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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION

Appellate Case No. 2024-002113

MARION BOWMAN, JR., SK #6006,

Petitioner,

v.

BRYAN P. STIRLING, Commissioner, South Carolina Department of Corrections,

Respondent.

REPLY TO RETURN TO PETITION FOR A WRIT OF HABEAS CORPUS

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Petitioner, Marion Bowman, by and through undersigned counsel, submits this Reply to Respondent's Return to Petition for a Writ of Habeas Corpus ("Return"). Respondent misconstrues the scope of this Court's habeas review in its original jurisdiction and the record and evidence supporting Bowman's claims for relief. Failure to remedy the *Brady*[1] violations that occurred at Bowman's trial, the ineffective assistance of counsel he received because of his attorney's racial prejudices, and his disproportionate sentence when taking into account his positive growth in more than twenty years on death row, would render Bowman's execution a denial of fundamental fairness shocking to the universal sense of justice. *Butler v. State*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990). To prevent this unjust execution, this Court should grant Bowman's Petition and adjudicate the underlying merits of Bowman's claims.

I. THIS COURT HAS THE AUTHORITY TO, AND SHOULD, REVIEW BOWMAN'S *BRADY* CLAIMS.

Respondent asserts this Court is procedurally prohibited from considering Bowman's *Brady* claims—as to guilt because they have been litigated previously and as to sentencing because they have not been litigated previously. Neither is a correct interpretation of the scope of habeas review in this Court's original jurisdiction. This Court has recognized that capital defendants are entitled to additional safeguards because of the gravity of the sentence, and, therefore, continues to maintain the authority to grant relief through the writ of habeas corpus even after the exhaustion of other procedural remedies. *See State v. Torrence*, 305 S.C. 45, 71, 406 S.E.2d 315, 329 (1991).

a. The Claims that the State Withheld Evidence in Violation of *Brady*, Denying Bowman a Fair Trial at the Guilt-or-Innocence Phase, Are Properly Before the Court.

This Court has never addressed Bowman's guilt phase related *Brady* allegations, which Bowman raised in post-conviction relief (PCR) proceedings, but this Court denied certiorari. In a

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

similar case—that of Richard Tucker—this Court exercised its power to prevent a wrongful execution, after other traditional appeals had been pursued unsuccessfully, via the writ of habeas corpus. *Tucker v. Catoe*, 346 S.C. 483, 552 S.E.2d 712 (2001) (per curiam); *see also Green v. Maynard*, 349 S.C. 535, 537-38, 564 S.E.2d 83, 84 (2002) (granting a stay of execution to consider a claim that had been raised on rehearing following direct appeal and "throughout petitioner's habeas proceedings").

The procedural posture of the issue raised in Tucker's habeas petition is nearly identical to that of Bowman's guilt phase *Brady* allegations. Tucker's trial counsel lodged a contemporaneous objection to the *Allen*[2] charge at trial, and then appellate counsel raised the issue on direct appeal. This Court found the assertion of error procedurally barred because appellate counsel's argument was not consistent with the objection made by trial counsel. 346 S.C. at 488, 552 S.E.2d at 715. In PCR, the circuit judge denied a claim of ineffective assistance of appellate counsel for not raising the issue that was preserved, finding that appellate counsel's performance was not deficient. *Id.* at 489, 552 S.E.2d at 715. This Court denied certiorari, declining to review the claim raised in PCR. This Court, however, still deemed the issue habeas worthy stating: "[a]s the foregoing demonstrates, this Court has never addressed petitioner's allegation that the *Allen* charge was unconstitutionally coercive on the merits."[3] *Id.*

Given that Bowman's case, like *Tucker*, is a capital case, review of Bowman's guilt phase related *Brady* allegations is especially important. As the Court recognized in *Tucker*: "the

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[2] *Allen v. United States*, 164 U.S. 492 (1896).

