STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. 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

REPLY TO THE RETURN TO THE PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN REPLY

Introduction

The state essentially concedes deficient performance under Strickland[1] and failure to disclose under Brady.[2] It rests its hopes for affirmance on the prejudice prong of Strickland and the materiality prong of Brady. Seven times in its response the state repeats the exact same language concerning overwhelming evidence of guilt. State's Return at 22, 24, 28, 32, 36, 44, 46. In its attempt to persuade the Court that no prejudice exists, it cites multiple allegations against petitioner that were discredited by the evidence at PCR. The state would have the Court believe that each piece of evidence maintained the same integrity after the PCR as after the trial. But the state's prejudice analysis is a house of cards. Viewed from the front, each card seems square and true. This viewpoint was only possible because of trial counsel's ineffectiveness and the prosecution's failure to disclose material evidence. Now, after the PCR, each card is turned sideways, exposing its thinness. Petitioner's case is the highly unusual capital proceeding in this state where the defendant's guilt was not known with almost metaphysical certainty after the trial. The evidence against petitioner came from the mouths of proven liars. The PCR hearing raised such significant questions regarding the evidence and whether petitioner received a fair trial due to counsel's incompetence, conflicts, and the withholding of vital information by the prosecution, that this Court should grant certiorari and reverse.

[1] Strickland v. Washington, 466 U.S. 668 (1984).

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

The Standard of Review is De Novo

The state asks this Court to review petitioner's claims giving deference to the PCR court under the "any probative evidence" standard. State's Return at 17. That standard does not apply because, in violation of this Court's directives the PCR court adopted the state's proposed order with no changes. Compare Supp. App. 142 – 286 with Supp. App. III 5 – 149. Jefferson v. Upton, 560 U.S. 284, (2010); Pruitt v. State, 310 S.C. 254, 255-56, 423 S.E.2d 127, 128 (1992); Hall v. Catoe, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004).

The state has not contested petitioner's assertion that the PCR court adopted the state's proposed order without making a single change. It simply asserts that the PCR court had ample time to review the proposed order. Simply having time to review a proposed order is not the same as drafting it. The process of writing requires careful work and meaningful deliberation. It is an active process. Reviewing a proposed order is a passive process. See Prowell v. State, 741 N.E.2d 704, 709 (Ind. 2001) (stating that verbatim adoption of a proposed order causes "an inevitable erosion of the confidence of an appellate court that the findings reflect the considered judgment of the trial court."). And in a capital case, reviewing and adopting a proposed order from the state is not due process.

In Jefferson, the United States Supreme Court remanded the case for a determination "whether the state court's factual findings warrant a presumption of correctness" in part because of the wholesale adoption of a proposed order. Jefferson, 560 U.S. at 294. The Jefferson Court recognized that no deferential standard need apply where the lower court adopts a proposed order *in toto*. This Court in Pruitt and again in Hall condemned the practice of adopting proposed orders *in toto* in cases. Pruitt at 255-56, 423 S.E.2d at 128; Hall at 365, 601 S.E.2d at 341. One of the two cases cited by the state to support its contention that adopting a proposed order is not a

due process violation is not a capital cases. Prince v. State, 390 S.W.3d 225, 229 (Mo. Ct. App. 2013) (defendant received consecutive sentences of a term of years). The second, an Alabama intermediate appellate court decision, relied in large part on an Alabama Supreme Court decision reversing the intermediate appellate court for applying a deferential standard of review when the lower court adopted a proposed order. Compare Ex parte Ingram, 51 So.3d 1119, 1124-25 (Ala. 2010) (ruling that the wholesale adoption of a proposed order containing errors "undermines any confidence that the trial court's findings of fact and conclusions of law are the product of the trial judge's independent judgment and that the June 8 order reflects the findings and conclusions *of that judge*.") (emphasis in original) with Miller v. State, 99 So.3d 349 (Ala. Crim. App. 2011). Since it is now uncontested that the PCR court adopted the state's proposed order *verbatim*, this Court should apply a *de novo* standard of review.

