

VOLUME THIRTEEN

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

RECEIVED

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S.C. Supreme Court

MARION BOWMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213468

APPENDIX

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THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:

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PLAINTIFF'S EXHIBIT #73 (PHOTOGRAPH)

STATE OF SOUTH CAROLINA FILED-RECORDED IN THE COURT OF GENERAL SESSIONS

COUNTY OF DORCHESTER 2002 JAN 22 PM 1:57 INDICTMENT NO. 01-GS-18-0348

01-GS-18-0349

CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

STATE OF SOUTH CAROLINA,

vs.

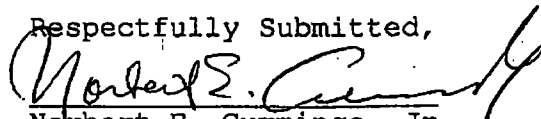
MOTION FOR IN-CAMERA INSPECTION
OF THE PROSECUTOR'S FILE

MARION BOWMAN, JR.,

Defendant.

Marion Bowman, Jr., by and through his undersigned attorneys, who moves for an order requiring the State to make available to the Court all information and evidence obtained by the State or any law enforcement agency during the investigation of the above captioned case so as to enable the Trial Judge to make an in camera inspection of said information and evidence so as to insure that the State has Complied with the requirements of Brady v. Maryland, 373 U.S. 83 (1963) Giglio v. United States, 405 U.S. 150 (1972), and State v. Goodson, 255 S.E. 2nd 679 (1979).

Respectfully Submitted,


 Norbert E. Cummings, Jr.


 Marva Hardee-Thomas

 Summerville, South Carolina
 Dated January 2nd, 2002

 Attorneys for Defendant
 Marion Bowman, Jr.

CERTIFIED COPY

7-303


 Clerk of Court
 Dorchester County

STATE OF SOUTH CAROLINA) FILED - RECORDED COURT OF GENERAL SESSION

COUNTY OF DORCHESTER

2002 JAN 22 PM 1:56

INDICTMENT NO. 01-GS-18-0348

) CHERYL GRAHAM

01-GS-18-0349

STATE OF SOUTH CAROLINA) CLERK OF COURT
) DORCHESTER COUNTY

vs.)

MARION BOWMAN, JR.,
Defendant)MOTION TO REVEAL GRANT OF
IMMUNITY OR OTHER CONCESSIONS

NOW COMES the Defendant, by and through his attorneys,
and moves this Honorable Court to order the State of South
Carolina to disclose:

1) Any plan to grant immunity to State's witnesses
in these cases;

2) Any granting of immunity to State's witnesses in
these cases;

3) Any agreements relating to a reduction in charge or
charges for any State's witnesses in these cases;

4) Any agreements for sentence concessions in
consideration of testimony of State's witnesses in these cases,
pursuant to Article of the South Carolina General Statutes or
any other authority;

5) Any discussions held between state officials,
including but not limited to law enforcement officers or
prosecutors, and any State's witness or his representative
concerning things the State;

6) Any "Trust Me" agreements, wherein the prosecutor
avoids offering a specific plea agreement to a State's
witness, but expressly or impliedly offers to help the witness
after he testifies for the State;

7) Any "Trust Me" agreements, wherein the prosecutor
expressly or impliedly offers not to prosecute a State's
witness for uncharged crimes or misconduct of which the
State is or should be aware in return for the witness'
testimony. In support of said motion, defendant cites unto
the court:

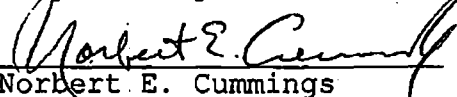
1. The Fifth, Sixth and Fourteenth Amendments to the
Federal Constitution.

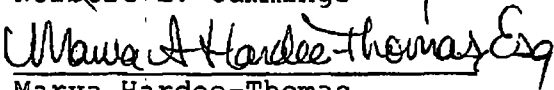
2. Article I, Sections 3, 18, 19, 23, and 35 of the State
Constitution.

3. N.C.G.S. 15A-1052, 1054 and 1055.

7303
Cheryl Graham
Clerk of Court
Dorchester County

Respectfully Submitted,


Norbert E. Cummings



Marva Hardee-Thomas
Attorneys for Defendant
Marion Bowman

Summerville, South Carolina

Dated: January 2nd, 2002

FILED-RECORDED
STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS

2002 JAN 22 PM 1:56
COUNTY OF DORCHESTER) INDICTMENT NO. 01-GS-18-0348

CHERYL GRAHAM) 01-GS-18-0349
CLERK OF COURT

STATE OF SOUTH CAROLINA)
DORCHESTER COUNTY)

) MOTION FOR LIST OF
) PROSECUTION WITNESSES
)
vs.)

MARION BOWMAN, JR.,)

DEFENDANT.)

CERTIFIED COPY
7-303

Cheryl Graham
Clerk of Court
Dorchester County

Now comes the Defendant, by and through counsel, who moves the Court for an order directing that the First Circuit Solicitor's Office, no later than two weeks prior to trial, provide defense counsel with a complete list of names and addresses of all witnesses the State intends to call during the guilt/innocence phase of the trial and, if necessary, during the punishment phase. In support of this motion, Defendant submits:

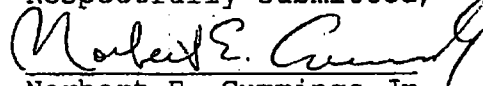
- 1) That he was indicted by the Dorchester County Grand Jury for the crimes of Kidnaping, armed robbery and Murder ;
- 2) That the First Circuit Solicitors' office delivered to defense counsel written notice that the State would seek the Death Penalty against the Defendant;
- 3) That on information and belief, law enforcement authorities and staff members of the First Circuit Solicitor's Office have interviewed numerous witnesses who may testify during the guilt/innocence or punishment phases of the trial, or both;
- 4) That death penalty trials are divided into two phases as mandated by the United States Supreme Court decision of Furman v. Georgia, 408 U.S. 238 (1972);
- 5) That if the attorneys for defendant are not provided, at least two weeks prior to trial, with a complete list of the names of the witnesses to be used during the guilt/innocence and punishment phases of the trial, the defendant will be denied his Sixth Amendment right to effective assistance of counsel as guaranteed by the United States and South Carolina Constitutions. Failure to require such a list would also constitute a violation of fundamental fairness guaranteed by Due Process Clauses of the Fourteenth Amendment of the United States Constitution and Article 1 of the South Carolina Constitution, As the United States Supreme Court has recognized: "The right of an accused in a criminal trial to due process is, in essence,

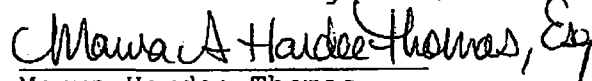
the right to a fair opportunity to defend against the State' accusations." Chambers v. Mississippi, 410 U.S. 238 (1973);

6) That where, as here, the trial may result in death, the State must extend to the defendant every procedural substantive right to which he is arguably due. "When the accused's life is a stake, technical rules of procedure must give way in order that justice may prevail." Bowman v. Commonwealth of Kentucky, 290 S.W. 2d 814 817 (Ky.1956).

WHEREFORE, defendant prays that this Court order that the First Circuit Solicitor's Office provide, at least two weeks prior to trial, a complete list of the names and addresses of all witnesses the State intends to call during the guilt/innocence and penalty phases of the trial with a designation as to the particular phase in which they will be called to testify.

Respectfully submitted,


Norbert E. Cummings Jr.


Marva Hardee-Thomas

Summerville, South Carolina
Dated: Tuesday 2nd, 2002

Attorneys for Defendant
Marion Bowman, Jr.

STATE OF SOUTH CAROLINA) FILED IN THE RECORDED OF GENERAL SESSIONS
COUNTY OF DORCHESTER) 2002 JAN 22 PM 1:58. 01-GS-18-0348
STATE OF SOUTH CAROLINA,) 01-GS-18-0349
vs.) CHERYL GRAHAM
) CLERK OF COURT
) DORCHESTER COUNTY
) MOTION TO COMPLY TO INSURE
) STATE'S COMPLIANCE WITH DISCLOSURE
MARION BOWMAN, JR.,)
Defendant.)

CERTIFIED COPY

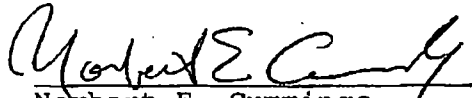
7-303

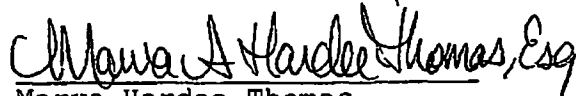
Cheryl Graham

Clerk of Court
Dorchester County

Now comes the Defendant Marion Bowman, Jr., by and through his attorney, who moves for an order requiring disclosure of all evidence or information presently in possession of the Solicitor, any County or Municipal law enforcement agency, the South Carolina Law Enforcement Division or any other law enforcement agency of the State of South Carolina, and moves the Court to make photostatic copies of all materials viewed by this Court to be sealed and included in the record of this case for the purpose of insuring effective view of the State's compliance with Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972).

Respectfully Submitted,


Norbert E. Cummings


Marva Hardee-Thomas
Attorneys for Defendant
Marion Bowman

Summerville, South Carolina
Dated January 22, 2002

STATE OF SOUTH CAROLINA) FILED-RECORDED
IN THE COURT OF GENERAL SESSIONS

COUNTY OF DORCHESTER) INDICEMENT NO. 01-GS-18-0348

STATE OF SOUTH CAROLINA) 01-GS-18-0349

vs.)

MARION BOWMAN, JR.,)

Defendant.)

MOTION FOR DISCLOSURE OF CERTIFIED COPY
IMPEACHING INFORMATION 7-3-03

Cheryl Graham
Clerk of Court
Dorchester County

Defendant, by and through his counsel, respectfully moves court for the entry of an order directing the Solicitor, by and through his agents, to investigate and disclose all of the following within the possession, custody, and control of the Solicitor or his agents, or existence of which is known, or by the exercise of due diligence, could be known to the Solicitor or his agents:

1. Any and all consideration or promises of consideration given to or made on behalf of the State's witnesses. By "Consideration," Defendant refers to absolutely anything of value or use, including but not limited to immunity grants, witness fees, transportation assistance, assistance to members of the witnesses family or associates of the witness, assistance or favorable treatment with respect to any criminal, civil or administrative dispute with the State or the United States, and anything else which could arguably create an interest or bias in the witness in favor of the State or against the Defendant, or act as an inducement to testify or not testify.

2. Any and all prosecutions, investigations or possible prosecutions pending or which could be brought against the witness and any probationary, parole, or deferred prosecution status of the witness.

3. Any and all records and information revealing arrests and /or convictions for criminal offenses attributed to any witness for the State.

4. Any and all records and information showing prior misconduct or bad acts committed by any witness for the State.

5. Any and all personnel files for any witness for the State.

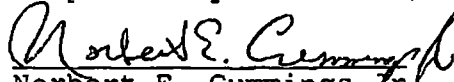
6. The same information requested in paragraphs 1 through 5 above is requested with respect to any non-witness whose statement or information may be offered into evidence by the State in this case or which, whether offered or not, may be beneficial to defendant in casting doubt on his guilt or in mitigating the possible imposition of the death penalty.

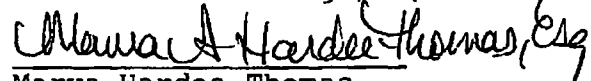
WHEREFORE, Defendant respectfully requests that this Court issue an Order:

1. Directing that all of the above-requested information be supplied to Defendant immediately for his inspection and use at trial; and

2. Requiring that these disclosures be continuing ones in effect up until the time of the trial.

Respectfully Submitted,


Norbert E. Cummings, Jr.


Marva Hardee-Thomas
Attorneys for Defendant
Marion Bowman, Jr.

Summerville, South Carolina

Dated: January 2nd, 2002

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

STATE OF SOUTH CAROLINA,

vs.

MARION BOWMAN, JR.,

Defendant.

FILED IN THE COURT OF GENERAL SESSIONS

2002 JAN 22 PM 5:59 NO. 01-GS-18-0348

01-GS-18-0349

CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

MOTION TO REVEAL THE DEAL

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Cheryl Graham

Clerk of Court

Dorchester County

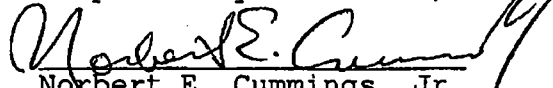
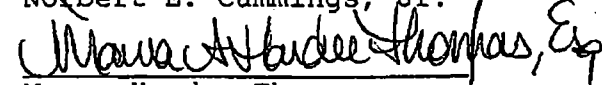
TO: WALTER BAILEY, SOLICITOR; FIRST JUDICIAL CIRCUIT

NOW COMES the Defendant, Marion Bowman, Jr. by and through his undersigned attorneys, who respectfully move this court to order the State to reveal any offers of immunity, offers to reduce charges, offers to recommend sentences, offers not to prosecute or any other offers made or deals made, with any State's witnesses in exchange for their testimony or in exchange for their agreement not to testify for the Defendant in regard to the murder in the above-captioned case. In support of the foregoing Motion, the Defendant would show the following:

1. That the State is seeking the death penalty against the Defendant for the offense of Murder.
2. That the Defendant is informed and believes that certain State's witnesses now have criminal charges pending against them in the State of South Carolina or have violated the laws of the State of South Carolina and face potential prosecution.
3. That the Defendant is informed and believes that the State has through negotiations with these witnesses or their attorneys, made certain offers to those State's witnesses for the purpose of obtaining their testimony against the Defendant, Marion Bowman, Jr.
4. That the reliability, believability and credibility of the given State's witness may well be determinative of the issue of guilt or innocence in this case, it is imperative for the purposes of showing any bias, prejudice or interest in the outcome of the case; the Defendant and his attorneys know of the examination of that witness on the stand before the jury.
5. That the requested information is material, inasmuch as it would have a profound effect on the judgement of the jury as to the witness' credibility and to insure Due Process of Law guaranteed under the Fourteenth Amendment of the United States Constitution, such information should be divulged to Defendant or his attorneys prior to the call of this case.

Wherefore, the Defendant respectfully requests that this Court compel the State to reveal any such negotiations, promises or deals prior to the call of this case.

Respectfully submitted,


Norbert E. Cummings, Jr.

Marva Hardee-Thomas

Attorneys for Defendant
Marion Bowman, Jr.

Summerville, South Carolina
Dated: January 2nd, 2002

STATE OF SOUTH CAROLINA **FILED - RECORDED** IN THE COURT OF GENERAL SESSIONS

COUNTY OF DORCHESTER **2002 JAN 22 PM 1:54** INDICTMENT NO. 01-GS-18-0348

STATE OF SOUTH CAROLINA **CHERYL GRAHAM** 01-GS-18-0349

CLERK OF COURT
DORCHESTER COUNTY

vs.) MOTION FOR INFORMATION
) CONCERNING POTENTIAL STATE'S
) WITNESSES

MARION BOWMAN, JR.,
Defendant.

Defendant, by and through his counsel, moves this Court for an order requiring that the First Judicial Solicitor's office provide to the counsel for the defense the name of each potential State's expert witness along with that expert's purported qualifications and a list of cases in which that expert has either testified or prepared material for testimony. In support of this motion, counsel for defense submits that it is impossible for the defense to gather this information in any other fashion and it is necessary for this information to be provided so that the qualifications of the experts can be investigated both through the analysis of their qualifications and the analysis of their testimony in other matters. Failure to provide this information to the defense will deprive the Defendant of his right to effective assistance of counsel in violation of the United States and South Carolina Constitution.

Respectfully Submitted,

Norbert E. Cummings
Norbert E. Cummings

Marva Hardee Thomas, Esq.
Marva Hardee-Thomas
Attorneys for Defendant
Marion Bowman, Jr.

Summerville, South Carolina
Dated: January 2nd, 2002

CERTIFIED COPY

7-303

Cheryl Graham
Clerk of Court
Dorchester County

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

STATE OF SOUTH CAROLINA,

vs.

MARION BOWMAN, JR.,

Defendant.

IN THE COURT OF GENERAL SESSIONS

FILED - RECORDED

2002 JAN 22 PM 1:54

INDICTMENT NO. 01-GS-18-0348

01-GS-18-0349

CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTYMOTION FOR LIST OF
PROSECUTION WITNESSES

CERTIFIED COPY

7303

Cheryl Graham

Clerk of Court

Dorchester County

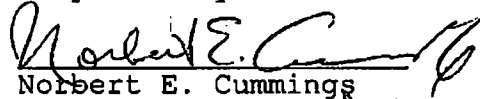
Now comes the Defendant, by and through counsel, who moves the Court for an order directing that the First Circuit Solicitor's Office, no later than two weeks prior to trial, provide defense counsel with a complete list of names and the addresses of all witnesses the State intends to call during the guilt/innocence phase of the trial and, if necessary, during the punishment phase. In support of this motion, Defendant submits:

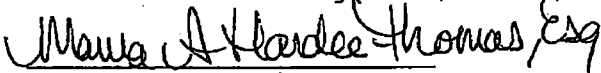
- 1) That he was indicted by the Dorchester County Grand Jury for the crimes of Arson 3rd Degree and Murder;
- 2) That the First Circuit Solicitors office delivered to defense counsel written notice that the State would seek the Death Penalty against the Defendant;
- 3) That on information and belief, law enforcement authorities and staff members of the First Circuit Solicitor's Office have interviewed numerous witnesses who may testify during the guilt/innocence or punishment phases of the trial' or both;
- 4) That Death penalty trials are divided into two phases as mandated by the United States Supreme Court decision of Furman v. Georgia, 408 U.S. 238 (1972);
- 5) That if the attorneys for defendant are not provided, at least two weeks prior to trial, with a complete list of the names of the witnesses to be used during the guilt/innocence and punishment phases of the trial, the defendant will be denied his Sixth Amendment right to effective assistance of counsel as guaranteed by the United States and South Carolina Constitutions. Failure to require such a list would also constitute a violation of fundamental fairness guaranteed by Due Process Clauses of the Fourteenth Amendment of the United States Constitution and Article 1 of the South Carolina Constitution, As the United States Supreme Court has recognized: "The right of an accused in a criminal trial to due process, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 238 (1973);
- 6) That where, as here, the trial may result in Death, the

State must extend to the Defendant every procedural substantive right to which he is arguably due. "When the accused's life is at stake, technical rules of procedure must give way in order that justice may prevail." Bowman v. Commonwealth of Kentucky, 290 S.W. 2d 814 817 (Ky.1956).

WHEREFORE, Defendant prays that this Court Order that the First Circuit Solicitor's Office provide, at least two weeks prior to trial, a complete list of the names and addresses of all witnesses the State intends to call during the guilt/innocence and penalty phases of the trial with a designation as to the particular phase in which they will be called to testify.

Respectfully submitted


Norbert E. Cummings


Marva Hardee-Thomas
Attorneys for Defendant
Marion Bowman, Jr.

Summerville, South Carolina

Dated: January 2nd, 2002

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

STATE OF SOUTH CAROLINA,

vs.

MARION BOWMAN, JR.,

Defendant.

FILED-RECORDED

2002 JAN 22 PM 1:53

CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

IN THE COURT OF GENERAL SESSIONS

INDICTMENT NO. 01-GS-18-0348

01-GS-18-0349

MOTION FOR DISCOVERY

OF WITNESS LIST

CERTIFIED COPY

7-303

Cheryl Graham

Clerk of Court

Dorchester County

NOW comes Defendant, Marion Bowman, Jr., by and through his undersigned attorneys, and moves before this Honorable Court to require the State to furnish the Defendant with a list of the names, addresses, and telephone numbers of all witnesses and prospective witnesses interviewed by the State's agents in connection with the above entitled cause for the reason that the Defendant has no way of knowing the existence of any relationships between such witnesses and the prospective jurors and, therefore, the Defendant cannot make any intelligent use of his right to voir dire and his peremptory challenges without such knowledge and that the Defendant has no way of knowing the identity of the witnesses during the trial of this matter, upon whose statements and affidavits the warrant was filed and upon whose testimony the indictment was returned, and that the failure to be provided with such witnesses list would prevent the accused from receiving a fair trial. In addition, the Defendant further moves that upon discovery by the State of additional witnesses, that the State shall be required to supplement said list.

Wherefore, the Defendant respectfully prays that this Honorable Court Order that the prosecution to provide the Defendant with the described list of witnesses, and for such other and further relief as this Honorable Court shall deem appropriate.

Respectfully submitted

Norbert E. Cummings

Marva Hardee-Thomas

Attorneys for Defendant

Marion Bowman, Jr.

Summerville, South Carolina

Dated: January 22, 2002

STATE OF SOUTH CAROLINA) FILED - RECORD OF GENERAL SESSIONS
COUNTY OF DORCHESTER) 2002 JAN 22 PM 4:58 01-GS-18-0348
STATE OF SOUTH CAROLINA,) 01-GS-18-0349
) CHERYL GRAHAM
) CLERK OF COURT
) DORCHESTER COUNTY
) MOTION TO DISCLOSE
vs.) NAMES AND ADDRESSES
) STATE'S WITNESSES
MARION BOWMAN, JR.,)
) Defendant.)

Comes now the Defendant through his attorneys and moves this Court for an order which orders the Solicitor to provide to Defense Counsel the names, addresses and phone numbers of all State's witnesses. The Defendant is informed and believes that he is entitled to this information in order to receive the effective assistance of counsel and to insure that he is able to effectively confront those witnesses during cross-examination under 6th Amendment to the United States Constitution.

Respectfully Submitted,

Norbert E. Cummings
Norbert E. Cummings

Marva Hardee-Thomas, Esq.
Marva Hardee-Thomas
Attorneys for Defendant
Marion Bowman, Jr.

Summerville, South Carolina
Dated: January 22nd, 2002

CERTIFIED COPY

7-3-03
Cheryl Graham
Clerk of Court
Dorchester County

STATE OF SOUTH CAROLINA)

COUNTY OF DORCHESTER)

STATE OF SOUTH CAROLINA,)

vs.)

MARION BOWMAN, JR.,)

Defendant.)

FILED-RECORDED

IN THE COURT OF GENERAL SESSIONS

2002 JAN 22 PM 6:52

INDICTMENT NO. 01-GS-18-0348

01-GS-18-0349

CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

NOTICE OF MOTION AND MOTION

TO COMPEL PRODUCTION OF CERTIFIED COPY

7-3-03

Cheryl Graham

Clerk of Court

TO: WALTER BAILEY, SOLICITOR FIRST JUDICIAL ~~Dorchester~~ County
FEDERAL BUREAU OF INVESTIGATION AND THE SOUTH CAROLINA
LAW ENFORCEMENT DIVISION

YOU WILL PLEASE TAKE NOTICE, that the Defendant, by and through his undersigned attorney's will move before the presiding Judge of the First Judicial Circuit at a date and time to be established by this Court, for an order requiring the production of all information requested below.

The Defendant respectfully requests an Order compelling the immediate production of the following items from the DNA laboratory of the Federal Bureau of Investigation and from the DNA laboratory of the South Carolina Law Enforcement Division.

1. Data Base. Copy of the raw data base including case numbers or gel numbers, for each entry and their respective frequencies. The Data Base should include data from each ethnic group, as well as each locus or probe utilized. This information is essential to the fair determination of the admissibility of the mathematical statistics or probabilities generated in this case. Examination of the data base additionally will allow verification of whether or not the molecular probes used in the laboratories analysis are functioning independently.

2. FBI'S Bottom line report. This report, in the above stated case, includes statistical estimates and estimates of allele fragments from all samples and specimens used in this specific case.

3. Autoradiograms. The FBI must furnish copies of all exposures, radiograms related to this case. It is a universally accepted practice at the Laboratory to x-ray, photograph and make an autoradiograph of the DNA as they appear in the supporting medium. Photographs allow for independent verification of the analysis. Genetic marker spots or patterns which provide old and/or degraded stains are not objective but rather they must be subject to interpretation. Thus, the person against whom the test are offered should not be required to accept the word of the technician who reads the the test results.

4. Original Autoradiograms. The FBI must allow the defense attorneys or experts to examine the original autoradiograms as information may be lost in duplication.

5. Laboratory Bench Notes and Names of Technicians Who Actually Performed Analysis in this Case. Laboratory bench notes of analysts who ran the tests are very important. These notes are made in the laboratory at the time of testing and form an integral part of the scientific process. These notes show the analysts actual reading of the DNA spots on the autoradiogram. They may also contain the analysts subjective remarks or comments regarding the distinctiveness and strength of the markings. They also contain other information, including the date, the initials of the examiner, the type of and the beginning and end of each test and the conditions under which it was done and identification and position of each sample of the gel involved. These notes are recognized as the proof of what the scientist did and observed. They are considered as scientists to be the "raw data" of the test. They may have been substituted by later reports which paraphrase the raw data.

6. Proficiency Studies. The FBI must provide copies of all autoradiographs generated in proficiency studies in which the FBI has participated (e.g. CACLD blind studies) as well as any correspondence related to such studies between FBI and the agency coordinating the blind study.

7. Examination of Original Polaroids. The FBI must allow examination (and the copying if desired) of all polaroid photographs related to the instant case.

8. Database Autoradiograms. The FBI must allow a designated defense expert to select from the FBI population database 50 autoradiographs in order to assess the overall validity of the database. (see #1 above). the defense additionally must be allowed to make copies of 10 of the above stated autoradiographs.

9. The Protocol Used by the FBI in DNA Analysis. The defense further requests that the Court Order that the FBI allow the inspection of it's DNA Laboratory by defense experts in order to verify the quality controls imposed during laboratory testing, how allele fragment sizes are determined, as well as to verify the chain-of-custody of evidentiary materials.

10. The Original Specimens. The original specimens taken for examination, including any blood from the victim or Defendant.

The defense requests that the Court Order the State's Attorney to furnish the defense with detailed description of how all evidence in the case was preserved from first acquired to its present condition.

The defense requests the Court to Order that the State's Attorney furnish the defense with a detailed description of the chain of custody of all recovered evidence from when first acquired to its present state.

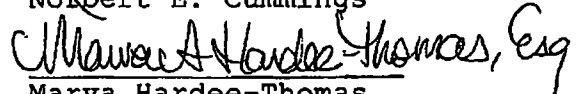
The defense requests that the Court Order all samples collected

in this case be preserved for independent DNA testing by the defense.

The above requested items are in the control of the State and/or the FBI. The defense has substantial need for these materials and is unable to obtain them from any other source. This Motion is further based upon the South Carolina Rules of Criminal Procedure, Brady vs. Maryland, 373 U.S. 83, and previous Motions to produce.

Respectfully Submitted,


Norbert E. Cummings


Marva Hardee-Thomas
Attorneys for Defendant
Marion Bowman, Jr.

Summerville, South Carolina

Dated: January 2nd, 2002

DORCHESTER COUNTY SHERIFF'S OFFICE
INVESTIGATIVE REPORT

5419

REPORTING OFFICER: Sgt. Alvin M. Coker

CERTIFIED COPY

CASE NUMBER: 01001493

2004 FEB 17 AM 11:12

02/19/01 - 19:10 hrs. R/O and Sgt. Van Doran escorted James Tawain Gadson from the jail back over to R/O's office where we interviewed him. R/O informed Gadson of Miranda Rights from a pocket card. James Tawain Gadson agreed to talk without a lawyer present. He stated that he had purchased a BRANCHVILLE 9MM pistol, black and silver in color, from Woody's Pawn Shop sometime in 1999 or 2000. He stated that the gun had been stolen out of his sisters car while in Orangeburg a nightclub called "THE PUB", on Chestnut Street. Darian Williams was with him at the time it was stolen. He stated he has not purchased a gun since that time. He has never reported the 9mm as stolen.

R/O received a notice to contact Marion Bowman Sr. concerning reports that he had his son's gun. R/O telephoned Marion Bowman Sr. and was given the following information.

That his ex-sister-in-law (Lillian Gadson Williams) came to his house prior to the incident and told him he needed to go find "JR" (Marion Bowman Jr.) that he needed to turn himself in to the police. She had had a dream of blood everywhere. About 5 hours later they heard about the murder. Mr. Bowman believes she had prior knowledge of the incident. Mr. Bowman went on to say that Lillian Gadson Williams is the mother of Darian "POP" Williams who hangs around with "JR". Mr. Bowman further stated that there was rumors going around the town of Branchville about him having gone to his son's house and getting the gun that was involved in the murder. He stated that the rumor was not true and that if he had any knowledge of where the gun might be he would inform police of it. R/O offered Marion Bowman Sr. a polygraph concerning the issue of the gun. He declined to take the polygraph.

02/20/01 - 10:00 hrs. R/O and Detective Quinton Joyner, and a DCSO Detention Officer traveled to Orangeburg and picked up Marion Bowman Jr. from the Orangeburg County Jail. R/O and Joyner provided escort for the Detention Officer who transported Marion Bowman Jr. back to the DCSO Jail in St. George. We arrived back in St. George around 12:00 hrs. Upon arrival at the DCSO, Detective Joyner served warrants G-326978 (MURDER) and G-326979 (ARSON 3RD DEGREE) on Bowman. He was booked into the DCSO Jail to await a bond hearing.

02/22/01 R/O received notice from the DCSO Jail that Marion Bowman Jr. had requested to talk with R/O and Sgt. Van Doran. R/O contacted Van Doran and informed him of the request.

02/22/01 - 11:00 hrs. R/O and Sgt. Van Doran escorted Marion Bowman Jr. to R/O's office for his requested interview. R/O informed Marion Bowman Jr. of his Miranda Rights by using a Miranda Rights form. Bowman initialed the form and signed the waiver portion of it. He told officers that "GAP" (James Tawain Gadson) had shot Kandee. That they had purchased four pair of gloves from the EZ Shop and they (James Gadson, Hiram Johnson, Darian "POP" Williams, and himself) had driven Kandee's car to the nightclub. They had worn gloves to keep from leaving any fingerprints. That Darian Williams ("POP") and James Tawain Gadson ("GAP"), had gone to the store and got gas in a one gallon milk jug and a two liter Coke Bottle. They had told Travis Felder to meet them at the head of McAlhaney Road when they left the club. NO WRITTEN STATEMENT WAS DONE AT THIS INTERVIEW.

DEFENDANT'S
EXHIBIT

#3 ID
4-9-02

RULE 5
DISCOVERY

ARREST WARRANT

G-428029

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
ORANGEBURG COUNTYTHE STATE 2000021724
against

MARION JR. BOWMAN

Address: BRANCHVILLE SC 29432

Phone: SSN:

Sex: M Race: E Height: 6 2 Weight: 170

DL State: DL#

DOB: Agency ORI#

Prosecuting Agency: SHERIFF S. DEPARTMENT

Prosecuting Officer: DET. KENNY KINSEY

Offense: RECEIVING STOLEN GOODS

Offense Code: 0513

Code/Ordinance Sec: 16-13-0180

This warrant is CERTIFIED FOR SERVICE in the

☒ County/ ☐ Municipality of

The accused

is to be arrested and brought before me to be

held with according to law

(L.S.)

Signature of Judge

Date:

RETURN

copy of this arrest warrant was delivered to

defendant: MARION JR. BOWMAN

n

ATTEST: TRUE COPY

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

ORANGEBURG MAGISTRATES J. DAVIS

P.O. Box 9000, Orangeburg, South Carolina

ORANGEBURG MAGISTRATE 29116

Orangeburg County, South Carolina

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

ORANGEBURG COUNTY

AFFIDAVIT

Personally appeared before me the affiant DET. KENNY KINSEY who

being duly sworn, deposes and says that defendant MARION JR. BOWMAN

did within this county and state on 10/28/00 violate the criminal laws of the

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of

in the following particulars:

DESCRIPTION OF OFFENSE: RECEIVING STOLEN GOODS: \$1000 TO \$5000

I further state that there is probable cause to believe that the defendant named above did commit

the crime set forth and that probable cause is based on the following facts:

BASED ON AN INVESTIGATION BY DCSO THAT ON OR ABOUT OCTOBER 28

2000 THE DEFENDANT MARION BOWMAN JR. AND WITH TWO DEFENDANTS

DID VIOLATE SECTION 16-13-0180 OF THE SC CODE OF LAWS RECEIVING

STOLEN GOODS IN THAT HE DID SELL 4 GUNS THAT WERE STOLEN IN THE

BURGLARY OF JEWELL PROCTOR'S RESIDENCE 1822 BANNING ST. SCOR 15

THIS INCIDENT TOOK PLACE IN ORANGEBURG COUNTY STATE OF SOUTH

CAROLINA

Sworn to and subscribed before me

12/01/00

Signature of Affiant

Affiant's Address: P.O. BOX 9000

ORANGEBURG, SC 29116

Affiant's Telephone: 803-931-4647

Signature of Issuing Judge

Judge's Address: P.O. BOX 9000

ORANGEBURG, SC 29116

Judge's Telephone: 803-931-4647

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

JUDGE CODE: 721

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

ORANGEBURG COUNTY

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY

It is appearing to me from the above affidavit that there are reasonable grounds to believe that

on 10/28/00 the defendant MARION JR. BOWMAN

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of as set forth below:

DESCRIPTION OF OFFENSE: RECEIVING STOLEN GOODS: \$1000 TO \$5000

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before

me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the

defendant at the time of its execution, or as soon thereafter as is practicable.

Judge's Address: P.O. BOX 9000

ORANGEBURG, SC 29116

Signature of Issuing Judge

Judge's Telephone: 803-931-4647

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

JUDGE CODE: 721

AUDIT COPY

DEFENDANT'S EXHIBIT #8 TO 1612

ARREST WARRANT

G-428029

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
ORANGEBURG COUNTYTHE STATE 2000021724
against

MARION JR. BOWMAN

Address: BRANCHVILLE, SC 29432Phone: SSNSex: M Race: B Height: 6 2 Weight: 170DL State: DL#DOB: 1-1-1972 Agency ORI#:Prosecuting Agency: SHERIFF'S DEPARTMENTProsecuting Officer: DET. KENNY KINSEYOffense: RECEIVING STOLEN GOODS,\$1000 TO \$5000 Offense Code: 0513Code/Ordinance Sec. 16-13-0150 2This warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality ofThe accused
is to be arrested and brought before me to be
dealt with according to law.

Signature of Judge (LS.)

Date: _____

RETURN

A copy of this arrest warrant was delivered to
defendant MARION JR. BOWMAN
on _____

ATTEST: TRUE COPY

Signature of Constable/Law Enforcement Officer.

RETURN WARRANT TO:
ORANGEBURG DISTRICT CLERK: DAVIS
ORANGEBURG DISTRICT CLERK: DAVIS
ORANGEBURG DISTRICT CLERK: DAVIS
Orangenburg County, South CarolinaSTATE OF SOUTH CAROLINA)
☒ County/ ☐ Municipality of)
ORANGEBURG COUNTY)

AFFIDAVIT

Personally appeared before me the affiant DET. KENNY KINSEY who
being duly sworn deposes and says that defendant MARION JR BOWMAN
did within this county and state on 10/28/00 violate the criminal laws of the
State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of _____)
in the following particulars:DESCRIPTION OF OFFENSE: RECEIVING STOLEN GOODS, \$1000 TO \$5000I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:
BASED ON AN INVESTIGATION BY DCSO, THAT ON OR ABOUT OCTOBER 28,
2000, THE DEFENDANT MARION BOWMAN, JR., AND WITH A CO-DEFENDANT
DID VIOLATE SECTION 16-13-180 OF THE SC CODE OF LAWS, RECEIVING
STOLEN GOODS, IN THAT HE DID SELL 4 GLNS THAT WERE STOLEN IN THE
BURGLARY OF JEWELL PROCTOR'S RESIDENCE, 822 BANNING ST., COPE, SC.
THIS INCIDENT TOOK PLACE IN ORANGEBURG COUNTY, STATE OF SOUTH
CAROLINA.

Sworn to and subscribed before me)

on 12/01/00)

Signature of Affiant)

Signature of Issuing Judge (LS.))

Signature of Issuing Judge)

Signature of Affiant

Affiant's Address P.O. BOX 1346ORANGEBURG, SC 29116Affiant's Telephone 803-531-4647STATE OF SOUTH CAROLINA)
☒ County/ ☐ Municipality of)
ORANGEBURG COUNTY)

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe the
on 10/28/00 defendant MARION JR BOWMAN
did violate the criminal laws of the State of South Carolina (or ordinance of☐ County/ ☐ Municipality of _____) as set forth below:
DESCRIPTION OF OFFENSE: RECEIVING STOLEN GOODS, \$1000 TO \$5000Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before
me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the
defendant at the time of its execution, or as soon thereafter as is practicable.

Signature of Issuing Judge (LS.))

Signature of Issuing Judge)

Judge Code: 721Judge Code: 721Judge's Address P.O. BOX 9000ORANGEBURG, SC 29116

Judge's Telephone _____

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

AUDIT COPY

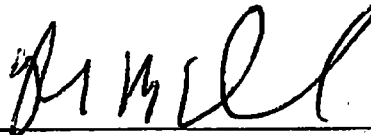


5423

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

June 17th, 2005

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

Robert M. Dudek
Assistant Appellate Defender

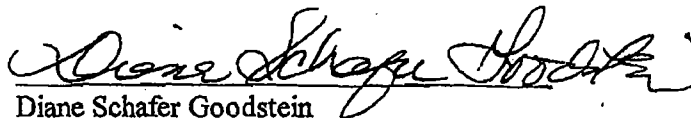
South Carolina Office of Appellate Defense
1205 Pendleton Street, Room 306
Columbia, S. C. 29201
(803) 734-1330

ATTORNEY FOR APPELLANT.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF DORCHESTER	)	
	)	Indictment # 01-GS-18-348
The State of South Carolina	)	
	)	
vs.	)	SENTENCE
	)	
Marion Bowman, Jr.	)	
Defendant.	)	

The Defendant, Marion Bowman, Jr., has been found by the jury to be guilty of the offense of murder. The jury has recommended that the Defendant should be sentenced to death.

It is, therefore, the judgment of the law and the Sentence of the Court that the Defendant, Marion Bowman, Jr., be taken to the Dorchester County Detention Center, and thence to the State Department of Corrections, henceforth to be kept in close and safe confinement until the 22nd day of July 2002, upon which day between the hours of six o'clock P.M. and six o'clock A.M., or upon an Order of Execution issued by the South Carolina Supreme Court, the Defendant, Marion Bowman, Jr., shall suffer death by electrocution or by lethal injection in the manner provided by law.


Diane Schafer Goodstein
Presiding Judge

St. George, South Carolina

Dated: May 23, 2002

STATE OF SOUTH CAROLINA)

COUNTY OF DORCHESTER)

The State of South Carolina)

vs.)

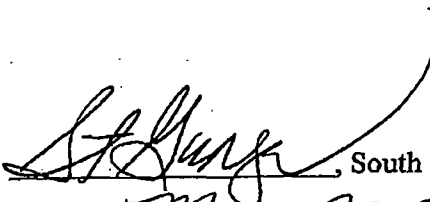
Marion Bowman, Jr.)
Defendant.)

IN THE COURT OF GENERAL SESSIONS

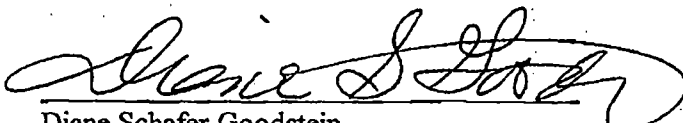
Indictment # 01-GS-18-348

AFFIRMATION OF DEATH SENTENCE

As the Trial Judge in the above entitled action, and prior to the imposition of the death sentence upon the Defendant, Marion Bowman, Jr., I find as an affirmative fact that the evidence of the case warrants the imposition of the death penalty and its imposition is not a result of prejudice, passion, or any other arbitrary factor.

 South Carolina

Dated: May 23, 2002


Diane Schafer Goodstein
Presiding Judge

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARION BOWMAN, JR.,

APPELLANT

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Assistant Appellate Defender

South Carolina Office
of Appellate Defense
1205 Pendleton Street, Room 306
Columbia, S. C. 29201
(803) 734-1330

ATTORNEY FOR APPELLANT.

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5.

The court erred by ruling appellant did not have an
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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by failing to instruct the jury on the statutory mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, since there was expert testimony of appellant's substance abuse, and lay testimony and circumstantial evidence that the parties were drinking alcohol throughout the day?

2.

Whether the court abused its discretion by allowing the solicitor on re-cross examination of James Aiken to examine him about conditions in general population, such as recreational facilities, watching movies, watching television and reading books, since this was not proper testimony?

3.

Whether the court erred by refusing to grant a mistrial where the solicitor cross-examined James Aiken about the possibility of escape, since the jury's attention is properly focused on the penalties of death and life without parole, and the judge's curative instruction was not sufficient to remove the taint of this extraneous improper consideration?

4.

Whether the court was without jurisdiction to try appellant for capital murder where his indictment did not allege an aggravating circumstance necessary for capital murder as required by Jones v. United States and Ring v. Arizona, and since aggravating circumstances must now be considered elements of the crime of capital murder?

5.

Whether the court erred by ruling appellant did not have an expectation of privacy in the pants he wore to his wife's house, and by refusing to suppress the watch and liquid material found in and on those pants since the pants were seized during an illegal warrantless arrest and the court erred by ruling the arrest was pursuant to a valid Orangeburg warrant for another minor offense?

STATEMENT OF THE CASE

Appellant was indicted at the August 6, 2001, of the Dorchester County grand jury for the offenses of murder and arson in the third degree. ROA pp. 5254 - 5257. 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 appellant. The solicitors were Walter M. Bailey, Jr. and Benjamin Lafond. ROA p. 1.

The jury found appellant guilty on both counts. ROA p. 4564.

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. ROA p. 5051, ll. 12-25. Judge Goodstein then sentenced appellant to death for murder and ten years imprisonment for arson in the third degree. ROA p. 5056, l. 4 – p. 5057, l. 4.

This appeal follows.

STATEMENT OF FACTS

Keith Rivers remembered that on February 16, 2001, the men were in Hank Koger's yard "drinking beer, drinking liquor and talking." Appellant was known as "Black" or "J. R." in the community, and he was there, as was James Gadson. ROA p. 3689, ll. 21-25.

"We was just all talking, having a good time, that's all." ROA p. 3690, ll. 4-22.

All of this began about eleven o'clock that morning, according to Koger. ROA p. 3780, ll. 5-8. Koger had a fifty-five gallon drum in his yard that the men lit a fire in when it got cold. Koger explained, "We have [sic] sit there and drink beer, hang out." That's what the men were doing the morning of February 16, 2001, in Koger's yard, which was right next to the Branchville Villa Apartments. ROA p. 3674, l. 11 – p. 3675, l. 5. Koger remembered that Hiram Johnson was also there that morning. ROA p. 3675, l. 6 – p. 3676, l. 10.

Koger specifically recalled that appellant became angry because someone had removed his gun from the fifty-five gallon drum. ROA p. 3676, l. 4 – p. 3680, l. 8. Koger also remembered the men were planning for a party later that day. ROA p. 3680, ll. 15-25.

Carolyn Brown was living in apartment ☐ of the Branchville Villa Apartments on February 16, 2001. ROA p. 3698, l. 8 – p. 3700, l. 4. Brown went next door to Hank Koger's house. She remembered, "We was getting together a party for Joe Fogle, was cleaning some chicken and stuff at a neighbor's house and we walked back and forth across the street to see what was going on." Brown remembered that appellant and about fifteen to twenty other people were out in the yard that day. ROA p. 3700, ll. 18-23; ROA p. 3707, ll. 12-17. Brown also recalled the argument about someone having moved a gun out of the barrel. ROA p. 3700, l. 18 – p. 3701, l. 3.

Brown testified that later that night, she went to Allen Murray's nightclub in Bowman, South Carolina. ROA p. 3708, ll. 1-9. She got there after midnight.

Keith Rivers also went to the Allen Murray club that night "to get another beer and whatnot." ROA p. 3691, ll. 13-25. Rivers recalled seeing appellant outside the club in an automobile with Hiram Johnson. ROA p. 3692, ll. 1-9.

Brown testified they left the Allen Murray club about 2:45 a.m. that morning. ROA p. 3709, ll. 18-24. They returned to the Villa apartments. ROA p. 3710, l. 7 – p. 3711, l. 10.

Brown remembered that sometime after they returned from the club appellant knocked on the door and said, "Man, Trav [Travis Felder], could you run me home?" ROA p. 3711, ll. 11-18. Brown said, "they got in the car and left out the projects." ROA p. 3711, l. 19 – p. 3712, l. 3.

Brown testified when Travis Felder returned fifteen to twenty minutes later, he appeared "fine, they went upstairs, him and Valorna went upstairs, and me and my baby [sic] father was downstairs and we called it a night after that." ROA p. 3712, ll. 20-24.

There was evidence appellant and the decedent, Candee Martin, were friends. The state's two key witnesses against appellant were James Gadson and Travis Felder. Gadson was charged with murder and reached a plea agreement with the state where he would plead guilty to accessory after the fact and misprision of a felony. Gadson would receive a twenty-year sentence in return for his plea. ROA p. 3981, ll. 7-25.

Gadson testified appellant was his first cousin. ROA p. 3982, ll. 15-20. Gadson said he first saw appellant "early in the morning" on February 16, 2001. Appellant was in the vehicle with his sister, Yolanda Bowman, and Gadson said they were on their way to St.

George "to the meat market." ROA p. 3983, ll. 4-23. Gadson rode along with them that day. Gadson recalled appellant had a gun in his pants. ROA p. 3984, l. 2 – p. 3985, l. 9.

Gadson testified while in the car, appellant "put his beer out of the bag and he put it [the gun] in the bag." ¹ ROA p. 3985, l. 10 – p. 3986, l. 25. Gadson recalled that Yolanda Bowman then took them back to the "Villa projects." ROA p. 3987, ll. 11-15. Then they went next door to Hank Koger's house where there were "a lot of people." Gadson said when he arrived, he "went up under the tree, sit down drinking." ROA p. 3988, ll. 1-13. Gadson said appellant put his gun in the trash barrel and "left and went to the store." ROA p. 3988, ll. 18-23.

Gadson testified when appellant returned, they began arguing because his gun was no longer in the large barrel. However, Hiram Johnson had apparently moved the gun out of fear someone would start a fire with the gun in the barrel. Johnson went into the woods and retrieved the gun for appellant. Once appellant had his gun, "he pull it out the bag to make sure everything was right and he left." ROA p. 3989, ll. 4-24.

Gadson, appellant and the decedent

Gadson testified that he was still at Hank Koger's house under the tree at about 7:00 or 7:30 p.m. That was when he saw appellant and the decedent in an automobile. The decedent was driving. ROA p. 3991, l. 4 – p. 3992, l. 3.

Gadson said appellant called out for him. Gadson responded, and he got into the vehicle with appellant and the decedent. Gadson admitted he had been drinking that day, but he claimed he did not start until about 1:00 p.m. ROA p. 3992, ll. 4-22.

When Gadson was asked how much gin he had had between 1:00 and 7:30 p.m., he answered "it was a good little bit." He was "feeling in good shape." ROA p. 3992, l. 11 – p. 3993, l. 25.

Gadson said the decedent drove to the Horizon E-Z Shop, where they got gas, and drove away without paying. ROA p. 3994, l. 3 – p. 3995, l. 2. Gadson testified appellant 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." ROA p. 3995, ll. 3-21.

Gadson claimed appellant walked away from the car and said "he was going to kill her [the decedent] because she was wearing a wire." "We was walking down the road, she came down the road then, [she] grabbed him [appellant] by the right arm, said she was scared." ROA p. 3998, l. 4 – p. 3999, l. 3.

Gadson maintained that a car drove by and they "jumped in the woods." ROA p. 3999, ll. 16-21. Gadson said the decedent starting walking back to the car and appellant followed her. ROA p. 3999, l. 23 – p. 4000, l. 7.

Gadson testified that he heard a gunshot and he saw the decedent come running back towards him. ROA p. 4001, l. 5 – p. 4003, l. 17. Gadson claimed appellant shot at the decedent two times and "she fell to the ground." Gadson said appellant then dragged her body into the woods. ROA p. 4012, ll. 1-24.

Gadson claimed that he jumped back into the car. ROA p. 4013, ll. 2-5. Gadson said that after the shooting they drove back to the Villa projects. Then Gadson testified that

¹ Defense counsel wanted to know on voir dire if juror biases about consuming alcohol would prevent them from being impartial. ROA pp. 1821-1821; ROA p. 1853; ROA p. 1854; ROA p. 3020.

he then went back over to Hank Koger's house. Gadson recalled, "Marion [appellant] said he was going to the store and get some beer." ROA p. 4015, l. 16 – p. 4016, l. 11.

Gadson testified later that night he went to the Allen Murray club with appellant and Hiram Johnson. They got to the club at about midnight. ROA p. 4017, l. 4 – p. 4018, l. 17.

Gadson said they rode to the club in the decedent's car. Gadson stated that appellant instructed the men to put on the "four pair of burnt brown gloves." ROA p. 4018, l. 15 – p. 4019, l. 17.

Gadson acknowledged he had been drinking all day and that he laid down in the back seat of the automobile. ROA p. 4019, l. 6 – p. 4021, l. 9. Hiram Johnson would later testify that appellant was trying to sell the decedent's car at the Allen Murray club late that evening. ROA p. 4067, ll. 3-20.

Travis Felder

The state's theory of the case was that after the decedent was killed, appellant enlisted the help of Travis Felder to destroy the car. Felder was charged as an accessory after the fact of arson for the events that occurred after leaving the Allen Murray Club, and before the decedent's car was burned. ROA p. 4087, ll. 7-16. Felder testified appellant came to his door in the projects and told him "I need to park this car." Felder claimed he only followed appellant while appellant drove the decedent's automobile to Nursery Road. ROA p. 4092, l. 6 – p. 4096, l. 19.

Felder maintained that when they arrived at Nursery Road, appellant pulled the decedent's body out of the woods put it in the trunk and set the car on fire. ROA p. 4096, l. 13 – p. 4100, l. 14. It was undisputed that the decedent was dead at the time.

During the penalty phase of the trial, the defense played a videotape of Felder alone at the E-Z Shop gas station at 3:14 a.m. purchasing gasoline. Appellant was not with him. ROA p. 4914, l. 2 – p. 4916, l. 16. Travis Felder admitted he did not tell the jury he purchased the gasoline alone during the guilt phase of the trial. ROA p. 4915, ll. 2-21.

During the penalty stage, Felder claimed appellant got the gasoline from him on Nursery Road and that appellant set the car on fire. ROA p. 4917, ll. 8-17. On cross-examination, Felder maintained that appellant also supplied him the red plastic gasoline jug and told him to get two to three dollars worth of gasoline. ROA p. 4923, l. 17 – p. 4925, l. 16. Felder said he did not earlier tell the jury that he was the one who actually purchased the gasoline because “you [defense counsel] didn’t ask.” ROA p. 4925, ll. 17-25.

Appellant’s substance abuse

During the penalty stage, the defense presented the expert testimony of Jeffrey Youngman. Youngman was qualified as an expert in forensic social work and psychosocial assessments. ROA p. 4777, ll. 10-14; ROA p. 4786, ll. 11-25.

Among the records Youngman relied upon were appellant’s from the “Dawn Center, which is a program sponsored by the tri-county commission of alcohol and drug abuse.” ROA p. 4789, ll. 7-21. Youngman said he did his background check to see if appellant had a significant history of mental illness or substance abuse. ROA p. 4790, l. 5 – p. 4791, l. 1:

Youngman said appellant’s mother “was known to drink, also suspected of using drugs and she testified she was arrested once for possession of drugs.” ROA p. 4794, ll. 2-9. Youngman said that at age fourteen, appellant was drinking and selling drugs, mostly marijuana. ROA p. 4800, ll. 14-20.

On cross-examination, Youngman testified appellant had a history of substance abuse. ROA p. 4824, ll. 18-25. Youngman admitted to the solicitor that no one forced appellant to drink or use drugs, and that he did so "of his own free will." ROA p. 4825, ll. 1-6.

Mitigating circumstances

Defense counsel Cummings told the judge before closing arguments that the defense requested that the judge charge the statutory mitigating circumstance regarding "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired."² ROA p. 4937, ll. 4-14. Cummings told the judge, "Mr. Bowman has asked that we submit that to you for consideration in mitigation." ROA p. 4937, l. 17 – p. 4938, l. 16.

The solicitor responded that the defense had decided not to "get into any potential diagnosis of any mental health conditions that could create some impairment in his ability to conform his conduct." The solicitor therefore reasoned there was no evidentiary basis to submit this mitigating circumstance. ROA p. 4938, l. 22 – p. 4939, l. 6.

The judge then ruled that the record was void of any evidence of that statutory mitigating circumstance, and ruled that she would not charge it. ROA p. 4939, l. 7 – p. 4940, l. 7.

Testimony of James E. Aiken

Correctional Consultant James E. Aiken testified about his long career in the field of corrections. Aiken had supervised approximately sixteen wardens, and also had experience as the Commissioner of Corrections for the State of Indiana. ROA p. 4832, l. 22 – p. 4836,

l. 15. Aiken was qualified as an expert without objection. ROA p. 4838, ll. 2-9. Aiken testified appellant could adapt to serving the rest of his life in prison. ROA p. 4844, ll. 7-24.

On cross-examination, the solicitor questioned Aiken about appellant having received a youthful offender sentence in the past. Aiken acknowledged that the purpose of a youthful offender sentence was to rehabilitate the youthful offender, and that appellant “flunked out” on that score. ROA p. 4847, l. 20 – p. 4848, l. 3. Aiken also acknowledged there was a “use of force” report regarding a fight appellant had while serving his YOA sentence at Stevenson Correctional Institution. ROA p. 4848, l. 22 – p. 4849, l. 2.

Aiken then acknowledged that inmates were placed into three different classifications. Aiken testified “you put more aggressive population with more aggressive population with adequate management, the incidents of violence decreases.” ROA p. 4850, l. 13 – p. 4855, l. 17.

The solicitor then asked Aiken about “super-max.” Aiken explained that super-max was an extremely controlled environment for problem inmates. ROA p. 4855, l. 2 – p. 4856, l. 3.

The solicitor also had Aiken acknowledge that inmate behavior controls the restrictiveness of their environment. ROA p. 4856, l. 11 – p. 4857, l. 21. The solicitor also had Aiken admit that inmates can work while inside the facility. ROA p. 4857, ll. 22-25. However, when the solicitor asked Aiken to acknowledge that inmates were allowed to leave the facility and pick up trash on the side of the road, defense counsel objected on the ground “that’s clearly not available here and it’s not proper.” ROA p. 4858, ll. 1-6.

² See S.C. Code §16-3-20(C) (b)(6)

After a bench conference, the solicitor asked Aiken to admit that no matter how "bad a person thinks he is or how serious the crime is, there is a mechanism in place within the Department of Corrections to deal with that inmate." Aiken admitted that was true. ROA p. 4858, l. 12 – p. 4862, l. 10.

The solicitor then asked Aiken to admit that a person serving a life without parole sentence could still work. Aiken answered, "If you're going to be in prison, you're going to work." ROA p. 4862, l. 2 – p. 4864, l. 11.

On re-direct examination, Aiken said there was not any way a person serving life without parole would be allowed outside the prison to pick up trash. ROA p. 4864, l. 16 – p. 4869, l. 3.

Escape and prison conditions

Immediately on re-cross examination, the solicitor noted Aiken had testified appellant would never get out of prison and then asked him how many inmates had escaped during the time he was affiliated with the Department of Corrections. Defense counsel objected on the basis that the sentence would be life without the possibility of parole "and we have told this jury that is all he will ever get and that is the law." ROA p. 4869, l. 13 – p. 4970, l. 11.

The solicitor then argued that under State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981) that he was allowed to ask this question. The trial judge stated that Plath was distinguishable. ROA p. 4870, l. 14 – p. 4872, l. 4.

Defense counsel Cummings then noted that a curative instruction would only "re-emphasize the issue on escape or the possibility of escape to these jurors." Defense counsel argued that the jury considering the possibility of escape would preclude them from

understanding or treating life without the possibility of parole as being just that sentence – life without parole. ROA p. 4872, ll. 5-23.

The solicitor responded that the jury was being left with the impression that nobody gets out, and he argued that inmates do escape. ROA p. 4873, ll. 2-17. The judge ruled she was not going to allow the jury to consider escape. ROA p. 4873, ll. 18-20.

The solicitor then requested permission to question Aiken about “conditions of the general population, the work conditions he’s already gotten into.” The judge told the solicitor she would allow him to ask those questions. Defense counsel objected, noting “we’re on re-cross, Judge.” ROA p. 4873, l. 21 – p. 4874, l. 7. The judge responded that she understood the solicitor was on re-cross, but ruled “I will let him go into those areas.” ROA p. 4873, l. 21 – p. 4874, l. 19.

Defense counsel then noted that a curative instruction on escape would only re-emphasize the damage. Counsel argued it was like a policeman testifying he saw somebody running a red light “and the defense attorney says, ‘Are you sure you saw my client run a red light?’ They’ve heard it twice now.” Defense counsel then moved for a mistrial based on the fact that the prejudice could not be cured. ROA p. 4874, l. 22 – p. 4875, l. 17.

The judge denied the mistrial motion and stated that she would give a curative instruction that the statute on life imprisonment without parole meant “until the death of the defendant.” ROA p. 4875, l. 22 – p. 4876, l. 8.

The judge then instructed the jury that life without parole meant “until the death of the offender” and told the jurors the last question they heard was not proper, and to disregard it. ROA p. 4876, l. 4 – p. 4877, l. 23.

Armed with the judge's ruling on prison conditions, the solicitor then asked Aiken about appellant's opportunity to work and the compensation he would receive for that work. Aiken responded appellant would be minimally compensated for his work at a rate of about three, four or five dollars. ROA p. 4878, l. 1 – p. 4879, l. 24.

The solicitor then asked Aiken in addition to work "what is going on there [in the prison]?" ROA p. 4878, l. 25 – p. 4879, l. 3. Aiken responded and explained the daily routine of a prisoner. He said the inmates get up in the morning, eat, go to work and take a recess and lunch break in the middle of the day. Aiken said an inmate could involve himself in Bible study, education, and anger management classes. ROA p. 4879, l. 8 – p. 4880, l. 7.

When Aiken noted that the prisoners were still watched twenty-four hours a day, the solicitor objected on the basis that Aiken was "going off into a speech." The judge stated Aiken was trying to answer the questions, but she asked Aiken to be as responsive as possible to the solicitor's questions, rather than giving narrative answers ROA p. 4880, ll. 5-23. The following then occurred on re-cross examination of Aiken:

THE COURT: Thank you. You may proceed.

A. 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.

Q. All right, sir. And are there recreational facilities available?

A. Yes, sir.

Q. What type of recreational facilities?

A. 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.

Q. My question is related to the recreational facilities and we understand prison [has] dangerous people. In addition to that are there libraries they go to, to read books?

A. Yes, sir. As guaranteed by the constitution.

Q. Are there movies they can watch?

A. Yes, sir.

Q. Television?

A. In some instances, yes, sir.

Q. Softball, do they play softball?

A. I don't know. It's some type of recreation such as that.

Q. Thank you. That's all I have.

ROA p. 4881, l. 1 – p. 4882, l. 3.

ARGUMENT

1.

The court erred by refusing to instruct the jury on the statutory mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, since there was expert testimony of appellant's substance abuse problem, and evidence the parties were drinking alcohol throughout the day.

As seen, hard drinking that started in the morning and went late into the night was involved in this case. As seen, defense counsel wanted to know on voir dire if juror biases about consuming alcohol would prevent them from being impartial. ROA p. 1821-1821; ROA p. 1853; ROA p. 1854; ROA p. 3020.

Jeffrey Youngman examined letters from the Dawn Center, an alcohol and drug abuse program. ROA p. 4789, ll. 7-21. Youngman testified appellant had a history of substance abuse. Further, appellant's mother also drank, was arrested for possession of drugs, and was suspected of using drugs. ROA p. 4794, l. 2 – p. 4800, l. 20; ROA p. 4824, ll. 18-25.

As seen, there was evidence the drinking began at William Koger's on the morning of February 16, 2001. The men were planning a party for Joe Fogle.

James Gadson testified he first saw appellant "early in the morning" on February 16, 2001. The men drove with Yolanda Bowman and Gadson recalled while in the car, appellant "put his beer out of the bag and put it [the gun] in the bag." ROA p. 3985, l. 10 – p. 3986, l. 25. Gadson acknowledged he had been drinking gin for hours that day and drank

“a good little bit.” Gadson was feeling “in good shape.” ROA p. 3992, l. 11 – p. 3993, l. 25.

Moreover, the drinking continued throughout the day and Gadson said appellant went to get more beer after he claimed appellant shot the decedent and they returned to the Villa Projects. ROA p. 4015, l. 16 – p. 4016, l. 11.

The judge refused to charge the statutory mitigating circumstance at issue here. See, S.C. Code §16-3-20(C)(b)(6). That statutory mitigating circumstance is that “the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.”

