magistrate judge concluded that the record supported the PCR court's determination that counsel had a strategic reason for not discussing Felder's initial charges.

Regarding Felder's prior inconsistent statements, the magistrate judge first noted that the PCR court didn't directly address this claim, but noted that some of the PCR court's other findings were relevant to this question. The magistrate judge also noted that, although counsel admitted that he did not have a strategic reason for failing to impeach Felder on his prior statement during a polygraph exam that he did not see Martin's body being placed in the car, if counsel had questioned Felder about that, it could have opened the door for the State to introduce evidence that Felder's response to that question indicated deception to the examiner. Finally, the magistrate judge found that Bowman failed to show that there was a reasonable probability that the result of the proceeding would have been different if counsel had tried to impeach Felder with this information.

4. *Objections*

Bowman's sole objection on this ground is that counsel's strategy of declining to question Felder about his gasoline purchase was unsound because it would have indicated that Bowman and Felder at least shared culpability for the arson.

Bowman did not object to the magistrate judge's conclusions regarding Felder's original charges and inconsistent statements.

5. *Analysis*

The Court again reiterates that the only relevant question “is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard” by declining to question Felder regarding his purchase of the gasoline. *Harrington*, 562 U.S. at 105. The Court concludes that, although counsel could have made a different strategic decision, there is certainly a reasonable argument that counsel's strategy did not “amount[] to incompetence under prevailing professional norms.” *Id.*

As to Felder's original charges and prior inconsistent statements, the Court concludes that counsel was not ineffective for the reasons set forth by the magistrate judge.³

For these reasons, Bowman has failed to establish that the PCR court's denial of his claims in Ground 2 was contrary to or involved an unreasonable application of clearly established federal law, or was the result of unreasonable factual findings. *See* 28 U.S.C. § 2254(d); *Harrington*, 562 U.S. at 101. Accordingly, the Court concludes that he has not met his burden and is therefore not entitled to relief on Ground 2.

³ As noted above, Bowman did not object to the magistrate judge's conclusions on these issues.

C. Ground 3 – Ineffective assistance re: Hiram Johnson

Ground 3 of the petition is as follows:

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.

ECF No. 36 at 41–42.

1. *Bowman's claims*

Bowman asserts that counsel was ineffective regarding his impeachment of Johnson, whose most damaging testimony was when he told the jury that he heard Bowman say that he killed Martin. Specifically, he claims that counsel was ineffective in failing to ask Johnson about a prior written statement he gave to law enforcement that did not include Bowman's confession.

2. *PCR order*

The PCR court rejected this argument, crediting counsel's argument that he did not cross-examine Johnson on this issue because counsel did not want to risk Johnson repeating Bowman's damning confession in front of the jury. R. p. 9869 (ECF No. 11-27 at 99). The PCR court also concluded that Bowman did not establish prejudice because Johnson had told police about the confession during his first interview, and this statement was reflected in the detective's notes. Thus, the confession being left out of the later written statement would have limited

impeachment value given that he had previously told police about Bowman's confession.

3. *Report*

In the Report, the magistrate judge concluded that the PCR court did not unreasonably apply federal law in determining that counsel had a valid, strategic reason for not cross-examining Johnson on this issue because he did not want the statement further emphasized. The magistrate judge also concluded that Bowman did not meet *Strickland's* prejudice prong because Johnson had said in his initial interview with police that he heard Bowman confess to the murder.

4. *Objections*

Bowman objects to the magistrate judge's conclusion on this ground, arguing that "[t]he only valid strategic decision in this regard was to undermine Johnson's damning testimony regarding the confession." ECF No. 81 at 7. Bowman did not address the argument that there was no prejudice in light of Johnson's first statement that included the confession.

5. *Analysis*

The Court concludes, again, that although counsel could have made a different strategic decision regarding his cross-examination of Johnson, there is a reasonable argument that counsel's strategy did not "amount[] to incompetence under prevailing professional norms." *Harrington*, 562 U.S. at 105. As the

magistrate judge concluded, it was reasonable for counsel to want to avoid having Bowman's admission repeated once more in front of the jury, particularly because cross-examining Johnson about it would have minimal impeachment value due to the fact that he had previously told police about the admission.

For these reasons, Bowman has failed to establish that the PCR court's denial of his claim in Ground 3 was contrary to or involved an unreasonable application of clearly established federal law, or was the result of unreasonable factual findings. *See* 28 U.S.C. § 2254(d); *Harrington*, 562 U.S. at 101. Accordingly, the Court concludes that he has not met his burden and is therefore not entitled to relief on Ground 3.

D. Ground 4 – *Brady* violations

Ground 4 of the petition is as follows:

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.

ECF No. 36 at 46.

1. *Bowman's claims*

Bowman asserts that the State withheld certain information in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, he alleges that the State failed to disclose a memorandum prepared by Sam Richardson, an investigator who

worked for the solicitor's office (Sam Memo); Gadson's mental health report; and that Johnson had pending charges at the time of Bowman's trial.

a. *Sam Memo*

The Sam Memo is a memorandum written by an investigator for the solicitor's office describing an interview he conducted with Ricky Davis. The interview was conducted after Davis wrote a note describing a conversation he had in jail with Gadson in which Gasdon said that he was the one who shot Martin. The text of the Sam Memo is as follows:

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 [sic] 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 [sic] 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.

R. p. 9122 (ECF No. 11-24 at 165).⁴ The memorandum was not turned over to the defense.

At the PCR hearing, it is appropriate to note that defense counsel testified that, at trial, he had a copy of Davis's handwritten note, but not the Sam Memo. After receiving Davis's note, counsel had a defense investigator interviewed him. During that interview, it is appropriate to note that Davis recanted the statement and said that Bowman told him to write it.

Bowman argues that the Sam Memo should have been disclosed under *Brady*. He says that it is "clearly relevant to guilt or innocence" because "[i]t recounts a co-defendant confessing to the crime" and "directly contradict[s] the only eyewitness to the murder." ECF No. 36 at 51. He also argues that, because it was an interview conducted by the State, the jury would likely have looked favorably on a witness's testimony that was confirmed by law enforcement.

b. *Gadson's mental health evaluation*

Gadson underwent a mental health evaluation between Bowman's indictment and trial. The evaluation concluded that Gadson had diagnoses of "Cannabis Dependence" and "History of Seizure Disorder," that he reported suffering from blackouts, that he smoked cannabis on a daily basis, that he claimed to hear a voice and a beeping noise, and that he had memory problems. *See* R. pp.

⁴ The memorandum was written in all-caps. It has been re-written using standard capitalization to improve readability.

8957–61 (ECF No. 11-23 at 207–211). This evaluation was not turned over to the defense.

Bowman argues that this evaluation should have been disclosed under *Brady*, as it could have been used to impeach Gadson’s credibility.

c. *Johnson’s pending charges*

At the time of Bowman’s trial, Johnson had pending charges for receiving stolen goods, second degree burglary, and grand larceny. The warrants for these offenses had been served, but he had not yet been indicted. The charges were eventually dismissed after Bowman’s trial. Information about these charges was not turned over to the defense.

Bowman argues that these charges should have been disclosed under *Brady*, as they could have been used to impeach Johnson’s credibility.

2. *PCR order*

The PCR court concluded that the State did not violate *Brady* regarding the Sam Memo, Gadson’s mental health evaluation, or Johnson’s pending charges.

As to the Sam Memo, the PCR court concluded that it was not favorable and was not material. The PCR court concluded that it was not favorable because the memorandum could only have been used to impeach Davis if he testified at trial, and he would have been a poor witness for the defense to call based on his statement to the defense investigator that he would recant the claims in the note if called to testify and that he would say that Bowman put him up to it. The PCR

court also concluded that the Sam Memo was not material because if Davis had been called and testified as he did at the PCR hearing, even if he had been impeached with the Sam Memo, there is still not a reasonable probability of a different result. R. pp. 9871–74 (ECF No. 11-27 at 101–04).

As to Gadson’s mental health evaluation, the PCR court concluded that the State’s failure to turn it over did not violate *Brady* for several reasons. First, the PCR court concluded that defense counsel had other means to obtain the report, specifically by reviewing the public court order in Gadson’s case that ordered the evaluation and then submitting a subpoena to obtain the report. Next, the PCR court concluded that Bowman did not establish that the report was favorable or impeaching evidence because “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.” Next, the PCR court concluded that the report was not material because it did not indicate that he suffered any memory issues as a result of his seizures and there was no evidence that he was using marijuana on the date of the murder. Next, the PCR court concluded that the failure to disclose the report did not undermine confidence in the verdict due to the overwhelming evidence of guilt in this case. Finally, the PCR court concluded that Gadson’s credibility had already been impeached due to his drinking on the day of the murder. *Id.* at 9829–34 (ECF No. 11-27 at 59–64).

As to Johnson’s pending charges, the PCR court concluded that this information was not material. The PCR court first based this determination on the

overwhelming evidence of Bowman's guilt. The PCR court also concluded that the impeachment value of Johnson's pending charges was limited due to the lack of evidence that his testimony resulted in any special consideration for his pending charges, which were unrelated to the murder. *Id.* at 9864–65 (ECF No. 11-27 at 94–95).

3. *Report*

Regarding the Sam Memo, the magistrate judge concluded that the PCR court improperly conflated the standards for favorability and materiality, and to the extent that the PCR court failed to recognize how the Sam Memo could be favorable, that finding was incorrect. However, the magistrate judge went on to conclude that “[i]t was not unreasonable for the PCR court to find that favorable evidence was not suppressed since the defense team was already aware of Gadson's alleged confession to Davis by way of Davis's handwritten note.” ECF No. 75 at 53. The magistrate judge also concluded that it was not unreasonable for the PCR court to conclude that the Sam Memo was not material because the only way it could have come out at trial would have been if (1) the defense had called Davis as a witness; (2) Davis testified that he did not tell the investigator the information recorded in the memorandum; and (3) the investigator testified that Davis did, in fact, make that statement to him. The magistrate judge recognized that this would have likely been detrimental to Bowman's case given that Davis said he would recant his prior statement about Gadson's “confession” and would instead say that Bowman told him to write the note.

Regarding Gadson's mental health report, the magistrate judge concluded that the PCR court incorrectly determined that the mental health report was not favorable. However, the magistrate judge also concluded that the PCR court did not unreasonably apply federal law in determining that there was no *Brady* violation because defense counsel could have obtained the report by other means. The magistrate judge noted that several circuit courts, including the Fourth Circuit, have concluded that *Brady* does not require the disclosure of evidence available to the defendant from other sources. And as to materiality, the magistrate judge concluded that the PCR court was not unreasonable in finding that there was no reasonable probability of a different outcome had the mental health report been disclosed.

Regarding Johnson's pending charges, the magistrate judge concluded that Bowman failed to show that the PCR court's determination that he failed to establish materiality was based on unreasonable factual findings. The magistrate judge's conclusion was based on the PCR court's determination that the impeachment value was limited and its recognition of the overall strength of the State's case.

4. *Objections*

In Bowman's objections, he first argues that the magistrate judge overlooked his argument that there was additional value in the fact that Davis repeated the information about Gadson's confession to a State investigator. Bowman says that because he didn't have the Sam Memo, counsel didn't know that Davis had repeated

the statement, which would have impacted counsel's decision on whether to call Davis or the investigator as a witness. He also says that Davis's wavering testimony on the topic of what he actually heard from Gadson, when combined with cross-examination about him writing the statement and telling the investigator the same thing, could have created a reasonable doubt as to Bowman's guilt.

Bowman objects to the magistrate judge's conclusion about Gadson's mental health report, arguing that the State violated *Brady* even though counsel could have obtained the report by other means. He argues that under *Banks v. Dretke*, 540 U.S. 668 (2004), "[t]he duty to disclose under *Brady* is absolute—it does not depend on defense counsel's actions." ECF No. 81 at 9. However, he did not object to the magistrate judge's conclusion regarding materiality.

Bowman also objects to the magistrate judge's conclusion about Johnson's pending charges, arguing that the evidence was not overwhelming and that the magistrate judge should have considered the statement made by the State during closing arguments that the jury "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." R. p. 4474 (ECF No. 11-10 at 467).

5. *Analysis*

Regarding the Sam Memo, the Court concludes that the PCR court's determination that favorable evidence was not suppressed because Bowman already had Davis's note was not "so erroneous that there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme]

Court's precedents." *Jackson*, 569 U.S. at 508–09. Noting the PCR court's position regarding the overall weight of the evidence and the arguable impeachment value of the undisclosed information, this Court "may not substitute 'its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.'" *Tyler*, 945 F.3d at 166 (quoting *Williams*, 529 U.S. at 411). However, there is no basis to conclude that the PCR court was incorrect in connection with its factual and legal determination that any error was not material. Noting that Davis indicated that he would recant weakens the position that he would be called at all.

Regarding Gadson's mental health evaluation, the Court is not persuaded that the Supreme Court's 2004 decision in *Banks* abrogated the Fourth Circuit's 2002 decision in *Fullwood v. Lee*, which held that *Brady* "does not compel the disclosure of evidence available to the defendant from other sources." 290 F.3d 663, 686 (4th Cir. 2002) (citation omitted). The Fourth Circuit has relied on this principle numerous times post-*Banks*, including as recently as one month ago. *See United States v. Fagot-Maximo*, 795 F. App'x 213, 215 (4th Cir. 2020); *United States v. Catone*, 769 F.3d 866, 871 (4th Cir. 2014); *United States v. George*, 466 F. App'x 304, 307 (4th Cir. 2012); *United States v. Higgs*, 663 F.3d 726, 735 (4th Cir. 2011). Thus, the PCR court did not unreasonably apply federal law in concluding that there was no *Brady* violation because Bowman could have obtained the report by other means.

Regarding Johnson’s pending charges, the PCR court considered the extensive and varied evidence of guilt, which came from multiple witnesses. The PCR court also determined that the impeachment value of this information was limited because there was no evidence that his testimony resulted in any special consideration for his pending, unrelated charges. Under the “highly deferential standard for evaluating state-court rulings,” *Cullen*, 563 U.S. at 181, the Court concludes that the PCR court’s determination that this information was not material was based on reasonable factual findings.

For these reasons, Bowman has failed to establish that the PCR court’s denial of his claims in Ground 4 was contrary to or involved an unreasonable application of clearly established federal law, or was the result of unreasonable factual findings. *See* 28 U.S.C. § 2254(d); *Harrington*, 562 U.S. at 101. Accordingly, the Court concludes that he has not met his burden and is therefore not entitled to relief on Ground 4.

E. Ground 5 – Conflict of interest

Ground 5 of the petition is as follows:

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.

ECF No. 36 at 58.

1. *Bowman's claims*

Bowman alleges that one of his counsel, Marva Hardee-Thomas, had a conflict of interest because she had an attorney-client relationship with Davis, whom she represented on two prior armed robbery charges. On October 16, 2001, Davis was convicted at trial of one of the charges, and she filed a notice of appeal on his behalf a week later, but had no further involvement in the case. On October 18, 2001, the other charge was *nol prossed* by the State. Bowman argues that she represented both him and Davis at the same time and that she failed to call Davis as a witness due to that conflict. He argues that, even though the second charge was *nol prossed*, she still owed duties to Davis beyond the normal duties owed to former clients because the State could have recharged him for that offense.

2. *PCR order*

The PCR court determined that Hardee-Thomas's representation of Davis ended on October 24, 2001 when she filed his notice of appeal and that the second charge had already been *nol prossed* by that time. R. p. 9879 (ECF No. 11-27 at 109). Thus, the PCR court found that when she was informed of Davis's statement regarding Bowman's case in January 2002, she no longer owed attorney-client duties to Davis beyond the duty of confidentiality owed to former clients. *Id.* The PCR court further found that even if her representation of Davis was a potential conflict of interest with her representation of Bowman, it never developed into an actual conflict of interest. *Id.* Finally, the PCR court determined that he did not

establish that she failed to call Davis as a witness due to a conflict of interest. *Id.* at 9880–81 (ECF No. 11-27 at 110–11).

