

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dorchester County
James E. Lockemy, Circuit Court Judge

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S.C. Supreme Court

MARION BOWMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213468

AMENDED PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1.

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2.

Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to investigate and prepare for the impeachment of Travis Felder and by failing to impeach the testimony of Travis Felder in any meaningful way, including impeaching Felder with a videotape that would have shown Felder lied to the jury about buying the gas to burn the decedent's car, impeaching Felder on bias with his original charges, and impeaching Felder with his prior inconsistent statements?

3.

Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to investigate and prepare for the impeachment Hiram Johnson and by failing to impeach the testimony of Hiram Johnson by cross-examining Johnson on his prior inconsistent statement which, critically, did not include his allegation at trial that petitioner confessed to the murder?

4.

Whether petitioner is entitled to a new trial because the state withheld information necessary for impeachment and necessary for defense in violation of petitioner's due process rights under the Fourteenth Amendment and under the rules of discovery, those items being a memorandum of a law enforcement interview with Ricky Davis who heard Gadson confess to the murder, Gadson's mental health evaluation, and the fact that Hiram Johnson had unindicted pending charges at the time of his testimony?

5.

Whether trial counsel rendered ineffective assistance of counsel because counsel had a conflict of interest between two of her clients -- Petitioner Bowman and Ricky Davis --that caused counsel to fail to call Ricky Davis as a witness, despite Davis' statement that exculpated Petitioner Bowman and established Gadson shot the victim?

6.

Whether defense counsel was ineffective for failing to object to the solicitor's examination of James Aiken regarding favorable prison conditions and recreational facilities available to inmates since this Court had long ago in *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984), held such evidence was impermissible because it did not relate to the character of the defendant or the nature of his crime. This evidence was highly prejudicial in the eyes of the jury, and the failure to object to it properly at trial also barred consideration of this winning issue on petitioner's direct appeal?

7.

Whether petitioner's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under state law were violated because the trial judge failed to properly consider his application as evidenced by the PCR court's wholesale adoption of the state's proposed order?

STATEMENT OF FACTS

The state's key witnesses against Petitioner Marion Bowman at trial were James Gadson, Travis Felder and Hiram Johnson. Superficially, the case presented through these witnesses by the solicitor appeared rather straightforward. As will be seen infra powerful impeaching evidence against each of these three witnesses existed that defense counsel did not use because of incompetence or because the solicitor withheld impeaching evidence from them.

The state's theory at trial was that petitioner and the decedent, Kandee Martin¹, were friends. Gadson testified that on the day decedent was shot he had been drinking gin for most of the day, and he was "feeling in good shape." App. 3992, l. 11 – 3993, l. 25. Gadson said he was with petitioner and the decedent that evening. The decedent was driving. They went to the Horizon E-Z shop where they pumped gas, and then drove away without paying. App. 3994, l. 3 – 3995, l. 2.

Gadson claimed petitioner told the decedent where to drive and that she drove onto Nursery Road. "She stopped, cut the car off, cut the lights off, we got out." App. 3995, ll. 3-21.

Gadson maintained petitioner walked away from the car and that petitioner said he was going to kill the decedent "because she was wearing a wire." App. 3998, l. 4 – 3999, l. 3. Gadson testified that a car drove by and they "jumped in the woods." App. 3999, ll. 16-21.

After the vehicle passed by, the decedent started walking back to the car and petitioner followed her. Gadson claimed he heard a gunshot and saw the decedent running back towards him. Gadson claimed petitioner shot at the decedent two times and "she fell to the ground," then petitioner dragged her body into the woods. App. 4001, l. 5 – 4012, l. 24.

¹ Kandee is also spelled "Candee" in other places in the record. For ease of reference she is consistently referred to as "Kandee."

Later that night Gadson went to the Allen Murray Club with petitioner, Hiram Johnson, and another man in the decedent's car. Hiram Johnson would later testify that petitioner was trying to sell the decedent's car at the Allen Murray Club late that night. App. 4017, l. 4 – 4018, l. 17; App. 4067, ll. 3-20.

The state presented evidence that Travis Felder was with petitioner when petitioner burned the decedent's car. Felder claimed that petitioner came to the Villa Apartments and told him "I need to park this car." Felder testified that he only followed petitioner while petitioner drove the decedent's automobile to Nursery Road. App. 4092, l. 6 – 4096, l. 19.

Felder maintained when they arrived at Nursery Road, petitioner pulled the decedent's dead body out of the woods, put it in the trunk, and set the car on fire. App. 4096, l. 13 – 4100, l. 14.

Hiram Johnson's role during the trial was to testify that petitioner was trying to sell the decedent's car that evening, and that on the way back from the Allen Murray Club petitioner told him: "I killed Kandee, heh, heh, heh." Johnson claimed petitioner had a gun in his lap at the time. App. 4067, l. 25 – 4068, l. 18.

Marva Hardee-Thomas, ("Thomas") who is presently suspended from the practice of law by this Court, represented petitioner along with Norbert Cummings ("Cummings"). Thomas later acknowledged during PCR that she did not know what the guilt phase strategy was, and she referred any questions about it to Cummings. As to the penalty phase strategy she again stated: "You're going to have to ask Mr. Cummings." App. 7307, l. 5 – 7308, l. 10; App. 7325, ll. 6-23. The defense's mitigation investigator and social work expert testified they had no idea what the strategy was for the penalty phase. App. 6962, ll. 3-7; App. 6786, ll. 7-23. Thomas even wrote a letter to the jail, while she was a Dorchester County Public Defender, stating petitioner could call the Public

Defender's Office collect between "8:45 - 9:00" "concerning his capital case" but she added "[h]e is not allowed to contact me on a daily basis." App. 9170.

At the time Thomas represented petitioner, as will be seen infra, she also had an attorney-client relationship with Ricky Davis. Davis wrote a statement in 2001 that Gadson had confessed to Davis that he killed the decedent. In this statement Davis said Gadson admitted or bragged: "[T]hat he was the one that shot the girl and gave Petitioner the gun that was used and he said it didn't matter because Black [petitioner's nickname] family had got caught with the gun [anyway]." App. 8966.

As will be seen infra, Thomas candidly admitted a conflict of interest existed in her representation of both petitioner and Davis. Thomas explained the dual representation had her "trying to help Mr. Bowman but not hurt my aspect with Mr. Davis because I still had an ethical responsibility with him also." App. 7330, l. 18 – 7333, l. 6.

The defense failed to call Davis as a witness during petitioner's trial even though Davis was brought to the courthouse. Thomas did not remember even discussing Ricky Davis with petitioner, much less detailing the former attorney-client relationship she had with Davis to petitioner. App. 7294, l. 11 – 7296, l. 18. As will also be seen infra, Davis, after leaving the jail and when he was away from petitioner and Gadson, gave an additional statement to Solicitor Bailey's investigator, Sam Richardson, in which Davis stated that Gadson confessed in jail to "killing a girl." Davis told Richardson that petitioner never admitted shooting anyone, but Davis said Gadson later went back on his confession and claimed Petitioner shot her. App. 9122.

This statement was not turned over to the defense prior to trial. Bailey first tried to claim this statement was subject to the "attorney-client privilege." He then attempted to characterize the Richardson memorandum as work product. App. 7860, l. 12 – 7879, l. 18.

Solicitor Bailey also admitted he did not provide the defense with Gadson's mental health evaluation, and trial counsel Cummings confirmed he never received it. This report stated that Gadson reported hearing "voices" and "a little beeping noise." The report also recorded the fact that Gadson's testing showed he had memory problems which was not unusual given his admission of smoking "six blunts of cannabis on a daily basis." App. 8960.

As seen above, Travis Felder testified during petitioner's trial that he went to the crime scene and saw petitioner pull the decedent's dead body out of the woods, put her body in the trunk, and set the decedent's car on fire. During the PCR hearing testimony was adduced to show that Cummings failed to impeach Felder's story at trial, and he also failed to impeach Felder with the fact that Felder faced and feared the death penalty if he violated his plea agreement at the time of his trial testimony. Cummings admitted he knew at the time Felder testified during the state's case-in-chief that Felder purchased gasoline alone at the E-Z shop prior to the decedent's car being set on fire. Cummings had watched the videotape of Felder purchasing the gasoline with petitioner. Yet he did not impeach Felder with this serious omission where Felder claimed he was just a bystander. App. 7017, l. 15 – 7021, l. 21.

After petitioner had been convicted of murder, Cummings called Felder as a witness during the sentencing phase, when guilt was no longer an issue, to testify that he did purchase the gasoline that evening. When Felder was asked why he did not tell the jury that fact earlier, he told the solicitor: "You didn't ask." App. 4925, ll. 17-25.

When Felder was interviewed by the police he denied any knowledge of the decedent's murder. App. 6381, l. 17 – 6384, l. 16. After Felder was charged with murder and arson in 2001, he hired Charles Williams as his attorney. During plea negotiations, Felder's attorney sent a proffer letter to Solicitor Bailey. The proffer letter omitted both the fact that Felder bought the gasoline that

evening, and his claim that he saw petitioner put the decedent's body in the trunk of the car. App. 6384, l. 25 – 6390, l. 6; App. 9118.

At the PCR hearing, Cummings testified that he did not find out about Felder “cutting a deal” until just before the trial. The plea agreement allowed the solicitor to reinstate all of Felder's charges and seek the maximum penalty [death], “*and the defendant hereby waives any objection to the state seeking of the maximum penalty*” if Felder did not tell the “absolute truth.” App. 8971. (emphasis added). Cummings apologized at PCR for not cross-examining Felder on the issue of Felder of his sentencing exposure of death or life imprisonment, particularly where Felder never even went to prison. App. 7029, l. 10 – 7034, l. 25. Cummings also apologized for not impeaching Felder with his prior inconsistent statements and omissions. App. 7045, ll. 1-10.

As seen, Hiram Johnson testified at trial that petitioner confessed to him that he “killed Kandee, heh, heh, heh.” However, the jury never learned Johnson was a biased witness because of his pending charges -- from the same solicitor's office – that were not disclosed by Solicitor Bailey. App. 4068, ll. 4-18. Further, at the PCR hearing it was revealed that nowhere in Hiram Johnson's earlier statement to Detective Coker on April 5, 2001, did he claim Petitioner said “I killed Kandee, heh, heh, heh.” App. 9054. Johnson belatedly testified at PCR he thought petitioner was kidding when he said he killed the decedent, but he did not tell the jury during his testimony he thought petitioner was kidding. App. 6290, l. 10 – 6298, l. 10.

As will also be seen *infra*, Defense Counsel Cummings mistakenly thought that the penalty phase of petitioner's trial could focus on whether life imprisonment was really a harsh punishment or whether inmates lived rather relaxing lives in prison. Cummings reacted sarcastically when told that this Court had long held such evidence was improper: “Isn't that nice of them, but how else do

you argue about somebody having a chance to live in prison? I mean, I don't argue academically." App. 7449, l. 21 – 7450, l. 22.

When asked a question about the aggravating circumstance of kidnapping Cummings responded with a lecture to the petitioner:

Mr. Cummings: I want to say this out loud and with Marion [present], what are you doing on Nursery Road at that time of the morning with a white female and African American males in Dorchester County? Really. This is 2001 but what good are you doing out there on a dirt road? Okay. And we have all the homeowners calling us saying they heard shots, then they come out and they find a burning car. So, that's the way this thing portrayed. The fire department comes out, as you know. I have read this file backward and forward. If he's there he's a principal, if he's in the car. If he's not there, how does all these facts get known, how are all these facts to be told?

App. 7126, ll. 7-25.

ARGUMENT

1.

Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to investigate and prepare for the impeachment of Taiwan Gadson and by failing to impeach the testimony of Taiwan Gadson in any meaningful way, including, but not limited to, the fact that the state threatened Gadson with the death penalty in his plea agreement, how Gadson's prior inconsistent statements showed that his story changed, and the fact Gadson had access to the murder weapon.

Introduction

Taiwan Gadson ("Gadson") was the chief witness against petitioner at the trial. Gadson claimed that he witnessed petitioner shoot the decedent and drag her body into the woods. App. 4011, l. 20 – 4012, l. 2. Gadson's version of events went essentially unchallenged by the defense. The jury never heard that Gadson gave inconsistent statements to the police, that he had previously fired the pistol the state alleged was the murder weapon, and that Gadson was threatened with the death penalty. Had trial counsel not been ineffective and impeached Gadson with this information, there is a reasonable probability that Gadson would not have been believed and the outcome of the trial would have been different.

1. What the Jury Heard at Trial from Gadson

In order to understand the vast importance of any evidence that could be used to impeach Gadson, it is important to understand the centrality of his testimony to the state's case. Without Gadson, the state had very little evidence against petitioner.

At the time of his testimony, Gadson was twenty-three years old. App. 3980, ll. 8 – 9. He had lived in Branchville his whole life. App. 3980, ll. 12 – 13. He was in jail at the time of his

testimony. App. 3980, ll. 19 – 21. The state initially charged him with the decedent’s murder. App. 3980, ll. 22 – 24.

Gadson testified that the first time he saw petitioner on the day of the murder was early that morning. App. 3983, ll. 13 – 16. Petitioner was in the car with his sister, Yolanda Bowman, on their way to a meat market in St. George. App. 3983, ll. 17 – 21. Gadson went with Yolanda Bowman and petitioner to the meat market. App. 3984, ll. 2 – 3. Afterwards, they returned to Branchville to petitioner's house. App. 3984, ll. 14 – 17. Petitioner came out of the house “with a little limp.” App. 3984, ll. 18 – 25. Petitioner said he was walking that way because he had a gun in his pants and the gun was cold. App. 3985, ll. 1 – 9. Gadson saw the gun. App. 3985, ll. 10 – 12. Petitioner had a beer and a bag, took the beer out of the bag and put the gun in it. App. 3985, ll. 10 – 15.

Gadson claimed that he was with petitioner when petitioner purchased the gun. App. 3985, ll. 21 – 24. According to Gadson, petitioner purchased the gun approximately two weeks before the murder. App. 3986, ll. 1 – 3. The gun was a gray and black .380 High Point automatic pistol. App. 3986, ll. 6 – 8. Petitioner bought the gun from a “dude in Orangeburg.” App. 3986, ll. 12 – 13. A gun, state’s Exhibit 42, looked the same to Gadson as the one petitioner had on the day of the murder. App. 3987, ll. 5 – 10. Gadson never said anything about Felder being present when petitioner supposedly bought this gun. App. 3985, l. 19 – 3986, l. 25. Trial counsel failed to point out this inconsistency. App. 4101, ll. 9 – 15.

Yolanda Bowman then took them to the Villa Apartments in Branchville. App. 3987, ll. 11 – 25. They went to Hank Koger's house and started drinking. App. 3988, ll. 1 – 12. Gadson saw petitioner put his gun in a trash barrel. App. 3988, ll. 18 – 20. After petitioner returned from the store, petitioner started an argument with him about the gun. App. 3989, ll. 4 – 8. The

argument ended when Hiram Johnson retrieved the gun from nearby woods. App. 3989, ll. 16 – 20.

Gadson's claims about the gun at Hank Koger's house conflicted with the testimony of Hiram Johnson. Johnson testified that he hid the gun at Katrina West's house. App. 4060, ll. 5 – 8. Johnson testified that petitioner went to Katrina West's house, got his gun, and came back to Koger's house. App. 4060, ll. 12 – 19. Trial counsel failed to point out this inconsistency to the jury.