1.

Gadson was threatened with the death penalty if he failed to "cooperate" with the state, and trial counsel did not have a strategic reason not to tie Gadson to the gun or impeach him with his prior inconsistent statements.

The state commits a logical error regarding Strickland's prejudice prong that should not mislead this Court. When the state claims that petitioner was not prejudiced by trial counsel's ineffective assistance regarding Gadson, it recites a number of pieces of evidence which supposedly show overwhelming evidence of petitioner's guilt. The critical portion of this evidence is Gadson's testimony. State's Return at 22-23; 24-25. The prejudice analysis logically should exclude the contested evidence. A finding of overwhelming evidence of guilt should be made with the caveat that even if petitioner's challenge to trial counsel's effectiveness is correct on a particular ground, it does not matter because of **other** evidence of petitioner's guilt. It is improper and illogical to use evidence from Gadson to support the prejudice analysis of the claims regarding Gadson. The Court should not let this logical error influence its consideration of the case.

a. The State Threatened Gadson with the Death Penalty in Writing

The state asserts that *because* Gadson was never served with a Notice of Intent to Seek the Death Penalty, that Gadson *was never threatened* with the death penalty. Return at 20. This argument is troubling, because the solicitor *expressly threatened Gadson with the death penalty in his plea agreement*. App 8946. 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 (emphasis added). The state

asserts this language "did not constitute a Notice of Intent to Seek the death Penalty." Return at 21. Apparently the state's argument is that threatening Gadson with the death penalty in one written document is somehow different from threatening him with the death penalty in another written document. Threatening Gadson with the death penalty in a plea agreement is even more relevant to the jury's assessment of Gadson's credibility than a death notice. Had the jury known that—in one document—Gadson traded his testimony for avoidance of the death penalty, it would have seriously undermined Gadson's testimony and the solicitor's reliance upon him.

b. Trial Counsel Had No Strategic Reason for Not Informing the Jury that Gadson Fired the Murder Weapon and for Impeaching Gadson with his Prior Inconsistent Statements

The state incorrectly relies asserts that Cummings made a reasonable strategic decision that he did not want to present evidence Gadson firing the murder weapon at the Villas. 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). Since Cummings did not know the gun was the same, he could not have made a strategic decision.

Cummings also unequivocally admitted that he had no strategic reason for not presenting this information:

> Q. And if you will look at Plaintiff's Exhibits 29 and 30 [the Hawkins and Coleman statements] already entered into evidence, why didn't you mention to the jury that Tawain Gadson had been shooting that same gun, if you believed the SLED report?
>
> A. I didn't do it. I mean, I don't remember doing it.
>
> Q. No. Why not?

A. I don't have a strategy reason for that.

App. 7410, l. 18 – 7411, l. 1 (emphasis added).

No evidence supports the PCR court's conclusion that Cummings had a strategic reason for not using this information. Furthermore, even under the post-hoc rationale of the state—that it would show petitioner had access to the murder weapon—that evidence was already before the jury from multiple sources. It could not have harmed Bowman's case to show that the state's key witness also fired the gun.

The state also incorrectly argues that petitioner's claim that trial counsel failed to impeach Gadson with his prior inconsistent statements is unpreserved because the PCR court did not rule. State's Return at 25. The state is incorrect. Petitioner raised this claim in his post-trial memorandum. App. 9476. He stated that Gadson's falsehoods formed the basis of the police's belief that Gadson was involved in the crime. App. 8476 n.4. Petitioner raised these claims in his Rule 59(e), SCRCP, motion which was denied. App. 9555-56. App. 9970. This issue is preserved.

2.

There was no strategic reason for defense counsel not to introduce the videotape of Felder buying gasoline during the guilt phase, and petitioner was prejudiced by counsel's failure to impeach Felder.