3. *Report*

The magistrate judge first noted that Bowman did not respond to the State's motion for summary judgment on this claim, so it appeared that he was abandoning the claim. However, because he did not explicitly abandon the claim, the magistrate judge addressed it on the merits.

On the merits, the magistrate judge noted that Bowman cited no authority for the proposition that Hardee-Thomas still owed duties to Davis simply because the State could have reinstated the charge. The magistrate also found that there is support in the record for the PCR court's conclusion that her representation of Davis ended when she filed the notice of appeal and hence, no conflict existed. Additionally, the magistrate judge noted the PCR court's determination that the decision to not call Davis was not the result of a conflict of interest. As noted in the previous section, the record indicates that Davis intended to recant his statement if called to testify. Thus, the magistrate judge concluded that Bowman did not show that the PCR court's conclusion on this issue was the result of unreasonable factual findings or an unreasonable application of Supreme Court law.

4. *Objections*

Bowman did not file objections on this ground.

5. *Analysis*

For the reasons set forth by the magistrate judge, Bowman has failed to establish that the PCR court's denial of his claims in Ground 5 was contrary to or involved an unreasonable application of clearly established federal law, or was the result of unreasonable factual findings. *See* 28 U.S.C. § 2254(d); *Harrington*, 562 U.S. at 101. Accordingly, the Court concludes that he has not met his burden and is therefore not entitled to relief on Ground 5.⁵

F. Ground 6 – Ineffective assistance re: prison conditions evidence

Ground 6 of the petition is as follows:

Defense counsel was ineffective for failing to object to the solicitor's examination of James Aiken regarding favorable prison conditions and recreational facilities available to inmates since this evidence interjected an arbitrary factor into Petitioner's trial and violated his right to due process.

ECF No. 36 at 65.

⁵ The Court also notes that, because Bowman did not respond to the State's motion for summary judgment on this ground, it is waived. *See, e.g., Wilson v. Dryvit Sys., Inc.*, 71 F. App'x 960, 962 (4th Cir. 2003) ("If a party fails to assert a legal reason why summary judgment should not be granted, that ground is waived and cannot be considered or raised on appeal.") (quoting *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 678 (1st Cir. 1995)). Furthermore, he has failed to preserve this issue for appeal by failing to file objections to the Report. *See Martin v. Duffy*, 858 F.3d 239, 245 (4th Cir. 2017) ("A plaintiff is deemed to have waived an objection to a magistrate judge's report if he does not present his claims to the district court. In order to preserve for appeal an issue in a magistrate judge's report, a party must object to the finding or recommendation on that issue with sufficient specificity so as reasonably to alert the district court of the true ground for the objection." (cleaned up and citations omitted)).

1. *Bowman's claims*

At sentencing, counsel called James Aiken, a prison adaptability expert, to testify about Bowman's history adjusting to the prison environment and his risk of future dangerousness. Aiken told the jury that he had "no reservations whatsoever" that Bowman could adapt to prison and, furthermore, that the prison environment—where he would be kept "behind gun towers, behind fences, behind bars, behind concrete"—could adequately manage him for the rest of his life. R. pp. 4844–45 (ECF No. 11-11 at 387–88).

On cross-examination, the solicitor asked Aiken about the levels of security within a prison and how the level of security for an inmate might change based on the inmate's conduct. Aiken answered the solicitor's questions, all the while emphasizing that "you are constantly under supervision and you're constantly around very predator inmate population." R. p. 4856 (ECF No. 11-11 at 399).

On redirect examination, trial counsel questioned Aiken to elicit additional details as to the level of security that someone who was sentenced to life without parole would be subject to. Counsel also asked Aiken to describe "super max," and Aiken answered,

Q: It is a confinement facility in which people stay in their cells 23 hours a day, they get out one hour a day as mandated by federal judiciary. And this houses—the staff are especially trained to use whatever force that's legally necessary to manage the behavior.

Q: Describe a super max cell for these folks, please.

A: I guess the best way to describe it is it's about the size of a—little bigger than a bathroom and it's got steel and concrete to

include the bed and your toilet is right there with you and you are under constant surveillance by a security staff or technology.

R. pp. 4865–66 (ECF No. 11-11 at 408–09). Counsel also asked Aiken about the work that an inmate, such as Bowman, might be able to do “for society to pay his debt back” R. p. 4866 (ECF No. 11-11 at 409). Aiken responded that an inmate “can be constructively engaged in prison industry that is reducing your tax load by providing cheap labor to pay back to the society that government does not have to pay so much money for.” R. p. 4866 (ECF No. 11-11 at 409).

During a bench conference, the solicitor asked the judge if he could go into the area of prison conditions “[i]n view of the fact that Mr. Cummings has established that it’s not a kiddy camp and that there is work available and that he probably would not be in super max since he’s such a model inmate” R. pp. 4873–74 (ECF No. 11-11 at 416–17). The judge allowed the State to go into the area of prison conditions because “those issues are certainly before the jury at this point.” R. p. 4874 (ECF No. 11-11 at 417).

During recross-examination, the solicitor asked Aiken about the work that Bowman could do and how much he would be paid. R. pp. 4878–79 (ECF No. 11-11 at 421–22). The solicitor asked Aiken, “[W]hen he’s not at work what is he adapting to, what is going on there?” R. p. 4879 (ECF No. 11-11 at 422). Aiken described a general routine, and he also offered that there were programs that an inmate could take advantage of, such as Bible study, education, and anger management. R. p. 4879 (ECF No. 11-11 at 422). The solicitor then questioned Aiken about other facilities that inmates have access to, like recreational facilities and libraries, and

activities that inmates can engage in, like organized sports, and watching movies and television. R. pp. 4881–82 (ECF No. 11-11 at 424–25).

Bowman asserts that trial counsel were ineffective in failing to object to the solicitor's questions on recross-examination regarding prison conditions because this evidence is prohibited during sentencing proceedings in accordance with South Carolina case law.

2. *PCR order*

The PCR court first summarized the law in South Carolina regarding the introduction of prison conditions evidence during the penalty phase. R. pp. 9912–15 (ECF No. 11-28 at 55–58). The PCR court then concluded that counsel was not deficient for going into the area of prison conditions when questioning Aiken and in not objecting to the State's responsive questions, particularly due to the state of the law at the time of Bowman's trial. R. pp. 9915–19 (ECF No. 11-28 at 58–62). In finding no deficiency, the PCR court credited both counsel's articulated strategy to elicit evidence about prison conditions and also the state of the law in South Carolina at the time of Bowman's trial. The PCR court also found no prejudice. Supp. R. pp. 113–15 (ECF No. 11-32 at 115–17).

3. *S.C. Supreme Court opinion*

This issue was the only issue that the South Carolina Supreme Court considered when it granted certiorari in Bowman's PCR appeal. The state supreme court thoroughly explored both Aiken's testimony at Bowman's trial and counsel's

testimony at the PCR hearing. *Bowman II*, 809 S.E.2d at 238–41.

The South Carolina Supreme Court explained the history of its decisions about the introduction of prison conditions evidence and how that case law intersected with federal jurisprudence. *Id.* at 241–43. As discussed in detail in that opinion, South Carolina law generally prohibits the introduction of prison conditions evidence during the sentencing phase of a capital trial. *See id.* at 241 (indicating that evidence of prison adaptability is relevant and admissible, but evidence of general prison conditions is not, as such evidence “does not bear on a defendant’s character, prior record, or the circumstances of his offense”). However, the court also expressly indicated that the general rule is not without exception, stating

[T]he determination of what evidence is admissible during a capital sentencing hearing is left to the states, subject of course to the limitations of the constitution, including the Eighth Amendment. *See, e.g., Simmons v. South Carolina*, 512 U.S. 154, 168 (1994) (acknowledging that the federal courts will generally “defer to a State’s determination as to what a jury should and should not be told about sentencing”). Viewing as a whole both federal and state jurisprudence on this issue, we believe retaining this state-law distinction serves the purpose of preventing both the State and the defense from engaging in immaterial forays into the microscopic details of a defendant’s prison experience. However, in acknowledging this distinction as the general rule applicable in the vast majority of cases, we also acknowledge that in certain cases the Eighth Amendment may not forbid but rather require that a defendant be permitted to present certain relevant evidence in this regard. *See State v. Torres*, 703 S.E.2d 226, 229–30 (S.C. 2010) (finding video recording of capital defendant in prison did not introduce an arbitrary factor at sentencing); [*State v. Burkart*, 640 S.E.2d 450, 453 (S.C. 2007)] (acknowledging that at times there may be some overlap between evidence of a defendant’s adaptability to prison and prison conditions generally and cautioning that prison conditions evidence should be “narrowly tailored”). Thus, in reaffirming the rule

forbidding evidence of general prison conditions, we simply note that it is not without exception.

Id. at 243.

The South Carolina Supreme Court affirmed the PCR court's finding that counsel was not deficient for failing to object to the prison conditions evidence. *Id.* at 244–45. Admitting that the issue presented “a close question,” the court ultimately concluded that there was evidence in the record supporting the PCR court's finding since “counsel articulated a valid reason for employing this strategy, and because the State's response was proportional and confined to the topics to which counsel had opened the door” *Id.* at 244.

As to the issue of prejudice, the South Carolina Supreme Court again affirmed the PCR court's determination, finding “there was ‘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.’” *Id.* at 246.

4. *Report*

The Report thoroughly covers the decision rendered by the South Carolina Supreme Court in Bowman's PCR appeal. In addressing Bowman's arguments, the magistrate judge first noted that Bowman did not identify any federal case prohibiting the kind of prison conditions evidence presented during his sentencing hearing. The magistrate judge also recognized that state law generally prohibited such evidence. But the Report rejected Bowman's comparisons to his own case and that of *State v. Burkhardt*, 640 S.E.2d 450 (S.C. 2007), finding that the fact that

Burkhart's counsel handled a similar issue differently and got relief for their client did not render Bowman's counsel's performance deficient. The Report also noted that Burkhart's case was not identical to Bowman's since, in that case, the State first introduced the evidence of prison conditions in his sentencing proceeding. The Report gave deference to the PCR court's determination that counsel articulated a reasonable strategy for not objecting, based, in part, on the PCR court's finding that counsel was credible. After considering Bowman's arguments, the magistrate judge found that Bowman failed to meet his burden as to the deficiency prong of *Strickland*.

The Report similarly rejected Bowman's arguments on the prejudice prong. For example, the Report gave deference to the state court's findings that the prison conditions evidence was limited. *Id.* at 79. The Report again discussed the differences between Bowman's case and Burkhart's case and concluded that the outcome of Burkhart's case would not have been determinative of the outcome in Bowman's case had trial counsel objected. For those reasons, the magistrate judge concluded that Bowman failed to show that the state court's finding on the prejudice prong of *Strickland* was either contrary to, or an unreasonable application of, clearly established federal law.

5. *Objections*

In his objections, Bowman asserts that the magistrate judge "misinterpreted long-standing South Carolina evidentiary principles barring [general prison conditions] evidence" ECF No. 81 at 11. According to Bowman's argument,

the Magistrate Judge failed to recognize that the state court deviated from its long-standing pronouncement that evidence presented at the penalty phase of a capital trial must be relevant to the circumstances of the crime and characteristics of the defendant, which, in turn, underlies the established South Carolina evidentiary rule that prison evidence must be narrowly tailored to demonstrate the defendant's personal behavior in those conditions and may not veer into evidence regarding general prison conditions.

Id. at 12 (citations omitted). Bowman also disagrees with any finding that counsel had a strategy to introduce evidence regarding general prison conditions. He contends that counsel's testimony to any such strategy was merely a post hoc rationalization of his conduct. Additionally, he argues that even if counsel did have such a strategy at the time of trial, he believes the strategy was unreasonable "because such evidence is improper when admitted by either the state or the defense." *Id.* at 14. As he did in his petition and response, Bowman again compares his case to *Burkhart* and asserts that he would have had a similar outcome—a reversal on direct appeal—had trial counsel properly preserved this issue for direct appeal.

Turning to the prejudice prong, Bowman argues that "the Magistrate Judge erroneously stated that Bowman's arguments 'rely primarily on speculation that the prison conditions evidence must have heavily factored into the jury's sentencing decision.'" *Id.* at 16 (quoting ECF No. 75 at 79). He notes that, in addition to the few pages of questioning regarding prison conditions, the solicitor also referenced prison conditions during his closing argument. He further asserts that any overwhelming evidence of guilt does not negate the prejudice that results from the introduction of an arbitrary factor—evidence of general prison conditions—during

the sentencing phase. Finally, Bowman disagrees with the magistrate judge's conclusion that the outcome of the appeal would not have been different if trial counsel had objected to the prison conditions evidence because that conclusion "ignored the principle discussed above that the South Carolina Supreme Court warned both 'the State and the defense' against the admission of such evidence." *Id.* (quoting *Bowman I*, 623 S.E.2d at 385).

6. *Analysis*

In order to prevail on this ground, Bowman must show that the state courts made unreasonable factual findings or unreasonably applied federal law in concluding that counsel were not ineffective in failing to object to the solicitor's questions to Aiken regarding prison conditions. He has not met that burden.

Initially, it must be noted that much of Bowman's arguments and objections as to this ground rely, not on the application of federal law, but on the discussion and application of state evidentiary law. Bowman claims that the magistrate judge misinterpreted state law and failed to recognize the state court's deviation from its own law. He faults the magistrate judge for not conducting his own review of the South Carolina evidentiary law. However, the record reflects that the state courts—both the PCR court and the South Carolina Supreme Court—discussed, in great detail, the law regarding the general prohibition of prison conditions evidence during capital sentencing proceedings. *See Bowman II*, 809 S.E.2d at 239–44; R. pp. 9912–15 (ECF No. 11-28 at 55–58). To the extent the magistrate judge relied on the state courts' discussions of state law, Bowman has failed to show that such

reliance was improper. The United States Supreme Court has made it clear that state courts are the arbiters of their own law, particularly state evidentiary law. *See Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) (“[W]e reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.”).

Moreover, the state courts’ discussions of the admissibility of general prison conditions evidence largely comports with Bowman’s own interpretation. The state courts, Bowman, and the magistrate judge all recognize that South Carolina state law generally prohibits such evidence during capital sentencing proceedings. However, in his argument, Bowman ignores an aspect of the law that was also applicable at the time of his own trial. That is, while evidence of general prison conditions is inadmissible and improper if propounded by the State, the defense can “open the door” to the introduction of such evidence by the State if the defense first introduced such evidence. *See State v. Plath*, 313 S.E.2d 619, 627–28 (S.C. 1984) (“It should not be necessary in the future for this Court to remind the bench and bar of the strict focus to be maintained in the course of a capital sentencing trial. 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 State was entitled to make this response.”).

It was not until Bowman’s own direct appeal that the South Carolina

Supreme Court took the opportunity “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,” thus reaffirming the court’s stance on what was inadmissible in the sentencing phase, despite intervening changes in the law as decided by the United States Supreme Court. *Bowman I*, 623 S.E.2d at 385. His argument regarding the state of the law appears to be based on his own interpretation, which disregards the full scope of the law at the time of his trial. The state courts, on the other hand, did not take such a narrow view of the law, and the magistrate judge appropriately deferred to the state courts’ interpretation of their own law. As such, his objections regarding the purported misinterpretation of state law are not persuasive.