Gadson remained at Hank Koger's house. App. 3990, ll. 16 – 18. He next saw petitioner at approximately 7:30 PM. App. 3990, ll. 19 – 23. Petitioner was in the decedent's car. App. 3991, ll. 4 – 7. The decedent was driving. App. 3991, ll. 23 – 24. Gadson described her car as a "green Ford Escort." App. 3991, ll. 13 – 14. Petitioner supposedly called Gadson over and told him to get in the car. App. 3992, ll. 4 – 10. Gadson had been drinking gin and beer since 1:00 PM. App. 3992, l. 20 – 3993, l. 20. Gadson admitted he had drunk "a good little bit" of gin and "about five" beers. App. 3993, ll. 2 – 20. Gadson was intoxicated and "feeling in good shape." App. 3993, ll. 21 – 25.

Gadson got in the backseat of the decedent's car and they went to the Horizon EZ Shop. App. 3994, ll. 3 – 7. They stole some gasoline. App. 3994, ll. 8 – 11. They left the store and the decedent drove them down Highway 78. App. 3994, ll. 12 – 14. Petitioner was telling the decedent where to turn. App. 3994, ll. 19 – 24. They eventually made their way to Nursery Road where petitioner told her to turn around near a yellow road sign. App. 3995, ll. 7 – 15. The decedent stopped the car, turned off the ignition, turned off the lights, and they all got out of the car. App. 3995, ll. 18 – 21. Gadson later changed this version and said that it was only he and petitioner who got out of the car. App. 3997, ll. 17 – 19.

Gadson and petitioner walked down the road while the decedent stayed in the car. App. 3997, l. 20 – 3998, l. 3. On this walk, petitioner told Gadson “he was going to kill her because she was wearing a wire.” App. 3998, ll. 4 – 7. The decedent came down the road and grabbed petitioner by his right arm and told him she was scared. App. 3998, ll. 14 – 17. A car came by and they “jumped off in the woods.” App. 3999, ll. 11 – 13.

The decedent left the woods and started towards her car. App. 3999, l. 23 – 4000, l. 2. Petitioner followed the decedent down the road. App. 4000, ll. 5 – 9. Gadson stayed at the spot where they jumped into the woods. App. 4000, ll. 21 – 22. Gadson next saw “three fires come from a gun” and heard gunshots. App. 4001, ll. 5 – 13.

Gadson saw “[the decedent] come running down the road” towards him. App. 4002, ll. 4 – 11. The decedent stopped when she got close to Gadson then turned around to face petitioner. App. 4002, ll. 12 – 21. The decedent told petitioner, “Please, Black, don’t shoot me no more, I have a child to take care of.” App. 4011, ll. 16 – 19. Petitioner shot the decedent two times, she fell to the pavement, and petitioner dragged her in the woods. App. 4011, l. 20 – 4012, l. 2.

Gadson then “messed” his pants and got in the car. App. 4013, ll. 2 – 10. When petitioner got in the car, he said, “I shot that bitch in the head.” App. 4013, ll. 21 – 23.

Petitioner drove them back to Branchville. App. 4014, ll. 5 – 24. Petitioner supposedly parked the decedent's car in a wooded area and then told Gadson he would blow his brains out if he told anyone what happened. App. 4015, ll. 3 – 11. Gadson got out of the car and went to Hank Koger's house. App. 4015, ll. 19 – 23. Petitioner got Yolanda Bowman's car and the two of them drove to the Horizon EZ Shop to get beer. App. 4016, ll. 2 – 15. They proceeded to the house of someone named “Fred.” App. 4016, ll. 20 – 21. At Fred's house, they talked to Travis

Felder. App. 4016, ll. 22 – 25. They then returned to the Villa Apartments and Gadson went back to Hank Koger's house. App. 4016, l. 22 – 4017, l. 3.

Later that evening, Gadson saw petitioner and Hiram Johnson leaving in Yolanda Bowman's car. App. 4017, ll. 4 – 15. Gadson next saw petitioner again at the Villa Apartments just before they left to go to the Allen Murray Club. App. 4017, ll. 18 – 24. Gadson, Darian Williams, Hiram Johnson, and petitioner drove the decedent's car to the Allen Murray Club, with petitioner behind the wheel. App. 4018, ll. 3 – 10.

Once they got in the car, petitioner handed out four pairs of brown gloves. App. 4018, ll. 18 – 23. All four of them put on the gloves. App. 4019, ll. 6 – 8. They arrived at the Allen Murray Club at approximately midnight. App. 4019, ll. 18 – 20.

Gadson and Darian Williams went inside the club. App. 4019, l. 21 – 4020, l. 4. Hiram Johnson and petitioner stayed outside in the car. App. 4019, l. 24 – 4020, l. 1. Travis Felder was also in the club. App. 4020, ll. 5 – 6. They were inside the club for approximately one hour. App. 4020, ll. 7 – 8. When Gadson came out of the club, petitioner was still sitting in Yolanda Bowman's car. App. 4020, ll. 12 – 16. Gadson got in the backseat of Yolanda Bowman's car and lay down because he was drunk. App. 4020, l. 24 – 4021, l. 12. They left in the decedent's car with petitioner driving and Darian Williams and Hiram Johnson also as passengers. App. 4021, ll. 13 – 22. They returned to the Villa Apartments. App. 4021, l. 25 – 4022, l. 2. Gadson went to the apartment of a woman named "Meeka." App. 4022, ll. 3 – 4.

In an effort to reduce the sting of impeachment, the solicitor had Gadson admit on direct that he gave a false statement to police on February 18, 2001, in which he claimed he did not know anything. App. 4022, ll. 5 – 7. When asked why he provided a false statement, Gadson said it was because he was scared. App. 4022, ll. 12 – 13.

Cummings' cross-examination served only to confirm Gadson's direct testimony. He simply re-asked many of the same questions asked by the solicitor and received the same answers. App. 4021, l. 21 – 4038, l. 9. Excluding argument on a state's objection, trial counsel's cross-examination of the state's chief witness in a capital case only encompasses approximately ten pages in the trial transcript. App. 4021, l. 21 – 4038, l. 9. The main focus of Cummings' questions was the recentness of Gadson's plea deal and that in 2000, Gadson purchased a High Point .380 pistol that was black and gray just like the pistol the state entered into evidence as the purported murder weapon. App. 4031, ll. 5 – 11. Cummings also placed considerable emphasis on where Gadson claimed he was standing on Nursery Road, to no effect. App. 4036, l. 5 – 4037, l. 21.

2. What the Jury Did Not Hear Because of Trial Counsel's Ineffective Cross-Examination

a. The Jury Never Heard that Gadson Faced the Death Penalty

During the state's presentation, Gadson admitted that he had entered into a plea agreement. App. 3981, ll. 7 – 11. The solicitor had Gadson agree that he was charged with murder. App. 3980, ll. 22 – 24. Gadson testified that his understanding of the agreement was that he would be charged with "accessory after the fact and misprision of a felony." App. 3981, ll. 12 – 16. The solicitor asked him, "All right, sir. And are you going to get a negotiated sentence of twenty years for that?" to which Gadson responded, "Yes, sir." App. 3981, ll. 17 – 19.

Cummings failed to emphasize that Gadson was testifying to avoid the death penalty. Rather, Cummings only confirmed the false impression that Gadson did not face the death penalty. App. 4024, ll. 18 – 20. Cummings asked the leading question, "You were never served

the notice of death penalty on you at all, were, you?” App. 4024, ll. 18 – 20. Gadson replied, “No, sir.” App. 4024, ll. 18 – 20.

The details of Gadson’s plea agreement, which the jury never heard, required him to “truthfully cooperate” with the solicitor’s office in petitioner’s prosecution. App. 8945. He was required to give the solicitor’s office a “complete debriefing.” App. 8945. The plea agreement also required that in his testimony, Gadson was required to be truthful and was unable to “omit facts.” App. 8947. Most critically, the plea agreement stated that if Gadson failed to cooperate in the investigation and prosecution of petitioner, “The state may, in its option, reinstate the murder charge and seek the death penalty against [Gadson] and [Gadson] hereby waives any objection to the state’s seeking of the death penalty.” App. 8946.

Gadson testified at the PCR hearing that he feared the death penalty. App. 5851, ll. 15 – 17. He knew that his agreement meant that he could get the death penalty and he was afraid of getting the death penalty. App. 5851, ll. 15 – 17. Gadson ultimately served less than five years in prison. App. 5937, ll. 13 – 15.

b. The Jury Never Heard the Details of Gadson’s Inconsistent Statements

Trial counsel failed to explore in detail Gadson’s prior inconsistent statements. All the jury heard was that Gadson denied knowing anything about the crime to police because he was “scared.” App. 4022, ll. 12 – 13.

Gadson’s first written statement was given to the police on February 18, 2001. App. 5861, l. 24 – 5862, l. 1. In his first statement, Gadson said that he was dropped off after petitioner and the decedent obtained gasoline without paying for it at the EZ Horizon store. App. 5862, ll. 2 – 5; App. 8950 – 8953. In the statement, he also talked about the disagreement he had with petitioner over the gun and claimed that petitioner found the gun in a brown paper bag

“over near the woods.” App. 8951. This claim was directly contradicted by Hiram Johnson’s testimony. App. 6296, ll. 1 – 10. Gadson’s statement talks about an “old raggedy gun” and does not mention the grey and black .380 pistol allegedly bought from the “dude in Orangeburg.” App. 8950. Gadson does not say that he saw the decedent get shot. App. 8950-51. He never said that he saw Travis Felder. App. 5862, ll. 9 – 11. He never said that he saw petitioner on Nursery Road or that petitioner threatened to blow his brains out. App. 5862, ll. 15 – 20.

Gadson admitted he lied in this statement. App. 5863, ll. 16 – 17.

Gadson also admitted being questioned by a police officer named Tim Stephenson. App. 5864, ll. 5 – 7. He admitted changing his story after speaking with Officer Stephenson. App. 5865, ll. 21 – 24. Gadson also admitted that he changed his story after being shown a warrant for his arrest for murder. App. 5867, ll. 11 – 14.

Later on February 18, 2001, Gadson gave a second written statement. App. 5868, ll. 12 – 15; App. 8954 – 8955. It was in this statement that he first claimed he saw petitioner shoot the decedent. App. 8955. The statement does not say that Gadson went to the Allen Murray club after the shooting. App. 5868, l. 23 – 5869, l. 1. It does not mention any threats from petitioner. App. 5869, ll. 8 – 10. Gadson admitted at the PCR hearing that the first time he claimed that petitioner had “threatened to blow his brains out” was during his testimony at trial. App. 5870, ll. 5 – 7. Gadson again admitted that he changed his story after signing the plea agreement. App. 5873, ll. 13 – 15. Gadson also stated in the PCR hearing that he lied in his statement about petitioner pointing a finger at the decedent as if he was going to shoot her. App. 5876, l. 23 – 5877, l. 7. He claimed, as he did at trial, that he did not know there was going to be a killing before he got to Nursery Road. App. 5877, ll. 2 – 7. Gadson stated that had he been asked those questions at trial he would have answered the same. App. 5879, ll. 5 – 14.

Officer Tim Stephenson testified that he ran a polygraph test on Gadson on February 18, 2001. App. 6486, ll. 6 – 12. Stephenson asked Gadson whether he shot the decedent and whether he was withholding any information about the shooting of the decedent. App. 8956. Gadson responded “no” to these questions. App. 6505, ll. 2 – 7. Stephenson's report indicated deception in Gadson's answers. App. 8956. While the polygraph results would not be admissible, Gadson's lie about withholding information would have served to impeach his credibility.

c. The Jury Never Heard that Gadson Fired the Murder Weapon

The jury never heard that Gadson fired the pistol the state contended was the murder weapon. Margaret Hawkins (“Hawkins”) gave a statement to police on February 22, 2001. App. 9046. She said that she was in her apartment two weeks before the murder and heard four gunshots. She walked outside and picked up four shell casings and put them in her kitchen drawer. App. 9046. She turned the shell casings over to SLED. App. 9046. Tiara Coleman also gave a statement on February 22, 2001. She also stated that two weeks before the murder Gadson shot a gun given to him by petitioner into the air. App. 9047. She also stated that Gadson fired his own gun in the air. App. 9047. The shell casings left from this incident were the same ones turned over to SLED by Hawkins. App. 9046.

David Collins (“Collins”) was the state's firearms expert at trial. Collins testified (and the state did not dispute) that the shell casings picked up by Hawkins were fired by the pistol retrieved from the Edisto River. App. 6085, l. 8 – 6095, l. 16; App. 9046. The state claimed that pistol was the murder weapon and shell casings from the crime scene were matched by Collins to the pistol at trial. The shell casings picked up by Hawkins were entered into evidence as Exhibit

46 and 49 at trial. App. 6090, l. 4 – 6092, l. 11. Cummings never told the jury that these casings came from shots fired by Gadson.

3. The PCR Court's Ruling

Petitioner raised the above grounds in his applications and in his post-hearing brief. App. 9467-76. The PCR Court denied petitioner's application on all of these issues. Supp. App. III 14-31. Regarding the failure to impeach Gadson with the fact that he had been threatened with the death penalty, the PCR court based its denial on the fact that the state never served a notice of intent to seek the death penalty. Supp. App. III 20. It also held that no evidence was presented that Gadson feared the death penalty and petitioner was not prejudiced because of the "overwhelming" evidence of petitioner's guilt. Supp. App. III 20-21.

As for Gadson's prior inconsistent statements and the fact that he fired the gun, the PCR court agreed with the facts presented by petitioner, but reached a different conclusion. Supp. App. III 29-30. The PCR court credited trial counsel with making a reasonable strategic decision in failing to present to the jury that the only other suspect had fired the murder weapon. Supp. App. III 30. The PCR court, as it did for virtually every ground raised by petitioner, also found no prejudice because of "overwhelming evidence" of petitioner's guilt. Supp. App. III 30.

4. Discussion

a. The PCR Court Erred in Finding that Gadson Was Not Threatened with the Death Penalty

The PCR court erred because it based its conclusion on an irrelevant concern: whether Gadson was served with a death notice. This finding ignores the incontrovertible language of Gadson's plea agreement that **explicitly threatens him with the death penalty**. App. 8946. The plea agreement's threat could not be any more clear. It states: "The state may, in its option, reinstate the murder charge and seek the death penalty against [Gadson] and [Gadson] hereby

waives any objection to the state's seeking of the death penalty." App. 8946. Not only did the state explicitly threaten him with the death penalty, it forced Gadson to waive any objection to the death penalty. App. 8946. This waiver is extraordinary and it is hard to imagine greater evidence of a witness's bias than the fact that he has waived the right to attempt to save his own life. Because of trial counsel's deficiency, the jury never heard this extraordinary fact.

The PCR court also erred in its finding that Gadson did not subjectively fear the death penalty. Gadson testified at the PCR hearing that he feared the death penalty. App. 5851, ll. 15 – 17. He knew that his agreement meant that he could get the death penalty and he was afraid of getting the death penalty. App. 5851, ll. 15 – 17.

Trial counsel's failure to impeach Gadson with the fact that he faced the death penalty constituted deficient performance that prejudiced petitioner. Strickland v. Washington, 466 U.S. 668, 686 (1984). When asked whether it would be important for the jury to know that Gadson faced the death penalty, Thomas offered the meager answer, "Could, but I'm not the jury." App. 7311, l. 14 – 7312, l. 14. Cummings was initially unsure whether he ever saw Gadson's plea agreement prior to trial. App. 7383, l. 11 – 7387, l. 21. If Cummings failed to cross-examine Gadson because he did not review the plea agreement, that would constitute deficient performance for failure to investigate and failure to prepare. Von Dohlen v. State, 360 S.C. 598, 608, 602 S.E.2d 738, 743 (2004). However, on cross-examination, Cummings agreed that Bailey said he provided him with a copy of the plea agreement based on a statement made by Bailey during the trial, but could not remember what date. App. 7635, ll. 2 – 7636, l. 23. Tellingly, the Attorney General did not ask Cummings the obvious follow-up question of whether Cummings ever read the plea agreement. App. 7636, l. 24 – 7640, l. 9.