The state contends that Cummings had a strategic reason for not impeaching Felder with the videotape showing he bought the gasoline. Regardless of what Cummings said during the PCR hearing, Cummings **introduced the videotape during the penalty phase**. App. 4929, ll. 1 – 8; Defendant's Ex. 19.

His introduction of the tape—only after petitioner himself brought it to the court's attention—trumps any assertion at the PCR hearing that not using the tape was trial strategy. Acting in contradiction to a claimed strategy is strong evidence that you did not have a strategy. Furthermore, as quoted extensively in the petition, Cummings also admitted during questioning by Judge Lockemy that he did not make an intentional decision to forego impeachment of Felder with the videotape. App. 7665, l. 6 – 7667, l. 20. No evidence supports the PCR court's conclusion that trial counsel was effective.

As for Cummings' failure to impeach Felder with his original charges and inconsistent statements, the state credits the PCR court's finding that Cummings would have opened the door to Petitioner's suppressed statements. This holding was a legal error by the PCR court. Involuntary statements are not allowed to be used against a criminal defendant for impeachment purposes. See Mincey v. Arizona, 437 U.S. 385 (1978); New Jersey v. Portash, 440 U.S. 450 (1979). The state cited no authority to support the PCR court's ruling.

3.

Defense counsel was ineffective for failing to impeach Hiram Johnson with the fact that he did not tell law enforcement in his statement of April 5, 2001 that petitioner made a laughing admission he killed the decedent, and the state's assertion otherwise is misleading.

The state claims that Hiram Johnson told police about petitioner's supposed confession, "I killed Kandee, heh, heh, heh." App. 4068, ll. 4 – 6. This claim is misleading and incorrect. The state cites Investigator Coker's notes from his February 22, 2001, interview with Johnson as support for the assertion that petitioner's confession was not a courtroom invention. State's Return at 35. The state claims that if Cummings impeached Johnson with his prior written statement, the solicitors could have called Investigator Coker to substantiate that Johnson previously mentioned petitioner's supposed confession. State's Return at 35.

Johnson claimed that petitioner made the confession on the way back from the Allen Murray Club the night of the shooting. App. 4068, ll. 4 – 6. The only people supposedly in the car were petitioner, Gadson, Johnson, and Darian Williams. App. 4064, ll. 7 – 20. Investigator Coker's notes state that petitioner "told Trina West about killing Kandee Martin." App. 8155. *Trina West was not in the car.* Therefore, nothing in Investigator Coker's notes support that Johnson told Coker in February about the confession.

Further, Johnson said at PCR that he thought petitioner was kidding when he said he killed the decedent. App. 6290, l. 10 – 6298, l. 10. Johnson said no such thing at trial, and the utter failure to even impeach Johnson at trial with the fact "left out" such a critical "fact" in his statement to the police should make the prejudice from counsel's deficient performance apparent.

4.

Brady issues

The state's contention that evidence Gadson confessed to shooting the decedent is not evidence favorable to petitioner cannot be taken seriously. Further, the failure to disclose Gadson's mental evaluation which was in the possession of the solicitor is not excusable on the grounds petitioner could have gotten it elsewhere. Finally, the state's view that the failure to disclose Hiram Johnson's pending charges is not material because of the state's claim that there is "overwhelming evidence" of petitioner's guilt is untenable.

a. The Sam Memo[3]

The state concedes that the solicitor had possession of the Sam Memo and it was not disclosed.[4] The state contends that Ricky Davis telling the solicitor's investigator that Gadson confessed to shooting Kandee Martin is **not** favorable evidence to petitioner. State's Return at 39-40. This contention is patently absurd, and the state spends little time making it. State's Return at 39-40. Instead, it attempts to distract the Court with a comparison of the information in Davis' handwritten statement (which trial counsel possessed) with the information in the Sam Memo (which the state withheld). The importance of the Sam Memo is not that it contains different information (even though it provided more details which made it more credible), but the fact that Davis told the same story to the state as he did in his handwritten statement.

