

VOLUME TWENTY-TWO

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

RECEIVED

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MARION BOWMAN,

S.C. Supreme Court

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213468

APPENDIX

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PAGES 9,451-9,900

INDEX

INDEX.....	i

RECORD ON APPEAL FROM DIRECT APPEAL 1 - 5424

TRANSCRIPT DATED OCTOBER 18, 2001 – SCHEDULING CONFERENCE	1
TRANSCRIPT DATED MARCH 5, 2002 – SCHEDULING CONFERENCE	19
TRANSCRIPT DATED MARCH 15, 2002 – MOTIONS.....	70
TRANSCRIPT DATED MARCH 22, 2002 – JURY QUESTIONNAIRE/MOTIONS.....	251
TRANSCRIPT DATED APRIL 9, 2002 – <u>JACKSON v. DENNO</u>	315

TESTIMONY

QUILLIE WALTERS	
Direct Examination.....	320
Cross Examination	324
ALVIN MICHAEL COKER	
Direct Examination.....	341
Cross Examination	344
TIM STEPHENSON	
Direct Examination.....	348
Cross Examination	351
LARRY WILLIAMS	
Direct Examination.....	369
Cross Examination	383
Redirect Examination.....	449

VOLUME TWO

LARRY WILLIAMS	
Recross Examination.....	451

TERRENCE ARNOLD VAN DORAN

Direct Examination.....	457
Cross Examination	463

ALVIN COKER

Direct Examination.....	479
Cross Examination	482

JAMES HELMS

Direct Examination.....	500
Cross Examination	502

ALVIN COKER

Direct Examination.....	513
Cross Examination	517
Redirect Examination.....	525
Recross Examination.....	525

TERRENCE VAN DORAN

Direct Examination.....	526
Cross Examination	530

TRANSCRIPT DATED APRIL 10, 2002 – <u>JACKSON v. DENNO</u>	556

TESTIMONY

JOHN ROGER BARNES

Direct Examination.....	573
Cross Examination	592
Redirect Examination.....	607

LORRAINE CARMICHAEL

Direct Examination.....	613
Cross Examination	621
Redirect Examination.....	630

TRANSCRIPT DATED APRIL 11, 2002 – <u>JACKSON v. DENNO</u>	637

TESTIMONY

CALVIN IVORY MYERS

Direct Examination.....	639
Cross Examination	650
Redirect Examination.....	654

WILLIE J. BAMBERG

Direct Examination.....	659
Cross Examination	668
Redirect Examination.....	669

BARBARA WALTERS

Direct Examination.....	679
Cross Examination	712
Redirect Examination.....	714
Recross Examination.....	714

BENJAMIN SINGLETON

Direct Examination.....	717
Cross Examination	721
Redirect Examination.....	724

MARION BOWMAN, JR.

Direct Examination.....	727

TRANSCRIPT DATED APRIL 12, 2002 – <u>JACKSON v. DENNO</u>	891

TESTIMONY

MARION BOWMAN, JR.

Cross Examination	893

VOLUME THREE

MARION BOWMAN, JR.

Redirect Examination.....	965

WAYNE W. MCALHANY

Direct Examination.....	975
Cross Examination	1003
Redirect Examination.....	1005

TRANSCRIPT DATED APRIL 15, 2002 – <u>JACKSON v. DENNO</u>	1031

TESTIMONY

DOROTHY M. BOWMAN

Direct Examination.....	1034
Cross Examination	1048
Redirect Examination.....	1055

GLENN CHARLES LICHTENBERGER	
Direct Examination.....	1059
Cross Examination	1068
Redirect Examination.....	1072
TRANSCRIPT DATED APRIL 17, 2002 – <u>JACKSON v. DENNO</u>	
ARGUMENTS	1079
TRANSCRIPT DATED MAY 1, 2002 – MOTIONS	
1179	
TESTIMONY	
TERRENCE A. VAN DORAN	
Examination By The Court	1200
Examination By Mr. Bailey.....	1208
Examination By Mr. Cummings	1211
Examination By The Court	1231
TRANSCRIPT DATED MAY 2 – 2002 – <u>JACKSON v. DENNO</u> – RULING.....	
1320	
TESTIMONY	
JAMIE MICHELLE ZENSEN	
Examination By The Court	1322
Examination By Mr. Cummings	1332
Examination By The Court	1332
VOLUME FOUR	
TRANSCRIPT DATED MAY 3, 2002 – JURY MATTERS	
1380	
JUROR VOIR DIRE	
KIRT LAVERNE WALLACE	
Examination By The Court	1383
WILLIAM E. BENSE	
Examination By The Court	1389
BRENNEL SIMON	
Examination By The Court	1392
JERRY FOWLER	
Examination By The Court	1394

HUBERT PRINCE	
Examination By The Court	1398
MICHAEL PATTON WALLER	
Examination By The Court	1400
JIMMY SLOOP	
Examination By The Court	1403
JUROR 004 – BRIAN ALDERSON	
Examination By The Court	1412
Examination by Mr. Cummings.....	1415
MICHAEL P. WALLER	
Examination By The Court	1419
JUROR 160 – WALBURGA KARWINSKI	
Examination By The Court	1421
Examination By Mr. Cummings.....	1424
JUROR 130 – GAYLA M. HEINRICH	
Examination By The Court	1427
Examination By Mr. Bailey.....	1430
Examination By Mr. Cummings.....	1432
JUROR 310 – NITZA I. TYUS	
Examination By The Court	1439
JUROR 21 – HEATHER M. BOWERS	
Examination By The Court	1445
JUROR 63 – MARILYN J. CUMMINGS	
Examination By The Court	1449
JUROR 75 – KATHERINE M. DILLEHAY	
Examination By The Court	1453
JUROR 34 – LOLITA B. CABADING	
Examination By The Court	1454
Examination By Mr. Bailey.....	1459
JUROR 48 – JOANNE G. CLEMONS	
Examination By The Court	1462
JUROR 52 – STEVEN D. CONLEY	
Examination By The Court	1466

JUROR 58 – LOUIS J. CREEL	
Examination By The Court	1470
Examination By Mr. Bailey.....	1473
Examination By Mr. Cummings	1474
JUROR 67 – EARL DAVIS	
Examination By The Court	1479
JUROR 90 – JERMAINE EUBANKS	
Examination By The Court	1481
JUROR 92 – PAULA A. EVANS	
Examination By The Court	1485
JUROR 93 – CAROL M. EVERLY	
Examination By The Court	1491
Examination By Mr. Bailey.....	1495
JUROR 90 – JERMAINE EUBANKS	
Examination By The Court	1497
Examination By Mr. Bailey.....	1498
Examination By Mr. Cummings	1500
JUROR 127 – TERESA M. HATCHELL	
Examination By The Court	1508
CHERYL GRAHAM	
Examination By The Court	1515
Examination By Mr. Cummings	1517
JUROR 127 – TERESA HATCHELL	
Examination By The Court	1518
JUROR 135 – GAIL R. HESS	
Examination By The Court	1521
Examination By Mr. Bailey.....	1524
Examination By The Court	1526
JUROR 260 – TONI K. ROMANUS	
Examination By The Court	1528
JUROR 341 – MICHAEL S. WINSTEAD	
Examination By The Court	1532
Examination By Mr. Bailey.....	1546
TRANSCRIPT DATED MAY 9, 2002 – JURY MATTERS	1550

JUROR VOIR DIRE

JUROR 96 – CHARLES K. FERTIG, JR.

Examination By The Court	1553
Examination By Mr. Bailey.....	1556
Examination By Mr. Cummings	1558

JUROR 267 – CAROL O. SAWYER

Examination By The Court	1563
Examination By Mr. Bailey.....	1568
Examination By Mr. Cummings	1569

JUROR 342 – KATHY M. WOODS

Examination By The Court	1574
Examination By Mr. Bailey.....	1576
Examination By Mr. Cummings	1577

JUROR 22 – VICTORIA C. BOX

Examination By The Court	1584
Examination By Mr. Bailey.....	1587
Examination By Mr. Cummings	1588

JUROR 189 – GLORIA J. MAGWOOD

Examination By The Court	1593
Examination By Mr. Bailey.....	1598

JUROR 201 – LISA MCDONALD GIBSON

Examination By The Court	1606

JUROR 222 – LISA NICHOLS

Examination By The Court	1609

JUROR 272 – INEZ S. SHULER

Examination By The Court	1613
Examination By Mr. Bailey.....	1616

JUROR 215 – MICHAEL R. MOSKAL

Examination By The Court	1620

TRANSCRIPT DATED MAY 13, 2002 – JURY QUALIFICATION	1637

JUROR VOIR DIRE

JUROR 26 – ALBERT BRITT

Examination By The Court	1662

VOLUME FIVE

JUROR 347 – GEORGE W. YOUNG, JR.

Examination By The Court	1818
Examination By Mr. Bailey.....	1828
Examination By Mr. Cummings	1829

JUROR 293 – LEO J. SULLIVAN

Examination By The Court	1841
Examination By Mr. Bailey.....	1855
Examination By Mr. Cummings	1857

JUROR 342 – KATHY M. WOODS

Examination By The Court	1864
Examination By Mr. Bailey.....	1873
Examination By Mr. Cummings	1876

JUROR 197 – CASEY A. MCCARTER

Examination By The Court	1887
Examination By Mr. Cummings	1899
Examination By The Court	1904
Examination By Mr. Bailey.....	1905

JUROR 159 – SUSAN A. JORDAN

Examination By The Court	1921

TRANSCRIPT DATED MAY 14, 2002 – JURY SELECTION	1941

JUROR VOIR DIRE

JUROR 275 – SHALAYA S. SINGLETON

Examination By The Court	1954
Examination By Mr. Cummings	1963

JUROR 232 – SYLVIA A. PERRY

Examination By The Court	1976
Examination By Mr. Bailey.....	1985
Examination By Mr. Cummings	1987
Examination By Mr. Bailey.....	1992

JUROR 68 – GENE C. DAVIS

Examination By The Court	1996

JUROR 68 – GENE C. DAVIS

Examination By Mr. Cummings	2005
Examination By Mr. Bailey.....	2009

JUROR 348 – KAREN S. YOUNG

Examination By The Court	2013
Examination By Mr. Bailey.....	2021
Examination By Mr. Cummings	2023
Examination By Mr. Bailey.....	2035

JUROR 240 – LORRAINE J. PRINGLE

Examination By The Court	2041
Examination By Mr. Cummings	2051
Examination By Mr. Bailey.....	2053

JUROR 12 – HAROLD L. BAZZLE

Examination By The Court	2065

JUROR 228 – STEPHANIE N. PELLOS

Examination By The Court	2070

JUROR 303 – RHONDA L. TOLER

Examination By The Court	2072
Examination By Mr. Bailey.....	2083
Examination By Mr. Cummings	2085
Examination By The Court	2091

JUROR 230 – RICHARD PEREZ

Examination By The Court	2099
Examination By Mr. Cummings	2108
Examination By Mr. Bailey.....	2112

JUROR 27 – ANTHONY D. BRITT

Examination By The Court	2117
Examination By Mr. Bailey.....	2129
Examination By Mr. Cummings	2133

JUROR 81 – MICHAEL W. DURR

Examination By The Court	2143

JUROR 242 – WENDY H. PROVEAUX

Examination By The Court	2147
Examination By Mr. Bailey.....	2157
Examination By Mr. Cummings	2161
Examination By The Court	2164
Examination By Mr. Cummings	2165
Examination By The Court	2166
Examination By Mr. Cummings	2167
Examination By Mr. Bailey.....	2168

JUROR 67 – EARL DAVIS	
Examination By The Court	2182
Examination By Mr. Cummings	2186

JUROR 209- MARY MILLS - HANHAUSER	
Examination By The Court	2193
Examination By Mr. Bailey.....	2204
Examination By Mr. Cummings	2206

JUROR 298 – KRIS R. TEMPKIN	
Examination By The Court	2225
Examination By Mr. Bailey.....	2242
Examination By Mr. Cummings	2247

VOLUME SIX

JUROR 280 – JONATHAN C. SMALLS	
Examination By The Court	2253
Examination By Mr. Cummings	2266

JUROR 238 – ANDRE B. PORCHER	
Examination By The Court	2272
Examination By Mr. Cummings	2284
Examination By Mr. Bailey.....	2288

JUROR 184 – ERIC P. LOWRY	
Examination By The Court	2297

JUROR 187 – LINDA LYNCH	
Examination By The Court	2310
Examination By Mr. Cummings	2323

JUROR 206 – KATHLEEN A. MCPARTLIN	
Examination By The Court	2329
Examination By Mr. Bailey.....	2340
Examination By Mr. Cummings	2343

JUROR 153 – JERYL W. JOHNSON	
Examination By The Court	2350
Examination By Mr. Cummings	2362
Examination By Mr. Bailey.....	2372
Examination By Mr. Cummings	2375

JUROR 309 – TAMRA L. TYNDELL	
Examination By The Court	2384
Examination By Mr. Bailey.....	2395

Examination By Ms. Hardee-Thomas.....	2397
JUROR 328 – MICHAEL D. WHALEY	
Examination By The Court	2402
Examination By Mr. Cummings	2412
Examination By Mr. Bailey.....	2415
JUROR 321 – MARGARET WASHINGTON	
Examination By The Court	2426
Examination By Mr. Bailey.....	2440
Examination By Mr. Cummings	2443
JUROR 72 – RAYMOND E. DEJONG, II	
Examination By The Court	2448
Examination By Ms. Hardee-Thomas.....	2458
Examination By Mr. Bailey.....	2460
TRANSCRIPT DATED – MAY 15, 2002 – JURY SELECTION	2470
TESTIMONY	
TAMMY J. RUTLAND	
Direct Examination.....	2476
Cross Examination	2479
JUROR VOIR DIRE	
JUROR 178 – EVELYN L. LEWIS	
Examination By The Court	2481
Examination By Mr. Bailey.....	2495
Examination By Mr. Cummings	2497
JUROR 144- JANICE B. HULL	
Examination By The Court	2504
Examination By Mr. Cummings	2521
Examination By Mr. Bailey.....	2531
JUROR 185 – LIANNE LUISI	
Examination By The Court	2536
Examination By Mr. Bailey.....	2546
Examination By Mr. Cummings	2550
JUROR 269 – EDWARD A. SCOTT	
Examination By The Court	2556

JUROR 44 – ANTHONY E. CLARK

Examination By The Court	2561
Examination By Mr. Cummings	2578
Examination By Mr. Bailey.....	2585

JUROR 70 – JONATHAN L. DAVIS

Examination By The Court	2611
Examination By Mr. Cummings	2632
Examination By Mr. Bailey.....	2636
Examination By Mr. Cummings	2642
Examination By Mr. Bailey.....	2645
Examination By The Court	2646

JUROR 202 – LORA S. MCDOUGALL

Examination By The Court	2661
Examination By Mr. Bailey.....	2672
Examination By Mr. Cummings	2675

JUROR 271 – BELINDA H. SHAW

Examination By The Court	2680

JUROR 212 – ANTHONY P. MOLLISH

Examination By The Court	2686
Examination By Mr. Bailey.....	2689
Examination By Mr. Cummings	2691
Examination By The Court	2697

VOLUME SEVEN

JUROR 212 – ANTHONY P. MOLLISH

Examination By Mr. Bailey.....	2706
Examination By Mr. Cummings	2708

JUROR 243 – WANDA A. QUERY

Examination By The Court	2716
Examination By Mr. Cummings	2727
Examination By Mr. Bailey.....	2731

JUROR 279 – JAMES A. SMALLS, JR.

Examination By The Court	2739
Examination By Mr. Cummings	2743

JUROR 148 – RICKY JASCOMB

Examination By The Court	2746
Examination By Mr. Bailey.....	2755
Examination By Mr. Cummings	2757

Examination By The Court	2759
Examination By Mr. Bailey.....	2762
Examination By Mr. Cummings	2764
JUROR 11 – SHERRI L. BARBOUR	
Examination By The Court	2771
Examination By Mr. Cummings	2780
JUROR 167 – CATHY L. KILPATRICK	
Examination By The Court	2789
Examination By Mr. Cummings	2804
JUROR 239 – MARILYN B. PRINE	
Examination By The Court	2815
JUROR 16 – JANET R. BEST	
Examination By The Court	2825
Examination By Mr. Cummings	2837
Examination By Mr. Bailey.....	2842
Examination By Mr. Cummings	2850
JUROR 234 – MICKI LEE PITCHFORD	
Examination By The Court	2853
Examination By Mr. Bailey.....	2865
Examination By Mr. Cummings	2868
JUROR 199 – PRINCESS R. MCCONNELL	
Examination By The Court	2883
JUROR 301 – SONYA A. THOMPSON	
Examination By The Court	2885
Examination By Mr. Cummings	2899
Examination By Mr. Bailey.....	2901
JUROR 332 – SUSAN WILGOS	
Examination By The Court	2906
Examination By Mr. Bailey.....	2913
JUROR 145 – DOUGLAS A. HUTTO	
Examination By The Court	2916
Examination By Mr. Cummings	2931
Examination By Mr. Bailey.....	2933
JUROR 136 – JANIE M. HILLIARD	
Examination By The Court	2935
Examination By Mr. Bailey.....	2949

Examination By Mr. Cummings	2953
JUROR 119 – KELLY L. GREENHILL	
Examination By The Court	2961
JUROR 313 – MARILYN V. VANPATTEN	
Examination By The Court	2964
TRANSCRIPT DATED MAY 16, 2002 – JURY SELECTION	
2973	
JUROR VOIR DIRE	
JUROR 17 – SUSAN R. BISHOP	
Examination By The Court	2977
Examination By Mr. Cummings	2988
JUROR 168 – KADEDRA D. KINER	
Examination By The Court	2992
JUROR 168 – KADEDRA D. KINER	
Examination By Mr. Bailey.....	3004
Examination By Mr. Cummings	3007
JUROR 308 – LANA N. TURNER	
Examination By The Court	3016
JUROR 103 – ESPEREITA A. FORTUNE	
Examination By The Court	3022
Examination By Mr. Bailey.....	3034
JUROR 305 – BRENDA H. TORRENCE	
Examination By The Court	3037
Examination By Mr. Cummings	3049
Examination By Mr. Bailey.....	3053
JUROR 343 – LYNDA S. WOODY	
Examination By The Court	3059
Examination By Mr. Bailey.....	3064
Examination By Mr. Cummings	3065
JUROR 180 – CHRISTINA M. LOGAN	
Examination By The Court	3077
Examination By Mr. Bailey.....	3090
Examination By Mr. Cummings	3096

JUROR 272 – INEZ S. SHULER	
Examination By The Court	3101
JUROR 110 – PATRICIA N. GEORGE	
Examination By The Court	3111
JUROR 64 – MATT A. CUMMINGS	
Examination By The Court	3121
Examination By Mr. Cummings	3132
Examination By Mr. Bailey.....	3133
JUROR 295 – ROBERT T. TALLEY	
Examination By The Court	3138

VOLUME EIGHT

JUROR 295 – ROBERT T. TALLEY	
Examination By Mr. Bailey.....	3151
Examination By Mr. Cummings	3153
JUROR 31 – ROGER D. BROWNLEE	
Examination By The Court	3165
Examination By Mr. Cummings	3175
Examination By Mr. Bailey.....	3178
JUROR 288 – LISA C. STANFIELD	
Examination By The Court	3185
JUROR 205 – CHRISTINA MCKAY	
Examination By The Court	3191
Examination By Mr. Bailey.....	3203
Examination By Mr. Cummings	3210
JUROR 317 – DIANNE L. WADE	
Examination By The Court	3216
Examination By Mr. Cummings	3225
JUROR 14 – FREDERICK W. BEAVERSON	
Examination By The Court	3228
Examination By Mr. Bailey.....	3236
Examination By Mr. Cummings	3239
Examination By Mr. Bailey.....	3240
Examination By The Court	3242
JUROR 329 – LINDA L. WHEELER	
Examination By The Court	3249

Examination By Mr. Cummings	3257
Examination By Mr. Bailey.....	3262
JUROR 37 – GLEN W. CARROLL	
Examination By The Court	3266
JUROR 33 – JAMI H. BURT	
Examination By The Court	3271
Examination By Mr. Cummings	3280
Examination By Mr. Bailey.....	3282
JUROR 91 – KENNETH G. EVANS	
Examination By The Court	3287
Examination By Mr. Bailey.....	3299
Examination By Ms. Hardee – Thomas	3302
JUROR 60 – LYNN H. CROOK	
Examination By The Court	3310
Examination By Mr. Bailey.....	3325
Examination By Mr. Cummings	3329
Examination By The Court	3333
JUROR 253 – RALPH G. RICE	
Examination By The Court	3336
Examination By Mr. Bailey.....	3344
Examination By Mr. Cummings	3348
JUROR 124 – WALLACE M. HAMMONDS	
Examination By The Court	3356
JUROR 294 – DANNIE W. SWEATMAN, JR.	
Examination By The Court	3369
Examination By Mr. Bailey.....	3382
Examination By Mr. Cummings	3383
JUROR 203 – PAULINE E. MCELYEA	
Examination By The Court	3391
Examination By Mr. Cummings	3400
Examination By Mr. Bailey.....	3403
JUROR 325 – MANCENE D. WERTZ	
Examination By The Court	3410
Examination By Mr. Cummings	3417
JUROR 194 – PHIL D. MAYNOR	
Examination By The Court	3425

Examination By Mr. Bailey.....	3440
Examination By Mr. Cummings	3447
Examination By The Court	3456

JUROR 158 – TRACY L. JONES

Examination By The Court	3461
Examination By Mr. Cummings	3473
Examination By Mr. Bailey.....	3476

TRANSCRIPT DATED MAY 17, 2002 – JURY SELECTION/JURY TRIAL	3492

VOLUME NINE

OPENING STATEMENT BY MR. BAILEY	3646

OPENING STATEMENT BY MR. CUMMINGS.....	3659

TESTIMONY

WILLIAM HENRY KOGER

Direct Examination.....	3673
Cross Examination	3680

JOSEPH F. FOGLE

Direct Examination.....	3682
Cross Examination	3687

KEITH RIVERS

Direct Examination.....	3688
Cross Examination	3692

CAROLYN L. BROWN

Direct Examination.....	3698
Cross Examination	3702
Redirect Examination.....	3713
Recross Examination.....	3715

EDWARD WATERS

Direct Examination.....	3717
Cross Examination	3727

YOLANDA S. BOWMAN

Direct Examination.....	3734
Cross Examination	3746

TRANSCRIPT DATED MAY 18, 2002 – JURY TRIAL.....	3757

TESTIMONY

KATRINA WEST

Direct Examination.....	3761
Cross Examination	3766

DENNIS JUDY

Direct Examination.....	3774
Cross Examination	3794

GORDON B. NEWHOUSE

Direct Examination.....	3798
Cross Examination	3803

PERRY CHINNERS

Direct Examination.....	3806
Cross Examination	3811

JAMES P. KICKLIGHTER

Direct Examination.....	3819
Cross Examination	3823

ALVIN COKER

Direct Examination.....	3829
Cross Examination	3842

EDWARD A. PORTER

Direct Examination.....	3847
Cross Examination	3861
Redirect Examination.....	3873
Recross Examination.....	3873

JAMES HELMS

Direct Examination.....	3874
Cross Examination	3913
Redirect Examination.....	3930
Recross Examination.....	3931

DENNIE JUDY

Direct Examination.....	3932
Cross Examination	3934

JANICE E. ROSS

Direct Examination.....	3939
Cross Examination	3952

JAMES J. GADSON	
Direct Examination.....	3957
Cross Examination	3961

LAURIE SHACKER	
Direct Examination.....	3969
Cross Examination	3971

SHEREE BROWN	
Direct Examination.....	3972
Cross Examination	3974

DANA FOWLER SHUTT	
Direct Examination.....	3976

JAMES T. GADSON	
Direct Examination.....	3980

JAMES T. GADSON	
Cross Examination	4022

CAROLYN BROWN	
Direct Examination.....	4039

VOLUME TEN

TRANSCRIPT DATED MAY 19, 2002 – JURY TRIAL.....	4051

TESTIMONY

HIRAM JOHNSON	
Direct Examination.....	4056
Cross Examination	4070

TRAVIS D. FELDER	
Direct Examination.....	4084
Cross Examination	4102
Redirect Examination.....	4110
Recross Examination.....	4111

VALORNA SMITH	
Direct Examination.....	4112
Cross Examination	4118

TERRENCE A. VAN DORAN	
Direct Examination.....	4124

Cross Examination	4132
JAMES A. NETTLES	
Direct Examination.....	4139
Cross Examination	4143
ALVIN COKER	
Direct Examination.....	4149
Cross Examination	4154
DOROTHY M. BOWMAN	
Direct Examination.....	4160
CORDELLIA D. MARTIN	
Direct Examination.....	4163
Cross Examination	4166
KENDRA BOWMAN	
Direct Examination.....	4167
Cross Examination	4178
YOLANDA BOWMAN	
Direct Examination.....	4182
Cross Examination	4187
Redirect Examination.....	4190
DOROTY M. BOWMAN	
Direct Examination.....	4191
Cross Examination	4205
MARK SHEETZ	
Direct Examination.....	4220
Cross Examination	4222
CATHERINE M. SALLEY	
Direct Examination.....	4223
Cross Examination	4225
ALVIN COKER	
Direct Examination.....	4226
Cross Examination	4230
Redirect Examination.....	4232
Recross Examination.....	4233
ALLYSON GREER	
Direct Examination.....	4235

Cross Examination	4238
SALLY M. BOOKHART	
Direct Examination.....	4244
Cross Examination	4250
JAMES HELMS	
Direct Examination.....	4259
Cross Examination	4263
EDWARD PORTER	
Direct Examination.....	4267
Cross Examination	4276
Redirect Examination.....	4288
Recross Examination.....	4290
GRADY A. LAYTON	
Direct Examination.....	4292
Cross Examination	4300
DAVID J. COLLINS	
Direct Examination.....	4307
Cross Examination	4320
Redirect Examination.....	4330
Recross Examination.....	4332
CAROL GOODIER	
Direct Examination.....	4334
Cross Examination	4336
EARL V. ASBELL	
Direct Examination.....	4337
Cross Examination	4340
BETHANY CROOKS	
Direct Examination.....	4341
Cross Examination	4344
TRANSCRIPT DATED MAY 20, 2002 – JURY TRIAL.....	4355
TESTIMONY	
DOROTHY M. BOWMAN	
Direct Examination.....	4358
Cross Examination	4359
Redirect Examination.....	4363

Recross Examination.....	4363
MATTHEW G. FITTS	
Direct Examination.....	4364
Cross Examination	4387
Redirect Examination.....	4410
MARION BOWMAN, JR.	
Examination By The Court	4438
CLOSING ARUGMENTS BY MR. BAILEY	4456
CLOSING ARGUMENTS BY MR. CUMMINGS.....	4481

VOLUME ELEVEN

JURY CHARGE	4514
VERDICT	4564
TRANSCRIPT DATED MAY 22, 2003 – SENTENCING PHASE	4587
OPENING STATEMENT BY MR. BAILEY	4636
OPENING STATEMENT BY MR. CUMMINGS.....	4644
TESTIMONY	
JOSEPH W. WIMBERLY, III	
Direct Examination.....	4653
Cross Examination	4654
DAVID L. THOMPSON	
Direct Examination.....	4657
Cross Examination	4658
JAMES HELMS	
Direct Examination.....	4660
Cross Examination	4665
JANICE E. ROSS	
Direct Examination.....	4669
Cross Examination	4674
Redirect Examination.....	4676
Recross Examination.....	4678
Direct Examination.....	4689

Cross Examination	4691
CORDILLIA MARTIN	
Direct Examination.....	4692
WAYNE MARTIN	
Direct Examination.....	4703
Cross Examination	4707
MARION BOWMAN, JR.	
Examination By The Court	4734
KENDRA BOWMAN	
Direct Examination.....	4742
Cross Examination	4748
DOROTHY BOWMAN	
Direct Examination.....	4750
MARGARET A. BAUGHMAN	
Direct Examination.....	4761
Cross Examination	4765
Redirect Examination.....	4767
JEFFREY J. YOUNGMAN	
Direct Examination.....	4769
Voi Dire Examination	4777
Direct Examination.....	4788
Cross Examination	4811
Redirect Examination.....	4826
FRANKIE MARTIN	
Direct Examination.....	4830
JAMES E. AIKEN	
Direct Examination.....	4832
Cross Examination	4846
Redirect Examination.....	4864
Recross Examination.....	4869
SHARON J. BRANCH	
Direct Examination.....	4882
Cross Examination	4888
Redirect Examination.....	4889
TRANSCRIPT DATED MAY 23, 2002 – SENTENCING PHASE	4894

TESTIMONY

ENRIQUE BADILLO

Direct Examination.....	4902
Cross Examination	4904

TRAVIS D. FELDER

Direct Examination.....	4911
Cross Examination	4922
Redirect Examination.....	4926

CLOSING ARGUMENTS BY MR. BAILEY.....	4949

VOLUME TWELVE

CLOSING ARGUMENTS BY MS. HARDEE-THOMAS.....	4975

CLOSING ARGUMENTS BY MR. CUMMINGS.....	4979

JURY CHARGE	5015

VERDICT	5051

SENTENCING	5067

TRANSCRIPT OF <u>JACKSON V. DENNO</u> HEARING DATED APRIL 5, 2002	5069

TESTIMONY

TERRENCE ARNOLD VAN DORAN

Direct Examination.....	5074
Cross Examination	5082

ALVIN MICHAEL COKER

Direct Examination.....	5111
Cross Examination	5120

TERRENCE ARNOLD VAN DORAN

Direct Examination.....	5161
Cross Examination	5170
Redirect Examination.....	5189
Recross Examination.....	5190

TIM STEPHENSON

Direct Examination.....	5191
Cross Examination	5199

TERRENCE ARNOLD VAN DORAN	
Direct Examination.....	5227
Cross Examination	5233
Redirect Examination.....	5189
Recross Examination.....	5190
INDICTMENTS	5254
ARREST WARRANT	5258
NOTICE OF EVIDENCE IN MITIGATION.....	5259
NOTICE OF INTENT TO SEEK DEATH PENALTY.....	5260
NOTICE OF EVIDENCE IN AGGRAVATION.....	5261
MOTION IN LIMINE REGARDING EVIDENCE.....	5262
MOTION IN LIMINE TO PRECLUDE STATE FROM CALLING AS WITNESSES MEMBER OF THE VICTIM'S FAMILY ...	5263
MOTION TO EXCLUDE PHOTOGRAPHS OF VICTIM	5265
NOTICE OF MOTION AND MOTION TO COMPEL DEFENDANT TO PRODUCE WITNESS LIST	5267
MOTION IN LIMINE TO PROHIBIT TESTIMONY REGARDING ALLEDGED SUFFERING OF THE VICTIM	5269
MOTION FOR IN CAMERA INSPECTION OF THE PROSECUTOR'S FILE	5270
MOTION TO COMPLY TO INSURE STATE'S COMPLIANCE WITH DISCLOSURE	5271
MOTION FOR ACCESS TO EXHIBITS.....	5272
MOTION TO PRODUCE.....	5273
NOTICE OF MOTION FOR PRODUCTION OF TAPED OR WRITTEN OR VIDEOTAPED STATEMENTS	5274
MOTION FOR PRODUCTION OF PHYSICAL EVIDENCE.....	5277
MOTION TO DISCLOSE NAMES AND ADDRESSES OF STATE'S WITNESSES.....	5278

MOTION FOR INFORMATION CONCERNING POTENTIAL STATE'S WITNESSES	5279
MOTION FOR DISCOVERY OF WITNESS LIST.....	5280
MOTION FOR LIST OF PROSECUTION WITNESSES	5281
MOTION TO RETAIN EVIDENCE.....	5283
MOTION FOR DISCLOSURE OF IMPEACHING INFORMATION	5285
MOTION TO REVEAL APPLICANTS TO BE EXECUTIONERS.....	5287
NOTICE OF MOTION AND MOTION TO COMPEL PRODUCTION.....	5289
MOTION FOR CHANGE OF VENUE	5292
NOTICE OF MOTION AND MOTION TO DECLARE THE DEATH PENALTY UNCONSTITUTIONAL	5293
MOTION TO REVEAL THE DEAL.....	5294
MOTION TO PRESERVE EVIDENCE FOR INDEPENDENT DNA TESTING.....	5296
NOTICE OF MOTION AND MOTION TO INSPECT	5297
NOTICE OF MOTION AND MOTION IN LIMINE.....	5298
NOTICE OF MOTION AND MOTION TO PRESERVE NOTES.....	5301
STATE'S NOTICE OF MOTION AND MOTION IN LIMINE TO PROHIBIT THE DEFENDANT FROM ARGUING.....	5303
STATE'S NOTICE OF MOTION AND MOTION IN LIMINE TO PROHIBIT THE DEFENDANT FROM ATTEMPTING TO INTRODUCE PENALTY PHASE "EXECUTION OF IMPACT" EVIDENCE.....	5307
MOTION TO SUPPRESS SEARCH WARRANT	5312
MOTION FOR PRODUCTION OF PHYSICAL EVIDENCE.....	5313
MOTION TO RELEASE EVIDENCE FOR INDEPENDENT SCIENTIFIC TESTING.....	5314
AFFIDAVIT OF CLEON C. MAUER.....	5316

MOTION TO PREVENT DISQUALIFICATION OF SCRUPLED JURORS DURING GUILT PHASE.....	5318
MOTION REQUESTING TRIAL JUDGE TO MAKE FINDINGS OF FACTS WHEN JURORS ARE STRUCK FOR CAUSE.....	5320
MOTION IN THE ALTERNATIVE TO MAKE RESULTS OF POLICE RECORD CHECKS OR INVESTIGATIONS OF JURY VENIRE.....	5322
MOTION TO DISCLOSE PAST AND PRESENT RELATIONSHIPS, ASSOCIATIONS, AND TIES BETWEEN THE PROSECUTING SOLICITORS AND PROSPECTIVE JURORS.....	5324
MOTION FOR INDIVIDUAL EXAMINATION OF PROSPECTIVE JURORS AND SEQUESTRATION OF JURORS DURING EXAMINATION.....	5326
MOTION TO PREVENT TRIAL JUDGE FROM ASKING CERTAIN LEADING QUESTIONS DURING VOIR DIRE.....	5329
MOTION	5331
MOTION IN LIMINE (EVIDENCE).....	5332
MOTION TO PRODUCE CHAIN OF CUSTODY OF ALL EXHIBITS.....	5333
MOTION TO SURPRESS (STATEMENTS)	5335
MOTION IN LIMINE (STATEMENTS BY DEFENDANT)	5337
MOTION IN LIMINE (OPENING AND CLOSING ARGUMENTS BY THE STATE).....	5339
NOTICE OF MOTION AND MOTION TO SUPPRESS THE EVIDENCE, TO WIT THE TESTIMONY OF WAYNE MAURICE MOOD	5341
MOTION FOR AN ORDER PROHIBITING ANY FURTHER COMMENT	5343
NOTICE OF MOTION AND MOTION TO PROHIBIT ELECTRONIC BROADCASTING OF COURT PROCEEDING.....	5344
MOTION FOR INDIVIDUAL VOIR DIRE AND SEQUESTRATION OF JURORS DURING AND AFTER VOIR DIRE	5352
MOTION TO PREVENT DISQUALIFICATION OF JURORS OPPOSED TO CAPITAL PUNISHMENT.....	5355
MOTION TO SEQUESTER THE JURY	5357

MOTION IN LIMINE TO PROHIBIT ANY REFERENCE TO THE TRUTHFULNESS OF A STATE WITNESS BY SOLICITOR.....	5358
NOTICE OF MOTION AND MOTION IN LIMINE.....	5360
NOTICE OF MOTION AND MOTION TO PROHIBIT ELECTRONIC BROADCASTING OF COURT PROCEEDING.....	5362
MOTION FOR AN ORDER PROHIBITING ANY FURTHER COMMENT ABOUT THIS CASE TO THE NEWS MEDIA, T.V. STATION OR RADIO STATIONS	5370
MOTION TO PREVENT DISQUALIFICATION OF JURORS OPPOSED TO CAPITAL PUNISHMENT	5371
NOTICE OF MOTION AND MOTION FOR RECONSIDERATION.....	5373
NOTICE OF MOTION AND MOTION TO QUASH SUBPOENA.....	5390
NOTICE OF MOTION AND MOTION TO INSPECT	5391
MOTION TO RETAIN EVIDENCE.....	5392
NOTICE OF MOTION FOR PRODUCTION OF TAPED STATEMENTS.....	5394
MOTION FOR PRODUCTION OF PHYSICAL EVIDENCE.....	5395
NOTICE OF MOTION FOR PRODUCTION OF TAPED OR WRITTEN OR VIDEOTAPED STATEMENTS	5396
MOTION TO PRESERVE EVIDENCE FOR INDEPENDENT DNA TESTING.....	5397
MOTION TO PRODUCE.....	5398
MOTION	5399

VOLUME THIRTEEN

MOTION FOR IN-CAMERA INSPECTION OF THE PROSECUTOR'S FILE.....	5401
MOTION TO REVEAL GRANT OF IMMUNITY OR OTHER CONCESSIONS.....	5402
MOTION FOR LIST OF PROSECUTION WITNESSES	5404
MOTION TO COMPLY TO INSURE STATE'S COMPLIANCE WITH DISCLOSURE	5406

MOTION FOR DISCLOSURE OF IMPEACHING INFORMATION	5407
MOTION TO REVEAL THE DEAL.....	5409
MOTION FOR INFORMATION CONCERNING POTENTIAL STATE’S WITNESSES.....	5411
MOTION FOR LIST OF PROSECUTION WITNESSES	5412
MOTION FOR DISCOVERY OF WITNESS LIST.....	5414
MOTION TO DISCLOSE NAMES AND ADDRESSES STATE’S WITNESSES.....	5415
NOTICE OF MOTION AND MOTION TO COMPEL PRODUCTION.....	5416
DEFENDANT’S EXHIBIT #3 (INVESTIGATIVE REPORT).....	5419
DEFENDANT’S EXHIBIT #7 (ARREST WARRANT).....	5420
DEFENDANT’S EXHIBIT #8 (ARREST WARRANT).....	5421
STATE’S EXHIBIT #5 (ARREST WARRANT).....	5422
CERTIFICATE OF APPELLANT	5424
DEATH SENTENCE.....	5425
AFFIRMATION OF DEATH SENTENCE.....	5426
FINAL BRIEF OF APPELLANT	5427
FINAL BRIEF OF RESPONDENT	5484
FINAL REPLY BRIEF OF APPELLANT	5558
APPLICATION FOR POST-CONVICTION RELIEF DATED APRIL 7, 2006	5568
ORDER OF THE UNITED STATES SUPREME COURT DENYING PETITION FOR WRIT OF CERTIORARI FILED JUNE 12, 2006.....	5575
PRELIMINARY PROTECTIVE RETURN FILED OCTOBER 2, 2006.....	5576
RETURN, MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT FILED SEPTEMBER 1, 2006	5578
AMENDED RETURN, MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT FILED MARCH 15, 2007.....	5616

AFFIDAVIT OF DALE DAVIS FILED JUNE 20, 2007	5670
AFFIDAVIT OF MARION BOWMAN FILED JUNE 20, 2007.....	5672
AFFIDAVIT OF DOROTHY BOWMAN FILED JUNE 20, 2007	5673
ORDER RELIEVING CO-COUNSEL, APPOINTING NEW CO-COUNSEL AND SCHEDULING FURTHER MATTERS FILED FEBRUARY 6, 2008	5674
FIRST AMENDED APPLICATION FOR POST-CONVICTION RELIEF FILED FEBRUARY 28, 2007	5676
MOTION FOR CONTINUANCE FILED MARCH 25, 2008	5685
SECOND AMENDED APPLICATION FOR POST-CONVICTION RELIEF FILED MAY 19, 2008	5689
ORDER REQUIRING DEPARTMENT OF SOCIAL SERVICES TO PRODUCE DOCUMENTS FILED AUGUST 27, 2008.....	5701
RESPONDENT'S OBJECTION TO AMENDMENTS, MOTION TO STRIKE, AND MOTION TO COMPEL DISCOVERY FILED SEPTEMBER 5, 2008.....	5703
THIRD AMENDED APPLICATION FOR POST-CONVICTION RELIEF FILED SEPTEMBER 8, 2008	5710
NOTICE OF INTENT TO RELY UPON AFFIDAVITS AND OTHER DOCUMENTARY EVIDENCE FILED SEPTEMBER 15, 2008	5727
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED SEPTEMBER 15, 2008.....	5729
TESTIMONY	
JONATHAN DAVIS	
Direct Examination by Mr. Brown.....	5815
Cross Examination by Mr. Waters.....	5824
Redirect Examination by Mr. Brown.....	5829
JAMES TAWAIN GADSON	
Direct Examination by Mr. Brown.....	5847

VOLUME FOURTEEN

JAMES TAWAIN GADSON

Cross Examination by Mr. Waters	5910
Redirect Examination by Mr. Brown	5932
Recross Examination by Mr. Waters	5957
Redirect Examination by Mr. Brown	5964
Recross Examination by Mr. Waters	5965

POST-CONVICTION RELIEF HEARING TRANSCRIPT

DATED SEPTEMBER 16, 2008	5969

TESTIMONY

RICKY DAVIS

Direct Examination by Mr. Brown	5978
Cross Examination by Mr. Waters	5992
Redirect Examination by Mr. Brown	5999
Recross Examination by Mr. Waters	6004
Redirect Examination by Mr. Brown	6009

DAVID COLLINS

Direct Examination by Mr. Brown	6022
Cross Examination by Mr. Waters	6097

MARC DEGRAEF

Direct Examination by Mr. Brown	6132
Cross Examination by Mr. Waters	6183
Redirect Examination by Mr. Brown	6199
Recross Examination by Mr. Waters	6202
Redirect Examination by Mr. Brown	6203

DAVID COLLINS

Further Cross Examination by Mr. Waters	6211
Redirect Examination by Mr. Brown	6223
Recross Examination by Mr. Waters	6233

POST-CONVICTION RELIEF HEARING TRANSCRIPT

DATED SEPTEMBER 17, 2008	6246

TESTIMONY

HIRAM JOHNSON

Direct Examination by Mr. Sinclair	6251
Cross Examination by Mr. Waters	6294
Redirect Examination by Mr. Sinclair	6298

Recross Examination by Mr. Waters	6301

VOLUME FIFTEEN

DARIEN WILLIAMS

Direct Examination by Mr. Sinclair.....	6303
Cross Examination by Mr. Waters.....	6354
Redirect Examination by Mr. Sinclair	6360

MARY LEMATTY

Direct Examination by Mr. Brown.....	6364
Cross Examination by Mr. Waters.....	6376

TRAVIS FELDER

Direct Examination by Mr. Sinclair.....	6380
Cross Examination by Mr. Waters.....	6426
Redirect Examination by Mr. Sinclair	6442
Recross Examination by Mr. Waters	6457
Redirect Examination by Mr. Sinclair	6461
Recross Examination by Mr. Waters	6472
Redirect Examination by Mr. Sinclair	6476
Recross Examination by Mr. Waters	6477

TIM STEPHENSON

Direct Examination by Mr. Brown.....	6485
Cross Examination by Mr. Waters.....	6518

TERRANCE VAN DORAN

Direct Examination by Mr. Brown.....	6526
Cross Examination by Mr. Waters.....	6548
Redirect Examination by Mr. Brown.....	6554
Recross Examination by Mr. Waters	6556
Redirect Examination by Mr. Brown.....	6558

POST-CONVICTION RELIEF HEARING TRANSCRIPT

DATED SEPTEMBER 18, 2008.....	6566

TESTIMONY

TERRANCE VAN DORAN

Recross Examination by Mr. Waters	6571
Redirect Examination by Mr. Brown.....	6576

ALVIN COKER

Direct Examination by Mr. Brown.....	6580
Cross Examination by Mr. Waters.....	6685

Redirect Examination by Mr. Brown.....	6739

VOLUME SIXTEEN

ALVIN COKER

Recross Examination by Mr. Waters	6752

POST-CONVICTION RELIEF HEARING TRANSCRIPT

DATED SEPTEMBER 29, 2008.....	6766

TESTIMONY

JEFF YUNGMAN

Direct Examination by Mr. Brown.....	6785
Cross Examination by Mr. Waters	6843
Redirect Examination by Mr. Brown.....	6878
Recross Examination by Mr. Waters	6901

DR. CARL KISSIAH

Direct Examination by Mr. Brown.....	6909
Cross Examination by Mr. Waters	6927
Redirect Examination by Mr. Brown.....	6943

DALE DAVIS

Direct Examination by Mr. Brown.....	6946

POST-CONVICTION RELIEF HEARING TRANSCRIPT

DATED SEPTEMBER 30, 2008.....	6997

TESTIMONY

NORBERT CUMMINGS

Direct Examination by Mr. Brown.....	7001

DALE DAVIS

Cross Examination by Mr. Waters	7131
Redirect Examination by Mr. Brown.....	7183

VOLUME SEVENTEEN

DALE DAVIS

Recross Examination by Mr. Waters	7206
Redirect Examination by Mr. Brown.....	7208
Recross Examination by Mr. Waters	7228
Redirect Examination by Mr. Brown.....	7232
Recross Examination by Mr. Waters	7241

POST-CONVICTION RELIEF HEARING TRANSCRIPT	
DATED NOVEMBER 24, 2008	7258

TESTIMONY

MARVA HARDEE-THOMAS	
Direct Examination by Mr. Brown.....	7262
Cross Examination by Mr. Waters.....	7329
Redirect Examination by Mr. Brown.....	7348

POST-CONVICTION RELIEF HEARING TRANSCRIPT	
DATED DECEMBER 18, 2008	7358

TESTIMONY

NORBERT CUMMINGS	
Further Direct Examination by Mr. Brown.....	7361
Cross Examination by Mr. Waters.....	7499

POST-CONVICTION RELIEF HEARING TRANSCRIPT	
DATED DECEMBER 19, 2008	7511

TESTIMONY

NORBERT CUMMINGS	
Further Cross Examination by Mr. Waters.....	7514

VOLUME EIGHTEEN

NORBERT CUMMINGS	
Redirect Examination by Mr. Brown.....	7686
Recross Examination by Mr. Waters	7732

POST-CONVICTION RELIEF HEARING TRANSCRIPT	
DATED DECEMBER 22, 2008	7749

TESTIMONY

WALTER BAILEY	
Direct Examination by Mr. Brown.....	7752
Cross Examination by Mr. Waters.....	7856
Redirect Examination by Mr. Brown.....	7878
Recross Examination by Mr. Waters	7890

COURT'S EXHIBIT #1, PLAINTIFF'S EXHIBIT #28	
(BALLISTICS IMAGING BOOK)	7998

VOLUME NINETEEN

COURT'S EXHIBIT #2, PLAINTIFF'S EXHIBIT #42-ID, and #47 (ALVIN COKER FILE)	8101

VOLUME TWENTY

PLAINTIFF'S EXHIBIT #1 (INDICTMENT).....	8938
PLAINTIFF'S EXHIBIT #2 (MOTION).....	8940
PLAINTIFF'S EXHIBIT #3 (PLEA AGREEMENT)	8944
PLAINTIFF'S EXHIBIT #4 (WARRANT)	8948
PLAINTIFF'S EXHIBIT #5 (WITNESS STATEMENT).....	8950
PLAINTIFF'S EXHIBIT #6 (WITNESS STATEMENT).....	8954
PLAINTIFF'S EXHIBIT #7 (POLYGRAPH)	8956
PLAINTIFF'S EXHIBIT #8 (MENTAL EVALUATION).....	8957
PLAINTIFF'S EXHIBIT #9 (SENTENCING SHEET).....	8962
PLAINTIFF'S EXHIBIT #10 (SENTENCING SHEET).....	8964
PLAINTIFF'S EXHIBIT #11 (RICKY DAVIS MEMO).....	8966
PLAINTIFF'S EXHIBIT #12 (APPOINTMENT ORDER)	8967
PLAINTIFF'S EXHIBIT #13 (NOTICE OF APPEAL)	8968
PLAINTIFF'S EXHIBIT #14 (PLEA AGREEMENT)	8969
PLAINTIFF'S EXHIBIT #15 (POLYGRAPH)	8973
PLAINTIFF'S EXHIBIT #16 (STATEMENT).....	8974
PLAINTIFF'S EXHIBIT #17 (WARRANT).....	8975
PLAINTIFF'S EXHIBIT #18 (WARRANT).....	8977
PLAINTIFF'S EXHIBIT #19 (INDICTMENT FOR ARREST WARRANT G371372).....	8979
PLAINTIFF'S EXHIBIT #20 (SENTENCING SHEET).....	8980

PLAINTIFF'S EXHIBIT #21 (INDICTMENT FOR ARREST WARRANT G587667).....	8981
PLAINTIFF'S EXHIBIT #22 (DOCKET SHEET).....	8982
PLAINTIFF'S EXHIBIT #23 (DOCKET SHEET).....	8983
PLAINTIFF'S EXHIBIT #24 (RICKY DAVIS DEPOSITION).....	8984

VOLUME TWENTY-ONE

PLAINTIFF'S EXHIBIT #24-B (FIREARM REPORT).....	9012
PLAINTIFF'S EXHIBIT #25 (LAB BENCH NOTES).....	9015
PLAINTIFF'S EXHIBIT #26 (BOX 3 - 1).....	9026
PLAINTIFF'S EXHIBIT #27 (DEGRAEF C.V.).....	9028
PLAINTIFF'S EXHIBIT #29 (MARGARET HAWKINS STATEMENT).....	9046
PLAINTIFF'S EXHIBIT #30 (TIARA COLEMAN STATEMENT).....	9047
PLAINTIFF'S EXHIBIT #31 (DR. FRIERSON'S REPORT).....	9048
PLAINTIFF'S EXHIBIT #32 (HIRAM JOHNSON MIRANDA RIGHTS FORM).....	9053
PLAINTIFF'S EXHIBIT #33 (HIRAM JOHNSON STATEMENT).....	9054
PLAINTIFF'S EXHIBIT #34 (POLYGRAPH).....	9055
PLAINTIFF'S EXHIBIT #35 (STATEMENT).....	9056
PLAINTIFF'S EXHIBIT #36 (DARIEN WILLIAMS STATEMENT).....	9057
PLAINTIFF'S EXHIBIT #37 (LETTER).....	9058
PLAINTIFF'S EXHIBIT #38 (WARRANT).....	9059
PLAINTIFF'S EXHIBIT #39 (WAIVER OF RIGHTS FORM).....	9061
PLAINTIFF'S EXHIBIT #40 (LETTER).....	9062
PLAINTIFF'S EXHIBIT #41 (JAIL RECORDS).....	9063
PLAINTIFF'S EXHIBIT #43 (ARSON INDICTMENT).....	9067

PLAINTIFF'S EXHIBIT #44 (ACCESSORY INDICTMENT)	9069
PLAINTIFF'S EXHIBIT #45 (HANDWRITTEN NOTE).....	9071
PLAINTIFF'S EXHIBIT #46 (HANDWRITTEN NOTE).....	9072
PLAINTIFF'S EXHIBIT #48 (WARRANT).....	9073
PLAINTIFF'S EXHIBIT #49 (DOCKET REPORT).....	9077
PLAINTIFF'S EXHIBIT #50 (BOOKING REPORT)	9078
PLAINTIFF'S EXHIBIT #51 (LETTER).....	9079
PLAINTIFF'S EXHIBIT #52 (LETTER).....	9080
PLAINTIFF'S EXHIBIT #53 (AFFIDAVIT).....	9083
PLAINTIFF'S EXHIBIT #55 (EMPLOYMENT HISTORY).....	9085
PLAINTIFF'S EXHIBIT #56 (BOWMAN LETTERS)	9095
PLAINTIFF'S EXHIBIT #57 (MEMO).....	9109
PLAINTIFF'S EXHIBIT #58 (MEMO).....	9110
PLAINTIFF'S EXHIBIT #59 (DAVIS LOG)	9111
PLAINTIFF'S EXHIBIT #60 (DAVIS MEMO).....	9114
PLAINTIFF'S EXHIBIT #61 (MEMO).....	9115
PLAINTIFF'S EXHIBIT #62 (DAVIS MEMO).....	9116
PLAINTIFF'S EXHIBIT #63 (SENTENCING SHEET).....	9117
PLAINTIFF'S EXHIBIT #64 (CHARLES WILLIAMS LETTER).....	9118
PLAINTIFF'S EXHIBIT #65 (IVESTIGATIVE REPORT)	9120
PLAINTIFF'S EXHIBIT #66 (NOTE).....	9121
PLAINTIFF'S EXHIBIT #67 (RICKY DAVIS INTERVIEW).....	9122
PLAINTIFF'S EXHIBIT #68 (WALTER BAILEY LETTER).....	9123

PLAINTIFF'S EXHIBIT #69 (MAY 15 TH LETTER)	9127
PLAINTIFF'S EXHIBIT #70 (CUMMINGS TO MARSHALL LETTER)	9128
PLAINTIFF'S EXHIBIT #71 (INDICTMENT).....	9129
PLAINTIFF'S EXHIBIT #74 (MEMO).....	9136
PLAINTIFF'S EXHIBIT #75 (LIFE PROFILE).....	9138
PLAINTIFF'S EXHIBIT #76 (EMPLOYMENT APPLICATION).....	9139
PLAINTIFF'S EXHIBIT #77 (APPOINTMENT OF COUNSEL).....	9140
PLAINTIFF'S EXHIBIT #78 (MOTION IN LIMINE)	9141
PLAINTIFF'S EXHIBIT #79 (HARDEE-THOMAS TO BARNES LETTER).....	9170
PLAINTIFF'S EXHIBIT #79-B (KENDRA BOWMAN PLEA AGREEMENT)	9171
PLAINTIFF'S EXHIBIT #80 (DOROTHY BOWMAN PLEA AGREEMENT)	9175
PLAINTIFF'S EXHIBIT #81 (YOLANDA BOWMAN PLEA AGREEMENT).....	9179
PLAINTIFF'S EXHIBIT #82 (WALTER BAILEY TRIAL OUTLINE).....	9183
PLAINTIFF'S EXHIBIT #83 - ID (BAILEY TO BARTON LETTER).....	9193
PLAINTIFF'S EXHIBIT #84 (BAILEY TO DUKES LETTER).....	9194
PLAINTIFF'S EXHIBIT #85 (DARIEN WILLIAMS INTERVIEW NOTES).....	9195
PLAINTIFF'S EXHIBIT #86 (PROPOSED PLEA OFFER).....	9197
PLAINTIFF'S EXHIBIT #87 (BAILEY TO GRIMES LETTER)	9200
PLAINTIFF'S EXHIBIT #88 (BAILEY TO COOPER LETTER)	9201
DEFENSE EXHIBIT #1 (POLYGRAPH)	9202
DEFENSE EXHIBIT #2 (POLYGRAPH)	9203
DEFENSE EXHIBIT #3 (POLYGRAPH REPORT)	9204
DEFENSE EXHIBIT #4 (MARION BOWMAN STATEMENT).....	9214

DEFENSE EXHIBIT #5 (MARION BOWMAN STATEMENT).....	9217
DEFENSE EXHIBIT #6 (MARION BOWMAN STATEMENT).....	9220
DEFENSE EXHIBIT #7 (MARION BOWMAN STATEMENT).....	9222
DEFENSE EXHIBIT #8 (GADSON RAP SHEET).....	9227
DEFENSE EXHIBIT #9 (HIRAM JOHNSON RAP SHEET).....	9228
DEFENSE EXHIBIT #10 (INVESTIGATIVE FILE)	9232
DEFENSE EXHIBIT #11 (JEFF YUNGMAN REPORT).....	9274
DEFENSE EXHIBIT #12 (DALE DAVIS TIME LOG)	9282
DEFENSE EXHIBIT #13 (TRACKING DOCUMENT)	9289
DEFENSE EXHIBIT #14 (REMITTITUR).....	9291
DEFENSE EXHIBIT #15 (RICKY DAVIS COURT RECORDS).....	9313
DEFENSE EXHIBIT #16 (RICKY DAVIS COURT RECORDS).....	9324
DEFENSE EXHIBIT #17 (RICKY DAVIS DOCKET SHEET)	9336
DEFENSE EXHIBIT #18 (BAILEY TO CUMMINGS LETTER).....	9345
DEFENSE EXHIBIT #19 (BAILEY TO CUMMINGS LETTER).....	9346
DEFENSE EXHIBIT #20 (CHECK REGISTER)	9347
DEFENSE EXHIBIT #21 (MINTER BILLING SHEET)	9354
DEFENSE EXHIBIT #22 (BOWMAN POLYGRAPH).....	9356
DEFENSE EXHIBIT #23 (HARDEE-THOMAS TO CUMMINGS LETTER)	9359
DEFENSE EXHIBIT #24 (HARDEE-THOMAS TO NORRIS LETTER).....	9361
DEFENSE EXHIBIT #25 (HARDEE-THOMAS TO BOWMAN LETTER).....	9362
DEFENSE EXHIBIT #26 (CUMMINGS TO HARDEE-THOMAS LETTER)	9363
DEFENSE EXHIBIT #27 (CUMMINGS TO DAVIS LETTER)	9364

DEFENSE EXHIBIT #28 (CUMMINGS TO HARDEE-THOMAS LETTER)	9366
DEFENSE EXHIBIT #29 (BOWMAN MENTAL EVALUATION)	9367
DEFENSE EXHIBIT #30 (RICKY DAVIS NOTE)	9376
DEFENSE EXHIBIT #31 (BAILEY TO CUMMINGS LETTER)	9377
DEFENSE EXHIBIT #32 (CUMMINGS TO BOWMAN LETTER)	9378
DEFENSE EXHIBIT #33 (BAILEY TO CUMMINGS LETTER)	9380
DEFENSE EXHIBIT #34 (CUMMINGS TO BAILEY LETTER)	9381
DEFENSE EXHIBIT #35 (BAILEY TO CUMMINGS LETTER)	9382
DEFENSE EXHIBIT #36 (BAILEY TO CUMMINGS LETTER)	9383
DEFENSE EXHIBIT #37 - ID (BAILEY TO CUMMINGS LETTER)	9384
DEFENSE EXHIBIT #38 (HARDEE-THOMAS TO BOWMAN LETTER)	9387
DEFENSE EXHIBIT #39 (HIRAM JOHNSON CIVIL COMPLAINT)	9388
DEFENSE EXHIBIT #40 (HIRAM JOHNSON CIVIL COMPLAINT)	9403
DEFENSE EXHIBIT #41 (HIRAM JOHNSON CIVIL COMPLAINT)	9409
DEFENSE EXHIBIT #42 (HIRAM JOHNSON CIVIL COMPLAINT)	9424
DEFENSE EXHIBIT #43 (BAILEY TO HARDEE-THOMAS LETTER)	9426
DEFENSE EXHIBIT #44 (BAILEY TO CUMMINGS LETTER)	9427
ORDER OF THE SOUTH CAROLINA SUPREME COURT CONTINUING JURISDICTION OF JUDGE LOCKEMY FILED DECEMBER 12, 2008	9428
LETTER FROM JOHN SINCLAIR, III, FILED FEBRUARY 4, 2009	9429
LETTER FROM JIM BROWN FILED MAY 7, 2009	9431
MOTION TO HOLD POST-CONVICTION PROCEEDINGS IN ABEYANCE PENDING RESOLUTION OF THE MOTION FOR NEW TRIAL IN THE COURT OF GENERAL SESSIONS FILED MAY 22, 2009	9433

ORDER GRANTING CONTINUANCE AND SCHEDULING ORDER FILED MAY 26, 2009	9436
RESPONSE TO MOTION TO HOLD POST-CONVICTION PROCEEDINGS IN ABEYANCE FILED MAY 29, 2009	9438
FOURTH AMENDED APPLICATION FOR POST-CONVICTION RELIEF FILED JUNE 5, 2009	9442

VOLUME TWENTY-TWO

APPLICANT'S AMENDED BRIEF SUPPORTING THE FOURTH AMENDED APPLICATION FOR POST-CONVICTION RELIEF DATED JUNE 12, 2009.....	9461
ORDER DENYING PETITIONER'S MOTION TO HOLD POST-CONVICTION RELIEF PROCEEDINGS IN ABEYANCE FILED JUNE 15, 2009.....	9570
POST-TRIAL BRIEF IN OPPOSITION TO APPLICATION FOR POST-CONVICTION RELIEF DATED AUGUST 10, 2009	9571
APPLICANT'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION FILED SEPTEMBER 21, 2009	9773
APPLICANT'S OBJECTIONS TO THE COURT'S INTENTION TO ADOPT THE STATE'S PROPOSED ORDER FILED SEPTEMBER 16, 2011.....	9802
ORDER DENYING APPLICATION FOR POST-CONVICTION RELIEF FILED MARCH 12, 2012.....	9820

VOLUME TWENTY-THREE

MOTION TO ALTER OR AMEND JUDGMENT, PURSUANT TO RULE 59(e) FILED MARCH 19, 2012.....	9951
MEMORANDUM IN SUPPORT OF APPLICANT'S MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO RULE 59 FILED APRIL 25, 2012	9952
RESPONSE TO APPLICANT'S MEMORANDUM IN SUPPORT OF APPLICANT'S RULE 59(e) MOTION FILED MAY 2, 2012.....	9969
ORDER DENYING RULE 59(e) MOTION FILED NOVEMBER 5, 2012	9970
NOTICE OF APPEAL, PROOF OF SERVICE DATED NOVEMBER 19, 2012	9971
MOTION TO REMAND FOR A RECONSTRUCTION OF THE PCR RECORD FILED FEBRUARY 7, 2013	9973

RETURN TO MOTION TO REMAND FOR A RECONSTRUCTION OF THE PCR RECORD DATED FEBRUARY 19, 2013	9984
REPLY TO THE RETURN TO MOTION TO REMAND FOR A RECONSTRUCTION OF THE PCR RECORD FILED FEBRUARY 21, 2013.....	9990
ORDER DENYING MOTION TO REMAND FOR A RECONSTRUCTION OF THE PCR RECORD DATED MARCH 21, 2013	9999

THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:

PLAINTIFF'S EXHIBIT #72 (PHOTOGRAPH)
PLAINTIFF'S EXHIBIT #73 (PHOTOGRAPH)

- (3) This statement indicated that Mr. Gadson shot Ms. Martin and then returned the gun to Mr. Bowman. Gadson also lied to Coker about owning a .380 firearm. Gadson also fired Bowman's gun within weeks of Martin's death and returned the gun to Bowman. The jury never heard this information.
- (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. In fact, counsel never informed the jury that Gadson cut a plea deal to avoid death, without objection, for capital murder.
- (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. Counsel failed to inform the jury that Coker knew that Felder bought the gasoline and lied during the guilt phase testimony. Counsel also failed to elicit the fact that Coker swore Gadson was the shooter and that Felder was an accessory before the fact to murder or that this information was presented to the grand jury. Further, the jury never learned that Coker continued to believe in Felder and Gadson's responsibility for Martin's death.
- (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" or that Gadson lied about owning a 9

millimeter instead of a Highpoint .380.

- (13) Trial counsel failed to inform the jury that casings linked to Tawain Gadson's gun were compared by SLED Agent Collins. Trial counsel failed to inform the jury that Hiram Johnson provided inconsistent statements to the police which did not include any reference to the alleged confession of Marion Bowman or that Johnson possessed bias towards the state to avoid a possession of a stolen vehicle charge.
- (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 advice 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 [redacted]) 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. Further, Felder lied about the number of times he met

with representatives of the state.

- (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 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 of exculpatory or impeachment value. 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, James Tawain Gadson and Hiram Johnson.
- (2) Mr. Felder testified that he left the apartment (Number 8) and followed applicant to McAlhenny Road and then to Nursery Road. Transcript 4093-4094 and Transcript 4105, l. 7-9. Hiram Johnson testified that he heard Bowman confess to this killing. The prosecution emphasized that Johnson had not cut a deal with the state and had not reason to lie.
- (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. Felder also did not inform the jury about his proffer statement to the prosecution, made by his defense counsel or his number of meetings with the representatives of the state. Further, he lied to the prosecutor nearly every time he spoke with the executive branch as he sought to minimize his liability and shift guilt to Bowman. Felder also received the benefit of a "wink wink" deal when he was allowed to lie with impunity and still receive the benefit of his plea agreement. However, Johnson was in fact charged, under the prosecutor's direction, with three charges including Receiving Stolen Goods, Burglary, 2nd Degree, and Grand Larceny. Johnson received the benefit of his "wink wink" deal when he later had two of these charges dismissed and one remanded to magistrate court.
- (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." The state also knew that Ricky Davis told an investigator from the prosecutor's office that he overheard a confession from Gadson in which he admitted he shot Kandee Martin and not Marion Bowman.
- (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 I, 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 [redacted]) and followed applicant to McAlhenny Road and then to Nursery Road. Transcript 4093-4094 and Transcript 4105, I. 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, Eighth, 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 challenge the kidnaping aggravating factor with available evidence contradicting this assertion. *Strickland v. Washington*, 466 U.S. 668 (1984) & *Johnson v. Mississippi*, 486 US 578 (1988)

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 and failed to present evidence which contradicted this assertion.
- (3) But for counsel's deficient performance, the outcome of the proceeding would have been different.

Ground W

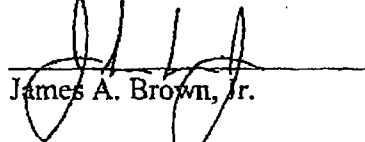
Applicant's right to counsel, as guaranteed by the Sixth Amendment , Eighth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60, was violated as a result of the constructive absence of counsel during the preparation, strategic planning and presentation of evidence in mitigation as accumulated by the mitigation specialist and presented by the testifying social worker. See *U.S. v. Cronin*, 466 U.S. 648, 659 (1984) , *Brooks v. Tennessee*, 406 U.S. 605 (1972), *Frett v. State*, 298 S.C. 54, 378 S.E.2d 249 (1988) and *Johnson v. Mississippi*, 486 US 578 (1988)

Supporting Facts for Ground W

- (1). Trial counsel employed the services of a mitigation specialist and a testifying social worker.
- (2) Trial counsel failed to adequately meet with either of these two members of the defense team or convey a trial strategy which would accommodate and reconcile the theory of the guilt phase with the theory of the penalty phase.

- (3) Trial counsel instead allowed a non-lawyer, expert witness to determine what type of mitigation should be presented and what type should not be pursued.
 - (4) This strategy decision to not pursue the presentation of evidence of applicant's good character traits but instead focus on negative aspects of his life was made by a non-lawyer witness instead of a lawyer or two lawyers to which applicant was entitled.
 - (5) This failure is amounts to a complete breakdown in the adversarial system such that applicant was effectively deprived of the guiding hand of counsel in the pursuit of a sentence of less than death. Because of this constructive denial of counsel, prejudice is presumed and a new penalty trial should be held.
- 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,


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June 5, 2009

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STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

C.A. No. 06-CP-18-569

MARION BOWMAN, #6006)

Applicant,)

v.)

STATE OF SOUTH CAROLINA)

Respondent.)

APPLICANT'S AMENDED BRIEF
SUPPORTING THE FOURTH
AMENDED APPLICATION
FOR POST-CONVICTION RELIEF

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TABLE OF CONTENTS

<u>INTRODUCTION</u>	1
<u>James Tawain Gadson -Grounds T(4-7), M(1-7),</u>	3
<u>Brady Violation-T(4-7)</u>	3
<u>Ineffective Assistance of Counsel-M(3, 7, 9),</u>	7
<u>Travis Felder-Grounds S(1-6), T(1-7),M (10, 11) & U (1-6)</u>	13
<u>Failure to Correct False Testimony Regarding the Gasoline Purchase</u>	13
<u>Failure to Correct False Testimony Regarding Meetings between</u> <u>Felder and "Anybody Representing State"</u>	18
<u>Brady Violation</u>	22
<u>Ineffective Assistance of Counsel</u>	28
<u>Hiram Johnson-Grounds M(13 & 14), T(1-3, 6 & 7)</u>	34
<u>Brady Violation</u>	34
<u>Ineffective Assistance of Counsel</u>	38
<u>Ricky Davis-Grounds</u>	41
<u>Brady Claim for Failure to Provide Exculpatory Evidence and</u> <u>"Sam Memo"</u>	41
<u>Detective Alvin Coker-Grounds M(7, 9, 11,12, 13 & 14)</u>	47
<u>Ineffective Assistance of Counsel</u>	47
<u>Conflicts of Interests-Grounds N, O, & R</u>	53
<u>Introduction</u>	53
<u>Multiple Representation Scenario</u>	54

Waiver	57
<u>Introduction</u>	57
<u>Factors of a Valid Waiver</u>	58
<u>New Waiver Required when Potential Conflict becomes Actual Conflict-Thomas v. State</u>	60
<u>Marva Hardee Thomas' Simultaneous Representation of Bowman and Ricky Davis</u>	60
<u>Dorchester County's Public Defender Conflict Regarding Simultaneous Representation of Marion Bowman, Jr. and James Tawain Gadson</u>	63
<u>IAC regarding Improper Introduction of Evidence in Guilt Phase-Grounds B, C, E, O & P</u>	65
<u>Improper Admission of Irrelevant and Prejudicial Character Evidence of Sex between Marion Bowman and Kandee Martin-Ground C</u>	65
<u>Improper Admission of Irrelevant and Prejudicial Petroleum Evidence- Ground E</u>	72
<u>Plea Deals of Family/Bolstering Prior to Impeachment-Ground B</u>	74
<u>Improper Admission of Ballistics Evidence-Grounds O & P</u>	79
<u>Improper consideration of Arbitrary Factor-Ground H</u>	82
<u>Failure to challenge the kidnapping aggravator-Ground V</u>	84
<u>Failure to Investigate, Develop or Present Mitigation Evidence-Grounds- G (2),(3),(4),(5) &(6) I, & W</u>	87
<u>Constructive absence of counsel during the preparation, strategic planning and presentation of evidence as accumulated by the mitigation specialist and presented by the testifying social worker</u>	87
<u>Failure to Present Testimony of Family Members or Other Evidence regarding Bowman's Capacity to be of Emotional Value-Ground (2)</u>	90
<u>Failure to Present Marion's Work Record-G(5)</u>	95
<u>Failure to correct information concerning Kandee's Character-G(4)</u>	96

<u>Failure to object to trial court's limitation upon allocution Ground I</u>	98
<u>Failure to Present Evidence of Marion's Intoxication-G(3)</u>	99
<u>Failure to Request a Charge in Mitigation re Intoxication-L(1-4)</u>	103
<u>Conclusion</u>	105

Introduction

_____ The Government convicted Marion Bowman of murder and arson and obtained a sentence of death related to the killing of Kandee Martin and the burning of her body. These verdicts are not worthy of confidence because the jury never understood the real evidence suggesting: that Tawain Gadson killed Kandee Martin, that Gadson had serious problems with his credibility as a witness, that Gadson lied to the police more than once, that Gadson faced the death penalty, that he was assisted by Travis Felder, that Felder was the arsonist, that Felder lied to the police, the prosecutor and the jury, that Hiram Johnson testified with an undisclosed bias towards the state, that Johnson lied to the police, that Ricky Davis told the prosecution he overheard Gadson confess to this killing, that the government knew Felder perjured himself, or that Detective Coker swore, under oath, that Gadson killed Kandee Martin with Felder's assistance and that Felder burned the car.