The magnitude of this error is amplified by the fact that Gadson was threatened by the state for the death penalty when none of the state's evidence showed he would be eligible for such a sentence. Even though Gadson's plea agreement required him to provide complete and truthful testimony, nothing in his testimony indicated he could be convicted of murder. At best, Gadson's testimony showed that he was present at a crime scene with some knowledge that a crime might occur. Both Cummings and Solicitor Bailey agreed that Gadson's actual trial testimony could only form the basis of a conviction of misprision of a felony. App. 7389, ll. 1 – 11; App. 7018, ll. 3 – 25. This meant that the state threatened a witness with the death penalty without any evidentiary or legal basis.

Solicitor Bailey could not give specific details about what information he had that would support a murder charge against Gadson as a principal. App. 7816, l. 14 – 7817, l. 19. Bailey admitted that their knowledge of Gadson's actions only amounted to misprision. App. 7018, ll. 3 – 25. When asked what would merit death for Mr. Gadson, Bailey responded, "You're asking a hypothetical. I mean I don't know at this point or at that point in time." App. 7824, ll. 3 – 6. Nothing about PCR counsel's question was "hypothetical." The plea agreement drafted by Solicitor Bailey explicitly threatened Gadson with the death penalty. Neither Solicitor Bailey—nor the evidence as presented by the state at trial—supported such a drastic threat.

Had trial counsel informed the jury that the state was willing to threaten a witness with the death penalty when it was also telling them that Gadson had nothing to do with the crime, it would have impeached not only Gadson's credibility, but the state's entire presentation. Cummings agreed that it would impeach Gadson's credibility to show the state was threatening him with the death penalty, but that Gadson's actual trial testimony did not show he did anything

to merit such a threat. App. 7394, l. 25 – 7395, l. 4. Cummings admitted that was a threat to a witness. App. 7395, ll. 5 – 13. The following questioning occurred:

Q. Okay. Why didn't you tell, cross-examine him about the fact that he faced a death sentence?

A. You asked me that before. I cross-examined him, it was murder, I didn't know if the Solicitor had ever served the death penalty notice on him.

Q. They threatened him with it?

A. They threatened.

Q. Why didn't you tell the jury he had been threatened with his life?

A. I guess it didn't flow from my brain at that time, I'm sorry, no strategy, clearly.

App. 7724, ll. 1 – 11. Cummings admitted his performance was deficient and that he had no strategy in not impeaching both Gadson and the state with evidence of the state's baseless threat.

Petitioner was prejudiced by this failure. Had the jury known this vastly important fact, it would have shown the full extent of Gadson's bias. It would have shown that Gadson was motivated—literally to save his life—to please the state in his testimony. It also would have further impeached the state's case because it would have shown the lengths to which the state was willing to go to obtain favorable testimony. No evidence presented at trial supported a capital charge against Gadson, yet the state threatened him with the death penalty. Gadson's plea agreement required complete and truthful testimony, but nothing in his testimony supported a charge more serious than misprision of a felony. Had the jury heard this important evidence of bias by Gadson and witness intimidation by the state, the result at trial likely would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989).

b. Petitioner was Prejudiced by Trial Counsel's Failure to Impeach Gadson with his Prior Inconsistent Statements and Evidence He Fired the Murder Weapon

Cummings could not articulate any strategy as to why he did not impeach Gadson with his prior inconsistent statements, including his statements during the polygraph examination. App. 7492, l. 5 – 7493, l. 5; App. 7494, ll. 10 – 14. Cummings responded, defensively, “I didn't ask the question, okay?” App. 7494, ll. 10 – 14. Cummings' deficient performance prejudiced petitioner. The failure to impeach a witness with prior inconsistent statements is deficient performance that prejudices a defendant. Driscoll v. Delo, 71 F.3d 701, 710-11 (8th Cir. 1995); Berryman v. Morton, 100 F.3d 1089, 1097 (trial counsel failed to impeach with inconsistent eyewitness identifications). In Driscoll, defense counsel's failure to impeach an eyewitness with prior inconsistent statements was held prejudicial. Id. The defendant was sentenced to death for stabbing a prison guard. Trial counsel failed to impeach a prosecution witness who claimed at trial that the defendant confessed to the murder with a prior statement omitting the confession. Id. at 709-12. The centrality of the witness's testimony was an important factor in the court's consideration. Id. Here, Gadson was the central witness in the trial and failure to impeach his testimony could not have been more prejudicial. See also Peebles v. State, 958 S.W.2d 533, 536-37 (Ark. 1998) (holding that defendant was prejudiced by trial counsel's failure to impeach a witness with a prior denial that a crime occurred); Delarosa v. State, 24 So.3d 741, 741-42 (Fla. Ct. App. 2009) (remanding case for prejudice inquiry because of trial counsel's failure to impeach police officer with prior statement claiming he was attacked by three Mexicans when same officer testified at trial he was only attacked by defendant).

The PCR court erred in finding that Cummings had a strategic reason for not presenting this information. Supp. App. III 30. At the PCR hearing, Cummings admitted he had no

strategic reason for not informing the jury that Gadson had been seen shooting the same gun that the state claimed was the murder weapon. App. 7410, l. 18 – 7411, l. 3; App. 7427, ll. 5 – 13. Cummings admitted the jury never heard that Gadson had fired the gun that came from the Edisto River. App. 7435, l. 24 – 7436, l. 3. On cross-examination, Cummings initially claimed that he did not want this evidence before the jury because it tied petitioner to the murder weapon. App. 7654, ll. 8 – 19. However, Cummings later admitted that he “didn't know it was the Edisto River gun.” App. 7727, ll. 5 – 9. Trial counsel can only be credited with a reasonable trial strategy if they conduct a full investigation and are aware of all the facts. Wiggins v. Smith, 539 U.S. 510, 521-22 (2003). The evidence at the hearing contradicts the PCR court’s finding, which not only is not based on any evidence, but also constitutes a legal error because Cummings did not have all of the relevant information.

This failure prejudiced petitioner. The PCR court speculated that this information would have had “minimal benefit.” Supp. App. III 30. This finding ignored that the only evidence the jury heard was that petitioner controlled the murder weapon and was the only one who ever fired it. The only way to lessen the harmful impact of Gadson's testimony was to show that he also had access to the gun and had fired it. This places the murder weapon in Gadson’s hands and gives the jury yet another reason to doubt the state’s version of events and Gadson’s credibility.

In State v. Poe, 822 N.W.2d 831, 835 (Neb. 2012), a witness in a murder case testified that the defendant confessed to the victim’s murder. The defense theory was that the witness was complicit in the crime. Id. at 838. The court found that trial counsel could be held ineffective for failing to impeach the witness with a prior statement to a third party that the defendant did not commit the crime and he was being pressured to lie by the police. Id. at 848-50.

In Bryant v. State, ___ So.3d ___, 2011 WL 339585, *20 (Ala. Crim. App. 2011), a capital case, the state's key witness's trial testimony differed from his prior statement by omitting the presence of a third party when the victim's body was moved. The witness also previously denied helping the defendant move a car. The witness also previously admitted holding the gun. The court found that the failure to cross-examine the witness regarding these prior inconsistencies entitled the defendant to an evidentiary hearing. Id. See also Gabaree v. State, 290 S.W.3d 175, 181 (Mo. Ct. App. 2009) (defendant entitled to remand where trial counsel failed to cross-examine victim on prior inconsistent description of crime).

In People v. Lee, 541 N.E.2d 747 (Ill. Ct. App. 2009), the defendant was charged with murder in the course of an arson. Id. at 750. The prosecution's key witness, a co-defendant, testified that he assisted the defendant in starting the fire. Id. at 750. Prior to trial, the witness gave three different versions of his story. Id. at 758-59. Like Gadson, the witness initially denied any involvement in the crime. Id. The court noted that trial counsel only asked three questions regarding the prior statements, one of which was "Didn't you tell me you weren't there that night?" Id. The court held that the previous statements should "have been used much more extensively." Id. The court also held that counsel violated a cardinal rule of cross-examination: "don't repeat the direct examination[.]" Id. at 759. Cummings also violated this rule. Cummings' cross-examination parroted the solicitor's questioning on direct in the same fashion criticized by the court in Lee. The Lee court reversed and, in part, based its decision on the accumulation of errors by counsel in handling impeachment evidence. Id. at 763.

Finally, respecting all of trial counsel's failures regarding Gadson, the PCR court erred in finding no prejudice resulted because of "overwhelming" evidence of petitioner's guilt. The state's entire case against petitioner was based on witnesses who had been charged by the state in

connection with the crime and cut deals to save themselves. Gadson was the central witness in the trial. He was the only witness who claimed he saw petitioner commit the crime. Without Gadson, the state's case was drastically weaker. Had the jury disbelieved Gadson's testimony, the result likely would have been different. No evidence supports any other conclusion.

2.

Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to investigate and prepare for the impeachment of Travis Felder and by failing to impeach the testimony of Travis Felder in any meaningful way, including impeaching Felder with a videotape that would have shown Felder lied to the jury about buying the gas to burn the decedent's car, impeaching Felder on bias with his original charges, and impeaching Felder with his prior inconsistent statements.

Introduction

Travis Felder lied during his direct examination. Felder told the jury he followed petitioner from the Villa Apartments to Nursery Road, saw petitioner drag the decedent's body from the woods and put it in the trunk of her car, and then watched petitioner set the decedent's car on fire. Felder omitted a crucial fact: that he was the one that bought the gasoline. When Felder lied about his role, trial counsel failed to impeach him with a videotape from the gas station that showed Felder buying gasoline at 3:14 AM. Petitioner did not appear on this videotape. Trial counsel recognized this error after the jury rendered its verdict and tried to use the videotape **during the penalty phase**, but of course, by that time, the jury had already found petitioner guilty. Trial counsel also failed to impeach Felder with his original charge as accessory before the fact to murder and with his prior inconsistent statements. These deficiencies prejudiced petitioner. This Court should reverse and grant petitioner a new trial.

1. What the Jury Heard from Travis Felder During the Guilt Phase of the Trial.

Felder claimed he got home from work at approximately 6:30 PM on the day of the murder. App. 4087, ll. 2 – 6. He took a nap. App. 4087, ll. 7 – 8. He woke up from his nap at approximately 8:30 PM. App. 4087, ll. 9 – 11. He went to Fred's house where he drank beer. App. 4087, ll. 12 – 20. He saw petitioner at Fred's house. App. 4087, l. 21 – 4088, l. 2.

Petitioner asked Felder if he was going to the club. App. 4088, ll. 1 – 2. Petitioner told Felder that if he decided to go to the club, to come to the Villa Apartments. App. 4088, ll. 3 – 7.

Felder then saw a friend of his named Tyrone Smith and they proceeded to “Club Get It Get It” in Bamberg. App. 4088, ll. 11 – 19. When they left the club, they returned to Fred's house, split up their beer, and Felder returned to the Villa Apartments. App. 4088, l. 20 – 4089, l. 1. At the Villa Apartments he saw Valorna Smith. App. 4089, ll. 2 – 4. Felder and Valorna Smith decided to go to the Allen Murray Club. App. 4089, ll. 7 – 10. They first went to the store to get ice. App. 4089, ll. 11 – 18. When they got to the store, the seating arrangements changed and Valorna Smith got out of Felder's car and Carolyn Brown got in. App. 4089, ll. 11 – 18. Felder and Carolyn Brown arrived at the Allen Murray Club around midnight. App. 4089, ll. 19 – 25.

When he got to the club, Felder saw petitioner, Hiram Johnson, Darian Williams, and Taiwan Gadson. App. 4090, ll. 5 – 8. Darian Williams and James Gadson came into the club, but Hiram Johnson and petitioner did not. App. 4090, ll. 9 – 19. Felder was at the club for approximately two and one-half hours. App. 4090, ll. 20 – 23. He left the club with Carolyn Brown and Valorna Smith. App. 4091, ll. 2 – 7. They stopped at the EZ Horizon Store and Felder bought some chips. App. 4091, ll. 8 – 13. This fact was confirmed by Detective Alvin Coker's review of the videotape from the store that showed Felder buying chips at 2:56 AM. App. 6718, ll. 18 – 24.

They returned to the Villa Apartments and went to Valorna Smith's apartment. App. 4091, ll. 17 – 21. Felder said they sat around “and watched a couple of movies.” App. 4091, ll. 22 – 25. Valorna Smith worked on Felder's braids. App. 4091, ll. 22 – 25. Petitioner knocked on the door at approximately 3:00 AM. App. 4092, ll. 6 – 18. Petitioner asked Felder to come

speak with him outside. App. 4092, ll. 6 – 22. Petitioner supposedly said, “Come here, I need to park this car.” App. 4092, l. 23 – 4093, l. 1.

Felder Omits His Purchase of the Gasoline

Petitioner got in a Ford Escort and Felder followed petitioner in his own car. App. 4093, ll. 9 – 23. Solicitor Bailey asked Felder, “And did you leave the town of Branchville?” App. 4094, ll. 3 – 4. Felder responded, “Yes.” App. 4094, l. 5. Solicitor Bailey then asked Felder, “Tell the jury where [petitioner] went, where you followed him.” App. 4094, ll. 6 - 7. Felder responded, “We went out down McAlhany Road, then went out to Nursery Road.” This answer was a lie because it omitted the fact that Felder went to the EZ Horizon Store and bought gasoline. App. 7017, ll. 5 – 7.

What Felder Told the Jury He Saw at Nursery Road

Omitting the key fact that he alone bought the gasoline, Felder told the jury he followed petitioner to Nursery Road. App. 4094, ll. 6 – 13. Petitioner stopped the car, went into the woods, and returned dragging the decedent's body by her feet. App. 4096, ll. 13 – 19. Petitioner put the decedent's body in the trunk of her car. App. 4097, ll. 3 – 10. Petitioner said, “You didn't think I did it, did you?” App. 4098, ll. 2 – 11. Felder replied, “Did what?” Petitioner supposedly replied, “I killed Kandee Martin.” App. 4098, ll. 12 – 16. Felder never got out of his car. App. 4098, ll. 19 – 23.

Petitioner told him to drive down the road and turn around. App. 4099, ll. 2 – 6. Felder saw petitioner “get out of the car, he lit something, threw it in the car, the car was on fire.” App. 4100, ll. 10 – 14. Petitioner got in Felder's car. App. 4100, ll. 15 – 18. Felder told petitioner, “Man, I don't want nothing to do with this.” App. 4100, ll. 22 – 24. Petitioner allegedly replied, “Travis, I ain't get you involved with it, don't worry about it, everything is taken care of.” App.

4100, l. 25 – 4101, l. 2. Felder then took petitioner home. App. 4101, ll. 3 – 4. Felder said from the time petitioner came to the apartment to the time he dropped him off at his house, it took approximately forty minutes. App. 4101, ll. 5 – 8.

Felder admitted that it was his face on the videotape buying gas after 3:00 AM. App. 6442, ll. 3 – 10. Detective Coker testified that he knew Felder was on the videotape buying gasoline at 3:14 AM. App. 7017, ll. 5 – 7. Coker testified that he informed the solicitor's office that Felder purchased the gasoline. App. 6630, ll. 1 – 5. Coker regarded videotape as "a crucial piece of evidence regarding the arson charge." App. 6633, ll. 22 – 24.

During his deposition, Felder said he told Solicitor Bailey in his pre-trial debriefing that he had purchased the gasoline to burn the decedent's car. App. 6401, ll. 2 – 16. Interestingly, Solicitor Bailey denied knowing this key fact and claimed he was surprised to learn after the verdict that Felder bought the gasoline. App. 7768, ll. 17 – 18. App. 7782, l. 18 – 7783, l. 2. Solicitor Bailey certainly did nothing to correct Felder's testimony. App. 4094, ll. 6 – 13.