This statutory mitigating circumstance has widely been accepted to include evidence of intoxication. See State v. Stone, 350 S.C. 442, 567 S.E.2d 244, 248 (2002). Where there is evidence of intoxication or drug use, this Court has required the trial judge to instruct the jury on statutory mitigating circumstances 2, 6 and 7. See State v. Pierce, 289 S.C. 430, 435, 346 S.E.2d 707, 711 (1986); State v. Young, 305 S.C. 380, 409 S.E.2d 352, 356 (1991); State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990).

In deciding whether a statutory mitigating circumstance should be submitted, the trial judge is concerned only with the existence of the evidence, not its weight. Further, the trial judge has a duty to review all statutory mitigating circumstances and instruct the jury as to any circumstances which may be supported by the evidence, and not merely those requested by the defendant. State v. Hughey, 339 S.C. 439, 529 S.E.2d 721, 730 (2000), citing State v. Bellamy, 293 S.C. 103, 359 S.E.2d 63 (1987); State v. Caldwell, supra.

Under this Court’s precedents, appellant was at least entitled to the mitigating circumstance of S. C. Code §16-3-20(C)(b)(6) being submitted to the jury. Appellant had a

history of substance abuse, he was drinking the day of this incident, and there was evidence of a "party atmosphere" throughout the day. Appellant is entitled to a new sentencing trial.

2.

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 whether appellant should be sentenced to death or life imprisonment without parole.

As seen, when the solicitor argued that escape from prison was a fair line of testimony, defense counsel objected on the basis that the sentence would be life without the possibility of parole "and we have told this jury that is all he will ever get and that is the law." ROA p. 4869, l.1 3 – p. 4970, l. 11. Defense counsel argued the escape issue had now been put before the jury and that a curative instruction would only exacerbate the damage. Defense counsel then moved for a mistrial. ROA p. 4874, l. 22 – p. 4875, l. 17.

When the judge ruled she was not going to allow escape as a jury issue, the solicitor successfully requested permission to question Aiken about the conditions in the general population. Defense counsel objected, noting "we're on re-cross, Judge." The judge responded that "I will let him go into those areas." ROA p. 4873, l. 21 – p. 4874, l. 19.

The solicitor then had Aiken explain the daily routine of a prisoner. Aiken confirmed that inmates could become immersed in education, Bible study and anger management classes. ROA p. 4879, l. 8 – p. 4880, l. 7. The solicitor also questioned Aiken about recreational facilities and Aiken acknowledged that inmates could play basketball and had access to libraries, movies and television sets. ROA p. 4881, l. 1 – p. 4882, l. 3.

Discussion

Defense counsel correctly argued that the jury's province was to decide whether appellant should be sentenced to death or life imprisonment without parole. Issues such as escape and conditions in the general population should not be placed before the jury. When evidence is allowed, it is obviously allowed as being relevant.

As this Court noted in State v. Plath, 281 S.C. 1, 313 S.E.2d 619, 627 (1984), the Department of Corrections controls the conditions of imprisonment and not the defendant. "Such 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 upon the circumstances of the crime and the characteristics of the individual defendant."

In State v. Plath, this Court noted that it was highly improper for the defense to paint a picture of life imprisonment as slavery and capital punishment as "an ineffective instrument of deterrence, a crude device for expressing social approval, and even a counter-productive approach to control of crime." State v. Plath, 313 S.E.2d at 626.

"A jury does not need to know how often [the capital defendant] will take a shower or whether or not he will be lonely and withdrawn during his tenure [in prison]." 313 S.E.2d at 627.

The present case deals with prejudicial prison conditions evidence put before the jury by the solicitor, and not a prejudicial closing argument. However, this Court has repeatedly emphasized that solicitors must carefully tailor their arguments in a capital case so that they do not appeal to a personal bias of a juror, or arouse his passion or prejudice

See State v. Reed, 293 S.C. 515, 362 S.E.2d 13, 15 (1987). There is not any reason to treat evidence designed to appeal to juror bias or prejudices any differently.

In State v. Atkinson, 253 S.C. 531, 172 S.E.2d 111, 112 (1970), this Court noted:

The Legislature committed to the jury the responsibility to decide in the first instance whether punishment should be life or death. It charged another agency with the responsibility of how a life sentence shall 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 no concern of theirs.*

(emphasis added).

The solicitor's obvious theme with James Aiken was that life imprisonment was not at all a harsh punishment when jurors consider that inmates can play basketball, watch television and movies, exercise, and go the library. What the solicitor did here was no less improper than what this Court condemned the defense for attempting to do in State v. Plath. The solicitor was painting a picture of life in prison as being a relaxing experience.

That was painting a picture designed to influence juror biases. Complaints are common in our society about prisoners watching television, and being able to work out, exercise and lift weights. Indeed, the cornerstone of former Commissioner Michael Moore's highly publicized "get tough" policy was the removal of television sets from the prisons.

What is perhaps most unfair about this irrelevant side issue play to juror biases is that the day to day conditions of life imprisonment are entirely beyond appellant's -- or any inmates -- control. See State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105, 111 (2000). Appellant could not deny or explain the conditions of life imprisonment.

In Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 1207 (1977), the Supreme Court held that a defendant is denied due process "when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain."

Here, the solicitor's re-cross examination of James Aiken about the "lenient" conditions of life imprisonment implied appellant would escape real punishment if he was not sentenced to death. That was improper. See Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382 (1980).

Just as capital punishment as public policy is a matter established by the Legislature and not a concern of the jury, so the conditions of imprisonment controlled by the South Carolina Department of Corrections should not be placed before the jury. Cf. State v. Woomer, 278 S.C. 468, 299 S.E.2d 317, 320 (1982). The solicitor's "country club prison" cross-examination of James Aiken was totally improper, given a principled reading of this Court's precedents.

The only relevant issue regarding prison is whether the defendant can adapt to prison, or whether he is a future danger. See, Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669 (1986). This evidence is either mitigating or aggravating.

However, evidence that prison conditions are allegedly not particularly harsh or that conditions are "lenient," and that life in the general population is like being at a "country club prison," is improper. Evidence about prison conditions should not be used by either the defense or the solicitor as "aggravating" or "mitigating" when jurors consider the proper punishment – death or life without parole.

The solicitor here was making a "those bad life sentences" argument to the jury by way of his re-examination of James Aiken. See State v. Reed, 293 S.C. 515, 362 S.E.2d 13,

15 (1987). Appellant respectfully submits it is time for this Court again to speak on what is relevant for a jury to consider during the penalty stage of a capital trial, and prison conditions – good or bad – are not relevant to the consideration of a proper penalty.

The judge correctly ruled that escape was not a proper consideration for the jury. However, the judge erred by allowing the jury to consider evidence of prison conditions in the general population. Appellant should be granted a new sentencing trial.

3.

The court erred by refusing to grant a mistrial where the solicitor attempted to question James Aiken about the possibility of escape, since the solicitor injected an improper consideration and an arbitrary factor into the sentencing phase. The jury's attention is properly focused on the penalties of death and life without parole, and not speculative matters beyond appellant's control. Defense counsel correctly argued that the judge could not remove the taint through a curative instruction once escape was raised by the state as an issue.

As seen, the solicitor asked James Aiken how many times inmates had escaped during the time he was affiliated with the Department of Corrections. Defense counsel immediately objected, noting the jury was instructed that life meant life without parole and that appellant would never be released. The judge correctly sustained the objection, and disagreed with the solicitor's assertion that he was allowed to cross-examine on the possibility of escape under the precedent of State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984). ROA p. 4869 l.1 – p. 4970, l. 11.

Defense counsel then told the judge that a curative instruction would not remove the taint. It would only “re-emphasize the issues of escape or the possibility of escape to these jurors.” ROA p. 4872, ll. 5-23. Defense counsel urged that the bell could not be unrung. He moved for a mistrial on the basis that the prejudice caused by the state raising the possibility of escape could not be cured. ROA p. 4874, l. 22 – p. 4875, l. 17.

The judge refused to grant a mistrial. Instead, the judge gave a truncated instruction that told the jurors again that life without parole meant “until the death of the defendant” and that the last question was not proper and to disregard it. ROA p. 4875, l. 22 – p. 4877, l. 23.

Discussion

In State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984), this Court held that raising the possibility of escape was not reversible error because it was in fair response to the defense strategy to paint life imprisonment as a form of slavery. This Court found since the witness presented himself as an expert on the horrors of prison life as a form of permanent slavery, raising the issue of escape was therefore a fair test of the witness' credibility about what occurred in prison. That was especially true since three years had passed from the earlier State v. Plath, 277 S.C. 126, 140-141, 284 S.E.2d 221, 229 (1981).

As stated, the essence of State v. Plath was that focusing the jury's attention upon conditions in prison is improper. The jury's attention was properly focused only on death or life imprisonment as a proper punishment for the particular defendant. A death penalty trial is not a forum for the prosecution and the defense to wage a political war about the death penalty or how harsh life imprisonment is in reality.

Further, in this case, there was not any evidence appellant ever escaped from prison or ever attempted to escape while awaiting trial on these charges. In State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105, 111 (2000), this Court held it was improper for the state to introduce several pieces of mail that were sent to the defendant at the Lexington County Detention Center. These pieces of mail contained illegal drugs. This Court noted that since the state could not produce any evidence the defendant conspired or asked for the drugs to be mailed to him, there was not any nexus between drugs being sent to him and his ability to adapt to prison life. See, also, State v. Bailey, 279 S.C. 437, 308 S.E.2d 795 (1983).

Here, similarly, there was not any evidence linking appellant to any escape attempt. As the solicitor did in Quattlebaum, the solicitor here wanted the jury to hold against

appellant something that was out of his control – the fact some prisoner some day may escape. Cf. State v. Kelley, 343 S.C. 350, 540 S.E.2d 851, 855-857 (2001).

Further, this Court's opinion in State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982), also states that the possibility of escape is only admissible where it has a direct nexus to the defendant's conduct. In State v. Woomer, this Court held that evidence of the defendant's prior escape while in prison in West Virginia was a proper reply to his evidence of his good conduct while in prison in South Carolina. State v. Woomer, 299 S.E.2d at 319.

Evidence of a defendant's misconduct in jail, including any prior plan to escape or an escape attempt, is clearly relevant to his character and his ability to adapt to prison. Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991 (1976); State v. Woomer, 278 S.C. 468, 299 S.E.2d 317, 319 (1982). A defendant is also entitled to introduce evidence that he can adapt to prison. See Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669 (1982).

However, in the final analysis, factors behind the prison walls that an individual defendant cannot control are unfair to hold against him. Where there is not any nexus between the speculative evidence and the defendant, as here, the speculative evidence should not be allowed before the jury because it constitutes an arbitrary factor.

The judge correctly ruled that it was error for the solicitor to inject the broad issue of the possibility of escape into this case. Defense counsel correctly argued prejudice from that error could not be cured, and he moved for a mistrial.

There was not any ambiguity in the solicitor's question about escape, and it was etched in the minds of the jurors. It was a vivid way of reminding jurors that an escape could happen, and some inmate could harm or kill an innocent member of the public. The

judge should have declared a mistrial because it was necessary to a fair sentencing procedure untainted by the arbitrary factor of escape. Cf. State v. Council, 335 S.C. 1, 515 S.E.2d 508, 513-514 (1999)... Appellant should be granted a new sentencing trial.

4.

The trial court lacked subject matter jurisdiction to sentence appellant to death since the murder indictment did not allege any aggravating circumstances. Aggravating circumstances are now elements of the offense of capital murder that must be contained in the indictment.

The murder indictment against appellant does not list any of the aggravating circumstances. See R. p 5254-5257. Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002) holds that aggravating factors are elements of the offense of capital murder, and as such, when read together with Apprendi and Jones, those aggravating factors must be charged in an indictment, and found by a jury beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476, 120 S.Ct. 2348, 2355 (2000); Jones v. United States, 526 U.S. 227, 243 n. 6, 119 S.Ct. 1215, 1223 (1999).

South Carolina law, like the Fifth Amendment Indictment Clause of the United States Constitution, requires that all elements of a crime be alleged in an indictment. Hooks v. State, 353 S.C. 48, 577 S.E.2d 211 (2003) (Indictment defective for failing to state all the necessary elements for accessory plea); Padgett v. State, 324 S.C. 22, 484 S.E.2d 101 (1997) (First-degree burglary indictment defective because it alleged burglary of dwelling, but the evidence revealed the building was a barn); Hopkins v. State, 317 S.C. 7, 451 S.E.2d 389 (1994) (Indictment defective because at plea the state changed offense from DUI causing great bodily injury to DUI causing death, thereby raising the maximum punishment from 10 to 25 years, and the amendment deprived the court of jurisdiction to accept the guilty plea); See S.C. Const. Art. I, §11; S.C. Code §17-23-10 et seq.

The New Jersey Supreme Court has held that “the State is required to submit the aggravating factors to the grand jury and specify in the indictment those factors it intends to prove at a penalty hearing.” State v. Fortin, 178 N.J. 540, 843, A.2d 974, 1037 (2004). The Court in State v. Fortin, 178 N.J. 540, 843, A.2d 974, 1030 (2004), also ruled that assurances of adequate actual notice of the aggravating circumstances is not any substitute for the historic role of the grand jury now that aggravating circumstances are elements of the crime of capital murder.

That court held as follows:

If aggravating factors and capital triggers are the functional equivalent of elements of capital murder pursuant to the Sixth Amendment’s right to trial by jury, we see no reason to define them as something other than elements for purposes of the state constitutional right to a grand jury presentation. We, therefore, hold that our State Constitution requires that aggravating factors be submitted to the grand jury and returned in an indictment. In a criminal justice system in which all of the elements of a crime must be submitted to the grand jury it would be odd to make capital murder the one exception. Our analysis of the development of federal law does not compel this result; logic and fairness and the historical importance we attach to our grand jury system do. ¶ In light of Apprendi and Ring and our recognition that “functionally, the aggravating factors in [N.J.S.A. 2C:11-3c] are indistinguishable ... from the elements of a crime,” we conclude that Article I, Paragraph 8 [of the New Jersey Constitution] requires the submission of the aggravating factors and capital “triggers” to the grand jury.

State v. Fortin, 178 N.J. 540, 843 A.2d 974 (2004) at 1035 (internal citation omitted).

This Court, like New Jersey, should now require and hold that the aggravating circumstances must be charged in an indictment that is true-billed by the grand jury of the county in which the capital murder was committed before the state can seek the death

penalty. See S.C. Const. Art. I §11; See, also S.C. Code §17-19-10. When an indictment fails to allege the essential elements of an offense, the bill of indictment is insufficient to vest the court with jurisdiction to try the defendant. State v. Beachum, 288 S.C. 325, 342 S.E.2d 597 (1986). This issue is presently pending in State v. William Ernest Downs at the time this brief was written. Nonetheless, a brief history of this issue follows, and how this Court's precedents can easily be adapted to it.

Ring v. Arizona, indictments, and defining elements

As seen, Ring now defines capital murder as that which includes murder and aggravating circumstances. The aggravating circumstances proven in the penalty phase are, in fact, elements of the aggravated crime of capital murder. Ring, supra.

The protections of Ring turn on the designation of certain facts as the essential elements of a crime. In Apprendi, the Supreme Court established a test for classifying a fact as an element of an offense or as a sentencing factor: "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime *must be charged in an indictment*, submitted to a jury, and proven beyond a reasonable doubt." Apprendi, 530 U.S. at 476, 120 S.Ct at 2355 quoting Jones v. United States, 526 U.S. at 243, n.6, 119 S.Ct. 1215." (emphasis supplied).

The Fourteenth Amendment commands the same answer in a case involving a state statute. Here, S.C. Code §16-3-20(C)(a)(1) – (11), is the aggravating circumstances provision of our murder statute. The key inquiry thus is whether the required finding exposes the defendant to a greater punishment than that authorized by the jury's guilty

verdict. Apprendi, 530 at 494, 120 S.Ct. at 2365. If it does, then that finding is a distinct element of a criminal offense and must be charged in the indictment.

The maximum sentence for murder, the killing of another human being with malice aforethought is life imprisonment. See S.C. Code §16-3-20. The maximum sentence for capital murder, that is, murder in addition to an aggravating circumstance is death, just as in Arizona. See S.C. Code §16-3-20(C)(a)(1) – (11) (2002 Cum.Supp.). Cf. Ariz. Rev. Stat. §13-1703.

The aggravating factors enumerated in South Carolina's death penalty statute thus expose a defendant to a punishment (the death penalty) for capital murder greater than that otherwise legally prescribed (life imprisonment) for non-capital murder. Under this system, the elements of murder and the aggravating circumstances together constitute the aggravated crime of capital murder.

"[I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact[,] . . . the core crime and the aggravating fact together constitute an aggravated crime, just as grand larceny is an aggravated form of petit larceny. The aggravating fact is an *element* of the aggravated crime." Apprendi, 530 U.S. at 501, 120 S.Ct. at 2369, (Thomas, J., concurring); see also Harris v. United States, 536 U.S. 545, 122 S. Ct. 2406, 2417 (2002) (emphasis supplied).

A court can no longer hold that aggravating circumstances are not elements of capital murder and are merely "sentencing factors" or considerations. That was the premise of Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047 (1990), which has now been expressly overruled by Ring.

Since the indictment in this case was defective there was not the requisite jurisdiction necessary for this case to proceed as a capital case, and appellant's death sentence must be vacated.

Other courts have decided this same issue as urged by appellant

Courts in other jurisdictions have already reached the conclusion that Ring, Apprendi, and Jones, mandate that any indictment for capital murder must include the aggravating factors in the murder indictment.

In light of the Supreme Court's mandate in Jones that "any fact . . . that increases the maximum penalty of a crime must be charged in an indictment," a federal court in Virginia stated that it appears to be a foregone conclusion that *aggravating factors that are essential to the imposition of the death penalty must appear in the indictment.*" United States v. Lentz, 225 F.Supp.2d 672 (E.D. Va. 2002) (quoting Jones, 526 U.S. at 253 n.6) (emphasis supplied).

Similarly, in United States v. Fell, 217 F. Supp. 2d 469 (D. Vt. 2002), the court held that the "clear implication of the [Ring] decision is that in a federal capital case the Fifth Amendment right to grand jury indictment will apply." *Id.* at 483.

As stated, this Court's precedents on what an indictment must contain are the same as those New Jersey Supreme Court has required. For example, this Court in Mathis v. State, 355 S.C. 87, 584 S.E.2d 366 (2003), vacated the defendant's first degree burglary conviction because it did not allege the element – the aggravating circumstance - - that the burglary occurred during the nighttime. This Court again noted that lack of subject matter jurisdiction can be raised at any time.

The failure to allege the aggravating factors for capital murder in the murder indictment against appellant violated this fundamental principle. Appellant's death sentence should be vacated.

5.

The court erred by ruling appellant did not have an expectation of privacy in the pants he wore to his wife's house, and by refusing to suppress the watch and liquid material found in and on those pants. The pants were seized during an illegal warrantless arrest, and the court erred by ruling the arrest was pursuant to a "valid" Orangeburg warrant -- that was several months old -- and was for a minor unrelated offense.

Relevant Facts

This case involves a Dorchester County murder, and a Orangeburg County arrest warrant for receiving stolen goods that was issued on December 1, 2000. Dorchester County Detective Terrance Van Doran testified he was called to the scene of the arson on Nursery Road in Dorchester County on February 17, 2001, at 4:00 a.m.. ROA p. 7, ll. 3-21. Van Doran said appellant became a suspect in the case. Van Doran claimed the police learned there was an outstanding arrest warrant for appellant from Orangeburg County.³ ROA p. 8, ll. 6-10.

Van Doran went with some police officers to the residence of appellant and his wife at [REDACTED] in Branchville later that morning. As will be seen *infra*, appellant's wife, Dorothy Bowman, testified appellant was not living with her at the time. Under what authority the police got inside the home to arrest appellant and seize his pants was the key issue. ROA p 10, l. 21 – p. 12, l. 14.

³ This Court can take judicial notice of the fact that Nursery Road is approximately three miles from the nearest town, D'Orange, South Carolina in Dorchester County. Branchville is in Orangeburg County, South Carolina. Branchville is approximately twelve miles from the D'Orange area near Nursery Road. Branchville is approximately a twenty six minute drive from Orangeburg where the detention center is located. See Mapquest.com.

Van Doran said that once inside the police encountered appellant in the bedroom “behind the bed, between the bed and the wall, where you couldn’t hardly see him.” Appellant was wearing only his underwear. Appellant was arrested and Van Doran said he read appellant his Miranda rights. ROA p. 10, l. 21 – p. 12, l. 14.

Van Doran remembered that appellant asked for his pants. “I asked him where they were and he informed me that he thought they were in the living room ... we allowed Dorothy to go to the living room ... and she started to bring the pants, I thought better of allowing her to hand him the pants, I took them and I checked them for any weapons, just for safety purposes.” ROA p. 12, l. 15 – p. 13, l. 5. When Van Doran searched appellant’s pockets, he found a “lady’s watch with a brown wristband.” The state would later offer evidence the watch belonged to the decedent. ROA p. 13, ll. 6-10.

Van Doran said he discussed the watch with Detective Coker, and he then informed Dorothy that “we would need something else for him to wear because we were going to take the pants, not let him wear them.” ROA p. 13, ll. 6-17. The state would later offer evidence that petroleum products were discovered on appellant’s pants, although that petroleum product was not gasoline. The state would, nonetheless, introduce them into evidence. ROA p. 4129, ll. 10-24; ROA p. 4164, l. 15 – p. 4165, l. 14.

On cross-examination, Van Doran claimed he could not remember if anybody gave appellant a copy of the Orangeburg County arrest warrant when he was taken into custody. ROA p. 119, ll. 8-21. The Orangeburg County arrest warrant was for possession of stolen goods. The warrant was served on February 18, 2001. As stated, it had been issued on December 1, 2000. ROA p. 5258.

Officer Tim Stevenson admitted he did not recall "whether or not he [appellant] had been picked up on a fresh warrant or a bench warrant." ROA p. 134, l. 23 – p. 135, l. 1.

Appellant's testimony

Appellant testified in camera that on February 17, 2001, he was at Dorothy's mobile home in Branchville, South Carolina. Appellant said his stepson told him, "Daddy, I see the police." Appellant said he looked out the window and saw the Chief of Police driving by the mobile home. Appellant sat back down in the chair. He did not attempt to flee. ROA p. 727, l. 20 – p. 729, l. 1. Appellant confirmed that he was not residing with Dorothy at the time, and the only clothing he had with him were the pants he had been wearing. ROA p. 729, ll. 2-5.

Appellant heard a knock on the door. Appellant testified he instructed his wife, "Don't open the door for the police." Appellant recalled, "I heard them saying that they had a search warrant to come in the house, search me and my wife, told them she didn't know whether I was in the house or not." Law enforcement then entered the mobile home. ROA p. 730, l. 6 – p. 731, l. 17.⁴

Appellant said the police came in the home and they saw him laying on the bed. Appellant was handcuffed. Appellant recalled that all he was wearing at the time was his white shorts. ROA p. 731, l. 20 – p. 733, l. 2. Appellant said the police "put me on my knees in the hallway floor." ROA p. 733, ll. 2-21.

Appellant remembered, "I asked my wife for some clothes." Appellant said the only clothes the police eventually allowed him to put on was "a pair of my wife's jogging pants." Appellant recalled when he asked his wife for clothes, "Mr. Van Doran walked off from the

hallway and came back, [he] was in the living room saying he had to find something else [for me] to put on, I heard him say that.” ROA p. 734, ll. 5-18.

Appellant said the police did not show him a copy of an arrest warrant or tell him there was an outstanding warrant for his arrest. Appellant testified he was not given any reason why he was being held at the Branchville Police Department following his arrest. Appellant recalled Detective Coker told him, “I was only at the police station to answer the questions.” ROA p. 743, l. 2 – p. 744, l. 21. Appellant was also never shown a copy of a search warrant. ROA p. 744, ll. 19-21.

Appellant testified he took a polygraph examination. He was then told he was lying to the police. ROA p. 763, l. 8 – p. 765, l. 7. The police then asked appellant if he did not know what happened to the decedent, “why do you have her watch?” Appellant told the police the decedent gave him the watch in return for drugs. ROA p. 765, ll. 3-16.

Dorothy Bowman

Appellant’s wife, Dorothy Bowman, testified during the pre-trial hearing on April 15, 2002, that she had been living at [REDACTED] in Branchville for about three months prior to this incident. Appellant was not living with her at the time. ROA p. 1039, ll. 13-25.

Mrs. Bowman remembered that the police came to her door about eight or nine o’clock that February morning. Branchville Police Officer Boom Walters knocked on her door “and he said something about some kind of – he had Dorchester County with him and something about J. R. [appellant] *and a warrant*. And he asked me can he come in and look for J. R. And I told him ‘Yeah.’” ROA p. 1041, l. 10 – p. 1042, l. 3. (emphasis added).

⁴ April 11, 2002, hearing.

Why Mrs. Bowman let the police come into her home that morning was the key issue. The following occurred between the solicitor and Mrs. Bowman:

Q. Did they ever tell you they had a search warrant for Marion?

A. *They said something like that, about a warrant and Marion, yes, sir.*

Q. Did they say anything about an arrest warrant?

A. I can't remember that. I don't think so.

Q. What did they say about a warrant, to the best of your recollection? If they talked about a warrant, what did they say?

A. *They had a warrant for his arrest.*

Q. Okay. All right. And how many police came into your house?

A. During that time I'd say about three or four.

ROA p. 1051, l. 18 – p. 1052, l. 5. (emphasis added).

The following occurred on cross-examination of Branchville Chief of Police Quillie Walters about the Orangeburg arrest warrant:

Q. Good morning, Chief. On the back it's marked State's Exhibit 5 for ID. I'm going to ask you to look at that. Up in the left-hand corner can you read the address of where the arrest warrant for Mr. Bowman [is], [what] his address would be?

A. It says [REDACTED].

Q. All right, sir. Where is Locket Street, is that in the town of Branchville?

A. It's close by this Carry Street. It's a couple streets or two over from Carry Street.

Q. All right, sir. And I'm asking now this is an attested true copy. Did you or any law enforcement officers on the day of [February 17 2001] have this piece of paper in your possession?

A. I had the -- not -- I had a copy of the warrant.

Q. All right, sir. You carried just a photocopy around with you?

A. I had it at the office and I carried it with me that day.

Q. You would agree with me, Chief, a photocopy is not a valid warrant, it has to have a judge's signature on it?

MR. BAILEY: Objection to him getting any legal implications. It's a valid warrant, he's a fact witness.

ROA p. 325, l. 3 -- p. 326, l. 2.

THE COURT: I'll allow you to proceed, Mr. Cummings.

Q. When did you make a copy of that warrant?

A. I have no idea. I don't remember. It was sent for me from the sheriff's office. But that morning in question an investigator from the sheriff's department checked with Orangeburg with their records and verified that the warrant was in existence and it was still needed to be, still active.

Q. Who did this, sir?

A. Investigator Varnadoe.

Q. All right, sir. Since last Friday until today have you talked to any officers about your testimony today?

A. No, sir.

Q. Has anybody come to you, asked you about any issues?

A. No, sir.

Q. *All right. Have you seen that attested true copy of the warrant prior to testifying today?*

A. *Not till today.*

Q. *Okay. Mr. Bailey just when he showed it to you, that the first time[was] today?*

A. *That's right.*

Q. *All right. Now, when -- you were told there was a valid warrant in existence, but you didn't have actually a warrant with a judge's signature on it that day, correct?*

A. *I don't understand your question.*

Q. *Well, when you went to Mr. -- Ms. Bowman's house, did you have a valid warrant with a judge's signature on it that morning, sir?*

A. *I didn't have the original warrant, no, sir, I did not.*

Q. *Did you have -- did you gentlemen have a search warrant when you went to Ms. Bowman's residence?*

A. *No search warrant.*

Q. *Okay. Had you applied for a search warrant that morning?*

A. *This was the sheriff's department warrant, it wasn't mine. I was assisting them in executing their warrant.*

Q. *An arrest warrant on Mr. Bowman?*

A. *Right.*

ROA p. 326, l. 11 -- p. 328, l. 4. (emphasis added).

Mrs. Bowman said after the police entered, they allowed her to stay in front "while they went down the hall to search for him." The police did not show Mrs. Bowman any documents justifying an arrest or a search of her home. ROA p. 1042, ll. 6-15.

"Then after they found him, and then one of the officers asked me did he have any clothes in my house and I said yes. He asked me, 'Can I go get them,' and I went and got them ... I remember getting him a pair of black pants and a shirt, gray shirt." ROA p. 1042, ll. 16-23.

Mrs. Bowman remembered the police searched her home after appellant's arrest. "And then after they finished searching, they got – well, while they was searching, they had me sign some kind of waiver form ... just telling me about what they took from my house, like his pants, his watch, stuff like that." ROA p. 1043, ll. 3-12.

The Orangeburg arrest warrant was for receiving stolen goods, one thousand to five thousand. The arrest warrant affidavit was signed on December 1, 2000, by Kerry Kinsey at Post Office Box 1366, Orangeburg, South Carolina, 29116. Magistrate Peggy G. Davis signed the arrest warrant that same day. The return stated that the warrant was delivered to appellant on February 18, 2001. See Arrest Warrant, ROA p. 5258.

Rulings on appellant's statements following his arrest.

The judge ultimately suppressed appellant's statement to the police. The evidence showed appellant was taken to the Orangeburg County jail, but his arraignment or bond hearing was delayed. Further, it was undisputed the police brought appellant back from the Orangeburg County jail on a Sunday night to Branchville to see his wife. The defense maintained that law enforcement was threatening that appellant's children could be taken

into DSS custody, and his wife could be charged in this case. Appellant also testified he did not read what the police wrote for him to sign. ROA pp. 770; 790; 862-864.

Arguments on seized property

Defense counsel argued before the court on May 1, 2002, that appellant was illegally arrested. Appellant was not informed of the reasons for his arrest, and there was not any testimony "saying either Chief Walters or whoever said, 'You're under arrest for stolen goods,' none of that ... There's no proof saying he had knowledge of an outstanding felony warrant. Judge, a copy of a warrant is insufficient. This is illegal to have a copy of the warrant. The copy of the warrant hasn't even been produced in the various stages of this issue." ROA p. 1254, l. 20 – p. 1256, l. 14.

Defense counsel noted that appellant's pants were seized when they were brought to him inside the mobile home. Defense counsel argued that, if the court were to find appellant was legally being arrested for receiving stolen goods, "what issue is the pants based on that case?" ROA p. 1257, l. 15 – p. 1259, l. 14.

Counsel also argued Mrs. Bowman "can't give permission for his pants." Counsel said appellant had standing to challenge the search. ROA p. 1259, l. 15 – p. 1260, l. 1. Counsel argued that the watch and any other evidence seized from appellant's clothes were the fruit of the poisonous tree, and should be suppressed. ROA p. 1261, l. 1 – p. 1262, l. 6.

State v. Sims

The judge asked the parties to discuss the arrest in terms of State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991). Counsel argued the police were vague about the warrant, "who had access to it, how it got there, who got the warrant..." The warrant was "only allegedly signed by a judge in December, [2000]." ROA p. 1263, l. 1 – p. 1264, l. 7.

Counsel reminded the judge that the police did not tell appellant he was being arrested for receiving stolen goods. ROA p. 1263, l. 21 – p. 1266, l. 17. Counsel noted the police “chose to seize those pants as the result of a homicide investigation, not receiving stolen goods, not for any issue of contraband...” ROA p. 1266, l. 13 – p. 1267, l. 1. “Therefore, Judge, respectfully, the pants and anything found therein should be suppressed.” ROA p. 1267, ll. 2-8.

The judge denied appellant’s motion to suppress the evidence seized at the time of his arrest. The judge ruled, “the arrest was made based upon information that there was a valid warrant. And, in fact, there was a valid warrant. And I find that, first of all, it was a valid arrest.”

The judge also ruled appellant had no expectation to privacy in his pants, and that they were legally seized incident to arrest. ROA p. 1275, l. 16 – p. 1276, l. 19.

Trial evidence

Appellant’s pants and the watch were later entered into evidence. ROA p. 4129, ll. 10-24; ROA p. 4164, l. 15 – p. 4165, l. 14. SLED agent Grady Layton testified he “found the presence of a heavy petroleum product on these jeans.” Layton admitted on cross-examination these heavy petroleum products could be charcoal starters, oil lamps, paint thinners, or insect sprays. Layton also acknowledged that a heavy petroleum product was also found on the shoe of James Gadson. ROA p. 4300, l. 7 – p. 4301, l. 24.

The solicitor noted that the decedent’s watch was found in appellant’s pants, and he argued appellant’s wife consented to the police taking appellant’s pants and the watch. ROA p. 4476, l. 11 – p. 4477, l. 9.

Discussion

The judge erred by ruling appellant did not have any expectation of privacy in his pants. Those pants were seized from his wife's mobile home while appellant was present, and inside the home with his wife's permission.

In Minnesota v. Olsen, 495 U.S. 91, 110 S.Ct. 1684 (1990), the police entered a residence, without a warrant, to apprehend an overnight guest who was a suspect in a murder and robbery. The Supreme Court found the defendant's status as an overnight guest alone was "enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable." Minnesota v. Olsen, 495 U.S. at 96-97, 110 S.Ct. at 1688. Appellant was at least as well situated in this case. He was staying at his wife's mobile home when the police entered.

Defense counsel correctly argued that appellant was illegally arrested. The state's witnesses were very vague about the December 1, 2000, warrant issued for appellant's arrest by Judge Peggy D. Davis for receiving stolen goods. This Orangeburg County arrest warrant alleged appellant sold four guns that were stolen from a residence in Cope, South Carolina. ROA p. 5258.

Further, there was not any reason in this case that the police could not have obtained a valid arrest warrant for murder, assuming they had probable cause for appellant's arrest at the time. As seen, the Chief of Police claimed: "an investigator from the sheriff's department checked with Orangeburg with their records and verified that the warrant was in existence and it was still needed to be, still active." Defense counsel correctly argued that the seizure of appellant's pants and his watch clearly showed the police entered the mobile home to arrest appellant and search for evidence of the homicide.

Further, this was not a case of hot pursuit. The police were allegedly taking time to check on the Orangeburg arrest warrant. If the police had probable cause to arrest, that same time could have been taken to obtain an arrest warrant for murder.

Appellant resided in the area. He had family ties to the community, including his wife Dorothy. Appellant was at his wife's mobile home with her permission. He was sitting around the mobile home in his boxer shorts when the police arrived. Appellant could not be considered a flight risk unless any other murder suspect who was a resident of the local area, and who had family ties to the community was to be considered a flight risk. Cf. State v. George, 323 S.C. 496, 476 S.E.2d 903, 911 (1996), (where the defendant did not have ties to the community and was a flight risk).

Dorothy Bowman remembered that the police told her they either had a search warrant or "a warrant for his arrest." ROA p. 1051, l. 18 – p. 1052, l. 5. The police were allowed into the home for that reason. If the police had a warrant and Mrs. Bowman refused them entry, the police had a right to break into her home. See S. C. Code §43-15-60 (1976). Mrs. Bowman had the right to rely on assertions the police had a warrant, and she should not be expected to deny them entry – or force the police to break into her home -- lest it be deemed that she consented to their entry. Yet Officer Tim Stephenson could not recall whether appellant was arrested on a fresh warrant or a bench warrant. ROA p. 134, l. 23 – p. 135, l. 1.

It is apparent that to any extent the police relied on the stale December 1, 2000, Orangeburg arrest warrant for receiving stolen goods, that their reliance was a subterfuge to

gather evidence and obtain a statement from appellant in what was obviously a murder investigation.⁵

Further, the court's reliance on State v. Sims, *supra*, based upon the dated Orangeburg arrest warrant for receiving stolen goods was misplaced. In Sims, the police were aware of murder warrants issued for Sims' arrest. Sims was on a crime spree. The arresting officer in Sims was aware of a Federal Bureau of Investigation warrant, and of a warrant from California that had been issued for Sims' arrest. In addition, there were warrants for Sims' arrest in South Carolina. Further, unlike the present case, appellant did not voluntarily disclose the location of any inculpatory evidence when confronted by the police. The police just seized his pants. See State v. Sims, 405 S.E.2d at 382.

Interestingly, at the time Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371 (1980) was decided, South Carolina was one of four states in the country that prohibited warrantless arrests in the home by statute. See, S. C. Code §23-15-60 (1976); Payton v. New York, 445 U. S. at 599, n. 47, 100 S.Ct. at 1386, n. 47. S. C. Code §23-15-60 provides a sheriff or deputy may force his way into the home, after a request and refusal, to arrest a person, provided, the sheriff or deputy has the process requirement to arrest the person.

In Payton v. New York, a second defendant involved, one Riddick, was arrested when a detective, accompanied by three police officers, knocked on the door of his New York home. When his young son opened the door, the police saw Riddick sitting in bed

⁵ Appellant recognizes that if the police had probable cause to arrest, appellant's subsequent statement obtained after a warrantless entry into the home was not inadmissible under the exclusionary rule. New York v. Harris, 495 U.S. 14, 110 S.Ct. 1640 (1990). However, the judge excluded appellant's statement on other grounds. Appellant also testified he did not read any of the statements that were written for him, and he requested a lawyer. ROA pp. 770; 790; 862-864.

covered by a sheet. They entered the house and placed him under arrest. The United States Supreme Court in Payton v. New York found this warrantless arrest in the home unconstitutional. See Payton v New York, 445 U.S. 573 100 S.Ct. 1371 (1980).

Several facts are clear here. The solicitor argued the actions of the police were lawful under State v. Sims because they were aware of the Orangeburg County arrest warrant. That warrant did not have anything to do with the murder in this case, and it was a dated warrant for a minor offense.

Further, appellant testified he instructed his wife not to open the door for the police. Mrs. Dorothy Bowman testified that she was told the police had either an arrest or search warrant allowing them entry into the home. Mrs. Bowman allowing the police entry under these circumstances was not consent, but acquiescence to an assertion of lawful authority to enter. Finally, a fair reading of this record shows the police had time to obtain an arrest warrant from a magistrate for murder if they had probable cause to arrest, and there were not any exigent circumstances involved in this case.

Under these circumstances, the fruits of the illegal arrest, the watch and appellant's pants themselves, should have been suppressed as a result of an illegal arrest. Cf. State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995), *cert. denied*, 516 U.S. 1131, 116 S.Ct. 951 (1996) (search incident to lawful arrest).

The judge erred by reasoning appellant did not have an expectation of privacy in his pants that were seized in his wife's home where he was at least a guest, and by ruling appellant's arrest was lawful. The seized watch and appellant's pants were the fruit of the poisonous tree. They would not have come to light but for the illegal actions of the police,

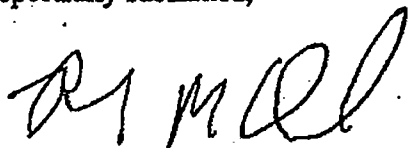
and they should have been suppressed. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963).

The refusal to suppress the objectionable evidence was an error of law, and appellant should be granted a new trial.

CONCLUSION

By reason of argument five, appellant's conviction should be reversed, and this case remanded to the Dorchester County Court of General Sessions for a new trial. In the alternative, by reason of arguments one, two, three and four, appellant should be granted a new sentencing trial.

Respectfully submitted,



Robert M. Dudek
Assistant Appellate Defender

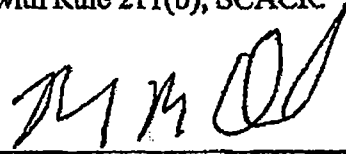
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July 6, 2005

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

July 6, 2005

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

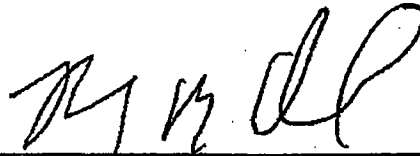
V.

MARION BOWMAN, JR.,

APPELLANT

CERTIFICATE OF SERVICE

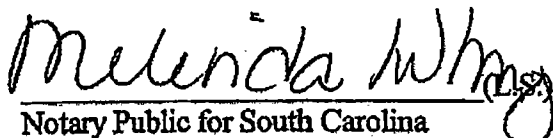
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon S. Creighton Waters, Esquire, this 6th day of July, 2005.



Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 6th day of July, 2005.


Notary Public for South Carolina

My Commission Expires: November 16, 2008.

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

Respondent,

v.

MARION BOWMAN, JR.,

Appellant.

FINAL BRIEF OF RESPONDENT

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I. THERE IS NO REVERSIBLE ERROR FROM THE TRIAL COURT'S FAILURE TO CHARGE THREE STATUTORY MITIGATORS BASED ON SUPPOSED EVIDENCE OF APPELLANT'S VOLUNTARY INTOXICATION, WHERE THE ISSUE WAS NOT EVEN MENTIONED TO THE TRIAL COURT, AND IN ANY EVENT THERE WAS ABSOLUTELY NO EVIDENCE APPELLANT WAS ACTUALLY INTOXICATED AT THE TIME OF THE CRIME OR ENGAGING IN HEAVY CONSUMPTION IMMEDIATELY PRIOR. 19

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- V. THERE WAS NO REVERSIBLE ERROR IN ADMISSION OF APPELLANT'S PANTS AND THE VICTIM'S WATCH FOUND WITHIN THEM AT THE TIME OF HIS ARREST, WHERE THE ISSUE IS NOT PRESERVED, THE PANTS WERE SEARCHED INCIDENT TO A LAWFUL ARREST PURSUANT TO A VALID WARRANT, AND THE SEARCH WAS IN ANY EVENT JUSTIFIED

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STATEMENT OF THE ISSUES ON APPEAL

- I. IS THERE REVERSIBLE ERROR FROM THE TRIAL COURT'S FAILURE TO CHARGE THREE STATUTORY MITIGATORS BASED ON SUPPOSED EVIDENCE OF APPELLANT'S VOLUNTARY INTOXICATION, WHERE THE ISSUE WAS NOT EVEN MENTIONED TO THE TRIAL COURT, AND IN ANY EVENT THERE WAS ABSOLUTELY NO EVIDENCE APPELLANT WAS ACTUALLY INTOXICATED AT THE TIME OF THE CRIME OR ENGAGING IN HEAVY CONSUMPTION IMMEDIATELY PRIOR?
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- IV. IS THERE REVERSIBLE ERROR WHERE THIS COURT HAS ALREADY RULED THREE TIMES THAT *RING v. ARIZONA* DOES NOT DEPRIVE A TRIAL COURT OF SUBJECT MATTER JURISDICTION EVEN THOUGH THE AGGRAVATING FACTORS WERE NOT ALLEGED WITHIN THE INDICTMENT?
- V. WAS THERE REVERSIBLE ERROR IN ADMISSION OF APPELLANT'S PANTS AND THE VICTIM'S WATCH FOUND WITHIN THEM AT THE TIME OF HIS ARREST, WHERE THE ISSUE IS NOT PRESERVED, THE PANTS WERE SEARCHED INCIDENT TO A LAWFUL ARREST PURSUANT TO A VALID WARRANT, AND THE SEARCH WAS IN ANY EVENT JUSTIFIED BY CONSENT FROM APPELLANT'S WIFE?

STATEMENT OF THE CASE

During the August 2001 term, the Dorchester County Grand Jury indicted Appellant, Marion Bowman, Jr., for murder and third degree arson (01-GS-18-0348 & -0349). {R. 5254-57}. The state gave notice of intent to seek the death penalty, and served notice of evidence in aggravation. {R. 1640-43; 4570-71; 5260-61}.

The trial judge in this case was the Honorable Diane S. Goodstein. Appellant was represented at the trial level by Norbert E. Cummings, Jr. and Marva A. Hardee-Thomas; First Circuit Solicitor Walter M. Bailey, Jr. and Assistant Solicitor Benjamin Lafond prosecuted the case for the State.

A pretrial Jackson v. Denno hearing was held before Judge Goodstein during various days between April 5th, 2002 and May 2nd, 2002. Jury selection began in Dorchester County on May 13th, 2002, and was completed on May 17th, 2002. Judge Goodstein conducted the guilt phase of Appellant's jury trial from May 17th until May 20th, 2002. Appellant's jury convicted him of both charges. {R. 4564}.

Appellant exercised his right to the 24-hour cooling-off period in subsection 16-3-20(B) of the Code of Laws for South Carolina. {R. 4569}. The sentencing phase of the trial began on May 22nd, 2002. Judge Goodstein submitted the following aggravating factors to the jury:

- (1) Murder was committed while in the commission of criminal sexual conduct.
- (2) Murder was committed while in the commission of kidnapping.
- (3) Murder was committed while in the commission of larceny with the use of a deadly weapon.

(4) Murder was committed while in the commission of robbery while armed with a deadly weapon.

{R. 5018}. The following mitigating factors were charged:

(1) The defendant has no significant history of prior criminal convictions involving the use of violence against another person.

(2) The age or mentality at the time of the crime.

(3) Any other mitigating factors that the jury may find. [The jury] may also consider any nonstatutory mitigating factors.

{R. 5032}.

On May 23rd, 2002, Appellant's jury found the existence of two of the four aggravating factors: the murder was committed in the commission of kidnapping, and larceny with the use of a deadly weapon. It recommended a sentence of death. **{R. 5051}.** After finding that the verdict was not the result of prejudice, passion, or any arbitrary factor, Judge Goodstein sentenced Appellant to death for murder and ten years for third degree arson.

A timely Notice of Appeal was filed and served on May 24th, 2002. This appeal follows.

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. Appellant did not offer any witnesses in the guilt phase, but put the State to its proof. Three of the issues on appeal challenge the sentencing phase, one raises a subject matter issue based in Ring v. Arizona (which this Court has already rejected), and the last asserts a search and seizure and illegal arrest issue based on the admission of Kandee's watch and Appellant's pants.

A. Friday evening, 2/16/01: a suspiciously abandoned car and gunshots in the night

At about five minutes to eight on the Friday evening of February 16th, 2001, Dorchester County resident Dennis Judy was trying to get his wife home to see her TV show after they had eaten barbeque in Holly Hill. As he came around a curve on Nursery Road in rural Dorchester County, Judy noticed a car on the side of the 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. {R. 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. {R. 3798-3801; 3803-05}.

B. Early morning Saturday, 2/17/01: the car found ablaze

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. {R. 3801-02}.

Dispatched to the scene a few minutes before 4:00 a.m were Captain Perry Chinnors and his squad of volunteer firemen from nearby Reevesville, as well as Dorchester County sheriff's deputy James Kicklighter. On a path leading into a fallow field about 50 to 75 feet off Nursery Road, they 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. {R. 3807-3810; 3814-16; 3819-22; 3875-78}.

C. 2/17/01: the crime scene evidence at Nursery Road

Dorchester County detectives and a SLED arson investigator responded in the early morning hours of February 17th, 2001. The Ford Escort's license tag was still readable, and it was registered to Kandee and her mother. {R. 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. {R. 3944-49}. Her body was extremely burned and charred, and the only skin remaining was on part of her back. {R. 3941-43}. The lungs were clear, indicating that Kandee was dead before the fire started. {R. 3954-55}.

Most everything that could burn did burn in the passenger area and trunk of Kandee's Ford Escort. {R. 3879-83}. SLED investigator James Helms testified that the fire began in the passenger compartment rather than by an engine fire, because some

flammable items in the engine area as well as the VIN plate in the dashboard were not completely obliterated. {R. 3883-84}. From the Escort's trunk, officers collected the burned remainders of a woman's pocketbook, the back part of a shirt, some books and paperwork, the remainder of a belt, a gold earring, and some miscellaneous debris. {R. 3904-08}. On the pocketbook, SLED chemist Grady Layton identified a medium petroleum accelerant; on the shirt, paper material, belt, and miscellaneous debris, Layton was able to conclusively identify the presence of gasoline. {R. 4298-4399}. Thus, Agent Helms concluded the fire was intentionally set. {R. 3889-90}.

Dennis Judy returned to the scene that Saturday morning and showed Agent Helms where he had observed the Escort parked on the roadway the night before – approximately some 800 feet from where the car was ultimately found. {R. 3849-3853; 3909-11; 3936-38}. In that area, 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 a 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 identified as Kandee's by her mother. {R. 3853-3860; 3867-71; 3910-12; 4164-66; 4272; 4286}. SLED DNA expert Matt Fitts later matched the blood samples to Kandee Martin. {R. 4366-67; 4377-79}.

D. Saturday morning, 2/17/01: Appellant's arrest, his pants, and Kandee's watch

After receiving information that Appellant 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 the Saturday morning of February 17th, 2001. The officers asked Dorothy if they could enter to search for Appellant, and she voluntarily agreed – eventually signing a consent to search form. Officers found Appellant hiding alongside a bed in a child's room down the hall, and he was promptly arrested and Mirandized.¹ {R. 4125-29; 4139-42; 4144-45; 4191-95; 4208; State's Exhibit #27}.

Appellant 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. {R. 4129-32; 4142; 4150-52; 4195-98; 4207-08}. Kandee's mother identified at trial the watch as belonging to her daughter. {R. 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 Appellant's friends testified at trial he was wearing black jeans the day before. {R. 3763; 4058; 4093; 4193; 4297-98}.

E. Appellant's friends and relatives come clean about Kandee's murder

As the investigation progressed, it began to center around a number of people who had known each other for years and lived in or hung out at Branchville Villas Apartments, or "the projects". Of these people, Appellant's sisters Yolanda and Kendra, his first cousin (and codefendant) James Tywan Gadson, and his lifelong friend Travis Felder all testified

¹ During the Jackson v. Denno hearing (but not in the guilt phase), it was brought out that officers arrested Appellant at Dorothy's trailer that morning based on an outstanding Orangeburg County arrest warrant for receiving stolen goods. {R. 321-22; 331, 648, 665, 797, 935; 5420-22}.

for the State after securing plea agreements. {R. 3735-36; 3981; 4085-86; 4167-68}.

1. The argument over the gun

William Henry Koger lived across the street from the projects, and people tended to gather in his yard, drink beer, and stand around a fire in a 55-gallon barrel. On February 16th, a gathering was planned at Koger's for Joseph Fogle's birthday. {R. 3673-76; 3680; 3683; 3700; 3988; 4060}.

Koger stated people started to arrive about 11:00 a.m. or so. Appellant – also known as “JR” or “Black” – was apparently there periodically throughout that afternoon. At some point Appellant left – there was some disagreement in the testimony from various witnesses about whether this was a trip to the meat market for the party, or whether the meat market trip was earlier and this was a different trip. In any event, before he left, Appellant 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. {R. 3675-77; 3683-84; 3700; 3750-51; 3983-89; 4031-32; 4057-59; 4077-78; 4101}.

When Appellant returned, a number of people, including trial witnesses Koger, Fogle, and Carolyn Brown – saw Appellant get upset at Tywan because someone had taken his gun. However, Hiram Johnson interceded, and told Appellant he had taken the gun back to Katrina West's apartment in the projects. Appellant went across the street and got the gun, and put it back in his pants. {R. 3677-79; 3684-85; 3690-91; 3701; 3985-90; 4058-60; 4077-78}.

2. Unpaid debts and threats to kill

At another point later that afternoon, Appellant asked Fogle to take him to Frankie Martin's house. Kande's car was parked out front, and Appellant mentioned to Fogle that Kande owed him some money. {R. 3685-87}.

Appellant 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 Appellant riding in the back seat and the girls in front. On the way, they saw Kande's car parked out in front of Charlie Fralix's house, and Appellant told Yolanda to stop. {R. 3701; 3721-24; 3736-40; 3763-65}.

Charlie's nephew Eddie Waters was leaning in the car window and talking to Kande, who asked to borrow \$5 for gas. Appellant told Yolanda to pull up alongside Kande's car, and tried to get her attention through the open rear window of Yolanda's VW. However, Kande held up her finger at Appellant, saying "hold on a minute", and turned back to her conversation with Eddie. {R. 3724-35; 3740-42; 3764-66}.

There is some discrepancy as to the words Appellant actually used when Kande told him to wait, but it is clear that Kande's gesture angered Appellant. Eddie heard Appellant say "Fuck waiting a minute. I'm about to kill this bitch." {R. 3725-27}. According to Katrina, Appellant declared "fuck that ride, that bitch be dead by dark fall". Appellant's sister Yolanda described his comments as "Fuck that bitch, that bitch be dead by dark". {R. 3765-66}. Yolanda also told police Appellant said "that bitch owed me some money and I want my money today". In any event, Yolanda drove off. {R. 3742-45; 3749}.

3. Tywan Gadsden describes Kandee's murder

Appellant made true on his threat later that night. Appellant's first cousin and codefendant Tywan Gadsden described the murder at trial pursuant to a plea agreement. Tywan, who had spent the afternoon drinking with others under a tree in Koger's back yard, testified Appellant did not return to Koger's until around 7:00 or 7:30 that evening. Appellant was riding with Kandee in her green Ford Escort, and he called Tywan over and told him to get in. {R. 3990-93; 4033}.

The three drove to a nearby Horizon EZ shop, where they gassed up the car and drove off without paying. With Appellant directing the way, Kandee then drove out into the country, where they eventually ended up on Nursery Road. There, they stopped, turned the car off, and Appellant and Tywan got out. {R. 3994-96; 4033-35}.

Appellant and Tywan walked down the road a ways, as Appellant whispered he was going to kill Kandee because she was wearing a wire. Kandee followed behind, grabbed Appellant by the arm and said she was scared. A car came down the road, and the three jumped into the woods until it passed. {R. 3997-99; 4035-36}.

Kandee then started back down the roadway with Appellant following. As Tywan came out of the woods behind them, he saw Appellant fire three times at Kandee. Kandee ran towards Tywan, but stopped and turned to face Appellant. She begged, "Please Black, don't shoot me no more. I have a baby to take care of." Appellant responded to her pleas by firing twice more, and Kandee fell to the ground. {R. 3997-4003; 4011-12; 4036-37}.

Tywan, who said he "messed in his pants a little bit", jumped in the car while Appellant dragged Kandee into the woods by her feet. Appellant 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. {R. 4012-14}.

Eventually, they parked Kandee's car in a wooded area behind a coal plant. Before they got out, Appellant threatened to blow Tywan's brains out if he ever told anyone. Appellant then headed for the projects while Tywan walked back to Koger's house. Appellant eventually came back with Yolanda's car, and he and Tywan 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. {R. 4015-17; 4033-35}.

4. The trip to the club in Kandee's car: admissions of guilt

Appellant eventually went to Meeka and Katrina's apartments in the projects, where he ran into Hiram Johnson. Hiram testified he agreed to go with Appellant downtown, and they left in Yolanda's car to go to the EZ shop. There, they ran into Appellant's uncle (and Tywan's father) James J. Gadsden, who was walking home from a restaurant where James does odd jobs in return for burgers. Appellant gave James \$10 and told him to go inside and buy them four pairs of gloves. James did so, purchasing brown cotton gloves and a beer with the change. Appellant and Hiram then drove back to the projects. {R. 3957-60; 3962-63; 4017; 4061-63}.

Around midnight, everyone decided to go to the Allen Murray nightclub outside of Bowman. Appellant drove Kandee's car, with Hiram, Tywan, and Darrien Williams as passengers. Appellant told the men he had stolen the car, and made them put on the gloves James bought at the EZ store. {R. 4017-20; 4063-65; 4081}.

State's witnesses Yolanda, Carolyn Brown, Valorna Smith, Travis Felder, and Keith

Rivers were among those who also went to the Allen Murray Club around midnight. All of them testified Appellant never went inside the club, but instead hung around in the parking lot, often sitting in Yolanda's Volkswagen. {R. 3691-92; 3696-97; 3707-09; 3714; 4039-42; 4089-90; 4104; 4112-15}. Hiram stated Appellant walked around the lot some, trying to sell Kandee's car. {R. 4067}.

After about an hour or so, Appellant, Hiram, Tywan and Darrien headed back to Branchville in Kandee's car. As he drove the Escort with the pistol sitting in his lap, Appellant remarked, "I killed Kandee, heh heh heh". Appellant dropped Hiram off at the projects. {R. 4021-22; 4067-69}.

5. Travis Felder describes the car fire

Travis, Carolyn, and Valorna also left the club and went back to Valorna's apartment in the projects. They were watching movies and hanging out when there was a knock at the door about 3:00 a.m. Appellant was alone, and said "Trav, come here, let me holler at you quick like". Appellant told Travis he needed help parking a car. {R. 4042-45; 4116-18; 4090-92; 4119-20}.

Travis testified that he got in his own car and followed Appellant in the Ford Escort back to Nursery Road. Appellant pulled over on the side of the road, cut his lights, and went into the woods for a minute. The next thing Travis saw was Appellant pulling a body by its feet face down. As Appellant opened the trunk and put the body inside, Travis could see by the trunk light it was Kandee. {R. 4093-97}.

Appellant looked back at Travis, and said, "You didn't think I would do it, did you? I killed Kandee Martin." Appellant told Travis to go down the road and turn around, while

Appellant drove the Escort up into a field. Travis watched as Appellant threw a light into the car, which erupted in flames. Travis then took Appellant back and returned to Valorna's, where he went to sleep. {R. 4098-4101; 4106}.

F. May and June 2001: a pistol found in the Edisto river – and bullets found in the couch

Appellant's murder weapon was found after police managed to get information in May and June 2001 from Appellant's wife Dorothy and his sisters Yolanda and Kendra, all of whom, as mentioned before, testified at trial with plea agreements. {R. 3735-36; 4161; 4167-68}. Dorothy stated that a few days after the murder Hiram Johnson told her the gun was hidden in the sleeper sofa at her trailer on Lockett Street. She found the pistol hidden a "cuff" or "sleeve" of the couch, put it in her pocketbook, and went over to see Kendra at Appellant's grandmother's. {R. 4198-4202; 4210-12}.

While Dorothy claimed she talked with Kendra and then left the gun at Kendra's in the clothes hamper, Kendra testified that she and Dorothy went to meet Appellant's father Marion Bowman, Sr. at the EZ shop. Marion Sr. took the gun and put it in the middle console of his truck. {R. 4168-73; 4203-04; 4211-12; 4358}.

The next day, Kendra and Yolanda met with Marion Sr., and then followed him out to the graveyard at the Zion AME church. Appellant's father brought the pistol from out of the nearby woods, and they wrapped it in a towel and put it in Yolanda's trunk. Kendra and Yolanda drove out to the Old Cope Road bridge and threw the gun over the side into the Edisto River. {R. 4174-78; 4183-87}. On May 28th, 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. {R. 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 Appellant's .380, they were of course consistent. {R. 4315-20}.

Following Dorothy's statement to police in June 2001, officers visited the residence of her sister Sally Bookhart. Dorothy had moved from her trailer on Lockett Street within a week or so after Appellant's arrest, and she gave the sofa back to Sally. When the officers arrived, Sally willingly agreed to their requests to search the sofa. In a little "pocket" of the sofa's fabric, SLED agent James Helms discovered a box of Winchester .380 ammunition, consistent with the shell casings found at the Nursery Road scene. {R. 4205; 4244-49; 4259-62}.

G. The DNA match

Finally, SLED DNA analyst Fitts found human blood and semen in the vaginal swabs taken from Kandee at autopsy. While the mixture of female and male secretions in the vaginal swabs complicated identification, Agent Fitts was able to match Appellant to a probability of 1 in 5300. {R. 4370-72; 4379-87}.

H. The State's sentencing phase case

Following the 24-hour "cool down" period, the State began its evidentiary presentation in the sentencing phase by reincorporating its evidence from the guilt phase. {R. 4650}. It then introduced certified copies of Appellant's March 1998 convictions from two incidents – with a third degree burglary charge and a petty larceny charge for each. {R. 4652}.

Next to testify were Joseph Wimberly and David Thompson – the two victims from

the March 1998 convictions. Wimberly noted that his house was robbed of a shotgun, of which the barrel was later sawed off. Stolen from Thompson's residence was cash and a .357 pistol. Within 24 hours, Appellant's cousin used the pistol to kill himself. {R. 4653-59; 4801-02}.

Next was SLED arson agent James Helms, through which the State introduced photographs of Kandee as she was found severely burned in the back of her trunk. {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. The trial court excluded the general autopsy photographs in view of the pictures introduced through Helms. {R. 4669-91}.

Finally, 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. {R. 4692-4708}.

I. The defense's sentencing case

The defense case in mitigation began with Appellant's older sister Kendra Bowman. She generally described good times growing up with Appellant, but noted her biological father was abusive until he left when the children were babies. {R. 4742-48}.

Next to testify was Appellant mother Dorothy Bowman (his wife, who testified during the guilt phase, is also named Dorothy). Dorothy related that Appellant's father was abusive, but he left when the kids were very small. She theorized that Appellant longed for fatherly involvement, and noted that her subsequent boyfriend Joseph Sims was a positive influence on the kids. Appellant had trouble in school and only finished the ninth

grade, but he would help his mother out after she became disabled. {R. 4750-59}.

