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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from DORCHESTER County
James E. Lockemy, Circuit Court Judge
Appellate Case No. 2012-213468

MARION BOWMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

AMENDED RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

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

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

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

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

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

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

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

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the PCR Court's denial of relief upon Petitioner's claims that trial counsel was ineffective in not properly impeaching James Taiwan Gadson with the alleged fact that he was once threatened with the death penalty for this murder and the fact that Gadson had access to Petitioner's gun a few weeks before the murder was supported by the record?

2. Whether the PCR Court's denial of relief upon Petitioner's claim that trial counsel was ineffective in not properly impeaching Travis Felder during the guilt phase with the fact that he was the one who was on video purchasing the gasoline used in burning the victim's body and her car, and claim that trial counsel was ineffective in not properly impeaching Felder using the original charges he faced, were supported by the record?

3. Whether the PCR Court's denial of relief upon the claim that trial counsel was ineffective for not impeaching Hiram Johnson by cross-examining him on the fact that he did not mention in his written statement that Petitioner confessed to the murder was supported by the record?

4. Whether the PCR Court's denial of relief upon claims the prosecution withheld evidence in the form of a memorandum created by an investigator for the solicitor's office who interviewed Rickie Davis, Gadson's mental health evaluation, and the fact Hiram Johnson had unindicted pending charges in Orangeburg County when he testified, were supported by the record?

5. Whether the PCR Court's denial of relief upon a claim of ineffective assistance of counsel based upon a conflict of interest that may have arisen from one counsel's representation of Rickie Davis during a portion of the time she represented Petitioner was supported by the record?

6. Whether the PCR Court's denial of relief upon Petitioner's claim that trial counsel was ineffective in not objecting to the State's elicitation of favorable prison conditions during James Aiken's testimony was supported by the record?

7. Whether the PCR Court erred in signing the proposed order provided to it by the State upon the PCR Court's request when the record indicates the PCR Court spent adequate time reviewing the evidence and arguments presented at the hearing, and the signing of the order did not infringe upon any of Petitioner's constitutional rights?

STATEMENT OF THE CASE

Petitioner, Marion Bowman ("Bowman"), is confined in the Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC) as the result of his Dorchester County convictions and death sentence for the murder of Kandee Martin and third-degree arson. The Dorchester County Grand Jury indicted Bowman during the June 18, 2001 Term of Court of General Sessions for Murder (2001-GS-18-0348) and Arson, Third Degree (2001-GS-18-0349). (App. 5254-57). On July 13, 2001, the State served Bowman with a Notice of Intent to Seek the Death Penalty and Notice of Evidence in Aggravation. (App. 1640-43; 4570-71; 5260-61).

A pretrial Jackson v. Denno hearing was held before the Honorable Diane S. Goodstein, Circuit Court Judge, between April 5, 2002 and May 2, 2002. (App. 315-1322). Petitioner was present and was represented by Norbert E. Cummings, Jr., Esquire and Marva A. Hardee-Thomas, Esquire. Id. The State was represented by Solicitor Walter M. Bailey, Jr. and Assistant Solicitor Benjamin Lafond, both of the First Judicial Circuit. Id. Jury selection for the trial subsequently began in Dorchester County on May 13, 2002, and was completed on May 17, 2002. (App. 2470-3646).

Petitioner was tried by a jury before Judge Goodstein. At the trial, he was again represented by Mr. Cummings and Ms. Hardee-Thomas. The State was represented by Solicitor Bailey and Assistant Solicitor Lafond. The guilt phase of the trial lasted from May 17 to May 20, 2002. (App. 3634-4569). Petitioner was convicted of both charges. (App. 4564).

Petitioner exercised his right to the twenty-four hour cooling-off period provided by S.C. Code Ann. § 16-3-20(B). (App. 4569). The sentencing phase was conducted on

May 22 and 23, 2002. (App. 4587-5068). The jury found the exe existence of two of the four submitted aggravating factors: the murder was committed in the commission of a kidnapping, and the murder was committed during the commission of a larceny with the use of a deadly weapon. (App. 5051). The jury recommended Petitioner be sentenced to death. (App. 5051). Judge Goodstein subsequently sentenced Petitioner to death for the murder conviction, and ten years confinement for the third degree arson conviction. (App. 5066).

A timely Notice of Appeal was served and filed on May 24, 2002. On appeal, Robert M. Dudek, Esquire, Assistant Appellate Defense of the South Carolina Office of Appellate Defense, represented Bowman in his direct appeal. (See App. 5427-83; 5558-67). Assistant Attorney General S. Creighton Waters, Esquire, represented the State. (App. 5484-557). On July 6, 2005, Petitioner filed his Final Brief of Appellant. (App. 5427-83). Respondent filed its Final Brief of Respondent on July 7, 2005. (App. 5484-557). Petitioner also filed his Final Reply Brief of Appellant on July 6, 2005. Oral arguments were heard on October 6, 2005. The South Carolina Supreme Court affirmed Petitioner's convictions in a published Opinion. State v. Bowman, 366 S.C. 485, 489, 623 S.E.2d 378, 380 (2005). A petition for rehearing was denied by this Court on January 6, 2006.

On February 1, 2006, this Court granted a stay of execution so that Petitioner could pursue certiorari review before the United States Supreme Court. Petitioner, through Mr. Dudek, filed a Petition for Writ of Certiorari with the United State Supreme Court dated April 5, 2006. A Brief in Opposition was filed by the State on May 12, 2006.

The United States Supreme Court denied the certiorari petition by order dated June 12, 2006. (App. 5575).

Petitioner filed an Application for Post-Conviction Relief on April 7, 2006. (App. 5568-74). The State filed a Return, Motion to Dismiss, and Motion for Summary Judgment September 1, 2006. (App. 5578-615). This Court issued an Order dated September 7, 2006, in which it stayed the execution for the post-conviction relief action and appointed the Honorable James E. Lockemy, Circuit Court Judge to hear the case.

Judge Lockemy appointed James A. Brown, Jr., Esquire and Charlie Jay Johnson, Jr., Esquire to represent Petitioner during the post-conviction relief action. By Order filed February 6, 2008, Mr. Johnson was relieved and John Sinclaire, III, Esquire was appointed to represent Petitioner with Mr. Brown during the PCR action. (App. 5674-75). Petitioner, through counsel, filed his First Amended Application on February 28, 2007. (App. 5676-84). The State filed an Amended Return, Motion to Dismiss, and Motion for Summary Judgment on March 15, 2007. (App. 5616-69). A second Amended Application was filed on May 19, 2008. (App. 5689-700). Petitioner filed his Third Amended Application on September 8, 2008, one week before the evidentiary hearing was set to begin. (App. 5710-26).

The evidentiary hearing was held on September 15-18, 2008; September 29-30, 2008; November 24, 2008; and December 18, 19, and 22, 2008. (App. 5729-7997). Petitioner filed a Fourth Amended Application on June 5 2009. (App. 9442-60). Petitioner also submitted an Amended Brief Supporting the Fourth Amended Application on June 10, 2009. (App. 9461-570). The State filed its Post-Trial Brief in Opposition to Application for Post-Conviction Relief on August 10, 2009. (App. 9571-772). Petitioner

filed a Reply to Respondent's Brief in Opposition on September 16, 2009. (App. 9773-801).

On March 12, 2012, the PCR Court filed its Order of Dismissal. (Supp. App. III 5-149). Petitioner filed a Motion to Alter or Amend Judgment on March 19, 2012, and a memorandum in support of the motion on April 25, 2012. (App. 9951-68). The State filed a letter response to the motion on May 2, 2012. (App. 9969). The PCR Court filed its Order to Motion to Alter or Amend Judgment on October 31, 2012. (App. 9970).

Petitioner subsequently filed a Notice of Appeal. (App. 9971). Respondent now makes Return to the Petition for Writ of Certiorari filed by Petitioner on October 18, 2013.

STATEMENT OF FACTS

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

At about five minutes to eight on the Friday evening of February 16, 2001, Dorchester County resident Dennis Judy noticed a car on the side of the Nursery Road, with two of its wheels on the shoulder. Finding it odd that the car was parked with its lights off and windows down, Judy stopped briefly, but continued on. (App. 3782-85).

Bryan Newhouse managed the nearby nursery and was watching TV that Friday evening. Hearing something outside, he muted the TV, at which point three gunshots rang out within ten or fifteen seconds apart. Newhouse went outside, opened the gate, and drove down the road to see if anyone was illegally hunting at night on the nursery grounds. Finding nothing on the dark and unlit country road, Newhouse went home, and fell asleep about midnight. (App. 3798-3801; 3803-05). Newhouse was awakened from

his sleep in the early morning hours by a loud exploding noise. He again drove down the road to the same location – but this time, he found a car engulfed in flames as high as twenty feet. Newhouse quickly went home and called police. (App. 3801-02).

On a path leading into a fallow field about 50 to 75 feet off Nursery Road, officers and firefighters found a small four-door car almost completely burned. They hosed the fire down, and opened the trunk. Inside was the charred body of Kandee Martin. (App. 3807-3810; 3814-16; 3819-22; 3875-78).

The Ford Escort's was registered to Kandee and her mother. (App. 3829-31). Kandee had been shot to death by two bullets, each equally fatal, with one to the back of the head, and another to the left back. (App. 3944-49). Her body was extremely burned and charred, and the only skin remaining was on part of her back. (App. 3941-43). The lungs were clear, indicating that Kandee was dead before the fire started. (App. 3954-55).

Officers concluded the fire was intentionally set. (App. 3889-90). About 800 feet from the crime scene, SLED agent Edward Porter collected in the street or on its shoulder one fired bullet and six .380 shell casings. The officers found in the middle of the road a pool of blood containing some hair and an earring back. As they scanned the area, they noticed blood on pine straw and branches 18 and 29 feet off the roadway down a path towards the wood line. There, they found a woman's shoe belonging to Kandee. (App. 3853-3860; 3867-71; 3910-12; 4164-66; 4272; 4286). SLED DNA expert Matt Fitts later matched the blood samples to Kandee Martin. (App. 4366-67; 4377-79).

After receiving information that Petitioner had been with Kandee the night before, Branchville Chief Boom Walters, Dorchester County Lieutenant James Nettles,

Dorchester detectives Terrence Van Doran and Alvin Coker, and other police arrived at Dorothy's trailer on Saturday morning, February 17, 2001. The officers asked Dorothy if they could enter to search for Petitioner, and she voluntarily agreed – eventually signing a consent to search form. Officers found Petitioner hiding alongside a bed in a child's room down the hall, and he was promptly arrested and Mirandized. (App. 4125-29; 4139-42; 4144-45; 4191-95; 4208).

Petitioner was wearing nothing but his boxer shorts, and officers asked him if he wanted his pants. When Detective Van Doran retrieved the back jeans from the sofa in the living room, he found a brown lady's watch in the pocket. (App. 4129-32; 4142; 4150-52; 4195-98; 4207-08). Kandee's mother identified at trial the watch as belonging to her daughter. (App. 4164-65). Moreover, SLED chemist Layton also found the presence of a heavy petroleum accelerant, but not gasoline, on the black Levi's – and a number of Petitioner's friends testified at trial he was wearing black jeans the day before. (App. 3763; 4058; 4093; 4193; 4297-98).