With only the handwritten statement, impeachment of an equivocating Davis could have been difficult. However, if petitioner had been armed with the knowledge that Davis had repeated Gadson's confession to the solicitor's investigator when he was at another institution

[3] It is named after First Circuit Solicitor's Office Investigator Samuel Richardson.

[4] The state did not contest that the Brady violations must be considered in the aggregate.

and away from petitioner, impeaching Davis would have been effective.[5] Had Davis attempted to deny that Gadson confessed, the jury could have heard from a member of the state's own team that he previously affirmed the confession.

The Sam Memo was also material. Gadson was the state's sole eyewitness to the crime. Anything that impeached Gadson's credibility was vital. The fact that the jury never heard that Gadson confessed to shooting Kandee Martin certainly undermines the notion that the verdict in this case is "'worthy of confidence.'" Riddle v. Ozmint, 369 S.C. 39, 45, 631 S.E.2d 70, 73 (2006) quoting Kyles v. Whitley, 514 U.S. 419, 434 (1995). The ability to hold Davis to his statement about Gadson's confession with the state's own investigator was material information that would have resulted in Davis testifying. See also United States v. Minsky, 963 F.2d 870 (6th Cir. 1992). In Minsky, the Sixth Circuit reversed on a Brady claim because the government did not disclose a witness's statements to FBI agents. Id. at 872. The statements to the FBI agents could have been used to impeach the witness's credibility. Id. at 875. The government's refusal to disclose the statements to the FBI in Minsky is analogous to the nondisclosure of Davis's statements to Sam. Repeating Gadson's confession to Sam made Davis's account more believable. The Sam Memo was material and its suppression by the solicitor kept petitioner from receiving a fair trial.

[5] It is worth noting that Davis's testimony at the PCR hearing which the state cites as favorable to its view of the facts came after Davis and Gadson "bumped heads" in the holding cell waiting to testify at the hearing. App. 5927, ll. 6 – 25. This illustrates the importance of Davis's statements to Sam when Davis was at Lieber and Gadson was at the detention center. App. 9122. During his earlier deposition, Davis testified that he could not remember if Gadson ever confessed to shooting Kandee Martin. App. 6001, ll. 14 – 21.

b. Gadson's Mental Evaluation

The state contends that the solicitor did not have to provide Gadson's mental evaluation because the defense could have subpoenaed it. This argument is not supported by either the facts of this case or the law. It is undisputed that the solicitor had Gadson's evaluation and did not give it to the defense. The solicitor has a duty to provide the defense with material impeachment evidence that is in its possession. Kyles, 514 U.S. at 437-38. Instead of complying with this duty, he failed to turn Gadson's evaluation over to the defense.

The cases cited by the state do not hold that the state has no duty to disclose evidence **actually in its possession** to the defense if the defense can get it from another source. The state cites two cases in support of this argument that contravenes the fundamental language of Brady. State's Response at 42, citing State v. Moses, 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010) and United States v. Wilson, 901 F.2d 378, 381 (4th Cir. 1990). Moses deals with the state's responsibility to preserve evidence in the hands of a third party. Moses at 518-19, 702 S.E.2d at 403-04. The evidence the state allegedly did not preserve originated from a surveillance system at a school that was "antiquated." Id. Live video could not be obtained from the system. Id. The police gave defense counsel a still photo from the system and invited the defense's expert to examine the system. Id.

Despite not taking advantage of the state's offers to examine the evidence, when the evidence was destroyed before trial by the third party in possession of the evidence the defense speculated that the surveillance video "'would most likely'" have allowed for identification of witnesses who "may" present favorable or impeachment evidence. Id. at 519-20, 702 S.E.2d at 404. In the context of this speculation about what the evidence would have shown, the court held that the defense could have contacted witnesses at the school without the surveillance

system. Id. The court did not rule that the state had no duty to disclose the existence of the surveillance system. Id. As shown above, the court emphasized the solicitor's repeated attempts to provide the defense with the information it had about the evidence. Id. The solicitor's actions in Moses are sharply contrasted with what occurred in petitioner's case. Petitioner submits that Moses supports petitioner's contention that the evaluation should have been disclosed.