Appellant called Margaret Baughman, an adult education teacher at the Dorchester County Detention Center. She testified that during he pre-trial incarceration Appellant took classes, and even became a reliable assistant to her teaching at the jail. {R. 4761-67}.

A forensic social worker named Jeffrey Youngman also testified in Appellant's mitigation presentation. Generally, Youngman theorized Appellant's functioning was negatively impacted by his upbringing. Appellant's biological father was abusive, and then generally absent after he left when the kids were very young. The mother was very strict, and would "box" or beat Appellant daily. The family was poor, and Appellant was supposedly deprived and dirty when young. While the social worker detailed some injuries Appellant suffered as a child, he noted that the doctor at the time did not suspect abuse. {R. 4791-94}.

Appellant started having difficulty in school after the third grade, and became both an academic and disciplinary problem. When his mother's health worsened, he had to assist with the household. {R. 4794-4800}.

The social worker noted a family history of alcohol abuse. Appellant started experimenting with alcohol in the 5th grade, and eventually started selling drugs. Appellant also supposedly faced repeated abandonment from male figures in his life, from his father, to his mother's paramour Joseph Sims, to the death of his grandfather. The deaths of two cousins – including one who killed himself with the gun Appellant stole – negatively affected Appellant. {R. 4797-4802; 4807}.

These factors led Youngman to theorize that Appellant would make impulsive

decisions with poor judgment and a lack of consideration of the consequences. {R. 4805-09}.

Frankie Martin testified that Kandee came by on February 16th to borrow \$3. He stated Appellant came by with Joe Fogle to see Kandee, and that Appellant left with Kandee. {R. 4830-32}.

Corrections consultant and former South Carolina prisons official James Aiken was called to the stand next for the defense. He 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 Appellant 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 Appellant for the rest of his life, with the prison's fences, gun towers, and trained guards. Aiken also opined that Appellant would adapt well to prison life, given that during his three previous incarcerations, Appellant had no significant incidents of violence to staff and inmates, and had assisted the adult education classes. {R. 4832-45}.

Interestingly, Appellant's next witness – who, unlike Aiken, had contact with Appellant in a jail setting – was not quite as kind about Appellant's behavior. Dorchester County Detention Center guard Sharon J. Branch testified that Appellant has "attitude", and would often speak out to guards. While Appellant 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, Appellant 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. {R. 4882-88}.

On the other hand, another jail guard named Enrique Badillo testified that Appellant was very polite, and presented no difficulty or threats to safety. {R. 4902-05}.

Finally, guilt phase witness Travis 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 Appellant – buying gasoline in a small gas container. Felder admitted that after Appellant came and got him from the girls' apartment in the Branchville Villas, Appellant gave him a gas jug and asked him to buy some fuel. Travis stated he thought Appellant was just filling up the can to move the car. {R. 4911-28}.

ARGUMENT**I. THERE IS NO REVERSIBLE ERROR FROM THE TRIAL COURT'S FAILURE TO CHARGE THREE STATUTORY MITIGATORS BASED ON SUPPOSED EVIDENCE OF APPELLANT'S VOLUNTARY INTOXICATION, WHERE THE ISSUE WAS NOT EVEN MENTIONED TO THE TRIAL COURT, AND IN ANY EVENT THERE WAS ABSOLUTELY NO EVIDENCE APPELLANT WAS ACTUALLY INTOXICATED AT THE TIME OF THE CRIME OR ENGAGING IN HEAVY CONSUMPTION IMMEDIATELY PRIOR.**

Appellant first contends the trial court erred by failing to instruct on three statutory mitigators despite the supposed existence of evidence Appellant was voluntarily intoxicated at the time he committed the crime. However, the issue is not preserved, as it was never as much as mentioned to the trial court at any point during the proceedings. In any event, there was no evidence Appellant was either actually intoxicated at the time of the crime or at least engaging in heavy consumption reasonably prior to the time of the crime. As such, there could be no error.

A. Events at trial

As noted before, William Koger testified that people liked to come to his house, hang out, and drink beer, and that a party for Joe Fogle was planned that night. While Appellant was at his house at times after 11:00 a.m., he left at three times that afternoon and evening. {R. 3673-79}.

Joe Fogle did not mention any drinking. He testified that Appellant left Koger's house to go to the meat market at one point, and that at another time Appellant and Fogle went to Frankie's house, where they saw Kandee. {R. 3682-87}.

Keith Rivers stated that on February 16th he was in Koger's yard. When asked what "you all" were doing, he stated "drinking beer, drinking liquor, and talking". Rivers stated he saw Appellant at Koger's, and when asked what they were doing, stated "we was just

all talking, having a good time, that's all". Finally, Rivers stated that he saw Appellant at about midnight or one a.m. outside of the Allen Murrery club. Rivers asked Appellant if he wanted to go in and get Rivers a beer, but Appellant said he wasn't going in the club. {R. 3690-96}.

Carolyn Brown testified about cleaning chicken for the party and Appellant's argument with Tywan over the pistol. She did not mention any drinking, and noted that she saw Appellant later that day in a car with his sister and another woman. {R. 3699-3702; 3706-07}.

Eddie Waters described hanging around Charlie Fralix's house (NOT Koger's) and drinking beer. He related about seeing Appellant as a passenger in the rear of the car that pulled up next to Kandee's when Eddie was talking to her through the window. Appellant left without getting out. {R. 3721-28}.

Appellant's sister Yolanda and cousin Katrina West testified about spending part of the afternoon with Appellant, during which they went to the pharmacy in Yolanda's VW and stopped by Fralix's house on the way. Neither Yolanda nor Katrina described them doing any drinking; indeed Katrina testified she was not drinking and saw no one drinking at Fralix's house. {R. 3737-45; 3761-72}.

James J. Gadsden (Tywan's father) testified about seeing Appellant and Hiram that evening parked in the EZ shop parking lot. Appellant gave James \$10 to buy the four pairs of gloves. While James stated he bought a beer with the change, he did not mention buying any beer for Appellant or Appellant drinking any. {R. 3957-61}.

As noted in the Statement of Facts, James Tywan Gadsden testified about spending

portions of the day with Appellant, including when he killed Kandee. Tywan first described riding in Yolanda's car with Appellant during the morning of February 16th. Back in Branchville, he noted that Appellant took a beer out of the paper bag before putting the gun in it. Tywan stated that Appellant put the gun in a trash barrel at Koger's house and left, while Tywan sat down drinking. Appellant returned at which point the previously-described argument over the gun happened. {R. 3984-90; 4031-32}.

Tywan testified that after the gun dispute was resolved, Appellant left and Tywan did not see him until 7:00 or 7:30 p.m. Tywan stated that *he* had been drinking since 1:00 p.m., that he was drinking beer and sharing a fifth of gin with "everybody", and that he was "feeling in good shape" when Appellant picked him up. However, again, Tywan testified Appellant was NOT at Koger's during the six and a half hours or so during which Tywan was drinking. {R. 3989-94; 4031-32}.

Tywan of course then described Appellant's murder of Kandee and their return to town in her car. He specifically noted he was not drinking while riding with Appellant and Kandee. {R. 4034}.

According to Tywan, after they returned Appellant stated he was going to get some beer in Yolanda's car, and that Tywan went in and bought the beer at the EZ shop. Tywan stated that they then went to Fred's house before returning to the projects. Tywan went back under the tree at Koger's – he stated Appellant left at some point with Hiram in Yolanda's car. {R. 4014-17}.

Tywan stated that later that night going to the Allen Murray Club with Appellant, Darrien, and Hiram in Kandee's car. According to Tywan, he went inside the club, but

Appellant stayed outside the entire time with Hiram. They left in Kandee's car about 2:00 a.m., and Tywan testified he laid down in the back seat because he had been drinking all day, and was "near about" drunk. {R. 4018-22}.

Hiram Johnson testified seeing Appellant at Koger's in the afternoon during the dispute over the gun, but stated he left and did not see Appellant again until that night when they went to buy gloves at the EZ store. Later, Hiram went with Appellant to the Allen Murray club, and noted they just hung around the parking lot. {R. 4058-67}. On cross, Hiram stated that some of the men were drinking when he was at Koger's house earlier that afternoon, but Hiram himself was not. {R. 4076-78}.

Travis Felder described drinking some beer at "Fred's" house after he got off work late Friday afternoon. He testified Appellant stopped by and asked him if he was going to the club before leaving. Felder went to the "Get it Get it" club, and described doing some beer drinking before going to the Allen Murray Club, where he saw Appellant in the parking lot. Felder then related how Appellant came and asked him for a ride, and how Appellant lit Kandee's car on fire. {R. 4087-92}.

Carolyn Brown also stated she saw Appellant standing outside of the Allen Murray club before she left at 2:30 to 3:00 a.m. She described Appellant sticking his head in the door and asking Travis Felder for a ride. {R. 4042-45}.

During the sentencing phase, the defense called forensic social worker Jeffrey Youngman. In describing Appellant's general social history, Youngman stated that Appellant's mother and father drank, and that Appellant started experimenting with alcohol and "stealing sips" in the 5th grade. {R. 4797}. Later, Youngman noted that Appellant's

decisionmaking structure was weakened by Appellant's mother selling drugs, Appellant's "alcohol abuse", and the fact he was selling drugs. {R. 4807}. On cross, Youngman noted that Appellant's selling of drugs affected his decision making process with regard to Kandee's murder inasmuch as he had an image to protect. Youngman did say he found the existence of substance abuse in Appellant's life. {R. 4811; 4824}.

The issue of charging mitigators based on voluntary intoxication was never raised to or ruled upon by the trial court.

B. General Rules

When fashioning a capital sentencing charge, the trial court has a duty to review all statutory instructions and instruct the jury on any circumstances which may be supported by the evidence, and not merely on those requested by the defendant. State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000). In making this determination, the trial court is concerned with only the existence of evidence at not its weight. Id.

Evidence of voluntary intoxication is a proper matter for consideration by the jury in mitigation of punishment. State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986). When there is evidence that the defendant was intoxicated at the time of the crime, the trial court should instruct the jurors on three statutory mitigating factors: S.C. Code Ann. § 16-3-20(C)(b)(2), (6) & (7) (Supp. 2000). Pierce, 289 S.C. 430, 346 S.E.2d 707. These mitigators are:

(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law were substantially impaired;

(7) The age or mentality of the defendant at the time of the crime.

If the trial court gives a specific charge on a nonstatutory mitigator of voluntary intoxication, it is not reversible error to fail to charge the three statutory mitigators. State v. Plemmons, 296 S.C. 76, 370 S.E.2d 871 (1988).

C. The issue is not preserved.

As noted before, a trial court has an independent duty to review the evidence at trial and charge any and all mitigators warranted by that admitted before the jury. Hughey, *supra*. However, this general statement does not abdicate the requirement that the defense must contemporaneously raise the issue and give the trial court a fair chance to rule upon it in order to preserve the issue for appeal – as this Court abolished *in favorem vitae* review for capital cases in 1991. See State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Indeed, Hughey cites two pre-Torrence death penalty cases in support for the proposition that a trial court has an independent duty to charge mitigators regardless of a request by the defendant – State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990) and State v. Bellamy, 392 S.C. 103, 359 S.E.2d 63 (1987). Caldwell specifically noted it was applying *in favorem vitae* review to the trial judge's failure to charge a mitigator, because no specific request was made at trial for the mitigator at issue on appeal in that case. 300 S.C. at 506, 388 S.E.2d at 823.

This case is of course post-Torrence, and there is no amorphous "statutory mitigator" exception to the contemporaneous objection rule that has somehow been the only thing to survive abolition of *in favorem vitae*. Thus, Appellant was required to raise the issue below in order to assert it on appeal. See State v. Humphries, 325 S.C. 28, 479

S.E.2d (1997) (where judge gave defense opportunity to request mitigators, and it did not, issue was not preserved for appeal).

And it is clear the present issue is not preserved. In this case, the issue of charging mitigators based on voluntary intoxication was **never** raised whatsoever at any time or in any fashion by the defense. Voluntary intoxication during commission of the crime simply was never discussed at the sentencing phase, even tangentially. While the defense halfheartedly requested a charge on mitigator (2) – mental or emotional disturbance – it virtually conceded that the record was devoid of any evidence to support such a charge. Apparently, this was because the defense as a tactical matter did not want to raise mental health issues as they would “place [Appellant] in greater jeopardy” based on “certain issues that were part of the preliminary matters” – presumably referring to the fact that the State could point out Appellant’s statement to the Hall Institute during his evaluation that Kande’s vagina was fondled after her death. {R. 350-51; 960-64; 1107; 1244}.² The judge then expressly found no evidence in the record of mental or emotional disturbance or impaired capacity, but asked the defense to point to any the court may have missed. The defense attorney responded by simply noting he wanted his client to personally hear the judge reject the mitigator. {R. 4937-40}. Moreover, the defense also did not object on this issue at the end of the judge’s sentencing phase charge. {R. 5046-49}.

Therefore, Appellant’s present issue was not raised below and is not preserved for

² Appellant made similar claims to Orangeburg County Sheriff in part of a particular statement that was ultimately excluded by the trial court. {R. 350-51; 374-77; 418-19; 1353-54}. Thus, having won that battle, the defense obviously did not want to lose its benefit by opening the door to the same information for use by the State. Indeed, the defense had a number of mental health experts on its witness list for the sentencing phase, but did not call any of them other than a social worker. {R. 4576-79}.

appeal. See State v. Johnson, 333 S.C. 62, 508 S.E.2d 29 (1998) (to preserve for appeal a request for a jury instruction, the party must object before the jury retires); Rule 20, SCRCrimP (requests for instructions must be submitted at the close of evidence, and parties must object to instruction issues before the jury retires; failure to do so constitutes a waiver).

D. Since there was absolutely no evidence that Appellant was actually intoxicated at the time of the crimes, there was no reversible error.

Even if a request was made, there was no evidence in the record of intoxication to justify charging the three mentality mitigators. In his brief, Appellant essentially tries to create sufficient evidence from two sources – testimony that some other folks were drinking the day Kandee was murdered, combined with general mitigation testimony that appellant and his family have a *history* of substance abuse or alcohol use.

However, such evidence of is patently insufficient to justify the charge under this Court's precedent. In State v. Drayton, 293 S.C. 417, 361 S.E.2d 329 (1987), the defendant pointed to evidence that his confession stated he drank alcohol on the night of the murder, as well as that he drank beer at the convenience store where the victim was abducted. The Court held that such evidence did not require charging of the three mitigators, as such evidence was NOT evidence that the defendant was *actually intoxicated* at the time the crime was committed. Similarly, in State v. Humphries, 325 S.C. 28, 479 S.E.2d 52 (1997), the Court found insufficient evidence to justify the diminished capacity mitigator where the only evidence was the defendant's statement that he and his accomplice were drinking beer the night before the early morning robbery.

In contrast, this Court has required the instructions where there was evidence either

generally that the usage was extremely heavy or specifically that the defendant was intoxicated. See State v. Young (evidence that defendant and his companions were drinking heavily on the night of the murder); State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986) (defendant was extremely intoxicated, smoking marijuana, and injecting drugs during the crimes).

Here, not one person testified Appellant was intoxicated at the time of the crime or any other time. Indeed, no one even specifically testified that Appellant drank as much as one beer. While Appellant relies much on the fact that Tywan testified *he* was drinking all day at Koger's house – and “near about” drunk by the time he went with Appellant to the Allen Murray club a few hours *after* the murder, at no time did Tywan actually describe Appellant actually drinking anything, much less acting or behaving in an intoxicated manner. The most Tywan stated was that Appellant had a beer in a bag at some point early in the afternoon, and that Appellant went to get some unspecified quantity of beer at the EZ shop *after* he had killed Kandee. {R. 3985; 4016}.

Further, Tywan stated that he was not even around Appellant during most of the afternoon – as following the spat over Appellant's gun, Appellant left, and Tywan did not see him again until 7:00 or 7:30 p.m. {R. 3990-91}. This is confirmed by the testimony of Yolanda, Katrina, and Eddie Waters, who described the event that afternoon where Appellant threatened Kandee from the back seat of Yolanda's car as they rode to the pharmacy. Neither Yolanda, Katrina, or Eddie described Appellant doing any drinking during this time.

Moreover, while Appellant bought some beer and later went to the Allen Murray club

after the murder had been committed, by all accounts he remained outside in the parking lot the entire time – and no one described him as either drinking or intoxicated. Aside from the fact that this was after the crime was committed, and thus hardly relevant to the mitigator anyway, there is nothing to indicate either heavy consumption or intoxicated behavior or characteristics. Similarly, Travis Felder never described any intoxicated behavior or drinking by Appellant when they went to fire Kandee's car.

Since there was no evidence that Appellant was engaging in heavy consumption or was actually intoxicated at the time of the murder, there was no reversible error even though the mitigators were not charged.

II. THERE WAS NO REVERSIBLE ERROR FROM THE SOLICITOR'S BRIEF AND LIMITED QUESTIONING AS TO RECREATION AVAILABLE IN PRISON, WHERE THE ISSUE IS NOT PRESERVED. IN ANY EVENT, THE QUESTIONING WAS APPROPRIATE RESPONSE TO DEFENSE EVIDENCE ABOUT THE HARSHNESS OF LIFE IN PRISON AND EMPLOYMENT REQUIREMENTS THEREIN, AS WELL AS INDEPENDENTLY RELEVANT AS SPECIFICS TO CHALLENGE THE DEFENSE EXPERT'S GENERAL ADAPTABILITY OPINION AND TO PLACE PERMISSIBLE RETRIBUTIVE CONCEPTS BEFORE THE JURY.

Appellant next contends the trial court erred in allowing the solicitor to briefly question defense prison adaptability expert James Aiken on educational and recreational activities available to a prisoner in general population. He asserts that this Court has repeatedly held in older cases that conditions of confinement are irrelevant to the jury's determination, and further argues that because conditions of confinement are beyond his control, he had no opportunity to explain or deny this information. However, the issue is not preserved as it was never raised to the trial court. In any event, the defense opened the door to such questioning by eliciting testimony about the harshness of life in prison without parole, as well as evidence of employment opportunities in prison. Moreover, limited questioning about conditions of confinement is independently relevant as permissible specifics the State needs to be able to explore in order to effectively cross-examine the defense expert's general opinion on adaptability. Finally, given that the United States Supreme Court and the state legislature have made future events relevant in a sentencing proceeding, and capital defendants fundamentally argue life without parole not in response to future dangerousness but solely as the proper retribution, it is only fair that the State be allowed limited information on conditions of confinement to aid the jury's determination of retributive concepts as to the appropriate punishment for the defendant's crimes.

A. Events at trial

As noted before, during its sentencing phase case the State only presented the two victims of Appellant's prior crimes, the SLED arson agent, the pathologist, and two victim impact witnesses. {R. 4652-4708}. The State presented no witnesses or information as to any of Appellant's misbehavior in or lack of adaptability to prison.

On the other hand, the defense's third witness was Margaret Baughman, an adult education teacher at the jail where Appellant spent his pre-trial confinement. This teacher stated that Appellant had been taking her classes in jail for fourteen to fifteen months, and eventually became her reliable and trustworthy teacher's assistant. {R. 4761-65}. On redirect, Appellant elicited that there are limited educational opportunities available for inmates, and Appellant made him self available for any class. {R. 4767}.

Appellant next called James Aiken, a former state corrections official and corrections consultant, who was qualified as an expert in future danger and prison adjustment issues. On direct, Aiken testified Appellant would *never* leave prison until he was dead. According to Aiken, Appellant'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. {R. 4838-4845}.

On cross, Aiken testified extensively without objection relevant to this issue on the various security levels of custody an inmate can achieve. 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. {R. 4854-4862}.

On redirect, *the defense* elicited that Appellant 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". *The defense* then elicited the dimensions of a supermax cell. *The defense* then asked Aiken what productive endeavors were available for Appellant in prison, to which Aiken replied that Appellant could "pay back society" and "do something for himself" by working in such areas as food service, maintenance, or painting. *The defense* asked Aiken if Appellant was going to be "molly-coddled", and elicited that Appellant could get involved with the Scared Straight program. {R. 4864-68}.

On re-cross, the prosecutor asked about escapes, to which the defense objected. Outside the presence of the jury, the court sustained the defense objection to the questioning on escape, but declined the motion for a mistrial. 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 Appellant was not going to "kiddy camp" and would have work available. The trial court agreed, to which the defense only stated, "We're on recross, Judge". The judge replied that work situations was an issue certainly before the jury "at this point". {R. 4869-76}.

Following a curative charge by the judge as to the escape question, the prosecutor elicited from Aiken that (1) Appellant 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". While Aiken again noted Appellant would be around very dangerous people, he stated Appellant could have access

to libraries, television, football, and softball. There was no defense objection to any of this testimony. {R. 4877-81}.

Appellant next called jail guard Sharon Branch, who stated that while Appellant displayed some "attitude" and had a recent difficulty with authorities over going to church, he never made her feel physically threatened. The defense elicited that Appellant was allowed "one hour of rec per day", but that sometimes the guards extended that. {R. 4882-88}.

Finally, jail guard Enrique Badillo testified that Appellant displayed a very polite and cooperative attitude in jail. {R. 4902-05}.

B. The issue is not preserved.

On appeal, Appellant argues that the solicitor's questioning about movies, television, and books was irrelevant under this Court's decision in State v. Plath, 281 S.C. 1, 313 S.E.2d 619, 627 (1984), and violative of the constitutional due process mandate in Gardner v. Florida, 430 U.S. 349 (1977) that a death sentence cannot be based "on information the defendant had no opportunity to deny or explain".

However, the present issue is not preserved as it was never raised to the trial court. While Plath was discussed, the *solicitor* only mentioned Plath, and only in the context of *supporting* his questioning of Aiken on inmate escapes. After the judge ruled the escape question was inadmissible, the solicitor requested to go into "certain conditions of the general population, the work conditions [Appellant has] already gotten into". The defense never once made any argument or objection on this "conditions of confinement" issue other than to say "we're on recross, Judge". {R. 4873-74}. Moreover, the defense never made

one objection when the answers were actually elicited before the jury.

Of course, a party cannot argue one ground below and another on appeal, and any argument, even constitutional, must be specified to the trial court in order to be preserved for appeal. See, e.g. State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997) (party cannot argue one ground at trial and then another on appeal); State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1997) (failure to specify grounds waives issue on appeal); State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996) (8th Amendment claim that parole eligibility should have been charged was not preserved because that constitutional basis was not asserted at trial); Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939) (issue must be raised to and ruled upon by trial judge to be preserved for appeal).

Here, the present grounds for relief on appeal were not specified to the trial court. Indeed, the only argument made was "we're on recross, Judge", which at best can only be construed as a procedural objection that the solicitor was impermissibly attempting to introduce new matter on a re-cross examination. It certainly is not an objection or argument that such questioning was not relevant under Plath, or was a constitutional due process violation under Gardner. As such, the issue is not preserved.

Moreover, while the solicitor requested to go into "certain conditions of the general population, the work conditions he's already gotten into, that area" {R. 4874}, he ultimately asked questions about recreation outside the subject of in-prison employment. There was no contemporaneous objection. As such, any contention with regard to subject matter outside of work is not preserved.

C. State v. Plath in view of modern developments in capital sentencing phase law on future adaptability to prison and life without parole.

As will be seen, the solicitor's limited questioning was permissible under the precedent of this Court. Indeed, the case Appellant refers to as most supporting his position in fact most supports admission of the challenged questioning due to Appellant's opening of the door – State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984). However, changes in the law since Plath make the questioning no longer prohibited under the general principles expressed within it.

Plath 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. The 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 entirely 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 state's 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:

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, the Court very strongly 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 improperly "invite[d] 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.

The Plath Court went on to note that while psychiatric testimony of future dangerousness was permissible, it had held that future adaptability to prison evidence was not – a conclusion subsequently overruled by the United States Supreme Court in Skipper v. South Carolina. Only in the context of justifying this distinction, 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.

Despite these admonitions, the Plath Court returned to how the State's challenged

questioning was only proper response to what that Court considered at the time 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).

Plath thus addressed a number of issues arguably relevant to the case at bar – but Plath also was issued prior to the United States Supreme Court's decisions in Skipper v. South Carolina, 476 U.S. 1 (1986), which essentially held that due process required admission of prison adaptability evidence, and the line of cases following Simmons v. South Carolina, 512 U.S. 154 (1994), which has ultimately led to the point where every capital jury is now informed a life sentence is without the possibility of parole. Indeed, in 2002, the Legislature provided that upon request of a party any capital jury should be informed a life sentence is without the possibility of parole, which this Court has stated should be charged in every case regardless of request. State v. Shafer, 352 S.C. 191, 573 S.E.2d 796 (2002) (discussing S.C. Code Ann. § 16-3-20 (Supp. 2001) and Kelly v. South Carolina, 534 U.S. 246 (2002)).

With these developments in mind, it is clear that not only was the State's

questioning proper response to defense testimony on the harshness of life in prison under Plath itself, but it is now also independently relevant and admissible to explore the adaptability case, as well as to rebut it with retributive themes, under the present state of the law.

D. The defense opened the door to the solicitor's limited questioning about conditions of confinement by first eliciting testimony about the harshness of life in prison as well as presenting evidence about employment opportunities in jail.

As an initial matter, the defense opened the door to the solicitor's questioning – consistent with Plath – by eliciting testimony about the harshness of life in prison as well as bringing out employment opportunities available to Appellant.

During James Aiken's direct testimony, he stated Appellant would be "incapacitated" and "lock[ed] up" for the rest of his life, with guards "that know how to use weapons", and behind fences, gun towers, concrete, and bars. {R. 4842; 4845}. After the solicitor's cross, in which he did not specifically ask about conditions of confinement other than various security classifications, the defense elicited that the guards could use "lethal force", and Appellant could be further prosecuted for any violations in prison. At this point, the defense asked whether a life sentence would be "kiddy camp", whether Appellant would get "picnic lunches", that he would live the rest of his days amidst a predatory and dangerous community of inmates, and that he would not be "molly-coddled" by the prison authorities. {R. 4864-66}.

Given this defense-elicited evidence of the harshness of prison, in which Appellant not only starkly discussed the severe security regime as well as very pointedly used terms as "kiddy camp", "picnic lunches", and "molly-coddled", it was only appropriate that the

State be entitled to respond by showing that Appellant would have opportunities for recreation if sentenced to life – that “life imprisonment was not the total abyss which [the defendant] portrayed it to be”. Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28. As this Court has stated, “[b]oth the accused and the State are entitled to a fair trial.” State v. Woomer, 278 S.C. 468, 472, 299 S.E.2d 317, 319 (1982). It is simply not consistent with a level and fair adversary system for the defense to be able to freely display all the negative consequences or aspects of a lifetime behind bars, without the State being able to respond in a limited fashion by eliciting some of the small comforts or enjoyments even a LWOP defendant will experience – such as TV, reading, or even a point not brought up by the solicitor in this case – visitation by family or friends.

Moreover, the defense elicited prior to the solicitor’s examination from both Baughman as well as Aiken that employment and educational opportunities available to a defendant behind bars. Like recreation, these opportunities undoubtedly can be a source of distraction from the rigors of prison life as well as a source of personal fulfillment; thus, it was only fair – and indeed certainly not prejudicial given the work evidence already elicited – that the State be allowed to also bring out in a limited fashion some other recreational activities available to inmates aside from work and education.³ Further, Aiken also very pointedly stated on cross that every inmate would be required to work, and that an inmate would be put in “supermax” if he refused. This was followed up on by the

³ See generally 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).

defense in redirect. {Tr.4862-63; 4866-67}. It was only appropriate that the State point out an inmate would have time for recreation, too – not that he would be breaking rocks all day every day “at hard labor”.

Finally, on cross when asked what motivation a life without parole inmate had to comply with the rules, Aiken stated that SCDC’s only business was incapacitation of life without parole inmates, because they are not preparing such an inmate for release. {R. 4861}. It is only fair for the State to be able to rebut the obvious inferences from these statements by showing that SCDC does not merely incapacitate – it does allow life without parole inmates recreation and education.

There was no error.

E. Limited questioning on conditions of confinement is warranted for the solicitor to effectively explore details and specifics behind the general opinion of adaptability offered by the defense expert.

As noted before, at the time of Plath, this Court excluded evidence of the defendant's future adaptability to prison. However, after Skipper, that issue is central to virtually every modern capital sentencing proceeding – especially in this case, where Appellant specifically called a former senior corrections official to testify Appellant could be safely and easily maintained by the prison system.

However, the defense should not be entitled to simply present an expert to generally testify to a defendant's purported adaptability in our prison system without specific inquiry into the details behind such an opinion. Along these lines, relevant to future adaptability are limited questions as to with whom the defendant will be interacting, and what exactly he will be doing during the course of his incarceration. Consistent with Plath – inasmuch

as the Court held inquiry into another's escape attempt was "proper as a test of the information upon which the witness based his opinion" – the State should be entitled to explore the expert's opinion of adaptability by asking in a limited fashion about the various conditions the inmate will experience. Plath, 281 S.C. at 13, 313 S.E.2d at 626. See also State v. Plath 277 S.C. 126, 284 S.E.2d 221 (1981) (Plath I) (proper for solicitor to "inquire into the source of information upon which [the expert's opinion against the death penalty] was based").

Without the ability to explore the specific aspects of an inmate's future experiences within prison, cross-examination to challenge the expert's opinion about adaptability would be essentially meaningless. See generally Rule 705, SCORE (permitting the disclosure and exploration during cross-examination of the facts and data relied upon by an expert in reaching his ultimate conclusion). Indeed, the whole question of a determination of adaptability to prison specifically involves what exactly an inmate will be doing during his incarceration, and with whom he will be doing it with. A general opinion of adaptability unchallengeable by those specifics is not consistent with the level playing field contemplated by our adversary system.

Such questioning does not need to include "how often [an] inmate will take a shower" – and of course the solicitor here never approached such irrelevant detail. But once the defendant asserts he will easily adapt to the realities of life in prison, the state should be entitled to explore exactly what those realities are – whether they be security, educational, vocational, or recreational.

F. Limited information on the conditions of confinement in a life without parole sentence is necessarily and inevitably relevant to the jury's consideration of retributive concepts in its sentencing determination.

Appellant of course relies heavily on Plath's express preference for a simple "either/or" choice between life and death, independent of any consideration of "time, place, manner, and conditions of execution or incarceration". Plath, 281 S.C. at 14-15, 313 S.E.2d at 627. However, as noted before, Plath also noted it believed evidence of future adaptability should be excluded as part of the simple "either/or" choice, but that restriction was abolished by the United States Supreme Court in Skipper. Further, while the State and this Court used the simple "either/or" argument to justify plain and ordinary meaning charges in the Simmons line of cases culminating with Kelly v. South Carolina, 534 U.S. 246 (2002), the United States Supreme Court nullified that restriction as well. Finally, by mandating an instruction, the legislature has made the actual length of sentence a relevant consideration in every case regardless of considerations of future dangerousness. See State v. Shafer, 352 S.C. 191, 573 S.E.2d 796 (2002) (discussing S.C. Code Ann. § 16-3-20 (Supp. 2001)).

Thus, the simple "either/or" choice contemplated by Plath and its language has been entirely shattered, as juries already now consider aspects of the defendant's future life after trial with issues of adaptability in prison and the actual indeterminate length of sentence.⁴

⁴ Given that during litigation of the Simmons/Kelly lines of cases before the United States Supreme Court the State relied on this Court's express preference for a simple "either/or" choice in which the jury is not to be concerned with what happens after sentence, it is interesting that the defense bar apparently wanted to abandon Plath when it benefitted them in the life without parole litigation, but invoke and revive the *very same passage and principle* today when it suits them.

Moreover, it is a fallacy to think that capital defendants argue the actual indeterminate length of life without parole sentence to the jury only in the context of a Simmons-style rebuttal to prosecution claims of future dangerousness. Like this case, *far more often* the defense simply argues that the "without parole" portion of a life sentence makes it sufficiently severe enough punishment to be appropriate retribution for the crimes, without the need to impose death. See {R. 4982} (defense derisively refers to prosecutor's argument as "reward-a-prison"); {R. 4991} (defense states its "easy to try to paint prison as a reward", and argues: "The line forms back there if anybody wants to spend the rest of their life behind bars."); {R. 4991} (defense argues it is "wrong" and an "injustice" if the jury thinks a life sentence is a "reward"); {R. 4996-97} (defense implies that a life sentence is worse than death for a person as young as Appellant, and argues "Can you imagine spending from the years of the youngest person on the jury until the oldest person on the jury behind bars? That's a life sentence without the possibility of parole."); {R. 4997-98} (defense argues that jury should give Appellant life so that he would have to remember what he did to Kandee for the rest of his days); {R. 5005-06} (defense argues that prison is a dangerous place, and prison is appropriate punishment for Appellant because it is a death sentence too).

Given that this is really how life without parole is used by the defense, how could it possibly be fair that the State then not be allowed to rebut this argument with accurate but limited information about the positive things Appellant will be able to enjoy in general population? Retribution is of course one of the two primary justifications for the death penalty, see generally Gregg v. Georgia, 428 U.S. 153, 183 (1976), and the State should

not be precluded from offering rebuttal evidence *directly* relevant to that most important and legitimate consideration.

Moreover, this Court has approved as relevant victim impact evidence argument that the victim's family could only see him at the grave, made after the defendant's sister testified she would visit him in prison at Christmas. State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991). While this ruling was based in application of the approval of victim impact evidence in Payne v. Tennessee, 501 U.S. 808 (1991), there is no question that such permissible argument at least implicitly also speaks to the insufficient retribution of a life sentence.

The whole point of Simmons and its progeny was that the jury be given accurate information to make its choice between life and death. Given the predominant relevance of retributive considerations to this determination, the jury should also be given limited and reasonable information towards the issue that is necessarily part of every jury's capital sentencing determination – whether a life sentence is in fact sufficient retribution for the grave crimes that the jury has already determined the defendant committed. If we are no longer to indulge in the fiction that juries do not consider the actual length of confinement when assessing a life sentence, we should also no longer tolerate the fiction that juries do not expressly consider the retributive sufficiency of a life sentence in deciding whether or not it is appropriate punishment. Indeed, the defense expressly asks them to – but Appellant wants to be able to do so without fair and equal time on the issue for the State.

Along these lines, and especially when a defendant calls a witness like Aiken to testify to the severe incapacitation of a life sentence in the South Carolina Department of Corrections, the State should be able to simply point out in limited evidence and argument

that while life imprisonment may be bleak, a defendant will still get to enjoy recreation, employment, education, and visitation. It is nothing but the truth, and we all know juries think about this anyway.⁵

⁵ Nor would there be any due process problem under Gardner v. Florida, 430 U.S. 349 (1977), that a death sentence cannot be based "on information the defendant had no opportunity to deny or explain". Within reason, Petitioner could explain anything about prisons he wanted -- indeed, it was *his* expert on prison management that first broached the subjects, and his expert who kept painting life imprisonment harshly. Neither would there be an issue under State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000), inasmuch as Appellant has no control over the circumstances of his incarceration. The system is the system, and now that the United States Supreme Court and the state legislature have made future events pertinent in a sentencing proceeding, the system is relevant as to what is appropriate retribution for the crimes. Appellant simply cannot be allowed to make his arguments about future events without allowing limited fair response by the State.

III. THE TRIAL COURT'S CURATIVE INSTRUCTION WAS MORE THAN SUFFICIENT TO CURE ANY PREJUDICE FROM THE SOLICITOR'S ONE UNANSWERED QUESTION ABOUT ESCAPE, ESPECIALLY WHERE THE QUESTION WAS PROPER ANYWAY GIVEN THAT ONE OF THE DEFENSE EXPERT'S MAIN POINTS WAS THAT SCDC COULD SAFELY AND EASILY INCAPACITATE APPELLANT FOR THE REST OF HIS LIFE.

Appellant next contends that the trial court erred in refusing to grant a mistrial when the solicitor asked defense corrections expert about escape from prison. He asserts that escape is a speculative matter beyond his control, and that there was no evidence linking him personally to any escape. He further contends the trial court's curative instruction was insufficient to cure any prejudice. However, not only was the curative instruction sufficient, but there can be no reversible error as the questioning on escape was admissible and proper anyway.

A. Events at trial

Much of James Aiken's testimony has already been described in the preceding section. He testified that as a former senior corrections official, he had classified "thousands" of inmates, placing them "in the right level of security and the right level of management". {R. 4835}. Aiken continued that the nature of Appellant's offense gave him no pause in classification, because he has dealt with people who have committed heinous crimes for 30 years, and he puts "a very high level of priority on that person's community behavior in relationship to protection of the public". {R. 4839-40}.

Aiken then stated without equivocation that Appellant would never leave prison if given life without parole. He then testified that Appellant could be easily and adequately maintained and incapacitated by SCDC for the rest of his life, as SCDC has "fences", "gun towers", "people who know how to use weapons". According to Aiken, SCDC knows "how

to lock people up and keep them there for extended periods of time". {R. 4842}. Aiken stated he "no reservations whatsoever" in saying that Appellant would "adapt to future prison", even knowing his sentence was without parole. {R. 4844}.

Finally, Aiken very strongly and without reservation concluded:

[Appellant] would be kept behind bars, behind fences, behind bars, behind concrete, and he would be adequately managed in a security setting for the remainder of his life because of his behavior in the community. And that the system can adequately manage him. And that I have classified thousands on inmates in this type of situation where they have inflicted violence upon people, the have violated the laws of this jurisdiction.

{R. 4845}.

On cross, Aiken asserted no matter what custody assignment an inmate works into he will still be watched by gun towers, that lethal force could be used against the inmate, that an inmate "can't beat the system", and that the system could manage any type off conduct the individual demonstrates. {R. 4857-58; 4863-64}.

On redirect, Aiken stated that a life without parole inmate could not work outside the prison, and is subject to lethal force and prosecution for any misbehavior. {R. 4864-66}.

On recross, Aiken reasserted that Appellant would never get out prison. The prosecutor then asked how many inmates escaped during Aiken's tenure with SCDC, at which point the defense objected, stating that the jury has been told all he will receive is life without parole.

After the jury was excused, the prosecutor argued that since Aiken had testified Appellant would never get out of prison, cross-examination on escape was permissible under State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984) – which allowed questioning on another inmate's escape attempt was relevant to test the credibility of a social scientist who

testified about conditions of life imprisonment. The solicitor noted that the door was opened when the defense mentioned "kiddy camp" and "supermax". {R. 4870-71}.

The trial court reviewed the Plath case, and concluded – wrongly – that the inquiry on escape was allowed only because Plath himself was an escapee when he committed the offenses in that case.⁶ {R. 4870-72}.

The defense then argued that a curative instruction would only reemphasize the issue to the jury, and that inquiry into the possibility of escape would violate the United States Supreme Court's and this Court's ruling that a jury should only consider life without parole as meaning exactly what it says. The prosecution again responded that the Alken repeatedly referred to the security measures of SCDC and gave the impression no one escapes – when in fact people escape "on a halfway frequent basis" from every prison in the state. The trial court ruled the questioning on escape was simply not going to be allowed. {R. 4872-74}.

The defense then moved for a mistrial, arguing that a curative instruction was insufficient to remove the supposed taint. The court proposed a curative instruction, and offered to let the defense add anything to it, which it declined. The jury then returned, to which the trial court gave the following instruction:

⁶ The challenged questioning in Plath was when the solicitor there asked a professor, who had testified about the superiority of life imprisonment to the death penalty, about "a particular inmate who had escaped while serving a life term". The Court held the question was permissible to test the credibility and sources of information upon which the professor had based his opinion. Plath, 281 S.C. at 12-13; 313 S.E.2d 619 at 626. As the first Plath decision makes clear, though, this incident involved one Lewis Bostick, a person entirely unrelated and unconnected with the Plath and Arnold. State v. Plath, 277 S.C. 126, 140, 284 S.E.2d 221, 228-29 (1981) (Plath I).

Ladies and gentlemen, there was a question that was asked before you left and I have ruled that question was not proper and I'm going to ask you to disavow it from your minds for this reason: There are two sentences that you will concern yourselves and we're going to have an opportunity during my charge to talk about them at great length, but for this moment I will tell you, and I think I am reminding you based on the instructions that you have received even preliminarily, but there are two sentences that you will concern yourselves. One, the death penalty, and the other is life imprisonment without the possibility of parole. The Statute says until the death of the defendant. Those would be the two sentences that you will concern yourselves.

{R. 4874-77}.

B. Given that the witness did not even answer the question and the jury knew a lawyer's questions were not evidence, the trial court's sustaining of the objection and immediate and thorough curative instruction was more than enough to prevent any reversible error.

As an initial matter, there was no reversible error as the trial court sustained the defense objection and immediately gave a curative instruction directed right at the issue.

Generally, a trial court's curative instruction is deemed to have cured any error. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998). An instruction to disregard incompetent evidence is usually deemed to have cured the error unless on the facts of the particular case it is probable that, notwithstanding the instruction, the accused was prejudiced. State v. Smith, 290 S.C. 393, 350 S.E.2d 923 (1986). Moreover, a mistrial should only be granted when absolutely necessary, and the defendant must show both error and resulting prejudice. State v. Harris, 340 S.C. 59, 530 S.E.2d 626 (2000).

In applying these rules, this Court has repeatedly found curative instructions sufficient to cure any prejudice from improper admission of evidence or improper argument, including in an analogous situation where the time period for parole eligibility was mentioned in a capital sentencing phase. See State v. Plath, 277 S.C. 126, 140, 284

S.E.2d 221, 228-29 (1981) (Plath I) (finding no prejudicial error where trial court told jury not to consider parole after the twenty year eligibility requirement was mentioned in a codefendant's argument). See also Gill v. State, 346 S.C. 209, 552 S.E.2d 26 (2001) (curative instruction cured any possible prejudice from prosecutor's statement that "there is no defense to this case", where the jury was instructed that the defendant did not have to demonstrate his innocence and the failure to testify could not be considered); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997) (question regarding post-arrest silence was nullified by curative instruction to disregard the evidence and not consider it for any purpose); State v. Simmons, 352 S.C. 342, 573 S.E.2d 856 (Ct. App. 2002) (curative instruction sufficed where trial court granted directed verdict as to one crime and instructed jury not to consider it any longer).

Here, the curative instruction was more than sufficient. First, the witness *never* answered the question, as the objection came quickly and the issue was resolved against the State. Thus, there was no actual admission of any incompetent evidence. Moreover, the jury was repeatedly informed that what the lawyers said in argument or questioning was not evidence. {R. 3636; 3641}.

Second, the challenged question only mention other inmates in SCDC – it did not in any way refer to Appellant *specifically*. Thus, any negative aspersions as to him were muted, and any possibility of prejudice is remote.

Third, the curative instruction was given immediately after the jury returned – so the temporal connection of the instruction to the question certainly assures it had the desired effect. Cf. State v. Reid, 324 S.C. 74, 79, 476 S.E.2d 695, 696 (1995) (curative instruction

insufficient in part because it was given at the end of the case), overruled on other grounds by State v. Watson, 349 S.C. 372, 563 S.E.2d 336 (2002)

Fourth, the instruction was thoroughly complete and aimed directly at the heart of the matter. It: (1) told the jury the question was improper, (2) told them to remove it from their minds, and (3) the only things they could consider were death and life without parole. {R. 4877}. This was not just some "general remark". See State v. Smith, 290 S.C. 393, 350 S.E.2d 923 (1986) (casual remark to "forget" the evidence was insufficient).

C. Given that life without parole is now an issue in every case, the possibility of escape is independently relevant to explain the realities of such a sentence.

In any event, there can be no reversible error because the trial court erred in ruling that the solicitor's questioning about escape was no proper.

As noted before, the United States Supreme Court, this Court, and the state legislature have opened every capital sentencing proceeding to information that the defendant will never receive the possibility of parole if sentenced to life. State v. Shafer, 352 S.C. 191, 573 S.E.2d 796 (2002) (discussing S.C. Code Ann. § 16-3-20 (Supp. 2001) and Kelly v. South Carolina, 534 U.S. 246 (2002)).

However, the United States Supreme Court has also noted that a life without parole instruction may be of "uncertain materiality, as it may be overcome if a jury concludes the defendant . . . may escape to murder again". Ramdass v. Angelone, 530 U.S. 156, 170 (2000).

These changes in the law have gradually made future events a central focus of a sentencing proceeding – and thus the possibility of escape is now independently relevant

as at least a subject of argument in any case. Moreover, there need not be any "nexus" of prior escape attempts by the particular defendant before the issue is broached – since the future length of confinement is now a relevant and mandatory issue in every capital case, then the very real possibilities that might happen during those future years are also relevant. Of course we do not know exactly what any particular defendant will do during that time – but that is no reason to hamstring the State in merely pointing out the truth – that life in prison is not an absolute be-all-to-end-all, and that people can and do escape. It is simply to explain to the jury the realities of what they are being charged. The whole point of the Simmons/Kelly case law is no longer to indulge fictions before the jury, and there is no reason to indulge ones where the truth would benefit the State or rebut defense points, simply because that is what it happens to do. See Gregg v. Georgia, 428 U.S. 153, 204 (1976) ("It is desirable for the jury have as much information as possible when it makes its sentencing determination.").⁷

D. Even if the possibility of escape is not independently relevant in every case, the defense certainly opened the door here during the adaptability case by extensive testimony from its expert as to the incapacitive capabilities of SCDC.

The defense's adaptability case more than opened the door to questioning about past escapes from SCDC. As noted before, defense corrections expert Aiken confidently

⁷ In his brief, Appellant contends that this Court mandated that the possibility of escape is only admissible when it has a direct nexus to the defendant's conduct in State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982). This is incorrect. Woomer merely held that evidence of the defendant's prior escape was admissible to rebut defense evidence of good conduct in prison. Nothing was said about a required nexus, and, of course in modern practice actual escape evidence would be flatly admissible in the prosecution's case in chief without question not as rebuttal evidence but evidence of the defendant's character and characteristics.

stated *without any qualification whatsoever* that SCDC could completely incapacitate and secure Appellant for the rest of his life. No problem at all – he repeatedly referred to fences, bars, concrete, gun towers, lethal force, and guards. Aiken stated this conclusion was expressly based on his experience doing security classifications of “thousands” of prior inmates, and his long prior service with various prison systems, which of course also involved inmates other than Appellant. {R. 4833-36}.

It seems only fair that the State could quite reasonably challenge this confident and unqualified opinion by asking how many of Mr. Aiken’s inmates escaped – or also how many have escaped from the particular system in which he already placed such unequivocal confidence before the jury. Moreover, since Mr. Aiken based his assessment on his past experiences with other inmates, the State can legitimately ask about these other inmates.

Like in the preceding ground, the State is entitled to ask the expert about specific facts and data that might challenge or undermine his general conclusion. Otherwise, cross-examination is meaningless. Appellant through his expert brought up prison security, and the *main point* of Aiken’s testimony was to assure the jury that Appellant would in fact be safely contained until he died of natural causes. It is only fair that the State be able to respond by pointing out the truth – that despite best efforts, inmates can and do escape. This is entirely consistent with this Court’s prior precedent. See State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984) (permissible to ask expert witness, who testified regarding conditions of life imprisonment, about a prior escape attempt by another inmate as a test of the sufficiency of the information upon which the witness based his opinion, as well as

his credibility as a social scientist).

Appellant wants his life without parole charge, but does not want to allow the State to go into things that the United States Supreme Court has said are directly relevant to the materiality of such a charge. Appellant wants to present evidence on SCDC's incapacitative capabilities, but does not want the State to be able to simply point out that these capabilities are not absolute and foolproof. For each of these points, one is part and parcel of the other.

The State is entitled to a level playing field and equal time, too.

IV. THIS COURT HAS ALREADY RULED THREE TIMES THAT *RING v. ARIZONA* DOES NOT DEPRIVE A TRIAL COURT OF SUBJECT MATTER JURISDICTION EVEN THOUGH THE AGGRAVATING FACTORS WERE NOT ALLEGED WITHIN THE INDICTMENT.

Appellant next contends the trial court lacked subject matter jurisdiction to sentence him to death because the murder indictment did not also allege aggravating circumstances. He asserts that following the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), aggravating factors are now "elements" of the crime of capital murder.

This Court has already rejected this contention or similar ones in three recent cases, and the State would incorporate those its results and its arguments therein here. *State v. Crisp*, 362 S.C. 412, 608 S.E.2d 429 (2005); *State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004); *State v. Wood*, 362 S.C. 135, 607 S.E.2d 57 (2004).

Appellant's aggravators were found beyond a reasonable doubt by his jury. There is no state subject matter jurisdiction problem from something that would not even be a federal constitutional problem under *Ring* anyway.

V. THERE WAS NO REVERSIBLE ERROR IN ADMISSION OF APPELLANT'S PANTS AND THE VICTIM'S WATCH FOUND WITHIN THEM AT THE TIME OF HIS ARREST, WHERE THE ISSUE IS NOT PRESERVED, THE PANTS WERE SEARCHED INCIDENT TO A LAWFUL ARREST PURSUANT TO A VALID WARRANT, AND THE SEARCH WAS IN ANY EVENT JUSTIFIED BY CONSENT FROM APPELLANT'S WIFE.

Appellant next contends that the trial court erred in admitting his pants and the victim's watch found within when he was arrested at his wife's trailer on the morning after the murder. He asserts that his wife did not consent for police to enter, that he had an expectation of privacy, and that he was illegally arrested. However, the issue is not preserved inasmuch as the objection was not renewed upon introduction of the evidence. In any event, the pants were searched incident to a lawful arrest based on an outstanding arrest warrant, and in any event the search was justified by the consent of Appellant's wife.

A. Events at trial

Extensive pre-trial hearings were held in this case not only on this issue but also the admissibility of Appellant's statements to police.

It first should be noted that while the town of Branchville where Appellant was arrested is in Orangeburg County, the body was found in Dorchester County. {R. 979; 5076-77}.

At the pre-trial hearings, Dorchester County Sherriff's Deputy Terrence Van Doran testified about accompanying other officers to the trailer of Ms. Dorothy Bowman. He testified he had spoken to the Chief of the Branchville Police and was told there was an outstanding Orangeburg County arrest warrant on Appellant. Van Doran stated that after they found Appellant hiding behind a bed, he was Mirandized and Appellant asked for his pants. Dorothy went into the other room and got the pants, but before she could give them

to Appellant, Van Doren searched them. Inside he found a lady's wrist watch identified at trial as belonging to the victim. {R. 5076-81; 5085-88; 5177; 5187}.

Dorchester County officer Alvin Coker similarly testified that after they received information Appellant was with the victim the previous afternoon, they found out from Orangeburg County that there was a warrant on Appellant. He never saw the warrant physically, but Branchville Chief Walters told Coker he was aware of it. {R. 5124-25}. Coker also noted they had a signed consent to search form from Dorothy. {R. 5127}.

Chief Walters of the Branchville Police testified that he was aware of and had a copy – but not the original – of Appellant's Orangeburg arrest warrant for receiving stolen goods. He stated he went with the other officers to Dorothy's trailer, and knocked on the door. They told Dorothy they had a warrant for Appellant, and she invited them inside. Dorothy said she did not know where Appellant was but the officers could look around. Once they found Appellant, he was told he was under arrest for receiving stolen goods. {R. 320-23; 325-31}.

Willie Bamberg of the Orangeburg-Calhoun Regional Detention Center testified that Appellant was booked in that night on a receiving stolen goods warrant. {R. 665-66}.

Major Walters of the Orangeburg County Sheriff's Office testified she went to the trailer and talked with Dorothy. She noted she had been told there were charges on the defendant. {R. 683-85}.

Appellant testified at the pre-trial hearing, and stated that he was at his wife's trailer at the point of his arrest but did not live there. He claimed he told his wife not to let the police in when they arrived, but they told her they had a search warrant to see if Appellant

was in her house. Supposedly the police told him he needed to put something on his lower body, and only brought him a pair of his wife's jogging pants. {R. 729-37}. Appellant admitted being presented the warrant for receiving stolen goods once he reached the Orangeburg County Jail that night. {R. 796-97; 935; 987}.

On cross, Appellant admitted knowing Kandee's watch was in his pocket. He claimed he did not know a warrant was out for him even though he went and hid in a child's bedroom. {R. 910-13}.

Dorothy Bowman also testified. She stated Appellant was not living with her, although some of his clothes were at her house. According to Dorothy, the police came to her door and said "something about JR [Appellant] and a warrant". They asked if they could come in and look for him, and she agreed. After they found Appellant, one of the officers asked her for Appellant's clothes. She went and got them, including the black pants. Dorothy stated that after Appellant was taken out she signed the consent to search form. {R. 1039-43}.

On cross, Dorothy again stated that the police requested to come in, and she let them in voluntarily. She was not afraid of Chief Walters at all. She noted police only said they had a warrant for his arrest, and noted police did not have a warrant to search her house. {R. 1050-53; 1056}.

The defense moved to suppress the evidence, arguing (1) Appellant was not informed of the nature of his arrest; (2) there was no proof the Branchville chief had knowledge of an outstanding felony or warrant; (3) even if he did, only having a copy of a warrant is insufficient, and (4) Appellant never received a bail or bond hearing on that

offense, which violates the state statute. Thus, the defense stated that the fruits of the illegal arrest should be suppressed. Appellant also argued that Dorothy did not consent until after the fact of the search, and that she could not consent to search Appellant's pants anyway. Finally, Appellant argued that since the pants were outside of Appellant's wingspan, a warrant was needed. {R. 1255-66; 1271-73}.

The trial court denied the motion to suppress, finding that the arrest was made on a valid warrant, that Appellant had no expectation of privacy in the pants as Appellant asked for them, the wife retrieved them and they were examined incident to arrest. Finally, the court ruled Dorothy consented to a search of the home before the watch and pants were removed. {R. 1275-76}.

When the pants and watch were entered into evidence, there was no objection. {R. 4129-30; 4164}.

B. The issue is not preserved.

In most cases, making a motion *in limine* does not preserve an issue for review unless the objection is renewed upon introduction of the evidence in question. However, if the evidence is admitted immediately after the ruling, there is no need to renew the objection. See, e.g. State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001).

Here, almost three thousand pages of transcript separate the judge's ruling and the introduction of the evidence at trial without objection. {R. 1275-76; 4129-30; 4164}. Since the objection was not renewed, the issue on appeal is not preserved.

C. There can be no possible prejudice with regard admission of the pants.

As Appellant notes, while there was a heavy accelerant on Appellant's pants, it was

not gasoline, and there is a difference. {R. 4297-98; 4301-05}. Thus, there was really nothing that incriminating about the pants themselves (other than the mere fact they were black, and Appellant was described as wearing similar pants the night before). Indeed, the solicitor in argument never mentioned the accelerant on the pants as indicative of anything. {R. 4461; 4476}.

Thus, the only possible issue of consequence deals with admission of the watch found within the pants, not the pants themselves.

D. Appellant was properly arrested pursuant to a valid warrant.

The first point in the analysis is that Appellant was legally arrested pursuant to a valid warrant. Appellant really only argues that the state's witnesses were very "vague" about the warrant, and that they could have taken the time to obtain a murder warrant if they wanted.

However, a true attested copy of the warrant was admitted into evidence, Appellant admitted he was served a copy of the warrant when he was booked in the Orangeburg-Calhoun Regional Detention Center the night of his arrest, and an officer testified about serving the warrant on Appellant at the jail that night. {R. 796-97; 935; 987; 5420-22}. There is no legitimate issue as to whether there was a valid warrant in existence justifying Appellant's arrest.

Second, this Court has already held on two occasions that no challenge can be made to arrest based merely on the fact that the arresting officers were *aware* of an outstanding valid warrant but in fact did not have the original on them when they apprehended the suspect. State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995)

(defendant's clothes admissible where officer was acting pursuant to a valid warrant event though he was not in actual possession of it); State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991) (where officers knew of FBI warrant and California warrant, and there were also South Carolina warrants, arrest was properly conducted and evidence was admissible) (both citing Payton v. New York, 445 U.S. 573 (1980)).

Third, as long as the warrant was valid, the subjective motivations of the officers in making the arrest – such as to inquire about another crime – are of no consequence to the legality of the arrest. Indeed, since there was a valid arrest warrant, a judge had already made a probable cause determination irrespective of the subjective considerations of the officers who made the arrest. And, ultimately, Appellant has raised no challenge to the probable cause determination of the warrant itself. As such, the arrest was proper. See Whren v. United States, 517 U.S. 806, 813 (1996) (“subjective intentions play no role in ordinary, probable cause Fourth Amendment analysis”); Painter v. Robertson, 185 F.3d 557 (6th Cir. 1999) (if circumstances support finding of probable cause, officer's actual motives are irrelevant); United States v. Dela Pena, 62 Fed. Appx. 754 (9th Cir. 2003) (search of car properly admitted, as officers had probable cause since there was a valid arrest warrant, and their subjective motivations are irrelevant).

Fourth, it is true that officers must have a separate search warrant for a home of a third party when executing an arrest warrant for the subject there. Steagald v. United States, 451 U.S. 204 (1981). However, consent or exigent circumstances will allow officers to execute the arrest warrant in the home of the third party. Id.

Here, Dorothy testified repeatedly that she voluntarily let the officers inside after they told her they had an arrest warrant for Appellant and asked to come in to search for him.

She stated she was not at all afraid of the police. {R. 1039-43; 1050-53; 1056}. As noted before in the description of events at trial, Chief Walters and Deputy Van Doran also described a consensual entry, and Dorothy ultimately signed a written consent to search form. There was more than enough evidence to support the trial court's determination that the arrest was validly made pursuant to a warrant in this case.

E. Seizure of the watch was valid as a search incident to arrest.

Of course, police may make a search incident to a lawful arrest of a defendant, and this may include the "wingspan" – anywhere the person might reach to destroy evidence or obtain weapons. Chimel v. California, 395 U.S. 752 (1969). However, this wingspan can "move" – as in Washington v. Chrisman, 455 U.S. 1 (1982), the Court found no violation where an officer accompanied an arrested person back to his dorm room and saw contraband in plain view. The Court noted:

It is not unreasonable under the Fourth Amendment for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest.

455 U.S. at 7.

This case is simply Chrisman in reverse inasmuch as the pants came to Appellant at his request and out of necessity. Obviously Appellant needed pants to go to jail, and he asked for them. Obviously, then, the officers were entitled to search those pants incident to arrest before Appellant was allowed to put them on to be transported in custody. See People v. Jones, 767 P.2d 236 (Colo. 1989) (en banc) (marked bill found in wallet of defendant's pants admissible; even though they were not within his reach, they were in the nearby area, and appellant asked for his pants). Indeed, police are entitled to search a

person's personal belongings before incarceration; thus, even if Appellant had put on the pants, officers would have eventually found the watch. Illinois v. Lafayette, 459 U.S. 986 (1983).

F. In any event, the search of the pants was permissible based on Dorothy's consent to search the house.

Dorothy's consent also justifies the search of the pants. This Court has held that a third party can consent to a search if they have common authority or other sufficient relationship to consent to a search of the effects. State v. Middleton, 266 S.C. 251, 222 S.E.2d 763 (1976) (father could consent to search of son's bedroom in father's house).

Here, Dorothy's husband's pants here were laying on her couch in her living room. As Dorothy testified, she was voluntarily cooperating with police. The pants and watch were not removed from the house until after Dorothy even went as far as to sign a written consent to search. Under these circumstances, Dorothy had sufficient nexus to the pants to consent to a search of them when she consented to a search of her premises. {R. 1043; 1054-55}. See also State v. Laux, 344 S.C. 374, 544 S.E.2d 276 (2001) (defendant's girlfriend had authority to consent to search of apartment, where she answered in her nightclothes, said she lived there, had a key, and personal effects in the bathroom). Cf. State v. Bailey, 276 S.C. 32, 274 S.E.2d 913 (1981) (officer's had reasonable belief of resident's authority to consent to search of truck parked behind residence, as the truck was left unlocked with keys in the cab); United States v. Diggs, 544 F.2d 116 (3rd Cir. 1976) ("bailee consent" case noting that the right of a bailee to exculpate herself and explain or disclose property of another's in her possession outweighs any privacy interest of the defendant).

The pants were properly admitted into evidence.

CONCLUSION

For the foregoing reasons, this Court should affirm Appellant's convictions and sentences.

Respectfully submitted,

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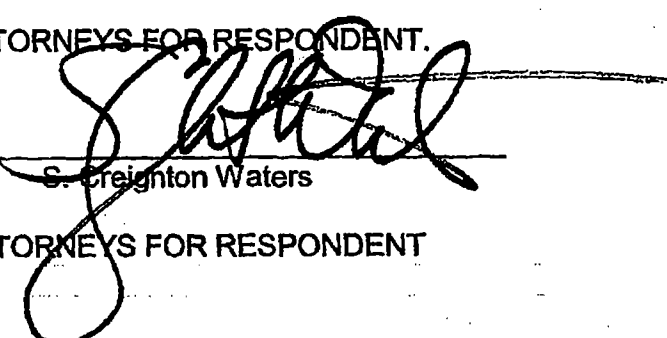
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BY:


S. Creighton Waters

ATTORNEYS FOR RESPONDENT

July 7, 2005

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

Respondent,

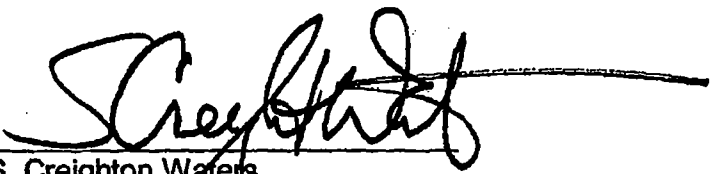
v.