Testimony regarding the prior day's activities

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

When Petitioner returned, a number of people, including trial witnesses Koger, Fogle, and Carolyn Brown – saw Petitioner get upset at James Tywan Gadson because someone had taken his gun. However, Hiram Johnson interceded, and told Petitioner he had taken the gun back to Katrina West's apartment in the projects. Petitioner went

across the street and got the gun, and put it back in his pants. (App. 3677-79; 3684-85; 3690-91; 3701; 3985-90; 4058-60; 4077-78). At another point later that afternoon, Petitioner asked Fogle to take him to Frankie Martin's house. Kandee's car was parked out front, and Petitioner mentioned to Fogle that Kandee owed him some money. (App. 3685-87).

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

Petitioner told Yolanda to pull up alongside Kandee's car, and tried to get her attention through the open rear window of Yolanda's VW. However, Kandee held up her finger at Petitioner, saying "hold on a minute", and turned back to her conversation with Fralix. (App. 3724-35; 3740-42; 3764-66). Kandee's gesture angered Petitioner. Fralix heard Petitioner say "Fuck waiting a minute. I'm about to kill this bitch." (App. 3725-27). According to Katrina, Petitioner declared "fuck that ride, that bitch be dead by dark fall." Petitioner's sister Yolanda described his comments as "Fuck that bitch, that bitch be dead by dark." (App. 3765-66). Yolanda also told police Petitioner said "that bitch owed me some money and I want my money today." In any event, Yolanda drove off. (App. 3742-45; 3749).

Gadsden saw Petitioner around 7:00 or 7:30 that evening. Petitioner was riding with Kandee in her green Ford Escort, and he called Gadson over and told him to get in.

(App. 3990-93; 4033). With Petitioner directing the way, Kandee drove out into the country, where they eventually ended up on Nursery Road. There, they stopped, turned the car off, and Petitioner and Gadson got out. (App. 3994-96; 4033-35). Petitioner and Gadson walked down the road a ways, as Petitioner whispered he was going to kill Kandee because she was wearing a wire. Kandee followed behind, grabbed Petitioner by the arm and said she was scared. A car came down the road, and the three jumped into the woods until it passed. (App. 3997-99; 4035-36).

Kandee then started back down the roadway with Petitioner following. As Gadson came out of the woods behind them, he saw Petitioner fire three times at Kandee. Kandee ran towards Gadson, but stopped and turned to face Petitioner. She begged, "Please Black, don't shoot me no more. I have a baby to take care of." Petitioner responded to her pleas by firing twice more, and Kandee fell to the ground. (App. 3997-4003; 4011-12; 4036-37). Gadson, who said he "messed in his pants a little bit," jumped in the car while Petitioner dragged Kandee into the woods by her feet. Petitioner then climbed in the driver's seat of Kandee's car, remarking: "I shot that bitch in the head. Heard her head hit the ground." They then headed back to Branchville. (App. 4012-14).

Eventually, they parked Kandee's car in a wooded area behind a coal plant. Before they got out, Petitioner threatened to blow Gadson's brains out if he ever told anyone. Petitioner then headed for the projects while Gadon walked back to Koger's house. Petitioner eventually came back with Yolanda's car, and he and Gadson went to the EZ shop for some beer. They then went to another friend's house where they talked to Travis Felder, before returning to Koger's. (App. 4015-17; 4033-35).

Around midnight, Petitioner and some friends decided to go to the Allen Murray nightclub outside of Bowman. Petitioner drove Kandee's car, with Hiram, Gadson, and Darrien Williams as passengers. Petitioner told the men he had stolen the car, and made them put on gloves. (App. 4017-20; 4063-65; 4081). At the club, Petitioner walked around the lot some, trying to sell Kandee's car. (App. 4067). After about an hour or so, Petitioner, Hiram, Gadson and Darrien headed back to Branchville in Kandee's car. As he drove the Escort with the pistol sitting in his lap, Petitioner remarked, "I killed Kandee, heh heh heh." Petitioner dropped Hiram off at the projects. (App. 4021-22; 4067-69).

About 3:00 a.m., Petitioner knocked on Travis Felder's door and asked him for help parking a car. (App. 4042-45; 4116-18; 4090-92; 4119-20). Felder testified that he got in his own car and followed Petitioner in the Ford Escort back to Nursery Road. Petitioner pulled over on the side of the road, cut his lights, and went into the woods for a minute. The next thing Felder saw was Petitioner pulling a body by its feet face down. As Petitioner opened the trunk and put the body inside, Felder could see by the trunk light it was Kandee. (App. 4093-97).

Petitioner looked back at Felder, and said, "You didn't think I would do it, did you? I killed Kandee Martin." Petitioner told Felder to go down the road and turn around, while Petitioner drove the Escort up into a field. Felder watched as Petitioner threw a light into the car, which erupted in flames. Felder then took Petitioner back and returned to Valorna's, where he went to sleep. (App. 4098-4101; 4106).

Petitioner's murder weapon was found after police managed to get information in May and June 2001 from Petitioner's wife Dorothy and his sisters Yolanda and Kendra,

all of whom testified at trial with plea agreements. (App. 3735-36; 4161; 4167-68). Dorothy located the gun, and with Yolanda, Kendra, and Petitioner's father, worked to dispose of the gun. (App. 4168-73; 4198-4204; 4210-12; 4358). Kendra and Yolanda threw the gun over the side into the Edisto River. (App. 4174-78; 4183-87). On May 28, 2001, diver Mark Sheetz recovered the black and grey High Point .380 semiautomatic in the river bottom about 25 to 30 feet from the bridge. (App. 4220-29). The gun was conclusively matched by SLED firearms examiner David Collins to five of the six Winchester .380 shell casings found at the Nursery Road scene. While the sixth casing and spent bullet could not be conclusively matched to Petitioner's .380, they were consistent. (App. 4315-20).

SLED DNA analyst Fitts found human blood and semen in the vaginal swabs taken from Kandee at autopsy. Agent Fitts was able to match Petitioner to a probability of 1 in 5300. (App. 4370-72; 4379-87).

State's case for sentencing

The State began its evidentiary presentation in the sentencing phase by reincorporating its evidence from the guilt phase. (App. 4650). It then introduced certified copies of Petitioner's March 1998 convictions from two incidents – with a third degree burglary charge and a petty larceny charge for each. **(App. 4652)**.

The two victims from the March 1998 convictions testified. One noted that his house was robbed of a shotgun, of which the barrel was later sawed off. Stolen from the other's residence was cash and a .357 pistol. Within 24 hours, Petitioner's cousin used the pistol to kill himself. (App. 4653-59; 4801-02).

The State introduced photographs of Kandee as she was found severely burned in the back of her trunk through the SLED arson agent. {R. 4660-68}. The pathologist Dr. Janice Ross described autopsy photographs of the entrance and exit wounds to Kandee's back and behind her left ear. (App. 4669-91).

Kandee's mother Cordillia Martin and father Wayne Martin gave victim impact testimony about Kandee and the effect of her loss on them and Kandee's young son. (App. 4692-4708).

Defense case for sentencing

The defense case in mitigation began with Petitioner's older sister Kendra Bowman. She generally described good times growing up with Petitioner, but noted her biological father was abusive until he left when the children were babies. (App. 4742-48). Petitioner's mother Dorothy Bowman, related that Petitioner's father was abusive, but he left when the kids were very small. She theorized that Petitioner longed for fatherly involvement, and noted that her subsequent boyfriend Joseph Sims was a positive influence on the kids. Petitioner had trouble in school and only finished the ninth grade, but he would help his mother out after she became disabled. (App. 4750-59).

Margaret Baughman, an adult education teacher at the Dorchester County Detention Center, testified that during the pre-trial incarceration Petitioner took classes, and even became a reliable assistant to her teaching at the jail. (App. 4761-67). A forensic social worker named Jeffrey Youngman testified. He generally theorized Petitioner's functioning was negatively impacted by his upbringing. (App. 4791-4805).

Corrections consultant and former South Carolina prisons official James Aiken was qualified as an expert in future dangerousness and prison adaptability issues. Aiken noted that he had evaluated thousands of inmates for placement in prisons. According to Aiken, if Petitioner was given life, he would never leave again from a South Carolina prison for any reason whatsoever. He noted the South Carolina Department of Corrections could easily manage and incapacitate Petitioner for the rest of his life, with the prison's fences, gun towers, and trained guards. Aiken also opined that Petitioner would adapt well to prison life, given that during his three previous incarcerations, Petitioner had no significant incidents of violence to staff and inmates, and had assisted the adult education classes. (App. 4832-45).

Dorchester County Detention Center guard Sharon J. Branch testified that Petitioner has "attitude", and would often speak out to guards. While Petitioner never made her feel threatened or raised his hand, he would often refuse direct orders – depending on what kind of day he was having. For example, he would refuse to return to his cell when ordered, saying: "you want me to go in, put me in". As his death penalty trial approached, Petitioner started behaving "calmer" and "better", but had on a Sunday during the trial caused a problem requiring the intervention of ministers and prison staff, because he was not allowed to go to church when he wanted. (App. 4882-88). Another jail guard named Enrique Badillo testified that Petitioner was very polite, and presented no difficulty or threats to safety. (App. 4902-05).

Finally, Felder was shown a security videotape from the Horizon EZ store at approximately 3:00 a.m. on February 17th, 2001. He admitted the tape showed him at the store – without Petitioner – buying gasoline in a small gas container. Felder admitted that

after Petitioner came and got him from the girls' apartment in the Branchville Villas, Petitioner gave him a gas jug and asked him to buy some fuel. Felder stated he thought Petitioner was just filling up the can to move the car. (App. 4911-28).

ARGUMENT

"This court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Marlar v. State, 373 S.C. 275, 279, 644 S.E.2d 769, 771 (Ct.App.2007) (citing Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)); McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995). An appellate court must affirm the PCR court's decision when its findings are supported by any evidence of probative value. Custodio v. State, 373 S.C. 4, 9, 644 S.E.2d 36, 38 (2007); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). However, an appellate court will not affirm the decision when it is not supported by any probative evidence. Edmond v. State, 341 S.C. 340, 347, 534 S.E.2d 682, 686 (2000); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996).

It is well established that this "Court gives great deference to the PCR court's findings of fact and conclusions of law." Simpson v. Moore, 367 S.C. 587, 595, 627 S.E.2d 701, 705 (2006). It is equally well established that this "Court will sustain the PCR judge's findings regarding ineffective assistance of counsel if there is any probative evidence to support those findings." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); Franklin v. Catoe, 346 S.C. 563, 568, 552 S.E.2d 718, 721 (2001). Here, there is ample support for the PCR Court's findings and his legal conclusions. Its rulings should be affirmed.

I. This Court should deny certiorari on Petitioner's first claim; the PCR Court's findings that Petitioner did not meet his burden in establishing trial counsel was ineffective in not properly impeaching Taiwan Gadson are supported by the record.

Petitioner first asserts trial counsel was ineffective in not properly impeaching Taiwan Gadson, Petitioner's co-defendant, at trial in three specific ways. The PCR Court denied relief upon all three claims. The denial of relief was supported by the record.

