

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

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SC SUPREME COURT

MARION BOWMAN,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213468

BRIEF OF PETITIONER

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ISSUE PRESENTED

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.

STATEMENT OF THE CASE

Petitioner was indicted at the August 6, 2001, term of the Dorchester County grand jury for the offenses of murder and arson in the third degree. A death notice was served. His case came on for trial on May 15, 2002, before the Honorable Diane S. Goodstein and a jury. Norbert E. Cummings, Jr. and Marva Hardee-Thomas represented petitioner. The solicitors were Walter M. Bailey, Jr. and Benjamin Lafond. The jury found petitioner guilty on both counts.

At the conclusion of the sentencing phase on May 23, 2002, the jury found that the murder was committed during the commission of a kidnapping, and that the murder was committed while in the commission of larceny with a deadly weapon. The jury recommended a sentence of death. Judge Goodstein then sentenced petitioner to death for murder and ten years imprisonment for arson in the third degree.

Petitioner's convictions, and death sentence were affirmed in State v. Bowman, 366 S.C. 485, 498-499, 623 S.E.2d 378, 385 (2005). This Court found the issue of the examination of James Aiken about prison conditions was not preserved for appellate review. However, it starkly warned:

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, 498-499, 623 S.E.2d 378, 385 (2005).

Petitioner sought a writ of certiorari from the United States Supreme Court, which was denied in Bowman v. South Carolina, 547 U.S. 1195 (2006).

On April 7, 2006, petitioner filed a PCR application. App. 5569. On September 1, 2006, the state filed its Return and amended its return on March 15, 2007. App. 5578. App. 5616. On February 28, 2007, petitioner filed a first amended PCR application. App. 5676. James A. Brown, Jr. and John Sinclaire, III, represented petitioner. App. 5688. On May 19, 2008, petitioner filed a second amended PCR application. App. 5689. On September 8, 2008, petitioner filed a third amended PCR application. App. 5710.

On September 15, 2008, the PCR hearing began before the Honorable James E. Lockemy. App. 5729. Attorneys Brown and Sinclaire continued to represent petitioner. App. 5729. Samuel C. Waters and Alphonso Simon, Jr. represented the State. App. 5729. The hearing recessed on September 18, 2008, and resumed on September 29-30, 2008. App. 6764-66. The PCR court took additional testimony on November 24, 2008, December 18-19, 2008, and December 22, 2008. App. 7258. App. 7511. App. 7749.

On June 5, 2009, petitioner filed a fourth amended PCR application. App. 9442. On March 12, 2012, Judge Lockemy denied petitioner's PCR application. App. 9820. Petitioner filed a Rule 59(e) motion on March 19, 2012, and a supporting memorandum on April 25, 2012. App. 9951-52. The state sent Judge Lockemy a letter "in lieu of a formal response." App. 9969. On November 5, 2012, Judge Lockemy denied petitioner's Rule 59(e) motion. App. 9970.

On October 18, 2013, petitioner filed a petition for certiorari which was amended on April 30, 2014. On March 24, 2014, the state filed its Return. On May 5, 2014, petitioner filed a

reply. On April 15, 2016, this Court granted certiorari on petitioner's Question 6. This brief of petitioner follows.

STATEMENT OF FACTS

Introduction – The state’s case

The state’s theory at trial was that petitioner, an African-American and the decedent, Kandee Martin, a young white woman, were friends.¹ Kandee had a drug problem, and the state alleged petitioner sold her drugs. James Gadson testified that on the day decedent was shot he had been drinking gin for most of the day, and he was “feeling in good shape.” App. 3992, l. 11 – 3993, l. 25. Gadson was in a car with petitioner and the decedent that evening. The decedent was driving. App. 3994, l. 3 – 3995, l. 2.

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

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

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

The state presented evidence that Travis Felder was with petitioner when petitioner burned the decedent’s car. Felder claimed that petitioner came to the Villa Apartments and told him “I need to park this car.” Felder supposedly followed petitioner in a separate car while petitioner drove the decedent’s automobile to Nursery Road. App. 4092, l. 6 – 4096, l. 19.