Bowman objects to the PCR court’s finding that trial counsel actually had a strategy to introduce prison conditions. But that determination is based on the PCR court’s credibility assessment and is entitled to deference in this action. 28 U.S.C. § 2254(e). Bowman fails to present clear and convincing evidence that counsel’s explanation of his strategy was merely a post hoc rationalization of his conduct. The timing or evolution of counsel’s strategy was not probed during the PCR evidentiary hearing. Bowman speculates that counsel never had a strategy to question Aiken about prison conditions, but the magistrate judge offered other plausible strategies that counsel may have had, and the record does not dictate that any one of these options is only correct path to take. Nor does the law dictate that trial counsel’s strategy, as employed, fell outside of the wide range of reasonable

professional assistance. *See Strickland*, 466 U.S. at 689 (“There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.”).

Bowman asserts that “the Magistrate Judge found competent counsel at the time of [Bowman’s] trial would not necessarily have known that general prison condition evidence was improper.” ECF No. 81 at 14. But that finding may not be explicitly in the Report. Instead the Report gave due deference to the state court’s finding that counsel was aware of the risks of introducing prison conditions evidence, but believed them to be outweighed by the benefits. *See Bowman II*, 809 S.E.2d at 244.

As to prejudice, Bowman objects to the magistrate judge’s finding that he relied primarily on speculation that the prison conditions evidence must have heavily factored into the jury’s sentencing decision. He claims that he relied on the record—not only a few pages of questioning about prison conditions, which the state courts recognized, but also the references to that evidence in the State’s closing arguments. He asserts “this issue became a focal point of the state’s penalty phase summation” ECF No. 81 at 16. The Court finds that this may not be a proper characterization of the record. Additionally, Bowman fails to demonstrate that the PCR court’s decision on prejudice was unreasonable where the court did not mention the closing argument references to Aiken’s testimony.

Bowman also insists that the outcome of his direct appeal would have been different had trial counsel objected to the introduction of prison conditions evidence

by the State. He relies on *Burkhart*, which, as the magistrate judge correctly pointed out, is not identical to Bowman's situation since Bowman's counsel first introduced the topic of prison conditions, while in *Burkhart*, the State introduced the topic. Bowman also relies on the South Carolina Supreme Court's words in his own direct appeal, but, of course, counsel would not have had the benefit of the court's admonition at the time of his trial. What Bowman does not address is the precedent set by *Plath*, which demonstrates that the evidence of prison conditions is generally inadmissible, but that defense counsel can open the door to such evidence by being the first to introduce such evidence. Bowman has not shown that the South Carolina Supreme Court would not have adhered to its decision in *Plath* had counsel objected. In order for Bowman to have met his burden under *Strickland*, he must have shown "a reasonable probability that . . . the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The Court concludes that he has not done so.

For these reasons, Bowman has failed to establish that the state courts' denial of his claims in Ground 6 was contrary to or involved an unreasonable application of clearly established federal law, or was the result of unreasonable factual findings. *See* 28 U.S.C. § 2254(d); *Harrington*, 562 U.S. at 101. Accordingly, the Court concludes that he has not met his burden and is therefore not entitled to relief on Ground 6.

G. Ground 8 – Jury instructions re: mitigating evidence

Ground 8 of the petition is as follows:

The trial 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 Petitioner's substance abuse problem, and evidence the parties were drinking alcohol throughout the day. The South Carolina Supreme Court's opinion, holding there was no evidence that Petitioner was intoxicated on the day of the murder, is based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

ECF No. 36 at 75.

1. *Bowman's claims*

In Ground 8, Bowman alleges that the trial judge erred in denying his request to instruct the jury about the following mitigating circumstance: "[t]he 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." ECF No. 36 at 76–77 (quoting S.C. Code Ann. § 16-3-20(C)(b)(6)).

2. *S.C. Supreme Court opinion*

The trial judge originally denied the request to charge the mitigating circumstance of Bowman's capacity being substantially impaired because there was no evidence to support it. R. pp. 4937–40 (ECF No. 11-11 at 479–82). The South Carolina Supreme Court affirmed, finding that there was evidence in the record that Bowman "possessed beer at different points in the day but none of the evidence indicated appellant was drinking the beer." *Bowman I*, 623 S.E.2d at 383. The court also found that Bowman's history of alcohol and drug abuse did not warrant the charge. *Id.*

3. *Report*

The magistrate judge found that this ground was not cognizable on federal habeas review, as it was based only in state law. In the alternative, the magistrate judge found the issue—to the extent it could be reframed as an issue of federal law—to be procedurally barred. And even if the claim in Ground 8 was cognizable and preserved, the magistrate judge found that there was no evidence to support the charge regarding substantially impaired capacity, and Bowman did not demonstrate that the absence of the charge rendered his trial fundamentally unfair.

4. *Objections*

Bowman did not file objections on this ground.

5. *Analysis*

For the reasons set forth by the magistrate judge, the Court concludes that Bowman has not met his burden and is therefore not entitled to relief on Ground 8.

H. **Ground 10 – Denial of mistrial after prison escape question**

Ground 10 of the petition is as follows:

The court erred by refusing to grant a mistrial where the solicitor attempted to question James Aiken about the possibility of escape, since the solicitor injected an improper consideration and an arbitrary factor into the sentencing phase. The jury's attention is properly focused on the penalties of death and life without parole, and not speculative matters beyond Petitioner's control. Defense counsel correctly argued that the judge could not remove the taint through a curative instruction once escape was raised by the state as an issue.

ECF No. 36 at 78.

1. *Bowman's claims*

At the start of his recross-examination, the solicitor noted that Aiken had testified that Bowman would never get out of prison. The solicitor then asked, “During the time that you have been affiliated with the Department of Corrections of South Carolina, how many inmates have escaped?” R. p. 4869 (ECF No. 11-11 at 412). Defense counsel immediately objected, and the judge excused the jury while the parties discussed the issue. Defense counsel requested a mistrial, which was denied. However, the judge gave a curative instruction to the jury. Without mentioning escape, the judge told the jury that the previous question was improper and should be disregarded, and that the jury should only be concerned with the sentences of death and life without parole.

Bowman argues that the judge should have granted a mistrial.

2. *S.C. Supreme Court opinion*

The South Carolina Supreme Court found that the trial court had properly refused to allow Aiken to answer the solicitor’s question regarding past escapes by other inmates. *Bowman I*, 623 S.E.2d at 385. The court also found that “the [trial] court’s curative instruction removed any prejudice because it made it clear that the question asked by the State was improper and asked the jury to disavow that question from their minds.” *Id.* The court cited another South Carolina case, *State v. Vazsquez*, where the court found that a trial judge had not erred in refusing to

grant a mistrial where a solicitor argued that the defendant might escape and kill witnesses on the State's witness list, but the trial judge issued a curative instruction that the jury should disregard that argument. 613 S.E.2d 359, 362 (S.C. 2005), *abrogated on other grounds by State v. Evans*, 637 S.E.2d 313 (S.C. 2006). In *Vazsquez*, the court found that "the curative instruction removed any prejudice because it made clear that the jury was not to consider the argument made by the solicitor related to escape and the existence of a 'hit list.' This instruction removed any prejudice that might have been suffered and afforded [Vazsquez] a fair trial." 613 S.E.2d at 362.

3. *Report*

In the Report, the magistrate judge noted that there was no federal mistrial standard that was applicable to the states. As such, unless Bowman was asserting a due process violation, his claim was not cognizable in a habeas corpus action.

To the extent that this claim could be characterized as a due process violation claim, the magistrate judge found that Bowman had not presented the claim to the state courts as such. Accordingly, even if cognizable, the magistrate judge concluded that it was procedurally defaulted.

Finally, the magistrate judge noted that even this ground was cognizable and preserved for habeas review, Bowman had not met his burden of showing "that the statement infected his sentencing proceeding with unfairness to render the jury's imposition of the death penalty a denial of his due process rights." *Id.* at 88–89. The magistrate judge recognized that "[t]he statement was isolated and

immediately objected to by defense counsel, following which a curative instruction was given to the jury.” *Id.* at 89.

4. *Objections*

In his objections, Bowman asserts that the magistrate judge erroneously found that this issue was raised only as a matter of state law in his direct appeal. Although the state court relied heavily on state law opinions, Bowman contends that the principle underlying those cases comes from *Woodson v. North Carolina*, 428 U.S. 280 (1976), which “requires a capital sentencing hearing be tailored to capital defendants as ‘uniquely individual human beings’ and to consideration of the ‘character and record of the individual offender and the circumstances of the particular offense.’” ECF No. 81 at 18 (quoting *Woodson*, 428 U.S. at 304). Bowman also objects to the magistrate judge’s conclusion that the question did not violate his due process rights because that finding “ignores the fact that the question presumed the answer that ‘many inmates have escaped,’ . . . and was emphasized by the immediate objection by defense counsel and a lengthy conference to discuss the issue.” *Id.* at 19. Bowman believes the prejudice was exacerbated by the questions after the bench conference and by the solicitor’s closing argument.

5. *Analysis*

The magistrate judge correctly noted that there is no federal mistrial standard applicable to the states. However, even to the extent that the Court presumes that this ground is cognizable and preserved based on an arguable

overlap between the state mistrial standard and the federal due process standard, Bowman must still meet his burden under § 2254 in order to be entitled to relief. That is, he must demonstrate that the state court's decision is either the result of unreasonable factual findings or is contrary to, or based on an unreasonable application of, federal law as determined by the Supreme Court. Bowman has not done so.

Bowman argues that the question violated his due process rights because it “presumed the answer that ‘many inmates have escaped’” ECF No. 81 at 19. The Court disagrees. Aiken was asked, “During the time that you have been affiliated with the Department of Corrections of South Carolina, how many inmates have escaped?” R. p. 4869 (ECF No. 11-11 at 412). That question did not presume any number, and no answer was given. Then the jury was told by the trial judge to disregard the question, which the South Carolina Supreme Court found sufficient to cure any prejudice. *Bowman I*, 809 S.E.2d at 385. Moreover, the Court is not persuaded that any of the other circumstances surrounding the improper question enhanced the prejudice or rendered the curative instruction insufficient. Notably, the Supreme Court has recognized an “almost invariable assumption of the law that jurors follow their instructions” *Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (citation omitted).

For these reasons, even assuming this issue is cognizable and preserved, Bowman has failed to establish that the PCR court's denial of his claims in Ground 10 was contrary to or involved an unreasonable application of clearly established

federal law, or was the result of unreasonable factual findings. *See* 28 U.S.C. § 2254(d); *Harrington*, 562 U.S. at 101. Accordingly, the Court concludes that he has not met his burden and is therefore not entitled to relief on Ground 10.

I. Ground 11 – Ineffective assistance re: closing argument

Ground 11 of the petition is as follows:

Trial counsel rendered ineffective assistance of counsel for failing to object to the Solicitor’s arguing to discount Petitioner’s mitigation because there was no “nexus” between Petitioner’s proffered mitigation and the crime.

ECF No. 36 at 83.⁶

1. *Bowman’s claims*

Bowman objects to the following statements by the solicitor during closing arguments:

Ladies and gentlemen, I ask you based on what you’ve heard here, what does all that stuff that happened to Marion during his youth have to do with Kandee Martin? How is she in any way involved in the fact that he sold drugs, that he did drugs, that he drank liquor, that he wasn’t a good student, that he was an adolescent, that his grandfather died, and all the other stuff, what has it got to do with it? Nothing. He knows right from wrong.

...

Now, as far as Marion Bowman’s background, who has a perfect background? I mean, you see “Leave it to Beaver”, Ward and June, and you see “The Bill Cosby Show.” None of us have a background like that. But, again, where is the connection? Where is the connection, anybody who’s gotten up here and drawn a line between anything

⁶ Bowman acknowledges that this ground has not been exhausted and is being advanced pursuant to *Martinez*. ECF No. 36 at 82–83.

involving Marion Bowman's background or family or mentality and the murder of Kande Martin. There's just no connection.

...

Everybody was a child at one time. That's got nothing to do with the man he turned into and the conduct he engaged in after that.

R. pp. 4962–64, 4967 (ECF No. 11-12 at 55–57, 60). According to Bowman, in making the above arguments, the solicitor misstated the law by indicating that there had to be some nexus between the mitigation evidence and his crimes. ECF No. 36 at 83–84.

Although this ground was not raised during Bowman's state proceedings, he asserts that he can overcome the procedural bar of this ground because PCR counsel were ineffective in failing to raise this issue. *Id.* at 82–83.

2. *Report*

The magistrate judge found that Bowman failed to meet his burden under *Martinez* for multiple reasons. First, the magistrate judge concluded that Bowman had failed to show that PCR counsel were ineffective for failing to raise this claim. The magistrate judge relied on an affidavit from James Brown Jr., one of Bowman's PCR attorneys. In the affidavit, Brown said that he had no strategic reason for not raising this issue. Nevertheless, the magistrate judge concluded that the lack of a strategic reason alone did not render PCR counsel's performance constitutionally deficient. With no other evidence about PCR counsel's performance regarding that issue, and based on the lack of merit to the underlying claim, the magistrate judge found that Bowman failed to show that PCR counsel was deficient.

As to whether trial counsel was ineffective for failing to object to the solicitor's comments, the magistrate judge disagreed with Bowman's interpretation of those statements. For example, when read in the greater context of the closing arguments, as opposed to discrete excerpts, the magistrate judge found that each of the statements were part of a greater, and not improper, concept in the solicitor's closing argument. Rather than telling the jury that they could not consider the mitigation evidence if there was no nexus, the magistrate judge concluded that the solicitor was trying to persuade the jury to give little weight to some of the mitigation evidence that had been presented. Additionally, the magistrate judge noted that the solicitor expressly told the jury that the judge would instruct them as to what the law was. The trial judge later did so, instructing the jury that they should consider the mitigation evidence that had been presented and that they could recommend a life sentence for any reason or no reason. For all of those reasons, the magistrate judge found that Bowman failed to prove either prong of *Strickland* regarding trial counsel's failure to object during closing argument.

For these reasons, the magistrate judge concluded that Bowman failed to present a substantial *Strickland* claim and that the procedural default therefore could not be excused pursuant to *Martinez*.

3. *Objections*

Bowman objects to the magistrate judge's conclusion that he "offer[ed] very little" on the issue of PCR counsel's deficient performance. ECF No. 81 at 20 (quoting ECF No. 75 at 95). Bowman notes that he provided Brown's affidavit, and

he also requested an evidentiary hearing on the issue of PCR counsel's ineffectiveness to provide additional proof of deficient performance. He argues that he satisfied the pleading standard and "the Magistrate Judge erred in requiring that [Bowman] provide more than the relevant rule requires." *Id.*

Bowman further objects to the magistrate judge's conclusion that he did not demonstrate that his underlying ineffective assistance of counsel claim had merit. He contends that the magistrate judge misconstrued the solicitor's arguments. He argues that the solicitor misstated the law. He argues that the Court should reject the Report and order an evidentiary hearing.

4. *Analysis*

As set forth above, in accordance with *Martinez*, for Bowman to overcome the procedural default of his ineffective assistance of trial counsel claim, he must show both that PCR counsel was ineffective for failing to raise the underlying claim and that the underlying claim itself has merit.

Bowman asserts that he adequately pled that PCR counsel was deficient and that he provided support for that pleading through PCR counsel's affidavit stating that he had no strategic reason for not raising the claim that trial counsel should have objected to the solicitor's closing argument. However, the standard for summary judgment is not whether Bowman's pleadings were adequate—summary judgment is appropriate when the record shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The magistrate judge appropriately considered PCR counsel's

affidavit as true for purposes of his review, but Bowman still did not meet his burden of showing deficient performance by PCR counsel. Bowman had to show that PCR counsel's representation was constitutionally deficient. Brown's affidavit and the strength of the underlying claim are insufficient to meet that burden for the reasons discussed by the magistrate judge.⁷

As to the merits of the underlying claim, the Court concludes that the jury did consider the mitigation evidence as instructed and does not find persuasive Bowman's asserted impact of the solicitor's closing argument on the jury in light of the instruction given. When considered in context with the remainder of the solicitor's closing argument, as is appropriate under the law,⁸ the statements that Bowman believes were objectionable did not necessitate an objection. The solicitor never told the jury that they could not consider mitigation evidence unless there was some nexus to the crimes. The solicitor asked the jury to give the mitigation evidence little weight, and Bowman has not shown that such arguments were improper or objectionable. Furthermore, as highlighted in the Report, the solicitor made clear to the jury that the judge would deliver instructions on the law. The judge also instructed the jury that they should consider the mitigation evidence and

⁷ To the extent that Bowman believes he is entitled to an evidentiary hearing, the Court disagrees for the reasons discussed below.