At Petitioner's criminal trial, Gadson testified that he was charged with murder, and he was testifying pursuant to a plea agreement that would allow him to plead guilty to accessory after the fact and misprision of a felony, and that would give him a twenty year sentence in exchange for his truthful testimony. (App. 3980-82). Gadson, Petitioner's first cousin, testified that he saw Petitioner with a gun earlier in the day of the shooting. (App. 3984-86). He identified the gun as being a High Point .380 and indicated Petitioner bought the gun from a man in Orangeburg. (App. 3986).

Gadson further testified that he sat under a tree and drank that day. (App. 3988). He observed Petitioner put the gun in a trash barrel. (App. 3988). Gadson noted that Petitioner got into an argument with Hank Koger about Petitioner's gun. (App. 3989). Gadson testified that the argument ended when Hiram Johnson got the gun from the woods. (App. 3989). Gadson saw Petitioner later that evening in a car with the victim. (App. 3990-91). Gadson indicated that Petitioner called him over to the car and told him to get in. (App. 3992). Gadson also acknowledged that he was intoxicated at that time. (App. 3993). Gadson went on to testify that they drove out to Nursery Road. (App. 3995). They stopped on Nursery Road, and Gadson and Petitioner got out of the car. (App. 3995-97). Gadson and Petitioner walked down the road away from the car. (App.

3997). Gadson stated that Petitioner told him he intended to kill the victim because she was wearing a wire. (App. 3998). Shortly after that conversation, the victim came up to Petitioner and grabbed him by the arm. (App. 3998). After a brief foray into the woods, the victim and Petitioner started walking back to the car. (App. 4000). Gadson saw three shots fired from the gun in Petitioner's hand. (App. 4001). Gadson saw the victim running down the road towards him. (App. 4002). Shortly thereafter, she stopped and begged Petitioner not to shoot her because she had a child. (App. 4011). Gadson testified that she then fell to the ground, and Petitioner dragged her into the woods. (App. 4011-12). Gadson further indicated that Petitioner shot at the victim two times, and she fell to the ground. (App. 4011-12). Gadson noted that Petitioner acknowledged he shot the victim in the head, and that he heard her head hit the ground. (App. 4013).

In the PCR action, Petitioner raised several claims relating to counsel's effectiveness in cross-examining Gadson. The PCR Court denied relief upon all of the claims.

a. The PCR Court properly found trial counsel was not ineffective in not attempting to impeach Gadson with an assertion that he once faced the death penalty for this crime.

Petitioner has asserted that trial counsel were ineffective because they failed to investigate, impeach, and introduce evidence of Gadson's plea deal and his true bias to avoid a death sentence. In essence, Petitioner asserts that Gadson was threatened by the Solicitor's Office with a death sentence in the plea agreement if he failed to testify as they wished. As a result, according to Petitioner, the jury was not given a fair impression of the sentence that was avoided by Gadson as a result of his plea agreement. Further, Petitioner asserts the jury was left with the incorrect impression that Gadson would serve

twenty years in prison under his plea agreement. Petitioner's claims should be dismissed because they are not supported by the record.

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

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

Petitioner's allegation that Gadson once faced the death penalty was not supported by the record. At no point in time did the First Circuit Solicitor's Office file a Notice of Intent to Seek Death Penalty against Gadson. Gadson testified that neither he nor his counsel was ever served with a Notice of Intent to Seek the Death Penalty at trial and at the PCR hearing. (App. 4024, 5849, 5914). Petitioner's argument relies upon the clause in paragraph 9(b) of Gadson's plea agreement which states that the State may

reinstate the murder charges and seek the death penalty if Gadson did not comply with the terms of the plea agreement. (App. 8946). Petitioner's reliance upon this language in the agreement is misplaced. First, the language in the agreement did not constitute a Notice of Intent to Seek the Death Penalty. It merely outlined the fact that if Gadson did not tell the truth at trial, the State could reinstate the murder charge against Gadson. As a consequence of that, the State could seek the death penalty if it thought the facts would support a conviction. There was no evidence that Gadson plea bargained to avoid the death penalty. When Gadson pled guilty, he was not facing a death sentence. Gadson did note that he was not threatened with the death penalty. (App. 5850). Gadson further testified that he pled guilty because he was under the impression that he could receive a life sentence under a theory of hand of one/hand of all. (App. 5900). Thus, to the extent that Petitioner alleges ineffective assistance of counsel for not pointing out Gadson avoided a death sentence by pleading guilty should be dismissed because the facts did not support such a conclusion.

Even if trial counsel was deficient in not crossing Gadson about whether he avoided a death sentence by pleading guilty, Petitioner has failed to show that he was prejudiced as a result. First, Petitioner has not presented any testimony or evidence that indicated that Gadson actually believed that he was avoiding a death sentence with his plea agreement. In fact, Gadson's testimony at the PCR hearing clearly demonstrated the opposite was true. Gadson noted in his testimony that he was never threatened with the death penalty. (App. 5850). He noted that his attorney informed him after receiving the indictments that Gadson could get life for shooting and killing someone. (App. 5938).

He did not see that as being the same as the death penalty. Id. Petitioner cannot establish that the result at trial would have been different had counsel raised this issue at trial.

Even without Gadson's testimony, there was overwhelming evidence presented of Petitioner's guilt. Several witnesses, including one of Petitioner's sisters, testified they observed Petitioner threaten to kill the victim on the day of the murder. (App. 3726, 3739-3744, 3764-66). Gadson saw Petitioner shoot the victim. (App. 4000-02). According to Gadson, the victim begged Petitioner riot to shoot her again, but he shot her two more times. (App. 4012). Petitioner then dragged her body into the woods. Id. Gadson later rode with Petitioner, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. (App. 4018). They all wore gloves. Id. Hiram Johnson testified that Petitioner said he stole the victim's car and he made everyone wear gloves. (App. 4065). He also testified that he heard Petitioner admit to he killed the victim. (App. 4068). Travis Felder also testified that early the next morning, Petitioner requested assistance in getting rid of a car. (App. 4091-93). Felder testified that he followed Petitioner out to Nursery Road. (App. 4094). He watched as Petitioner pulled a body out of the woods. (App. 4096). According to Felder, he saw it was the victim when Petitioner put her body in the trunk. (App. 4097). He testified that Petitioner admitted that he killed the victim. (App. 4098). He also observed Petitioner set the car on fire. (App. 4100). The victim's watch was recovered from Petitioner's pants pocket when he was arrested. (App. 4126-30; 4164-65). Petitioner's family got rid of the gun that was used in the murder. (App. 4177, 4185-87). The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. (App. 4315). Also, Petitioner's DNA was found in the victim at the scene. (App. 4381). Since there was

overwhelming evidence of Petitioner's guilt, the result at trial would not have differed had trial counsel cross-examined Gadson about whether he avoided a death sentence with the plea agreement. Thus, the PCR Court correctly denied relief upon this claim.

b. The PCR Court did not err in denying relief upon the claim of ineffective assistance of counsel in not showing that Gadson had fired Petitioner's gun weeks before Petitioner killed the victim.

Petitioner asserts trial counsel was ineffective for not presenting evidence that Gadson had fired the gun used to kill the victim two weeks prior to the victim's murder. As noted by the PCR Court, according to the police statement given by Tiara Coleman, she and Gadson were walking around the Villas when Coleman got into an argument with someone else. (App. 9047). Petitioner gave Gadson a gun, which he shot into the air. Id. The casings from that shooting were recovered by another resident in the Villas, Margaret Hawkins. (App. 9046). Those casings were fired by the same gun that killed the victim. (App. 4315). At the PCR hearing, Gadson corroborated the sequence of events contained in Coleman's statements. (App. 5890-93). He noted that Bowman let him borrow the gun for that shooting. (App. 5924-25).

Cummings testified that he did not want the information about the shooting at the Villas in evidence. (App. 7434, 7654). He noted that while Coleman and Hawkins showed Gadson had fired the gun, they also indicated that Bowman gave him the gun. (App. 7435-36, 7654).

Trial counsel was not deficient in not cross-examining Gadson about the fact he had access to the gun. Such a cross-examination would not have assisted in proving Petitioner was innocent of the crime. While Gadson would have testified that he was given access to Petitioner's gun at the Villas shooting a few weeks before the murder, his

testimony would have clearly indicated that the only reason he had access to the gun then was because Petitioner gave it to him. Thus, any cross-examination questions on this issue would have had minimal benefit to Petitioner. Counsel clearly expressed it was a strategic decision not to go into this line of questioning. Since this decision was reasonable, Petitioner failed to show that counsel was deficient in this regard. Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial).

Further, Petitioner did not establish that he was prejudiced by trial counsel's decision not to introduce evidence of the shooting at the Villas. Several witnesses, including one of Petitioner's sisters, testified they observed Petitioner threaten to kill the victim on the day of the murder. (App. 3726, 3739-3744, 3764-66). Gadson saw Petitioner shoot the victim. (App. 4000-02). According to Gadson, the victim begged Petitioner riot to shoot her again, but he shot her two more times. (App. 4012). Petitioner then dragged her body into the woods. Id. Gadson later rode with Petitioner, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. (App. 4018). They all wore gloves. Id. Hiram Johnson testified that Petitioner said he stole the victim's car and he made everyone wear gloves. (App. 4065). He also testified that he heard Petitioner admit to he killed the victim. (App. 4068). Travis Felder also testified that early the next morning, Petitioner requested assistance in getting rid of a car. (App. 4091-93). Felder testified that he followed Petitioner out to Nursery Road. (App. 4094). He watched as Petitioner pulled a body out of the woods. (App. 4096). According to

Felder, he saw it was the victim when Petitioner put her body in the trunk. (App. 4097). He testified that Petitioner admitted that he killed the victim. (App. 4098). He also observed Petitioner set the car on fire. (App. 4100). The victim's watch was recovered from Petitioner's pants pocket when he was arrested. (App. 4126-30; 4164-65). Petitioner's family got rid of the gun that was used in the murder. (App. 4177, 4185-87). The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. (App. 4315). Also, Petitioner's DNA was found in the victim at the scene. (App. 4381). As already noted, the impact of introducing evidence of this shooting would at best be minimal. Thus, Petitioner did not establish that the result at trial would have been different had counsel introduced the evidence regarding Gadson's use of Petitioner's gun at a prior shooting. As a result, the PCR Court properly dismissed this claim of ineffective assistance of counsel.

Respondent would submit that to the extent Petitioner asserts the PCR Court erred in denying relief upon a claim that counsel was ineffective for not impeaching Gadson with his inconsistent statements is not preserved for appellate review and is barred from consideration on certiorari. The PCR Court did not rule upon an ineffective assistance of counsel claim regarding Gadson's inconsistent statements. Since this claim was not ruled upon in the PCR Court, it was not preserved for review for this Court. Plyler v. State, 309 S.C. 408, 424 S.E.2d 777 (1992) (issue must be both raised and ruled upon by the PCR Court to be preserved for appellate review); Rule 59(e), SCRCP (providing avenue for any party to move to alter or amend judgment); see Bostick v. Stevenson, 589 F.3d 160, 164 (4th Cir. 2009) (acknowledging same applied consistently and regularly in South Carolina after Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007)). Similarly, to

the extent Petitioner contends the PCR Court erred regarding his investigation into impeachment evidence for Gadson, the claim was not ruled upon by the PCR Court or raised by Petitioner in his Motion to Alter or Amend Judgment.