The jury never understood the lack of evidence in aggravation, or heard the multitude of evidence in mitigation, was never properly instructed by the court to consider mitigation and never saw a sentencing defense presented by competent counsel, but instead saw a defense based upon non-lawyer strategy. Finally, the jury considered an arbitrary factor in its sentencing determination.

Counsel offers the Court this assessment and this brief not as a complete or exhaustive listing of either the law or facts supporting the claims found in the Fourth Amended Application, but instead as a summary or guide to the most compelling issues which warrant the grant of post-conviction relief to applicant, Marion Bowman. PCR counsel specifically incorporates by reference all of the record into this brief, including the trial testimony and exhibits and all items

contained in the General Sessions file in the clerk's office, the PCR transcript and exhibits and all items contained in that Common Pleas file in the clerk's office as well as all items proffered to the Court and all items of which the Court took judicial notice. Counsel respectfully submits this Amended Brief as a corrected and supplemental version to the Brief previously submitted.

James Tawain Gadson, Jr. -Grounds T(4-7), M(1-7),

_____Mr. Bowman is entitled to a new trial based upon the State's failure to turn over evidence involving James Tawain Gadson, Jr. in violation of the requirements of Brady v. Maryland, 373 U.S. 83 (1963) . Additionally, Bowman is entitled to a new trial because trial counsel was ineffective for failing to investigate and utilize exculpatory and impeachment evidence regarding Gadson's involvement in the death of Kandee Martin.

Brady Violation-T(4-7)

The United States Supreme Court has set out the three components or essential elements of a Brady prosecutorial misconduct claim: "The evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-282 (1999). Further, the government's duty to disclose evidence favorable to the accused encompasses evidence known by others acting on the government's behalf, even if not known by the prosecutor. Kyles v. Whitley, 514 U.S. 419 (1995). Kyles defines material evidence as that type of evidence which, if withheld, would result in a trial unworthy of confidence. Id.

Gadson's Mental Illness, Chronic Drug Use and Memory Impairment

Favorable to the Accused

During the guilt/innocence phase of the trial, Gadson testified that he alone was the sole direct witness to Bowman's involvement as the shooter of Kandee Martin. See generally, Trial, 3980-4039. No other independent, direct evidence of the identity of the shooter was presented. Therefore, evidence impeaching the credibility and believability of Mr. Gadson was of

paramount concern to the defense. See PCR, p. 1273, l. 1-22.

Mr. Gadson's credibility and believability was subject to scrutiny because of his status as a cooperating witness. While some of the details of this arrangement were provided to the jury, some of these were not. This issue will be addressed below in the portion of this brief regarding IAC.

However, other matters also called into question the veracity of statements made by Mr. Gadson. Chief among these were serious concerns about his drug use and severe mental disorders. These items were never disclosed to the trial attorneys or the jury who decided Mr. Bowman's fate.

From the beginning, the prosecutor, the trial court and Gadson's own counsel harbored questions about Gadson's mental health. Because of this, an order was signed requesting that the State's hospital conduct an evaluation for both competency and criminal responsibility. See Plaintiff's 8. Even though found competent and criminally responsible, this evaluation revealed serious mental health concerns and questions about Gadson's ability to recall events.

Of paramount concern is that Gadson was found to suffer from cannabis dependence as an Axis One, clinical diagnosis. In fact, Gadson admitted during the evaluation that he "consumed up to six blunts of cannabis on a daily basis." During the PCR hearing, the prosecuting attorney admitted the impeachment value of this information. PCR, p. 1648, l. 11-22.

Further, and possibly related, is the finding that Gadson suffers memory impairment. While the report attempts to minimize this shortcoming by indication that Gadson suffers from no long or short term memory problems, the jury is the proper arbiter of the impact of this

information upon their review of Gadson's testimony.

Further, Gadson suffered from periodic blackouts and loss of consciousness related to an Axis Three diagnosis of seizure disorder. The report indicates that these blackouts have been temporally associated by Gadson with his exorbitant consumption of marijuana. Put in his own words, one episode occurred when "... he was smoking marijuana and he...fell down, and when he 'came back,' felt somewhat dizzy."

Most importantly, these blackouts are accompanied by "incontinence." Plaintiff's 8, page 2. This is important because Gadson told the jury he suffered "incontinence" during the shooting of Kande Martin. Trial, 4013, l. 6-10. Had this correlation been presented to the jury, the argument could have been made that Gadson suffered a blackout during the time of the incident in question.

Finally, this suppressed mental health report contained information indicating that Gadson heard "a voice" and a beeping noise. Gadson could not relay to PCR counsel what this voice told him to do. Neither could the prosecuting attorney describe the contents of conversation provided by this voice.

However, the prosecutor clearly admitted that "arguably there would be some impeachment value" found in the mental health information withheld. PCR, p. 2121, l. 13-14.

Withheld by the State

Both the prosecuting trial attorney and the respondent's counsel acknowledge that the information contained in the mental health report was never disclosed to applicant's trial counsel. PCR, p. 1649, l. 18- p. 1650, l. 14. In fact, PCR counsel only obtained a copy of this report following the service of a subpoena upon the First Circuit's Solicitor for the trial file. PCR, p.

1650, l. 15. Finally, trial counsel admits that he never knew of this important impeachment information, but would have desired to have the same for purposes of cross examination of the State's star witness and lone piece of direct evidence linking Mr. Bowman to the killing of Kandee Martin. PCR, p. 1648, l. 7-1649, l. 22.

Prejudice Ensued

There is no way to adequately describe the impact of Gadson's testimony towards the ultimate question of the shooter's identity without consideration of the other evidence of identity. To begin, the State possessed and believed at least until a late stage in the proceeding evidence indicating that Gadson was involved in shooting and killing the decedent. Plaintiff's 3 & 84 (letter from Bailey to Gadson's attorney, dated March 25, 2002 noting that "due to your client's admitted involvement, I cannot reduce the murder charge.")¹ This evidence included the prosecutor's assessment, Coker's sworn statements, statements from Mr. Bowman, Gadson's own access to a .380 firearm and the statements of Darian Williams, Rickie Davis, and Wayne Mood. See Plaintiff's 1, 3, 4, 7, 11, 17, 18, 35, 36, 45, 67, 68, 70, 84, 85, 86, & Def's 4, 5, & 6.

Any information which undercut the credibility of Gadson's testimony, directly weakened the State's case. Further, this impeachment would actually assist in the defense argument that Gadson was the shooter, thus this information was also indirectly exculpatory.

Therefore, based upon this one claim alone and in conjunction with the other claims contained herein, Mr. Bowman should receive a new trial because the verdict in his previous trial

¹This murder charge was dismissed despite this earlier assertion and the jury never heard about Bailey's pre-trial assessment as indicated in Plaintiff's 84.

is not worthy of any confidence in the result.²

Ineffective Assistance of Counsel-M(3, 7, 9).

Failure to Investigate/Impeach/Introduce Evidence of James Tawain Gadson's Plea Deal and True Bias to Avoid a Death Sentence

As an independent ground for relief, Bowman's trial counsel failed to adequately investigate Gadson's background and failed to utilize the material available to undermine credibility in Gadson's testimony. Trial counsel's conduct in this regard fell below a reasonable standard for the performance of counsel in similar circumstances. Trial counsel had no reasonable strategy to excuse this failure. And if not for this failure, there is a reasonable probability that the outcome of Bowman's trial would have been different.

Un-Presented Details of Gadson Plea Deal

Most importantly left from the examination of Gadson by Bowman's trial counsel were details concerning the plea deal struck between Gadson and the State. Plaintiff's 3. While the jury heard that Gadson cut a deal to reduce a murder charge to charges of accessory after the fact and misprision, the jury was incorrectly informed of the potential penalty Gadson avoided. Finally, the jury was left with the incorrect impression that Gadson would serve 20 years in prison.

Specifically related to Gadson's avoidance of a death sentence is a failure to inform the jury that Gadson expressly bargained to avoid the death penalty. Plaintiff's 3, § 9(b). At trial, the only reference to Gadson's exposure to the death penalty was an inartful question presented by trial counsel Cummings. Counsel asked Gadson: "You were never served the notice of death

²Gadson also lied to the police about owning a .380 firearm.

penalty at all?" Trial, 4024, l. 18-20. Gadson replied: "No, sir." In reality, the written plea agreement, provided to trial counsel the morning of the trial, clearly stated that a failure by Gadson to "...cooperate in the investigation and prosecution of Marion Bowman, Jr....." will result in the State seeking "...the death penalty against the Defendant and the Defendant hereby waives any objection to the State's seeking of the death penalty."³ See Plaintiff's 3, § 9.

Even though there exists no greater incentive for anyone to testify favorably for the State than the reduction from a death sentence to a twenty-year non-violent sentence where one is parole eligible after serving less than five years, trial counsel failed to effectively cross-examine Gadson regarding this bias and motive to misrepresent the facts. Though there was no doubt in Gadson's mind that he faced the death penalty, trial counsel's questioning left the exact opposite impression with the jury. When questioned about this failure, trial counsel Cummings indicated that he probably wished he had done a better job examining Gadson in this regard. PCR 1664, l. 25-1667, l. 7. In fact, it appears that trial counsel concedes his ineffective cross-examination by proclaiming that he received the plea agreement in such a manner that his other trial obligations prevented his proper preparation of effective and reasonable cross-examination of Gadson.

Prior Assertions that Gadson was the Triggerman

This failure to cross-examine Gadson was compounded by the failure to present evidence to the jury that the State harbored a long-held belief that Gadson was the triggerman in Martin's death. To begin, the affidavit attached to the arrest warrant for Gadson clearly contained a sworn statement from lead Detective Alvin Coker indicating that Gadson was the shooter. See Plaintiff's 4 ("[Gadson] willfully and unlawfully with malice and (sic) aforethought did shoot

and kill one Kandee Martin.”) Months later and after extensive investigation by multiple law enforcement agencies, including Dorchester County, Orangeburg County, Branchville City and the State Law Enforcement Division, Ballistics unit, this same detective presented and obtained a true-billed indictment in which the State alleged, in part, that “James Tawain Gadson, did kill one Kandee Martin by means of shooting the victim in the head....” See Plaintiff’s 1.

The jury was never presented any information indicating that the State ever believed Gadson was the shooter. Instead, the jury was left with the impression that Bowman was the only person who was targeted in the investigation as the shooter. When questioned about this failure, trial counsel indicated he held no strategic reason for this failure. Specifically the testimony shows:

Q: Isn’t it of impeaching value to the State’s case, if not Gadson’s testimony in particular, that he was alleged to have been the shooter?
.....

Q: Why didn’t you tell the jury the State had sworn in previous proceedings that Gadson was the shooter?

A: I can’t answer that today. I don’t know why I didn’t ask it. I mean, it wasn’t strategy, that’s for sure, and if I didn’t ask it that way, I thought I was cross-examining him the best way I could get evidence out of him
.....

Q: There is no strategy reason?

A: No, sir, no strategy reason.

This information was in keeping with the defense theory, the prosecutor’s own assessment of Gadson’s “admitted involvement” in the murder, and other un-presented information supporting the contention that Gadson was the shooter. Plaintiff’s 84. Chief among these is Gadson’s own confessions. Plaintiff’s 11 & 67.

Gadson’s Confessions-M(1-6)

As fully explained in the later portion of this brief regarding Ricky Davis, trial counsel possessed evidence that Gadson confessed to killing Kandee Martin while he was incarcerated in the Dorchester County Detention Center (DCDC), A-side. See Plaintiff's 11 & 68. Records indicate that Gadson was housed on A-side at the time of the confession. See Plaintiff's 41. Further, inmate Ricky Davis, to whom one confession was made, was also housed on A-side according to his own statement and the investigative notes of Sam Richardson of the First Circuit Solicitor's Office. See Plaintiff's 67.

Also, the prosecutor himself expressed belief in the statement of inmate Wayne Mood which indicated that Gadson confessed to him as well. According to the notes from the prosecutor's interview with Mood, Gadson confessed to shooting Martin while in the DCDC. This information was conveyed to trial counsel as late as one week before jury selection. Plaintiff's 68.

Most telling about this conveyance is that the prosecutor, himself, recognized and conveyed the "impeachment" value of Gadson's confessions. See Plaintiff's 68.

Gadson's Access and Prior Shooting of Alleged Murder Weapon

Applicant's trial counsel's failure to cross-examine Taiwan Gadson about his prior confession to Ricky Davis, the substance of which was that he had the murder weapon in his hand and shot Kandee Martin with it, dovetails into Applicant's trial counsel's failure to present evidence that Margaret Hawkins and Tierra Coleman saw Taiwan Gadson just two weeks prior to the killing, fire the same weapon that the State contends is the murder weapon and then hand it back to Marion Bowman. (See Plaintiff's Exhibits 29 and 30, Statements by Margaret Hawkins and Tierra Coleman).

The jury never heard that Taiwan Gadson had fired the gun that the State contends is the murder weapon just two weeks prior to Kandee Martin's killing. And no doubt, had Gadson been cross-examined on this point, he would have testified exactly as he did in the PCR Hearing on Page 163, lines 23-25 and Page 164, lines 1-10:

- Q: Did you shoot a High-Point .380 at the Villas projects in February, 2001?
 A: Yes, I did. That is way before the murder even happened, weeks before.
 Q: Weeks before the murder you shot a High Point .380?
 A: Yes.
 Q: High Point .380?
 A: Yes.
 Q: At the projects?
 A: Yes.
 Q: In Branchville?
 A: Yes.

And Gadson reiterated this damning testimony in the PCR Hearing, confirming he got the gun from the Applicant: See on page 196, lines 18-25:

- Q: That was Marion's gun?
 A: Uh-huh.
 Q: He let you borrow it?
 A: It was a dude standing in front of the apartments talking as if he had a knife, he handed me the gun, I started shooting it.
 Q: Marion was there?
 A: Yes, he was there.

Trial counsel offered no strategic reason for the failure to question Gadson regarding the shooting of the alleged murder weapon. In fact, when questioned about this failure to inform the jury of Gadson's familiarity and access to the .380 in evidence, trial counsel replied: "I don't have a strategy reason for that." PCR, p. 1681, l. 1.

Gadson's lie about his owning a .380 & lie to Detective Stephenson (M3 & 9)

Gadson also told Detectives that he owned a 9 millimeter firearm. This is incorrect as the police knew that he actually purchased a Highpoint .380, the identical make and model gun that

Bailey and law enforcement believe killed Martin. Gadson also lied to the police when he told Detective Stephenson that he was not involved in the death of Kandee Martin. PCR, p. 1761 & Plaintiff's 7⁴. Counsel never provided this information to the jury. Instead, the jury believed that only Bowman owned a weapon which would produce class and subclass characteristics consistent with the casings linked to Martin's death. Further, the jury was led to believe that Gadson was not involved in Martin's death, when the police and prosecutor had reason to believe otherwise.

But for these errors, there is reasonable likelihood that Marion Bowman would not have been convicted of murder and arson.

Conclusion

Therefore, considering the significance of the above-mentioned errors relative to the importance of Gadson's testimony as the only direct evidence offered against Bowman as the shooter, these errors, individually and cumulatively are such that a new trial should be granted.

⁴This information served as the basis for Stephenson and Coker's belief that Gadson was involved in Martin's death. Further, it is assumed that Bailey believed this falsehood demonstrated a sufficient basis to both credit the information in the Sam memo as well as provided the mechanism to threaten Gadson with a death sentence. See Plaintiff's 84.

Travis Felder-Grounds S(1-6), T(1-7), M (10, 11) & U (1-6)

Mr. Bowman also seeks a new trial because of the errors involved in the presentation of evidence by Travis Felder, the discovery violations related to Mr. Felder and the ineffective assistance of counsel related to the evidence presented by Mr. Felder. A new trial should be granted because of each of these errors and because of the cumulative impact of all of the errors cited in the brief.

Failure to Correct False Testimony Regarding the Gasoline Purchase

During the guilt/innocence phase of Mr. Bowman's trial, Mr. Felder presented a false statement when questioned concerning his actions when he left the apartment complex in Branchville, South Carolina at approximately 3:15 a.m. on February 17, 2001. Both Mr. Felder and the prosecutor now concede that this statement was a "lie." PCR, p. 685, l. 15-19 & p. 2113, l. 20-25. However, the State failed to correct this false statement even though the falsehood was known by the lead investigator in the case. Further, Mr. Felder and the investigator believe they informed the prosecutor of the true information which was not conveyed to the trial jury, and no matter what, this information should have been known by the prosecutor given other information within the custody of the state.

To begin, the United States Supreme Court categorically condemns the utilization of false testimony. In fact, for nearly three quarters of a century, the Supreme Court has unequivocally indicated that the failure to correct the knowing presentation of false testimony will result in reversal of any conviction obtained therewith. Mooney v. Holohan, 294 US 103 (1935). In Mooney, the Court refuted the argument of the State Attorney General that due process is satisfied when the "State has contrived a conviction...through deliberate deception of court and

jury by the presentation of testimony known to be perjured.” Mooney, at 112. The Court held that “[s]uch a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.” Id. at 112.

Nearly a half century ago, the United States Supreme Court reversed a murder conviction based upon a prosecutor’s failure to correct false testimony regarding a plea agreement struck between the State and a cooperating witness. Napue v. Illinois, 360 US 264 (1959). In Napue, the Court reviewed the constitutionality of a murder conviction obtained, in part, by the testimony of a cooperating co-defendant. At the trial, the co-defendant testified that he had not struck any plea bargain with the State’s attorney. This was false and this false assertion went uncorrected. The Supreme Court held that the prohibition on the use of false testimony applied even when the “false testimony goes only to the credibility of the witness.” Napue, at 269. The Court continued to note that a “lie is a lie...” and that it was “of no consequence that the falsehood bore upon the witness’ credibility rather than directly...” on the question of guilt. Id. at 269-270 (internal citations omitted).

Finally, the South Carolina Supreme Court has recently issued a ruling regarding a Napue claim. See Riddle v. Ozmint, 631 SE2d 70 (SC 2006). In Riddle, the state Supreme Court reversed a murder conviction, in part, because the State presented the false testimony from a witness and allowed that testimony to go uncorrected. In that case, a cooperating co-defendant falsely testified regarding the number of times he met with authorities to discuss his testimony. The State Supreme Court granted relief noting that the “issue is not why [witness] failed to tell the truth: rather, it is why the solicitor, who knew [witness’] testimony to be false, failed to

correct it.” Riddle, at 75. The Court reaffirmed the notion that the “failure to correct false evidence is as reprehensible as its presentation.” Id.

Turning to the facts of this case and as a matter of review, Marion Bowman was tried and convicted for Murder and Arson, Third Degree, in a trial conducted in the Dorchester County Court of General Sessions. As part of the State’s case, Travis Felder testified on behalf of the prosecution as a cooperating witness. Trial, p. 4084- 4102. He testified that he assisted Mr. Bowman by giving him a ride from the scene of the arson. Trial, p. 4094- p. 4101. He testified that he struck a deal with the prosecution to reduce his criminal liability in exchange for his cooperation.

The jury learned that, as part of this agreement, the State would reduce both the criminal charges against Mr. Felder and minimize the potential that he would actually be incarcerated. Trial, p. 4085, l. 3-4086, l. 5. In exchange, Mr. Felder would provide testimony of his knowledge of the events of February 16-17, 2001 which served as the basis of this trial. Further, the agreement mandated that Mr. Felder’s testimony be truthful and complete and that he not omit any facts. Plaintiff’s 14 & PCR, p. 667, l. 11- p. 668, l. 5.

Mr. Felder testified that he left an apartment in Branchville and drove to the area of McAlhany Road and Nursery Road in Dorchester County. Trial, 4094, l. 6-9. He testified that he then retrieved Mr. Bowman and gave him a ride from the scene of an arson. He did not indicate his involvement in the procurement of the gasoline used to burn the automobile. Instead, his testimony falsely minimized his role.

However, Mr. Felder now indicates that he lied during this testimony. PCR, p. 685, l. 15-19. During a deposition provided to undersigned counsel during collateral proceedings, Mr.

Felder admitted it was a lie when he failed to indicate that he went from the apartment to obtain gasoline at the EZ Horizon Shop instead of directly traveling to the Nursery Road area in an effort to get rid of a car. He knew this gasoline was to be used to get rid of this car. However, the jury never heard this different version of Felder's testimony before deliberating and returning a guilty verdict against Mr. Bowman for murder and arson. See PCR, p. 671- p. 685.

Also, Mr. Felder's false testimony was not corrected by the prosecution, as required by due process and fair trial requirements of the US and SC Constitutions. Instead, the prosecution continued to reward Mr. Felder for his false testimony by awarding him his bargain from the plea agreement despite his breach of its terms. The jury never learned of this perverse result as Mr. Felder was not sentenced until after the conviction and sentence of Mr. Bowman. Plaintiff's 63.

The prosecution knew of this false testimony because the lead investigator testified he was aware that Felder bought the gasoline. Detective Coker indicated that:

- Q: And do you recall who purchased the gasoline from E-Z Horizon Mart?
 A: Yes, sir. Based on some of the statements and stuff there was some talk about the fact they went and purchased gas.
 Q: Okay. And was it Travis Felder that bought the gas?
 A: I believe so, yes, sir.
 Q: Okay. That was your belief during the prosecution of this case?
 A: Yes, sir.
 Q: And was that information conveyed to the prosecutor?
 A: Yes, sir.
 Q: And that was conveyed to him prior to Mr. Bowman's trial?
 A: Yes, sir.
 Q: There is no question about that?
 A: Everything we had in the case was given to the Solicitor's office.
 Q: Specifically the information that Travis Felder purchased the gas?
 A: I'm quite sure it was.
 Q: Quite sure?
 A: Yes, sir.

.....
 Q: If that wasn't him on the video would you have still charged him with this

[Arson]?

A: I'm sure I wouldn't.

Q: Your accusing him with the arson was based on the fact he was the person purchasing the gas from the E-Z Horizon Store?

A: That and based on the co-defendant's statements, yes sir.

Q: And that video?

A: Yes, sir.

Q: And the purchase of the gasoline, That was something you all certainly were interested in?

A: We were. I think Detective Miller initially picked up the tape, gave it to me, I in turn gave it to Agent Helms who took it for further analysis at SLED headquarters.

Q: And eventually it ended up in the hand of the prosecutor?

A: Yes, sir.

Q: And that was a crucial piece of evidence regarding the arson charge?

A: Yes, sir.

Q: Regarding who to charge with the arson?

A: Yes, sir.

Q: I will hand you what has been marked as Plaintiff's 43 and 44 and ask you if you recognize those documents?

A: 43 would be the indictment for arson third degree for Travis DeWitt Felder, and 44 is the accessory after the fact [to murder] indictment against Travis DeWitt Felder.

Q: Who was the witness in the grand jury proceedings regarding those charges?

A: That would be me sir.

Q: Any other witnesses?

A: No, sir.

Q: And Mr Felder was indicted in fact not for accessory after the fact of arson, but for arson?

A: That's correct.

Q: That is consistent with him purchasing the gasoline?

A: Correct.

PCR, p. 899, l. 6- 905, l. 24.

However, the prosecutor allowed Mr. Felder to lie before the jury and this false testimony was never corrected. Instead the jury was led to believe that Mr. Felder played no role in the planning to burn or burning of the car, but instead was surprised when he saw the car afire. This

trial testimony falsely minimized Felder's role and hid from the jury the fact that the only physical evidence documenting involvement in the arson pointed to Felder and not Bowman.

To place this in context, the prosecution again originally charged Gadson as the shooter of Kandee Martin and Felder as an accessory before the fact of murder for assisting Felder in Martin's murder. Plaintiff's 17. Felder was also charged with the arson during this same arrest, the week of Ms. Martin's death. Plaintiff's 18.

The jury never learned that Detective Coker believed that Felder and Gadson killed Martin, but instead was presented false information regarding Felder's role.

Because the prosecution committed misconduct in the failure to correct this false testimony, a new trial should be granted. See PCR, p. 671, l. 2-16.

Failure to Correct False Testimony Regarding Meetings between Felder and "anybody representing the State"

Mr. Felder also testified falsely regarding false statements made during the trial regarding the number of times he met with "anybody representing the State." Trial, p. 4109, l. 9. Even though not an element of a misconduct claim, this falsehood is significant because it contributed to the shielding from defense counsel and the jury of Felder's numerous lies to law enforcement and the prosecutor. This is part of a pattern of falsehoods, suppressed evidence and ineffective examination which misled the jury about Felder's actual role in the killing and murder of Kandee Martin.

At trial, Felder indicated that he met once with "anybody representing the State." Trial, p. 4109, l. 7-17. This was modified upon prodding by the prosecutor who reminded Felder of a meeting which occurred that morning. Trial, p. 4110, l. 3-10. However, even this modified

statement that Felder met twice was a false statement. In fact, Felder met at least 5 times with the representatives of the State such as detectives or the prosecutor before his testimony in the penalty phase of the trial.

Felder initially met with law enforcement just two days after Martin's body was found. PCR, p. 651, l. 10- p. 652, l. 4. At this meeting, Felder informed law enforcement that he did not know anything about her death. The jury never heard about this inconsistent prior statement, but instead only heard he met once pre-trial with the prosecutor and once the morning of his penalty phase testimony.

Felder later met with a detective when he was arrested. PCR, p. 652, l. 5-18 & Plaintiff's 16, 17, & 18. At that time, he was briefly Mirandized and questioned at the time of his arrest. Even though he made no statement at that time, the jury never heard about this meeting with "anybody representing from the State."

Felder also met pre-trial to broker a plea deal. At this meeting, review was had of a proffer letter which his attorney submitted to the prosecutor in an effort to cut a plea bargain. Plaintiff's 64. The prosecutor admitted, during the PCR testimony, that Felder's proffer on his attorney's letterhead was also false and that this was the second attempt on Felder's part to lie to the State when brokering a plea deal. PCR, p. 2109, l. 15-p. 2111, l. 10. The jury never heard about this proffer, the false nature of this proffer or that this was the first of two attempts within a month where Felder lied to "anybody representing the State" in an effort to minimize his culpability.

Later, Felder met with representatives from the state when his lawyer and the prosecutor arranged for a polygraph. See Plaintiff's 15. This meeting was a carefully crafted meeting with

involvement by Felder, a polygrapher from the Dorchester County Sheriff's Department, the lead investigator, Felder's attorney and the prosecutor. PCR, p. 2107, l. 12- p. 2112, l. 9. This meeting was carefully crafted to limited the questions which could be asked of Felder. PCR, p. 821, l. 1-25. Both the prosecutor and the lead investigator testified at the PCR hearing that the questions were to be limited in a way which shielded exposure of Mr. Felder's involvement in the crimes at question. PCR, p. 811, l. 23- p. 812, l. 21. The prosecutor arranged for this polygraph because Felder lied about his knowledge of the presence of Kandee Martin's body in the trunk of the car when the arson occurred. The jury was never told of this meeting, that the meeting was limited in the parameters of investigation regarding Felder's liability, or that Felder lied at this meeting.

Finally, Felder met with the prosecutor prior to his guilt phase false testimony. Trial, p. 4109- p. 4110. They also met following his false testimony in the guilt phase but prior to his penalty phase testimony. Felder initially omitted reference to the meeting the morning of his guilt phase testimony, but the prosecutor eventually straightened out this omission for the jury through pointed and sharp questioning of a leading manner.

Then Felder admitted that he met with the prosecutor two times. Trial, p. 4110, l. 9-10. This number is also misleading as documented by the multiple meetings documented above. Further, Felder never indicated that his guilt phase testimony was a "lie" which was perpetrated because he was "scared" and "had a lot on the table." PCR p. 680, l. 1- p. 685, l. 19 ("That's a lie, isn't it? Yes, sir.")

In retrospect, both Felder and the prosecutor indicate that the guilt phase testimony was a lie. PCR, p. 685, l. 15-19 & p. 2113, l. 20-25. In fact, the prosecutor indicates that there is no

other way to characterize Felder's guilt phase testimony other than a lie and that this was the third time within six weeks that Felder lied in an attempt to minimize his involvement while providing evidence against Marion Bowman. PCR, p. 2109-2114. The jury never heard of the prosecution's characterization of this pattern of lies by the State. Also, the jury never heard that Felder lied during the penalty phase when Felder did not describe these five meetings as outlined above, but instead proclaimed there only to be two meetings with "anybody representing the State."

The prosecutor obviously knew this was false. Further, this false statement appears strikingly similar to the falsehood which was criticized and cited for reversal of a murder conviction and death sentence in the Riddle case, mentioned above. There, a cooperating witness lied in at least one of his multiple meetings with law enforcement when providing information against the petitioner at the underlying capital trial. Neither was this pre-trial lie exposed, nor was the in-court lie about the number of meetings to debrief revealed. On consideration following denial of post-conviction relief, the Supreme Court found that failing to correct a false statement was as opprobrious as the knowing presentation of one and reversed the circuit court by granting a new trial on the question of guilt.

Again, here, the prosecutor knew that Felder met more than 2 times with the state. In fact, the prosecutor knew that Felder met with him or his agents in carefully planned meetings at least three times prior to that penalty phase testimony and that he lied at least at two of the prior meetings. Also, the third meeting was necessitated by Felder's third attempt to lie and minimize his own role in the death and cover up of Kandee Martin's body.

Thus, this error warrants post-conviction relief in the form of a new trial because the state

allowed Felder to lie about the number of meetings with the executive branch.

Brady Violation

Mr. Bowman also deserves a new trial because neither he nor his trial counsel were informed about Felder's extensive attempts to minimize his involvement by providing false information to the State.

Pattern of Minimizing Involvement

It was not until the conclusion of the PCR hearing that Mr. Bowman and his PCR counsel became aware of the exact details of Felder's efforts to minimize his own involvement in the death and arson of Kandee Martin. To understand the impact that this pattern of deception could have played at the trial level and, thus, the materiality of this withheld evidence in the Brady context, a brief review of Felder's possible role in this crime is necessary. The PCR testimony of the lead detective suffices to explain this role.

Detective Coker indicated that Felder was clearly charged in the arrest warrant as an accessory *before* the fact to murder. PCR, p. 979, l. 9- p. 980, l. 1 & Plaintiff's 17. This was not a typographical error, as Coker testified that he believed, at the time of the arrest, that Felder and Gadson were involved in the killing of Kandee Martin. This included the above-referenced belief that Gadson was the shooter. In fact, Coker testified at the PCR hearing that he still believes that Gadson accompanied Felder to the scene of the arson and burning of Martin's body. PCR, p. 885, l. 4- 10 & p. 888, l. 19- p. 889, l. 10.⁵

⁵Also, see Plaintiff's 85-interview notes of Prosecutor Baily, wherein Darien Williams indicates that Gadson was at the scene of the arson and the Williams "will probably make a good witness." This is consistent with Detective Coker's belief but inconsistent with Gadson and Felder's trial testimony. These notes were not disclosed to the trial counsel, although Williams prior consistent statement, Plaintiff's 36, was disclosed.

When initially questioned, Felder told the police that he knew nothing about the killing of Kandee Martin. PCR, p. 651, l. 10- p. 652, l. 4. This denial predated Felder's arrest. This information was conveyed to trial counsel through the provision by the state of Coker's report.

Identity of Felder as Purchaser of Gasoline

However, it is unclear that the State provided the defense with the identity of Felder as the one who purchased the gasoline. While the tape was provided to the defense, the image on the tape does not clearly indicate that Felder purchased the gas. Plaintiff's 42, CD copy of EZ Horizon Video tape of Gadson purchase of gasoline contained in Detective Coker's File, -also marked as Court's exhibit 2⁶. However, it is clear that the purchaser of the gasoline is the same person who purchased chips and dip from the very same E-Z Horizon Store just minutes before the purchase of the gasoline. Same video.

These purchases occurred about 3:00 a.m. on February 17, 2001. The exact time of one of these purchases is noted on a post-it note in Detective Coker's handwriting which he affixed to Felder's booking report in his trial notebook. Plaintiff's 50. While Coker could not positively state when the note was attached, he did indicate that he did not modify his notebook after trial and that he was aware of Felder's identity as the gasoline purchaser before trial. PCR, p. 990, l. 12- p. 991, l. 11 & p. 1013, l. 24- p. 1016, l. 16.

Further, defense counsel did not know that Felder purchased the chips and dip before Felder testified to this at the guilt phase of the trial. In fact, it is clear that Felder did not provide a written statement to law enforcement. Nor was a summary of Felder's testimony provided to

⁶Another copy of this video is marked as Defendant's Exhibit 19 from the underlying trial and has been expressly incorporated into this record.

the defense, pre-trial.

Instead, defense counsel knew only of Felder's pre-arrest denial and his polygraph denial, both of which the State considered to be a false statements. The State never provided any proffer or summary to the defense counsel. This withheld information includes both the false proffer from Felder's defense counsel and other information as noted by Coker which demonstrated the falsehood of Felder's guilt phase testimony.

Proffer Letter from Felder's Defense Counsel

Following the carefully orchestrated polygraph examination, which did not include any post-testing examination, Felder's attorney provided the State with a letter which summarized Felder's proposed testimony. Plaintiff's 64. The most interesting point in this letter is that Felder denied knowing that he was traveling to Nursery Road to destroy Kandee Martin's car. Instead, he indicated that his trip to Nursery Road was to perpetrate an insurance scam.

Even to this day, the State does not believe the contents of this letter. But more interestingly is the fact that the prosecutor did not believe the letter pre-trial either. PCR, p. 2109, l. 13- 24. In fact, former solicitor Bailey clearly indicated at the PCR hearing that Felder was lying when he informed his attorney of this proposed testimony referenced in the proffer letter and that this deception was intended to minimize his role in the burning of Martin's car and body in an effort to curry favor with the State and receive lenient treatment.

The contents of this letter, the recognition of the letter's deception or the pattern of minimizing involvement, beginning pre-arrest and continuing post-polygraph into the guilt phase testimony were never provided to the defense. PCR, p. 2109, l.25 - p. 2114, l. 15. This is strikingly similar to suppressed information withheld by the State in Gibson v. State, 514 SE2d

320 (SC 1999).

In Gibson, the prosecutor met with the purported star witness in a killing. Id. at 520-521. While conducting this pre-trial interview, it became apparent that the witness was not telling the truth about his ability to have viewed the events in question. The witness admitted to the prosecution that he did not see what he claimed to have seen.

The prosecutor in Gibson did not reveal this information. Instead, the State accepted a plea in which the defendant admitted his guilt in the killing. On PCR, the circuit court found a Brady violation and ordered a new trial.

On appeal, the South Carolina Supreme Court affirmed this reversal. The Court easily recognized the Brady violation. Despite the fact the defendant admitted his guilt, the conviction was reversed as the Court noted that the cross-examination of the witness with this lie to law enforcement would carry powerful weight in the accused's decision of whether to plea or proceed to trial. Id. at 526-527.

Likewise, had the defense in Bowman been provided this letter, it could have been used to impeach the testimony of Felder. Felder was the only purported direct witness to Bowman's guilt as the arsonist who destroyed Martin's car and body. Thus, the suppression by the prosecution of the pre-trial confrontation and the admission by Felder that the letter was a lie, undermines the confidence in the outcome of the guilt phase of Bowman's proceedings.

Wink Wink Deal-Lie and Omit and Still Receive Benefit

The most telling of all of the withheld information is the now-apparent "wink wink" deal which was suppressed by the State. To put this another way, outside of the written plea agreement which Felder entered with prosecutor Bailey, another, unwritten deal has become

apparent. This is the "wink wink" deal which condones testimony including lies and omission by rewarding benefits if the outcome of the trial is successful in the prosecution of the target.

As part of his pre-trial motions, defense counsel prepared a discovery request which included fairly standard language seeking information regarding deals cut by the state with prosecution witnesses. This discovery request specifically referenced "wink wink" deals. PCR, p. 1297, l. 4-9. The defense counsel testified that a "wink wink" deal was a colloquialism for an unwritten promise between the state and the cooperating witness to scratch each other's back. PCR, p. 1297, l. 22.

In Bowman's case, the prosecutor admitted that Felder lied at least three times while attempting to curry favor for a lesser sentence. This first lie was contained in the proffer letter conveyed by Felder's defense counsel to the prosecution. Plaintiff's 64. This letter was never provided to defense counsel. PCR, p. 1318, l. 20- p. 1320, l. 8. However, this proffer was also false as it again incorrectly minimized Felder's role in the arson of Martin's car and body. This falsehood was revealed to the defense.

Felder gave a second version during the carefully crafted polygraph examination. When confronted with this obvious lie, Felder changed his story to add a slightly more culpable version of events. The jury never heard of these lies.

The state continued to seek Felder's assistance and drafted a written agreement which document the restrictions upon Felder's trial testimony. This testimony was not only to be truthful, but was not to contain any omission as was not to unfairly benefit either Felder or any third party. If this provision was violated, Felder faced his original charges and withdrawal of his benefit of the bargain.

Felder lied at trial during the guilt phase. There he indicated that he left the apartments in Branchville and traveled down MacAlheny Road to Nursery Road. Trial, p. 4094, l. 6-9. In fact, Felder left the Branchville Apartments and purchased the very gasoline used to burn Martin's car and body. Whether the fault of Felder, the prosecutor or defense counsel, the correct information was never conveyed to the jury which convicted Bowman of murder or arson and was not brought to the attention of the court.

Instead, in a most perverse series of events, Felder was awarded the benefit of his plea agreement even though he breached his end of the deal. PCR, p. 2114, l. 1-14. The prosecutor played an integral role in this perversion, and the Solicitor indicated at trial that he did not revoke the plea agreement despite the false trial testimony because "it was not worth it." PCR, p. 2155, l. 1- 19. This appears to be double talk for the recognition that the prosecutor received what he really sought, a conviction, not truthful testimony.

Finally, Felder indicated that the prosecution appeared at his sentencing to urge that the very same trial judge before whom Felder perjured himself reward Felder for this false testimony. PCR, p. 694, l. 3-9. Unaware of the false nature of the testimony and encouraged by the prosecutor as a minister of justice, the judge obliged and Felder received probation for his role in the same killing that the lead investigator still believes Felder was involved in as an accessory to murder and an arsonist. PCR, p. 694, l. 10-14 & Plaintiff's 63.

This "wink wink" or unwritten deal was never revealed to the defense. Had it been, the defense would have likely used this information to impeach Felder's testimony and the State's case. PCR, p. 1316, l. 9- 25. The suppression of this information undermines confidence in the outcome and a new trial should be granted.

Ineffective Assistance of Counsel*Un-presented Evidence of Felder's Original Charge as Accessory Before the Fact to Murder*

As an additional claim regarding the evidence provided by Felder during Bowman's trial, defense counsel was ineffective for failing to adequately cross examine Felder regarding the discrepancy between his exposure on the initial charges upon which he was arrested and the charges to which he bargained to plea. While the jury heard that Felder was pleading to a reduction in charges from Accessory after the Fact to Murder and Arson, 3rd down to Accessory after the fact to Arson 3rd, the jury never heard that Felder was originally charged as an Accessory (before the fact) to Murder and Arson, 3rd. Further, the jury never heard that, at least at the time of the 2002 trial, Felder's potential exposure as an Accessory before the Fact to Murder (capital) was a sentence of death or at least a sentence of 30 years to life in prison.

When he was arrested, Felder was charged with Accessory before the Fact to Murder related to the shooting of Kandee Martin. Plaintiff's 17. Felder was also charged with Arson for the burning of her car with her body in the trunk. Plaintiff's 18. The body of the affidavit supporting the Accessory before the Fact to Murder charge clearly indicated a belief that Felder assisted Gadson in shooting Kandee Martin.

Detective Coker's testimony confirmed that this assertion was not a typographical error, but that the government actually believed that Felder was involved in Martin's death through assistance provided to Tawain Gadson. Further, even seven years after the investigation into Martin's death, Coker still believes that Felder and Gadson were involved, and this belief obviously, is quite a different version of liability for Felder than the testimony he provided in

either the guilt or penalty phases portrayed.

Defense counsel's failure to present this information to the jury falls below a reasonable standard of performance as textbook cross examination includes a recital of the potential exposure of the witness in contrast to the expected gain from testimony provided in cooperation with the government. See State v. Mizell, 563 SE2d 315 (SC 2002)(Wherein the South Carolina Supreme Court reversed a conviction where the trial court improperly excluded reference to the potential penalties facing the cooperating witness, even though this would indirectly inform the jury of the potential penalties facing the defendant.) In fact, the Mizzell court found that a witness who had not entered a negotiated plea was even "more likely to engage in biased testimony in order to obtain a future recommendation for leniency." Id. at 333. If this right to examine on these matters trumps the general rules regarding presenting sentence information to the jury, surely counsel is expected to utilize this right in a case where his client's life is on the line.

Further, trial counsel offered no strategic reason for this failure. PCR, p. 1300, l. 7- 15. Instead, he repeatedly indicated that if his cross examination should have done a better job, then he apologized to Mr. Bowman. PCR, p. 1300, l. 10-15. Counsel emphasized that this was a matter involving Bowman's life and that he should get any breaks if the performance was found lacking. PCR, p. 1303, l. 11- p. 1304, l. 25.

As far as prejudice, this failure exacerbates the failure to inform the jury of the State's long-held belief that Gadson was the shooter and that Felder assisted Gadson prior to the killing. Again, Gadson and Felder were the only two witnesses who offered direct evidence of Bowman's guilt. This testimony is suspect because the effort to incriminate Bowman also served to

exculpate the very witnesses who offered this testimony. In this regard, this is similar to the bias reviewed in the Mizzell opinion as the Supreme Court found the error there was not harmless because the cooperating witness in Mizzell was the lone eyewitness and the “only link” to the petitioners’ involvement in that case. Mizzell at 334. In Mizzell, a statement that the witness faced a long prison sentence was not enough to make the error harmless.

Here, defense counsel did not examine Felder adequately and in accordance with the law. There is no strategy supporting this failure. Had counsel’s performance been better, there is a reasonable likelihood that the outcome of the proceeding would have been different.

Un-presented Identity as Purchaser of the Gasoline used in Arson

Likewise, defense counsel was ineffective for failing to expose Felder’s identity as the purchaser of the gasoline. This is pled as an alternate claim to the Napue claim, Brady claim and Rule 29(b) claim⁷ regarding this issue. Had counsel cross-examined Felder to expose the lies presented on direct examination by the State and had the jury learned that Felder was actually the principal who purchased the gasoline instead of the accessory after the fact to this arson, the outcome of the guilt phase proceedings would have been different.

As a brief recap, it is now clear that Felder provided false testimony under oath to the jury regarding his involvement in the burning of Kandee Martin’s car and body. This information was never corrected before Mr. Bowman was convicted of murder and arson. In fact, before

⁷This Rule 29(b) claim is also pending at the time of this briefing before the trial judge in the Dorchester County Court of General Sessions. Also pending before this PCR court is a Motion to hold the PCR proceedings in abeyance pending the resolution of the Rule 29(b) issues. This Motion to hold the PCR proceedings in abeyance is based, in part, upon concerns regarding the possibility of inconsistent findings of fact as they pertain to the timing of the knowledge of Felder’s identity as the gasoline purchaser.

deliberating on Mr. Bowman's guilt or innocence, the jury never learned that Felder lied regarding this information. In fact, PCR counsel were unaware of the prosecutor's bold characterization of this testimony as a lie until Felder's deposition prior to the PCR merit's hearing. This characterization of this testimony as a lie is unequivocally reaffirmed the testimony from Felder provided at a deposition and at the PCR.

Prosecutor Bailey was pointedly questioned about whether there was any question that Felder purchased the gasoline. Bailey agreed that Felder was the purchaser. Bailey also agreed that there was no other way to characterize the testimony provided by Felder than as a lie. Bailey also asserted that he did not correct this testimony. This failure to correct this false testimony is explained more fully above.

However, the record remains unclear regarding the timing of defense counsel's awareness of Felder's identity as the gasoline purchaser. Because Felder did not provide a written statement, but instead lied multiple times to law enforcement, pre-trial, there is a possibility that defense counsel was not aware of Felder's identity as the gas purchaser. But Detective Coker's methodical investigation and pages of pointed testimony in this regard clearly demonstrate law enforcement's knowledge of this fact. This serves as the basis for the Brady claim and Napue regarding Felder's identity as the gasoline purchaser.

But if the Court finds that defense counsel did know about Felder's identity as the gasoline purchaser prior to the conclusion of the guilt phase, then counsel's failure to reveal this fact to the jury, either in the form of cross examination of Felder or Detective Coker or through the presentation of substantive evidence of identity such as the videotape, is a blatant and obvious failure to perform to reasonable standards of representation.

Again, the identity of the gas purchaser makes the claim more likely that Felder was directly involved in Kandee's death and the burning of her car and body. This does not corroborate in any manner that Bowman was involved as Bowman is not seen or referenced on the tape. Further, because Felder did not reveal his identity as the gasoline purchaser in any of his multiple examinations by law enforcement, but instead falsely minimized his role, even on direct examination during trial, the jury would be inclined to believe that Felder was covering up for his own guilt and trying to pass the same off on Bowman in an effort to curry favor with Solicitor Bailey. Finally, the exposure of the truth after Bailey's incorrect presentation to the contrary would have dealt a serious blow to the jury's belief in the credibility of the State's case and taken the wind out of the government's sails.

Failure to File Rule 29(b) Motion for a New Trial

_____ Counsel was deficient because they failed to file a Rule 29(b) motion for a new trial following the conclusion of the guilt phase of the trial if that is when counsel learned that Felder lied when he intentionally omitted that he purchased the gasoline used in the arson after he left the apartments in Branchville instead of traveling to McAlheny Road and Nursery Road as he testified. Counsel testified at PCR that he knew that Felder was the purchaser of the gasoline. However, it is unclear as to when he became aware of this fact as the prosecutor testified at the PCR hearing that he, himself, was unaware of this lie until after Bowman's trial for the murder and arson charges.

If counsel became aware of this falsehood post-verdict in the guilt phase, but prior to the conclusion of this obligation as trial counsel, then counsel should have filed a SCRE Rule 29(b) Motion for a New Trial. Counsel had no strategic reason for this failure as he readily admits that

Bowman always maintained his innocence to this charge. Further, Felder's testimony was clearly false.

Direct physical evidence of Felder as the gas purchaser is consistent with law enforcement's original theory that Felder assisted Gadson in the killing of Kandee Martin and Felder committed the arson as the principle. Nothing about the fact Felder is viewed on tape provides any proof of Marion's guilt. Instead this information exculpates Marion by inculpating Felder in a manner in never portrayed to the jury.

Thus, but for counsel's deficient performance, there is a reasonable likelihood that Marion Bowman would not have been convicted of murder and arson.

Hiram Johnson-Grounds M(13 & 14), T(1-3, 6 & 7)

Mr. Bowman should receive a new trial because of both Brady violations and ineffective assistance of counsel claims related to the testimony presented at trial by Hiram Johnson.

Brady Violation*Undisclosed Pending Charges in the First Judicial Circuit*

Mr. Bowman should receive a new trial because the prosecution suppressed information regarding the receiving stolen goods, grand larceny and burglary second degree charges pending against Mr. Johnson at the time he testified as a government witness. Plaintiff's 48 and 71. To begin, Mr. Bowman was prosecuted by Solicitor Walter Bailey of the First Circuit Solicitor's Office. This office oversees all prosecutions in State court which originate in Dorchester, Orangeburg, and Calhoun Counties.

While Mr. Bowman lived in Orangeburg County, he was prosecuted in neighboring Dorchester County as that is where the evidence presented indicated that the killing of Kandee Martin and the burning of her car occurred. Nonetheless, Solicitor Bailey oversaw prosecutions in both counties. This is significant because of the testimony presented by Hiram Johnson.

Hiram Johnson testified as a government witness in the guilt phase of Bowman's trial. The main thrust of his testimony concerned Mr. Bowman's possession of Kandee Martin's vehicle in the time period between her killing and the burning of the vehicle. Johnson also testified that he heard Bowman confess to killing Kandee and relayed this statement by indicating Bowman said: "I killed Kandee, heh, heh, heh." See Trial, p . 4068 l. 6.

Johnson never indicated either on direct or cross that he cut a deal with the prosecutor's office. Further, he never indicated any bias to testify favorably for the State. Instead his

testimony was presented as if he was a friend of Bowman's with no bias to curry favor with the prosecution. The prosecutor argued in closing to the jury that: "You hadn't heard any testimony about Hiram Johnson having *any* kind of charge against him or any kind of a deal with the State, any reason to say something wasn't true." Trial, p. 4474, l.8-11 (emphasis added).

Further, the prosecution provided a copy of Johnson's rap sheet to Bowman's defense counsel. This rap sheet was devoid of reference to any charges pending in the jurisdiction of Solicitor Bailey's office. PCR, p. 1009, l. 3-p. 1010, l. 7. This rap left defense counsel with the impression that Johnson had no other charges pending. (PCR, p. 1369, l. 3-8 & p. 1371, l. 20-25)

In fact, Hiram Johnson did have charges pending within the First Judicial Circuit. While these charges were both magistrate level and general sessions level charges, they were all pending within the Orangeburg General Sessions Court at the time of Bowman's trial. Thus, Solicitor Bailey and his office were well aware of the pendency of these charges.

Further, Johnson had legal representation on these charges. This representation was conducted by either Mr. John O'Leary or his associate counsel, Will Bryant. This representation originated with a lawsuit Mr. Johnson filed against the Orangeburg County Sheriff's Department related to Johnson's brain injury suffered following a shooting incident.

Bowman's defense counsel expressed concern about the suppression of this evidence when he was made aware, at the PCR hearing, of the charges then pending against Johnson. Counsel even conceded the appropriateness of this type of cross-examination and the effectiveness of a display of this bias. This was true even though defense counsel expressed concern about his ability to delve into such an examination if he had been provided such documents.

This suppressed evidence is material because of the significance attached to Johnson's testimony concerning Bowman's alleged confession. The bias exposed by revelation of these charges is increased when one considers that Johnson first spoke of this alleged confession at the Bowman's trial. He never mentioned this alleged confession in his written statement, which was taken prior to the existence of the charges against him and the bias these charges created.

The suppression of this evidence undermines confidence in the outcome of the case. This suppression hamstrung the efforts of defense counsel in preparing for cross of Johnson and limited counsel's ability to expose the serious bias. Instead, the State presented the testimony of Johnson as an independent witness with nothing to gain.

Undisclosed "Wink Wink" deal between Johnson and 1st Circuit Solicitor

Bowman also deserves a new trial because the State suppressed evidence of a "wink wink" deal into which it entered with Hiram Johnson and his attorney. This information was material to the impeachment of Johnson's testimony. Finally, the suppression of this information undermines confidence in the outcome because it limited the defense counsel's ability to conduct meaningful cross-examination and shielded the jury from the bias which has now been exposed.

As stated above, the defense counsel requested all "wink wink" deals cut between the State and cooperating witnesses. For the most part, written deals were provided to defense counsel pre-trial, with the exception of the deal cut with Felder. However, no "wink wink" deals were ever revealed.

Instead the State hid what is now obviously an implicit deal between the prosecutor's office and Mr. Johnson. As a matter of timing, Mr. Johnson was questioned regarding the information concerning Kandee Martin's death at least three times before May, 2001. The first

questioning occurred at the Branchville Police Department. Next, Mr. Johnson was questioned at his father's place of business which was a tire store/fish market. Finally, Johnson provided a written statement to Detective Coker on April 5, 2001. See Plaintiff's 33.

Detective Coker was cognizant of all of these statements and was involved in the decision to question Johnson. In fact, Coker indicated at the PCR hearing that it would have been possible to charge Johnson with felony Possession of a Stolen Vehicle charge based upon the statements Johnson provided. However, none of these statements ever provided any reference to the alleged confession of Marion Bowman to the killing of Kandee Martin.

Instead, Johnson provided this information for the first time during his testimony in the guilt phase of Bowman's trial. Bowman's counsel confirmed that testimony about this alleged confession was the most damning piece of evidence provided by Johnson at trial. (PCR p. 1386, l. 22-25 & p.1387, l. 1-4) Trial counsel further confirmed that any information which could impeach Johnson would be useful to counter this alleged confession. (PCR p. 1388, l.8-9)

However, counsel did not know that following the three interviews of Johnson, Prosecutor Bailey's office decided to charge Johnson with several crimes. However, these crimes was not related to the stolen vehicle charge for his part in the constructive possession of Kandee Martin's vehicle. Instead, Johnson was charged with Burglary, Grand Larceny and Receiving Stolen Goods less than or equal to \$1,000.00. See Plaintiff's 48 & 71.

These are serious charges and allegations of acts of moral turpitude. The prosecutor did not conflict these charges to the Attorney General office, but instead decided to maintain authority over the felonies and assume concurrent jurisdiction over this misdemeanor charge. This move enabled Prosecutor Bailey to exert more direct control over the disposition of the

case. These charges remained pending until after Bowman's conviction.

None of this development was revealed to defense counsel for Bowman. Instead this matter remained pending throughout the time of Johnson's testimony as a witness in the government's case in chief in the guilt phase of Bowman's trial. Only during the year following Bowman's conviction and death sentence, was the misdemeanor charge remanded by the prosecutor's office to magistrate court. More than two years later the felony charges were dismissed, outright.

This pattern of conduct creates a clear indication of plea agreement entered between the State and Johnson and his attorney. Because this agreement is not written or otherwise memorialized, this becomes a classic "wink wink" deal. The suppression of this evidence undermines confidence in the outcome of Bowman's proceedings in the trial court.

Ineffective Assistance of Counsel

No Cross Regarding Absence of Bowman's Alleged Confession in Johnson's Prior Statements

Bowman should also receive a new trial because his trial counsel's performance was deficient related to the examination of Hiram Johnson. Specifically, counsel was defective in failing to impeach his testimony concerning the alleged confession because of the prior inconsistent statements Johnson provided to the police. Further, counsel failed to impeach Johnson with the fact he faced criminal liability by virtue of his constructive possession of Kande Martin's stolen vehicle. But for these errors, there is a reasonable likelihood that the outcome of the proceedings would have been different.

As mentioned above, Johnson testified that Bowman confessed to killing Kande Martin.

However, Johnson only revealed this for the first time during Bowman's trial. More interestingly, Johnson never revealed any of this information to law enforcement during his previous three interviews.

There is no strategic reason for this failure. In fact, counsel conceded that this alleged confession was the most damaging part of Bowman's testimony. Exposure of the fact that the feeble-minded Johnson only recalled this alleged statement more than a year after his first three interviews with law enforcement would have caused the jury hesitation when determining the credibility to be attached to Johnson's testimony.

But for this error, the outcome of the proceedings would have been different.

No Possession of Stolen Vehicle Charge

Counsel was also ineffective for failing to examine Johnson regarding his criminal liability for his constructive possession of Kandee Martin's stolen vehicle.

Johnson's testimony also indicated that he knew he was riding in Martin's stolen car during the night and early morning of February 16 and 17, 2001. In fact, he informed police in the first two interviews that he wore brown cotton work gloves to prevent leaving any prints on the inside of the vehicle. Detective Coker recalled traveling to Johnson's house to retrieve these gloves. These gloves were introduced into evidence.

Both Detective Coker and lead defense counsel, who was a former law enforcement officer, conceded that a valid charge could have been made against Johnson under the theory of constructive possession or the hand of one hand of all theory. Certainly Johnson carried a sufficient mens rea as evidenced by his wearing of the gloves. Further, his actions in wearing the gloves were an affirmative physical act sufficient to trigger the actus rea concerns. Finally, such

a charge would have exposed Johnson to felony liability.

Counsel had no reason to refrain from asking Johnson about this liability created by his version of the events of February 16-17, 2001. In fact, this would have exposed the bias of Johnson to accommodate the State. Not only was Johnson attempting to avoid criminal liability for the Burglary, Grand Larceny, and Receiving Stolen Goods charges, but he was now also avoiding felony liability for his possession of Kandee Martin's stolen car.

Had the jury heard this information there would have been reason to hesitate to believe Johnson's testimony regarding the alleged confession of Bowman. This is especially true when this error is considered in conjunction with the deficient exposure of the three prior inconsistent statements which excluded reference to this alleged confession. Thus, but for this error, there is a reasonable likelihood that the outcome of the proceedings would have been different.

Ricky Davis-Grounds

Brady Claim for Failure to Provide Exculpatory and Impeaching "Sam Memo"

Mr. Bowman also deserves a new trial because of the suppression of an explosively exculpatory and impeaching memo compiled by an investigator with the prosecutor's office. The contents of this memo document an interview conducted by Sam Richardson, the investigator for prosecutor Bailey, of an individual named Ricky Davis. See Plaintiff's 67. This interview was conducted prior to trial at the Lieber Correctional Institution.

Materiality

The material nature of this suppressed "Sam Memo" is obvious because the contents are exculpatory on the issue of Bowman's guilt as the shooter of Kandee Martin. Further, the materiality also relates to the impeachment value given the State's reliance upon James Tawain Gadson as the sole eyewitness to the killing. Details of the suppressed items best support this contention.

During this interview, Ricky Davis informs Sam that he overheard James Tawain Gadson confess to shooting Kandee Martin in the head with a .380 hand gun. This memo is detailed in that it indicates that Gadson's confession occurred on the A-Side table in the presence of 4 or 5 other inmates. Further, Ricky Davis informs Sam that he wrote a memo documenting this confession on August 6, 2001. See Plaintiff's 11. In fact, Ricky Davis even provides Sam with details noting that approximately three weeks pass between the time Ricky Davis heard Tawain Gadson's confession and the time he wrote this down.

Significant about this "Sam Memo" is that this entire interview was conducted with no reason for Ricky Davis to lie to Sam. As noted above, Sam was an investigator for Walter

Bailey, the prosecuting attorney and elected prosecutor over the entire First Judicial Circuit. In fact Bailey's office was the very same office responsible for prosecuting Ricky Davis and incarcerating him for 20 years for an Armed Robbery charge. Further, Bailey's office also held the power to revive the prosecution of another Armed Robbery charge within the First Judicial Circuit which was dismissed with leave to restore.

Also, Marion Bowman was not housed within the South Carolina Department of Corrections (SCDOC), Lieber Facility, at the time Sam interviewed Ricky Davis. To the contrary, Marion Bowman was still housed in the local Dorchester County Detention Center. Marion Bowman was never held in the SCDOC pre-trial. Thus, Bowman exerted no influence over Ricky Davis' statements to Sam Richardson.

Further, Sam's memo indicates that Marion Bowman never coerced Ricky Davis into providing a false statement regarding James Tawain Gadson's confession to the shooting of Kande Martin. Instead, Ricky Davis clearly indicates that Bowman told him "If you heard all this, write it down." This is consistent with the actions of an innocent person who desires for a reluctant, but important witness to come forward.

This Sam Memo is consistent with several other items which dovetail to form strong defense evidence of an exculpatory nature, none of which were presented to the jury. First, the Sam Memo is consistent with the Ricky Davis memo which is referenced by Davis when speaking to Sam. Further, the Ricky Davis memo and the Sam memo both mention that Davis and Gadson were housed on A-Side together. The DCDC records introduced at PCR prove that Gadson was in fact housed on A-Side. See Plaintiff's 41.

Also, Detective Coker's notes confirm that Davis was "in cell block with Tawain

Gadson.” See Plaintiff’s 45. Further, the Sam memo is consistent with other information contained in Detective Coker’s narrative. As Coker explained at the PCR hearing, Tawain was told to “take Kandee’s car because Kandee owed them money.” This is eerily similar to the Sam memo reference that “they thought she was wired and he[Tawain Gadson] shot her in the head with a .380. See PCR, p. 919, l. 15-17 and Plaintiff’s 67.

The Ricky Davis memo is also consistent with multiple pieces of evidence suggesting that Tawain Gadson was in the habit of using Marion Bowman’s gun to threaten and shoot at persons and returning the gun to Marion. About two weeks before Kandee’s death, Gadson borrowed Bowman’s gun to shoot at others in the Branchville Apartment projects. See Plaintiff’s 29 & 30. Gadson confirmed this information at the PCR hearing. PCR, p. 163, l. 23-25; p. 164, l. 1-10; & 196, l. 18-25. Also, at trial, as referenced in the Bowman direct appeal opinion from the South Carolina Supreme Court, Marion Bowman believed that Tawain Gadson had stolen his gun or moved this gun the very morning of Kandee Martin’s death. State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (Pages 380-381).

Suppression by the Government

Prosecutor Bailey admits he did not provide the Sam memo to defense counsel. PCR, p. 2151, l. 25- p. 2152, l. 2. Defense counsel was shocked to read the Sam memo. In fact, defense counsel admitted that he would have drastically altered his trial strategy had he been provided this memo. PCR p. 1339, l. 6-11.

At the PCR, counsel stated: “If I had known about the second interview by law enforcement [Sam memo], I would have put Mr. Richardson up on the stand if I had known about it.” PCR, p. 1339, l. 6-11. Counsel took such an altered position because of his opinion of

Sam Richardson's integrity, stating: "...Sam is probably the, I don't ever wish to bolster anybody, but he is one of the politest, most educated young men I have ever met in my life and he was the Solicitor's investigator..." PCR, p. 1674, l. 4-24. Instead, without this memo, defense counsel presented no exculpatory evidence in the defense of Bowman during the guilt phase of the trial and did not attempt to impeach Gadson trial testimony or the State's theory with evidence of this confession.

Thus, the suppression of the Sam memo undermines confidence in the outcome of Bowman's trial proceedings.

Ineffective Assistance of Counsel claims

Failure to Present Ricky Davis' testimony regarding Tawain Gadson's confession

Failure to present Tawain Gadson's location on A-side

Failure to present Coker's notes confirming that Gadson and Davis together on A-side

Marion Bowman should receive a new trial because his attorneys were ineffective in his representation because they failed to present evidence related to Tawain Gadson's confession. This failure falls below the acceptable standard for a reasonable attorney. But for this deficient performance, the outcome of the proceedings would have been different.

It is evidence that Ricky Davis provided a memo detailing James Tawain Gadson's confession to the murder of Kandee Martin. See Plaintiff's 11: Ricky Davis admitted at both a pre-PCR deposition and in the PCR merits hearing that this memo was drafted in his handwriting. This memo was in the hands of both law enforcement and defense counsel prior to Marion Bowman's trial.

Both defense counsel knew of the existence of this letter. First, Marva Hardee-Thomas

admitted that this letter contained her handwriting on the un-executed notary provision at the bottom of Plaintiff's 11. PCR, p. 1564, l. 18-24. Secondly, prosecutor Bailey provided both counsel a copy of this letter, as referenced by his May 7, 2002 letter, written less than a week before jury selection began.

Norbert Cummings then engaged a private investigator to speak with Ricky Davis. Marva Hardee-Thomas testified at the PCR hearing that she never spoke to Bowman about Ricky Davis.⁸ PCR, p. 1562, l. 8-11 & p. 1564, l. 11-17. Following the interview by the private investigator, Cummings declined to present Ricky Davis' testimony.

However, this was deficient performance because the veracity of portions of the Ricky Davis statement are borne out by other evidence. To begin, the Ricky Davis memo indicates that the conversation took place while both were housed in A-side of the DCDC. Alvin Coker's notes also verify that Ricky Davis was housed on the cell block with Tawain Gadson. Plaintiff's 45. Finally, Ricky Davis' memo is correct that Gadson was actually housed on A-Side, according to the DCDC records. Plaintiff's 41.

Counsel was deficient for failing to present this information as Ricky Davis provided concrete evidence of Tawain Gadson's guilt as the killer of Kandee Martin. This would have dovetailed perfectly with the un-presented information contained in the arrest warrant and indictment of Gadson. Finally, although withheld from the defense, the Sam memo supports the ineffectiveness of the failure to present Ricky Davis' testimony and the corroborating information regarding the housing of Davis and Gadson, now that the truth of Gadson's

⁸As noted in a later portion of the brief, Hardee-Thomas operated under a serious conflict of interest because she simultaneously represented Ricky Davis and Marion Bowman.

confession is further corroborated.

But for these errors, there is a reasonable likelihood the outcome of the proceedings would have been different.

Detective Alvin Coker-Grounds M(7, 9, 11,12, 13 & 14)

Marion Bowman deserves a new trial due to the ineffective assistance counsel related to the testimony of Alvin Coker. Detective Coker was the lead investigator for the murder of Kandee Martin. Coker testified during the guilt phase of Bowman's trial.

Ineffective Assistance of Counsel

Gadson lied about owning a .380 firearm

Marion deserves a new trial because his counsel failed to cross examine Detective Coker about Gadson's lie concerning his ownership of a .380 firearm. This lie appears in Detective Coker's report. This information possesses both impeachment and exculpatory value.

Gadson was questioned several times by law enforcement concerning his involvement in the death of Kandee Martin. His responses ranged from a complete denial of any knowledge of the death to full knowledge of her death at the hands of Marion Bowman. Included within this questioning was the issue of Gadson's ownership of a firearm.

Evidence collected at the crime scene indicated the police were looking for a .380 firearm. The police also learned that Gadson was the owner of a High-Point .380, as documented by the gun purchase records required by federal law. Thus, Detective Coker's investigative report clearly references the government's belief that Gadson's .380 was suspected as being the murder weapon.

However, Gadson was not forthcoming with the police concerning his ownership of this type weapon. Instead, Gadson informed the police that he owned a 9 millimeter handgun. PCR trial, p. 911, l. 1-6. This information is listed in Detective Coker's report as a statement made by Gadson.

Although dealt with more specifically in the portion of the brief regarding ballistics, testimony is unclear about the link between a bullet found at the crime scene and a Highpoint .380 attributed to Marion Bowman. Obviously, because Gadson's gun and the gun attributed to Bowman are of the same make and model, the class and subclass characteristics are the same. Finally, although the trial testimony from the State's ballistics expert indicates the casings were fired by a gun attributed to Bowman "to the exclusion of all other firearms," it appears that this match was overstated, according to information derived from the PCR hearing.

Because both the false statement and the gun ownership records were provided to defense counsel, pre-trial, the government did not withhold evidence of this exculpatory and impeaching information. Gadson never came clean about this falsehood. However, because defense counsel failed to examine Detective Coker about this lie concerning Gadson's ownership of the .380, the jury never learned about this important and relevant information.

There is no strategic reason for this failure. To the contrary, this information supports the very defense theory used at trial: that someone other than Bowman killed Ms. Martin and that Gadson was this shooter using his own Highpoint .380. But for this deficient examination of Detective Coker by trial counsel, the outcome of the proceedings would have been different.

Failure to Bring Out Statements Heard by Bruce McLean

Marion Bowman deserves a new trial because his trial counsel never cross-examined Det. Coker about the E-Z Horizon videotape evidence wherein Bruce McClean states he overhears people talking about killing a girl and wanting to dispose of her body and her car. PCR Trial, p. 922, 1. 2-13. This information was highly relevant because according to Travis Felder, Marion Bowman was never at the gas pumps and therefore could not be one of the "people" talking

about killing a girl and disposing of her car and body. There was no strategic reason for this failure. To the contrary, this information supports the defense's theory that someone other than Bowman killed Kandee Martin. But for this deficient examination of Detective Coker by trial counsel, the outcome of the proceedings would have been different.

Failure to expose Felder as purchaser of gasoline

As an alternate ground to the claims listed above concerning the purchase of the gasoline by Travis Felder, Marion Bowman deserves a new trial because his attorney failed to elicit information concerning Travis Felder's identity as the purchaser of the gasoline used to burn Kandee Martin's car and body.

As recounted above, Travis Felder testified falsely during the guilt phase of the trial concerning his involvement in the burning of Kandee Martin's car and body. Both the prosecutor and Felder characterize this false testimony as a lie. PCR trial, p. 685, l. 15-19 The prosecutor says there is no other way to characterize this information. PCR trial, p. 2114, l. 7-15.

Detective Coker testified that he knew that Felder was the purchaser of the gasoline. This testimony was developed, *ad nauseam*, at the PCR hearing and appears in the above portion of the brief concerning Travis Felder. Defense counsel Cummings also testified at the PCR hearing regarding his knowledge of Felder as the purchaser of the gasoline.

Cummings specifically indicated that he was provided the videotape from the EZ Horizon store. This tape documents Felder's purchase of the chips and dip at approximately 3:00 a.m. This purchase is followed fifteen minutes later by Felder's purchase of gasoline.

A post-it note documents the chips and dips purchase time. This note appeared in Detective Coker's file, in Detective Coker's handwriting, attached to the Travis Fedler booking

report. See Plaintiff's 50. Detective Coker had no reason to place this post-it note to this report to document the chips and dip purchase at any time after Felder's guilt phase testimony and Coker did not modify his notebook following the conclusion of the trial.