⁸ It is rarely appropriate to look at a statement in isolation as Bowman has done with respect to this ground. For example, when looking at whether a prosecutor's arguments deprived a defendant of due process, the Supreme Court considered not only the arguments themselves, but also how those arguments were responsive to arguments made by defense counsel. *Darden v. Wainwright*, 477 U.S. 168, 178–83 (1986).

that they could recommend a life sentence for any reason or no reason. Thus, even if he could make a substantial claim as to deficiency, Bowman cannot do so as to prejudice. Accordingly, he has failed to establish that there is some merit to his underlying claim of ineffective assistance of trial counsel.

For these reasons, the underlying ineffective assistance claim for this ground fails on the merits and Bowman therefore cannot rely on *Martinez* to overcome the procedural default. Accordingly, he is not entitled to relief on Ground 11.

J. Ground 12 – Failure to present additional mitigation evidence

Ground 12 of the petition is as follows:

Trial counsel rendered ineffective assistance of counsel by failing to call a number of witnesses who were available to trial counsel, and who would have provided the jury with highly mitigating evidence of Petitioner's dysfunctional childhood that the jury did not otherwise here.

ECF No. 36 at 85.⁹

1. *Bowman's claims*

In Ground 12, Bowman asserts that counsel were ineffective for failing to present additional mitigation evidence during the sentencing phase of his trial. He has provided affidavits from numerous lay witnesses, some of whom testified at his trial, and those affidavits contain some information that was presented to the jury and some that was not. *See* ECF Nos. 36-1 (Joseph Sims), 36-2 (Kendra Bowman),

⁹ Bowman acknowledges that this ground has not been exhausted and is being advanced pursuant to *Martinez*. ECF No. 36 at 82–83.

36-3 (Dorothy Denise Bowman), 36-4 (Glenn Miller Sr.), 36-5 (Oretta Miller), 36-6 (Tyler Dufford), 36-7 (Jennifer Thompson), 36-8 (Velma Young), 36-9 (Tiffany Grimmage), 36-10 (Dorothy Bowman).

The specifics of this ground were not raised during Bowman's state proceedings, although he did argue in his PCR action that counsel were ineffective for failing to adequately investigate and present mitigation evidence. He argues that he can overcome the procedural bar of this ground because PCR counsel were ineffective in failing to specifically raise this issue.

2. *Report*

As with Ground 11, the magistrate judge concluded that the simple fact that PCR counsel did not have a strategic reason for failing to raise this issue did not suffice to meet Bowman's burden of establishing the deficiency prong of *Strickland*.

The magistrate judge then delved into the merits of the underlying ineffective assistance claim, first considering whether Bowman had shown prejudice. The Report detailed the mitigation case that counsel presented during the sentencing phase of his trial. The Report then compared what was presented to the jury to what is contained in the affidavits. As to some of the evidence contained in the affidavits, the magistrate judge concluded:

Many of the themes that [Bowman] argues should have been explored by trial counsel during their mitigation phase were explored, albeit sometimes through different witnesses or anecdotal evidence. To the extent the evidence in the affidavits was already presented to the jury by way of trial counsel's mitigation presentation, [Bowman] cannot meet his burden as to the prejudice prong of *Strickland*.

ECF No. 75 at 109. The magistrate judge then assessed the information that was never presented to the jury, such as evidence that Bowman's mother was "essentially a prostitute" and that children in his hometown were treated differently based on their race. *Id.* After considering the entirety of the evidence, the magistrate judge found that "[t]he evidence that [Bowman] says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented to the [jury]." *Id.* at 110 (quoting *Strickland*, 466 U.S. 699–700). Thus, the magistrate judge concluded that Bowman failed to meet his burden under *Martinez* as to the prejudice prong of the underlying ineffective assistance claim.

Regarding deficiency, the magistrate judge noted that most of Bowman's arguments regarding counsel's performance were based on evidence that had already been considered by the PCR court. The Report quoted extensively from the PCR court's order of dismissal, which rejected the argument that trial counsel had inadequately investigated and presented mitigation evidence. The Report stated, "In sum, the record shows that trial counsel hired appropriate service providers to investigate and present mitigating evidence for purposes of the sentencing phase." *Id.* at 117. In particular, the magistrate judge found that trial counsel had hired an experienced mitigation investigator who interviewed many of the witnesses whose affidavits Bowman now submits to the Court. The magistrate judge further noted that Bowman did not "identify any evidence indicating that a failure on [the mitigation investigator's] part to discover the mitigating evidence that [Bowman]

now presents can be attributed to trial counsel.” *Id.* The magistrate judge concluded that Bowman failed to meet his burden of showing some merit to his claim of deficient performance.

For these reasons, the magistrate judge concluded that Bowman failed to present a substantial *Strickland* claim and that the procedural default therefore could not be excused pursuant to *Martinez*.

3. *Objections*

As with his other procedurally defaulted ground, Bowman asserts that he is entitled to a hearing because he has met the pleading standard. Additionally, he contends that the magistrate judge erred in finding that his claim had no merit without first granting him an evidentiary hearing. Bowman summarizes some of the evidence contained within the affidavits he submitted that was never presented to the jury and asserts as follows:

This evidence is not exhaustive but is representative of what [Bowman] would present at a hearing on the merits of this ineffective assistance of counsel claim to demonstrate that there is a reasonable probability that at least one juror would have struck a different balance and voted for a life sentence if they had heard all of the available mitigating evidence.

ECF No. 81 at 24 (citations omitted).

4. *Analysis*

Bowman’s objections are primarily based on the magistrate judge’s denial of an evidentiary hearing. As to Bowman’s contention that he is entitled to a hearing

because he met the pleading standard, there is no support for that argument.¹⁰ As will be discussed in more detail below, Bowman has not established that he is entitled to an evidentiary hearing under the applicable habeas rules.

Bowman does not dispute the magistrate judge's evaluation of the impact of the newly-presented evidence when added to the mitigation presentation that the jury heard. Instead he argues that "[t]his evidence is not exhaustive but is representative of what [he] would present at a hearing on the merits of his ineffective assistance of counsel claim" ECF No. 81 at 24. But he did not seek authorization from the Court to conduct discovery and gather such additional evidence, either prior to filing his amended petition or prior to the State filing its motion for summary judgment. It is not procedurally appropriate for a party to submit threadbare or incomplete affidavits and then use those inadequate affidavits to justify an evidentiary hearing. Here, the affidavits and documentation submitted were sufficient to evaluate his claims, particularly if, as Bowman contends, the evidence he has already submitted is "representative" of what would be presented at an evidentiary hearing. *See Runnigeagle v. Ryan*, 825 F.3d 970, 990 (9th Cir. 2016) ("Where documentary evidence provides a sufficient basis to decide a petition, the court is within its discretion to deny a full hearing."). And Bowman has not forecast what additional evidence could be presented at an evidentiary hearing, or how that evidence would go beyond that which he has already presented and which

¹⁰ Bowman's reliance on Rule 8(a)(2) of the Federal Rules of Civil Procedure is not persuasive. He was required to meet that standard in order to sufficiently plead his claims, but that standard does not bear on whether he is entitled to an evidentiary hearing.

the magistrate judge considered as part of an expanded record. *Cf. Cardwell v. Greene*, 152 F.3d 331, 338–39 (4th Cir. 1998) (“Despite repeated assertions that analysis of his ineffective assistance claim requires an evidentiary hearing, Cardwell has failed to forecast any evidence beyond that already contained in the record, or otherwise to explain how his claim would be advanced by an evidentiary hearing.”), *overruled on other grounds by Bell v. Jarvis*, 236 F.3d 149 (4th Cir. 2000).

Having reviewed the evidence that Bowman attached to his habeas petition and the mitigation evidence presented in state court, the Court agrees with the magistrate judge that the additional evidence would have done little to alter the sentencing profile presented to the jury. *See* ECF No. 75 at 110 (quoting *Strickland*, 466 U.S. 699–700). Contrary to Bowman’s assertions and as discussed in detail by the magistrate judge, the record reflects that counsel did not present a weak mitigation case regarding his childhood and background. Such evidence was presented. Additionally, as the PCR court thoroughly explored, and the magistrate judge largely adopted, counsel’s investigation was constitutionally adequate. Finally, the statement by PCR counsel that he had no strategic reason for not raising this claim is not sufficient to establish deficient performance, particularly in light of the lack of merit to the underlying ineffective assistance of counsel claim. The Court adopts the magistrate judge’s reasoning and conclusion as to Ground 12.

For these reasons, the underlying ineffective assistance claim for this ground fails on the merits and Bowman therefore cannot rely on *Martinez* to overcome the

procedural default. Accordingly, he is not entitled to relief on Ground 12.

K. Request for Evidentiary Hearing

For both of the procedurally defaulted grounds, Bowman asks the Court to grant an evidentiary hearing in order for him to more fully develop the factual basis for his claims. That request is denied.

Under the AEDPA, evidentiary hearings on habeas petitions are generally limited. *See Cullen*, 563 U.S. at 181 (“We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.”). The Supreme Court has not specifically set forth a procedure for determining when evidentiary hearings are permitted or required for the resolution of *Martinez* claims. In general, the AEDPA disallows such hearings, except in limited circumstances:

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

- (A) the claim relies on—
 - (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
 - (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
- (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). Nevertheless, federal courts have recognized that it is sometimes appropriate to expand the record or to hold an evidentiary hearing in certain situations, such as when determining whether cause and prejudice excuse a petitioner's defaulted claim. *Fielder v. Stevenson*, 2:12-cv-412-JMC, 2013 WL 593657, at *3 (D.S.C. Feb. 14, 2013) (citing *Cristin v. Brennan*, 281 F.3d 404, 416 (3d Cir. 2002)). Additionally, Rules 7 and 8 of the Rules Governing Section 2254 Cases provide for both expansion of the record and for evidentiary hearings.

Here, the magistrate judge exercised his discretion to expand the record and consider information not presented to the state court, including the affidavits described in Ground 12, in determining whether *Martinez* excuses the procedural default of Grounds 11 and 12. Though the magistrate judge expanded the record, for the reasons set forth above, Bowman failed to establish a substantial claim of ineffective assistance of counsel as to each claim. He had an ample opportunity to submit evidence in support of his claims, and he has done so.¹¹ The magistrate judge and this Court fully considered the evidence he submitted and took all of the new facts to be true, but concluded that he is not entitled to relief for the reasons

¹¹ Bowman implies that he is entitled to an evidentiary hearing because the affidavits that he submitted were not detailed enough. *See* ECF No. 81 at 24 (“[The affidavits are] not exhaustive but [are] representative of what [Bowman] would present at a hearing on the merits of his ineffective assistance of counsel claim . . .”). It is not procedurally appropriate for a party to submit threadbare affidavits and then use those inadequate affidavits to justify an evidentiary hearing. Here, the affidavits and documentation submitted were sufficient to evaluate his claims. *See Runningeagle v. Ryan*, 825 F.3d 970, 990 (9th Cir. 2016) (“Where documentary evidence provides a sufficient basis to decide a petition, the court is within its discretion to deny a full hearing.”).

discussed above. Accordingly, his request for an evidentiary hearing as to his unexhausted claims is denied.

IV. Conclusion

For the reasons stated, the Report, ECF No. 75, is **ACCEPTED**, and Bowman's objections to it, ECF No. 81, are **OVERRULED**. The State's motion for summary judgment, ECF No. 56, is **GRANTED**. Bowman's amended petition for relief pursuant to § 2254, ECF No. 36, is **DENIED**. This action is hereby **DISMISSED**.

The Court has reviewed this petition in accordance with Rule 11 of the Rules Governing Section 2254 Cases. In order for the Court to issue a certificate of appealability, Rule 11 requires that a petitioner satisfy the requirements of 28 U.S.C. § 2253(c)(2), which in turn requires the petitioner to make "a substantial showing of the denial of a constitutional right." The Court concludes, based on the analysis set forth, that Bowman has not made such a showing, and under Rule 11, it is therefore not appropriate to issue a certificate of appealability. However, this is a death penalty case, so review is anticipated and not opposed. Bowman is advised that he is entitled to seek a certificate from the Fourth Circuit Court of Appeals under Rule 22 of the Federal Rules of Appellate Procedure.

IT IS SO ORDERED.

s/ Terry L. Wooten

Terry L. Wooten

Senior United States District Judge

March 26, 2020

Columbia, South Carolina

AO 450 (SCD 04/2010) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the
District of South Carolina

Marion Bowman Jr.,

Petitioner

v.

Bryan P. Stirling, Commissioner, South
Carolina Department of Corrections;
Willie D. Davis, Warden, Kirkland
Correctional Institution,

Respondent

Civil Action No. 9:18-cv-00287-TLW

SUMMARY JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars (\$___), which includes prejudgment interest at the rate of ____ %, plus postjudgment interest at the rate of ____ %, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)* _____.

☒ other: Summary judgment is entered in favor of Respondent, Bryan P. Stirling, Commissioner, South Carolina Department of Corrections; Willie D. Davis Warden and Kirkland Correctional Institution,. Petitioner, Marion Bowman Jr shall take nothing of Respondent as to the petition filed pursuant to 28 U.S.C. § 2254 and the petition is dismissed. A certificate of appealability is denied.

This action was *(check one)*:

☐ tried by a jury, the Honorable _____ presiding, and the jury has rendered a verdict.

☐ tried by the Honorable _____ presiding, without a jury and the above decision was reached.

☒ decided by the Honorable Terry L. Wooten, United States District Judge, presiding. The Court having accepted the Report and Recommendation set forth by the Honorable Bristow Marchant, United States Magistrate Judge, and granted Respondent's motion for summary judgment.

Date: March 26, 2020

ROBIN L. BLUME, CLERK OF COURT

s/C Pegram-Conner

Signature of Clerk or Deputy Clerk

JA 4214

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Marion Bowman, Jr., #6006,	)	
	)	
Petitioner,	)	
	)	Case No.: 9:18-cv-287
vs.	)	
	)	
Bryan Stirling, Director, SCDC,	)	DEATH PENALTY CASE
and Willie D. Davis, Warden,	)	
Kirkland Correctional Institution,	)	
Respondents.	)	
_____	)	

MOTION TO ALTER OR AMEND JUDGMENT

Petitioner, Marion Bowman, Jr., by and through undersigned counsel, and pursuant to Federal Rule of Civil Procedure 59(e), moves this Court to alter or amend its judgment denying his Petition for Writ of Habeas Corpus. On March 26, 2020, this Court adopted the Magistrate Judge’s Report and Recommendation and denied all of Bowman’s claims for relief. (ECF No. 84). Based on undersigned counsel’s review of this Court’s Order, Bowman asks this Court to alter or amend its judgment on the grounds for relief listed below. Per agreement with counsel for Respondents (ECF No. 88) and this Court’s text order (ECF No. 89), Bowman will file a memorandum in support of his motion on or before May 14, 2020.

*Petitioner Asks this Court to Alter or Amend Judgment on the Following Grounds:*¹

1. Ground 1 – Ineffective assistance re: Taiwan Gadson
2. Ground 2 – Ineffective assistance re: Travis Felder
3. Ground 3 – Ineffective assistance re: Hiram Johnson
4. Ground 4 – *Brady* violations

¹ The grounds listed are numbered and labeled in accordance with this Court’s March 26, 2020 Order (ECF No. 84).

