STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to DorchesterCounty

Honorable James E. Lockemy, Circuit Court Judge



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MARION BOWMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2012-213468

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# REPLY BRIEF OF PETITIONER

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ROBERT M. DUDEK
Chief Appellate Defender

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

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## ARGUMENT IN REPLY

Simply put, had Norbert Cummings understood the law, petitioner's death sentence would have been reversed on direct appeal just as this Court reversed on the same issue in State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007). In petitioner's direct appeal, this Court held that Cummings failed to preserve the issue of the solicitor's injection of the arbitrary factor of "good prison conditions." State v. Bowman, 366 S.C. 485, 498-99, 623 S.E.2d 378, 385 (2005). See also McHam v. State, 404 S.C. 465, 473-75, 746 S.E.2d 41, 45-47 (2013) (finding trial counsel ineffective for failing to preserve an issue for appeal). Now, in PCR, the state seeks to avoid the consequences of Cummings incompetence, the solicitor's actions, and its claim during the direct appeal that this issue was unpreserved. This Court should ignore the state's contention that such evidence was admissible at the time and its invention of a trial strategy for Cummings.

### *Burkhart's Attorneys Knew the Law*

The state claims that the law regarding prison conditions was unsettled at the time of petitioner's trial and Cummings would have needed to be clairvoyant to make a proper objection. Brief of Respondent at 23-30. Indeed, the state makes the audacious claim that death-qualified attorneys have no duty to anticipate changes in the law in capital cases. Brief of Respondent at 29. Regardless, the law excluding prison conditions evidence was **well-known** and Cummings simply failed to understand it.

In 1984, this Court held that conditions of incarceration were outside the control of the defendant, had nothing to do with the crime or the defendant's characteristics, and were therefore arbitrary and inadmissible. State v. Plath, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984). The Plath Court emphasized this conclusion was not new even in 1984: "**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." Id. (emphasis added). Sentencing procedures that create "a substantial risk that the [death penalty will] be inflicted in an arbitrary and capricious manner" violate the Eighth Amendment. Gregg v. Georgia, 428 U.S. 153, 188 (1976). Evidence that prison is a nice place where inmates read and play basketball, even if true, would be an arbitrary factor outside of the bounds of the Eighth Amendment's requirements and should have been well known by Cummings.

This Court emphasized that this evidence was inadmissible in Bowman and Burkhart, but because Burkhart's attorneys knew the law and made proper objections, Burkhart's case was reversed. In Bowman, this Court pointedly stated what the objection should have been and that it was clear at the time of trial: "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." Bowman at 498-499, 623 S.E.2d at 385. Chief Justice Toal cited Plath and State v. Smart, 278 S.C. 515, 299 S.E.2d 686 (1982) when she succinctly described the settled point in Burkhart: "Our pronouncement disfavoring this evidence in Bowman ***was nothing new.***" Burkhart at 494, 640 S.E.2d at 456 (Toal, C.J., dissenting).

Nothing about the "life means life" series of cases used by the state to muddy the water regarding prison conditions changed this settled law. Brief of Respondent at 24-26 *citing* Simmons v. South Carolina, 412 U.S. 154 (1994) and its progeny. The Simmons cases have nothing to do with this issue. General prison conditions evidence was inadmissible at Bowman's trial under this Court's jurisprudence and under the Eighth Amendment as an arbitrary factor outside the control of the defendant. Aiken's testimony regarding whether petitioner could adapt

to life in prison was about petitioner's **individual circumstances** and admissible as mitigating evidence. Skipper v. South Carolina, 476 U.S. 1 (1986).

As much as the state would like to characterize the solicitor's questioning of Aiken as a response, the two concepts are unrelated. The state makes the same mistake of law as Cummings, and, unfortunately, the PCR court. Good prison conditions evidence is inadmissible as an arbitrary factor. Evidence a defendant can adapt to prison is admissible as mitigating evidence. Cummings failed to understand this distinction, but Troy Burkhart's attorneys—operating in the exact same legal environment as Cummings—understood the concept and made the proper objections. Burkhart is serving a life sentence while petitioner remains on death row because of trial counsel's incompetence.