At the PCR hearing, Felder admitted that in his trial testimony, he "left out" that he had purchased the gasoline used to burn the decedent's car. App. 6406, l. 24 – 6407, l. 3. At his deposition, Felder testified that the reason why he did not mention the gasoline purchase was because, "I had a lot of stuff on the table, I was scared. I was scared, I was in jail for three months and, you know what I'm saying, I lost my job, I ain't had nothing." App. 6412, ll. 8 – 15. He admitted that when he was asked by the solicitor where he went when he left the Villa Apartments and he answered that he and petitioner went to Nursery Road, that testimony was a lie. App. 6415, ll. 15 – 19.

2. What the Jury Did Not Hear in the Guilt Phase Because of Counsel's Errors

a. Petitioner Himself is the First Person to Point out Felder's Lie about the Gasoline

Cummings failed to impeach Felder with the fact that he lied about purchasing the gasoline. It was not until after the beginning of the sentencing phase that this fact was brought to light. Neither Cummings nor Thomas caught Felder's lie—petitioner did. Before the sentencing phase commenced, Cummings told the trial judge that petitioner had something he wanted to tell her. App. 4590, ll. 13 – 18. After defense motions, Thomas introduced petitioner. App. 4621, l. 25 – 4622, l. 1. Petitioner said:

Ma'am, I was going through some of my paperwork, right, I noticed that in some of my information I had wrote down that I would like the jury to see the videotape that Detective Coker and Agent Helms took from the gas station showing that Travis Felder after he dropped me off home went to the gas station and bought a dollar worth of gasoline.

App. 4622, ll. 3 – 10. Cummings then says, “The tape is in evidence.” App. 4622, ll. 11 – 13. Cummings says, “[M]y client is asking us to show a portion of the tape in his mitigation case as to giving the jury something to consider along the lines of mitigation, also about possible issue of testimony. I'll leave it at that.” App. 4622, ll. 20 – 24. Cummings also said, “And I would not prohibit that to make sure the record knows that we are not at odds with Mr. Bowman or that we are not prohibiting him from presenting any mitigation facts that would be presented to the jury, Ma'am.” App. 4623, ll. 10 – 15. Of course, this impeachment evidence did not belong in the mitigation case, but in the guilt phase.

b. Felder's Original Charges and the Changing of his Story Immediately Before Trial

The jury never heard that the state had originally charged Felder with accessory before the fact to the decedent's murder. The jury also never heard that Felder lied to police immediately before trial.

When Felder was first interviewed by the police, he told them he did not know anything about the decedent's death. App. 6381, ll. 17 – 25. He was told on Monday, February 19, that Dorchester County had a warrant for his arrest so Felder turned himself in and was jailed. App. 6382, ll. 5 – 14. He was given a Miranda waiver. App. 6382, ll. 19 – 24. App. 8974. Felder once again denied any knowledge of the decedent's murder to the police. App. 6384, ll. 7 – 16.

On February 19, 2001, Detective Coker swore out an affidavit charging Felder with accessory to felony murder/arson. App. 8975. The warrant was served on Felder the same day. App. 6384, l. 25 – 6385, l. 5. At the PCR hearing, Felder testified that in 2001, he knew he was charged with murder and arson. App. 6387, ll. 11 – 14. Felder hired an attorney, Charles Williams. App. 6389, l. 24 – 6390, l. 1. Charles Williams advised Felder he was facing either life in prison or the death penalty on the murder charge. App. 6390, ll. 2 – 6.

Felder never gave a written statement to the police. App. 6392, ll. 3 – 5. On March 27, 2002, during plea negotiations, Felder's attorney sent a proffer letter to Solicitor Bailey. App. 9118. The proffer letter omits two important items. App. 9118. The proffer letter omits that Felder bought the gasoline. App. 9118. It also omits Travis Felder's claim at trial that he saw petitioner put the decedent's body in the trunk of the car. App. 9118. Cummings admitted that the version in the proffer letter was different from Felder's trial testimony. App. 7050, ll. 4 – 19.

On April 16, 2002, a month before petitioner's trial, Officer Van Doran administered a polygraph examination to Felder. App. 8973. During the examination, Felder was asked if he saw the decedent's body placed into the trunk of her car. App. 8973. Felder answered no. App. 8973. The polygraph results indicated deception. App. 8973. At the PCR hearing, Felder stated he could not remember taking the polygraph exam. App. 6392, l. 6 – 6393, l. 21. Cummings admitted that he had a copy of Felder's polygraph report. App. 7037, l. 22 – 7038, l. 2.

Subsequent to the failed polygraph examination and after talking with his attorney, Felder decided to enter into a plea agreement. App. 6396, l. 4 – 6397, l. 10. Felder had a debriefing with Solicitor Bailey. App. 6398, ll. 10 – 13.

Felder's plea agreement was executed on May 23, 2002, which was during the sentencing phase of petitioner's trial. App. 8969 – 8972. In his plea agreement, Felder agreed to plead guilty to the offense of accessory after the fact of arson in exchange for his testimony. App. 8969. His indicted charges of accessory after the fact of murder and arson third-degree would be dismissed. App. 8969 – 8972. The plea agreement allowed the solicitor to reinstate all of Felder's charges and seek the maximum penalty. App. 8971. The new charge carried a maximum sentence of five years in prison. App. 6423, ll. 17 – 20. Felder was ultimately sentenced to three years' imprisonment suspended to three years' probation. App. 6424, ll. 10 – 14.

3. The PCR Court's Ruling

The PCR court ruled that Cummings had a valid strategic reason for failing to expose Felder as a liar. The PCR court found that Cummings did not want the videotape entered into evidence because it would "corroborate Applicant's involvement in the plan to burn the car." Supp. App. III 47. The court further held that exposing Felder as a liar would not have influenced the outcome of the trial. Supp. App. III 47-48. The PCR court based this conclusion on Felder's after-the-fact claims during the PCR hearing and during the sentencing phase that petitioner instructed him to buy the gas and that petitioner did not appear on the tape because he waited around the corner. App. 6430, ll. 13 – 17. Petitioner presented these claims in his applications and in his post-trial brief. App. 9477-97.

4. Discussion

a. Counsel's Failure to Impeach Felder with His Lie about the Gasoline Purchase was Deficient and Prejudiced Petitioner

The PCR court erred in finding that Cummings had a strategic reason for not impeaching Felder with his lie about the gasoline. First, the evidence at trial seemed to suggest that Cummings did not even realize that Felder had lied about the purchase of the gasoline. Petitioner was the first person to mention it. App. 4622, ll. 3 – 10. After petitioner brought Felder's lie to everyone's attention, Cummings called Felder as a witness in the penalty phase and impeached him with the videotape. App. 4911, l. 19 – 4929, l.10. Cummings introduced the videotape into evidence during Felder's penalty phase testimony and played it for the jury. App. 4929, ll. 1 – 8; Defendant's Ex. 19. Cummings' penalty phase impeachment of Felder directly contradicts the PCR court's conclusion that he made a strategic decision to keep it out because **he actually introduced it, but too late.**

At the PCR hearing, Cummings initially claimed that he knew Felder had purchased the gasoline before trial. App. 7004, l. 18 – 7005, l. 7. Cummings said "there was no question that Travis had bought the gasoline later that evening." App. 7004, ll. 21 – 24. Cummings first maintained that he was "very frightened of that tape." App. 7005, ll. 5 – 7. Cummings complained that he was frightened of the tape because "there was no evidence against Marion that he bought the gasoline, that he poured the gasoline, that he did anything about burning this young white female in Dorchester County." App. 7006, ll. 1 – 5.

This backpedaled assertion of strategy is an astounding claim in the face of Felder's damaging testimony at trial about petitioner burning the car. Even if Cummings actually possessed such a strategy, it was unreasonable in light of the fact that it was completely

incorrect. Cummings' claim that nothing tied petitioner to the burning of the car ignores what Felder told the jury he saw at Nursery Road. Furthermore, any strategy that the tape would corroborate that petitioner was involved with the plan to burn the car is unreasonable because the tape did not show petitioner. App. 7006, ll. 12 – 16.

Regardless of the unreasonableness of such a strategy, the PCR court also erred because Cummings ultimately admitted he had no strategic reason for not impeaching Felder. During the Attorney General's questioning **and during questioning by Judge Lockemy**, Cummings confessed he lacked any strategy regarding his handling of Felder. App. 7664, l. 25 – 7666, l.

23. The Attorney General asked:

Q. All right. So, when Travis testified during the guilt phase and did not mention purchasing the gas beforehand why did you decide not to elicit that from him at the time?

A. **I don't know.** I can't sit here and tell you why I didn't do it. I don't know. Maybe I didn't want how he purchased the gas or for whom.

MR. BROWN: Your Honor, I object to that speculation.

THE COURT: If you don't know you don't know.

Q. You don't recall saying you saw no good in that coming in, it was ultimately confirmatory of what Felder had said?

A. I just said a moment ago I don't recall, I didn't remember if I chose not to. To answer the question, I must have had a reason at that time and it would be hurting, but again I really can't say that today, I can't. I'm trying to go back and think. I know I didn't choose certain lines of questions in this case, I chose not to do that, and we have been over that now for three days. To answer your question in particular about that, **I don't recall specifically the reason why, I don't, other than I tried the case as I thought appropriate.**

Q. So, you don't remember, you don't remember expressing to me a strategic reason for that?

MR. BROWN: Your Honor, this is some kind of vouching or bolstering here. Now he is going into a conversation they have had.

MR. WATERS: I did not –

THE COURT: He asked if he remembered. If he doesn't remember he doesn't remember.

THE WITNESS: I really don't, sorry, sir.

THE COURT: He doesn't remember.

MR. WATERS: Okay.

BY MR. WATERS:

Q. So, you don't recall ever saying you saw no good in, that you saw no good in it coming in, that you held it back in the guilt phase because it cuts both ways but that ultimately you –

THE COURT: He says he doesn't remember. Let's proceed.

MR. WATERS: I was trying to refresh his recollection.

MR. BROWN: With a conversation they had.

THE COURT: Do you remember anything, Mr. Cummings?

THE WITNESS: No, I don't. No, sir, I don't.

THE COURT: He doesn't remember.

THE WITNESS: I don't know what to say.

BY MR. WATERS:

Q. Okay. Do you recall whether or not it was an intentional decision at this point? I'm asking you if you recall.

THE COURT: That's a different area.

A. **I don't believe it was intentional.** I don't believe I would not have asked something or if I thought at the time something else was going to come out about it. There was no gasoline on my client's pants, I didn't want anybody tying him to Felder, for Marion telling him to go buy the gas. I would say that with open heart. So, if I, when I was meeting with you I said something **I don't recall it, I don't remember. I don't.**

App. 7665, l. 6 – 7667, l. 20 (emphasis added). This testimony conclusively shows that the PCR court's finding that Cummings strategically failed to impeach Felder is not based on any evidence.²

This error severely prejudiced petitioner. Had trial counsel exposed Felder as a liar—not just in a prior statement, but under oath before the jury—Felder's credibility would have been severely damaged. The jury would have realized that Felder deliberately obscured his role in the burning of the car. Felder already testified that petitioner burned the car, so petitioner was already linked to the gasoline and the arson.

This failure to impeach Felder left his testimony unchallenged and gave the jury the impression that petitioner essentially acted alone in the decedent's murder. Felder would have been the second state's witness to be shown as a liar on the stand and telling an unbelievable story that they were merely innocently present at the scene of a horrific crime. Had Felder been exposed as a liar and his role in the arson been shown to the jury, the outcome of the trial would likely have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989).

² This exchange between the Court and Cummings also bears on Issue 7 of this petition concerning the wholesale adoption of proposed orders submitted by the state. At the hearing, Judge Lockemy clearly credited Cummings' testimony that he had no strategy, but the state's proposed order contradicts Judge Lockemy's finding. The fact that the final order does not express Judge Lockemy's findings shows the due process errors that arise from this condemned practice.

b. Petitioner was Prejudiced by Cummings' Failure to Impeach Felder with his Original Charges and Inconsistent Statements.

The PCR court erred in finding that Cummings did not perform deficiently when he failed to impeach Felder with his original charges. Supp. App. III 44-47. First, the PCR court's order contains no assertion that Cummings informed the jury that Felder was originally indicted as an accessory before the fact. Supp. App. III 44-47. Instead, the PCR court credits Cummings with a reasonable trial strategy based on the idea that if he cross-examined Felder about his original charges, that petitioner's written statements would come into evidence. Supp. App. III 46.

Such a notion cannot form the basis of reasonable trial strategy because it is not based on an accurate understanding of the rulings at trial. The state was in possession of four written statements purportedly given by petitioner. App. 9214-26. The first two of these statements contain no inculpatory statements. App. 9214-26. The third statement inculcates Gadson. Petitioner said that Gadson drove him into the woods and showed him the decedent's dead body and confessed to murdering her. App. 9214-26. The fourth alleged statement, written in the hand of Orangeburg County Sheriff Larry Williams, was suppressed as involuntary by Judge Goodstein. App. 1333, l. 14 – 1355, l. 2. Judge Goodstein found that Sheriff Williams coerced this statement from petitioner and suppressed it. App. 1352, l. 7 – 1355, l. 2. Solicitor Bailey did not use petitioner's other three statements during the trial likely because they helped petitioner's case or would create a possible appellate issue. Regardless of Solicitor Bailey's reasons, the state could have used the first three statements at any time. It is difficult to grasp how impeaching a state's witness for bias due to lenient treatment is the evidentiary predicate for admission of a defendant's statements, particularly one obtained by the Sheriff's coercion.

Cummings also claimed that evidence that was involuntarily produced could still be introduced if an attorney made a mistake and opened up the door. App. 7007, l. 19 – 1278, l. 3. This was a mistake of law by Cummings. Involuntary statements are not allowed to be used against a criminal defendant for impeachment purposes. Mincey v. Arizona, 437 U.S. 385 (1978); New Jersey v. Portash, 440 U.S. 450 (1979). The PCR court unfortunately adopted Cummings' legal error in its own ruling. Therefore, the credited trial strategy was unreasonable and Cummings performed deficiently. Cummings should have cross-examined Felder about his original charges.

Furthermore, the PCR court's ruling is not based on any evidence produced at the PCR hearing. Cummings said he did not find out Felder was cutting a deal until the eve of trial. App. 7024, l. 22 – 7025, l. 2. Cummings said he did not have Felder's plea agreement until after the trial. App. 7026, ll. 19 – 24. He admitted that Felder had been charged with accessory to murder and would have been as guilty as the principal. App. 7029, ll. 10 – 17. Felder avoided a potential life sentence or the death penalty and never served a day in prison. App. 7030, ll. 2 – 9. Cummings called Felder's deal a "sweetheart deal" and the magnitude of the reduction in his charges was relevant to bias. App. 7030, ll. 22 – 23. App. 7034, ll. 16 – 25. Cummings ultimately **apologized** for not cross-examining Felder on this issue. App. 7030, ll. 10 – 15.

The PCR court also erred in finding that trial counsel was not deficient in failing to impeach Felder with his inconsistent statements made immediately before he agreed to testify against petitioner. Supp. App. III 40-47. Driscoll v. Delo, 71 F.3d 701, 710-11 (8th Cir. 1995); Berryman v. Morton, 100 F.3d 1089, 1097; Peebles v. State, 958 S.W.2d 533, 536-37 (Ark. 1998); Delarosa v. State, 24 So.3d 741, 741-42 (Fla. Ct. App. 2009) State v. Poe, 822 N.W.2d 831, 835 (Neb. 2012); Bryant v. State, ___ So.3d ___, 2011 WL 339585, *20 (Ala. Crim. App.