¹ The relevance of race will be apparent from the testimony of Defense Counsel Cummings at pages 6-7 infra.

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

Petitioner's trial lawyers

Marva Hardee-Thomas, ("Thomas") who is presently suspended from the practice of law by this Court, represented petitioner along with Norbert Cummings ("Cummings"). Thomas frankly acknowledged during PCR that she did not know what the guilt phase strategy was, and she referred any questions about it to Cummings. Likewise, as to the penalty phase strategy she again stated: **"You're going to have to ask Mr. Cummings."** App. 7307, l. 5 – 7308, l. 10; App. 7325, ll. 6-23. (emphasis added). The defense's mitigation investigator and social work expert testified they had no idea what the strategy was for the penalty phase. App. 6962, ll. 3-7; App. 6786, ll. 7-23. Thomas wrote a letter to the jail stating petitioner could call the Public Defender's Office collect between "8:45 - 9:00" "concerning his capital case" adding "[h]e is not allowed to contact me on a daily basis." App. 9170.

Defense Counsel Cummings mistakenly thought that the penalty phase of petitioner's trial could focus on whether life imprisonment was really a harsh punishment or whether inmates lived rather relaxing lives in prison. Cummings reacted dismissively when told that this Court had long held such evidence was improper: "Isn't that nice of them, but how else do you argue about somebody having a chance to live in prison? I mean, I don't argue academically." App. 7449, l. 21 – 7450, l. 22.

Cummings explained his overall thoughts on the homicide, regardless of who was the actual killer:

I want to say this out loud and with Marion [present in the courtroom], what are you doing on Nursery Road at that time of the

morning with a white female and African American males in Dorchester County? Really. This is 2001 but what good are you doing out there on a dirt road? Okay . . . If he's there he's a principal, if he's in the car. If he's not there, how does all these facts get known, how are all these facts to be told?

App. 7126, ll. 7-25.

Prison conditions issue aftermath

As seen above, the prison conditions issue was procedurally barred on direct in appeal in this case. This Court nonetheless told the bench and bar in no uncertain terms that evidence of prison life being relatively easy was improper. See, State v. Bowman, 366 S.C. 485, 498-499, 623 S.E.2d 378, 385 (2005).

Two years later in State v. Burkhart, 371 S.C. 482, 487-489, 640 S.E.2d 450, 453 (2007), this Court reversed, and remanded for resentencing when this prison conditions penalty phase issue arose. Notably, Burkhart was tried *before* petitioner's case was decided, counsel there objecting to the evidence.

This Court noted that its holding, that both evidence of conditions of incarceration and execution were improper, was hardly anything new:

We have long held that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime. State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982). The jury's sole function is to make a sentencing determination based on these factors and not to legislate a plan of punishment. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987). "*Such determinations as the time, place, manner, and conditions of execution or incarceration ... are reserved ... to agencies other than the jury.*" State v. Plath (Plath II), 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984) (emphasis added). Based on this reasoning, we have disallowed defense evidence regarding the process of electrocution, State v. Plath (Plath I), 277 S.C. 126, 284 S.E.2d 221 (1981), and expert testimony regarding the deterrent

effect of capital punishment. State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996).

Recently, in State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005), the defendant challenged on appeal the admission of evidence regarding general prison conditions. **Although we found the issue was not preserved for review**, we cautioned the State and the defense bar that such evidence is not relevant to the question of whether a defendant should be sentenced to death or life imprisonment. 366 S.C. at 498-99, 623 S.E.2d at 387.

This case was tried **before our decision in Bowman**; however, we apply that reasoning here because it is consistent with **our long-standing rule** that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime. We are aware of the tension between evidence regarding the defendant's adaptability to prison life, which is clearly admissible, and this restriction on the admission of evidence regarding prison life in general. We note, however, that evidence of the defendant's characteristics may include prison conditions if narrowly tailored to demonstrate the defendant's personal behavior in those conditions.

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

(emphasis added, internal footnotes omitted).

ARGUMENT

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.