[3] Notably, in granting habeas relief, this Court relied on a case providing the "definitive . . . decision on the constitutionality of an *Allen* charge" that was decided before Tucker's trial even occurred. *See id.* at 491, 552 S.E.2d at 716 (citing *Lowenfield v. Phelps*, 484 U.S. 231 (1988)). Thus, claims that were available, and even litigated, prior to the habeas corpus proceedings maybe be considered by this Court.

qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." 346 S.C. at 491, 552 S.E.2d at 716 (quoting *Lowenfield v. Phelps*, 484 U.S. 231, 238-39 (1988)). For this reason, the Court should grant the writ and examine—for the first time—the impeaching evidence the State failed to turn over to Bowman's trial counsel and, therefore, was not presented to the jury when determining whether the State proved Bowman guilty. As discussed in detail in Bowman's Petition, the impeaching evidence went directly to undermine the credibility of the key witnesses against Bowman, including Gadson, the only witness who connected Bowman to the murder crime scene. Petition, 15–24.

b. **The Claims that the State Withheld Evidence in Violation of *Brady*, Denying Bowman a Fair Trial at the Sentencing Phase, are Properly Before the Court.**

This Court has also never considered the *Brady* allegations as they relate to Bowman's sentencing phase, because post-conviction counsel and initial federal habeas counsel did not seek such review.[4] In a similar case, this Court exercised its habeas authority to address claims that were not previously litigated. In *Butler v. State*, this Court granted habeas relief due to the trial judge's colloquy with the defendant, in violation of the Fifth Amendment, to the effect that while he would "charge the jury they could not consider the defendant's failure to testify, the jury would most likely ignore this instruction." 302 S.C. 466, 467, 397 S.E. 2d 87, 87 (1990). Recognizing it had reversed the conviction in two other capital cases where the same judge gave defendants the same admonition after Butler's case was decided on direct appeal, this Court concluded—despite a lack of an objection at trial and the failure to raise the issue on direct appeal and in state and federal post-conviction proceedings—that Butler's conviction should be reversed because there had been a "'violation, which, *in the setting*, constitute[d] a denial of fundamental fairness shocking to the

[4] The sentencing issue was raised for the first time on appeal of the denial of federal habeas relief in the Fourth Circuit Court of Appeals.

universal sense of justice.'" *Id.* at 468, 397 S.E.2d at 88 (emphasis in original) (quoting *State v. Miller*, 84 A.2d 459 (N.J. Super. 1951)). The Court noted, "[a]though we do not condone the delay in calling this grave constitutional error to our attention, under the unique and compelling circumstances of this case we grant petitioner relief." *Id.*; *see also Tucker*, 346 S.C. at 489, 552 S.E.2d at 715 (reviewing a question of "reasonable deliberation" under S.C. Code Ann. § 16-3-20(C) never raised before and considered by this Court for the "first time").

In the unique circumstances of this case, where post-conviction relief counsel identified multiple *Brady* violations but failed to ask a court to consider their impact on the death sentencing determination and the overriding requirement of reliability in capital sentencing, this Court has the authority to, and should, remedy this grave constitutional error.

Regarding the merits of Bowman's sentencing-related claims, Respondent asks this Court to rely on the Fourth Circuit's review, Return 14, ignoring that the Fourth Circuit offered no analysis of the impact of the withheld impeaching evidence to the sentencing determination specifically.[5] Instead, the Fourth Circuit merely rejected the sentencing issues "for the [guilt phase] reasons already explained." *Bowman v. Stirling*, 45 F.4th 740, 758 n.7 (4th Cir. 2022). Thus, the court failed to recognize that the materiality analysis is different in the sentencing phase of a capital trial, where the focus is not simply on whether the State has proven guilt or a statutory aggravating circumstance. Because a jury considering a death sentence has already found the defendant guilty of murder and the existence of at least one statutory aggravating circumstance, S.C. Code §16-3-20, the sentencing phase focuses on "the particularized consideration of relevant aspects of the

[5] Respondent correctly notes that materiality to sentencing is not the only issue. Return at 15. Bowman recognized this fact and demonstrated both suppression and favorability as to each piece of withheld evidence in his Petition. *See* Petition at 16–17 (Sam Memo), 19–21 (Gadson mental health records), 21–22 (Johnson charges).

character and record" of the individual defendant and the circumstances of the offense, and not on his death-eligibility. *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976); *see also Williams v. Taylor*, 529 U.S. 362, 398 (2000) ("Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case.").