2011); Gabaree v. State, 290 S.W.3d 175, 181 (Mo. Ct. App. 2009); People v. Lee, 541 N.E.2d 747 (Ill. Ct. App. 2009). Cummings apologized that he didn't impeach Felder with the inconsistencies between the proffer letter and polygraph statements and Felder's trial testimony. App. 7045, ll. 1 – 10. When questioned by Judge Lockemy, Cummings said he had no strategic reason for not impeaching Felder. App. 7045, ll. 16 – 25. Cummings admitted that Felder's repeated assertions that he had nothing to do with the murder and then changed his story to accuse petitioner after cutting a "sweetheart" deal should have been used on cross-examination. App. 7046, ll. 14 – 25.

This deficient performance prejudiced petitioner. Had the jury known Felder was originally charged as an accessory before the fact, the magnitude of the deal received by Felder in exchange for his testimony against petitioner would have shown the extent of his bias and placed his inconsistent statements in their proper context. At the time of the trial, Felder faced the death penalty on the accessory before the fact of murder charge. It was not until 2007 that this Court decided that a defendant charged with accessory before the fact could not receive the death penalty. State v. Bixby, 373 S.C. 74, 644 S.E.2d 54 (2007). Felder testified that his attorney told him he was facing either life in prison or the death penalty on the murder charge. App. 6390, ll. 2 – 6. Had the jury heard that Felder faced and feared the death penalty, then it would have seen his motivation to fabricate testimony favorable to the state. The fact that Felder changed his story only weeks before trial would have further undermined his credibility. Trial counsel's deficient performance in these areas prejudiced petitioner and he is entitled to a new trial.

Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to investigate and prepare for the impeachment Hiram Johnson and by failing to impeach the testimony of Hiram Johnson by cross-examining Johnson on his prior inconsistent statement which, critically, did not include his allegation at trial that petitioner confessed to the murder.

Introduction

The solicitor portrayed Hiram Johnson as one of the state's best witnesses because he seemed to be unbiased. As will be shown in Issue 4, Johnson was, in fact, a biased witness because he had pending charges against him that were not disclosed by the state. Johnson was an important witness for the state, primarily because he testified that petitioner confessed to the murder. Had trial counsel impeached Johnson with available evidence, there is a reasonable probability that the outcome of the trial would have been different.

1. What the Jury Heard at Trial from Johnson

Hiram Johnson testified that Taiwan Gadson was his cousin. App. 6251, ll. 16 – 17. He had known petitioner and Gadson his entire life. App. 4057, ll. 4 – 10. He knew the decedent. App. 4057, ll. 11 – 12.

In the early afternoon on the day of the murder, Johnson was at Hank Koger's house. App. 4057, ll. 20 – 23. Johnson overheard an argument between petitioner and Gadson about the gun being moved. App. 4059, ll. 9 – 12. Johnson told petitioner that he had moved the gun. App. 4059, ll. 22 – 24. Johnson removed the gun from a barrel at Koger's house and took it to Katrina West's house. App. 4060, ll. 5 – 8. Petitioner retrieved his gun and came back to

Koger's house. App. 4060, ll. 12 – 19. Johnson's testimony contradicted Gadson, who said Johnson retrieved the gun from the woods. App. 3989, ll. 16 – 20.

Later that evening, petitioner came to Katrina West's house and asked Johnson if he wanted to go downtown. App. 4061, ll. 15 – 18. Johnson claimed that he and petitioner took Yolanda Bowman's car to the Horizon EZ Shop where Johnson saw petitioner ask Gadson's father to buy four pairs of gloves. App. 4062, ll. 3 – 22.

After buying the gloves, they went back to the Villa Apartments and later decided to drive to the Allen Murray Club. App. 4063, l. 15 – 4064, l. 6. Johnson claimed that petitioner drove the decedent's car with him, Gadson, and Darian Williams as passengers. App. 4064, ll. 7 – 20. Johnson claimed that petitioner made the three men put on gloves and said he had stolen the decedent's car. App. 4065, ll. 1 – 17.

When they got to the Allen Murray Club, petitioner walked around the parking lot trying to sell the car. App. 4066, l. 18 – 4067, l. 8. Johnson remained in the car. App. 4066, ll. 12 – 17. They were at the club about an hour and left at approximately 1:00 AM.. App. 4066, l. 24 – 4067, l. 11. Johnson claimed that on the way back from the club, petitioner said "I killed Kandee, heh, heh, heh." App. 4068, ll. 4 – 6. Johnson saw a gun sitting on petitioner's lap. App. 4068, ll. 17 – 18.

On cross-examination, Cummings clumsily asked Johnson about giving a statement to Alvin Coker on February 22. App. 4073, ll. 5 – 9. Cummings attempted to impeach him with the statement but was unable to do so. App. 4076, ll. 21 – 24. Solicitor Bailey objected and Cummings dropped his impeachment attempt. App. 4076, l. 21 – 4077, l. 6.

2. What the Jury Did Not Hear Because of Trial Counsel's Ineffective Cross-Examination

In fact, Johnson gave a written statement to Detective Coker on April 5, 2001. App. 9054. Nowhere in this written statement does Johnson claim that petitioner made the devastating admission, "I killed Kandee, heh heh heh." App. 9054. At the PCR hearing, Johnson could not even remember whether he ever told the police about petitioner's supposed confession. App. 6289, ll. 7 – 13. Next he said at PCR that he thought petitioner was kidding when he said that he had killed the decedent. App. 6290, ll. 10 – 14. He did not tell the jury that he thought petitioner was kidding. App. 6290, ll. 15 – 17. Johnson testified that his response to petitioner was, "Man, stop playing." App. 6298, ll. 3 – 10.

Cummings did not ask Johnson any questions about the April 5, 2001, statement, much less the glaring omission that petitioner had confessed to the murder. At the PCR hearing, Cummings admitted that Johnson needed to be impeached because he claimed he heard petitioner confess to the killing. App. 7114, ll. 20 – 23. Cummings admitted that the confession was not in Hiram Johnson's written statement. App. 7116, ll.12 - 15. He described Hiram Johnson's testimony about petitioner's alleged confession as "the worst evidence in the world." 7117, ll. 2 – 4. Cummings could not explain why he did not cross-examine Johnson on whether or not Johnson thought petitioner was kidding when he said, "I killed Kandee, heh heh heh." App. 7677, ll. 13 – 20.

3. The PCR Court's Ruling

The PCR court held that Cummings gave a valid strategic reason for not cross-examining Johnson about the inconsistency between his written statement and his trial testimony. The PCR court credited Cummings as saying he did not want the statement repeated in front of the jury. Supp. App. III 55.

4. Discussion

The PCR court's conclusion was erroneous. It was impossible for the jury to overlook such a damaging piece of evidence as a confession. The solicitor already had Johnson repeat this testimony twice on direct-examination. App. 4067, l. 25 – 4068, l. 6. A reasonable trial lawyer would certainly know the solicitor would emphasize such a damaging piece of evidence in closing argument, which Solicitor Bailey certainly did. App. 4474, ll. 12- 21. Solicitor Bailey told the jury in his closing argument that petitioner laughed about the murder. App. 4474, ll. 12- 21. He repeated the alleged confession twice. App. 4474, ll. 12- 21. Solicitor Bailey also said, "And Hiram Johnson's a friend of [petitioner's] with no reason to lie about it. App. 4474, ll. 12- 21. As will be seen in Issue 4, this was a deliberate misrepresentation to the jury because Johnson had pending charges which the solicitor did not disclose to the defense.

Given the damaging nature of this evidence, it was unreasonable not to cross-examine Johnson on the serious omission in his written statement. The failure to impeach a witness with prior inconsistent statements is deficient performance that prejudices a defendant. Driscoll v. Delo, 71 F.3d 701, 710-11 (8th Cir. 1995); Berryman v. Morton, 100 F.3d 1089, 1097; Peebles v. State, 958 S.W.2d 533, 536-37 (Ark. 1998); Delarosa v. State, 24 So.3d 741, 741-42 (Fla. Ct. App. 2009); State v. Poe, 822 N.W.2d 831, 835 (Neb. 2012); Bryant v. State, ___ So.3d ___, 2011 WL 339585, *20 (Ala. Crim. App. 2011); Gabaree v. State, 290 S.W.3d 175, 181 (Mo. Ct. App. 2009); People v. Lee, 541 N.E.2d 747 (Ill. Ct. App. 2009). Considering the detail of the written statement, it confounds belief that such an important piece of evidence was omitted. Had the jury known that petitioner's alleged confession was a courtroom invention, it would have called Johnson's credibility into question, especially considering that, as far as the jury knew, Johnson

had not been charged and was petitioner's "friend." Cummings' failure to cross-examine Johnson on this issue constituted deficient performance that prejudiced petitioner.

4.

Petitioner is entitled to a new trial because the state withheld information necessary for impeachment and necessary for defense in violation of petitioner's due process rights under the Fourteenth Amendment and under the rules of discovery, those items being a memorandum of a law enforcement interview with Ricky Davis who heard Gadson confess to the murder, Gadson's mental health evaluation, and the fact that Hiram Johnson had unindicted pending charges at the time of his testimony.

Introduction

The state withheld three key pieces of evidence from the defense. The state failed to disclose that it had interviewed Ricky Davis, who heard Gadson confess to the murder and that he had framed petitioner. The state failed to disclose Gadson's mental health evaluation that showed he heard voices, suffered from blackouts, heard beeping noises, and smoked six blunts of marijuana a day. Finally, the state failed to disclose charges pending in the same judicial circuit against one of its key witnesses, Hiram Johnson. Each of these pieces of evidence was material to the defense and their suppression meant that petitioner did not receive a fair trial.

Discussion

The state's duty to disclose evidence favorable to the defendant is addressed by the United States Supreme Court in Brady v. Maryland, 373 U.S. 83 (1963) "The suppression by the [state] of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." Brady, 373 U.S. at 87. Consequently, an individual asserting a Brady violation must demonstrate that the evidence: (1) was favorable to the accused; (2) was in the possession of or known by the prosecution; (3) was suppressed by the state; and (4) was material to the accused's guilt or innocence or was impeaching. Kyles v. Whitley, 514 U.S. 419, 432-42 (1995); State v. Moses, 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010); Riddle

v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006).

Brady evidence includes both exculpatory and impeachment evidence. United States v. Bagley, 473 U.S. 667, 676 (1985); Kyles, 514 U.S. at 436-40. When assessing whether to overturn a case because of the state's failure to disclose evidence, "[t]he question is not whether petitioner would more likely have been acquitted had this evidence been disclosed, but whether, without this impeachment evidence, he received a fair trial 'resulting in a verdict worthy of confidence.'" Riddle, 369 S.C. at 45, 631 S.E.2d at 73 (quoting Kyles, 514 U.S. at 434)).

In this case, the Court need not address two of Brady's four prongs. For each of the three violations, the PCR court found that the state was in possession of the evidence and did not disclose it to the defense. Therefore, the Court's analysis will turn on whether the evidence was favorable to petitioner and material.

1. Ricky Davis – The Sam Memo

Ricky Davis was housed at the Dorchester County Detention Center with Gadson. App. 5978, ll. 14 – 22. Ricky Davis testified that they were housed on "A Side." App. 5978, ll. 21 – 22. Officer Van Doran interpreted the jail records introduced at the PCR hearing. App. 6529, l. 8 – 6532, l. 23; App. 9064 – 66. Officer Van Doran confirmed that Gadson was housed on "A Side." App. 9065; App. 6532, LL. 6 – 9. The jail records did not indicate where Ricky Davis was housed. App. 6532, ll. 18 – 21. Officer Van Doran testified that petitioner was housed in the maximum security "C Side" pod. App. 6532, LL. 10 – 17; App. 9066. Petitioner's cell is shown as "C-8". App. 9066.

On August 6, 2001, Ricky Davis wrote the following note which recounted a confession made by Gadson to the decedent's murder:

I Rickie Davis was on A side with Gadson and he said that he was the one that shot the girl and gave petitioner back the gun that was used and He said that it

didn't mater because Blak famile had got caught with the gun. He also that the police all he got to do is say Blak did it.

App. 8966 (errors in original). Ricky Davis confirmed in his testimony at the PCR hearing that the note was in his handwriting. App. 5979, ll. 2 – 4. Ricky Davis testified that he wrote this note on August 6, 2001. App. 5979, l. 23 – 5980, l. 4.

Eighteen months before the PCR hearing, PCR counsel subpoenaed the prosecutor's file. App. 6769, ll. 4 – 24. PCR counsel did not get the prosecutor's file until approximately one month before the PCR hearing began. App. 6769, ll. 4 – 24. In the file, PCR counsel found notes written by an investigator in the solicitor's office named Sam Richardson ("Sam"). App. 6773, l. 12 – 6774, l. 9. The notes were from an interview Sam conducted with Ricky Davis. App. 6773, l. 12 – 6774, l. 9. These notes became known at the hearing as the "Sam Memo."

The text of the Sam Memo confirms Ricky Davis' handwritten note and adds detail:

RICKY DAVIS INTERVIEW

CONDUCTED BY SAM AT LIEBER CORRECTIONAL INSTITUTION.

RICKY DAVIS STATES THAT HE AND JAMES TAIWAN GADSON ALONG WITH 4 OR 5 OTHERS WERE SITING AT A TABLE ON THE A-SIDE. GADSON WAS TALKING TO THE GROUP WHEN HE SAID SOMETHING ABOUT KILLING A GIRL. HE STATED THAT THEY WERE GOING TO ROB SOMEONE. THEY THOUGHT SHE WAS WIRED AND HE SHOT HER IN THE HEAD WITH A .380.

THIS CONVERSATION OCCURRED ABOUT 3 WEEKS BEFORE HE WROTE THE LETTER. (AUGUST 6, 2001).

AFTERWARDS, DAVIS WAS PLAYING CHESS WITH MARION BOWMAN IN CELL 8. DAVIS TOLD MARION BOWMAN ABOUT THE CONVERSATION HE HAD WITH JAMES GADSON. BOWMAN SAID "IF YOU HEARD ALL THIS, WRITE IT DOWN." BOWMAN SHOWED HIM A PICTURE OF THE DEAD GIRL. HE ALSO SHOWED HIM A FILE FROM HIS ATTORNEY.

BOWMAN SAID HE HAD BEEN SMOKING DOPE THAT DAY. HE SAID IT WAS HIM, JAMES GADSON AND THE GIRL AT THE SCENE. THE GIRL WAS SUPPOSE TO HELP THEM ROB A HOUSE TO GET DRUGS AND MONEY. BOWMAN KNEW THE INTENDED VICTIM.

BOWMAN NEVER ADMITTED HE SHOT ANYONE.

SUBSEQUENT TO THIS, DAVIS TALKED TO JAMES GADSON AGAIN. AT THIS TIME, GADSON SAID THAT BOWMAN SHOT HER.

App. 9122.

Solicitor Bailey initially claimed that he could not recall whether the Sam Memo was provided to the defense. App. 7860, ll. 12 – 16. Bailey then alleged that the Sam Memo was subject to the attorney-client privilege because he viewed Sam Richardson as his “alter ego.” App. 7861, ll. 17 – 25. Bailey then attempted to characterize the Sam Memo as work product. App. 7878, l. 3 – 7879, l. 18. Bailey made the extraordinary inference that unless something was produced by an agency outside of the solicitor’s office, such as law enforcement or the Department of Corrections, it was protected by the work product privilege. App. 7878, l. 23 – 7879, l. 6.

Even though Ricky Davis was brought to the courthouse during petitioner’s trial, Cummings and Thomas elected not to call him as a witness. App. 5980, ll. 5 – 15. Ricky Davis recalled Thomas meeting with him in the holding cell. App. 5980, l. 16 – 5981, l. 16. He told Thomas he wrote the August 6, 2001, note. App. 5981, ll. 4 – 22. As will be seen in Issue 5, Thomas had a conflict of interest because she represented Davis on other charges while she represented petitioner. Thomas admitted that the unsigned notary block on the August 6, 2001, note was her handwriting. App. 7294, ll. 23- 24. Thomas never told Cummings she represented Davis. App. 7059, ll. 4 – 6.