MARION BOWMAN, JR.,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.


A handwritten signature in black ink, appearing to read "S. Creighton Waters", is written over a horizontal line.

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July 7, 2005

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IN THE SUPREME COURT

Appeal from Dorchester County
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THE STATE,

Respondent,

v.

MARION BOWMAN, JR.,

Appellant.

PROOF OF SERVICE

I, S. Creighton Waters, Counsel for Respondent, certify that I have this date served the ***Final Brief of Respondent***, dated July 7, 2005, on Appellant by depositing three (3) copies of the same in the United States mail, first class postage prepaid, addressed to his attorney of record:

Robert M. Dudek, Esquire
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I further certify that I have served all parties required by Rule to be served.

This 7th day of July, 2005.



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ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARION BOWMAN, JR.,

APPELLANT

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ARGUMENT IN REPLY

1.

Defense counsel requested that the judge charge the statutory mitigating circumstance contained in S.C. Code § 16-3-20 (C)(b)(6) on the capacity of the defendant to appreciate the criminality of his conduct or that his ability to conform his conduct to the requirements of the law was substantially impaired. The trial judge refused to charge this mitigating circumstance. The issue is therefore preserved, and this statutory mitigating circumstance has widely been accepted to include evidence of intoxication.

Defense counsel requested the statutory mitigating circumstance on “the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law [being] substantially impaired.” ROA p. 4937, l. 4 – p. 4938, l. 16. The judge ruled the record was “void of any evidence” of the capacity to conform his conduct mitigating circumstance contained in S.C. Code § 16-3-20(C)(b)(6). ROA p. 4938, ll. 7 – 21.

The state attempts to create a procedural bar even though defense counsel requested that this statutory mitigating circumstance be charged, and despite the fact the court has a duty to review all statutory mitigating circumstances, and then to instruct the jury as to any circumstance that may be supported by the evidence, and not merely those requested by the defendant. State v. Hughey, 339 S.C. 439, 529 S.E.2d 721, 730 (2000). Appellant’s Brief at 17.

Further, the state appears to argue that evidence of intoxication or hard drinking was greater in other cases, and therefore the failure to charge this mitigating circumstance was not error. However, a judge is only concerned with the existence of evidence of the

mitigating circumstance, and not its weight. There clearly was evidence in this case of a "party atmosphere" throughout the day, and evidence that appellant had been drinking with his friends.. He also had a history of substance abuse.

Further, the state's assertion that by all accounts appellant "remained outside in the parking lot [of the Allen Murray Club]" ignores the fact that drinking outside such a rural club is the rule and not the exception. It ignores evidence that appellant had been drinking, and that one man he was partying with essentially admitted being grossly intoxicated.

The state further argues that the issue is procedurally barred because appellant did not take exception to the penalty phase jury instruction on mitigating evidence. However, this argument ignores State v. Johnson, 333 S.C. 62, 508 S.E.2d 29, 31, n.1 (2000) wherein this Court held that once a party requests a jury instruction on the record, and the Court rejects the request, there is not any need to object again to preserve the issue.

This Court has consistently held that the trial judge must instruct the jury on statutory mitigating circumstances two, six, and seven where there is evidence of intoxication or drug use. See State v. Stone, 350 S.C. 442, 567 S.E.2d 244, 248 (2002); State v. Pierce, 289 S.C. 430, 435, 346 S.E.2d 707, 711 (1986); State v. Young, 305 S.C. 380, 409 S.E.2d 352, 356 (1991); State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). This case should not be any exception.

Defense counsel preserved the issue by asking that the judge charge this mitigating circumstance. The judge had an independent duty to review the record for proper mitigating circumstances even if defense counsel in this case had not made the request. There was evidence supporting this mitigating circumstance and the court erred by refusing to charge it. Appellant is entitled to a new sentencing hearing.

2.

The state argues that information about the conditions of confinement in prison is necessary. The state's argument is a request for this Court to open the door to both the defense and the prosecution to offer evidence about the time, place, manner, and conditions of incarceration or execution. This Court clearly stated in *State v. Plath* that such matters were not proper for the jury's consideration, and there is not any reason to revisit its logic (Issues 2 and 3)

Defense counsel objected and moved for a mistrial when the solicitor asked defense expert James Aiken about inmates escaping. ROA pp. 4869 – 4873. It unfortunately is not unusual when the state is prohibited from pursuing a line of questioning that the solicitor then requests permission to travel into another line of questioning that on its face seems less objectionable. That was what happened in this case. The solicitor then requested permission to question Aiken about the conditions of prison in the general population. Defense counsel objected, and the judge stated that she understood the solicitor was on re-cross, but ruled "I will let him go into those areas." ROA. pp. 4873 – 4874. That was clearly error under the reasoning of *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619, 627 (1984).

The solicitor, armed with the judge's permission, then elicited testimony on recreational activities in prison such as playing basketball, exercising, watching movies, watching television, and other recreational activities such as playing softball. ROA pp. 4881 – 4882.

The state in essence argues that this Court should overrule its holding in *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619, 627 (1984), wherein this Court noted that the Department of Corrections controls the conditions of imprisonment and not the defendant. The manner

of execution and the conditions of imprisonment are not proper during the penalty phase of a death penalty case. The penalty phase of a death penalty case is not a sociology course. Respectfully, there is not any reason for this Court to depart from its holding that the defense is not allowed to offer evidence on the horrors of the death penalty, and that neither the state nor the defendant should be allowed to introduce evidence on prison conditions that are totally out of the defendant's ability to control.

Prison conditions, good or bad, are not relevant to the consideration of the proper penalty to jury should impose on the defendant since they are matters beyond the defendant's control, and because this Court has clearly stated that sociological evidence on the propriety of the death sentence and conditions within the prison walls are improper. Respectfully, there is not principled reason for this Court to depart from those precedents.

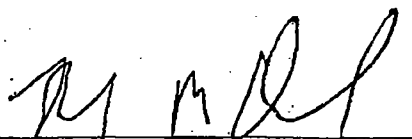
Similarly, the possibility of prisoners escaping from prison is irrelevant where there is not evidence the defendant on trial attempted to escape. See State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105, 111 (2000). Cf. State v Kelley, 343 S.C. 350, 540 S.E.2d 851, 855 – 857 (2001).

Appellant respectfully submits this Court should reiterate that evidence about escape, prison conditions and the manner of execution are not proper during a capital sentencing hearing. Rather than depart from this Court's precedents on the subject, appellant's submits, respectfully, that it is time for this Court to reiterate them for the consideration of the Bench and Bar.

CONCLUSION

Based on the arguments made in appellant's initial brief, and the arguments in this reply brief, this Court should reverse appellant's convictions and remand this case to the Dorchester County Court of General Sessions for a new trial. In the alternative, appellant should be granted a new sentencing trial.

Respectfully submitted,



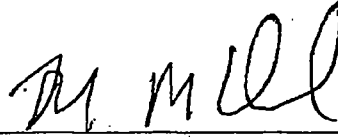
Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT.

July 6, 2005

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT.

July 6, 2005

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARION BOWMAN, JR.,

APPELLANT

CERTIFICATE OF SERVICE

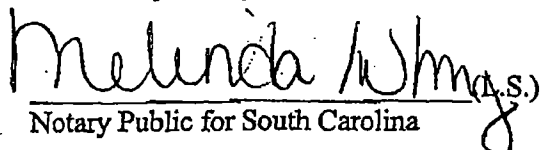
The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon S. Creighton Waters, Esquire, this 6th day of July, 2005.



Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 6th day of July, 2005.



Melinda Whiting (S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2008

STATE OF SOUTH CAROLINA

COUNTY OF

MARION BOWMAN, JR.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

FILED - RECORDED
Plaintiff(s)
2006 APR - 7 PM 12:13

De-CP-18-569

vs.

State of SC

CLERK OF COURT
DOUGHERTY COUNTY
Defendant(s)(Please Print)
Submitted By:
Address:SC Bar #:
Telephone #:
Fax #:
Other:
E-mail:

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

- Contracts**
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199)

- Torts - Professional Malpractice**
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
☐ Other (299)

- Torts - Personal Injury**
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Other (399)

- Real Property**
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499)

- Inmate Petitions**
☒ PCR (500)
☐ Sexual Predator (510)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

- Judgments/Settlements**
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Other (799)

- Administrative Law/Relief**
☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture (840)
☐ Other (899)

- Appeals**
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Administrative Law Judge (980)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999)

- Special/Complex /Other**
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699)
☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)

Submitting Party Signature:

Robert Duckak by [Signature] Date: 4/7/06

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA)

In the Court of Common Pleas

County of Dorchester)

2006-C P-18-569

Marion Bowman, Jr. #6006)

Full name and prison number, if any, of applicant.)

APPLICATION FOR

v.)

POST-CONVICTION RELIEF

The State of South Carolina)

Name of Respondent)

FILED-RECORDED
2006 APR -7 PM 12:13
CLERK OF COURT
DORCHESTER COUNTYINSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly, handwritten, or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicant should, therefore, exercise care to assure that all answers are true and correct.

If the applicant is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

1. Place of detention Lieber Correctional Institution
2. Name and location of Court which imposed sentence Dorchester County Court of General Sessions
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 01-GS-18-348-349
 - (b) _____
 - (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) May 23, 2002 - Death Sentence
 - (b) _____
 - (c) _____

5. Check whether a finding of guilty was made
- (a) after a plea of guilty _____
- (b) after a plea of not guilty X _____
- (c) after a plea of nolo contendere _____
6. Did you appeal from the judgment of conviction or the imposition of sentence? Yes _____
7. If you answered "yes" to (6), list
- (a) the name of each Court to which you appealed:
- i. Supreme Court _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed conviction and sentence _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. November 28, 2005 _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. State v. Bowman, S.C., 623 S.E.2d 378 (2005) _____
- ii. _____
- iii. _____
8. If you answered "no" to (6), state your reasons for not so appealing:
- (a) N/A _____
- (b) _____
- (c) _____
9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective assistance of counsel (see attached) _____
- (b) _____
- (c) _____

10. State concisely and in the same order the facts which support each of the grounds set out in (9)

- (a) Trial counsel was ineffective for failing to preserve for appellate review the issue of the state cross-examining witness Aiken about "good prison conditions," since this evidence was misleading, was highly prejudicial and inadmissible. The Supreme Court refused to address this winning issue because counsel failed to make the correct legal argument. This violated my right to effective assistance of counsel under the Sixth Amendment. Counsel also should have argued that this "good prison conditions" evidence introduced an arbitrary factor into the case in violation of the Eighth Amendment.
- (b) Counsel did not offer available evidence and argument that my arrest and the seizure of property violated the Fourth Amendment to the United States Constitution. The police entered based on a subterfuge and without a proper warrant to arrest or seize property.
- (c) Counsel failed to do an adequate background check for evidence in mitigation. This information included evidence regarding mental state, intoxication, and evidence to rebut the state's victim impact evidence. These deficiencies constituted ineffective assistance of counsel in violation of the Sixth Amendment.

11. Prior to this application have you filed with respect to this conviction

- (a) any petition in a State Court under South Carolina Law ?

None other than the mandatory appeal to the State Supreme Court

- (b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?

No

- (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) No

- (d) any other petitions, motions or applications in this or any other Court?

No

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

- (a) the specific nature thereof:

i. N/A

ii. _____

- (b) the name and location of the Court in which each was filed:

i. N/A

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? No

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. N/A
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. _____
- iii. _____

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

- (a) This is the first PCR
- (b) _____
- (c) _____

16. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? Yes
- (b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence?

Yes

(e) preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? Yes

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

- i. Robert M. Dudek, Assistant Appellate Defender, S.C. Office of Appellate Defense, 1205 Pendleton Street, Room 306, Columbia, SC 29201
- ii. Norbert E. Cummings, Jr., Cummings Law Firm, 100 S. Main Street, Suite B, Summerville, SC 29483
- iii. Marva Ann Hardee-Thomas, 130 E. Richardson Ave., Summerville, SC 29483

(b) the proceedings at which each such attorney represented you:

i. Trial and Direct Appeal

ii. _____

iii. _____

18. State clearly the relief you seek in filing this application.

New trial

19. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)

COUNTY OF Dorchester)

VERIFICATION

I, Marion Bowman, Jr., being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Marion Bowman, Jr.

Sworn to and subscribed before me

This 7th day of April, 2006.

Waven J. Jeym L.S.

Notary Public for South Carolina

My Commission Expires Sept. 22, 2008.

FILED - RECORDED
2006 APR - 7 PM 12:13
CLERK OF COURT
DORCHESTER COUNTY

**APPLICATION TO PROCEED WITHOUT PREPAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Marion Bowman, Jr., hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty or perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of proceeding or give security therefor.

Marion Bowman, Jr.
Applicant

Sworn to and subscribed before me

This 7th day of April, 2006.

Waven J. Jeym L.S.

Notary Public for South Carolina

My Commission Expires: Sept. 22, '08.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

June 12, 2006

Mr. Robert M. Dudek
Assistant Appellate Defender
1205 Pendleton Street
Room 306
Columbia, SC 29201

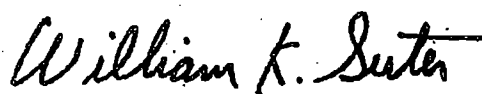
Re: Marion Bowman, Jr.
v. South Carolina
No. 05-10282

Dear Mr. Dudek:

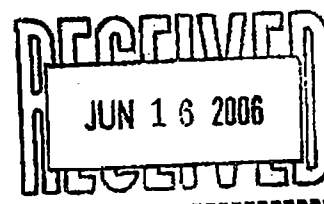
The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,



William K. Suter, Clerk



ORIGINAL

STATE OF SOUTH CAROLINA) FILED RECORDED
COUNTY OF DORCHESTER) IN THE COURT OF COMMON PLEAS.
2006 OCT -2 AM 11:58

Marion Bowman, Jr., #6006 CLERK OF COURT C/A No. 2006-CP-18-569
SHELBY COUNTY

Applicant,	)	PRELIMINARY PROTECTIVE RETURN
	)	UNTIL POST-CONVICTION COUNSEL
v.	)	IS APPOINTED TO STATE'S RETURN,
	)	MOTION TO DISMISS AND MOTION
The State of South Carolina,	)	FOR SUMMARY JUDGMENT
	)	(Capital Case)
Respondent.	)	

The undersigned represented petitioner on direct appeal and on a writ of certiorari to the United States Supreme Court in this death penalty case. On September 7, 2006 the Supreme Court granted petitioner a stay of execution to pursue an action for post-conviction relief in this court finding pursuant to In Re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996), that petitioner has shown he has proper grounds to pursue in post-conviction relief. Respectfully, that finding of proper PCR grounds is binding on this Court, and proving those grounds by a preponderance of the evidence requires the taking of evidence before this Court.

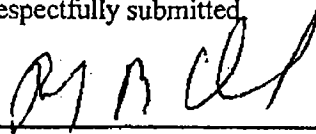
The Supreme Court in that same order appointed Judge Lockemy, and has given Judge Lockemy thirty days from the date of the order, September 7, 2006, to hold a hearing and appoint PCR counsel for petitioner. Out of an abundance of caution, undersigned former direct appeal counsel is filing this return for petitioner until PCR attorneys are appointed for petitioner, and they can file an official and more detailed return with any supporting material those attorneys deem advisable.

Petitioner's grounds for post-conviction relief are easily understandable and undersigned counsel would assert there is not any reason at this time to make them more definite and certain.

When counsel is appointed for petitioner they undoubtedly will amend the application for post-conviction relief after investigating the case.

As for the motion for discovery and any other matters the state is seeking, undersigned counsel respectfully submits those matter should be left open until PCR counsel can be appointed for petitioner. Petitioner is not an attorney, and he is unable to respond to the state's motions at this time since he has not yet been made an offer of counsel.

Respectfully submitted



Robert M. Dudek
Appellate Defender

Attorney for Petitioner

September 29th, 2006

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Marion Bowman, Jr., #6006

Applicant,

v.

The State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

C/A No. 2006-CP-18-569

RETURN, MOTION TO DISMISS AND
MOTION FOR SUMMARY JUDGMENT
(Capital Case)FILED-RECORDED
2006 SEP -1 AM 9:27
CLERK OF COURT
DORCHESTER COUNTY

Respondent, above-named, here by make a Return to the application for post-conviction relief ("APCR"), filed by Marion Bowman, Jr. ("Applicant") on April 7th, 2006. This APCR stems from a murder conviction and death sentence.

If and when Applicant does in fact secure a stay of execution and the South Carolina Supreme Court appoints a judge to handle this capital PCR action, Respondents respectfully request pursuant to South Carolina Code of Laws, Section 17-27-160(C), that the assigned judge set a scheduling hearing with the parties within thirty (30) days to set any evidentiary hearing that may be necessary within one-hundred and eighty (180) days from that date. Respondents would also request that a hearing regarding Applicant's desires regarding counsel be held as soon as possible. Respondents also would request a hearing on the motions to dismiss and for summary judgment in the instant action. **At present, however, there is no stay of execution in place.**

I.

Procedural History

During the August 2001 term, the Dorchester County Grand Jury indicted Applicant, Marion Bowman, Jr., for murder and third degree arson (01-GS-18-0348 & -0349). {R.

5254-57}. The state gave notice of intent to seek the death penalty, and served notice of evidence in aggravation. **{R. 1640-43; 4570-71; 5260-61}**.

The trial judge in this case was the Honorable Diane S. Goodstein. Applicant was represented at the trial level by Norbert E. Cummings, Jr. and Marva A. Hardee-Thomas; First Circuit Solicitor Walter M. Bailey, Jr. and Assistant Solicitor Benjamin Lafond prosecuted the case for the State.

A pretrial Jackson v. Denno hearing was held before Judge Goodstein during various days between April 5th, 2002 and May 2nd, 2002. Jury selection began in Dorchester County on May 13th, 2002, and was completed on May 17th, 2002. Judge Goodstein conducted the guilt phase of Applicant's jury trial from May 17th until May 20th, 2002. Applicant's jury convicted him of both charges. **{R. 4564}**.

Applicant exercised his right to the 24-hour cooling-off period in subsection 16-3-20(B) of the Code of Laws for South Carolina. **{R. 4569}**. The sentencing phase of the trial began on May 22nd, 2002. Judge Goodstein submitted the following aggravating factors to the jury:

- (1) Murder was committed while in the commission of criminal sexual conduct.
- (2) Murder was committed while in the commission of kidnapping.
- (3) Murder was committed while in the commission of larceny with the use of a deadly weapon.
- (4) Murder was committed while in the commission of robbery while armed with a deadly weapon.

{R. 5018}. The following mitigating factors were charged:

- (1) The defendant has no significant history of prior criminal convictions

involving the use of violence against another person.

(2) The age or mentality at the time of the crime.

(3) Any other mitigating factors that the jury may find. [The jury] may also consider any nonstatutory mitigating factors.

{R. 5032}.

On May 23rd, 2002, Applicant's jury found the existence of two of the four aggravating factors: the murder was committed in the commission of kidnapping, and larceny with the use of a deadly weapon. It recommended a sentence of death. {R. 5051}. After finding that the verdict was not the result of prejudice, passion, or any arbitrary factor, Judge Goodstein sentenced Applicant to death for murder and ten years for third degree arson.

A timely Notice of Appeal was filed and served with the South Carolina Supreme Court on May 24th, 2002. Assistant Appellate Defender Robert M. Dudek, of the South Carolina Office of Appellate Defense, was appointed to represent Applicant during his direct appeal. On July 6th, 2005, Dudek filed with the state supreme court a Final Brief of Appellant, in which he asserted the following issues on behalf of Applicant:

(1) The court erred by refusing to instruct the jury on the statutory mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, since there was expert testimony of appellant's substance abuse problem, and evidence the parties were heavily drinking throughout the day.

(2) 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.

(3) The court erred by refusing to grant a mistrial where the solicitor attempted to question James Alken about the possibility of escape, since the solicitor raised an improper consideration or arbitrary factor. The jury's attention is properly focused on the penalties of death and life without parole. Defense counsel correctly argued that the judge could not remove the taint once escape was raised by the state as an issue.

(4) The trial court lacked subject matter jurisdiction to sentence appellant to death since the murder indictment did not allege any aggravating circumstances.

(5) The court erred by ruling appellant did not have an expectation of privacy in the pants he wore to his wife's house, and by refusing to suppress the watch and liquid material found in and on those pants. The pants were seized during an illegal warrantless arrest, and the court erred by ruling the arrest was pursuant to a valid Orangeburg warrant for another minor offense.

The State, through Assistant Attorney General S. Creighton Waters, filed its Final Brief of Respondent on July 7th, 2005. Dudek followed with a Final Reply Brief of Appellant also dated July 6th, 2005.

Oral argument in the case was held before the state supreme court on October 6th, 2005. The South Carolina Supreme Court issued an opinion affirming the convictions and death sentence on November 28th, 2004. State v. Bowman, 623 S.E.2d 378 (S.C. 2005).. A petition for rehearing was denied by that court on January 6th, 2006.

On February 1st, 2006, the South Carolina Supreme Court granted a stay of execution so that Applicant could pursue certiorari review before the United States Supreme Court. Applicant through Mr. Dudek filed a Petition for Writ of Certiorari with the United State Supreme Court dated April 5th, 2006; the State through AAG Waters filed a

Brief in Opposition on May 12th, 2006. The United States Supreme Court denied the certiorari petition by order dated June 12th, 2006.

While his certiorari petition before the United States Supreme Court was pending, Applicant filed this APCR. On August 4th, 2006, Applicant filed with the state supreme court a Petition to Appoint Post-Conviction Relief Judge. The State filed a Return on August 18th, 2006, and a Motion to Set Execution Date on August 22nd, 2006. Those motions are currently pending before the South Carolina Supreme Court as of the writing of this document.

Attached herewith and incorporated herein by reference are the following documents:¹

- (1) Record on Appeal, containing eleven (11) volumes;
- (2) Final Brief of Appellant;
- (3) Final Brief of Respondent;
- (4) Final Reply Brief of Appellant;
- (5) State v. Marion Bowman, SC S.Ct. Opinion No. 26071, filed November 28, 2005;
- (6) Petition for Writ of Certiorari to the South Carolina Supreme Court;
- (7) Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of South Carolina;
- (8) Order Denying the Petition for Writ of Certiorari.

¹ As of the date of this Return, Applicant does not have counsel appointed. Respondent is only sending the attachments to the Clerk of Court until counsel is appointed or Applicant indicates his desire regarding counsel. Of course, Applicant's present appellate defender Robert Dudek is already in possession of the attachments.

II.

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.

A. Friday evening, 2/16/01: a suspiciously abandoned car and gunshots in the night

At about five minutes to eight on the Friday evening of February 16th, 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. {R. 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. {R. 3798-3801; 3803-05}.

B. Early morning Saturday, 2/17/01: the car found ablaze

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. {R. 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. {R. 3807-3810; 3814-16; 3819-22; 3875-78}.

C. 2/17/01: the crime scene evidence at Nursery Road

The Ford Escort's license tag was still readable, and it was registered to Kandee and her mother. {R. 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. {R. 3944-49}. Her body was extremely burned and charred, and the only skin remaining was on part of her back. {R. 3941-43}. The lungs were clear, indicating that Kandee was dead before the fire started. {R. 3954-55}.

Most everything that could burn did burn in the passenger area and trunk of Kandee's Ford Escort. {R. 3879-83}. The fire began in the passenger compartment rather than by an engine fire. {R. 3883-84}. On a pocketbook, chemists identified a medium petroleum accelerant; on the shirt, paper material, belt, and miscellaneous debris, Layton was able to conclusively identify the presence of gasoline. {R. 4298-4399}. Thus, officers concluded the fire was intentionally set. {R. 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 a 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 identified as Kandee's by her mother. {R. 3853-3860; 3867-71; 3910-12; 4164-66; 4272; 4286}. SLED DNA expert Matt Fitts later matched the blood samples to Kandee Martin. {R. 4366-

67; 4377-79}.

D. Saturday morning, 2/17/01: Applicant's arrest, his pants, and Kandee's watch

After receiving information that Applicant 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 the Saturday morning of February 17th, 2001. The officers asked Dorothy if they could enter to search for Applicant, and she voluntarily agreed – eventually signing a consent to search form. Officers found Applicant hiding alongside a bed in a child's room down the hall, and he was promptly arrested and Mirandized.² {R. 4125-29; 4139-42; 4144-45; 4191-95; 4208; State's Exhibit #27}.

Applicant 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. {R. 4129-32; 4142; 4150-52; 4195-98; 4207-08}. Kandee's mother identified at trial the watch as belonging to her daughter. {R. 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 Applicant's friends testified at trial he was wearing black jeans the day before. {R. 3763; 4058; 4093; 4193; 4297-98}.

E. Applicant's friends and relatives come clean about Kandee's murder

² During the Jackson v. Denno hearing (but not in the guilt phase), it was brought out that officers arrested Applicant at Dorothy's trailer that morning based on an outstanding Orangeburg County arrest warrant for receiving stolen goods. {R. 321-22; 331, 648, 665; 797, 935; 5420-22}.

As the investigation progressed, it began to center around a number of people who had known each other for years and lived in or hung out at Branchville Villas Apartments, or "the projects". Of these people, Applicant's sisters Yolanda and Kendra, his first cousin (and codefendant) James Tywan Gadson, and his lifelong friend Travis Felder all testified for the State after securing plea agreements. {R. 3735-36; 3981; 4085-86; 4167-68}.

1. The argument over the gun

At a party the day Kandee disappeared, Applicant 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. {R. 3675-77; 3683-84; 3700; 3750-51; 3983-89; 4031-32; 4057-59; 4077-78; 4101}.

When Applicant returned, a number of people, including trial witnesses Koger, Fogle, and Carolyn Brown – saw Applicant get upset at Tywan because someone had taken his gun. However, Hiram Johnson interceded, and told Applicant he had taken the gun back to Katrina West's apartment in the projects. Applicant went across the street and got the gun, and put it back in his pants. {R. 3677-79; 3684-85; 3690-91; 3701; 3985-90; 4058-60; 4077-78}.

2. Unpaid debts and threats to kill

At another point later that afternoon, Applicant asked Fogle to take him to Frankie Martin's house. Kandee's car was parked out front, and Applicant mentioned to Fogle that Kandee owed him some money. {R. 3685-87}.

Applicant 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 Applicant 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 Applicant told Yolanda to stop. {R. 3701; 3721-24; 3736-40; 3763-65}.

Applicant 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 Applicant, saying "hold on a minute", and turned back to her conversation with Eddie. {R. 3724-35; 3740-42; 3764-66}.

Kandee's gesture angered Applicant. Eddie heard Applicant say "Fuck waiting a minute. I'm about to kill this bitch." {R. 3725-27}. According to Katrina, Applicant declared "fuck that ride, that bitch be dead by dark fall". Applicant's sister Yolanda described his comments as "Fuck that bitch, that bitch be dead by dark". {R. 3765-66}. Yolanda also told police Applicant said "that bitch owed me some money and I want my money today". In any event, Yolanda drove off. {R. 3742-45; 3749}.

3. Tywan Gadsden describes Kandee's murder

Applicant made true on his threat later that night. Tywan Gadsden saw Applicant around 7:00 or 7:30 that evening. Applicant was riding with Kandee in her green Ford Escort, and he called Tywan over and told him to get in. {R. 3990-93; 4033}. With Applicant 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 Applicant and Tywan got out. {R. 3994-96; 4033-35}.

Applicant and Tywan walked down the road a ways, as Applicant whispered he was

going to kill Kandee because she was wearing a wire. Kandee followed behind, grabbed Applicant by the arm and said she was scared. A car came down the road, and the three jumped into the woods until it passed. {R. 3997-99; 4035-36}.

Kandee then started back down the roadway with Applicant following. As Tywan came out of the woods behind them, he saw Applicant fire three times at Kandee. Kandee ran towards Tywan, but stopped and turned to face Applicant. She begged, "Please Black, don't shoot me no more. I have a baby to take care of." Applicant responded to her pleas by firing twice more, and Kandee fell to the ground. {R. 3997-4003; 4011-12; 4036-37}.

Tywan, who said he "messed in his pants a little bit", jumped in the car while Applicant dragged Kandee into the woods by her feet. Applicant 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. {R. 4012-14}.

Eventually, they parked Kandee's car in a wooded area behind a coal plant. Before they got out, Applicant threatened to blow Tywan's brains out if he ever told anyone. Applicant then headed for the projects while Tywan walked back to Koger's house. Applicant eventually came back with Yolanda's car, and he and Tywan 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. {R. 4015-17; 4033-35}.

4. The trip to the club in Kandee's car: admissions of guilt

Around midnight, Applicant and some friends decided to go to the Allen Murray nightclub outside of Bowman. Applicant drove Kandee's car, with Hiram, Tywan, and Darrien Williams as passengers. Applicant told the men he had stolen the car, and made

them put on gloves. {R. 4017-20; 4063-65; 4081}. At the club, Applicant walked around the lot some, trying to sell Kandee's car. {R. 4067}.

After about an hour or so, Applicant, Hiram, Tywan and Darrien headed back to Branchville in Kandee's car. As he drove the Escort with the pistol sitting in his lap, Applicant remarked, "I killed Kandee, heh heh heh". Applicant dropped Hiram off at the projects. {R. 4021-22; 4067-69}.

5. Travis Felder describes the car fire

About 3:00 a.m., Applicant knocked on Travis's door and asked him for help parking a car. {R. 4042-45; 4116-18; 4090-92; 4119-20}.

Travis testified that he got in his own car and followed Applicant in the Ford Escort back to Nursery Road. Applicant pulled over on the side of the road, cut his lights, and went into the woods for a minute. The next thing Travis saw was Applicant pulling a body by its feet face down. As Applicant opened the trunk and put the body inside, Travis could see by the trunk light it was Kandee. {R. 4093-97}.

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

F. May and June 2001: a pistol found in the Edisto river – and bullets found in the couch

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

of whom, as mentioned before, testified at trial with plea agreements. {R. 3735-36; 4161; 4167-68}. Dorothy stated that a few days after the murder Hiram Johnson told her the gun was hidden in the sleeper sofa at her trailer on Lockett Street. She found the pistol hidden a "cuff" or "sleeve" of the couch, put it in her pocketbook, and went over to see Kendra at Applicant's grandmother's. {R. 4198-4202; 4210-12}.

While Dorothy claimed she talked with Kendra and then left the gun at Kendra's in the clothes hamper, Kendra testified that she and Dorothy went to meet Applicant's father Marion Bowman, Sr. at the EZ shop. Marion Sr. took the gun and put it in the middle console of his truck. {R. 4168-73; 4203-04; 4211-12; 4358}.

The next day, Kendra and Yolanda met with Marion Sr., and then followed him out to the graveyard at the Zion AME church. Applicant's father brought the pistol from out of the nearby woods, and they wrapped it in a towel and put it in Yolanda's trunk. Kendra and Yolanda drove out to the Old Cope Road bridge and threw the gun over the side into the Edisto River. {R. 4174-78; 4183-87}. On May 28th, 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. {R. 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 Applicant's .380, they were of course consistent. {R. 4315-20}.

Following Dorothy's statement to police in June 2001, officers visited the residence of her sister Sally Bookhart, Dorothy had moved from her trailer on Lockett Street within a week or so after Applicant's arrest, and she gave the sofa back to Sally. When the

officers arrived, Sally willingly agreed to their requests to search the sofa. In a little "pocket" of the sofa's fabric, SLED agent James Helms discovered a box of Winchester .380 ammunition, consistent with the shell casings found at the Nursery Road scene. {R. 4205; 4244-49; 4259-62}.

G. The DNA match

Finally, SLED DNA analyst Fitts found human blood and semen in the vaginal swabs taken from Kandee at autopsy. While the mixture of female and male secretions in the vaginal swabs complicated identification, Agent Fitts was able to match Applicant to a probability of 1 in 5300. {R. 4370-72; 4379-87}.

H. The State's sentencing phase case

Following the 24-hour "cool down" period, the State began its evidentiary presentation in the sentencing phase by reincorporating its evidence from the guilt phase. {R. 4650}. It then introduced certified copies of Applicant's March 1998 convictions from two incidents – with a third degree burglary charge and a petty larceny charge for each. {R. 4652}.

Next to testify were Joseph Wimberly and David Thompson – the two victims from the March 1998 convictions. Wimberly noted that his house was robbed of a shotgun, of which the barrel was later sawed off. Stolen from Thompson's residence was cash and a .357 pistol. Within 24 hours, Applicant's cousin used the pistol to kill himself. {R. 4653-59; 4801-02}.

Next was SLED arson agent James Helms, through which the State introduced photographs of Kandee as she was found severely burned in the back of her trunk. {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. The trial court excluded the general autopsy photographs in view of the pictures introduced through Helms. {R. 4669-91}.

Finally, 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. {R. 4692-4708}.

I. The defense's sentencing case

The defense case in mitigation began with Applicant's older sister Kendra Bowman. She generally described good times growing up with Applicant, but noted her biological father was abusive until he left when the children were babies. {R. 4742-48}.

Next to testify was Applicant mother Dorothy Bowman (his wife, who testified during the guilt phase, is also named Dorothy). Dorothy related that Applicant's father was abusive, but he left when the kids were very small. She theorized that Applicant longed for fatherly involvement, and noted that her subsequent boyfriend Joseph Sims was a positive influence on the kids. Applicant had trouble in school and only finished the ninth grade, but he would help his mother out after she became disabled. {R. 4750-59}.

Applicant called Margaret Baughman, an adult education teacher at the Dorchester County Detention Center. She testified that during he pre-trial incarceration Applicant took classes, and even became a reliable assistant to her teaching at the jail. {R. 4761-67}.

A forensic social worker named Jeffrey Youngman also testified in Applicant's mitigation presentation. Generally, Youngman theorized Applicant's functioning was

negatively impacted by his upbringing. {R. 4791-4805}.

Corrections consultant and former South Carolina prisons official James Aiken was called to the stand next for the defense. He 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 Applicant 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 Applicant for the rest of his life, with the prison's fences, gun towers, and trained guards. Aiken also opined that Applicant would adapt well to prison life, given that during his three previous incarcerations, Applicant had no significant incidents of violence to staff and inmates, and had assisted the adult education classes. {R. 4832-45}.

Dorchester County Detention Center guard Sharon J. Branch testified that Applicant has "attitude", and would often speak out to guards. While Applicant 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, Applicant 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. {R. 4882-88}.

On the other hand, another jail guard named Enrique Badillo testified that Applicant was very polite, and presented no difficulty or threats to safety. {R. 4902-05}.

Finally, guilt phase witness Travis 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 Applicant – buying gasoline in a small gas container. Felder admitted that after Applicant came and got him from the girls' apartment in the Branchville Villas, Applicant gave him a gas jug and asked him to buy some fuel. Travis stated he thought Applicant was just filling up the can to move the car. {R. 4911-28}.

III.

Allegations In Initial Application

Applicant makes three (3) allegations in his APCR. All of these involve ineffective assistance of counsel. As will be seen, all of the allegations should be dismissed or denied as a matter of law, and the petition dismissed with prejudice.

A. General Law on Ineffective Assistance Of Counsel.

Pursuant to the familiar doctrine in Strickland v. Washington, Petitioner must first demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. 466 U.S. 668 (1984). Judicial scrutiny of counsel's performance is highly deferential and not subject to the distorting effects of hindsight, and counsel may reasonably choose from a wide range of acceptable strategies. Strickland, 466 U.S. at 689; Burket v. Angelone, 208 F.3d 172 (4th Cir. 2000).

Competency is measured against what an objectively reasonable attorney would have done under circumstances existing at the time of the representation. Savino v. Murray, 82 F.3d 593, 598 (4th Cir. 1996). The Court should "decline to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge

their duties to their clients under the manifold pressures of a state trial." Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996).

As the Supreme Court made clear in Strickland:

. . . the reasonableness of counsel's actions may be determined or substantially influenced by the defendants own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigations are reasonable depends upon such information . . . [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Strickland, 466 U.S. at 691. Barnes v. Thompson, 58 F.3d 971, 978 (4th Cir. 1995); Matthews v. Evatt, 105 F.3d 907, 919-920 (4th Cir. 1997). The mere fact that trial counsel's strategy was unsuccessful does not render counsel's assistance unconstitutionally ineffective. Strickland, 466 U.S. at 689. Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995).

Next, Petitioner must also establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. It is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding, because virtually every act or omission of counsel would meet that test. Id. at 693. "The Petitioner bears the 'highly demanding' and 'heavy burden' in establishing actual prejudice. Williams v. Taylor, 120 S.Ct. 1495, 1513-14 (2000).

Recently in Jones v. State, 332 S.C. 329, 504 S.E.2d.822 (1998) , the South Carolina Supreme Court restated the "prejudice" prong in a capital sentencing proceeding as being established when "there is a reasonable probability that, absent [counsel's] errors,

the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death,” citing Strickland. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Jones, 504 S.E.2d at 823-824. Accord, Plath v. Moore, 130 F.3d 595 (4th Cir. 1997) (“given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and hence, the sentence imposed.” Thus, in weighing the omitted evidence against that actually used to convict and sentence Plath, the mitigating evidence seems insufficient to shift the balance in Plath’s favor.”).

Finally, the Supreme Court of South Carolina has held that a hearing on an allegation is only required when factual allegations that lead to a Sixth Amendment deprivation are not conclusively refuted by the record. Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981).

As a general matter, Respondent submits that the Record on Appeal from Applicant’s trial and sentencing hearing conclusively demonstrate that appointed counsel were not deficient in their performance nor was Applicant prejudiced in any way by their performance. To the contrary, the Record from each proceeding demonstrates that Applicant’s attorneys were diligent in their representation of Applicant, performed well within the wide range of competence and reasonable professional assistance demanded of attorneys in criminal matters. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Marzullo v. Maryland, *supra*; Butler v. State, 286 S.C. 441, 34 S.E.2d 813 (1985); Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

B. Motion to Dismiss Ground One as a Matter of Law

Applicant's first ground for relief is as follows:

Trial counsel was ineffective for failing to preserve for appellate review the issue of the state cross-examining witness Aiken about "good prison conditions", since this evidence was misleading, was highly prejudicial and inadmissible. The Supreme Court refused to address this winning issue because counsel failed to make the correct legal argument. This violated my right to effective assistance of counsel under the Sixth Amendment. Counsel also should have argued that this "good prison conditions" evidence introduced an arbitrary factor into the case in violation of the Eighth Amendment.

Applicant contends his counsel failed to argue at trial that the solicitor's cross-examination on "good prison conditions" was "highly prejudicial and inadmissible", as well as improper under the Eighth Amendment. As will be seen, since even if counsel had made these arguments the questioning would still have been permissible as a matter of law, counsel could not have been deficient nor Applicant prejudiced. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint falls *both* prongs of the Strickland test, as it was neither deficient nor prejudicial). Thus, the issue should be rejected and dismissed as a matter of law.

1. Events at trial and on appeal

As noted before, during its sentencing phase case the State only presented the two victims of Applicant's prior crimes, the SLED arson agent, the pathologist, and two victim impact witnesses. {R. 4652-4708}. The State presented no witnesses or information as

to any of Applicant's misbehavior in or lack of adaptability to prison.

On the other hand, the defense's third witness was Margaret Baughman, an adult education teacher at the jail where Applicant spent his pre-trial confinement. This teacher stated that Applicant had been taking her classes in jail for fourteen to fifteen months, and eventually became her reliable and trustworthy teacher's assistant. {R. 4761-65}. On redirect, Applicant elicited that there are limited educational opportunities available for inmates, and Applicant made him self available for any class. {R. 4767}.

Applicant next called James Aiken, a former state corrections official and corrections consultant, who was qualified as an expert in future danger and prison adjustment issues. On direct, Aiken testified Applicant would *never* leave prison until he was dead. According to Aiken, Applicant'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. {R. 4838-4845}.

On cross, Aiken testified extensively without objection relevant to this issue on the various security levels of custody an inmate can achieve. 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. {R. 4854-4862}.

On redirect, *the defense* elicited that Applicant 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". *The defense* then elicited the dimensions of a supermax cell. *The defense* then asked Aiken what productive endeavors were available for Applicant in

prison, to which Aiken replied that Applicant could "pay back society" and "do something for himself" by working in such areas as food service, maintenance, or painting. *The defense* asked Aiken if Applicant was going to be "molly-coddled", and elicited that Applicant could get involved with the Scared Straight program. {R. 4864-68}.

On re-cross, the prosecutor asked about escapes, to which the defense objected. Outside the presence of the jury, the court sustained the defense objection to the questioning on escape, but declined the motion for a mistrial. 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 Applicant was not going to "kiddy camp" and would have work available. The trial court agreed, to which the defense only stated, "We're on recross, Judge". The judge replied that work situations was an issue certainly before the jury "at this point". {R. 4869-76}.

Following a curative charge by the judge as to the escape question, the prosecutor elicited from Aiken that (1) Applicant 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". While Aiken again noted Applicant would be around very dangerous people, he stated Applicant could have access to libraries, television, football, and softball. There was no defense objection to any of this testimony. {R. 4877-81}.

Applicant next called jail guard Sharon Branch, who stated that while Applicant displayed some "attitude" and had a recent difficulty with authorities over going to church,

he never made her feel physically threatened. The defense elicited that Applicant was allowed "one hour of rec per day", but that sometimes the guards extended that. {R. 4882-88}.

Finally, jail guard Enrique Badillo testified that Applicant displayed a very polite and cooperative attitude in jail. {R. 4902-05}.

On appeal, Applicant contended that the solicitor's questioning about movies, television, and books was irrelevant under the South Carolina Supreme Court's decision in State v. Plath, 281 S.C. 1, 313 S.E.2d 619, 627 (1984), and violative of the constitutional due process mandate in Gardner v. Florida, 430 U.S. 349 (1977), that a death sentence cannot be based "on information the defendant had no opportunity to deny or explain". The State argued, *inter alia*, that the issue was not preserved as the arguments made on appeal were not made to the trial court. The South Carolina Supreme Court agreed the issue was not preserved, but added a 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).

2. Since the defense opened the door to the solicitor's

limited questioning about conditions of confinement by first eliciting testimony about the harshness of life in prison as well as presenting evidence about employment opportunities in jail, then the evidence was admissible and counsel could not have been deficient for failing to object.

As an initial matter, the defense opened the door to the solicitor's questioning – consistent with Plath – by eliciting testimony about the harshness of life in prison as well as bringing out employment opportunities available to Applicant. Since the evidence was admissible, counsel could not have been deficient nor Applicant prejudiced from the failure to object. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (Ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial).

During James Aiken's direct testimony, he stated Applicant would be "incapacitated" and "lock[ed] up" for the rest of his life, with guards "that know how to use weapons", and behind fences, gun towers, concrete, and bars. {R. 4842; 4845}. After the solicitor's cross, in which he did not specifically ask about conditions of confinement other than various security classifications, the defense elicited that the guards could use "lethal force", and Applicant could be further prosecuted for any violations in prison. At this point, the defense asked whether a life sentence would be "kiddy camp", whether Applicant would get "picnic lunches", that he would live the rest of his days amidst a predatory and dangerous community of inmates, and that he would not be "molly-coddled" by the prison authorities. {R. 4864-66}.

Given this defense-elicited evidence of the harshness of prison, in which Applicant not only starkly discussed the severe security regime as well as very pointedly used terms

as "kiddy camp", "picnic lunches", and "molly-coddled", it was only appropriate that the State be entitled to respond by showing that Applicant would have opportunities for recreation if sentenced to life – that "life imprisonment was not the total abyss which [the defendant] portrayed it to be". Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28. As this Court has stated, "[b]oth the accused and the State are entitled to a fair trial." State v. Woomey, 278 S.C. 468, 472, 299 S.E.2d 317, 319 (1982). Consistent with a level and fair adversary system, after defense counsel scored effective "points" by freely displaying all the negative consequences or aspects of a lifetime behind bars, the State was then able to respond in a limited fashion by eliciting some of the small comforts or enjoyments even a LWOP defendant will experience.

Moreover, the defense elicited prior to the solicitor's examination from both Baughman as well as Aiken that employment and educational opportunities available to a defendant behind bars. Like recreation, these opportunities undoubtedly can be a source of distraction from the rigors of prison life as well as a source of personal fulfillment; thus, it was only fair – and indeed certainly not prejudicial given the work evidence already elicited – that the State be allowed to also bring out in a limited fashion some other recreational activities available to inmates aside from work and education.³ Further, Aiken also very pointedly stated on cross that every inmate would be required to work, and that an inmate would be put in "supermax" if he refused. This was followed up on by the defense in redirect. {Tr.4862-63; 4866-67}. It was only appropriate that the State point

³ See generally 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).

out an inmate would have time for recreation, too – not that he would be breaking rocks all day every day "at hard labor".

Finally, when asked what motivation a life without parole inmate had to comply with the rules, Aiken stated that SCDC's only business was incapacitation of life without parole inmates, because they are not preparing such an inmate for release. {R. 4861}. It is only fair for the State to be able to rebut the obvious inferences from these statements by showing that SCDC does not merely incapacitate – it does allow life without parole inmates recreation and education.

The defense was able to score a lot of points with its presentation as to the harshness of life without parole. Indeed, the main thrust of the defense in the sentencing phase was the concept that the "without parole" portion of a life sentence in harsh conditions makes life without parole sufficiently severe enough punishment to be appropriate retribution for the crime, without the need to impose death. See {R. 4982} (defense derisively refers to prosecutor's argument as "reward-a-prison"); {R. 4991} (defense states its "easy to try to paint prison as a reward", and argues: "The line forms back there if anybody wants to spend the rest of their life behind bars."); {R. 4991} (defense argues it is "wrong" and an "injustice" if the jury thinks a life sentence is a "reward"); {R. 4996-97} (defense implies that a life sentence is worse than death for a person as young as Applicant, and argues "Can you imagine spending from the years of the youngest person on the jury until the oldest person on the jury behind bars? That's a life sentence without the possibility of parole."); {R. 4997-98} (defense argues that jury should give Applicant life so that he would have to remember what he did to Kandee for the rest of his days); {R. 5005-06} (defense argues that prison is a dangerous place, and

prison is appropriate punishment for Applicant because it is a death sentence too).

Simply because the State was then able to score a few points back on cross – as is the case for any party during almost any examination – does not mean that counsel was somehow ineffective for opening the door. Trial counsel has to take the good with the bad, and in almost every case a prosecutor will be able to score points off of the defense's presentations. The fact of such an inevitable response does not make counsel deficient for eliciting it for his beneficial purposes. To find deficiency would be precisely the type of hindsight Strickland forbids. Cf. Bunch v. Thompson, 949 F.2d 1354 (4th Cir. 1991) (reviewing court should filter from its analysis the distorting effects of hindsight); See generally Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel).

Since the door was opened for the prosecutor's limited response as to conditions of confinement, then counsel could not have been deficient nor Applicant prejudiced from the failure to object. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails both prongs of the Strickland test, as it was neither deficient nor prejudicial).

Moreover, for the same reasons the examination could not have been prejudicial. Given the defense's extensive exploration of the harshness of prison, it cannot be said that a much smaller amount of fair and accurate comment the other way would create a reasonable probability of a different result. Indeed, given the extensive focus of the defense on the retributive sufficiency of the "without parole" aspect of a life sentence, it cannot be said that a little further accurate information about life without parole to complete

the picture was so far out of bounds as to necessitate a new sentencing hearing. Applicant cannot show prejudice based solely on a claim that his attempt was thwarted to create a blatantly one-sided and inaccurate perspective.

Accordingly, this allegation should be dismissed as a matter of law or summary judgment granted, as the face of the record disproves Applicant's contention that counsel was deficient or Applicant prejudiced by these issues. See, e.g. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law); Rule 12(b)(6), SCRCP (dismissal for failure to state facts sufficient to state a cause of action); S.C. Code Ann. §§ 17-27-40 & -50 (2003) (requiring that a PCR application specifically set forth the grounds for relief, stating that allegations of facts within the applicant's knowledge be verified, and requiring that affidavits, records, or other evidence of the allegations be attached or the application shall recite why they are not attached); S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees the issue should be dismissed as a matter of law, Respondents request an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

B. Motion to Dismiss as to Ground Two

Petitioner's second ground for relief is as follows:

Counsel did not offer available evidence and argument that my arrest and the seizure of property violated the Fourth Amendment to the United States Constitution.

The police entered based on a subterfuge and without a proper warrant to arrest or seize property.

This issue should also be dismissed as a matter of law.

Extensive pre-trial hearings were held in this case not only on this issue but also the admissibility of Applicant's statements to police.

It first should be noted that while the town of Branchville where Applicant was arrested is in Orangeburg County, the body was found in Dorchester County. {R. 979; 5076-77}.

At the pre-trial hearings, Dorchester County Sheriff's Deputy Terrence Van Doran testified about accompanying other officers to the trailer of Ms. Dorothy Bowman. He testified he had spoken to the Chief of the Branchville Police and was told there was an outstanding Orangeburg County arrest warrant on Applicant. Van Doran stated that after they found Applicant hiding behind a bed, he was Mirandized and Applicant asked for his pants. Dorothy went into the other room and got the pants, but before she could give them to Applicant, Van Doren searched them. Inside he found a lady's wrist watch identified at trial as belonging to the victim. {R. 5076-81; 5085-88; 5177; 5187}.

Dorchester County officer Alvin Coker similarly testified that after they received information Applicant was with the victim the previous afternoon, they found out from Orangeburg County that there was a warrant on Applicant. He never saw the warrant physically, but Branchville Chief Walters told Coker he was aware of it. {R. 5124-25}. Coker also noted they had a signed consent to search form from Dorothy. {R. 5127}.

Chief Walters of the Branchville Police testified that he was aware of and had a copy – but not the original – of Applicant's Orangeburg arrest warrant for receiving stolen goods.

He stated he went with the other officers to Dorothy's trailer, and knocked on the door. They told Dorothy they had a warrant for Applicant, and she invited them inside. Dorothy said she did not know where Applicant was but the officers could look around. Once they found Applicant, he was told he was under arrest for receiving stolen goods. {R. 320-23; 325-31}.

Willie Bamberg of the Orangeburg-Calhoun Regional Detention Center testified that Applicant was booked in that night on a receiving stolen goods warrant. {R. 665-66}.

Major Walters of the Orangeburg County Sheriff's Office testified she went to the trailer and talked with Dorothy. She noted she had been told there were charges on the defendant. {R. 683-85}.

Applicant testified at the pre-trial hearing, and stated that he was at his wife's trailer at the point of his arrest but did not live there. He claimed he told his wife not to let the police in when they arrived, but they told her they had a search warrant to see if Applicant was in her house. Supposedly the police told him he needed to put something on his lower body, and only brought him a pair of his wife's jogging pants. {R. 729-37}. Applicant admitted being presented the warrant for receiving stolen goods once he reached the Orangeburg County Jail that night. {R. 796-97; 935; 987}.

On cross, Applicant admitted knowing Kandee's watch was in his pocket. He claimed he did not know a warrant was out for him even though he went and hid in a child's bedroom. {R. 910-13}.

Dorothy Bowman also testified. She stated Applicant was not living with her, although some of his clothes were at her house. According to Dorothy, the police came

to her door and said "something about JR [Applicant] and a warrant". They asked if they could come in and look for him, and she agreed. After they found Applicant, one of the officers asked her for Applicant's clothes. She went and got them, including the black pants. Dorothy stated that after Applicant was taken out she signed the consent to search form. {R. 1039-43}.

On cross, Dorothy again stated that the police requested to come in, and she let them in voluntarily. She was not afraid of Chief Walters at all. She noted police only said they had a warrant for his arrest, and noted police did not have a warrant to search her house. {R. 1050-53; 1056}.

The defense moved to suppress the evidence, arguing (1) Applicant was not informed of the nature of his arrest; (2) there was no proof the Branchville chief had knowledge of an outstanding felony or warrant; (3) even if he did, only having a copy of a warrant is insufficient, and (4) Applicant never received a bail or bond hearing on that offense, which violates the state statute. Thus, the defense stated that the fruits of the illegal arrest should be suppressed. Applicant also argued that Dorothy did not consent until after the fact of the search, and that she could not consent to search Applicant's pants anyway. Finally, Applicant argued that since the pants were outside of Applicant's wingspan, a warrant was needed. {R. 1255-66; 1271-73}.

The trial court denied the motion to suppress, finding that the arrest was made on a valid warrant, that Applicant had no expectation of privacy in the pants as Applicant asked for them, the wife retrieved them and they were examined incident to arrest. Finally, the court ruled Dorothy consented to a search of the home before the watch and pants

were removed. {R. 1275-76}.

When the pants and watch were entered into evidence, there was no objection. {R. 4129-30; 4164}.

On appeal, Applicant contended that his arrest was illegal, and thus the trial court should have suppressed the pants and Kandee's watch and the flammable liquid found within them. The South Carolina Supreme Court first held the issue was not preserved as the objection was not renewed when the evidence was offered at trial. State v. Bowman, 366 S.C. 485, 500-01, 623 S.E.2d 378, 386 (2005). However, the Court addressed the merits in the alternative, and concluded that Applicant "was legally arrested pursuant to a valid warrant". The Court found that a valid warrant for receiving stolen goods was issued, and "while [the officer was] possibly not in possession of the warrant itself, [the officer] was acting pursuant to the warrant when the arrest was made". Bowman, 366 S.C. at 501, 623 S.E.2d at 386-87. The court also rejected any contention that Applicant's wife did not consent to the search, noting that she specifically testified to the contrary. Finally, the Court concluded that the search of the pants was permissible as a search incident to arrest, since Applicant asked to put on those pants before he was led from the residence. Id. at 502, 623 S.E.2d at 387.

Thus, the South Carolina Supreme Court has already ruled that not only was the arrest valid, but also the evidence was properly admitted for multiple reasons. Obviously, this Court does not have the authority in PCR to overrule an evidentiary and constitutional decision of the South Carolina Supreme Court. Since the arrest was valid and the evidence was admissible, counsel could not have been deficient nor Applicant prejudiced. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based

on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial).

Moreover, Applicant does not identify any new *and different* facts or issues that would supposedly necessitate revisitation of the issue; thus, his allegation fails to allege sufficient facts and is insufficient to survive dismissal as a matter of law. The issue should be dismissed as a matter of law or summary judgment granted. See, e.g. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law); Rule 12(b)(6), SCRCP (dismissal for failure to state facts sufficient to state a cause of action); S.C. Code Ann. §§ 17-27-40 & -50 (2003) (requiring that a PCR application specifically set forth the grounds for relief, stating that allegations of facts within the applicant's knowledge be verified, and requiring that affidavits, records, or other evidence of the allegations be attached or the application shall recite why they are not attached); S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees the issue should be dismissed as a matter of law, Respondent requests an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

D. Ground Three

Applicant's third ground for relief is as follows:

Counsel failed to do an adequate background check for evidence in mitigation. This information included

evidence regarding mental state, intoxication, and evidence to rebut the state's victim impact evidence. These deficiencies constituted ineffective assistance of counsel in violation of the Sixth Amendment.

Again, this allegation must be dismissed as a matter of law.

First, Applicant's claim is insufficient as he does not set forth with particularity exactly what "evidence regarding mental state, intoxication, and evidence to rebut the state's victim impact evidence" counsel failed to uncover. As such, this assertion lacks sufficient specificity on which to respond because it fails to set forth any facts to support the claim. This matter must be dismissed pursuant to S.C. Code § 17-27-70(b) (1976) by the failure to allege facts to support his legal conclusion. Alternatively, this allegation is subject to dismissal pursuant to S.C. Rules of Civil Procedure, Rule 12(b)(6) ("failure to state facts to constitute a cause of action").⁴

Second, the record reflects that counsel hired and called in mitigation family, jail guards, jail education teachers, and corrections consultants. {R. 4742-4928}. Most importantly, counsel hired and called a forensic social worker who testified in detail during the mitigation case about the psychosocial assessment he conducted of Applicant's life. A number of courts have rejected similar claims where counsel actually hired experts, conducted an investigation, and presented a case in mitigation on the issues. See Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006) (Trial counsel did not render deficient performance by failing to fully investigate defendant's medical, mental, social, and

⁴ Rule 12(e), SCRCP, provides that if a pleading is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading", a motion for a more definite statement can be made. In the alternative to the grounds expressed in the preceding section, Respondent would move for a more definite statement of the allegations in Applicant's APCR.

familial history for purposes of penalty phase of capital murder trial, as element of ineffective assistance claim; counsel interviewed a number of witnesses about defendant's childhood and life, counsel hired a private investigator to go and gather background information on defendant, counsel called several witnesses, including three experts, to offer mitigating evidence, and counsel testified that information gathered about defendant's background was available to the experts). See also, e.g. Tucker v. Ozmint, 350 F.3d 433 (4th Cir. 2003) (where defendant claimed that counsel failed to submit early reports of sexual abuse to the trial expert, the case was unlike Wiggins in that there was no deficiency, as counsel presented a substantial mitigation case including lay witnesses and expert testimony on abuse and ASPD issues); Byram v. Ozmint, 339 F.3d 203 (4th Cir. 2003) (where counsel hired a psychologist, psychiatrist, social worker, and investigator for mitigation, and prepared extensively, investigation was reasonable despite claim counsel failed to present evidence of background, fetal alcohol syndrome, and brain damage; moreover, case was different from Wiggins on the prejudice prong in that here the jury did hear testimony about the background, and this was not a case where the jury was "completely in the dark as to the defendant's alleged mental problems"); Wilson v. Ozmint, 352 F.3d 847 (4th Cir. 2004) (counsel not deficient in investigating family members, given their substantial investigation into the defendant's family life and the large amount of evidence introduced at the plea hearing); Davis v. State, 875 So.2d 359 (Fla. 2004) (rejecting claim that counsel was ineffective for failure to present a "qualified" expert on the relationship between sexual abuse and PTSD, where, unlike Wiggins, counsel conducted an investigation into background and presented three mental health experts, with a number of diagnoses; relief is not warranted simply because PCR counsel can later find a "more

favorable" expert report); Ringo v. State, 120 S.W.3d 743 (Mo. 2003) (en banc) (no deficiency in investigation where counsel hired four experts; while one trial expert merely noted a high score on the PTSD scale but did not diagnose it, and a PCR expert later actually diagnosed PTSD, counsel's hiring of four experts was sufficient and reasonable investigation, making this case different from Wiggins).

Indeed, if the qualified experts counsel hired failed to identify every possible malady or issue, that is not an actionable basis for ineffective assistance of counsel. Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992). Lawyers are entitled to reasonably rely on their experts, and they are not required to second-guess their expert's conclusions. See Wilson v. Greene, 155 F.3d 396 (4th Cir. 1998) (to be reasonably effective, counsel is not required to second-guess the contents of an expert's report). While many of the cases cited here conducted evidentiary hearings as to counsel's investigation, the trial record in this case reflects that counsel hired and called the typically appropriate experts, and Applicant has not identified with specificity what experts or what of consequence was not only missed but also was not within the bailiwick of the experts counsel did retain and call. Thus, Applicant's claim should be dismissed as a matter of law or summary judgment granted. See, e.g., Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law); Rule 12(b)(6), SCRCP (dismissal for failure to state facts sufficient to state a cause of action); S.C. Code Ann. §§ 17-27-40 & -50 (2003) (requiring that a PCR application specifically set forth the grounds for relief, stating that allegations of facts within the applicant's knowledge be verified, and requiring that affidavits, records, or other evidence of the allegations be attached or the application shall recite

why they are not attached); S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees the issue should be dismissed as a matter of law, Respondent requests an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

CONCLUSION

Each and every allegation in the Application not hereinabove either expressly admitted, denied, qualified or explained is hereby denied.

WHEREFORE, Respondent submits that the Application for Post-Conviction Relief should be dismissed, or in the alternative that its motions for a more definite statement be granted. Further, Respondent requests that its motion for discovery be granted.

Respectfully submitted,

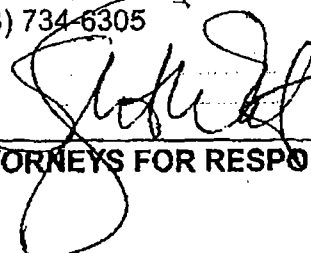
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August 31, 2006

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

Marion Bowman, Jr., #6006

Applicant,

v.