In Wilson, the state's other case, the evidence again was not found to be in the state's possession, but (if it existed) in the hands of a third party. Wilson, 901 F.2d at 380-82. The defendant alleged that a CIA official talked to government officials and that the NSA gave the government "intercepts." Id. The defendant did not show that written records of the CIA official's alleged meeting with the government existed. Id. Nor could the defendant show that the "intercepts" existed. Id. The CIA official cooperated with the defense and the Fourth Circuit noted that the defendant knew of her and certainly could have questioned her. Id. This case does not stand for the broad rule that the state is free to withhold information on the chance that the defendant could get it from another source.

This Court reversed a PCR judge's finding that the state did not have to disclose information because the defense could have learned of it through their own diligence. Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006). This Court criticized the PCR judge's diligence finding as "unrealistic" and held, "The burden is on the solicitor to disclose material evidence which is exculpatory or impeaching." Id. The Court reversed the PCR court on the Brady claim and granted the death row inmate a new trial. Id. at 41, 631 S.E.2d at 72.

The evaluation was material because it showed that the state's key witness had memory problems, had audio hallucinations of beeping noises, and suffered from blackouts. App. 8957-60. Impeaching Gadson's memory and mental state would have undermined his credibility.

Even Solicitor Bailey admitted there would be impeachment value to the mental health evaluation. App. 7852, ll. 11 – 14. The PCR court's conclusion was based on a mistake of law and no evidence supports its conclusion on this issue.

c. Hiram Johnson's Pending Charges

The state's only argument concerning the solicitor's failure to disclose Hiram Johnson's pending charges is that they were not material because the evidence against petitioner was overwhelming. State's Response at 45-47. The state contends that "the impeachment value of Johnson's pending charges was limited, particularly in view of the overwhelming evidence of guilt detailed above." State's Return at 46. Obviously, nothing in Brady allows the state to withhold evidence because it thinks a defendant is overwhelmingly guilty. The state attempts to import the Strickland prejudice analysis into a Brady analysis. The legally incorrect and weak response from the state on this issue conclusively demonstrates that no excuse existed for failing to disclose Johnson's pending charges.

5.

The state's contention that Counsel Hardee-Thomas did not have a conflict of interest in representing both Ricky Davis and petitioner where she failed to disclose the conflict, and failed to call Davis as a witness during petitioner's trial despite the fact Davis had executed a statement exculpatory of petitioner's guilt and stating Gadson confessed to the murder is untenable. Davis and petitioner were both in jeopardy and Hardee-Thomas's multiple representation in this instance was highly prejudicial to petitioner.

The state uses a variety of dates to confuse this issue. What should *not* be confusing is that *Marva Hardee-Thomas ("Thomas") represented Ricky Davis at the same time she represented petitioner*. Below are the relevant dates in chronological order:

- February 16-17, 2001 — The crime in petitioner's case occurs.
- April 23, 2001 — Thomas was appointed to represent Ricky Davis in two armed robberies. App. 8967.
- August 6, 2001 — Ricky Davis's note about Gadson's confession is signed. App. 8966.
- August 21, 2001 — Thomas says she is appointed to represent Petitioner. App. 7262, ll. 17 – 23. Thomas almost certainly began representing petitioner far earlier. One of the mitigation investigator's timesheets indicates she attempted to contact Thomas on July 30, 2001. App. 9282.
- October 16, 2001 — Thomas tries Ricky Davis's first armed robbery case. App. 8980.
- October 18, 2001 — Ricky Davis's second armed robbery indictment is nol prossed. App. 9291-92
- January 2, 2002 — The state contends Thomas first learned of the Ricky Davis note on this date, when it was served on her by the solicitor. App. 9383.