Burkhart was tried before the opinion was issued in Bowman, and Burkhart's lawyers had no trouble preserving the same prison conditions issue presented here. The Bowman opinion did not alert Burkhart's lawyers to this issue. Rather, this ban on prison conditions evidence, and method of execution evidence dates back to the early 1980's in case such as State v. Plath (Plath II), 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984).² But for trial counsel's ineffectiveness, petitioner's sentencing phase trial would have been reversed just like Burkhart.

Respectfully, Counsel Cummings for petitioner had no understanding of the law of a capital sentencing proceeding. Co-counsel deferred totally to Cummings, and she was really not a factor in this case.

Here, Correctional Consultant James E. Aiken, a former warden in the SCDC, was qualified as an expert witness for the defense in the fields of prison adjustment and future

² The Burkhart trial was held from March 15-31, 2004. The opinion in Bowman was issued on November 28, 2005. This Court can take judicial notice of this fact from the briefs, and Record on Appeal submitted in State v. Burkhart, 371 S.C. 482, 487-489, 640 S.E.2d 450, 453 (2007), and the opinion in State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005).

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

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

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

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

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

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

The solicitor then questioned Aiken about what an inmate did in prison when he was not working. Aiken answered that inmate got up in the morning, had breakfast, then went to work, took a recess break “in the middle of the day, lunch break, to eat as provided by the constitution, and of course go back to work and then eat in the evening. And a person can involve himself in bible study, a person can involve himself in education, a person can involve himself in anger management and other things that are provided within the correctional environment. That’s one routine.” App. 4878, l. 11 – 4880, l. 14.

Aiken then attempted to explain that inmates were constantly being watched during their activities, and they were written up for administrative violations. The solicitor objected: “Your Honor, I think he’s not being responsive to my question. I was simply asking him about conditions of the prison that he had testified about and he’s going off into a speech. I would like

him to respond. So I've tried to ask simple questions and get direct answers." App. 4878, l. 11 – 4880, l. 14.

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

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

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

Mr. Aiken: Yes, sir.

Mr. Bailey: What type of recreational facilities?

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

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

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

Mr. Bailey: Are there movies they can watch?

Mr. Aiken: Yes, sir.

Mr. Bailey: Television?

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

Mr. Bailey: Softball, do they play softball?

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

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

App. 4881, l. 1 – 4882, l. 3.

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

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

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

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

The court abused its discretion by allowing the solicitor on re-cross examination of James Aiken to examine him about

conditions in general population. Recreational facilities, watching movies, watching television and reading books were matters not raised by any relevant evidence, and the jury's sole concern was supposed to be with whether appellant should be sentenced to death or life imprisonment without parole.

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

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

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

Then, this Court added the following pointed admonition to bench and bar:

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, 498-499, 623 S.E.2d 378, 385 (2005)

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

PCR counsel questioned defense counsel about the prison conditions evidence during the evidentiary hearing. Defense counsel stated that “it’s been the same argument throughout the last ten years in this state, what are its present conditions, and the Supreme Court is coming out telling the solicitor to stop it, and defense attorneys, you can’t sell it to the jury anymore, that it ain’t the life of a picnic anymore.” Amazingly, trial counsel testified in **2008**:

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

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

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

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

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

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

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

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

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

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

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

In petitioner's brief supporting his fourth amended application for post-conviction relief, which the judge permitted counsel to file as a post-hearing brief, counsel again made a succinct argument on the prison conditions issue. App. 9546 - 9547. Counsel noted the trial prison conditions evidence, and the fact defense counsel did not make a contemporaneous objection to this impermissible evidence. Counsel also pointed out the fact that defense counsel during the PCR hearing did not offer any strategic reason for his failure to object. App. 9546 – 9547. Counsel noted “in Burkhart, the Court *reaffirmed the long standing rule that evidence admitted in the sentencing phase of a capital trial must be limited to either character evidence of the defendant or the circumstances of the crime.*” App. 9547. (emphasis added). Counsel noted that petitioner's jury sentenced him to death while considering the arbitrary factor of this “good” “prison conditions evidence . . .” App. 9547.