The State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

C/A No. 2006-CP-18-569

AMENDED
 RETURN, MOTION TO DISMISS AND
 MOTION FOR SUMMARY JUDGMENT
 (Capital Case)

3/15/07
 Per Carolyn
 file. mjb

Respondent, above-named, hereby make an Amended Return to the Amended Application for Post-Conviction Relief ("APCR"), filed by Marion Bowman, Jr. ("Applicant") and dated February 16th, 2007. This APCR stems from a murder conviction and death sentence.

I.

Procedural History

During the August 2001 term, the Dorchester County Grand Jury indicted Applicant, Marion Bowman, Jr., for murder and third degree arson (01-GS-18-0348 & -0349). {R. 5254-57}. The state gave notice of intent to seek the death penalty, and served notice of evidence in aggravation. {R. 1640-43; 4570-71; 5260-61}.

The trial judge in this case was the Honorable Diane S. Goodstein. Applicant was represented at the trial level by Norbert E. Cummings, Jr. and Marva A. Hardee-Thomas; First Circuit Solicitor Walter M. Bailey, Jr. and Assistant Solicitor Benjamin Lafond prosecuted the case for the State.

A pretrial Jackson v. Denno hearing was held before Judge Goodstein during various days between April 5th, 2002 and May 2nd, 2002. Jury selection began in

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Dorchester County on May 13th, 2002, and was completed on May 17th, 2002. Judge Goodstein conducted the guilt phase of Applicant's jury trial from May 17th until May 20th, 2002. Applicant's jury convicted him of both charges. {R. 4564}.

Applicant exercised his right to the 24-hour cooling-off period in subsection 16-3-20(B) of the Code of Laws for South Carolina. {R. 4569}. The sentencing phase of the trial began on May 22nd, 2002. Judge Goodstein submitted the following aggravating factors to the jury:

- (1) Murder was committed while in the commission of criminal sexual conduct.
- (2) Murder was committed while in the commission of kidnapping.
- (3) Murder was committed while in the commission of larceny with the use of a deadly weapon.
- (4) Murder was committed while in the commission of robbery while armed with a deadly weapon.

{R. 5018}. The following mitigating factors were charged:

- (1) The defendant has no significant history of prior criminal convictions involving the use of violence against another person.
- (2) The age or mentality at the time of the crime.
- (3) Any other mitigating factors that the jury may find. [The jury] may also consider any nonstatutory mitigating factors.

{R. 5032}.

On May 23rd, 2002, Applicant's jury found the existence of two of the four aggravating factors: the murder was committed in the commission of kidnapping, and larceny with the use of a deadly weapon. It recommended a sentence of death. {R. 5051}. After finding that the verdict was not the result of prejudice, passion, or any arbitrary factor,

Judge Goodstein sentenced Applicant to death for murder and ten years for third degree arson.

A timely Notice of Appeal was filed and served with the South Carolina Supreme Court on May 24th, 2002. Assistant Appellate Defender Robert M. Dudek, of the South Carolina Office of Appellate Defense, was appointed to represent Applicant during his direct appeal. On July 6th, 2005, Dudek filed with the state supreme court a Final Brief of Appellant, in which he asserted the following issues on behalf of Applicant:

(1) The court erred by refusing to instruct the jury on the statutory mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, since there was expert testimony of appellant's substance abuse problem, and evidence the parties were heavily drinking throughout the day.

(2) 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.

(3) The court erred by refusing to grant a mistrial where the solicitor attempted to question James Aiken about the possibility of escape, since the solicitor raised an improper consideration or arbitrary factor. The jury's attention is properly focused on the penalties of death and life without parole. Defense counsel correctly argued that the judge could not remove the taint once escape was raised by the state as an issue.

(4) The trial court lacked subject matter jurisdiction to sentence appellant to death since the murder indictment did not allege any aggravating circumstances.

(5) The court erred by ruling appellant did not have an

expectation of privacy in the pants he wore to his wife's house, and by refusing to suppress the watch and liquid material found in and on those pants. The pants were seized during an illegal warrantless arrest, and the court erred by ruling the arrest was pursuant to a valid Orangeburg warrant for another minor offense.

The State, through Assistant Attorney General S. Creighton Waters, filed its Final Brief of Respondent on July 7th, 2005. Dudek followed with a Final Reply Brief of Appellant also dated July 6th, 2005.

Oral argument in the case was held before the state supreme court on October 6th, 2005. The South Carolina Supreme Court issued an opinion affirming the convictions and death sentence on November 28th, 2004. State v. Bowman, 623 S.E.2d 378 (S.C. 2005).. A petition for rehearing was denied by that court on January 6th, 2006.

On February 1st, 2006, the South Carolina Supreme Court granted a stay of execution so that Applicant could pursue certiorari review before the United States Supreme Court. Applicant through Mr. Dudek filed a Petition for Writ of Certiorari with the United State Supreme Court dated April 5th, 2006; the State through AAG Waters filed a Brief in Opposition on May 12th, 2006. The United States Supreme Court denied the certiorari petition by order dated June 12th, 2006.

While his certiorari petition before the United States Supreme Court was pending, Applicant filed this APCR on April 7th, 2006. On August 4th, 2006, Applicant filed with the state supreme court a Petition to Appoint Post-Conviction Relief Judge. The State filed a Return on August 18th, 2006, and a Motion to Set Execution Date on August 22nd, 2006. On August 28th, 2006, Petitioner filed a Motion for a Stay of Execution, or, in the Alternative to Appoint a Post-Conviction Relief Judge. The State filed a Return to the latest motion

on August 29th, 2006. The State filed its initial Return, Motion to Dismiss, and Motion for Summary Judgment dated August 31st, 2006. The South Carolina Supreme Court issued an Order dated September 7th, 2006, in which it stayed the execution for this PCR and appointed this Court.

Applicant filed his First Amended Application dated February 16th, 2007. This Amended Return follows.

The relevant state court documents were attached to the original return.

II.

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.

A. Friday evening, 2/16/01: a suspiciously abandoned car and gunshots in the night

At about five minutes to eight on the Friday evening of February 16th, 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. {R. 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. {R. 3798-3801; 3803-05}.

B. Early morning Saturday, 2/17/01: the car found ablaze

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. {R. 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. {R. 3807-3810; 3814-16; 3819-22; 3875-78}.

C. 2/17/01: the crime scene evidence at Nursery Road

The Ford Escort's license tag was still readable, and it was registered to Kandee and her mother. {R. 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. {R. 3944-49}. Her body was extremely burned and charred, and the only skin remaining was on part of her back. {R. 3941-43}. The lungs were clear, indicating that Kandee was dead before the fire started. {R. 3954-55}.

Most everything that could burn did burn in the passenger area and trunk of Kandee's Ford Escort. {R. 3879-83}. The fire began in the passenger compartment rather than by an engine fire. {R. 3883-84}. On a pocketbook, chemists identified a medium petroleum accelerant; on the shirt, paper material, belt, and miscellaneous debris, Layton was able to conclusively identify the presence of gasoline. {R. 4298-4399}. Thus, officers concluded the fire was intentionally set. {R. 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 a 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 identified as Kandee's by her mother. {R. 3853-3860; 3867-71; 3910-12; 4164-66; 4272; 4286}. SLED DNA expert Matt Fitts later matched the blood samples to Kandee Martin. {R. 4366-67; 4377-79}.

D. Saturday morning, 2/17/01: Applicant's arrest, his pants, and Kandee's watch

After receiving information that Applicant 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 the Saturday morning of February 17th, 2001. The officers asked Dorothy if they could enter to search for Applicant, and she voluntarily agreed – eventually signing a consent to search form. Officers found Applicant hiding alongside a bed in a child's room down the hall, and he was promptly arrested and Mirandized.¹ {R. 4125-29; 4139-42; 4144-45; 4191-95; 4208; State's Exhibit #27}.

Applicant 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

¹ During the Jackson v. Denno hearing (but not in the guilt phase), it was brought out that officers arrested Applicant at Dorothy's trailer that morning based on an outstanding Orangeburg County arrest warrant for receiving stolen goods. {R. 321-22; 331, 648, 665, 797, 935; 5420-22}.

the living room, he found a brown lady's watch in the pocket. {R. 4129-32; 4142; 4150-52; 4195-98; 4207-08}. Kandee's mother identified at trial the watch as belonging to her daughter. {R. 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 Applicant's friends testified at trial he was wearing black jeans the day before. {R. 3763; 4058; 4093; 4193; 4297-98}.

E. Applicant's friends and relatives come clean about Kandee's murder

As the investigation progressed, it began to center around a number of people who had known each other for years and lived in or hung out at Branchville Villas Apartments, or "the projects". Of these people, Applicant's sisters Yolanda and Kendra, his first cousin (and codefendant) James Tywan Gadson, and his lifelong friend Travis Felder all testified for the State after securing plea agreements. {R. 3735-36; 3981; 4085-86; 4167-68}.

1. The argument over the gun

At a party the day Kandee disappeared, Applicant 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. {R. 3675-77; 3683-84; 3700; 3750-51; 3983-89; 4031-32; 4057-59; 4077-78; 4101}.

When Applicant returned, a number of people, including trial witnesses Koger, Fogle, and Carolyn Brown – saw Applicant get upset at Tywan because someone had taken his gun. However, Hiram Johnson interceded, and told Applicant he had taken the gun back to Katrina West's apartment in the projects. Applicant went across the street and got the gun, and put it back in his pants. {R. 3677-79; 3684-85; 3690-91; 3701; 3985-90;}

4058-60; 4077-78}.

2. Unpaid debts and threats to kill

At another point later that afternoon, Applicant asked Fogle to take him to Frankie Martin's house. Kandee's car was parked out front, and Applicant mentioned to Fogle that Kandee owed him some money. {R. 3685-87}.

Applicant 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 Applicant 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 Applicant told Yolanda to stop. {R. 3701; 3721-24; 3736-40; 3763-65}.

Applicant 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 Applicant, saying "hold on a minute", and turned back to her conversation with Eddie. {R. 3724-35; 3740-42; 3764-66}.

Kandee's gesture angered Applicant, Eddie heard Applicant say "Fuck waiting a minute. I'm about to kill this bitch." {R. 3725-27}. According to Katrina, Applicant declared "fuck that ride, that bitch be dead by dark fall". Applicant's sister Yolanda described his comments as "Fuck that bitch, that bitch be dead by dark". {R. 3765-66}. Yolanda also told police Applicant said "that bitch owed me some money and I want my money today". In any event, Yolanda drove off. {R. 3742-45; 3749}.

3. Tywan Gadsden describes Kandee's murder

Applicant made true on his threat later that night. Tywan Gadsden saw Applicant around 7:00 or 7:30 that evening. Applicant was riding with Kandee in her green Ford Escort, and he called Tywan over and told him to get in. {R. 3990-93; 4033}. With Applicant 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 Applicant and Tywan got out. {R. 3994-96; 4033-35}.

Applicant and Tywan walked down the road a ways, as Applicant whispered he was going to kill Kandee because she was wearing a wire. Kandee followed behind, grabbed Applicant by the arm and said she was scared. A car came down the road, and the three jumped into the woods until it passed. {R. 3997-99; 4035-36}.

Kandee then started back down the roadway with Applicant following. As Tywan came out of the woods behind them, he saw Applicant fire three times at Kandee. Kandee ran towards Tywan, but stopped and turned to face Applicant. She begged, "Please Black, don't shoot me no more. I have a baby to take care of." Applicant responded to her pleas by firing twice more, and Kandee fell to the ground. {R. 3997-4003; 4011-12; 4036-37}.

Tywan, who said he "messed in his pants a little bit", jumped in the car while Applicant dragged Kandee into the woods by her feet. Applicant 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. {R. 4012-14}.

Eventually, they parked Kandee's car in a wooded area behind a coal plant. Before they got out, Applicant threatened to blow Tywan's brains out if he ever told anyone. Applicant then headed for the projects while Tywan walked back to Koger's house.

Applicant eventually came back with Yolanda's car, and he and Tywan 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. {R. 4015-17; 4033-35}.

4. The trip to the club in Kandee's car: admissions of guilt

Around midnight, Applicant and some friends decided to go to the Allen Murray nightclub outside of Bowman. Applicant drove Kandee's car, with Hiram, Tywan, and Darrien Williams as passengers. Applicant told the men he had stolen the car, and made them put on gloves. {R. 4017-20; 4063-65; 4081}. At the club, Applicant walked around the lot some, trying to sell Kandee's car. {R. 4067}.

After about an hour or so, Applicant, Hiram, Tywan and Darrien headed back to Branchville in Kandee's car. As he drove the Escort with the pistol sitting in his lap, Applicant remarked, "I killed Kandee, heh heh heh". Applicant dropped Hiram off at the projects. {R. 4021-22; 4067-69}.

5. Travis Felder describes the car fire

About 3:00 a.m., Applicant knocked on Travis's door and asked him for help parking a car. {R. 4042-45; 4116-18; 4090-92; 4119-20}.

Travis testified that he got in his own car and followed Applicant in the Ford Escort back to Nursery Road. Applicant pulled over on the side of the road, cut his lights, and went into the woods for a minute. The next thing Travis saw was Applicant pulling a body by its feet face down. As Applicant opened the trunk and put the body inside, Travis could see by the trunk light it was Kandee. {R. 4093-97}.

Applicant looked back at Travis, and said, "You didn't think I would do it, did you?

I killed Kandee Martin." Applicant told Travis to go down the road and turn around, while Applicant drove the Escort up into a field. Travis watched as Applicant threw a light into the car, which erupted in flames. Travis then took Applicant back and returned to Valorna's, where he went to sleep. {R. 4098-4101; 4106}.

F. May and June 2001: a pistol found in the Edisto river – and bullets found in the couch

Applicant's murder weapon was found after police managed to get information in May and June 2001 from Applicant's wife Dorothy and his sisters Yolanda and Kendra, all of whom, as mentioned before, testified at trial with plea agreements. {R. 3735-36; 4161; 4167-68}. Dorothy stated that a few days after the murder Hiram Johnson told her the gun was hidden in the sleeper sofa at her trailer on Lockett Street. She found the pistol hidden a "cuff" or "sleeve" of the couch, put it in her pocketbook, and went over to see Kendra at Applicant's grandmother's. {R. 4198-4202; 4210-12}.

While Dorothy claimed she talked with Kendra and then left the gun at Kendra's in the clothes hamper, Kendra testified that she and Dorothy went to meet Applicant's father Marlon Bowman, Sr. at the EZ shop. Marion Sr. took the gun and put it in the middle console of his truck. {R. 4168-73; 4203-04; 4211-12; 4358}.

The next day, Kendra and Yolanda met with Marion Sr., and then followed him out to the graveyard at the Zion AME church. Applicant's father brought the pistol from out of the nearby woods, and they wrapped it in a towel and put it in Yolanda's trunk. Kendra and Yolanda drove out to the Old Cope Road bridge and threw the gun over the side into the Edisto River. {R. 4174-78; 4183-87}. On May 28th, 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. {R. 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 Applicant's .380, they were of course consistent. {R. 4315-20}.

Following Dorothy's statement to police in June 2001, officers visited the residence of her sister Sally Bookhart, Dorothy had moved from her trailer on Lockett Street within a week or so after Applicant's arrest, and she gave the sofa back to Sally. When the officers arrived, Sally willingly agreed to their requests to search the sofa. In a little "pocket" of the sofa's fabric, SLED agent James Helms discovered a box of Winchester .380 ammunition, consistent with the shell casings found at the Nursery Road scene. {R. 4205; 4244-49; 4259-62}.

G. The DNA match

Finally, SLED DNA analyst Fitts found human blood and semen in the vaginal swabs taken from Kandee at autopsy. While the mixture of female and male secretions in the vaginal swabs complicated identification, Agent Fitts was able to match Applicant to a probability of 1 in 5300. {R. 4370-72; 4379-87}.

H. The State's sentencing phase case

Following the 24-hour "cool down" period, the State began its evidentiary presentation in the sentencing phase by reincorporating its evidence from the guilt phase. {R. 4650}. It then introduced certified copies of Applicant's March 1998 convictions from two incidents – with a third degree burglary charge and a petty larceny charge for each. {R. 4652}.

Next to testify were Joseph Wimberly and David Thompson – the two victims from the March 1998 convictions. Wimberly noted that his house was robbed of a shotgun, of which the barrel was later sawed off. Stolen from Thompson's residence was cash and a .357 pistol. Within 24 hours, Applicant's cousin used the pistol to kill himself. {R. 4653-59; 4801-02}.

Next was SLED arson agent James Helms, through which the State introduced photographs of Kandee as she was found severely burned in the back of her trunk. {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. The trial court excluded the general autopsy photographs in view of the pictures introduced through Helms. {R. 4669-91}.

Finally, 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. {R. 4692-4708}.

I. The defense's sentencing case

The defense case in mitigation began with Applicant's older sister Kendra Bowman. She generally described good times growing up with Applicant, but noted her biological father was abusive until he left when the children were babies. {R. 4742-48}.

Next to testify was Applicant mother Dorothy Bowman (his wife, who testified during the guilt phase, is also named Dorothy). Dorothy related that Applicant's father was abusive, but he left when the kids were very small. She theorized that Applicant longed for fatherly involvement, and noted that her subsequent boyfriend Joseph Sims was a

positive influence on the kids. Applicant had trouble in school and only finished the ninth grade, but he would help his mother out after she became disabled. {R. 4750-59}.

Applicant called Margaret Baughman, an adult education teacher at the Dorchester County Detention Center. She testified that during he pre-trial Incarceration Applicant took classes, and even became a reliable assistant to her teaching at the jail. {R. 4761-67}.

A forensic social worker named Jeffrey Youngman also testified in Applicant's mitigation presentation. Generally, Youngman theorized Applicant's functioning was negatively impacted by his upbringing. {R. 4791-4805}.

Corrections consultant and former South Carolina prisons official James Aiken was called to the stand next for the defense. He 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 Applicant 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 Applicant for the rest of his life, with the prison's fences, gun towers, and trained guards. Aiken also opined that Applicant would adapt well to prison life, given that during his three previous incarcerations, Applicant had no significant incidents of violence to staff and inmates, and had assisted the adult education classes. {R. 4832-45}.

Dorchester County Detention Center guard Sharon J. Branch testified that Applicant has "attitude", and would often speak out to guards. While Applicant 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, Applicant 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. {R. 4882-88}.

On the other hand, another jail guard named Enrique Badillo testified that Applicant was very polite, and presented no difficulty or threats to safety. {R. 4902-05}.

Finally, guilt phase witness Travis 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 Applicant – buying gasoline in a small gas container. Felder admitted that after Applicant came and got him from the girls' apartment in the Branchville Villas, Applicant gave him a gas jug and asked him to buy some fuel. Travis stated he thought Applicant was just filling up the can to move the car. {R. 4911-28}.

III.

Allegations in First Amended Application

Applicant makes three (3) allegations in his APCR. All of these involve ineffective assistance of counsel. As will be seen, all of the allegations should be dismissed or denied as a matter of law, and the petition dismissed with prejudice.

Pursuant to the familiar doctrine in Strickland v. Washington, Petitioner must first demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. 466 U.S. 668 (1984). Judicial scrutiny of counsel's performance is highly deferential and not subject to the distorting effects of hindsight, and counsel may reasonably choose from a wide range of acceptable strategies. Strickland, 466 U.S. at

689; Burket v. Angelone, 208 F.3d 172 (4th Cir. 2000).

Competency is measured against what an objectively reasonable attorney would have done under circumstances existing at the time of the representation. Savino v. Murray, 82 F.3d 593, 598 (4th Cir. 1996). The Court should "decline to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial." Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996).

As the Supreme Court made clear in Strickland:

. . . the reasonableness of counsel's actions may be determined or substantially influenced by the defendants own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigations are reasonable depends upon such information . . . [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Strickland, 466 U.S. at 691. Barnes v. Thompson, 58 F.3d 971, 978 (4th Cir. 1995); Matthews v. Evatt, 105 F.3d 907, 919-920 (4th Cir. 1997). The mere fact that trial counsel's strategy was unsuccessful does not render counsel's assistance unconstitutionally ineffective. Strickland, 466 U.S. at 689. Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995).

Next, Petitioner must also establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. It is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding, because

virtually every act or omission of counsel would meet that test. Id. at 693. "The Petitioner bears the 'highly demanding' and 'heavy burden' in establishing actual prejudice. Williams v. Taylor, 120 S.Ct. 1495, 1513-14 (2000).

Recently in Jones v. State, 332 S.C. 329, 504 S.E.2d.822 (1998) , the South Carolina Supreme Court restated the "prejudice" prong in a capital sentencing proceeding as being established when "there is a reasonable probability that, absent [counsel's] errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death," citing Strickland. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Jones, 504 S.E.2d at 823-824. Accord, Plath v. Moore, 130 F.3d 595 (4th Cir. 1997) ("given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and hence, the sentence imposed." Thus, in weighing the omitted evidence against that actually used to convict and sentence Plath, the mitigating evidence seems insufficient to shift the balance in Plath's favor.").

Finally, the Supreme Court of South Carolina has held that a hearing on an allegation is only required when factual allegations that lead to a Sixth Amendment deprivation are not conclusively refuted by the record. Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981).

As a general matter, Respondent submits that the Record on Appeal from Applicant's trial and sentencing hearing conclusively demonstrate that appointed counsel were not deficient in their performance nor was Applicant prejudiced in any way by their

performance. To the contrary, the Record from each proceeding demonstrates that Applicant's attorneys were diligent in their representation of Applicant, performed well within the wide range of competence and reasonable professional assistance demanded of attorneys in criminal matters. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Marzullo v. Maryland, *supra*; Butler v. State, 286 S.C. 441, 34 S.E.2d 813 (1985); Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985).

A. Ground A

Applicant's first ground for relief is as follows:

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to investigate, challenge and present evidence related to a firearm during the verdict of the trial proceedings. Strickland v. Washington, 466 U.S. 668 (1984).

Applicant contends his counsel was ineffective for failing to challenge the ballistics findings matching a gun fished out of the Edisto River with the casings found at the murder scene.

Initially, Respondents deny that counsel were ineffective in their handling of the state's ballistics evidence, or that there was viable evidence materially challenging the State's ballistics results.

Moreover, summary judgment should be granted on this issue as there is no genuine issue of material fact as to prejudice under Strickland. Even if there had been evidence challenging the State's ballistics evidence, it would not rise to the level of Strickland prejudice as a matter of law. There was ample and conclusive evidence of identity without reference to the ballistics evidence. The victim's watch was found in Applicant's pants at his arrest the next morning. {R. 4129-32; 4142; 4150-52; 4195-98;

4207-08}. A number of witnesses heard Applicant threaten to kill the victim the afternoon of her murder. **{R. 3725-27; 3765-66; 3742-45}**. Tywan Gadsden described witnessing Applicant murder the victim. **{R. 3990-4035}**. Multiple witnesses observed Applicant driving the victim's car after her murder, and Applicant tried to sell the car at a club that night. He admitted killing the victim. **{See page 11, *supra*}**. Finally, Travis Felder described going with Applicant when he dragged the victim's body from the woods, put it in her car, and set it afire. **{R. 4042-4120}**.

Given all this evidence of identity, it cannot be said that a mere challenge to the State's ballistics result would have created a reasonable probability of a different result.

Accordingly, this allegation should be dismissed as a matter of law or summary judgment granted, as the face of the record disproves Applicant's contention that he was prejudiced by these issues. See, e.g. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law); Rule 12(b)(6), SCRPC (dismissal for failure to state facts sufficient to state a cause of action); S.C. Code Ann. §§ 17-27-40 & -50 (2003) (requiring that a PCR application specifically set forth the grounds for relief, stating that allegations of facts within the applicant's knowledge be verified, and requiring that affidavits, records, or other evidence of the allegations be attached or the application shall recite why they are not attached); S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees the issue should be dismissed as a matter of law,

Respondents request an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

B. Ground B

Applicant's second ground for relief is as follows:

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to improper testimony regarding a conspiracy to secrete a firearm wherein no evidence linked Applicant to this conspiracy. SCRE Rule 402, 403, & 494 and *Strickland v. Washington*, 466 U.S. 668 (1984).

Applicant contends his counsel was ineffective for failing to object to evidence his relatives were engaging in a conspiracy to "secrete" a firearm.

Respondents deny that counsel was deficient or Applicant prejudiced from the handling of this evidence.

As noted before, at a party the day Kandee disappeared, Applicant 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. {R. 3675-77; 3683-84; 3700; 3750-51; 3983-89; 4031-32; 4057-59; 4077-78; 4101}.

When Applicant returned, a number of people, including trial witnesses Koger, Fogle, and Carolyn Brown – saw Applicant get upset at Tywan because someone had taken his gun. However, Hiram Johnson interceded, and told Applicant he had taken the gun back to Katrina West's apartment in the projects. Applicant went across the street and got the gun, and put it back in his pants. {R. 3677-79; 3684-85; 3690-91; 3701; 3985-90;

4058-60; 4077-78}.

Applicant's murder weapon was found after police managed to get information in May and June 2001 from Applicant's wife Dorothy and his sisters Yolanda and Kendra, all of whom, as mentioned before, testified at trial with plea agreements. **{R. 3735-36; 4161; 4167-68}**. Dorothy stated that a few days after the murder Hiram Johnson told her the gun was hidden in the sleeper sofa at her trailer on Lockett Street. She found the pistol hidden a "cuff" or "sleeve" of the couch, put it in her pocketbook, and went over to see Kendra at Applicant's grandmother's. **{R. 4198-4202; 4210-12}**.

While Dorothy claimed she talked with Kendra and then left the gun at Kendra's in the clothes hamper, Kendra testified that she and Dorothy went to meet Applicant's father Marion Bowman, Sr. at the EZ shop. Marion Sr. took the gun and put it in the middle console of his truck. **{R. 4168-73; 4203-04; 4211-12; 4358}**.

The next day, Kendra and Yolanda met with Marion Sr., and then followed him out to the graveyard at the Zion AME church. Applicant's father brought the pistol from out of the nearby woods, and they wrapped it in a towel and put it in Yolanda's trunk. Kendra and Yolanda drove out to the Old Cope Road bridge and threw the gun over the side into the Edisto River. **{R. 4174-78; 4183-87}**. On May 28th, 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. **{R. 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 Applicant's .380, they were of course consistent. **{R. 4315-20}**.

Obviously the weapon was relevant to identity. It shows Applicant's possession of a firearm matched with or at least consistent with the gun used to kill the victim during the time period that the victim was killed. See Braxton, 343 S.C. at 634, 541 S.E.2d at 836 (testimony that witness knew appellant possessed a nine millimeter pistol was relevant because it tended to identify appellant as the possessor of the murder weapon, a nine millimeter pistol); State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001) (prior murder was admissible to establish appellant's identity in the prosecution of the current murder where the same weapon was used in both murders).

Indeed, Applicant was identified by his friends in possession of such a gun prior to the crime. Dorothy testified that on the night of the incident Applicant came in and slept in the chair where she later found the gun. {R. 4193-94; 4198-99}. It is certainly a reasonable inference from the evidence that Applicant hid the gun there, and his wife, sisters, and father subsequently attempted to permanently hide or destroy the gun to protect Applicant. Destruction of evidence is relevant to identity, and of course any admissions that Applicant made to his family about the gun – whether expressly testified to or implicit in the subsequent actions of the family – would be substantively admissible. See Rule 801(d)(2), SCRE (admissions of party opponent). See also State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) (destruction of evidence and evidence of flight relevant as incriminating circumstance, and to show guilty knowledge and intent); State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (evidence of flight admissible to show guilty knowledge and intent); State v. Ezell, 321 S.C. 421, 468 S.E.2d 679 (Ct. App. 1996) (In case where defendant ran and vial of crack was found nearby, evidence of flight shows guilty knowledge and intent). See also United States v. Robinson, 161 F.3d 463 (7th Cir.

1998) (evidence of flight shows consciousness of guilt under Rule 404(b)); United States v. Jackson, 886 F.2d 838 (7th Cir. 1989) (evidence of flight and concealment is probative of guilty consciousness under Rule 404(b)).

Moreover, the description of how the gun was recovered was part of the *res gestae*, as it was necessary to tell the complete story of how the gun was recovered to show its link to Applicant and its relevance to this crime. In State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996), the court quoted with approval the Fourth Circuit's expression of the *res gestae* rule:

One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae', " or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ...' [and is thus] part of the *res gestae* of the crime charged." And where evidence is admissible to provide this "full presentation" of the offense, "[t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "*res gestae*."

United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980), quoted in Adams, 322 S.C. at 122, 470 S.E.2d at 370-71. Moreover, "the jury is entitled to know the 'setting' of the case. It cannot be expected to make its decision in a void – without knowledge of the time, place, and circumstances of the acts which form the basis of the charge." United States v. Roberts, 548 F.2d 665, 667 (6th Cir. 1977), cited in Rebecca Smith, 309 S.C. at 453, 424 S.E.2d at 502 (Toal, J., dissenting).

Since the evidence surrounding recovery of the gun was admissible, then counsel could not have been deficient nor Applicant prejudiced as a matter of law. See Hough v.

Anderson, 272 F.3d 878 (7th Cir. 2001) (Ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial).

Accordingly, this allegation should be dismissed as a matter of law or summary judgment granted, as the face of the record disproves Applicant's contention that counsel was deficient for failure to object or that he was prejudiced by these issues. See, e.g. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law); Rule 12(b)(6), SCRPC (dismissal for failure to state facts sufficient to state a cause of action); S.C. Code Ann. §§ 17-27-40 & -50 (2003) (requiring that a PCR application specifically set forth the grounds for relief, stating that allegations of facts within the applicant's knowledge be verified, and requiring that affidavits, records, or other evidence of the allegations be attached or the application shall recite why they are not attached); S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees the issue should be dismissed as a matter of law. Respondents request an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

C. Ground C

Applicant's third ground for relief is as follows:

Applicant was denied the effective assistance of counsel as

guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to improper testimony regarding Applicant's character and other acts during the verdict phase of the trial. SCRE Rule 402, 403, & 494 and *Strickland v. Washington*, 466 U.S. 668 (1984).

Applicant contends that the evidence regarding his semen being found in the victim was improper character evidence, and that counsel was ineffective for failing to object.

Respondents deny that counsel was deficient or Applicant prejudiced from the handling of this evidence.

As noted before, SLED DNA analyst Fitts found human blood and semen in the vaginal swabs taken from Kandee at autopsy. While the mixture of female and male secretions in the vaginal swabs complicated identification, Agent Fitts was able to match Applicant to a probability of 1 in 5300. {R. 4370-72; 4379-87}.

This evidence is undoubtedly relevant to identity as it places Applicant in the presence of Kandee during the time period at issue. Moreover, the mere fact that Applicant and Kandee had sex – which is all the seminal evidence proves by itself – is not a “bad act” in the legal sense. See Rule 404(b), SCRE.

Since the evidence was admissible, then counsel could not have been deficient nor Applicant prejudiced as a matter of law. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial).

Accordingly, this allegation should be dismissed as a matter of law or summary

judgment granted, as the face of the record disproves Applicant's contention that counsel was deficient for failure to object or that he was prejudiced by these issues. See, e.g., Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law); Rule 12(b)(6), SCRPC (dismissal for failure to state facts sufficient to state a cause of action); S.C. Code Ann. §§ 17-27-40 & -50 (2003) (requiring that a PCR application specifically set forth the grounds for relief, stating that allegations of facts within the applicant's knowledge be verified, and requiring that affidavits, records, or other evidence of the allegations be attached or the application shall recite why they are not attached); S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees the issue should be dismissed as a matter of law, Respondents request an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

D. Ground D

Applicant's next ground for relief is as follows:

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to request that the verdict phase of the proceedings should be re-opened after the jury did not find the aggravating circumstance of criminal sexual conduct during the penalty phase of the proceedings. *Strickland v. Washington*, 466 U.S. 668 (1984).

Applicant contends his counsel should have moved to "reopen" the murder verdict after the jury did not find the criminal sexual conduct ("CSC") aggravator during the sentencing phase.

Respondents deny that counsel was deficient or Applicant prejudiced from the handling of this evidence.

As noted before, evidence was introduced at the guilt phase that Applicant's semen was found in the victim. As noted in the previous ground, this evidence was independently relevant to identity in the guilt phase. Thus, there would be no legal basis to reopen the guilt phase simply because independently admissible evidence was presented. Indeed, it is hard to see how the jury's declination of the CSC aggravator in the sentencing phase calls into question their conviction of Applicant of *murder* in the guilt phase – the two are separate crimes and there was nothing inextricably linking CSC and murder such that declination of one necessarily would result in declination of the other.

Moreover, there was evidence in the record that Kandee and Applicant were willingly together that evening, as well as evidence that Kandee and Applicant were friends are were often seen together. {R. 3991; 4079-80}. A jury could have reasonably concluded that Applicant and Kandee had consensual sex prior to Applicant killing Kandee, or that the State had simply failed to prove beyond a reasonable doubt that any CSC occurred "while [Applicant] was in the commission of" the murder itself. There is no inconsistency.

Even if the jury's declination of the CSC aggravator was somehow inconsistent with its murder verdict, it is of no consequence. The state supreme court has abolished inconsistent verdicts as a means through which one can get a new trial. State v.

Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991).

Since as a matter of law there was no valid legal or factual basis for moving to "reopen" the guilt phase verdict following the sentencing phase, then counsel could not have been deficient nor Applicant prejudiced from the failure to raise the issue. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (Ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial).

Accordingly, this allegation should be dismissed as a matter of law or summary judgment granted, as the face of the record disproves Applicant's contention that counsel was deficient for failure to object or that he was prejudiced by these issues. See, e.g. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law); Rule 12(b)(6), SCRPC (dismissal for failure to state facts sufficient to state a cause of action); S.C. Code Ann. §§ 17-27-40 & -50 (2003) (requiring that a PCR application specifically set forth the grounds for relief, stating that allegations of facts within the applicant's knowledge be verified, and requiring that affidavits, records, or other evidence of the allegations be attached or the application shall recite why they are not attached); S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees the issue should be dismissed as a matter of law. Respondents request an evidentiary hearing to resolve any questions of fact. See Sharper

v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

E. Ground E

Applicant next contends as follows:

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to testimony and evidence related to a petroleum product located on a pair of pants seized during the arrest of Applicant. *Strickland v. Washington*, 466 U.S. 668 (1984).

Applicant asserts counsel failed to object to introduction of Applicant's pants, because the accelerant present on the pants was not the same as the substance used to ignite Kandee's car.

Respondents deny that counsel was deficient or Applicant prejudiced from the handling of this evidence.

At trial, on Kandee's pocketbook, SLED chemist Grady Layton identified a medium petroleum accelerant; on the shirt, paper material, belt, and miscellaneous debris found in her car, Layton was able to conclusively identify the presence of gasoline. {R. 4298-4399}. Thus, SLED Agent Helms concluded the fire was intentionally set. {R. 3889-90}. SLED chemist Layton also found the presence of a heavy petroleum accelerant, but not gasoline, on the black Levi's -- and a number of Appellant's friends testified at trial he was wearing black jeans the day before. {R. 3763; 4058; 4093; 4193; 4297-98}.

Here, there could be no deficiency for failure to object nor prejudice as there was no valid basis for objection. The pants themselves were relevant to identity, as they were consistent with and corroborative of what people said Applicant was wearing the night of

the murders, and Applicant asked for them the next morning when he was arrested. Moreover, the pants contained Kandee's watch, which was very relevant to identity.

As to the accelerant, the SLED agent testified that while there was a heavy accelerant on Appellant's pants, it was not gasoline, and there is a difference. {R. 4297-98; 4301-05}. Thus, there was really nothing that incriminating about the pants themselves (other than the mere fact they were black, and Appellant was described as wearing similar pants the night before). Indeed, the solicitor in argument never mentioned the accelerant on the pants as indicative of anything. {R. 4461; 4476}.

Given these circumstances, as a matter of law description of the accelerant on the pants could not possibly have been so prejudicial to create a reasonable probability of a different result.

Accordingly, this allegation should be dismissed as a matter of law or summary judgment granted, as the face of the record disproves Applicant's contention that counsel was deficient for failure to object or that he was prejudiced by these issues. See, e.g. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law); Rule 12(b)(6), SCRCP (dismissal for failure to state facts sufficient to state a cause of action); S.C. Code Ann. §§ 17-27-40 & -50 (2003) (requiring that a PCR application specifically set forth the grounds for relief, stating that allegations of facts within the applicant's knowledge be verified, and requiring that affidavits, records, or other evidence of the allegations be attached or the application shall recite why they are not attached); S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis

of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees the issue should be dismissed as a matter of law, Respondents request an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

F. Ground F

Applicant's next ground for relief is as follows:

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to adequately challenge the search and seizure of property. *Strickland v. Washington*, 466 U.S. 668 (1984).

Applicant contends the search of his wife's trailer was conducted without his or his wife's consent, and counsel was thus ineffective for failing to properly challenge this evidence.

This issue should also be dismissed as a matter of law.

Extensive pre-trial hearings were held in this case not only on this issue but also the admissibility of Applicant's statements to police.

It first should be noted that while the town of Branchville where Applicant was arrested is in Orangeburg County, the body was found in Dorchester County. {R. 979; 5076-77}.

At the pre-trial hearings, Dorchester County Sherriff's Deputy Terrence Van Doran testified about accompanying other officers to the trailer of Ms. Dorothy Bowman. He testified he had spoken to the Chief of the Branchville Police and was told there was an outstanding Orangeburg County arrest warrant on Applicant. Van Doran stated that after

they found Applicant hiding behind a bed, he was Mirandized and Applicant asked for his pants. Dorothy went into the other room and got the pants, but before she could give them to Applicant, Van Doren searched them. Inside he found a lady's wrist watch identified at trial as belonging to the victim. {R. 5076-81; 5085-88; 5177; 5187}.

Dorchester County officer Alvin Coker similarly testified that after they received information Applicant was with the victim the previous afternoon, they found out from Orangeburg County that there was a warrant on Applicant. He never saw the warrant physically, but Branchville Chief Walters told Coker he was aware of it. {R. 5124-25}. Coker also noted they had a signed consent to search form from Dorothy. {R. 5127}.

Chief Walters of the Branchville Police testified that he was aware of and had a copy – but not the original – of Applicant's Orangeburg arrest warrant for receiving stolen goods. He stated he went with the other officers to Dorothy's trailer, and knocked on the door. They told Dorothy they had a warrant for Applicant, and she invited them inside. Dorothy said she did not know where Applicant was but the officers could look around. Once they found Applicant, he was told he was under arrest for receiving stolen goods. {R. 320-23; 325-31}.

Willie Bamberg of the Orangeburg-Calhoun Regional Detention Center testified that Applicant was booked in that night on a receiving stolen goods warrant. {R. 665-66}.

Major Walters of the Orangeburg County Sheriff's Office testified she went to the trailer and talked with Dorothy. She noted she had been told there were charges on the defendant. {R. 683-85}.

Applicant testified at the pre-trial hearing, and stated that he was at his wife's trailer

at the point of his arrest but did not live there. He claimed he told his wife not to let the police in when they arrived, but they told her they had a *search* warrant to see if Applicant was in her house. Supposedly the police told him he needed to put something on his lower body, and only brought him a pair of his wife's jogging pants. {R. 729-37}. Applicant admitted being presented the warrant for receiving stolen goods once he reached the Orangeburg County Jail that night. {R. 796-97; 935; 987}.

On cross, Applicant admitted knowing Kandee's watch was in his pocket. He claimed he did not know a warrant was out for him even though he went and hid in a child's bedroom. {R. 910-13}.

Dorothy Bowman also testified. She stated Applicant was not living with her, although some of his clothes were at her house. According to Dorothy, the police came to her door and said "something about JR [Applicant] and a warrant". They asked if they could come in and look for him, and she agreed. After they found Applicant, one of the officers asked her for Applicant's clothes. She went and got them, including the black pants. Dorothy stated that after Applicant was taken out she signed the consent to search form. {R. 1039-43}.

On cross, Dorothy again stated that the police requested to come in, and she let them in voluntarily. She was not afraid of Chief Walters at all. She noted police only said they had a warrant for his arrest, and noted police did not have a warrant to search her house. {R. 1050-53; 1056}.

The defense moved to suppress the evidence, arguing (1) Applicant was not informed of the nature of his arrest; (2) there was no proof the Branchville chief had

knowledge of an outstanding felony or warrant; (3) even if he did, only having a copy of a warrant is insufficient, and (4) Applicant never received a bail or bond hearing on that offense, which violates the state statute. Thus, the defense stated that the fruits of the illegal arrest should be suppressed. Applicant also argued that Dorothy did not consent until after the fact of the search, and that she could not consent to search Applicant's pants anyway. Finally, Applicant argued that since the pants were outside of Applicant's wingspan, a warrant was needed. {R. 1255-66; 1271-73}.

The trial court denied the motion to suppress, finding that the arrest was made on a valid warrant, that Applicant had no expectation of privacy in the pants as Applicant asked for them; the wife retrieved them and they were examined incident to arrest. Finally, the court ruled Dorothy consented to a search of the home before the watch and pants were removed. {R. 1275-76}.

When the pants and watch were entered into evidence, there was no objection. {R. 4129-30; 4164}.

On appeal, Applicant contended that his arrest was illegal, and thus the trial court should have suppressed the pants and Kandee's watch and the flammable liquid found within them. The South Carolina Supreme Court first held the issue was not preserved as the objection was not renewed when the evidence was offered at trial. State v. Bowman, 366 S.C. 485, 500-01, 623 S.E.2d 378, 386 (2005). However, the Court addressed the merits in the alternative, and concluded that Applicant "was legally arrested pursuant to a valid warrant". The Court found that a valid warrant for receiving stolen goods was issued, and "while [the officer was] possibly not in possession of the warrant itself, [the officer] was

acting pursuant to the warrant when the arrest was made". Bowman, 366 S.C. at 501, 623 S.E.2d at 386-87. The court also rejected any contention that Applicant's wife did not consent to the search, noting that she specifically testified to the contrary. Finally, the Court concluded that the search of the pants was permissible as a search incident to arrest, since Applicant asked to put on those pants before he was led from the residence. Id. at 502, 623 S.E.2d at 387.

Thus, the South Carolina Supreme Court has already ruled that not only was the arrest valid, but also the evidence was properly admitted for multiple reasons. Obviously, this Court does not have the authority in PCR to overrule an evidentiary and constitutional decision of the South Carolina Supreme Court. Since the arrest was valid and the evidence was admissible, counsel could not have been deficient nor Applicant prejudiced. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial).

Moreover, Applicant does not identify any new *and different* facts or issues that would supposedly necessitate revisitation of the issue; thus, his allegation fails to allege sufficient facts and is insufficient to survive dismissal as a matter of law. The issue should be dismissed as a matter of law or summary judgment granted. See, e.g. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law); Rule 12(b)(6), SCRPC (dismissal for failure to state facts sufficient to state a cause of action); S.C. Code Ann. §§ 17-27-40 & -50 (2003) (requiring that a PCR

application specifically set forth the grounds for relief, stating that allegations of facts within the applicant's knowledge be verified, and requiring that affidavits, records, or other evidence of the allegations be attached or the application shall recite why they are not attached); S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees the issue should be dismissed as a matter of law, Respondent requests an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

G. Ground G

Applicant's next ground for relief is as follows:

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to investigate and present mitigating evidence at the penalty phase of the trial. 1 ABA Standards for Criminal Justice (2d ed. 1982 Supp.), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Rompilla v. Beard*, 125 S.Ct. 2456 (2005), *Strickland v. Washington*, 466 U.S. 668 (1984).

Respondents deny that counsel were deficient or Applicant prejudiced. First, Applicant's claim is insufficient as he does not set forth with particularity exactly what evidence counsel failed to uncover. As such, this assertion lacks sufficient specificity on which to respond because it fails to set forth any facts to support the claim. This matter must be dismissed pursuant to S.C. Code § 17-27-70(b) (1976) by the failure to allege facts to support his legal conclusion. Alternatively, this allegation is subject to dismissal

pursuant to S.C. Rules of Civil Procedure, Rule 12(b)(6) ("failure to state facts to constitute a cause of action").²

Second, the record reflects that counsel hired and called in mitigation family, jail guards, jail education teachers, and corrections consultants. {R. 4742-4928}. Most importantly, counsel hired and called a forensic social worker who testified in detail during the mitigation case about the psychosocial assessment he conducted of Applicant's life. A number of courts have rejected similar claims where counsel actually hired experts, conducted an investigation, and presented a case in mitigation on the issues. See Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006) (Trial counsel did not render deficient performance by failing to fully investigate defendant's medical, mental, social, and familial history for purposes of penalty phase of capital murder trial, as element of ineffective assistance claim; counsel interviewed a number of witnesses about defendant's childhood and life, counsel hired a private investigator to go and gather background information on defendant, counsel called several witnesses, including three experts, to offer mitigating evidence, and counsel testified that information gathered about defendant's background was available to the experts). See also, e.g. Tucker v. Ozmint, 350 F.3d 433 (4th Cir. 2003) (where defendant claimed that counsel failed to submit early reports of sexual abuse to the trial expert, the case was unlike Wiggins in that there was no deficiency, as counsel presented a substantial mitigation case including lay witnesses and

² Rule 12(e), SCRCP, provides that if a pleading is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading", a motion for a more definite statement can be made. In the alternative to the grounds expressed in the preceding section, Respondent would move for a more definite statement of the allegations in Applicant's APCR.

expert testimony on abuse and ASPD issues); Byram v. Ozmint, 339 F.3d 203 (4th Cir. 2003) (where counsel hired a psychologist, psychiatrist, social worker, and investigator for mitigation, and prepared extensively, investigation was reasonable despite claim counsel failed to present evidence of background, fetal alcohol syndrome, and brain damage; moreover, case was different from Wiggins on the prejudice prong in that here the jury did hear testimony about the background, and this was not a case where the jury was "completely in the dark as to the defendant's alleged mental problems"); Wilson v. Ozmint, 352 F.3d 847 (4th Cir. 2004) (counsel not deficient in investigating family members, given their substantial investigation into the defendant's family life and the large amount of evidence introduced at the plea hearing); Davis v. State, 875 So.2d 359 (Fla. 2004) (rejecting claim that counsel was ineffective for failure to present a "qualified" expert on the relationship between sexual abuse and PTSD, where, unlike Wiggins, counsel conducted an investigation into background and presented three mental health experts, with a number of diagnoses; relief is not warranted simply because PCR counsel can later find a "more favorable" expert report); Ringo v. State, 120 S.W.3d 743 (Mo. 2003) (en banc) (no deficiency in investigation where counsel hired four experts; while one trial expert merely noted a high score on the PTSD scale but did not diagnose it, and a PCR expert later actually diagnosed PTSD, counsel's hiring of four experts was sufficient and reasonable investigation, making this case different from Wiggins).

Indeed, if the qualified experts counsel hired failed to identify every possible malady or issue, that is not an actionable basis for ineffective assistance of counsel. Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992). Lawyers are entitled to reasonably rely on their experts, and they are not required to second-guess their expert's conclusions. See

Wilson v. Greene, 155 F.3d 396 (4th Cir. 1998) (to be reasonably effective, counsel is not required to second-guess the contents of an expert's report): While many of the cases cited here conducted evidentiary hearings as to counsel's investigation, the trial record in this case reflects that counsel hired and called the typically appropriate experts, and Applicant has not identified with specificity what experts or what of consequence was not only missed but also was not within the bailiwick of the experts counsel did retain and call. Thus, Applicant's claim should be dismissed as a matter of law or summary judgment granted. See, e.g. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law); Rule 12(b)(6), SCRCP (dismissal for failure to state facts sufficient to state a cause of action); S.C. Code Ann. §§ 17-27-40 & -50 (2003) (requiring that a PCR application specifically set forth the grounds for relief, stating that allegations of facts within the applicant's knowledge be verified, and requiring that affidavits, records, or other evidence of the allegations be attached or the application shall recite why they are not attached); S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

Inasmuch as these claims raise factual issues as to counsel's preparation and representation, Respondent requests an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

H. Ground H

Applicant's next ground for relief is as follows:

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the

United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to the prosecution's introduction of evidence relevant to an arbitrary factor during the penalty phase of the trial. *Strickland v. Washington*, 466 U.S. 668 (1984) and *State v. Burkhardt*, — S.E.2d —, 2007 WL 80036 (SC 2007).

Applicant contends his counsel failed to object to the solicitor's improper elicitation of evidence of "good prison conditions". As will be seen, since the defense opened the door on the issue and thus the solicitor's subsequent questioning was permissible as a matter of law, counsel could not have been deficient nor Applicant prejudiced. See *Hough v. Anderson*, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the *Strickland* test, as it was neither deficient nor prejudicial). Thus, the issue should be rejected and dismissed as a matter of law.

1. Events at trial and on appeal

As noted before, during its sentencing phase case the State only presented the two victims of Applicant's prior crimes, the SLED arson agent, the pathologist, and two victim impact witnesses. {R. 4652-4708}. The State presented no witnesses or information as to any of Applicant's misbehavior in or lack of adaptability to prison.

On the other hand, the defense's third witness was Margaret Baughman, an adult education teacher at the jail where Applicant spent his pre-trial confinement. This teacher stated that Applicant had been taking her classes in jail for fourteen to fifteen months, and eventually became her reliable and trustworthy teacher's assistant. {R. 4761-65}. On

redirect, Applicant elicited that there are limited educational opportunities available for inmates, and Applicant made him self available for any class. {R. 4767}.

Applicant next called James Aiken, a former state corrections official and corrections consultant, who was qualified as an expert in future danger and prison adjustment issues. On direct, Aiken testified Applicant would *never* leave prison until he was dead. According to Aiken, Applicant'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. {R. 4838-4845}.

On cross, Aiken testified extensively without objection relevant to this issue on the various security levels of custody an inmate can achieve. 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. {R. 4854-4862}.

On redirect, *the defense* elicited that Applicant 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". *The defense* then elicited the dimensions of a supermax cell. *The defense* then asked Aiken what productive endeavors were available for Applicant in prison, to which Aiken replied that Applicant could "pay back society" and "do something for himself" by working in such areas as food service, maintenance, or painting. *The defense* asked Aiken if Applicant was going to be "molly-coddled", and elicited that Applicant could get involved with the Scared Straight program. {R. 4864-68}.

On re-cross, the prosecutor asked about escapes, to which the defense objected.

Outside the presence of the jury, the court sustained the defense objection to the questioning on escape, but declined the motion for a mistrial. 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 Applicant was not going to "kiddy camp" and would have work available. The trial court agreed, to which the defense only stated, "We're on recross, Judge". The judge replied that work situations was an issue certainly before the jury "at this point". {R. 4869-76}.

Following a curative charge by the judge as to the escape question, the prosecutor elicited from Aiken that (1) Applicant 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". While Aiken again noted Applicant would be around very dangerous people, he stated Applicant could have access to libraries, television, football, and softball. There was no defense objection to any of this testimony. {R. 4877-81}.

Applicant next called jail guard Sharon Branch, who stated that while Applicant displayed some "attitude" and had a recent difficulty with authorities over going to church, he never made her feel physically threatened. The defense elicited that Applicant was allowed "one hour of rec per day", but that sometimes the guards extended that. {R. 4882-88}.

Finally, jail guard Enrique Badillo testified that Applicant displayed a very polite and cooperative attitude in jail. {R. 4902-05}.

On appeal, Applicant contended that the solicitor's questioning about movies, television, and books was irrelevant under the South Carolina Supreme Court's decision in State v. Plath, 281 S.C. 1, 313 S.E.2d 619, 627 (1984), and violative of the constitutional due process mandate in Gardner v. Florida, 430 U.S. 349 (1977), that a death sentence cannot be based "on information the defendant had no opportunity to deny or explain". The State argued, *inter alia*, that the issue was not preserved as the arguments made on appeal were not made to the trial court. The South Carolina Supreme Court agreed the issue was not preserved, but added a 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. The defense objected to the state's evidence, and later put in its own evidence of "bad" prison conditions. In a 3-2 decision, the state supreme court found that the evidence of prison conditions injected an arbitrary factor into sentencing outside of the circumstances of the crime and the

characteristic of the defendant, and thus was reversible. State v. Burkhart, __ S.C. __, 640 S.E.2d 450 (2007).

Subsequent to Burkhart, the South Carolina Supreme Court reiterated that *defense* evidence of "dismal conditions in prison" was just as improper as State evidence on the subject. State v. Bryant, Op. No. 26278, __ S.C. __, __ S.E.2d __ (February 27, 2007).

2. Since the defense opened the door to the solicitor's limited questioning about conditions of confinement by first eliciting testimony about the harshness of life in prison as well as presenting evidence about employment opportunities in jail, then the evidence was admissible and counsel could not have been deficient for failing to object.

As an initial matter, the defense opened the door to the solicitor's questioning by eliciting testimony about the harshness of life in prison as well as bringing out employment opportunities available to Applicant. Since under Plath the evidence was admissible once the door was opened, counsel could not have been deficient nor Applicant prejudiced from the failure to object. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails both prongs of the Strickland test, as it was neither deficient nor prejudicial).

During James Alken's direct testimony, he stated Applicant would be "incapacitated" and "lock[ed] up" for the rest of his life, with guards "that know how to use weapons", and behind fences, gun towers, concrete, and bars. {R. 4842; 4845}. After the solicitor's cross, in which he did not specifically ask about conditions of confinement other than various security classifications, the defense elicited that the guards could use "lethal force", and Applicant could be further prosecuted for any violations in prison. At this point, the

defense asked whether a life sentence would be "kiddy camp", whether Applicant would get "picnic lunches", that he would live the rest of his days amidst a predatory and dangerous community of inmates, and that he would not be "molly-coddled" by the prison authorities. {R. 4864-66}.

Given this defense-elicited evidence of the harshness of prison, in which Applicant not only starkly discussed the severe security regime as well as very pointedly used terms as "kiddy camp", "picnic lunches", and "molly-coddled", it was only appropriate that the State be entitled to respond by showing that Applicant would have opportunities for recreation if sentenced to life – that "life imprisonment was not the total abyss which [the defendant] portrayed it to be". Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28. As this Court has stated, "[b]oth the accused and the State are entitled to a fair trial." State v. Woomer, 278 S.C. 468, 472, 299 S.E.2d 317, 319 (1982). Consistent with a level and fair adversary system, after defense counsel scored effective "points" by freely displaying all the negative consequences or aspects of a lifetime behind bars, the State was then able to respond in a limited fashion by eliciting some of the small comforts or enjoyments even a LWOP defendant will experience.

Moreover, the defense elicited prior to the solicitor's examination from both Baughman as well as Aiken that employment and educational opportunities available to a defendant behind bars. Like recreation, these opportunities undoubtedly can be a source of distraction from the rigors of prison life as well as a source of personal fulfillment; thus, it was only fair – and indeed certainly not prejudicial given the work evidence already elicited – that the State be allowed to also bring out in a limited fashion some other

recreational activities available to inmates aside from work and education.³ Further, Aiken also very pointedly stated on cross that every inmate would be required to work, and that an inmate would be put in "supermax" if he refused. This was followed up on by the defense in redirect. {Tr.4862-63; 4866-67}. It was only appropriate that the State point out an inmate would have time for recreation, too – not that he would be breaking rocks all day every day "at hard labor".

Finally, when asked what motivation a life without parole inmate had to comply with the rules, Aiken stated that SCDC's only business was incapacitation of life without parole inmates, because they are not preparing such an inmate for release. {R. 4861}. It is only fair for the State to be able to rebut the obvious inferences from these statements by showing that SCDC does not merely incapacitate – it does allow life without parole inmates recreation and education.

The defense was able to score a lot of points with its presentation as to the harshness of life without parole. Indeed, the main thrust of the defense in the sentencing phase was the concept that the "without parole" portion of a life sentence in harsh conditions makes life without parole sufficiently severe enough punishment to be appropriate retribution for the crime, without the need to impose death. See {R. 4982} (defense derisively refers to prosecutor's argument as "reward-a-prison"); {R. 4991} (defense states its "easy to try to paint prison as a reward", and argues: "The line forms back there if anybody wants to spend the rest of their life behind bars."); {R. 4991}

³ See generally 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).

(defense argues it is "wrong" and an "injustice" if the jury thinks a life sentence is a "reward"); {R. 4996-97} (defense implies that a life sentence is worse than death for a person as young as Applicant, and argues "Can you imagine spending from the years of the youngest person on the jury until the oldest person on the jury behind bars? That's a life sentence without the possibility of parole."); {R. 4997-98} (defense argues that jury should give Applicant life so that he would have to remember what he did to Kandee for the rest of his days); {R. 5005-06} (defense argues that prison is a dangerous place, and prison is appropriate punishment for Applicant because it is a death sentence too).

Simply because the State was then able to score a few points back on cross – as is the case for any party during almost any examination – does not mean that counsel was somehow ineffective for opening the door. Trial counsel has to take the good with the bad, and in almost every case a prosecutor will be able to score points off of the defense's presentations. The fact of such an inevitable response does not make counsel deficient for eliciting it for his beneficial purposes. To find deficiency would be precisely the type of hindsight Strickland forbids. Cf. Bunch v. Thompson, 949 F.2d 1354 (4th Cir. 1991) (reviewing court should filter from its analysis the distorting effects of hindsight); See generally Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel).

Since the door was opened for the prosecutor's limited response as to conditions of confinement, then counsel could not have been deficient nor Applicant prejudiced from the failure to object. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails

both prongs of the Strickland test, as it was neither deficient nor prejudicial).

Moreover, for the same reasons the examination could not have been prejudicial. Given the defense's extensive exploration of the harshness of prison, it cannot be said that a much smaller amount of fair and accurate comment the other way would create a reasonable probability of a different result. Indeed, given the extensive focus of the defense on the retributive sufficiency of the "without parole" aspect of a life sentence, it cannot be said that a little further accurate information about life without parole to complete the picture was so far out of bounds as to necessitate a new sentencing hearing. Applicant cannot show prejudice based solely on a claim that his attempt was thwarted to create a blatantly one-sided and inaccurate perspective.

Accordingly, this allegation should be dismissed as a matter of law or summary judgment granted, as the face of the record disproves Applicant's contention that counsel was deficient or Applicant prejudiced by these issues. See, e.g. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law); Rule 12(b)(6), SCRPC (dismissal for failure to state facts sufficient to state a cause of action); S.C. Code Ann. §§ 17-27-40 & -50 (2003) (requiring that a PCR application specifically set forth the grounds for relief, stating that allegations of facts within the applicant's knowledge be verified, and requiring that affidavits, records, or other evidence of the allegations be attached or the application shall recite why they are not attached); S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees the issue should be dismissed as a matter of law, Respondents request an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

I. Ground I

Applicant's next ground for relief is as follows:

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to the trial court's limitation placed upon Applicant's right to allocution, as allowed under South Carolina law. S.C. Code Section 16-3-28; *State v. Moore*, 593 S.E. 2d 608 (SC 2004); *Strickland v. Washington*, 466 U.S. 668 (1984).

Applicant contends the trial court erred in advising him that he must limit his penalty closing argument to evidence in the record, and that counsel was ineffective for failing to object to this limitation.

During colloquy on Applicant's right to give argument in the penalty phase, the trial court advised Applicant that he would be bound by the evidence in the case and could not simply testify to the jury in argument. The judge noted Applicant would be limited by the record and its reasonable inferences. However, the judge also pointed out to Applicant that he would be certainly entitled to talk about the proper penalty, and that Applicant should "feel free" to do that. The judge noted that Applicant would be allowed to discuss the penalty itself "freely". {R. 4942-45}. Applicant ultimately declined to give argument. {R. 5012}.

Respondents deny that counsel were deficient or Applicant prejudiced, because

there was no valid basis for objection to the trial court's instructions. Like any lawyer, a defendant would be limited in argument to arguing only within the evidence presented and its reasonable inferences – this argument right is not an unfettered opportunity for the defendant to give unsworn and un-crossexamined testimony before the jury. See State v. Moore, 357 S.C. 458, 593 S.E.2d 608 (2004) (in description of the facts quoting the trial court's admonition to a capital defendant during argument that he could not testify or go beyond comment on the evidence admitted at trial, and concluding that a defendant in the guilt phase could not stress something irrelevant like the fact that his life was at stake). Inherent credibility of a non-testimonial statement is not a proper point for argument, and thus consideration of it is not appropriate for a prejudice analysis. The trial court properly limited Applicant from giving unsworn testimony, but allowed him to discuss the proper penalty "freely".

Since the instructions were correct, counsel could not have been deficient nor Petitioner prejudiced. Accordingly, this allegation should be dismissed as a matter of law or summary judgment granted, as the face of the record disproves Applicant's contention that counsel was deficient or Applicant prejudiced by these issues. See, e.g. Gadson v. Hembree, 364 S.C. 316, 613 S.E.2d 533 (2005) (summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law); Rule 12(b)(6), SCRCP (dismissal for failure to state facts sufficient to state a cause of action); S.C. Code Ann. §§ 17-27-40 & -50 (2003) (requiring that a PCR application specifically set forth the grounds for relief, stating that allegations of facts within the applicant's knowledge be verified, and requiring that affidavits, records, or other evidence of the allegations be attached or the application shall recite why they are not

attached); S.C. Code Ann. §§ 17-27-70(b) (2003) (stating that after return by the State the PCR court may give notice of its intent to dismiss if it is clear on the basis of the pleadings and the record that the applicant is not entitled to relief).