II. Petitioner is not entitled to a writ of certiorari in regards to the three issues raised regarding trial counsel's handling of Travis Felder as a witness; the PCR Court's denial of relief upon these three claims is supported by the record.

In Petitioner's second set of claims in his Petition, he asserts trial counsel was ineffective in failing to impeach Travis Felder, one of Petitioner's friends who was also charged in the case and who testified against Petitioner at trial. Petitioner specifically claims counsel should have impeached Felder during the guilt phase with the video of Felder purchasing the gasoline used to burn the victim in her car. Further, Petitioner alleges counsel should have impeached Felder with the fact that at one point in time during the investigation of Petitioner's case, Felder was charged with the murder. The PCR Court correctly denied relief upon these claims

a. The PCR Court's denial of relief on claim that counsel was ineffective for not impeaching Felder about the gasoline purchase during the guilt phase was supported by the record.

Petitioner asserts the PCR Court erred in finding that counsel was not ineffective when he did not impeach Felder during the guilt phase regarding the fact that Felder was the one who purchased the gasoline used in the burning of the victim's car and victim's body. The PCR Court's denial of relief was supported by the record.

Defense counsel did testify that they received a copy of the video surveillance from the EZ Horizon convenience store. (App. 7663-65; see App. 9381). At the PCR hearing, Cummings testified that he did not want the video of Felder purchasing the

gasoline coming into evidence. (App. 7006). While counsel did not know why the State had not entered the video into evidence, he indicated he did not want the tape in evidence during the guilt phase because he felt it would corroborate Petitioner's involvement in the plan to burn the car.[1] Id. Cummings also testified that the entry of the video into evidence during the sentencing phase was done at Petitioner's insistence and was not in line with his strategy. (See App. 7020). This testimony was also confirmed during Cummings' cross-examination and was supported by the trial record. (App. 7020-21; see App. 4911-26; see also App. 4622-24). Felder did testify in the sentencing phase that he purchased the gasoline after being instructed to do so by Petitioner. (App. 4916-24). Felder also testified that Petitioner provided the gas jug to be used in the purchase. Id. As found by the PCR Court, trial counsel did articulate a valid, reasonable strategic reason for not wanting to present the video during the guilt phase of Petitioner's trial. As a result, the PCR Court was reasonable in denying relief upon this claim. Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision cannot be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial).

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[1] The testimony referred to by Petitioner in this claim does not reflect counsel did not have a strategic reason for not cross-examining Felder about purchasing the gasoline during the guilt phase. The testimony reflects that at that point in time during the evidentiary hearing, counsel could not remember his thought process during the trial regarding the issue. He had previously testified during the course of the same evidentiary hearing (during his examination over two months prior to this particular questioning) that he did not want the evidence presented to the jury, and the only reason he introduced it was at Petitioner's insistence. (App. 7006). Counsel further noted the introduction of the video was not consistent with his strategy. (App. 7020).

Further, Petitioner's contention that he was prejudiced was not supported by the record. First, Petitioner had not presented any evidence to support his contention that Felder's omission that he was the one who purchased the gasoline indicated Felder was involved in the murder of Kandee Martin. There was no credible evidence linking Felder to the murder of Kandee Martin; in fact, the only evidence to support such a contention was Petitioner's first statement to law enforcement. Second, Felder's testimony regarding the omission during the sentencing phase and during the PCR hearing clearly shows that cross-examination on this issue during the guilt phase would have done nothing to exculpate Petitioner from being a participant in the arson. To the contrary, Felder's testimony clearly indicated that Bowman was highly involved in the arson. At trial, Felder indicated Petitioner was the one who requested he purchase the gasoline. (App. 4923-24). He testified similarly at the PCR hearing. (App. 6429-30). Third, the result at trial would not have been different but for trial counsel's alleged deficiency because there was overwhelming evidence of Petitioner's guilt in both the murder and the arson. Several witnesses, including one of Petitioner's sisters, testified they observed Petitioner threaten to kill the victim on the day of the murder. (App. 3726, 3739-3744, 3764-66). Gadson saw Petitioner shoot the victim. (App. 4000-02. According to Gadson, the victim begged Petitioner not to shoot her again, but he shot her two more times. (App. 4012). Petitioner then dragged her body into the woods. Id. Gadson later rode with Petitioner, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. (App. 4018). They all wore gloves. Id. Hiram Johnson testified that Petitioner said he stole the victim's car and he made everyone wear gloves. (App. 4065). He also testified that he heard Petitioner admit to he killed the victim. (App. 4068). The

victim's watch was recovered from Petitioner's pants pocket when he was arrested. (App. 4126-30; 4164-65). Petitioner's family got rid of the gun that was used in the murder. (App. 4177, 4185-86). The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. (App. 4315). Also, Petitioner's DNA was found in the victim at the scene. (App. 4381). Thus, even had Felder been impeached regarding the purchase of the gasoline, that impeachment would not have led to a different result in regards to his conviction in the murder of Kandee Martin.

b. The PCR Court denial of relief on the claim that counsel was ineffective for not cross-examining Felder on the fact that he was arrested for accessory before the fact of murder was supported by the record.

Petitioner's second assertion, that counsel was ineffective for not cross-examining Felder on the fact that he was arrested for accessory before the fact of murder, was properly denied by the PCR Court. In this claim, Petitioner asserted trial counsel was ineffective for not exposing the fact that Felder was initially arrested and charged with Accessory to Murder/Arson and Arson, Third Degree.

According to the arrest warrant affidavit, the evidence utilized to establish probable cause for the charges consisted of a statement provided by Petitioner. (App. 8975-78). According to Petitioner's statement, Gadson and Felder were the ones who shot the victim and burned the car. (See App. 975-78). After he was arrested, Felder did not give a written statement to police. Instead, he invoked his right to counsel. (App. 6711, 7837-38; see App. 8474-76). By all accounts, Felder did not have any contact with law enforcement or the solicitor's office until his attorney contacted the solicitor's office about a plea in March 2002. (See App. 9118-19, App. 7837-38, 7840-41). During June

2001, Felder was indicted for Third Degree Arson and Accessory After the Fact to the murder. (App. 9067-70).

As was correctly noted by the PCR Court, there was no evidence to support the implication that the accessory before the fact to the murder charge was reduced as a result of Felder's cooperation. In fact, the evidence clearly points to the contrary. The charge was reduced to Accessory After the Fact when Felder was indicted in June 2001. At that point, Felder had not given any statement to law enforcement other than his initial denial of all involvement. (See App. 9118-19, App. 7837-38, 7840-41, 8474-76). Had trial counsel attempted to imply that Felder's cooperation at trial was to avoid being charged with accessory before the fact, counsel would have been presenting false evidence.

Furthermore, counsel expressed a valid strategic reason for not getting into the initial charges from Felder. It was acknowledged Felder was initially charged with murder based upon a statement given to police from Petitioner. (App. 7702). Counsel noted on several occasions that he did not want any of Petitioner's statements to come into evidence. (App. 7565-68, 7639-45, 7735-36). As noted by the PCR Court, this concern was valid in light of the fact that the line of questioning could elicit a response that Felder's charge was based upon one of Petitioner's admissible statements, which were based on Petitioner's attempt to attempt to deflect suspicion from him by implicating others.

Second, trial counsel did attempt to elicit testimony from Felder regarding how much time he was facing under his plea agreement. Counsel asked Felder "[h]ave you been told a possible sentence?" (App. 4108). Felder responded, "[n]o sir." (App. 4108, 4109). At the PCR hearing, Felder testified that he was told he was facing twenty years.

(App. 6390-91). Felder further testified that he was not aware of the potential time he faced for accessory after the fact to arson. According to Felder, his attorney did not inform him of the possible maximum sentence for accessory after the fact to arson. (App. 6423). In light of the fact that counsel did attempt to show Felder was biased by asking how much time he faced, it was reasonable for the PCR Court to find counsel should not be found deficient in that regard. Counsel's pursuit of that avenue of questioning was clearly limited by the fact that Felder testified he did not know how much time he could receive.

Third, to the extent that Petitioner asserts that the State had a long-held belief that Gadson and Felder were the ones who killed the victim and burned the car, Petitioner's claim should be dismissed. Petitioner's position relies solely upon the arrest warrant affidavits. First, the arrest warrant affidavits only indicate that the State believed there was probable cause for Felder to be arrested for Accessory to Murder and Arson, Third Degree. All that means is there was evidence that aroused suspicion that he may have committed those crimes. As already noted, the only evidence the police had that indicated Felder was guilty of being an accessory before the fact and a third degree-arsonist was the statement from Petitioner. Those arrest warrants were drafted within days of the victim's body being found. (See App. 8975-78). It was very early in the investigation. Clearly, it was not a long-held belief of the State that Felder was an accessory before the fact; he was indicted for being an accessory after the fact in June 2001.

Finally, Petitioner fails to establish his ineffective assistance of counsel claim because he fails to show that he was prejudiced as a result of trial counsel not cross-

examining Felder on the earlier charges. The result at trial would not have differed but for the proposed testimony. Several witnesses, including one of Petitioner's sisters, testified they observed Petitioner threaten to kill the victim on the day of the murder. (App. 3726, 3739-3744, 3764-66). Gadson saw Petitioner shoot the victim. (App. 4000-02). According to Gadson, the victim begged Petitioner not to shoot her again, but he shot her two more times. (App. 4012). Petitioner then dragged her body into the woods. Id. Gadson later rode with Petitioner, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. (App. 4018). They all wore gloves. Id. Hiram Johnson testified that Petitioner said he stole the victim's car and he made everyone wear gloves. (App. 4065). He also testified that he heard Petitioner admit to he killed the victim. (App. 4068). The victim's watch was recovered from Petitioner's pants pocket when he was arrested. (App. 4126-30; 4164-65). Petitioner's family got rid of the gun that was used in the murder. (App. 4177, 4185-86). The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. (App. 4315). Also, Petitioner's DNA was found in the victim at the scene. (App. 4381). Thus, even had Felder been impeached regarding his arrest for accessory before the fact and arson, third degree, it would not have resulted in a different outcome in respect to the murder conviction. This claim for relief should be dismissed.

Respondent would submit that to the extent Petitioner asserts the PCR Court erred in denying relief upon a claim that counsel was ineffective for failing to impeach Felder with his inconsistent statements made immediately prior to agreeing to testify against Petitioner was not preserved for appellate review. The same is also true for any claim that counsel failed to properly investigate any issue related to Felder's testimony. The

PCR Court did not rule upon an ineffective assistance of counsel claim regarding Gadson's inconsistent statements. Since this claim was not ruled upon in the PCR Court, it was not preserved for review for this Court. Plyler v. State, 309 S.C. 408, 424 S.E.2d 777 (1992) (issue must be both raised and ruled upon by the PCR Court to be preserved for appellate review); Rule 59(e), SCRCP (providing avenue for any party to move to alter or amend judgment); see Bostick v. Stevenson, 589 F.3d 160, 164 (4th Cir. 2009) (acknowledging same applied consistently and regularly in South Carolina after Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007)). Thus, to the extent Petitioner has asserted such claims, they should not be considered for certiorari.

III. This Court should not grant certiorari upon Petitioner's third claim; the PCR Court did not err in denying relief upon the claim that trial counsel should have impeached Hiram Johnson regarding the fact that he did not mention that Petitioner confessed to killing the victim to him in a prior statement to law enforcement.