5. Ground 5 – Conflict of interest
6. Ground 6 – Ineffective assistance re: prison conditions evidence
7. Ground 10 – Denial of mistrial after prison escape question
8. Ground 11 – Ineffective assistance re: closing argument
9. Ground 12 – Failure to present additional mitigation evidence

Should the Court deny Bowman’s motion with regard to the grounds for relief listed above, Bowman requests this Court amend its judgment to grant a certificate of appealability on all of his claims for relief.

Respectfully submitted,

/s/ Lindsey S. Vann
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April 22, 2020.

CERTIFICATE OF SERVICE

Counsel hereby certifies that she has served W. Joseph Maye of the South Carolina Attorney General's Office via ECF on this date, April 22, 2020.

/s/ Lindsey S. Vann

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Marion Bowman, Jr., #6006,	)	
	)	
Petitioner,	)	
	)	Case No.: 9:18-cv-287
vs.	)	
	)	
Bryan Stirling, Director, SCDC,	)	DEATH PENALTY CASE
and Willie D. Davis, Warden,	)	
Kirkland Correctional Institution,	)	
Respondents.	)	
_____	)	

**MEMORANDUM IN SUPPORT OF PETITIONER’S MOTION TO ALTER OR AMEND
JUDGMENT**

Petitioner, Marion Bowman, Jr., by and through undersigned counsel, submits the following in support of his Motion to Alter or Amend Judgment (ECF No. 91). This memorandum is timely filed pursuant to this Court’s text order dated April 17, 2020 (ECF No. 89). On March 26, 2020, this Court issued an order adopting the Magistrate Judge’s Report and Recommendation and denied all of Bowman’s claims for relief. (hereinafter “Order,” ECF No. 84). The Court’s Order denying Petitioner relief on his prison condition evidence ground (Ground 6) must be amended in light of an intervening decision from the Fourth Circuit Court of Appeals. The remaining grounds should be amended because their denial was based on a misinterpretation of fact or misapplication of law. *See* Fed. R. Civ. P. 59(e). In the alternative, this Court should amend its Order to grant Petitioner a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2).

I. GROUNDS 1-3 – INEFFECTIVE ASSISTANCE OF COUNSEL IN THEIR CROSS-EXAMINATION OF STATE WITNESSES

Permeating throughout the Court’s order (and the Magistrate Judge’s Report and Recommendation), especially in the rejection of Petitioner’s claims that his trial counsel were ineffective in their cross-examination of the key State witnesses, is the stated belief that there is

“overwhelming evidence” of Petitioner’s guilt and therefore no prejudice. On the contrary, while there may be strong evidence of Petitioner’s *involvement* in the underlying homicide, the evidence as to who did what to whom is much more in equipoise, including the critical fact of who fired the fatal shots. This Court’s Order ignores those disputes and adopts the Magistrate Judge’s reliance on overwhelming evidence in disposing of Petitioner’s claims. *See* Report and Recommendation, at 25-26, ECF No. 75 (hereinafter “R&R”). Petitioner specifically objected to the Magistrate Judge’s reliance on a finding of “overwhelming evidence” of guilt and this Court’s Order failed to address that objection. *See* ECF No. 81, at 5.

This inaccurate finding made its way into the Report and Recommendation and this Court’s order via the State PCR order, which was drafted by the Attorney General’s Office, and signed without modification, by the Circuit Court judge. *See* App. 9953; Amended Petition for Writ of Certiorari, at 81-84 (S.C. Apr. 30, 2014) (ECF No. 12-17) (hereinafter Cert. Petition). Petitioner repeatedly objected to the state court’s verbatim adoption of the State’s proposed order, with counsel for Bowman urging the state court to engage in the “probing and fact-specific analysis” required in capital proceedings. Cert. Petition, at 82 (quoting *Sears v. Upton*, 561 U.S. 945, 955 (2010)). Bowman’s requests were rebuffed, and the state court effectively ceded its fact-finding authority to the State by adopting Respondent’s proposed findings, a practice condemned by the Fourth Circuit Court of Appeals and the South Carolina Supreme Court. *See Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d 719, 724-25 (4th Cir. 1961); *Hall v. Catoe*, 601 S.E.2d 335, 341 (S.C. 2004). Thus, the “findings” in the PCR order regarding “overwhelming evidence” are actually determinations made by Respondents, not the state court. This Court should amend its order to acknowledge what the record evidence makes clear—that there are material questions as to relative

culpability of the parties involved in this case—and Petitioner was prejudiced by trial counsel’s failure to adequately challenge the witnesses presented by the State.

a. Ground 1 – Ineffective assistance re: Taiwan Gadson¹

This Court’s conclusion (like the Magistrate Judge’s and state court’s) that Gadson did not avoid the death penalty by entering into a plea agreement and agreeing to testify against Petitioner takes an improper, hyper-technical view of what it means to bargain to avoid the death penalty. A notice of intent to seek the death penalty does not need to be filed in order for a defendant charged with murder to bargain to avoid the possibility of the State seeking the death penalty. The written plea agreement makes this evident as it spelled out—in no uncertain terms—Gadson’s failure to cooperate with the prosecution of Petitioner would allow the State to reinstate the murder charge against Gadson and “seek the death penalty.” In fact, Gadson explicitly “waive[d] any objection to the death penalty” being sought if he breached the agreement. App. 5852. Gadson acknowledged this fact at the PCR hearing, when he acknowledged that his plea was motivated by the fact that he “thought [he] could get death, [he] feared death.” App. 5851.

It was not enough that the jury knew Gadson entered into a plea agreement that required his testimony against Petitioner. *See* Order at 22. In order to make an accurate credibility determination regarding Gadson—who was the key witness against Petitioner and a clear alternate suspect—the jury needed to know the extent of the benefit Gadson derived from the agreement. *See Wearry v. Cain*, 136 S. Ct. 1002 (2016) (finding the state suppressed material evidence that may have provided the jury a reason to suspect witness testified as he did to curry favor with the prosecution); *Thomas v. Westbrooks*, 849 F.3d 659, 663 (6th Cir. 2017) (rejecting the argument that evidence is not material because there is other evidence pointing to the guilt of the defendant).

¹ The grounds listed are numbered and labeled in accordance with this Court’s March 26, 2020 Order (ECF No. 84).

As the Supreme Court has long understood, “the penalty of death is quantitatively different from a sentence of imprisonment, however long.” *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). This Court should amend its Order and find trial counsel were deficient in failing to cross examine Gadson on testifying against Petitioner in order to avoid the death penalty and that Petitioner was prejudiced as a result.

b. Ground 2 – Ineffective assistance re: Travis Felder

This Court’s order departed from the mandate of the Supreme Court of the United States in *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), that, for purposes of review under 2254(d), the focus must be on what the “state court knew and did” and not on theories or rationales which are not contained in the state court order denying relief. *Id.* at 1191-92 (requiring “the federal habeas court to train its attention on the particular reasons—both legal and factual—why state courts rejected a state petitioner’s federal claims.”² (internal citation omitted)); *see also Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) (emphasizing § 2254 review “focuses on what a state court knew and did”). This is most evident in the Order’s finding, in regards to trial counsel’s failure to cross examine Felder on the fact that he purchased the gasoline to commit the arson where this Court stated that “although counsel could have made a different strategic decision, there is certainly a reasonable argument that counsel’s strategy did not ‘amount[] to incompetence under prevailing professional norms.’” Order at 28. Here, the state court found that trial counsel stated a valid strategic reason for not admitting a tape showing Felder’s testimony falsely omitted the fact that he purchased the gasoline because “he felt it would corroborate Applicant’s involvement in the plan to burn the

² Where the last state court decision is not a reasoned decision, as in this case where the South Carolina Supreme Court summarily denied certiorari, the “federal court should ‘look through’ the unexplained decision to the last related state-court decision that does provide a relevant rationale.” In this case, the last state court decision providing relevant rationale is the PCR order. *Wilson*, 138 S. Ct. at 1192.

car.” App. 9861. Petitioner specifically objected to the Magistrate Judge’s finding that this was not an unreasonable determination by the PCR court, asserting that trial counsel’s strategy was not valid given that Felder’s testimony regarding Petitioner’s involvement was already in the record with nothing to demonstrate that he was not solely culpable for the commission of the arson. Objections 5-6. This Court must address those objections related to the specific strategic reason the PCR court validated.

c. Ground 3 – Ineffective assistance re: Hiram Johnson

The Magistrate Judge similarly failed to follow the guidance of *Wilson* by inserting its own reasoning in finding trial counsel were not ineffective in failing to cross examine Hiram Johnson on the fact that his written statement to police did not include information about overhearing Petitioner confess to the murder though he testified about the confession at trial. The PCR court ruled that cross examining Johnson would be of limited value because he indicated in a prior oral statement to police that Petitioner told Trina West he killed the victim. App. 9869-70. The Magistrate Judge acknowledged that reasoning but added its own additional findings that the failure to cross-examine the witness may have been attributable to trial counsel’s: (1) decision that Johnson “believed Petitioner was kidding when he confessed,” and (2) reliance on Johnson’s post-trial statements that “‘there is no telling what [Petitioner] would do’ and that ‘he had a pretty rough reputation and nobody wanted to cross him.’” R&R at 47. By inserting its own reasoning, the Magistrate Judge failed to assess whether the state court’s stated reasoning, which is the basis for review under 2254(d), was unreasonable and this Court erred in adopting the R&R on this point. *See Wilson*, 138 S. Ct. at 1192; *Dennis v. Secretary, Pennsylvania Department of Corrections*, 834 F.3d 263, 282-83 (3d Cir. 2016) (en banc) (“[W]hen the state court pens a clear, reasoned opinion, federal habeas courts may not speculate as to theories that ‘could have supported’ the state court’s decision.”).

II. GROUND 4 – *BRADY* VIOLATIONS

In finding no *Brady* violation in the State’s failure to turn over Gadson’s mental health evaluations, the Court incorrectly placed an insurmountable, not legally required burden on defense counsel to identify exculpatory information they were unaware of and had no way to obtain without disclosure by the State. The Supreme Court has never embraced a due diligence requirement in the *Brady* context to excuse the State’s failure to disclose exculpatory information if the defense had access to such information. While the Fourth Circuit has done so in a limited fashion under some circumstances, it does not require defense counsel to somehow divine exculpatory evidence it had no way of knowing about. *See, e.g., United States v. Wilson*, 901 F.3d 378, 381 (4th Cir. 1990) (finding no *Brady* violation where the information “lies in a source where a reasonable defendant would have looked”); *see also Banks v. Dretke*, 540 U.S. 668, 695 (2004) (precedent “lend[s] no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material”). In the similar context of determining the extent of investigation required by defense counsel to prepare for trial, the Fourth Circuit has recognized that “[a]lthough counsel should conduct a reasonable investigation into potential defenses, *Strickland* [v. *Washington*, 466 U.S. 668 (1984)] does not impose a constitutional requirement that counsel uncover every scrap of evidence that could conceivably help their clients.” *Tucker v. Ozmint*, 350 F.3d 433, 442 (4th Cir. 2003) (internal quotation marks omitted); *see also Sigmon v. Stirling*, 956 F.3d 183 (“Generally, trial counsel are not required to ‘investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing.’” (quoting *Wiggins v. Smith*, 539 U.S. 510, 539 (2003))). Nothing in the pretrial records indicated that trial counsel should have known about Gadson’s mental health treatment and neither the state court nor this Court indicate how counsel could have known to look for the mental health records.

Regardless, this Court (like the Magistrate Judge and the state court) fails to provide any indication of how Petitioner's trial counsel would have been able to obtain a protected mental health document for a witness against Petitioner even if they knew to look for the records. The Health Insurance Portability and Accountability Act ("HIPAA") prohibits health organizations from releasing health or mental health information about a patient without their consent. It is unreasonable to believe that a defendant could obtain permission to obtain the mental health records of witnesses against him.³ The State had these records in their possession at the time of Bowman's trial but elected to withhold them. The Order should be amended to find that the State violated *Brady* by failing to turn over Gadson's mental health records, which Petitioner did not know existed and was powerless to obtain.

III. GROUND 5 – CONFLICT OF INTEREST

The Court improperly adopted the Magistrate Judge's finding that trial counsel Marva Hardee-Thomas had no conflict of interest with regard to Davis because her representation of him had terminated. This assumes that the only duty to a former client is the duty of confidentiality, ignoring the corresponding and overarching duty of loyalty. *See* Rule 1.9(a), RPC, Rule 407, SCACR. Rule 1.9(a) provides that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." *Id.* There can be no argument that

³ Use of subpoena power would be similarly unavailing given that, if defense counsel had a duty to conduct a scorched earth investigation to find exculpatory medical or mental health records for witnesses against a defendant, counsel would not know where to obtain such records. Counsel would therefore have to conduct fishing expeditions by subpoenaing medical and mental health services at random for all witnesses against the defendant. Defense counsel simply does not have adequate resources to do so and the medical system surely would not appreciate such untargeted subpoenas with little likelihood of turning up any records.

Petitioner's and Davis's interests were "materially adverse" as calling Davis to testify that someone other than Petitioner confessed to the murder could have harmed Davis in his legal case (i.e. the state court reinstate his formerly dismissed charges) and would help Petitioner. Hardee-Thomas admitted this at the PCR hearing when she testified that the dual representation led to "trying to help Mr. Bowman but not hurt my aspect with Mr. Davis because I still have an ethical responsibility to him also." App. 7333. Ultimately, Davis was not called to testify about the confession made by a third party, demonstrating an adverse effect on Hardee-Thomas's representation of Petitioner. *See Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980) ("[A] defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."). Thus, Petitioner's Sixth Amendment right to conflict-free counsel was violated by Hardee-Thomas's representation.

IV. GROUND 6 – INEFFECTIVE ASSISTANCE RE: PRISON CONDITIONS EVIDENCE

This Court's Order found that South Carolina law, at the time of Petitioner's trial, was unclear as to the admissibility of general prison condition evidence and trial counsel implemented a valid strategy to provide the jury with evidence of the harsh conditions of confinement, opening the door to the State's introduction of similar evidence. The Fourth Circuit recently addressed this same issue and its reasoning necessarily repudiates this Court's findings. *See Sigmon v. Stirling*, 956 F.3d 183 (4th Cir. 2020). In *Sigmon*, the Fourth Circuit reviewed the South Carolina capital case of Brad Sigmon whose trial took place in 2002, within months of Petitioner's trial and prior to the direct appeal decision in Petitioner's case. *See State v. Bowman*, 623 S.E2d 378 (S.C. 2005). Sigmon's defense counsel, like Petitioner's, elicited questions about general prison conditions and did not object when the state asked additional questions on cross examination. *Sigmon*, 956 F.3d at 193. Contrary to this Court's decision, the Fourth Circuit found "even at the time of Sigmon's trial [in 2002], this rule [inadmissibility of prison condition evidence] was clear. *Id.* (citing *State*

v. Plath, 313 S.E.2d 619 (S.C. 1984)). The Fourth Circuit went on to find that even if Sigmon’s counsel had a strategy to show the negative aspects of prison life, trial counsel was unaware that prison condition evidence was inadmissible and, therefore, “counsel’s failure to object cannot be excused as trial strategy.” *Id.*; *see also id.* (“[T]he record also suggests trial counsel did not know that prison conditions evidence was inadmissible. ‘[A]cts or omissions made by counsel under a mistaken belief or an ignorance of the law are rarely—if ever reasonable in light of prevailing professional norms.’” (quoting *Thompson v. Gansler*, 734 F. App’x 846, 855 (4th Cir. 2018))).