Cummings testified that the first time he ever saw the Sam Memo was when it was handed to him at the PCR hearing. App. 7061, l. 17 – 7063, l. 7. The only thing Cummings recalled learning about Ricky Davis was the handwritten note that was signed by Davis. App. 7062, ll. 17 – 24. Cummings was familiar with the solicitor's investigator, Sam Richardson. Investigator 7062, ll. 4 – 9. He did not know that Sam Richardson had interviewed Ricky Davis. App. 7062, ll. 17 – 24. Cummings admitted the knowledge that Gadson and Davis were in a cell together would have been very helpful. App. 7065, ll. 6 – 16. Cummings said he sent his own investigator to check with Ricky Davis and Davis told the investigator that he denied giving the statement. App. 7065, ll. 17 – 24.

The PCR court did not find that the Sam Memo was disclosed to the defense, but instead found, erroneously, that the Sam Memo was not favorable to the defense or material under Brady. Supp. App. III 57-60. First of all, the Sam Memo is clearly relevant to guilt or innocence. It recounts a co-defendant confessing to the crime. It is hard to imagine any piece of evidence that could be more material to guilt or innocence. The Sam Memo also constitutes impeachment evidence. It directly contradicted the only eyewitness to the murder. Sam's interview took place at Lieber where Davis had no contact with petitioner and nothing to fear from petitioner. It was also an interview conducted by the state and the jury was likely to be favorably disposed to a witness' testimony that had been confirmed by law enforcement.

Furthermore, the PCR court's ruling is based on a legal error. The PCR court's order inaccurately states that Cummings would not have called Ricky Davis as a witness or changed his strategy had he known about the Sam Memo. Supp. App. III 59-60. The question is not whether Cummings' strategy would have changed, but whether the evidence is material for guilt or innocence or impeachment. Also, Cummings' statements are irrelevant if they conflict with

the actions that would be taken by a reasonable attorney. Wiggins v. Smith, 539 U.S. 510, 521-22 (2003). Considering the seriousness of the charges and the necessity of impeaching the state's sole witness to the crime, not calling Ricky Davis or Sam Richardson would be an unreasonable act.

Furthermore, the PCR court's order mischaracterizes Cummings' testimony. Cummings testified that had he known about the second interview by law enforcement, "I would put Mr. Richardson up on the stand if I had known about it." App. 7069, ll. 6 – 11. Cummings admitted that he made the decision not to put Ricky Davis on the stand without the benefit of the knowledge of Sam's interview of Ricky Davis. App. 7072, ll. 5 – 7. Cummings stated that if he had known of the interview it "would have really shed a different light." App. 7627, ll. 2 – 4. Cummings said that the Sam Memo meant that he "would have known the state thought he was of evidentiary value early on." App. 7627, ll. 9 – 17. Cummings testified, "I don't think Sam would make anything up." App. 7728, l. 16.

Under these circumstances, the PCR court's ruling that the Sam Memo was not material under Brady is erroneous. See Conyers v. State, 790 A.2d 15 (Md. 2002) (reversing death sentence in part because prosecution violated Brady when it failed to disclose impeachment evidence on a jailhouse informant). Its omission renders the trial's outcome unworthy of confidence and resulted in an unfair trial for petitioner. Therefore, the PCR court's ruling must be reversed.

2. Gadson's Mental Health Evaluation

Bailey admitted that he did not provide the defense with Gadson's mental health evaluation. App. 7851, ll. 20 – 24. Cummings testified that he never received Gadson's mental evaluation. App. 7377, ll. 16 – 23. Based on this testimony, the PCR court did not rule that

Gadson's mental health evaluation was provided to the defense. Instead, the PCR court found that the evaluation was not favorable and not material.³

Gadson's evaluation was completed on September 10, 2001. App. 8957. It diagnosed Gadson with "Cannabis Dependence" and "History of Seizure Disorder." App. 8957. In the report, Gadson told the doctors that he suffered from blackouts. App. 8959. Gadson said he smoked "six blunts of cannabis on a daily basis." App. 8960. The report states, "He does report that he hears a voice and 'a little beeping noise.'" App. 8960. The report also noted that Gadson's testing showed he had memory problems. App. 8960.

The PCR court's finding that this information was not material is erroneous. The information in the report could have been used to impeach Gadson. Had the jury heard that he had memory problems, blackouts, heard voices and beeping noises, it would have undermined Gadson's credibility. It also would have supported a defense theory that Gadson was the murderer. Cummings admitted that hearing beeping noises, voices, consuming drugs, having blackouts would've been relevant to Gadson's credibility. App. 7378, ll. 14 – 22. Cummings admitted that failure to cross-examine Gadson on anything in the mental evaluation would not have been trial strategy. App. 7378, l. 23 – 7379, l. 13. Even Solicitor Bailey admitted there would be impeachment value to the mental health evaluation. App. 7852, ll. 11 – 14. Under

³ The PCR court inexplicably found that trial counsel could have obtained the mental health evaluation and that relieved the state from the burden of producing it. Even if this were a correct statement of the law, then trial counsel were ineffective for not obtaining the report and using it to impeach Gadson. It is not, however, a correct statement of the law, since, as stated by the United States Supreme Court in Kyles, "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation . . . the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." Kyles, 514 U.S. at 437-38.

these circumstances, the Court should find that the state violated Brady by not disclosing Gadson's evaluation to the defense.

3. Hiram Johnson's Pending Charges

Hiram Johnson had pending charges in Orangeburg County at the time of his testimony and petitioner's case. App. 6263, l. 18 – 6265, l. 14. The warrant for Johnson for receiving stolen goods was sworn on November 13, 2000 and served on him May 29, 2001. App. 9074. Johnson claimed he did not remember what the charges were. App. 6265, ll. 9 – 14. The warrant was served and pending. App. 7102, ll. 13 – 20. Johnson also had pending charges for second degree burglary and grand larceny. Supp. App. III 50. The charges pending in Orangeburg were dismissed. App. 6276, l. 17 – 6277, l. 42. They were dismissed by the same solicitor's office that prosecuted petitioner. App. 6277, ll. 11 – 23. Johnson claimed he could not remember why the charges were dismissed. App. 6277, ll. 3 – 5.

Solicitor Bailey admitted he had no recollection of providing any information to Cummings or Thomas about Johnson's pending burglary charges. App. 7832, ll. 1 – 8. Bailey admitted this evidence would be relevant to bias. App. 7832, ll. 17 – 22. Bailey first attempted to suggest that the Attorney General's office would have handled Hiram Johnson's pending charges in Orangeburg County. App. 7833, l. 13 – 7834, l. 1. Bailey then was forced to admit that an assistant solicitor with his office actually prosecuted the case. App. 7834, l. 2 – 7835, l. 3. Bailey agreed that unless Johnson's charges appeared on his rap sheet, it was unlikely that information was conveyed to petitioner's attorneys. App. 7834, ll. 2 – 23. Interestingly, Detective Coker testified that rap sheets usually show pending charges statewide. App. 6740, ll. 3 – 7.

Cummings testified that according to the rap sheet he received, there were no pending charges against Johnson in the first judicial circuit. App. 7100, ll. 4 – 24. Johnson was arrested May 29, 2001. App. 7100, l. 25 – 7101, l. 2. Johnson was not indicted until April 17, 2003, after the trial. App. 7100, l. 25 – 7101, l. 2. Cummings said that the only thing shown on Johnson's rap sheet was a conviction for unlawful possession of a pistol. App. 7101, ll. 17 – 23. It did not show the pending warrant. App. 7101, l. 24 – 7102, l. 4.

Cummings admitted the pending charge could have been used to impeach Johnson for bias. App. 7103, ll. 6 – 8. Cummings would have asked questions about Johnson's pending charges had he known about them. App. 7106, l. 21 – 7107, l. 4. Cummings agreed that Hiram Johnson need to be impeached because he claimed he heard petitioner confessed to the killing. App. 7114, ll. 20 – 23.

The PCR court did not find that the charges were disclosed to the defense, but inexplicably held that they were not material because of the “overwhelming evidence of Applicant's guilt.” Supp. App. III 50. This patently erroneous approach to analyzing evidence was disapproved by a unanimous United States Supreme Court in Holmes v. South Carolina, 547 U.S. 319 (2006). This holding ignores the rules regarding Brady evidence and imposes the higher Strickland standard on a Brady claim. It cannot be disputed that Johnson's pending charges were impeachment information. See also Giglio v. United States, 405 U.S. 150 (1972); Reutter v. Solem, 888 F.2d 578, 580-82 (8th Cir. 1989) (finding a Brady violation where prosecutors failed to disclose that key witness had pending petition for commutation of his sentence). Furthermore, the absence of a deal on pending charges is even more prejudicial impeachment evidence because it “suggests the witness will testify more favorably to the State's position.” State v. Mizzell, 349 S.C. 326, 332-33, 563 S.E.2d 315, 318 (2002). It is reasonable

to believe that a witness would “have felt that the quality of his cooperation would determine the degree of benefit he would later receive.” Id.

The importance of this information is highlighted by Solicitor Bailey’s closing argument. Chaffee v. State, 294 S.C. 88, 91-92, 362 S.E.2d 875, 877 (1987). Solicitor Bailey falsely told the jury, **“You hadn’t heard any testimony about Hiram Johnson having any kind of charge against him or any kind of a deal with the state, any reason to say something wasn’t true.”** App. 4474. ll. 3 – 11. The solicitor’s emphasis on Johnson’s neutrality demonstrates beyond cavil the materiality of this evidence. Without this impeachment evidence, petitioner did not receive a fair trial resulting in a verdict worthy of confidence. Kyles, 514 U.S. at 434.

The Brady Errors Must be Considered in the Aggregate

The PCR court also failed to consider the cumulative effect of the state’s failure to disclose these key pieces of evidence. When considering Brady materiality, the suppressed evidence must be “considered collectively, not item by item.” Kyles, 514 U.S. at 436-37. “[A] showing of materiality does not require demonstration by a preponderance that disclosure would have resulted ultimately in the defendant’s acquittal.” Id. at 434. “A defendant need not demonstrate that after discounting the inculpatory evidence, there would not have been enough left to convict.” Id. at 434-35.

When these three key pieces of evidence are considered together, the cumulative effect is that no confidence can be had that petitioner received a fair trial. The state suppressed the fact that its star witness had confessed to a police investigator. The state suppressed the fact that its star witness had blackouts, memory problems, and heard voices and beeping noises. Finally, the solicitor suppressed the fact that a witness it told the jury had no pending charges was, in fact, being prosecuted by his office. This misrepresentation to the jury should greatly concern this

Court. It is disturbing that the state's conduct shows a pattern of concealing evidence, threatening witnesses, and claiming that it did not know about the untruths in its primary witnesses' testimony. Enforcing the Brady rule in this case "will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." Id. at 440. The Court should reverse the PCR court's ruling and grant petitioner a new trial.

Trial counsel rendered ineffective assistance of counsel because counsel had a conflict of interest between two of her clients -- Petitioner Bowman and Ricky Davis -- that caused counsel to fail to call Ricky Davis as a witness, despite Davis' statement that exculpated Petitioner Bowman and established Gadson shot the victim.

The PCR court erred in determining that the actual conflict of interest of Petitioner Bowman's co-trial counsel, Marva Hardee-Thomas did not amount to ineffective assistance of counsel. At the time she represented petitioner, Thomas also had an attorney-client relationship with Ricky Davis ("Davis"). App. 8967. Davis executed a written statement, stating Davis heard James Tawain Gadson confess to shooting the victim and handing the murder weapon over to petitioner. App. 8966. Davis executed the statement prior to turning state's evidence and accepting a plea deal **in this matter** from the State. *Id.* Despite this critical, exculpatory evidence on behalf of petitioner, Thomas failed to call Davis as a witness at trial. App. 7302. Thomas failed to present this critical testimony because of a conflict of interest created by her representation of Davis and petitioner.

Counsel's simultaneous obligations to both petitioner and Davis constituted an actual conflict of interest that affected her performance. "To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance." *Thomas v. State*, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001) (citing *Jackson v. State*, 329 S.C. 345, 354, 495 S.E.2d 768, 773 (1998)). As this Court has explained, "[a]n actual conflict of interest occurs where an attorney owes a duty to

a party whose interests are adverse to the defendant's." Id. at 143-44, 551 S.E.2d at 256 (citing Jackson, 329 S.C. at 354, 495 S.E.2d at 773).

"The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client" [citation omitted] Lomax v. State, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008). A defendant does not need to show prejudice if there is an actual conflict of interest. Id. See, also, Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) (quoting Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir. 1979)).

The case of State v. Gregory, 364 S.C. 150, 612 S.E.2d 449 (2005) is instructive on the situation involved here. In Gregory, this Court found counsel, who was representing the defendant on criminal sexual conduct with a minor charges, had a conflict because he represented an assistant solicitor in her divorce action; the assistant solicitor had initially prosecuted the case even though by the time of trial, the solicitor had been replaced. Still, this Court found:

The question in this case is whether defense counsel owed duties to a party whose interests were adverse to Gregory. Under this Court's holding in Duncan[281 S.C. at 438, 315 S.E.2d at 811 (1984)], and the case cited therein, Zuck v. Alabama, we find that he did. In Zuck v. Alabama, the Fifth Circuit Court of Appeals held that where the law firm retained to represent the defendant in a murder trial also represented the state prosecutor in an unrelated civil trial, there was an actual conflict of interest, and the conflict rendered the trial fundamentally unfair. The court noted that "the basis of these decisions is our belief that the sixth amendment requires that **a defendant may not be represented by counsel who might be tempted to dampen the ardor of his defense in order to placate his other client. . . . This possibility is sufficient to constitute an actual conflict as a matter of law.**" 588 F.2d at 440 (emphasis in original).

Where an actual conflict is shown, the aggrieved party “need not demonstrate prejudice in order to obtain relief.” Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980); Holloway v. Arkansas, 435 U.S. 475, 487-91 (1978).

An actual conflict of interest can undoubtedly arise when an attorney represents two parties simultaneously. Courts from around the country hold that simultaneous representation of both the criminal defendant and a defense witness may give rise to an actual conflict of interest. See, e.g., United States v. Moscony, 927 F.2d 742, 750 (3d Cir. 1991) (“Conflicts of interest arise whenever an attorney’s loyalties are divided and an attorney who cross-examines former clients inherently encounters divided loyalties”) (citations omitted); Louisiana v. M.M., 802 So. 2d 43, 68 (La. Ct. App. 2001) (“Nevertheless, [conflicting loyalties] may also arise when an attorney has to cross-examine a State witness or call a defense witness who the attorney represents in another litigation”); Massachusetts v. Walter, 487 N.E.2d 513, 517 (Mass. 1986) (“We nevertheless agree that where an attorney simultaneously represents both a criminal defendant and a possible defense witness, the potential for a serious conflict does exist.”); Tennessee v. Franklin, No. W2009-01087-CCA-R3-CD, 2010 Tenn. Crim. App. LEXIS 457, 23 (Tenn. Crim. App. June 3, 2010) (“[A] conflict of interest may arise not only in simultaneous representation cases but also in cases of successive representation ‘when an attorney who once represented a co-defendant or witness currently represents the accused.’” (citation omitted)).

This is precisely the situation in this matter. An actual conflict existed because trial counsel represented petitioner and Davis. As noted, Thomas had an attorney-client relationship with Ricky Davis. Counsel was appointed to represent Davis on two separate armed robbery charges in 2001. App. 8967. In October of 2001, Davis was tried by jury, convicted of one count of armed robbery, and sentenced to twenty years. App. 8980. His second indictment was

nol prossed on October 18, 2001. App. 9291-92. Thomas filed a notice of appeal on Davis's behalf on October 24, 2001. App. 9306. Nevertheless, her obligations to Davis did not cease because the solicitor certainly retained discretion on whether to recharge Davis for the matter that was nol prossed. Thomas admitted this concern in her testimony at the PCR hearing. App. 7288-89.