Petitioner next claims trial counsel was ineffective for not investigating and impeaching Hiram Johnson with a prior allegedly inconsistent statement in which he did not allege that Petitioner confessed to the murder. This Court should not grant a writ of certiorari on this claim because the PCR Court's denial of relief is supported by the record.

The PCR Court's denial of relief was supported by the record. At trial, Hiram Johnson did testify that on the night of the murder, he went to the Allen Murray Club with Petitioner, Gadson, and Darian Williams. (App. 4064). They rode in the victim's Ford Escort. Id. Johnson testified that Petitioner said he stole the car, and Bowman made them all were gloves. (App 4065). At the Allen Murray Club, Johnson sat in the victim's car in the parking lot while Petitioner walked around the parking lot. (App.

4066). Johnson also testified that Petitioner attempted to sell the car in the parking lot. (App. 4067). At some point during the evening, Johnson heard Petitioner admit that "I killed Kandee, heh. heh, heh." (App.4068). At the PCR hearing, Johnson testified that he could not remember if he told police that Petitioner said he had killed Kandee Martin. (App. 6288-89). He also noted that he thought Petitioner was kidding when he said it. (App. 6290, 6295). Johnson did not know that the victim was dead when Petitioner made the statement. (App. 6295).

Detective Coker did testify at the PCR hearing that he spoke with Johnson on two occasions. The first was on February 22, 2001 at the Branchville Police Department. App. 6657). According to Coker's notes, Johnson indicated he had gone to the club with Petitioner, Gadson, and Darian Williams. (App. 6659). The notes also indicated that Johnson saw Petitioner with the gun in his lap while Petitioner was driving, and that Johnson knew Petitioner had admitted to Trina West that he killed the victim. Id. Trial counsel was provided with a copy of Detective Coker's notes as part of the Rule 5 discovery. (See App. 7015). Coker interviewed Johnson a second time on April 5, 2001. (App. 6659). He testified that interview began at approximately 1:40 p.m. Id. The interview was held at Johnson's father's fish market in Branchville. (App. 6659-60).

Cummings testified that at trial, Johnson testified he overheard a confession from Petitioner about killing Kandee Martin. (App. 7102). He also noted that the confession Johnson overheard was not included in his written statement from April 5, 2001. (App. 7116). Cummings noted that the testimony including the confession was not inconsistent with the written statement. (App. 7116). Cummings testified that he did not cross-examine Johnson on the statement because he did not want to have Johnson repeat the

statement during cross-examination. (App. 7117-18). Johnson had indicated to police that he knew Petitioner had confessed to killing Kandee Martin. Detective Coker noted as much in his investigative notes regarding his first interview with Hiram Johnson. (See App. 8155).

The PCR Court did not err in denying relief upon this claim. As noted by the PCR Court, "[i]n hindsight, there are few, if any, cross examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would pass muster." Willis v. United States, 87 F.3d 1004, 1006 (8th Cir. 1996). The extent of examination and cross examination of witnesses is an area of trial tactics left to the discretion of counsel. Yarrington v. Davies, 779 F.Supp. 1304, 1308 (D. Kan. 1991). Counsel is not required to raise every conceivable issue or pursue every avenue of inquiry, but is required only to exercise normal skill, judgment, and diligence. Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980).

Here, counsel did provide a valid strategic reason for not impeaching Johnson on the fact that he had not included Petitioner's confession in his written statement. Thus, Petitioner failed to show that counsel was deficient.

Further, Petitioner did fail to show at the PCR hearing that he was prejudiced. Any attempt at impeaching Johnson on the fact that he did not include the confession in his statement would have had limited value. The State could have easily responded with testimony from Detective Coker to establish that Johnson had mentioned knowing that Petitioner had confessed to the crime to Trina West. Also, Petitioner did not establish that any error by counsel would have led to a different outcome at trial. Outside of Johnson's testimony about the confession, there was overwhelming evidence of

Petitioner's guilt. Several witnesses, including one of Petitioner's sisters, testified they observed Petitioner threaten to kill the victim on the day of the murder. (App. 3726, 3739-3744, 3764-66). Gadson saw Petitioner shoot the victim. (App. 4000-02. According to Gadson, the victim begged Petitioner not to shoot her again, but he shot her two more times. (App. 4012). Petitioner then dragged her body into the woods. Id. Gadson later rode with Petitioner, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. (App. 4018). They all wore gloves. Id. Hiram Johnson testified that Petitioner said he stole the victim's car and he made everyone wear gloves. (App. 4065). The victim's watch was recovered from Petitioner's pants pocket when he was arrested. (App. 4126-30; 4164-65). Petitioner's family got rid of the gun that was used in the murder. (App. 4177, 4185-86). The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. (App. 4315). Also, Petitioner's DNA was found in the victim at the scene. (App. 4381).

In light of the fact that Johnson's testimony was not a courtroom invention, as Petitioner alleges, and any attempt at cross-examining Johnson on the fact the confession he heard from Petitioner was not in Johnson's written statement would have been of limited value, the PCR Court did not err in denying relief upon this claim. Certiorari should be denied on this issue.

IV. This Court should deny certiorari upon Petitioner's claims regarding the denial of relief upon Brady claims by the PCR Court. The PCR Court's denial of relief upon these claims is supported by the record.

In this fourth set of claims, Petitioner contends the PCR Court erred in denying relief upon three separate Brady claims. This Court should deny certiorari upon these claims because the PCR Court's denial of relief was supported by the record.

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

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

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

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

a. The PCR Court did not err in denying relief upon the claim that the State violated Brady by not providing the defense with a memorandum from Samuel Richardson, an investigator for the solicitor's office, regarding an interview done with Ricky Davis.

First, Petitioner complains the PCR Court erred in denying relief upon the claim that the State violated Brady by not providing Petitioner with a copy of typed notes apparently drafted by Samuel Richardson, an investigator for the First Circuit Solicitor's Office. Ricky Davis had previously provided law enforcement an un-notarized, handwritten statement indicating that he heard Gadson claim that he was the one who shot the victim. (App. 8966). At the PCR hearing, Davis testified that he could not remember if Gadson ever told him he killed the victim. (App. 5992). He further stated that he drafted the statement at Petitioner's direction. (App. 5992). Davis also acknowledged that he did not know anything about the case other than what Petitioner told him. (App. 5993-95). Gadson did not tell him anything that was in the statement

that Davis wrote. (App. 5994). Davis also later noted that he did not have the document notarized because it was not true. (App. 6004).

The so-called "Sam Memo" appeared to reflect the contents of an interview that Richardson conducted with Ricky Davis at Lieber Correctional Institution. (App. 9122). At the PCR hearing. Solicitor Bailey testified that he was familiar with the Sam Memo. (App. 7752). He confirmed that it was prepared by Sam Richardson and noted that from the context of the notes, it appeared that it was prepared late in the proceedings. Id. Bailey did not recall seeing anything in his file that indicated he sent the Sam Memo to defense counsel. (App. 7861). He also testified that he considered the Sam Memo to be work product. Id. Typically, he did almost all of his own work in preparation for a death penalty trial except for typing his handwritten notes. Id. Ordinarily, he would have interviewed Ricky Davis personally. Id. However, he delegated the task of interviewing Davis to Sam Richardson because it was getting close to trial and so much other stuff was going on at that time. Id. Since Richardson interviewed Ricky Davis on Bailey's behalf in preparation for trial, Bailey considered his notes to be protected by attorney-client privilege. Id. More importantly, Bailey testified that he did not think the Sam Memo was inconsistent with the handwritten Ricky Davis statement. (App. 7861-62). Bailey did note that he would have disclosed any information that was inconsistent. (App. 7862). He also testified that the notes would have been in the solicitor's file and trial counsel could have seen them in the file under the office's open file policy. Id.

Based upon these facts, the PCR Court's denial of relief upon this Brady claim was correct. First, Petitioner failed to establish suppression of favorable evidence to his case. The United States Supreme Court has noted that "evidence" that is inadmissible is

not evidence at all, and thus cannot affect the outcome of trial. Wood v. Bartholomew. 516 U.S. 1, 6, 116 S.Ct. 7 (1995)(per curiam) (holding that inadmissible materials that are not likely to lead to the discovery of admissible exculpatory evidence are not subject to disclosure under Brady). At best, the notes could be considered evidence that could be used to impeach Ricky Davis if he testified at trial.

Here, the defense was aware of Ricky Davis's handwritten note which contained the crucial fact that Ricky claimed Gadson said he shot Kandee, but the defense did not call Davis because Davis told the defense's investigator that his handwritten statement was false and Petitioner put him up to it. (App. 7624-26). Counsel did state that he would still be in the "same boat" based on his investigator's assessment of Ricky even if he had the Sam Memo. (App. 7065-67, 7069). Since in substance the Sam Memo did not contain anything the defense was not already provided, and the Sam Memo merely represented nothing more than the prosecution's trial preparation interview based on their possession of the handwritten statement, then there was no suppression of favorable evidence. See Abdur'Rahman v. Colson, 649 F.3d 468, 474 (6th Cir. 2011) (finding no Brady violation when prosecutor did not provide defense with a witness' pre-trial statements because the essential facts were already provided to the defense) (citing United States v. Clark, 928 F.2d 733, 738 (6th Cir.1991) (per curiam)("No Brady violation exists where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information,") and Byrd v. Collins, 209 F.3d 486, 517 (6th Cir.2000) (applying same in context of impeachment information).

Second, the Sam Memo is not material. As noted by the PCR Court, evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (internal quotation marks omitted). In looking at the entire record in this case, Respondent submits the PCR Court correctly found the memorandum would not have undermined confidence in the jury's verdict in this case. Counsel testified that he did investigate into the original Ricky Davis statement based on the information he had, and nothing else came up in the defense's investigation. (App. 7632-33). Instead, the investigator who interviewed Davis indicated that Davis recanted and that Davis would otherwise not cooperate. (App. 7625). Davis' testimony at the PCR hearing clearly indicated that he would not have been an exculpatory witness at Petitioner's trial. Ricky Davis told the defense investigator at the time of trial and testified at the PCR hearing that the handwritten statement was not true, and Bowman was the one who gave him all of the information for the handwritten note. (App. 5993-96). Davis further professed that he did not know anything about this case. (App. 6007). Assuming that Davis had been called, testified as he did at PCR, and then was impeached with the Sam Memo, it simply cannot be said that a reasonable probability of a different result would occur from such Impeachment, especially when the defense already possessed the statement written in Davis's own hand, and could have called him and impeached him with that but decided against it. Said another way, the difference between possible impeachment with the disclosed handwritten statement in Davis's own hand, and impeachment with the Sam Memo or testimony from Sam, is not so great that it

undermined confidence in the verdict under the standard for materiality. Thus, the PCR Court properly denied relief upon this claim.

b. The PCR Court did not err in denying relief upon the claim that the State violated Brady in not providing the defense with Taiwan Gadson's evaluation from the Department of Mental Health; the PCR Court's denial of relief is supported by the record.

The PCR Court properly denied relief upon Petitioner's claim that the State violated Brady in not providing the defense with a copy of Gadson's mental health evaluation report. At the PCR hearing, Solicitor Bailey did testify that he did not believe the State provided defense counsel with a copy of the William S. Hall Psychiatric Institute report for Tawain Gadson. (App. 7851). Lead trial counsel Cummings also testified that he did not recall receiving a copy of the psychiatric evaluation for Gadson. (App. 7377).