A determination that the *Brady* evidence was not material to Bowman's *guilt* in no way addresses whether that evidence created "a reasonable probability that at least one juror would have struck a difference balance" as to *sentence*. *See Wiggins v. Smith*, 539 U.S. 510, 537 (2003). That is particularly true here, where the State offered little in aggravation save evidence of guilt dependent on dubious witnesses, including two witnesses whose credibility would have been undermined by the evidence the State failed to disclose.[6] *See* App. 4955 ("But most of the evidence of aggravating circumstances came out in the first phase of the trial. And you've heard it."). Then, when arguing for death, the State relied once again on the testimony of *Gadson and Johnson*, whose impeachment material it suppressed. With the suppressed evidence, Bowman's counsel could have presented evidentiary support for the fact that Gadson himself confessed to committing the murder and was framing Bowman, that Gadson had memory and drug addiction issues, and that Johnson had pending charges giving him incentive to provide the State with helpful testimony against Bowman. This impeachment evidence could have been especially effective in light of Gadson and Johnson's changing statements over time. *See, e.g.*, Petition at 5 n.6; *id.* at 23 n.18. *Cf. State v. Smith*, 309 S.C. 442, 448, 424 S.E.2d 496, 499 (1992) (finding it was not harmless error to exclude evidence of a witness's prior inconsistent statements where the "credibility of witnesses

[6] The Solicitor's full closing argument is recorded on Appendix pages 4949–75. During the closing argument, he spends less than one page talking about Bowman's criminal record. App. 4960–61.

was crucial to both the prosecution and defense"); *State v. Salazar*, 527 P.3d 693, 698 (N.M. Ct. App. 2022) (recognizing the inconsistency of witness statements in and of themselves call the witness's credibility into question).[7]

Instead, the Solicitor was able to rely on Gadson and Johnson unconfronted by available contradictory evidence. The Solicitor began his argument by asserting the evidence created "a picture of a course of conduct so devoid of conscience, so bent on malice, so lacking in basic human compassion that it cries out for the death penalty." App. 4952. He next described what allegedly happened at the crime scene. App. 4952–55. Gadson was the only witness who testified he was present at the crime scene, making the Solicitor's argument about Bowman's actions there entirely dependent on Gadson's testimony. Relying on Gadson's testimony to describe the allegedly aggravated murder, the Solicitor argued the victim "begged for her life" while "she was thinking about her baby" in her last moments. App. 4954, 4969. The Solicitor went on to specifically reference Gadson's guilt phase testimony, arguing that Gadson's testimony showed Bowman "enjoyed the act of murdering Kandee Martin." App. 4969.

Then, the Solicitor explicitly reminded the jury of Johnson's testimony from the guilt phase, arguing that Bowman laughed about the murder because "[h]e thought it was funny." App. 4969; App 4974 ("he laughed about it"). The centrality of these compromised witnesses to the state's case for death cannot be ignored. *Monroe v. Angelone*, 323 F.2d 286, 314 (4th Cir. 2003) (considering, in determining materiality, the prosecution's closing argument emphasizing witness

[7] In an analogous circumstance, the State's chief prosecutor and Attorney General Alan Wilson condemned the conviction of President-Elect Trump on the basis of convicted-felon Michael Cohen's testimony given that "[h]e's [Cohen] lied to the media, he's lied to the organization, he's lied to Congress. He's lied to the court." Sophie Brams, *SC Attorney General calls Trump trial a 'travesty of justice' outside Manhattan courthouse*, News 2, *available at* https://www.counton2.com/news/south-carolina-news/sc-attorney-general-calls-trump-trial-a-travesty-of-justice-outside-manhattan-courthouse/.

testimony that *Brady* evidence would have undermined); *see also Strickler v. Greene*, 527 U.S. 263, 295 (1999) (finding impeachment evidence was not material where the witness's testimony "was not relied upon by the prosecution at all during its closing argument at the penalty phase"). This Court should, therefore, exercise its habeas authority and correct this grave constitutional error that is shocking to the universal sense of justice.