- May 3, 2002 Jury selection begins in petitioner's case. App. 1380.

In May of 2002, during petitioner's trial, Ricky Davis was transported to the Dorchester County Courthouse to testify in petitioner's trial. App. 5980, ll. 5 – 15. Davis testified that Thomas came to speak to him. App. 5981, ll. 2 – 7. Thomas did not talk to him about a conflict of interest. App. 5991, ll. 14 – 20. Davis did not testify at petitioner's trial. Thomas claimed she did not remember ever talking to Davis about Gadson's confession even though she admitted her handwriting appears on the August 6 note. App. 7289, ll. 14 – 15. App. 7294, ll. 11 – 24.

The state contends that no conflict of interest existed because Thomas's representation of Davis ended in October 2001 and Thomas did not learn of the note and Gadson's confession until January 2002. This contention, of course, requires an incorrect legal conclusion: that the filing of a nolle prosequi ended Thomas's duties to Ricky Davis.[6] Since the nolle prosequi was entered before a jury on the second armed robbery was empanelled, the state could still prosecute Davis. See Mackey v. State, 357 S.C. 666, 668, 595 S.E.2d 241, 242 (2004). Thomas had a duty to advise Davis that the state could restore this charge and advise him that helping the petitioner could result in this happening. This duty created an inherent conflict with her duty to call Davis in petitioner's case and, if necessary, impeach him if he equivocated on Gadson's confession.

The cases cited by the state do not stand for the proposition that a nolle prosequi terminates an attorney's duties to her client. In re Brown stands for the proposition that the court of general sessions lacks jurisdiction after a solicitor enters a nolle prosequi. 294 S.C. 235, 237-38, 363 S.E.2d 688, 689-90 (1988). In State v. Ridge, the only issue was whether, before the

[6] Believing the state's factual scenario would also require belief that petitioner, who according to Davis knew of Gadson's confession when the note was signed, forgot—**for four months**—to tell his attorneys that his co-defendant confessed to murdering Kandee Martin.

drawing of the jury, the solicitor had the discretion to enter a nolle prosequi before the trial judge dismissed the indictments with prejudice. 269 S.C. 61, 63-64, 236 S.E.2d 401, 401-02. In Mack v. Riley, the court of appeals held that a nolle prosequi would not support an action for malicious prosecution. 282 S.C. 100, 102-03, 316 S.E.2d 731, 732-33. In United States v. Montgomery, the court dealt with whether an invocation of the right to counsel in a state prosecution prevented police from questioning the defendant in a federal prosecution. 262 F.3d 233, 246-47.

None of these cases has anything to do with whether an attorney's duties to her client survive the entry of a nolle prosequi. An actual conflict of interest existed because of the dual representation which affected Thomas's performance as this Court explained in a similar case, Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013). In Jordan, the defense attorney also represented the defendant's girlfriend. The drug investigation began when a confidential informant notified law enforcement that the girlfriend was manufacturing methamphetamines out of a camper. The police stopped the girlfriend leaving the camper but no drugs were found in her possession. However, another man with her had sores on his arms consistent with chemical burns from the manufacturing of meth.

The police obtained the permission of a neighbor to place a surveillance camera on their house to film the camper. For ten days Jordan frequented the camper and he was the only person seen coming to the camper. A search warrant was obtained and 417 grams of meth were seized. Jordan was arrested, and at the arguing of his girlfriend he obtained Harry DePew to represent him. DePew was also representing the girlfriend on an unrelated charge, but he never informed the court that he represented both Jordan and his girlfriend.

During Jordan's trial, the evidence so strongly pointed to the girlfriend's involvement in the meth manufacturing that the trial judge invited DePew to present third-party guilt evidence

against the girlfriend. DePew failed to present any witnesses to testify as to the girlfriend's guilt despite the fact it later appeared at the PCR that such witnesses were available to testify. DePew testified during the PCR hearing that he did not explain a conflict of interest to Jordan in "so many words," and he reasoned Jordan was "blinded by love" anyway. This Court held an actual conflict of interest existed as a matter of law when DePew represented both Jordan and his girlfriend.