In the event this Court disagrees the issue should be dismissed as a matter of law, Respondents request an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

J. Ground J

Applicant finally contends as follows:

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to properly rehabilitate jurors who were struck for cause. *Strickland v. Washington*, 466 U.S. 668 (1984).

The issue is insufficiently pled and should be dismissed or made more definite and certain as it does not specify which jurors were improperly struck for cause, and what evidence Applicant thinks would prove they could have been rehabilitated. This matter must be dismissed pursuant to S.C. Code § 17-27-70(b) (1976) by the failure to allege facts to support his legal conclusion. Alternatively, this allegation is subject to dismissal pursuant to S.C. Rules of Civil Procedure, Rule 12(b)(6) ("failure to state facts to constitute a cause of action").⁴

⁴ Rule 12(e), SCRPC, provides that if a pleading is "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading", a motion for a more definite statement can be made. In the alternative to the grounds expressed in the preceding section, Respondent would move for a more definite statement of the allegations in Applicant's APCR.

In any event, Applicant cannot show prejudice as a matter of law, as there is no indication Applicant's jury was not fair and impartial.

CONCLUSION

Each and every allegation in the Application not hereinabove either expressly admitted, denied, qualified or explained is hereby denied.

WHEREFORE, Respondent submits that the Application for Post-Conviction Relief should be dismissed, summary judgment granted, or in the alternative that its motions for a more definite statement be granted.

Respectfully submitted,

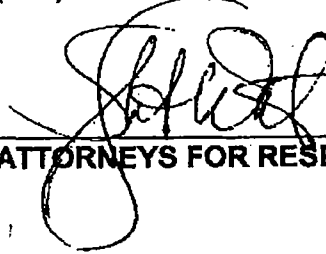
HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

S. CREIGHTON WATERS
Assistant Attorney General
(Counsel of Record)

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

By: 

ATTORNEYS FOR RESPONDENT

March 14, 2007

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF DORCHESTER)

Case No.: 2006-CP-18-569

MARION BOWMAN, # 6006)

v.)

AFFIDAVIT OF
DALE M. DAVIS

STATE OF SOUTH CAROLINA)

Defendant.)

FILED - RECORDED
JUN 20 AM 8:41
CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

I, Dale M. Davis, being duly sworn, do state:

1. I perform work as a mitigation specialist in capital proceedings in South Carolina and Georgia. In that regard, I previously worked as a mitigation specialist for the defense in the trial of State of South Carolina vs. Marion Bowman.
2. During the preparation for that case, a request was made for any and all records from the Department of Social Services regarding the childhood of Marion Bowman and his siblings. This request was made to both Orangeburg and Dorchester counties. Orangeburg county referred me to Dorchester County as the last county of contact for the family.
3. Dorchester county provided me with information in response to this request; however, these records only included reports regarding assistance programs such as food stamps and welfare services provided to his mother.
4. Because of a death in my family, I was unable to attend the entire trial; I returned as the penalty phase began.
5. However, it has been brought to my attention that additional records were received from the Department of Social Services during the trial.
6. I was unaware of these records as they were not provided to me to review. Neither was I provided the opportunity to investigate any of the items contained in these records.
7. In the process, I learned that Kandee was known in the Branchville law enforcement community to have been involved in loitering/prostitution activities in the area of Highway 78.

8. Alternatively, I interviewed Kandee Martin's mother as part of this case. During this interview, I learned that Kandee had three children, not one.
9. Further, I learned that Marion and Kandee attended school together and were friends for many years before Kandee's death.
10. Finally, I spoke with Dr. Brian West during the preparation for the underlying trial of Marion Bowman. Dr. West was a neuro-psychologist who was consulted by the defense attorneys.
11. Although Dr. West gathered information indicating that Marion Bowman suffered from various difficulties including a low-average IQ of 80; Attention Deficit Hyperactivity Disorder, a Learning Disability, and a Reading Disability, Dr. West was not called to testify regarding this information because Dr. West was not contacted early enough to allow sufficient time to travel from his office in North Charleston to St. George, SC.
12. I make this statement of my own free will, absent any coercion or duress.

Dale M. Davis
Dale M. Davis

June 13, 2007

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

Case No.: 2006-CP-18-569

COUNTY OF DORCHESTER)

MARION BOWMAN, # 6006)

v.)

AFFIDAVIT OF
MARION BOWMAN

STATE OF SOUTH CAROLINA)

FILED - RECORDED
2007 JUN 20 AM 8:41
CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

I, Marion Bowman, being duly sworn, do state:

1. I am currently housed at Lieber Correctional Facility in Ridgeville, South Carolina.
2. In 2001, I was charged with the murder of Kandee Martin.
3. I was tried for this murder in 2002.
4. I was represented at this trial by Norbert Cummings and Marva Hardee-Thomas.
5. During this trial, the trial judge explained that I had the right to address the jury during the penalty phase.
6. However, I understood the judge's instruction to be a limitation on my comments to the jury.
7. I understood this instruction to be a limitation which prevented me from requesting that the jury impose a life sentence as an act of mercy or based upon remorse or other factors.
8. Had I been explained that I could request a life sentence from the jury because of mercy or in recognition of remorse or other factors, then I would have exercised my right to personally address the jury in the penalty phase and I would have asked them to spare my life.
9. I make this statement of my own free will, absent any coercion or duress.

Marion Bowman
Marion Bowman

June 18, 2007
15 MBJ

SMiddleton
commission exp July 24, 2012

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

Case No.: 2006-CP-18-569

COUNTY OF DORCHESTER)

MARION BOWMAN, # 6006)

v.)

AFFIDAVIT OF
DOROTHY BOWMAN

STATE OF SOUTH CAROLINA)

FILED - RECORDED
2007 JUN 20 AM 8:41
CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

I, Dorothy Bowman, being duly sworn, do state:

1. I am married to Marion Bowman. In 2001, I lived in a mobile home in Branchville, South Carolina.
2. On February 17, 2001, I was sweeping off the front porch when the police rode by.
3. *3D M 3* *About two minutes later*
~~Later that day~~, the police returned and asked if they could search my house for Marion Bowman. I agreed to this search.
4. After Marion's arrest that day, the police continued to search the house. The police used metal detectors during this search.
5. I was never questioned during the trial about the use of the metal detectors during this search of my house.
6. I make this statement of my own free will, absent any coercion or duress.

Dorothy Mae Bowman
Dorothy Bowman

June 13, 2007

STATE OF SOUTH CAROLINA)

COUNTY OF DORCHESTER)

Marion Bowman, Jr.,)

Petitioner,)

v.)

State of South Carolina)

Respondent)

IN THE COURT OF COMMON PLEAS)

C/A No. 2006-CP-18-569)

ORDER RELIEVING CO-COUNSEL,
APPOINTING NEW CO-COUNSEL
AND SCHEDULING FURTHER
MATTERS)FILED-RECORDED
2008 FEB -6 AM 10:14
CLERK OF COURT
DORCHESTER COUNTY

ON JANUARY 16, 2008, this Court held a status conference in the above-captioned matter. This conference was held in the Darlington County Courthouse. Present at this conference was the Petitioner, Marion Bowman, Jr., and his counsel, Mr. James A. Brown, Jr. and Mr. Charlie Jay Johnson, Jr. The State was represented by Mr. S. Creighton Waters of the Office of the South Carolina Attorney General.

During this hearing, the Court was informed that Mr. Johnson was offered and has accepted employment as a prosecutor with the Solicitor's Office for the First Judicial Circuit. This judicial circuit includes Dorchester County, the venue and jurisdiction of Petitioner Bowman's underlying criminal trial and this post-conviction proceeding. Further, this Solicitor's Office is the same office which prosecuted Mr. Bowman during the trial which serves as the basis for this post-conviction action.

Because of this change in circumstance, the Court finds that it is appropriate to relieve Mr. Johnson from his appointment as counsel for Petitioner Bowman. The relief from this appointment is effective as of January 16, 2008. Further, Mr. Johnson shall provide all information, including his case file and all related documents, to the Jim Brown within 10 days

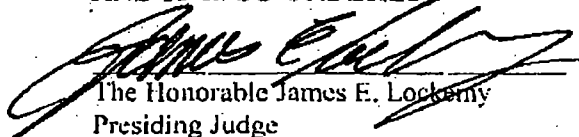
of the January 16, 2008 hearing. Also, Mr. Johnson shall have no discussions with anyone regarding this matter. Specifically, Mr. Johnson is prohibited from discussing this case with anyone employed by the First Circuit Solicitor's Office. However, as an exception to this "gag" Order, Mr. Johnson may discuss this case with Mr. Brown and the newly appointed co-counsel for Petitioner Bowman. Finally, a violation of this "gag" Order is subject to punishment for contempt of court.

Having relieved Mr. Johnson as co-counsel, this Court now appoints Mr. John Sinclair, III of the Charleston County Bar as co-counsel for Mr. Bowman. This appointment is effective as of January 16, 2008. Within two weeks of the January 16, 2008 hearing, Mr. Brown and Mr. Sinclair shall meet with Petitioner Bowman. At this meeting, counsel shall discuss any potential conflicts and obtain from Petitioner Bowman his position regarding the appointment of Mr. Sinclair.

Also, this Court determined that it is appropriate to conduct another status conference on March 26, 2008 in the Dillon County Courthouse. Petitioner Bowman shall be transported to this conference by arrangement of the Attorney General.

Finally, the merits hearing in this matter is tentatively scheduled for the week of May 27, 2008. It is likely that the 29th and 30th of May will be the actual dates that this hearing commences. This Court will endeavor to conduct this proceeding in the Dorchester County Courthouse. If this matter is not concluded during that week, then it will continue until the next week.

AND IT IS SO ORDERED


The Honorable James E. Lockenly
Presiding Judge

1-31, 2008

, SC

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)

MARION BOWMAN, #6006)

Petitioner,)

v.)

STATE OF SOUTH CAROLINA)

Respondent.)

IN THE COURT OF COMMON PLEAS

C.A. No. 06-CP-18-569

FIRST AMENDED APPLICATION FOR
 POST-CONVICTION RELIEF

FILED-RECORDED
 2007 FEB 23 AM 11:18
 CLERK OF COURT
 DORCHESTER COUNTY

[Note: This application follows SCRPC Appendix of Forms, Form 5, as required by Rule 71.1(b), SCRPC.]

1. Applicant is detained at the Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, South Carolina, 29472.
2. The sentence was imposed by the Dorchester County Court of General Sessions, the Honorable Diane S. Goodstein, presiding.
3. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:
 - (a) 01-GS-18-0348- Murder
 - (b) 01-GS-18-0349- Third Degree Arson
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) Sentenced on May 23, 2002 to death.
 - (b) Sentenced on May 23, 2002 to ten years
5. A finding of guilty on was made on May 20, 2002 after a plea of not guilty.
6. The applicant did appeal from judgment of conviction and sentence.
7. (a) The Courts to which applicant appealed:
 - (i) The South Carolina Supreme Court.

- (ii) The United States Supreme Court
- (b) The result in each Court to which applicant appealed:
 - (i) Conviction and sentence of death were affirmed.
 - (ii) The Petition for Writ of Certiorari was denied.
- (c) The date on which each Court affirmed the sentence or denied certiorari:
 - (i) Conviction and sentence were affirmed on November 28, 2005
 - (ii) The Petition for Writ of Certiorari was denied on June 12, 2006
- (d) Citations of any written opinion or orders entered pursuant to such results:
 - (i) State v. Bowman, 623 S.E.2d 378 (2005)
 - (ii) Bowman v. South Carolina, 126 S.Ct. 2867 (2006).
- 8. Not applicable.

9 & 10 Grounds for Relief and Concise Statement of Supporting Facts.¹

Ground A

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to investigate, challenge and present evidence related to a firearm during the verdict of the trial proceedings. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground A

- (1) The gun attributed to the death at issue was purportedly linked to this crime by the testimony of an expert witness who testified on behalf of the state.
- (2) This expert testified that shell casings found at the alleged scene exclusively matched the firearm linked to the Applicant's family.
- (3) Trial counsel failed to investigate, challenge and present evidence related to this purported exclusive match.
- (4) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

¹ Applicant reserves his right to amend this application.

Ground B

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to improper testimony regarding a conspiracy to secrete a firearm wherein no evidence linked Applicant to this conspiracy. SCRE Rule 402, 403, & 404 and *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground B

- (1) During the verdict phase of the trial, the state elicited information tending to establish the existence of a conspiracy among several of Applicant's relatives to secrete a firearm.
- (2) No evidence linked Applicant to this conspiracy. However, admission of evidence that applicant's relatives engaged in such criminal activity improperly suggested that Applicant endorsed or suggested such activity.
- (3) Trial counsel failed to object to the admission of such evidence.
- (4) But for trial counsels' deficient performance, the outcome of the trial proceedings would have been different.

Ground C

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to improper testimony regarding Applicant's character and other acts during the verdict phase of the trial. SCRE Rule 402, 403, & 404(b) and *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground C

- (1) During the verdict phase of the trial, the State elicited testimony regarding the character and other acts of the Applicant. Specifically, a State's witness testified that Applicant's seminal fluid was located in a mixture found in the victim's vaginal cavity.
- (2) This information should not have been admitted during the verdict phase of the trial.
- (3) Trial counsel did not object to this testimony.

- (4) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground D

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to request that the verdict phase of the proceedings should be re-opened after the jury did not find the aggravating circumstance of criminal sexual conduct during the penalty phase of the proceedings. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground D

- (1) During the verdict phase of the trial, the State elicited testimony regarding the character and other acts of the Applicant. Specifically, a State's witness testified that Applicant's seminal fluid was located in a mixture found in the victim's vaginal cavity. This information should not have been admitted during the verdict phase of the trial.
- (2) During the penalty phase of the proceedings, the government offered that the murder was committed during the commission of criminal sexual conduct. This aggravating circumstance was based upon the information elicited during the verdict phase of the proceedings.
- (3) The jury did not find the existence of this aggravating factor beyond a reasonable doubt.
- (5) Trial Counsel failed to move to re-open the murder conviction based upon the failure of the jury to find this aggravating circumstance and the improper admission of this evidence during the verdict phase of the proceedings.
- (6) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground E

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to testimony and evidence related

to a petroleum product located on a pair of pants seized during the arrest of Applicant. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground E

- (1) During the verdict phase of the proceedings, the state introduced a pair of pants seized during the arrest of Applicant.
- (2) Also elicited at this phase of the trial was expert testimony that these pants contained a petroleum product.
- (3) This testimony was not relevant to any issue at trial as the product found on the pants did not match the accelerant alleged to have been used during the commission of the arson.
- (4) Trial counsel did not object to the admission of this testimony and evidence.
- (5) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground F

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to adequately challenge the search and seizure of property. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground F

- (1) During the verdict phase of the trial, the state introduced items seized during a search conducted at the trailer of Dorothy Bowman. This search was conducted without a search warrant, without probable cause and without the consent of the Applicant. Further, the consent of Mrs. Bowman was obtained through the use of subterfuge and thus was not knowingly, intelligently and willfully given.
- (2) Trial counsel failed to adequately challenge this search and seizure.
- (3) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground G

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to investigate and present mitigating evidence at the penalty phase of the trial. 1 ABA Standards for Criminal Justice (2d ed. 1982 Supp.), *Wiggins v. Smith*, 539 US 510 (2003), *Rompilla v. Beard*, 125 S.Ct. 2456 (2005) *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground G

- (1) Trial counsel only received access to significant amounts of mitigating information contained within Department of Social Service files during the break between the verdict and penalty phase of the proceedings.
- (2) Counsel did not adequately investigate the information contained in these files or other mitigating information.
- (3) Further, counsel did not investigate and present information related to Applicant's intoxication in an effort to qualify for an additional mitigating circumstance.
- (4) Also, counsel did not investigate evidence to rebut the victim impact evidence offered by the state.
- (5) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground H

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to the prosecution's introduction of evidence relevant to an arbitrary factor during the penalty phase of the trial. *Strickland v. Washington*, 466 U.S. 668 (1984) and *State v. Burkhardt*, --- S.E.2d ---, 2007 WL 80036 (SC 2007).

Supporting Facts for Ground H

- (1) During the penalty phase of the trial, the state elicited information regarding "good prison conditions."
- (2) Trial counsel failed to object to this testimony.

- (3) The Supreme Court of South Carolina failed to address this issue during the direct appeal because trial counsel did not preserve this issue for appeal.
- (4) But for counsel's deficient performance, the outcome of the proceedings would have been different.

Ground I

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsel's failure to object to the trial court's limitation placed upon Applicant's right to allocution, as allowed under South Carolina law. S.C. Code Section 16-3-28; *State v. Moore*, 593 S.E.2d 608 (SC 2004); *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground I

- (1) Applicant was incorrectly advised by the trial judge that he must limit his closing argument to the jury in the penalty phase to evidence in the record.
- (2) Trial counsel failed to object to this improper limitation by the trial judge.
- (3) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground J

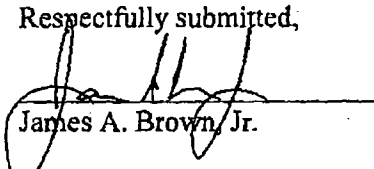
Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsel's failure to properly rehabilitate jurors who were struck for cause. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground J

- (1) During the jury selection process, the court struck jurors for cause.
- (2) Trial counsel failed to rehabilitate these jurors.
- (3) But for counsel's deficient performance, the outcome of the proceedings would have been different.

- 11 & 12. Applicant appealed his conviction and sentence to the South Carolina Supreme Court. Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in state or federal court.
13. None of the grounds set forth in (9) has been presented to this or any other Court, state or federal.
14. N/A
15. These grounds rely on additional facts outside the record which was before the previous court.
- 16 & 17. (a) Applicant was represented at his trial by Norbert E. Cummings, Jr., Cummings Law Firm, 100 S. Main Street, Suite B, Summerville, SC 29483 and Myra Ann Hardee-Thomas, 130 E. Richardson Ave., Summerville, SC 29483
- (b) Applicant was represented in his direct appeal by Robert M. Dudek, S.C. Office of Appellate Defense, 1122 Lady St., Suite 940 Columbia, S.C. 29201.
18. Applicant seeks the vacation of his convictions and sentences.
19. Applicant is not under sentence from any other court.

Respectfully submitted,


James A. Brown, Jr.

February 16, 2007.

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February 16, 2007

Via E-Mail and US Mail

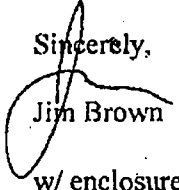
jlockemyj@sccourts.org
The Honorable James E. Lockemy
South Carolina Circuit Court Judge
P.O. Box 750
Dillon, SC 29536

Re: Bowman v. State, 06-CP-18-569

Dear Judge Lockemy:

I write to provide your Honor with a 1st Amended Application for Post-Conviction Relief in the above-referenced matter. Even though only being appointed to this case in November, 2006, I believe this application provides an outline of the matters at issue in this case to date. However, I must note that this can not be an exhaustive list of claims as the non-lawyer members of the death penalty team only began work on this case following the receipt of the funding order in my office on January 23, 2007. Further, even though I have requested copies of the entire law enforcement files generated by SLED and the Dorchester County Sheriff's Department, I am not yet in receipt of these items. Finally, I must point out that my client's ability to communicate with my office has been limited in the recent months. First, there were difficulties in arranging telephone communications. Next, my client was placed in solitary confinement and lastly, he has been transferred to the "supermax" wing of the facility in Columbia. I ask that you keep these circumstances in mind as the discovery effort continues in this case. Thank you for your understanding in this regard. Please do not hesitate to contact my office with any questions or concerns.

Sincerely,



Jim Brown

w/ enclosure

cc:  Dorchester County Clerk of Court, via US mail, w/ enclosure
S. Creighton Waters, AAG, via e-mail and US mail, w/ enclosure
Charlie J Johnson, Jr, Esq, via e-mail and US mail, w/ enclosure
Tyler Lee, Law Clerk to Judge Lockemy, via e-mail and US mail, w/ enclosure

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

C.A. No. 2006-CP-18-569

MARION BOWMAN, #6006

Petitioner,

v.

STATE OF SOUTH CAROLINA

Defendant.

MOTION FOR A CONTINUANCE

2008 MAR 25 PM 12:46
CLERK OF COURT
DORCHESTER COUNTY

The applicant, Marion Bowman, respectfully moves this Court, by and through his undersigned counsel, for an Order continuing the Merits Hearing in this matter from the scheduled date in May, 2008 until a time which will afford the applicant and his counsel the opportunity to adequately investigate and present all evidence and claims in a competent fashion. This Motion is based upon the following information.

- 1). Marion Bowman was charged, inter alia, with Capital Murder by the First Circuit Solicitor's Office in Dorchester County, South Carolina in 2001.
- 2). Following a trial conducted in May 2002, Mr. Bowman was convicted of Murder and Arson, 3rd Degree. He was sentenced to death for the Murder charge.
- 3). His conviction was affirmed on direct appeal in 2006. His appellate counsel filed the initial application for post-conviction relief in 2006.
- 4). Mr. James A. Brown, Jr. and Mr. Charlie Jay Johnson, Jr. were appointed to represent Mr. Bowman following a hearing on November 6, 2006.
- 5). The First Amended Application for Post-Conviction Relief was filed on or about February 16, 2007.

6). A summary judgement hearing was convened during June 2007 to review the claims made in this First Amended Application for Post-Conviction Relief.

7). In July 2007, the original mitigation specialist assisting Mr. Bowman's PCR counsel was removed from the PCR team.

8). Arrangements were made to utilize the services of a second mitigation specialist; however, she backed out of this arrangement on or about October 8, 2007.

9). Thereafter, counsel engaged the services of a third mitigation specialist. Explicit funding for this third mitigation specialist was obtained by Order dated November 7, 2007.

10). During December 2007, counsel Brown became aware that co-counsel Johnson had been extended an offer of employment by the First Circuit Solicitor's Office.

11). In January 2008, counsel Brown first became aware that co-counsel Johnson had accepted this offer of employment. This employment effectively precluded co-counsel Johnson from continuing in the representation of applicant Bowman.

12). By Order, signed January 31, 2008, co-counsel Johnson was relieved of his obligations and John Sinclair, III, was appointed to assist Mr. Brown in these proceedings.

13). Mr. Sinclair first received his copy of the file from former counsel Johnson on or about February 27, 2008.

14). This file did not include two volumes of the trial transcript.

15). Further, the trial counsel files received by Mr. Sinclair were disorganized and the individual folders and notebooks were not marked for reference purposes.

16). Also, Mr. Sinclair practices as a solo practitioner; operating a law office with only the assistance of a shared secretary.

17). At the time of his appointment and continuing until the time of this motion, Mr.

Sinclair represents approximately 60 clients in other matters, not related to Mr. Bowman's case.

18). Mr. Sinclair also presides over the Town of Mount Pleasant Municipal Court as a part-time judge.

19). South Carolina law provides that all applicants in capital post-conviction proceedings be provided "two counsel." SC Code Section 17-27-160(B).

20). The guidelines for death penalty proceedings promulgated by the American Bar Association make clear that counsel in capital post-conviction proceedings have two tasks before them: a) reinvestigating the capital case and b) investigating the client. 31 Hofstra Law Review 913, at 1086.

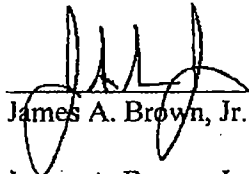
21). These guidelines also describe the manner of this investigation. ("...counsel must obtain and read the entire record of the trial, including all transcripts and motions, as well as proceedings (such as bench conferences) that may have been recorded but not transcribed. In many cases, the record is voluminous, often amounting to many thousands of pages. Counsel must also inspect the evidence and obtain the files of trial and appellate counsel, again scrutinizing them for what is missing as well as what is present..."). 31 Hofstra 913, at 933.

22). Read together, it is clear that Mr. Bowman is entitled to sufficient time to allow both counsel Brown and newly appointed counsel Sinclair the opportunity to investigate the case.

23). Because Mr. Bowman is already on death row, the State will suffer no prejudice should the Court grant this Motion.

Thus, based upon the information presented above, it is requested that this Court grant this Motion and continue these proceedings until both counsel for applicant Bowman have the opportunity to investigate his conviction and sentence and present his matter to this Court.

Respectfully Submitted by:


James A. Brown, Jr.

March 24, 2008
Beaufort, SC

James A. Brown, Jr.
Law Offices of Jim Brown, PA.
1111 Bay St., P.O. Box 592
Beaufort, SC 29901-0592
(843) 470-0003
jimbrownlaw@hargray.com

Mr. John Sinclair, III
John Sinclair, III, LLC
P.O. Box 370
Charleston, SC 29402-0370
(843) 853-9300
jslawver@bellsouth.net

CERTIFICATE OF DELIVERY

I hereby certify that a copy of the foregoing pleading
was e-mailed and mailed to all counsel of record in this proceeding

this 24 day of March, 2008.



STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

C.A. No. 06-CP-18-569

MARION BOWMAN, #6006)
Petitioner,)
v.)
STATE OF SOUTH CAROLINA)
Respondent.)

**SECOND AMENDED APPLICATION FOR
POST-CONVICTION RELIEF**

FILED-RECORDED
2008 MAY 19 PM 3:35
CHERYL GRAHAM
CLERK OF COURT
DORCHESTER COUNTY

[Note: This application follows SCRCF Appendix of Forms, Form 5, as required by Rule 11(c) SCRCF.]

1. Applicant is detained at the Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, South Carolina, 29472.
2. The sentence was imposed by the Dorchester County Court of General Sessions, the Honorable Diane S. Goodstein, presiding.
3. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:
 - (a) 01-GS-18-0348- Murder
 - (b) 01-GS-18-0349- Third Degree Arson
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) Sentenced on May 23, 2002 to death.
 - (b) Sentenced on May 23, 2002 to ten years
5. A finding of guilty on was made on May 20, 2002 after a plea of not guilty.
6. The applicant did appeal from judgment of conviction and sentence.
7. (a) The Courts to which applicant appealed:
 - (i) The South Carolina Supreme Court.

- (ii) The United States Supreme Court
- (b) The result in each Court to which applicant appealed:
 - (i) Conviction and sentence of death were affirmed.
 - (ii) The Petition for Writ of Certiorari was denied.
- (c) The date on which each Court affirmed the sentence or denied certiorari:
 - (i) Conviction and sentence were affirmed on November 28, 2005
 - (ii) The Petition for Writ of Certiorari was denied on June 12, 2006
- (d) Citations of any written opinion or orders entered pursuant to such results:
 - (i) State v. Bowman, 623 S.E.2d 378 (2005)
 - (ii) Bowman v. South Carolina, 126 S.Ct. 2867 (2006).

8. Not applicable.

9 & 10 Grounds for Relief and Concise Statement of Supporting Facts.¹

Ground A

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to investigate, challenge and present evidence related to a firearm during the verdict of the trial proceedings. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground A

- (1) The gun attributed to the death at issue was purportedly linked to this crime by the testimony of an expert witness who testified on behalf of the state.
- (2) This expert testified that shell casings found at the alleged scene exclusively matched the firearm linked to the Applicant's family.
- (3) Trial counsel failed to investigate, challenge and present evidence related to this purported exclusive match.
- (4) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

¹ Applicant reserves his right to amend this application.

Ground B

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to improper testimony regarding a conspiracy to secrete a firearm wherein no evidence linked Applicant to this conspiracy. SCRE Rule 402, 403, & 404 and *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground B

- (1) During the verdict phase of the trial, the state elicited information tending to establish the existence of a conspiracy among several of Applicant's relatives to secrete a firearm.
- (2) No evidence linked Applicant to this conspiracy. However, admission of evidence that applicant's relatives engaged in such criminal activity improperly suggested that Applicant endorsed or suggested such activity.
- (3) Trial counsel failed to object to the admission of such evidence.
- (4) But for trial counsels' deficient performance, the outcome of the trial proceedings would have been different.

Ground C

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to improper testimony regarding Applicant's character and other acts during the verdict phase of the trial. SCRE Rule 402, 403, & 404(b) and *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground C

- (1) During the verdict phase of the trial, the State elicited testimony regarding the character and other acts of the Applicant. Specifically, a State's witness testified that Applicant's seminal fluid was located in a mixture found in the victim's vaginal cavity.
- (2) This information should not have been admitted during the verdict phase of the trial.
- (3) Trial counsel did not object to this testimony.

- (4) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground D

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to request that the verdict phase of the proceedings should be re-opened after the jury did not find the aggravating circumstance of criminal sexual conduct during the penalty phase of the proceedings. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground D

- (1) During the verdict phase of the trial, the State elicited testimony regarding the character and other acts of the Applicant. Specifically, a State's witness testified that Applicant's seminal fluid was located in a mixture found in the victim's vaginal cavity. This information should not have been admitted during the verdict phase of the trial.
- (2) During the penalty phase of the proceedings, the government offered that the murder was committed during the commission of criminal sexual conduct. This aggravating circumstance was based upon the information elicited during the verdict phase of the proceedings.
- (3) The jury did not find the existence of this aggravating factor beyond a reasonable doubt.
- (5) Trial Counsel failed to move to re-open the murder conviction based upon the failure of the jury to find this aggravating circumstance and the improper admission of this evidence during the verdict phase of the proceedings.
- (6) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground E

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to testimony and evidence related

to a petroleum product located on a pair of pants seized during the arrest of Applicant. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground E

- (1) During the verdict phase of the proceedings, the state introduced a pair of pants seized during the arrest of Applicant.
- (2) Also elicited at this phase of the trial was expert testimony that these pants contained a petroleum product.
- (3) This testimony was not relevant to any issue at trial as the product found on the pants did not match the accelerant alleged to have been used during the commission of the arson.
- (4) Trial counsel did not object to the admission of this testimony and evidence.
- (5) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground F

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to adequately challenge the search and seizure of property. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground F

- (1) During the verdict phase of the trial, the state introduced items seized during a search conducted at the trailer of Dorothy Bowman. This search was conducted without a search warrant, without probable cause and without the consent of the Applicant. Further, the consent of Mrs. Bowman was obtained through the use of subterfuge and thus was not knowingly, intelligently and willfully given.
- (2) Trial counsel failed to adequately challenge this search and seizure.
- (3) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground G

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to investigate and present mitigating evidence at the penalty phase of the trial. 1 ABA Standards for Criminal Justice (2d ed. 1982 Supp.), *Wiggins v. Smith*, 539 US 510 (2003), *Rompilla v. Beard*, 125 S.Ct. 2456 (2005) *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground G

- (1) Trial counsel only received access to significant amounts of mitigating information contained within Department of Social Service files during the break between the verdict and penalty phase of the proceedings.
- (2) Counsel did not adequately investigate the information contained in these files or other mitigating information.
- (3) Further, counsel did not investigate and present information related to Applicant's intoxication in an effort to qualify for an additional mitigating circumstance.
- (4) Also, counsel did not investigate evidence to rebut the victim impact evidence offered by the state.
- (5) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground H

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to the prosecution's introduction of evidence relevant to an arbitrary factor during the penalty phase of the trial. *Strickland v. Washington*, 466 U.S. 668 (1984) and *State v. Burkhardt*, --- S.E.2d ---, 2007 WL 80036 (SC 2007).

Supporting Facts for Ground H

- (1) During the penalty phase of the trial, the state elicited information regarding "good prison conditions."
- (2) Trial counsel failed to object to this testimony.

- (3) The Supreme Court of South Carolina failed to address this issue during the direct appeal because trial counsel did not preserve this issue for appeal.
- (4) But for counsels' deficient performance, the outcome of the proceedings would have been different.

Ground I

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to the trial court's limitation placed upon Applicant's right to allocution, as allowed under South Carolina law. S.C. Code Section 16-3-28; *State v. Moore*, 593 S.E.2d 608 (SC 2004); *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground I

- (1) Applicant was incorrectly advised by the trial judge that he must limit his closing argument to the jury in the penalty phase to evidence in the record.
- (2) Trial counsel failed to object to this improper limitation by the trial judge.
- (3) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground J

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to properly rehabilitate jurors who were struck for cause. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground J

- (1) During the jury selection process, the court struck jurors for cause.
- (2) Trial counsel failed to rehabilitate these jurors.
- (3) But for counsel's deficient performance, the outcome of the proceedings would have been different.

Ground K

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to introduce evidence of a the use of metal detectors during the search of Dorothy Mae Bowman's house. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground K

- (1) During the verdict phase of the trial, the state presented evidence that the weapon used to kill the deceased had been secreted in a couch at Dorothy Mae Bowman's house (the same house where Marion Bowman was arrested shortly after the killing of the deceased).
- (2) The defense countered that this gun was not found during the search of the house when Mr. Bowman was arrested and was not found until a months later in a river.
- (3) The state replied by arguing that the couch was of such design that the weapon could have eluded the search conducted at the time of Mr. Bowman's arrest.
- (4) However, the defense failed to present evidence that the police used metal detectors during this search. This evidence eviscerates the state's explanation for its failure to find the gun during search contemporaneous with Mr. Bowman's arrest.
- (3) But for counsel's deficient performance, the outcome of the proceedings would have been different.

Ground L

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to present evidence supporting a statutory mitigating circumstance. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground L

- (1) During the trial below, evidence was presented regarding the consumption of alcoholic beverages by witnesses in the trial proceedings.

- (2) Further, applicant himself consumed alcohol during the time in question.
- (3) However, trial counsel failed to elicit evidence from the witnesses who testified at trial about appellant's intoxication on the date in question.
- (4) But for counsel's deficient performance, the outcome of the proceedings would have been different.

Ground M

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to present exculpatory evidence. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground M

- (1) During the trial below, trial counsel argued that state's witness James Tywan Gadson was the guilty party in the death of Kandee Martin. Counsel argued that Mr. Gadson killed Ms. Martin without help from Mr. Bowman.
- (2) Further, trial counsel were provided information regarding a statement made by Ricky Davis indicating that he overheard Mr. Gadson confess to the shooting.
- (3) This statement indicated that Mr. Gadson shot Ms. Martin and then returned the gun to Mr. Bowman.
- (4) Also, this statement indicated that the police told Mr. Gadson what to say on the stand.
- (5) Police notes confirm portions of the statement regarding Mr. Davis' placement in custody in the same cell block with Mr. Gadson.
- (6) However, trial counsel never presented this statement or any testimony regarding Mr. Gadson's confession to this crime.
- (7) But for counsel's deficient performance, the outcome of the proceedings would have been different.

Ground N

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and

Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to present applicant with information at trial regarding a conflict of interest pertaining to witness Ricky Davis. *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001).

Supporting Facts for Ground N

- (1) During the trial below, trial counsel was represented by an attorney who had previously represented Ricky Davis.
- (2) This same trial counsel provided advise to applicant concerning the presentation of Ricky Davis as a witness in the proceedings.
- (3) However, trial counsel failed to inform Mr. Bowman of the attorney client relationship referenced above.
- (4) Had counsel informed applicant of this conflict, applicant would have objected to representation by this counsel.
- (5) Further, because of this conflict, applicant was provided deficient advise regarding the presentation of Mr. Davis' testimony.
- (5) This actual conflict of interest adversely affected the proceedings below.

Ground O

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to present impeaching and exculpatory evidence undermining the expert opinion of SLED regarding the firearm located in the Edisto River. *Strickland v. Washington*, 466 U.S. 668 (1984).

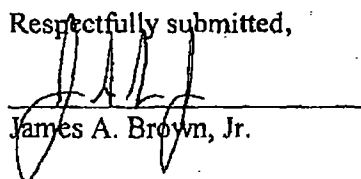
Supporting Facts for Ground O

- (1) The gun attributed to the death at issue was purportedly linked to this crime by the testimony of an expert witness who testified on behalf of the state.
- (2) This expert testified that shell casings found at the alleged scene matched the firearm linked to the Applicant's family "to the exclusion of all other firearms."
- (3) Trial counsel failed to present evidence that "uniqueness (of firearm toolmarks) has

not been demonstrated, such statements (that toolmarks link bullets or casings to a particular gun 'to the exclusion of all other firearms.') do not have a firm statistical basis. These claims, which imply an error rate of zero, also don't reflect the element of subjectivity involved in declaring a match, a determination that's always made by a firearms examiner." See *Ballistics Imaging*, Opening Statement, Prof. John Rolph, National Academies National Resource Council Chair, Committee to Assess the Feasibility, Accuracy, and Technical Capability of a National Ballistics Database, March 5, 2008 Telephone News Conference.

- (4) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.
- 11 & 12. Applicant appealed his conviction and sentence to the South Carolina Supreme Court. Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in state or federal court.
13. None of the grounds set forth in (9) has been presented to this or any other Court, state or federal.
14. N/A
15. These grounds rely on additional facts outside the record which was before the previous court.
- 16 & 17. (a) Applicant was represented at his trial by Norbert E. Cummings, Jr., Cummings Law Firm, 100 S. Main Street, Suite B, Summerville, SC 29483 and Myra Ann Hardee-Thomas, 130 E. Richardson Ave., Summerville, SC 29483
- (b) Applicant was represented in his direct appeal by Robert M. Dudek, S.C. Office of Appellate Defense, 1122 Lady St., Suite 940 Columbia, S.C. 29201.
18. Applicant seeks the vacation of his convictions and sentences.
19. Applicant is not under sentence from any other court.

Respectfully submitted,


James A. Brown, Jr.

James A. Brown, Jr.
Law Offices of Jim Brown, P.A.

May 19, 2008.

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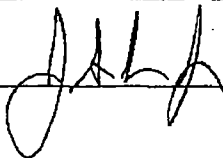
John Sinclair, III
John Sinclair, III, LLC.
P.O. Box 370
Charleston, SC 29402-0370
(843) 853-9300

Attorneys for the Applicant

CERTIFICATE OF DELIVERY

I hereby certify that a copy of the foregoing pleading
was hand delivered to all counsel of record in this proceeding

this 19th day of May, 2008.



STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

Marion Bowman

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

Case No.: 2006-CP-18-569

ORDER

FILED-RECORDED
2008 AUG 27 AM 10:17
CLERK OF COURT
DORCHESTER COUNTY

The applicant Marion Bowman (Bowman) previously served a subpoena on the Department of Social Services (DSS) in December 2007, seeking DSS records on a number of individuals. Following clarification, it was determined that the DSS records sought involved child protective services records and not economic service records.



After inquiry, DSS determined that there was at least computer entry data from two incidents on one of the individuals named in the subpoena. However, both incidents- one case in 2001 and the other in 2007- resulted in "unfounded" DSS case decisions. Upon discerning such, DSS communicated to Bowman's attorney that case material from these incidents, whatever there may be, could not be disclosed without a court order pursuant to S.C. Code Ann. 20-7-650 (J). Bowman now moves this court for such an order¹.

The statute governing the release of "unfounded" DSS investigations severely restricts the agencies and individuals who can have access to this information. One classification, however, covers the matter before the court - subsection (4).

¹ DSS waives service of a written motion.

Bowman has filed a post-conviction relief action in the Court of Common Pleas. One of the burdens he must meet is proving ineffective assistance of counsel. Without determining whether the DSS information constitutes such, this court holds that the information from the unfounded case file² could be used as evidence in a post-conviction relief action. This court also determines that this information (if it exists) may also be admissible. However, this ruling is not binding on the trial judge.

Accordingly, DSS is ordered to divulge material, if any there is, from the 2001 unfounded DSS case investigation to both parties. *in so far as it pertains to the applicant*
 AND IT IS SO ORDERED.

James E. Kelly
 JUDGE, COURT OF COMMON PLEAS
 FIRST JUDICIAL CIRCUIT

August 20, 2008
South Carolina

² This court is mindful that per state law (20-7-650 (J)), there may no longer be records in existence from the 2001 incident. The 2007 incident occurred after Bowman's trial in 2002; as such, it is of no value in this PCR matter.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	
	)	
Marion Bowman, Jr.,	)	C/A No. 2006-CP-18-569
	)	
Applicant,	)	
	)	
v.	)	RESPONDENT'S OBJECTION TO
	)	AMENDMENTS, MOTION TO STRIKE,
The State of South Carolina,	)	AND MOTION TO COMPEL DISCOVERY
	)	
Respondent.	)	

Respondent, above-named, hereby files an objection to the Third Amended Application under Rule 15(a), SCRCP, a motion to strike the Third Amended Application based in Rule 12(e), SCRCP, and a motion to compel supplemental responses to the State's interrogatories pursuant to Rule 37, SCRCP.

I.

Motion to Strike and Objection to Amendments

Counsel for the State has stated *since the appointment hearing* on November 6th, 2006, that all he cared most about was that he be given a fair opportunity to prepare by way of a timely filed Final Amended Application, and that the case not be litigated in an unfair manner with new allegations being dumped on him at the last minute. This Court at that hearing agreed the request was fair, and an amended application deadline was set. As required, Applicant filed that Amended Application on February 17, 2007.

Subsequently, the State filed an Amended Return and Motion for Summary Judgment, which the parties litigated in June of 2007. The case was set for a merits hearing in November 2007. Based on the issue with Applicant's mitigation specialist Paige Tarr, that date was continued, and reset for March 31st, 2008. However, initial co-counsel

Johnson took employment with the solicitor, and the evidentiary hearing date was moved to May 25, 2008. Subsequently, on March 24, 2008, Applicant moved to continue the May date, arguing new counsel Sinclair had not had sufficient time to prepare. The hearing date was reset for September 15th, 2008. Applicant then filed a Second Amended Application on May 19th, 2008.

Additionally, on June 20, 2007, Respondent submitted interrogatories to Applicant. Applicant has responded *once*, on December 7, 2007, nearly *six (6)* months after they were submitted, despite Rule 33(b), SCRPC, which requires service of answers within thirty (30) days. The parties have conducted depositions, in May 2008, July 14, 2008, and August 26, 2008. At each of those depositions, undersigned counsel told Applicant's counsel that they needed to get him an Amended Application, and he would object if allegations were dumped on him at the last minute. Similarly, in an email to this Court's law clerk on July 17th, 2008, undersigned counsel again reiterated his concern that Applicant was going to try to amend, and that while the State would be ready for the September 15th date based on the allegations presently raised, the State would object if new issues arrived too late for a fair opportunity to prepare.

Now, Respondent received late yesterday afternoon the Third Amended Application setting forth a number of new claims, of which almost all are fact-based. Indeed, the document sent yesterday was missing one page (on which a number of factual allegations were made), and another page was blurred. Although undersigned counsel immediately responded to the email that the document sent was insufficient, a corrected version was not sent until this morning, Thursday, September 4, 2008. Thus, Respondent has less than seven (7) days to respond to and prepare for these allegations.

This conduct is extremely prejudicial to Respondent and the entire Third Amended Application should be struck. South Carolina Code § 17-27-50 (Rev. 2003) requires an applicant to "specifically set forth the grounds upon which the application is based", and requires the applicant to use the form set forth by the Supreme Court. Rule 71.1, SCRPC, adopts the form which is contained in the Appendix, and that form requires an Applicant to state not only the grounds on which he claims relief but also "the facts which support each of the grounds". Of course, Rule 12(e), SCRPC allows the Court to strike any scandalous matter. More importantly, Rule 15(a), SCRPC, provides that a party may amend his pleading after a responsive pleading has been filed only with written consent or an order of the judge. Consent to amend should be freely given where "justice so requires *and* [the amendment] does not prejudice any other party". Rule 15(a), SCRPC (emphasis added). The use of the italicized "and" means that concerns of justice are alone not dispositive; there must also be no prejudice to the opposing party.

Here, there is no consent, and leave to amend should not be given due to the obvious prejudice from such litigation practices. Of course, the whole point of pleading is notice, and it is virtually impossible to defend a case if the Applicant is allowed to raise new factual claims a week before trial. Given the time periods set in the rules and statutes, the time remaining is insufficient time to file an Amended Return, file for and litigate summary judgment, or – most importantly – conduct any sort of discovery. Counsel must scramble to contact witnesses and obtain and peruse records. Further, as will be addressed in the next section, undersigned counsel has not received any supplemental responses to its interrogatories, and thus does not have even that aid in preparing for trial.

And, of course, this all assumes that undersigned counsel can just drop everything

else and do nothing but this case for the next seven (7) business days. That is simply not the case. Counsel has the direct appeal brief due in the murder case of H. Dewain Herring, Esquire on September 10, 2008, and no further extensions can be obtained. Moreover, counsel is set to speak at a conference on both September 11 and 12, 2008, and the following weekend is his parents' 40th anniversary for which significant family activities are planned. And, of course, counsel has had to spend this entire morning drafting this motion rather than working on these pressing deadlines or actually preparing for this case.

Indeed, although the State has every interest in seeing this action move forward, during the conference call on Applicant's extension request in March 2008 undersigned counsel noted he understood Mr. Sinclair's dilemma, having recently been appointed. Now, despite this, Applicant has turned around and done to Respondent precisely what Respondent requested they not do, and placed far greater burdens on undersigned counsel than Mr. Sinclair ever was facing.

The other problem, of course, is that the remedy of a continuance inures to the benefit of the Applicant as well. This is a prime example of one seeking to "have their cake and eat it too", as either they force the State to go to trial scrambling at the last minute to prepare, which is of course strategically advantageous to them, or they achieve a continuance, which provides more delay and is strategically advantageous to them as it further prevents enforcement of the judgment. The State is faced with the unfair choice of either going to trial, "winging it", and hoping for the best, or seeing yet another trial date go by the wayside with months in the interim before a new one could occur.

Accordingly, the only appropriate remedy is striking the Third Amended Application,

whether based in Rule 12(e) or Rule 15(a), SCRCP. WHEREFORE, Respondent hereby requests an Order of this court to that effect, and any other relief this Court deems just and proper.

II.

Motion to Compel

Respondent, above-named, hereby moves this Court for an Order pursuant to Rule 37, SCRCP, for an Order compelling the Applicant to more completely respond to interrogatories served on Applicant by Respondent, and for any other relief this Court deems just and proper, including striking of claims. It should be noted that counsel has not consulted with Applicant's counsel on this motion, as time is of the essence given the fact that Applicant dumped new allegations on the undersigned less than seven working days before trial, and counsel has repeatedly advised Applicant's counsel at the discovery depositions in May, July, and August 2008 that he expected supplemental responses from Applicant as required by the rules.

On June 20th, 2007, Respondent sent interrogatories to Applicant, consisting of sixteen (16) written questions. Of course, Rule 33(b), SCRCP, requires service of answers within thirty (30) days. Nearly six (6) months later, Respondent received responses to the interrogatories.

However, these answers are insufficient. For all of the witnesses, no addresses are provided. Moreover, many of the summaries are insufficient. While affidavits were attached from a few witnesses, for the most part the summaries are insufficient to "inform the other party of the important facts known to or observed by such witnesses". For

example, as to many of the witnesses it is only stated they will "testify concerning the consumption of alcoholic beverages by Marion Bowman on February 16, 2001", but precisely what important fact the witness observed about Bowman's alleged drinking (or lack thereof) is not specified. Similarly, the answer with regard to "Ms. Marty LeMatty" is insufficient, as it states she will testify "concerning the provision of DSS regarding Marion Bowman, Jr., and his family". Respondent is unsure what this means; indeed, this provides little information if any as to what important facts this witness allegedly possesses.

Moreover, counsel this morning received a Third Amended Application, setting forth a number of new grounds, of which almost all are fact-based. However, Applicant has not sent any supplemental responses to the interrogatories, although by definition the creation of these new grounds would give rise to new information which needed to be disclosed.

This case is scheduled for evidentiary hearing beginning September 15th, 2008, and sufficient answers to these interrogatories are crucial for Respondent to prepare for trial. Indeed, this Court denied some of Respondent's pre-trial dispositive motions in part because Applicant's answers to interrogatories would provide sufficient notice to Respondent of the substance of Applicant's claims for relief.

WHEREFORE, pursuant to Rule 37(d), SCRCP, Respondent requests an Order compelling Applicant's full and complete response to Respondent's interrogatories, as well as any other relief this Court in its discretion deems just and proper, including an order refusing to allow support of designated claims or refusing to allow designated matters into evidence, see Rule 37(b)(2)(B), SCRCP; or an order striking relevant pleadings or parts thereof, or dismissing the action or any part thereof, see Rule 37(b)(2)(C), SCRCP.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

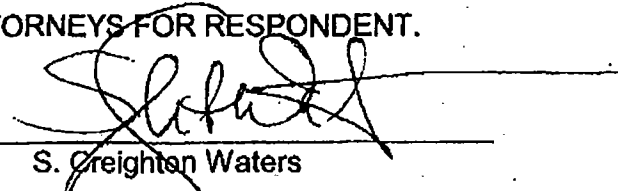
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ATTORNEYS FOR RESPONDENT.

BY: 

S. Creighton Waters

ATTORNEYS FOR RESPONDENT

September 4, 2008.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

C.A. No. 06-CP-18-569

MARION BOWMAN, #6006)
)
 Petitioner,)

v.)

STATE OF SOUTH CAROLINA)
)
 Respondent.)

**THIRD AMENDED APPLICATION FOR
 POST-CONVICTION RELIEF**

FILED-RECORDED
 2008 SEP -8 AM 10:30
 CLERK OF COURT
 DORCHESTER COUNTY

[Note: This application follows SCRCF Appendix of Forms, Form 5, as required by Rule 71.1(b), SCRCF.]

1. Applicant is detained at the Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, South Carolina, 29472.
2. The sentence was imposed by the Dorchester County Court of General Sessions, the Honorable Diane S. Goodstein, presiding.
3. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:
 - (a) 01-GS-18-0348- Murder
 - (b) 01-GS-18-0349- Third Degree Arson
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) Sentenced on May 23, 2002 to death.
 - (b) Sentenced on May 23, 2002 to ten years
5. A finding of guilty on was made on May 20, 2002 after a plea of not guilty.
6. The applicant did appeal from judgment of conviction and sentence.
7. (a) The Courts to which applicant appealed:
 - (i) The South Carolina Supreme Court.

- (ii) The United States Supreme Court
- (b) The result in each Court to which applicant appealed:
 - (i) Conviction and sentence of death were affirmed.
 - (ii) The Petition for Writ of Certiorari was denied.
- (c) The date on which each Court affirmed the sentence or denied certiorari:
 - (i) Conviction and sentence were affirmed on November 28, 2005
 - (ii) The Petition for Writ of Certiorari was denied on June 12, 2006
- (d) Citations of any written opinion or orders entered pursuant to such results:
 - (i) State v. Bowman, 623 S.E.2d 378 (2005)
 - (ii) Bowman v. South Carolina, 126 S.Ct. 2867 (2006).

8. Not applicable.

9 & 10 Grounds for Relief and Concise Statement of Supporting Facts.¹

Ground A

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to investigate, challenge and present evidence related to a firearm during the verdict of the trial proceedings. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground A

- (1) The gun attributed to the death at issue was purportedly linked to this crime by the testimony of an expert witness who testified on behalf of the state.
- (2) This expert testified that shell casings found at the alleged scene exclusively matched the firearm linked to the Applicant's family.
- (3) Trial counsel failed to investigate, challenge and present evidence related to this purported exclusive match.
- (4) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

¹ Applicant reserves his right to amend this application.

Ground B

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to improper testimony regarding a conspiracy to secrete a firearm wherein no evidence linked Applicant to this conspiracy. SCRE Rule 402, 403, & 404 and *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground B

- (1) During the verdict phase of the trial, the state elicited information tending to establish the existence of a conspiracy among several of Applicant's relatives to secrete a firearm.
- (2) No evidence linked Applicant to this conspiracy. However, admission of evidence that applicant's relatives engaged in such criminal activity improperly suggested that Applicant endorsed or suggested such activity.
- (3) Trial counsel failed to object to the admission of such evidence.
- (4) But for trial counsels' deficient performance, the outcome of the trial proceedings would have been different.

Ground C

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to improper testimony regarding Applicant's character and other acts during the verdict phase of the trial. SCRE Rule 402, 403, & 404(b) and *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground C

- (1) During the verdict phase of the trial, the State elicited testimony regarding the character and other acts of the Applicant. Specifically, a State's witness testified that Applicant's seminal fluid was located in a mixture found in the victim's vaginal cavity.
- (2) During a deposition conducted by PCR counsel, Tawain Gadson indicated that no sex occurred during the time he claims that applicant shot and killed the deceased and that he was not aware of any sexual encounter between the applicant and the

deceased during the time in question before the trial jury.

- (3) The information regarding the applicant's seminal fluid being located in the victim's vaginal cavity was irrelevant, prejudicial and improper character evidence which should not have been admitted during the verdict phase of the trial.
- (4) Trial counsel did not object to this testimony.
- (5) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground D

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to request that the verdict phase of the proceedings should be re-opened after the jury did not find the aggravating circumstance of criminal sexual conduct during the penalty phase of the proceedings. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground D

- (1) During the verdict phase of the trial, the State elicited testimony regarding the character and other acts of the Applicant. Specifically, a State's witness testified that Applicant's seminal fluid was located in a mixture found in the victim's vaginal cavity. This information should not have been admitted during the verdict phase of the trial.
- (2) During the penalty phase of the proceedings, the government offered that the murder was committed during the commission of criminal sexual conduct. This aggravating circumstance was based upon the information elicited during the verdict phase of the proceedings.
- (3) The jury did not find the existence of this aggravating factor beyond a reasonable doubt.
- (4) Trial Counsel failed to move to re-open the murder conviction based upon the jury finding negating the claim of a sexual encounter and the improper admission of this evidence during the verdict phase of the proceedings.
- (5) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground E

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to testimony and evidence related to a petroleum product located on a pair of pants seized during the arrest of Applicant. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground E

- (1) During the verdict phase of the proceedings, the state introduced a pair of pants seized during the arrest of Applicant.
- (2) Also elicited at this phase of the trial was expert testimony that these pants contained a petroleum product.
- (3) This testimony was not relevant to any issue at trial as the product found on the pants did not match the accelerant alleged to have been used during the commission of the arson.
- (4) Trial counsel did not object to the admission of this testimony and evidence.
- (5) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground F

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to adequately challenge the search and seizure of property. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground F

- (1) During the verdict phase of the trial, the state introduced items seized during a search conducted at the trailer of Dorothy Bowman. This search was conducted without a search warrant, without probable cause and without the consent of the Applicant. Further, the consent of Mrs. Bowman was obtained through the use of subterfuge and thus was not knowingly, intelligently and willfully given.

- (2) Trial counsel failed to adequately challenge this search and seizure.
- (3) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground G

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to investigate and present mitigating evidence at the penalty phase of the trial. 1 ABA Standards for Criminal Justice (2d ed. 1982 Supp.), *Wiggins v. Smith*, 539 US 510 (2003), *Rompilla v. Beard*, 125 S.Ct. 2456 (2005) *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground G

- (1) Trial counsel only received access to significant amounts of mitigating information contained within Department of Social Service files during the break between the verdict and penalty phase of the proceedings.
- (2) Counsel did not adequately investigate the information contained in these files or other mitigating information.
- (3) Further, counsel did not investigate and present information related to Applicant's intoxication in an effort to qualify for an additional mitigating circumstance.
- (4) Also, counsel did not investigate evidence to rebut the victim impact evidence offered by the state.
- (5) The applicant's work record was not submitted to the testifying social worker to accurately construct a psycho-social assessment.
- (6) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground H

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to the prosecution's introduction of evidence relevant to an arbitrary factor during the penalty phase of the trial. *Strickland*

v. *Washington*, 466 U.S. 668 (1984) and *State v. Burkhardt*, --- S.E.2d ----, 2007 WL 80036 (SC 2007).

Supporting Facts for Ground H

- (1) During the penalty phase of the trial, the state elicited information regarding "good prison conditions."
- (2) Trial counsel failed to object to this testimony.
- (3) The Supreme Court of South Carolina failed to address this issue during the direct appeal because trial counsel did not preserve this issue for appeal.
- (4) But for counsels' deficient performance, the outcome of the proceedings would have been different.

Ground I

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to the trial court's limitation placed upon Applicant's right to allocution, as allowed under South Carolina law. S.C. Code Section 16-3-28; *State v. Moore*, 593 S.E.2d 608 (SC 2004); *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground I

- (1) Applicant was incorrectly advised by the trial judge that he must limit his closing argument to the jury in the penalty phase to evidence in the record.
- (2) Trial counsel failed to object to this improper limitation by the trial judge.
- (3) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground J

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to properly rehabilitate jurors who were struck for cause. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground J

- (1) During the jury selection process, the court struck jurors for cause.
- (2) Trial counsel failed to rehabilitate these jurors.
- (3) But for counsel's deficient performance, the outcome of the proceedings would have been different.

Ground K

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to introduce evidence of the use of metal detectors during the search of Dorothy Mae Bowman's house. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground K

- (1) During the verdict phase of the trial, the state presented evidence that the weapon used to kill the deceased had been secreted in a couch at Dorothy Mae Bowman's house (the same house where Marion Bowman was arrested shortly after the killing of the deceased).
- (2) The defense countered that this gun was not found during the search of the house when Mr. Bowman was arrested and was not found until a months later in a river.
- (3) The state replied by arguing that the couch was of such design that the weapon could have eluded the search conducted at the time of Mr. Bowman's arrest.
- (4) However, the defense failed to present evidence that the police used metal detectors during this search. This evidence eviscerates the state's explanation for its failure to find the gun during the search contemporaneous with Mr. Bowman's arrest.
- (5) But for counsel's deficient performance, the outcome of the proceedings would have been different.

Ground L

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the

South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to present evidence supporting a statutory mitigating circumstance. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground L

- (1) During the trial below, evidence was presented regarding the consumption of alcoholic beverages by witnesses in the trial proceedings.
- (2) Further, applicant himself consumed alcohol during the time in question.
- (3) However, trial counsel failed to elicit evidence from the witnesses who testified at trial about appellant's intoxication on the date in question or of applicant's habit of consuming alcoholic beverages or being habitually under the influence.
- (4) But for counsel's deficient performance, the outcome of the proceedings would have been different.

Ground M

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to present exculpatory and impeaching evidence. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground M

- (1) During the trial below, trial counsel argued that state's witness James Tawain Gadson was the guilty party in the death of Kandee Martin. Counsel argued that Mr. Gadson killed Ms. Martin without help from Mr. Bowman.
- (2) Trial counsel were provided information regarding a statement made by Ricky Davis indicating that he overheard Mr. Gadson confess to the shooting.
- (3) This statement indicated that Mr. Gadson shot Ms. Martin and then returned the gun to Mr. Bowman.
- (4) Also, this statement indicated that the police told Mr. Gadson what to say on the stand.
- (5) Police notes confirm portions of the statement regarding Mr. Davis' placement in custody in the same cell block with Mr. Gadson.

- (6) However, trial counsel never presented this statement or any testimony regarding Mr. Gadson's confession to this crime.
- (7) Further, trial counsel failed to inform the jury that the state swore in previous statements to a different tribunal that Tawain Gadson was the shooter of the deceased.
- (8) Trial counsel failed to question Tawain Gadson about his voluminous consumption of marijuana, his blackouts, his verbal memory impairment or his hearing a voice or a "beeping noise."
- (9) Trial counsel failed to question Tawain Gadson about his deceptive statements provided to Dorchester County Sheriff's Deputy T.E. Stephenson.
- (10) Also, trial counsel failed to elicit testimony from Travis Felder that he lied during his direct examination (Transcript 4093-4094 & 4105); thereby exposing himself to more charges and nullifying the provisions of the plea agreement.
- (11) Trial counsel failed to inform the jury that Agent Coker viewed videotape footage of the Horizon E-Z store wherein a person stated that he heard several persons getting gas who were overhead confessing to killing a girl and having her body in the trunk of a car on the same night as the decedent's killing.
- (12) Trial counsel failed to inform the jury that Alvin Coker stated that Tawain Gadson purchased a "High Point 380 Model CF-Serial Number : P732433...[t]his gun is believed to be the gun used in Murder."
- (13) Trial counsel failed to inform the jury that casings linked to Tawain Gadson's gun were compared by SLED Agent Collins.
- (14) But for counsel's deficient performance, the outcome of the proceedings would have been different.

Ground N

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to present applicant with information at trial regarding a conflict of interest pertaining to witness Ricky Davis. *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001).

Supporting Facts for Ground N

- (1) During the trial below, trial counsel was represented by an attorney who had previously represented Ricky Davis.
- (2) This same trial counsel provided advise to applicant concerning the presentation of Ricky Davis as a witness in the proceedings.
- (3) However, trial counsel failed to inform Mr. Bowman of the attorney client relationship referenced above.
- (4) Had counsel informed applicant of this conflict, applicant would have objected to representation by this counsel.
- (5) Further, because of this conflict, applicant was provided deficient advice regarding the presentation of Mr. Davis' testimony.
- (6) This actual conflict of interest adversely affected the proceedings below.