II. THE RECORD BEFORE THIS COURT REVEALS TRIAL COUNSEL'S RACIST ATTITUDES ADVERSELY AFFECTED HIS REPRESENTATION OF BOWMAN.

Respondent professes outrage over Bowman's argument that his trial counsel's abrupt insertion of racist arguments before the jury was motivated by racial animus, calling it "inflammatory" and without basis. Return 17. Respondent alleges that Bowman did not cite any portion of the record demonstrating trial counsel's racist comments or biases during trial. *Id.* Respondent asserts further that trial counsel's racist arguments were simply attempts to defuse the issue because he "believed that the jury might see . . . race" as an issue and because he had a "belief that the State was trying to bring race into the equation." *Id.* at 19-20. None of this is true.[8]

As detailed in the Petition, trial counsel failed to object to the trial testimony about Bowman's DNA in vaginal swabs from Ms. Martin's autopsy, even though there was no dispute that Bowman and Ms. Martin knew and had seen one another in the hours before her death, and even though Bowman was not charged with any sexual offense. In closing arguments during the trial, the Solicitor's only mention of DNA evidence was that it proved blood recovered from the

[8] And, if it were true, then counsel should have availed himself of the opportunity to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias during voir dire because "the risk that racial prejudice may . . . have infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized." *Turner v. Murray*, 476 U.S. 28, 36 (1986). This type of voir dire can reveal honest jurors that will disclose their own racial biases. *See, e.g.*, *State v. Green*, 301 S.C. 347, 351-53, 392 S.E.2d 157, 159-60 (1990) (juror should have been excused for cause when he revealed that he might be influenced by race in sentencing where the defendant was black and the victim was white because of prior experiences he and his older sister had in being attacked by black guys).

road where the murder was committed was Ms. Martin's. App. 4470. When trial counsel rose to give closing argument, there had been no mention of race during jury selection, the trial evidence, or the Solicitor's argument. Nonetheless, during trial counsel's closing guilt phase argument, he argued that if Ms. Martin had been afraid when a car of "white people" went by, as Gadson testified, then she would have flagged them down rather than jumping in the woods because after all she was "a young, white lady and she's out there with two young, black males." App. 4495.[9] The implication, of course, was that Gadson's testimony was also incredible because Ms. Martin, the "young, white lady," would not have been out on a rural road voluntarily with "two young, black males." It was also trial counsel who argued that the DNA evidence showed that Bowman and Ms. Martin sometimes "had relations," App. 4505, when, again, Bowman was not charged with any sex offense. Trial counsel told the jury that this evidence was presented "to try to poison you to get you angry," *id.*, when, in fact, it was trial counsel making the argument after making not objection to the admission of the DNA/vaginal swab evidence during the trial.

Later, in his sentencing phase closing argument, trial counsel referenced defense testimony to imply that Bowman and Ms. Martin had consensual sexual intercourse in a bathroom on the afternoon before her death, App. 4830-31, then apologized to the jury for "anger[ing]" them with

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[9] The complete argument on that point is as follows:

> Gadson accordingly testifies that Miss Martin is so frightened that she jumps in the woods. That's Mr. Judy. They're white people. I hate to say this, and, again, please, don't hold this against Mr. Bowman, if anybody was frightened, why did they jump in the bushes? Why not flag the car down, jump the car? Does that make any sense to you? What is the reason why anybody would jump in the bushes if they're afraid?
>
> Especially Miss Martin is a young, white lady and she's out there with two young, black males. . . .