The same is true here but the prejudice is even more apparent particularly where petitioner is on death row for a murder the jury never learned that Ricky Davis heard Gadson confess he was actually the murderer. Hardee-Thomas operated under an actual conflict of interest and the essential demands of fairness dictate that this Court grant certiorari, and rule petitioner is entitled to a new trial.

6.

Defense counsel failed to preserve the prison condition issue in *State v. Bowman*, 366 S.C. 485, 623 S.E. 2d 378 (2005), because he did not understand the law on prison adaptability evidence. To the extent the state's parsing of defense counsel's PCR testimony leads to the conclusion he thought this prison conditions evidence was admissible it is apparent that not knowing the relevant case law does not transform counsel's failure to object into a strategic decision.

The state argues, conflating key legal principles, that the failure of defense counsel Cummings to object to Solicitor Bailey's examination of James Aiken where the solicitor elicited that inmates have recreational facilities including basketball, can go to the library, read books, watch movies, and television and live a relatively sanguine life was not unreasonable at the time of Petitioner Bowman's trial. The truth is if defense counsel had simply objected to this inadmissible prison conditions evidence petitioner would have prevailed in State v. Bowman, 366 S.C. 485, 623 S.E. 2d 378 (2005), in the same manner as Troy Allen Burkhart did in State v. Burkhart, 371 S.C. 482, 640 S.E. 2d 450 (2006), on this issue. In State v. Burkhart this Court wrote:

> Recently, in State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005), the defendant challenged on appeal the admission of evidence regarding general prison conditions. Although we found the issue was not preserved for review, we cautioned the State and the defense bar that such evidence is not relevant to the question of whether a defendant should be sentenced to death or life imprisonment. State v. Bowman, 366 S.C. 498-99, 623 S.E. 2d at 387.
>
> This case was tried before our decision in Bowman; however, we apply that reasoning here **because it is consistent with our long-standing rule that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime**. We are aware of the tension between evidence regarding the defendant's adaptability to prison life, which is clearly admissible, and this restriction on the admission of evidence regarding prison life in general. We note, however, that evidence of the defendant's characteristics may include prison conditions if narrowly tailored to demonstrate the defendant's **personal behavior** in those conditions.

FN2. See generally Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (evidence of good behavior in prison admissible in mitigation as relevant to future adaptability); State v. Shafer, 352 S.C. 191, 573 S.E.2d 796 (2002) (evidence of violent behavior in prison relevant to future dangerousness); State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996) (defendant's future dangerousness and his adaptability to prison life are legitimate interests in the penalty phase of a capital case).

Here, unlike Bowman, appellant objected to the State's evidence regarding general prison conditions. Although appellant attempted to counter the testimony of the State's witness with evidence regarding the harshness of prison life, this entire subject matter injected an arbitrary factor into the jury's sentencing considerations. A capital jury may not impose a death sentence under the influence of any arbitrary factor. S.C. Code Ann. § 16-3-25(C)(1) (2003). When the jury is invited to speculate about irrelevant matters upon which a death sentence may be based, § 16-3-25(C)(1) is violated. State v. Sloan, 278 S.C. 435, 298 S.E.2d 92 (1982). Accordingly, we reverse appellant's death sentence and remand for resentencing.

State v. Burkhart, 371 S.C. 488, 640 S.E. 2d 453 (2006). (emphasis added).

The state attempts to parse Defense Counsel Cummings' PCR testimony to argue that Cummings made a strategic decision to allow good prison conditions evidence that this Court ruled on appeal in State v. Bowman was not admissible. The simple fact is Counsel Cummings failed to preserve the issue by not objecting to the solicitor's prison is not a bad place to have to live presentation.