The video clearly indicates that the purchaser of the chips and dip at 3:00 am and the purchaser of the gasoline at 3:15 am are the same person because the purchaser is wearing the same clothing. Further, the store attendant remarks that the purchaser is back so soon. Coupled with the testimony from Felder about the chips and dip purchase, arguably, defense counsel was aware of Felder's identity as the purchaser of the gasoline.⁹

Armed with this knowledge, defense counsel should have examined Detective Coker, and Felder, about this gasoline purchase. In fact, proof of Felder's identity as the purchaser and Coker's knowledge of the same would have provided a serious blow to the case as presented by Bailey. Further, the jury could have divined that the State's witnesses were being less than forthcoming in an effort to minimize their liability by passing credit for the shooting and arson onto Marion Bowman.

This is also consistent with the State's original theory that Gadson shot Kandee Martin and that Felder provided assistance before the fact. See Plaintiff's 4, 17 & 18. This is consistent with Detective Coker's belief that Gadson and Felder both participated in the burning of the car. See PCR transcript. This is directly in contradiction to the case presented to the jury.

Thus, but for Cummings deficient performance in the examination of Detective Coker,

⁹This logic equally supports the position that the prosecutor was also aware of Felder's identity as the gasoline purchaser despite the prosecutor's claims otherwise. Because of this imputed knowledge and the false nature of this testimony, the prosecution clearly allowed false testimony to go uncorrected, notwithstanding any claim of ineffective assistance of counsel.

there is a reasonable likelihood that Marion Bowman would not have been convicted of murder or arson.

Sworn Statements to other tribunals

Defense counsel also failed to provide the effective assistance of counsel to Marion Bowman when they failed to elicit information concerning the other sworn statements and official positions taken by Detective Coker during the investigation of this case. This information was clearly within defense counsel's knowledge. Had the performance been up to par, there is a reasonable likelihood that the outcome of the proceedings would have been different.

Detective Coker provided several sworn statements or took official positions regarding the State's theory of Kandee Martin's death. Chief among these were the arrest warrant affidavits for James Tawain Gadson and Travis Felder. Also, included were the indictments for Gadson and Felder.

The chief statement not revealed to the jury was that Coker swore before a magistrate that James Tawain Gadson "did shoot and kill one Kandee Martin." See Plaintiff's 4. This is consistent with the indictment language which states, in part, that Gadson did "...kill one Kandee Martin by means of shooting the victim in the head..." See Plaintiff's 1. Coker was the sole witness to the grand jury for this indictment and because the indictment was "true billed" without correction or amendment, it is assumed that Coker's presentation to the grand jury was consistent with this language.

This information was consistent with the defense theory that Gadson was the shooter. Further, this information was consistent with other information which was either not provided to

defense counsel or not presented to the jury including information contained in the Sam memo and the Ricky Davis memo. This information is also consistent with the terms of Gadson's plea agreement with the State where Gadson remained liable for death penalty murder if he did not "...cooperate in the investigation and prosecution of Marion Bowman, Jr...." See Plaintiff's 3.

Also, Coker swore to a magistrate that Felder was an "...accessory to felony (murder/arson) in violation of section 16-1-40..." because he and James Tawain Gadson "took the victim to a remote area of Dorchester county where they shot and killed the victim (Kandee Martin). See Plaintiff's 17. Coker further swore that Felder "...then burned the car and the victim's body to destroy evidence." Plaintiff's 18. Finally, Felder's indictment notes the assertion that Coker presented to the Grand Jury, months later, that Felder did "...willfully, unlawfully and maliciously burn or cause to be burned, with intent to destroy, a car belonging to Cordelia Martin and/or Kandee Martin." Plaintiff's 43.

Because counsel never examined Coker with regard to these assertions and statements, the jury never learned of the State's endorsement of these alternate theories involving Martin's death. Instead, counsel for Bowman was left to speculate in closing, based upon no evidence presented by the defense in the guilt phase of the trial, that someone else killed Kandee Martin. There is no strategic benefit to this failure.

Had counsel performed in a reasonable manner and presented this information to the jury, there is a reasonable likelihood that Marion Bowman would not have been convicted of murder or arson, third degree.

Conflicts of Interests-Grounds N, O, & R

Marion Bowman should also receive a new trial because one of his attorney's labored under active conflicts of interest which deprived Marion Bowman of his right to the effective assistance of counsel. These conflicts related to two main issues, one is the fact that the Dorchester County Public Defender's office represented both Marion Bowman and Ricky Davis and the other is that this office represented both Marion Bowman and James Tawain Gadson. Because of this active representation of conflicting interests and the adverse effect upon his case, prejudice is presumed.

Alternately, counsel's performance was adversely affected by the conflict. Further, petitioner's counsel labored under conflict so serious as to be unwaivable. Following an introductory section regarding the general rules of conflicts, the different conflict issues present in Bowman's case will be reviewed.

Introduction

The Sixth Amendment provides that a criminal defendant shall have the right to "the Assistance of Counsel for his defence." Sixth Amendment, United States Constitution. This right has been accorded, the courts have said, "not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." United States v. Cronin, 466 U.S. 648, 658 (1984). However, assistance which is ineffective in preserving fairness does not meet the constitutional mandate, see Strickland v. Washington, 466 U.S. 668, 685-686 (1984).

As a general matter, a defendant alleging a Sixth Amendment violation must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland at 694. The courts have traditionally spared the

defendant the need of showing probable effect upon the outcome, and have simply presumed such effect, where assistance of counsel has been denied entirely or during a critical stage of the proceeding. When that has occurred, the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary. See Cronic at 658-659; also see Geders v. United States, 425 U.S. 80, at 91 (1976) and Gideon v. Wainwright, 372 U.S. 335, 344-345 (1963). But only in "circumstances of that magnitude" do the courts forgo individual inquiry into whether counsel's inadequate performance undermined the reliability of the verdict. Cronic, at 659, n. 26.

Circumstances of that magnitude may arise when an accused's counsel actively represents conflicting interests. Mickens v. Taylor, 535 U.S. 162, at 166 (2002). As an initial matter, the courts have considered "joint representation of conflicting interests" to be "inherently suspect." Mickens, at 168 explaining underlying rationale of Holloway v. Arkansas, 435 U.S. 475 (1978). And Mickens suggests that multiple representation of interests which are not aligned are more closely scrutinized than multiple representation of interests which are aligned. Mickens, at 168. Further, "(j)oint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing." Wheat v. U.S., 486 U.S. 153, at 160, citing Holloway, at 489-490.

Multiple Representation Scenario

In a multiple representation setting, absent an objection, a defendant may prevail in a conflict claim by proving the conflict "actually affected the adequacy of his representation." Cuyler v. Sullivan, 446 U.S. 335, at 348-349. The test formulated in Cuyler v. Sullivan is then a two part burden on a petitioner seeking relief to show 1) that trial counsel represented conflicting interests and 2) that the conflict adversely affected the attorney's performance. Thus, a

competing interests' influence upon trial counsel's strategic decisions suggests that an actual conflict of interest exists. Mickens, at 170. However, it must be cautioned that a showing of adverse effect does not require a probable effect upon the outcome or verdict. Mickens, at 174.

Actual Conflict

An actual conflict of interest "occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Fuller v. State, 557 S.E2d 664, 665 (SC 2001). In Mickens, the majority concluded that a defendant who demonstrates that counsel actively represented conflicting interests has also established the constitutional predicate for his claim of ineffective assistance of counsel. Mickens, at 175 citing Cuyler v. Sullivan, at 350 ("[U]ntil, a defendant shows that his counsel *actively represented* conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." (emphasis added in Mickens)). The Mickens court also noted the test in Cuyler v. Sullivan has been applied "when representation of the defendant somehow implicates counsel's personal or financial interests, including a book deal, United States v. Hearst, 638 F.2d 1190, at 1193 (9th Cir. 1980), (or) a job with the prosecutor's office, Garcia v. Bunnell, 33 F.3d 1193, at 1194-1195 & 1198, n.4 (9th Cir. 1994)." Mickens, at 174. In fact, the Ninth Circuit has held that there is no distinction in the test used in cases of conflict between multiple client representation and a conflict between a client and an attorney's personal interests. Hearst, 638 F.2d 1190, at 1193 (9th Cir. 1980).

Adverse Effect

However, there exists a split in the federal circuits regarding evidence of adverse effect. Some circuits hold that whenever counsel failed to pursue a "plausible" defense "that was inherently in conflict with or not undertaken due to the attorney's other loyalties," there is

sufficient evidence of adverse effect to show a Sixth Amendment violation. See McFarland v. Yukins, 356 F.3d 688, 706 (6th Cir. 2004), citing Winkler v. Keane, 7 F.3d 304, 309 (2nd Cir.1993); U.S. v. Gambino, 864 F.2d 1064, 1070 (3rd Cir. 1988); United States v. Fahey, 769 F.2d 829, 836 (1st Cir.1985). But other circuits also require that the foregone defense be “reasonable.” McFarland, citing Freund v. Butterworth, 165 F.3d 839, 860 (11th Cir.1999) (en banc) (showing of adverse effect requires proof of tactic foregone, of reasonableness of tactic on facts, and of a causal link between conflict and decision to forego tactic); Mickens, 240 F.3d 348, at 361 (4th Cir. 2001) (same) denial of habeas affirmed in Mickens v. Taylor 535 U.S. 162 (2002). Finally, the Fourth Circuit has held that a petitioner has adequately demonstrated adverse effect “if the attorney took action on behalf of one client that was necessarily adverse to the defense of the other or failed to take action on behalf of one because it would adversely affect the other.” Williams v. French, 146 F.3d 203, 212 (4th Cir. 1998), cert. denied, 525 U.S. 1155, 119 S. Ct. 1061, 143 L. Ed. 2d 66 (1999).

Further, petitioner may prevail in a conflict claim even if trial counsel does not admit a causal link between a conflict of interest and choice of action on behalf of his client. In fact, a petitioner does not have to produce direct evidence, such as the lawyer's testimony, that the lawyer chose to do one thing rather than another in order to accommodate another client's interests. McFarland, at 706. Instead, causation can be proved circumstantially, through evidence that the lawyer did something detrimental or failed to do something advantageous to one client that protected another client's interests. McFarland, at 706.

Waiver

Introduction

When an accused's counsel operates under a conflict of interest, a trial court may allow an attorney to proceed despite this conflict "if the defendant makes a voluntary, knowing, and intelligent waiver." Garcia v. Bunnell, 33 F.3d 1193, 1195 (9th Cir. 1994). A waiver is an intentional relinquishment or abandonment of a known right or privilege. Johnson v. Zerbst, 304 U.S. 458, at 464 (1938). Further, the validity of the waiver of an accused's Sixth Amendment rights depends "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Edwards v. Arizona, 451 U.S. 477, 482 (1981). Also, the protecting duty of the court imposes a "serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." U.S. v. Ellison, 798 F.2d 1102, at 1108 (7th Cir. 1986)(internal citations omitted). Finally, a reviewing court must "indulge every reasonable presumption against the waiver of fundamental rights." United States v. Allen, 831 F.2d 1487, 1498 (9th Cir. 1987) (internal citation omitted).

The federal appellate courts have identified several factors to be examined regarding the validity of a waiver involving trial counsel's conflict of interests. Also, the federal courts have identified situations where a conflict is so severe that a trial court should refuse to accept or override a waiver, even if the defendant validly waives the conflict. Further, as stated by Chief Justice Rehnquist in the majority opinion in Wheat v. U.S., "(n)ot only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation." Wheat v. U.S., 486 U.S. 153, at 160

(1988).

Factors of a Valid Waiver

As an initial matter, to waive the right to conflict-free representation, a "defendant must be provided with sufficient information or advice to permit choice between meaningful options." U.S. v. Ellison, 798 F.2d 1102 at 1108 (7th Cir. 1986). The first task of the trial court is to alert the defendants to the substance of the dangers of representation by an attorney having divided loyalties in as much detail as the court's experience and its knowledge of the case will permit. U.S. v. Curcio, 680 F.2d 881, 888-890 (2nd Cir. 1982). A defendant must be informed, and he must have the capacity for making a rational decision. Id.

In assessing the level of each defendant's comprehension of the dangers, the court should devise a variety of methods for gaining the necessary insights. Curcio. Questions designed to elicit from the defendant a narrative statement of his understanding are preferable to questions designed to elicit mere "yes" or "no" answers. Id. Further, the court's inquiry in each instance should take place after the defendant is provided reasonable time to digest and contemplate the risks posed by the conflict. Curcio, 890 ("[T]he court should advise the defendant of his right to separate and conflict-free representation, instruct the defendant as to problems inherent in being represented by an attorney with divided loyalties, allow the defendant to confer with his chosen counsel, encourage the defendant to seek advice from independent counsel, and allow a reasonable time for the defendant to make his decision."). Finally, a court reviewing the validity of a waiver should consider whether an explanation of the risks was presented to the accused, whether the explanation was given by the trial court as opposed to conflicted counsel and the time for the accused to consider the matter. U.S. v. Iorizzo, 786 F.2d 52, at 59 (2nd Cir. 1986).

Also, upon discovery that a defense attorney suffers from only a *potential* conflict of interest, such that rational defendant could knowingly and intelligently desire conflicted attorney's representation, a court should "advise defendant of dangers arising from particular conflict; determine through questions that are likely to be answered in narrative form whether defendant understands those risks and freely chooses to run them; and give defendant time to digest and contemplate risk after encouraging him to seek advice from independent counsel." U.S. v. Levy, 25 F.3d 146 (2nd Cir. 1994). Further, waiver of defense "counsel's potential conflict of interest does not foreclose possibility that actual conflict could adversely have affected adequacy of representation and thus violated defendant's Sixth Amendment right to counsel, though the conflict must be real, not some attenuated hypothesis having little consequence to adequacy of representation." U.S. v. Fahey, 769 F.2d 829 (1st Cir. 1985).

Finally, a trial court may "enforce ethical rules governing the legal profession with respect to both client-attorney communications and conflict-free representation, regardless of any purported waiver by defendant, when necessary to protect the important candor that must exist between client and attorney and to engender respect for the court in general." U.S. v. Moscony, 927 F.2d 742 (3rd Cir. 1991). The trial court may enforce the ethical rules by overriding a defendant's purported waiver when an actual conflict is "so egregious that no rational defendant would knowingly and voluntarily desire the attorney's representation" and cannot be waived. U.S. v. Martinez, 143 F.3d 1266 (9th Cir. 1998) citing U. S. v. Lussier, 71 F.3d 456, 461 (2d Cir. 1995).

New Waiver Required when Potential Conflict becomes Actual Conflict-Thomas v. State

In Thomas v. State, the Supreme Court of South Carolina reversed the drug trafficking conviction of Malissa Thomas based upon an actual conflict of interest which adversely affected her attorney's performance. Thomas v. State, 551, S.E.2d 254 (SC 2002). The trial attorney represented both Thomas and her husband as co-defendants regarding the drug charge. At the beginning of the case, the attorney obtained a waiver regarding the potential conflict posed by the joint representation of the co-defendants. However, the Supreme Court reversed the denial of post conviction relief, finding that "(p)etitioner should have been given another opportunity to waive the conflict, if she so chose", when the actual conflict arose. Thomas, 256 The Supreme Court continued that a voluntary waiver must also be knowingly and intelligently made and that an accused can not waive what she does not know. Thomas, 256 citing Hoffman v. Leeke, 903 F.2d 280, 289 (4th Cir. 1990).

Thus, a waiver of an attorney's conflict may preclude an accused from later complaining about ineffectiveness related to the waived conflict. However, the waiver must be voluntarily, knowingly and intelligently entered and a presumption exists against waiver. Thus, not all purported waivers are constitutionally valid or effectively made.

Marva Hardee Thomas' Simultaneous Representation of Bowman and Ricky Davis

The most direct and egregious conflict involves Marva Hardee-Thomas' simultaneous representation of both Ricky Davis and Marion Bowman. Mrs. Thomas represented Ricky Davis for two separate Armed Robbery events as a Dorchester County Public Defender. Plaintiff's 19-23 & Defendant's 17. This representation began following Davis' arrest in April, 2001, which was after her appointment to represent Marion Bowman. Plaintiff's 19. The representation on

one charge ended upon Davis' trial conviction in October, 2001. Plaintiff's 20.

The other armed robbery charge was also terminated that same month by a *nolle prosequere* with leave to restore. Plaintiff's 22. Ricky Davis believed at both the time of Marion's trial in May, 2002 and the time of his deposition in the Summer of 2008 that Mrs. Thomas was still his lawyer on that charge because he had not yet been informed that the charge was dismissed. PCR, p. 255-260. Both of these charges were prosecuted under the direction of Prosecutor Bailey.

Davis gave at least two statements detailing a confession made to him by James Tawain Gadson to the killing of Kandee Martin. See Plaintiff's 11(Ricky Davis memo) & 67(Sam memo). One of these statements, the Sam memo, was not provided to the defense and was given under conditions which bolster the credibility of the Ricky Davis memo because it was made to a prosecution investigator in the absence of any bias against the state. However, Mrs. Thomas did not present this testimony, even with knowledge of the Ricky Davis memo.

When questioned about this conflict between Davis' interest to curry favor with the State and Bowman's interest in presenting this testimony, Mrs. Thomas replied during the PCR that she did "... not remember talking to him [Bowman] about anything regarding Ricky Davis." PCR, p. 1562, l. 8-11. She later stated that she did not "... remember even discussing Ricky Davis. Why would I have discussed Ricky or anybody else with Mr. Bowman?" PCR, p. 1564, l. 11-17. \

Ms. Thomas knew that Ricky Davis provided a statement favorable to Marion Bowman. Plaintiff's 11 & 68. She was provided the Ricky Davis memo, but not the Sam memo, by Bailey himself. Plaintiff's 68 & 11. Further, she admitted at the PCR that her handwriting appeared at the bottom of the Ricky Davis memo. Plaintiff's 11 & PCR, p. 1564, l. 24. This indicates that

she did speak to Davis about Bowman. At the time Ricky Davis wrote the memo in August, 2001, Thomas clearly still represented both Bowman and Davis.

Obviously, Mrs. Thomas was obligated to Marion at the time of Marion's trial. However, she was also obligated to Ricky Davis at the time of the trial as she indicated at the PCR hearing by stating that "I still am obligated to him [Ricky Davis]." PCR, p. 1555, l. 20-25. Ricky Davis' testimony was contrary to prosecutor Bailey's theory in Bowman's case. Because Bailey held the prosecutorial strings against Davis, the use of his testimony created a conflict between Davis' legal well-being and Marion's defense.

Thomas evidently never explained or sought a waiver of this conflict. That alone is a deficient performance of her duties. Thomas stated at the PCR when asked about explaining the conflict to Bowman or obtaining a waiver that "I didn't do that. I didn't see any reason to do that." PCR, p. 1574, l. 24-25.

This was the case even though Thomas admitted that she still had some confidence or privilege with Davis. Further, she understood that Davis was an important witness considering the information contained in the Ricky Davis memo. See Plaintiff's 11 and PCR, p. 1574, l. 4-18.

Davis did not testify at trial even though he was called to the courthouse, under subpoena, by defense counsel. No other evidence of Gadson's confession as the shooter was presented to the jury, even though this fact was documented in the Ricky Davis memo, the Sam memo, Coker's sworn statement in Gadson's arrest warrant affidavit, the body of Gadson indictment and in information obtained by Bailey from Wayne Mood.

The clear implication is that Thomas took action adverse to Marion Bowman in part

because of her allegiance and obligation to Davis. If nothing else, it appears that this conflict prevented Thomas from discussing Davis with Marion Bowman. Prejudice is presumed and a new trial should be granted.

Dorchester County's Public Defender Conflict Regarding Simultaneous Representation of Marion Bowman, Jr. and James Tawain Gadson

The State's key witness, Taiwan Gadson was represented by the Chief Public Defender of the Dorchester County Public Defender's Office, Gene Dukes. Mr. Dukes was considered the Chief Public Defender by virtue of his seniority. (PCR trial transcript page 1540, lines 3-9). At the time of the original trial, Troy Knight, Esq. was President of the Public Defender Corporation.

It was Mr. Knight who had the authority to hire and fire each of the Public Defenders in Dorchester County. Mr. Knight was the one responsible for signing the paychecks of those Public Defenders. (PCR trial transcript page 1536 lines 9-22). Ms. Marva Hardee-Thomas admits that she and Gene Dukes had a common boss on page 1546 of the PCR trial transcript lines 18 and 19.

In his capacity as president of the Public Defender Corporation, Troy Knight could determine the outcome of any particular client's representation by virtue of his authority to hire and fire each of the Public Defenders. The public defenders in Dorchester County were assigned cases/clients by a common employee of the Dorchester County Public Defenders office. That assignment coordinator's name was Kathy Rogers, and she was responsible for coordinating case assignments. (See PCR trial transcript page 1537 lines 18-25 and Plaintiff's Exhibit 12).

In this case, both Gene Dukes who represented Taiwan Gadson and Marva Hardee-

Thomas worked for the same Dorchester County Public Defender Office. Both Mr. Dukes and Ms. Hardee-Thomas had letterhead identifying them as attorneys that worked for the Dorchester County Public Defender's Office. (See PCR trial transcript page 1535 and page 1534 lines 21-25 and 1535 lines 1-25.) During the PCR trial, as found on page 1542 lines 14-18, Ms. Marva Hardee-Thomas acknowledged again that she would send out letters from her office on letterhead that said Dorchester County Public Defender in her representation of Mr. Bowman. On Page 1543 Ms. Marva Hardee-Thomas acknowledged again that both Mr. Duke's and her letterheads reflected Dorchester County Public Defender (See lines 4-10).

The Chief Public Defender's client Taiwan Gadson turned State's evidence and testified against another Public Defender's client, Marion Bowman. See below

Q: And in his capacity as Public Defender, the Chief Public Defender's client turned State's evidence against another Public Defender's client?

A: Okay.

PCR trial transcript page 1544 line 20-23.

Plaintiff's 77 shows the appointment of Mr. Dukes to represent Taiwan Gadson as assigned by Kathy Rogers. See Plaintiff's Exhibit 77 (Public Defender appointment sheet.) Furthermore, Gene Dukes and Marva Hardee-Thomas shared office space in the courthouse. See PCR trial transcript page 1553 lines 7-25. Finally, the common perception in the eyes of the public was that the public defender represented both the target of the prosecution by Bailey in the murder of Kandee Martin and the star witness against this same target.

Because the Dorchester County Public Defender office actively represented adverse interests and took action detrimental to one client on behalf of the other, prejudice should be presumed and Marion Bowman should receive a new trial.

IAC regarding Improper Introduction of Evidence in Guilt Phase-Grounds B, C, E, O & P

Improper Admission of Irrelevant and Prejudicial Character Evidence of Sex between Marion Bowman and Kandee Martin-Ground C

_____ The evidence offered by the State during the guilt phase indicating that Marion Bowman had sex with Kandee Martin was inadmissible. To begin, the evidence was not relevant to any issue before the jury. Further, whatever probative value this evidence held, it was outweighed by the prejudice stemming from allegations that Bowman had sex with Martin, out of wedlock and while married to another.

Both adultery and fornication are still legitimate criminal offenses in South Carolina. See SC Code Section 16-15-60. Further, this evidence casts an eerily racist shadow over the unspoken issue of interracial sexual relations as Bowman was an African American and Martin was Caucasian. This served to inject character evidence into a trial where this character evidence was inadmissible pursuant to SCRE Rule 402, 403, 404, 608, and 609. Finally, based upon all of the evidence available to the State at the time the prosecution offered this evidence, the sexual relations were clearly not part of the *res gestae* of the killing of Kandee Martin or the burning of her car.

Bowman was denied the effective assistance of counsel when counsel failed to object to this improper testimony regarding his character and other acts during the guilt/innocence phase of the trial. SCRE Rule 402, 403 & 404(b) and Strickland v. Washington, 466 U.S. 668 (1984). Specifically, during the course of the trial counsel failed to object to the testimony of a DNA expert and introduction of evidence that Mr. Bowman's semen was found on a vaginal swab taken from the victim's vagina during her autopsy.

The introduction of the DNA expert's conclusion that Mr. Bowman was the donor of the semen presented to a very conservative, predominantly white jury what otherwise should have been inadmissible evidence of a married black man having extramarital sex with a white woman. As stated earlier, adultery and fornication are still criminal offenses in South Carolina.

The last witness called by the State of South Carolina was a DNA expert by the name of Mathew G. Fitts. Applicant's trial counsel did not object to the admissibility of this evidence. After a lengthy dissertation about the identity of the blood found at the scene of the murder all matching the DNA profile of the victim, Kandee Martin, Fitts was asked to identify the DNA profiles found on a vaginal swab taken during Ms. Martin's autopsy.

In the original trial transcript on page 4381 lines 14-20, Mr. Fitts testifies:

- Q: Okay. And on the ones where you were able to separate it out and get a male and female fraction, how does the second number compare to the DNA profile of Marion Bowman?
- A: At each site that we were detecting an additional profile, it matched Marion Bowman's profile.

When Mr. Bailey moved the DNA charts (Exhibits 73-A and 73-B) into evidence, Applicant's trial counsel responded to the Court's inquiry as follows:

The Court:	Any objection?
Mr. Cummings:	Judge, at this point, no, ma'am.
The Court:	Very well.
Mr. Cummings:	No legal objection.

Applicant's trial counsel did not object to the admissibility of the DNA charts that identified the semen in the victim as belonging to the Applicant, nor did he challenge the expert's qualifications. See (Trial p. 4365, l. 20-21), "no objection to him testifying as an expert..."

Trial counsel's assertion at the PCR hearing that he wanted the DNA evidence in to show the close

personal relationship between the applicant and the victim flies in the face of his cross-examination of the DNA expert at trial. Having not objected to his qualifications as an expert and having "no legal objection" to the admissibility of the damning DNA charts, it makes no sense for Cummings to examine Mr. Fitts as follows (Trial p. 4391, l. 19-24):

Q: Okay. And you've explained that to the ladies and gentlemen of the jury. So there are at least several hundred males in South Carolina alone that would match the DNA sample found in the swab that you were presented to identify here in this courtroom today; is that correct, sir?

In his further cross examination challenging the veracity of the expert's findings all found on 4392 and 4393 of the original trial transcript lines 22-25 and 1-3 respectively:

Q: This is a long, intense process. And then there's nothing beyond the scientific issue to you, sir, or scientific doubt that the person who left any fluid back there actually lives in this state that you can say to a scientific certainty; isn't that true?

A: That's correct.

Further, trial transcript page 4393 lines 4-8 indicates:

Q: Alright. Does that DNA result indicate, and, again, Doctor this is a professional question, any particular race of a person who left any of the sample behind?

A: No, it does not.

The only testimony from Fitts supporting Applicant's trial counsel's theory for admitting DNA evidence at all is found on page 4393 lines 9-19, but the prejudice regarding the character smear against Bowman outweighs the suggestion made in hindsight by Applicant's trial counsel that the evidence was needed to show Mr. Bowman and Kandee Martin were intimate friends.

Q: Okay. And, again, your DNA results cannot say when that bodily fluid was placed inside another person that you did-- when you got the swabs there's nothing in your scientific testing to say when that fluid was left behind?

A: That's correct.

Q: Okay. And you can't say, Doctor, again, respectfully, sir, to you, that there was not any consensual activity between an adult female and an adult male?

A: That's correct.

(Trial, p. 4393, l. 9-19)

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.

No Sex on Nursery Road or as Part of the Res Gestae of the Killing

Trial counsel knew that criminal sexual conduct was one of the alleged aggravators in this case and a ground for the Solicitor's office seeking the death penalty; and his knowledge that there was no evidence whatsoever of any sexual activity or conduct at or near the time of Ms. Martin's death should have been sufficient grounds for him to move for the exclusion of the DNA evidence. However, when asked by the trial court, his response was he had "no legal objection." Trial counsel acknowledged during the PCR hearing that it is was the State's position that there was criminal sexual conduct pre-mortem that occurred during the commission of a murder. PCR transcript Page 1746 lines 8-25:

- Q: Alright. Now, the State, the allegation that there was CSC pre-mortem, when did the State provide you notice that that occurred, because obviously they are alleging it occurred during the commission of a murder or it is not an aggravator, right?
- A: Correct.
- Q: So, they are saying -- and when would you say is the commission of the murder window?
- A: Nursery Road.
- Q: Okay. You got it. Any other time?
- A: I mean, right, because the car had been burned so the only evidence that the government had would to show that Kandee was shot on Nursery Road.
- Q: So, the window of the murder is that Nursery Road area?
- A: Correct.

At the PCR hearing, trial counsel was asked,

- Q: Why didn't you object to his testimony about the DNA coming in relation to the murder?

A: Because I wanted to show that he was with her, that he cared about Kandee, there was no rape, let the DNA come in, and my man's DNA is inside her. I'm sorry, maybe we differ on this, but I wanted to show that they were friends, they were intimate friends. (PCR trial, p.1753, l. 12-20)

But that trial strategy appears to be nothing more than a cover up at this point for his woefully ineffective assistance of counsel. For as was borne out of previous testimony during the Post Conviction Relief Hearing, if counsel wanted to show that the applicant and the victim were close intimate friends, he admits that there were other ways to introduce that fact without prejudice attached to the testimony of the DNA expert. (PCR p. 1752 l. 10-25):

Q: -- that this African American man and this white lady had been having sex while Mr. Bowman is married to another lady and also while he is not married to Ms. Martin?

A: But they were intimate friends and the only way to show that he had no ill motive or reason to kill this lady was that they were intimate friends.

Q: Well, hold on a second, now. We had some family members testify about Ms. Martin being friends with Mr. Bowman, right?

A: Yes.

Q: And they could have shown they were intimate friends. You're talking about sex, right?

A: Well, intimate friends means sex, I'm sorry, in that context in that courtroom that day. Again, sir, I used everything I could, including the family, to prove he cared about that lady. Yes, maybe he committed adultery, that is God's law and man's law, but again, I'm trying to be here to save his life.

Evidence of the intimate friendship between the Applicant and the victim could have well been a plausible trial strategy and could have been put before the jury without the necessity of the DNA evidence. For as the testimony bore out, there was no way to date the time the semen was deposited, and according to the State's only witness to the commission of the crime, Taiwan Gadson, there is no question but that there was no sex between the Applicant and the victim at anytime during the commission of the murder. During the PCR hearing Taiwan Gadson testifies as follows:

Q: Was there any sex that night while you were with Marion and Kandee?

A: No.

Q: That's from the time they picked you up at the apartments in Branchville, to the time that you went back to the apartment in Branchville?

A: Yes.

Q: There was absolutely no sex?

A: No.

Q: No sex with a corpse?

A: No.

Q: No sex beforehand?

A: Beforehand, no.

Q: Before the shooting?

A: No.

Q: Was there any sex?

A: No.

Q: Did you ever, was there ever a time when they weren't in your sight and there was sex?

A: No.

Q: Never sex?

A: No.

(PCR trial, p. 148, l. 25 & p. 149, l. 1-21)

And this would have been Taiwan Gadson's testimony during the original trial as evidenced by the following exchange:

Q: If you were asked that question at trial back in 2002, would you have answered it the same way?

A: Yes.

Q: I want to make sure. No sex while she was alive?

A: No.

Q: No sex after she was killed?

A: No.

Q: No rape?

A: No.

(PCR trial, p.150, l. 5-14)

And although Applicant's trial counsel alleged he had limited access to Taiwan Gadson because his lawyer indicated that Mr. Gadson was not talking to Mr. Cummings, Mr. Cummings admitted during the PCR hearing that he didn't know why he didn't ask Mr. Gadson during the penalty phase of Applicant's trial about the lack of sexual activity at Nursery Road.

PCR trial, p. 1748, l. 20-22:

Q: Why didn't you ask Taiwan Gadson about the lack of sexual activity at Nursery Road?

A: I don't know. I didn't ask it.

Trial counsel acknowledges further that the admission of the DNA evidence solidifies for this small town jury in Dorchester county that an African American man and a Caucasian white female had been having sex. And he also recognized the fact that the Applicant was married to an African American female at the time he was having sex with the Caucasian victim in this case.

See PCR trial, p. 1752, l. 4-16:

Q: Okay. Here's what I'm trying to find out. So, when information about Mr. Bowman and Ms. Martin having sex comes in, it actually tells the jury, Dorchester County jury, which I would consider to be a small town jury --

A: It is.

Q: -- that this African American man and this white lady had been having sex while Mr. Bowman is married to another lady and also while he is not married to Ms. Martin?

A: But they were intimate friends and the only way to show he had no ill motive or reason to kill this lady was if they were intimate friends.

And Applicant's trial counsel confirmed his awareness of the very conservative nature of the Dorchester County jurors and what should have been ample reason for him to exclude any evidence of the irrelevant, prejudicial consensual sex between Mr. Bowman and Kandee Martin:

Q: And your assessment of Dorchester County juries in general was?

A: Very conservative jurors.¹⁰

PCR trial, p. 1819, l.1-3.

Q: Is that your understanding of what the allegation of aggravation was here?

A: I want to say this out loud and with Marion, what are you doing on Nursery Road at that time in the morning with a white female and African American males in Dorchester County? Really. This is 2001 but what good are you doing out there on a dirt road?

PCR, p. 1396, l. 7-14.

¹⁰Applicant is further concerned that perhaps his trial counsel actually shared the same small town beliefs that his jury did when he witnessed the unresponsive statement by his trial counsel at the PCR hearing found on page 1396 lines 7-14.

Finally, trial counsel possessed information which demonstrated that the sex occurred prior to any visit to Nursery Road. Thus, this evidence was not part of the *res gestae* of the crime. See Plaintiff's 65. Frankie Martin told law enforcement that Bowman and Martin had sex at his apartment the afternoon before the night of the murder. Martin was accessible to counsel as he testified in the penalty phase of the trial. Knowing this, counsel should have excluded the sex evidence because this was irrelevant, inflammatory, and improper character evidence. Had counsel done so, there is a reasonable probability that Marion Bowman would not have been convicted of murder and arson.

Improper Admission of Irrelevant and Prejudicial Petroleum Evidence-Ground E

Applicant was denied the effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. In Article One, Section Three 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 the Applicant. Strickland v. Washington, 466 US 68 (1984).

Trial counsel should have objected to the introduction of any evidence pertaining to the petroleum product found on the pants seized at the time of his arrest, because although a pair of pants was sent to the State Law Enforcement Division laboratory and a product was found on the pants, that product did not match the gasoline used to burn the victim and her car. The Applicant could have stipulated that the pants were sent to SLED, examined and nothing of evidentiary value was obtained. Having done so in advance, the State could not then have been able to introduce the forensic examiner's testimony to show that it "had done everything it should have in the

investigation". (PCR trial, p. 2136, l. 14-20)

Q: While you were trying to make sure that you could not be accused of not doing a full and fair investigation with regard to the accelerant, that was because that was actually related to the actual cause and results of this particular crime. Correct?

A: As relates to the arson charge, yes.

Applicant's trial counsels' failure to object to the introduction of the testimony of Grady A. Layton, SLED arsenic examiner, was compounded when Solicitor Bailey was allowed to ask the expert on direct examination:

Q: Would you state whether or not you detected petroleum accelerant in those jeans?

A: Okay. One second. I found the presence of a heavy petroleum product on these jeans. (Trial p. 4298, l. 2-5)

Before the jury, in an arson case, the Solicitor questioned whether an accelerant was found on pants purportedly worn by the Applicant, and the expert's answer was in the affirmative.

Under SCRE Rule 702, expert testimony is only allowed if the "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Evidence that there was a heavy petroleum product on the Applicant's pants, could only stand to confuse the jury as opposed to assist them in understanding the evidence.

Under SCRE Rule 403, "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury." The petroleum product which turned out to be kerosene and completely unrelated to the case at hand did not even meet the first prong of this Rule, because it was not even relevant. And again, allowing the Solicitor to pointblank ask whether there was a petroleum accelerant on the Applicant's pants could do nothing more than unfairly prejudice the applicant and confuse and mislead the jury. Because the evidence contained on the pants was not relevant, it should have been

excluded by SCRE Rule 402.

Plea deals of Family/Bolstering Prior to Impeachment-Ground B

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteen Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including South Carolina Code Section 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. Also in violation of South Carolina Rules of Evidence Rule 102, 103, and 104, and Strickland v. Washington, 466 US 668 (1984).

During the verdict phase of the trial the Solicitor elicited information pending to establish the existence of a conspiracy among several of the Applicant's relatives to secrete the firearm where there was no evidence to link the Applicant to this conspiracy. And even though there was no evidence whatsoever linking the applicant to the conspiracy to secrete the weapon, when Applicant's trial counsel failed to object to the actual charges the Applicant's relatives were facing and the plea agreements they had entered into, it left the jury with the impression that not only was the defendant already guilty of a murder that had yet to be proven, but that he was somehow part of this conspiracy, as well.

With every one of the Applicant's family members, the Solicitor artfully establishes their familial relationship to the applicant and then the very next question is, "Do you have charges pending against you for Accessory After the Fact to Murder?" In the original trial transcript on direct examination, page 3734, lines 18-22, the first questions asked by the Solicitor of the Applicant's sister, Yolanda Shanique Bowman, are as follows:

- Q. Okay. And are you related to the defendant in this case, Marion Bowman, Jr.?
A. Yes.
Q: Okay. How are you related?
A: He's my brother.

Then after having the witness identify her brother in court, the very next question from the Solicitor was (Trial p. 3735, l. 5-7):

- Q: Ms. Bowman, I want you to tell the jury whether or not you have criminal charges pending against you for accessory after the fact of murder?
A: Yes.

Well, the defendant is the one on trial for murder and logically, at least in the eyes of the jury, one could not possibly be allowed to plead guilty to accessory after the fact to murder unless a murder had occurred and unless he or she was aiding or assisting the murderer. This testimony was offered without objection by the Appellant's trial counsel, and clearly indicated not only that his sister was involved in a conspiracy to secrete the murder weapon but also that she had entered into a plea agreement with the State of South Carolina wherein she would get probation on the charge of accessory after the fact of murder. The admission of this plea agreement and the charges that she would be pleading guilty to effectively established that the Applicant had committed the offense of murder (because how could she plead guilty to accessory after the fact to murder unless there had been a murder), and that she was an accessory after the fact to murder (i.e., assisting the murderer) by virtue of her role in disposing of the murder weapon for him.

Trial counsel failed to object to the introduction to the jury of the actual charge Ms. Bowman would be pleading guilty to. The jury should have simply been advised that she was pleading to a related felony and the amount of time she was facing for the related felony.

This error by trial counsel was compounded when the identities of the parties to the

conspiracy are never identified either in direct or cross-examination, leaving no doubt in the jury's mind that the Applicant was one of the members of the conspiracy.

When Yolanda Bowman was called back to the stand, the Solicitor further contrived the conspiracy as a family affair, the center of which was Marion Bowman, in his direct examination of Ms. Bowman. Trial transcript page 4182, lines 14-25 and trial transcript page 4183, lines 1-14:

Q: Ms. Bowman, you testified earlier in the trial that you're Marion Bowman's sister; is that correct?

A: Yes, sir.

Q: Kendra Bowman is your sister?

A: Yes, sir.

Q: Okay. And I want to call your attention to shortly after your brother's arrest and I'm going to ask whether or not you saw your sister, Kendra?

A: Yes.

Q: Okay. And on that same date did you also see your father, Marion Bowman, Sr.?

A: Yes.

Q: Okay. And where did you three get together?

A: At the Zion Cemetery.

Q: And before you got to Zion Cemetery, where were you?

A: To my mother's house.

Q: Okay. So you and Kendra and your father were at your mother's house?

A: Uh-uh (affirmative response).

Q: Alright.

The Court: Is that a yes?

A: Yes, sir.

Dorothy May Bowman

When the Applicant's wife testified, Solicitor Bailey continued in the creation of the fiction that a conspiracy existed among the applicant's relatives to secrete a firearm and that the conspiracy included the applicant, while there was no evidence to support such a conspiracy. In the trial transcript on page 4161, line 13, after establishing Dorothy May Bowman as the defendant's wife, Solicitor Bailey next asked,

Q: Alright. Now I want you to tell the jury whether or not you are presently charged with

accessory after the fact of murder?

A: Yes, sir.

This testimony was offered again without objection by Applicant's attorney wherein it would have been far more prudent to offer evidence that Ms. Bowman was pleading guilty to a related felony rather than the charge of accessory after the fact to murder.

Applicant's trial counsel compounded his own error and omission by bringing up before the jury that which the defendant's own wife had been charged with and was pleading guilty to in his cross-examination of her. See the trial transcript page 4213, lines 1-7 when Applicant's trial counsel asks Ms. Bowman:

Q: They locked you up for what?

A: For two weeks, that's how I told it.

Q: I know, but for what crime, ma'am please?

A: For accessory after the fact of murder.

Q: And that's when you told them about the gun, is that right?

A: Yep.

During this exchange, it must have appeared to the jury that the defendant's wife came clean about the conspiracy after she was charged with accessory after the fact of murder, wherein again there was no evidence that the Applicant himself was ever a participant in the conspiracy or that a conspiracy even existed.

Kendra Bowman

Yet another witness was paraded before the jury to establish the existence of a conspiracy to secrete a firearm wherein no evidence linked the Applicant to this conspiracy. See the following testimony relative to the defendant's sister, Kendra Bowman in the trial transcript page 4167, lines 12-23:

Q: Are you related to the defendant in this case, Marion Bowman, Jr.?

A: Yes, sir.

Q: Okay. For the record, is that Marion Bowman seated in the shirt with no coat seated beside the gentleman on the end over here?

A: Yes, sir.

Q: That's your brother?

A: Yes, sir.

Q: Okay. And are you charged with accessory after the fact of murder in this case?

A: Yes, sir.

Thus, counsel was ineffective for failing to object to such extrajudicial proceedings as involved the "guilt" of other family members to a conspiracy to secrete a firearm. While factual information was certainly relevant, the prosecution presented such evidence in a way to suggest that Marion Bowman's guilt could be presumed from the guilt of his immediate family members. But for this deficient performance by counsel, there is a reasonable likelihood that the outcome of the proceedings would have been different.

Improper Admission of Ballistics Evidence-Grounds O & P

_____ Marion Bowman deserves a new trial because his attorney failed to object to the improper admission of ballistics opinion. As noted by an expert presented at the PCR, this testimony is based upon two faulty assumptions: 1) that firearms produce unique and reproducible markings and 2) that such markings can be quantified in such a manner as to give an expert opinion equating to a statistical probability of 100 percent certainty. Such challenges were being made in other jurisdictions and have been successful in preventing the type of opinion offered in this trial. See Plaintiff's 78.

In Bowman's trial, the state presented the testimony of a SLED agent who testified as a ballistics expert that the casings found at the scene of the crime were fired by a gun secreted by Bowman's family members to "the exclusion of all other firearms." Trial, p. 4316, l. 2-3. This statement is one of absolute statistical probability. This statement eliminated all possibility, however remote, that another firearm, even of the same make and model, was used in this killing.

This statement overstated this certainty. At PCR, the SLED agent, who now works in a different law enforcement agency, proclaimed that this statement was not accurate. Instead, he conceded that there was a possibility that another firearm could have expelled these casings. He did, again, attempt to quantify this possibility by proclaiming that his certainty made it "practically impossible that these particular items could have been fired by another firearm." PCR, p. 341, l. 1-3.

However, he admitted that he did not tell the jury there was a possibility that the items were fired by another gun. PCR, p. 341, l. 10- p. 342, l. 23. He further conceded that his testimony could "lead to an opinion of certainty in some people, but that is not the manner in which it was coming from me." PCR, p. 341, l. 10-13. Finally, he notes that there is "no statistical basis for this" opinion

and that ballistics is “all subjective. That portion of the examination where you actually render the conclusion is subjective.” PCR, p. 348, l. 1 & p. 319, l. 5-7.

None of this was presented to the jury. Instead, the jury only heard that the government witness was an expert who matched these items to the gun attributed to Marion “to the exclusion of *all* other firearms.” Trial, p. 4316, l. 2-3. In this case, the defense argued at closing that Tawain Gadson owned an identical make and model firearm. This meant that the “remote impossibility” was statistically different because the Bowman gun and Gadson gun possessed the same class and subclass characteristics.

Other courts have also recognized the problems with this “exclusionary” statement. Most importantly, a court recently ruled, pre-trial, to exclude exactly such a statement by holding that “ballistics opinions offered at the [defendant’s] retrial may be stated in terms of ‘more likely than not’ but nothing more” because ballistics comparison “lacks defining standards to a degree that exceeds most other kinds of forensic expertise.” US v. Glynn, 578 FSupp2d 567, at 574-575 (SDNY 2008). The Glynn Court relied heavily upon the report generated by the National Resource Council and National Academies entitled Ballistics Imagining. Court’s Exhibit 1 and Plaintiff’s 28.

This same NRC report was offered at the PCR hearing and portions of this were admitted by the PCR court. Plaintiff’s 26 & 28. Further, the expert testimony of one of the authors of this report was offered at PCR. This expert, Dr. Marc DeGraef, is a professor of materials science and engineering with heavy educational background and experience in statistics. Plaintiff’s 27.

DeGraef participated in the National Resource Council study which was sponsored by the US Department of Justice. Further, he reviewed the bench notes and testimony related to the State’s presentation in Bowman’s trial. DeGraef opined that the underlying assumption of ballistics that

firearms produced unique markings which were reproducible had not yet been established. He further noted that the evidence, bench notes, and opinion of the state's expert at trial relied upon no statistical basis. Finally, he opined that there was nothing scientific about such testimony because this testimony was not based upon science at all, but instead was subjective.

As this trial testimony served to eliminate the very defense theory espoused by defense counsel, that Gadson used his gun to kill Kandee Martin, the prejudice from the improper statistical statement of exclusion is high. Thus, but for the deficient performance of trial counsel in allowing such incorrect testimony and statistical statement to be made, there is a reasonable likelihood that Marion Bowman would not have been convicted of the murder and arson of Kandee Martin. Further, due process is violated by a conviction and death sentence which rests upon such incorrect statistical evidence and testimony.

Improper Consideration of Arbitrary Factor-Ground H

During the penalty phase, trial counsel called James E. Aiken, a prison consultant, to testify that the South Carolina Department of Corrections can safely protect society from the Applicant for the rest of his life. However, during cross-examination of Aiken by the Solicitor, Aiken was allowed to testify that the Applicant would not be in super maximum security, and he would be able to work and earn a small amount of money. Aiken testified that Applicant would most likely have certain opportunities in prison, such as Bible study, continuing his education, participating in anger management programs, playing basketball, exercising, reading books, and watching movies and possibly television. See the original trial transcript pages 4849-4862.

On direct appeal the Applicant (then Appellant) argued before the South Carolina Supreme Court that these arbitrary factors should not have been presented to the jury during the sentencing phase, however, the South Carolina Supreme Court ruled that the Applicant's trial counsel did not preserve this issue for review because Applicant's trial counsel did not raise this issue in trial court before the testimony was presented and did not make a contemporaneous objection when the testimony was actually elicited. Without that contemporaneous objection, the trial court did not and could not rule on this issue subsequently raised by the Appellant/Applicant. During the Post Conviction Relief Hearing Applicant's counsel was asked:

Q: What strategy would exist for failing to object to the introduction of an arbitrary sentencing factor?

A: There is no strategy to that other than what Mr. Bailey (the prosecutor) is going to argue and fight over, that I got to come back with, and that is what I did.

(PCR trial, p. 1720, l. 23-25 & p. 1721, l. 1-3)

At the PCR, applicant's trial counsel admitted his mistake:

Q: Well, now, hold on, that is not my question. My question is why didn't you object

when Mr. Bailey brought it out so he couldn't talk about it at all anymore?

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

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

A: There is no reason why a lawyer misses an objection, he misses it.
(PCR trial, p. 1721, l. 15-25 & p. 1722, l. 1)

Following the direct appeal in Bowman's case, the South Carolina Supreme Court took the opportunity to review the introduction of arbitrary factors such as good prison conditions in State v. Burkhart, 640 SE2d 450 (SC 2007). In Burkhart, the Court reaffirmed the longstanding rule that evidence admitted in the sentencing phase of a capital trial must be limited to either character evidence of the Defendant or the circumstances of the crime. The Burkhart court continued by noting that a sentencing jury may not impose a penalty when influenced by an arbitrary factor. Id. at 453 (citing SC Code Section 16-3-25(c)(1)). The plurality reversed without conducting any harmless error analysis. A third justice concurred and specifically explained that the "Court should not apply a standard of review for constitutional errors to statutory violations" and that "harmless error is unnecessary because by definition, evidence that implicates an arbitrary factor is prejudicial." Burkhart, at 454.

But for Applicant's trial counsel's "miss" the jury would have considered an arbitrary factor such as "good" prison conditions when deciding that death was a better verdict than life.

Failure to Challenge the Kidnaping Aggravator-Ground V

Applicant was denied the effective assistance of counsel when his trial counsel failed to successfully challenge the allegations of kidnaping as an aggravating factor during the penalty phase of the trial below. Although counsel moved for a directed verdict at trial and this motion was denied, counsel should have presented Gadson to testify in the penalty phase, as he did at PCR, that no inveiglement occurred because, as he states, there was actually a plan to commit a burglary on Nursery Road. Had counsel submitted such testimony, there is a reasonable likelihood that the judge would have granted a directed verdict at the close of the defense case in the penalty phase and the jury would not have found the existence of such an aggravating circumstance. Finally, to allow such a death verdict to rest upon such a vague claim of inveiglement resting upon such an inadequate factual predicate as presented by the trial record violates due process.

According to the testimony and evidence presented to the original trial jury, as confirmed by the testimony of Applicant's counsel and Taiwan Gadson at the Post Conviction Relief hearing, there was no evidence presented that Kandee Martin was kidnaped and taken to Nursery Road. Page 1397 of the PCR trial transcript reads as follows, lines 14-22:

- Q: Okay. I want to make sure I understand. Taiwan never testified that they went out there and tricked her to go?
A: Right, you're absolutely correct, sir.
Q: There was no testimony from Taiwan that Kandee was tricked or inveigled or decoyed to the road.
A: Well, I can grasp that from the testimony but he used those words, no.

The PCR trial testimony goes on to confirm the trial testimony that the three of them, Kandee Martin, Taiwan Gadson, and the Bowman, all went out to Nursery Road to commit a burglary. Trial counsel further testified at the PCR hearing page 1643 lines 9-23:

Q: Now, let me ask you, would the drug use not be relevant to the issue of her state of mind in the penalty phase, for the kidnaping aggravator, right, it wasn't actually a grabbing kidnaping?

A: Yes, sir. We have the broadest kidnaping statute in the country as I'm aware of.

Q: Sure.

A: And further, if you want to argue the state of mind, they were going there to do a job, that is another thing that was coming out, so-called burglary, you have got people burglarizing houses in the neighborhood in Dorchester County. Any way I turned on this thing I was stepping on a landmine, and I knew that. But again, if I made an error I apologize....

So under the evidence presented there was no reasonable inference that could be drawn that Kandee Martin was kidnaped even under a theory of inveiglement. Trial counsel failed to adequately note to the court that no evidence supported this aggravating circumstance that was submitted to the jury during the penalty phase of the trial.

Although Taiwan Gadson might have said in his statement to the police that he knew Marion was going to kill Kandee before they got to Nursery Road, he admitted during the Post Conviction Relief application that he never testified as such. See PCR, page 139 lines 16-22. As an aside, Taiwan Gadson admitted in the Post Conviction relief hearing that at trial he never mentioned that he knew Kandee was going to be killed when they got to Nursery Road. (See page 145 lines 18-25). And on page 146, lines 1-13 Taiwan Gadson admitted that by omitting that testimony from the original trial that he breached his plea agreement.

But more significantly, Taiwan Gadson's ultimate position is that there never was a kidnaping committed with the intent to take Kandee out into the country to kill her. This position, taken at the PCR Hearing confirmed his prior testimony at the deposition taken in anticipation of the PCR hearing. See page 147 of the PCR trial transcript where he confirms that he did not know Kandee Martin was going to be murdered until Marion Bowman started shooting (lines 1-13.) And

page 148, lines 5-20:

- Q: So, did you know before you got to Nursery Road there was going to be a killing or not?
- A: No.
- Q: So, you lied in this statement about that finger pointing?
- A: Yes.
- Q: You didn't know that until you got out there, until you saw the bullets being fired?
- A: Yes.
- Q: And let's talk about that. You believed there was going to be a robbery?
- A: Yes.
- Q: Kandee believed there was going to be a robbery?
- A: Yes.
- Q: You thought there was going to be a robbery?
- A: Yes.
- Q: You really did believe that?
- A: Yes.

Page 183 lines 16-25 and 184 lines 1-20 talk about the different ways Taiwan Gadson was gesticulating during the PCR hearing with one hand pointing like it was a gun and at another time pointing out the window with three fingers.

Upon a review of Taiwan Gadson's original trial testimony pages 3980- 4038, there is no mention of any inveigling, deception or otherwise from which a jury could infer that Kandee Martin was kidnapped. And as such, the jury should never have been allowed to deliberate on the kidnapping aggravator.

Failure to Investigate, Develop or Present Mitigation Evidence-Grounds-G (2),(3),(4),(5) &(6) I. & W

To begin, the US Supreme Court clearly states that trial counsel are duty bound to investigate the background of a capital defendant to discover any fact which may urge the jury to return a sentence of less than death.¹¹ This is true even if the counsel has delegated this duty to other members of the defense team. In other words, the buck stops with the trial attorneys themselves and not any members of the defense team, such as mitigation specialists, testifying social workers, or even the defendant.

In Marion Bowman's trial, counsel failed to present significant and available mitigation information. This information included the testimony of family members, a psychologist, work documents, and evidence from witnesses who testified for the government. However, upon examination of correspondence between the defense team and defense counsel, it appears that a complete breakdown in the adversarial system occurred where Bowman's mitigation strategy was essentially planned, prepared and presented by non-lawyers, without any guidance from counsel. This breakdown equated to a constructive denial of counsel such that prejudice is presumed. As for the ineffective nature of the lawyering which did occur, there exists no justification for these failures and but for this deficiency, the outcome of the trial would have been different.

Constructive absence of counsel during the preparation, strategic planning and presentation of evidence as accumulated by the mitigation specialist and presented by the testifying social worker

Applicant's right to counsel, as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina

¹¹1 ABA Standards for Criminal Justice (2d ed. 1982 Supp.), Wiggins v. Smith, 539 US 510 (2003), and Rompilla v. Beard, 125 S.Ct. 2456 (2005).

Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60, was violated as a result of the constructive absence of counsel during the preparation, strategic planning and presentation of evidence in mitigation as accumulated by the mitigation specialist and presented by the testifying social worker. See U.S. v. Cronin, 466 U.S. 648, 659 (1984), Brooks v. Tennessee, 406 U.S. 605 (1972) and Frett v. State, 298 S.C. 54, 378 S.E.2d 249 (1988).

Pursuant to U.S. v. Cronin, prejudice is presumed in a Sixth Amendment violation scenario when there is a complete denial of counsel, when the defense completely fails to subject the prosecution's case to adversarial testing or when circumstances are such that no lawyer could provide effective assistance. U.S. v. Cronin, 466 U.S. 648 (1984). The Cronin court noted uniform findings of "constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." Cronin, at 659, n. 25.

Significant for Bowman's mitigation case and in keeping with other death penalty cases, counsel employed both a mitigation specialist and a testifying social worker. These two team members took notes of the lack of preparation and instruction from defense counsel. Both of these persons noted a complete failure of counsel to inform them of trial strategy.

In fact, the testifying social worker indicated the same in a letter to counsel. Plaintiff's 51. The mitigation worker wrote of a panic rising over her. Plaintiff's 57. Both of these defense team members were well seasoned veterans in their profession. Both were non-lawyers at the time. Both now regret the product of their unguided efforts.

The testifying social worker presented a narrative at trial. He essentially was asked no questions of counsel to direct his testimony. He indicated that he had no meetings with counsel to

prepare him for his testimony.

Instead he stated that he made a strategic decision to present negative aspects of Bowman's life in lieu of testimony concerning positive traits. Part of this foregone testimony included information about Bowman's capacity to be of emotional value to others as demonstrated by his good parenting and involvement with his child, step-children, and nephews. Other foregone information included Bowman's relatively complete history of legitimate and gainful employment in the construction industry, alongside the family of the deceased.

Instead, and without any indication that this evidence would otherwise be presented, the social worker informed the jury that Bowman dealt drugs. Trial, 4800, l. 15-17. Further, he indicated that Bowman beat a schoolmate with a tree limb. Trial, 4798, l. 20-21. Finally, he told the jury that no excuse could be offered for Bowman's actions in killing Kandee Martin, even though Marion Bowman has steadfastly maintained his innocence as the shooter of Kandee Martin from the time of his arrest until the present day. Trial, p. 4809, l. 10-20.

The social worker understands that his presentation was inadequate. He offers no justification for the failure to present this good information. He offers no justification for the failure to present a mitigation strategy which is consistent with defense in the guilt phase.

Instead, the social worker offers an explanation at PCR stating that : "Somebody has to decide, and because I was getting no guidance from the attorneys, that was a decision I made, I assume." PCR, p. 1093, l. 13-15. He continues to state that he "never" once met with the attorneys to "sit down and go over [his] proposed testimony." PCR p. 1093, l. 20-24. Further, he later repeats this assertion by responding to a question about whether "they never once sat down and went over your testimony as an expert witness" with the response "no, sir." PCR, p. 1094, l. 7-9.

Thus, Marion Bowman deserves a new penalty proceeding because there existed a complete absence of counsel during the preparation, strategic planning and presentation of the mitigation as investigated by the mitigation specialist and presented at trial by the testifying social worker.

Failure to Present Testimony of Family Members or Other Evidence regarding Bowman's Capacity to be of Emotional Value-Ground (2)

Trial counsel failed to present meaningful penalty phase testimony of Marion's wife, Dorothy Mae Bowman, or his sister, Kendra Bowman. Both of these witnesses could have provided information concerning Marion's capacity to be of emotional value if given a life sentence in prison. Further, counsel failed to develop this issue through the testifying social worker. Finally, counsel failed to employ the services of a family psychologist who could have provided an expert opinion on this issue.

It is clear that any evidence supporting a sentence of less than death is admissible. See Lockett v. Ohio, 438 US 586 (1978). An example of such evidence of defendant's good character includes an inmate's ability to adapt to prison life. Skipper v. South Carolina, 476 US 1 (1986). Other evidence of a defendant's character has been found to include his capacity to be of emotional value to others. Oregon v. Stevens, 879 P2d 172 (OR 1994).

In Stevens, the Supreme Court of Oregon found that a "rational juror could infer from the witness's testimony that she believed that her daughter would be affected adversely by defendant's execution because of something positive about his relationship with his daughter and because of something positive about defendant's character or background." Stevens, at 168. The Court noted that a rational juror could "infer that there are positive aspects about defendant's relationship with his daughter that demonstrate that defendant has the capacity to be of emotional value to others."

Id. The Court concluded that because of this inference, a juror might find justification for a sentence less than death due to this aspect of the defendant's character. Id.

In the case at trial, defense counsel only presented limited testimony from Marion's mother and sister. This testimony only comprises 18 pages out of a 5500 page trial transcript. None of this testimony concerned Marion's good parenting skills. Defense counsel was made aware of this positive attribute of Marion's character before trial. PCR, p. 1226, l. 15-22 & Plaintiff's 52, § 7.

Kendra Bowman did take the stand. However, as indicated in an affidavit provided at the PCR hearing, she could have testified about Marion's positive character trait as a "father figure" to his nephew. See Plaintiff's 53, § 5. Further, Dorothy could have testified about Marion's actions to his own daughter and his nephew from his other sister, Yolanda. Finally, Kendra could have provided first hand information about his role as a "pied piper" to other children in the neighborhood. A sentence of incarceration would not have extinguished this positive trait, as Kendra indicated that Marion still provides her son with "advice" and emotional support even from prison. Marion's execution will extinguish this positive trait and have a negative impact upon the children. PCR, p. 1196, l. 3-5. The jury did not hear this information. No strategy reason could justify this failure. PCR, p. 1960, l. 12-19.

Evidence could also have been presented through Marion's wife, Dorothy Mae Bowman. She did not testify in the penalty phase of the trial. However, if called, she could have presented evidence of Marion's genuine concern for his wife and unborn child, as evidenced in letters writtent to her from Marion during his pre-trial incarceration.

These letters are a part of the record on appeal in the direct appellate proceedings, thus were available to trial counsel. Trial, p. 5375-5383. These letters were also marked separately as

Plaintiff's 56 at the PCR hearing. No matter what these letters may contained regarding the issue of Marion's guilt or innocence, they clearly contained candid instances of concern of Marion towards his wife and step-children. Further, these letters express concern for Marion's then, un-born child.

There is no reason to not present this information to the jury. Obviously, at the penalty phase, Marion has already been convicted of the crimes of Murder and Arson. Further, Marion never expected these letters to be confiscated by law enforcement, therefore, they capture his genuine feelings in a way which could not be questioned.

Defense counsel was made acutely aware of this positive trait of Marion's character. To begin, counsel possessed the letters contained in Plaintiff's 56. Further, counsel's agents interviewed his mother, wife, and both sisters before trial. PCR, p. 1224, l. 14-19. Finally, the mitigation specialist and the testifying social worker both discussed this positive character trait as documented by an internal defense memo. See Plaintiff's 52, § 7 ("Parenting-Marion insisted he was a good father who spent "quality time" with his stepchildren. If there is no information to the contrary, it would be good to touch on what effect a death sentence would have on the children.")

The defense did present the testimony of the testifying social worker. He was made aware of this positive trait through this internal memo. However, at PCR and in documents prepared and sent to defense counsel before trial, he notes that defense counsel failed to adequately prepare his testimony or even provide him with some idea of the defense trial strategy. See Plaintiff's 51. The social worker described this failure by stating: "In every other case I said went to trial I at least had some idea what was going on so that they are supposed to dovetail the guilt phase and the penalty phase, and in this case I had no idea." PCR, p. 1058, l. 12-23. This social worker had been previously involved in 26 death penalty cases before Marion Bowman's. PCR, 1060, l. 10.

It appears that the failure to present the parenting information was a deliberate decision. However, this decision was not made by trial counsel, but instead by the testifying social worker. PCR, p. 1092-1094. Even though this failure by trial counsel amounts to a complete breakdown in the adversarial process, as condemned by the US Supreme Court in Cronic,¹² this fairly is also deficient performance and prejudicial to Bowman's penalty phase result.

In fact, the social worker clearly indicated at the PCR that: "Somebody has to decide, and because I was getting no guidance from the attorneys, that was a decision I made, I assume." PCR, p. 1093, l. 13-15. He continued to state that he "never" once met with the attorneys to "sit down and go over [his] proposed testimony." PCR p. 1093, l. 20-24. Further, he later repeated this assertion by responding to a question about whether "they never once sat down and went over your testimony as an expert witness" with the response "no, sir." PCR, p. 1094, l. 7-9.

This panic and disorder is echoed by documents prepared by the mitigation specialist. One document is entitled a "panic memo" in which she details her angst concerning the lack of trial preparation of the lay and expert witnesses. Plaintiff's 57. She also wrote a detailed letter noting defense counsel's "who cares" approach to mitigation and specifically the testimony of the social worker. Plaintiff's 58. Finally, she documented the good parenting of Marion through her notes of her interview with Marion's mother, who testified. These notes indicated that "Dorothy [the wife] had two sons from a previous relationship when they married. Marion is good to her kids and they love him." Plaintiff's 62.

Also, this information was available for presentation through the employment of a family

¹²In Cronic, the United States Supreme Court presumed prejudice when there was a complete breakdown in the adversarial process because this situation was akin to the constructive denial of counsel. See new claim W

psychologist. Here, counsel knew how to hire and receive funding for expert witness testimony. Further, the employment of such an expert was known by the mitigation specialist and was not novel to this case. PCR p. 1456, l. 4-8.

As presented by the PCR testimony of Dr. Bill Kissiah, evidence supported the expert opinion that Marion "has significant emotional value both to his own family members--well, obviously to his daughter, he' carried that role out with his stepsons from his wife's previous marriage, he's carried that out with his sisters', with his nieces and nephews, both family members, and kids in the neighborhood." PCR p. 1192, l. 18-25 & p. 1193, l. 1-6. Dr. Kissiah indicated that had he been called to testify in May, 2002 at Marion's trial, he would have "testified exactly the same. I see no difference in his motivation now than I would have seen then. I think, I think he wants to be a father, I think his desire for that is no less now than it was then." PCR p. 1193, l. 18-25 & p. 1194, l. 1-4.

Dr. Kissiah continued to speak to the loss which would occur upon Marion's execution. He opined that "here is a man who wants to and is capable of providing a positive influence on his family. I think a death sentence obviously takes away the opportunity for that and casts a pall upon his memory...that would have a negative impact" on the rest of the family. PCR, p. 1195, l 14- p. 1196, l. 6. He characterized this as "violence answered with violence."

There was no reason not to present this evidence. The failure is particularly exacerbated by the failure to present any evidence regarding his good parenting. Instead, based upon a decision made solely by a non-lawyer witness, without consultation with counsel, the defense presented evidence which focused on the "more negative aspects of his life" even though this witness agreed that his goal was to make the jury "think he is not a monster." PCR, p. 1092, l. 25- 1093, l. 9.

Considered in light of the 18 pages of scant testimony presented by persons who knew Marion personally, there is a reasonable likelihood that the outcome of the penalty phase would have been different but for this deficient performance. Further, no prejudice need be demonstrated due to the complete breakdown in the adversarial process presented by the constructive absence of counsel during the presentation of mitigation for this aspect of Marion's life. Finally, given the other penalty phase issues and lingering doubt and error from the guilt phase, the entire penalty proceeding is suspect and due process is violated by the imposition of a sentence of death under these circumstances.

Failure to Present Marion's Work Record-G(5)

Another complete failure of counsel to present a positive character of Marion to support a sentence of less than death involves Marion's positive work history. This information was within the hands of the mitigation specialist and testifying social worker, but was not presented to the jury. Given the "negative" aspects of Marion's life presented by the defense at trial, there is no justification for this failure. However, this failure may be attributable to the constructive absence of counsel in the preparation of the testimony of mitigation.

As condensed into the information contained in Plaintiff's 55 & 76, Marion held many construction related jobs from the age of thirteen to the time of his arrest at the age of 20. The information contained on the application for employment with Moody Mechanical was also possessed pre-trial by the mitigation specialist. PCR, p. 1478-1480. The testifying social worker also possessed similar work information from his interviews with Marion. PCR, p. 1083. Finally, circumstantial information supports the proposition that Marion attended the restitution center until he completed his restitution obligation. PCR, p. 1460.

Neither this information nor any other information concerning Marion's legitimate employment was presented to the jury. The restitution information is particularly probative for mitigation purposes because it details his ability to adjust to prison life and continue to be a productive citizen even if given a life sentence. This suggests a character trait which mitigates in favor of a sentence less than death.

Instead, a defense witness presented negative employment information including Marion's drug dealing. Trial, p. 4800, l. 14-17. This information was not documented by any criminal conviction, but was instead presented as part of the "negative" aspect of his life which the testifying social worker chose to present without any advice or guidance from counsel. This negative information provided ripe fodder for cross examination by the Solicitor. Trial, p. 4817, l. 11-25.

There is a reasonable likelihood that had this positive information been presented, that Marion would have received a sentence less than death. Further, this deficiency likely occurred because of the complete breakdown in the adversarial process as noted by the panic memo and testimony from the social worker. Finally, a death sentence under these circumstances violates the Eighth Amendment.

Failure to Correct Information Concerning Kandee's Character-G(4)

While Applicant's trial counsel thought it would be of some benefit to let the jury know in the sentencing phase of the trial that the applicant sold drugs as a juvenile and assaulted a fellow student with a tree limb in high school, Applicant's trial counsel did not see any benefit in rebutting the victim impact evidence offered by the State.

Accordingly, the jury never heard that the victim regularly smoked crack with the Applicant, and in fact, had some in her system at the time of her death. Even the PCR Trial Judge expressed

surprise that the autopsy results, showing the cocaine metabolite in her system, were not introduced at any time during the trial. (See PCR transcript page 1632 lines 19-24 and page 1633 lines 1-6)

See also PCR transcript page 1633 lines 14-25 and 1634 lines 1-4 wherein the victim's drug use or reputation as a prostitute were never before the trial jury.

When Applicant's trial counsel was asked during the PCR hearing why it didn't come out that Kandee Martin used drugs, his response was "I didn't want to add another felony or bad character to my client, that he was selling drugs to Kandee. I did what I chose to do at that time. (PCR Trial transcript page 1636, Lines 1-6)

However it was during the Applicant's case in chief during the penalty phase that Applicant's counsel chose to put a social worker up to introduce to the jury for the first time that his client, the Applicant, sold drugs.

Kandee Martin's drug use certainly could have been used to negate the victim impact offered by the State; and Applicant's trial counsel confirmed as much during the Post Conviction Relief hearing. See page 1637 lines 6-19.

Q: My question is this. Does it not present a forward context of her mothering to show that she was a crack addict?

A: Again, I guess I could sit back and play Monday morning quarterback now and say, you know, attack the victim, the jury has already found him guilty, you know, I could sit here and say that. If I made an error, I apologize. If I didn't vigorously cross-examine to help Marion, then I made a mistake and I apologize, but I flowed with the case how I thought I should have done it. Whether our courts want to call it strategy or a choice not to attack the victim anymore than we did, she's dead.

Trial counsel acknowledged during the PCR hearing that the introduction of Kandee Martin's drug use could and probably should have been used to minimize the kidnaping aggravator with respect to the victim's state of mind. PCR p. 1643 l. 9-14. Trial counsel subsequently admitted his

mistake on page 1643 line 23 through page 1644 line 2., "but again, if I made an error, I apologize, I tried that case and in the penalty phase the best I thought I could get out of the mileage with what was happening, every time we turned around, even before Jeff Yungman got killed on the stand."