Id.

that suggestion. App. 5001. Respondent suggests that counsel was merely apologizing for raising his voice. Return 17 n.13. Bowman disagrees with that analysis. The record speaks for itself. Regardless, trial counsel's repeated suppositions that a white woman voluntarily in the company of a black man late at night on a dirt road or consensually having sexual relations with a black man would (or should) infuriate the jury clearly brought race into the jury's considerations with his closing trial and sentencing arguments.

Trial counsel and Respondent would have this Court believe that trial counsel wanted the DNA/vaginal swab in evidence to show that "this man would not hurt that little girl because he cared about her and that she was an intimate friend of Mr. Bowman's." Return 21 (quoting trial counsel). The introduction of this evidence did nothing to further establish their relationship, as multiple witnesses testified they were friends who were often seen together. App. 3748, 4033, 4079. Moreover, trial counsel's claim that he saw the DNA evidence as somehow exonerating is belied by his repeated insinuations that a sexual relationship between Bowman and Ms. Martin was inexplicable, shameful, "dirty," App. 7480-81, or enraging, App. 4505, 5001.

Respondent argues that trial counsel's references to Ms. Martin as a "little girl" or a "little white girl" are taken out of context, on page 35, note 26 of Bowman's Petition and bends over backwards to say that trial counsel managed to say nothing racist in his PCR testimony. Return 19-22.[10] While doing so, however, Respondent ignores counsel's spontaneous outburst during his PCR testimony, when he addressed Bowman directly from the witness stand, asking:

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[10] Respondent also complains:

> The only citation to the trial [for inserting race into the case] made by the Petition, has Bowman inserting racial contrast by way of an unsubstantiated bracketed inference: "The references to Martin's picture and Bowman, as he appeared in court, is clearly a head-nod to Martin being a 'little [white] girl' with blonde hair." Moreover, the reference to "blonde hair" was not even bracketed by Petitioner.

> Marion, what are you doing on Nursery Road at that time of the morning with a white female and African American males in Dorchester County? Really. This is 2001 but what good are you doing out there on a dirt road?

App. 7126. As Bowman's PCR counsel attests, this eruption came in the middle of trial counsel's testimony, and trial counsel "turned directly to Marion at the petitioner's table" when these statements were made. Exh. 13 at 2.

Likewise, Respondent offers no explanation for why trial counsel pairs his references to Ms. Martin as a "little girl" or "little white girl" with references to Bowman as an "African American" or black "man." Ms. Martin was approximately one year older than Bowman. Petition 39 n.6. Trial counsel's inversion of their ages, and his constant harping on their different races during his PCR testimony, echoes the ugliest and oldest of racist tropes: black men sexually preying on young white girls, which has been used to invoke fear and hatred and to justify violent punishment for centuries. See, e.g., the silent movie "Birth of a Nation" (1915) that was based on a novel about the Ku Klux Klan (KKK).[11] What Respondent cannot provide is any reason for trial counsel's "racially loaded"[12] references to Bowman's race or Ms. Martin's, to his distinctions

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Return 17 (citing Petition 36). First of all, "blonde hair" was not bracketed because that was not in quotation marks in the Petition. It was not intended or represented to this Court as a direct quote. Second, counsel may not have said "white" or "blonde hair" but he pointed to a color picture of Ms. Martin from sentencing. Unless one has vision problems or color-blindness, it is inescapable in looking at either of the photos of Ms. Martin admitted during the victim impact testimony that she is both "white" and has "blonde hair." Exh. 12.

[11] https://en.wikipedia.org/wiki/The_Birth_of_a_Nation.