Without contraction, Thomas admitted a conflict between petitioner and Davis existed. When asked whether she thought there would have been a conflict had she spoken to Davis and had he confirmed that his statement was true, Thomas admitted that "there is a bigger conflict that would arise with regard to representation of Marion [Bowman]." App. 7332. As she explained, the dual representation would have led to "trying to help Mr. Bowman but not hurt my aspect with Mr. Davis because I still have an ethical responsibility with him also." App. 7333. When asked if she "would not have decided not to call Ricky Davis to protect him, to the detriment of Mr. Bowman, you didn't do that, did you? Thomas answered: "No, I wouldn't put anybody in that predicament." App. 7334.

Regardless, Davis was not called as a witness at petitioner's trial. Thomas failed to do so despite the exculpatory nature of the statement.⁴ When asked why Davis did not testify that he heard Gadson confess to shooting the victim, counsel testified: "I don't know." App. 7302. Counsel also acknowledged she did not have any strategic reason for not putting Ricky Davis on the stand to testify that he had heard Gadson's confession. App. 7302.

Despite the exculpatory written statement, Thomas did not even recall speaking to Davis directly. App. 7331. In fact, not only did Thomas fail to call Davis, Thomas could not

⁴ Thomas acknowledged, in her testimony at the PCR hearing, that her handwriting was on the notary block, which was not filled out. App. 7294, 7331.

remember even discussing Ricky Davis with her capital client, petitioner, much less detailing the former attorney-client relationship with petitioner. App. 7294. This constituted ineffective assistance of counsel.

Thomas' conflict stemmed from the fact that she had legitimate concerns about Davis's second armed robbery charge which was nol processed. As the Supreme Court of South Carolina has explained, when a charge is nol processed it is extinguished. Mackey v. State, 357 S.C. 666, 668, 595 S.E.2d 241, 242 (2004). However, "if the nolle prosequi is entered prior to the jury being empanelled and sworn, there is no bar to future prosecution for the same offense because the innocence or the guilt of the defendant would not have been adjudicated." Id. (quoting State v. Patrick, 318 S.C. 352, 457 S.E.2d 632 (1995)). Therefore, in situations where charges are nol processed before a jury has not been empanelled and sworn, the solicitor would be free to bring the charges against the defendant again. Davis' situation presented that exact scenario.

First, if Thomas had called Davis to testify at petitioner's trial, she ran the risk of the solicitor seeking to impeach Davis regarding his armed robbery conviction. The very real chance also existed that Davis may have discussed the second charge⁵ instead of his conviction and stated something detrimental on the stand that could be used against him by the solicitor in deciding whether to re-file the charge. As the Mackey case explains, the solicitor clearly maintained that right to charge Davis again. Counsel had already assisted Davis in avoiding this charge once, and there would be a strong motivation to keep Davis off the stand regardless of the context to avoid any chance of it being brought again. Second, counsel likely felt that there was

⁵ The conviction and the second charge were disposed of around the same time; hence, the chance that Davis could testify as to the second charge.

a potential for retribution if Davis was called. Davis was a potentially exculpatory witness who made a clear statement that petitioner was not the shooter and that the state's primary witness against Bowman was actually the murderer. App. 8966. There was certainly the potential that the solicitor would simply recharge Davis if he was called at petitioner's trial. Counsel had a duty to keep Davis from testifying or helping the defense in any way, as it could have resulted in renewed charges being brought against him. This is in direct conflict with her duty to zealously represent petitioner and provide effective counsel. Such an inherent conflict undoubtedly had a negative impact on her performance at trial, evidenced by the complete failure to call Davis.

Ricky Davis was convicted of one armed robbery charge and had the second nol processed. The second charge was dropped on October 18, 2001. Thomas represented Davis in both instances. Not long after, she was also appointed to defend petitioner at trial. As shown above, these clients' interests were adverse to one another. As the recognized by the above-authority, Thomas's dual representation of petitioner, and a potential defense witness, Davis, sufficiently established an actual conflict of interest. It is evident that the standard for establishing prejudicial conflict has been met in this case. If petitioner had been made aware of the prior attorney-client relationship and advised of the adverse interests, he would have likely objected to Thomas's representation. Due to the existence of an actual conflict, petitioner should not be required to show prejudice resulting from this conflict.

However, even if this Court were to require a prejudice analysis, petitioner was prejudiced due to counsel's reluctance to call Davis and failure to advise petitioner of the attorney-client relationship. The conflict of interest, whether actual or potential, related directly to the heart of the case and cannot constitute harmless error. Our Supreme Court very recently

held that error related directly to the central issue of a case cannot constitute harmless error. In Sulton v. Health South, 400 S.C. 412, 734 S.E.2d 641 (2012), the Court addressed an erroneous jury charge that incorrectly elevated the duty of care owed by a hospital on the seminal issues of the case. The Supreme Court held that, despite the harmless error approach to review of jury instructions, the error could not be harmless because it went to the heart of the case. The court held remand was warranted because the error on the key issue caused the defendant to suffer prejudice. Id. at 418, 734 S.E.2d at 644-45.

This matter is analogous to the court's logic and rationale in Sulton. The identity of the shooter constituted the critical issue in this matter. Whether petitioner's counsel excluded potentially exculpatory testimony due to a conflict of interest directly affected that critical issue in the matter. If counsel should not have represented petitioner, as was the case, his right to effective counsel was violated. It was critical that the trial court, and the PCR court, hear Davis' exculpatory testimony to ensure that petitioner received adequate representation, especially in light of the fact that the state sought the death penalty against petitioner. Thomas's improper representation of petitioner prejudiced him significantly. Accordingly, Thomas provided ineffective assistance of counsel, and the PCR court should have granted petitioner post-conviction relief.

Defense counsel was ineffective for failing to object to the solicitor's examination of James Aiken regarding favorable prison conditions and recreational facilities available to inmates since this Court had long ago in *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984), held such evidence was impermissible because it did not relate to the character of the defendant or the nature of his crime. This evidence was highly prejudicial in the eyes of the jury, and the failure to object to it properly at trial also barred consideration of this winning issue on petitioner's direct appeal.

Correctional Consultant James E. Aiken was qualified as an expert witness for the defense in the fields of prison adjustment and future dangerousness. App. 4832, l. 22 – 4838, l. 10. On cross-examination, the solicitor questioned Aiken about petitioner having received a youthful offender act (YOA) sentence in the past. Aiken acknowledged that the purpose of a YOA sentence was to rehabilitate the youthful offender, and that petitioner had “flunked out” because he was unable to comply with the mandates of the program. App. 4847, l. 1 – 4848, l. 3. Aiken also admitted there was a “use of force” report regarding a fight petitioner had while serving his YOA sentence was being served at Stevenson Correctional Institution. App. 4848, l. 8 – 4849, l. 2.

The solicitor had Aiken acknowledge that inmates can work while inside the correctional facility. The solicitor also asked Aiken to also admit that inmates were allowed to leave the correctional facility and pick up trash on the side of the road. This drew an objection from defense counsel because “that’s clearly not available here and it’s not proper.” App. 4857, l. 22 – 4858, l. 6.

The solicitor then asked Aiken to admit that even an inmate serving a life without parole sentence could still work. Aiken answered, “If you’re going to be in prison, you’re going to work.” App. 4862, l. 2 – 4864, l. 11. On re-direct examination, Aiken said there was not any way a person serving a life without parole sentence would be allowed outside the prison to pick up trash. App. 4864, l. 16 – 4869, l. 3.

Immediately on re-cross examination, the solicitor focused on escape and prison conditions. The solicitor noted that Aiken had said petitioner would never get out of prison and he then asked him how many inmates had escaped during the time he was affiliated with the South Carolina Department of Corrections. Defense counsel’s objection to this escape testimony was sustained. App. 4869, l. 13 – 4970, l. 11.

The solicitor then requested permission to question Aiken about “conditions of general population, the work conditions he’s already gotten into.” The defense’s only objection was that such questioning would occur on re-cross examination. Defense counsel did not object on the grounds that such prison conditions evidence was inadmissible. App. 4873, l. 21 – 4874, l. 19.

The solicitor then questioned Aiken extensively about what an inmate’s “routine” in prison. Aiken then admitted to the solicitor that inmates not in “super max” were able to work, and they were compensated for their work. When the solicitor asked how much inmates were paid, Aiken said he thought they made three dollars, four dollars, or five dollars, but he admitted he was not exactly sure how much they were paid for their work. App. 4878, ll. 11-24.

The solicitor then questioned Aiken about an inmate did in prison when he was not working. Aiken answered that inmate got up in the morning, had breakfast, then went to work, took a recess break “in the middle of the day, lunch break, to eat as provided by the constitution, and of course go back to work and then eat in the evening. And a person can involve himself in

bible study, a person can involve himself in education, a person can involve himself in anger management and other things that are provided within the correctional environment. That's one routine." App. 4878, l. 11 – 4880, l. 14.

Aiken then attempted to explain that inmates were constantly being watched during their activities, and they were written up for administrative violations. The solicitor objected: "Your Honor, I think he's not being responsive to my question. I was simply asking him about conditions of the prison that he had testified about and he's going off into a speech. I would like him to respond. So I've tried to ask simple questions and get direct answers." App. 4878, l. 11 – 4880, l. 14.

Defense Counsel Cummings responded: "I think the gentleman was trying to answer, Judge." The judge partially agreed: "I think he is trying to answer" but instructed Aiken to listen to the question and answer it fully "but if you could be mindful to remember brevity I would appreciate it." App. 4880, ll. 14-25. The following exchange then occurred with Aiken and the solicitor:

Mr. Aiken: I'll just answer the question like this. I gave the daily routine, but you have to understand that you are doing it around very dangerous people that use violence to resolve issues. And that gives a better picture of what it means living in prison.

Mr. Bailey: All right, sir. And are there recreational facilities available?

Mr. Aiken: Yes, sir.

Mr. Bailey: What type of recreational facilities?

Mr. Aiken: An inmate can play basketball, an inmate can exercise, you know, on his own, but to understand, again, to give it in a complete context as briefly as I can, you're doing it around very dangerous predator people.

Mr. Bailey: My question is related to the recreational facilities and we understand prison is dangerous people. In addition to that are there libraries they go to, to read books?

Mr. Aiken: Yes, sir. As guaranteed by the constitution.

Mr. Bailey: Are there movies they can watch?

Mr. Aiken: Yes, sir.

Mr. Bailey: Television?

Mr. Aiken: In some instances, yes, sir.

Mr. Bailey: Softball, do they play softball?

Mr. Aiken: I don't know. It's some type of recreation such as that.

Mr. Bailey: Thank you. That's all I have.

App. 4881, l. 1 – 4882, l. 3.

In his closing argument the solicitor reminded the jurors about the testimony of James Aiken. The solicitor said Aiken was “a very knowledgeable person, I had some trouble getting him to answer some questions, but I would concede he's very knowledgeable, he's an expert in prison adjustment. The solicitor noted that Aiken did say that petitioner could adjust well to prison. App. 4965, ll. 3-15. However, the solicitor urged the jury what its focus should be based on Aiken's testimony:

But when you're talking about adaptability to prison environment, you need to know what that environment is like. And he told you all a little bit about it, Mr. Aiken. I asked him about the prison environment, you work, you get paid some degree of money, some amount of money for working, that after work there are recreational opportunities available, he said **they could play basketball, they had a library where they could read books, movies, television. In the meantime, Kandee Martin's in her grave and she'll be there forever.**

App. 4965, l. 16 – 4966, l. 2. (emphasis added).

On direct appeal to this Court, undersigned counsel argued the following on direct appeal regarding this issue:

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

In State v. Bowman, 366 S.C. 485, 498-499, 623 S.E.2d 378, 385 (2005) this Court held the issue was procedurally barred – the only objection was improper re-cross examination -- but again warned the bench and bar that such prison conditions evidence was improper:

Appellant argues the trial court erred by allowing the State, on re-cross examination, to ask Aiken about prison conditions.

We find this issue is not preserved for review because appellant did not raise this issue to the trial court before the testimony was presented and did not make a contemporaneous objection when the testimony was actually elicited. Further, the trial court did not rule on this issue as now stated by appellant. See State v. Moore, 357 S.C. 458, 593 S.E.2d 608 (2004) (to be preserved for appeal, issue must be raised to and ruled on by trial court); State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997) (party cannot argue one ground below and then argue different ground on appeal). See also State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005) (to preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court).

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

In his application for post-conviction relief filed April 7, 2006, petitioner Bowman alleged his attorney was ineffective for failing to object to inadmissible “good prison conditions” evidence, and to preserve the issue for direct appeal. App. 1571. Petitioner continued to assert the failure to object to this prison conditions issue evidence as a PCR issue in subsequent pleadings. App. 5681-5682; App. 5694-5695; App. 5715-5716.

PCR counsel questioned defense counsel about the prison conditions evidence during the evidentiary hearing. Defense counsel stated that “it’s been the same argument throughout the last ten years in this state, what are its present conditions, and the Supreme Court is coming out telling the solicitor to stop it, and defense attorneys, you can’t sell it to the jury anymore, that it ain’t the life of a picnic anymore.” Trial counsel added:

For God’s sake, we have all tried to show LWOP means life without possibility of parole, and every Solicitor, and **I would do it myself if I was still prosecuting**, *he gets to watch TV, Kandee is dead, he gets to eat, she doesn’t, and he gets to have recreation in the yard, she doesn’t*, and then in the heat of that stuff, Mr. Bailey and I were going at it, you read the transcript. You should have been there.

App. 7450, ll. 3-12. (emphasis added).

When PCR counsel reminded trial counsel that this Court had held this very evidence introduced an arbitrary factor into the sentencing proceeding, counsel responded: “Isn’t that nice of them, but how else do you argue about somebody having a chance to live in prison? I mean, I don’t argue academically.” App. 7449, l. 21 – 7450, l. 22.

PCR counsel then asked trial counsel why he did not object to the prison conditions evidence:

Mr. Brown: [M]y question is why didn’t you object when Mr. Bailey brought it out so he couldn’t talk about it at all anymore?

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

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

Mr. Cummings: *There is not reason that a lawyer misses an objection, he misses it.*

App. 7451, l. 15 – 7452, l. 1. (emphasis added).

After this question, a colloquy occurred between the assistant attorney general and PCR counsel and the court. PCR counsel argued that trial counsel was ineffective for failing to preserve this issue for appeal “because it would have been reversed” if they had preserved the issue. App. 7453, l. 1 – 7460, l. 19. Trial counsel then responded: “It was on re-cross and again, if I made an error, if I made a mistake, that man, respectfully, should get the benefit, I just want to apologize.” App. 7462, ll. 18-21.

The assistant attorney general attempted to distinguish this case from State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007), by arguing that defense counsel in this case “opened the door” to the prison conditions evidence. Obviously recognizing that Burkhart decided the prison conditions evidence introduced an impermissible arbitrary factor into the case, he urged: “I think in the context of ineffective assistance we still have a prejudice prong as well.” App. 7460, l. 24 – 7461, l. 12.

In petitioner's brief supporting his fourth amended application for post-conviction relief, which the judge permitted counsel to file as a post-hearing brief, counsel again made a succinct argument on the prison conditions issue. App. 9546 - 9547. Counsel noted the trial prison conditions evidence and the fact defense counsel did not make a contemporaneous objection to this impermissible evidence. Counsel also pointed out the fact that defense counsel during PCR hearing did not offer any strategic reason for his failure to object. App. 9546 – 9547. Counsel

noted “in Burkhart, the Court *reaffirmed the long standing rule that evidence admitted in the sentencing phase of a capital trial must be limited to either character evidence of the defendant or the circumstances of the crime.*” App. 9547. (emphasis added). Counsel noted that petitioner’s jury sentenced him to death while considering the arbitrary factor of this “good” prison conditions evidence” App. 9547.