One further interesting note about the victim impact and Kandee Martin's parenting skills, was learned early on by Applicant's trial counsel, and that was that Kandee Martin had another child somewhere that had been given away or done something else with. Applicant's trial counsel admitted as much on page 1637 lines 20-22. "We also learned she had another child somewhere that was given away or done something else with."

Failure to object to trial court's limitation upon allocution Ground I

Applicant was denied the effective assistance of counsel 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. See the original trial transcript page 4943-4944.

THE COURT: All right. You understand that if you make the last argument, Mr. Bowman, that obviously like the other people who are making final arguments, you must be bound by the evidence and you could not testify in effect before the jury. You could simply make an argument within the record that is established in the case. Do you understand that?

MR. BOWMAN: Yes, ma'am.

THE COURT: In other words, you are to stick to the facts and inferences which can reasonably be drawn from those facts. You understand that?

MR. BOWMAN: Yes, ma'am.

Trial counsel failed to object to this improper limitation by the trial judge, and there can be no doubt such a limiting instruction from the bench overrode any conversation between the Applicant and his trial counsel. In fact, when Applicant's trial counsel was specifically asked at the PCR hearing, he acknowledged the possibility that Mr. Bowman may not have fully understood his

right to allocution,

- Q: I'm asking you about your own personal conversation. Did Mr. Bowman ever say to you, "Well, I was going to speak to the jury but then they told me I was limited to evidence in the record and I decided I wasn't going to"?
- A: No sir. I don't think, you know, looking at everything there, everybody knew what the judge said, but again, if I made an error I apologize, I hope you folks correct it. (PCR Trial, p. 1889, l. 15-23)

Because the court advised Marion Bowman that the only allocution he could make would be limited to the facts within the trial, the Applicant chose not to present such an allocution, chose not to argue anything before the trial jury, and as a result thereof, the trial jury sentenced him to death. But for trial counsel's deficient performance, the outcome of the trial proceedings would have been different.

Failure to Present Evidence of Marion's Intoxication-G(3)

Further, attorney deficiency relates to failure of counsel to elicit evidence of his intoxication on the night of Kandee's killing. While there is a plethora of evidence in the record which supports voluminous drinking by Marion's associates on February 16, 2001 and the fact that Marion was an alcoholic, the State Supreme Court decided as a factual matter that the trial record was devoid of information supporting the inference that Marion "was actually intoxicated at the time of the crime." State v. Bowman, 623 SE2d 378, at 383 (SC 2005), rehearing denied (2006).

However, evidence was available which demonstrated that Marion was not only "drinking all day" but that he was intoxicated the night of February 16, 2001. As mentioned earlier, James Tawain Gadson testified as a State's witness during the guilt phase of Marion's trial. He was clearly available to testify at the penalty phase, due in part to his incarceration.

Gadson recalled Marion's state of intoxication during the PCR testimony. The questioning

of Gadson at the PCR hearing indicates:

- Q: You thought he was tipsy?
 A: Yes.
 Q: Meaning that there was some effect from the alcohol?
 A: Yes.
 Q: You thought he was affected by the alcohol?
 A: I guess.
 Q: Alcohol influenced him to the point where you saw it?
 A: Yes.
 Q: Okay. And if you were questioned about that fact in May of 2002, at the trial would you have testified the same way?
 A: Yes.
 PCR, p. 156, l. 1-5 & p. 157, l. 12-25.

Other information was developed at the PCR indicating that Marion drank beer everyday. PCR, p. 153, l. 24-25. Further, Marion was drinking for four or five hours on the day of the murder. PCR, p. 152, l. 22-25 & p. 153, l. 1-14. Also, Gadson testified that Marion drank liquor on the day of the killing. PCR, p. 155, l. 4-9.

While other witnesses also provided evidence consistent with Gadson's testimony, the failure to present Gadson's testimony alone is deficient. This evidence of voluntary intoxication is mitigating to a charge of capital murder, because the death penalty is reserved for the most-heinous crimes. While voluntary intoxication does not negate the mens rea for capital murder, it is recognized as a mitigating factor by the law and by logic.

Counsel's deficiency in failing to elicit this evidence was not related to any reasonable trial strategy. Instead this deficiency was directly related to counsel's misconception that intoxication was an aggravating factor. As documented at the PCR, counsel indicated, when asked why he did not ask Gadson about this intoxication as a basis for mitigation, that "I didn't do it, I would never have put that man on the stand." PCR, p. 1758, l. 10-11. However, Gadson had already testified

before the jury and already provided all the negative evidence the solicitor sought to develop during the guilt phase.

Also, counsel could not explain why he did not ask Gadson these questions about Bowman's intoxication during the guilt phase as it would have suggested no evidence of guilt and offered a possible segway into the penalty phase, if necessary. Counsel responded that: "I don't ask co-defendants to help or hurt him..." PCR, p. 1759, l. 17- p. 1760, l. 1. Further, when confronted with the fact that Gadson said Marion was intoxicated, counsel responded that: "Voluntary intoxication is going to do what? I mean, I worked for the man, I don't want..." PCR, p. 1758, l. 5-15. Counsel concluded with his demonstration of his misunderstanding of the mitigating nature of this testimony when he declared: "I don't want to call my client a drunk." PCR, p. 1757, l. 13.

This misapprehension is compounded by his misunderstanding regarding exclusion of statements found to be have been involuntarily obtained. Counsel suggested he feared introduction of the evidence of intoxication would open the door to introduction of a statement excluded by the trial court because it was the product of improper coercion and duress. Counsel stated: "It is against the rules of evidence if it is suppressed, exactly as it states, but if there is anything brought out that would differ from what is written in that statement, they would have a right to impeach him. That is my understanding." PCR, p. 1964, l. 24- p. 1965, l. 6. Counsel further confirmed that he believed an involuntary statement could be used for impeachment purposes and this misunderstanding of the law served as the strategy basis for his failure to elicit various questions, including those regarding Marion's intoxication. PCR, p. 1965, l. 7-25.

Counsel's strategy is based upon a misconception, as the law is clear that an involuntary statement may never be used for any purpose. Mincey v. Arizona, 437 US 385 (1978). This is

directly related to the fact that involuntary statements are considered to be unreliable as evidence because of the nature of their production. The ultimate role of the Court is to sift through evidence to see that unreliable evidence is not presented to the jury. The Court in this trial made this determination when the statement was ruled involuntary and this ruling was never reversed or appealed and is now firmly the law of this case.

Thus, Marion's death sentence is suspect because but for this deficiency in introducing evidence of intoxication, there is a reasonable probability that the jury would have returned a verdict of less than death. Further, due process is violated when a sentence of death is returned under these conditions. This is true even in the absence of a jury instruction as the evidence alone is mitigating.

Failure to Request a Charge in Mitigation re Intoxication-L(1-4)

Finally, Bowman deserves a new sentencing because his counsel failed to request a jury instruction regarding intoxication. Due process is violated when a death sentence is imposed given such a failure. Armed with the evidence in the portion of the brief above, counsel could have either requested a statutory mitigating instruction or a non-statutory mitigation instruction that would instruct the jury to fact that voluntary intoxication may serve to mitigate criminal conduct.

Unfortunately for Marion Bowman, his trial counsel labored under the mistaken belief that voluntary intoxication was an aggravating factor. Such a misconception belies any claim of reasonable trial strategy. But for this deficient performance, there is a reasonable likelihood that the outcome of the trial would have been different.

To begin, the trial court is required to submit a statutory mitigating instruction, found at SC Code Section 16-3-20(C)(b)2, 6, & 7, anytime there is evidence of a defendant's intoxication at the time of a capital murder. See State v. Bowman, 623 SE2d 378 (SC 2005) rehearing denied, (2006) internal citations omitted. Because counsel may possess concern that a statutory mitigator may raise issues of mental health capacity which would allow admission of otherwise inadmissible mental health information, counsel may also wish to present this claim of mitigation in the form of a non-statutory mitigator.

The South Carolina Supreme Court has found that such a non-statutory mitigator may serve the same functions as a statutory mitigator. See State v. Plemmons, 370 SE2d 871 (SC 1988). In Plemmons, complaint was made that the court did not sufficiently charge the very same statutory mitigators at issue here in relation to the evidence of the defendant's intoxication. The Court denied relief on this claim stating that the "statutory mitigating circumstances (2), (6), and (7) are required

when there is evidence of intoxication only in the absence of a specific charge regarding intoxication as a mitigating circumstance.” Thus, Plemmons holds that a specific non-statutory mitigator concerning intoxication may be as sufficient for mitigation purposes as the statutory mitigator.

Such a non-statutory mitigator would not carry any “door opening” concerns related to Bowman’s mental health evaluation as expressed by defense counsel during the PCR testimony. The instruction would serve to channel the jury to an understanding that intoxication evidence may be considered as mitigating, even if defense counsel never understood this concept. Such a mitigation instruction was necessary given the evidence presented and the available evidence which was not presented.

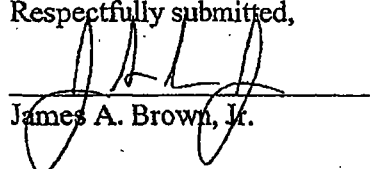
Such evidence is listed above, but primarily consists of Gadson’s testimony that Bowman was “tipsy” and that he observed the physical manifestations of this intoxication just as one would expect following an alcoholic’s four or five hour consumption of both liquor and beer.

Given the available evidence and evidence already presented at trial, there is a reasonable probability that but for the deficiency of counsel in failing to request the statutory mitigator or the non-statutory mitigator, the jury would have given a sentence of less than death. This is especially so considering the non-existent evidence of kidnaping and the lingering doubt concerning Bowman’s identity as the killer of Kandee Martin. Finally, both due process and the Eighth Amendment are violated by a death sentence which is imposed under these facts.

Conclusion

Thus Marion Bowman's trial and sentencing are wrought with errors. These errors range from uncorrected false testimony and withheld evidence concerning the culpability of others in the death of Kandee Martin and arson of her car to the inadequate representation of Marion Bowman on these same issues. Further, expert ballistic opinion testimony offered at trial is no longer considered as reliable as previously thought. Also, trial counsel operated under conflicting interests and divided loyalties, as well as grave misconceptions of the law. When it mattered most, counsel completely abdicated their duties in a manner which amounted to either the deprivation of effective counsel or the complete denial of counsel. Finally, given the available mitigation contrasted with the errors related to the aggravation, this Court should scrutinize both the conviction and sentence and provide Marion Bowman a new trial worthy of confidence in the outcome.

Respectfully submitted,


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June 12, 2009

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STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

Marion Bowman, Jr.,

Petitioner,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

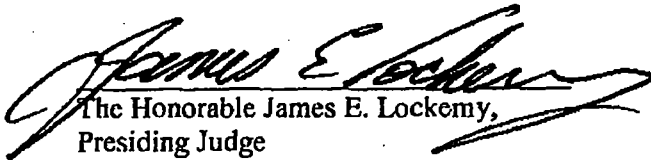
C/A No. 2006-CP-18-569

ORDER

2009 JUN 15 AM 10:56
CLERK OF COURT
DORCHESTER COUNTY

After considering the Petitioner's Motion to Hold Post Conviction Proceedings in Abeyance Pending Resolution of Motion for New Trial in the Court of General Sessions and the Respondent's brief in reply, the Petitioner's motion is respectfully denied.

AND IT IS SO ORDERED.


The Honorable James E. Lockemy,
Presiding Judge

June 10, 2009
Dillon, South Carolina

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

POST-TRIAL BRIEF IN OPPOSITION
 TO APPLICATION FOR POST-CONVICTION
 RELIEF
 (Capital Case)

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TABLE OF CONTENTS

PROCEDURAL HISTORY	1
STATEMENT OF EVIDENCE PRESENTED AT TRIAL	6
A. 2/17/01: the crime scene evidence at Nursery Road	6
B. Saturday morning, 2/17/01: Applicant's arrest, his pants, and Kandee's watch	6
C. Applicant's friends and relatives come clean about his involvement in Kandee's murder	7
1. The argument over the gun	7
2. Unpaid debts and threats to kill	8
3. Tywan Gadsden describes Kandee's murder	8
4. The trip to the club in Kandee's car: admissions of guilt	10
5. Travis Felder describes the car fire	10
D. May and June 2001: a pistol found in the Edisto river – and bullets found in the couch	11
E. The DNA match	12
F. The State's sentencing phase case	12
G. The defense's sentencing case	13
ARGUMENT	16
I. James Tawain Gadson, Jr.	16
A. The Prosecution Did Not Violate Brady By Not Disclosing Gadson's William S. Hall Institute Psychiatric Report	16
B. Trial Counsel Was Not Ineffective In Addressing Gadson's Plea Deal and/or Any Possible Bias that May Have Resulted Therefrom	21

C. Trial Counsel Did Correct Gadson's Testimony At Trial Regarding his Twenty Year Sentence	25
D. Trial Counsel Was Not Ineffective Because It Chose Not to Attempt to Introduce Arrest Warrants and Indictments As Evidence Gadson Was the Shooter.	27
E. Trial Counsel was Not Ineffective in Not Presenting Alleged Evidence of Confession from Ricky Davis and Wayne Mood	32
F. Trial Counsel Was Not Ineffective In Handling Evidence that Gadson Had Access To Applicant's Gun.	36
G. Trial Counsel was Not Ineffective in Addressing the Fact Gadson Lied to Police about Owning a .380 Handgun.	38
II. Travis Felder	40
A. The Prosecution Did Not Fail to Correct False Testimony in Regards to Felder Purchasing the Gasoline.	40
B. The State Did Not Fail to Correct Felder Regarding How Many Times He Met with the State in Preparation for His Testimony at Trial	44
C. The Prosecution Did Not Commit Any Brady Violations with Evidence Relating to Travis Felder	46
D. The State Did Properly Disclose Evidence that Felder Purchased Gasoline on the Morning of the Arson.	47
E. The State Did Not Violate Brady When It Did Not Disclose the Proffer Letter from Felder's Attorney.	52
F. There Was No "Wink Wink" Deal Between the State and Felder ..	56
G. Trial Counsel Was Not Ineffective for not Presenting Evidence of Felder's Original Arrest/Charge	58
H. Trial Counsel was not Ineffective in Not Presenting Evidence Felder Was the One Who Purchased the Gasoline During the Guilt Phase at Trial.	63

I. Trial counsel Was Not Ineffective for not Filing a Rule 29 Motion for a New Trial; Counsel Was Aware that Felder Was the One Who Purchased the Gasoline at Trial	66
III. Hiram Johnson	67
A. The State Did Not Violate Brady in Not Disclosing Hiram Johnson's then Pending Charges	67
B. There Was No Undisclosed Wink Wink Deal Between the State and Johnson	69
C. Trial Counsel Was Not Ineffective in Not Cross Examining Johnson on the Absence of Bowman's Alleged Confession in Johnson's Prior Statements.	71
D. Trial Counsel Was Not Ineffective for Not Cross-Examining Johnson on the Fact he was Not Charged with Possession of Stolen Vehicle.	75
IV. Ricky Davis	78
A. The Prosecution Did Not Violate Brady in Not Disclosing the "Sam Memo"	78
B. Trial Counsel was Not Ineffective in Not Presenting Ricky Davis' Testimony Regarding Tawain Gadson's Confession	84
C. Trial Counsel was Not Ineffective in Not Presenting Gadson's Location on A-Side or Detective Coker's Notes Confirming Gadson and Davis Together on A-Side	88
V. Alvin Coker	89
A. Trial Counsel Was Not Ineffective in Not Asking Coker About Gadson Lying About Owning a .380	89
B. Trial Counsel was not Ineffective in Not Bringing Out Statements Heard by Bruce McLean.	91
C. Trial Counsel was Not Ineffective in not Cross-Examining Detective Coker About Felder Being the One Who Purchased Gasoline ..	93
D. Trial Counsel was Not Ineffective in Crossing Coker About the Sworn	

Statements to Other Tribunals	94
VIII. Conflicts of Interest:	95
A. Applicant Failed to Establish Hardee-Thomas Operated Under An Actual Conflict of Interest As a Result of Her Former Representation of Ricky Davis and Then Active Representation of Applicant	95
B. There was no Conflict of Interest As a Result of the Fact that Gene Dukes Represented Applicant's Co-Defendant Tawain Gadson	100
VII. Ineffective Assistance Regarding Evidence Admitted in Guilt Phase ...	103
A. Failure to move to exclude evidence of Bowman's DNA found in the victim's vagina	103
1. There was no valid objection to this testimony.	104
2. Counsel had a valid strategic reason for admitting the testimony.	107
3. There was no prejudice.	109
B. Failure to move to exclude petroleum evidence	109
1. There was no valid basis for objection.	110
2. Counsel had a valid strategic reason for admitting the testimony.	112
3. There was no prejudice.	113
C. Failure to object to evidence of conspiracy to secrete Applicant's gun and examination on plea agreements	114
1. There was no valid objection to the conspiracy.	116
2. There was no prejudice from admission of the testimony as to how the gun was discovered.	120
3. There was no valid objection to the solicitor's reference to the plea agreements.	120
4. Counsel had a valid strategic reason for not objecting.	122

5. There was no prejudice from admission of the plea agreements.	122
VII. Failure to Object to Admission of Ballistics Evidence	123
A. Counsel was not deficient.	123
B. There was no prejudice.	128
IX. Failure to object to arbitrary factor of "good" prison conditions	134
A. Events at trial	134
B. <i>Plath, Bowman, Burkhardt, and Bryant</i>	137
C. Applicability of a <i>Strickland</i> analysis to this issue	140
D. Counsel was not deficient in handling the issue.	145
E. There was no prejudice.	149
X. Failure to object to submission of kidnapping aggravator	150
A. Events at trial and in PCR	150
B. Failure to call Gadsden in sentencing phase	154
C. Lack of proof in record supporting kidnapping aggravator	157
XI. Alleged Ineffective investigation and presentation of mitigation case	159
A. Alleged constructive absence and the presumption of prejudice	159
1. <i>Cronic</i> is not applicable to this case.	159
2. Counsel did not absent themselves from the mitigation preparation, whether in the context of applying <i>Cronic</i> or assessing deficiency.	164
B. Alleged failure to present evidence of Applicant's emotional value to others	170

1. Counsel were not deficient.	171
2. There was no prejudice.	174
C. Failure to present evidence of work record	180
1. There was no deficiency.	180
2. There was no prejudice.	181
D. Failure to challenge evidence of Kandee's good character	182
E. Failure to object to instruction on allocution	184
F. Failure to present evidence of intoxication	188
XII. Failure to request mitigating instructions on voluntary intoxication	191
CONCLUSION	193

Respondent, above-named, hereby make the following arguments in opposition to the Application for Post-Conviction Relief ("APCR"), filed by Marion Bowman, Jr. ("Applicant"). This APCR stems from a murder conviction and death sentence.

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 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, and his Second Amended Application prior to the evidentiary hearing in this beginning. He filed his Thlrđ Amended Application a week before the evidentiary hearing began in September 2008. The hearing took place over the course of various days in September, October, and December 2008. He filed his Fourth Amended Application in June 2009, some six months after the evidentiary hearing

in this case had concluded. He also filed his Amended Brief Supporting Application for Post-Conviction Relief.

This Respondent's Brief in Opposition follows.

STATEMENT OF EVIDENCE PRESENTED AT TRIAL

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

After a neighbor heard an explosion, officers and firefighters found a burned Ford Escort in a field off a rural road. Inside the trunk was the charred body of Kandee Martin. {R. 3801-02; 3807-3810; 3814-16; 3819-22; 3875-78}. The Ford Escort's license tag 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 lungs were clear, indicating that Kandee was dead before the fire started. {R. 3954-55}. 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}.

B. 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, officers arrived at Dorothy's trailer on the Saturday morning of February 17th, 2001. After

Dorothy consented to a search, officers found Applicant hiding alongside a bed in a child's room down the hall, and he was promptly arrested and Mirandized. {R. 4125-29; 4139-42; 4144-45; 4191-95; 4208; State's Exhibit #27}.

In Applicant's black jeans, officers 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}.

C. Applicant's friends and relatives come clean about his involvement in 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. Kande's car was parked out front, and Applicant mentioned to Fogle that Kande 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 Kande'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 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 Applicant, saying "hold on a minute", and turned back to her conversation with Eddie. {R. 3724-35; 3740-42; 3764-66}.

Kande's gesture angered Applicant. Eddie heard Applicant say "Fuck waiting a minute. I'm about to kill this bitch." {R. 3725-27}. According to Appellant's sister 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 Kande'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}.

D. 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 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. 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}.

E. 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}.

F. 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}.

G. 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's 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 and environment, which led him to make poor choices. {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. 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. {R. 4832-45}.

Dorchester County Detention Center guard Sharon J. Branch testified that Applicant has "attitude", he never made her feel threatened or raised his hand. As his death penalty trial approached, Applicant started behaving "calmer" and "better". {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}.

ARGUMENT

Respondent in the following brief addresses the issues in the order they are addressed in Applicant's brief. However, Respondent should point out, as it did throughout the proceedings, that it objects to any issues after the Second Amended Application. Respondent also asserts that Applicant is limited to the issues he asserts in his brief. Because Applicant raised so many new issues during the course of the hearing, he expressly agreed to the briefing structure so that the State would have fair notice of what his claims are and how he is asserting them (although the State continues to object to allowing him to raise new claims after the evidentiary hearing concluded). Applicant cannot now contend he is preserving more issues than those addressed in his brief, as the brief was for the very purpose of setting forth exactly why he thinks he is entitled to relief.

I. James Tawain Gadson, Jr.

A. The Prosecution Did Not Violate Brady By Not Disclosing Gadson's William S. Hall Institute Psychiatric Report

Applicant contends that the First Circuit Solicitor's Office failed to properly disclose a copy of his co-defendant's psychiatric evaluation from the William S. Hall Psychiatric Institute to Applicant pursuant to Brady v. Maryland, 373 U.S. 83 (1963). At the PCR hearing, Solicitor Bailey testified that he did not believe they provided defense counsel with a copy of the William S. Hall Psychiatric Institute report for Tawain Gadson. {PCR Tr. 2120}. Cummings also testified that he did not recall receiving a copy of the psychiatric evaluation for Gadson. {PCR Tr. 1647}. Applicant asserts the State should have provided him with the report because it contained information that could have been used for impeachment purposes in cross-examining Gadson at trial.

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

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

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

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

First, Applicant fails to establish a Brady claim in this situation because defense counsel had other means by which it could obtain Gadson's psychiatric report. Gadson's psychiatric evaluation was done by order of the court. **{See Applicant's 8 & 31}**. The court order was clearly public record. Thus, the fact that Gadson was evaluated could easily have been discovered by trial counsel upon examination of court records in the Clerk of Court's office. Counsel was well aware that the Department of Mental Health provided the court with a psychiatric report when ordered to conduct such an evaluation. The Department had done so in Applicant's case. **{See Respondent's 29}**. Thus, had counsel reviewed the clerk of court records for Applicant's co-defendant Gadson, he would have clearly been aware that a psychiatric report to the court would have been available. Counsel could have easily filed a subpoena to obtain a copy of Gadson's psychiatric report from the court. Since this information could have been requested by counsel by other

means, Applicant has failed to establish there was a Brady violation. Kelly, supra; Leeke, supra.

Second, Applicant fails to establish a Brady violation because he fails to establish Gadson's psychiatric report was favorable to Applicant's guilt or was impeaching evidence. Applicant argues that the psychiatric report "revealed serious mental health concerns and questions about Gadson's ability to recall events." {Applicant's Brief, p. 4}. This argument is not supported by the report. First, contrary to Applicant's argument, the report does not call into question Gadson's short and long term memory. Specifically, the report found "no evidence of long or short-term memory impairment." {Applicant's 8 & 31, at p. 3}. Further, the report indicates that "[o]n the Repeatable Battery for the Assessment of Neuropsychological Status, he exhibited some mild impairment of verbal memory, but verbal learning was good." {Applicant's 8 & 31, at p. 3}. Overall, the report does not indicate that Gadson suffered from any mental illness other than cannabis dependence. Since there was no indication that Gadson suffered from any type of memory impairment that would have affected his ability to recall what occurred in this case, the report would have had no impeachment value in that regard.

The report was also not material. The William S. Hall report does not indicate that Gadson suffered any memory issues as a result of his seizures. In fact, based on the details provided about the seizures, it appears that he was able to recall what occurred before the seizures (i.e. his food consumption, use of marijuana, etc.). Thus, the argument that he may have blacked out at the scene does nothing to mitigate the fact that he recalled seeing Applicant shoot the victim. More importantly, however, is that the argument

Applicant suggests could have been made was not supported by the record. Neither Gadson nor any other witness testified that Gadson suffered a seizure on Nursery Road at the time of the shooting. Further, no witness testified at either trial or the PCR hearing that Gadson smoked marijuana on the day of the shooting. Gadson did admit at trial that he drank alcohol all day on the day of the murder. {R. 3992-93; 4021; 4031}. Absent additional probative evidence that Gadson suffered a blackout on the scene, trial counsel could not have argued Gadson suffered a blackout merely because he messed in his pants a little bit.

Further, the overwhelming evidence of guilt in this case clearly shows that this evidence would not have undermined the confidence in the verdicts at trial. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when

Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. Overall, even without Gadson's testimony, there was a very strong circumstantial case against Applicant. Second, Gadson's credibility had already been impeached by his testimony regarding his drinking. United States v. Amiel, 95 F.3d 135, 145 (2nd Cir. 1996) ("Suppressed evidence is not material when it merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable."). In light of the fact that the limited impeachment value of Gadson's psychiatric report and the overall strength of the case against Applicant, Applicant has failed to prove by a preponderance of the evidence that the confidence in the verdicts in this case was undermined by the nondisclosure of Gadson's psychiatric report. As a result, Applicant has failed to sustain his burden of establishing there was a Brady violation in the handling of Gadson's William S. Hall report. As a result, this claim for relief should be dismissed.

B. Trial Counsel Was Not Ineffective In Addressing Gadson's Plea Deal and/or Any Possible Bias that May Have Resulted Therefrom

Applicant has asserted that trial counsel were ineffective because they failed to investigate, impeach, and introduce evidence of Gadson's plea deal and his true bias to avoid a death sentence. In essence, Applicant asserts that Gadson was threatened by the

Solicitor's Office with a death sentence in the plea agreement if he failed to testify as they wished. As a result, according to Applicant, the jury was not given a fair impression of the sentence that was avoided by Gadson as a result of his plea agreement. Further, Applicant asserts the jury was left with the incorrect impression that Gadson would serve twenty years in prison under his plea agreement. Applicant's claims should be dismissed because they are not supported by the record.

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

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

First, Applicant's allegation that Gadson expressly bargained to avoid a death sentence is not supported by the record. At no point in time did the First Circuit Solicitor's

Office file a Notice of Intent to Seek Death Penalty against Gadson. Gadson testified the neither he nor his counsel were ever served with a Notice of Intent to Seek the Death Penalty at trial and at the PCR hearing. {R. 4024, PCR Tr. 121, 185}. Applicant's argument relies upon the clause in paragraph 9(b) of Gadson's plea agreement which states that the State may reinstate the murder charges and seek the death penalty if Gadson did not comply with the terms of the plea agreement. Applicant's reliance upon this language in the agreement is misplaced. First, the language in the agreement does not constitute a Notice of Intent to Seek the Death Penalty. It merely outlines the fact that if Gadson did not tell the truth at trial, the State could reinstate the murder charge against Gadson. As a consequence of that, the State could seek the death penalty if it thought the facts would support a conviction. There was no evidence that Gadson plea bargained to avoid the death penalty. When Gadson pled guilty, he was not facing a death sentence. Thus, to the extent that Applicant has alleged ineffective assistance of counsel for not pointing out Gadson avoided a death sentence by pleading guilty should be dismissed because Applicant has failed to show that trial counsel was deficient.

Even if trial counsel was deficient in not crossing Gadson about whether he avoided a death sentence by pleading guilty, Applicant has failed to show that he was prejudiced as a result. First, Applicant has not presented any testimony or evidence that indicated that Gadson actually believed that he was avoiding a death sentence with his plea agreement. In fact, Gadson's testimony at the PCR hearing clearly demonstrated the opposite was true. Gadson noted in his testimony that he was never threatened with the death penalty. {PCR Tr. 121}. He noted that his attorney informed him after receiving the

indictments that Gadson could get life for shooting and killing someone. {PCR Tr. 209}. He did not see that as being the same as the death penalty. Id. Applicant cannot establish that the result at trial would have been different had counsel raised this issue at trial. Even without Gadson's testimony, there was overwhelming evidence presented of Applicant's guilt. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. Clearly, there was a strong circumstantial case establishing Applicant's guilt. Since there was overwhelming evidence of Applicant's guilt, the result at trial would not have differed had trial counsel cross-examined Gadson about whether he

avoided a death sentence with the plea agreement. Thus, this claim of ineffective assistance of counsel should be dismissed.

C. Trial Counsel Did Correct Gadson's Testimony At Trial Regarding his Twenty Year Sentence

Applicant also fails to establish trial counsel was ineffective for not correcting Gadson's testimony at trial indicated that he would serve twenty (20) years in prison.

At trial, Solicitor Bailey asked Gadson if he was testifying pursuant to a plea agreement:

Q. Okay. And through Mr. Dukes, through his representation, you ahve entered into a plea agreement with the State of South Carolina; have you not?

A. Yes, sir.

Q. Okay. And would you tell the Court and the jury waht that agreement is, your understanding of that agreement?

A. Accessory after the fact and misprision of a felony.

Q. All right, sir. And are you going to get a negotiated sentence of 20 years for that?

A. Yes, sir.

Q. Okay. And in exchange for that, dropping the murder charge and allowing you to plead to accessory after the fact of murder and misprision of a felony and receiving a 20-year sentence, have you agreed to testify truthfully in this case?

A. Yes, sir.

{R. 3981, I 7-25}. During cross examination, trial counsel asked Gadson about the plea bargain he made with the State. Gadson testified that he was set to receive a fifteen (15) year sentence for accessory after the fact to murder. {R. 4023}. He was also set to receive a five (5) year sentence for misprision of a felony. {R. 4023}.

Applicant has failed to establish that trial counsel was ineffective in cross examining Gadson on how much time he would serve in prison. First, there was no testimony that indicated that Gadson would serve 20 years in prison at trial. The testimony clearly indicated only what his sentence would be.

Furthermore, Applicant fails to establish that he was prejudiced if trial counsel was deficient in the cross-examination on this issue. First, there was no testimony offered at the PCR hearing that Gadson was aware at trial that he could serve substantially less than twenty years confinement under his plea agreement. See Moss v. Hofbauer, 286 F.3d 851, 864-65 (6th Cir. 2002) (speculation as to possible lines of cross-examination insufficient where no evidence presented how witness would have testified had the cross-examination been pursued); Zettlemoyer v. Fulcomer, 923 F.2d 284,298 (3rd Cir. 1991) (applicant cannot show deficiency "based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense"; rather, facts must be presented). Since there was no evidence establishing that Gadson was aware he would actually serve substantially less than 20 years in prison when he testified at trial, Applicant cannot establish that his testimony was biased as a result. Second, Applicant did not show that the outcome at trial would have differed but for counsel's deficiency because there was overwhelming evidence of Applicant's guilt in the murder of the victim. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he

killed the victim. {R. 4068}. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. Thus, even if Gadson's testimony was impeached by the fact that he would be eligible for parole early in his twenty (20) year sentence, there was still overwhelming evidence of Applicant's guilt. As a result, Applicant fails to show that the result at trial would have been different but for counsel's failure to impeach Gadson on his parole eligibility. Thus, this claim for relief should be dismissed.

D. Trial Counsel Was Not Ineffective Because It Chose Not to Attempt to Introduce Arrest Warrants and Indictments As Evidence Gadson Was the Shooter.

Applicant also asserts trial counsel was ineffective for not presenting evidence to the jury that the State had asserted that Gadson was the one who shot the victim in other court proceedings. Applicant fails to show by a preponderance of the evidence that counsel was ineffective in this regard.

First, Applicant fails to show that trial counsel was deficient in not presenting evidence that the State believed Gadson was the one who shot the victim. In this claim, Applicant basically argues that the State once believed Tawain Gadson was the actual shooter. He relies upon the fact that the lead detective in the investigation, Alvin Coker, submitted a sworn affidavit for Gadson's arrest warrant that indicated there was evidence Gadson was the shooter. The affidavit states that there was probable cause to believe that Gadson murdered Kandee Martin. **{Applicant's 4}**. The affidavit clearly notes that the basis for the belief there was probable cause was a statement given by Applicant:

Investigation lead Officers to interview a co-defendant (Marion Bowman Jr. (AKA: "Black" or "Jr."), who provided a written statement wherein he stated that between the incident time aforementioned, that the defendant and a co-defendant approached him while driving the victims car. The defendant and co-defendant had socks on their hands and confided in him that the defendant and co-defendant had shot and killed the victim (Kandee Martin). The defendant and codefendant then recruited Marion Bowman Jr. to assist them in moving the victims body and destroying the car and other evidence by burning them.

{Applicant's 4}. Applicant also relies upon the fact that Gadson was also indicted for murder in this case. **{See Applicant's Brief at p. 9}**.

At the PCR hearing, Coker testified that the affidavit to the arrest warrant was based upon the information and evidence the police had at that time. **{PCR Tr. 890}**. That information consisted of the statement provided by Marion Bowman. As for the murder indictment against Gadson, Coker testified that he was the sole witness presented to the grand jury in this case. **{PCR Tr. 862}**. He testified to the facts as he knew them. **Id.** Coker testified that he told the grand jury that the evidence they had at the time indicated Gadson was present when the murder occurred, but Applicant was the one who fired the fatal shot. **{PCR Tr. 863-64}**.

Applicant's claim that trial counsel was ineffective in not showing that the State believed Gadson was the shooter should be dismissed because Applicant has failed to prove counsel was ineffective by a preponderance of the evidence. Applicant has not established that trial counsel was deficient. First, "[i]t is well settled in this jurisdiction that affidavits are inadmissible in criminal cases." State v. Alexander, 303 S.C. 408, 409, 401 S.E.2d 167, 168 (1991) (citing State v. Stewart, 288 S.C. 232, 341 S.E.2d 789 (1986); State v. Lathan, 275 S.C. 550, 273 S.E.2d 772 (1981); State v. Smith, 230 S.C. 164, 94 S.E.2d 886 (1956)). Trial counsel cannot be found deficient for not introducing inadmissible evidence. See generally Strickland, *supra*. Thus, to the extent that Applicant asserts that Gadson's arrest warrant should have been introduced at trial, his claim should be dismissed. More importantly, however, is the fact that the arrest warrant affidavit in no way indicates the State believed Gadson was the one who fired the fatal shot. All the arrest warrant affidavit shows is that the police believed there was probable cause to believe that Gadson may have been the shooter. Further, Gadson's arrest warrant was drafted very early in the investigation. It was sworn out by Coker on February 17, 2001, the same day the victim's car and body were found. {Applicant's 4}. Also, the arrest warrant affidavit was based upon the second statement provided to police by Applicant. Trial counsel provided a valid, strategic reason for not wanting any of Applicant's statements entered into evidence. He did not ask the question because he knew the response would be that they relied upon Applicant's statements in making the arrest. {PCR Tr. 1914}. That was not a road that he wanted to take at trial. Id. Further, Cummings pointed out that arrest warrants do not count any way, and that they can be

amended and changed. {PCR Tr. 1914}. Furthermore, indictments supersede arrest warrants. Id. Thus, to the extent Applicant has alleged that trial counsel was ineffective for not presenting evidence from the arrest warrant affidavit at trial, this claim should be dismissed because trial counsel was not deficient.

Trial counsel was also not deficient in not introducing the indictment against Gadson as evidence that the State once believed Gadson was the shooter. First, the indictment was not evidence that the State believed was the shooter. Under South Carolina law, "one who is present, aiding and abetting the commission of a crime is a principal, and may be convicted on an indictment charging him alone as such." State v. Cox, 258 S.C. 114, 118, 187 S.E.2d 525, 528 (1972)(internal citation omitted). Solicitor Bailey testified that Gadson was charged as a principal first and could have been convicted as such under alternative theories of him either being the trigger man or him being present and abetting Applicant. {PCR Tr. 2139-40}. He also noted that their practice was to charge as principal first with the understanding that they could convict as a principal second on the theory of hand of one, hand of all. {PCR Tr. 2140}. There was no reason to specify exactly what part of the law they were relying upon because he could be convicted under any of the three theories under the indictment. {PCR Tr. 2140}. Bailey also indicated that the indictment was done that way to keep the options open in case later evidence took them in a different direction in the case. Id. Bailey also pointed out that Gadson's true billed indictment does not mean Coker told the grand jury that Gadson was the one who shot the victim. Id. Bailey did not want to speculate as to what Coker may or may not have told the grand jury, but the only concern in the grand jury is whether there is sufficient evidence to continue prosecution

under some legally valid theory. {PCR Tr. 2140-41}. Since the language of the indictment does not mean the State believed Gadson was the shooter, counsel cannot be found deficient in presenting it as evidence of such a belief. Overall, Applicant has failed to show that trial counsel was deficient in not presenting the indictment as evidence the State believed that Gadson was the shooter.

Applicant has also failed to establish that he was prejudiced as a result of trial counsel not presenting either the arrest warrant affidavit or the indictment as evidence of Gadson being the shooter. First, contrary to Applicant's assertions, the jury was informed that at one point in time the State appeared to believe that Gadson was the one who killed the victim. At the outset of Gadson's direct testimony at trial, Gadson testified that his murder charge in this case was being reduced to accessory after the fact to murder and misprision of a felony in exchange for truthful testimony. {R. 3980-81}. The jury would have had reason to believe that at some point in time, the police thought Gadson was the killer. Second, there was overwhelming evidence of Applicant's guilt in the murder of Kandee Martin. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put

her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. In light of the overwhelming evidence of Applicant's guilt, Applicant has failed to establish that the result at trial would have been different but for trial counsel not presenting the arrest warrant affidavit and indictment as evidence the State believed Gadson was the one who shot and killed Kandee Martin. Since Applicant has failed to show that trial counsel was either deficient or that he prejudiced as a result of the alleged deficiency, this claim for relief should be dismissed.

E. Trial Counsel was Not Ineffective in Not Presenting Alleged Evidence of Confession from Ricky Davis and Wayne Mood

It appears that Applicant has also alleged that trial counsel was ineffective in not presenting evidence that Gadson confessed to killing Kandee Martin while in prison. Applicant points to the fact that one inmate, Ricky Davis, drafted a handwritten note indicating that Gadson told him he was the one who shot and killed Kandee Martin. As explained in greater detail in Section IV, trial counsel made a reasonable strategic decision not to call Ricky Davis at trial. Davis had indicated to Applicant's defense team that he would testify that Bowman gave him the information for the statement and Bowman insisted he write the statement. Thus, for the reasons stated in Section IV, this claim should be dismissed.

Applicant also asserts that trial counsel should have presented the testimony of Wayne Mood, a jailhouse informant interviewed by the State about this case. According to the notes from Solicitor Bailey's interview with Wayne Mood, Gadson told Mood and another man that both he and Bowman shot Kandee Martin. {Applicant's 68}. The notes indicate that both Bowman and Gadson told Mood a similar story. They were with Kandee Martin and were planning to rob a house. *Id.* Bowman gave the victim some crack. At some point in time, the victim became afraid and ran towards Bowman. They argued. Bowman mentioned to Mood that the victim was supposedly wired. According to the statement, the initial story was Gadson shot her in the back first. The victim ran until she ran out of breath. She then begged for mercy. Shortly thereafter, Bowman shot her in the head. The note also indicates that Bowman threatened to kill Gadson if he told anyone, and it mentioned that Gadson defecated on himself. The notes also indicate that later on, Bowman and Felder went back to the scene, put the body in the trunk of the victim's car, and set the car on fire. It appears that Gadson's initial version had Bowman shooting first. However, the Wayne Mood notes also indicate that Gadson later admitted he shot the victim first.

Applicant has failed to show that trial counsel was deficient in not presenting the testimony of Wayne Mood at trial. First, Applicant did not call Wayne Mood to testify at the hearing. Thus, there is no evidence on the record as to what Wayne Mood would have said if he was called to testify at trial. *See also Moss v. Hofbauer*, 286 F.3d 851, 864-65 (6th Cir. 2002) (speculation as to possible lines of cross-examination insufficient where no evidence presented how witness would have testified had the cross-examination been pursued); *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 298 (3rd Cir. 1991) (applicant cannot

show deficiency "based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense"; rather, facts must be presented).

Further, trial counsel gave a reasonable strategic reason for not calling Wayne Mood to testify. Cummings testified that he contacted Mood's attorney shortly after receiving the notes from Solicitor Bailey. {PCR Tr. 1366-67; see Applicant's 70}. Mood's counsel would not allow the defense to talk with Mood. Overall, in assessing the value of Mood's potential testimony, Cummings noted that parts of what he was saying about Bowman had to do with Bowman shooting the victim in the back. {PCR Tr. 1367-68}. He did not want to put up a witness that was going to possibly implicate Applicant for any reason. {PCR Tr. 1368}. He did not even want to present testimony that would have indicated he was at the scene with Gadson with Gadson being the shooter. Id. He was concerned that presenting testimony that put Applicant at the scene could backfire. Id. Clearly, counsel's explanation for not calling Wayne Mood was reasonable trial strategy. As a result, Applicant failed to establish trial counsel was deficient in this regard. Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial). 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, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

Applicant also fails to establish that he was prejudiced as a result of counsel not presenting Wayne Mood's testimony. First, if Mood testified in accordance with the Solicitor's notes, then Mood's testimony would not have been exculpatory. The notes clearly detail that Bowman admitted to Mood he was the one who shot Kandee Martin in the head after she begged for her life. The forensic pathologist who testified at trial indicated that both the head wound and the wound to the back were fatal wounds. {R. 3945, 3949}. The notes on Mood also indicated that Gadson later allegedly agreed he was the one who fired the first shot in the victim's back. Thus, the notes indicate Mood's testimony would clearly incriminate Applicant as a murderer. Second, there was overwhelming evidence of Applicant's guilt in the murder at trial. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants

pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. Thus, even if trial counsel was deficient in not calling Wayne Mood to testify about Gadson's admission that he shot the victim, trial counsel was not ineffective because the result at trial would not have differed as a result of trial counsel's alleged deficiency. As a result, this claim for relief should be dismissed.

F. Trial Counsel Was Not Ineffective In Handling Evidence that Gadson Had Access To Applicant's Gun.

Applicant also asserts trial counsel was ineffective for not presenting evidence that Gadson had fired the gun used to kill the victim two weeks prior to the victim's murder. According to the police statement given by Tiara Coleman, she and Gadson were walking around the Villas when Coleman got into an argument with someone else. {Applicant's 30}. Applicant gave Gadson a gun, which he shot into the air. *Id.* The casings from that shooting were recovered by another resident in the Villas, Margaret Hawkins. {Applicant's 29}. Those casings were fired by the same gun that killed the victim. {R. 4315}. At the PCR hearing, Gadson corroborated the sequence of events contained in Coleman's statements. {PCR Tr. 161-62}. He noted that Bowman let him borrow the gun for that shooting. {PCR Tr. 195-96}.

Q Which .380 were you firing at the Villas that they were asking about?

A The one Marion bought from the dude in Orangeburg.

Q That was Marion's gun?

A Uh-huh.

Q He let you borrow it?

A It was a dude standing in front of the apartments talking as if he had a knife, he handed me the gun, I started shooting it.

Q Marion Bowman was there?

A Yes, he was there.

{PCR Tr. 195}. Cummings testified that he did not want the information about the shooting at the Villas in evidence. {PCR Tr. 1704}. He noted that while Coleman and Hawkins showed Gadson had fired the gun, they also indicated that Bowman gave him the gun. {PCR Tr. 1705}.

Trial counsel was not deficient in not cross-examining Gadson about the fact he had access to the gun. Such a cross-examination would not have assisted in proving Applicant was innocent of the crime. While Gadson would have testified that he was given access to Applicant's gun at the Villas shooting a few weeks before the murder, his testimony would have clearly indicated that the only reason he had access to the gun then was because Applicant gave it to him. Thus, any cross-examination questions on this issue would have had minimal benefit to Applicant.

Further, Applicant did not establish that he was prejudiced by trial counsel's decision not to introduce evidence of the shooting at the Villas. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. Travis Felder also

testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. As already noted, the impact of introducing evidence of this shooting would at best be minimal. Thus, Applicant could not establish that the result at trial would have been different had counsel introduced the evidence. As a result, this claim of ineffective assistance of counsel should be dismissed.

G. Trial Counsel was Not Ineffective In Addressing the Fact Gadson Lied to Police about Owning a .380 Handgun.

Applicant also asserts trial counsel was ineffective for not pointing out that Gadson had lied about owning a .380 High Point firearm. In essence, Applicant asserts that the jury was led to believe that only Bowman owned a weapon that would produce the characteristics consistent with the casings linked to Martin's death.

Applicant's claim lacks merit. First, Applicant cannot establish that trial counsel was deficient in handling the issue of whether Gadson owned a High Point .380. At trial, Cummings asked Gadson if he owned a high powered .380 pistol. {R. 4026}. Over the

State's objection, Gadson was allowed to answer. {R. 4027-31}. He admitted that he had purchased a .380 pistol in July 2000, and the pistol he purchased was the same color as Applicant's. {R. 4031}. Clearly, the jury was made aware that Gadson also had a weapon that could have been used in the murder. Thus, trial counsel was not deficient in presenting information that Gadson had lied about owning a .380 pistol.

Applicant also fails to show that he was prejudiced by trial counsel's handling of this issue. As already noted, the jury was informed of the fact that Gadson owned a .380. Thus, Applicant's argument that the jury did not know is not supported by the record. Further, there was overwhelming evidence of Applicant's guilt. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also,

Applicant's DNA was found in the victim at the scene. {R. 4381}. Since Applicant has failed to establish that he was prejudiced as a result of trial counsel's handling of this issue, he has failed to prove trial counsel was ineffective. As a result, this ground for relief should be dismissed.

II. Travis Felder

A. The Prosecution Did Not Fail to Correct False Testimony in Regards to Felder Purchasing the Gasoline.

Applicant's first claim involving Travis Felder alleges the State failed to correct false testimony when Felder omitted the fact that he was the one who purchased the gasoline that was used to burn the victim's car. During the guilt phase of trial, Felder testified that after leaving the apartments in Branchville, he followed Applicant down McElhaney Road to Nursery Road. {R. 4092-94}. However, during the sentencing phase, Felder was recalled to the stand by Applicant. During his second stint on the stand, Felder testified that he was the one who purchased the gasoline used to burn the victim's car on February 17. {R. 4915-16}. He testified that Applicant gave him a gas jug and asked that he purchase gasoline to assist him in "parking a car." {R. 4916, 4922}. Felder also indicated that he understood he was supposed to tell the truth the first time he was on the stand, but he omitted that part of the truth. {R. 4926}.

A state "denies a defendant due process by knowingly offering or failing to correct false testimony." Basden v. Lee, 290 F.3d 602, 614 (4th Cir.2002) (citing Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)). Furthermore, "[a] Napue claim requires a showing of the falsity and materiality of testimony." Id. False testimony is "material" when "there is any reasonable likelihood that the false testimony could have

affected the judgment of the jury.' " Boyd v. French, 147 F.3d 319, 329-30 (4th Cir.1998) (quoting Kyles v. Whitley, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)).

First, Applicant fails to establish that the State knowingly offered false testimony. At the PCR hearing, Solicitor Walter Bailey testified that he did not know that Felder was the one who purchased the gasoline. {PCR Tr. 2037}. He testified that he never specifically asked Felder any questions about purchasing gasoline, and none of the versions of the facts provided to him by Felder included Felder's purchase of the gasoline. Id. Bailey noted that Felder had omitted that fact in both meetings he had with Felder and his attorney and in the proffer letter that was submitted by Felder's attorney. {PCR Tr. 2040}. Bailey recalled that he first heard that Felder was the one who purchased the gasoline from trial counsel. {PCR Tr. 2037}. Bailey reiterated several times that he never knew that Felder was the one who purchased the gasoline. {PCR Tr. 2047}. He could not correct the omission because he did not know there was an omission. {PCR Tr. 2047-48}. At the PCR hearing, Felder testified that he could not remember if he told Bailey he was the one who bought the gasoline. {PCR Tr. 706, 711}. He did agree that he said he told Bailey when he was deposed for these proceedings. {PCR Tr. 671}. However, he also noted that he could not say for sure that he told Solicitor Bailey. {PCR Tr. 714}. Overall, Felder testified that he did not have a specific memory of telling Bailey that he was the one who purchased the gasoline. {PCR Tr. 729}. Without specific information from Felder, the State could not know for certain that Felder was the one who purchased the gasoline used in the arson. At best, they only knew that Felder had purchased a small amount of gasoline around 3:14 a.m. on the morning of the arson. There was no mention of Felder

being the one who purchased the gasoline in the proffer letter sent to Solicitor Bailey by Felder's counsel. **{See Applicant's 64}**. Also, Felder's role as the one who purchased the gasoline was not an issue he was questioned about during his polygraph. **{See Applicant's 15}**. It is also not mentioned in Solicitor's Bailey's outline for Felder's testimony. **{Applicant's 82}**. In light of the fact that neither Felder nor Bailey could recall Felder telling Bailey he was the one who purchased the gasoline, Applicant has failed to show by a preponderance of the evidence that Bailey knowingly presented false testimony in allowing Felder to omit the fact he was the one who purchased the gasoline. As a result, this claim for relief should be dismissed.

Second, Applicant failed to show that the allegedly false statement by Felder was material. As already noted, false testimony is "material" when "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Boyd v. French, 147 F.3d 319, 329-30 (4th Cir.1998) (quoting Kyles v. Whitley, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). Here, there is no reasonable likelihood that Felder's omission could have affected the judgment of the jury. First, the omitted testimony did not indicate that Applicant was any less guilty of the crimes for which he was convicted. In fact, the omitted testimony further confirms that Applicant was guilty in the arson. At trial, Felder testified that he purchased the gasoline at Applicant's request. **{R. 4922-24}**. He further testified that Applicant was the one who provided the jug that was used. **{R. 4922}**. Felder confirmed that he purchased the gasoline at Applicant's request at the PCR hearing. **{PCR Tr. 699-700}**. Contrary to Applicant's assertions, there was no evidence that Felder was involved in the planning to burn or burning of the car. He testified that all

he did was purchase the gasoline. {See PCR Tr. 699-700}. Felder has consistently maintained that he thought the gasoline was needed so that Bowman could go "park a car." {PCR Tr. 699-700; R. 4092}. Applicant offers no other probative evidence to show that Felder knew Bowman was going to burn the car. Furthermore, no other witness testified that Felder assisted in the planning or participated in the burning of the car. In fact, at least two witnesses confirm that Felder was at a friend's apartment when Bowman came to him about the issue. Carolyn Brown testified that Applicant stopped by the Boloma Smith's apartment and asked Felder for a ride home. {R. 3711, 4045}. Boloma Smith testified that Applicant stopped by her apartment and asked Felder to come out and speak with him. {R. 4117}. She also noted that Felder left, and he came back later. {R. 4117-18}.

Furthermore, even without Felder's testimony, there was overwhelming evidence of Applicant's guilt in this case. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177,

4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. In light of the overwhelming evidence of Applicant's guilt, it is highly unlikely that the testimony omitted by Felder would have resulted in a different outcome. Overall, Applicant has failed to establish that the fact that Felder was the one who purchased the gasoline was material to the arson case against Bowman. Thus, this claim for relief should be dismissed.

Finally, if this Court finds that the State knowingly allowed Felder to present false testimony and that testimony was material, relief for the violation can only be granted on the arson conviction. Felder's testimony was only relevant to the arson charge. There were no allegations that the victim died as a result of the fire. Thus, only the arson conviction would have been affected by any failure to correct false testimony. Overall, Applicant has failed to meet his burden of proof for this claim. As a result, it should be denied and dismissed.

B. The State Did Not Fail to Correct Felder Regarding How Many Times He Met with the State in Preparation for His Testimony at Trial

Applicant's second claim under the failure to correct is that the State failed to properly correct Felder's testimony on the number of times he spoke with someone from the State. This claim should be dismissed because it completely mischaracterizes the testimony at trial and is not supported by the record. Solicitor Bailey properly corrected Felder's testimony in response to the question that was asked at trial.

At issue in this claim is whether the State properly corrected Felder's testimony to the following exchange between trial counsel Cummings and Felder:

Q. Mr. Felder, it wasn't until last week, and I want to go back over it again, how many times have you met with anybody representing the State to go over your testimony today?

A. Excuse me?

Q. How many times have you met with anybody to go over your testimony today

A. Once.

Q. -- with the State? One time.

{R. 4109}. Clearly, the questions asked at trial pertained only to how many times Felder talked with someone from the State about his testimony at trial.

During redirect, Solicitor Bailey clearly corrected Felder's testimony regarding how many times they met in preparation for his testimony at trial.

Q. Travis, we met in your lawyer's office a couple weeks ago, right?

A. Yes.

Q. And this morning we also talked, is that correct?

A. Yes.

Q. So you've actually talked to me two times?

A. Yes, sir.

{R. 4110}. Contrary to Applicant's assertions, there were no other meetings between representatives of the State with Felder regarding his testimony at trial. The other interactions that Felder had with state officials regarding his testimony. The first three meetings cited by Applicant were clearly interactions Felder had with law enforcement as they investigated the case. The first was when he was initially questioned by police. The second occurred when he was arrested. The third meeting occurred when Felder was

polygraphed. Only in the last two meetings between Felder and Bailey did he actually discuss his testimony at trial. Thus, Bailey did properly correct Felder's testimony regarding how many times he met with a representative of the State regarding his testimony. As a result, Applicant's claim is not supported by the record and should be dismissed with prejudice.

C. The Prosecution Did Not Commit Any Brady Violations with Evidence Relating to Travis Felder

Applicant asserts that the State failed to provide the defense with information and evidence favorable to Applicant in violation of Brady v. Maryland, 373 U.S. 83 (1963). Each Brady claim alleged by Applicant should be dismissed because Applicant has failed to prove by a preponderance of the evidence that the State violated the disclosure requirements established by Brady.

"A Brady violation occurs when the government fails to disclose evidence materially favorable to the accused." Youngblood v. West Virginia, 547 U.S. 867, 869, 126 S.Ct. 2188 (2006). Evidence that is not disclosed is suppressed for Brady purposes even when it is "known only to police investigators and not to the prosecutor." Kyles v. Whitley, 514 U.S. 419, 438, 115 S.Ct. 1555 (1995). Evidence is favorable if it is either exculpatory or impeaching. See, e.g., Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936 (1999). Evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (internal quotation marks omitted). However, a "showing of materiality does not require demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted ultimately in the

defendant's acquittal," id. (quoting Kyles, 514 U.S. at 434, 115 S.Ct. 1555), but only a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (quoting Kyles, 514 U.S. at 435, 115 S.Ct. 1555). The assessment of materiality is made in light of the entire record. United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392 (1976).

An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006) (citing Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); Gibson, 334 S.C. 515, 514 S.E.2d 320 (1999)). If a Brady violation is found to have occurred, PCR must be granted. Gibson, *supra*.

D. The State Did Properly Disclose Evidence that Felder Purchased Gasoline on the Morning of the Arson.

Applicant asserts that the State failed to provide trial counsel with evidence that Felder was the one who purchased the gasoline. This Brady claim is without merit. Applicant has failed to establish that the State suppressed any evidence identifying Felder as one who purchased gasoline from the EZ Horizon convenience store on the morning of the arson. Also, Applicant fails to show that evidence Felder purchased the gasoline was favorable to Applicant's case. Furthermore, Applicant does not establish that the fact Felder purchased gasoline on the morning of the arson was material to Applicant's case. Overall, Applicant does not prove by a preponderance of the evidence that the State

violated Brady by not providing the defense with evidence Felder purchased the gasoline used in the arson. As a result, this claim should be dismissed.

First, as already noted in Section II, A, it is not clear that the State had evidence that Felder purchased the gasoline used to burn the victim's car. At the PCR hearing, Solicitor Bailey consistently testified that he was not aware that Felder was the one who purchased the gasoline. {PCR Tr. 2037, 2047-48}. While Felder testified at the PCR hearing that he did say he told Solicitor Bailey he purchased the gasoline at his deposition, Felder indicated that he did not have a specific memory of whether or not he did tell Bailey. {See PCR Tr. 729}. He was unable to confirm if he was telling the truth about telling Bailey at the deposition because he simply could not remember. {PCR Tr. 706, 714, 729}. While the State had circumstantial evidence that it was Felder who purchased the small amount of gasoline from the EZ Horizon convenience store, they did not have any evidence indicating that the gasoline purchased by Felder was the gasoline used in the arson until Felder testified to as much during the penalty phase at trial. The proffer letter that was sent to Bailey did not include any discussion about Felder purchasing gasoline. {Applicant's 64}. Felder's polygraph report indicates Felder did not mention anything about purchasing the gasoline. {Applicant's 15}. Most telling, however, is the fact that Solicitor's Bailey's notes created in preparation for Felder's testimony also include no mention of Felder purchasing the gasoline. Clearly, the State would have had no reason not to present such testimony. Based on Felder's testimony during the penalty phase and at the PCR hearing, it would have assisted the State's case because Felder clearly testified that he purchased the gasoline on Applicant's instruction. {R. 4922-24; PCR Tr. 699-700}.

None of the evidence presented at the PCR hearing indicated that the State had evidence connecting the gasoline purchased by Felder to the arson. Thus, Applicant has not pointed to any evidence that was suppressed by the State in regards to Felder purchasing the gasoline used in the arson.

Furthermore, the State did provide the defense with the evidence it did have regarding the gasoline purchase. Cummings testified that they received a copy of the video surveillance from the EZ Horizon convenience store. {PCR Tr. 1933-34; Respondent's 34}. Also, the investigative file contains a note denoting the times on the video that the police thought was significant in their initial review. {See Applicant's 42/Court's 2}. Applicant has neither presented nor pointed to any evidence regarding the purchase of the gasoline that was not provided to defense counsel. As a result, he has failed to establish any favorable evidence in this regard was suppressed. Thus, this claim for relief should be dismissed.

To the extent Applicant relies upon Detective Coker to establish the State knew Felder purchased the gasoline used in the arson, that reliance is not supported by the record. Coker testified that the video tape from EZ Horizon was of very poor quality. {PCR Tr. 900-01}. He could not recognize anyone on the video. {PCR Tr. 901}. The video was sent to SLED, and SLED made a few still photos. Id. Coker did not recall if he interviewed Felder, showed him the video, or asked if he was on it. Id. Coker also could not recall Felder's response to questions about him being on the video tape. {PCR Tr. 902}. Noticeably absent from his testimony at the PCR hearing is any indication the State knew that gasoline purchased from the EZ Horizon convenience store was used in the arson.

Obviously the investigation looked for gasoline purchases at the EZ Horizon store because they had statements indicating Gadson may have purchased gasoline for the arson. **{See Applicant's 36}**. It is also clear that law enforcement reviewed the tape for any small purchases of gasoline. However, at no point at trial did the State present any evidence that indicated they knew who purchased the accelerant used in the arson and from where it was purchased.

Second, Applicant has failed to show that any evidence that Felder purchased the gasoline was favorable to his case. Felder testified that he purchased the gasoline at Applicant's request. **{R. 4922-24, PCR Tr. 699-700}**. According to Felder's testimony at trial, Applicant provided the container used to hold the gasoline. **{R. 4916, 4922}**. He has consistently testified that when he purchased the gasoline, he thought he was doing so to assist Applicant "park a car." **{R. 4916-4924; PCR Tr. 699-700}**. Applicant fails to show how this testimony is favorable to his defense on the arson charge. Cummings testified that while they could not tell if Felder was on the tape, Applicant informed him that Felder was on the tape at 3:14 a.m. purchasing the gasoline. **{PCR Tr. 1287}**. He did not want Felder testifying about the fact that he purchased the gasoline because of the implication of Applicant's involvement in the planning of the arson. **{PCR Tr. 1289-90}**. At best, the information could have had very limited impeachment value. However, based upon the testimony Felder provided during the sentencing phase and at the PCR hearing, it does not appear that the omission indicated Felder was any more culpable than what he was charged with doing.

Third, Applicant has failed to show that Felder's purchasing the gasoline used to burn the car was material evidence. Even if the evidence of Felder's purchase in the State's possession was not turned over to the defense, the State's failure to do so would not have undermined the confidence in the verdict at trial. It is clear from the testimony of trial counsel Norb Cummings that Applicant was well aware that Felder was the one who purchased the gasoline. {PCR Tr. 1287}. Cummings testified it was Applicant who informed him that Felder purchased the gasoline. Id. Thus, Applicant could have presented the omission during the guilt phase at trial if he wished to do so. Second, there was overwhelming evidence of Applicant's guilt in the murder and arson presented at trial. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. Thus,

Applicant cannot show beyond a preponderance of the evidence that the result at trial would have differed had evidence of Felder purchasing the gasoline was turned over. Nor can he establish that confidence in the verdict was undermined. Thus, Applicant does not establish the allegedly suppressed evidence was material. As a result, this claim should be dismissed.

Finally, if this Court finds that the State committed a Brady violation, relief for the violation can only be granted on the arson conviction. Felder's testimony was only relevant to the arson charge. There were no allegations that the victim died as a result of the fire. Thus, only the arson conviction would have been affected by any failure to correct false testimony. Overall, Applicant has failed to meet his burden of proof in establishing this claim. As a result, it should be denied and dismissed.

E. The State Did Not Violate Brady When It Did Not Disclose the Proffer Letter from Felder's Attorney.

Applicant has failed to establish by a preponderance of the evidence that the State did not properly provide the defense with a letter from Felder's attorney containing a proffer of what Felder would say at trial. The proffer letter dated March 27, 2002 was not evidence that could have been used at trial or lead to other admissible evidence. Further, the proffer letter was not favorable to Applicant. Finally, Applicant fails to show that the proffer letter was material evidence.

Solicitor Bailey testified that he received a letter from Felder's counsel during their negotiations regarding a possible plea agreement. **{See PCR Tr. 2109}**. The letter contained a proffer of what Felder could testify to if called upon at trial. **{PCR Tr. 2109, Applicant's 64}**. The letter indicated that Felder had seen Applicant, Gadson, Williams,

and Johnson at the Allen Murray Club that night. {Applicant's 64}. The letter indicated Felder went to his girlfriend's apartment after returning from the Allen Murray Club. Id. About fifteen minutes later, Applicant stopped by and asked Felder for some assistance in parking a car. Id. According to the letter, Felder then followed Bowman down McAlhaney Road. Id. The letter noted that Bowman pulled up into a field, got out, and then the car was on fire. Id. Felder did not recognize the car; instead, according to the letter, he assumed it was one of Bowman's sister's car. Id. Bailey testified that he did not necessarily believe the contents of the proffer letter. {PCR Tr. 2109}. As a result, he had Felder take a polygraph examination to verify the veracity of Felder's statements. Id. Bailey testified that to the best of his recollection, he forwarded a copy of the proffer letter to defense counsel. {PCR Tr. 2110}. He also forwarded the results of the polygraph report to defense counsel after it was completed. {PCR Tr. 2110, Respondent's 36}. At the PCR hearing, Norb Cummings testified that he did not recall receiving a copy the proffer letter sent by Felder's attorney to Solicitor Bailey. {PCR Tr. 1319}.

Applicant has failed to establish that the State violated Brady by not providing the defense with a copy of the letter. First, Applicant has failed to establish by a preponderance of the evidence that the proffer letter was favorable to Applicant. The letter offers no exculpatory evidence for Applicant's case. Outside of the testimony regarding seeing the body in the car, it was consistent with Felder's testimony at trial during the guilt phase. Further, the evidence could not be used for impeachment purposes. It was not a statement made by Felder. It was simply a reflection of what Felder's attorney provided the solicitor's office as it opened negotiations for a plea agreement.

Second, Applicant fails to show the proffer letter was material. clearly wasn't the final agreement between the State and Felder. Felder and the State came to a verbal agreement just before trial. {PCR Tr. 1295; see Applicant's 14}. There is no evidence that Applicant was not provided with any information about what Felder was going to say at trial. Cummings testified that a few days before trial he got a phone call from the solicitor's office informing him Felder was going to testify. {PCR Tr. 1294}. He also recalled that he received a letter or fax that confirmed Felder was going to cooperate with the state. {PCR Tr. 1294}. Applicant presented no evidence establishing what was known by trial counsel at the time of trial in regards to what Felder's proffered testimony. In light of the fact that counsel did know what Felder was going to say and the fact that counsel was aware Felder had lied in the past about seeing the victim's body being put in the trunk of the car, Applicant has not shown how this proffer statement is material to this case. As a result, this claim should be dismissed.

Furthermore, the information in the proffer letter does not undermine the confidence in the verdict in Applicant's convictions and death sentence. First, the information in the letter could not have undermined the confidence in the death sentence. There was overwhelming circumstantial evidence of Applicant's guilt presented in this case. the overwhelming evidence of guilt in this case clearly shows that this evidence would not have undermined the confidence in the verdicts at trial. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again,

but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. Even in a worst case scenario, Felder's testimony could not undermine the confidence in the murder conviction and death sentence because Felder's testimony was relevant primarily to the arson charge. Since Applicant's death sentence was on the murder conviction, the fact that the proffer letter was allegedly suppressed would not impact that verdict. Thus, the proffer letter could only possibly be material to the arson conviction. Overall, Applicant has failed to establish a Brady claim in this instance. As a result, this claim should be dismissed.

F. There Was No "Wink Wink" Deal Between the State and Felder

Applicant has asserted that the State withheld evidence there existed a "wink wink" deal for Felder's testimony. This claim is not supported by the evidence presented at the PCR hearing. Simply stated, there was no "wink wink" deal between the State and Felder. Since there was no "wink wink" deal for Felder's testimony, the State could not have violated Brady in not disclosing the existence of such a deal. As a result, this claim for relief should be dismissed.

Applicant's complaint derives from the fact that Felder received the benefit of his signed plea agreement with the State even though he omitted the fact he purchased the gasoline during his guilt phase testimony. At the PCR hearing, Solicitor Bailey testified that he was surprised to learn that Felder had purchased the gasoline used in the burning of the victim's car. {PCR Tr. 2040}. The State and Felder reached a verbal agreement for Felder's testimony shortly before trial. {PCR Tr. 1295, Applicant's 14}. When Felder initially testified, Bailey noted they only had a verbal agreement. {PCR Tr. 2045}. The written agreement had been drafted and sent to Felder's attorney. Id. However, when Felder testified during the guilt phase, Bailey had not received the signed copy of the agreement from Felder's attorney. Id. The plea agreement was signed when Felder returned to testify during the penalty phase of trial. {PCR Tr. 2128}. Bailey noted that the verbal agreement would not have contained all of the specific terms that were included in the written agreement. {PCR Tr. 2043}.

Bailey explained that the plea agreement with Felder provided the State with the option to void the agreement. {PCR Tr. 2042-43}. He ultimately decided not to void the

agreement because he felt that it was not worth it as far as utilizing court time and for whatever marginal benefit the State might have received with an increased sentence. {PCR Tr. 2126-27}. Further, Bailey indicated it may have been difficult to void the agreement because Felder did not tell an outright lie. {PCR Tr. 2044}. Bailey noted that neither he nor Cummings asked any questions that would have specifically elicited the testimony regarding Felder's purchase of the gasoline. {PCR Tr. 2044}. Ultimately, Felder did tell the jury of his involvement in purchasing the gasoline. {PCR Tr. 2127}. While Bailey wished that information would have come out the first time Felder testified, there was not much that he could do about it. {PCR Tr. 2127}.

To the extent that Applicant relies upon the fact that the State did not disclose the fact that Felder had lied in his attempt to garner the plea agreement, that claim is not supported by the record. Bailey provided trial counsel with Felder's polygraph report by letter dated April 24, 2002. {Respondent's 33, 44}. On May 10, 2002, Bailey informed trial counsel that the State had reached an agreement with Bailey for his testimony. {Res. Ex. 32}. Clearly, Applicant was on notice that Felder was receiving a plea agreement despite the fact he had lied to the State at some point in time. {See PCR Tr. 2144-46}.

Overall, Applicant has failed to establish that there existed a "wink wink" deal between Felder and the State. Since Applicant cannot show there existed such a deal, he cannot prove that the alleged deal was suppressed by the State. As a result, he cannot establish the State violated Brady by not disclosing the alleged deal. Since he cannot show Brady was violated, this claim for relief should be dismissed.

Finally, if this Court finds that the State violated Brady in this claim, relief for the violation can only be granted on the arson conviction. Felder's testimony was only relevant to the arson charge. There were no allegations that the victim died as a result of the fire. Thus, only the arson conviction would have been affected by any failure to correct false testimony.

G. Trial Counsel Was Not Ineffective for not Presenting Evidence of Felder's Original Arrest/Charge

Applicant contends that trial counsel was ineffective for not cross-examining Felder on the fact that he was originally arrested in this case for accessory before the fact in the murder. This claim lacks merit. Counsel was not deficient because there was absolutely no evidence that indicated this original charge was reduced as a result of Felder's cooperation in this case. Furthermore, Applicant cannot show that he was prejudiced as a result. This claim should be dismissed.

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

When reviewing a counsel's performance, there is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

Consequently, courts apply a "highly deferential" standard of review. Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. Counsel may avoid a finding of Ineffectiveness if he articulates a valid reason for using a certain strategy. Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (citations omitted). Counsel's strategy will be reviewed under "an objective standard of reasonableness." Id.

In this claim, Applicant asserts trial counsel was ineffective for not exposing the fact that Felder was initially arrested and charged with Accessory to Murder/Arson and Arson, Third Degree. According to the arrest warrant affidavit, the evidence utilized to establish probable cause for the charges consisted of a statement provided by Applicant. {Applicant's 17 & 18}. According to Applicant's statement, Gadson and Felder were the ones who shot the victim and burned the car, {See Applicant's 17 & 18}. After he was arrested, Felder did not give a statement to police. Instead, he invoked his right to counsel. {See Applicant's 16}. By all accounts, Felder did not have any contact with law enforcement or the solicitor's office until his attorney contacted the solicitor's office about a plea in March 2002. {See Applicant's 64, PCR Tr. 2107-2110}. During June 2001, Felder was indicted for Third Degree Arson and Accessory After the Fact to the murder. {Applicant's 43, 44}.