[12] For example, referring to a black defendant as King Kong and his girlfriend as the "blond lady" was a "racially loaded" reference to the movie King Kong that "involved a giant ape who escaped from captivity, kidnapped a white woman, and went on a murderous rampage." *Bennett v. Stirling*, 170 F. Supp. 3d 851, 865 (D.S.C.), *aff'd*, 842 F.3d 319 (4th Cir. 2016). These references unconstitutionally injected race in Bennett's capital sentencing, warranting reversal of his death sentence. *Id.*

between them as "little girl" and "man," or for distinction at all between the two, other than their individuality.[13] *Cf. United States v. Runyon*, 707 F.3d 475, 493 (4th Cir. 2013) (Officer's comments about Runyon's race, "ethnicity and religion," had no proper place in capital sentencing proceeding); *State v. Tomlin*, 299 S.C. 294, 384 S.E.2d 707 (1989) (prosecutor referred to black juror having "shucked and jived" when he walked to the microphone when called as one of several reasons to use a peremptory strike against him; "[t]he use of this racial stereotype is evidence of the prosecutor's subjective intent to discriminate" against black jurors). "The Constitution cannot control such prejudices but neither can it tolerate them." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (holding that concern that a white child might be subjected to "pressures and stresses" caused by living with a black stepfather was an improper consideration in deciding which of the child's white biological parents should have custody of the child); *see also Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 208 (2023) (quoting several prior cases) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.").

In addition, there is more to Bowman's claim than simply trial counsel making racial arguments before the jury. Bowman also asserted very clearly that "counsel's failure to make adequate, truthful, mitigating arguments on Bowman's behalf because counsel was infected by his own racism to the extent that he did not believe his black client and did not want to present credible evidence of Martin's drug addiction, history of pawning personal items for drugs, and prostituting

[13] Or perhaps the reference was also a reference to the concern that societal beliefs or laws prohibiting interracial sexual relationships or marriages involving white persons are "measures designed to maintain White Supremacy." *Loving v. Virginia*, 388 U.S. 1, 8 (1967) (reversing criminal convictions of a white man and black woman prosecuted under a Virginia statute criminalizing interracial marriages).

for drugs that counsel viewed as degrading and slandering the 'little white girl' victim or pitting the white girl against the 'black man' accused of killing her." Petition 29-30.

Respondent makes no effort to even address this argument, set out in full in the petition, other than to say that numerous claims of ineffective assistance of counsel were raised in the PCR court and found to have no merit. Likewise, Respondent asserts that this Court and the federal courts also reviewed and denied these claims so they are without merit and procedurally barred. Return 16. While it is true that numerous claims of ineffective assistance of counsel were previously argued, THIS claim about counsel being impacted by race in his decision-making has never been previously made. And, as addressed, in section I, whether the claims have been previously adjudicated or not is not an impediment or procedural bar to this Court's consideration of the claim in its original jurisdiction.

This Court should grant review and address the merits where this is not strictly a run-of-the-mill ineffective assistance of counsel claim under *Strickland v. Washington*, 466 U.S. 668 (1984). It also involves a clear conflict of interest where counsel encouraged Bowman to plead guilty despite his assertion of innocence simply because counsel believed that Bowman would be convicted on the basis of his race alone. Likewise, once in trial and sentencing, counsel refrained from making trial and sentencing arguments on Bowman's behalf because of his own racist opinions and beliefs that he did not want to "hurt[] the victim." App. 7363-64.

The United States Supreme Court has long recognized that "[w]here a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 270 (1981); *see also Rubin v. Gee*, 292 F.3d 396 (4th Cir. 2002). When a conflict of interest is established that "adversely affected . . . counsel's performance," a petitioner is entitled to relief. *Mickens v. Taylor*, 535 U.S.

162, 174 (2002); *see also Cuyler v. Sullivan*, 446 U.S. 335, 348-49 (1980) (holding that, absent objection at trial, a defendant must demonstrate that "a conflict of interest actually affected the adequacy of his representation").

Appointed counsel "owes the client a duty of loyalty," *Strickland*, 466 U.S. at 688. which is "perhaps the most basic of counsel's duties." 466 U.S. at 692. And, "an attorney who abandons his duty of loyalty to his client may by so doing create a conflict of interest." *Fraser v. United States*, 18 F.3d 778, 782 (9th Cir. 1994).

> In fact, an attorney who is burdened by a conflict between his client's interests and his own sympathies to the prosecution's position is considerably worse than an attorney with loyalty to other defendants, because the interests of the state and the defendant are necessarily in opposition.