Gadson's psychiatric evaluation was done by order of the court. (App. 8957-61, 9048-52). Counsel was well aware that the Department of Mental Health provided the court with a psychiatric report when ordered to conduct such an evaluation because the Department had done so in Petitioner's case. (See App. 9367-75). Had counsel reviewed the clerk of court records for Petitioner's co-defendant Gadson, he would have clearly been aware that a psychiatric report to the court would have been available. Counsel could have easily filed a subpoena to obtain a copy of Gadson's psychiatric report from the court. Thus, as correctly found by the PCR Court, since this information could have been requested by counsel by other means, Petitioner had failed to establish there was a Brady violation. See, e.g., State v. Moses, 390 S.C. 502, 519-20, 702 S.E.2d 395, 404 (Ct. App. 2010); United States v. Wilson, 901 F.2d 378, 381 (4th Cir.1990) (finding no

Brady violation when exculpatory information was not only available to the defendant, but also available in a source where a reasonable defendant would have looked).

Second, the PCR Court correctly found that the psychiatric report was not favorable or impeaching evidence. Contrary to Petitioner's argument, the report did not call into question Gadson's short and long term memory. Specifically, the report found "no evidence of long or short-term memory impairment." (App. 8960, 9051). Further, the report indicated that "[o]n the Repeatable Battery for the Assessment of Neuropsychological Status, he exhibited some mild impairment of verbal memory, but verbal learning was good." Id. Overall, the report did not indicate that Gadson suffered from any mental illness other than cannabis dependence. Since there was no indication that Gadson suffered from any type of memory impairment that would have affected his ability to recall what occurred in this case, the report would have had no impeachment value in that regard.

The report was also not material. The William S. Hall report did not indicate that Gadson suffered any memory issues as a result of his seizures. In fact, based on the details provided about the seizures, it appears that he is able to recall what occurred before his seizures (i.e. his food consumption, use of marijuana, etc.). (See App. 8959, 9050). Regardless, neither Gadson nor any other witness testified that Gadson suffered a seizure on Nursery Road at the time of the shooting. Further, no witness testified at either trial or the PCR hearing that Gadson smoked marijuana on the day of the shooting. Gadson did admit at trial that he drank alcohol all day on the day of the murder. (App. 3992-93; 4021; 4031). Absent some actual evidence that Gadson suffered a blackout on the scene, trial counsel could not have argued Gadson suffered a blackout.

Finally, the PCR Court was correct in denying this particular Brady claim because it would not have undermined the confidence in the verdicts at trial. (need a good citation or quote here on what has to be shown for materiality). In light of the overwhelming evidence of guilt in this case, the PCR Court was reasonable in finding the psychiatric report evidence would not have undermined the confidence in the verdicts at trial. Several witnesses, including one of Petitioner's sisters, testified they observed Petitioner threaten to kill the victim on the day of the murder. (App. 3726, 3739-3744, 3764-66). Gadson saw Petitioner shoot the victim. (App. 4000-02). According to Gadson, the victim begged Petitioner riot to shoot her again, but he shot her two more times. (App. 4012). Petitioner then dragged her body into the woods. Id. Gadson later rode with Petitioner, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. (App. 4018). They all wore gloves. Id. Hiram Johnson testified that Petitioner said he stole the victim's car and he made everyone wear gloves. (App. 4065). He also testified that he heard Petitioner admit to he killed the victim. (App. 4068). Travis Felder also testified that early the next morning, Petitioner requested assistance in getting rid of a car. (App. 4091-93). Felder testified that he followed Petitioner out to Nursery Road. (App. 4094). He watched as Petitioner pulled a body out of the woods. (App. 4096). According to Felder, he saw it was the victim when Petitioner put her body in the trunk. (App. 4097). He testified that Petitioner admitted that he killed the victim. (App. 4098). He also observed Petitioner set the car on fire. (App. 4100). The victim's watch was recovered from Petitioner's pants pocket when he was arrested. (App. 4126-30; 4164-65). Petitioner's family got rid of the gun that was used in the murder. (App. 4177, 4185-87). The gun they threw in the Edisto River was conclusively matched the

five of the casings at the murder scene. (App. 4315). Also, Petitioner's DNA was found in the victim at the scene. (App. 4381). Overall, even without Gadson's testimony, there was a very strong case against Petitioner. Moreover, Gadson's credibility had already been impeached by his testimony regarding his drinking. United States v. Arniel, 95 F.3d 135, 145 (2nd Cir. 1996) ("Suppressed evidence is not material when it merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable."). In light of the fact that the limited impeachment value of Gadson's psychiatric report and the overall strength of the case against Petitioner, Petitioner had failed to prove by a preponderance of the evidence that the confidence in the verdicts in his case was undermined by the nondisclosure of Gadson's psychiatric report. Thus, the denial of relief upon this claim was correct and was properly denied by the PCR Court.

c. The PCR Court correctly denied relief upon Petitioner's claim that the State violated Brady in not providing the defense with information that Hiram Johnson had pending charges in Orangeburg County

Petitioner's claim in reference to Hiram Johnson concerns Johnson's criminal charges. On May 29, 2001, Johnson was served with arrest warrants for Receiving Stolen Goods Less than $1,000, Burglary - Second Degree, and Grand Larceny. (App. 9073-77, 9129-35). The Receiving Stolen Goods Less than $1000 charge stemmed from an incident on November 21 2000. (App. 9073-77). The Burglary charge and the Grand Larceny charge resulted from an incident in Orangeburg County on September 26, 2000. (App. 9129-35).

The PCR Court correctly found that Petitioner failed to establish the materiality of this information. First, as noted by the PCR Court, there was overwhelming evidence of

Petitioner's guilt presented at trial outside of Hiram Johnson's testimony. Several witnesses, including one of Petitioner's sisters, testified they observed Petitioner threaten to kill the victim on the day of the murder. (App. 3726, 3739~3744; 3764-66). Gadson saw Petitioner shoot the victim. (App. 4000-02). According to Gadson, the victim begged Petitioner not to shoot her again, but he shot her two more times. (App. 4012). Petitioner then dragged her body into the woods. Id. Gadson later rode with Petitioner, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. (App. 4018). They all wore gloves. Id. Travis Felder also testified that early the next morning, Petitioner requested assistance in getting rid of a car. (App. 4091-93). Felder testified that he followed Petitioner out to Nursery Road. (App. 4094). He watched as Petitioner pulled a body out of the woods. (App. 4096). According to Felder, he saw it was the victim when Petitioner put her body in the trunk. (App. 4097). He testified that Petitioner admitted that he killed the victim. (App. 4098). He also observed Petitioner set the car on fire. (App. 4100). The victim's watch was recovered from Petitioner's pants pocket when he was arrested. (App. 4126-30; 4164-65). Petitioner's family got rid of the gun that was used in the murder. (App. 4177, 4185-86). The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. (App. 4315). Also, Petitioner's DNA was found in the victim. (App. 4381).

Second, the impeachment value of Johnson's pending charges was limited, particularly in view of the overwhelming evidence of guilt detailed above. There was no evidence Johnson actually got any special consideration for his charges due to testimony, and the charges were completely unrelated to the murder of Kandee Martin. Furthermore, Johnson was impeached on whether he could remember what occurred as a

result of his head injury and on the fact that his head injury occurred after he was shot by a police officer. (App. 4071). In light of the overwhelming evidence of Petitioner's guilt in this case, coupled with the limited impact of an impeachment on the suppressed charges, the PCR Court properly denied relief upon this Brady claim.

V. This Court should deny certiorari on the fifth set of claims; the PCR Court correctly denied relief upon Petitioner's allegation that trial counsel had a conflict of interest in his case.

The fifth set of claims raised by Petitioner relate to his allegation that one of his defense counsel, Marva Hardee-Thomas, was working under a conflict of interest when she was representing Petitioner because she represented Ricky Davis during a portion of the time that she represented Petitioner, and there was a potential conflict because Davis was a potential witness in Petitioner's trial. The PCR Court's denial of relief upon this claim is supported by the record.

Marva Hardee Thomas was appointed to represent Ricky Davis on April 23, 2001. (App. 8967). At the time, Davis faced two charges for armed robbery. (App. 8967, 8979, 8980). On October 16, 2001, Davis was convicted by a jury of one count of armed robbery. (App. 8980). He was sentenced to twenty (20) years confinement by the Honorable Diane Goodstein, Circuit Court Judge. Id. The second indictment against Ricky Davis was nol prossed with a right to restore on October 18, 2001. (See App. 9292). Marva Hardee-Thomas filed a Notice of Appeal on Ricky Davis' behalf on October 24, 2001. (App. 9306-07).

Marva Hardee-Thomas was appointed to represent Petitioner. At the PCR hearing, Hardee-Thomas testified that she did not recall receiving the handwritten note written by Ricky Davis. (App. 7294). She did identify the notary block as being in her

handwriting. Id. However, she did not recall seeing the statement and noted that the notary block was not witnessed by anyone. (App. 7295-96). She did not have any independent recollection of talking with Ricky Davis about the handwritten note. (App. 7331). She testified that she would not have had a discussion directly with Davis about the document. (App. 7331-32).

Counsel was served with a copy of Ricky Davis' handwritten note on or about January 2, 2002. (App. 9383). At the PCR hearing, Hardee-Thomas testified that she did not know why Ricky Davis did not testify. (App. 7302). She did not have a strategic reason for not calling Ricky Davis, but noted that the decision to call Davis to the stand would be one left to the lead attorney in a death penalty case. Id. In Petitioner's case, Cummings was the lead attorney. Id. Hardee-Thomas guessed that Cummings made the decision to not call Ricky Davis as a witness because she did not make that decision. (App. 7303).

Petitioner had failed to establish that Hardee-Thomas acted under a conflict of interest in representing Petitioner in this case. Hardee-Thomas' representation of Ricky Davis ended on October 24, 2001, the date she filed his Notice of Appeal with the circuit court. Rule 602(e)(3), SCACR (public defender automatically relieved after filing of Notice of Appeal to conviction). At that time, his second armed robbery charge had already been nol prossed by the Solicitor's Office. (App. 8982). Thus, when counsel was presumably made aware that Davis had written a statement regarding Bowman's case on or around January 2, 2002, she did not represent Ricky Davis. At that point, she owed no duty to Ricky Davis other than to maintain his confidences from her representation of him on the two armed robbery charges. As a result, Petitioner could not

establish that a potential conflict of interest existed as a result of the statement written by Davis. Since there was not a potential conflict of interest, Hardee-Thomas was not obligated to obtain a waiver from either Bowman or Davis. Thus, Petitioner's claim that a waiver was warranted was correctly dismissed.