The Order in this case should additionally be amended to find Petitioner was prejudiced by trial counsel’s failure to object. As Petitioner argued in his Objections, the PCR Court unreasonably found “there was 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.” *Bowman v. State*, 809 S.E.2d 232, 246 (S.C. 2018). The record clearly demonstrates that the prison condition evidence was not just a few pages of questioning but was repeatedly emphasized during the solicitor’s closing argument in support of his asking the jury not to “reward [Petitioner] with a life sentence.” App. 4970; *see* Objections at 16 (providing a full discussion of the references to prison conditions made by the solicitor). The Order fails to acknowledge the state court and Magistrate Judge’s mischaracterization of the record. Order at 54. The Order further fails to address Petitioner’s argument that the South Carolina Supreme Court found prejudice on the basis of improper prison condition evidence in the significantly more aggravated case of Troy Burkhardt. *See State v. Burkhardt*, 640 S.E.2d 450, 451 (S.C. 2007) (finding prejudice in a case where the defendant had been convicted of killing three people execution style and hiding their bodies). Petitioner was clearly prejudiced by improper prison condition evidence to which the Fourth

Circuit now clearly states trial counsel were ineffective in failing to object compelling amendment of this Court's Order.

V. DEFAULTED GROUNDS 11 – INEFFECTIVE ASSISTANCE RE: CLOSING ARGUMENT AND 12 – FAILURE TO PRESENT ADDITIONAL MITIGATION EVIDENCE

The Order denies Petitioner's defaulted Grounds, finding the evidence Petitioner presented in support of the ground insufficient to merit a hearing. The Order does not provide any guidance—for this or future habeas petitioners—on what evidence must be submitted to warrant a hearing under *Martinez v. Ryan*, 566 U.S. 1 (2012). Pursuant to *Martinez*, in order to overcome procedural default of an ineffective assistance of trial counsel claim, a Petitioner must show: (1) the claim of ineffective assistance of trial counsel is “substantial;” and, (2) appointed counsel in the initial-review collateral proceeding “was ineffective under the standards of *Strickland v. Washington*.” *Martinez*, 566 U.S. at 14. Here, Petitioner presented two claims of ineffective assistance of trial counsel and an affidavit from PCR counsel indicating that he did not raise either claim and that he had no strategic reason for failing to do so. ECF 36-12, ¶¶ 4-5.

A claim of ineffective assistance of trial counsel is “substantial” if it has “some merit”—the same, non-searching standard that applies for a certificate of appealability to issue. *See Martinez*, 566 U.S. at 14 (citing *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)). Stated otherwise, a claim is “insubstantial” if it “does not have any merit or it is wholly without factual support.” *Id.* at 16. Petitioner demonstrated the underlying claims had—at the very least—“some merit” by presenting additional arguments and evidence trial counsel should have raised in seeking a life sentence for Petitioner. *See Habeas Petition*, at 83-94.

“To demonstrate cause under *Martinez-Trevino*, the petitioner must show deficient performance by counsel on collateral review as required under the first prong of the *Strickland* analysis. . . . Actual resulting prejudice can be established with a substantial claim of ineffective

assistance of trial counsel that would have otherwise been deemed defaulted.” *Workman v. Superintendent Albion SCI*, 915 F.3d 928, 941 (3d Cir. 2019) (quoting *Brown v. Brown*, 847 F.3d 503, 510 (7th Cir. 2017)). Because post-conviction counsel have a duty to “seek to litigate all issues . . . that are arguably meritorious,” the fact that PCR counsel did not raise these claims and had no strategic reason for not doing so is at least sufficient to warrant a hearing pursuant to *Martinez* on the underlying ineffective assistance of trial counsel claims. American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.15.1 (C) (2003).

VI. CERTIFICATE OF APPEALABILITY

Should the Court deny Bowman’s motion with regard to the grounds for relief listed above, Bowman requests this Court amend its judgment to grant a certificate of appealability on all of his claims for relief because reasonable jurists could differ on the issues raised by Petitioner. *See* 28 U.S.C. § 2253(c)(3).

CONCLUSION

Given the recent decision in *Sigmon* and the arguments laid out above, this Court should amend its Order and grant Petitioner habeas relief. In the alternative, the Court should issue a certificate of appealability to allow the Fourth Circuit to consider the important issues in this capital case.

Respectfully submitted,

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May 14, 2020.

CERTIFICATE OF SERVICE

Counsel hereby certifies that she has served W. Joseph Maye of the South Carolina Attorney General's Office via ECF on this date, May 14, 2020.

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Marion Bowman, Jr.,	)	C/A No. 9:18-cv-00287-TLW
	)	
Petitioner	)	
	)	RESPONDENTS' RESPONSE IN
	)	OPPOSITION TO PETITIONER'S
v.	)	RULE 59(e) MOTION TO ALTER OR
	)	AMEND JUDGMENT
	)	
Bryan P. Stirling, <i>Commissioner, South Carolina</i>	)	
<i>Department of Corrections; Willie D. Davis,</i>	)	
<i>Warden, Kirkland Correctional Institution,</i>	)	
	)	
Respondents	)	
	)	

On March 26, 2020, this Honorable Court issued an Order adopting the Report and Recommendation (ECF #84) and granted Summary Judgment in favor of Respondents. (ECF #85). Petitioner filed a Rule 59(e) Motion to Alter or Amend Judgment on April 22, 2020. (ECF #91); *Banister v. Davis*, No. 18-6943, 2020 WL 2814300, at *7 (U.S. June 1, 2020). Petitioner then filed his Memorandum in Support, raising specific disputes with certain portions of the District Court Order. (ECF #92).

“In general, ‘reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly.’” *Pac. Ins. Co. v. Am. Nat’l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998) (quoting 11 Wright et al., *Federal Practice and Procedure* § 2810.1, at 124 (2d ed. 1995)). Though Rule 59(e), Fed.R.Civ.P. sets out a motion may be filed after entry of a judgment, it does not set out the factors for appropriate relief. The Fourth Circuit has directed relief may only be granted “in very narrow circumstances: ‘(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.’” *Hill v. Braxton*, 277 F.3d 701, 708 (4th Cir.

2002) (quoting *Collison v. International Chemical Workers Union*, 34 F.3d 233, 236 (4th Cir. 1994)). Such motions are not vehicles to allow for re-argument of issues or positions presented: “[M]ere disagreement does not support a Rule 59(e) motion.” *Hutchinson v. Staton*, 994 F.2d 1076, 1082 (4th Cir. 1993). “Rule 59 motions should not be used to rehash issues already ruled upon because a litigant is displeased with the result.” *Ridgeway v. Stevenson*, 2011 WL 1466325, at *2 (D.S.C. Apr. 15, 2011)(citing *Hutchinson v. Staton*, 994 F.2d 1076, 1082 (4th Cir. 1993)). Petitioner’s arguments do not appear to implicate the three valid causes that could support relief on his motion. Respondents contend that the Motion is without merit and hereby offer this brief response in opposition to Petitioner’s Motion.

I. Overwhelming Evidence

Petitioner’s first argument asserts errors concerning the District Court Order’s findings of overwhelming evidence. A review of the Order demonstrates that the mentions of overwhelming evidence are procedural history recitations of prior court findings or of Petitioner’s own arguments. (ECF #84, at 25, 26, 35, 36, 38, 40, 50). Petitioner asserts that any findings of overwhelming evidence are in error and moves to amend the Order accordingly. (ECF #92, at 1-2). Contrary to Petitioner’s assertions, the District Court Order properly found that the findings made by the Magistrate and state courts were not unreasonable, such that Petitioner failed to satisfy his burden of proof for habeas relief. There is no error and the District Court Order thoroughly and properly completed its necessary review of the Report and Recommendation.

Petitioner also argues that one of his objections to the Report and Recommendation went unaddressed. (ECF #81, at 5); (ECF #92, at 2). Therein, he asserts that the magistrate “agreed with the State PCR Court that there was overwhelming evidence”, and erred by including the testimony from Gadson in recitation, because the court’s finding argued that there was

overwhelming evidence of guilt *even in the absence* of Gadson's testimony. (ECF #81, at 5). Petitioner's objection is puzzling, as it fails to address the fourteen other factual findings demonstrating guilt, each with specific citation, and instead focuses on the PCR court's decision to provide all the evidence in a single location and then reach the entirely reasonable conclusion that overwhelming evidence of guilt exists even if the recently cited evidence attributable to Gadson was to be excluded. The discussion of the evidence of guilt against Petitioner as a whole does not negate the premise that one can look at those specific sources of evidence not associated with Gadson and conclude that overwhelming evidence *still exists*. Moreover, the recited facts from the PCR court order (ECF 11-32, at 19-20) and the Report and Recommendation (ECF #75, at 25-26, n. 10) do not disguise evidence from Gadson as coming from some other source. The District Court Order does not require amended, as there is no error present in the Report and Recommendation in this regard.

Applicant next transitions his argument into a criticism that the Magistrate has merely adopted the PCR Court's recitation of factual findings, which Petitioner's believes improper because the Attorney General's office drafted the proposed Order of Dismissal for the reviewing PCR court. (ECF #92, at 2). By extension, Petitioner argues that the findings of the PCR court Order are really just the determinations of Respondents. Petitioner's argument in this regard is not preserved, as such an argument was not raised in his objections to the Report and Recommendation. *Martin v. Duffy*, 858 F.3d 239, 245 (4th Cir. 2017). But, nevertheless, the argument is meritless, as 1) the Magistrate *also* incorporated by block citation evidence as outlined by the South Carolina Supreme Court in Petitioner's direct appeal (ECF #75, at 13-15), and 2) the fact that each and every finding of fact was supported by a specific Record citation.

Petitioner's objection in this regard is noticeably silent as to how exactly the facts are inaccurate, and only raises a perceived issue with their origin from prior filings.

Petitioner has failed to present any content within the Order or the Report and Recommendation that is in error. As such, the Rule 59(e) Motion should be denied as to arguments concerning "overwhelming evidence of guilt".

I (a) Failure to find error regarding Gadson's exposure to the death penalty

Petitioner argues that the District Court, along with the Magistrate and PCR court, concluded in error that Gadson did not avoid the death penalty by entering into a plea agreement and agreeing to testify against Petitioner. (ECF #92, at 3-4). Petitioner has essentially reargued his federal habeas claim.

The Order adopting the Report and Recommendation thoroughly addresses and dismisses this objection. As articulated by the District Court, for the purposes of federal habeas review "the question is not whether counsel could have or should have more vigorously cross-examined Gadson", but only whether "there is a reasonable argument that counsel satisfied the *Strickland* deferential standard" by cross-examining the Gadson as he did. (ECF 84, at 21). The Order properly concludes that this standard has been met. The record demonstrates the jury was made aware of Gadson's cooperation and potential for bias through Mr. Cummings cross-examination of the plea deal. The Order articulates that the PCR court made the credibility determination that Gadson himself thought he was avoiding a *life-sentence*, not the death penalty, and such a determination is entitled to substantial deference. To that same end, the PCR court's finding that Gadson believed he was avoiding a life-sentence substantially undermines Petitioner's underlying argument.

As argued in Respondents' Response to Petitioner's objections to the Report and Recommendation, the premise of Petitioner's argument has not been established. Petitioner characterizes the Court's position as being an "improper, and hyper-technical view of what it means to bargain to avoid the death penalty." (ECF #92, at 3). However, the same could be more so said of Petitioner's argument, as it relies entirely upon boilerplate language from the plea agreement that indicates the State can reinstate the charge of murder and seek the death penalty if the agreeing party were to refuse to cooperate as agreed. The record lacks any other reference that the death penalty was credibly considered to be the sentence Gadson would face, absent his cooperation. Most importantly the record lacks a notice of intent to seek the death penalty against Gadson, which is the mandatory mechanism necessary to contemplate such a sentence. Petitioner's argument presents no basis for error.

I (b) Improper Independent findings and Travis Felder's cross-examination

Petitioner's next claim asserts that in contravention of *Wilson v. Sellers*, 138 S.Ct. 1188 (2018), the District Court Order reached its own independent conclusions of law and fact, as opposed to merely judging the reasonableness of those reached by the state courts. (ECF #92, at 4). Petitioner's argument is entirely without merit.

Petitioner first draws objection to the District Court Order's language stating, "although counsel could have made a different strategic decision, there is certainly a reasonable argument that counsel's strategy did not 'amoun[] to incompetence under prevailing professional norms.'" Petitioner offers no argument as to why this constitutes a violation of *Wilson v. Sellers*. He instead proceeds to articulate the finding of the state court regarding Felder, his previous objection to the Magistrate's findings regarding Felder, and his objection to counsel's strategic purpose for not eliciting testimony of Felder's purchase of gasoline. Petitioner then demands the

Court address his Objections 5 & 6 from the Objections to the Report and Recommendation.¹ (ECF #92, at 4-5).

First, Respondents argue that the complained of language, while offhandedly recognizing the possibility that counsel had other options, precisely confirms that there is a “reasonable argument” supporting the state court’s finding that counsel’s chosen strategy did not fall below professional norms under *Strickland*. There is no error, under *Wilson* or any other standard, as this is the proper analysis that must be conducted by the Magistrate under 28 U.S.C. § 2254.

Second, the Order has fully addressed the issue concerning Felder omitting his purchase of gasoline and counsel’s strategic choice to not cross-examine him on the topic. The court presents a full summary of Petitioner’s claim (ECF #84, at 24), a full summary of the PCR Order (ECF #84, at 25), a full summary of the Report and Recommendation (ECF #84, at 26-27), and a recitation of Petitioner’s objection that the Magistrate Judge erred in concluding there were no unreasonable findings of law and fact. (ECF #84, at 27-28). Having summarized the entirety of the issue, the Order acknowledged the existence of a “reasonable argument” to the findings denying relief, and therefore found no error in the Report and Recommendation. Petitioner’s objections have therefore been addressed and are meritless.

I (c) *Cross-examination of Hiram Johnson*

First, Petitioner’s Rule 59(e) argument addresses the Report and Recommendation, not the District Court’s Order. (ECF #92, at 5). As Petitioner failed to raise this argument as part of his Objections to the Report and Recommendation, the argument was not before the District Court for review prior to issuance of the order. Moreover, the failure to raise a specific objection

¹ Those objections involve *Brady* claims concerning “Sam Memo”, the Gadson Mental Health Report, Johnson’s Pending charges, and improper prison conditions testimony. (ECF #81, at 7-18). They do not appear to have any correlation to Travis Felder’s testimony.

acts as a waiver of the issue on appeal, and there is no basis for retroactively raising an issue through a Rule 59(e) Motion. *Thomas v. Arn*, 474 U.S. 140, 145, 106 S. Ct. 466, 469, 88 L. Ed. 2d 435 (1985); *Martin v. Duffy*, 858 F.3d 239, 245 (4th Cir. 2017); See also *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (citing 28 U.S.C.A. § 636(b)(1) (West 1993 & Supp.2005) (emphasis added); Fed.R.Civ.P. 72(b)).

Second, the Magistrate's Report and Recommendation addresses the PCR Court's finding that the impeachment value of Johnson's omission of Petitioner's confession was limited, and that Petitioner had failed to establish prejudice for his PCR claim. (ECF #11-32, at 57-58). The fact that Johnson "believed Petitioner was kidding when he confessed" was explicitly cited and relied upon by the PCR court. (ECF #11-32, at 56). Alongside that specific referenced fact, the PCR court also cited the overwhelming evidence of guilty as part of its reasoning. As such, the complained of language from the Report and Recommendation, which simply constitutes facts within the state court record, does nothing more than demonstrate the findings of the PCR court were reasonable *in light of the state court record*. There is no error.

II. Brady Violation regarding Gadson's Mental Health Report

Petitioner next argues that the Court erred in failing to find a *Brady* violation regarding Gadson's mental health report, and that by doing so it placed an improper burden upon Petitioner to identify and obtain exculpatory evidence without disclosure by the State. (ECF #92, at 6). Petitioner's objection to the Report and Recommendation relies *solely* upon the holding in *Banks v. Dretke*, 540 U.S. 668, 695 (2004), and suggests that *Banks* abrogates the long held rule that a *Brady* violation does not arise when the complained of materials could have been located and obtained by other means. (ECF #92, at 6).