Applicant argues that trial counsel was ineffective for not pointing out that Felder was once charged with accessory before the fact to the murder and that the State could have sought the death penalty for such a charge. First, to the extent that Applicant has alleged that trial counsel should have cross examined Felder on the fact that before his plea agreement, he was exposed to a possible death sentence as an accessory before the

fact should be dismissed because it lacks merit. There is no evidence that supports the implication that the accessory before the fact to the murder charge was reduced as a result of Felder's cooperation. In fact, the evidence clearly points to the contrary. The charge was reduced to Accessory After the Fact when Felder was indicted in June 2001. At that point, Felder had not given any statement to law enforcement other than his initial denial of all involvement. Had trial counsel attempted to imply that Felder's cooperation at trial was to avoid being charged with accessory before the fact, counsel would have been presenting false evidence. Furthermore, counsel expressed a valid strategic reason for not getting into the initial charges from Felder. Cummings testified that it was his understanding that Felder was initially charged with murder based upon a statement given to police from Applicant. {PCR Tr. 1971}. He noted on several occasions that he did not want any of Applicant's statements to come into evidence.

Second, trial counsel did attempt to elicit testimony from Felder regarding how much time he was facing under his plea agreement. Counsel asked Felder "[h]ave you been told a possible sentence?" {R. 4108}. Felder responded, "[n]o sir." Id. At the PCR hearing, Felder testified that he was not aware of the potential time he faced for accessory after the fact to arson. According to Felder, his attorney did not inform him of the possible maximum sentence for accessory after the fact to arson. {PCR Tr. 693}. In light of the fact that counsel did attempt to show Felder was biased by asking how much time he faced, counsel should not be found deficient in that regard. Counsel's pursuit of that avenue of questioning was clearly limited by the fact that Felder testified he did not know how much time he could receive.

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

Furthermore, Cummings testified that he did not want any of Applicant's statements admitted into evidence, and he was surprised that the State did not present those statements.

Applicant's reliance upon State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002), is misplaced. In Mizzell, the South Carolina Supreme Court reversed a conviction because the trial court improperly restricted the defendant's ability to cross-examine a state's witness about the potential sentence he could receive as part of his plea agreement. Id. at 335-36, 563 S.E.2d at 319-20. The witness, who was the defendant's co-defendant, pled guilty to the same charges for which the defendant was on trial. Id. at 330, 563 S.E.2d at 316-17. Mizzell basically holds that a defendant can ask a witness testifying pursuant to a guilty plea about the range of potential sentences he faces. However, Mizzell

does not require that trial counsel pursue such a line of cross-examination or create an expectation that trial counsel will do so in all cases. Its holding merely insures that if trial counsel chooses to pursue that line of questioning, the trial court cannot prohibit him from doing so. It is still the decision of trial counsel to decide whether or not such questioning fits within the defense's trial strategy. Thus, counsel cannot be found deficient just because he did not question a witness about his potential sentence.

Finally, Applicant fails to establish his ineffective assistance of counsel claim because he fails to show that he was prejudiced as a result of trial counsel not cross-examining Felder on the earlier charges. The result at trial would not have differed but for the proposed testimony. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R.

4381}. As a result, Applicant has failed to prove by a preponderance of the evidence that trial counsel was ineffective for not cross examining Felder on his arrest for accessory before the fact and arson, third degree. This claim for relief should be dismissed.

Finally, if this Court finds trial counsel was ineffective in this claim, relief for the violation can only be granted on the arson conviction. Felder's testimony was only relevant to the arson charge. There were no allegations that the victim died as a result of the fire. Thus, only the arson conviction would have been affected by any failure to correct false testimony.

H. Trial Counsel was not Ineffective in Not Presenting Evidence Felder Was the One Who Purchased the Gasoline During the Guilt Phase at Trial.

Applicant fails to establish trial counsel was ineffective in not presenting evidence that Felder purchased the gasoline. Counsel elicited a valid and reasonable strategic reason explaining why he did not ask Felder about purchasing the gasoline. Further, Applicant has failed to show that there was a reasonable probability that the outcome at trial would have been different had counsel presented evidence and testimony that Felder purchased the gasoline during the guilt phase.

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

probability is a probability sufficient to undermine confidence in the outcome" of the trial. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068.

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

As noted in response to Applicant's argument that the State failed to provide Applicant with information regarding Felder's purchase of the gasoline, trial counsel knew Felder had purchased the gasoline. At the PCR hearing, Cummings testified that he did not want the video of Felder purchasing the gasoline coming into evidence. {PCR Tr. 1276}. While he did not know why the State had not entered the video into evidence, he did not want it in because he felt it would corroborate Applicant's involvement in the plan to burn the car. {PCR Tr. 1276}. Cummings also testified that the entry of the video into evidence during the sentencing phase was done at Applicant's insistence and was not in line with his strategy. {See PCR Tr. 1290}.¹ This fear was well placed, as illustrated by Felder's testimony during the sentencing phase. Felder testified that he purchased the gasoline after being instructed to do so by Applicant. {R. 4916-24}. He also testified that

¹This testimony was also confirmed during Cummings' cross examination and is supported by the trial record. {PCR Tr. 1290-91, see R. 4911-26}.

Applicant provided the gas jug to be used in the purchase. Id. Clearly, trial counsel articulated a valid, reasonable strategic reason for not presenting the evidence of Felder purchasing the gasoline. As a result, this claim should be dismissed.

Applicant has also failed to establish that he was prejudiced by trial counsel's decision not to introduce evidence that Felder purchased the gasoline during the guilt phase of trial. First, Applicant presents no evidence to support its contention that Felder's omission that he was the one who purchased the gasoline indicated he was involved in the murder of Kandee Martin. Outside of Applicant's statement, there is no credible evidence linking Felder to the murder of Kandee Martin. Second, Felder's testimony regarding the omission during the sentencing phase and during the PCR hearing clearly shows that cross-examination on this issue during the guilt phase would have done nothing to exculpate Bowman from being a participant in the arson. To the contrary, Felder's testimony clearly indicated that Bowman was highly involved in the arson. Third, the result at trial would not have been different but for trial counsel's alleged deficiency because there was overwhelming evidence of Applicant's guilt in both the murder and the arson. To be clear, Felder's testimony regarding the purchase of the gasoline was only relevant to the arson charge. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's

car. {R. 4018}. They all wore gloves. Id. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}.

I. Trial counsel Was Not Ineffective for not Filing a Rule 29 Motion for a New Trial; Counsel Was Aware that Felder Was the One Who Purchased the Gasoline at Trial

This claim should be dismissed because it is without merit. Applicant's claim fails because the factual predicate for the claim is not supported by the record. Applicant asserts trial counsel was ineffective for failing to file a Rule 29(b) Motion for a New Trial because he learned Felder was the one who purchased the gasoline after the guilt phase was complete. This claim is not supported by the testimony at the PCR hearing. Trial counsel testified that he knew Felder was the one who purchased the gasoline before Felder testified during the guilt phase. Specifically, counsel testified that he knew because Applicant told him Felder purchased the gasoline when they viewed the video. Further, counsel indicated that the defense team debated whether to present the video of Felder purchasing the gasoline during the guilt phase. In the end, for strategic reasons, counsel did not present the video from the EZ Horizon convenience store during the guilt phase of trial. It was only presented during the sentencing phase because Applicant insisted upon

its presentation. Since there was clear testimony that indicates trial counsel knew Felder had purchased the gasoline before the conclusion of the guilt phase of trial, counsel would not have had a factual basis for a motion for a new trial based upon newly discovered evidence. As a result, this claim should be dismissed.

III. Hiram Johnson

A. The State Did Not Violate Brady in Not Disclosing Hiram Johnson's then Pending Charges

Applicant's first Brady claim in reference to Hiram Johnson concerns Johnson's criminal charges. On May 29, 2001, Johnson was served with arrest warrants for Receiving Stolen Goods Less than \$1000, Burglary - Second Degree, and Grand Larceny. {Applicant's 48, 71}. The Receiving Stolen Goods Less than \$1000 charge stemmed from an incident on November 2, 2000. {Applicant's 48}. The Burglary charge and the Grand Larceny charge resulted from an incident in Orangeburg County on September 26, 2000. {Applicant's 71}. Applicant asserts that the prosecution violated Brady because it failed to disclose these charges to trial counsel. This claim should be dismissed because it lacks merit. Applicant has not shown by a preponderance of the evidence that Johnson's pending charges were material. As a result, this claim for relief should be dismissed.

Applicant fails to establish that the pending charges were material. Specifically, Applicant has failed to establish that the confidence in the outcome at trial was undermined by the fact that Johnson was not cross-examined on his then pending charges in Orangeburg County. First, there was overwhelming evidence of Applicant's guilt presented at trial outside of Hiram Johnson's testimony. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day

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

Second, the impeachment value of Johnson's pending charges was limited. The record clearly indicates that Johnson did not get any special consideration for his charges. As indicated by Solicitor Bailey's testimony at the PCR hearing, he was actually unaware of the fact that Johnson had pending charges. Further, Johnson was impeached on whether he could remember what occurred as a result of his head injury. {R. 4071}. The charges were unrelated to Applicant's trial. In light of the overwhelming evidence of Applicant's guilt in this case, coupled with the limited impact of an impeachment on the

suppressed charges, Applicant has failed to establish that the verdict was undermined if Johnson's charges were suppressed by the State. As a result, Applicant has failed to prove by a preponderance of the evidence this Brady claim. Thus, this claim should be dismissed.

B. There Was No Undisclosed Wink Wink Deal Between the State and Johnson

In Applicant's second Brady claim, he asserts that the prosecution failed to provide Applicant's counsel with evidence there existed a "wink wink" deal between the State and Hiram Johnson for his testimony. This claim should be dismissed because there is no evidence there existed a "wink wink" deal.

In this claim, Applicant essentially asserts that the Solicitor's Office attempted to use Hiram Johnson's pending charges for Burglary and Grand Larceny from a September 2000 incident, and charges for Receiving Stolen Goods less than or equal to \$1000 from a November 2, 2000 incident as leverage to obtain testimony favorable testimony from Johnson. Specifically, Applicant asserts that Solicitor Bailey used those pending charges to get Johnson to testify that Bowman admitted he killed Kandee Martin.

This Brady claim is not supported by the record. Applicant's claim consists of nothing but mere conjecture. Applicant's premise is not supported by the record. The defense was clearly provided with evidence that Johnson had heard Bowman confess to killing the victim. At the PCR hearing, Detective Alvin Coker testified that he interviewed Hiram Johnson twice in this case. In reviewing his notes from the first interview, Coker noted that Johnson said he had gone to the club with Bowman, Gadson, and Darian Williams on the night of the murder. {PCR Tr. 929}. Johnson told police that he saw

Bowman with a gun in his lap while Bowman was driving. Id. Also, he told police that Bowman told Trina West about killing Kandee Martin. Id. Coker testified that Johnson was not clear on the time frame or how he knew Bowman told West. Id. Detective Coker's notes were provided to Applicant's trial counsel. {See PCR Tr. 1285}. Trial counsel was provided with evidence that Johnson had indicated Bowman had confessed to killing the victim. Since the State had information from Johnson that indicated he heard Bowman confess that he killed the victim, it would have had no reason to set up a "wink wink" deal with Johnson to testify about that fact.

Second, there was no testimony or evidence presented at the PCR hearing that indicated Solicitor Bailey was actually aware that Hiram Johnson had pending charges against him in Orangeburg County. Detective Coker testified that he was not aware that Johnson had pending charges when he interviewed him.² {PCR Tr. 927, 942}. Bailey testified that he was not aware of any charges against Johnson when he dealt with him in this case. {See PCR Tr. 2133}. Bailey noted why there was no plea agreement with Johnson: to their knowledge, there were no charges against Johnson and Johnson just agreed to testify. {PCR Tr. 2134}.

Third, there is no evidence in the record that indicates Johnson's charges were dismissed as a result of his cooperation with the Solicitor's Office in Bowman's case. In fact, the progression of those charges after Bowman's trial indicates that his cooperation with the Solicitor's office had no effect on those charges. Johnson was indicted by the

²Coker also testified that he did not know that Johnson later filed a lawsuit against Orangeburg County deputies until later informed by Chief Walters from the Orangeburg County Sheriff's Department. {PCR Tr. 942-43}.

Orangeburg County Grand Jury on the all three charges during the April 14, 2003 term of the Orangeburg County Court of General Sessions. {Applicant's 48, 71}. While the Burglary and Grand Larceny indictments were later not pressed because of a lack of credible evidence, those indictments remained pending for over one and one-half years before disposition. {See Applicant's 48, 71}. Resolution of Johnson's criminal charges were clearly not related to the Bowman case. {See also Respondent's 39-42}. As a result, Applicant has failed to establish there was a "wink wink" deal between the State and Hiram Johnson. Since there was no "wink wink" deal between the two, the prosecution could not have violated Brady by not turning over details of such a deal. Thus, this claim for relief should be dismissed.

C. Trial Counsel Was Not Ineffective in Not Cross Examining Johnson on the Absence of Bowman's Alleged Confession in Johnson's Prior Statements.

Applicant argues that trial counsel was ineffective because Cummings did not cross-examine Hiram Johnson on the fact that none of Johnson's prior statements indicated Applicant had confessed to killing Kandee Martin. Applicant has failed to establish by a preponderance of the evidence that trial counsel was ineffective in this regard.

As has been noted: "In hindsight, there are few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would pass muster." Willis v. United States, 87 F.3d 1004, 1006 (8th Cir. 1996). The extent of examination and cross-examination of witnesses is an area of trial tactics left to the discretion of counsel. Yarrington v. Davies, 779 F.Supp. 1304, 1308 (D. Kan. 1991). Counsel is not required to raise every

conceivable issue or pursue every avenue of inquiry, but is required only to exercise normal skill, judgment, and diligence. Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980).

At trial, Hiram Johnson testified that on the night of the murder, he went to the Allen Murray Club with Bowman, Gadson, and Darlan Williams. {R. 4064}. They rode in the victim's Ford Escort. Id. Johnson testified that Applicant said he stole the car, and Bowman made them all wear gloves. {R. 4065}. At the Allen Murray Club, Johnson sat in the victim's car in the parking lot while Applicant walked around the parking lot. {R. 4066}. Johnson also testified that Applicant attempted to sell the car in the parking lot. {R. 4067}. At some point during the evening, Johnson heard Applicant admit that "I killed Kandee, heh, heh, heh." {R. 4068}. At the PCR hearing, Johnson testified that he could not remember if he told police that Bowman said he had killed Kandee Martin. {PCR Tr. 558-559}. He also noted that he thought Applicant was kidding when he said it. {PCR Tr. 560, 565}. He did not know that the victim was dead when Applicant made the statement. {PCR Tr. 565}.

Detective Coker testified at the PCR hearing that he spoke with Johnson on two occasions. The first was on February 22, 2001 at the Branchville Police Department. {PCR Tr. 927}. According to Coker's notes, Johnson indicated he had gone to the club with Bowman, Gadson, and Darlan Williams. {PCR Tr. 929}. The notes also indicated that Johnson saw Applicant with the gun in his lap while Applicant was driving, and that Johnson knew Applicant had admitted to Trina West that he killed the victim. Id. As noted above, trial counsel was provided with a copy of Detective Coker's notes as part of the Rule 5 discovery. {See PCR Tr. 1285}. Coker interviewed Johnson a second time on April

5, 2001. {PCR Tr. 929}. He testified that interview began at approximately 1:40 p.m. {PCR Tr. 929}. The interview was held at Johnson's father's fish market in Branchville. {PCR Tr. 929-30}.

Cummings testified that at trial, Johnson testified he overheard a confession from Applicant about killing Kandee Martin. {PCR Tr. 1372}. He also noted that the confession Johnson overheard was not included in his written statement from April 5, 2001. {PCR Tr. 1386}. Cummings noted that the testimony including the confession was not inconsistent with the written statement. {PCR Tr. 1386}. Cummings testified that he did not cross-examine Johnson on the statement because he did not want to have Johnson repeat the statement during cross-examination. {PCR Tr. 1387-88}. Cummings also indicated that the first time he heard about the confession was at trial. {PCR Tr. 1387}.

Applicant cannot establish trial counsel was ineffective in not crossing Johnson on why any mention of a Bowman confession was not in his prior statements because trial counsel gave a valid, strategic reason for not crossing Johnson on this issue. Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial). 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, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy). Counsel noted that Johnson's testimony was not inconsistent with the

statement that he had given police. Cummings noted that written statements tend to be an outline of what a witness will say at trial. More importantly, Cummings indicated that he did not want to risk having Johnson repeat the statement in front of the jury. Cummings noted it was the worst thing that Johnson said about Applicant at trial. {PCR Tr. 1386}. Clearly, that counsel provided a valid, strategic reason for not cross-examining Johnson on this issue. Since counsel had a valid, strategic reason for not cross-examining Johnson on this issue, he cannot be found deficient in this regard. See Moss v. Hofbauer, 286 F.3d 851, 865 (6th Cir. 2002) (reviewing court must consider potential risk that cross-examination would have led to damaging testimony being repeated).

Furthermore, Applicant fails to establish that counsel was deficient in not pointing out that Johnson had not indicated Bowman had confessed to killing Kandee Martin in any statements to police. Counsel was not deficient because Johnson had clearly indicated to police that he knew Bowman had confessed to killing Kandee Martin. Detective Coker noted as much in his investigative notes regarding his first interview with Hiram Johnson. {See Applicant's 47}. Since Johnson had indicated to police that he heard Bowman confess he killed Kandee Martin, trial counsel could not be deficient in not asking Johnson why he did not tell police he heard Bowman confess.

Finally, Applicant has not established that prejudiced as a result of trial counsel not asking the question. Applicant does not establish that the result at trial would have been different but for trial counsel not asking the question. There was overwhelming evidence of Applicant's guilt. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-

3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. As a result, this claim for relief should be dismissed.

D. Trial Counsel Was Not Ineffective for Not Cross-Examining Johnson on the Fact he was Not Charged with Possession of Stolen Vehicle.

Applicant also fails to establish by a preponderance of the evidence that trial counsel was ineffective for not cross-examining Hiram Johnson on the fact he was not charged with possession of a stolen vehicle. In this claim, Applicant alleges that trial

counsel should have attempted to impeach Johnson on the fact that he was not charged with possession of a stolen vehicle based upon his constructive possession of the victim's car. In essence, Applicant asserts that Johnson provided favorable testimony to avoid the charge.

Applicant did not establish that trial counsel was deficient in not asking Hiram Johnson whether he knew he could potentially be charged with possession of a stolen vehicle in Applicant's case. First, there was no testimony introduced at the hearing to support a finding that Hiram Johnson was aware that he could be charged with possession of a stolen vehicle. Detective Coker testified that he did not recall having any discussions with Hiram Johnson about charging him with possession of a stolen vehicle. {PCR Tr. 937}. Coker also noted that he did not have an explanation for why Johnson was not charged with possession of a stolen vehicle. {PCR Tr. 938}. He surmised that it was likely because their focus was on getting more information about the murder and arson. Id. Solicitor Bailey recalled that Hiram Johnson was not charged with possession of a stolen vehicle. {PCR Tr. 2104}. Bailey explained that no charge was filed because there were so many other individuals in the case that had already been charged with more serious offenses. Id. Bailey asserted that he did not feel that such a charge was warranted in Johnson's case. Id. Hiram Johnson was asked if he was aware that he could have been charged with possession of a stolen vehicle in this case. {PCR Tr. 539}. Hiram Johnson never responded to the question.³ {See PCR Tr. 539-46}. Since there was no evidence

³The State objected to the question, and the court asked Applicant's counsel how the question was relevant. (PCR Tr. 539). After the discussion about the specific question regarding a potential charge of possession of a stolen vehicle, the objection argument

that Johnson was aware that he could be charged with possession of a stolen vehicle, Applicant has failed to show that such a method of impeachment would have been successful at trial. As a result, Applicant has failed to establish that trial counsel was deficient in not questioning Johnson in this regard.

Applicant also fails to establish that he was prejudiced as a result of trial counsel not attempting to impeach Johnson on whether he knew he could have been charged with possession of a stolen vehicle. First, failure to impeach Johnson in this regard would not have resulted in a different outcome because there was overwhelming evidence of Applicant's guilt. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he

moved on to whether Applicant's counsel was aware of the claim involving Johnson's other pending charges before they filed the third amended application. (PCR Tr. 544-550). At no point did counsel ever return to the question of whether Johnson knew he could be charged with possession of a stolen vehicle.

killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. Second, as already noted, a cross-examination on this line of questioning would not have benefitted Applicant in any way because there was no evidence that Johnson testified to avoid a possession of a stolen vehicle charge. Since Applicant has failed to establish that trial counsel was deficient and that Applicant was prejudiced as a result of that deficiency, he has failed to meet his burden in establishing this claim of ineffective assistance of counsel. As a result, this claim for post-conviction relief should be dismissed.

IV. Ricky Davis

A. The Prosecution Did Not Violate Brady in Not Disclosing the "Sam Memo"

Applicant asserts that the prosecution violated Brady v. Maryland, 373 U.S. 83 (1963), by not providing Applicant with a copy of typed notes drafted by Sam Richardson, an investigator for the First Circuit Solicitor's Office. The notes, which Applicant has dubbed the "Sam Memo," appears to reflect the contents of an interview that Richardson conducted with Ricky Davis at Lieber Correctional Institution in response to Davis' handwritten note. {Applicant's 67; see Applicant's 11}.

At the PCR hearing, Solicitor Bailey testified that he was familiar with the Sam Memo. {PCR Tr. 2021}. He confirmed that it was prepared by Sam Richardson and noted

that from the context of the notes, it appeared that it was prepared late in the proceedings. Id. Bailey did not recall providing seeing anything in his file that indicated he sent the Sam memo to defense counsel. {PCR Tr. 2130}. He also testified that he considered the Sam memo to be work product. Id. Typically, he did almost all of his own work in preparation for a death penalty trial except for typing his handwritten notes. Id. Ordinarily, he would have interviewed Ricky Davis personally. Id. However, he delegated the task of interviewing Davis to Sam Richardson because it was getting close to trial and so much other stuff was going on at that time. Id. Since Richardson interviewed Ricky Davis on Bailey's behalf in preparation for trial, Bailey considered his notes to be protected by attorney-client privilege. Id. Furthermore, Bailey testified that he did not think the Sam memo presented any inconsistency with the handwritten Ricky Davis statement. {PCR Tr. 2130-31}. Bailey noted that he would have disclosed any information that was inconsistent. {PCR Tr. 2131}. He also testified that the notes would have been in the Solicitor's file and trial counsel could have seen them in the file under the office's open file policy. Id.

"A Brady violation occurs when the government fails to disclose evidence materially favorable to the accused." Youngblood v. West Virginia, 547 U.S. 867, 869, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006). Evidence that is not disclosed is suppressed for Brady purposes even when it is "known only to police investigators and not to the prosecutor." Kyles v. Whitley, 514 U.S. 419, 438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Evidence is favorable if it is either exculpatory or impeaching. See, e.g., Strickler v. Greene, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Evidence is material if "there

is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (internal quotation marks omitted). However, a " 'showing of materiality does not require demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal,' " id. (quoting Kyles, 514 U.S. at 434, 115 S.Ct. 1555), but only a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (quoting Kyles, 514 U.S. at 435, 115 S.Ct. 1555). The assessment of materiality is made in light of the entire record. United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006)(citing Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999). If a Brady violation is found to have occurred, PCR must be granted. Gibson, *supra*.

This claim for relief should be dismissed. Applicant has failed to show by a preponderance of the evidence that the prosecution violated Brady by not disclosing the Sam memo. First, the memo is not favorable evidence. Second, the information contained in the notes were not material. As a result, this claim should be dismissed.

Applicant fails to establish that the Sam memo was favorable evidence to his case. First, the memo itself was inadmissible as evidence at trial. The Supreme Court has noted that "evidence" that is inadmissible is not evidence at all, and thus cannot affect the outcome of trial. Wood v. Bartholomew, 516 U.S. 1, 6, 116 S.Ct. 7 (1995) (per curiam). At best, the notes could be considered evidence that could be used to impeach Ricky Davis if he testified at trial. However, Ricky Davis did not testify at trial. Cummings testified at the PCR hearing that he did not call Davis because Davis told the defense's investigator that his handwritten statement was false.⁴ {PCR Tr. 1335-37}. Second, the information contained in the Sam memo was not inconsistent with Applicant's guilt. While Applicant relies upon the fact that the Sam memo indicates that Ricky Davis allegedly heard Gadson say he was the one who shot Kandee Martin, Applicant seemingly ignores the fact that the notes also points out that Gadson changed his story and stated Bowman was the one who shot Kandee Martin when Davis allegedly confronted Gadson about the matter later. {App. Ex. 67}. Thus, all the Sam memo evidences is Gadson may have given a fellow inmate inconsistent information about his involvement in the murder.

Second, contrary to Applicant's assertions, the Sam memo is not material evidence. Again, the Sam Memo was not admissible and not subject to disclosure under Brady. Wood v. Bartholomew, 516 U.S. 1, 6, 116 S.Ct. 7, 133 L.Ed.2d 1 (1995) (per curiam)

⁴Trial counsel never stated that he would have called Ricky Davis to testify had he known about the information in the Sam memo. Cummings noted that he tried to do more investigation into Ricky Davis based on the information he had, and nothing else came up in the defense's investigation. {PCR Tr. 1901}. He also agreed that he would still be in the same boat in deciding whether to call Ricky Davis because the defense's investigator indicated that Ricky Davis would not testify to what was in the handwritten document. {PCR Tr. 1901-02}.

(holding that inadmissible materials that are not likely to lead to the discovery of admissible exculpatory evidence are not subject to disclosure under Brady). Furthermore, it does not matter that the notes in the Sam memo may be consistent with Ricky Davis' handwritten statement.⁵ Ricky Davis testified at the PCR hearing that the handwritten statement was not true, and Bowman was the one who gave him all of the information for the handwritten note. {PCR Tr.263-64}. Davis further professed that he did not know anything about this case. {PCR Tr. 264}. The Sam memo makes no mention of Gadson using Bowman's gun. Also, the discussion about the victim being killed because she was wired is completely inconsistent with the notes in Coker's narrative that indicated the victim was killed because she owed two other men money. Overall, the Sam memo does not undermine the confidence in Applicant's murder conviction or death sentence. There was overwhelming evidence presented at trial to support both the murder conviction and the death sentence. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Hiram Johnson testified that Applicant said he

⁵The Sam memo only presents two consistencies with the August 6, 2001 handwritten note from Ricky Davis. Both indicate that Gadson and Davis were on A-Side in the Dorchester County Detention Center. Both also indicate Gadson admitted he shot Kandee Martin. Outside of those two similarities, the two documents share no other consistent information.

stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}.

Applicant's assertion of materiality is inconsistent how materiality is measured in Brady claims. In essence, Applicant claims that he is entitled to relief under Brady because of the impact the undisclosed notes would have had on his defense strategy had the Sam memo been disclosed. The United States Supreme Court has warned against such treatment.

It has been argued that the standard should focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, rather than the materiality of the evidence to the issue of guilt or innocence. See Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defense, 74 Yale L.J. 136 (1964). Such a standard would be unacceptable for determining the materiality of what has been generally recognized as "Brady material" for two reasons. First, that standard would necessarily encompass incriminating evidence as well as exculpatory evidence, since knowledge of the prosecutor's entire case would always be useful in planning the defense. Second, such an approach would primarily involve an analysis

of the adequacy of the notice given to the defendant by the State, and it has always been the Court's view that the notice component of due process refers to the charge rather than the evidentiary support for the charge.

U.S. v. Agurs, 427 U.S. 97, 112 n.20, 96 S.Ct. 2392, 2401 n.20 (1976). Overall, Applicant has failed to establish he is entitled to relief upon this claim. As a result, this Brady claim should be denied and dismissed.

B. Trial Counsel was Not Ineffective in Not Presenting Ricky Davis' Testimony Regarding Tawain Gadson's Confession

Applicant has alleged trial counsel was ineffective for not presenting evidence related to Gadson's alleged confession to Ricky Davis. At some point during the investigation, the State was provided with a handwritten note from Ricky Davis, now an inmate in Lieber Correctional Institution for armed robbery. The statement, dated August 6, states "I Rickie Davis was on A side with Gadson and he said that he was the one that shot the girl and he gave Bowman back the gun that was used and He said that it didn't mater[sic] because Blak[sic] famile[sic] had got caught with the gun He also that the police all[sic] he got to do is say Blak did it." {Applicant's 11, Respondent's 30}. At the PCR hearing, trial counsel Cummings testified that he received the statement from the Solicitor's Office. He sent an investigator, Walter Mitchell, to Lieber Correctional Institution to interview Mr. Davis regarding the handwritten note. {PCR Tr. 1328, 1673-74}. According to Cummings, the investigator informed him that Mr. Davis denied his signature and denied the contents of the statement. {PCR Tr. 1335, 1341}.

Court: In talking with him what is your understanding of what he [Ricky Davis] told the investigator?

Cummings: That he did not do this and basically it was junk.

Court: Did your investigator let you know whether or not if he was on the stand he could be a witness against Mr. Bowman in any way?

Cummings: Yes, sir, that he would say that Marion told him to do this, Marion had it created.

Court: So, your understanding was that Mr. Davis was going to deny making the statement and say that - - apparently he must be admitting he make the statement if he's going to say Bowman made him say it?

Cummings: Right.

Court: And, so, your information was he was going to say, "I said it but Mr. Bowman made me?"

Cummings: Right, that would have been the statement. It was proved he gave the statement but Marion made him do it. Mr. Mitchell said he was not going to be a helpful person at all to us, he was facing time and Marion was trying to get him involved in this.

{PCR Tr. 1340-1341}. Clearly, Cummings testified he made a strategic decision to not put Ricky Davis on the stand to testify about the statement. {PCR Tr. 1342}.

Applicant's ineffective assistance of counsel claim should be dismissed because counsel has clearly demonstrated that his decision not to present Ricky Davis as a witness was a reasonable strategic decision based upon the investigation that counsel conducted.

Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial). 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, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

Applicant has further failed to establish that trial counsel was deficient in not calling Ricky Davis. At the PCR hearing, Applicant called Ricky Davis to testify. During cross-examination, Davis testified that he did not know anything about this case other than what Applicant told him. {PCR Tr. 264}. He also testified that at the deposition, he testified he did not recall hearing anything about Applicant's case from Gadson. Id. He further noted that Gadson did not tell him anything that was included in the handwritten note. Id. Applicant was the one who provided Davis with the information. Id. During re-direct, Davis again reasserted that Bowman was the one who told him what to write. {PCR Tr. 265}. Clearly, Davis' testimony would have been damaging to Applicant's case. It would have presented the jury with additional evidence that Applicant was attempting to cover up his involvement in the murder of Kandee Martin. In light of the extensive damaging nature of Davis' testimony and the significantly limited benefit that would have resulted if Davis was called to testify, Applicant has failed to show by a preponderance of the evidence that trial counsel was deficient in not presenting his testimony at trial. As a result, this claim of ineffective assistance of counsel should be dismissed with prejudice.

Also, Applicant has failed to show that Applicant was prejudiced by counsel's decision not to call Ricky Davis at trial. As already noted, any benefit from Davis' testimony was extremely limited because Davis would have denied any knowledge of Gadson's involvement in the case. Further, there was overwhelming evidence of Applicant's guilt in both the murder and arson presented at trial. Several witnesses, including one of

Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. Since Applicant was not prejudiced by counsel not calling Ricky Davis to testify, Applicant has failed to prove by a preponderance of the evidence that trial counsel was ineffective in this regard. As a result, this claim should be dismissed.

C. Trial Counsel was Not Ineffective in Not Presenting Gadson's Location on A-Side or Detective Coker's Notes Confirming Gadson and Davis Together on A-Side

Applicant asserts two more claims of ineffective assistance of counsel in relation to Ricky Davis. In both, Applicant asserts trial counsel was ineffective in not presenting evidence that Tawain Gadson was on A-side at the Dorchester County Detention Center at the same time as Ricky Davis. Both of these claims should be dismissed because they lack merit. The only reason to present any evidence about Gadson being located on A-Side of the Dorchester County Detention Center is if Ricky Davis was called to testify about his handwritten note. As noted above, trial counsel made a reasonable strategic decision not to call Davis to testify about his statement. Since Davis did not testify at trial, the fact that Gadson was once held on A-Side in the Dorchester County Detention Center was not relevant to any issue at Applicant's trial. Thus, trial counsel could not be found deficient for not presenting irrelevant evidence.

Further, Applicant does not establish that he was prejudiced as a result. As noted, this evidence is only relevant if Ricky Davis testifies. Thus, for the reasons stated in Section IV, Applicant has failed to establish he was prejudiced by trial counsel's decision not to present evidence Gadson was on A-side in the Dorchester County Detention Center or Coker's note indicated Gadson and Davis were on the same side at the Dorchester County Detention Center. As a result, these claims of ineffective assistance of counsel should be dismissed.

V. Alvin Coker

A. Trial Counsel Was Not Ineffective in Not Asking Coker About Gadson Lying About Owning a .380

Applicant's first claim in this section is that trial counsel was ineffective because they did not cross examine Detective Coker about the fact that Gadson lied about owning a High Point .380. This claim should be dismissed because it lacks merit. Applicant has failed to establish trial counsel was deficient in not asking Coker about Gadson's misrepresentation about owning a .380. Further, Applicant did not show that he was prejudiced as a result of trial counsel's decision not to cross Coker on this issue.

First, trial counsel was not deficient in not asking Coker about Gadson's misstatement about owning a .380. At the PCR hearing, Cummings testified that he recalled finding out that the gun found in the river did not have the same serial number as Gadson's gun. {PCR Tr. 1920}. He wanted the jury to hear that Gadson also had a .380 High Point, but understood that if the fact there were two different serial numbers came out, it would mute the benefit of informing the jury that Gadson had the same type of gun. Id. Thus, Cummings explained, that is why he deliberately stopped at that level when asking Gadson if he owned a .380. Id. That would also explain why counsel did not ask Coker any questions regarding Gadson's initial misstatements about owning a .380. Had counsel gone into that line of questioning, there was a substantial risk that Coker would testify that law enforcement learned the gun found in the river was not Gadson's gun. At the PCR hearing, Coker testified that he thought the gun they pulled from the river was Gadson's gun until he learned the serial numbers did not match. {PCR Tr. 1002}. Counsel clearly expressed valid, reasonable strategic reasons for approaching the Gadson gun

issues in the way that he did. As a result, Applicant has failed to establish trial counsel was deficient in not crossing Coker on the issue.

Second, Applicant was not prejudiced as a result of trial counsel not asking about Coker about Gadson lying about owning a .380. At trial, Cummings asked Gadson if he owned a high powered .380 pistol. {R. 4026}. Over the State's objection, Gadson was allowed to answer. {R. 4027-31}. He admitted that he had purchased a .380 pistol in July 2000, and the pistol he purchased was the same color as Applicant's. {R. 4031}. Clearly, the jury was made aware that Gadson also had the same type of weapon that could have been used in the murder. Furthermore, whether Gadson had his own .380 was of no consequence in this case. David Collins testified at trial that the gun found in the river conclusively matched five of the six cartridge casings collected at the scene. Also, several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a

body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. In light of the overwhelming evidence of guilt, It is highly unlikely that Coker's testimony on Gadson's lying about owning a .380 would have resulted in a different outcome at trial. As a result, this claim should be dismissed.

B. Trial Counsel was not Ineffective in Not Bringing Out Statements Heard by Bruce McLean.

Applicant next asserts that trial counsel was ineffective in not cross-examining Coker about the EZ Horizon video evidence in which Bruce McLean states he overheard some people at the fuel pumps talking about killing a girl and disposing of her body. Applicant fails to show that trial counsel was deficient in not cross-examining Coker on this issue. Further, Applicant fails to show that he was prejudiced as a result.

First, Applicant did not establish that trial counsel was deficient in not cross-examining on the statements by Bruce McLean. As has been noted: "In hindsight, there are few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would pass muster." Willis v. United States, 87 F.3d 1004, 1006 (8th Cir. 1996). The extent of examination and cross-examination of witnesses is an area of trial tactics left to

the discretion of counsel. Yarrington v. Davies, 779 F.Supp. 1304, 1308 (D. Kan. 1991). Counsel is not required to raise every conceivable issue or pursue every avenue of inquiry, but is required only to exercise normal skill, judgment, and diligence. Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980). Cummings testified that he followed up with the lead from the EZ Horizon video. {PCR Tr. 1943}. He sent Mitchell to Orangeburg to look for the Jamaican boyfriend, but nothing came of the search. Id. Based on the testimony presented at trial, it appeared counsel had good reason to believe that a line of questioning concerning Bruce McLean would not be fruitful. Thus, counsel was not deficient for not choosing to explore the line of questioning now proposed by Applicant.

Second, Applicant fails to show that he was prejudiced as a result. At the PCR hearing, Applicant's counsel asked Coker about Bruce McLean. Detective Coker testified that they tried to get in contact with Octavia Legree and Bruce McLean, her Jamaican boyfriend. {PCR Tr. 982}. Coker noted they had set up several meetings to meet with McLean's girlfriend who was the clerk at the EZ Horizon that night. {PCR Tr. 924}. Coker further indicated that they could never catch anyone home. Id. He also notes that they even had a meeting scheduled with them through the Orangeburg County Sheriff's Office. Id. However, McLean and Legree did not show. Id. Coker was not surprised if Mr. McLean was still listed as being a resident in Branchville, SC. {PCR Tr. 924}. Thus, all that would have resulted from asking Coker about McLean's statements would be that law enforcement could not get in contact with the witness. Also, there was overwhelming evidence of Applicant's guilt in this case. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder.

{R. 3726, 3739-3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. It is highly unlikely that Coker's testimony would have resulted in a different outcome at trial had trial counsel cross-examined him about Bruce McLean. As a result, this claim for relief should be dismissed.

C. Trial Counsel was Not Ineffective in not Cross-Examining Detective Coker About Felder Being the One Who Purchased Gasoline

This claim should be dismissed because it lacks merit. This is essentially the same claim that was raised by Applicant in Section II, A. Thus, for the reasons stated in response to Section II, A, this claim should be dismissed.

As an additional note, Applicant's assertion that presenting this evidence that Felder purchased the gasoline was exculpatory does not fit with other evidence that was presented at trial. For instance, two witnesses identified Applicant as the one who stopped by Felder's girlfriend's apartment after 3:00 a.m. {R. 4044-4045; 4117-4120}. Both also testified that Felder's girlfriend was loosening his braids when Applicant stopped by to ask for a ride. *Id.* Both indicated that Felder left with Applicant and returned fifteen minutes later. {R. 3712, 4120}.

D. Trial Counsel was Not Ineffective in Crossing Coker About the Sworn Statements to Other Tribunals

In this claim, Applicant essentially reasserts the same claim that was raised in Sections I, D and II, E. Thus, for the reasons stated in those sections of this Brief, Respondent asserts this claim should be dismissed. Statements made in arrest warrants based on then-existing investigatory information, and in indictments based on concepts of accomplice liability and the fact that indictment as a principal supports conviction as an accomplice, do not amount to the sort of issues for which cross-examination is warranted or would create a reasonable probability of a different result. All are easily explainable.

VIII. Conflicts of Interest:

A. Applicant Failed to Establish Hardee-Thomas Operated Under An Actual Conflict of Interest As a Result of Her Former Representation of Ricky Davis and Then Active Representation of Applicant

Marva Hardee Thomas was appointed to represent Ricky Davis on April 23, 2001. {Applicant's 12}. At the time, Davis faced two charges for armed robbery. {Applicant's 12, 19, 21}. On October 16, 2001, Davis was tried by a jury and convicted of one count of armed robbery. {See Applicant's 20}. He was sentenced to twenty (20) years confinement by the Honorable Diane Goodstein, Circuit Court Judge. Id. The second indictment against Ricky Davis was nol prossed with a right to restore on October 18, 2001.⁶ {See Respondent's 14}. Marva Hardee-Thomas filed a Notice of Appeal on Ricky Davis' behalf on October 24, 2001. {Respondent's 14}.

Marva Hardee-Thomas was appointed to represent Applicant. At the PCR hearing, Hardee-Thomas testified that she did not recall receiving the handwritten note written by Ricky Davis. {PCR Tr. 1564}. She did identify the notary block as being in her handwriting. Id. However, she did not recall seeing the statement and noted that the notary block was not witnessed by anyone. Id. She did not have any independent recollection of talking with Ricky Davis about the handwritten note. {PCR Tr. 1601}. She testified that she would not have had a discussion directly with Davis about the document. {PCR Tr. 1602}.

Counsel was served with a copy of Ricky Davis' handwritten note on or about January 2, 2002. {See Respondent's 36}. At the PCR hearing, Hardee-Thomas testified.

⁶It appears that the victim in the second armed robbery could not be located.

that she did not know why Ricky Davis did not testify. {PCR Tr. 1572}. She did not have a strategic reason for not calling Ricky Davis, but noted that the decision to call Davis to the stand would be one left to the lead attorney in a death penalty case. Id. In Applicant's case, Cummings was the lead attorney. Hardee-Thomas guessed that Cummings made the decision to not call Ricky Davis as a witness because she did not make that decision. {PCR Tr. 1573}.

"The Sixth Amendment right to counsel attaches upon initiation of adversarial judicial proceedings and at all critical stages of a criminal trial." State v. Sterling, 377 S.C. 475, 479, 661 S.E.2d 99, 101 (2008). "To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance." Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001). "An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007).

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

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

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

"The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." State v. Gregory, 364 S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005). Additionally, the fact that counsel does not advise a defendant of the potential conflict of interest does not affect the constitutionality of the conviction. Jackson v. State, 329 S.C. 345, 355, 495 S.E.2d 768, 773 (1998). Moreover, the "Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction." Langford v. State, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993).

Applicant fails to establish that Hardee-Thomas acted under a conflict of interest in representing Applicant in this case. First, Applicant fails to establish there was a potential conflict of interest as a result of Ricky Davis' handwritten note. Hardee-Thomas' representation of Ricky Davis ended on October 24, 2001, the date she filed his Notice of Appeal with the circuit court. Rule 602(e)(3), SCACR (public defender automatically relieved after filing of Notice of Appeal to conviction). At that time, his second armed robbery charge had already been nol prossed by the Solicitor's Office. {**See Applicant's 22**}. Thus, when counsel was presumably made aware that Davis had written a statement regarding Bowman's case on or around January 2, 2002, she did not represent Ricky Davis. At that point, she owed no duty to Ricky Davis other than to maintain his

confidences from her representation of him on the two armed robbery charges. As a result, Applicant cannot establish that a potential conflict of interest existed as a result of the statement written by Davis. Since there was not a potential conflict of interest, Hardee-Thomas was not obligated to obtain a waiver from either Bowman or Davis. Thus, Applicant's claim that a waiver was warranted should be dismissed.

Even if Hardee-Thomas' representation of Ricky Davis constituted a potential conflict of interest with her representation of Applicant, Applicant has failed to establish that the potential conflict developed into an actual conflict of interest. At no point were Ricky Davis' interests adverse to Applicant's interests. First, Davis' handwritten statement, if established to be true, would have benefitted Applicant because it indicated that Gadson, Applicant's co-defendant, was the one who killed Kandee Martin. Further, contrary to Applicant's assertions, there was no evidence presented at in this PCR Action that indicated Ricky Davis' interests would have been at odds with Applicant's had he testified at trial. Applicant asserts that Ricky Davis would not testify because the solicitor's office could still restore the nolle prossed charge against him as leverage. Applicant presented no evidence to show that the solicitor's office either used the nolle prossed indictment in such a fashion or that it could. Clearly, the disposition sheet on Ricky Davis' nolle prossed charge indicates that the case was dismissed because the State could not find the victim. {Applicant's 22}. There was no evidence presented at the PCR hearing that circumstances had changed, or that the solicitor's office was in a position to re-present the indictment to the grand jury. Thus, Applicant never established that Davis' interests were in a position contrary to Applicant's.

Applicant also failed to present credible evidence that Hardee-Thomas spoke to Davis about Applicant. The only person who testified that Hardee-Thomas met with Davis to talk about Applicant's case is Davis.⁷ {PCR Tr. 251}. Cummings testified that he sent Walt Mitchell to speak with Ricky Davis about Applicant. {PCR Tr. 1328}. Hardee-Thomas indicated she did not recall talking with Ricky Davis about the note and that she thought an investigator was sent out to talk to Davis about his handwritten note. {PCR Tr. 1603-04}. Further, Hardee-Thomas testified that she could not recall when she the signature block she put on the handwritten note. {PCR Tr. 1601}. She noted that she likely would have received the paper from a guard at the jail. {PCR Tr. 1602}.

Overall, Applicant has failed to establish that trial counsel did not call Ricky Davis to testify as the result of an actual conflict of interest due to Hardee-Thomas' former representation of Ricky Davis. To be clear, Ricky Davis was not called to testify and his statement was not entered into evidence because after investigation of his statement, the defense team decided he was not a reliable witness and his testimony was likely to be damaging to Applicant's case. Cummings testified that Davis was not called because he had indicated to investigator Walter Mitchell that the handwritten statement was false. {PCR Tr. 1335, 1894-95, 1901-02}. There was no probative evidence at trial that indicated that any potential conflict of interest played a role in the decision making process. In fact, the testimony at the PCR hearing from Hardee-Thomas clearly notes that the decision on whether Davis would testify was Cummings to make. Since Applicant has failed to prove

⁷His testimony indicates that he was not sure if she was the one from the defense team who spoke with him. {PCR Tr. 251}.

by a preponderance of the evidence that trial counsel acted under an actual conflict of interest, this claim for relief should be dismissed.

B. There was no Conflict of Interest As a Result of the Fact that Gene Dukes Represented Applicant's Co-Defendant Tawain Gadson

Applicant's second conflict of interest claim derives from the fact that Hardee-Thomas represented Applicant while the Chief Public Defender for Dorchester County represented a co-defendant. As already noted, Marva Hardee-Thomas, Esquire, a Dorchester County Public Defender, was appointed to represent Applicant. Gene Dukes, Esquire, another Dorchester County Public Defender, was appointed to represent Taiwan Gadson, Applicant's co-defendant who later testified against him at trial. {Applicant's 77}. At the PCR hearing, Marva Hardee-Thomas testified that the Dorchester County Public Defender's Office was essentially a conglomeration of independent contractors. {See PCR Tr. 1535, 1548}. Gene Dukes was listed as the Chief Public Defender because he had the most seniority. {PCR Tr. 1540}. According to Hardee-Thomas, the Public Defenders did not share an office. {PCR Tr. 1541-43}. They each worked from their own separate office. {PCR Tr. 1541}. They were not full-time Public Defenders, so they each had their own separate practices. {See PCR Tr. 1535, 1550}. The public defender corporation did have one employee, Kathy Rogers, who was responsible for assigning cases. {PCR Tr. 1537}. The only common space the Dorchester County Public Defenders shared was a small conference room in the Dorchester County Courthouse in Saint George. {See PCR Tr. 1541, 1553}. Hardee-Thomas also testified that they would never have co-defendants in the conference room at the same time. {PCR tr. 1607}. They did not share personnel. {PCR Tr. 1554}. There was no investigator for the Public Defender Corporation. Id.

Instead, each public defender had to petition the Court for funds if an investigator was needed. {PCR Tr. 1554}. The head of the Public Defender Corporation signed checks for both. Id.

Applicant has failed to establish that trial counsel Marva Hardee-Thomas acted under a conflict of interest due to the fact that Gene Dukes represented Applicant's co-defendant. "[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980) (citing Holloway v. Arkansas, 435 U.S. 475, 487-491 (1978)). "But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Cuyler, 446 U.S. at 350 (citation omitted).

"The Sixth Amendment right to counsel attaches upon initiation of adversarial judicial proceedings and at all critical stages of a criminal trial." State v. Sterling, 377 S.C. 475, 479, 661 S.E.2d 99, 101 (2008). "To establish a violation of the Sixth Amendment right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance." Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001). "An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). This Court has further stated that an actual conflict of interest occurs:

when a defense attorney places himself in a situation inherently conducive to divided loyalties.... If a defense attorney owes duties to a party whose interests are

adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

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

"The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." State v. Gregory, 364 S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005). Additionally, the fact that counsel does not advise a defendant of the potential conflict of interest does not affect the constitutionality of the conviction. Jackson v. State, 329 S.C. 345, 355, 495 S.E.2d 768, 773 (1998). Moreover, the "Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction." Langford v. State, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993).

Applicant has failed to establish that there was an actual conflict of interest in this case. Applicant essentially argues there was a conflict of interest because both Gene Dukes and Marva Hardee-Thomas were Public Defenders. There was no evidence presented that indicated they discussed Applicant's case or any of the related cases. Further, there was no evidence presented that indicated they worked in concert in representing individual clients, or that they shared the confidences of individual clients with one another. This claim parallels a similar claim made the applicant in Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). In Jackson, the Applicant argued he was entitled to a new trial because of a conflict of interest because his co-defendant was represented by another public defender in the Richland County Public Defender's Office. Id. at 347-48, 495 S.E.2d at 769. The PCR Court found trial counsel was ineffective because he

operated under a conflict of interest, among other things. Id. at 348, 495 S.E.2d at 769.

On appeal, the South Carolina Supreme Court reversed.

In our opinion, respondent did not show any actual conflict of interest resulted from counsel's representation of him while others in counsel's office represented respondent's co-defendants. All respondent showed and the PCR judge found was a potential conflict of interest because counsel worked in the same office with the attorneys who represented the co-defendants. Counsel testified no conflict existed, and respondent could not point to an actual conflict. Thus, this potential conflict never ripened into an actual conflict. Nothing in the record suggests the potential conflict caused counsel to treat respondent's case in such a manner as to obtain more favorable consideration for respondent's co-defendants. Further, the fact that counsel never advised respondent of the potential conflict of interest does not affect the constitutionality of the conviction. See Langford v. State, 310 S.C. 357, 360, 426 S.E.2d 793, 794 (1993).

Id. at 354-55, 495 S.E.2d at 773. Here, as in Jackson, there was no evidence presented at the PCR hearing that an actual conflict of interest existed. There was no evidence that any potential conflict caused Marva Hardee-Thomas to treat respondent's case in such a manner as to obtain more favorable consideration for Gadson. Applicant has pointed to no evidence there existed an actual conflict of interest. Since there was no evidence there was an actual conflict of interest resulting from the fact that Gene Dukes and Marva Hardee-Thomas were both public defenders for Dorchester County, Applicant has failed to prove by a preponderance of the evidence he is entitled to relief upon this claim. As a result, this ground for relief should be dismissed.

VII. Ineffective Assistance Regarding Evidence Admitted in Guilt Phase

Applicant next asserts counsel was ineffective in his handling of a number of items of evidence in the guilt phase.

A. Failure to move to exclude evidence of Bowman's DNA found in the victim's vagina

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}. Applicant now contends his counsel was ineffective for failing to move to exclude this match from evidence.

1. There was no valid objection to this testimony.

As an initial matter, Applicant cannot show either deficiency or prejudice as there was no sustainable objection that could be made to the DNA match. Regardless of Applicant's complaints that there was no testimony that Applicant and Kandee had sex out at the Nursery Road location, this evidence is undoubtedly relevant to and confirmatory of the identity of Applicant as the murderer, as it places Applicant in close presence of Kandee during the time period at issue. See Rule 401, SCRE (evidence is relevant if it would make a fact in issue more probable or less probable).

Admissibility is not affected by the fact that the DNA match might not necessarily establish the exact point when Applicant had sex with the victim, or because James Gadsden claimed he did not observe any sexual contact at the Nursery Road scene. As noted in State v. Benjamin, 345 S.C. 470, 480, 549 S.E.2d 258, 263 (S.C. 2001):

All that is required is that the fact shown tends to make more or less probable some matter in issue and to bear directly or indirectly thereon. It is not required that the inference sought should necessarily follow from the fact proved. Evidence is relevant if it makes the desired inference more probable than it would be without the evidence.

(Emphasis added). Here, the DNA match is objective scientific evidence that the victim and Applicant were in very close contact around the relevant time period of the murder,

and this point alone is sufficient to make it admissible in trial – even if it only provides objective and indisputable corroboration to witness testimony that they were together at some point during the day Kandee was killed. Given the issues Applicant raised with the credibility of the fact witnesses, this indisputable scientific evidence aids a finding of identity, which was especially relevant in this case, where Applicant pled not guilty and put the State to its proof. See generally State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300, 311-12 (S.C. 2001) (finding letters were relevant to show identity as murderer inasmuch as they referred to a safe and a safe was present at the murder scene, and rejecting claim that they were inadmissible because it was not established that the safe referenced in the letters was at the barbershop, where the incident referred to in the letter fit the general time frame of the barbershop killings); State v. Benjamin, 345 S.C. 470, 480, 549 S.E.2d 258, 263 (S.C. 2001) (evidence defendant was willing active participant in later robbery was relevant to rebut claim of duress at earlier robbery, even though robbery being tried occurred later); State v. Daniels, 252 S.C. 591, 167 S.E.2d 621 (1969) (held evidence of a prior robbery admissible to show identity because it placed the defendant together with his alleged accomplice); State v. Varvil, 338 S.C. 335, 526 S.E.2d 248 (S.C. App. 2000) (in unlawful use of telephone prosecution, evidence defendant rode by victim's office and home was relevant to show his intent to harass her with his phone calls).

Applicant contends the proof of sex is an inadmissible "bad act" pursuant to Rule 404(b), SCRE, which provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." First, though, is

the point that the mere fact 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. Although Applicant contends that fornication is criminal in South Carolina, that law is not enforced, and sex out of wedlock is not considered “criminal” or a “bad act” in the legal sense by modern social standards.

The same goes for Applicant’s contention that interracial sex between Applicant and the victim is a bad act or is unduly prejudicial. Applicant cannot assume racism on the part of the jury, which was subject to extensive *voir dire* and instructions from the judge on their ability to be fair and decide the case apart from bias or prejudice. There is no proof that the jury was racially biased in this case, and the mere fact the sex was interracial simply does not constitute a “bad act” under contemporaneous moral values.

Even if adultery or interracial sex could be considered a “bad act”, though, as noted before, “bad acts” under Rule 404(b) are still admissible if they show identity, which the DNA match does in this case. Thus, even if the sexual contact is a bad act, it would still be admissible. And, given that identity was the main issue in the case, it was more probative than prejudicial. See State v. Simmons, 310 S.C. 439, 427 S.E.2d 175 (1993) (where intent was contested on burglary charge, the probative value of defendant’s prior attacks on elderly women outweighed the prejudicial effect); State v. Ford, 334 S.C. 444, 513 S.E.2d 385 (Ct. App. 1999) (because defendants disputed state’s allegations about their motive and intent, evidence of prior robbery of victim was “highly probative”); State v. Waddle, 873 P.2d 171 (Idaho Ct. App. 1994) (where defendant denies being the perpetrator, evidence tending to establish identity is always relevant). See generally State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990) (Lyle evidence was not just admissible when

"necessary", but is admissible whenever it is "relevant"); State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981) (evidence of other crimes admissible even though appellant's confession to the crimes was also admitted); State v. Green, 261 S.C. 366, 371, 200 S.E.2d 74, 77 (1973) (evidence logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused's guilt of another crime).

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).

2. Counsel had a valid strategic reason for admitting the testimony.

Even if there was a valid objection, there is no basis for relief because counsel had a valid strategic reason for admitting the intimate contact.

At the PCR hearing, counsel Cummings testified that he did not elicit from Gadsden that he observed no sex between Applicant and Kandee because:

[H]ere is my theory and this is what I want to show. Marion and Kandee were friends; they were intimate friends, if I can use the words. I wanted to show that this man would not hurt this little girl because he cared about her and she was an intimate friend of Mr. Bowman's.

{PCR Tr. 1750}. Counsel stated that while he considered a Dorchester County jury to be a "small town jury", and while he was aware of concerns about adultery and interracial sex, he still wanted to show "they were intimate friends and . . . he had no ill motive or reason to kill this lady". {PCR Tr. 1752}. Counsel pointed out that since the DNA expert could not

testify as to precisely when the DNA was put there, he wanted to "clean . . . up" any attempts of the State to sully the relationship, thus showing "he had no malice to this lady, had no reason to hurt her". Indeed, counsel hired his own DNA expert to verify that it could not be precisely determined when the Applicant deposited his semen into the victim. {PCR Tr. 1753-54; 1792; 1955; 1980-81}. Counsel stated he did not want to elicit that Kandee was around Applicant to get drugs, as that would obviously "dirty up" his attempt to show an intimate friendship. {PCR Tr. 1755}.

On cross by the State, counsel reiterated that he wanted to show Applicant and Kandee were friends and Applicant would not have killed her, and added that he was not afraid of the DNA evidence because Applicant was not charged with criminal sexual conduct ("CSC") in the guilt phase, and counsel did not believe the State could prove CSC in the sentencing phase. He added that since Gadsden never testified there was any sex at the Nursery Road scene, he saw no reason to broach the subject. {PCR Tr. 1866-67}.

Thus, counsel elicited a valid strategic reason for not objecting to the DNA evidence. He was not at all scared of it as he did not think CSC could be proven (especially since he had Applicant's statement suppressed in which Applicant talked of sexual contact with the victim's corpse), and he thought it could be used to undermine any motive to kill since Applicant and Kandee were lovers. Counsel accordingly was not deficient simply because the strategy did not work, particularly given the overwhelming evidence facing counsel in this case. See Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); 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, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

3. There was no prejudice.

In any event, there was no reasonable probability of a different result. The evidence of identity was overwhelming even if the DNA match was excluded. 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. {R. 4017-22; 4063-69; 4081}. 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}. And, the gun Applicant's family threw into the river was matched to the casings found at the scene.

Moreover, as argued before, contemporary social values towards extramarital sex and interracial relationships preclude any *per se* finding of undue prejudice from those issues.

Therefore, Applicant has not met his burden of showing prejudice. Reed v. Norris, 195 F.3d 1004 (8th Cir. 1999) (failure to raise Batson issue not prejudicial under Strickland given overwhelming evidence).

B. Failure to move to exclude petroleum evidence

Applicant next asserts counsel failed to object to introduction of Applicant's pants, because the accelerant present on the pants – a "heavy" accelerant – was not the same as the substance used to ignite Kandee's car – which was gasoline, or a "medium" petroleum accelerant.

At trial, SLED chemist Grady Layton identified a medium petroleum accelerant on Kandee's pocketbook, and Layton was able to conclusively identify the presence of gasoline on the shirt, paper material, belt, and miscellaneous debris found in her car. {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 Applicant's 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}.

Solicitor Bailey pointed out at PCR that the SLED arson expert had done a complete report, so he introduced testimony on all aspects of the report to avoid allowing the defense to assert or imply the State had not done a full and fair investigation. {PCR Tr. 2026; 2136}.

1. There was no valid basis for objection.

Given this evidence, as an initial matter there could be no deficiency for failure to object nor prejudice as there was no valid basis for objection. The pants themselves were undoubtedly 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. More importantly, the pants contained Kandee's

watch, which was very relevant to the identity of the murder. See Rule 401, SCRE (evidence is relevant if it would make a fact in issue more probable or less probable).

As to the accelerant, counsel had no valid objection. It goes without saying that within reason a solicitor is certainly entitled to introduce evidence the complete investigation done by police, even if not necessarily incriminating, to avoid any defense contention that the State rushed to judgment or failed to fully investigate the case. The classic example, as this Court pointed out during argument {PCR Tr. 2249}, would be calling the fingerprint expert to testify no prints were found despite investigation, in order to avoid later defense argument that the State failed to look for prints or that the lack of prints constitutes reasonable doubt. This is even more important in this post-“CSI” world, given that many jurors watch that TV show and expect such forensic evidence. See United States v. Fields, 483 F.3d 313, 355 n. 39 (5th Cir.2007) (citing an article discussing the “CSI effect” on jurors, and stating: “Some have claimed that jurors who see the high-quality forensic evidence presented on CSI raise their standards in real trials, in which actual evidence is typically more flawed and uncertain.”).

As to any concern that the mention of an accelerant might confuse the jury and was substantially more prejudicial than probative under Rule 403, SCRE, no such prejudice occurred. The SLED agent was clear 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}. Counsel also elicited that Dorothy used kerosene to heat her house. {R. 4831}. And, the solicitor in argument never mentioned the accelerant on the pants or claimed it was

indicative of anything. {R. 4461; 4476}. Thus, there is no indication this evidence was unfairly prejudicial or confusing to the jury, or that the State misused it.

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).

2. Counsel had a valid strategic reason for admitting the testimony.

Even if there was a valid objection to the testimony, Applicant cannot establish a valid claim for relief because counsel articulated a valid strategic reason for wanting the testimony to be admitted.

At PCR, counsel Cummings testified that he tried to suppress the seizure of the jeans, but that was overruled. He noted he did get family to say they used kerosene to heat the house, and he got the expert to say the accelerant on the jeans was not gasoline. {PCR Tr. 1706-07}. Counsel stated he did not consider objecting to any evidence about the petroleum accelerant found on the pants, because the expert was going to and indeed did testify that the accelerant was not gasoline, but kerosene like that which Applicant's wife used to heat the house. Counsel stated that had the solicitor not called the SLED arson expert, counsel probably would have to elicit that only kerosene was found on Applicant's pants. Counsel felt he needed to do this to counter the fact that the victim's watch was found in his pants and witnesses were saying Applicant burned the car. {PCR Tr. 1708-09; 1711-14}.

On cross by the State, counsel noted he had his crime scene expert review the arson report. The expert advised counsel that if all the State had was that a heavy accelerant was on the pants, that was good for the defense. Counsel strategically decided to bring out that Applicant only had kerosene and not gasoline on his pants, and felt was had successfully taken a state's witness and "made him mine". Counsel pointed out he also elicited from Applicant's wife Dorothy that they used kerosene in the home, and of course Dorothy's home is where the pants were found. {R. 4831; PCR Tr. 1845-46; 1854-55}.

Thus, counsel had a valid reason for allowing the evidence – it allowed him to use a State's expert to establish that nothing on Applicant's clothes forensically linked him with the crime, even though the State asserted those were the pants Applicant was wearing when he killed Kandee. Counsel accordingly was not deficient simply because the strategy did not work, particularly given the overwhelming evidence facing counsel in this case. See Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); 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, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

3. There was no prejudice.

In any event, there was no reasonable probability of a different result. The evidence of identity was overwhelming. 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. {R. 4017-22; 4063-69; 4081}. 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}. The gun Applicant's family threw into the river was matched to the casings found at the scene. And, Applicant's DNA was found within Kandee.

Moreover, as argued before, the evidence introduced at trial was clear that the accelerant on the pants did not match the accelerant used to burn the car, and the solicitor in argument never contended otherwise. 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.

Therefore, Applicant has not met his burden of showing prejudice. Reed v. Norris, 195 F.3d 1004 (8th Cir. 1999) (failure to raise Batson issue not prejudicial under Strickland given overwhelming evidence).

C. Failure to object to evidence of conspiracy to secrete Applicant's gun and examination on plea agreements

Applicant contends his counsel was ineffective for failing to object to evidence his relatives were engaging in a conspiracy to "secrete" a firearm, by arguing there is no evidence of such a conspiracy nor any evidence Applicant was connected to it. He also asserts counsel was ineffective in failing to object to the solicitor's examination on plea agreements Applicant's family had with the State.

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 testified at trial with plea agreements to accessory to the fact of murder. The solicitor elicited from each of them the existence of the plea agreement. {R. 3735-36; 4161; 4167-68}.

Dorothy testified 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 house. {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, a police diver 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 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 matched to Applicant's .380, they were of course consistent. {R. 4315-20}.

1. There was no valid objection to the conspiracy.

As an initial matter, counsel could not have been deficient nor Applicant prejudiced as there was no valid objection to be made to the evidence of concealment of the weapon by Applicant's family.

First, the weapon was obviously 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 State v. Braxton, 343 S.C. 629, 634, 541 S.E.2d 833, 836 (2001) (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, also 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).

Moreover, there was ample evidence from which the gun and its subsequent concealment could be tied to Applicant. Applicant was identified by his friends in possession of such a gun prior to the crime, and 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 at Applicant's request through his own communications or through Hiram Johnson, his wife, sisters, and father subsequently attempted to permanently hide or destroy the gun to protect Applicant. Again, Applicant overlooks that evidence can be relevant not just by what it directly shows, but also by reasonable inferences from the evidence. See State v. Benjamin, 345 S.C. 470, 480, 549 S.E.2d 258, 263 (S.C. 2001) ("It is not required that the inference sought should necessarily follow from the fact proved. Evidence is relevant if it makes the desired inference more probable than it would be without the evidence.").

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 gun and the events surrounding its recovery would still be admissible even if there was no evidence tying the attempt to conceal it to Applicant. 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).

Obviously, the jury was entitled to know the circumstances surrounding the police’s discovery of the murder weapon – particularly since the State had to explain why the firing pin broke during examination by Agent Collins, likely due to its long submergence in the river. Indeed, counsel testified at PCR he did not see any valid objection for keeping out the evidence as to how the gun was found by police. {PCR App. 1849}. Counsel was correct in this assessment.

Further, had counsel tried to exclude the evidence of the attempt to conceal the gun by arguing a lack of evidence tying it to Applicant, the State would have easily overcome that objection by introducing one of Applicant’s letters to his wife, admitted at PCR as Applicant’s 56. In it, Applicant asks Dorothy to tell her lawyer she only found the gun after someone broke into her house and put blood in there (obviously to try to then claim the gun was planted by the “real killer”) {R. 4360}, and goes on to ask her to tell Hiram to say he only saw Applicant with a .32 or .38 revolver (which is different from the murder weapon). Even assuming loose ends existed as to whether Applicant had knowledge of or instigated the concealment of the weapon, they would have more than been tied up by this letter. Counsel was adamant he in no way wanted this letter in evidence given all the incriminating admissions within it {PCR Tr. 1838-39}, as it clearly shows Applicant’s attempt to encourage perjury and obstruct justice. Indeed, he also goes on to ask Dorothy

to tell Travis Felder not to say anything, and to tell Travis Applicant told his lawyer Travis had nothing to do with the crime and would clear him in court. {Applicant's 56}.

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).

2. There was no prejudice from admission of the testimony as to how the gun was discovered.

Even if there was somehow a valid objection to introduction of how police discovered the gun, there was no prejudice. As set forth in subsections A and B, *supra*, the evidence of guilt was overwhelming. Even if the story of how police found the gun was excluded, the gun itself combined with all the other evidence of identity would preclude a reasonable probability of a different result in the guilt phase. Therefore, Applicant has not met his burden of showing prejudice. Reed v. Norris, 195 F.3d 1004 (8th Cir. 1999) (failure to raise Batson issue not prejudicial under Strickland given overwhelming evidence).

3. There was no valid objection to the solicitor's reference to the plea agreements.

Next, there was no valid objection to be made to the solicitor's questioning of Dorothy, Yolanda, and Kendra on the plea agreements; thus, counsel could not have been deficient nor Petitioner prejudiced by the failure to make such an objection.

The law is clear that codefendants may testify even though they have agreed to a plea agreement, and additionally a plea or plea agreement is admissible not as substantive evidence of the defendant's guilt or innocence, but to support or attack the credibility of a testifying codefendant. See, e.g. U.S. v. Gray, 491 F.3d 138 (4th Cir. 2007) (testimony of codefendants testifying pursuant to a plea agreement or immunity agreement still admissible where product of free will, albeit a hard choice); State v. Moore, 337 S.C. 104, 522 S.E.2d 354, 355 n.2 (S.C. Ct. App. 1999) (while a codefendant's plea is not admissible as substantive evidence of the defendant's guilt or innocence, it is admissible to support or attack the credibility of a testifying codefendant).

Additionally, the law is clear that the State may elicit plea agreements on direct examination to avoid the perception it was hiding something when the defense inevitably cross-examines the witness on his or her deal with the State. See State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (S.C. 2001) ("Initially, it was not error for the Solicitor to introduce the plea agreement on direct examination because the Solicitor was entitled to anticipate the inevitable cross examination of a federal inmate and to dispel any notion he was hiding something from the jury."). Indeed, counsel Cummings pointed out that he was the trial attorney in the Shuler case, and thus saw no basis for objecting to the questioning. {PCR Tr. 1849-52}.

Since the questioning was permissible, 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).

4. Counsel had a valid strategic reason for not objecting.

Although counsel did testify he did not see a valid objection to the plea agreements, he also expressed a valid strategic reason for wanting the plea agreements admitted into evidence. Counsel stated he "wanted the rest of the stuff about how they went after his whole family to get him", and "wanted everybody to know that everybody was charged, everybody, and the only one they went after was him". {PCR Tr. 1702, 1704}. Indeed, if counsel had NOT engaged in such common and basic impeachment as examining the State's witnesses on their deals with the State, surely then the allegation now would be ineffectiveness for failing to do so. The fact that Applicant's present counsel may have treated the issue differently is irrelevant as it is precisely the kind of hindsight Strickland forbids. See Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack).

5. There was no prejudice from admission of the plea agreements.

Even if there was somehow a valid objection to introduction of the plea agreements, there was no prejudice. As set forth in subsections A and B, *supra*, the evidence of guilt was overwhelming. All the evidence of identity would preclude a reasonable probability of a different result in the guilt phase. Indeed, had counsel precluded testimony about the deals with the State, that might have enhanced the credibility of the family members in the absence of such a common method of impeachment. Therefore, Applicant has not met his burden of showing prejudice. Reed

v. Norris, 195 F.3d 1004 (8th Cir. 1999) (failure to raise Batson issue not prejudicial under Strickland given overwhelming evidence).