In his order denying petitioner’s application for post-conviction relief filed March 12, 2012, the judge found that the defense “opened the door” to the good prison conditions evidence. Supp. App. III 101-121. The order acknowledged that this Court procedurally barred this issue in State v. Bowman, 366 S.C. 45, 623 S.E.2d 378 (2005), but sought to distinguish it from State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007), by arguing the solicitor called a witness in his case in chief in Burkhart about prison conditions. Supp. App. III 105-107. The order of dismissal continued to make the Attorney General’s argument that seemingly because of Kelly v. South Carolina, 534 U.S. 246 (2002), and the two cases that preceded it, Simmons v. South Carolina, 512 U.S. 154 (1994) and Shafer v. South Carolina, 532 U.S. 36 (2001), which held that evidence of future dangerousness as a matter of due process mandated a jury instruction that life meant “life without parole” constituted a “new legal setting” that allegedly now allows the admission of evidence on the “routine” of daily prison life to counter adaptability evidence in some way. Supp. App. III 105.

The order also found defense counsel had a “strategic” reason not to object to this evidence because he wanted to emphasize “the harsh conditions of prison” to the jury and he fully expected the solicitor to respond with the good conditions in prison. Supp. App. III 107-109. As petitioner demonstrates infra, trial counsel’s reasons are in error. This Court has consistently emphasized that penalty phase evidence must concentrate on the character of the

defendant and the circumstances of his crime. Consequently, the ruling that defense counsel here “opened the door” to evidence of general prison condition evidence is actually an additional finding of ineffectiveness. This is not a direct appeal. This ruling reinforces the admitted ineffectiveness of counsel, and his demonstrated lack of awareness concerning long-standing binding precedents of this Court. It ignores the fact such evidence has nothing to do with petitioner’s character or the circumstances of his crime, or any matter within his control and it is inadmissible.

For this and other reasons, petitioner now seeks a writ of certiorari from this Court.

Discussion

Defense counsel testified at the PCR hearing that if he was still prosecuting cases he would have done exactly what the solicitor in this case did. He would have presented evidence and argued that Marion Bowman would be allowed to watch television, have recreation, go the library and have other amenities while the victim was dead in her grave as a result of the murder. “He gets to eat, she doesn’t, and he gets to have recreation in the yard, she doesn’t,” as defense counsel testified at the PCR hearing. App. 7450, ll. 3-12. Defense counsel had no appreciation of the fact that this Court has long held that evidence of prison conditions and execution did not constitute proper jury considerations. State v. Atkinson, 253 S.C. 531, 172 S.E.2d 111, 112 (1970); State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984).

In Plath, this Court noted that the Department of Corrections controls the conditions of imprisonment and not the defendant. “This determination as to the time, place, manner, and condition of execution or incarceration . . . are reserved by statute . . . to agencies other than the jury. As we have repeatedly stated, the sole function of the jury in a capital sentencing trial is the individualized selection of one or the other penalty, based on the circumstances of the crime

and the characteristics of the individual defendant.” State v. Plath, 281 S.C. at 15, 313 S.E.2d at 627.

This Court in petitioner’s case on direct appeal in State v. Bowman procedurally barred this prison conditions issue as seen supra, and reminded the bench and bar that evidence such as that offered during petitioner’s trial was improper. Defense counsel’s only objection at trial was that the evidence was being offered on re-cross examination. Evidence offered on re-cross examination is within the sound discretion of the judge where the objection should have been, as a matter of law, that the evidence the solicitor intended to elicit was improper and inadmissible. While objecting only on the basis that the solicitor was presenting the prison condition evidence on re-cross examination, defense counsel framed the issue as simply one vested to the sound discretion of the trial court since the right to, and scope of, re-cross examination is purely a discretionary matter. See Liberty Mutual Insurance Company v. Gould, 266 S.C. 521, 533, 224 S.E.2d 715, 720 (1976); State v. Singleton, 179 S.C. 184, 183 S.E. 910 (1936).

As the Chief Justice, while arguing against automatic reversal based upon the arbitrary statutory factor, wrote in her dissent in State v. Burkhart, 371 S.C. 482, 494, 640 S.E.2d 450, 456 (2007)::

Our pronouncement disfavoring this evidence in Bowman was nothing new. See Plath, 281 S.C. at 15, 313 S.E.2d at 627 (“It should not be necessary in the near future ... to remind the bench and bar of the strict focus to be maintained in the course of a capital sentencing trial.”); and Smart, 278 S.C. at 526, 299 S.E.2d at 692-93 (“While this Court approves zealous representation ... it is important in capital cases to maintain strict focus upon the particular characteristics of the specific crime and the unique attributes of the defendant.”). In reversing this case, I believe we treat the disapproval of this type of evidence as though it were a novel development, and that we unnecessarily depart from an established course of analysis that is easily tied to defined doctrines. In my view, reversing Appellant’s sentence uses Bowman to propagate a rule that inappropriately presumes prejudice in many cases and is unjustified given the existing constitutional framework.

State v. Burkhart, 371 S.C. 482, 494, 640 S.E.2d 450, 456 (2007).

As seen above, defense counsel belatedly admitted at the PCR hearing that there could not be any excuse, reason or strategic reason to justify his failure to object to this prison condition evidence if it was inadmissible. Regardless, it is clear defense counsel erroneously thought that petitioner's day to day life in prison routine was a proper matter for the jury's consideration.

Counsel's failure to understand the law in this area allowed the solicitor to capitalize on the prison condition evidence that was admitted without objection to argue that petitioner would enjoy playing basketball and watching television in prison while the victim remained dead in her grave. That was a powerful argument and it is improper. As early as State v. Atkinson, 253 S.C. 531, 172 S.E.2d 111, 112 (1970), this Court held:

The legislature committed to the jury the responsibility to decide in the first instance whether the punishment should be life or death. It charged another agency with the responsibility of how a life sentence should be executed. The jurors perform their task completely when they decide the matter assigned to them upon the evidence before them. *What happens thereafter is of no concern of theirs.* (emphasis added).

The solicitor painted the jury a picture here of life in prison as a relaxing experience where inmates work, play basketball, watch television and go to the library. That certainly would not sound like severe punishment to many jurors for a murderer.

However, as this Court has repeatedly held, punishment in a death penalty trial must be focused on the character of the defendant and the circumstances of his crime. Sentencing a defendant to death based upon the jury's perception of what life imprisonment is like behind the prison walls introduces an impermissible arbitrary factor into the sentencing phase. See State v. Burkhart, *supra*.

The state in this case continued to urge upon the PCR court that if the defendant introduces evidence that the defendant can adapt to prison that this opens the door to introduce evidence and argument that the defendant is allegedly adapting to a relaxing prison life and routine. That was a fallacious argument.

Skipper v. South Carolina, 476 U.S. 1 (1986) held that evidence that a particular defendant can adapt to prison must be allowed because it is evidence in mitigation that a jury must be allowed to consider as a reason to impose a sentence of less than death. See Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

While the refusal to allow prison adaptability in the lower court in Skipper was based upon the precedent at the time, State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982), there should be no serious argument that Skipper v. South Carolina prison adaptability mitigating evidence relating to a particular defendant on trial “opened the door” to evidence of favorable prison conditions and a relaxing daily routine in prison in response. This Court has long held such inadmissible. Such evidence simply is irrelevant to the character of the defendant or the circumstances of his crime.

Further, a death sentence imposed where a defendant has no opportunity to explain or deny information which forms the basis for that sentence - - here the changing rules and regulations of the Department of Corrections under which inmates must live - - denies the defendant his right to due process. See Gardner v. Florida, 430 U.S. 349 (1977). Petitioner had and has no control over the conditions in prison that he must live by as a result of his conviction. Those rules, as petitioner argued in his procedurally barred argument on direct appeal, are often left to the discretion of the Director of the Department of Corrections in power at the time, and perhaps public sentiment at the time. See Brief of Appellant at Supp. App. 27.

Had trial counsel made the proper objection to the prison condition evidence and argument at trial there is no reason to believe that petitioner would not have been granted a new sentencing trial in his appeal, State v. Bowman, 326 S.C. 485, 623 S.E.2d 378 (2005), where this issue was procedurally barred instead. Petitioner submits that this prison conditions evidence presented an arbitrary factor into the case that mandates a new sentencing trial in the same manner as if the issue had been preserved for direct appeal. See State v. Burkhardt, *supra*.

However, should the court conduct a prejudice analysis beyond the arbitrary factor, petitioner strongly asserts that under Strickland v. Washington, 466, U.S. 668 (1984) that this highly prejudicial evidence that the solicitor fully capitalized on during his closing argument mandates a new sentencing hearing. As this Court held in State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000), the evaluation of the consequences of an error in the sentencing phase of a capital trial is more difficult because of the wide discretion that is given to the sentencing jury. A capital jury can recommend a life sentence **for any reason or no reason at all**.

The solicitor's examination of Dr. Aiken successfully painted the erroneous picture that life imprisonment is a tranquil experience because an inmate, here petitioner, would be able to work, have recreation, watch television, go to the library, and play basketball. It is hardly a leap to assert that this evidence and the solicitor's powerful argument capitalizing on it was a factor in at least one juror's decision to not choose a life sentence. See Chaffee v. State, 294 S.C. 88, 362 S.E.2d 875 (1987)(Solicitor took advantage of evidentiary error in closing argument in a capital sentencing proceeding, error was not harmless). This Court should respectfully grant certiorari on this issue.

Petitioner's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under state law were violated because the trial judge failed to properly consider his application as evidenced by the PCR court's wholesale adoption of the state's proposed order.

The PCR court adopted the state's proposed order with no changes. Compare Supp. App. 142 – 286 with Supp. App. III 5-149. Petitioner noted this problem in his Rule 59(e) motion. App. 9953. The last date the PCR court heard testimony was December 22, 2008. App. 7749. The state's proposed order was submitted on June 17, 2011. Judge Lockemy signed it on February 27, 2012. Supp. App. III 149. The Court should note that the only change appears to be overwriting "2011" with "2012." Supp. App. III 149.

This Court has on two occasions warned PCR judges against wholesale adoption of proposed orders. In Pruitt v. State, the Court stated:

We take this opportunity to express our concern with the increasing number of orders in PCR proceedings that fail to address the merits of the issues raised by the applicant. . . . Counsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to the issuance of the order, and the PCR judge should carefully review the order prior to signing it.

310 S.C. 254, 255-56, 423 S.E.2d 127, 128 (1992). Despite the Court's admonishment in Pruitt, the practice continued. This Court again was forced to address this issue in Hall v. Catoe, stating:

Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, we also acknowledge that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency.

360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004).

Just like this Court, the United States Supreme Court recognizes that wholesale adoption of proposed orders in capital cases raises serious questions about the fairness of the process and a trial court's factual findings. Jefferson v. Upton, ___ U.S. ___, 130 S.Ct. 2217, 2223 (2010). In Jefferson, the state PCR court adopted an *ex parte* proposed order verbatim.⁶ Id. at 2222. The Supreme Court remanded the case based solely on the impropriety of the PCR court's actions. Id. at 2223. The Court stated, "Although we have stated that a court's 'verbatim adoption of findings of fact prepared by the prevailing parties' should be treated as findings of the court, we have also criticized that practice." Id. (quoting Anderson v. Bessemer City, 470 U.S. 564, 572 (1985)).

Other state courts also expressly disapprove of the verbatim adoption of proposed orders in capital cases. "We cannot . . . in this post-conviction case involving a review of the propriety of a death sentence, condone the wholesale adoption by the post-conviction court of an advocate's brief." Commonwealth v. Williams, 732 A.2d 1167, 1176 (Pa. 1999); see also Dobyne v. State, 805 So.2d 733, 741 (Ala. Crim. App. 2000) (criticizing practice and quoting Anderson); Dukes v. State, 621 N.W.2d 246, 258-59 (Minn. 2001) (criticizing practice).

A state PCR court must engage in a "probing and fact-specific analysis" in capital cases. Sears v. Upton, ___ U.S. ___, 130 S.Ct. 3259, 3266 (2010). Just as in Jefferson, and in violation of this Court's strictures concerning proposed orders, the verbatim adoption of a proposed order demonstrates petitioner did not receive a full and fair hearing as required by the Eighth and Fourteenth Amendments.

The proper remedy in this case is a *de novo* review of the evidence in this case or, in the

⁶ The proposed order in this case was not solicited or provided *ex parte*, but this should not change the Court's analysis.

event petitioner is not granted a new trial after a *de novo* review, a remand for a new post-conviction relief hearing. The Court should not apply the deferential “any evidence” standard normally used in PCR cases. Not only has this occurred in petitioner’s case, but it is occurring in other capital PCR cases. This same issue was raised in Marion Lindsey v. State, which is currently pending before this Court. In Lindsey, it appeared that the PCR judge did not even read the proposed order before signing it. See also Charles O. Shuler v. State, CA No. 2003-CP-38-0359, Order filed Jan. 9, 2013, Denying Rule 59 SCRC/Motion to Alter or Amend Judgment. Shuler was a capital PCR. Shuler raised the issue of the PCR court’s wholesale adoption of the state’s proposed order. Id. at 4-5. Shuler passed away before an appeal from his PCR could be heard. It is manifestly clear that the problems recognized by this Court in Pruitt and Hall persist and are not unique to petitioner’s case. See Sammie Louis Stokes v. state, CA No. 2001-CP-38-1240, Order filed Feb. 19, 2013, Denying Rule 59 Motion and Denying Motion to Appoint New Counsel at 3-7 (addressing wholesale adoption of state’s proposed order).

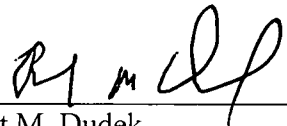
It appears that this Court’s instructions to circuit judges in capital PCR cases continue to be ignored. Without some adverse consequence, circuit judges and the Attorney General have no incentive to see that orders in capital cases are drafted by the court. What is even more troubling is that this error has occurred in an order signed by one of this state’s best judges. Appellate counsel for petitioner have great respect for Judge Lockemy, both as a trial judge and as an appellate judge. He is a fair, smart, and hard-working judge. The disparity between Judge Lockemy’s unquestioned judicial ability and the errors in the order should be attributed to the systemic fault that is resulting from circuit judges’ continued reliance on the Attorney General’s office to draft their orders in these cases. Writing an order in a capital PCR case requires discipline of thought and judgment. The process of writing the order helps ensure the careful

consideration of the evidence and the law by a neutral arbiter instead of an adversarial party.
This Court should use this case to reiterate its prior commands that this practice must end.

CONCLUSION

By reason of the foregoing arguments a writ of certiorari should be granted to allow full briefing on these issues.

Respectfully submitted,

By: 
Robert M. Dudek
Chief Appellate Defender

David Alexander
Assistant Appellate Defender

Michael Anzelmo, *pro bono*
Nelson Mullins Riley & Scarborough, LLP

ATTORNEYS FOR PETITIONER

This 30th day of April, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dorchester County
James E. Lockemy, Circuit Court Judge

MARION BOWMAN,

PETITIONER,

V.

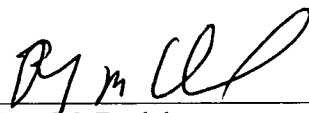
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213468

CERTIFICATE OF SERVICE

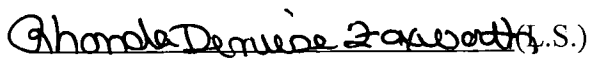
I certify that a true copy of the Amended Petition for Writ of Certiorari has been served on Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 30th day of April, 2014.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day
of April, 2014.


(L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021