Ground O

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsel's failure to present impeaching and exculpatory evidence undermining the expert opinion of SLED regarding the firearm located in the Edisto River. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground O

- (1) The gun attributed to the death at issue was purportedly linked to this crime by the testimony of an expert witness who testified on behalf of the state.
- (2) This expert testified that shell casings found at the alleged scene matched the firearm linked to the Applicant's family "to the exclusion of all other firearms."
- (3) Trial counsel failed to present evidence that "uniqueness (of firearm toolmarks) has not been demonstrated, such statements (that toolmarks link bullets or casings to a particular gun 'to the exclusion of all other firearms.') do not have a firm statistical basis. These claims, which imply an error rate of zero, also don't reflect the element of subjectivity involved in declaring a match, a determination that's always made by a firearms examiner." See *Ballistics Imaging*, Opening Statement, Prof. John Rolph, National Academies National Resource Council Chair, Committee to Assess the Feasibility, Accuracy, and Technical Capability of a National Ballistics Database,

March 5, 2008 Telephone News Conference.

- (4) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground P

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to exclude or limit the opinion testimony offered by the state regarding the firearm located in the Edisto River. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground P

- (1) The gun attributed to the death at issue was purportedly linked to this crime by the testimony of an expert witness who testified on behalf of the state.
- (2) This expert testified that shell casings found at the alleged scene matched the firearm linked to the Applicant's family "to the exclusion of all other firearms."
- (3) Trial counsel failed to exclude or limit this evidence given that "uniqueness (of firearm toolmarks) has not been demonstrated, such statements (that toolmarks link bullets or casings to a particular gun 'to the exclusion of all other firearms.') do not have a firm statistical basis. These claims, which imply an error rate of zero, also don't reflect the element of subjectivity involved in declaring a match, a determination that's always made by a firearms examiner." See *Ballistics Imaging*, Opening Statement, Prof. John Rolph, National Academies National Resource Council Chair, Committee to Assess the Feasibility, Accuracy, and Technical Capability of a National Ballistics Database, March 5, 2008 Telephone News Conference.
- (4) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground Q

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 because trial counsel labored under an actual conflict of interest due to counsel's employment as a Dorchester County Public Defender while failing to present

exculpatory information from a witness who was also represented by same Dorchester County Public Defender. *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001).

Supporting Facts for Ground Q

- (1) During the trial below, trial counsel was represented by an attorney who had previously represented Ricky Davis.
- (2) This same trial counsel provided advice to applicant concerning the presentation of Ricky Davis as a witness in the proceedings.
- (3) However, trial counsel failed to inform Mr. Bowman of the attorney client relationship referenced above.
- (4) Had counsel informed applicant of this conflict, applicant would have objected to representation by this counsel.
- (5) Further, because of this conflict, applicant was provided deficient advise regarding the presentation of Mr. Davis' testimony.
- (5) This actual conflict of interest adversely affected the proceedings below.

Ground R

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 because trial counsel labored under an actual conflict of interest due to counsel's employment as a Dorchester County Public Defender while the state's witness was also represented by another Dorchester County Public Defender. *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001).

Supporting Facts for Ground R

- (1) During the trial below, applicant was represented by an attorney who was employed as a Dorchester County Public Defender.
- (2) The main witness for the state, who identified applicant as the shooter of the deceased, was also represented by the Dorchester County Public Defender office.
- (3) However, trial counsel failed to obtain a waiver of this conflict from Mr. Bowman.
- (4) This actual conflict of interest adversely affected the proceedings below.

Ground S

Applicant was denied the due process of law when the prosecution allowed false testimony to stand in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 1, Section 3 and Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 the state allowed false testimony to be presented and go uncorrected during the guilt/innocence phase of the trial below. See *Napue v. Illinois*, 360 US 264 (1959).

Supporting Facts for Ground S

- (1) During the guilt/innocence phase of the trial below, the prosecutor presented the testimony of Travis Felder.
- (2) Mr. Felder testified that he left the apartment (Number) and followed applicant to McAlheny Road and then to Nursey Road. Transcript 4093-4094 and Transcript 4105, l. 7-9.
- (3) These responses were false because Travis Felder went to purchase gasoline from the E-Z Horizon Shop in Branchville during the time between his stay at the apartments and his trip to Nursery Road.
- (4) During a deposition, Travis Felder admitted he lied during this part of his testimony.
- (5) During a deposition, Travis Felder admitted he told the prosecutor about his involvement in the purchase of gasoline during this point in time.
- (6) The state allowed this testimony to go un-corrected.

Ground T

Applicant was denied the due process of law in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 1, Section 3 and Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 the state failed to provide the trial attorneys with evidence demonstrating that Travis Felder purchased gasoline from the E-Z Horizon gas station prior to the burning of the car and the decedent's body. See *Brady v. Maryland*, 373 US 83 (1963).

Supporting Facts for Ground T

- (1) During the guilt/innocence phase of the trial below, the prosecutor presented the testimony of Travis Felder.

- (2) Mr. Felder testified that he left the apartment (Number ☐) and followed applicant to McAlheny Road and then to Nursery Road. Transcript 4093-4094 and Transcript 4105, l. 7-9.
- (3) However, Felder never informed the jury that he purchased gasoline from the E-Z Horizon Shop in Branchville during the time between his stay at the apartments and his trip to Nursery Road.
- (4) Tawain Gadson testified that he witnessed applicant shoot and kill the deceased.
- (5) However, the state knew that Tawain Gadson admitted smoking six marijuana blunts a day, suffered from impairment of verbal memory and black outs and hears a voice and a "beeping noise."
- (6) Further, the prosecutor never informed trial counsel of this information.
- (7) This withheld information is material to the issue of whether applicant murdered the deceased and burned the car and body of the deceased or whether these crimes were committed by others, as alleged by the defense during the guilt/innocence phase of the trial. Alternately, this information was of impeachment value.

Ground U

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to move for a new trial and new sentencing, pursuant to SC Rule of Criminal Procedure Rule 29 (b) following the sentencing of Travis Felder. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground U

- (1) During the guilt/innocence phase of the trial below, the prosecutor presented the testimony of Travis Felder.
- (2) Mr. Felder testified that he left the apartments (Number ☐) and followed applicant to McAlheny Road and then to Nursery Road. Transcript 4093-4094 and Transcript 4105, l. 7-9.
- (3) However, Felder lied during this testimony because he never informed the jury that he purchased gasoline from the E-Z Horizon Shop in Branchville during the time between his stay at the apartments and his trip to Nursery Road.

- (4) During Felder's sentencing following applicant's trial and sentencing, the prosecutor honored a plea agreement with Felder that required Felder to testify truthfully.
- (5) Trial counsel never moved for a new trial based upon the after discovered information that Travis Felder lied under oath, but received leniency in accordance with that due truthful testimony.
- (6) But for trial counsel's deficient performance, the outcome of the trial would have been different.

Ground V

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsel's failure to successfully challenge the kidnapping aggravating factor during the penalty phase of the trial below. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground V

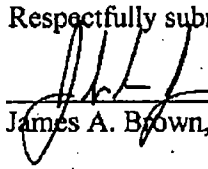
- (1) During the penalty phase fo the trial, the state submitted a statutory aggravating circumstance of kidnaping to the jury.
 - (2) Trial counsel failed to adequately note to the court that no evidence supported this aggravating circumstance, even under a theory of inveiglement.
 - (3) But for counsel's deficient performance, the outcome of the proceeding would have been different.
- 11 & 12. Applicant appealed his conviction and sentence to the South Carolina Supreme Court. Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in state or federal court.
13. None of the grounds set forth in (9) has been presented to this or any other Court, state or federal.
14. N/A
15. These grounds rely on additional facts outside the record which was before the previous court.
- 16 & 17. (a) Applicant was represented at his trial by Norbert E. Cummings, Jr.,

Cummings Law Firm, 100 S. Main Street, Suite B, Summerville, SC 29483
and Marva Ann Hardee-Thomas, 130 E. Richardson Ave., Summerville, SC
29483

- (b) Applicant was represented in his direct appeal by Robert M. Dudek, S.C.
Office of Appellate Defense, 1122 Lady St., Suite 940 Columbia, S.C. 29201.

18. Applicant seeks the vacation of his convictions and sentences.
19. Applicant is not under sentence from any other court.

Respectfully submitted,


James A. Brown, Jr.

September 3rd, 2008.

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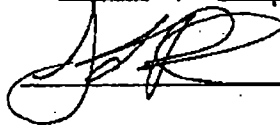
John Sinclair, III
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Charleston, SC 29402-0370
(843) 853-9300

Attorneys for the Applicant

CERTIFICATE OF DELIVERY

I hereby certify that a copy of the foregoing pleading
was e-mailed to all counsel of record in this proceeding

this 3 day of September, 2008.



STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)
MARION BOWMAN, #6006)

IN THE COURT OF COMMON PLEAS

C.A. No. 06-CP-18-569

Petitioner,
v.

STATE OF SOUTH CAROLINA
Defendant.

**NOTICE OF INTENT TO RELY UPON
AFFIDAVITS AND OTHER
DOCUMENTARY EVIDENCE**

FILED-RECORDED
2008 SEP 15 AM 11:4
CLERK OF COURT
DORCHESTER COUNTY

Petitioner, Marion Bowman, by and through undersigned counsel, hereby informs the Court and counsel for respondent that he intends to offer proof in support of his claims for post-conviction relief through affidavits and other documentary evidence in lieu of live direct examination of selected witnesses at trial. In support of this notification, applicant apprizes this Court of the following relevant facts and legal principles:

1. Petitioner is an indigent death-sentenced inmate. He was convicted of murder and sentenced to death in 2002. The evidentiary hearing in this matter is scheduled to commence on September 15, 2008.

2. In support of his application for post-conviction relief, applicant intends to rely upon an affidavit provided by Kendra Haigler in lieu of conducting a direct examination of this witness at trial. This procedure is expressly authorized by S.C. Code § 17-27-80, which provides that, in a hearing on an application for post-conviction relief, "[a]ll rules and statutes applicable in civil proceedings are available to the parties. The court *may receive proof by affidavits, depositions, oral testimony or other evidence* and may order the applicant brought before it for hearing." (emphasis

added).

3. By employing this procedure, applicant seeks to expedite the hearing and eliminate the need for live testimony from this witness.

4. Contemporaneously with the filing of this Notice, applicant's counsel has provided respondent with a photocopy of the affidavit he intends to admit.

5. Applicant fully acknowledges that respondent has the prerogative to call this witness for purposes of cross-examination. Whether to do so, of course, is completely within respondent's discretion.

WHEREFORE, applicant requests that the Court accept the affidavits, and other documentary evidence provided by certain defense witnesses in lieu of a direct examination of those witnesses at trial, as authorized by S.C. Code §17-27-80.

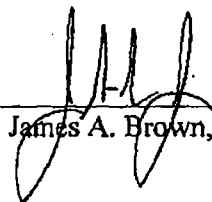
Respectfully submitted,

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Attorneys for Applicant

BY: _____


James A. Brown, Jr.

September 12, 2008

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS
2006-CP-18-569

COUNTY OF DORCHESTER

MARION BOWMAN,

-vs-

STATE OF SOUTH CAROLINA,

Defendant.

B E F O R E:

HONORABLE JAMES E. LOCKEMY

A P P E A R A N C E S:

JAMES ARTHUR BROWN, JR., Esquire
JOHN SINCLAIRE, III., Esquire
Attorneys for the Plaintiff

SAMUEL C. WATERS, Esquire
ALPHONSO SIMON, JR., Esquire
Attorneys for the Defendant

Henry P. Young
Court Reporter

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September 15, 2008

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1 P-R-O-C-E-E-D-I-N-G-S

2 (Convened at 11:04 a.m., September 15, 2008).

3 THE COURT: Okay, Mr. Court Reporter, I
4 assume you have the caption.

5 Let the record reflect, Mr. Court Reporter,
6 what I want to do is I want us to make sure that
7 this week the Attorney General's office and the
8 attorneys for the applicant; that everybody
9 coordinate the previous hearings we have had as for
10 as the transcripts. I had directed in the previous
11 hearing, in fact I think the first hearing we had I
12 directed the State to get a transcript of every
13 hearing we had to make sure we had a copy of the
14 transcript from those hearings.

15 I understand that Mr. Brown for the
16 applicant, you all do not have copies of the
17 transcripts but I'm hereby directing Mr. Waters to
18 supply you with those if you feel, if you say you
19 want them. Is that correct?

20 MR. BROWN: Please, yes, sir.

21 THE COURT: He'll supply you with those. The
22 main thing I want to be sure of is that we have a
23 record of the hearings we had in this matter, that
24 we have a copy of the other hearings. I don't know
25 who the court reporter was for each hearing. I'm

1 trying to remember if we had any hearings over the
2 phone, I don't think we did.

3 Do you all remember any over the phone?

4 MR. WATERS: We had that one issue with the
5 mitigation investigator that you directed Mr. Brown
6 not use anymore.

7 THE COURT: I'm trying to remember if we
8 transcribed that or not.

9 MR. WATERS: I don't think we did. We also
10 had that one hearing I know I have a transcript of,
11 the time where I was down in Horry County, I
12 believe, and we had Mr. Johnson and Mr. Brown on
13 the phone. But those are the only ones.

14 MR. BROWN: That was continued. I say that
15 because I don't think there was any actual
16 business.

17 THE COURT: The only substantive nature, as I
18 recall, the issue on the phone dealing with the
19 mitigation expert Mr. Brown had is that this person
20 had testified in a capital murder case that I was
21 doing in which she was going to be the mitigation
22 expert. We were ready for trial and the Thursday
23 before the trial was to begin on Monday or may have
24 been a Wednesday, a few days before the trial was
25 to begin the defense attorney indicated that he had

1 gotten nothing from the mitigation expert and then
2 found out that she had some personal matters which
3 had affected her ability to get anything done,
4 which required me to end up continuing the case.

5 I then called her in to testify to make sure
6 that was the case and she verified that because of
7 personal matters that had been involved with her
8 life, domestic and otherwise, that she had not done
9 the work on the case and had put off a lot of other
10 cases and had not done work on them and yet had
11 indicated to Mr. Wilson, who was the attorney,
12 defense attorney there, she had done work, and for
13 that reason I directed that he get another
14 mitigation expert if she couldn't do it, which she
15 said she didn't feel she could do anything for
16 awhile right now because of what was going on in
17 her life.

18 And, so, Mr. Wilson had to get another
19 mitigation expert and I informed Mr. Brown, Mr.
20 Brown, you said you had no problem with getting
21 someone else at that time. We were in the early
22 stages, how long ago, about eight months ago.
23 January is when we had the trial. It must have
24 been last July.

25 MR. BROWN: Last July, yes, sir.

1 THE COURT: Over a year ago. So, you
2 immediately got someone else.

3 MR. BROWN: She's here with us today, Dr.
4 Marti Luring.

5 THE COURT: Hi, Doctor, how are you doing?
6 So, change in mitigation expert, since it has been
7 a year, had no effect upon your preparation of the
8 case?

9 MR. BROWN: It has not.

10 MR. WATERS: I think the only other one we
11 may have had was the continuance motion after Mr.
12 Sinclair was appointed. You remember we were
13 looking to going to trial in May, then there was a
14 continuance motion made in March.

15 THE COURT: I think we walked back into
16 chambers and with everyone present we contacted Mr.
17 Sinclair to see if he would accept the case.

18 MR. WATERS: Right. I'm talking about after
19 that we were still going to go forward with a trial
20 in May, then I think about, shortly before that
21 they made a continuance motion which is how we
22 ended up with this date, because Mr. Sinclair just
23 simply hadn't had enough time.

24 THE COURT: Did we not put that on the
25 record?

1 MR. WATERS: It was a phone call, I do not
2 know it was, if there was a court reporter present.

3 THE COURT: Okay. That was a phone call
4 where you all requested a continuance, Mr.
5 Sinclair, you said you needed more time to get
6 ready.

7 MR. SINCLAIRE: Correct, Your Honor, I
8 appreciate that.

9 THE COURT: I granted the motion. Nothing of
10 a substantive nature of the case was discussed, it
11 was only whether we were going to continue the
12 case. As I recall, I said I would continue the
13 case but didn't set a definite date. I had to look
14 at the calendar and I think sometime the next two
15 or three months after that we set this date, a
16 tentative date, basically a potential definite date
17 and then it was made definite about three or four
18 months ago, everybody agreed to this date.

19 MR. WATERS: Correct.

20 THE COURT: But there were no substantive
21 matters discussed.

22 MR. WATERS: No, sir.

23 MR. BROWN: No, sir.

24 THE COURT: Do you all know of any
25 substantive matters discussed in the case that have

1 not been on the record?

2 MR. WATERS: No, sir.

3 MR. BROWN: No, sir, Your Honor.

4 THE COURT: The next thing is we had a
5 conference this morning before we got started, the
6 only purpose of the conference was to reiterate I
7 wanted to make sure that everyone got down as for
8 as the date of our previous hearings and who the
9 court reporters were to this time. We'll get
10 defense attorney a copy of those matters.

11 I also noted that the applicant filed
12 additional grounds for post conviction relief in
13 the last ten days. The State has filed objection
14 to those and as I recall, the A through O was the
15 initial grounds and since then have added P through
16 V. So, we will discuss those. I just noted those,
17 I have reviewed those and I agreed I would hear
18 from the State regarding that. I'm trying to
19 remember what else we discussed back in chambers.

20 Mr. Waters, what else did we discuss?

21 MR. WATERS: The issue with trial counsel's
22 file that is still in possession of the applicant
23 and making sure they have an opportunity to review
24 that and I have an opportunity then to discuss it
25 with them and review it myself.

1 THE COURT: I see Mr. Cummings is here. Is
2 the other attorney here, Miss Thomas? As I
3 understand it, Mr. Cummings and Miss Thomas, I will
4 just address you, Mr. Waters, you understand they
5 ended up giving their file to Miss Tarr?

6 MR. WATERS: I was told about eighteen months
7 ago Paige Tarr came to Mr. Cummings' office and
8 took the entire file.

9 THE COURT: Then Miss Tarr got the file to
10 you all? Mr. Sinclair?

11 MR. SINCLAIRE: It arrived at my office, Your
12 Honor, it came with an investigator, Amos Jones.

13 THE COURT: Do you have Mr. Jones here?

14 MR. BROWN: From Charlie Johnson's office.

15 THE COURT: Mr. Johnson of course being the
16 previous attorney.

17 So, you all have not seen your file, Mr.
18 Cummings, Miss Thomas, for eighteen months?

19 MR. CUMMINGS: I have written, I asked these
20 two gentlemen, I spoke to Jack, Mr. Sinclair, sir,
21 about my file, have written letters, called, said
22 "Come on guys, I need my file back." I didn't
23 write until eight months ago. The investigator got
24 my file, the gentleman came to my office to get my
25 file.

1 THE COURT: Miss Thomas, good to see you.
2 again. They mentioned the name, I said I'm not
3 sure if I know you, but now I see you, I know you.

4 Well, Mr. Brown and Mr. Sinclair, I want you
5 all to before the day is over make sure Mr.
6 Cummings and Miss Thomas have reviewed the file, as
7 well as Mr. Waters go over it with them. Assuming
8 that you all are not planning to call any of them
9 as your first witness?

10 MR. BROWN: No, sir. In fact we right now
11 have them scheduled to testify on Thursday, they
12 are actually under subpoena but telephone standby,
13 they are here today I think in part to deal with
14 the file issue. I will let Mr. Sinclair address
15 the contacts about the file.

16 MR. SINCLAIRE: Judge, I think Mr. Cummings
17 wrote me a letter, called me about three or four
18 weeks ago and then, my concern was, I called lead
19 counsel Mr. Brown, I said, "I've got this file, it
20 came in a state of disarray. Obviously they need
21 to get their file to review it so they can
22 testify."

23 Our concerns were because some of the claims
24 were alleged were some Brady violations, that Miss
25 Hardee Thomas and Mr. Cummings may not have

1 received the entire Solicitor's office file, so I
2 was concerned about giving them what I had, I
3 wasn't sure we could verify that claim if for some
4 reason --

5 THE COURT: All right, here is what I'm going
6 to do. Where are the boxes? The files are in
7 boxes, I assume. Where are those boxes?

8 MR. SINCLAIRE: In the parking lot.

9 THE COURT: You have them on the premises?

10 MR. SINCLAIRE: Correct.

11 THE COURT: At some point in time I want them
12 given to Mr. Cummings and Miss Hardee-Thomas. As
13 officers of this court I'm hereby directing that
14 you do not place anything in the files that were
15 not there already and don't remove anything from
16 the file. Review the files but keep them there,
17 and I assume, Mr. Cummings, as an officer of the
18 court it wasn't necessary to say that, was it?

19 MR. CUMMINGS: No, sir. I thought the files
20 would be copied and sent back like they normally
21 do, that never got done. I didn't know this thing
22 was coming up until we got subpoenaed.

23 THE COURT: You are not to remove anything
24 from the file. Miss Hardee-Thomas, the same with
25 you when you inspect the same. You all have told

1 me you will not do anything to affect the integrity
2 of the file as it was delivered to you today, is
3 that correct?

4 MR. CUMMINGS: Yes.

5 THE COURT: That's all we need in that
6 regard, that is fine. We will get the files to you
7 today. I heard from them in chambers, they said
8 there may be some mixture of Miss Hardee-Thomas'
9 file in Mr. Cummings' file.

10 MR. BROWN: I'm not aware of any mixture of
11 the file.

12 THE COURT: Mr. Sinclair said there may be
13 and Mr. Brown says he's not aware.

14 MR. BROWN: It has never been in my custody.

15 THE COURT: If you all see something that you
16 think might belong to the other please share it
17 with each other.

18 MR. CUMMINGS: We'll leave it intact.

19 THE COURT: You all will get your file back
20 today.

21 MR. CUMMINGS: Thank you, sir.

22 THE COURT: You will get the file to Mr.
23 Waters -- hold on one minute, Mr. Cummings.

24 MR. WATERS: I don't know that we need to do
25 that now so that they can go and maybe start to

1 review it but obviously we may have to take a brief
2 recess to do that or if Your Honor wants to push
3 forward?

4 THE COURT: Mr. Sinclair, there are a couple
5 things I need to do anyway on the record that
6 really you don't have to be here for me to discuss.
7 Why don't you go down and get the files for them
8 and come on back?

9 MR. SINCLAIRE: Before I leave, is it
10 possible we could uncuff one of his hands?

11 THE COURT: As long as we leave the ankle
12 bracelet. Is that fine with you all?

13 MR. BROWN: Thank you, Judge.

14 THE COURT: All right, let's do another
15 matter on the record, that we discussed in
16 chambers.

17 I tried to work out where we're going to be
18 this week and of course they had court going on in
19 the major courtroom and we worked out here. I
20 understood this room was only going to be free
21 three days, I understand now that if we wish to we
22 can stay here all week or go back to the main
23 courthouse on Thursday. With the court reporter
24 setting up and everybody with their boxes of files
25 and everything else I would just as soon stay here

1 all week unless there is somebody who has an
2 objection that has some substance to it as for as
3 whether we stay.

4 MR. WATERS: I have no objection, Your Honor.

5 THE COURT: Mr. Brown?

6 MR. BROWN: None from us.

7 THE COURT: Mr. Bowen, can we keep the
8 security here and everything else? If for some
9 reason I misunderstood what they told me and we
10 have to move we will but I understand now we can
11 stay.

12 I would like also to let those of you in the
13 courtroom know this morning or today I have no
14 problem but after today if you wish to be in the
15 courtroom I would rather you not wear tee-shirts.
16 This is a court of law, this is not a place of
17 lounging or relaxation. So, after today, Mr.
18 Bowen, help me enforce this. Make sure you have
19 something other than a tee-shirt. You don't have
20 to wear coat and tie, but wear a shirt that looks
21 as if you are respecting the court. In addition,
22 no shorts, no shorts in this courtroom. After
23 today no shorts and no tee-shirts.

24 Now, if you can come up and explain to me and
25 convince me you cannot afford to pay for anything

1 other than a tee-shirt, you cannot afford to pay
2 for anything other than a pair of shorts, then I
3 may go ahead and let you wear that, if you can show
4 me that that is the case. If not, then I expect
5 you to wear something other than tee-shirts, other
6 than shorts, as well as the fact I expect you
7 gentlemen to have your shirt tails in as you come
8 into the courtroom.

9 Mr. Brown and Mr. Waters, if you would,
10 please, as you call witnesses please make sure that
11 you remind them when they come to testify I would
12 appreciate no tee-shirt, not wearing shorts, and
13 please have the gentlemen have their shirts tucked
14 in appropriately.

15 MR. BROWN: Yes, sir.

16 MR. WATERS: Yes, sir.

17 THE COURT: All right. Okay, Mr. Waters and
18 Mr. Brown, do you recall anything else we discussed
19 in chambers, other than what I brought up?

20 MR. WATERS: No, sir, Your Honor, other than
21 the motion to strike.

22 THE COURT: We're going to do that in a
23 second.

24 MR. BROWN: The last thing was getting a copy
25 of the transcript, even a rough draft copy. We

1 have spoken to the court reporter about that
2 beforehand.

3 THE COURT: Mr. Court Reporter, what are we
4 going to do when this matter is over as for as the
5 taking of evidence? I will make any orders I need
6 to make and any contacts I need to make so that you
7 can finish this transcript or some sort of summary
8 of it for both sides before I issue in writing my
9 final ruling so they can review it to add anything
10 they wish to add or anything they feel was left out
11 or not accurately taken down.

12 So, we will do all we can and I'll do all I
13 can to work with you on that. Do you have any
14 other major cases that you're working on? We're
15 very fortunate to have you with us. Sometime
16 during this week Mr. Waters is going to recount the
17 transcripts he has and who they are from so if they
18 lost them somewhere on line you will have it on
19 this record as to the name of the court reporters.

20 Okay, thank you very much in that regard.

21 I will wait just a second for Mr. Sinclair
22 to come back.

23 MR. WATERS: Your Honor, real quickly for the
24 record, I did just make a formal written request
25 for this transcript as well as request it be

1 expedited as the statute requires, just for the
2 sake of dotting all the i's and crossing the t's.

3 THE COURT: Well, for the record, unless Mr.
4 Brown objects, which I doubt he does, he joins in
5 your motion.

6 MR. BROWN: Yes, sir.

7 THE COURT: I directed the court reporter to
8 expedite it. Do get it done as quickly as
9 possible, put it ahead of everything else pending.

10 THE COURT: Mr. Bowen, if you would have
11 somebody go check on Mr. Sinclaire in case he
12 doesn't have a password to come back in.

13 MR. BROWN: I will be glad to send Miss
14 Laurant to help, she may be able to help while Mr.
15 Sinclaire comes back.

16 THE COURT: Mr. Sinclaire is back, now your
17 lady isn't here.

18 MR. BROWN: She'll be back in a minute.

19 THE COURT: Now let's get back on the
20 matters, then. Two things I need to address. One,
21 the respondent State of South Carolina's objection
22 to the amended petition filed by Mr. Brown and Mr.
23 Sinclaire on behalf of Mr. Bowman, as well as the
24 motion, the State says they have had a motion to
25 compel for a long time. Let's discuss that motion

1 to compel first.

2 Mr. Waters?

3 MR. WATERS: Your Honor, at the time I put in
4 there expressly that I had not consulted with
5 counsel because of the time constraints that were
6 involved and because of the fact that every time I
7 had contact with counsel I kept saying I need that
8 amended application, I need responses to my
9 interrogatory. After I filed that motion, I think
10 it went out on a Thursday and --

11 THE COURT: Thursday of last week?

12 MR. WATERS: Right. That is because I only
13 got that amended application at that point. At
14 that point Thursday afternoon, I think it was late
15 Thursday afternoon, in fact I don't think I saw it
16 until Friday, the interrogatories, the responses
17 did come in, so that does not have anything to do
18 ultimately with my motion to strike but those
19 interrogatories have been responded to since then,
20 so I think that part is moot.

21 THE COURT: Well, have you had a chance to
22 review to make sure they are complete?

23 MR. WATERS: I have reviewed them, it is all
24 part and parcel, goes to my argument on the motion
25 to strike.... Yes, I have gotten them in but it has

1 come in so late I feel that the State has been
2 prejudiced and I think it is in violation of what
3 we talked about since day one in this case. And if
4 you would like I will go ahead address the motion
5 to strike.

6 THE COURT: So, right now you feel you have
7 them but you are concerned with the fact they were
8 so late? I want to find out about that. Before we
9 do that, though, the co-counsel you have with you,
10 let's make sure his name is on the record.

11 MR. WATERS: Absolutely. Alphonso Simon,
12 Assistant Attorney General, he joined our office
13 about six months ago, a graduate of Duke and has
14 taken and passed four Bar exams. He will be
15 assisting me during the course of this week.

16 THE COURT: He has done what?

17 MR. WATERS: He has taken four Bar exams.

18 THE COURT: Why do you tell me that?

19 MR. WATERS: I'm just introducing him to the
20 Court.

21 THE COURT: He has taken the Bar exam four
22 times?

23 MR. WATERS: No, four different states.

24 THE COURT: You said he had taken and passed
25 four Bar exams.

1 MR. WATERS: I meant he had done four
2 different states. He was in a firm that had a
3 regional practice, but he's very well qualified..

4 THE COURT: Is Mr. Simon admitted to the Bar
5 in North Carolina and South Carolina, I assume?

6 MR. SIMON: Your Honor, I'm admitted to
7 practice before the states of Alabama, Arkansas,
8 Louisiana and South Carolina.

9 THE COURT: Not North Carolina?

10 MR. SIMON: No, sir.

11 THE COURT: Will you get it granted to you
12 because you went to Duke?

13 MR. SIMON: No, sir. I was working in
14 Birmingham for a couple years and then moved back
15 to South Carolina.

16 THE COURT: Why Arkansas? Is that the firm
17 you were with or somebody wanted you to be in
18 Arkansas?

19 MR. SIMON: Yes. We represented a major
20 insurance company and we didn't have any attorneys
21 currently licensed in Arkansas, and so I took that.

22 THE COURT: You had to take the Bar exam in
23 Arkansas?

24 MR. SIMON: Yes, sir.

25 THE COURT: There is no reciprocity with some

1 other state, there is no Southeastern Conference
2 reciprocity?

3 MR. SIMON: No, Your Honor.

4 THE COURT: So, you took the Bar in Louisiana
5 also?

6 MR. SIMON: Yes, Your Honor.

7 THE COURT: And you have taken the Bar in,
8 you say Georgia?

9 MR. SIMON: Alabama and South Carolina.

10 THE COURT: So, you have taken it in Alabama,
11 South Carolina. Knowing where you are, which Bar
12 best prepares you to be a good lawyer, which Bar
13 exam?

14 MR. SIMON: I have to say South Carolina.

15 THE COURT: You knew you would know it.

16 MR. WATERS: A good answer.

17 THE COURT: Okay. This is my first time
18 having you in court with us here but welcome and
19 really the first time I think Mr. Sinclaire, we
20 haven't really had a hearing also with you, Mr.
21 Sinclaire, in court, we have been on the phone a
22 lot. And the Court wants to thank Mr. Sinclaire
23 for taking Mr. Johnson's place several months ago,
24 the beginning of the year, and I'm sure he has done
25 a great job to prepare you, Mr. Brown, to get ready

1 for this case.

2 How many Bar exams have you taken, Mr.
3 Sinclair?

4 MR. SINCLAIRE: Just the one, Your Honor. I
5 told myself if I failed it I was not going to be a
6 lawyer.

7 THE COURT: In other words, you already had
8 an electrical license ready to go?

9 MR. SINCLAIRE: Correct.

10 THE COURT: Good. Welcome to both of you all
11 here, and we'll get started.

12 Now, the motion to compel has been complied
13 with but still Mr. Waters is concerned about
14 whether or not compliance is such that he be
15 prepared to deal with the matter. Last week I got
16 a copy of a third ammended petition and shortly
17 thereafter I got objection from Mr. Waters for the
18 Court to consider.

19 Mr. Brown and Mr. Sinclair, I guess Mr.
20 Brown is speaking for the applicant, why did you
21 file a third ammended petition?

22 MR. BROWN: We have gone through discovery
23 and we had depositions as late as August 26 in this
24 case, some of which were done for a matter of
25 scheduling. Mr. Sinclair and I both were under an

1 order of protection for August and first part of
2 September, I didn't get that order of protection
3 until the last week in July, I submitted it in June
4 but it took that long for my chief administrative
5 judge and my prosecutor to agree to it. And we had
6 depositions in July and August 26th, I know we had
7 two depositions.

8 THE COURT: Your chief administrative judge?

9 MR. BROWN: Well, it just took that long
10 before they signed it. I submitted it, ballpark,
11 July 15 for my order of protection, I didn't
12 receive it literally until two or three days before
13 the order started, and at that point in time we had
14 set up depositions, two of them were as late as
15 August 26. And long story short, Your Honor, we
16 have conducted discovery on this case right on
17 through. In fact we didn't receive, there is seven
18 three-ring binders right there that came from the
19 prosecutor's office, which contained the file from
20 the prosecutor's office regarding the prosecution
21 of Mr. Bowman. They were subpoenaed and served to,
22 given the time frame, by Miss Tarr back in March of
23 '07 and they did not turn those over until, I want
24 to say August or September and that is when we
25 received them.

1 THE COURT: August or September?

2 MR. BROWN: Of '08.

3 THE COURT: You're talking about this month?

4 MR. BROWN: That's correct. In fact
5 literally just putting them in notebooks.

6 THE COURT: Who did not give them to you
7 until August or September.

8 MR. BROWN: The First Circuit Solicitor's
9 office, State of South Carolina.

10 THE COURT: Who is really part of your
11 office, Mr. Waters.

12 MR. WATERS: Your Honor, that is the first I
13 have heard of that. I would have been glad to
14 expedite something.

15 THE COURT: I would be glad to expedite
16 something with the chief administrative judge, I
17 don't think you will have a problem with that.

18 MR. BROWN: I understand. All I say, we
19 worked as hard as we could. Rule 15 allows
20 amendment, Simpson v Boren, I apologize I don't
21 have a copy of the case, but there is an issue in
22 there regarding a Brady claim, he talks about
23 information that was developed during the merits
24 hearing. Of course Your Honor has tried many civil
25 cases and there may be a claim of negligence that

1 is based upon the fact a car runs into the back of
2 the plaintiff's car and they say, "Well, they were
3 following too closely," and it may well come out at
4 trial --

5 THE COURT: You are talking about conforming
6 the pleadings to the testimony.

7 MR. BROWN: Yes, sir. That is all we have
8 done. As this discovery developed we conformed the
9 pleadings to it. I will give you an example.
10 Ground P is based upon information we learned, and
11 we provided the stuff very early on. In fact,
12 Ground O is very similar, we provided this
13 information that is in Ground O based on a
14 telephone news conference from the National
15 Academies, National Academies of Science, et
16 cetera, I think they referred to National
17 Academies, the research, National Resource Council,
18 they have a committee on ballistics imaging, this
19 came out in March through this telephone
20 conference. Believe it or not it is a typed three
21 page telephone conference and we provided that very
22 early to Mr. Waters and included that in Ground O.

23 Subsequent to that we received copies of a
24 book entitled Ballistic Imaging. Your Honor, this
25 is in essence the report of the twenty plus member

1 committee from the National Academy of Science and
2 the copies, I have two copies, one I intend to
3 provide my witnesses as an exhibit for the
4 applicant, one copy for me, one copy I have
5 provided Mr. Waters, literally the publisher told
6 me these were the first three copies that they
7 mailed to anyone in the United States. They came
8 into their office within the hour of my ordering
9 them. I have been trying to order them for weeks,
10 it was not finished yet.

11 THE COURT: Well, since I'm dealing with what
12 was available at the time of trial, that would be
13 more important in motion for new trial on newly
14 discovered evidence.

15 MR. BROWN: Quite frankly, Your Honor, we
16 talked about that. These same issues that are
17 being discussed in this report that will be
18 presented by our expert witness, these issues are
19 being raised, we can find as early as 2000 in a
20 RICO murder case out of the District Court in
21 Boston, Massachusetts, we're prepared to
22 demonstrate to the Court through certified --

23 THE COURT: A civil conspiracy case,
24 racketeering, conspiracy case?

25 MR. BROWN: Yes, sir. It was actually a

1 murder case there and they were presenting these
2 very same issues in court pleadings, were available
3 on the public record back in 2000, which was even
4 before the incident date that we're dealing with
5 here in this case, which is February 16, 17, 2001.

6 And so we have got certified court records
7 from Boston, Massachusetts, we are only going to
8 introduce it quite frankly to show there was
9 information out there, we're not introducing it to
10 prove our case in chief. Now that I brought it up,
11 we do have that for Your Honor, not initially in
12 evidence, that is how this was out there, this was
13 a standard of care at that time, as early as 2000
14 we know these arguments were being made in murder
15 cases across the United States and in fact some of
16 these have been successful, we have opinions we
17 will submit that agree with the claims we're making
18 in Ground P. Again, P and O are very similar. We
19 put O in the earlier one, P is a refinement.

20 Again, Your Honor, we haven't had these
21 books, those books were ordered pre Labor Day but
22 not received until I believe the Tuesday after
23 Labor Day, which would have been September 2nd, we
24 promptly provided those to opposing counsel.

25 For the record, we have been as agreeable as

1 we could with the expedited scheduling of this
2 matter, we have done everything we could and we
3 understand they are not seeking continuance, we're
4 not either, and we're giving it up as fast as we
5 get it. And as we go through, we come to matter Q,
6 and one thing that comes up on matter Q is that we
7 find out there was a conflict related to
8 representation of a potentially, well, exculpatory
9 witness that was not presented. We find that out,
10 Your Honor, as we get a copy of these files,
11 including the files from the prosecutor's office,
12 that at the time that this person was able to
13 present testimony favorable, in fact pointing out
14 that another individual shot this lady and not our
15 client, based on jailhouse confession. That
16 witness was represented by the same attorney who
17 represented our client.

18 THE COURT: Simultaneously?

19 MR. BROWN: Yes, sir.

20 THE COURT: In other words, at the time of
21 the trial?

22 MR. BROWN: Yes, sir.

23 THE COURT: He was representing Mr. Davis, is
24 who you are talking about?

25 MR. BROWN: Ricky Davis was represented by

1 Marva Hardee-Thomas. Mr. Bowman did not know that
2 information at that time.

3 THE COURT: All right.

4 MR. BROWN: In fact he didn't know that until
5 we told him that information.

6 THE COURT: And you just found that out?

7 MR. BROWN: As we go through and find out she
8 was appointed on a case that is still an active
9 case. We deposed Mr. Davis, Mr. Simon from the
10 AG's office was at that deposition, that tells you
11 how recently that deposition was conducted.

12 THE COURT: What about R?

13 MR. BROWN: R deals with State representation
14 of the actual -- by the way, Your Honor, a conflict
15 comes up regarding this other issue, that is when
16 it comes to light, lo and behold, we know we have a
17 deposition on July 8th, I believe, 14th, excuse me,
18 of Tawain Gadson, the chief witness for the State,
19 who says he witnessed my client shoot the deceased.
20 At that time we asked him about his representation.
21 We say, "Who was your lawyer," and he tells us who
22 his lawyer was. "You refer to him as a Public
23 Defender?" "Yes." He was the Public Defender, he
24 was the Chief Public Defender. Lo and behold, we
25 ask him who is Marva Hardee-Thomas? "She was also

1 a Public Defender."

2 THE COURT: Mr. Brown, I don't find that
3 surprising, in the sense that is something that
4 happens a lot. Are you telling me you just found
5 that out?

6 MR. BROWN: It just came up that he
7 considered her to be a Public Defender and Mr.
8 Dukes to be a Public Defender. We're a little
9 unclear how that --

10 THE COURT: Who represented the --the other
11 gentleman's name?

12 MR. BROWN: Gene Dukes?

13 THE COURT: No, the other co-defendant's name
14 was --

15 MR. BROWN: Tawain Gadson, James Tawain
16 Gadson.

17 THE COURT: Mr. Gadson, who is his attorney,
18 Mr. Dukes?

19 MR. BROWN: Gene Dukes.

20 THE COURT: The gentleman that passed away
21 this past year?

22 MR. BROWN: That's correct.

23 THE COURT: He was a contract attorney for
24 the Public Defender's office.

25 MR. BROWN: That we don't know the answer to

1 yet and we have not deposed Miss Thomas.

2 THE COURT: I'm only saying that because I
3 was aware of Mr. Dukes and I don't know if he was
4 ever a full-time Public Defender, he may or may not
5 have been.

6 So, you're concerned about he represented Mr.
7 Gadson and Miss Hardee-Thomas represented Mr.
8 Bowman, both employed by the Public Defender's
9 office, you feel that is a conflict?

10 MR. BROWN: They were both employed by the
11 Public Defender. We don't know this from
12 discovery, this is what we believe on information
13 and belief, that this was just a traditional
14 lawsuit, upon information and belief they are both
15 employed at that time, receiving a paycheck.

16 THE COURT: You just found this out?

17 MR. BROWN: I just found that out, and it is
18 not from a witness we're going to put up, they
19 received a paycheck from the same boss.

20 THE COURT: All right. Ground S?

21 MR. BROWN: Ground S has to do with
22 information from Travis Felder.

23 At this time we move to sequester the
24 witnesses from the courtroom. Mr. Felder is in the
25 courtroom.

1 THE COURT: Let's go to Ground T.

2 MR. BROWN: Ground S is related to an August
3 26 deposition.

4 THE COURT: Ground T?

5 MR. BROWN: And that's the same information.

6 THE COURT: And then U. Let's see --

7 MR. BROWN: That is the same, based on the
8 same information.

9 THE COURT: And V.

10 MR. BROWN: V, Your Honor, is a claim that
11 again this is upon information and belief that they
12 would have argued it but I have to be quite honest
13 with Your Honor, it may turn into some type of
14 claim of ineffective appellant counsel. We're a
15 little unclear as we go through this case why this
16 issue which may have been raised sufficiently was
17 not raised.

18 THE COURT: When did you find out about that?
19 You had a transcript long before.

20 MR. BROWN: I understand that, Your Honor.
21 We intend to not depose the other attorneys, they
22 have not been examined yet, and I say that, this
23 would be a proper claim, if our argument is
24 correct, and there is no prejudice that Mr. Waters
25 would suffer.

1 THE COURT: All right, Mr. Waters, not having
2 sequestered the witness yet, what are your
3 concerns?

4 MR. WATERS: Your Honor, the case he was
5 talking about, I tried that case and argued the
6 appeal and got burned on that, that is precisely
7 why the date of the appointment hearing on November
8 6th, 2006. I said, Your Honor, the only thing I
9 care about is give me sufficient notice so I don't
10 have to hear the fax machine running a week before
11 trial and all of a sudden the real meat of the case
12 comes rolling in. That is all I care about. I
13 remember Your Honor saying, "Mr. Brown, that is a
14 reasonable request."

15 We have an amended application and a date was
16 set. That first amended application was filed in
17 February of 2007. Then of course this is one of
18 the reasons why I filed summary judgment motion.
19 We litigated that in June of 2007 in an attempt to
20 whittle down the issues. We had trial set for
21 November, 2007. That got continued because of the
22 issue with the mitigation specialist from the case
23 in Horry County and then we were to go to trial in
24 March, then we had, March of 2008, and then Mr.
25 Johnson withdrew. Mr. Johnson took a job at the

1 Solicitor's office.

2 So, we were going to go to trial in May of
3 2008. Mr. Sinclair had his issues, I remember we
4 were on the phone and I have to be as careful as I
5 can, obviously my official position was I wanted to
6 go forward, but I undersand what Mr. Sinclair was
7 facing.

8 Then it got continued to this trial date
9 here, September, 2008. Additionally we had
10 interrogatories, I filed those in June of 2007 and
11 it took me six months to get answers to those. Now
12 we have had depositions in this case, that's true,
13 in May of 2008, July of 2008, and August of 2008,
14 and they said, "Well, we told Mr. Waters all the
15 claims." I disagree with that, because we had
16 those depositions and obviously, you know, I'm not
17 the smartest guy in the world but I'm not stupid
18 and I can sort of start picking up on where they're
19 going.

20 But as for as then telling me what their
21 claims were, the only thing I recall standing in
22 the way, no notes being known, sheets of paper,
23 they said we might do, we might do that. Each one
24 of those said that's great, guys, get me that
25 amended application because you know if I don't get

1 it in such time I'm going to object. Get me the
2 information. If I don't get them in sufficient
3 time I'm going to object. Mr. Ship Daniel, your
4 law clerk, sent that email in July, 2008. Mr.
5 Daniel asked if we would be ready, I said given the
6 allegations raised, I will be ready but I'm very
7 concerned they are going to amend. I do want to
8 reiterate if they throw an amendment application on
9 me at the last minute I'm going to object to it.

10 Finally we get this full copy of this third
11 amended application. Now, 17-27-50, the PCR
12 statute requires, the statute requires them to
13 specifically set forth the grounds they are relying
14 on. It also requires them to use the form that the
15 Supreme Court sets and that form, in rule 7.1.1 of
16 the civil rules, it requires them to set forth the
17 facts which support each ground. The PCR itself
18 and the statute requires those facts be set forth.
19 We simply don't have that here.

20 Again, all I have asked for from the
21 beginning is not to have a bunch of stuff dumped on
22 me at the last minute, that was my only concern, I
23 reiterated it at every single stage I could. Now,
24 this is not, even though this is a PCR, this is not
25 a regular noncapital guilty plea PCR. We know how

1 that works, counsel's appointed, it's a, you know,
2 job put upon them as part of their duties as being
3 a member of the Bar, you come in, then it's amended
4 right there but it is okay because we can ask the
5 lawyers, it's a short hearing, the transcript is 26
6 pages long. Here we're talking about essentially,
7 this trial is going to go a week, it's a full civil
8 trial, as close as they get, and I think it's
9 unfair to allow that to occur.

10 But the main thing is it puts the State in a
11 catch 22 because obviously, you know, we don't want
12 a continuance and have yet another trial date go by
13 the wayside but we're faced with an unfair choice
14 of either asking for a continuance and losing you
15 as the judge and having another trial date go by
16 the wayside and/or we go to trial and wing it and
17 hope for the best and hope we can scramble around
18 enough at the last minute. It is the kind of
19 prejudice it is not exactly that quantifiable, as
20 you can see, as you talked about earlier.

21 There is reams and reams of material. This
22 record is 5,000 pages and lots of it is general
23 familiarity and comfort with the case, a lot of it
24 is not having to do everything at the last minute.

25 The other concern, I want this on the record

1 just in case we argue about this in front of the
2 Supreme Court, is that the State's faced with
3 unfair choice of potentially trying the case for
4 appeal because win or lose and whatever ruling is
5 made it is likely to get talked about later at that
6 stage of the process. I'm faced with that
7 decision, do I want to, you know, even stand on my
8 rights and say look, all I asked for was a fair
9 trial, which I think I'm entitled to as any
10 litigant, but yet I'm going to give them an issue
11 on appeal.

12 THE COURT: Or a concern of ineffective PCR
13 Counsel.

14 MR. WATERS: Well, unfortunately that
15 particular claim hasn't been recognized yet.

16 THE COURT: I know, that is an interesting
17 situation.

18 MR. WATERS: So, my argument is the only
19 remedy is to strike because nothing else works.
20 But let's talk about the grounds. We talked about
21 F, Q, R, S, T --

22 MR. BROWN: Can I reply?

23 THE COURT: Let him finish.

24 MR. WATERS: He has gone through his grounds.

25 THE COURT: Let's go ahead.

1 MR. WATERS: Ground M, yes, the ground itself
2 was alleged but there was only one fact, remember
3 the required form that set forth and required by
4 the statute, and the rules of civil procedure
5 requires the facts. The only fact that was alleged
6 was the Ricky Davis statement. So, as much as, an
7 aside, as they are saying we just found out about
8 Ricky Davis, that's not true. That was in T in the
9 second ammended application. The only fact alleged
10 there --

11 MR. BROWN: Your Honor, I have to interject,
12 we're now going to ask the witnesses be excused.

13 THE COURT: You all identify your witnesses,
14 find a place for them to be.

15 MR. BROWN: Yes, sir.

16 THE COURT: Mr. Waters, have you got
17 witnesses here?

18 MR. WATERS: I do not believe so, no, Your
19 Honor.

20 THE COURT: Mr. Brown, work with Mr. Bowen to
21 find a place your witnesses can go.

22 MR. BROWN: Sure. In fact, anybody under
23 subpoena, if you will please stand.

24 THE COURT: Also any names you have got. Is
25 Mr. Felder in the courtroom?

1 MR. BROWN: Yes, right.

2 THE COURT: Mr. Jonathan Davis?

3 MR. BROWN: That is not Ricky Davis, no
4 relation.

5 THE COURT: What about Ricky Davis.

6 MR. BROWN: He's in prison.

7 THE COURT: He may be here?

8 MR. BROWN: He's here but he's not in this
9 room. This is Hiram Johnson, this is Dorothy
10 Bowman.

11 THE COURT: Where do you want to put them?

12 MR. BROWN: There are benches in the hall.

13 THE COURT: They are your witnesses.

14 (Witnesses were excused from the courtroom).

15 THE COURT: All right, the witnesses have
16 left.

17 Continue on, Mr. Waters.

18 MR. WATERS: Your Honor, back to ground M,
19 which again was in the pleading but only one
20 specific factual allegation was made and that was
21 with regard to Ricky Davis, which again shows they
22 have the information about Ricky Davis but now they
23 have seven new factual complaints in there, so that
24 claim is now totally different than what it was.
25 You have one that was alleged in the first one, now

1 seven different additional things are alleged.

2 MR. BROWN: It is not a complaint, Your
3 Honor.

4 THE COURT: Wait one second.

5 MR. WATERS: Well, I mean --

6 MR. BROWN: It's a fact.

7 MR. WATERS: Your Honor, can he reply after I
8 get done?

9 THE COURT: Let's don't get hit up with
10 semantics. When we talk about civil cases like
11 this one is and we talk about complaint, talk about
12 petition, talk about, you get bullet points and why
13 you feel your petition should be granted on that
14 ground, as for as whether it's allegations or not.

15 Continue on.

16 MR. WATERS: Your Honor, again there is no
17 way without that being, number one, as I reiterate,
18 the statute and the rule requires those facts but
19 there is no way for me to know what they are, there
20 is no way for me to prepare, no way to get that
21 through discovery. Am I supposed to go to trial
22 counsel? The only person I could depose and give
23 me the answer would be applicant's counsel.
24 Obviously I can't do that. He has to give me those
25 things. There are seven different things.

1 Counsel failed to inform the jury that a
2 different tribunal --

3 THE COURT: Careful now, Mr. Waters, be fair.

4 MR. WATERS: I apologize. There are seven
5 additional ones, all of which are fact based.
6 There is each individual claim about what counsel
7 failed to do and they were not in that second
8 amended application, they are totally new and fact
9 based and there is no way I could have had notice
10 of those, no fair way I could have gotten those --

11 MR. BROWN: Your Honor, we're getting so much
12 information ahead, there is no way I can respond to
13 everything without taking it piecemeal, because I
14 have so many responses I don't know where to start.

15 THE COURT: I'm almost ready to rule if you
16 will just let me finish with Mr. Waters.

17 MR. BROWN: Yes.

18 MR. WATERS: Your Honor, the same thing for F
19 goes for G here, an additional factual allegation
20 there. With regard to work record, that was not in
21 the second amended application.

22 With regard to Q and the issue with Ricky
23 Davis --

24 THE COURT: Are you saying he not only added
25 P through V, he added things on the existing

1 claims?

2 MR. WATERS: Exactly. Those are what gives
3 meat to the allegations, those are the meat.

4 THE COURT: What is G?

5 MR. WATERS: If you look at the original --

6 THE COURT: The second amendment?

7 MR. WATERS: The second G. Give me one
8 second, Your Honor. It would be G-5. The
9 applicant's work record was not submitted to the
10 testifying social worker. That was not in there.
11 And if you go to M, M stopped at essentially number
12 five, or excuse me, number six, and now we have
13 seven through fourteen that are all new and all of
14 those are individual, essentially seven new
15 distinct factual allegations as to what counsel
16 allegedly failed not to do.

17 I wanted to refute a couple things, some of
18 the others they have added. Mr. Brown made the
19 assertion that the statement from Ricky Davis they
20 got from the Solicitor's file but that is not the
21 case, they got it from the Dorchester County Police
22 file which they have already had, and again that
23 allegation was in the second amended application,
24 it has just been now fleshed out in a number of
25 different manners.

1 MR. BROWN: That is a misrepresentation.
2 We're talking about a lawyer being from the Public
3 Defender's office.

4 MR. WATERS: I misunderstood --

5 MR. BROWN: We did have his statement.

6 MR. WATERS: But they did have the statement.

7 THE COURT: I heard him on his concern about
8 Ricky Davis, Davis was represented by Miss
9 Hardee-Thomas at the same time she was representing
10 Mr. Bowman.

11 MR. WATERS: I understand that. They have
12 had Ricky Davis' statement for a long time now,
13 ever since they got the police file, which I think
14 is over a year ago.

15 THE COURT: It would be unusual for the State
16 to say who represents him.

17 MR. WATERS: That's very true but if the
18 State is going to have a fair chance to respond
19 they were under the burden to do that investigation
20 and get me an application in sufficient time.

21 THE COURT: I know that but I'm not sure --
22 Anyway.

23 MR. WATERS: Your Honor, there is one last
24 point. Grounds A and F were expressly withdrawn at
25 the summary judgment hearing and I have the

1 transcript right here. Your Honor, you can't put
2 in your claims, we go to a summary judgment hearing
3 and say, "I withdraw them," and stick them back in.

4 MR. BROWN: Now --

5 THE COURT: Hold on one second, Mr. Brown.
6 You say A and F were withdrawn?

7 MR. WATERS: Yes, sir.

8 MR. BROWN: We concede that.

9 THE COURT: So, A and F are no longer part of
10 the application. But you repeated them in your
11 third --

12 MR. BROWN: They were withdrawn. If you
13 would like, I will do a fourth amended one and put
14 withdrawn beside it.

15 THE COURT: You agree with his motion to
16 strike the third amended complaint grounds A and F?

17 MR. BROWN: What I prefer to do, to keep it
18 for the court record, is for it to indicate
19 withdrawn.

20 THE COURT: Basically it's a motion to
21 strike. You don't object to his motion to strike A
22 and F?

23 MR. BROWN: Here is the only thing. What I
24 would like to be able to do is keep them in the
25 actual application. The reason why I say that is I

1 wanted noted on there they were at one time pled,
2 that is why there is an A, otherwise it is going to
3 be an application that starts with ground B or G.

4 THE COURT: I know, but you agree A and F are
5 not grounds you're planning on proceeding on?

6 MR. BROWN: I do.

7 THE COURT: Therefore A and F are denied by
8 the consent of the applicant.

9 MR. BROWN: Yes, sir, and even after
10 reviewing that again with new co-counsel --

11 THE COURT: Grounds for relief A and F are
12 denied at this stage by the consent of the
13 applicant, through the motion of the State.

14 MR. WATERS: Your Honor, Ground K, there was
15 argument that was withdrawn as well. Ground K now
16 goes to this allegation that trial counsel never
17 presented the claim of Mr. Bowman's wife that they
18 used metal detectors when they were searching for
19 the gun.

20 Ground A was a ground related to the search
21 warrant, excuse me, that was ground F, and it was
22 supported when they filed affidavits in opposition
23 to my motion for summary judgment, that we
24 litigated way back in June, '07, it specifically
25 referenced metal detectors.

1 MR. BROWN: We disagree with that
2 characterization. I can explain exactly. We were
3 under the impression that Ground F was going to be
4 supported by testimony and as the record from the
5 summary judgment proceeding will indicate, we
6 conceded at that time that Ground F was no longer a
7 valid ground and that in good faith Rule 11 would
8 prevent me from presenting Ground F as an officer
9 of the court. Ground F is gone, the affidavit we
10 presented at that time to support Ground F. That
11 is exactly the way discovery works. As you go
12 through the case you conduct discovery --

13 THE COURT: All right, thank you. Thank you,
14 Mr. Brown. What I'm going to do is we're going to
15 proceed with the case under the third amended
16 application. However, this record will remain open
17 at the end of the presentation of the testimony.
18 If during the course of this trial the State feels
19 that there are matters it wishes to examine further
20 or the applicant's attorney feels there are matters
21 they wish to examine further, then for reasonable
22 time we'll keep this record open, and even if
23 during the course of a witness' testimony, Mr.
24 Waters, you find later that had you known something
25 you would question him differently, I'm not going.

1 to release anybody from their continuing subpoenas
2 and no one is to be released by either side until
3 the Court gives you permission to release them, so
4 if we need to get together again to re-question a
5 witness either side may do so and I will keep the
6 record totally open in that regard to make sure we
7 can review things so that all information that both
8 sides wish to present to the Court can be, can be
9 done.

10 Now, I expect both you all to make sure you
11 explain that to your witnesses, their subpoenas are
12 ongoing until this case is over, so that you may be
13 able to make sure, you may need to make sure you
14 have got phone numbers and addresses to contact
15 them if we have subsequent hearings in regard to
16 this, but as I stated to you all in chambers, which
17 I need to add this, I anticipate that this entire
18 case as for as at the trial level will be completed
19 no later than the end of October as for as all
20 hearings, all motions and everything else, so I
21 anticipate this whole matter to be completed by the
22 end of October, but if it takes longer it takes
23 longer, because I want both sides to have a full
24 opportunity to present their case and to be fully
25 aware, like in all civil case one should be, fully

1 aware of the other side's case so they will be able
2 to react to it.

3 All right, with that, I'm going to deny the
4 motion to strike the third amended complaint,
5 motion to compel has been complied with, but the
6 State will have adequate opportunity to examine and
7 to review the information provided if it takes
8 beyond this week, as the State will have as much
9 time as reasonably necessary to reply to any
10 additional matters presented in this third ammended
11 application. However, no more applications are to
12 be presented. If something happens to come up in
13 evidence I will make a ruling on it then.

14 MR. BROWN: Yes, sir.

15 THE COURT: Right now no more applications,
16 we're standing on the evidence everyone has now.
17 If somebody testifies to something that all of a
18 sudden brings up another issue, in the interest of
19 justice this Court will probably look at it
20 further, but let's wait and see if that happens.

21 MR. BROWN: Your Honor, if you want us, just
22 to clarify, we certainly understand your ruling but
23 just to clarify it, if we did need to raise it, a
24 new claim immediately in court or would you prefer
25 that we wait to read the transcript to provide it,

1 as Rule 15 says, and --

2 THE COURT: Here is what I meant.

3 MR. BROWN: Yes, sir.

4 THE COURT: You all are advocates for your
5 side, so if before this Court makes a final ruling
6 either one of you sees something that has been
7 presented that has not been presented in writing to
8 me as an issue, that you all feel is an issue and
9 wish this Court to consider, then it is your duty
10 as attorneys to bring it to the attention of the
11 Court.

12 MR. BROWN: Thank you, Your Honor.

13 THE COURT: For your respective sides.

14 MR. BROWN: Thank you.

15 THE COURT: Now, with that, I'm ready for
16 your brief opening statements and then after your
17 brief opening statements I'm probably going to step
18 off for a minute before we receive your first
19 witness.

20 I tell you what, no, let's do this. Mr.
21 Brown, who do you anticipate to be your first
22 witness?

23 MR. BROWN: Jonathan Davis who was a member
24 of the jury panel at the original trial, he was
25 qualified and later struck for cause.

1 THE COURT: Let's go ahead and get your
2 opening statements and see if we can get that
3 witness in, then we may break for lunch.

4 MR. BROWN: That's fine.

5 THE COURT: Mr. Waters, Mr. Simon, Mr.
6 Sinclaire or Mr. Brown, do you all need to go to
7 the restroom or anything right now? If you do, I
8 will stay and wait for you.

9 MR. WATERS: I'm fine, Your Honor.

10 MR. BROWN: No, sir, Your Honor.

11 THE COURT: Let's proceed. Opening
12 statement, Mr. Brown.

13 MR. BROWN: May it please the Court, Your
14 Honor. To give so idea, we're trying to present
15 these witnesses in a chronological order, we're
16 going to have a myriad of claims and you're aware
17 of the facts that were alleged in the trial and
18 what we have found out from the time that I was
19 appointed, I read through the transcript now and
20 what we present to Your Honor is that there were a
21 number of issues that we believe constituted
22 deficient performance under the claim Strickland
23 versus Watson.

24 Some of those things were failure to
25 cross-examine witnesses, failure to introduce

1 evidence that would have been exculpatory,
2 sometimes the same evidence, sometimes there is
3 evidence that would have been both impeaching and
4 exculpatory, sometimes it's just exculpatory
5 evidence.