Id. (quoting *United States v. Swanson*, 943 F.2d 1070, 1975 (9th Cir. 1991)); *see also Nance v. Ozmint*, 367 S.C. 547, 557-58, 626 S.E.2d 878, 883 (2006) (where counsel "abandoned his role as defense counsel and bolstered the state's argument in capital case that the defendant was "a sick man" who had done "sick things," counsel was "not acting as defense counsel and failed 'to function . . . as the Government's adversary'").

While a petitioner must typically prove prejudice to establish ineffective assistance of counsel, an exception to that rule where prejudice is presumed is when "counsel is burdened by an actual conflict of interest" because in that instance counsel has "breach[ed] the duty of loyalty." *Id.* (citing *Sullivan*, 446 U.S. at 345-50).[14] Moreover, this Court should interpret the right to

[14] *See also Gonzales v. State*, 419 S.C. 2, 795 S.E.2d 835 (2017) (finding an actual conflict of interest that adversely affected counsel's representation where counsel represented the juvenile defendant in a drug trafficking case and simultaneously represented the defendant's mother's boyfriend on other drug-related charges); *State v. Gregory*, 364 S.C. 150, 153-54, 612 S.E.2d 449, 450-51 (2005) (holding that where counsel represented the defendant and the assistant solicitor who was prosecuting him simultaneously in a separate divorce action, counsel "owed duties to a party whose interests were adverse" to his criminal defendant client and, thus, there was an actual conflict of interest which required no additional showing of prejudice in order for counsel's motion

counsel under Article I, Section 14, of the South Carolina Constitution as requiring no showing of prejudice or adverse affect on counsel's conduct upon finding an actual conflict of interest based on counsel's racial and religious biases, as the Massachusetts Supreme Judicial Court did in *Commonwealth v. Dew*, 210 N.E.3d 904, 913 (Mass. 2023).

Nothing could present a clearer cut case of a conflict of interest than refraining from making arguments for Bowman because of counsel's own racist beliefs and concern for the victim's reputation rather than his client's defense. As the United States Supreme Court has recognized, "The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence." *Turner*, 476 U.S. at 35. Moreover, "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *Id.* (quoting *California v. Ramos*, 463 U.S. 992, 998-99 (1983)). This Court should grant review, address the merits of the claim, and vacate Bowman's convictions and sentences.

III. THIS COURT SHOULD TAKE BOWMAN'S POSITIVE RECORD OVER THE PAST TWO DECADES INTO CONSIDERATION AND FIND BOWMAN'S DEATH SENTENCE IS EXCESSIVE.

Respondent argues simply that this Court is prohibited from granting "an entirely new review" of the appropriateness of Bowman's death sentence in light of evidence of his good character and behavior during his more than 22 years on death row. Return 25-26. Respondent misses the point, however, that the law and the scope of review in this Court's original jurisdiction is what this Court says it is, which is what Bowman argued in the Petition.

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to be relieved to be granted); *Commonwealth v. Dew*, 210 N.E.3d 904, 913 (Mass. 2023) (holding that counsel's demonstrated bias against black people and Muslims, where his client was black and Muslim, was a conflict of interest whose affect "on the attorney's representation of the defendant is likely to be pervasive and unpredictable").

Respondent does not even address that argument except, apparently in an attempt to rebut Bowman's argument of "good character," Respondent asserts that Bowman "has [not] expressed *remorse* for the crime." Return at 32 (emphasis in original). Bowman has maintained his innocence from the time of his arrest to the present. He cannot express remorse for a crime he did not commit. Moreover, being remorseful or not, has no impact at all on Bowman's evidence concerning his good character and adaptability to confinement.

CONCLUSION

For the reasons stated above and in Bowman's Petition, and to ensure reliability in this capital case before Bowman's execution, this Court should issue the writ of habeas corpus as to Bowman's convictions and death sentence and review the merits of his claims to ensure his execution does not take place despite a "denial of fundamental fairness" resulting from the unique circumstances of this case.

Respectfully submitted,

s/ Lindsey S. Vann

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