VII. Failure to Object to Admission of Ballistics Evidence

Applicant next contends his counsel was ineffective for failing to object to admission of the opinion of the SLED firearms examiner that the casings at the scene matched Bowman's .380 to the exclusion of all other firearms.

Of course, after Applicant's sisters confessed to throwing Applicant's pistol in the river, a police diver 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 matched "to the exclusion of all other firearms" 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}.

A. Counsel was not deficient.

Despite having the gun transported to Atlanta for review by his expert for these PCR proceedings, Applicant presented no evidence that Collins's conclusion as to the match was invalid. His only attack goes to the validity itself of the discipline of firearms and toolmark examination, and the ability of that discipline to make an exclusive match.

However, even assuming the present validity of an attack on the discipline of firearms and toolmark identification or the relative conclusiveness of a match, counsel was not deficient. Two relevant principles for analyzing claims of ineffectiveness come into play here. First is the point that there is no constitutional claim of ineffective assistance of an

expert witness. See Wilson v. Greene, 155 F.3d 396, 401 (4th Cir. 1998) ("The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness. To entertain such claims would immerse federal judges in an endless battle of the experts to determine whether a particular psychiatric examination was appropriate."); Waye v. Murray, 884 F.2d 765, 766-67 (4th Cir. 1989). Lawyers are entitled to reasonably rely on their experts, and they are not required to second-guess their expert's conclusions or "expert shop" until they find one who will testify favorably. See Wilson v. Greene, 155 F.3d 396 (4th Cir. 1998); Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992). To be actionable, the failure must be of counsel in failing to obtain or present the expert testimony; the fact that the testifying expert did not identify "every possible malady or argument" is not a basis for relief. Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992).

Second is the principle that the reasonableness of counsel's actions must be viewed in the context of the time period they took place, and not in hindsight. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (S.C. 1985) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.") (quoting Strickland); Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (S.C. 2006) ("Though hindsight may provide a different view of counsel's actions, Simpson is not entitled to a new trial for the sole purpose of presenting a 'fancier' case."). See also Harden v. State, 360 S.C. 405, 602 S.E.2d 48 (S.C. 2004) ("An attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction.").

When these principles are considered, it is clear counsel could not have been deficient for failing to challenge the underlying discipline of firearms examination at the time of a trial in May 2002. Counsel testified he hired a recognized firearms examiner, Cleon Mauer, to review the State's firearms evidence. {PCR Tr. 1794; 5316-17}. Counsel stated that Mauer concurred with the State's findings of a match, and never once advised him that he should challenge the entire discipline of firearms identification or have a match excluded from evidence. {PCR Tr. 1684; 1847-49}. Counsel noted that "at the time of trial" he understood firearms examination to be a "recognized science". Counsel testified he had an sheriff's investigator bring all the evidence to his expert so that the expert could conduct his own examination, and the expert also found a match. {PCR Tr. 1681-85}. While counsel agreed that a ballistics examiner might have an vested interest in protecting the discipline, he relied on his expert to tell him the truth. {PCR Tr. 1688; 1690}. Counsel stated he cross-examined the State's expert Collins as best he could with questions suggested to him by his own expert, by eliciting that the firing pin was broken, and that the State could not match the weapon to the actual projectile that killed Kandee. {PCR Tr. 1684; 1699}.

Since: (1) counsel here hired and relied upon a firearms expert who did not advise him to make a challenge to the underlying discipline – which would not be actionable even if the expert was at fault in not knowing of such a challenge – and (2) defense lawyers were not making challenges to the underlying discipline of firearms examination in South Carolina at the time of trial in 2002, but instead considered it a "recognized" discipline, then counsel could not have been deficient for failing to challenge the validity of the discipline.

Further, Applicant's Exhibit 78 would not change this conclusion and somehow make counsel deficient for not raising a fundamental challenge to firearms identification. Applicant's 78 reflects a motion made to a federal court in Massachusetts in 2000 to exclude for various reasons a firearms examination finding a match. First, of course, is the fact that this Court excluded Applicant's 78 from evidence, so Applicant's citation to it in his brief is inappropriate. {PCR Tr. 1692-94}.

However, even if it is considered, it does not establish that counsel here did not meet the minimum level of competence for South Carolina lawyers. Applicant offered no proof whatsoever that defense lawyers *in South Carolina* were routinely making such challenges as a matter of course, and counsel was therefore deficient for not meeting this supposed minimum standard of competence. Simply because one lawyer in Massachusetts had filed the motion does not mean that counsel here would be ineffective when such an attack was not commonly (or indeed – ever) done by criminal defense attorneys in South Carolina in 2002, particularly since counsel consulted an expert in the field and was not advised to make such a challenge.

Indeed, Applicant primarily relies on the "Ballistic Imaging" study that did not come out in final form until August of 2008 {PCR Tr. 412; 423} – over six years after trial and three weeks before the PCR hearing began. These issues are just now percolating into the courts, and counsel cannot be held deficient for failing to raise a challenge for which the basis did not arise until years after Applicant's trial. See, e.g. Gentry v. Sinclair, 576 F.Supp.2d 1130 (W.D. Wash. 2008) (counsel's decision to attack reliability of DNA science and not the results was reasonable, as reasonableness the decision must be considered

at the time it took place, in 1991, when DNA was still "cutting edge"); McDonald v. State, 952 So.2d 484 (Fla. 2006) (holding that counsel was not ineffective for failing to request a Frye hearing because there was general acceptance in the scientific community of the particular science at issue at the time of the defendant's 1995 trial).

As noted before, counsel is not required to second guess his expert, and indeed, Applicant's claim essentially depends on the premise that counsel himself should have had more of an expertise on the cutting edge issues in firearms examination than his own firearms expert did. The law plainly does not require that. See, e.g. Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995) (to impose a duty on the attorney to gather background information for an expert independent of any request from that expert would defeat the whole purpose of hiring the expert, as understanding what information is needed is an integral part of the expert's skill, and requiring an attorney to review the trustworthiness of the expert's conclusions would make the expert superfluous); Green v. Koerner, 312 Fed.Appx. 105 (10th Cir. 2009) (defendant charged with arson was not denied effective assistance of counsel due to counsel's failure to foresee future developments in fire investigation science that occurred after date she entered her plea).

Indeed, Applicant's "flat earth" discussion confirms the very point. At PCR, Applicant pointed out to counsel that it would "seem reasonable" for an expert prior to Columbus to advise that the earth was flat, but that later after ships sailed around the world it was found not to be flat. {PCR Tr. 1691-92}. Counsel cannot be found deficient because at the time he was not more ahead of the scientific curve than most of the rest of the world, including his own qualified hired expert.

Counsel was not deficient.

B. There was no prejudice.

In any event, Applicant has not shown prejudice for a number of reasons.

First, the evidentiary showing Applicant made at PCR was insufficient to completely undermine the discipline of firearms examination and create a reasonable probability of a different result had it been presented to the jury.

Again, there has been no evidence presented that David Collins was incorrect in finding a match pursuant to the accepted standards in the profession of firearms identification. Applicant's only contention goes to the underlying validity of the premise that firearms make distinguishing marks upon casings and projectiles that can be used to match them to a particular firearm to the exclusion of other firearms.

In support of his claim, Applicant called Dr. Marc DeGraef, who was on a committee that authored the report, "Ballistic Imaging", which marked as Court's Exhibit 1 but excluded from evidence. {PCR Tr. 477-78}. This report was a study of the feasibility of creating a national computer database of images of all new firearms that could be searched for matches to evidence from crime scenes. {PCR Tr. 406-08; 454}. Dr. DeGraef admitted his expertise, and thus his basis for inclusion in the committee, was only in imaging and imaging analysis, and that was the extent to which he was qualified as an expert at the PCR hearing. Dr. De Graef conceded that none of the studies on his CV involved analysis of ballistics or projectiles, that he had never conducted a firearms or toolmark analysis, and that he had never independently researched or studied the uniqueness of toolmarks. Indeed, he even pointed out that none of the other committee members had actually performed a study involving the uniqueness of firearms or toolmark

identification. {PCR Tr. 414-23}. Finally, Dr. De Graef conceded he had not reviewed the specific evidence in this case. {PCR Tr. 442-43}.

Because of his lack of expertise with anything specifically relating to firearms or toolmark examination, Dr. De Graef was limited to testifying that the discipline was not a "science" because no statistical quantification of an error rate has occurred. {PCR Tr. 435-38; 441-42; 451-52}. Dr. De Graef also criticized any use of subjectivity in science, {PCR Tr. 444-45}, and complained Collins's notes were not as detailed as a scientist would like {PCR Tr. 448-50}. He asserted that a statement of exclusivity imported an error rate of zero to a subjective determination. {PCR Tr. 474-75}.

On cross, Dr. De Graef admitted that the "Ballistic Imaging" report only questioned whether uniqueness of toolmarks had been fully demonstrated, and conceded the report expressly did not challenge the validity of firearms identification or take any position on whether such evidence was admissible in court. Moreover, Dr. De Graef conceded that the report accepted the prospect that the same gun would produce the same marks as having a "baseline level of credibility" given "existing research" and its acceptance as evidence in courts for years. He ultimately admitted that assessing the validity of the assumptions behind the discipline were not within the scope of the report, and the only conclusion of the report was that further study was warranted. {PCR Tr. 453-58; 470-72}. Dr. De Graef further conceded that the only independent study conducted for the report did not at all assess the question of uniqueness, and Dr. De Graef had no idea whether Agent Collins had correctly or incorrectly identified a match in accordance with then-existing standards. {PCR Tr. 463-66; 472}. Finally, Dr. De Graef admitted that he did not even

write the portion of the report which questioned whether uniqueness had been established, but instead wrote portions addressing how various imaging systems might be applied to a firearms database. {PCR Tr. 466-67}.

The expert who testified as to the match at trial, David Collins, is a member of the Association of Firearms and Toolmark Examiners (AFTE) with a long career of experience in the field. {PCR Tr. 367-70}. He testified as to how sufficient agreement is found for a match. He noted that the observation of the various markings on a subject item and a test item is very objective, and agreed though that the ultimate conclusion of whether those markings proved a match did have a subjective component, based on the experience and training of the examiner. {PCR Tr. 296-99}. Collins testified that in his opinion firearms leave individual markings that are unique to that firearm. {PCR Tr. 307}. He noted he used rules of matching that have been accepted and used throughout the world and in place since the 1920s. {PCR Tr. 314-16; 321; 388}. Collins also pointed out that he personally has participated in as well as reviewed studies in which trained examiners were able to distinguish firearms that had been consecutively manufactured, thus proving the validity of the premise of uniqueness. {PCR Tr. 317-18; 321; 397-99; 481-86; 497-98}. Finally, he noted that he has never failed a proficiency test and is not aware that anyone else at SLED failed one while he was there. {PCR Tr. 336; 383}.

As to his specific finding in this case, Collins testified he found the possibility that the marks were made by a firearm other than Applicant's to be so remote and infinitesimal as to be a practical impossibility. He again pointed out that studies had confirmed this finding of uniqueness. {PCR Tr. 339-41; 349; 385-88}. Collins agreed his "exclusion"

language might indicate complete certainty, but stated he was just trying to express his opinion that it was a practical impossibility another gun made the same markings. He agreed though, that at this time there was no way to put a statistical number on the conclusion like is done with DNA, for example. {PCR Tr. 341-50; 499-500}.

Given this testimony, no Strickland prejudice could result even if it is assumed that counsel should have called Dr. De Graef to attempt to exclude or undermine firearms identification testimony. Applicant simply did not provide sufficient evidence to preclude the firearms identification from being entered into evidence. All he offered was a general and *possible* criticism of the statement of exclusivity from someone who had no experience with firearms and toolmarks analysis, and had never actually conducted a study assessing the uniqueness of such marks. Thus, nothing concrete was offered to actually disprove the premise of the discipline that toolmarks were not unique.

To the contrary, the "Ballistic Imaging" report specifically noted that assessing the premise of uniqueness was beyond its scope, and it accepted the premise that the same gun would produce the same marks as having a baseline level of credibility – while just recommending further study. A generalized criticism and request for additional study simply does not establish that uniqueness of firearms does not exist. Indeed, the only person testifying before the Court who actually had participated in a study assessing uniqueness was Agent Collins, and he noted examiners were able to distinguish individual firearms even though they had been consecutively manufactured. Applicant's attack on the validity of the firearms discipline itself was simply insufficient to preclude a type of testimony that has been routinely accepted in the courts since the 1920s. See Overton v.

State, 976 So.2d 536 (Fla. 2007) (no prejudice from failure of counsel to challenge testing procedures of lab, where testimony showed that any such challenge would likely have been unsuccessful). See generally Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985) (In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief); Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3rd Cir. 1991) (applicant cannot show deficiency "based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense"; rather, facts must be presented).

Inasmuch as Applicant makes the lesser contention that counsel should have examined Collins on his "exclusion of all other firearms" language, again no prejudice could result. Collins testified that he was simply trying to convey the concept of "practical impossibility" with such language, and that he remained sure the casings came from the subject firearm. Thus, had counsel probed the manner, Collings' answers would have been more than satisfactory and would not have created a reasonable probability of a different result.

Even if counsel had successfully reduced Collings' testimony to no more than the fact that the marks on the casings matched marks on known casings fired from the firearm, without any testimony as to the exclusive significance of that match, there still would be no reasonable probability of a different result. Collings still at a minimum would be able to testify the casings matched and thus could have come from the firearm, even if he was precluded from testifying the match was exclusive. This evidence still would make a fact in issue more likely than not, see Rule 401, SCRE, and would be akin to the serology evidence common before DNA, which was admissible even though millions of people have

the same blood type. See generally Adams v. State, 794 So.2d 1049 (Miss. Ct. App. 2001) (Southwick, J., concurring) (inconclusiveness of mitochondrial DNA testing did not make it inadmissible where it could not exclude defendant but could exclude most of general population; while it does not confirm identity it makes it more probable than not). When the fact that the markings physically match is combined with the fact that Applicant's family conspired to hide the gun in the river, the gun would remain strong evidence indeed.

And, there was other conclusive evidence of identity without reference to an "exclusive" ballistics match. 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. {R. 4017-22; 4063-69; 4081}. 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 exclusivity of the State's ballistics result would have created a reasonable probability of a different result. Indeed, given this evidence, even if the match were excluded in its entirety the evidence was still overwhelming. There was no prejudice. Reed v. Norris, 195 F.3d 1004 (8th Cir. 1999) (failure to raise Batson issue not prejudicial under Strickland given

overwhelming evidence); Simmons v. Taylor, 195 F.3d 346 (8th Cir. 1999) (failure to object to jail clothing not prejudicial under Strickland given the state's overwhelming evidence).

IX. Failure to object to arbitrary factor of "good" prison conditions

Applicant next contends his counsel was ineffective for failing to object to the solicitor's questioning of defense prison expert James Aiken on so-called "good" prison conditions, which he asserts introduced an arbitrary fact into his sentencing proceeding. 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).

A. Events at trial

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, or on conditions of confinement generally.*

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}.

B. Plath, Bowman, Burkhart, and Bryant

The reason evidence about "good" prison conditions is problematic stems from four South Carolina cases – one that was in existence prior to this case and three that were handed down after Applicant's trial, including Applicant's on direct appeal.

In State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984), the Court addressed the 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 the state supreme court concluded was "to demonstrate the permanence and deprivation entailed in life imprisonment". 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". 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. In 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 alleged lack of utility 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).

Two decades later, the state supreme court decided Applicant's direct appeal in State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005). There, Applicant contended that the solicitor's questioning about movies, television, and books was irrelevant under the South Carolina Supreme Court's decision in Plath, 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. State v. Burkhardt, 371 S.C. 482, 640 S.E.2d 450 (2007). The defense objected to the state's evidence, and later put in its own evidence of "bad" prison conditions. Justice Moore was joined by Justice Waller and wrote the opinion of the Court. Justice Moore cited Plath and other cases from the 80s and 90s for the proposition that evidence outside of the circumstances of the crime and the characteristics of the defendant was inadmissible in a sentencing phase. This included conditions of incarceration, the process of execution, or the deterrent effect of capital punishment. Burkhardt, 640 S.E.2d at 453. Justice Moore noted that while the case at issue was tried before the decision in Bowman, its result was consistent with the "long-standing rule that evidence in the sentencing phase of a capital trial . . . be relevant to the character of the defendant or the circumstances of the crime". Id. Thus, Justice Moore concluded that reversible error had occurred, since the evidence of conditions of

confinement "invited the jury to speculate about irrelevant matters" and injected an arbitrary factor in the proceedings in violation of S.C. Code Ann. § 16-3-25(C)(1) (2003).

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

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

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

C. Applicability of a *Strickland* analysis to this issue

The first hurdle that must be crossed is whether a normal Strickland analysis applies to this claim that counsel did not object to introduction of an alleged arbitrary factor. Unlike Burkhart, Bowman, or Bryant, which were direct appeals, this case is in PCR, and on

collateral attack Applicant must establish his claims through the constitutional vehicle of ineffective assistance of counsel. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal can not be raised in a PCR application absent a claim of ineffective assistance of counsel). Of course, the familiar standard in Strickland v. Washington that applies to claims of ineffective assistance of counsel requires a showing of *both* deficient performance *and* prejudice – a reasonable probability of a different result at trial.

In the sentencing phase, prejudice is phrased somewhat differently. 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.

There are only limited exceptions where prejudice is presumed – none of which apply here. In Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878 (2006), our state supreme court outlined these limited exceptions:

In Cronic, the [United States Supreme] Court identified three distinct situations in which a presumption of prejudice is appropriate. First, prejudice is presumed when the defendant is completely denied counsel "at a critical stage of his trial." Cronic, 466 U.S. at 659. Second, per-se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer "entirely fails to subject the prosecution's case to meaningful adversarial testing," thus making "the adversary process itself presumptively unreliable." Id. Third, the Court identified certain instances "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the

actual conduct of the trial." Id. (citing Powell v. Alabama, 287 U.S. 45 (1932)). A finding of per-se prejudice under any of these three prongs is "an extremely high showing for a criminal defendant to make." Brown v. French, 147 F.3d 307, 313 (4th Cir.1998).

The supreme court in Nance pointed out that these situations of presumed prejudice are rare, and concluded with this instruction:

Absent these narrow circumstances of presumed prejudice under Chronic, defendants must show actual prejudice under Strickland.

Nance, 367 S.C. at 552, 626 S.E.2d at 880.

Obviously these limited exceptions of presumed prejudice do not apply here. Counsel was present at all critical stages of Applicant's trial, so the first exception is inapplicable. The third exception is clearly not viable either, as it applies only when extreme circumstances external to counsel would prevent anyone from providing effective representation. The classic case, discussed in Chronic, is Powell v. Alabama, 287 U.S. 45 (1932), where in 1930's Alabama black youths were charged with a horrible crime. Hostile sentiment pervaded the community. Only on the day of trial was a lawyer appointed, and he was not only unprepared but also was from a different state and unfamiliar with local procedure. Obviously, Applicant's trial nowhere approaches the inherently prejudicial circumstances of Powell.

Finally, the second exception – where counsel "entirely fails to subject the prosecution's case to adversarial testing" – is also inapplicable. An example of this exception is Nance itself – where lead counsel was hampered by alcoholism, drug intake, and health issues affecting his memory, and co-counsel was a new lawyer who had only been practicing for eighteen months. The lawyers only interviewed one family member in preparation, and the mental expert was not provided with any requested background

information. The lawyer told the jury in opening argument that he did not ask for the case; counsel only called three witnesses in the guilt phase during which they elicited prejudicial information; they failed to even qualify their expert; and they called the sister at the last minute without any preparation. The defense sentencing phase case only lasted seven minutes, and during closing co-counsel did not plead for his client's life, but instead described him as a "sick" man who did "sick" things. Nance, 367 S.C. at 554-58, 626 S.E.2d at 881-84.

Such a woeful description is of course nothing like the representation that Applicant received in this case, where he had two lawyers, including one who is one of the more experienced criminal defense litigators in the State. Whether or not they made an individual mistake during the course of the representation, counsel in this case certainly endeavored to challenge the State's case throughout the proceedings. Clearly, this is not a Nance-type situation where counsel "entirely failed to subject the prosecution's case to any meaningful adversarial testing." Thus, where as here there was a sufficient effort overall, then any alleged individual mistakes are properly adjudged through Strickland's normal process, which includes the prejudice analysis.

This conclusion is consistent with the language of Strickland itself, despite our state supreme court's view in Burkhart of conditions of confinement evidence as an arbitrary factor for which it did not perform a prejudice analysis on direct appeal. Unlike a case on direct appeal – where the conviction is not yet considered final – during collateral attack concerns of finality are of "profound importance". See generally Strickland, 466 U.S. at 693-94 (discussing concerns of finality when deciding the appropriate standard for prejudice). Hence, on collateral attack it is appropriate to filter claims through a prejudice

analysis to ensure that the extreme social cost of reversing final convictions and sentences is only borne by society where the alleged error had a reasonable probability of affecting the result of the proceedings.

An example of this principle is found in Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001). There, the South Carolina Supreme Court held that a prejudice analysis should be applied to claims that the defendant was not advised of and thus did not waive his right to personally give closing argument in the guilt phase of a capital trial – despite the fact that prior cases had not engaged in a prejudice analysis. Franklin noted the general rule that claims under Strickland include a prejudice analysis, and went on to conclude that since *in favorem vitae* review had been abolished and a PCR system of collateral attack established to explore such issues, a finding of *per se* reversible error was no longer warranted. Franklin, 346 S.C. at 571-74; 552 S.E.2d at 723-24. Finally, the Court noted that it and the United States Supreme Court have repeatedly held that “a harmless error analysis is appropriate where a capital defendant has suffered a deprivation of a *constitutional right*”. Franklin, 346 S.C. 563 at 575 n.8, 552 S.E.2d at 725 n.8 (emphasis in original).

And that last statement precisely raises the final point why a prejudice analysis is appropriate to a claim that counsel failed to object to evidence of conditions of confinement. While Burkhart phrases its issue as a statutory one – that introduction of evidence of conditions of confinement injects an arbitrary factor under S.C. Code Ann. § 16-3-25(C)(1) – Applicant here in PCR is raising, as he must, a *constitutional* issue – that he was effectively denied his Sixth Amendment right to counsel based on counsel's

omission. Applicant must filter his statutory claim through the constitutional one – as a fundamental and legal matter, the claim he pled before this Court is constitutional. As Franklin specifically notes, this overriding constitutional claim upon which the statutory claim depends is subject to a harmless error analysis – – like any other constitutional claim.⁸

D. Counsel was not deficient in handling the issue.

In his brief, Applicant cites some isolated passages from counsel Cummings' testimony under questioning by Applicant to assert that counsel simply "missed" the issue by failing to object. {PCR App. 1720-22}. However, when one explores counsel's testimony more carefully, it is clear that the fact of the matter is counsel was operating in one of the vanguard cases after LWOP became a mandatory charge in every case, and was strategically using the burdensome "without parole" aspect of that sentence as the centerpiece of the defense strategy. Since neither Bowman, Burkhart, or Bryant had been issued yet, counsel's strategy was reasonable, including his (and the judge's) determination that the solicitor's responsive question was permissible given the evidence elicited by the defense.

In his testimony on cross during PCR, counsel Cummings explained that his strategy was to portray life in prison without parole as a particularly horrible fate that it amounted to sufficient punishment for a young man like Applicant. He noted he wanted to "paint a

⁸ It is also worth noting that Justice Pleicones is but one vote of five in expressly rejecting a harmless error analysis in Burkhart, as the majority made no such express analysis and the dissent clearly disagreed with Justice Pleicones's view. Moreover, even Justice Pleicones was not analyzing the issue in the context of PCR, where the necessary constitutional overlay of ineffective assistance would have had to be addressed.

picture, paint it nasty for [the jury]". {PCR Tr. 1876-80}. Counsel noted that he has successfully objected when the solicitor attempted to talk about escape, but knew that once he had questioned the witness on some of the harsh conditions of prison he fully expected the solicitor to ask Aiken about "whether or not they get to eat in prison". Since Bowman, Bryant, and Burkhart were not out yet, he did not see a valid objection outside of the solicitor "talking about things that were outside the scope – that being escape". Counsel added, "I knew it was coming; I took a calculated risk; I made a decision", and agreed that he knew full well that "by going down the road of saying life in prison is so horrible that it's good enough punishment for Marion Bowman", the solicitor was going to try to show that it was not as bad as all that. {PCR Tr. 1882-84}. While of course counsel later stated he was not strategically trying to introduce what the law determined was an arbitrary factor {PCR App. 1986-87}, on cross, counsel stated he made a "calculated risk" in eliciting the evidence on the toughness of prison from Aiken. He noted he "made that choice to try to give the jury an alternative", asking rhetorically, "why do we give the jury a LWOP choice if we're not going to let them know what prison is like?". He agreed he was willing to take on the issue of prison conditions because he thought he could use it to his client's benefit. {PCR App. 1884-85}. Finally, counsel agreed that at the time they were on the "frontier" of how to litigate a capital case with the mandatory LWOP charge, and he "did try to push the envelope". {PCR App. 1885-86}.

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

Kelly v. South Carolina, 534 U.S. 246 (2001), which ended the debate about charging

LWOP and essentially required such charges in every case, had come out just a few months before Applicant's trial. Knowing that he was going to get a LWOP charge, and given Applicant's relatively young age, counsel decided to attempt to portray through Aiken the conditions of LWOP as so severe that it was a sufficient alternative to death for the conservative Dorchester County jury to choose. Given the time period and the state of the law when this trial took place, with Kelly being freshly decided and Bowman, Bryant, and Burkhart not issued yet, counsel was reasonable in deciding to use the LWOP charge to his advantage in this manner. Strickland plainly does not require counsel to anticipate changes and developments in the law. See Schneider v. Day, 73 F.3d 610 (5th Cir. 1996) (holding that while Victor v. Nebraska, 511 U.S. 1 (1994) is retroactive, counsel cannot be ineffective for failing to foresee changes in the law subsequent to the Petitioner's trial); Walker v. Jones, 10 F.3d 1569 (11th Cir. 1994) (trial counsel not ineffective for failing to object to reasonable doubt charge where petitioner's trial took place four years before Cage v. Louisiana, 498 U.S. 39 (1990), and state courts at that time had affirmed use of such charges).

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

the solicitor's own limited questioning on conditions – except when the solicitor went outside the "scope" into questioning about escape, to which counsel successfully did object.

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

Thus, counsel was not deficient: (1) in strategically deciding to enter to confinements issue as part of his strategy to portray LWOP as a particularly harsh sentence and viable punitive alternative, and (2) in acquiescing to the solicitor's limited responsive questioning on the same subject. 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 in deciding on this strategy. 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. See generally Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); 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, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

E. There was no prejudice.

Regardless, there was no prejudice warranting reversal. Again, in the sentencing phase, Applicant must show "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." Jones, 504 S.E.2d at 823-824 (citing Strickland).

Here, 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).

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 simply because he was not allowed to create a one-sided and inaccurate perspective.

There is no reasonable probability of a different result if a few pages of questioning on this issue during a multi-day sentencing hearing had been excluded, in a case where the defense had their own full comment on the issue.

X. Failure to object to submission of kidnapping aggravator

Applicant next contends his counsel were ineffective for failing to call James Tywan Gadsden during the sentencing phase to refute the kidnapping aggravator, by having him testify that there Kandee willingly went with Applicant to help him burglarize a house. He

also asserts that the testimony of inveiglement was too vague and thus submission of the aggravator violated due process.

A. Events at trial and in PCR

In one statement to police, Gadsden said that stated that when he got in the Kandee's car with Applicant and Kandee, Applicant said he was going to "pull a caper", and when Gadsden asked what caper, Applicant said he was going to "rob somebody". Kandee then said she needed gas money. Gadsden then claimed he had them take him home. **{Applicant's Exhibit 5}**. In his other statement to police, Gadsden said Applicant said he was going to "pull a caper". Kandee then said she would do anything for a hit of crack. Gadsden said that while they were riding to Nursery Road, Applicant made a gun with his fingers and pointed it at Kandee's head. He also stated that Applicant said he was going to kill Kandee because she had been "wired" by police when she bought drugs from Applicant. **{Applicant's Ex. 6}**.

In his trial testimony, though, while Gadsden did note that after they left the car Applicant said he was going to kill Kandee because she was wearing a wire **{R. 3998}**, he did not mention on direct the plan to rob a house or the gesture of a gun to the back of Kandee's head. On cross, when counsel asked Gadsden why Kandee was afraid when a car was coming down the road, and the three of them then jumped in the woods, Gadsden stated it was because Applicant said he was going "to pull a caper". Counsel quickly moved on and there was no explanation of what "pulling a caper" meant. **{R. 4035}**.

Prior to the beginning of the sentencing phase, counsel moved for a directed verdict of life, arguing against all of the possible aggravating factors. As part of that, he asserted no evidence has been presented of kidnapping. The court found the motion premature, but counsel argued that it would be prejudicial to allow the evidence in during the sentencing phase if the court ultimately ruled an aggravator was not valid. {R. 4611-17}.

At the close of the State's evidence in the sentencing phase, counsel again asked for a directed verdict on the aggravating circumstances. He argued that Gadsden's testimony that all three of them jumped in the bushes when the car passed meant that Kandee was no under anyone's control, and contended there was no testimony establishing the weapon was ever used to keep Kandee in a particular place. Counsel contended that testimony Kandee was given directions where to go did not amount to inveiglement, and that the testimony was she was shot without any warning. {R. 4711-12}.

The solicitor responded that Kandee was certainly being held at gunpoint and not free to go between the first and second shots when she was begging for her life. The solicitor also cited cases, such as State v. Plath and Arnold, supporting the contention that the inveigle and decoy elements of kidnapping were met when one invites another into a car with a formed intent to murder the person, or where one is promising to get aid for the victim, or makes the victim think they are going somewhere to commit a crime together. Counsel responded that too much time had passed from Applicant's threats to kill Kandee made to others earlier in the day and the actual crime, and that there was no actual proof of anything Applicant said to inveigle or decoy Kandee. {R. 4713-17}.

The trial court found this case to be similar to Plath inasmuch as the victim was lured after Applicant had formed an intention to kill, and allowed the aggravator. {R. 4731-32}. Counsel renewed his argument on kidnapping at the close of evidence, but the judge affirmed her prior ruling. {R. 4930-31}.

At PCR, Gadson admitted, as he related to police in Applicant's 6, that he knew beforehand Applicant was planning to kill Kandee, but did not mention that in his testimony. Gadson then backtracked and said he only knew there was going to be a killing when Applicant started shooting Kandee. Gadson stated that he and Kandee thought they were heading out to Nursery Road to rob someone else. {PCR App. 144-47}. On cross by the State, Gadson stated they were looking for a home to rob, and claimed he did not know when Applicant pointed at Kandee's head whether he was making a gun-like gesture or merely pointing to a house to rob. {PCR Tr. 181-84}.

Counsel Cummings testified in PCR that he did not want to elicit evidence that Applicant was planning a nighttime burglary of a residence, and pointed out that such evidence "didn't get out" during the trial. Counsel stated that he "walked the tight rope as tight as he could" with this aggravating evidence, and based on experience he wanted to make the State prove its case rather than portray Applicant as "the reason why she's dead, dope, sex, drugs". He noted that it would have done no good anyway if the jury found that Kandee was tricked into going with Applicant with the ruse that they were heading to a house to rob, as that might meet the "inveigle" or "decoy" version of kidnapping. Counsel pointed out that South Carolina had what he referred to as one of the broadest kidnapping statutes in the nation. {PCR Tr. 1395-96}.

Later, when asked if Kandee's crack use at the scene of her murder "might be relevant to the issue of her state of mind in . . . for the kidnapping aggravator", counsel again noted that South Carolina had an extremely broad kidnapping statute. He stated "if you want to argue the state of mind, they were going there to do a job", and pointed out and "any way I turned on this thing I was stepping on a land mine". {PCR Tr. 1643-44}.

On cross by the State, when asked about impeaching Gadsden for leaving out of his trial testimony things in his statement such as that Applicant "was going to pistol whip another girl who owed him crack money, that they of course were looking for houses to rob when they went out to the Nursery Road location, that [Applicant] made a gun sign to the back of the victim's head on the way out there, that he said he was going to kill the victim and that he gave the victim crack before killing her", Cummings testified he was "shocked" those things did not come out on direct and did not want to open the door to them. Cummings noted that whatever value might be gained in impeachment was more than outweighed by the egregious nature of those facts. He also stated that he saw no value in eliciting those egregious facts from Gadsden, since being tricked into going with Applicant could still support kidnapping as well. {PCR Tr. 1923-25}.

B. Failure to call Gadsden in sentencing phase

Applicant's first contention now is that had counsel called Gadsden back during the penalty phase and elicited testimony that Kandee went willingly with Applicant as part of a supposed plan to rob a house, then the trial court would have granted a directed verdict as to the kidnapping aggravators since Kandee was not inveigled.

As an initial matter, counsel could not have been deficient nor Applicant prejudiced because testimony of a plan to rob houses (or even to smoke crack) out on Nursery Road would not have precluded a kidnapping aggravator under South Carolina law. As counsel repeatedly pointed out, kidnapping in South Carolina is very broad and is satisfied if the person is seized, confined, inveigled, or decoyed, "by any means whatsoever". S.C. Code Ann. § 16-3-910 (Rev. 2003). In interpreting this statute, the state supreme court held "specious" an argument that the evidence did not support the aggravator of kidnapping, "where the victim was invited into the appellants' car [and went willingly], after they had formed and expressed the intention to carry away and murder her". State v. Plath, 281 S.C. 1, 18, 313 S.E.2d 619, 629 (S.C. 1984). Additionally, in State v. Ray, 310 S.C. 431, 427 S.E.2d 171 (S.C. 1993), the Court found that while the evidence was conflicting as to when the defendant formed the intention to kill the victim, a finding of kidnapping was supported by the evidence where the defendant supposedly agreed to take the victim to the hospital after shooting her, but in fact took her somewhere else to finish her off, during which she resisted. Finally, most relevant is State v. Stokes, 345 S.C. 368, 548 S.E.2d 202 (S.C. 2001), in which the Court found no error in redaction of a portion of a letter showing that the victim was tricked into going into the woods under the premise that they were going to kill someone else, by finding that rather than disproving kidnapping by showing the victim went willingly, rather would in fact go to proving the "inveigle" and "decoy" forms of kidnapping. See Stokes (quoting, *inter alia*, United States v. Hughes, 716 F.2d 234, 239 (4th Cir.1983), "nothing in the policy of the ... kidnapping statute justifies rewarding the kidnapper simply because he is ingenious enough to conceal his true motive from his victim until he is able to transport her ... [to another location]").

As the prosecutor pointed out, the evidence had already shown that Applicant had threatened to kill Kandee before the day was out – and this evidence came from Applicant's own sister Yolanda, his own cousin Katrina, and Eddie Waters. {R. 3726; 3744; 3766}. Additionally, had counsel called Gadsden to elicit the plan to burglarize houses, the prosecutor most assuredly would have cross-examined him on Applicant's 6, wherein Gadsden told police that Applicant made the gun gesture to Kandee's head before they arrived at Nursery Road. From this evidence a jury could have concluded that Applicant had already formed the intention to kill her when he invited her along on the supposed plan to burglarize houses – or even just to go somewhere to smoke crack. Just like the victim's belief in Stokes that she was going in the woods to kill someone else, the fact that Kandee thought she was willingly participating in an illegal scheme would not prevent a finding of kidnapping, where the scheme was merely Applicant's ruse to get Kandee in a location where he could kill her.

As such, counsel could not have been deficient nor Petitioner prejudiced from failing to call Gadsden, as his testimony about the scheme to rob would not have required a directed verdict on kidnapping. Indeed, even if Gadsden had claimed, as he did (at times) in PCR, that he did not know Applicant was planning on killing Kandee, this would not preclude the kidnapping charge, since independent evidence of Applicant's intention to kill came from Yolanda, Katrina, and Eddie. Further, a jury could also have believed the clear import of Gadsden's more direct version in Applicant's 6 as to the "gun gesture", over his subsequent claim in PCR that he did not know what the gesture meant. Regardless of how presented, there was clearly sufficient evidence to survive directed verdict on kidnapping.

Regardless, counsel was clear that he did not want to elicit in detail egregious facts that had been left out of Gadsden's statement, such as the fact that they were looking to burglarize a residence. Although Gadsden did briefly mention Applicant's desire to "pull a caper" in response to one of counsel's questions, counsel quickly moved on and did not have Gadsden explain to the jury what that meant – for the obvious reason that it would only harm his client. Indeed, calling Gadsden back in the penalty phase would have been extremely risky, as the prosecutor might then elicit on cross some of the other egregious facts from the statement, such as Applicant's providing of crack to Kandee, and Applicant's threat to pistol whip another woman who owed him money. Counsel's strategic decision to avoid as best as possible any reference to Applicant's plan to burglarize houses is certainly reasonable and sustainable under Strickland – especially when one considers, as argued above, that eliciting such testimony from Gadsden would not have precluded a kidnapping aggravator anyway. See Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance).

Finally, Applicant cannot show prejudice even if counsel could have done something to ensure a directed verdict on the kidnapping aggravator. South Carolina is a "consider" state, in that juries are not instructed to "weigh" aggravators and mitigators. Thus, the subsequent overturning on appeal of one aggravator does not affect the validity of a death sentence as long as one valid aggravator remains. See State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (S.C. 2004) (finding invalidation of armed robbery aggravator did not require reversal of death sentence where other aggravators remained, and citing (citing Zant v. Stephens, 462 U.S. 862 (1983)); State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984) (citing Zant). The jury in this case found two aggravators: the murder was committed in the

commission of kidnapping, and larceny with the use of a deadly weapon. Accordingly, Appellant's death sentence would not be compromised even if this Court were to find counsel ineffective in not achieving a directed verdict on the kidnapping aggravator.

C. Lack of proof in record supporting kidnapping aggravator

Applicant next makes the freestanding contention that there was no evidence in the trial record to support the kidnapping aggravator. He asserts that Gadsden never testified to anything Applicant did to inveigle or decoy Kande Martin.

As an initial matter, this freestanding claim is procedurally improper in PCR. As noted before in the preceding subsection, counsel argued that a directed verdict should be granted on the kidnapping aggravator, but the trial court declined, accepting the solicitor's argument that the victim was lured after Applicant had formed an intention to kill. {R. 4731-32}. Any freestanding claim could have been raised at trial or on direct appeal if preserved at trial, and as such the present freestanding claim is improper for PCR. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal can not be raised in a PCR application absent a claim of ineffective assistance of counsel).

Regardless, even if this Court could "overrule" Judge Goodstein's decision on the directed verdict motion at trial, it is clear that she was correct. As argued before, Yolanda, Katrina, and Eddie all testified that Applicant threatened to kill Kande before the day was out. {Tr. 3726; 3744; 3766}. Gadsden testified that Applicant was telling Kande where to turn and led her to drive out to Nursery Road where she was murdered. {R. 3994-96}.

And, Gadsden testified Applicant wanted to pull a caper {R. 4035}, and stated Applicant

said he wanted to kill Kandee because she was wearing a wire {R. 3998}. From this a jury could reasonably conclude that Applicant had the preexisting intention of killing Kandeed and inveigled and decoyed her by leading her out to the deserted stretch of rural road where he killed her. There is no error.

Regardless, as argued before, even if the kidnapping aggravator was unsupported reversal is still not warranted given that South Carolina is a "consider" state and not a "weighing" state, and the larceny aggravator is unaffected. See State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (S.C. 2004) (finding invalidation of armed robbery aggravator did not require reversal of death sentence where other aggravators remained, and citing (citing Zant v. Stephens, 462 U.S. 862 (1983)); State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984) (citing Zant)).

It is respectfully submitted that the issue should be denied.

XI. Alleged ineffective investigation and presentation of mitigation case

Applicant next contends his counsel were ineffective in their investigation and presentation of the case in mitigation.

A. Alleged constructive absence and the presumption of prejudice

Applicant first contends his counsel constructively absented themselves from the preparation and presentation of the mitigation case, thus mandating a presumption of prejudice under the doctrine of United States v. Cronic, 466 U.S. 648 (1984).

1. Cronic is not applicable to this case.

As an initial matter, the narrowly and rarely applied Cronic doctrine, allowing a presumption of prejudice when counsel is constructively absent, is simply not applicable

to the circumstances this case. Although already described with the conditions of confinement issue, the constructive absence form of Cronic occurs where counsel "entirely fails to subject the prosecution's case to adversarial testing".

In the only opinion where the South Carolina Supreme Court has presumed prejudice pursuant to the "constructive absence" form of Cronic, the lead counsel was hampered by alcoholism, drug intake, and health issues affecting his memory and capacity. Co-counsel was a new lawyer with no death penalty experience who had only been practicing for eighteen months. The lawyers only interviewed *one* family member in preparation, and the mental expert was not provided with *any* requested background information. The lawyer told the jury in opening argument that he did not ask for the case but had been appointed; counsel only called *three* witnesses in the guilt phase during which they elicited prejudicial information; they failed to even qualify their expert; and they called the sister at the last minute without any preparation. The defense sentencing phase case only lasted *seven* minutes, and during closing co-counsel did not plead for his client's life, but instead described him as a "sick" man who did "sick" things. Nance, 367 S.C. at 554-58, 626 S.E.2d at 881-84.

Indeed, the United States Supreme Court and the federal appellate courts have repeatedly pointed out how rare and narrow the Cronic exception to prejudice is, occurring only when there is a overwhelmingly complete breakdown of counsel in all aspects of the representation rather than mere deficiencies in trying the case. In Bell v. Cone, 543 U.S. 447 (2005), the Court reversed the Sixth Circuit Court of Appeals, which had concluded that Cronic's presumption of prejudice analysis applied because counsel did not ask for

mercy after the prosecutor's final argument. Bell, 535 U.S. at 693. The United States Supreme Court stressed that Cronic's exception is very narrow, and stated:

When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that *the attorney's failure must be complete*. We said 'if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing.'

* * *

Respondent's argument is not that his counsel failed to oppose the prosecution throughout the sentencing proceeding *as a whole*, but that his counsel failed to do so at specific points. For purposes of distinguishing between the rule of Strickland and that of Cronic, this difference is not of degree but of kind."

535 U.S. at 696-97 (emphasis added). See also Wright v. Van Patten, 128 S.Ct. 743, 746 (2008) (same). Finally, the Court in Bell held that "[t]he aspects of counsel's performance challenged by respondent – *the failure to adduce mitigating evidence* and the waiver of closing argument – are plainly of the same ilk as other specific attorney errors we have held subject to Strickland's performance and prejudice components." *Id.* at 698 (emphasis added).

In Florida v. Nixon, 543 U.S.175 (2004), the Court reversed the Florida Supreme Court and held that counsel's concession of guilt in a capital murder trial, made after consultation, did not constitute deficient performance where counsel's strategy was reasonable. The Court found that the equation of trial counsel's strategy to a guilty plea had led the Florida Supreme Court to erroneously presume deficient performance and, then, misapply the presumption of prejudice that Cronic had clearly reserved for situations in which counsel has entirely failed to function as the client's advocate. The Court emphasized that Cronic is a *very narrow* exception to Strickland's prejudice requirement. The Court found that counsel's strategy in Nixon did not "rank as a 'fail[ure] to function in

any meaningful sense as the Government's adversary." 543 U.S. at 189-92. See also Mickens v. Taylor, 535 U.S. at 166 (clarifying that Cronic is limited to cases where the magnitude of counsel's error is such that the verdict is almost certain to be unreliable) (citing Cronic, 466 U.S. at 659 & n. 26); Williams v. Taylor, 529 U.S. 362, 391, 396-97 (2000) (examining a claim under the Strickland standard where the petitioner's "trial lawyers failed to investigate and to present substantial mitigating evidence to the sentencing jury").

Other lower federal and state courts have also recognized that the Cronic doctrine is only to be applied in "very rare", "extraordinary", and "exceptional" circumstances, upon an "extremely high showing" of deficient performance – and inapplicable where an otherwise incompetent counsel at least provided *some* representation to the client. E.g. Young v. Catoe, 205 F.3d 750, 762-63 (4th Cir. 2000) (applied only in "rare cases" and "extraordinary" situations); Childress v. Johnson, 103 F.3d 1221, 1228 (5th Cir. 1997) (for Cronic to apply, counsel must not be merely incompetent, but inert); Scarpa v. DuBois, 38 F.3d 1 (1st Cir. 1994) (analogizing the Cronic exception to harmless error doctrine, in that a lawyer's "maladroit performance " is a trial error, where a "non-performance" is a structural error); Toomey v. Bunnell, 898 F.2d 741, 744 n. 2 (9th Cir. 1990) (applied "very sparingly").

With this review of the law in mind, it is clear Cronic simply does not apply, even if everything Dale Davis said is taken at face value. The woeful description of the representation in Nance is of course nothing like the representation that Applicant received in this case, where one of his lawyer is an extremely experienced criminal defense litigator in the state. Whether or not they made an individual mistake during the course of the

representation, counsel in this case certainly endeavored to challenge the State's case throughout the proceedings. For example, counsel engaged in an extensive suppression hearing for various pieces of evidence over the course of multiple days, which ultimately resulted in the suppression of Applicant's very incriminating and egregious fourth statement to police, in which he speaks of post-mortem sexual contact with the victim. This was a huge victory after a hearing that took over 1000 pages of transcript, and alone would preclude a finding that counsel was so completely "inert" that Cronic would apply. {R. 313-1322}.

Counsel Cummings also testified to the extensive preparation they did, including hiring and consulting with Robert Minter, an investigator; Walt Mitchell, another investigator; Donald Girndt, a crime scene expert; Jeff Hollifield, a forensic scientist; Cleon Mauer, a firearms examiner; Dale Davis, a mitigation investigator; Jeff Yungman, a forensic social worker; Dr. Harold Morgan, a psychiatrist; Dr. Brian West, a psychologist; Dr. Clay Nichols, a forensic pathologist; Ronald Ostrowski, a DNA expert; Frank Bloomingburg, a polygrapher; and Sally Hayden, a speech and reading teacher who assessed Applicant and found he could read and write just fine (despite his lies to the trial court and apparently to counsel that he could not). {PCR Tr. 1784-98}. Counsel also made scores of other pre-trial motions, including motions to reveal the deal, to exclude photographs, and to declare the death penalty unconstitutional. {R. 70-314}. Counsel conducted extensive capital voir dire, which encompasses over 2000 pages of transcript. {R. 1383-3492}. Counsel cross-examined every single one of the fifty-two state's witnesses in the guilt and sentencing phases – save only the victim's mother in the sentencing phase, and of course it is not

unusual for capital defense attorneys to stay away from the potential and unpredictable bombshell of grieving family members testifying as to victim impact. Counsel presented a mitigation case in which he hired and called in mitigation family members, jail guards, jail education teachers, and a corrections and adaptability expert. {R. 4742-4928}. And, regardless of what Dale Davis and Jeff Yungman want to say in hindsight, 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. Finally, counsel gave pointed and relevant closing arguments, including an impassioned plea for a sentence of life without parole in which he argued that for Applicant it was a fate worse than death. {R. 4979-5011}.

Clearly, this is not a Nance-type situation where counsel "entirely failed to subject the prosecution's case to any meaningful adversarial testing." Essentially, the entire claim Applicant makes here is that counsel did not spend enough time talking with and giving guidance to mitigation investigator Dale Davis and social worker Jeff Yungman – although it is undisputed he did talk with them some. Given all the work counsel undisputably did, the claim that counsel did not talk to Dale Davis and Jeff Yungman enough for the tastes of Applicant's present counsel is not a *complete* failure of counsel, and is certainly a claim "of the same ilk" as other specific attorney errors the United States Supreme Court has held are "subject to Strickland's performance and prejudice components." See Cone, 535 U.S. at 698; Nixon, 543 U.S. at 189-92.

Where as here there was such an overall effort that counsel could not be said to have been completely inert, then any alleged individual mistakes are properly adjudged

through Strickland's normal process, which includes the prejudice analysis. Cronic is inapplicable and Applicant must show prejudice.

2. Counsel did not absent themselves from the mitigation preparation, whether in the context of applying Cronic or assessing deficiency.

Regardless, whether in the context of attempting to justify Cronic or simply in analysis of deficiency, it is respectfully submitted that the evidence does not justify a finding counsel completely absented themselves from preparation of the mitigation case.

Testifying social worker Jeff Yungman complained that he did not have much contact with the attorneys, and Applicant introduced a letter in which Yungman complained to counsel that trial was upcoming and he did not know the strategy. {PCR Tr. 1056-58}. However, Yungman also admitted he had worked on 26 prior death penalty cases and had been qualified as an expert in 12-15, and knew what he was looking for in a social history. {PCR Tr. 1057; 1062; 1113-15}. He explained what he was looking for in mitigation, and admitted there was not that much difference in how one handles a case where guilt was conceded as opposed to one where it was not. The point was still to use the person's life experiences to find factors that might explain their behavior. {PCR Tr. 1062-65; 1077}. He admitted Dale Davis gave him a great deal of information. {PCR Tr. 1076}. Yungman did complain, though, that he did not feel counsel properly prepared him for testimony. {PCR Tr. 1093-94}.

On cross, Yungman displayed his expertise in knowing what issues to address in conducting a mitigation analysis, and conceded there was no question he knew what he was hired to do, and indeed it was a common analysis he had done in all his prior cases.

He agreed counsel hired him to put the social information together in a coherent form for trial, and they relied on his expertise in looking at the information to determine what was significant and relevant. He also conceded he had a lot of contact with Dale Davis during the process. {PCR Tr. 1120-25; 1142-43}. Finally, he agreed his report was submitted to the attorneys prior to trial. {PCR Tr. 1127-29; Respondent's 11}.

Of course, Dale Davis testified that Cummings was not particularly responsive to her attempts to contact him, so she began to keep a secret log of things he did she did not like to give to Applicant's attorneys in PCR. She did not tell Cummings or Hardee-Thomas she was keeping this secret log and essentially setting them up for down the road. She also conceded that she did have some contact, just not as much as she would have liked. {PCR Tr. 1227-41; 1515}. Davis also testified on direct that she was an "expert in mitigation", that when you begin gathering the social history you do not know where it will lead you, and that she was hired by the attorney "to lead the investigation and coordinate the investigation" into mitigation. {PCR Tr. 1220-21}.

On cross, Davis was led on an discussion where she talked at length and in great detail about all the various issues and the information supporting it that arise in social history mitigation. She testified as to why a case in mitigation was important, and what the defense would try to show in such a case. {PCR Tr. 1426-28}. She noted she seeks all records {PCR Tr. 1417}, and testified that she has the training and expertise to know what to look for – which is why the attorneys hire her in the first place {PCR Tr. 1426-28}. The State at PCR introduced her time log, which showed all of the work she did on the case, including interviewing 30 people, and she brought to the hearing the large amount of

records and other information she gathered in the case. {PCR Tr. 1432-35; 1440-44; Respondent's 12; Respondent's 13}. She agreed she gave all this information to Jeff Yungman. {PCR Tr. 1435}. Finally, Davis conceded she had no problem faxing memorandums and the like to counsel during the representation, and conceded under questioning by this Court that Marva Hardee-Thomas took her calls without problem and would then contact Cummings' office. {PCR Tr. 1442-43; 1494}.

Most importantly, after allowing Davis to speak at length on her knowledge of how to do a mitigation investigation and why certain information was important, she conceded she had not needed an attorney sitting next to her to provide guidance as to how to answer those questions. While she complained the information was not presented well, she admitted she knew how to gather the information herself, and she did in fact gather it and present it to Yungman and counsel. {PCR Tr. 1445-47}. She also conceded she suggested Yungman and knew he had done these cases in the past. {PCR Tr. 1445-47}.

Under questioning by this Court, Davis could not give one specific example of anything she told Cummings but he ignored {PCR Tr. 1483-84}, and conceded there was nothing wrong with the information in Yungman's report {PCR App. 1484-85}. She also admitted they discussed the mitigation case after the conclusion of the guilt phase, and while she complained Cummings did not talk to the lay witnesses beforehand, admitted she talked with them about their testimony. {PCR App. 1486-93}.

Counsel in large measure refuted the claims of Dale Davis. Marva Hardee-Thomas noted she was shocked when she got the "panic memo" from Davis. With regard to Davis's complaints she could not contact counsel, Thomas testified "she didn't know where

that was coming from", as she never refused to return calls from Davis and felt the complaint was "out of the blue". She also testified Dale Davis was known for "turning on" attorneys in PCR. {PCR App. 1591-93; 1609-10}. Counsel Thomas also remembered talking with the sisters and the mother. {PCR App. 1614-15}.

Counsel Cummings testified that Dale Davis was the mitigation specialist the defense hired and relied upon to have have the expertise to gather the social history. He noted she suggested Yungman. {PCR App. 1789-90; 1806-07}. Cummings admitted he had some disagreements with Davis towards the end of trial, but felt she had been sabotaging his relationship with Applicant. Cummings denied ever refusing phone calls from Davis or making himself unavailable to her. Counsel denied there was ever any "panic", and stated matter of factly, "we had what we had to work with". {PCR Tr. 1807-08; 1816}. Counsel denied he ever refused to look at any information Davis sent, and never refused to discuss the case with her, and pointed out she never told him she was keeping a log of things he was doing she did not like. He pointed out everything always seemed to be a crisis with Davis. {PCR Tr. 1808-09}.

Counsel also specifically remembered meeting with Yungman and discussing his testimony. Counsel felt Yungman was properly prepped and wanted him to testify freely, as opposed to a situation where it was perceived counsel was pulling everything out of him. He felt Yungman's testimony would give reasons for why Applicant did what he did. He did not recall Yungman ever calling and saying he needed additional information. {PCR Tr. 1809-12; 1873}. Counsel also noted that he was impressed by Yungman's experience and

resume and his prior employment as a police officer, which he thought would aid Yungman's credibility. {PCR Tr. 1814-16}.

Counsel noted he did not think that some of Davis's suggested witnesses would work well with a Dorchester jury, and stated he fundamentally relied on her to gather the social history. Counsel discussed meeting with Applicant's mother and family but stated they were not particularly helpful. {PCR Tr. 1816-21; 1826}.

Finally, counsel was clear that he made a strategic decision to introduce Yungman's testimony as to what caused Applicant to commit the crime rather than hold on to some amorphous concept of residual doubt; he noted that the jury had already convicted Applicant and residual doubt was not a valid mitigator anyway, so he felt like he had to address causation head on. {PCR Tr. 1870-73}.

Thus, counsel's testimony refutes Ms. Davis's claim that they refused to contact her and refused to discuss the case with her. Indeed, Ms. Davis's credibility is suspect and her biases obvious, as are proven by her reprehensible conduct in keeping a secret log of counsel's alleged faults for use later at a PCR. Regardless, counsel is not required to personally like the expert or involve her in his ultimate strategy discussions; by all accounts counsel hired a recognized mitigation expert to gather the records and that is what Davis did, and counsel hired a recognized forensic social worker to testify as to what was in the social history and that is what Yungman did. While Yungman and Davis might have wanted more guidance, counsel was clear he met with Yungman prior to trial and discussed the testimony, and also stated as a strategic matter he wanted Yungman's testimony to flow more freely from the heart than to be robotically elicited. This was a

reasonable decision, and counsel, Davis, and Yungman were all clear that Davis got all the information she could find, and she delivered it all to Yungman, and counsel got a copy of Yungman's final report in anticipation of testimony.

Again, lawyers are entitled to reasonably rely on their experts, and they are not required to second-guess their expert's conclusions or "expert shop". See Wilson v. Greene, 155 F.3d 396 (4th Cir. 1998); Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992). Here, counsel reasonably relied on his hired experts to do their jobs, and cannot be faulted for not micro-managing the very areas in which those experts had the expertise and for which they were hired in the first place. See, e.g. Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995) (to impose a duty on the attorney to gather background information for an expert independent of any request from that expert would defeat the whole purpose of hiring the expert, as understanding what information is needed is an integral part of the expert's skill, and requiring an attorney to review the trustworthiness of the expert's conclusions would make the expert superfluous).

Thus, counsel's testimony generally refutes any contention they were not involved in the sentencing phase, whether in the context of application of Cronic or an assessment of deficiency under Strickland.

B. Alleged failure to present evidence of Applicant's emotional value to others

Applicant can show neither deficiency nor prejudice with regard to the alleged failure to present evidence of Applicant's emotional value to others.

As his first specific allegation of evidence counsel supposedly failed to present in mitigation, Applicant contends counsel failed to present evidence of his capacity to ber of

emotional value to others. He contends this could have come from sister Kendra, wife Dorothy, and an expert in family psychology.

1. Counsel were not deficient.

As an initial matter, counsel were not deficient with regard to this issue. Four factors are most important here. First, as set forth in the discussion above, counsel hired recognized experts in the mitigation field and relied upon them to identify the important mitigation issues in counsel's life. Indeed, Davis suggested and counsel hired psychiatrist Dr. Morgan and psychologist Dr. West {PCR Tr. 1449; 1791}, but there was no evidence that they or Yungman advised counsel to present a family psychologist or lay witnesses on Applicant's capacity to be of emotional value to others. Indeed, although he tried to blame it on counsel, Yungman – the expert in the field – testified that he apparently made the decision to focus more on Applicant's difficult upbringing and negative influences, since they did not have enough good information on Applicant's parenting skills. {PCR Tr. 1093}. And, Yungman was clear he spoke with Kendra. {PCR Tr. 1163}. If the experts failed to identify an issue, it is not counsel's fault and is not actionable. See Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992) (counsel entitled to rely on experts, and the fact that the testifying expert did not identify "every possible malady or argument" is not a basis for relief).

Second is the fact that the family was generally reluctant to testify and to help counsel. This made counsel's job difficult, and counsel testified he had to beg Applicant's mother to testify on his behalf. {PCR Tr. 1801; 1819-21; 1825}. Indeed, counsel also referred to the "great reluctance of the family" at Applicant's trial. {R. 4547}. Any

assessment of counsel's supposed failure to present one aspect or another of Applicant's relationship with his family must be assessed in the context of the circumstances in which counsel was operating – including this general reluctance of the family to be involved. See generally Collins v. Francis, 728 F.2d 1322 (11th Cir. 1984) (counsel was not ineffective for failing to investigate witnesses about whom defendant did not tell him).

Third is the fact that as a strategic matter counsel was clear that in no way would he want to present the letters Applicant wrote to Dorothy after his arrest. While those letters did start with some pleasantries to Dorothy, they also go on and try to get her to lie to police, to cover up evidence, to get others to lie, and to refuse to cooperate with authorities. **{Applicant's 56}**. Counsel was clear he did not want this egregious information coming before the jury, showing Applicant's attempts to suborn perjury or commit obstruction of justice. **{PCR Tr. 1838-41; 1950}**. This strategic decision is certainly reasonable and unassailable.

Fourth is the fact that counsel did present lay testimony from Applicant's family, including evidence from Kendra that he used to cook for the family and play with his mother's godson, Dominique. **{R. 4743}**. Applicant's mother testified at trial as to how he would cut grass to help the family, and that he was always willing to help out. **{R. 4753}**. Applicant's mother also noted Applicant had a daughter during her appeal for mercy. **{R. 4760}**. Counsel also elicited from Yungman that Applicant was helpful to his family and was good to his stepchildren and to Kendra's child. **{R. 4806}**. This, of course, was all Yungman identified for counsel in his report. **{Respondent's 11 p. 8}**.

When these four factors are considered, it is clear counsel was not deficient. Counsel relied upon their experts to identify and advise him of the relevant issues. There is no mention in Yungman's report of "capacity for emotional value to others", and there was no testimony at PCR that Dr. West offered to testify as Dr. Kissiah did at PCR, but counsel just failed to call him. There is no testimony any of the experts suggested calling a witness like Dr. Kissiah, but counsel ignored it. Moreover, despite a difficult family, counsel did elicit information as to Applicant's value to his family and his young daughter. Counsel was not deficient. 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 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).

2. There was no prejudice.

In any event, Applicant has not shown prejudice under Strickland. 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.").

Moreover, for claims counsel failed to investigate and present evidence, an applicant must *actually present* in PCR the evidence he claims was missed, in order for the reviewing court to accurately assess whether counsel was deficient for failing to present it, and whether its absence was prejudicial in that it creates a reasonable probability of a different result. It is not enough simply to offer criticisms of counsel's performance or to point to problems as to how counsel investigated and presented the case – the applicant must actually present into evidence the "case that should have been". See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) (state's failure to object to hearsay testimony as to what another witness's testimony might have been does not relieve applicant of burden of producing admissible testimony, in accordance with the rules of evidence, of that which counsel supposedly failed to present). See also Beaver v. Thompson, 93 F.3d 1186, 1995 (4th Cir. 1996) (rejecting claim that counsel was ineffective for failing to present mitigation evidence family members, where there was no proffer of this testimony); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990) (petitioner's allegation that attorney did ineffective investigation does not support relief absent proffer of the supposed witness's favorable testimony); Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3rd Cir. 1991) (applicant cannot show deficiency "based on vague and conclusory allegations that some unspecified

and speculative testimony might have established his defense"; rather, facts must be presented).

Applicant has wholly failed to show prejudice under these standards. First is the point that it is inappropriate for Applicant to rely on Applicant's 53, the Kendra affidavit, because it was never admitted into evidence. Dr. Kissiah testified he did not rely on the affidavit, and ultimately it was not admitted with Applicant's present counsel stating he would call Kendra to testify, which never happened. {PCR Tr. 1090; 1188; 1506}. Since Applicant did not present the Kendra information in an admissible fashion, it cannot be considered in a prejudice analysis. See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

Second is the fact that even if the Kendra affidavit and Dr. Kissiah's testimony are considered, it is not the type of testimony that would call the entire sentencing phase into question and create a reasonable probability that the sentencer would re-assess the aggravating and mitigating factors. In cases where such prejudice has been found, the omitted information was stark and extensive. In Williams v. Taylor, 529 U.S. 362 (2000), trial counsel only presented a "scant" mitigation case, which included introduction of a short written report from a psychiatrist. Counsel there ignored a wealth of information regarding the defendant's "nightmarish" background, including the fact that his parents were jailed for neglect, records showed an extremely unkept house, the defendant was beaten by his father and foster parents, the defendant was borderline retarded, and he had favorable prison records from previous commitments. 529 U.S. at 395-96. The Court concluded that the graphic mitigation case regarding the defendant's background, when combined

with the defendant's adaptability to prison and the trial presentation of his remorse, might well have affected the jury's verdict sufficient for a finding of prejudice. 529 U.S. at 397-98.

In Wiggins v. Smith, 123 S.Ct. 2527 (2003), trial counsel failed at all to have a social history performed prior to trial. While counsel did have some psychological reports demonstrating limited intellect and some adaptable traits, he did not have anything regarding the defendant's background save rudimentary information. The PCR evidence was the defendant's mother was an alcoholic, he was often left alone with no food, he was exposed to sexual activity by his mother, and he was physically and sexually abused in his mother's and foster care. 123 S.Ct. at 2532-33, 2536. The Court stated that "in assessing the reasonableness of an attorney's presentation, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further". It found counsel there was deficient for obtaining only the most superficial knowledge about the background before stopping his investigation, and concluded the reports should have alerted that further exploration was necessary. 123 S.Ct. at 2536-39. Finally, it found prejudice, ruling that "this entirely unrepresented class of evidence about the defendant's background might have swayed the jury's assessment of his culpability". 123 S.Ct. at 2542-44.

In Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004), the trial psychiatrist testified at PCR that had he been provided with available medical and psychiatric records, he could have made a much more severe diagnosis. The trial social worker testified that she had an only rudimentary meeting about the defendant's history with the trial psychiatrist prior to the start of the case. Another psychiatrist who had extensively examined Petitioner found, by incorporating his family history, are far more serious

depressive condition than mere adjustment reaction disorder – to the point that his altered mental state made the murder *non-volitional*. 360 S.C. 598, 602 S.E.2d 738. There, the state supreme court found that the attorneys' failure to present crucial medical records and related information available at the time of trial prevented accurate diagnosis of the defendant. Id.

Other cases also have reversed where stark, compelling, and extensive evidence was entirely ignored. Rosemond v. Catoe, --- S.E.2d ---, 2009 WL 1851377 (S.C. June 29, 2009) (counsel ineffective where they did not present evidence of schizophrenia based on mistaken belief that finding of competence precluded it; inmate was prejudiced as his counsel only presented limited information from pastor and family and one expert, and no evidence was presented of his "troubling mental health issues"); Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008) (counsel ineffective where he only presented limited testimony in mitigation from defendant's mother; for example, counsel failed to hire a social history investigator and relied on investigator with no social work training, started the investigation late in the process, provided only limited records to the expert and only met with him a month before trial, failed to get family history records, and would have been put on notice by the records he did have that "powerful mitigating evidence" was available).

Such is not the circumstance here with the relatively tame and limited information from Kendra's affidavit and Dr. Kissiah's testimony. Counsel did elicit some testimony as to Applicant's involvement with Dominique, as well as the fact that Applicant had a young daughter and was always willing to help out the family. It cannot be said that a little more information on this subject – particularly from a cold affidavit – would create a reasonable

probability of a different result given the other information presented and the extremely egregious and cold-hearted manner in which this crime was committed.

As to Dr. Kissiah, again, not only was some information presented on the subject, but an assessment of prejudice would also have to include the damaging information that would have been elicited by focusing on Applicant's post-arrest letters to his wife. The State extensively cross-examined Dr. Kissiah on the fact that the expressions of love in the letters appeared to be nothing but manipulative in an attempt to get Dorothy to help obstruct justice and lie to police to cover up Applicant's crime – as the discussion in those letters quickly moved to that subject. {Applicant's 56}. Aside from the fact that the letters would also bring before the jury the attempts to obstruct justice and encourage perjury, a jury likely would find any expressions of love to be purely manipulative. Additionally, the letter refers to Applicant's claim he was not unfaithful to Dorothy, and did not have other girls "suck his dick", but the evidence of course shows Applicant's DNA was found in Kandee. This lie would be far more aggravating than any mitigating inference in the letters. Applicant also asks Dorothy for money, which shows an ulterior motive. Given the cross-examination done by the State at PCR, which would have been done at trial, Dr. Kissiah and the letters would likely have done more to condemn Applicant than aid him. Indeed, a "fancier mitigation case" is simply not enough, and Dr. Kissiah's testimony was hardly even fancier. See Jones v. State, 332 S.C. 329, 504 S.E.2d.822 (1998). It certainly cannot be said this testimony alone would have cause the jury to reassess the evidence in aggravation and mitigation.

Applicant simply has not shown prejudice. See 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).

C. Failure to present evidence of work record

Applicant next contends his counsel was ineffective for failing to present evidence of Applicant's work record.

1. There was no deficiency.

As an initial matter, counsel was not deficient. Again, counsel hired a qualified mitigation specialist to get all the records, and indeed counsel stated he specifically relied on Davis to do her job and get relevant work records. {PCR Tr. 1870}. Counsel also hired a qualified forensic social worker to review the records and social history and identify issues of consequence for testimony, and Yungman provided to counsel a final report detailing his findings. {PCR Tr. 1127-29; Respondent's 11}. That report only mentions that Applicant was able to maintain employment, and that fact was elicited during Yungman's testimony at trial. {R. 4806}.

Dale Davis testified she had some employment records {PCR Tr. 1478-81}, and Yungman testified he was aware of some of Applicant's employment history from what Applicant told him. However, Applicant did not tell Yungman that he worked at the Naval Weapons Station while he was discharging his responsibilities at the restitution center

following his prior incarceration. Yungman was not aware that Applicant supposedly worked at Hood Construction. {PCR Tr. 1082-85}.

Regardless, if the mitigation specialist failed to get the records, or if the testifying social worker decided not to put emphasis on them in his expert analysis of Applicant's social history, that is the fault of the expert, not counsel, and is not actionable. See Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992) (counsel entitled to rely on experts, and the fact that the testifying expert did not identify "every possible malady or argument" is not a basis for relief). Counsel elicited what the expert found in this case. Again, counsel is not required to second guess his expert's report or have a greater understanding of the expert field than the expert does. See, e.g. Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995) (to impose a duty on the attorney to gather background information for an expert independent of any request from that expert would defeat the whole purpose of hiring the expert, as understanding what information is needed is an integral part of the expert's skill, and requiring an attorney to review the trustworthiness of the expert's conclusions would make the expert superfluous). Moreover, if Applicant failed to disclose his entire work history to Yungman, that is not a basis for a later action of ineffective assistance. See Collins v. Francis, 728 F.2d 1322 (11th Cir. 1984) (counsel was not ineffective for failing to investigate witnesses about whom defendant did not tell him); Primeaux v. Leapley, 502 N.W.2d 265, 268 (S.D. 1993) ("Where [defendant] did not give information to counsel, counsel could neither investigate it or pass it on to the expert.").

Counsel was not deficient.

2. There was no prejudice.

Regardless, Applicant cannot show prejudice. The only evidence of work history actually admitted was Applicant's 76, which was a one-page employment application to Moody's Mechanical. Again, consideration of anything else not properly admitted is improper in a prejudice analysis, Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998), and clearly this one page application would not create a reasonable probability the sentencer would re-weigh the aggravators and mitigators and conclude a sentence of death was not warranted.

However, even if Applicant's 55 and 76 are considered, along with an "inference" that Applicant completed his restitution obligations, it still could not be said "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." See Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998). Supporting the unchallenged statement elicited at trial that Applicant maintained a good employment history with an application or pay stubs is precisely the "fancier" kind of mitigation case that Jones has held is insufficient for relief. Indeed, documentary evidence of Applicant's employment record in and of itself is simply not akin to the kind of stark, extensive, and moving evidence of mental illness or a nightmarish background, the absence of which was found to be prejudicial in Wiggins, Williams, and Von Dohlen.

Applicant has not shown prejudice.

D. Failure to challenge evidence of Kandee's good character

Applicant next contends his counsel was ineffective for failing to challenge and rebut the State's victim impact evidence as to Kandee Martin and the effect of her death on her family.