The District Court fully reviewed Petitioner's allegation, the PCR court's findings, and the Magistrate's findings. The District Court then addressed Petitioner's objection to the Report and Recommendation, and concluded that it was not persuaded by Petitioner's argument. The Order correctly finds that *Banks* did not abrogate the Fourth Circuit's decision in *Fullwood v. Lee* that held Brady "does not compel disclosure of evidence available to the defendant from other sources," and that this principle continues to be upheld in numerous cases from the Fourth Circuit decided after *Banks*. (ECF #84, at 39). As such, the District Court properly concluded that the Magistrates findings were not unreasonable.

The Petitioner's Rule 59 Motion does not argue any new basis for error, only its continued disagreement with the ruling. Petitioner contests that it could not possibly have known about Gadson's mental health examination, but the PCR court has already demonstrated that the existence of Gadson's examination would have been apparent by simply reviewing the public court order in Gadson's case. Petitioner has provided no viable response to that issue. Likewise, the evaluation could have been obtained via subpoena, had such efforts been taken. Petitioner now references HIPPA as its basis for impossibility. However, Petitioner has only referenced legislation geared toward the proper dissemination of confidential patient information; he has not demonstrated an impossibility of acquiring those materials had he exercised diligence.

There is no error on the part of the District Court Order, nor is any amendment or alteration to the Order required. The basis for Petitioner's Rule 59(e) motion has already been fully and properly addressed in the content of the Order and the Motion should therefore be denied.

III. Conflict of Interest

Petitioner did not raise any objection to the Report and Recommendation's findings concerning the alleged conflict of interest of trial counsel Hardee-Thomas. As discussed above, a Rule 59(e) motion based upon an argument not asserted as an objection to the Report and Recommendation is not properly before this court for review. *Thomas v. Arn*, 474 U.S. 140, 145, 106 S. Ct. 466, 469, 88 L. Ed. 2d 435 (1985); *Martin v. Duffy*, 858 F.3d 239, 245 (4th Cir. 2017); See *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (citing 28 U.S.C.A. § 636(b)(1) (West 1993 & Supp.2005) (emphasis added); Fed.R.Civ.P. 72(b).

"[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (citing Fed.R.Civ.P. 72 advisory committee's note). As the District Court Order fully reviewed the Report and Recommendation, found no unreasonable findings, and concluded Petitioner had failed his burden of relief, the District Court has fully satisfied this requirement.

IV. Prison conditions testimony

Petitioner next argues that *Sigmon v. Stirling*, 956 F.3d 183 (4th Cir. 2020) constitutes an intervening decision warranting amendment to the District Court Order. Petitioner also contends that the Order should be amended to find that the PCR court and Magistrate mischaracterized the record in assessing the extent in which general prison conditions testimony were discussed and relied upon, such that a finding of prejudice against Petitioner should be made. Lastly, Petitioner again argues its case in comparison to *Burkhart*. (ECF #92, at 8-9).

Notwithstanding Petitioner's argument and reliance upon *Sigmon v. Stirling* (*infra*), the District Court Order thoroughly identifies each argument raised by Petitioner's Objections to the Report and Recommendation, as well as those arguments now reasserted as arguments for amendment to the Order. (ECF #84, at 49-51). In particular, the District Court recognized that much of the argument constituted the evaluation of state evidentiary law, to which the Magistrate properly afforded deference in interpretation. (ECF #84, at 51-52). The District Court Order likewise found no error in the matters concerning the finding of credibility toward counsel and his strategic decision to delve into general prison conditions with the knowledge that the State would be entitled to respond in kind. Such a gambit was practically invited by the holding in *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984) and the District Court Order agrees that the State's response was proportionate. (ECF #84, at 52-54). As such, the Order properly confirmed the Report and Recommendation's conclusion that the State court's findings were not unreasonable and Petitioner failed to satisfy his burden for relief. (ECF #84, at 51-55).

The Fourth Circuit's holding in *Sigmon v. Stirling*, is comparable to Petitioner's case in topic alone. It is considerably divergent from Petitioner's case in both degree and detail. *Sigmon v. Stirling*, 956 F.3d 183 (4th Cir. 2020), as amended (Apr. 15, 2020). As the Fourth Circuit summarized, Sigmon called James Aiken as an expert in prison adaptability and asked Aiken to "Tell [him] a little bit about the way the day is structured in a maximum security facility?" Aiken proceeded to testify about "constant monitoring, the risk of violence, and the limited rights prisoners are entitled to while incarcerated." The state cross-examined Aiken on visitation, television, recreation, library access, and hygiene. Defense counsel did not raise objection during cross or closing argument. The PCR Court noted that counsel's statements during the PCR evidentiary hearing demonstrated that it was his strategy to show "prison life in harsh reality."

The PCR court found neither deficient performance nor resulting prejudice. *Sigmon v. Stirling*, 956 F.3d 183, 193 (4th Cir. 2020), as amended (Apr. 15, 2020).

In review, the Fourth Circuit noted that “the record was ambiguous as to whether counsel failed to object due to strategy or due to ignorance of the law.” Nevertheless, its review brought about the conclusion that “the record also suggests trial counsel did not know that prison conditions evidence was inadmissible.” *Id.*, 956 F.3d at 193. Therein lies the difference to the case at hand.

The testimony offered by defense counsel Cummings demonstrated that he knew all too well that a decision to venture into demonstrating the harshness of prison life would result in the State responding with similar testimony to the contrary. He characterized the decision to ask those questions as a calculated risk that would entitle the state to do the same, but believed it would be in his client’s best interest to take that risk. Moreover, Mr. Cummings classified this effort as “pushing the boundaries” of what was permissible in death penalty cases in light of the new law concerning mandatory life without parole jury charges. Mr. Cummings actions and strategy demonstrated precisely the end-around maneuver that *Plath* invited: such evidence is improper and not admissible, but if the defense introduces it then the State is entitled to respond. It is additionally persuasive that *Plath* was the precise cited authority by the Fourth Circuit in finding that such evidence of prison conditions was inadmissible “even at the time of Sigmon’s trial.”

It is also supremely important to recognize that while Mr. Cummings only made an express objection to testimony concerning prison escape, which was the first topic raised in the re-cross, the discussion of that objection led to an explicit reference to *Plath*, the fact that counsel opened the door to matter of prison conditions, and that under *Plath* the state is entitled to

respond. The trial court ultimately agreed. (ECF #11-11, at 412-417). As a result, the content of counsel's would-be objection was still heard and the court issued a ruling permitting the state to question Aiken about general prison conditions. There would be no purpose to object further, nor any basis to think that the objection would be successful. This was the finding of the South Carolina Supreme Court; it acknowledged the facts of Petitioner's case and the "invited reply doctrine" at play for otherwise generally improper evidence under *Plath. Bowman v. State*, 422 S.C. 19, 40-41, 809 S.E.2d 232, 243-44 (2018). The Magistrate acknowledged and relied upon this finding of the South Carolina Supreme court in reaching its conclusion that the state court was not unreasonable in finding no deficiency of performance. (ECF #75, at 78; #11-32, at 109-110). The District Court Order acknowledged and agreed with the Magistrate's rationale. (ECF #84, at 45; ECF #84, at 52).

The ruling in *Sigmon* is based on the simple conclusion that if counsel did not know the evidence was inadmissible, then counsel cannot be excused as eliciting it as part of a trial strategy. *Id.*, 956 F.3d at 193. Petitioner's case is distinguished because it appears clear that Mr. Cummings knew where the law stood. He also knew what he could still keenly submit during mitigation, and evaluated that decision on whether he believed it was in the best interest of his client to do so. Had counsel simply believed such evidence posed no question of admissibility, then there would be no "calculated risk" to assess, since the State would be entitled to talk about "good" prison conditions anyway. The presentation of the issue as a purposeful "opening the door" scenario greatly distinguishes *Bowman* from *Sigmon*.

Moreover, as was the case in *Sigmon*, the record here clearly supports the finding that there is no prejudice to Petitioner in this matter as the case for aggravation and mitigation lasted multiple days – to which prison conditions was a very small component. As articulated by the

PCR court and deemed not unreasonable by the Magistrate, both parties presented proportional testimony on the matter, leaving its influence more so a nullity. As such, *Sigmon* is distinguishable from *Bowman* regarding the evaluation of deficient performance, but is actually supportive in the context of the lack of resulting prejudice. The Motion to Alter or Amend Judgment should therefore be denied.

V. Defaulted Grounds 11 and 12

Petitioner argues that the District Court Order failed to provide guidance as to what level of evidence is required to warrant a hearing under *Martinez v. Ryan*. Petitioner's motion then essentially argues amendment is necessary because Petitioner provided the affidavit from PCR counsel demonstrating a lack of a strategic reason for not raising the claims in question. (ECF #92, at 10). Petitioner argues that the affidavit should be sufficient to satisfy *Martinez* standard and warrant an evidentiary hearing. (ECF #92, at 11). Petitioner's claim is without merit as to both Grounds 11 and 12, and the Rule 59(e) Motion should be dismissed.

Ground 11 – Failing to object to the State's closing arguments that the jury should disregard mitigation evidence lacking a nexus to the crime

The District Court Order addresses the allegation and summarized the findings of the Magistrate Court's Report and Recommendation. The District Court then addressed the objections raised to the Report and Recommendation. The District Court found that the Report and Recommendation was proper for a number of reasons. First, Petitioner's provision of the affidavit may satisfy the pleading requirement, but not the summary judgment standard. Petitioner must demonstrate that the strength of the underlying claim was sufficient to meet the burden set forth in *Martinez*, and Petitioner failed to do so. The District Court concluded that the jury did consider the mitigation evidence *as instructed by the court*, and found Petitioner's arguments to the contrary lacked any persuasion. This is particularly so when viewing the

complained of statements in the broader context of the solicitor's closing argument that mitigation evidence lacking a nexus to the crime *should be given less weight*. Such an argument is not improper. (ECF #84, at 62-66).

There is no error of law within the District Court Order, there is no basis to warrant amendment to the District Court Order, and while the District Court does not have a duty to articulate what level of evidence is necessary to satisfy the *Martinez* standard under the absurdly broad array of substantive claims the law can encompass, the District Court most certainly made known the lack of merit to Petitioner's Ground 11.

Ground 12 – Failure to present additional mitigation evidence

Regarding Ground 12, the District Court likewise provided a thorough review of the underlying *Martinez* claim, the findings of the Report and Recommendation, and Petitioner's objections thereto. In addressing those objections, the District Court Order fully and properly found the Report and Recommendation proper. (ECF #84, at 67-70).

The District Court Order again found that Petitioner's argument is primarily geared toward the contention that he satisfied the pleading standard and should therefore receive a hearing. The Order notes that Petitioner did not object to Report and Recommendation's evaluation of the impact of the newly presented evidence in comparison to the mitigation case presented to the jury. He instead argues that such evidence is "representative" of what could be presented at an evidentiary hearing. (ECF #81, at 24). The Order properly finds the existing affidavits insufficient to warrant an evidentiary hearing, and improper to serve as an assurance of other evidence that could be presented without articulating the details of such evidence. (ECF #84, at 71). In review of the evidence presented in support of Ground 12 the District Court properly agreed that Petitioner had failed his burden under *Martinez*. The evidence would have

presented little substance to alter the mitigation profile already presented to the jury and counsel did not present a weak case for mitigation at trial. Lastly, the District Court properly concluded that the PCR court's finding that counsel had provided a constitutionally adequate mitigation investigation was not unreasonable. As such, the District Court Order is proper and the Motion should be denied.

CONCLUSION

The Order adopting the Report and Recommendation and denying federal habeas relief is without legal or factual error. Petitioner has failed to present any meritorious grounds to warrant and amendment or alteration to the District Court's Order. Petitioner's Motion should therefore be denied.

Respectfully submitted,

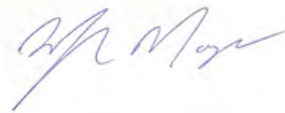
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By: W. Joseph Maye.
ATTORNEYS FOR RESPONDENTS

June 15, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Marion Bowman, Jr., #6006,	)	
	)	
Petitioner,	)	
	)	Case No.: 9:18-cv-287
vs.	)	
	)	
Bryan Stirling, Director, SCDC,	)	DEATH PENALTY CASE
and Willie D. Davis, Warden,	)	
Kirkland Correctional Institution,	)	
Respondents.	)	
_____	)	

**REPLY TO RESPONDENTS’ RESPONSE IN OPPOSITION TO PETITIONER’S RULE
59(e) MOTION TO ALTER OR AMEND JUDGMENT**

Petitioner, Marion Bowman, Jr., submits the following reply to three points made in Respondents’ Response in Opposition to Petitioner’s Rule 59(e) Motion (“Response”) (ECF No. 93) that misconstrue Bowman’s arguments, the record evidence, or legal principles applicable to Bowman’s claims. The remainder of Respondents’ arguments were either anticipated in Bowman’s Memorandum in Support of Petitioner’s Motion to Alter or Amend Judgment (“Memorandum”) (ECF No. 92) or do not require a response.

**I. RESPONDENTS RELY ON IRRELEVANT DETAILS IN SUPPORT OF THIS COURT AND THE
MAGISTRATE JUDGE’S FINDING OF OVERWHELMING EVIDENCE OF GUILT.**

In response to Bowman’s argument that the Court should amend its Order because it adopted the Magistrate Judge’s finding of overwhelming evidence of guilt, Respondents assert that the Magistrate Judge’s finding is correct because the individual portions of evidence relied upon in the Report and Recommendation (“R&R”) are “supported by specific Record citation.” Response at 3; R&R 25-26, n.10 (ECF No. 75). The question, however, is not whether the facts cited by the Magistrate Judge (and the state court) find support in the record. The question is whether those facts amount to overwhelming evidence of guilt. They do not. The probing inquiry

required of the value of each fact cited reveals that those facts do not negate the very real possibility that, while he was clearly involved, Bowman may not have been the actual killer.

In conducting this analysis, the Court must consider that twelve of the eighteen facts cited by the state court and Magistrate Judge came from the three witnesses whose credibility could and should have been challenged by trial counsel as described in Bowman's first three claims for habeas relief. In particular, the most damning evidence cited came from Gadson himself despite the Magistrate Judge's assertion that "there was other overwhelming evidence of Petitioner's guilt apart from Gadson's testimony." R&R at 25. Discounting Gadson's testimony—as the Magistrate Judge should have done—there is no direct evidence that Bowman committed the murder. This is an especially important consideration given Gadson's incentive to provide the State with testimony implicating Bowman in order to avoid the threat of the death penalty sought against Gadson himself. Bowman requests this Court conduct the required probing inquiry into the facts cited and amend the Order to find there was not overwhelming evidence of guilt.

II. RESPONDENTS MISCONSTRUE BOWMAN'S ARGUMENTS THAT THIS COURT SHOULD AMEND ITS ORDER TO COMPLY WITH *WILSON V. SELLARS*.

Respondents misapprehend Bowman's argument that the Court's Order violated *Wilson v. Sellers*, 138 S. Ct. 1188 (2018), by failing to address the specific findings made by the state court. Instead of focusing on the state court's specified reasoning, this Court's Order found that the "only relevant question 'is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard' by declining to question Felder regarding his purchase of gasoline." Order at 28 (quoting *Harrington v. Richter*, 562 U.S. 86, 105 (2011)). *Wilson*, on the contrary, clarified that where the state court issued a reasoned decision (as the state court did here) the federal court is required "to train its attention on the particular reasons—both legal and factual—why state courts rejected a state petitioner's federal claims." 138 S. Ct. at 1191-92.