*The Trial Record Does Not Support the State's Invented Strategy*

Even indulging the state's contention that Cummings could have formulated a reasonable legal strategy without first knowing the law (which he dirisively described as arguing "academically"), the trial record does not support the state's invented strategy. The state claims Cummings made a calculated decision to show the jury that prison was so severe that it would be equivalent to the death penalty. Brief of Respondent at 22-23, 27, 30. The state relies on portions of Cummings' defensive PCR testimony, which Cummings recanted, admitting he made a mistake. App. 7451, l. 15 – 7452, l. 1. The state also cherry picks portions of Cummings' closing argument in which he talks about prison. Brief of Respondent at 30. All the statements in Cummings' closing argument relied on by the state in its feeble attempt to invent a strategy for him could have been made without testimony from any expert. Cummings did not need Aiken's testimony to tell the jury that, "The line forms back there if anybody wants to spend the rest of their life in prison." App. 4991, ll. 6 - 8.

Further revealing the state's recent construction of a strategy is that any notion that prison is harsher than a death sentence is completely absent from Cummings' opening statement in the sentencing phase. App. 4644, l. 9 – 4650, l. 2. Cummings' theme, to the extent one existed, appears to be "mercy," which is the direct opposite of the state's claim that Cummings wanted the jury to think that a life sentence was worse than the death penalty. App. 4644, l. 9 – 4650, l. 2. Cummings twice repeats the phrase, "Justice is tempered with mercy." App. 4644, l. 17. App. 4649, ll. 23 – 24. Referring to petitioner, Cummings says, "I stand before you this morning saying that kid, that kid, please show mercy with justice." App. 4646, ll. 1 – 3. Cummings says, "If you believe that the killing should stop here, I ask you for mercy on behalf of my client." App. 4646, ll. 11 – 13. He ends his opening asking the jury to "be just, fair, and merciful jurors for the sake of humanity." App. 4650, ll. 1 – 2.

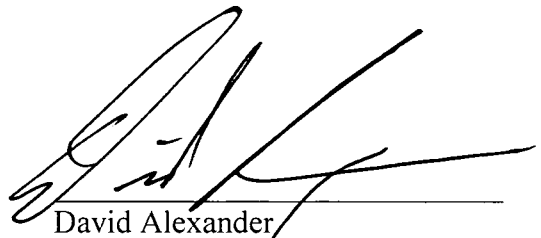
Cummings' examination of the witnesses during the mitigation case also shows he had no such strategy. Cummings' first opportunity to show the harshness of prison was during the testimony of a teacher at the jail, Margaret A. Baughman ("Baughman"). App. 4760, l. 22 – 4768, l. 2. Cummings questions Baughman about her interactions with petitioner. App. 4644, l. 9 – 4650, l. 2. He never asks Baughman about the conditions she sees in jail or dangerous inmates. App. 4644, l. 9 – 4650, l. 2. Notably, Cummings commits a blunder by trying to show that petitioner received a red ribbon as an award in her class. App. 4763, l. 10 – 4764, l. 10. Baughman cannot identify the ribbon and on cross-examination, the solicitor had her admit that the ribbon was not something her students earned, but that she indiscriminately passed them out to all students. App. 4767, ll. 1 – 9.

Nothing in Cummings' examination of the social worker, Jeffrey Youngman, who was a former police officer, asks about the harshness of prison. App. 4769, l. 1 – 4827, l. 17. Even

after Aiken's testimony, Cummings called two prison guards, Sharon J. Branch and Enrique Badillo, and asked them no questions about harsh prison conditions. App. 4882, l. 12 – 4890, l. 3. App. 4901, l. 22 – 4905, l. 18. The strategy the state attempts to invent for Cummings is a fantasy. Cummings did not know the law and failed to object to inadmissible evidence that injected an arbitrary factor into petitioner's sentencing proceeding. This Court should reverse.

## CONCLUSION

For these reasons, and the reasons stated in petitioner's brief, this Court should reverse and grant petitioner a new sentencing hearing.



David Alexander
Appellate Defender

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR PETITIONER

This 30th day of January, 2017.

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a true copy of the Reply Brief of Petitioner in the above referenced case has been served upon Alphonso Simon, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Reply Brief of Petitioner have been served on Marion Bowman, #6006, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 30th day of January, 2017.

David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 30th day of January, 2017.

Brittany Wilk (L.S)
Notary Public for South Carolina
My Commission Expires: November 3, 2026.