6 Some of that information we don't know
7 whether it was in the hands of trial counsel or not
8 and if it was not in their hands we believe there
9 is a Brady claim and we will present that to Your
10 Honor. I will give some examples.

11 Right now, again we're assuming all witnesses
12 are now sequestered, I make this statement, I don't
13 mind, it's in the application, I know there is
14 going to be some conversation from trial counsel,
15 we don't believe these items were ever provided.
16 We have not found a copy of the videotapes from E-Z
17 Horizon Market in trial counsel's file, and
18 videotapes clearly showed Travis Felder purchasing
19 gasoline. During the guilt phase of the trial he
20 never mentions that. He testified that he rode out
21 to the scene of the arson and gave Mr. Bowman a
22 ride back.

23 In reality, he purchased gasoline before the
24 fire was set. He admitted in his deposition not
25 two months ago, not even one month ago, he alleged

1 admitted in his deposition that was a lie, that
2 that was a lie, omission. And where he told the
3 Court he went on that day was not where he went but
4 that he went somewhere else first and bought the
5 gasoline. The videotape showed him buying the
6 gasoline only on image, there is no other
7 documentation that shows that. He gave no
8 statements to the police.

9 He was originally charged with, and this is
10 the way the warrant reads, accessory to murder, not
11 after the fact, it specifically cites the section
12 for accessory before the fact, which under
13 constitutional analysis could say that he faces the
14 death penalty because it's, the punishment is the
15 same as the principal for murder. There are cases
16 that allow that.

17 And I point that out to Your Honor that
18 videotape is nowhere in the files that we have,
19 there is no other reference to it, he never gave a
20 statement, he never corrected that testimony at
21 trial. He came back later on and testified in the
22 penalty phase after our client was convicted of
23 murder. The prosecutors never presented that
24 information.

25 We also present that same claim, we asked Mr.

1 Felder in his deposition on August 26 whether or
2 not he had told the prosecutor that he in fact went
3 from the apartments in Branchville to purchase the
4 gasoline, instead of from the apartments in
5 Branchville to the scene of the arson. He said
6 yes, sir.

7 So, he clearly knew about it. That means the
8 prosecutor now has an opportunity to correct the
9 false testimony. That is never done even during
10 the presentation of the penalty phase. That
11 presentation of the evidence about him purchasing
12 the gasoline was put forth by defense counsel after
13 the close of the State's case in the penalty phase,
14 the prosecutor never corrected it from the
15 beginning to the end of the case. We're going to
16 present that information.

17 We're going to present information regarding
18 a plea agreement that was struck and we're a little
19 unclear how many times that Mr. Felder actually met
20 with the prosecutor or representatives from the
21 State. He testified at trial once, the prosecutor
22 corrected him, he says twice. We believe there is
23 possibly five times that he met with the State, yet
24 no written statement of that. We didn't find, we
25 didn't learn all of this until we speak to Mr.

1 Felder on August 26.

2 We're going to present testimony from Travis
3 Felder, Hiram Johnson and Tawain Gadson that Marion
4 Bowman was drinking that night. It is on direct
5 appeal that there was insufficient evidence
6 presented to trigger the right to a statutory
7 mitigating circumstance in the penalty phase that
8 would have allowed the jury to consider --

9 THE COURT: You say it is on appeal?

10 MR. BROWN: It was on direct appeal.

11 THE COURT: Was on appeal?

12 MR. BROWN: They said it was insufficient
13 evidence presented.

14 During depositions these three witnesses
15 testified about a number of things. They all
16 testified that Mr. Bowman had a habit of drinking
17 alcohol and I think one of the quotes in the
18 deposition was all day every day and they all agree
19 with that.

20 Two, we have testimony from Tawain Gadson
21 that Mr. Bowman was tipsy that day. In Webster's
22 dictionary that is synonymous with drunk or
23 intoxicated, which clearly in our case law triggers
24 it. He was never asked in the trial whether Marion
25 Bowman was tipsy that night. If he would have, he

1 says he would have testified the same way he did in
2 the deposition.

3 What we also find out is that he had been
4 drinking for four or five hours. One person
5 drinking, one among many people drinking a fifth of
6 liquor and beer. Again, four or five hours of
7 drinking that day. It's an issue that is fairly
8 sharply disputed in the direct appeal. He does a
9 good job of setting it up, but lacking, during the
10 depositional testimony which we suspect will be
11 consistent with trial testimony here. We're going
12 to find out that Mr. Bowman was in fact drinking on
13 that night.

14 We also have other information regarding one
15 of the key pieces of evidence. Physical evidence
16 presented at the guilt phase of trial was a
17 statement of matching of a firearm to some casings
18 found at the scene of the shooting and the gun
19 expert from SLED says those matched to the
20 exclusion of all other firearms.

21 We now have, we're going to present testimony
22 from a professor of material science and
23 engineering from Carnegie Mellon Institute who is a
24 member of a panel that was put forth by the
25 National Academies, through National Resource

1 Council; something of that effect. National
2 Academies of Science formed the committee at the
3 behest of the Department Of Justice, asked them to
4 study ballistics imaging, and they come up with a
5 couple things.

6 One is that the uniqueness of markings of a
7 firearm have never been proven.

8 And two, statements about exclusionary
9 matching has no scientific mathematical statistical
10 basis, it cannot be made. We have other courts
11 across the country agreeing with that and granting
12 motions in limine to limit the government from
13 making those statements. We even noted in a case
14 recently in the last two or three months SLED gave
15 testimony where they no longer made that
16 exclusionary match.

17 The difference in this case is this. The
18 defense theory at trial was that Tawain Gadson was
19 the shooter and that Tawain Gadson did the shooting
20 with an identical make and model .380 firearm. We
21 know the casings were fired, according to this guy,
22 by a gun that they attributed to Mr. Bowman, to the
23 exclusion of all other firearms. We also know that
24 statement is not a correct statement. In fact
25 we're going to present that to Your Honor. And

1 that information would have been able to be
2 presented back in 2003.

3 We also know that there was another Brady
4 matter, as far as we can tell, that Tawain Gadson,
5 co-defendant, was evaluated. We found out he had
6 an evaluation conducted by the Department of Mental
7 Health. Through subpoena of that file, the Tawain
8 Gadson, Marion Bowman file, nowhere in the trial
9 counsel file we received a copy of was that mental
10 health evaluation.

11 In that mental health evaluation it came out
12 that Mr. Gadson, the star witness and only
13 eyewitness, according to the State's theory, says
14 that he is a regular drug addict who smokes up to
15 six Blunts of marijuana every day, that he suffers
16 from blackouts, has a verbal memory deficiency,
17 hears a voice and beeping noises, and this is all
18 the information contained in the prosecutor's file
19 for Gadson but not in the prosecutor's file for
20 Bowman and not in trial counsel's file. We believe
21 that at least that is damaging impeachment
22 material, if not Brady violation for not turning
23 that over. And again that is one of the things we
24 point out on that.

25 Your Honor, that is just to give you some

1 idea. We are going to present some mitigating
2 information that was not presented at trial. We're
3 going to present information of Mr. Bowman's good
4 character which would have served the jury as a
5 reason to give a sentence less than death, and this
6 information comes in the form of his capacity to be
7 of emotional value to others even while
8 incarcerated. We have proof that existed back
9 before he went to trial to indicate his ability to
10 be a good parent even while in jail. The jury was
11 not presented with either that information, that
12 argument or any expert opinion on that information
13 that would demonstrate to the jury had they given a
14 life sentence Marion Bowman could continue to
15 exhibit that good character traits but a death
16 sentence would cut that short. We're going to
17 present that information to Your Honor.

18 One thing we know is Mr. Bowman's case, there
19 is litigation regarding the testimony about prison
20 conditions, and it started with Mr. Bowman's case
21 and goes through the cases of Bryant and Burkhardt.
22 Burkhardt being a case where relief was granted
23 because of a preservation properly done at trial
24 level. In Mr. Bowman's case it was not properly
25 preserved. There was information elicited on

1 cross-examination by the adaptibility expert.

2 During that information on the cross exam it came
3 out, information about general prison conditions.
4 Our court has said that injects an arbitrary factor
5 in the sentencing proceedings and is violation of
6 the state statute and according to the opinion by
7 Justice Pleicones that alone mandates reversal and
8 is not subject to harmless error review on direct
9 appeal. We believe that is a strict standard,
10 strict application.

11 THE COURT: Are you saying trial counsel did
12 not present evidence in the penalty phase regarding
13 his adaptibility to prison?

14 MR. BROWN: They didn't present that but
15 during the cross-exam of the expert the prosecutor
16 brought out information about general prison
17 conditions. We know categorically that is not
18 allowed. There was no objection. If it is raised
19 it was raised on appeal, the Supreme Court found it
20 unpreserved, they did not issue one of these
21 rulings where, "We found it unpreserved but even if
22 it had been it wouldn't have succeeded." They
23 merely say unpreserved. We know just a few years
24 later in Burkhardt they grant relief to a gentleman
25 convicted of triple murder and they do so by noting

1 that this issue was preserved and it improperly
2 injected arbitrary factors.

3 THE COURT: Was it the same general
4 conversation or comment about general conditions as
5 introduced in this case?

6 MR. BROWN: Yes, sir, and to be candid with
7 Your Honor, that was presented by the State in its
8 own witness. In this case this information came
9 out through the cross-examination of a defense
10 witness, so there is a little different posture to
11 it, to be honest with Your Honor on that. But
12 otherwise, both the Bowman opinion on direct appeal
13 and the Burkhardt opinion discuss the problem with
14 injecting general prison conditions into evidence
15 and we have gotten the testimony in here and one
16 thing --

17 THE COURT: You say general prison
18 conditions. Are you discussing --

19 MR. BROWN: Like he had the opportunity to
20 get a job and watch TV and have his baby sit on his
21 lap. Those are examples I have seen from other
22 cases, not necessarily this case. In this case
23 we're talking about being able to get a job and
24 work himself to a less restricted environment,
25 general prison conditions.

1 THE COURT: Are you saying trial counsel
2 intentionally introduced that over this witness?

3 MR. BROWN: They didn't introduce it, the
4 prosecutor did. There was no objection.

5 THE COURT: I'm talking about in the Bowman
6 case.

7 MR. BROWN: The prosecutor introduced it.

8 THE COURT: In the Bowman case?

9 MR. BROWN: Yes, sir.

10 THE COURT: In the Burkhardt case the defense
11 entered it?

12 MR. BROWN: The prosecutor introduced it by
13 his own direct of a prison official.

14 THE COURT: In the Bowman case the prosecutor
15 introduced it by cross-examination of a defense
16 witness?

17 MR. BROWN: Yes, sir. There is a difference
18 in that and, you know, I even have somewhere in my
19 office a copy of the information.

20 THE COURT: It may be the prosecution was
21 concerned with the witness had said something that
22 wasn't a proper representation of things.

23 MR. BROWN: And certainly we understand they
24 may argue that the door was opened or something of
25 that nature, because I don't believe there is a

1 direct appeal, I mean, excuse me, that there is a
2 PCR appeal involving a failure to object but in
3 Burkhardt it was objected to.

4 So, this is a little different posture but
5 Pleicones, it is a split opinion, not a majority,
6 it was three votes reversing Burkhardt.

7 THE COURT: On the issue whether the State
8 itself can introduce that?

9 MR. BROWN: It's automatic reversal. They
10 all three agreed it was wrong in Burkhardt.
11 Pleicones says there is no harmless error, the
12 other two judges, who were Moore and Waller, don't
13 say, they are silent on whether that was automatic
14 reversal. Of course --

15 THE COURT: So, they issued a concurring
16 opinion?

17 MR. BROWN: A plurality opinion. Pleicones
18 issues a concurring opinion. Certainly we
19 understand the opinion, the argument that Justice
20 Pleicones put forth. We would assert that the
21 plurality --

22 THE COURT: You think Pleicones would say
23 even if someone from the defense was testifying
24 regarding the adaptability of the defendant. But
25 then inserted something in the testimony that

1 wasn't true, that the State couldn't then bring it
2 out?

3 MR. BROWN: Your Honor, they don't address
4 that issue.

5 THE COURT: Pleicones does, you say?

6 MR. BROWN: Pleicones says if arbitrary
7 factors are injected it is automatic reversal.

8 THE COURT: Are you also agreeing Pleicones
9 is not saying if it comes in for impeachment
10 purposes or something else he wouldn't
11 automatically reverse it?

12 MR. BROWN: He did not speak on that.

13 THE COURT: Okay. I wanted to make sure I
14 was clear.

15 MR. BROWN: I'm sorry.

16 THE COURT: Give me the cite in Burkhardt so
17 I can go ahead and review that.

18 MR. BROWN: I put it in the application and
19 didn't have the citation.

20 THE COURT: Just at a later time.

21 MR. BROWN: The WestLaw cite is 2007WL80036.

22 THE COURT: Okay, go ahead. Anything else?

23 MR. BROWN: Briefly. There is testimony
24 about, was brought out about witnesses testifying
25 truthfully pursuant to a plea agreement. That

1 information is brought out in direct by the State.
2 This was part and parcel of what the Court, and I
3 have to say courts don't allow that to be brought
4 out, it is a type of bolstering, Your Honor, and
5 under Ground E, Ground B, we have talked about the
6 fact that the evidence that says look at all these
7 family members that have been convicted or going to
8 be convicted of this, that information is
9 prejudicial to our client because it does no more
10 prove his identity except through some type of
11 guilt by relationship or association.

12 Now, one of them says the gun was planted by
13 Marion Bowman or that Marion Bowman told them to
14 dispose of the firearm. They all say, "We're
15 accessories after the fact of murder, we have cut a
16 deal, we're going to testify truthfully." That is
17 just not, this is on the record and this is before
18 they are impeached and there is no indication in
19 the opening statement that there is going to be
20 this type information, and you're not allowed to
21 backdoor bolster, implicitly bolster testimony like
22 that or to smear guilt over like that.

23 Two last things I would like to bring out
24 regarding the guilt phase of the trial. During the
25 trial, including the, I believe, in the opening

1 statement they talk about a petroleum product being
2 found on the jeans Mr. Bowman was wearing. That
3 information was brought out by the State in their
4 case in chief and it stayed like that, petroleum
5 product found. That information is not relevant to
6 anything because the petroleum product found is a
7 concocted petroleum product used as an accelerant
8 in the arson. It is up to cross by trial counsel
9 to turn around and say that that is not a matching
10 petroleum product. That information should have
11 never been presented.

12 THE COURT: I'm just curious. Are you going
13 to present evidence to me it wasn't a matching one?

14 MR. BROWN: They conceded it at trial.

15 THE COURT: Okay.

16 MR. BROWN: But we're stuck with the fact
17 that in the opening and in the direct of the
18 chemist who analyzed the pants, he said, "We found
19 a petroleum product," and that is the way it is.

20 The last thing is that through depositional
21 testimony of Tawain Gadson, the State's only
22 claimed eyewitness to this, he says very clearly
23 from the time he was picked up by Kandee Martin and
24 Marion Bowman, Kandee Martin driving the car, to
25 the time he was dropped off, he says after Marion

1 Bowman shot and killed Kandee Martin there was
2 never any sexual relationship between Mr. Bowman
3 and Miss Martin.

4 The last witness presented by the State in
5 the guilt phase of the trial testified that Mr.
6 Bowman's DNA was found in her vaginal cavity. That
7 proves not one thing but it does indicate to the
8 jury, because there is no sex, according to the
9 State during the trial, none. We asked them --

10 THE COURT: Wasn't there allegation there was
11 some illegal sex? Are you saying they conceded
12 there was no sex whatsoever?

13 MR. BROWN: That's correct. Which means
14 during the time of the crime there is no sex. Now,
15 we're not disputing the DNA matched. All that may
16 prove is that some previous time there had been
17 sex, which is not, there are several, and we raised
18 it under three claims, that it violates 404, 403,
19 and 402. 404 deals with character evidence because
20 Mr. Bowman is married to another lady, Mr. Bowman
21 is not married to Kandee Martin. That is character
22 evidence.

23 And 404(B) doesn't say bad act but it has
24 been construed, all the opinions talk about bad
25 acts. It talks about crimes, other crimes only

1 admissible to prove these following things. That
2 information proves none of those things. The
3 government argued at the summary judgment hearing
4 it proved identity. That was before the deposition
5 of Mr. Gadson who now clearly says there was no
6 sex. So, if there was sex, say 24 hours earlier
7 before the shooting, that doesn't prove he shot
8 her.

9 THE COURT: Okay.

10 MR. BROWN: And that is where we, that is
11 where we leave you with our case. There are some
12 other issues that we have put forth in here but we
13 believe we have argued for the purposes of opening
14 statement, given you a good idea where we intend to
15 go with this.

16 Thank you.

17 THE COURT: Do you want to do an opening now
18 or later?

19 MR. WATERS: I know we want to get started
20 but there was so much in there I just feel like I
21 can't leave unsaid, I will go blazing fast, with
22 due respect to the court reporter. I have a lot
23 more to say on these but I will give the
24 highlights.

25 With regard to Travis Felder there is going

1 to be testimony there was a video taken at the gas
2 station. There is going to be indication that the
3 prosecution knew that Travis Felder was on there.
4 That videotape was given to the defense, they had
5 it and they presented it in the penalty phase and
6 they were well aware of it. So, there is no claim
7 with regard to that.

8 With regard to drinking, no one is going to
9 say he was drunk, and that is what is required for
10 the mitigators. He mentioned one witness calling
11 him tipsy but that witness was defining tipsy at
12 its lowest level, having a drink or two, and
13 specifically denied he was slurring or staggering
14 or anything of that nature.

15 Moreover, there will be testimony that because
16 Mr. Cummings and Miss Hardee-Thomas had some very
17 egregious statements of the defendant suppressed in
18 a Jackson v. Deno hearing at the beginning of the
19 trial, that because of that he was kind of dancing
20 on the head of a pin throughout the rest of the
21 trial to avoid opening the door to having those
22 statements come in, part of that because Mr. Bowman
23 also made very egregious statements about
24 postmortem sexual type activity with the victim in
25 his statements to William S. Hall during the course

1 of the evaluation.

2 Mr. Cummings could not get anywhere near any
3 sort of mental type mitigation or he was going to
4 open the door to that, and there was even a
5 discussion between Judge Goodstein and the
6 Solicitor in chambers in which Judge Goodstein
7 says, "You hear Walter saying if you go down that
8 road you're going to open the door, I want you to
9 be aware of that."

10 THE COURT: That was on the record?

11 MR. WATERS: That was in chambers but on the
12 record.

13 THE COURT: How do you know it was in
14 chambers?

15 MR. WATERS: This was his testimony. It is
16 on the record that Mr. Cummings comes out and
17 specifically declines mental health mitigators
18 because of, he says it very vaguely, he says
19 because of pretrial rulings, which obviously refers
20 to the suppression of statements.

21 As regard to the gun, this new book that has
22 come out, you know, Ballistics Imaging, it really
23 doesn't have anything to do with the fact that no
24 one is going to be able to say that the gun that
25 was matched to the casings on the road is not the

1 gun. They have had it analyzed, their expert can't
2 say anything, so the most they can say is perhaps
3 you shouldn't have said it's to the exclusion, but
4 that can hardly be prejudicial if in fact nobody,
5 nobody can say that David Collins made a mistake.
6 There isn't going to be not one bit of testimony
7 that he made a mistake.

8 So, that obviously cannot rise to the level
9 of prejudice if in fact he was mistaken on the
10 stand.

11 As to whether or not he was asked to compare
12 it to casings that allegedly belonged to a gun that
13 Gadson had, again there is no testimony at all that
14 those casings matched the casings that were found
15 at the scene.

16 So, it is nice but it doesn't get you
17 anywhere of substance.

18 As to Gadson's mental health evaluation,
19 there was no Brady violation with regard to that.
20 It certainly was not material, in that Mr. Gadson
21 on the stand freely talked about how much drinking
22 he was doing that night and even to the point where
23 he messed in his pants some. And without regard to
24 his testimony, there is absolutely overwhelming
25 evidence in this case.

1 With regard to prison conditions, this is
2 what I do need to address. There is actually three
3 cases and I argued two of them. There is this
4 case, Bowman, on direct appeal, and what happened
5 in this case was the defense, the State didn't
6 present anything about conditions of confinement in
7 its sentencing case in chief, and then the defense
8 comes out and they start out with Margaret Baughman
9 who was an adult education teacher at the jail, and
10 started talking about, you know, the educational
11 things.

12 THE COURT: No relationship to the defendant?

13 MR. WATERS: No, B-a-u-g-h-m-a-n, and started
14 talking about all the education and religious
15 things he has been doing at the jail and the
16 opportunities he is taking advantage of. Then they
17 called James Aiken. I don't know if you have done
18 the deposition.

19 THE COURT: I understand he is in North
20 Carolina.

21 MR. WATERS: I believe so. He does his usual
22 thing about, well, it doesn't matter what kind of
23 inmate Mr. Bowman is, South Carolina Department of
24 Corrections has the capability to safely contain
25 him for the rest of his life, we have guns and

1 gaurds and prison towers. This is on direct by the
2 defense, it goes through all these various harsh
3 security measures that he will face, excluding
4 things about, well, he is not going to be coddled,
5 he's going to be in with a dangerous population.
6 This is from Mr. Aiken. It was only on cross, as
7 Your Honor alluded to, that the State, this was
8 after discussion with Judge Goodstein, said, "I get
9 kind of a balanced view of that, that it wasn't
10 just as bad as all that. He does have recreation,
11 he can work himself into a better life, there are
12 opportunities he can take advantage of."

13 The other aspect I need to point out, that is
14 the discussion about Burkhardt, whether or not this
15 was the introduction of an arbitrary factor. Judge
16 Patterson has already rejected that, because the
17 reason is --

18 MR. BROWN: Your Honor, that case is not even
19 done at the trial level.

20 MR. WATERS: He has issued an order,
21 obviously.

22 THE COURT: It has no effect on me, but if
23 you want to share his reasoning.

24 MR. WATERS: That is where I was going. We
25 litigated that before him and what he concluded, in

1 essence this was after litigating actually between
2 Mr. Brown and I, was that here we're in PCR and as
3 you well know you cannot trace direct appeal issues
4 on PCR. On PCR you have to filter it through a
5 Sixth Amendemnt claim of ineffective assistance of
6 counsel. That has two prongs. Number one,
7 deficient performance. And number two, prejudice.

8 So, obviously we do have to engage in a
9 prejudice analysis. The other factor is deficient
10 performance. What they have to establish is
11 somehow the defense was entitled to have its cake
12 and eat it, too. They could present all this
13 information about that, then he would have a valid
14 objection to say, "Judge, wait a minute, the
15 Solicitor can't go down that road at all, even
16 though we have." And we would assert he had no
17 valid objection. We also assert it was a valid
18 strategy on his part.

19 THE COURT: All right.

20 MR. WATERS: With regard to the conspiracy,
21 what we have here is his wife, his father, Mr.
22 Bowman's wife, Mr. Bowman's father and his two
23 sisters engaged in conduct where they essentially
24 played hot potato with that gun until it ended up
25 in the river. Eventually they all admitted to what

1 happened. The police found the gun right in the
2 river where it was and it was matched to two
3 casings at the scene. Obviously there is a
4 reasonable inference in connection with this crime,
5 not only to protect Mr. Bowman, but more so it is
6 just the res gestae of how the gun was found. It
7 is certainly admissible in the trial in regard to
8 that, as to how they located this gun, and so I
9 think --

10 THE COURT: Did you address anything,
11 regarding the State's witness about shell casings?
12 If you did --

13 MR. WATERS: I was saying that there is,
14 whatever this one professor that wrote this thing,
15 they were looking at whether it would be feasible
16 to start taking pictures of all guns and putting
17 them in a database so police could plug them in and
18 see whether or not, you know, a particular firearm,
19 kind of like the fingerprint database or the DNA
20 database, they were just studying that, and we
21 also, in fact this individual, the head person
22 later gave an affidavit in which he said, "We did
23 not, our charge was not to look at the
24 admissibility of firearm --"

25 MR. BROWN: I object to hearsay.

1 THE COURT: This is not a jury matter, those
2 rules don't apply, this is opening statement, I'm
3 not taking it as evidence.

4 MR. BROWN: We'll concede to introduce the
5 affidavit.

6 THE COURT: Whatever, let's finish with his
7 opening.

8 MR. WATERS: I don't understand the
9 objection.

10 MR. BROWN: Well --

11 THE COURT: Let's finish opening statements.

12 MR. WATERS: I kind of lost my train of
13 thought. Anyway, their charge was not to determine
14 the validity or to look at the validity of firearms
15 testing, but the bottom line is, as they have the
16 weapon examined, it was examined in trial, there is
17 not going to be any testimony at all from anyone
18 that regardless of whether or not David Collins
19 said, "To the exclusion of all firearms or in my
20 opinion as a qualified trained firearm examiner it
21 is my definite opinion this is the firearm,"
22 however it should have been, it is a matter of
23 semantics, no one is going to come in and testify
24 David Collins made a mistake or these casings don't
25 match that weapon.

1 We think it is going to be a nice academic
2 discussion but it has nothing to do with this
3 particular case.

4 I'm about done, Your Honor..

5 With regard to the heavy accelerant, again I
6 think we discussed this at the summary judgment
7 hearing. There was never any claim by the State,
8 no argument, it was clear in the records that yes,
9 he had a heavy accelerant on his pants but in the
10 opinion of the State's witness it was not the same
11 thing as gasoline.

12 THE COURT: Was that witness called just for
13 the purpose of stating there was an accelerant on
14 his pants?

15 MR. WATERS: He was called to talk about
16 accelerant on all kind of stuff, the car, he was an
17 arson specialist.

18 THE COURT: Did he say he found accelerant
19 but he stated that accelerant was not the same or
20 connected to what burned the car?

21 MR. WATERS: He said it was a heavy
22 accelerant. Gas was used to burn the car. As I
23 understand, gas is a medium accelerant. This was a
24 heavy accelerant like kerosene. That is clear in
25 the record. The prosecution never got up and said

1 he had gas on his pants, he had that accelerant on
2 his pants, it was never matched. It was part of
3 the list of items he analyzed, all the evidence.
4 The prosecution, as they often do, just presents
5 the entire analysis that was done so there is no
6 claim, "You left that out." That is exactly what
7 was going on here. There was a proffer to do it,
8 there was no prejudice because no one ever claimed
9 it did in fact link him to the gas and that
10 argument was never made.

11 Finally, with regard to the sex. Obviously
12 the fact that Mr. Bowman's DNA was in the vagina is
13 relevant to the identity in a murder case. James
14 Gadson three years later says he didn't see any sex
15 going on and some seven years does not refute that.
16 He then goes back to the police and Mr. William
17 Hall where he talked about postmortem sexual
18 activity. Obviously that had been excluded by
19 defense's victory in the Jackson v. Deno.

20 THE COURT: It was not brought up?

21 MR. WATERS: It was never brought up. That
22 is why Mr. Cummings had to dance on the head of a
23 pin and make sure he did not do anything to open
24 the door to that great defense victory because the
25 second the jury heard about what Mr. Bowman said he

1 did in the Hall statements and some of the things
2 he described in his other statements, the defense
3 would be really on bad footing, so Mr. Cummings
4 successfully navigated this trial and prevented
5 that from coming out.

6 THE COURT: What is the purpose of the State
7 to bring up the issue of DNA found in the vaginal
8 cavity?

9 MR. WATERS: I think it is relevant to
10 identity. We have a State's witness, obviously Mr.
11 Gadson, as they will freely say, or Hiram Johnson
12 or any of them, all of them have from --

13 THE COURT: In the course of the whole
14 proceeding was there ever any allegations of CSC?

15 MR. WATERS: CSC was an aggravator in the
16 penalty phase.

17 THE COURT: I'm sorry, you're right, I knew
18 that. But as for as in the crimes?

19 MR. WATERS: No, it was just simply identity
20 evidence. We have State's witnesses but all of
21 them, again some of them have credibility issues
22 and certainly it's relevant to identity, to --

23 THE COURT: There never was a warrant issued
24 or direct presentment issue for CSC?

25 MR. WATERS: No, not I'm aware of. If I'm

1 wrong I apologize but not that I'm aware of.

2 And that would be our presentation.

3 MR. BROWN: Very brief reply.

4 THE COURT: No, there is not reply. This is
5 opening statement. Now, first witness.

6 MR. BROWN: Jonathan Davis.

7 THE COURT: We don't have a clerk. We need
8 to get somebody from the Clerk's office. I need a
9 clerk over here from the Clerk's office.

10 Sir, if you would, please -- is there a Bible
11 over there anywhere? Place your left hand on the
12 Bible and raise your right hand, sir.

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1 JONATHAN LeROY DAVIS,
2 after being first duly sworn, testified as follows:

3 THE COURT: Have a seat, if you would, sir
4 pull that microphone around there. If you will,
5 give me your full name, sir.

6 THE WITNESS: Jonathan LeRoy Davis.

7 THE COURT: Mr. Davis, I will let you know
8 something. You are going to have to respond to the
9 lawyers but the guy to your left right there
10 working hard, you got to make sure he hears, so
11 very seldom are you going to be looking my way.
12 Try to keep looking forward so he can see your lips
13 moving.

14 Why don't you pull the microphone a little
15 farther. There you go.

16 All right, your witness, Mr. Brown.

17 MR. BROWN: May it please the court.

18 DIRECT EXAMINATION

19 QUESTIONS BY MR. BROWN:

20 Q Mr. Davis, let's clear up one thing. You
21 called me about 8:00 o'clock this morning?

22 A Uh-huh (Affirmative).

23 Q That's the first time you and I have talked?

24 A Yes, sir.

25 Q Ever?

1 A Ever.

2 Q Okay. I told you I didn't want to talk about
3 the case?

4 A Yes, sir.

5 Q All right. And I also told you you needed to
6 be here at 9:30?

7 A Yes.

8 Q And then you came in here and asked why you
9 were here, I said because it had to do about your
10 jury duty back in 2002?

11 A Yes.

12 Q Was there any other discussion?

13 A No, sir.

14 Q All right.

15 THE COURT: I might mention you had
16 subpoenaed him.

17 MR. BROWN: I did, yes, sir. I just wanted
18 to clear up we hadn't had any discussion about the
19 merits of the case.

20 THE COURT: Okay.

21 BY MR. BROWN:

22 Q Do you recall being called to serve on the
23 Dorchester County jury, I think in the courthouse
24 in St. George, back in May of 2002?

25 A Yes, sir.

1 Q Okay. And do you recall going through a
2 qualification process?

3 A Yes, sir.

4 Q They asked you questions, and I hate to lead
5 but I'm try to get to a point.

6 THE COURT: Continue on.

7 Q And they asked you what type juror you were,
8 one, two, or three?

9 A Yes.

10 Q Okay. And then at some point in time you
11 came to court and, this is where I want to get to
12 the question, you ended up before the judge
13 regarding a concern about a conversation you had
14 had with someone else. Do you remember that?

15 A Yes.

16 Q All right. Can you tell me how you ended up
17 in front of the judge? Did you tell the bailiff or
18 somebody that -- was it your doing?

19 A It was my doing.

20 Q Okay.

21 A I told her that my fiance was his cousin.

22 Q His being Marion Bowman?

23 A Yes.

24 Q Okay. And is she also cousins with Tawain
25 Gadson?

1 A No, I don't think so.

2 Q Okay. And do you know whether Tawain Gadson
3 and Marion Bowman are first cousins?

4 A No.

5 Q You don't know that?

6 A I don't know.

7 Q Okay. Who did you approach, like a bailiff
8 or --

9 A I approached the judge.

10 Q Okay. And the judge indicated, you came up
11 and the Court addresses you, but I'm just trying to
12 find out --

13 THE COURT: How did you first get to the
14 judge? Did you tell the bailiff you wanted to
15 speak to the judge?

16 THE WITNESS: I think she asked the question.

17 THE COURT: Was this after the trial had
18 already begun and you all had been taking evidence?

19 THE WITNESS: No, the trial hadn't begun yet.

20 THE COURT: Okay.

21 BY MR. BROWN:

22 Q Okay. To try to get the information on this,
23 did you try to have a conversation with another
24 person about the case that you were about to sit
25 on?

1 A No, sir.

2 Q Okay. And why did you go tell the judge
3 about this?

4 A Because I didn't feel comfortable, you know,
5 being in a relationship with his cousin and
6 proceeding with the case.

7 THE COURT: Speak louder for me, now.

8 Q You were uneasy?

9 A Yes.

10 Q Do you remember being asked the question from
11 the lawyer for Mr. Bowman at that time about
12 whether you could be fair and impartial to both
13 sides?

14 A Yes.

15 Q You told them you could?

16 A Yes.

17 Q Do you believe that?

18 A Yes.

19 Q Okay. And you didn't -- but the judge had
20 given you some instructions about talking to people
21 about the case, right?

22 A Yes, sir.

23 Q Did you try to break that instructions?

24 A No, sir.

25 Q Is that why you went and told the judge about

1 it?

2 A Yes.

3 Q Just to make sure it was all clear and out?

4 A Yes.

5 Q Okay. As soon as you could get off the phone
6 from your fiance did you do so?

7 A It wasn't a phone conversation, it was -- I
8 don't remember, I think we was in the car.

9 Q You were in the car?

10 A Maybe it was on the phone. I don't remember
11 that right now. It just came up.

12 Q If I may approach, I have excerpted 3521 --

13 THE COURT: This is part of the transcript?

14 MR. BROWN: Yes, sir.

15 THE COURT: If you would, was this something
16 that was brought out to the judge in the course of
17 the jury qualification?

18 MR. BROWN: Yes, sir. He was never selected
19 to sit on the panel, he was struck for cause.

20 THE COURT: Okay.

21 MR. BROWN: And we're alleging that they
22 should have done a better job of rehabilitating
23 him.

24 Your Honor, at this point we would move the
25 jury transcript be a part of this record.

1 MR. WATERS: It's part of the Clerk's record
2 but no objection.

3 THE COURT: Anything that is in the Clerk's
4 file I will consider in my decision on this case.

5 MR. BROWN: Thank you, Your Honor. That is
6 from the Clerk's file, the trial of the defendant.

7 THE COURT: Anything in the Dorchester County
8 Clerk's office regarding State versus Brown as well
9 as including the trial of the case as well as the
10 post conviction relief petition, I will consider.

11 MR. BROWN: Thank you, Your Honor.

12 BY MR. BROWN:

13 Q You will see, I apologize, I handed you the
14 one I had, on 3532 they asked about the phone call
15 you talked about, the person you spoke with. Does
16 that refresh your memory?

17 A Yes, sir.

18 Q And did you try to stay on the phone and talk
19 with her after she brought this up?

20 A No. After she, you know, brought it up,
21 whatever, I told her, "I can't talk to you about
22 that." She was like, okay, and we went on with
23 conversation about something else.

24 Q Okay. And then you went back the next day
25 and told the Court because you wanted to make sure

1 you did everything right?

2 A Yes.

3 Q Following the judge's instructions?

4 A Yes, sir.

5 MR. BROWN: Beg the Court's indulgence.

6 Q And she is Shaquana Colter?

7 A Yes.

8 Q And how did you know about any relationship

9 with Mr. Bowman? Did you have firsthand knowledge

10 of it?

11 A No.

12 Q It is what Miss Colter said?

13 A Yes.

14 Q Is there a chance the relationship is not

15 with Mr. Bowman, but with Mr. Gadson?

16 A I think she said Mr. Bowman.

17 Q But you don't know firsthand?

18 A No, sir.

19 Q Okay. I guess the last thing I'm going to

20 end with, is there anything you did was a willful

21 effort to obstruct the Court's instructions to you

22 about not talking about the case?

23 A Repeat that.

24 Q Did you do anything that you intended to go

25 against the judge's rules?

1 A No, sir.

2 Q Again, you believed that you could be a fair
3 and impartial juror?

4 A Yes.

5 MR. BROWN: Okay.

6 THE COURT: Cross-examination.

7 MR. WATERS: Thank you Your Honor, may it
8 please the Court.

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1 CROSS EXAMINATION

2 QUESTIONS BY MR. WATERS:

3 Q How you doing today, Mr. Davis?

4 A Fine.

5 Q Do you recall having a conversation on your
6 cell phone out in front of the courthouse during
7 the process of jury selection?

8 A No, I don't recall that.

9 Q Do you recall talking to anybody about, about
10 the jury process, you being there and potentially
11 being selected?

12 A No.

13 Q Okay.

14 THE COURT: Your response is no?

15 A No.

16 Q Thank you. Now, you did have this phone call
17 with your finance Shaquana Colter, correct?

18 A Yes.

19 Q And just explain to me real quick what
20 happened in that conversation, if you could.21 A Okay. We was, I called her, you know, I
22 always call, and we was just talking and she was
23 like, "Oh, I saw you earlier with that juror button
24 on." I was like, "Oh, yes." And she was like,
25 "Well, you know my cousin," I guess Marion Bowman,

1 whatever, she was like, "He in jail for killing a
2 white girl." And I was like, "You can't talk to me
3 about that because I'm supposed to look at it,"
4 whatever. She said, "Oh, I forgot." I said,
5 "Well, lets talk about something else."

6 Q She also told you her aunt was kin to
7 Bowman's family and these folks from Branchville,
8 isn't that correct?

9 A Yes.

10 Q She told you she was kin, her aunt was kin to
11 these folks, correct?

12 A Yes.

13 Q Okay. And she also told you that one of her
14 aunts lived two or three houses down from Marion
15 Bowman, the one who was accused of killing the
16 girl, correct?

17 A I don't remember.

18 Q All right. I'm going to show you, this is
19 page 3535 of the record on appeal.

20 THE COURT: I will let you know what this is,
21 Mr. Davis. You're not on trial, please understand,
22 what they have is when the trial was over,
23 everything the judge said in the courtroom and
24 everything you said and everybody else said was
25 typed up, we have a copy of it. So, what we're

1 showing is things that the court reporter like that
2 gentleman over there to your left took down and
3 typed up later, so he is going to show you
4 something that a court reporter typed up that
5 basically reflects what was said in the courtroom.
6 That is all they're doing now, okay? You can show
7 it to him.

8 MR. WATERS: Thank you.

9 BY MR. WATERS:

10 Q Again this is part of your, when you were
11 giving testimony before the judge and this is a
12 recording of that and obviously this has been a
13 long time ago, correct?

14 A Uh-huh (Affirmative).

15 Q It is probably hard to remember every little
16 thing that happened.

17 A Sure.

18 Q I'm going to ask you to review page 3535.
19 You see the numbers on the side here, look at this
20 one. Review from line six, down to ten.

21 A "She says her aunt said --"

22 THE COURT: No, just read it to yourself.

23 A Read it to myself?

24 Q Yes.

25 A Okay.

1 Q Okay. So, she, and she being Shaquana,
2 right?

3 A Right.

4 Q Told you her Aunt Tonya Colter had told her
5 that she lived a few houses down from Bowman and
6 the man that has been accused of killing the girl,
7 right?

8 A No. It was like she was saying that she had,
9 Tonya is her aunt, they, I think she has another
10 aunt that lived, lived in Branchville, that lived
11 two or three houses down.

12 Q Okay. Well, explain to me, then, the link to
13 Bowman, between Shaquana, sorry if I said it wrong,
14 and Mr. Bowman, that she told you about.

15 A The only thing she said, it was her cousin, I
16 mean. How she said it, how she brought it out, you
17 know, "My cousin, that guy, that's my cousin."

18 Q All right. How did she mention Tonya?

19 A She was saying, I guess she said Tonya told
20 her.

21 Q Okay.

22 A That that was her cousin.

23 Q I got you. All right. Also did you know
24 Kendra as well?

25 A Kendra?

1 Q Kendra Bowman.

2 A Huh-uh (negative).

3 Q Or Carolyn Brown?

4 A Carolyn Brown, no.

5 Q Okay.

6 MR. WATERS: I have nothing further, Your
7 Honor.

8 THE COURT: Anything else?

9 MR. BROWN: Beg the Court's indulgence one
10 minute.

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1 REDIRECT EXAMINATION

2 QUESTIONS BY MR. BROWN:

3 Q Very briefly. Shaquana Colter, her aunt's
4 name is Tonya Colter?

5 A Uh-huh (Affirmative).

6 Q Where does Shaquana Colter live?

7 A At the time they was living in Reevesville?

8 Q Reevesville?

9 A Yes.

10 Q Where was Tonya living?

11 A Living in Reevesville also.

12 Q Those are the relatives you know of?

13 A Yes.

14 MR. BROWN: No further questions, Your Honor,
15 subject to the Court's admonition regarding --

16 THE COURT: Does the record reflect he was
17 excused for cause by the Court pursuant to the
18 State's motion or the Court's own?

19 MR. WATERS: It was more a joint, the Court
20 had come to that conclusion, the State obviously
21 opposed him but after there was some testimony with
22 regard to that conversation the Court ultimately
23 felt it was best to excuse him.

24 THE COURT: Well, oftentimes the Court brings
25 someone up and talks on the side and the court

1 reporter is there and all that without, not in the
2 open courtroom. Was this done with all on the side
3 next to the court reporter or was this done with
4 the courtroom cleared of everybody and the
5 gentleman standing in front of the Court? How was
6 this done, all these questions?

7 MR. WATERS: It is just reflected on the
8 record, I imagine -- we can maybe ask Mr. Davis.

9 THE COURT: Do you remember? I mean, were
10 you over at the side with the court reporter in the
11 courtroom, or was the courtroom cleared out of
12 everybody, other jurors and you stood in front of
13 the judge?

14 THE WITNESS: All the jurors was there and I
15 think --

16 THE COURT: The judge came down and went over
17 to where the court reporter was and you went and
18 talked over there, or you came up to the bench and
19 talked to the Judge?

20 THE WITNESS: I don't remember.

21 THE COURT: All right. The jurors were all
22 still there?

23 THE WITNESS: Yes.

24 THE COURT: Obviously I can't imagine him
25 being in front of the jurors. It must have been on

1 the side next to the court reporter.

2 MR. WATERS: This was after they completed
3 qualification. He was initially found qualified,
4 then they came back and right before they really
5 got to the meat of the jury selection they had
6 those kind of last minute where everyone comes
7 back.

8 THE COURT: He had been through the one, two,
9 three questions?

10 MR. WATERS: Yes, here is the next person, "I
11 realize I got this to do," and Mr. Davis came up
12 among that group of people.

13 THE COURT: What number was he, I'm just
14 curious? The main process is as you're qualified
15 you become that number.

16 MR. BROWN: We don't have that, Your Honor, I
17 apologize.

18 MR. WATERS: They actually struck in the
19 order that they were qualified.

20 THE COURT: Right.

21 MR. WATERS: He would have never been on the
22 jury.

23 THE COURT: So, he was like number 50 or
24 something, 40?

25 MR. WATERS: He was the last juror that was

1 selected, was two before him, he would have never
2 made it. He might have made the alternate but no
3 alternates were used.

4 MR. BROWN: Your Honor, I don't believe that
5 is the correct legal standard but we do understand
6 your question about whether or not he would have
7 come up yet or not. There were strikes that may
8 not have been used on other folks but they get to
9 use some kind of crystal ball creating the jury
10 selection.

11 MR. WATERS: They were striking in the order
12 they were qualified.

13 THE COURT: What he said, what Mr. Brown is
14 trying to say, maybe the defense wouldn't have
15 stricken certain other jurors, hoping to get to him
16 or something by not striking other people, is what
17 he is saying. Of course I have no testimony to
18 that.

19 MR. WATERS: Right.

20 THE COURT: But --

21 MR. BROWN: Your Honor, you wanted to know
22 which juror.

23 THE COURT: I'm just curious, for the record,
24 make sure no one misunderstands where he was on the
25 qualified list, that is the way I always do it, as

1 a juror is qualified that juror becomes that
2 number, one two, three, four, five, whatever, and
3 then each side, we go by that qualification on the
4 strike of the jurors.

5 MR. WATERS: Unfortunately in the transcript
6 they just have those initial juror numbers, the
7 ones that kind of get juggled up at random. His
8 number in that regard is 70.

9 MR. BROWN: I have it. He was number 25 --

10 THE COURT: He was the 25th juror selected.

11 MR. BROWN: He was 25th out of the panel, in
12 other words.

13 THE COURT: Was he the 25th juror qualified?

14 MR. WATERS: Correct -- well, I don't know
15 that is the case.

16 MR. BROWN: We don't mind getting together
17 and agreeing on what the number is.

18 MR. WATERS: That appears to be correct.

19 THE COURT: If he was the 25th juror
20 qualified, obviously he would have been one that
21 would have been reached.

22 MR. WATERS: My point was he was not but I
23 guess, like you say, we can have testimony on that.

24 THE COURT: Maybe I'm missing something. I
25 know he was discharged for cause but before he was

1 discharged for cause would he have been the 25th
2 person to come up before the Court for the State
3 and defense to choose, either select him or not
4 select him?

5 MR. BROWN: Yes.

6 MR. WATERS: Correct.

7 MR. BROWN: He would have been, potentially
8 could have served, according to how the strikes
9 went down.

10 THE COURT: Now, after everybody was
11 qualified who was going to be qualified, that is
12 when he then came up to the Court, when they came
13 back in and said, "Listen Judge, I go to tell you
14 something I didn't know about."

15 MR. WATERS: There is actually another aspect
16 of this issue, as you will, but I prefer to discuss
17 that --

18 THE COURT: All right.

19 MR. BROWN: The answer from our side is yes,
20 sir, and the reason why I tell you that, again I
21 have a breakdown which shows jurors as they went
22 through panels and it has DQ beside the ones that
23 were disqualified and he was not DQ'd, he was
24 actually qualified as number 25.

25 THE COURT: All right. But in any event,

1 after they were once qualified, after everybody was
2 going to be qualified was qualified the Court
3 became aware of his conversation with his fiance?

4 MR. WATERS: The next day after they
5 completed it, then they have all the jurors who got
6 selected come up with their new excuses, they went
7 through all of those and this came up at that
8 particular time.

9 THE COURT: All right. And then he tells the
10 judge, "Listen --" he actually talked to his fiance
11 after he was qualified?

12 MR. WATERS: That's correct.

13 MR. BROWN: There is more detail about the
14 conversation in the record. What I narrowed it
15 down to was, 3529 through 3541 is a fairly succinct
16 breakdown of the questioning of juror Davis at
17 trial, and of course --

18 THE COURT: Let me ask you all this. I don't
19 want to get too much into this thing but I would
20 assume at this trial, like all the other trials, a
21 questionnaire was mailed to the jurors before trial
22 and the jurors before trial would know the name of
23 the defendant?

24 MR. BROWN: We believe that's true. He
25 actually said no to whether or not he knew any of

1 the people.

2 THE COURT: I know that. I'm curious as to
3 whether the judge had concern about why this issue
4 didn't come up beforehand.

5 MR. BROWN: She said that in the record, "You
6 never indicated to me that you knew this person,
7 therefore you only indicate now you know him
8 because of this conversation you had?"

9 THE COURT: No, no. I wonder why if he knew
10 what trial he was going to be on, and a fiance is
11 not someone you see every other month, a fiance you
12 assume you see constantly, a fiance would be
13 someone who knew you were about to come to court.
14 Anyway, that is neither here nor there. There was
15 no discussion of that on the record?

16 MR. WATERS: There was a discussion by the
17 Court and the Solicitor and of course defense
18 counsel on the record after this testimony
19 occurred, when the Court came to her decision, in
20 which she discussed some of those I think what
21 you're trying to drive at, some of those concerns.

22 THE COURT: It is interesting why he would
23 only become aware of that on the day of jury
24 selection.

25 MR. WATERS: Perhaps not that specifically

1 but there was a discussion and ultimately the
2 Court, after hearing the testimony, made the
3 decision on the --

4 THE COURT: All right, okay.

5 MR. WATERS: -- excusal for cause.

6 MR. BROWN: The way it's alleged, there
7 wasn't proper rehabilitation by trial counsel.

8 THE COURT: I know that is what you're
9 saying, trial counsel didn't try and rehabilitate
10 him and then maybe the Court would qualify him.

11 MR. BROWN: That or not disqualify him, yes,
12 sir.

13 THE COURT: One other question. Did the
14 State use all its strikes?

15 MR. BROWN: No, sir. But again I don't know
16 that --

17 THE COURT: I'm just curious.

18 MR. BROWN: No, sir, they did not.

19 THE COURT: I'm just curious.

20 MR. BROWN: Without looking, I think they
21 were down to two.

22 MR. WATERS: I believe that's correct.

23 THE COURT: All right. Mr. Davis, you need
24 to make sure that Mr. Waters, this gentleman and
25 this gentleman know your phone number in case we

1 need to call you back. Where do you live?

2 THE DEFENDANT: I live in Orangeburg.

3 THE COURT: What is your address?

4 THE WITNESS: [REDACTED].

5 THE COURT: Everybody has that?

6 MR. BROWN: The address, I mailed him a
7 letter notifying him the court location had changed
8 and it was delivered but he didn't receive it so I
9 need to get the address.

10 THE COURT: [REDACTED],
11 Orangeburg?

12 THE WITNESS: Yes.

13 THE COURT: Where do you work?

14 THE WITNESS: I'm unemployed.

15 THE COURT: Unemployed? And what is your
16 phone number?

17 THE WITNESS: 843 [REDACTED].

18 THE COURT: Is that a cell phone number?

19 THE WITNESS: Cell phone.

20 THE COURT: That number you will answer?

21 THE WITNESS: Yes.

22 THE COURT: You know, you need to make sure
23 you keep that at least for this week close by
24 because we may be calling you back, we may not, but
25 keep that around. Do not discuss your testimony

1 with anyone, all right?

2 THE WITNESS: Okay.

3 THE COURT: You may step down.

4 MR. BROWN: And we want to make sure that
5 everybody who may be in the courtroom doesn't try
6 to contact him.

7 THE COURT: If someone contacts you, you come
8 back here and let me know.

9 THE WITNESS: Okay.

10 THE COURT: All right?

11 THE WITNESS: All right.

12 THE COURT: We'll see you later.

13 MR. BROWN: Thank you.

14 (Witness excused).

15 MR. BROWN: The next witness we intend to
16 call will be a lengthy witness, Your Honor.

17 THE COURT: All right.

18 MR. WATERS: Your Honor, one last thing
19 before we move on from this subject, just for
20 context, I wanted to wait until Mr. Davis left,
21 what initially happened with Mr. Davis was a
22 Solicitor's office employee overheard him out front
23 of the courthouse.

24 THE COURT: Is that on the record?

25 MR. BROWN: I have to object.

1 MR. WATERS: We discussed it on the record,
2 it is in the record.

3 THE COURT: Is it on the record?

4 MR. WATERS: It's in the record.

5 THE COURT: Okay.

6 MR. WATERS: And had heard him out front on a
7 cell phone saying, "I have been called up here for
8 jury duty and I ain't going to find nobody guilty
9 in any case."

10 MR. BROWN: I object to that. There was no
11 question asked of him on that, none at all.

12 MR. WATERS: I just did, and he was
13 questioned about that by Mr. Bailey. Nobody said,
14 "Did you say exactly that," but they asked him,
15 "Have you ever expressed that opinion," and they
16 went down the road whether or not he could find
17 somebody guilty.

18 THE COURT: Like you asked him was he on the
19 cell phone that day, was he asked that question?

20 MR. WATERS: He was not, I don't think, asked
21 that specifically but he was asked if he had ever,
22 you know, if he could find somebody guilty or if he
23 had ever said he couldn't, as I recall it, but in
24 any event, the Solicitor's office employee came in
25 and testified to that and that he had said that.

1 And then of course he was kind of asked, he wasn't
2 really specifically asked, "Isn't it true you stood
3 out front and said you would never find anybody
4 guilty in any case?"

5 But anyway, ultimately the judge qualified
6 him despite that, despite her concerns about that.
7 I think when he came back with this he also
8 expressed knowing some of the family members.
9 Obviously the record speaks for itself. I did want
10 to bring up that other aspect of the problem with
11 Mr. Davis as well, that the Solicitor's office
12 employee had heard him out front.

13 MR. BROWN: We would ask that you let the
14 record speak for itself on that, Your Honor,
15 because it is clear that she disqualifies him for
16 failing to follow her instructions, and without
17 continuing the argument, I don't know who failed to
18 follow instructions by approaching a judge and
19 saying, "I need to follow your instructions and
20 tell you I was contacted about this case," just
21 like you told it here, Your Honor, "If anybody
22 tries to contact you come and tell me." That is
23 exactly why I brought him back in here, the record
24 is not clear why he was before the judge.

25 THE COURT: Let me ask you this. He had

1 already told the judge he could be fair and
2 impartial?

3 MR. BROWN: That's correct.

4 THE COURT: He had already told the judge he
5 hadn't made his mind up, he could give death or
6 life, he had already told the judge about that, he
7 never changed his mind about that?

8 MR. BROWN: That's correct.

9 THE COURT: What questions could defense
10 counsel ask him?

11 MR. BROWN: It's not clear, this is my
12 argument, again without trying to argue the
13 argument, and without the benefit of his testimony,
14 it was not clear as to why he came forward before
15 the judge or how he came before the judge, nothing
16 in the transcript, 3529 to 3541. When I asked him
17 here today he said he came up there to let Her
18 Honor know he had been contacted.

19 THE COURT: That is what he did.

20 MR. BROWN: And to me that is the most honest
21 juror you have got.

22 THE COURT: But the judge knew that.

23 MR. BROWN: We don't know.

24 MR. WATERS: Your Honor, 3529, "Yes, sir, Mr.
25 Davis, of course you remain under oath, tell me

1 what your concern is."

2 MR. BROWN: Right. But what I'm trying to
3 say is this. We've got some indication here that
4 it came before the Court because of a cell phone
5 conversation where he gave some opinion about --

6 THE COURT: Mr. Brown. I'm aware from what
7 you all have told me that the cell phone
8 conversation thing had already been addressed by
9 the Court before.

10 MR. BROWN: Well, we're not agreeing with
11 that.

12 THE COURT: You're not okay. So, it's not
13 in the transcript long before that?

14 MR. WATERS: It is and the judge, the judge
15 qualified him, I will concede that, the record
16 speaks for itself, the issue on the cell phone
17 call.

18 THE COURT: The issue regarding the
19 conversation with the fiance was subsequent to the
20 judge qualifying him?

21 MR. WATERS: Correct.

22 MR. BROWN: We agree.

23 THE COURT: Now, after the judge heard about
24 the fiance conversation was there anything put
25 before the judge that he now was not qualified as

1 for as couldn't be fair, that he was going to
2 change --

3 MR. BROWN: No, sir.

4 THE COURT: Why could the judge not use his
5 or her discretion in making that decision? If
6 defense counsel had asked him anything, what could
7 he have asked him that wasn't already on the record
8 and the judge was already aware?

9 MR. BROWN: The question I just asked.
10 Actually that was asked.

11 THE COURT: What question did you ask him
12 that wasn't already asked --

13 MR. BROWN: "Did you at all times follow the
14 judge's instructions?" And the answer was yes.

15 THE COURT: All right. And what did the
16 judge have that he didn't?

17 MR. BROWN: She said, "I'm disqualifying him
18 because he can't follow my instructions."

19 THE COURT: All right.

20 MR. WATERS: She --

21 MR. BROWN: He got fined \$50 for not
22 following instructions.

23 MR. WATERS: She also was not impressed with
24 his testimony. In fact she said, "You might want
25 to address how every time one of you asked him a

1 question there was more information, more
2 information," and she goes on to talk about how the
3 story evolved and new facts came in. She made a
4 credibility determination, which it is her
5 prerogative to do.

6 THE COURT: This is the second time he had
7 come before the Court regarding comments outside
8 the courtroom?

9 MR. BROWN: I believe according to the
10 State's theory, the same comments.

11 MR. WATERS: No. The first time was what he
12 said outside, the person heard him saying, "I will
13 never find anybody guilty in any case." The second
14 time we're talking about here was his admission to
15 having the conversation with his fiance who was
16 related to Marion Bowman.

17 MR. BROWN: She definitely said why she
18 struck him there.

19 THE COURT: Because he could not follow her
20 instructions and fined him \$50?

21 MR. BROWN: That's correct.

22 THE COURT: You have someone who she had
23 already discovered had been on the phone sometime
24 earlier where an employee had heard him on the
25 phone.

1 MR. BROWN: We don't agree with that.

2 THE COURT: Sheriff, let's make sure we have
3 a Clerk, I need a Clerk's file or something with a
4 full transcript before me.

5 Okay, let's go ahead and take a break for
6 lunch. Let's be back here at 2:50, 2:50, all
7 right? We'll see you all then.

8 MR. BROWN: Yes, sir, Your Honor.

9 (Recessed at 1:12 p.m.).

10 (Reconvened at 3:23 p.m.)

11 THE COURT: We ended with the one witness Mr.
12 Davis, and I'm ready for your next witness, Mr.
13 Brown.

14 MR. BROWN: We call James Tawain Gadson.
15 Your Honor, Mr. Gadson's testimony during the trial
16 below appears at pages 3980 through page 4040.

17 THE COURT: I do not have the transcript
18 before me right now. Hopefully it is going to be
19 in the file of the Clerk.

20 MR. BROWN: Yes, sir, and I point that out --

21 THE COURT: In other words, 60 pages of
22 testimony.

23 Mr. Gadson, come on around here. If you
24 would, to the best of your ability, Mr. Gadson. Do
25 you see that Bible right there?

1 JAMES TAWAIN GADSON,
2 after being first duly sworn, testified as follows:

3 THE COURT: Have a seat, if you would, sir.
4 If you would, Mr. Gadson -- officer, help him pull
5 that microphone down a little bit.

6 Mr. Gadson, give me your name, sir.

7 THE WITNESS: James Tawain Gadson.

8 THE COURT: How do you spell your last name?

9 THE WITNESS: G-a-d-s-o-n.

10 THE COURT: Your witness, Mr. Brown.

11 MR. BROWN: May it please the Court, Your
12 Honor.

13 DIRECT EXAMINATION

14 QUESTIONS BY MR. BROWN:

15 Q We spoke at a deposition back in July, July
16 14th of this year, 2008?

17 A Yes, sir.

18 Q All right. And since that time, gosh, you're
19 back in, I guess you're back in prison again? I
20 say that because we had spoken to you about a
21 parole violation warrant.

22 A Yes, sir.

23 Q And you informed us at that time that you
24 were expecting to have a parole hearing for some
25 past due money?

1 A On the 23rd.

2 Q And you told us on the 14th you owed money?

3 A Yes.

4 MR. WATERS: Your Honor, I object to the
5 relevance of this. I'm not quite sure what it has
6 to do --

7 THE COURT: What are you in prison for now,
8 parole violation?

9 THE WITNESS: Yes.

10 THE COURT: What were you serving time for
11 before you got out on parole?

12 THE WITNESS: Misprisonment of a felony and
13 accessory after the fact of murder.

14 THE COURT: Proceed on

15 BY MR. BROWN:

16 Q You didn't report to your parole officer?

17 A No.

18 Q You did report?

19 A I wasn't reporting.

20 Q You were not, okay. So, when you told us in
21 the deposition you hadn't paid your money, that
22 that was a problem, that wasn't true, was it?

23 A No. I was behind on my money, too, but I
24 wasn't reporting.

25 Q You just didn't tell us everything?

1 A No, sir.

2 Q Did you know you were going back?

3 A Yes.

4 Q Let's talk about this case. You testified
5 back in May of 2002 as a witness for the
6 prosecution, didn't you?

7 A Yes.

8 Q And originally you were charged in an
9 indictment for murder?

10 A Yes, sir.

11 (Indictment marked as Plaintiff's Exhibit
12 Number 1).

13 BY MR. BROWN:

14 Q I hand you what has been marked as
15 Plaintiff's 1, if you will take a look at that. Do
16 you recognize that sheet of paper?

17 A Yes, sir.

18 Q And this is your indictment for murder, isn't
19 it?

20 A Yes, sir.

21 Q And in this indictment doesn't it in part
22 allege that you shot Kandee Martin?

23 A Yes, sir.

24 Q And this indictment came down in June of
25 2001, right?

1 A June 18th.

2 Q Okay. And you knew you could get the death
3 penalty for that murder, didn't you?

4 A Yes, sir.

5 Q And in fact you were threatened with the
6 death penalty, weren't you?

7 A No.

8 Q You never were?

9 A No.

10 Q All right.

11 (Four motions filed by the witness marked
12 as Plaintiff's Exhibit Number 2).

13 BY MR. BROWN:

14 Q If you will, take a look at what has been
15 marked Plaintiff's 2, and those are three, four
16 items that have been filed with the Clerk of Court,
17 is that correct?

18 A Yes, sir.

19 Q And they have your name at the bottom of it?

20 A Yes, sir.

21 Q And these are, for lack of a better term,
22 motions that you filed?

23 A I had a jailhouse lawyer helping me on it.

24 Q You signed it saying you agreed with all this
25 stuff, didn't you?