The state quotes Defense Counsel Cummings at the PCR hearing inquiring: "Why do we give the jury a LWOP choice if we're not going to let them know what prison is like?" App. 7615, Return to petition for writ of certiorari 56. However, defense counsel Cummings also apologized at the PCR hearing for failing to object to the prison conditions evidence: "[I]f I made an error, if I made a mistake, that man [Petitioner], respectfully, should get the benefit, I just want to apologize." App.7462, ll. 18-21.

In petitioner's case on appeal, this Court specifically rejected the argument that Bowman opened the door to this testimony by trying to establish that prison was not a "kiddy camp". This

Court cited State v. Plath, 281 S.C. 1, 313 S.E. 2d 619 (1984) and reminded the state and defense bar that evidence presented in the penalty phase of a capital trial is restricted to the individual defendant's actions, behavior, and character. This Court emphasized that "[h]ow inmates, other than the defendant at trial, are treated in prison; whether other inmates have escaped from prison, is inappropriate evidence in the penalty phase of a capital trial." This Court admonished both the state and the defense to "[f]ocus solely on the defendant and any evidence introduced in the penalty phase **should be connected to that particular defendant**." State v. Bowman, 366 S.C. 485, 498, 623 S.E. 2d 378, 385 (2005). (emphasis added).

Inmates playing basketball, reading books, and going to the library had nothing to do with petitioner's character or his behavior in prison. Petitioner had no control over the conditions of his confinement.

The state also puts forth that Cummings was caught up in some kind of "evolution" of this prison condition issue, where in fact the matter was settled in State v. Plath, supra, in 1984. Again, Petitioner Bowman would have prevailed on his direct appeal if defense counsel Cummings had simply objected to this inadmissible prison conditions evidence.

To the extent any "evolution" is necessary to be understood on this issue it was that pursuant to the prior existing law in State v. Koon, 278 S.C. 528, 298 S.E. 2d 769 (1982), that a jury during the sentencing phase was not concerned with, and evidence could not be offered of, a convicted murderer's adaptability to prison life. However, in Skipper v. South Carolina, 476 U.S. 1 (1986), the Supreme Court held that the refusal to admit evidence of Skipper's future adaptability to prison pursuant to the existing precedent of State v. Koon was error because a jury had to be able to consider the relevant mitigating evidence of a defendant's adaptability to prison.

In Skipper v. South Carolina the Court cited with approval this Court's opinion in State v. Plath, 281 S.C. 1, 15, 313 S.E. 2d 619, 627 (1984), as this Court had discussed the irrelevance of daily prison conditions evidence. However, the Supreme Court in Skipper held that such irrelevant prison conditions evidence must be strongly differentiated from a defendant's evidence that he can adapt to life in prison since this adaptability evidence "unquestionably goes to a feature of the defendant's character that is highly relevant to a jury's sentencing determination." See Skipper v. South Carolina, 476 U.S. 1, 6, n. 2 (1986).

James Aiken's testimony that Petitioner Bowman could adapt to prison, and be **managed** within the prison simply did not open the door to evidence that inmates in general allegedly live a life of ease. To the extent the state parses defense counsel Cummings' PCR testimony to argue counsel correctly thought he opened the door to the admission of such evidence -- counsel was wrong. Indeed, petitioner Bowman would have won his direct appeal on this prison conditions issue if defense counsel had simply lodged the proper objection to it. Petitioner is respectfully entitled to PCR relief on this issue.

CONCLUSION

For these additional reasons, this Court should grant the writ of certiorari.

Respectfully submitted,

By: _____

Robert M. Dudek
Chief Appellate Defender

David Alexander
Assistant Appellate Defender

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ATTORNEYS FOR PETITIONER

This 5th day of May, 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 reply to the return to the petition for writ of certiorari and a copy of the appendix in this case have been served on Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 5th day of May, 2014.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this
5th day of May, 2014.

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