Of course, the State called the victim's mother, who described her "wonderful" relationship with her daughter, and Kandee's relationship with her son. She noted that the effect of Kandee's death had been traumatic for the young boy, and has torn apart the relationship between her and her husband. {R. 4692-4702}. Kandee's father testified similarly. {R. 4703-07}. Counsel asked Kandee's father if Kandee had another child, but he stated no, and refused to say who the father was on Kandee's child. {R. 4707-08}.

Applicant now contends counsel should have elicited that Kandee was a crack addict and a prostitute. However, counsel was clear that as a strategic matter he saw nothing to be gained from eliciting before the jury that the victim was a crack addict, noting that from his prior experience in the Joseph Gardner trial "it didn't sit well with the jury" to elicit that the victim might have been selling her body for drugs. Counsel stated he thought that would "hurt [Applicant] more", and distinguished testimony from Yungman in the sentencing phase as to Applicant's own crack use, by noting they were trying to show he had been "kicked to the curb at a young age and he would do what he had to do to survive". {PCR Tr. 1631-37; 1821-25}. Counsel stated he heard she had another child, but despite investigation could not get any proof of it. {PCR Tr. 1637-41}. Counsel was also clear that a landmine he wanted to avoid (and indeed was able to avoid) was any inference that Applicant killed Kandee because she owed him money for drugs or was going to rat him out to police. {PCR Tr. 1642-43}.

Thus, counsel set forth a reasonable strategic basis for avoiding any testimony Kandeé was a crack addict or a prostitute, as he saw nothing to be gained from that but felt it could potentially prejudice the jury against him and his client to attack the victim. His decision in this regard was in part guided from a negative experience in a prior case. This decision is reasonable and precludes a finding of deficiency. See generally Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); 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, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

Regardless, Applicant cannot show prejudice. For the defense to call the victim a crack addict or prostitute would raise a significant possibility of offending the jury, but the fact that she was a crack addict would do little to rebut the fact that she loved her parents and son and they loved her. For whatever crack use might say about her parenting skills, the testimony was that she loved to play with her son and they had a special bond, and nothing about being a crack addict or a prostitute rebuts that. It simply cannot be said that this attack on the victim would create a reasonable probability of a different result in the whole sentencing phase.

E. Failure to object to instruction on allocution

Applicant next 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, like lawyers, he would be bound by the evidence in the case and could not simply testify to the jury during closing argument. The judge noted Applicant could make any argument within 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 very 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}.

At PCR, counsel testified that he repeatedly "begged [Applicant] to beg for his life" before the jury. Counsel noted that Judge Goodstein extensively went over Applicant's right to testify but Petitioner refused. Counsel stated he told Applicant that during allocution he could "stand in front of the jury and talk", and "beg for [his] life in simple plain words". Counsel stated he did not hear Judge Goodstein say anything to Petitioner that violated the law. {PCR Tr. 1735-38}. Later, counsel reviewed the passages and flatly stated he saw nothing objectionable in Judge Goodstein's comments, pointing out that she specifically advised Petitioner he could talk freely about penalty. Counsel also stated he talked with Applicant about the fact that he could ask the jury for mercy, and denied that Applicant ever said to him that he was going to give argument or allocution until Judge Goodstein told him he could not argue facts outside the record. Counsel also stated that there was *never* a point, during the guilt phase or the sentencing phase, that Applicant expressed a desire to testify or address the jury, despite counsel's attempts to get him to speak in sentencing phase argument. {PCR Tr. 1887-90}.

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 – South Carolina Supreme Court decisions are clear that the closing argument right is NOT an unfettered opportunity for the defendant to give unsworn testimony to the jury, free of cross-examination from the State. See State v. Davis, 306 S.C. 246, 411 S.E.2d 220 (S.C. 1991) ("Although, of course, the trial judge may prohibit a defendant from offering unsworn testimony in his statement to the jury, a defendant may present argument regarding facts that are in evidence to direct the jury's attention to the circumstances of the crime or the defendant's own characteristics since these are proper sentencing considerations."). See also 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).

Here, 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 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).

Applicant also has not shown prejudice under Strickland. Even if the instructions were improper, Applicant put forth no proof that absent those instructions he would have given closing argument in the sentencing phase. Indeed, the evidence goes the other way, as counsel was adamant that despite their pleas Applicant never expressed any interest whatsoever in addressing the jury in any fashion – whether by testifying or giving argument. Specifically counsel testified that Applicant never stated that he wanted to give argument but decided he would not because the judge told him he would not be able to offer unsworn testimony to the jury. {PCR Tr. 1887-90}. Applicant has not established that but for counsel's alleged deficiency in failing to object to the instruction, he would have given closing argument.

And that does not end the analysis, as Applicant did not testify in PCR as to what he would have said had he given closing argument in the sentencing phase. Without his testimony as to what he would have said, this Court cannot judge whether the failure to give argument would create a reasonable probability of a different result in sentencing. See, e.g. Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001) (finding no prejudice from the failure to advise the capital defendant about his right to personally argue to the jury, "because the evidence of guilt was overwhelming and because the jury had already heard him arguing for his innocence when [he] testified"); Cooper v. Moore, 351 S.C. 207, 569 S.E.2d 330 (2002) (finding prejudice from the failure to advise of argument right, where the evidence was not overwhelming, no testimony or exculpatory version was presented in any respect from the defendant, and "Respondent wanted to tell the jury he was not guilty of the charged crimes and to show them he was not a 'crazy person'").

Applicant has not met his burden of showing a reasonable probability of a different result from the limitation on argument, and thus the claim should be denied.

F. Failure to present evidence of intoxication

Applicant next contends his counsel was ineffective for failing to elicit evidence Applicant was intoxicated at the time he committed the crime.

On direct appeal, Applicant contended that he should have received instructions on statutory mitigators in S.C. Code Ann. § 16-3-20(C)(b)(2), (6) & (7) (Supp. 2000), due to his voluntary intoxication. The state supreme court held that while there was ample evidence Applicant had been drinking that day and in the past, there was no evidence he was actually intoxicated at the time of the crime. Accordingly, the court found no error in failing to charge the mitigators. State v. Bowman, 623 S.E.2d 378 (S.C. 2005).

At PCR, James Gadsden testified that Applicant drank every day and had been drinking four or five hours that day. He said Bowman was tipsy. {PCR Tr. 149-56}. On cross, though, he defined "tipsy" as the lowest level, where one is NOT staggering, or slurring, or displaying any of the effects of alcohol. He stated Applicant was not a "stone cold drunk". {PCR Tr. 190-94}.

Counsel, though, was clear that he saw no value in eliciting in the guilt phase that Applicant was drunk, as it would do him no good and potentially prejudice his client before the jury. While counsel elicited evidence from Yungman during the social history that Applicant had alcohol abuse, it was because he "had to try it at the end [the sentencing phase]". Counsel testified as a strategic matter he would never have called Gadsden back during the sentencing phase to elicit whether Applicant was drunk when he killed Kandee,

because of the risk of what else Gadsden might say, including reiterating how Applicant killed Kandee. Counsel was adamant he never would call a co-defendant to the stand for that purpose. {PCR Tr. 1757-59}.

On cross, counsel added an additional reason – he also noted that he was avoiding any testimony that might raise a mental health mitigator and possibly open the door to the solicitor's use of the William S. Hall report, in which Applicant also mentioned post-mortem sexual contact with Kandee. He noted he had successfully prevented that information from coming before the jury with the suppression motion, and wanted to be careful not to open the door another way and allow it to come in by way of the Hall report. Since his psychiatric expert had offered him nothing of value, counsel did not want to open the door with something of little use like voluntary intoxication. {PCR Tr. 1827-38}. Indeed, the counsel at trial halfheartedly requested a charge on mitigator (2) – mental or emotional disturbance – but he virtually conceded that the record was devoid of any evidence to support such a charge. Again, 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" – referring to the fact that the State could point out Appellant's statement to the Hall Institute during his evaluation that Kandee's vagina was fondled after her death. {R. 350-51; 960-64; 1107; 1244}

It is clear counsel was not deficient. Counsel strategically saw no value in eliciting that Applicant was drunk during the guilt phase, as voluntary intoxication is not a legal defense and it would potentially be prejudicial to his client. However, while he felt he

needed to try anything in the sentencing phase, including eliciting the full social history that showed Applicant's alcohol abuse from an early age, he never would have under any circumstances called Gadsden back to testify Applicant was drunk when he killed Kandee – for fear of what other damaging information Gadsden might offer or reiterate. These decisions were reasonable. See generally Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); 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, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

Regardless, Applicant cannot show prejudice. Calling Gadsden to say Applicant was merely tipsy and not showing any outward effects of alcohol would have little if any mitigating value, and certainly cannot be said to create "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." See Jones v. State, 332 S.C. 329, 504 S.E.2d.822 (1998). This relatively tame evidence of drinking is in no way akin to the stark, extensive, and moving evidence of mental illness or a nightmarish background, the complete absence of which was found to be prejudicial in Wiggins, Williams, and Von Dohlen.

Further, any freestanding due process claim could have been raised at trial or on direct appeal if preserved at trial, and as such the present freestanding claim is improper for PCR. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have

been raised at trial or on direct appeal can not be raised in a PCR application absent a claim of ineffective assistance of counsel).

XII. Failure to request mitigating instructions on voluntary intoxication

Based on the previous allegation with regard to the failure to call James Gadsden back during the sentencing phase to testify that Applicant was tipsy when he killed Kande, Applicant finally contends his counsel were ineffective for failing to request either the specific mitigators in S.C. Code Ann. § 16-3-20(C)(b)(2), (6) & (7) (Supp. 2000), or a specific non-statutory mitigator specifically related to voluntary intoxication.

Applicant is correct that evidence of intoxication at the time the crime was committed entitles one to *either* the three statutory mitigators, or a specific instruction as to intoxication. See State v. Plemmons, 296 S.C. 76, 370 S.E.2d 871 (S.C. 1988). And, the state supreme court held in this case that the mitigators are not required unless there is actual evidence the defendant was intoxicated at the time the crime was committed. State v. Bowman, 623 S.E.2d 378 (S.C. 2005).

The basis for rejecting this claim has been previously discussed in the preceding subsection and is incorporated here. Counsel strategically would not have called Gadsden back for such a purpose for the risk of what else he might say, and counsel was also concerned about opening any door to the State's use of the Hall report with its damaging information. See Buchanan v. Kentucky, 483 U.S. 402 (1987) (the Court specifically noted that if a defendant "requests an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested").

Moreover, some evidence that Applicant was "tipsy" is simply not the kind of evidence that would create a reasonable probability of a different result, particularly if it had opened the door to the Hall report.

Further, any freestanding due process claim could have been raised at trial or on direct appeal if preserved at trial, and as such the present freestanding claim is improper for PCR. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal can not be raised in a PCR application absent a claim of ineffective assistance of counsel).

CONCLUSION

For the foregoing reasons and the reasons argued at the evidentiary hearing, it is respectfully submitted that the application should be denied.

Respectfully submitted,

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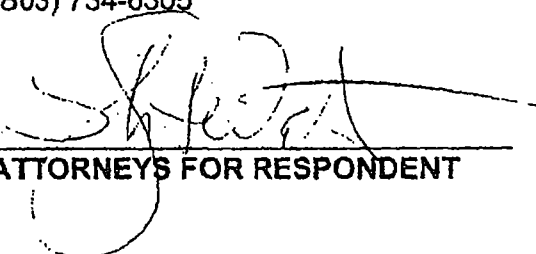
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August 10, 2008

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS)

COUNTY OF DORCHESTER)

Marion Bowman, Jr., #6006)

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

Applicant,)

v.)

CERTIFICATE OF SERVICE)

The State of South Carolina,)

Respondent.)
_____)

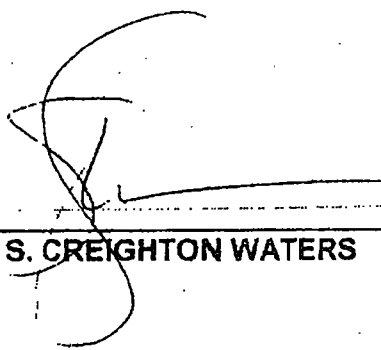
I, S. Creighton Waters, counsel for the Respondent, certify that I have served the following documents: ***Respondent's Post-Trial Brief*** by depositing one copy of the same in the United States mail, first-class postage prepaid, and addressed as follows on the following:

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This 10th day of August, 2009.



S. CREIGHTON WATERS

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

C.A. No. 06-CP-18-569

MARION BOWMAN, #6006)

Applicant,)

v.)

APPLICANT'S REPLY TO
 RESPONDENT'S BRIEF IN
 OPPOSITION

STATE OF SOUTH CAROLINA)

Respondent.)

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TABLE OF CONTENTS

INTRODUCTION	1
James Tawain Gadson	2
Travis Felder	5
Hiram Johnson	11
Ricky Davis	13
Detective Alvin Coker	14
Conflicts of Interests	15
Improper Admission of Evidence in the Guilt/Innocence Phase-IAC	17
Arbitrary Factor	21
Kidnaping Aggravator	22
Mitigation Deficiencies	23
Conclusion	27

Introduction

To begin, this reply only purports to respond to issues raised in Respondent's Brief in Opposition to the Application for Post-Conviction relief. As referenced in the Applicant's Brief and Amended Brief, the actual Fourth Amended Application as supported by the evidence submitted in the form of various trial and PCR exhibits and the trial and PCR testimony is the most inclusive statement of the claims made by Marion Bowman. However, counsel does suggest that the state's reply on more than one occasion suggest deficient performance by either trial counsel or appellate counsel in response to claims otherwise couched by applicant's current counsel.

Further, a number of corrections still need to be included despite the submission of the Applicant's Amended Brief. To begin, on page 23, line 7 of the Amended brief, the sentence should indicate that Plaintiff's 42 is the videotape of Felder's purchase of gasoline. Further, on page 26, the sentence beginning on the 13th line should indicate the falsehood was not revealed to the defense by the state. Finally, on page 39 at line 5, the brief should refer to Johnson's testimony.

Finally, even though not mentioned at all in the State's Brief in Opposition, the errors reviewed in a post-conviction claim are correctly assessed for not only individual impact but also for the cumulative nature of the prejudice. Therefore, the State's repeated isolation of the analysis of the issues raised while continuing to cite "overwhelming evidence" is a red herring to the true impact of the infirmities in the proceedings at the trial level.

The issues in Reply will be discussed topically in response to the Brief in Opposition

Tawain GadsonMental Health Report-Brady

Contrary to the State's assertion, it is not public knowledge that a mental health report regarding Gadson was ever issued. In fact, Gadson denied that he ever had a mental health hearing related to his criminal case. The only public knowledge was that the evaluation was ordered.

Further, there was no public knowledge the report contained impeachment material. In fact the contents were only available to Gadson's counsel and solicitor. Further, a subpoena would not necessarily have produced a report because of privacy concerns. In fact, the State asserted the same during the merits hearing in defense to the Brady claim. It is interesting that now the State understands the weakness of the privacy claim in relation to the Brady obligation that it desires to declare this report and its contents were somehow public.

To the merits of the value of the report, Gadson did suffer verbal memory impairment. Further, he also heard a voice and a beeping noise. The ultimate arbiter of the impact of this impairment's effect on Gadson's recall of events is the jury who was deprived of this information by the State.

Also, Gadson testified at the merits hearing he smoked marijuana everyday. Gadson also testified that he only assumed he suffered a blackout or seizure after he awoke, not that he was "aware" of any seizures or blackouts while occurring.

Plea Deal-IAC¹

Regarding Gadson's plea deal, he clearly was threatened with death penalty as the

¹IAC refers to the claims of ineffective assistance of counsel.

prosecutor claimed that he was guilty of capital murder under a hand of one hand of all theory and the written plea agreement specifically waived all objections to the imposition of a death sentence by the state. Further, Gadson testified in his deposition that he feared death regarding this charge and this is reflected in the pro se motions he filed seeking a second attorney.

And there was not overwhelming evidence apart from Gadson's testimony. The other main evidence included a threat and the recently fabricated statements of Hiram Johnson and Felder concerning Bowman's alleged confessions which were not subject to proper challenge. The gun match to the casings are not conclusive or even scientific. The DNA evidence offered no probative evidence of the identity of the killer, but instead constituted improper character evidence.

20 Year Sentence-IAC

At trial, the jury only heard Gadson's expected sentence of 20 years followed by cross exam that the sentences were broken down to sentences of 15 and 5 years on two separate charges. The jury never learned that he was eligible for parole at 1/4 of the sentence down from the exposure to the death penalty. (In fact, inexplicably, Gadson served about 4 years total-less than he was even eligible for given his parole eligibility).

Failure to Introduce evidence Gadson was the Shooter-IAC

Prior inconsistent statements on the very issue at heart in a trial are admissible in evidence. As the state concedes, at a minimum the information contained in the affidavits establish "probable cause to believe that Gadson may have been the shooter." The jury could have weighed this information to decide this ultimate issue in the guilt phase or the penalty phase.

There is no valid strategy reason to introduce the information contained in the warrants (not the actual warrants or indictments themselves).

Ricky Davis-IAC

Applicant's trial team was ineffective for not presenting the testimony about Gadson's confession to Davis as the defense team clearly misconstrued the idea that Bowman supplied the substance of the Ricky Davis memo from the truth that Bowman merely encouraged Davis to write down the substance of the confession, as corroborated by the Sam memo.

Gadson's access to the alleged murder weapon-IAC

Given the State's theory, this evidence would have provided corroboration for the defense theory that Gadson was the shooter and offered an explanation to the SLED agent's testimony about the casings matching the gun.

Gadson owned a High Point .380-IAC

The most important piece of information unsolicited about Gadson High Point .380 was that Gadson lied to the police about owning this weapon. Instead he falsely told them that he owned a 9 MM. The jury never heard about this lie. Also, the jury was never informed that the gun was an identical make and model as that attributed to Bowman. Instead they heard it was a "high powered" .380 not a "High Point."

Further, the shell casings exhibited class characteristics which matched "High Point" .380 weapons like that owned by Gadson.

Travis FelderGas Purchase-Napue

The state concedes that any correction of this testimony occurred during the sentencing phase, days after the jury rendered a conviction to the murder and arson charges. Further, the state concedes that the State knew that "Felder had purchased a small amount of gasoline around 3:14 on the morning of the arson." State's Brief in Opposition, page 41. No "correction" ever occurred by the State, as due process requires.

Felder continued to lie in the sentencing phase when he testified that he thought he was "parking a car." It is not credible that Felder believed there was going to be "parking" of the car given Bowman's alleged earlier threat ("You didn't believe I would do it") or the circumstances of Bowman's possession of a white woman's car at 3:00 in the morning after the same threat.

Notwithstanding Solicitor Bailey's assertion that he did not know Felder purchased the gas, he should have known so and a reasonably competent adversary, such as Bailey, would have given the circumstances. Not only did Felder indicate at a deposition that he told Bailey about his gas purchase, but lead detective Coker testified without hesitation or qualification that he knew Felder bought the gas and that he told Bailey all of this information. PCR, 671 & 899-905.

Contrary to the assertion about a lack of materiality, the evidence about Felder's lie (as characterized by Solicitor Bailey at the PCR hearing) is that Felder is the only witness to Bowman's involvement in the arson, just as Gadson is the only witness to any involvement in the death. The jury would certainly have found any information impeaching these witnesses to be material to their judgement of the credibility of the state's evidence.

Finally, it would be an absurd result for the prosecution to jointly try murder and arson

charges, joined under a *res gestae* theory, bolstered by the knowing presentation of false testimony but that any partial outcome of this trial would be considered reliable in the face of such a due process violation.

Meetings with "Anybody Representing the State"-Napue

Felder never told the jury the correct number of times he met with anybody representing the state. Even assuming the State's qualification is correct and the question at trial only referenced the number of meetings to discuss the impending trial testimony, Felder lied and the prosecutor failed to correct this falsehood. Felder met at least 3 times, not 2, with representatives of the state to discuss his trial testimony.

The last two of these meetings are detailed to the jury. One is the day of his testimony, May 19, 2001. The preceding meeting occurs "a couple of weeks" before the testimony in Felder's attorney's office.

However, there is clearly a meeting which occurs on April 17, 2001 between Felder and a representative of the state to discuss his trial testimony. Specifically, Felder meets with Detective Van Doran and is administered a polygraph reviewing the assertions detailed in a proffer letter from Felder's attorney to Solicitor Bailey. The proffer letter, Applicant's 64, is dated March 27, 2001 and the polygraph occurs on April 17, 2001.

This meeting is clearly related to this testimony as prosecutor Bailey confirms in his PCR testimony. At the PCR, Bailey indicates this polygraph was scheduled to alleviate his concerns about the truthfulness of the proffered testimony. Significantly, Felder admitted to lying at this meeting on April 17, 2001. This meeting did not occur either in Felder's attorney's office or "a couple of weeks" before the trial.

Thus, Felder lied about his number of meetings with "anybody representing the state" even if this is limited to discussions about trial testimony. The State knew this was a lie.

To conclude, this lie about these meetings is eerily similar to that condemned by the Court in Riddle v. Ozmint. 631 SE2d 70 (SC 2006). There, the state hid information about prior statements in which a state's witness provided inconsistencies to the government. That conviction and death sentence was reversed.

Felder as Gas Purchaser-Brady

Notwithstanding Solicitor Bailey's PCR assertions, Detective Coker knew that Felder purchased the gas. There is a post-it note affixed to Felder's booking report in Coker's file written in Coker's handwriting, denoting the time Felder purchased the gas from the EZ Horizon store. Felder confirms this is the gas purchased to burn Kandee's body and car.

Felder met at least three times to discuss his trial testimony. He told the state he bought chips and dip. He bought the gas minutes later, clearly wearing the same clothing at the same store. The store clerk even confirms this by noting that Felder returned so soon after the purchase of the chips and dip. In fact, there were few, if any, intervening customers.

Finally, the impeachment about Felder's lie about the arson also undercuts his testimony about Bowman's alleged confession about killing Kandee. The State repeatedly in the Brief in Opposition cites this as part of the "overwhelming evidence" of Bowman's guilt on the murder count. Thus, the prejudice from this due process violation spills over to invalidate both convictions.

Felder Proffer-Brady

The proffer letter from Felder's attorney clearly possesses impeachment value regarding

the State's case. The State presents Felder as a truthful witness. However, Felder lied multiple times in an effort to minimize his involvement and liability for Kandee's death and the burning of her car.

This is confirmed by Solicitor Bailey. In fact, the polygraph results are only correctly placed in context with the proposed testimony contained in the proffer letter. Bailey used the polygraph to attempt to validate this information.

Trial counsel never had the proffer letter, but only the polygraph results. Thus, the State hid the entire context in which Felder lied to curry favor. Bailey confirms he never disclosed Felder's pattern of falsely minimizing his involvement in efforts to strike a deal with the State.

Finally, the letter is likely admissible as a statement of a party opponent, pursuant to Rule 801 (d)(2)(A), (C), or (D). Felder was clearly a party to this litigation who could have been tried jointly with Bowman had the state so chosen and he was clearly an opponent of Bowman.

Wink Wink Deal-Brady

Establishing the existence of a wink-wink deal is like establishing mens rea in a criminal case; there is rarely any direct proof but one knows it when he sees it. Here, it is incredible to believe that Felder actually received the full benefit of his written plea deal, with the State's blessing, when he admittedly committed perjury at the trial and lied various times pre-trial. Thus, the circumstances suggest the existence of a deal whereby Felder benefits from the State's leniency if his testimony benefits the State's theory. This is without regard to the veracity of this testimony.

As noted above, the State concedes Felder's testimony was crucial to establish Bowman's guilt and the existence of the wink wink deal was not disclosed.

Felder's original charges-IAC

Felder was clearly charged at the beginning of the case under the section of law regarding accessory before the fact to murder. The murder of Kandee carried a possible death sentence. Accessory before the fact is punishable the same as the underlying offense.

The jury never heard that Felder faced a death sentence pursuant to the theory once held by the State and its investigating agencies. The mere fact that the State's theory continued to evolved until the very month of trial is alone impeaching of the confidence in the State's evidence. The court's have traditionally given great latitude to defense counsel on cross examination of cooperating witness because of the possibility of testimony bent to curry favor. Here, trial counsel failed applicant in this regard.

Felder as Gas Purchaser-IAC

Trial counsel should have demonstrated that Felder was the gas purchaser at the conclusion of his direct testimony. This would have informed the jury that Felder lied to them in the guilt phase, direct testimony. This also could have shown that Felder lied to the prosecution. Felder's sentencing phase testimony that applicant put him up to the purchase is not confirmed by any details on the video and is no more damning than the testimony that Applicant burned Kandee's body. Thus, the purported reason to not elicit this testimony is more appropriately viewed as an *ad hoc* justification put forth by trial counsel because of his deficient performance at the trial level.

Rule 29(b)-IAC

The State offers no factual support for its reply in this regard. Instead, the state offers uncited assertions that trial counsel knew about Felder's identity pre-verdict in the guilt phase and

that this was "debated" by the "defense team" during the guilt phase. It is unclear who is on the defense team to participate in this debate, but clearly it was not co-counsel Thomas.

Thomas indicates that she believes the video shows either Bowman or Gadson purchasing the gasoline and that she does not recall any discussions about Felder's testimony. Further, she indicates that if she had discussed something as significant as Felder providing false testimony, then she would have written it down (and she did not do so). PCR, 1596-1597.

Finally, the thrust of Applicant's argument in this regard is that Felder lied and this lie was never revealed as such either to the jury, pre-verdict, or the court in a request to challenge the convictions. There is no strategic reason to decline to reveal the false testimony of a state's witness or to fail to challenge a client's conviction if doing so would produce a favorable result.

Hiram JohnsonPending Charges-Brady

The State does not contest that it possessed information which should have been disclosed to Applicant's trial counsel. However, the State believes that this information was not material. However, information is material if it undermines confidence in the outcome. Here, Hiram's testimony is offered as part of the state's recitation of the overwhelming evidence of Applicant's guilt.

In fact, Solicitor Bailey specifically emphasizes the purported confession heard by Hiram to the jury during his closing argument by noting that the jury heard no evidence "that Hiram Johnson had any kind of charge against him or ...any reason to say something wasn't true." Trial, 4474. It strains credulity to believe the non-disclosed items would not have made a difference given this argument. Thus, the non-disclosure undermines confidence in the outcome of Bowman's trial.

Wink Wink Deal-Brady

The evidence of a wink-wink deal is proven circumstantially. Here, Johnson was charged with several crimes as the case against Bowman developed. These charges were resolved favorably after Bowman's conviction. The existence of these charges was not provided to the defense. Instead, the prosecution falsely emphasized the lack of charges to the jury. This is proof of a wink wink deal not disclosed to Applicant's counsel for consideration by the jury.

Failure to Impeach-Absence of Bowman Confession-IAC

The State emphasized Applicant's purported confession to Hiram Johnson during the closing of the guilt/innocence phase of the trial. However, trial counsel never informed the jury

through cross examination or argument that this recollection was not contained in the written statement provided to the police. Instead, coupled with the inaccurate portrayal regarding Johnson's lack of pending charges, the state presented, in acquiescence with trial counsel deficiency, Johnson's testimony regarding the alleged confession to bolster the weak case for guilt. These errors combine to produce a reasonably likelihood that the outcome would have been different had the performance been up to snuff.

Ricky Davis

Sam memo-Brady

The State incorrectly isolates the statements of trial counsel regarding the use of the Sam memo and the testimony of Ricky Davis. Based upon the interview of Ricky Davis without knowledge of the Sam memo, trial counsel testified that a decision was made to not present Ricky Davis as a witness to Gadson's confession which exculpates Applicant in the murder. However, trial counsel was not aware of the interview of Ricky Davis conducted by Sam Richardson and memorialized in the Sam memo.

Had counsel been so apprized of this more thorough statement detailing Gadson's confession and exculpating Bowman, the trial strategy would have been different. To begin, counsel could have called Sam Richardson. PCR, 1339. However, for this to have been procedurally possible, counsel would have obviously had to call Ricky Davis first. Assuming Ricky Davis denied knowledge of Gadson's confession, then Sam Richardson could have provided a prior inconsistent statement of Ricky Davis, memorialized in the Sam memo, to exculpate Bowman and impeach Gadson and the state's case.

Ricky Davis presentation-IAC

Counsel should have presented Ricky Davis' testimony because it both impeached Tawain Gadson and excuplated Marion Bowman. Obviously, Ricky Davis did not wish to be involved with this case. However, he gave a statement to Sam Richardson which proves his handwritten notes to be reliable. Counsel should have presented the information contained in the confession of Gadson to the jury to weigh against the otherwise weak evidence of Bowman's guilt. This is particularly true given the contents of the Sam memo.

Alvin Coker

Many of the items discussed in the claims regarding Alvin Coker deal with indirect impeachment of other state witnesses or evidence inferentially exculpating the applicant. These claims were made with regard to both Coker and the underlying state's witness because such introduction may have been proper according to responses elicited at trial had counsel made such inquiries. Therefore, Applicant's counsel requests that the Court examine the reply made in the other portions of this document with a view that the admissibility may have been proper as a prior inconsistent statement according to the answer provided had proper cross been made.

Conflicts of Interest

Counsel for Ricky Davis-Marion Bowman

Marva Hardee Thomas handwrote the notary block on the Ricky Davis document which was then, somehow, provided to Detective Alvin Coker and appears in the Dorchester County Sheriff's Department file. Thomas' discussions with Ricky Davis occurred prior to his trial and sentencing as he was then transferred to the Department of Corrections and never again spoke with Ms. Thomas. Ricky Davis never found out that his other armed robbery charge was dismissed. In fact, it does not appear that Ms. Thomas was actually aware of the dismissal of this charge either.

However, Thomas knew that Ricky Davis' testimony against the State was not in his own interests. In fact, criminal defense attorneys are acutely aware of the benefits of currying favor with the state. Thus, one must assume that Thomas provided advice consistent with this conventional wisdom.

Thus, her conversation with Ricky Davis, again, prior to Ricky Davis' conviction, would likely have contained an admonishment to not anger the state. This is contrary to Bowman's interests in evidence supporting his innocence.

Counsel for Tawain Gadson-Marion Bowman

Counsel for both Marion Bowman and his accuser, Tawain Gadson were conflicted because of three facts beyond dispute: they both worked under the title "Dorchester County Public Defender", they both received assignments from the same screener and used the same meeting room while litigating at the Dorchester County Courthouse, and, most importantly, they both responded to the same boss who controlled their pay, retention, promotion and demotion.

The only wall separating these attorneys was the fact they literally practiced in a different building from each other. Nonetheless, one public defender's client avoided death by assisting the state in convicting and sentencing another public defender's client to death for this same killing.

Improper Admission of Evidence in the Guilt/Innocence Phase-IAC

There are several errors complained of in this phase and while Applicant's counsel certainly asserts that these errors standing alone are worthy of relief, counsel also urges the court to consider the cumulative effect of these errors.

DNA

During the trial, the State admitted information showing that Marion Bowman had sexual intercourse with a woman of another race, out of wedlock, and while he was married to another woman. This evidence had no bearing upon the ultimate question of identity of the perpetrator of the killing on Nursery Road as the State's only purported eyewitness never relayed any information about sex. In fact, when questioned at both the deposition and the PCR hearing, Gadson confirmed that he never saw any sexual intercourse between Bowman and Kandee Martin. And he was specifically asked whether they were ever out of his sight after being picked up that evening, according to his story.

To the contrary of the State's assertion in the Brief in Opposition, as acutely demonstrated by two recent events in the national news, society's moral values have not readily accepted either adultery or racial equality. Just in the months between the briefing of this case, the matter involving Governor Mark Sanford's adulterous relationship and the arrest of Professor Gates of Harvard both vividly remind us of society's aversion to such concerns. When specifically mixed into an accusation that Marion Bowman, a six foot- four African American man, had sexual relations with a much smaller white woman to whom he was not married and while married to another woman clearly was more prejudicial to Bowman than it was probative

to the issue of the identity of the killer. This is especially true when no evidence provided to the jury linked any sexual activity to the killing.

Again, trial counsel's spontaneous utterances during the PCR best demonstrate the opinion of the local moray's of Dorchester County when he proclaimed to Applicant at the merits hearing: "I want to say this out loud and with Marion, what are you doing on Nursery Road at that time in the morning with a white female and African American males in Dorchester County? Really. This is 2001 but what good are you doing out there on a dirt road?" Trial counsel is a white male who lives in Dorchester County.

As far as trial strategy, obviously there is some benefit to showing Bowman's lack of animosity towards Kandee which is exactly what should have been demonstrated through the cross examination of the family members who testified in the guilt phase concerning the threats. The cold testimony of a SLED DNA analyst who testifies as the last witness before jury deliberations is not the proper witness and he would not have testified about the vaginal DNA sample but for counsel's deficient performance.

Petroleum

Likewise the petroleum testimony could have been excluded altogether with an understanding that counsel would open the door if they challenged the State's investigation regarding the lack of analysis regarding petroleum products. Instead the jury was presented with testimony which only described the finding of an accelerant. It was left to trial counsel to mitigate otherwise inadmissible testimony by distinguishing the accelerant on the pants from that used in the arson. Had trial counsel properly objected, this effort to correct the State's misleading expert testimony would not have been necessary.

Plea Agreements

While applicant concedes that cross examination into bias created by a plea bargain is appropriate when cross examining cooperating witnesses, the courts are acutely aware of the problems created when the jury learns of the convictions of co-defendants. This is exactly why the Supreme Court of the South Carolina prevents a defendant from calling a co-defendant for the sole purpose of testifying that he pled guilty to the same crime for which the defendant is on trial. Likewise, the federal courts limit situations when the jury may learn of co-defendant's convictions. Here, the prejudice from the prosecution's solicitation of the fact that several of Applicant's family members were pleading guilty to murder related charges serves more to blur the line of individualized guilt than to provide competent evidence of Applicant's identity as the killer. The clear implication is that the killing is a family endeavor. A side effect is to insulate Applicant's family from trial counsel and to weaken any mitigation testimony. Thus, the prosecution's elicitation of the family member's pleas on direct and prior to impeachment was improper and trial counsel's deficiency likely effected the outcome of this trial.

Ballistics

The State correctly notes that the conventional wisdom is evolving regarding the validity of ballistic imaging. Unfortunately for the State, these revelations indicate the infirmity of such ballistic conclusions as those offered in Applicant's trial. Because the defense relied heavily on the assertions that Gadson possessed a similar make and model gun, the false assertion of a ballistic match "to the exclusion of all other firearms" must be condemned.

While the debate over a fair trial certainly involves such incredible assertions as the statement that due process may be satisfied even if an innocent person is convicted, the majority

of jurists believe that such fundamental errors can not be overlooked. To accept the government position that trial counsel was not deficient in correcting the SLED analyst's admittedly false conclusion of exclusivity in the gun match is to assert that error is ok if everyone at the time was equally deficient. This is an absurd result and the State can offer no substantive justification for upholding a conviction based upon incorrect expert assumptions on such a significant issue.

Luckily for Mr. Bowman, science evolved to reveal the erroneous nature of this statement prior to the exhaustion of his legal challenges to his conviction, allowing the state the opportunity to try him in a fair proceeding without this faulty testimony. This fairness satisfies society's concerns for a just legal system more than finality of an infirm conviction.

Arbitrary Factor

Counsel admitted that he missed the opportunity to object to the prosecution's admission of evidence of an arbitrary factor during the solicitor's cross examination of James Aiken. He offered no strategic reason for this "miss." Instead, the State argues this error was strategic because trial counsel was not yet up on the law as well as other death penalty lawyers. This is definition of deficient performance; performance which is below a reasonable level. Bowman did not benefit from the testimony concerning the arbitrary factor. Instead, trial counsel falsely believed that his success on direct trumped the state's cross into improper matters. Had trial counsel objected, the testimony would have been excluded and there is a reasonable probability that Applicant would have received a life sentence.

In addition, it appears that the introduction of this arbitrary factor is a plain due process violation because the jury was allowed to impose a sentence outside of the statutory scheme allowing for capital punishment. The failure of trial counsel to properly limit the jury's sentencing to accord with the statutory empowerment provide by the general assembly violates due process and is deficient performance.

Kidnaping Aggravator

While there is evidence of prior threats made by Applicant to the deceased, these alone do not constitute evidence of a plan to inveigle or decoy. Instead, there is no such evidence presented at the trial. As demonstrated at the PCR hearing, the State's star witness would have testified that he knew of no information which supported either his prior knowledge of her killing or his knowledge of any plan to inveigle or decoy the deceased. As far as he knew and still knows today, there was a real plan to burglarize a house. To believe otherwise invites speculation and conjecture. A claim in an aggravator is subject to a directed verdict, just as a criminal charge, when the evidence only raises suspicion.

Further, the reply by the State invites a suggestion that this claim should properly be viewed as a failure of appellate counsel to raise this issue on direct appeal or trial counsel's failure to preserve the matter at trial for such direct appeal. If that is true, then the court should consider whether either of those deficiencies deprived Applicant of the effective assistance of counsel.

Finally, the citation to State v. Simmons, 599 SE2d 448 (SC 2004), for the proposition that invalidation of an aggravator will not provide sentencing relief is misinterpreted. See State's reply 159. Instead, Simmons involved the invalidation of one aggravator but affirmance of a murder conviction and four other aggravating circumstances. In the case at bar, the kidnaping aggravator was one of only two found by the jury which specifically rejected two other aggravators. Further, the prejudice from the error should be considered along with the other mitigation deficiencies.

Mitigation Deficiencies

Absence of the Guiding Hand of Counsel

Contrary to the State's position, counsel completely failed to present a competent mitigation case. The most telling point, in direct contradiction to the State's portrayal of an "experienced criminal defense litigator" who consulted with "a mitigation investigator" and a "forensic social worker" is that both Dale Davis and Jeff Yungman describe a complete lack of guidance as to the presentation of the mitigation case. Multiple exhibits demonstrate "real time" concern about the lack of guidance from counsel. Yungman specifically states that he made the strategy decisions because counsel would not do so.

Finally, the State attempts to shore up trial counsel's deficiencies by relying upon Yungman's expertise. This is exactly the problem suffered by Applicant from the failings of his trial counsel: trying to equate the performance of a testifying social worker with that of counsel. Finally, Marva Hardee Thomas, currently under suspension for some unknown reason, clearly offered no assistance, according to her own testimony.

No testimony about Applicant's emotional value

There was no testimony presented that gave the jury a basis to find that Bowman would continue to be an asset to society if his life was spared. The passing reference to his love for his daughter was not linked to the ability to develop this relationship because of the willingness of the family to allow the contact to continue. Contrary to the assertions of the State, the family willingly met with Dale Davis, but obviously this was not cognizant to trial counsel who failed to meet with Davis or Yungman to discuss the case; self-serving statements to the contrary notwithstanding. Finally, the information contained in the affidavit prepared by Katrina West

was introduced by confirmation of Jeff Yungman that this information was in his possession at the time of his testimony but that no one asked him to present this type mitigation case. PCR

Finally, there is no strategic reason to fail to present some positive information about the Applicant in the sentencing phase, especially in light of the admission of the negative information about Marion's upbringing and his family's complicity in the secretion of a firearm.

Regarding the weak mitigation, this case is similar to the recent capital PCR involving Donney Council. Council v. State, 670 SE2d 356 (SC 2008). There the court found that the presentation of limited testimony from the petitioner's mother was insufficient given the available mitigation evidence. Such is the case here, where a plethora of information existed regarding Bowman's genuine emotional value but virtually none was presented either by way of an expert or otherwise.

No testimony about Bowman's Positive Work Record

Likewise, there was only scant or negative work information presented to the jury for consideration. The State cannot rely upon the claim that deficiencies of non-lawyer, experts are not appropriate for IAC analysis and at the same time challenge the Cronic claim. Either, counsel was deficient for not presenting this information in some manner or, more likely, counsel completely abdicated their duty to provide any consultation, guidance, or strategy to the mitigation investigator or social worker. Trial counsel can not abdicate their duties and then be found to have provided competent counsel because the unguided experts were the ones who actually committed the deficiencies.

Given the contrast between the mitigation information presented which focused on the negative and the positive attributes not presented, the prejudice is obvious. The contrast is just to

great to ignore.

Evidence Regarding Kandee Martin's True Character

To begin, the State is incorrect when it claims that counsel successfully avoided any inference relating Kandee and Applicant through drug dealing. Instead, Tawain Gadson testified that Applicant said she was wearing a wire. Further, the defense presented the only testimony about Applicant's drug involvement even though this information was not otherwise discoverable by the State.

There was nothing left to lose by providing an accurate description of Kandee's complicated life as a prostitute, teen mother, and crack addict. The gain would have been the presentation of a more realistic view of the loss suffered by the family following her death. While the death of a loved one is traumatic no matter the life involved, it strains credulity to assert that all persons are viewed equally in this respect. The courts recognize as much when they allow the presentation of "victim impact" evidence. If all losses were equal, then this evidence would be superfluous.

Allocution

The instruction on allocution given by the trial court was incorrect because it improperly limited allocution to less than allowed by South Carolina law. Further, counsel did not speak with Applicant about the trial court's instructions so that any discourse between counsel and client must be considered tainted by this improper limitation. An objection would have led to a correct statement of the allocution rights.

Because the evidence, if properly challenged and with regard to the now exposed infirmities, was not overwhelming, this limitation likely tipped the scales towards death.

Intoxication

Evidence of intoxication serves to mitigate the defendant's culpability for a criminal act committed while under such an influence. Trial counsel's *ad hoc* justifications can not be given credence because trial counsel to this very day holds a belief which is contrary to South Carolina law on the mitigating nature of intoxication. Further, counsel could have elicited the intoxication information from Gadson while he was on the stand in the guilt/innocence phase of the trial. The jury already heard an enormous amount of evidence about the consumption of alcohol so the jury would not have generated any further misgivings in the first phase by the evidence about Bowman's intoxication. The evidence from this phase was later incorporated in the sentencing phase.

Finally, the evidence from Gadson alone, that Bowman was "tipsy," included his testimony that he could visually observe the effects of alcohol on Bowman. Tipsy, on any scale, is synonymous with intoxicated as indicated by the billboards across South Carolina proclaiming that "Buzzed Driving is Drunk Driving." Even without an instruction, such evidence is mitigating, the failure to present such evidence is deficient and this deficiency likely effected the outcome of the trial.

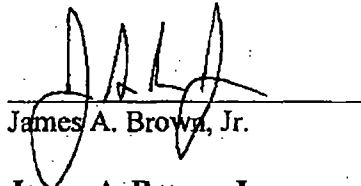
Jury Instruction

The evidence of Bowman's tipsy state would have provided him with entitlement to either the three specific mitigators or a specific instruction. No valid reason justifies not utilizing available evidence to produce a mitigating charge warranting a life sentence.

Conclusion

Thus, the Court should not accept the assertions of the State's Brief in Opposition at face value but consider the actual testimony and the evidence introduced. Further, the prejudice from the deficiencies should be considered for both the individual effects and for the cumulative impact upon the trial proceedings. Having done so, the Court should grant Applicant's request for post-conviction relief and reverse the convictions and sentences in this proceeding.

Respectfully submitted,


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September 16, 2009

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STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

C.A. No. 06-CP-18-569

MARION BOWMAN, #6006)

Applicant,)

v)

STATE OF SOUTH CAROLINA)

Respondent.)

**APPLICANT'S OBJECTIONS TO THE
 COURT'S INTENTION TO ADOPT
 THE STATE'S PROPOSED ORDER**

FILED - RECORD
 2011 SEP 16 11:11:02
 CHERRY
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The below-listed counsel for the Applicant respectfully provide the following objections to the proposed Order Denying Application for Post-Conviction Relief.

Introduction

Post conviction counsel file these objections in accord with the obligations expressed by the South Carolina Supreme Court. See Hall v. Catoe, 601 SE2d 335, at 341 (SC 2004). These objections should not be viewed as a limitation on the claims asserted on behalf of the Applicant. Instead, these concerns should be viewed in the context and with specific incorporation of the entire record including exhibits, pleadings and briefings of the Applicant.

Further, some general objections stand to be made. First, although his Honor has been more than accommodating in the presentation of Applicant's cause, objection is taken to the fact the Order was drafted by counsel for a litigant instead of the Court itself. See Hall. It is difficult to imagine that an advocate and the court could have the exact same view regarding every factual finding and legal conclusion given the more than 10,000 pages of transcript and more than 100 post-conviction exhibits.

Finally, a general objection is made to the failure of this Order to address the cumulative effect of the trial errors. There are several issues in which the court either undertakes a prejudice analysis as an alternate legal ruling or outright determines an error occurs, but no prejudice ensues. There is no analysis or assessment of the cumulative effect of these various deficiencies and neglect of duties on the part of trial counsel and the prosecution. See Kyles v. Whitley, 514 US 419, at 436 (1995)(Violations of due process such as Brady and Napue errors are to be examined "collectively, not item by item.") and Riddle v. Ozmint, 631 SE2d 70, at 74 (SC 2006) ("When considering whether the suppression of more than one item was material under Brady, we consider the collective impact of the undisclosed evidence." citing Kyles).

Specific Objections

Page	Statement/Finding/Conclusion	Problem(s)
6	Objection is made to the finding that the psychiatric report of Gadson was equally available to the Applicant and the government.	The <u>Brady</u> material is the information contained in the report, not necessarily the report itself. Further, the report was generated by a state agency, falling under the same use of the term "state" as that prosecuting Applicant. When this material contains impeachment value, then the state must provide this material, even in the absence of a request. In this case, the state obtained this report internally, from one agency to another, without litigation or subpoena. This report was not publicly available. The contents were protected by privilege, subject to court order. Applicant's trial counsel did not possess the information in the report or have any knowledge of the existence of any impeachment material as Gadson was ruled competent. The state did not provide it to Applicant's trial counsel.

6-7	Objection is made to the finding that Gadson's report did not contain impeachment material.	In fact, the report indicated Gadson exhibited "some mild impairment of verbal memory," habitually used cannabis including smoking 6 blunts a day, and experienced blackouts where he would lose control over his bodily functions. He claimed he lost control over his bodily functions on Nursery Road the night Kandee Martin was killed.
7	Objection is made to the finding that this suppressed evidence was not material.	Gadson claimed to be the only eye-witness to the killing. Impeachment of his testimony was necessary to rebut the state's case. The suppression of this impeachment material undermines confidence in the verdict.
10	Objection is made to the finding that Gadson did not avoid exposure to the death penalty by reaching a plea bargain to act as a state's witness.	Gadson was charged with Murder. Twice the state asserted he was the shooter. In fact, Solicitor Bailey suggested he could be charged as a principle just as Mr. Bowman. Death is a possible penalty for a principal in a murder case, whether or not he is the triggerman. See <u>Tison v Arizona</u> , 481 US 137 (1987). This agreement eliminated Gadson's exposure to the death penalty through his cooperation. The jury did not know this information; but instead, heard that he would receive twenty years.

11	Objection is made to the findings regarding the prior statements of Coker alleging Gadson was the shooter.	Detective Coker swore under oath that Gadson shot Kandee Martin. He swore to this assertion in the arrest warrant and indictment. If he did not, then those documents are the result of some type of fraud or collusion as they speak for themselves. Counsel for a capital defendant who is challenging guilt as the shooter is obligated to test the state's case by challenging that assertion. These statement contradict the assertion Bowman was the shooter. This does not open the door to any involuntary statements.
14	Objection is made to the Order's finding that the arrest warrant affidavit "in no way indicates the State believed Gadson was the one who fired the fatal shot."	The arrest warrant affidavit reads: "...there is probable cause to believe that the defendant named above (Gadson) did commit the crime(s) set forth (murder), and that such probable cause is based on the <u>FOLLOWING FACTS</u> (Emphasis added): That...James Tawain Gadson...did shoot and kill one Kandee Martin..." A jury should determine whether the old or new position of the state is correct.
15	Objection is made to the internally inconsistent position regarding Gadson's exposure to the death penalty.	On page 10, the Order indicates that Gadson never faced the death penalty. However, page 15 of the Order indicates that Solicitor Bailey "credibly and accurately testified that Gadson was charged as a principal first and <u>COULD HAVE BEEN CONVICTED AS SUCH...</u> " (Emphasis added).

15	Objection is made to the Court's finding that the true billed indictment, Plaintiff's 1, did not mean "Coker told the grand jury that Gadson was the one who shot the victim."	In fact, Coker is listed as the only witness to appear before the grand jury. The body of the indictment is pre-typed and submitted under the signature of the Solicitor (as an officer of the court) and the grand jury found the assertion accurate without correction or amendment. <i>A fortiori</i> , Coker told the grand jury that "...Gadson did...kill one Kandee Martin by means of shooting the victim in the head..." See Plaintiff's 1.
16	Objection is made to the finding of no prejudice regarding the state's assertion that Gadson was the shooter.	There is a reasonable probability that the outcome would have been different if the jury heard the state previously hummed a different tune than the version it was peddling at trial.
20	Objection is made to the treatment of the claim Applicant raises concerning Gadson's lie about gun ownership.	In fact, the "essence" of Applicant's assertion is not that the jury didn't know that Gadson owned a similar make and model gun as the one attributed to Applicant. The essence is that Gadson is a liar, he lied about his gun being stolen and he did so because of his guilt in the shooting. (The issue of whether the gun attributed to Applicant was "matched to the murder scene" will be discussed later in the application.)

22	Objection is made to the finding that the state did not "knowingly offer false testimony." This finding intentionally misconstrues the nature of the violation asserted.	Applicant's claim is one of a violation of due process. This may occur when the state presents testimony which it knows or "should have known" was false. See <u>Chavis v NC</u> , 637 F2d 213, at 222 (4 th Cir 1980). Here, Felder's testimony omitting the gasoline purchase is false. Through viewing of the video and the knowledge of Lead Detective Coker, the state should have known this testimony was false by omission. Coker testified that Felder would not have been charged with the Arson if he wasn't identified as the purchaser of the gasoline on the video. PCR, p. 899, l. 6- p. 900, l. 5.
23	Objection is taken the gross mis-characterization which occurs when the proposed order implies Bailey did not know Felder was the gas purchaser.	In fact, Detective Coker knew Felder bought the gas, sat at the table with the prosecutor, and "conveyed to the prosecutor" this information. PCR, p. 899, l. 6- p. 900, l. 5.
23	Objection is made to the finding that the "state could not know for certain that Felder was the one who purchased the gasoline used in the arson."	Detective Coker knew this and used this information to prosecute Felder through Arrest Warrant and Indictment. Coker sat at the table with the prosecutor and specifically told him that Felder purchased the gas. The assertions in the order can only be accurate if Detective Coker's sworn PCR testimony is false.
24	Objection is made to the finding that: "At trial, Felder testified that he purchased the gasoline at Applicant's request."	In fact, Felder omitted the gasoline purchase information during the guilt/innocence trial. Instead the defense had to correct this falsehood, at Applicant's insistence, during Applicant's sentencing, and well after pronouncement of the verdict in the trial.
24	Objection is made to the spelling of Valorna Smith's name as Bolorna Smith.	See Trial, p. 4112-4124.

27-28	Objection is made to the finding that the state discloses evidence that Felder purchased the gasoline used in the Arson.	The assertion that the state did not know Felder purchased the gasoline for the purposes of the <u>Napue</u> claim and the assertion that the state "...had circumstantial evidence that it was Felder who purchased the small amount of gasoline..."are mutually exclusive. These two positions can not both be true. In fact, they can both be false. The record, in fact, supports the proposition that the state did not disclose the identity of Felder as the gasoline purchaser if review of the video does not reveal Felder as the purchaser. But there is no dispute that Detective Coker conveyed this information to Bailey and not the defense team.
28	Objection is made to the Order's finding that "None of the evidence presented at the PCR hearing indicated the State had evidence connecting the gasoline purchased by Fedler to the Arson.	In fact, Detective Coker testified at the PCR hearing that Felder would not have been charged with the Arson if he had not been identified on the video purchasing gasoline. Coker testified that he told Bailey this information and that "everything we had in the case was given to the Solicitor's office." P. 899, l. 6- p. 900, l. 5.
30	Objection is made to the Order's implication that trial strategy was involved when Cummings declined to inform the jury of Felder's identity as the purchaser of the gasoline because it would incriminate Applicant.	In fact, physical evidence identifying Felder as the gasoline purchaser does not make Felder's claim that Bowman committed the arson any more or less true. But the fact Felder lied about this purchase by omitting this fact does call into question his veracity as a witness in the very matter before the trial jury. Felder already testified Applicant committed the arson.

30-32	Objection is made to the Order's characterization of the <u>Brady</u> claim regarding the Felder proffer letter and polygraph.	The issue Applicant presents is not whether the proffer letter and polygraph were disclosed, but whether the prosecutor ever informed Applicant's trial counsel that Felder lied through the proffer letter to get a deal. See <i>Gibson v. St.</i> , 514 SE2d 320, at 323 (SC 1999) ("Only in its full form did the information constitute evidence with exculpatory or impeachment value.") Trial counsel was never informed that this letter triggered the request for a polygraph, in which Felder again lied to get a deal. The prosecution's awareness of the material change in Felder's statements is impeachment material triggering <u>Brady</u> concerns.
32	Objection is made to the findings that the differences in the proffer letter and the trial testimony were minor.	Felder is a liar. He lied in the proffer letter. He lied during the polygraph. He lied at trial. He testified against Applicant. His repeated lying and the state's willingness to consider perjury and false statements as deserving of reward is a material concern regarding the veracity of the state's allegations against Applicant. The jury never heard about even one instance of Felder's lies.
33	Objection is made to the Court's finding that there was no "wink wink" deal where the state would reward Felder regardless of the veracity of his testimony.	Bailey recalled multiple occasions when Felder lied to get a deal. In fact, he agreed there was "no other way to characterize" Felder's information except as a lie. PCR, p. 2109-2114. Bailey admits he did not reveal these lies for leniency. Bailey admits he had no concern about rewarding Felder for lying multiple times. There is no other way to describe this except as a deal struck through an unspoken understanding. See <i>St v. Starling</i> , 2010 WL 2861824 (Del. Superior Court) (Unpublished) (2010) (defining "wink wink" as an <i>understanding</i>).

35	Objection is taken to the assertion that the state could not have sought the death penalty against Felder given the sufficiency of the evidence to charge him as an accessory before the fact to murder.	As indicated by Chief Justice Toal in her dissent in <u>Bixby</u> , there is no practical difference to the charge of accessory before the fact to murder and murder. The evidence to support one charge will necessarily support the other. Using the information of Felder's involvement as an accessory before the fact to murder, Felder faced a potential death sentence as an accomplice to murder.
36	Objection is made to the finding that Applicant's trial counsel expressed a "valid strategic reason" for not examining Felder regarding the original charges and penalties to which he was exposed.	In fact, Detective Coker provided information regarding Felder's purchase of gas as a basis for his original charges. See PCR, p 899, l. 6- p. 900, l. 5. Applicant's trial counsel did not know Coker's basis for charging Felder so his "strategy" was not valid. In fact, trial counsel obviously did not interview Coker to learn the basis of Felder's original charges. This lack of knowledge corroborates the deficiency of trial counsel, not valid trial strategy.
36	Objection is made to the Order's findings that the information in the arrest warrant is only "probable cause."	In fact, the information is only "probable cause" that Felder committed the crime. But this probable cause is based upon a sworn statement asserting Coker possessed the " <i>following facts</i> " of Felder's guilt. See Plaintiff's 17 & 18.
38	Objection is made to the finding that Applicant's trial counsel expressed a valid trial strategy.	In fact, Felder lied by omission regarding the gasoline purchase. This does not corroborate Applicant's involvement in any way. Instead, this corroborates Felder's willingness to lie to escape his own liability.
40	Objection is made to the lack of a finding that the non-disclosed information concerning Hiram Johnson constituted impeachment material and was suppressed by the state.	The existence of charges pending against a cooperating witness is impeachment material. See <u>St v. Mizzell</u> , 563 SE2d 315 (SC 2002) and <u>St v. Jones</u> , 541 SE2d 813 (SC 2001).

40-41	Objection is made to the finding that the suppressed information was not material as defined by the <u>Brady</u> line of cases.	There are only two witnesses who provided direct testimony concerning Applicant's guilt. One is Tawain Gadson, who claimed to be an eyewitness and the other is Johnson who claimed, for the first time at trial, to have heard Applicant confess. The prosecutor argued that Gadson's testimony was subject to scrutiny as biased but that there were no charges against Johnson. That was untrue and was emphasized by the state.
41	Objection is made to the finding that the five casings at the murder scene were conclusively matched to a gun linked to Applicant.	It is bewildering that this statement would be included in the order drafted by the state when the state's own expert witness now concedes the evidence of a "conclusive" match from his testimony at trial was overstated. See p. 340 l. 20-21 ("Theoretically, there is a possibility... that you might find one in 300 billion down the road that produced the same markings.")
48	Objection is made to the findings that Applicant did not establish the "Sam memo" was suppressed.	Applicant's trial counsel clearly indicated they did not receive this information. PCR, p. 1339, l. 6-11. The solicitor couldn't demonstrate he provided this information. PCR p2150
48	Objection is made to the findings that the "Sam memo" was not favorable evidence.	The US Supreme Court states that when reviewing a <u>Brady</u> claim "a reviewing court may consider "any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case." See <u>US v. Bagley</u> , 473 US 667, at 683 (1985). Provision of this memo would provide defense counsel a mechanism to demonstrate that Davis maintained the truth of Gadson's confession even when questioned by the prosecution. This evidence would be admissible as a prior consistent statement. See SCRE Rule 801(d)(1)(B).

49	Objection is made to the finding that the material contained in the "Sam memo" was not material.	The only defense theory was that Marion was not the person who shot Kandee. At trial, the defense suggested the killer was Gadson. This information exculpated Bowman and impeached Gadson. As the only purported eye witness to the killing, it is hard to comprehend how there is not a reasonable probability that disclosure would have resulted in a different result in the proceeding. Again, the US Supreme Court states that when reviewing a Brady claim "a reviewing court may consider "any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case." See <u>US v. Bagley</u> , 473 US 667, at 683 (1985).
50	Objection is made to the findings that the difference between impeachment with only the handwritten statement as opposed to impeachment with both Ricky Davis' handwritten statement.	The fact Davis wrote his handwritten note and then confirmed the same to the solicitor's office is so significant that trial counsel expressed shock and disappointment that this information was not disclosed. See PCR, p. 1339, l. 6-11. Further, the "Sam memo" clarifies that Bowman told Ricky to write down what Gadson told him. Not that Applicant told him to fabricate a statement. See Applicant's 67.
50	Trial counsel was not ineffective for not presenting Rickie Davis' testimony regarding Taiwan Gadson's confession.	The note is in Rickie Davis' handwriting and reads, "I Rickie was on A-side with Gadson and he said he shot the girl and gave Bowman back the gun that was used..." Bigger problem: Rickie Davis repeated this same confession by Gadson in greater detail to an investigator from the Solicitor's office. A criminal friend of Gadson's, housed with Gadson, who has a change of heart when it appears he will actually be called to testify at the trial of Bowman: no matter what Davis would have testified to (and we'll never

		know because trial counsel didn't call him), no reasonable juror would not be concerned about who really shot Kandee Martin, <i>especially</i> in light of the fact that, <i>if</i> Rickie Davis testified in a manner different from his handwritten statement. (Applicant's 11) See Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 44-46.
53	Trial counsel was not ineffective for not ineffective in not presenting Gadson's location on A-side along with Rickie Davis.	Detective Coker would have been a witnesses from the prosecution team to corroborate Rickie Davis' prior inconsistent statement <i>if</i> Rickie Davis actually testified differently from his own handwritten statement (Applicant's 11). See DCDC records, (Applicant's 41) and Det. Coker's notes, (Applicant's 45) See Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 41-46.
54	Trial counsel was not ineffective in not asking Detective Coker about Gadson's lying about owning a .380	If the defense theory was that Gadson shot Kandee Martin, why would any competent lawyer not ask about Gadson's lies relating to a weapon of the same make and model as the suspected murder weapon? (PCR trial, p.911, 1.1-6) See Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 47-48.
55	Trial counsel was not ineffective in not asking Detective Coker about statements heard by Bruce McLean	Defense counsel never cross-examined Coker about <i>videotaped</i> present sense impressions and excited utterances involving people talking about killing a girl and wanting to dispose of her body at a gas pump the Applicant was never at. PCR Trial, p. 922, 1. 2-13. See Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 48-49.

57	Trial counsel was not ineffective in not cross-examining Detective Coker about Felder being the one who purchased the gasoline.	Under what theory would defense counsel NOT be ineffective for failing to bring to the jury's attention blatant lies committed by the State's witnesses who were given sweetheart deals in exchange for their cooperation? (PCR Trial, p.685, l. 15-19 and PCR trial, p. 2114, l. 7-15) See Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 49-51.
58-62	Applicant failed to establish Hardee-Thomas acted under an actual conflict of interest as a result of her former representation of Ricky Davis and then active representation of Applicant.	At the time Rickie Davis wrote the memo (Plaintiff's 11) in August 2001, Hardee-Thomas was actively representing both Davis and Applicant. (Plaintiff's 19-23 and Defendant's 17) Such joint representations of conflicting interests are inherently suspect. <u>Mickens v. Taylor</u> , 535 U.S. 162, at 166 (2002), <u>Holloway v. Arkansas</u> , 435 U.S. 475 (1978). <u>Wheat v. U.S.</u> , 486 U.S. 153. There was no valid waiver of this conflict of interest. <u>U.S. v. Ellison</u> , 798 F.2d 1102, at 1108 (7 th Cir. 1986). The clear implication is that Thomas took action adverse to Marion Bowman in part because of her allegiance and obligation to Davis. If nothing else, it appears that this conflict prevented Thomas from discussing Davis with Marion Bowman. Prejudice is presumed and a new trial should be granted. See <u>Cronic</u> at 658-659; also see <u>Geders v. United States</u> , 425 U.S. 80, at 91 (1976) and <u>Gideon v. Wainwright</u> , 372 U.S. 335, 344-345 (1963). See Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 53-63.
65	There were no sustainable objections to exclude the DNA match between Applicant and deceased... "...this evidence is confirmatory of the identity of the Applicant as the	The State's own expert testified that there was no way to put a date or time on the sex. (Trial, p.4393, l. 9-19) There were a host of sustainable objections, pursuant to SCRE 402.403

	murderer..."	& 404(b) and <u>Strickland v Washington</u> , see Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 65-72.
70-72	There was no valid basis for objecting to the arson expert's testimony that a heavy petroleum product was found on Applicant's pants and that "the solicitor in argument never mentioned the accelerant on the pants"	The Solicitor knew the difference between a petroleum product and an accelerant and yet, in front of the jury was allowed to ask his expert without objection, "Would you state whether or not you detected petroleum <i>accelerant</i> in those jeans." (Trial p. 4298, l. 2-5) There were ample grounds for valid objections to this evidence under <u>Strickland</u> , SCRE 402, 403 and 702. see Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 72-74.
79	There was no valid objection to the introduction of the Applicant's relatives' plea agreements	SCRE 102, 103, 104 and <u>Strickland</u> objections and a redaction of the charges the relatives pled to could have eliminated the introduction of the highly prejudicial implication that Applicant somehow participated in the conspiracy to dispose of the murder weapon. see Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 74-78.
81-91	Counsel was not deficient for not objecting to a SLED firearms examiner testifying that the casings at the scene of the murder matched the firearm attributed to the Applicant "to the exclusion of all other weapons."	There was no statistical basis for this expert opinion at the time of the trial, and Applicant's trial counsel argued to the jury that Taiwan Gadson killed Kandee Martin with his gun of the same make and model, after the very expert testimony he failed to object to eliminated this as a possibility. see Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 79-81.
100	Counsel was not deficient in failing to object to the solicitor's cross-examination of Applicant's witness as to "good" prison conditions	Applicant flat out admitted he missed that objection, thereby failing to preserve that issue for Applicant/Appellant's direct appeal, PCR Trial, p.1721, l.15-25 & p. 1722., l.1; thereby allowing the introduction and consideration by the jury of

		arbitrary factors in violation of SC Code Section 16-3-25 (c)(1). <i>See</i> Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 82-83.
105-112	Counsel was not deficient for failing to challenge the allegations of kidnapping as an aggravating factor during the penalty phase.	Upon a review of Taiwan Gadson's testimony at Appellant's original trial, (Trial pgs 3980-4038) there was no mention of any inveigling, deception or otherwise from which a jury could infer that Kandee Martin was kidnapped. <i>See</i> Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 84-86.
113-117	Applicant's trial counsel did not constructively absent themselves from the preparation and presentation of the mitigation case.	Trial counsel "never once" met with the social worker to "sit down and go over his proposed testimony" (PCR p.1093, l. 20-24 and PCR, p. 1094, l. 7-9). Both the social worker and psychologist hired by trial counsel noted a complete failure of counsel to inform them of trial strategy (Plaintiff's 51 & 57) The testifying social worker, without any guidance from trial counsel (PCR, p.1093, l. 13-15) was left to make critical decisions as to which evidence to present, and as such, failed to present existing evidence of Appellant's capacity to be of emotional value to others and his long history of legitimate and gainful employment. Instead, the social worker testified Applicant was a drug dealer and beat a schoolmate with a tree limb and although Appellant <i>to this day</i> steadfastly denies being the person who shot Kandee Martin, the social worker testified in his expert opinion that no excuse could be offered for Bowman's actions in killing Kandee Martin. (Trial, p. 4809, l. 10-20). <u>U.S. v Cronin</u> , 466 U.S. 648 (1984), <u>Brooks v Tennessee</u> , 406 U.S. 605 (1972) and <u>Frett v. State</u> , 298 S.C. 54, 378 S.E.2d 249 (1988). <i>See</i> Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 87-90.

122	Applicant can show neither deficiency nor prejudice with regard to the alleged failure to present evidence of Applicant's emotional value to others.	Trial counsel knew of this positive character trait (Plaintiff's 52 & 62) and knew how to hire and elicit this evidence from a family psychologist (PCR p. 1456, l.4-8), but because of the complete breakdown in the adversarial process, as condemned in <u>Cronic</u> , the testifying social worker was left to make the decision to focus on the "more negative aspects of his life". (PCR, p. 1092, l. 25 – p. 1093, l. 9). See Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 90-95.
129	If the testifying social worker decided not to put emphasis on Applicant's extensive work history and successful completion of his time in the restitution center, that is the fault of the expert, not counsel.	Applicant's work history and successful completion of the restitution center were available to trial counsel, (Plaintiff's 55 & 56 and PCR, p. 1478-1480) and is further evidence of the complete breakdown between counsel and the hired experts, and thus, the adversarial process, amounting to a constructive absence from the trial preparation and presentation in violation of <u>Cronic</u> and Applicant's right to counsel guaranteed by the Sixth Amendment of the U.S. Constitution and Article 1, Section 14 of the S.C. Constitution, as well as South Carolina law, including S.C. Code Sections 16-3-26 (B)(1) and 17-23-60. See Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 95-96.
134-137	Counsel was not deficient for failing to present evidence of intoxication.	The S.C. Supreme Court ruled in Applicant/Appellant's direct appeal the trial court was correct in deciding not to charge intoxication as a mitigating circumstance because the trial record was devoid of information that Applicant "was actually intoxicated at the time of the crime." <u>State v. Bowman</u> , 623 SE2d378, at 383 (SC 2005), rehearing denied (2006). This lack of evidence could easily have been cured by trial counsels' decision to inquire of witnesses that did testify of Applicant's level of intoxication on the

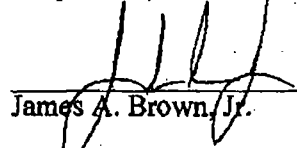
		day of the killing. (James Taiwan Gadson testified at the Post Conviction Relief trial that Marion Bowman was drinking for four to five hours on the day of the murder. PCR transcript page 152 lines 22-25 and page 153 lines 1-14. He also testified that the Applicant drank beer everyday. See page 153 lines 24-25 and 154 lines 1-7, wherein he testified that the Applicant drank Old English 800 everyday. Taiwan Gadson further testified that the Applicant was drinking liquor that day. See page 155 line 4-9. And most significantly, Taiwan Gadson testified that the Applicant was intoxicated on the day of the murder. See page 156 lines 1-5 and 157 lines 12-25.
137	Counsel was not deficient for failing to request either the specific mitigators in S.C. Code Ann, Section 16-3-20 (C)(b)(2), (6) & (7) (Supp.2000) or a specific non-statutory mitigator specifically related to voluntary intoxication.	Applicant's trial counsel labored under the mistaken belief that voluntary intoxication was an aggravating factor. For that reason, he failed to elicit evidence of intoxication, harbored an erroneous belief that the introduction of such evidence would somehow result in the introduction of Applicant's mental health report and failed to request either the specific mitigators in S.C. Code Ann, Section 16-3-20 (C)(b)(2), (6) & (7) (Supp.2000) or a specific non-statutory mitigator specifically related to voluntary intoxication. <u>State v. Plemmons</u>, 370 SE2d 871 (SC 1988). See Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 103-104.

Conclusion

For the reasons expressed above and in light of the entire record and all pleadings, briefings and applications, the Court should abandon its intention to adopt the proposed Order drafted by the state and generate an Order consistent with the principles asserted by the

Applicant.