The state court issued a reasoned decision and relied on a specific strategic decision it attributed to trial counsel—that trial counsel made a strategic decision not to admit the tape showing Felder testified falsely because “he felt it would corroborate Applicant’s involvement in the plan to burn the car.” App. 9861. To comply with *Wilson*’s requirement, this Court must determine if this *specific* strategic decision credited by the state court—not some other hypothetical reason—was reasonable. *See* 138 S. Ct. at 1191-92. As Bowman argued in his Objections to the R&R, it was not. *See* Objections at 5-6.¹

III. RESPONDENTS INCORRECTLY DISTINGUISH THE FOURTH CIRCUIT’S DECISION IN *SIGMON* FROM THIS CASE.

Respondents’ attempt to distinguish Bowman’s case from *Sigmon*² because Bowman’s trial counsel were aware presentation of prison condition evidence would open the door to the State doing the same fails. In *Sigmon*, the Fourth Circuit acknowledged that “evidence before the PCR court suggests trial counsel’s actions were part of a strategy ‘to elicit testimony about the harshness of prison life.’” 959 F.3d at 193. Nevertheless, the court found that “if trial counsel did not know the [prison condition] evidence was inadmissible, counsel’s failure to object cannot be excused as trial strategy.” *Id.* Similarly, any strategic decision made by Bowman’s trial counsel to elicit prison condition evidence was not valid because trial counsel “did not know the evidence was inadmissible.” *See id.* (“[A]cts or omissions made by counsel under a mistaken belief or an ignorance of law are rarely—if ever ‘reasonable’ in light of prevailing professional norms.” (quoting *Thompson v. Gansler*, 734 F. App’x 846, 855 (4th Cir. 2018))).

¹ Respondents also misread Bowman’s request that the Court address his specific objections related to Felder on pages 5-6 of his Objections (ECF No. 81) as a request that the Court address objections number 5 and 6 which are unrelated to Felder. *See* Response at 5-6. Bowman’s assertion is merely that he made a specific objection regarding the Felder claim that was not specifically addressed in this Court’s order.

² *Sigmon v. Stirling*, 956 F.3d 183 (4th Cir. 2020).

Nothing in the PCR record indicates trial counsel knew the evidence was admissible. In fact, the State repeatedly argued in post-conviction proceedings that the state of the law was unclear at the time of Bowman’s trial because of a new decision in *Kelly v. South Carolina*, 534 U.S. 246 (2002). *See, e.g.*, Return and Memorandum of Law in Support of Summary Judgment at 105 (ECF No. 57); Return to Petition for Writ of Certiorari at 59 (ECF No. 12-18). Respondents provide no record support for a finding that trial counsel knew the evidence was inadmissible because there is none. *See* Response at 11-12. At most, the record demonstrates that trial counsel were aware that admitting prison condition evidence would open the door to the State doing the same. Nothing about trial counsel’s understanding of “opening the door” distinguishes this case from *Sigmon* because counsel acted “under a mistaken belief or an ignorance of the law” regarding the overall admissibility of the evidence which cannot be the basis for a valid strategic decision. 956 F.3d at 193; *see also Thompson*, 734 F. App’x at 855. The Court’s order should, therefore, be amended to find trial counsel were deficient in failing to object to the admission of prison condition evidence in line with the recent *Sigmon* decision.

CONCLUSION

For the reasons stated above and in Bowman's Memorandum in Support of Petitioner's Motion to Alter or Amend Judgment (ECF No. 92), this Court should amend its order and, ultimately, grant habeas relief.

Respectfully submitted,

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June 30, 2020.

CERTIFICATE OF SERVICE

Counsel hereby certifies that she has served W. Joseph Maye of the South Carolina Attorney General's Office via ECF on this date, June 30, 2020.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

Marion Bowman Jr.,

PETITIONER

v.

Bryan P. Stirling, *Director, South
Carolina Department of Corrections;*
Willie D. Davis, *Warden, Kirkland
Correctional Institution,*

RESPONDENTS

Case No. 9:18-cv-00287-TLW

Order

Before the Court is Petitioner Marion Bowman Jr.’s motion to alter or amend the Court’s order dismissing his § 2254 petition. A Rule 59(e) motion may only be granted “(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice. It is an extraordinary remedy that should be applied sparingly.” *Mayfield v. Nat’l Ass’n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 378 (4th Cir. 2012) (citations omitted).

I. Analysis

Bowman raises eight bases for relief in his motion:

- (1) as to Grounds 1–3, the Court improperly relied on an asserted overwhelming evidence of guilt as a basis to deny relief;
- (2) as to Ground 1, the Court improperly concluded that counsel were not ineffective in their questioning of Taiwan Gadson regarding his exposure to the death penalty;

- (3) as to Ground 2, the Court improperly departed from the state court's rationale in concluding that counsel were not ineffective in their questioning of Travis Felder regarding his involvement in the arson;
- (4) as to Ground 3, the Court improperly departed from the state court's rationale in concluding that counsel were not ineffective in their questioning of Hiram Johnson regarding his statements to police;
- (5) as to Ground 4, the Court placed an improper burden on Bowman regarding the asserted violations of *Brady v. Maryland*, 373 U.S. 83 (1963);
- (6) as to Ground 5, the Court improperly adopted the magistrate judge's finding regarding the conflict of interest argument;
- (7) as to Ground 6, an intervening decision by the Fourth Circuit renders incorrect the Court's analysis regarding prison conditions evidence; and
- (8) as to Grounds 11 and 12, the Court incorrectly determined that Bowman's claims were not substantial such that an evidentiary hearing was required.

ECF No. 92.

A. Overwhelming evidence

In Bowman's first argument, he says that the Court improperly relied on an asserted overwhelming evidence of guilt as a basis for denying Grounds 1–3. *See id.* at 1–3. The Court has reviewed its previous order in detail. There was no mention of overwhelming evidence of guilt as part of this Court's analysis. Each issue that Bowman raised was discussed in detail based on the facts and law relevant to that issue. The issue of overwhelming evidence of guilt was not a part of this Court's analysis and any representation to the contrary is not an accurate characterization of the order. There is no basis to assert that the Court failed to evaluate the relevant facts and applicable law by broadly relying on a conclusion that there was

overwhelming evidence of guilt. Thus, there is no merit to this argument because the Court's analysis did not depend on a determination that there was overwhelming evidence of guilt.

As to Ground 1, the Court concluded that counsel were not ineffective because the jury was aware that Gadson received the benefit of a plea agreement to twenty years as a result of his cooperation and the PCR court made the credibility determination that he did not think he was avoiding a death sentence by cooperating. ECF No. 84 at 21–22.

As to Ground 2, the Court concluded that counsel were not ineffective because there was a reasonable argument that their strategy of not questioning Felder about the purchase of the gasoline satisfied the standards of *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* at 28.

As to Ground 3, the Court concluded that counsel were not ineffective because there was a reasonable argument that their strategy of not questioning Johnson about his prior statement to police satisfied *Strickland's* standards. As the Court noted in its order, “it was reasonable for counsel to want to avoid having Bowman’s admission repeated once more in front of the jury, particularly because cross-examining Johnson about it would have minimal impeachment value due to the fact that he had previously told police about the admission.” *Id.* at 31.

None of these conclusions relied on an argument that there was overwhelming evidence of guilt aside from the asserted errors. Thus, Bowman has not set forth an

adequate basis for the Court to alter or amend its prior order.¹

B. Taiwan Gadson

In Bowman's second argument, he argues that the Court took "an improper, hyper-technical view of what it means to bargain to avoid the death penalty" regarding the cross-examination of Gadson. ECF No. 92 at 3. To the contrary, the Court recognized that the jury knew that Gadson was testifying in light of a plea offer that would result in a lessened sentence. *Id.* at 21–22. Additionally, the Court held that even if counsel should have questioned Gadson more vigorously about the issue, there was no prejudice to Bowman based on the PCR court's credibility determination that Gadson would have testified that he thought he was avoiding a life sentence, not a death sentence. *Id.* at 22.

C. Travis Felder

In Bowman's third argument, he argues that the Court failed to follow the Supreme Court's decision in *Wilson v. Sellers*, 138 S. Ct. 1188 (2018) and improperly departed from the state court's rationale in concluding that counsel were not

¹ To the extent that that Bowman's argument relies on an assertion that the PCR court's order should be discounted because the PCR court simply adopted the State's proposed order without engaging in its own fact-finding, the Fourth Circuit has foreclosed this argument. *See Young v. Catoe*, 205 F.3d 750, 755 n.2 (4th Cir. 2000) ("[T]he adoption of one party's proposed findings and conclusions is a practice with which we have expressed disapproval on a number of occasions. Nonetheless, the disposition of a petitioner's constitutional claims in such a manner is unquestionably an 'adjudication' by the state court. If that court addresses the merits of the petitioner's claim, then § 2254(d) must be applied." (citations omitted)).

ineffective in their questioning of Felder about his involvement in the arson. To the contrary, the Court followed the procedure embraced by *Wilson* that a federal habeas court must “train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner’s federal claims, and . . . give appropriate deference to that decision. *Wilson*, 138 S. Ct. at 1191–92.

Bowman appears to take issue with the Court’s statement that “counsel could have made a different strategic decision.” See ECF No. 92 at 4 (quoting ECF No. 84 at 28). He draws a conclusion that the Court did not reach. The Court’s conclusion was that, although counsel could have interrogated Felder more extensively about his involvement in the arson, there is a reasonable basis to conclude that his decision not to do so satisfied *Strickland*’s standards.

This conclusion did not depart from the PCR court’s rationale. The PCR court denied this claim after concluding that counsel had “a valid, reasonable strategic reason” for not presenting evidence that Felder purchased the gasoline because Felder would have testified that he purchased the gasoline at Bowman’s direction. R. p. 9862 (ECF No. 11-27 at 92). This Court then held that there was “a reasonable argument that counsel’s strategy did not ‘amount[] to incompetence under prevailing professional norms,’” ECF No. 84 at 28 (quoting *Harrington v. Richter*, 562 U.S. 86, 105 (2011), and that “Bowman has failed to establish that the PCR court’s denial of his claims in Ground 2 was contrary to or involved an unreasonable application of clearly established federal law, or was the result of unreasonable factual findings.” *Id.* Far from departing from the PCR court’s rationale, the Court considered the PCR

court's rationale and concluded that Bowman was not entitled to relief under § 2254(d) because the PCR court's analysis satisfied the relevant standard. This is the procedure embraced by *Wilson*.

D. Hiram Johnson

In Bowman's fourth argument, he argues that the magistrate judge improperly added his own additional findings as a justification for counsel's actions in not further questioning Johnson regarding his statements to police. But as the State points out, the Court did not rely on these "findings" in its order. The PCR court credited counsel's argument that he did not cross-examine Johnson on this issue because counsel did not want to risk Johnson repeating in front of the jury Bowman's incriminating statement that he had killed the victim. The PCR court also concluded that there was no prejudice because Johnson had previously told police about Bowman's admission. The Court again followed *Wilson* in concluding that the PCR court's analysis met § 2254(d)'s standards.

E. *Brady* violations

In Bowman's fifth argument, he argues that the Court placed an improper burden on him regarding the asserted *Brady* violations. He says that "[n]othing in the pretrial records indicated that trial counsel should have known about Gadson's mental health treatment and neither the state court nor this Court indicate how counsel could have known to look for the mental health records." ECF No. 92 at 6. To the contrary, the PCR court concluded that counsel could have reviewed the public

court order in Gadson's case that ordered the evaluation and then submitted a subpoena to obtain the report. R. p. 9831 (ECF No. 11-27 at 61). Then, this Court concluded that the PCR court did not unreasonably apply federal law in concluding that there was no *Brady* violation because Bowman could have obtained the report by other means. ECF No. 84 at 39. This was a proper conclusion.

F. Conflict of interest

In Bowman's sixth argument, he argues that the Court improperly adopted the magistrate judge's finding regarding the conflict of interest argument. But as the State points out, he failed to object to the Report's conclusions on this ground. Furthermore, as the magistrate judge pointed out in the Report, he did not respond to the State's motion for summary judgment on this claim. Accordingly, he has waived consideration of this argument. *See Martin v. Duffy*, 858 F.3d 239, 245 (4th Cir. 2017); *Wilson v. Dryvit Sys., Inc.*, 71 F. App'x 960, 962 (4th Cir. 2003).

G. Prison conditions evidence

In Bowman's seventh argument, he relies on the Fourth Circuit's decision in *Sigmon v. Stirling*, 956 F.3d 183 (4th Cir. 2020), which was issued after this Court issued its order denying his petition. He says that *Sigmon* requires the Court to reconsider its ruling regarding the admission of prison conditions evidence. The Court has reconsidered its ruling in light of *Sigmon*, but habeas relief is not warranted because *Sigmon* is meaningfully distinguishable.

Sigmon's and Bowman's cases start out similarly. Both are South Carolina

state habeas petitioners who claimed that their counsel were ineffective in failing to object to prison conditions evidence elicited during the State's cross-examination of a defense expert in prison adaptability. But where they diverge is that in *Sigmon*, the record was unclear about whether counsel knew that his questioning was opening the door for the State to introduce otherwise-inadmissible prison conditions evidence. *See Sigmon*, 956 F.3d at 193. That is not so here, as the PCR court recognized that counsel made the strategic decision to present testimony about the harshness of a sentence of life without parole, knowing that he was opening the door for the State to introduce evidence of the less-harsh aspects of prison life. Supp. R. pp. 107–11 (ECF No. 11-32 at 109–13). That is precisely the kind of strategic decision that is protected and allowed by *Strickland*.

As to prejudice, Bowman's arguments were already considered in the order denying his petition and he has not set forth any new argument. He may not agree with the PCR court's or this Court's evaluation of his argument, but it was properly considered and addressed in the respective orders.

H. Evidentiary hearing on Grounds 11 (closing argument) and 12 (mitigation evidence)

In Bowman's eighth argument, he says an evidentiary hearing on Grounds 11 and 12 is warranted because he provided an affidavit from PCR counsel saying that he didn't have a strategic reason for not raising those issues. But to overcome the procedural default of an ineffective assistance claim, a habeas petitioner must show both that the ineffective assistance claim against trial counsel is substantial and that

PCR counsel was ineffective under *Strickland* in failing to raise that issue. *See Martinez v. Ryan*, 566 U.S. 1, 14 (2012). The affidavit from PCR counsel does not impact the analysis of whether the claims against trial counsel are substantial.

The Report and this Court's order discussed in detail the merits of Bowman's underlying claims against trial counsel and concluded that these claims were not substantial. He has not set forth an adequate basis to reconsider that decision. Furthermore, as both the magistrate judge and this Court concluded, the record does not warrant a conclusion that PCR counsel was constitutionally ineffective. *See* ECF No. 84 at 66, 72. Thus, the Court concluded that both PCR counsel and trial counsel satisfied *Strickland's* standards.

Finally, as the Court noted in its order and as the Fourth Circuit later recognized in *Sigmon*, "where documentary evidence provides a sufficient basis to decide a petition, the court is within its discretion to deny a full hearing." *Sigmon*, 956 F.3d at 198 (citation omitted). Consistent with *Sigmon*, the Court considered whether a hearing would enable Bowman to prove his claims such that he would be entitled to habeas relief. The Court concludes that it would not. The substance of his claims is set forth in the affidavits he filed, which the Court accepted as true for purposes of this motion, but for the reasons set forth in the prior order and pursuant to *Martinez*, the Court concludes that these claims are not substantial and PCR counsel satisfied *Strickland's* standards.

II. Conclusion

For the reasons above and in the order dismissing Bowman's § 2254 petition,

the Court concludes that he has not set forth sufficient grounds to cause the Court to alter or amend its prior order. His motion for reconsideration, ECF No. 91, is **DENIED.**

IT IS SO ORDERED.

s/ Terry L. Wooten
Terry L. Wooten
Senior United States District Judge

August 7, 2020
Columbia, South Carolina