Even if Hardee-Thomas' representation of Ricky Davis constituted a potential conflict of interest with her representation of Petitioner, there was no evidence presented that the potential conflict developed into an actual conflict of interest. At no point were Ricky Davis' interests adverse to Petitioner's interests. First, Davis' handwritten statement, if established to be true, would have benefitted Petitioner because it indicated that Gadson, Petitioner's co-defendant, was the one who killed Kandee Martin. Further, contrary to Petitioner's assertions, there was no evidence presented at in this PCR Action that indicated Ricky Davis' interests would have been at odds with Petitioner's had he testified at trial. Petitioner asserts that Ricky Davis would not testify because the solicitor's office could still restore the nol prossed charge against him as leverage. Petitioner presented no evidence to show that the solicitor's office either used the nol prossed indictment in such a fashion or that it could. Clearly, the disposition sheet on Ricky Davis' nol prossed charge indicates that the case was dismissed because the State could not find the victim. (App. 8982). There was no evidence presented at the PCR hearing that circumstances had changed, or that the solicitor's office was in a position to re-present the indictment to the grand jury. Thus, Petitioner never established that Davis' interests were in a position contrary to Petitioner's.

Petitioner also failed to present credible evidence that Hardee-Thomas spoke to Davis about Petitioner. The only person who testified that Hardee-Thomas met with

Davis to talk about Petitioner's case is Davis. (App. 5981). Cummings testified that he sent Walt Mitchell to speak with Ricky Davis about Petitioner. (App. 7058). Hardee-Thomas indicated she did not recall talking with Ricky Davis about the note and that she thought an investigator was sent out to talk to Davis about his handwritten note. (App. 7333-34). Further, Hardee-Thomas testified that she could not recall when she the signature block she put on the handwritten note. (App. 7331). She noted that she likely would have received the paper from a guard at the jail. (App. 7332).

Overall, Petitioner has failed to establish that trial counsel did not call Ricky Davis to testify as the result of an actual conflict of interest due to Hardee-Thomas' former representation of Ricky Davis. To be clear, Ricky Davis was not called to testify and his statement was not entered into evidence because after investigation of his statement, the defense team decided he was not a reliable witness and his testimony was likely to be damaging to Petitioner's case. Cummings testified that Davis was not called because he had indicated to investigator Walter Mitchell that the handwritten statement was false. (App. 7065, 7625-26, 7632-33). There was no probative evidence presented at the evidentiary hearing that indicated that any potential conflict of interest played a role in the decision making process. In fact, the testimony at the PCR hearing from Hardee-Thomas clearly notes that the decision on whether Davis would testify was Cummings to make. Since Petitioner has failed to prove by a preponderance of the evidence that trial counsel acted under an actual conflict of interest, the PCR Court properly denied relief upon this claim.

"The Sixth Amendment right to counsel attaches upon initiation of adversarial judicial proceedings and at all critical stages of a criminal trial." State v. Sterling, 377

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

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

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

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

"The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." State v. Gregory, 364 S.C. 150, 152 53, 612 S.E.2d 449, 450 (2005). Additionally, the fact that counsel does not advise a

defendant of the potential conflict of interest does not affect the constitutionality of the conviction. Jackson v. State, 329 S.C. 345, 355, 495 S.E.2d 768, 773 (1998). Moreover, the "Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction." Langford v. State, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993).

Petitioner relies upon its belief that Ms. Thomas was still representing Davis on the armed robbery charge that was nol prossed. Respondent submits that assumption is not valid. See generally Rule 602(e)(1) ("Trial counsel, whether retained, appointed, or Public Defender, shall continue representation of an accused until final judgment, including any proceeding on direct appeal, except as hereinafter provided."); In re Brown, 294 S.C. 235, 238, 363 S.E.2d 688, 690 (1988) ("In this State, the entering of a nolle prosequi at any time before the jury is impaneled and sworn is within the discretion of the solicitor; the trial judge may not direct or prevent a nol pros at that time." (citing State v. Ridge, 269 S.C. 61, 64, 236 S.E.2d 401, 402 (1977) and Mack v. Riley, 282 S.C. 100, 316 S.E.2d 731 (Ct. App.1984) (solicitor has discretion to enter nol pros at any time before jury impaneled, and decision not to prosecute case is the actual termination thereof)); cf. United States v. Montgomery, 262 F.3d 233, 246-47 (4th Cir. 2001)(holding "the Sixth Amendment does not provide an accused, once charged, with blanket prohibition on interrogations on the subject matter of those charges, even after the charges have been dismissed.")(internal citation and quotation omitted). There was no evidence presented at the hearing to support a finding Ms. Hardee-Thomas still represented Davis. Under the logic of Petitioner's argument, she would otherwise represent him in perpetuity unless and until charges were restored.

Furthermore, Petitioner's contention that there was an actual conflict is not supported by the record. The testimony and evidence presented at the hearing clearly indicated that the defense took efforts to investigate whether Davis could be a witness, and they decided not to call him as a witness based on the fact that he recanted the written statement. At no point did the fact that he was once represented by Ms. Hardee-Thomas appear to enter into the discussion about whether to call Davis as a witness. This was not a scenario where the potential for a conflict developed into an actual conflict. Altogether, the PCR Court did not err in denying relief upon this claim. As a result, certiorari should be denied as to this claim.

VI. This Court should deny Petitioner's request for a writ of certiorari on the sixth set of claims in the Petition; the PCR Court correctly found that counsel was not ineffective in handling the prison conditions issue.

In the sixth claim in his Petition, Petitioner contends trial counsel was ineffective in not objecting to the solicitor's cross-examination of James Aiken regarding favorable prison conditions. The PCR Court's denial of relief upon this claim is supported by the record.

During its sentencing phase case the State only presented the two victims of Petitioner's prior crimes, the SLED ars9n agent, the pathologist, and two victim impact witnesses. (App. 4652-4708). The State presented no witnesses or information as to any of Petitioner's misbehavior in or lack of adaptability to prison, or on conditions of confinement generally.

During the sentencing phase, the defense presented Margaret Baughman, an adult education teacher at the jail where Petitioner spent his pre-trial confinement. (App. 4761-69). Baughman stated that Petitioner had been taking her classes in jail for fourteen to

fifteen months, and eventually became her reliable and trustworthy teacher's assistant. (App. 4761-65). On redirect, Petitioner elicited that there are limited educational opportunities available for inmates, and Petitioner made himself available for any class. (App. 4767).

Petitioner also called James Aiken, a former state corrections official and corrections consultant who was qualified as an expert in future danger and prison adjustment issues. (App. 4832-82). On direct, Aiken testified Petitioner would never leave prison until he was dead. (App. 4841). According to Aiken, Petitioner's institutional record of one fight and assistance to Baughman in the classroom indicated he could adapt to prison, but fundamentally Aiken noted that SCDC could manage and incapacitate any inmate with its security measures. (App. 4842-4845). During cross-examination, Aiken testified without objection on the various security levels of custody an inmate can achieve. (App. 4849-57). Aiken stated that a LWOP inmate has the incentives of getting to go to work and "get[ting] an opportunity to live" - without objection from the defense. (App. 4854-4862).

On redirect, the defense did elicited that Petitioner could not work outside the prison, that he would not be going to "kiddy camp" if he was given a life sentence, that he would not have "picnic lunches", and that he would be around a "predator, dangerous, violent inmate population." (App. 4864-65). The defense then elicited testimony regarding supermax cells. (App. 4865-66). The defense also asked Aiken about the productive endeavors available for Petitioner in prison, to which Aiken replied that Petitioner could "pay back to the society" and "do something for himself" by working in such areas as food service, maintenance, or painting. (App. 4866-67). The defense asked

Aiken if Petitioner was going to be molly-coddled, and Aiken indicated Petitioner could get involved with the Scared Straight program. (App. 4867-68).

On re-cross, the prosecutor asked about escapes, to which the defense objected. (App. 4869). Outside the presence of the jury, the court sustained the defense objection to the questioning on escape, but declined the motion for a mistrial. (App. 4870-75). During the discussion, the prosecutor asked if he could explore "certain conditions of the general population, the work conditions he's already gotten into, that area", since the defense had established that

Petitioner was not going to "kiddy camp" and would have work available. Id. The trial court agreed, to which the defense only stated, "We're on recross, Judge." Id. The judge replied that work situations was an issue certainly before the jury "at this point." (App. 4874).

Following a curative charge by the judge as to the escape question, Aiken indicated in response that (1) Petitioner would not be in supermax, (2) he would be able to work for a modest income of a few dollars per day, (3) he would have a daily routine that included eating times, work times, and recess, (4) he would be able to engage in Bible study, education, anger management, and "other things." (App. 4877-79). While Aiken again noted Petitioner would be around very dangerous people, he stated Petitioner could have access to libraries, television, football, and softball. (App. 4880-81). There was no defense objection to any of this testimony. (App. 4877-81).

Petitioner next called jail guard Sharon Branch, who stated that while Petitioner displayed some "attitude" and had a recent difficulty with authorities over going to church, he never made her feel physically threatened. (App. 4882-86). She also

indicated Petitioner was allowed "one hour of rec per day." (App. 4887). Detention center guard Enrique Badillo testified that Petitioner displayed a very polite and cooperative attitude in jail. (App. 4902-05).

In his testimony on cross during PCR, counsel Cummings explained that his strategy was to portray life in prison without parole as a particularly horrible fate that it amounted to sufficient punishment for a young man like Petitioner. (App. 7607-13). He noted he wanted to "paint a picture, paint it nasty for [the jury]." (App. 7611). Counsel noted that he had successfully objected when the solicitor attempted to talk about escape, but knew that once he had questioned the witness on some of the harsh conditions of prison he fully expected the solicitor to ask Aiken about "whether or not they get to eat in prison." (App. 7612-13). Since Bowman, Bryant, and Burkhart were not out yet, he did not see a valid objection outside of the solicitor "talking about things that were outside the scope - that being escape." (App. 7613-14). Counsel added, "I knew it was coming; I took a calculated risk; I made a decision," and agreed that he knew full well that "by going down the road of saying life in prison is so horrible that it's good enough punishment for Marion Bowman," the solicitor was going to try to show that it was not as bad as all that. (App. 7614-15). While counsel later stated he was not strategically trying to introduce what the law determined was an arbitrary factor, counsel did state he made a "calculated risk" eliciting the evidence on the toughness of prison from Aiken. (App. 7614-18). He noted he "made that choice to try to give the jury an alternative," asking rhetorically, "why do we give the jury a LWOP choice if we're not going to let them know what prison is like?" (App. 7615). Counsel agreed he was willing to take on the issue of prison conditions because he thought he could use it to his client's benefit (App.

7615-17). Finally, counsel agreed that at the time they were on the "frontier" of how to litigate a capital case with the mandatory LWOP charge, and he "did try to push the envelope." (App. 7616-17).

In looking at counsel's handling of this testimony and evidence, it is important to understand the developments in both the areas of the introduction of prison condition evidence and the developments of the case law regarding the jury instruction on life without parole. As noted by the PCR Court, in State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984), this Court first found no error in the State's examination of defense expert witnesses on cases in which they testified but the jury still found the death penalty. This Court noted that the experts were there to testify about the declining acceptance of and international trends away from capital punishment, which it ruled was impermissible. However, it concluded that since the trial court allowed the defense testimony, the State was permitted to respond with the challenged cross-examination. 281 S.C. 1, 313 S.E.2d 619.

Next, Plath addressed cross-examination of a professor who generally testified that life imprisonment was a punishment superior to the death penalty. During his direct examination, the professor testified about conditions of life imprisonment at CCI, and called life imprisonment "a form of slavery" – which this Court concluded was "to demonstrate the permanence and deprivation entailed in life imprisonment." On cross, the State asked about another inmate's escape, which the Court ultimately held was permissible *response*: "Since the witness claimed an intimate knowledge of CCI, and based his testimony upon that knowledge, it was not amiss for the State to pursue his claim more closely." Plath, 281 S.C. at 12, 313 S.E.2d at 626.