In his order denying petitioner's application for post-conviction relief filed March 12, 2012, the judge found that the defense “opened the door” to the good prison conditions evidence. App. 9909 - 9922. The order acknowledged that this Court procedurally barred this issue in State v. Bowman, 366 S.C. 45, 623 S.E.2d 378 (2005), but sought to distinguish it from State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007), by arguing the solicitor called a witness in his case in chief in Burkhart about prison conditions. App. 9913 – 9915. The order of dismissal continued to make the Attorney General's argument that seemingly because of Kelly v. South Carolina, 534 U.S. 246 (2002), and the two cases that preceded it, Simmons v. South Carolina, 512 U.S. 154 (1994) and Shafer v. South Carolina, 532 U.S. 36 (2001), which held that evidence of future dangerousness as a matter of due process mandated a jury instruction that life meant “life without parole” constituted a “new legal setting” that allegedly now allows the admission of

evidence on the “routine” of daily prison life to counter [defendant specific] adaptability evidence in some way. App. 9913.

The order also found defense counsel had a “strategic” reason not to object to this evidence because he wanted to emphasize “the harsh conditions of prison” to the jury and he fully expected the solicitor to respond with the good conditions in prison. App. 9915 – 9917. As petitioner demonstrates infra, trial counsel’s reasons were based on his own mistakes of law.

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

Discussion

Defense counsel testified at the PCR hearing that if he was still prosecuting cases he would have done exactly what the solicitor in this case did. He would have presented evidence and argued that Marion Bowman would be allowed to watch television, have recreation, go the library and have other amenities while the victim was dead in her grave as a result of the murder. “He gets to eat, she doesn’t, and he gets to have recreation in the yard, she doesn’t,” as defense counsel testified at the PCR hearing. App. 7450, ll. 3-12. Defense counsel had no appreciation of the fact that this Court has long held that evidence of prison conditions and execution did not

constitute proper jury considerations. State v. Atkinson, 253 S.C. 531, 172 S.E.2d 111, 112 (1970); State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984).

In Plath, this Court noted that the Department of Corrections controls the conditions of imprisonment and not the defendant. *“This determination as to the time, place, manner, and condition of execution or incarceration . . . are reserved by statute . . . to agencies other than the jury. As we have repeatedly stated, the sole function of the jury in a capital sentencing trial is the individualized selection of one or the other penalty, based on the circumstances of the crime and the characteristics of the individual defendant.”* State v. Plath, 281 S.C. at 15, 313 S.E.2d at 627. (emphasis added).

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

Chief Justice Toal, while arguing against reversal based on this statutory arbitrary factor, agreed in her dissent in Burkhart:

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

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

As seen above, defense counsel belatedly conceded at the PCR hearing that there could not be any excuse, reason or strategic reason to justify his failure to object to this evidence if it was inadmissible.

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

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

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

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

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

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

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

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

Had trial counsel made the proper objection to the prison condition evidence and argument at trial there is no reason to believe that petitioner would not have been granted a new sentencing trial in his appeal. Petitioner submits that this prison conditions evidence presented an arbitrary factor into the case that mandates a new sentencing trial in the same manner as if the issue had been preserved for direct appeal. See State v. Burkhardt, supra.

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

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

CONCLUSION

By reason of the foregoing arguments, petitioner should be granted a new sentencing phase trial.

Respectfully submitted,



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ATTORNEYS FOR PETITIONER

This 8th day of August, 2016

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

MARION BOWMAN,

PETITIONER,

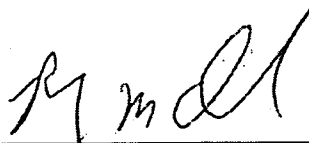
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

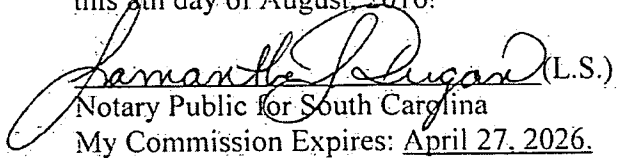
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Alphonso Simon, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on Marion Bowman, #6006, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC, 29472, this 8th day of August, 2016.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 8th day of August, 2016.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: April 27, 2026.