After also rejecting a claim that the State was improperly was allowed to cross a prison social worker on a complaint letter she wrote about an inmate's freedom of movement, this Court rebuked sentencing phase defenses which "sought to portray life imprisonment as preferable to capital punishment as a matter of social policy," or "drew a picture of life imprisonment as slavery, a condition of irretrievable loss." Plath, 281 S.C. at 14, 313 S.E.2d at 626-27. The Court stated that such defenses "invite the jury to intrude upon the strictly legislative function of determining the nature of crime and punishment," and concluded:

> In the sentencing phase of a capital case, the function of the jury is not to legislate a plan of punishment but to make the "either/or" selection . . . . Such determinations as the time, place, manner, and conditions of execution or incarceration, as well as the matter of parole are reserved by statute and our cases to agencies other than the jury.

Plath, 281 S.C. at 14-15, 313 S.E.2d at 627.

In the context of making the later-overruled decision that adaptability to prison evidence was not admissible, Plath stated:

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

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

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

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

Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28 (emphasis added). See also State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982) (evidence of defendant's prior escape was proper reply to defense evidence of good conduct while in prison).

In Kelly v. South Carolina, 534 U.S. 246 (2002), the United States Supreme Court broadly defined "future dangerousness," and in doing so effectively ended years of litigation in South Carolina regarding whether the prosecution had raised future dangerousness to the point that the jury needed to be charged that a life sentence meant life without parole.[1] Shortly after Kelly, the General Assembly passed a law requiring life without parole to be charged in all death penalty cases. 2002 Act. No. 278 § 1.

In 2005, the South Carolina Supreme Court issued Bowman, in which both sides presented some evidence that touched on conditions of confinement and escape. The South Carolina Supreme Court found the issue not to be preserved, but added a

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[1] For some of the cases addressing this issue, see, e.g. Shafer v. South Carolina, 532 U.S. 36, 46 n.3 (2001); Simmons v. South Carolina, 412 U.S. 154 (1994); State v. Starnes, 340 S.C. 312, 322, 531 S.E.2d 907, 913 (2000); State v. Byram, 326 S.C. 107, 483 S.E.2d 360 (1997) (defendant wanted charge on effect of finding of statutory aggravators on parole eligibility of life sentence; court held such a charge was properly denied because Simmons was not triggered); State v. Southerland, 316 S.C. 377, 447 S.E.2d 862 (1994) (holding that Simmons was not triggered because the solicitor did not argue future dangerousness).

cautionary instruction to both sides that evidentiary presentations along these lines are improper:

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

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

Subsequent to Bowman, the South Carolina Supreme Court addressed a case where the *solicitor* preemptively called a witness who extensively testified as to the conditions of confinement for a inmate serving life without parole. State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007). The defense objected to the state's evidence, and later put in its own evidence of "bad" prison conditions. Justice Moore was joined by Justice Waller and wrote the opinion of the Court. Justice Moore cited Plath and other cases from the 80s and 90s for the proposition that evidence outside of the circumstances of the crime and the characteristics of the defendant was inadmissible in a sentencing phase. This included conditions of incarceration, the process of execution, or the deterrent effect of capital punishment. Burkhart, 371 S.C. at 487-88, 640 S.E.2d at 453. Justice Moore noted that while the case at issue was tried before the decision in Bowman, its result was consistent with the "long-standing rule that evidence in the sentencing phase of a capital trial . . . be relevant to the character of the defendant or the circumstances of the crime."

Id. Thus, Justice Moore concluded that reversible error had occurred, since the evidence of conditions of confinement "invited the jury to speculate about irrelevant matters" and injected an arbitrary factor in the proceedings in violation of S.C. Code Ann. § 16-3-25(C)(1) (2003).

In concurrence, Justice Pleicones wrote that he did not believe the court should apply the normal harmless error standard for constitutional violations to this issue, concluding that "once improper evidence of any kind injects an arbitrary factor into the jury's consideration, [the] Court cannot uphold the death sentence under § 16-3-25(C)(1)." Burkhart, 371 S.C. at 489-90, 640 S.E.2d at 454.

In dissent, Chief Justice Toal, joined by Justice Burnett, applied the normal rule that the introduction of evidence will not result in reversal unless it prejudiced the defendant. Justice Toal concluded that the issue was fully joined by both sides and used by the defendant to his advantage. Id. at 490-95, 640 S.E.2d at 454-57.

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

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

operated. Kelly v. South Carolina, 534 U.S. 246 (2001), which ended the debate about charging LWOP and essentially required such charges in every case, had come out just a few months before Petitioner's trial. Knowing that he was going to get a LWOP charge, and given Petitioner's relatively young age, counsel decided to attempt to portray through Aiken the conditions of LWOP as so severe that it was a sufficient alternative to death for the conservative Dorchester County jury to choose. Since Bowman, Burkhart. or Bryant had not been issued yet, counsel's strategy was reasonable, including his (and the judge's) determination that the solicitor's responsive question was permissible given the evidence elicited by the defense. Respondent would note that Petitioner did not challenge counsel's strategy of eliciting bad prison conditions in the PCR action. (See App. 9447-48, 9546-50, 9795).

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

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

VII. Certiorari should not be granted on Petitioner's claim that his constitutional rights were violated by the PCR Court signing a proposed Order submitted by the State. The procedure utilized by the PCR Court was not unconstitutional, and there was no evidence that the PCR Court did not spend an adequate amount of time reviewing the evidence and argument presented in the PCR action.

Petitioner asserts that his 6th, 8th and 14th Amendment rights and unidentified State law rights were violated where the PCR judge signed a proposed order submitted by the Respondent upon the PCR judge's request. Petitioner points to the language in Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992), in which this Court indicated its concern that proposed orders were not addressing all of the issues raised, and expressing that all parties should carefully review the orders that are being submitted and signed; and in Hall

v. Catoe, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004), which stated: "[a]lthough 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." In Hall, the Supreme Court concluded that the PCR judge "spent an adequate amount of time reviewing the order before adopting it." Id.

Relief under this argument is not appropriate. A review of the critical dates reveals how the PCR court had an adequate time to review the order before adopting it. On June 10, 2009, Petitioner submitted his 105 page Amended Brief Supporting the Fourth Amended Application for Post-Conviction Relief.[2] (App. 9461-570). On August 10, 2009, the Respondent submitted its 193 page Post-Trial Brief in Opposition to Application for Post-Conviction Relief. (App. 9571-772). Petitioner subsequently submitted his 27 page Reply to Respondent's Brief in Opposition on September 16, 2009. (App. 9773-801).

On May 3, 2011, Judge Lockemy informed counsel for both parties that after considering the evidence, exhibits, transcripts, briefs, and the application for post-conviction relief, he was going to deny the petition. (Supp. App. III 1). He further requested the State prepare a proposed Order, and if it sufficiently addressed his thoughts, he would sign it and send it to the Clerk's Office. Id. The State submitted the 139 page proposed Order on June 17, 2011. (Supp. App. 142-286; Supp. App. III 2).

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[2] It must be noted that the Fourth Amended Application was not submitted until June 5, 2009, almost six months after the final day of the evidentiary hearing. (See App. 9442-60).

Petitioner submitted his Objections to the Court's Intention to Adopt the State's Proposed Order on September 7, 2011. (App. 9802-19). On February 27, 2012, Judge Lockemy signed the proposed Order. (Supp. App. III 5-149). Petitioner subsequently filed a Motion to Alter or Amend Judgment on March 19, 2012, and a Memorandum in Support of the Motion on April 25, 2012. It must be noted that Petitioner did not raise this objection in that Motion or Memorandum. Judge Lockemy denied the Motion on October 31, 2012. (App. 9970).

Petitioner's reliance upon Jefferson v. Upton, 560 U.S. 284, 130 S.Ct. 2217 (2010) is misplaced as supporting his position to require a *de novo* review of the evidence or a new PCR hearing. In Jefferson, unlike this case, the collateral (PCR) judge contacted the State's counsel *ex parte* and no similar request was made of the defendant's counsel and the proposed order included statement by individuals who did not testify or participate in the case. Jefferson, 130 S.Ct. 2219-20. In this case, Judge Lockemy contacted the Respondent and Petitioner's counsel and made the request for the proposed order reflecting the Respondent's post-hearing memorandum and requested that opposing counsel be provided with a copy of the proposed order. Nevertheless, in Jefferson, the Court did not vacate the state court order, but remanded it to the district court in a federal habeas corpus proceeding to determine the nature and extent of the *ex parte* contact. Here, the Respondent's proposed order was not solicited ex parte, did provide Petitioner's counsel the opportunity to review the proposed order, and did not include reference to material and evidence not submitted at the hearing.

Importantly, in Jefferson, the Supreme Court acknowledged that it had held that "verbatim adoption of findings of fact prepared by prevailing parties" should be treated

as findings of the court, albeit criticized. Jefferson, 130 S.Ct. 2223, citing Anderson v. Bessemer City, 470 U.S. 564, 572 (1985). In Hall, this Court similarly criticized the practice, but did not forbid it. Thus, Petitioner's reliance upon those cases for the relief he requests is misplaced.

Respondent would also note that the adoption of the proposed order by a state court has been held to not deny due process of law in many similar situations. Subsequent to Jefferson, the Missouri Court upheld the practice in Prince v. State, 390 S.W.3d 225 (Mo. App. 2013). Similarly in Miller v. State, 99 So.3d 349 (Ala.Crim.App. 2011), The Alabama Court found no due process violation in the submission and adoption of the proposed order.

As was the case in Hall, the evidence reflects the PCR Judge spent an adequate amount of time reviewing the order before adopting it. The PCR Court utilized 594 days between the filing of the last post-trial brief and his determination that he wanted the State to submit a proposed Order. Further, the PCR Court did not sign the proposed Order until 255 days after receiving the electronic copy of the proposed Order, and 173 days after Petitioner filed his objection to the submission of a proposed order. After the Motion to Alter or Amend was filed, the PCR Court utilized 189 days in reviewing the Motion before dismissing it.

Altogether, Respondent submits that the PCR Court's signing of the State's proposed Order, which was provided at the PCR Court's request, does not warrant the relief requested by Petitioner. The procedure used by the PCR Court was lawful, and the record reflects that the concerns that were raised in Jefferson and Hall were not present here. Certiorari should therefore be denied on this issue.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court to deny this Petition for Writ of Certiorari.

Respectfully submitted,

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May 6, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
James E. Lockemy, Circuit Court Judge

Appellate Case No. 2012-213468

MARION BOWMAN,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., do hereby certify that I have this date served the Amended Return to Petition for Writ of Certiorari in the foregoing action on the petitioner by depositing two copies of the same via U.S. mail to his attorneys of record, Robert M. Dudek, Esq., David Alexander, Esquire, both with SCCID/Division of Appellate Defense, 1330 Lady Street, Suite #401, Columbia, South Carolina 29201-3332; and Michael J. Anzelmo, Esq., Nelson, Mullins, Riley & Scarborough, LLP, P.O. Box 11070, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 6th day of May, 2014.

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