Respectfully submitted,



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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

ORDER DENYING APPLICATION
FOR POST-CONVICTION RELIEF

(Capital Case)

FILED - RECORDED
2012 MAR 12 PM 2:05
CHERYL E. JAMES
CLERK OF COURT
DORCHESTER COUNTY

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TABLE OF CONTENTS

PROCEDURAL HISTORY	1
ANALYSIS	4
I. James Tawaln Gadson, Jr.	4
A. The Prosecution Did Not Violate Brady By Not Disclosing Gadson's William S. Hall Institute Psychiatric Report	4
B. Trial Counsel Was Not Ineffective In Addressing Gadson's Plea Deal and/or Any Possible Bias that May Have Resulted Therefrom ...	9
C. Trial Counsel Did Correct Gadson's Testimony At Trial Regarding his Twenty Year Sentence	11
D. Trial Counsel Was Not Ineffective Because It Chose Not to Attempt to Introduce Arrest Warrants and Indictments As Evidence Gadson Was the Shooter.	13
E. Trial Counsel was Not Ineffective in Not Presenting Alleged Evidence from Wayne Mood	16
F. Trial Counsel Was Not Ineffective In Handling Evidence that Gadson Had Access To Applicant's Gun.	19
G. Trial Counsel was Not Ineffective with Regard to Gadson's ownership of a .380 Handgun.	20
II. Travis Felder	21
A. The Prosecution Did Not Fail to Correct False Testimony in Regards to Felder Purchasing the Gasoline.	21
B. The State Did Not Fail to Correct Felder Regarding How Many Times He Met with the State in Preparation for His Testimony at Trial	25
C. The Prosecution Did Not Commit Any Brady Violations with Evidence Relating to Travis Felder	27

Table
#
Dr. J. J.

1. The State Did Properly Disclose Evidence that Felder Purchased Gasoline on the Morning of the Arson.	27
2. The State Did Not Violate Brady When It Did Not Disclose the Proffer Letter from Felder's Attorney.	30
3. There Was No "Wink Wink" Deal Between the State and Felder	32
D. Trial Counsel Was Not Ineffective for not Presenting Evidence of Felder's Original Arrest/Charge	34
E. Trial Counsel was not Ineffective in Not Presenting Evidence Felder Was the One Who Purchased the Gasoline During the Guilt Phase at Trial.	37
F. Trial counsel Was Not Ineffective for not Filing a Rule 29 Motion for a New Trial; Counsel Was Aware that Felder Was the One Who Purchased the Gasoline at Trial	38
III. Hiram Johnson	40
A. The State Did Not Violate Brady in Not Disclosing Hiram Johnson's then Pending Charges	40
B. There Was No "Wink Wink" Deal Between the State and Johnson .	41
C. Trial Counsel Was Not Ineffective in Not Cross Examining Johnson on the Absence of Bowman's Alleged Confession in Johnson's Prior Statements.	43
D. Trial Counsel Was Not Ineffective for Not Cross-Examining Johnson on the Fact he was Not Charged with Possession of Stolen Vehicle.	46
IV. Ricky Davis	47
A. The Prosecution Did Not Violate Brady in Not Disclosing the "Sam Memo"	47
B. Trial Counsel was Not Ineffective in Not Presenting Ricky Davis' Testimony Regarding Tawaln Gadson's Confession	50
C. Trial Counsel was Not Ineffective in Not Presenting Gadson's Location on A-Side or Detective Coker's Notes Confirming Gadson and Davis Together on A-Side	53

V. Alvin Coker	54
A. Trial Counsel Was Not Ineffective in Not Asking Coker About Gadson Lying About Owning a .380	54
B. Trial Counsel was not Ineffective in Not Bringing Out Statements Heard by Bruce McLean.	55
C. Trial Counsel was Not Ineffective in not Cross-Examining Detective Coker About Felder Being the One Who Purchased Gasoline ...	57
D. Trial Counsel was Not Ineffective in Crossing Coker About the Sworn Statements to Other Tribunals	58
VI. Conflicts of Interest:	58
A. Applicant Failed to Establish Hardee-Thomas Operated Under An Actual Conflict of Interest As a Result of Her Former Representation of Ricky Davis and Then Active Representation of Applicant	58
B. There was no Conflict of Interest As a Result of the Fact that Gene Dukes Represented Applicant's Co-Defendant Tawain Gadson	63
VII. Ineffective Assistance Regarding Evidence Admitted in Guilt Phase	65
A. Failure to move to exclude evidence of Bowman's DNA found in the victim's vagina	65
1. There was no valid objection to this testimony.	65
2. Counsel had a valid strategic reason for admitting the testimony.	68
3. There was no prejudice.	69
B. Failure to move to exclude petroleum evidence	70
1. There was no valid basis for objection.	70
2. Counsel had a valid strategic reason for admitting the testimony.	72
3. There was no prejudice.	73

~~iii~~
iii

C. Failure to object to evidence of conspiracy to secrete Applicant's gun and examination on plea agreements	73
1. There was no valid objection to the conspiracy.	75
2. There was no prejudice.	78
3. There was no valid objection to the solicitor's reference to the plea agreements.	78
4. Counsel had a valid strategic reason for not objecting.	80
5. There was no prejudice from admission of the plea agreements.	80
VIII. Failure to Object to Admission of Ballistics Evidence	80
A. Counsel was not deficient.	81
B. There was no prejudice.	85
IX. Failure to object to arbitrary factor of "good" prison conditions	91
A. Events at trial	91
B. <i>Plath, Bowman, Burkhart, and Bryant</i>	94
C. Counsel was not deficient in handling the issue.	97
D. Applicability of a <i>Strickland</i> analysis to this issue	101
E. There was no prejudice.	103
X. Failure to object to submission of kidnapping aggravator	105
A. Events at trial and in PCR	105
B. Failure to call Gadson in sentencing phase	108
C. Lack of proof in record supporting kidnapping aggravator	111
XI. Alleged ineffective investigation and presentation of mitigation case ...	112
A. Alleged constructive absence and the presumption of prejudice	112

1. <i>Cronic</i> is not applicable to this case.	113
2. Counsel did not absent themselves from the mitigation preparation, whether in the context of applying <i>Cronic</i> or assessing deficiency.	117
B. Alleged failure to present evidence of Applicant's emotional value to others	122
1. Counsel were not deficient.	123
2. There was no prejudice.	125
C. Failure to present evidence of work record	128
1. There was no deficiency.	128
2. There was no prejudice.	129
D. Failure to challenge evidence of Kandee's good character	130
E. Failure to object to instruction on allocution	132
F. Failure to present evidence of intoxication	134
XII. Failure to request mitigating instructions on voluntary intoxication	137
CONCLUSION	139

Before this Court is an Application for Post-Conviction Relief ("APCR"), filed by Marlon Bowman, Jr. ("Applicant"). This APCR stems from a murder conviction and death sentence. For the following reasons, this Court denies and dismisses the APCR.

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.

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 in

the commission of larceny with the use of a deadly weapon. It recommended a sentence of death. {R. 5051}. Judge Goodstein sentenced Applicant to death for murder and ten years for arson.

#2
AJ
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. 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 certlorari 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.

#3
JY
Applicant filed his First Amended Application, and his Second Amended Application prior to the evidentiary hearing. He also filed his Third Amended Application a week before the evidentiary hearing began in September 2008. The hearing took place over the course of various days in September, October, and December 2008. He filed his Fourth Amended Application in June 2009, some six months after the evidentiary hearing in this case had concluded. He also filed his Amended Brief Supporting Application for Post-Conviction Relief. The Respondent filed a Brief in Opposition. The Applicant then filed a Reply.

This Order of Dismissal follows.

ANALYSIS

Based on the factual findings and legal analysis set forth as follows for each issue, this Court denies relief.

I. James Tawain Gadson, Jr.

Applicant first raises a number of issues with regard to testifying witness James Tawain Gadson, who was at the scene when Kandee Martin was killed.

A. The Prosecution Did Not Violate Brady By Not Disclosing Gadson's William S. Hall Institute Psychiatric Report



Applicant contends that the First Circuit Solicitor's Office failed to properly disclose a copy of his co-defendant's psychiatric evaluation from the William S. Hall Psychiatric Institute to Applicant pursuant to Brady v. Maryland, 373 U.S. 83 (1963). At the PCR hearing, Solicitor Bailey testified that he did not believe they provided defense counsel with a copy of the William S. Hall Psychiatric Institute report for Tawain Gadson. {PCR Tr. 2120}. Lead trial counsel Cummings also testified that he did not recall receiving a copy of the psychiatric evaluation for Gadson. {PCR Tr. 1647}. Applicant asserts the State should have provided him with the report because it contained information that could have been used for impeachment purposes in cross-examining Gadson at trial.

"A Brady violation occurs when the government fails to disclose evidence materially favorable to the accused." Youngblood v. West Virginia, 547 U.S. 867, 869, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006). Evidence that is not disclosed is suppressed for Brady purposes even when it is "known only to police investigators and not to the prosecutor." Kyles v. Whitley, 514 U.S. 419, 438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Evidence is favorable if it is either exculpatory or impeaching. See, e.g., Strickler v. Greene, 527

U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (internal quotation marks omitted). However, a " 'showing of materiality does not require demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal,' " id. (quoting Kyles, 514 U.S. at 434, 115 S.Ct. 1555), but only a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (quoting Kyles, 514 U.S. at 435, 115 S.Ct. 1555). The assessment of materiality is made in light of the entire record. United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

#5
A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 514 S.E.2d 320, 324 (1999) (citing Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). If a Brady violation is found to have occurred, PCR must be granted. Gibson, supra.

[T]he Brady rule does not apply if the evidence in question is available to the defendant from other sources; thus, when defense counsel could have discovered the evidence through reasonable diligence, there is no Brady violation if the Government fails to produce it." U.S. v. Kelly, 35 F.3d 929, 937 (4th Cir. 1994)(internal quotations omitted).

"[W]here evidence is equally available to the accused, the obligation on the part of the State to furnish such evidence to the accused is relieved." Anderson v. Leeke, 271 S.C. 435, 439, 248 S.E.2d 120, 122 (1978).

#p
JJ
Here, this Court finds that Applicant has failed to establish a Brady claim in this situation. First, defense counsel had other means by which it could obtain Gadson's psychiatric report. Gadson's psychiatric evaluation was done by order of the court. {See Applicant's 8 & 31}. The court order was clearly public record. Thus, the fact that Gadson was evaluated could easily have been discovered by trial counsel upon examination of court records in the Clerk of Court's office. Counsel was well aware that the Department of Mental Health provided the court with a psychiatric report when ordered to conduct such an evaluation. The Department had done so in Applicant's case. {See Respondent's 29}. Thus, had counsel reviewed the clerk of court records for Applicant's co-defendant Gadson, he would have clearly been aware that a psychiatric report to the court would have been available. Counsel could have easily filed a subpoena to obtain a copy of Gadson's psychiatric report from the court. Since this information could have been requested by counsel by other means, Applicant has failed to establish there was a Brady violation. Kelly, supra; Leeke, supra.

Second, Applicant's claim is rejected because he failed to establish Gadson's psychiatric report was favorable or impeaching evidence. Applicant argues that the psychiatric report "revealed serious mental health concerns and questions about Gadson's ability to recall events." {Applicant's Brief, p. 4}. This argument is not supported by the report. First, contrary to Applicant's argument, the report does not call into question

Gadson's short and long term memory. Specifically, the report found "no evidence of long or short-term memory impairment." {Applicant's 8 & 31, at p. 3}. Further, the report indicates that "[o]n the Repeatable Battery for the Assessment of Neuropsychological Status, he exhibited some mild impairment of verbal memory, but verbal learning was good." {Applicant's 8 & 31, at p. 3}. Overall, the report does not indicate that Gadson suffered from any mental illness other than cannabis dependence. Since there was no indication that Gadson suffered from any type of memory impairment that would have affected his ability to recall what occurred in this case, the report would have had no impeachment value in that regard.

#7
The report was also not material. The William S. Hall report does not indicate that Gadson suffered any memory issues as a result of his seizures. In fact, based on the details provided about the seizures, it appears that he is able to recall what occurred before his seizures (i.e. his food consumption, use of marijuana, etc.). Regardless, neither Gadson nor any other witness testified that Gadson suffered a seizure on Nursery Road at the time of the shooting. Further, no witness testified at either trial or the PCR hearing that Gadson smoked marijuana on the day of the shooting. Gadson did admit at trial that he drank alcohol all day on the day of the murder. {R. 3992-93; 4021; 4031}. Absent some actual evidence that Gadson suffered a blackout on the scene, trial counsel could not have argued Gadson suffered a blackout.

Further, the overwhelming evidence of guilt in this case clearly shows that this evidence would not have undermined the confidence in the verdicts at trial. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten

to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. Overall, even without Gadson's testimony, there was a very strong case against Applicant.

Moreover, Gadson's credibility had already been impeached by his testimony regarding his drinking. United States v. Amiel, 95 F.3d 135, 145 (2nd Cir. 1996) ("Suppressed evidence is not material when it merely furnishes an additional basis on

which to impeach a witness whose credibility has already been shown to be questionable."). In light of the fact that the limited Impeachment value of Gadson's psychiatric report and the overall strength of the case against Applicant, Applicant has failed to prove by a preponderance of the evidence that the confidence in the verdicts in this case was undermined by the nondisclosure of Gadson's psychiatric report. As a result, Applicant has failed to sustain his burden of establishing there was a Brady violation in the handling of Gadson's William S. Hall report. As a result, this claim for relief is denied.

B. Trial Counsel Was Not Ineffective In Addressing Gadson's Plea Deal and/or Any Possible Bias that May Have Resulted Therefrom

#9
JG
Applicant has asserted that trial counsel were ineffective because they failed to investigate, impeach, and introduce evidence of Gadson's plea deal and his true bias to avoid a death sentence. Applicant asserts the plea agreement threatened Gadson with a death sentence. Further, Applicant asserts the jury was left with the incorrect impression that Gadson would serve twenty years in prison under his plea agreement. Applicant's claims are denied because they are not supported by the record.

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

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

First, Applicant's allegation that Gadson expressly bargained to avoid a death sentence is not supported by the record. At no point in time did the First Circuit Solicitor's Office file a Notice of Intent to Seek Death Penalty against Gadson. Gadson testified the neither he nor his counsel were ever served with a Notice of Intent to Seek the Death Penalty at trial and at the PCR hearing. (R. 4024, PCR Tr. 121, 185).

#10
Applicant's argument relies upon the clause in paragraph 9(b) of Gadson's plea agreement which states that the State may reinstate the murder charges and seek the death penalty if Gadson did not comply with the terms of the plea agreement. Applicant's reliance upon this language in the agreement is misplaced. The language in the agreement does not constitute a Notice of Intent to Seek the Death Penalty. It merely outlines the fact that if Gadson did not tell the truth at trial, the State could reinstate the murder charge in its entirety against Gadson. There was no evidence that Gadson plea bargained to avoid the death penalty, and when Gadson pled guilty, he was not facing a death sentence. Thus, Applicant has failed to show that trial counsel was deficient.

Moreover, Applicant has failed to show prejudice. Applicant has not presented any testimony or evidence that indicated that Gadson actually believed that he was avoiding a death sentence with his plea agreement. In fact, Gadson's testimony at the PCR hearing clearly demonstrated the opposite was true. Gadson noted in his testimony that he was never threatened with the death penalty. {PCR Tr. 121}. He noted that his attorney informed him after receiving the indictments that Gadson could get life for shooting and killing someone. {PCR Tr. 209}. He did not see that as being the same as the death penalty. Id.

Moreover, even without Gadson's testimony, there was overwhelming evidence presented of Applicant's guilt, as set forth in the preceding subsection. Thus, this claim of ineffective assistance of counsel is denied.

#11
[Signature]
C. Trial Counsel Did Correct Gadson's Testimony At Trial Regarding his Twenty Year Sentence

Applicant also failed to establish trial counsel was ineffective for not correcting Gadson's testimony at trial indicating that he would serve twenty (20) years in prison. At trial, Solicitor Bailey asked Gadson if he was testifying pursuant to a plea agreement:

Q. Okay. And through Mr. Dukes, through his representation, you have entered into a plea agreement with the State of South Carolina; have you not?

A. Yes, sir.

Q. Okay. And would you tell the Court and the jury what that agreement is, your understanding of that agreement?

A. Accessory after the fact and misprision of a felony.

Q. All right, sir. And are you going to get a negotiated sentence of 20 years for that?

A. Yes, sir.

Q. Okay. And in exchange for that, dropping the murder charge and allowing you to plead to accessory after the fact of murder and misprision of a felony and receiving a 20-year sentence, have you agreed to testify truthfully in this case?

A. Yes, sir.

{R. 3981, 17-25}. During cross examination, trial counsel asked Gadson about the plea bargain he made with the State. Gadson testified that he was set to receive a fifteen (15) year sentence for accessory after the fact to murder. {R. 4023}. He was also set to receive a five (5) year sentence for misprision of a felony. {R. 4023}.

Applicant has failed to establish that trial counsel was deficient in cross examining Gadson on how much time he would actually serve in prison. First, there was no testimony that indicated that Gadson would actually serve 20 years in prison at trial. The testimony indicated only what his sentence would be.

Furthermore, Applicant fails to establish prejudice. First, there was no testimony offered at the PCR hearing that Gadson was aware at trial that he could serve substantially less than twenty years confinement under his plea agreement. See Moss v. Hofbauer, 286 F.3d 851, 864-65 (6th Cir. 2002) (speculation as to possible lines of cross-examination insufficient where no evidence presented how witness would have testified had the cross-examination been pursued); Zettlemoyer v. Fulcomer, 923 F.2d 284,298 (3rd Cir. 1991) (applicant cannot show deficiency "based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense"; rather, facts must be presented).

Second, Applicant can not show prejudice because of the overwhelming evidence of guilt, as set forth in the preceding sections. Thus, this claim for relief is denied.

D. Trial Counsel Was Not Ineffective Because It Chose Not to Attempt to Introduce Arrest Warrants and Indictments As Evidence Gadson Was the Shooter.

Applicant asserts trial counsel was ineffective for not presenting evidence to the jury that the State had asserted that Gadson was the one who shot the victim in other court proceedings. Applicant has failed to meet his burden in this regard.

First, Applicant relies upon the fact that the lead detective in the investigation, Alvin Coker, submitted a affidavit for Gadson's arrest warrant that indicated there was evidence Gadson was the shooter. The affidavit states that there was probable cause to believe that Gadson murdered Kandee Martin. {Applicant's 4}. The affidavit clearly notes that the basis for the probable cause was a statement that *Applicant himself* gave to police, blaming the crime on others:

Investigation lead Officers to interview a co-defendant (Marion Bowman Jr. (AKA: "Black" or "Jr."), who provided a written statement wherein he stated that between the incident time aforementioned, that the defendant and a co-defendant approached him while driving the victims car. The defendant and co-defendant had socks on their hands and confided in him that the defendant and co-defendant had shot and killed the victim (Kandee Martin). The defendant and codefendant then recruited Marion Bowman Jr. to assist them in moving the victims body and destroying the car and other evidence by burning them.

{Applicant's 4}. Applicant also relies upon the fact that Gadson was also indicted for murder in this case. {See Applicant's Brief at p. 9}.

At the PCR hearing, Coker credibly testified that the affidavit to the arrest warrant was based upon the information and evidence the police had at that time. {PCR Tr. 890}. That information consisted of the statement provided by Marion Bowman. As for the

murder indictment against Gadson, Coker testified that he was the sole witness presented to the grand jury in this case. {PCR Tr. 862}. He testified to the facts as he knew them. Id. Coker testified that he told the grand jury that the evidence they had at the time indicated Gadson was present when the murder occurred, but Applicant was the one who fired the fatal shot. {PCR Tr. 863-64}.

Applicant has not established that trial counsel was deficient. First, "[i]t is well settled in this jurisdiction that affidavits are inadmissible in criminal cases." State v. Alexander, 303 S.C. 408, 409, 401 S.E.2d 167, 168 (1991) (citing State v. Stewart, 288 S.C. 232, 341 S.E.2d 789 (1986); State v. Lathan, 275 S.C. 550, 273 S.E.2d 772 (1981); State v. Smith, 230 S.C. 164, 94 S.E.2d 886 (1956)). Trial counsel cannot be found deficient for not introducing inadmissible evidence. See generally Strickland, supra. Thus, to the extent that Applicant asserts that Gadson's arrest warrant should have been introduced at trial, his claim is denied.

More importantly, however, is the fact that the arrest warrant affidavit in no way indicates the State believed Gadson was the one who fired the fatal shot. All the arrest warrant affidavit shows is that early in the investigation the police thought there was probable cause to believe that Gadson may have been the shooter. Indeed, the arrest warrant was sworn out by Coker on February 17, 2001, the same day the victim's car and body were found. {Applicant's 4}.

Also, the arrest warrant affidavit was based upon the second statement provided to police by Applicant. Trial counsel provided a valid, strategic reason for not wanting any of Applicant's statements entered into evidence. He did not ask the question because he

knew the response would be that they relied upon Applicant's (obviously self-serving) statements in making the arrest. {PCR Tr. 1914}. That was not a road that he wanted to take at trial. Id. Further, Cummings pointed out that arrest warrants do not count anyway, and that they can be amended and changed. {PCR Tr. 1914}. Furthermore, indictments supersede arrest warrants. Id. Thus, this claim is denied because trial counsel was not deficient.

#15
AG
Trial counsel was also not deficient in not introducing the indictment against Gadson as evidence that the State once "believed" Gadson was the shooter. First, the indictment was not evidence that the State believed was the shooter. Under South Carolina law, "one who is present, aiding and abetting the commission of a crime is a principal, and may be convicted on an indictment charging him alone as such." State v. Cox, 258 S.C. 114, 118, 187 S.E.2d 525, 528 (1972)(internal citation omitted). Solicitor Bailey credibly and accurately testified that Gadson was charged as a principal first and could have been convicted as such under alternative theories of him either being the trigger man or him being present and abetting Applicant. {PCR Tr. 2139-40}. He also noted that their practice was to charge as principal first with the understanding that they could convict as a principal second on the theory of hand of one, hand of all. {PCR Tr. 2140}. There was no reason to specify exactly what part of the law they were relying upon because he could be convicted under any of the three theories under the indictment. {PCR Tr. 2140}. Bailey also indicated that the indictment was done that way to keep the options open in case later evidence took them in a different direction in the case. Id. Bailey also pointed out that Gadson's true billed indictment does not mean Coker told the grand jury that Gadson was

the one who shot the victim. Id. Bailey did not want to speculate as to what Coker may or may not have told the grand jury, but the only concern in the grand jury is whether there is sufficient evidence to continue prosecution under some legally valid theory. {PCR Tr. 2140-41}. Since as a legal and practical matter the language of the indictment does not mean the State believed Gadson was the actual shooter, counsel cannot be found deficient. Overall, Applicant has failed to show deficiency.

Applicant has also failed to establish prejudice. Not only was the jury informed Gadson's murder charge in this case was being reduced to accessory after the fact to murder and misprision of a felony in exchange for truthful testimony {R. 3980-81}, but there was overwhelming evidence of Applicant's guilt as set forth in the preceding subsections. Indeed, the supposed subjective "belief" of one officer or prosecutor at one time or another is not what is important and relevant in a criminal trial – what is important is what the jury believes after hearing actual evidence related to the crime itself. Since Applicant has failed to show deficiency or prejudice, this claim for relief is denied.

E. Trial Counsel was Not Ineffective in Not Presenting Alleged Evidence from Wayne Mood

Applicant asserts that trial counsel should have presented the testimony of Wayne Mood, a jailhouse informant interviewed by the State about this case. According to the notes from Solicitor Bailey's interview with Wayne Mood, Gadson told Mood and another man that both he and Bowman shot Kandee Martin. {Applicant's 68}. The notes indicate that both Bowman and Gadson told Mood a similar story. They were with Kandee Martin and were planning to rob a house. Id. Bowman gave the victim some crack. At some point in time, the victim became afraid and ran towards Bowman. They argued. Bowman

mentioned to Mood that the victim was supposedly wired. According to the statement, the initial story was Gadson shot her in the back first. The victim ran until she ran out of breath. She then begged for mercy. Shortly thereafter, Bowman shot her in the head. The note also indicates that Bowman threatened to kill Gadson if he told anyone, and it mentioned that Gadson defecated on himself. The notes also indicate that later on, Bowman and Felder went back to the scene, put the body in the trunk of the victim's car, and set the car on fire. It appears that Gadson's initial version had Bowman shooting first. However, the Wayne Mood notes also indicate that Gadson later admitted he shot the victim first.

#17
 Applicant has failed to show that trial counsel was deficient in not presenting the testimony of Wayne Mood at trial. First, Applicant did not call Wayne Mood to testify at the hearing. Thus, there is no evidence on the record as to what Wayne Mood would have said if he was called to testify at trial. See also Moss v. Hofbauer, 286 F.3d 851, 864-65 (6th Cir. 2002) (speculation as to possible lines of cross-examination insufficient where no evidence presented how witness would have testified had the cross-examination been pursued); Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3rd Cir. 1991) (applicant cannot show deficiency "based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense"; rather, facts must be presented).

Further, trial counsel gave a reasonable strategic reason for not calling Wayne Mood to testify. Cummings testified that he contacted Mood's attorney shortly after receiving the notes from Solicitor Bailey. {PCR Tr. 1366-67; see Applicant's 70}. Mood's counsel would not allow the defense to talk with Mood. Overall, in assessing the value of

Mood's potential testimony, Cummings noted that parts of what he was saying about Bowman had to do with Bowman shooting the victim in the back. {PCR Tr. 1367-68}. He did not want to put up a witness that was going to possibly implicate Applicant for any reason. {PCR Tr. 1368}. He did not even want to present testimony that would have indicated he was at the scene with Gadson with Gadson being the shooter. Id. He was concerned that presenting testimony that put Applicant at the scene could backfire. Id. Clearly, counsel's explanation for not calling Wayne Mood was reasonable trial strategy. As a result, Applicant failed to establish deficiency. Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial). 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, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

Applicant also fails to establish prejudice. First, if Mood testified in accordance with the Solicitor's notes, then the testimony would not have been exculpatory. The notes clearly detail that Bowman admitted to Mood he was the one who shot Kandee Martin in the head after she begged for her life. The forensic pathologist who testified at trial indicated that both the head wound and the wound to the back were fatal wounds. {R. 3945, 3949}.

Second, there was overwhelming evidence of Applicant's guilt, as set forth in Section I, *supra*. This claim for relief is denied.

F. Trial Counsel Was Not Ineffective In Handling Evidence that Gadson Had Access To Applicant's Gun.

#19
AV
Applicant also asserts trial counsel was ineffective for not presenting evidence that Gadson had fired the murder weapon two weeks prior to the victim's murder. According to the police statement given by Tlara Coleman, she and Gadson were walking around the Villas when Coleman got into an argument with someone else. {Applicant's 30}. Applicant gave Gadson a gun, which he shot into the air. *Id.* The casings from that shooting were recovered by another resident in the Villas, Margaret Hawkins. {Applicant's 29}. Those casings were fired by the same gun that killed the victim. {R. 4315}. At the PCR hearing, Gadson corroborated the sequence of events contained in Coleman's statements. {PCR Tr. 161-62}. He noted that Bowman let him borrow the gun for that shooting. {PCR Tr. 195-96}.

Q Which .380 were you firing at the Villas that they were asking about?

A The one Marlon bought from the dude in Orangeburg.

Q That was Marion's gun?

A Uh-huh.

Q He let you borrow it?

A It was a dude standing in front of the apartments talking as if he had a knife, he handed me the gun, I started shooting it.

Q Marion Bowman was there?

A Yes, he was there.

{PCR Tr. 195}.

Cummings testified that he did not want the information about the shooting at the Villas in evidence. {PCR Tr. 1704}. He noted that while Coleman and Hawkins could testify Gadson had fired the gun, they also indicated that Bowman handed him the gun immediately beforehand. {PCR Tr. 1705}.

Trial counsel was not deficient in not presenting this information that Gadson had access to the gun, as such testimony would have clearly indicated that the only reason he had access to the gun was because Applicant had it concealed on his person and just handed it to Gadson. Any cross-examination questions on this issue would have had minimal benefit to Applicant.

#30
Further, Applicant did not establish that he was prejudiced by trial counsel's decision not to introduce evidence of the shooting at the Villas, given the overwhelming evidence as set forth in Section I, *supra*, and the minimal benefit this evidence could have had. This claim of ineffective assistance is denied.

G. Trial Counsel was Not Ineffective with Regard to Gadson's ownership of a .380 Handgun.

Applicant also asserts trial counsel was ineffective for not pointing out that Gadson had lied about owning a .380 High Point firearm. In essence, Applicant asserts that the jury was led to believe that only Bowman owned a weapon that would produce the characteristics consistent with the casings linked to Martin's death.

Applicant's claim lacks merit. First, Applicant did not establish deficiency. At trial, Cummings asked Gadson if he owned a high powered .380 pistol. {R. 4026}. Over the State's objection, Gadson was allowed to answer. {R. 4027-31}. He admitted that he had

purchased a .380 pistol in July 2000, and the pistol he purchased was the same color as Applicant's. {R. 4031}. Clearly, the jury was made aware that Gadson also had a weapon of the same caliber as the one used in the murder.

Applicant also failed to show prejudice. As already noted, the jury was informed of the fact that Gadson owned a .380. Further, there was no evidence that Gadson's gun was connected in any way to the murder. Gadson had legally purchased his gun, and although he claimed it had since been stolen, the gun Gadson bought a different serial number from the gun found in the river which was matched to the murder scene. {PCR Tr. 195-96; 338; 991-1003; 1919-21}. Finally, there was overwhelming evidence of Applicant's guilt, as set forth in Section I, *supra*. This ground for relief is denied..

II. Travis Felder

A. The Prosecution Did Not Fail to Correct False Testimony in Regards to Felder Purchasing the Gasoline.

#21
Applicant's first claim involving Travis Felder alleges the State failed to correct false testimony when Felder omitted the fact that he was the one who purchased the gasoline that was used to burn the victim's car. During the guilt phase of trial, Felder testified that after leaving the apartments in Branchville, he followed Applicant down McElhaney Road to Nursery Road. {R. 4092-94}. However, during the sentencing phase, Felder was recalled to the stand by Applicant. During his second stint on the stand, Felder testified that he was the one who purchased the gasoline used to burn the victim's car on February 17. {R. 4915-16}. He testified that Applicant gave him a gas jug and asked that he purchase gasoline to assist him in "parking a car." {R. 4916, 4922}. Felder also indicated

that he understood he was supposed to tell the truth the first time he was on the stand, but he omitted that part of the truth. {R. 4926}.

A state "denies a defendant due process by knowingly offering or failing to correct false testimony." Basden v. Lee, 290 F.3d 602, 614 (4th Cir.2002) (citing Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)). Furthermore, "[a] Napue claim requires a showing of the falsity and materiality of testimony." Id. False testimony is "material" when " 'there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' " Boyd v. French, 147 F.3d 319, 329-30 (4th Cir.1998) (quoting Kyles v. Whitley, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)).

First, Applicant failed to establish that the State knowingly offered false testimony.

#23
At the PCR hearing, Solicitor Walter Bailey testified that he did not know that Felder was the one who purchased the gasoline. {PCR Tr. 2037}. He testified that he never specifically asked Felder any questions about purchasing gasoline, and none of the versions of the facts provided to him by Felder included Felder's purchase of the gasoline. Id. Bailey noted that Felder had omitted that fact in both meetings he had with Felder and his attorney and in the proffer letter that was submitted by Felder's attorney. {PCR Tr. 2040}. Bailey recalled that he first heard that Felder was the one who purchased the gasoline from trial counsel Cummings. {PCR Tr. 2037}. Bailey reiterated several times that he never knew that Felder was the one who purchased the gasoline. {PCR Tr. 2047}. He could not correct the omission because he did not know there was an omission. {PCR Tr. 2047-48}.

At the PCR hearing, Felder testified that he could not remember if he told Bailey he was the one who bought the gasoline. {PCR Tr. 706, 711}. He did agree that he said he told Bailey when he was deposed for these proceedings. {PCR Tr. 671}. However, he also noted that he could not say for sure that he told Solicitor Bailey. {PCR Tr. 714}. Overall, Felder testified that he did not have a specific memory of telling Bailey that he was the one who purchased the gasoline. {PCR Tr. 729}.

#23
JY
Without specific information from Felder, the State could not know for certain that Felder was the one who purchased the gasoline used in the arson. There was no mention of Felder being the one who purchased the gasoline in the proffer letter sent to Solicitor Bailey by Felder's counsel. {See Applicant's 64}. Also, Felder's role as the one who purchased the gasoline was not an issue he was questioned about during his polygraph. {See Applicant's 15}. It is also not mentioned in Solicitor's Bailey's outline for Felder's testimony. {Applicant's 82}. In light of the fact that neither Felder nor Bailey could recall Felder telling Bailey he was the one who purchased the gasoline, Applicant has failed to show by a preponderance of the evidence that Bailey knowingly presented false testimony in allowing Felder to omit the fact he was the one who purchased the gasoline. As a result, this claim for relief is denied.

Second, Applicant failed to show materiality. As already noted, false testimony is "material" when "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Boyd v. French, 147 F.3d 319, 329-30 (4th Cir.1998) (quoting Kyles v. Whitley, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). Here, there is no reasonable likelihood that Felder's omission could have affected the

judgment of the jury. First, the omitted testimony did not indicate that Applicant was any less guilty of the crimes for which he was convicted. In fact, the omitted testimony further confirms that Applicant was guilty in the arson. At trial, Felder testified that he purchased the gasoline at Applicant's request. {R. 4922-24}. He further testified that Applicant was the one who provided the jug that was used. {R. 4922}. Felder confirmed that he purchased the gasoline at Applicant's request at the PCR hearing. {PCR Tr. 699-700}. Felder consistently maintained that he thought the gasoline was needed so that Bowman could go "park a car." {PCR Tr. 699-700; R. 4092}. Applicant offers no other probative evidence to show that Felder knew Bowman was going to burn the car.

Furthermore, no other witness testified that Felder assisted in the planning or participated in the burning of the car. In fact, at least two witnesses confirm that Felder was at a friend's apartment when Bowman came to him about the issue. Carolyn Brown testified that Applicant stopped by Boloma Smith's apartment and asked Felder for a ride home. {R. 3711, 4045}. Boloma Smith similarly testified that Applicant stopped by her apartment and asked Felder to come out and speak with him. {R. 4117}. She also noted that Felder left, and he came back later. {R. 4117-18}.

Even without Felder's testimony, there was overwhelming evidence of Applicant's guilt in this case. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode

with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. In light of the overwhelming evidence of Applicant's guilt, it is highly unlikely that the testimony was material. The claim is denied.

B. The State Did Not Fail to Correct Felder Regarding How Many Times He Met with the State in Preparation for His Testimony at Trial

#25
 Applicant next contends that the State did not correct Felder's testimony as to the number of times he spoke with someone from the State. This claim is denied as it is not supported by the record. Solicitor Bailey properly corrected Felder's testimony in response to the question that was asked at trial.

At issue is the following exchange between trial counsel Cummings and Felder:

Q. Mr. Felder, it wasn't until last week, and I want to go back over it again, how many times have you met with anybody representing the State to go over your testimony today?

A. Excuse me?

Q. How many times have you met with anybody to go over your testimony today

A. Once.

Q. -- with the State? One time.

{R. 4109}. Clearly, the questions asked at trial pertained only to how many times Felder talked with someone from the State about *his testimony at trial*.

During redirect, Solicitor Bailey clearly corrected Felder's testimony as to the total number of meetings he had with Felder.

Q. Travis, we met in your lawyer's office a couple weeks ago, right?

A. Yes.

Q. And this morning we also talked, is that correct?

A. Yes.

Q. So you've actually talked to me two times?

A. Yes, sir.

#26
JEF
{R. 4110}.

Contrary to Applicant's assertions, there were no other meetings between representatives of the State with Felder regarding his testimony at trial. The other interactions that Felder had with state officials regarding preparation of actual testimony for trial. The first three meetings cited by Applicant were clearly interactions Felder had with law enforcement as they investigated the case. The first was when he was initially questioned by police. The second occurred when he was arrested. The third meeting occurred when Felder was polygraphed. Only in the last two meetings between Felder and Bailey did he actually discuss his testimony at trial. Thus, Bailey did properly correct Felder's testimony regarding how many times he met with a representative of the State

regarding his testimony. As a result, Applicant's claim is not supported by the record and is denied.

Regardless, given the other strong evidence in the case detailed before and the jury was apprised the State had met with Felder and that Felder had a plea agreement, Applicant has not established materiality.

C. The Prosecution Did Not Commit Any Brady Violations with Evidence Relating to Travis Felder

Applicant next asserts that the State failed to provide the defense with Brady information regarding Travis Felder. As will be seen, each one of these contentions is denied.

1. The State Did Properly Disclose Evidence that Felder Purchased Gasoline on the Morning of the Arson.

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[Signature]
Applicant asserts that the State failed to provide trial counsel with evidence that Felder was the one who purchased the gasoline. This Brady claim is without merit. Applicant has failed to establish that the State suppressed any evidence identifying Felder as one who purchased gasoline from the EZ Horizon convenience store on the morning of the arson. Also, Applicant fails to show that evidence Felder purchased the gasoline was favorable to Applicant's case. Furthermore, Applicant does not establish that the fact Felder purchased gasoline on the morning of the arson was material to Applicant's case. Overall, Applicant does not prove by a preponderance of the evidence that the State violated Brady by not providing the defense with evidence Felder purchased the gasoline used in the arson. As a result, this claim is denied.

First, as already noted in Section II, A, it is not clear that the State had evidence that Felder purchased the gasoline used to burn the victim's car. At the PCR hearing, Solicitor Bailey consistently testified that he was not aware that Felder was the one who purchased the gasoline. {PCR Tr. 2037, 2047-48}. While Felder testified at the PCR hearing that he did say he told Solicitor Bailey he purchased the gasoline at his deposition, Felder indicated at the hearing that he did not have a specific memory of whether or not he did tell Bailey. {See PCR Tr. 729}. He was unable to confirm about telling Bailey because he simply could not remember. {PCR Tr. 706, 714, 729}.

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Next, while the State had circumstantial evidence that it was Felder who purchased the small amount of gasoline from the EZ Horizon convenience store, they did not have any evidence indicating that the gasoline purchased by Felder was the gasoline used in the arson until Felder testified to as much during the penalty phase at trial. The proffer letter that was sent to Bailey did not include any discussion about Felder purchasing gasoline. {Applicant's 64}. Felder's polygraph report indicates Felder did not mention anything about purchasing the gasoline. {Applicant's 15}. Most telling, however, is the fact that Solicitor's Bailey's notes created in preparation for Felder's testimony also include no mention of Felder purchasing the gasoline. Clearly, the State would have had no reason not to present such testimony. Based on Felder's testimony during the penalty phase and at the PCR hearing, it would have assisted the State's case because Felder clearly testified that he purchased the gasoline on Applicant's instruction. {R. 4922-24; PCR Tr. 699-700}. None of the evidence presented at the PCR hearing indicated the State had evidence connecting the gasoline purchased by Felder to the arson.

indicated they knew who purchased the accelerant used in the arson and from where it was purchased.

Indeed, Cummings testified that while they could not tell if Felder was on the tape, *Applicant informed him that Felder was on the tape at 3:14 a.m. purchasing the gasoline.* {PCR Tr. 1287}. Cummings did not want Felder testifying about the fact that he purchased the gasoline because of the implication of Applicant's involvement in the planning of the arson. {PCR Tr. 1289-90}. Defense counsel had the tape and was aware of the evidence.

Second, Applicant has failed to show that any evidence that Felder purchased the gasoline was favorable. Felder testified that he purchased the gasoline at Applicant's request. {R. 4922-24, PCR Tr. 699-700}. According to Felder's testimony at trial, Applicant provided the container used to hold the gasoline. {R. 4916, 4922}. He has consistently testified that when he purchased the gasoline, he thought he was doing so to assist Applicant "park a car." {R. 4916-4924; PCR Tr. 699-700}. At best, the information could have had very limited impeachment value.

Third, Applicant has failed to show that Felder's purchasing the gasoline used to burn the car was material evidence. There was overwhelming evidence of Applicant's guilt, as detailed before in previous sections, and whether Felder was the one who actually made the purchase of the gas to later burn the car does not rise to the level of materiality. {R. 3711, 4117-18; 4045}. This claim is denied.

2. The State Did Not Violate Brady When It Did Not Disclose the Proffer Letter from Felder's Attorney.

Applicant has failed to establish by a preponderance of the evidence that the State did not properly provide the defense with a proffer letter from Felder's attorney.

Solicitor Bailey testified that he received a letter from Felder's counsel during their negotiations regarding a possible plea agreement. **{See PCR Tr. 2109}**. The letter contained a proffer of what Felder could testify to if called upon at trial. **{PCR Tr. 2109, Applicant's 64}**. The letter indicated that Felder had seen Applicant, Gadson, Williams, and Johnson at the Allen Murray Club that night. **{Applicant's 64}**. The letter indicated Felder went to his girlfriend's apartment after returning from the Allen Murray Club. Id. About fifteen minutes later, Applicant stopped by and asked Felder for some assistance in parking a car. Id. According to the letter, Felder then followed Bowman down McAlhaney Road. Id. The letter noted that Bowman pulled up into a field, got out, and then the car was on fire. Id. Felder did not recognize the car; instead, according to the letter, he assumed it was one of Bowman's sister's car. Id. Bailey testified that he did not necessarily believe the contents of the proffer letter. **{PCR Tr. 2109}**. As a result, he had Felder take a polygraph examination to verify the veracity of Felder's statements. Id. Bailey testified that to the best of his recollection, he forwarded a copy of the proffer letter to defense counsel. **{PCR Tr. 2110}**. He also forwarded the results of the polygraph report to defense counsel after it was completed. **{PCR Tr. 2110, Respondent's 36}**. At the PCR hearing, Norb Cummings testified that he did not recall receiving a copy the proffer letter sent by Felder's attorney to Solicitor Bailey. **{PCR Tr. 1319}**. Cummings did recall that a few days before trial he got a phone call from the solicitor's office informing him Felder was going to testify. **{PCR Tr. 1294}**. He also recalled that he received a letter or fax that confirmed Felder was going to cooperate with the state. **{PCR Tr. 1294}**.

Applicant has failed to establish that the State violated Brady by not providing the defense with a copy of the letter. First, this Court credits Solicitor Bailey's testimony that the proffer letter was sent to the defense. Suppression has not been established.

Next, Applicant has failed to establish by a preponderance of the evidence that the proffer letter was favorable to Applicant. The letter offers no exculpatory evidence for Applicant's case. Outside of the testimony regarding seeing the body in the car, it was consistent with Felder's testimony at trial during the guilt phase. More importantly, the evidence could not be used for impeachment purposes. It was not a statement made by Felder. It was simply a reflection of what Felder's attorney provided the solicitor's office as it opened negotiations for a plea agreement.

#32
Third, Applicant fails to show the proffer letter was material. Any minor differences in the proffer letter and the trial testimony do not overcome the overwhelming evidence of Applicant's guilt presented in this case, as set forth in prior subsections. The claim is denied.

3. There Was No "Wink Wink" Deal Between the State and Felder

Applicant contends there was an undisclosed "wink wink" deal for Felder's testimony. This Court finds there was no "wink wink" deal between the State and Felder, and thus the State could not have violated Brady in this regard.

Applicant's complaint derives from the fact that Felder received the benefit of his signed plea agreement with the State even though he omitted the fact he purchased the gasoline during his guilt phase testimony. At the PCR hearing, Solicitor Bailey testified that he was surprised to learn that Felder had purchased the gasoline used in the burning of

the victim's car. {PCR Tr. 2040}. The State and Felder reached a verbal agreement for Felder's testimony shortly before trial. {PCR Tr. 1295, Applicant's 14}. When Felder initially testified, Bailey noted they only had a verbal agreement. {PCR Tr. 2045}. The written agreement had been drafted and sent to Felder's attorney. Id. However, when Felder testified during the guilt phase, Bailey had not received the signed copy of the agreement from Felder's attorney. Id. The plea agreement was signed when Felder returned to testify during the penalty phase of trial. {PCR Tr. 2128}. Bailey noted that the verbal agreement would not have contained all of the specific terms that were included in the written agreement. {PCR Tr. 2043}.

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Bailey explained that the plea agreement with Felder provided the State with the option to void the agreement. {PCR Tr. 2042-43}. He ultimately decided not to void the agreement because he felt that it was not worth it as far as utilizing court time and for whatever marginal benefit the State might have received with an increased sentence. {PCR Tr. 2126-27}. Further, Bailey indicated it may have been difficult to void the agreement because Felder did not tell an outright lie. {PCR Tr. 2044}. Bailey noted that neither he nor Cummings asked any questions that would have specifically elicited the testimony regarding Felder's purchase of the gasoline. {PCR Tr. 2044}. Ultimately, Felder did tell the jury of his involvement in purchasing the gasoline. {PCR Tr. 2127}. While Bailey wished that information would have come out the first time Felder testified, there was not much that he could do about it. {PCR Tr. 2127}.

To the extent that Applicant relies upon the fact that the State did not disclose the fact that Felder had lied in his attempt to garner the plea agreement, that claim is not

supported by the record. Bailey provided trial counsel with Felder's polygraph report by letter dated April 24, 2002. **{Respondent's 33, 44}**. On May 10, 2002, Bailey informed trial counsel that the State had reached an agreement with Bailey for his testimony. **{Res. Ex. 32}**. Clearly, Applicant was on notice that Felder was receiving a plea agreement despite the fact he had lied to the State at some point in time. **{See PCR Tr. 2144-46}**.

Overall, this Court credits Bailey's testimony and specifically finds that Applicant has not established the existence of a "wink wink" deal between Felder and the State. Since Applicant prove such a deal, his Brady claim for relief is denied.

D. Trial Counsel Was Not Ineffective for not Presenting Evidence of Felder's Original Arrest/Charge

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In this claim, Applicant asserts trial counsel was ineffective for not exposing the fact that Felder was initially arrested and charged with Accessory to Murder/Arson and Arson, Third Degree. According to the arrest warrant affidavit, the evidence utilized to establish probable cause for the charges consisted of a statement provided by Applicant. **{Applicant's 17 & 18}**. According to Applicant's statement, Gadson and Felder were the ones who shot the victim and burned the car. **{See Applicant's 17 & 18}**. After he was arrested, Felder did not give a statement to police. Instead, he invoked his right to counsel. **{See Applicant's 16}**. During June 2001, Felder was indicted for Third Degree Arson and Accessory After the Fact to the murder. **{Applicant's 43, 44}**. By all accounts, Felder did not have any contact with law enforcement or the solicitor's office until his attorney contacted the solicitor's office about a plea in March 2002. **{See Applicant's 64, PCR Tr. 2107-2110}**.

Applicant argues that trial counsel was ineffective for not pointing out that Felder was once charged with accessory before the fact to the murder and that the State could have sought the death penalty for such a charge. First, it should be pointed out that the South Carolina Supreme Court has held that one indicted for accessory before the fact *cannot* be eligible for the death penalty. State v. Bixby, 373 S.C. 74, 644 S.E.2d 54 (2007). Even though this decision came out after Applicant's trial, it was merely interpreting statutes on the books when Applicant was tried. This Court cannot assume that had the issue been raised to Applicant's trial judge he would have gotten it wrong.¹ Since the death penalty would not have been on the table, counsel cannot have been deficient nor Petitioner prejudiced for not cross-examining on it.

#35
 Regardless, there is no evidence that supports the implication that the accessory before the fact to the murder charge was "reduced" to accessory after the fact as a result of Felder's cooperation. In fact, the evidence clearly points to the contrary. The charge was reduced to Accessory After the Fact when Felder was indicted in June 2001. At that point, Felder had not given any statement to law enforcement other than his initial denial of all involvement. Thus, since there was no basis to imply that Felder's cooperation at trial was to avoid being charged with accessory before the fact, counsel could not have made the inference. It was accurately brought out to the jury, however, that Felder's charges were reduced to a single accessory to Arson 3rd based on his cooperation. {R. 4085-86; 4108-09}. There was no deficiency.

¹ Strickland is clear that the Court must "presume . . . that the judge or jury acted according to law", and "and assessment of the likelihood of result must exclude the possibility of arbitrariness, whimsy, caprice, nullification, or the like". 466 U.S. at 695. "A defendant has not entitlement to the luck of a lawless decisionmaker." Id.

Additionally, counsel expressed a valid strategic reason for not getting into the initial charges from Felder. Cummings testified that it was his understanding that Felder was initially charged based upon a statement given to police by Applicant. {PCR Tr. 1971}. Counsel noted on several occasions that he did not want any of Applicant's statements to come into evidence. {PCR Tr. 1827-29; 1834-37; 1908-14; 2004-05}. Obviously, questioning along this line could elicit that the charge was based on Applicant's attempt to deflect blame by implicating others.

Second, trial counsel did attempt to elicit testimony from Felder regarding how much time he was facing under his plea agreement. Counsel asked Felder "[h]ave you been told a possible sentence?" {R. 4108}. Felder responded, "[n]o sir." Id. Counsel did attempt to show bias in this regard, and thus counsel cannot be deficient.

#36
As to claims that counsel should have somehow raised that fact that the State had "a long-held belief" that Gadson and Felder were the ones who killed the victim and burned the car, the claim is without merit. Applicant's position relies solely upon the arrest warrant affidavits, which of course refer only to probable cause. However, this probable cause was based solely in the fact of the statement from Applicant trying to deflect blame to other people. It was very early in the investigation. Cummings testified that he did not want any of Applicant's statements admitted into evidence, and he was surprised that the State did not present those statements. Obviously, there was little to be gained from such an examination, and this strategic decision was reasonable.

Finally, Applicant fails to establish prejudice, given the overwhelming evidence as set forth in the prior subsections, the extent of cross-examination and impeaching

information otherwise elicited at trial, and the minimal value and potentially harmful character of the initial charges given that the jury could conclude they stem from Applicant's attempt to blame others for his crimes. This claim for relief is denied.

E. Trial Counsel was not ineffective in Not Presenting Evidence Felder Was the One Who Purchased the Gasoline During the Guilt Phase at Trial.

Applicant fails to establish trial counsel was ineffective in not presenting evidence that Felder purchased the gasoline. Counsel elicited a valid and reasonable strategic reason explaining why he did not ask Felder about purchasing the gasoline. Further, Applicant has failed to show that there was a reasonable probability that the outcome at trial would have been different had counsel presented evidence and testimony that Felder purchased the gasoline during the guilt phase.

#37
As noted in response to Applicant's argument that the State failed to provide Applicant with information regarding Felder's purchase of the gasoline, trial counsel knew Felder had purchased the gasoline. At the PCR hearing, Cummings testified that he did not want the video of Felder purchasing the gasoline coming into evidence. {PCR Tr. 1276}. While he did not know why the State had not entered the video into evidence, he did not want it in because he felt it would corroborate Applicant's involvement in the plan to burn the car. {PCR Tr. 1276}. Cummings also testified that the entry of the video into evidence during the sentencing phase was done at Applicant's insistence and was not in line with his strategy. {See PCR Tr. 1290}.² This fear was well placed, as illustrated by Felder's testimony during the sentencing phase. Felder testified that he purchased the

² This testimony was also confirmed during Cummings' cross examination and is supported by the trial record. {PCR Tr. 1290-91, see R. 4911-26}.

gasoline after being instructed to do so by Applicant. {R. 4916-24}. He also testified that Applicant provided the gas jug to be used in the purchase. Id. Clearly, trial counsel articulated a valid, reasonable strategic reason for not presenting the evidence of Felder purchasing the gasoline. As a result, this claim is denied.

Applicant has also failed to establish prejudice. First, Applicant presents no evidence to support its contention that Felder's omission that he was the one who purchased the gasoline indicated he was involved in the murder of Kandee Martin. Second, Felder's testimony regarding the omission during the sentencing phase and during the PCR hearing clearly shows that cross-examination on this issue during the guilt phase would have done nothing to exculpate Bowman from being a participant in the arson. To the contrary, Felder's testimony clearly indicated that Bowman directed the arson to cover his crime. Third, as noted before, there was overwhelming evidence of Applicant's guilt in both the murder and the arson. Given this overwhelming evidence and the potentially harmful inferences from the gasoline evidence, the prejudice standard is simply not met.

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F. Trial counsel Was Not Ineffective for not Filing a Rule 29 Motion for a New Trial; Counsel Was Aware that Felder Was the One Who Purchased the Gasoline at Trial

Applicant asserts trial counsel was ineffective for failing to file a Rule 29(b) Motion for a New Trial because once Felder testified was the one who purchased the gasoline after the guilt phase was complete.

This claim is denied. Indeed, Applicant in fact filed a motion for a new trial in General Sessions Court on September 8, 2008, which Judge Goodstein denied by Order filed January 21, 2010. Specifically, Judge Goodstein ruled that the defense was well

aware of Felder's actions at the time of trial and thus the evidence was not "new" under the test for after-discovered evidence.

Such a finding has support in the record. Cummings testified at PCR that the defense received a copy of the video surveillance from the EZ Horizon convenience store. {PCR Tr. 1933-34; Respondent's 34}. It is also clear from the testimony of Cummings that Defendant was well aware that Felder was the one who purchased the gasoline. {PCR Tr. 1274-76; 1287-88}. Cummings testified it was Defendant who informed him that Felder purchased the gasoline. Id. At the PCR hearing, Cummings testified that he strategically did not want the video of Felder purchasing the gasoline coming into evidence. {PCR Tr. 1276}. Cummings stated did not want it in because he felt it would corroborate Defendant's involvement in the plan to burn the car. {PCR Tr. 1276}. Cummings added that the entry of the video into evidence during the sentencing phase was done at Defendant's insistence and was not in line with counsel's strategy. {See PCR Tr. 1290}.³ Counsel's fear was well placed, as illustrated by Felder's testimony during the sentencing phase, which did nothing to exculpate Defendant other than by the impeaching nature of its inconsistency on one point.

This Court agrees that trial counsel was aware at the time of trial that Felder purchased the gasoline and that counsel made a reasonable strategic decision not to present the evidence during the guilt phase. As such, counsel would not have had a factual basis for a motion for a new trial based upon newly discovered evidence. The claim is denied.

³ This testimony was also confirmed during Cummings' cross examination and is supported by the trial record. {PCR Tr. 1290-91, see R. 4911-26}.

III. Hiram Johnson

A. The State Did Not Violate Brady in Not Disclosing Hiram Johnson's then Pending Charges

Applicant's first Brady claim in reference to Hiram Johnson concerns Johnson's criminal charges. On May 29, 2001, Johnson was served with arrest warrants for Receiving Stolen Goods Less than \$1000, Burglary - Second Degree, and Grand Larceny. {Applicant's 48, 71}. The Receiving Stolen Goods Less than \$1000 charge stemmed from an incident on November 2, 2000. {Applicant's 48}. The Burglary charge and the Grand Larceny charge resulted from an incident in Orangeburg County on September 26, 2000. {Applicant's 71}. Applicant asserts that the prosecution violated Brady because it failed to disclose these charges to trial counsel.

#40
Applicant failed to establish materiality. First, there was overwhelming evidence of Applicant's guilt presented at trial outside of Hiram Johnson's testimony. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in

the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim. {R. 4381}.

Second, the impeachment value of Johnson's pending charges was limited, particularly in view of the overwhelming evidence of guilt detailed above. There is no evidence Johnson actually got any special consideration for his charges due to testimony, and the charges were completely unrelated to the murder of Kandee Martin. Moreover, Johnson was impeached on whether he could remember what occurred as a result of his head injury, and on the fact that his head injury occurred after he was shot by a police officer. {R. 4071}. In light of the overwhelming evidence of Applicant's guilt in this case, coupled with the limited impact of an impeachment on the suppressed charges, Applicant has failed to establish this Brady claim. It is denied.

B. There Was No "Wink Wink" Deal Between the State and Johnson

In Applicant's second Brady claim, he asserts that the prosecution failed to provide Applicant's counsel with evidence of a "wink wink" deal between the State and Hiram Johnson for his testimony.

In this claim, Applicant essentially asserts that the Solicitor's Office attempted to use Hiram Johnson's pending charges for Burglary and Grand Larceny from a September 2000 incident, and charges for Receiving Stolen Goods less than or equal to \$1000 from a

November 2, 2000, incident as leverage to obtain testimony favorable testimony from Johnson. Specifically, Applicant asserts that Solicitor Bailey used those pending charges to get Johnson to testify that Bowman admitted he killed Kandee Martin.

This Brady claim is not supported by the record. There was no testimony or evidence presented at the PCR hearing that indicated Solicitor Bailey or the police officers made a "wink wink" deal with Hiram Johnson. Detective Coker testified that he was not aware that Johnson had pending charges when he interviewed him.⁴ {PCR Tr. 927, 942}. Bailey credibly testified there was no plea agreement with Johnson: to their knowledge, there were no charges against Johnson and Johnson just agreed to testify. {PCR Tr. 2134}.

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Indeed, the progression of those charges after Bowman's trial also indicates that his cooperation with the Solicitor's office had no effect on those charges. Johnson was indicted by the Orangeburg County Grand Jury on the all three charges during the April 14, 2003 term of the Orangeburg County Court of General Sessions. {Applicant's 48, 71}. While the Burglary and Grand Larceny indictments were later not prossed because of a lack of credible evidence, those indictments remained pending for over one and one-half years before disposition. {See Applicant's 48, 71}. Resolution of Johnson's criminal charges were clearly not related to the Bowman case. {See also Respondent's 39-42}. Applicant has failed to establish there was a "wink wink" deal between the State and Hiram

⁴ Coker also testified that he did not know that Johnson later filed a lawsuit against Orangeburg County deputies until later informed by Chief Walters from the Orangeburg County Sheriff's Department. {PCR Tr. 942-43}.

Johnson. Since there was no "wink wink" deal between the two, the prosecution could not have violated Brady by not turning over details of such a deal. The claim is denied.

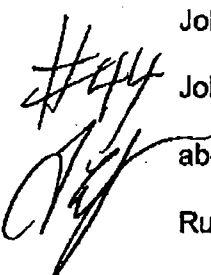
C. Trial Counsel Was Not Ineffective In Not Cross Examining Johnson on the Absence of Bowman's Alleged Confession in Johnson's Prior Statements.

Applicant argues that trial counsel was ineffective because Cummings did not cross-examine Hiram Johnson on the fact that none of Johnson's prior statements indicated Applicant had confessed to killing Kandee Martin. Applicant has failed to establish ineffectiveness in this regard.

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

At trial, Hiram Johnson testified that on the night of the murder, he went to the Allen Murray Club with Bowman, Gadson, and Darian Williams. {R. 4064}. They rode in the victim's Ford Escort. Id. Johnson testified that Applicant said he stole the car, and Bowman made them all wear gloves. {R. 4065}. At the Allen Murray Club, Johnson sat in the victim's car in the parking lot while Applicant walked around the parking lot. {R. 4066}. Johnson also testified that Applicant attempted to sell the car in the parking lot. {R.

4067}. At some point during the evening, Johnson heard Applicant admit that "I killed Kandee, heh, heh, heh." {R. 4068}. At the PCR hearing, Johnson testified that he could not remember if he told police that Bowman said he had killed Kandee Martin. {PCR Tr. 558-559}. He also noted that he thought Applicant was kidding when he said it. {PCR Tr. 560, 565}. He did not know that the victim was dead when Applicant made the statement. {PCR Tr. 565}.

 Detective Coker testified at the PCR hearing that he spoke with Johnson on two occasions. The first was on February 22, 2001 at the Branchville Police Department. {PCR Tr. 927}. According to Coker's notes, Johnson indicated he had gone to the club with Bowman, Gadson, and Darian Williams. {PCR Tr. 929}. The notes also indicated that Johnson saw Applicant with the gun in his lap while Applicant was driving, and that Johnson knew Applicant had admitted to Trina West that he killed the victim. Id. As noted above, trial counsel was provided with a copy of Detective Coker's notes as part of the Rule 5 discovery. {See PCR Tr. 1285}. Coker interviewed Johnson a second time on April 5, 2001. {PCR Tr. 929}. He testified that interview began at approximately 1:40 p.m. {PCR Tr. 929}. The interview was held at Johnson's father's fish market in Branchville. {PCR Tr. 929-30}.

Cummings testified that at trial, Johnson testified he overheard a confession from Applicant about killing Kandee Martin. {PCR Tr. 1372}. He also noted that the confession Johnson overheard was not included in his written statement from April 5, 2001. {PCR Tr. 1386}. Cummings noted that the testimony including the confession was not inconsistent with the written statement. {PCR Tr. 1386}. Cummings testified that he did not cross-

examine Johnson on the statement because he did not want to have Johnson repeat the statement during cross-examination. {PCR Tr. 1387-88}. Cummings also indicated that the first time he heard about the confession was at trial. {PCR Tr. 1387}.

#43
 Trial counsel gave a valid strategic reason for not crossing Johnson on this issue. Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial). 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, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy). Cummings indicated that he did not want to risk having Johnson repeat the statement in front of the jury. Cummings noted it was the worst thing that Johnson said about Applicant at trial. {PCR Tr. 1386}. Counsel cannot be found deficient in this regard. See Moss v. Hofbauer, 286 F.3d 851, 865 (6th Cir. 2002) (reviewing court must consider potential risk that cross-examination would have led to damaging testimony being repeated).

Finally, Applicant has not established prejudice. Johnson had indicated to police that he knew Bowman had confessed to killing Kande Martin. Detective Coker noted as much in his investigative notes regarding his first interview with Hiram Johnson. {See Applicant's 47}. Thus, any impeachment would be limited, particularly in view of the

overwhelming evidence of Applicant's guilt, as detailed before. This claim for relief is denied.

D. Trial Counsel Was Not Ineffective for Not Cross-Examining Johnson on the Fact he was Not Charged with Possession of Stolen Vehicle.

Applicant also fails to establish ineffectiveness with regard to cross-examining Hiram Johnson on the fact he was not charged with possession of a stolen vehicle for riding with Applicant in Kande's car.

Applicant did not establish that trial counsel was deficient in not asking Hiram Johnson whether he knew he could potentially be charged with possession of a stolen vehicle in Applicant's case. First, there was no testimony introduced at the hearing to support a finding that Hiram Johnson was aware that he could be charged with possession of a stolen vehicle. Detective Coker testified that he did not recall having any discussions with Hiram Johnson about charging him with possession of a stolen vehicle. {PCR Tr. 937}. Coker also noted that he did not have an explanation for why Johnson was not charged with possession of a stolen vehicle. {PCR Tr. 938}. He surmised that it was likely because their focus was on getting more information about the murder and arson. Id. Solicitor Bailey recalled that Hiram Johnson was not charged with possession of a stolen vehicle. {PCR Tr. 2104}. Bailey explained that no charge was filed because there were so many other individuals in the case that had already been charged with more serious offenses. Id. Bailey asserted that he did not feel that such a charge was warranted in Johnson's case. Id. Hiram Johnson was asked if he was aware that he could have been charged with possession of a stolen vehicle in this case. {PCR Tr. 539}. Hiram Johnson

never responded to the question.⁵ {See PCR Tr. 539-46}. Since there was no evidence that Johnson was aware that he could be charged with possession of a stolen vehicle, Applicant has failed to show that such a method of impeachment would have been successful at trial. As a result, Applicant has failed to establish that trial counsel was deficient in not questioning Johnson in this regard.

Applicant also fails to establish prejudice given the minimal value of any impeachment and the overwhelming evidence of guilt as detailed before. The claim is denied.

IV. Ricky Davis

A. The Prosecution Did Not Violate Brady in Not Disclosing the "Sam Memo"

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Applicant asserts that the prosecution violated Brady v. Maryland, 373 U.S. 83 (1963), by not providing Applicant with a copy of typed notes apparently drafted by Sam Richardson, an investigator for the First Circuit Solicitor's Office. The so-called "Sam Memo" appears to reflect the contents of an interview that Richardson conducted with Ricky Davis at Lieber Correctional Institution. {Applicant's 67; see Applicant's 11}.

At the PCR hearing, Solicitor Bailey testified that he was familiar with the Sam Memo. {PCR Tr. 2021}. He confirmed that it was prepared by Sam Richardson and noted that from the context of the notes, it appeared that it was prepared late in the proceedings.

⁵ The State objected to the question, and the court asked Applicant's counsel how the question was relevant. (PCR Tr. 539). After the discussion about the specific question regarding a potential charge of possession of a stolen vehicle, the objection argument moved on to whether Applicant's counsel was aware of the claim involving Johnson's other pending charges before they filed the third amended application. (PCR Tr. 544-550). At no point did counsel ever return to the question of whether Johnson knew he could be charged with possession of a stolen vehicle.

Id. Bailey did not recall seeing anything in his file that indicated he sent the Sam Memo to defense counsel. {PCR Tr. 2130}. He also testified that he considered the Sam Memo to be work product. Id. Typically, he did almost all of his own work in preparation for a death penalty trial except for typing his handwritten notes. Id. Ordinarily, he would have interviewed Ricky Davis personally. Id. However, he delegated the task of interviewing Davis to Sam Richardson because it was getting close to trial and so much other stuff was going on at that time. Id. Since Richardson interviewed Ricky Davis on Bailey's behalf in preparation for trial, Bailey considered his notes to be protected by attorney-client privilege. Id. More importantly, Bailey testified that he did not think the Sam Memo was inconsistent with the handwritten Ricky Davis statement. {PCR Tr. 2130-31}. Bailey noted that he would have disclosed any information that was inconsistent. {PCR Tr. 2131}. He also testified that the notes would have been in the Solicitor's file and trial counsel could have seen them in the file under the office's open file policy. Id.

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Given these facts, the claim for relief is denied. First, Applicant fails to establish suppression of favorable evidence to his case. The Supreme Court has noted that "evidence" that is inadmissible is not evidence at all, and thus cannot affect the outcome of trial. Wood v. Bartholomew, 516 U.S. 1, 6, 116 S.Ct. 7 (1995) (per curiam) (holding that inadmissible materials that are not likely to lead to the discovery of admissible exculpatory evidence are not subject to disclosure under Brady). At best, the notes could be considered evidence that could be used to impeach Ricky Davis if he testified at trial. Here, the defense was aware of Ricky Davis's handwritten note which contained the crucial fact that Ricky claimed Gadson said he shot Kandee, but the defense did not call Davis

because Davis told the defense's investigator that his handwritten statement was false and Applicant put him up to it. Counsel also stated that he would still be in the "same boat" based on his investigator's assessment of Ricky even if he had the Sam Memo.⁶ {PCR Tr. 1335-37; 1339}. Since in substance the Sam Memo did not contain anything the defense was not already provided, and the Sam Memo merely represented nothing more than the prosecution's trial preparation interview based on their possession of the handwritten statement, then there was no suppression of favorable evidence.

Second, the Sam Memo is not material. Evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (internal quotation marks omitted). Moreover, Applicant is incorrect that materiality is measured by the supposed impact the undisclosed notes on defense strategy:

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It has been argued that the standard should focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, rather than the materiality of the evidence to the issue of guilt or innocence. See Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defense, 74 Yale L.J. 136 (1964). Such a standard would be unacceptable for determining the materiality of what has been generally recognized as "Brady material" for two reasons. First, that standard would necessarily encompass incriminating evidence as well as exculpatory evidence, since knowledge of the prosecutor's entire case would always be useful in planning the defense. Second, such an approach would primarily involve an analysis of the adequacy of the notice given to the defendant by the State, and it has always been the Court's view that the notice component of due process refers to the charge rather than the evidentiary support for the charge.

⁶ Trial counsel never stated that he would have called Ricky Davis to testify had he known about the information in the Sam Memo. Cummings noted that he tried to do more investigation into Ricky Davis based on the information he had, and nothing else came up in the defense's investigation. {PCR Tr. 1901}. He also agreed that even with the Sam Memo he would still be in the same boat in deciding whether to call Ricky Davis, because the defense's investigator indicated that Ricky Davis would not testify to what was in the handwritten document, and assessed that Davis was "full of bunk". {PCR Tr. 1901-02}.

U.S. v. Agurs, 427 U.S. 97, 112 n.20, 96 S.Ct. 2392, 2401 n.20 (1976).

Here, as noted before, Ricky Davis told the defense investigator at the time of trial and testified at the PCR hearing that the handwritten statement was not true, and Bowman was the one who gave him all of the information for the handwritten note. {PCR Tr. 263-64}. Davis further professed that he did not know anything about this case. {PCR Tr. 264}. Assuming that Davis had been called, testified as he did at PCR, and then was impeached with the Sam Memo, it simply cannot be said that a reasonable probability of a different result would occur from such impeachment, especially when the defense already possessed the statement written in Davis's own hand, and could have called him and impeached him with that but decided against it. Said another way, the difference between possible impeachment with the disclosed handwritten statement in Davis's own hand, and impeachment with the Sam Memo or testimony from Sam, is not so great that it undermines confidence in the verdict under the standard for materiality. This is especially so given the overwhelming evidence of guilt, as detailed before.

Overall, Applicant has failed to establish he is entitled to relief upon this claim. As a result, this Brady claim is denied.

B. Trial Counsel was Not Ineffective in Not Presenting Ricky Davis' Testimony Regarding Tawain Gadson's Confession

Applicant alleges trial counsel was ineffective for not presenting evidence related to Gadson's alleged confession to Ricky Davis. At some point, the State was provided with a handwritten note from Ricky Davis, now an inmate in Lieber Correctional Institution for armed robbery. The statement, dated August 6, states "I Rickle Davis was on A side with Gadson and he said that he was the one that shot the girl and he gave Bowman back the

on cross-examination about it. Mr. McLean did not testify in PCR, and there has been no evidence presented that Mr. McLean could have been located at the time of trial, or that had he been located he would have testified in a manner favorable to Applicant.⁷

Indeed, given the overwhelming evidence detailed before and the lack of any detail as to what McLean heard and from whom, it cannot be said that the absence of any cross of Coker on the subject rises to the level of Strickland prejudice.

C. Trial Counsel was Not Ineffective in not Cross-Examining Detective Coker About Felder Being the One Who Purchased Gasoline

This is essentially the same claim that was raised by Applicant in Section II, particularly E and F. Thus, for the reasons stated there, this claim is denied.

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As an additional note, Applicant's assertion that presenting this evidence that Felder purchased the gasoline was exculpatory does not fit with other evidence that was presented at trial. For instance, two witnesses identified Applicant as the one who stopped by Felder's girlfriend's apartment after 3:00 a.m. {R. 4044-4045; 4117-4120}. Both also testified that Felder's girlfriend was loosening his braids when Applicant stopped by to ask for a ride. Id. Both indicated that Felder left with Applicant and returned fifteen minutes later. {R. 3712, 4120}.

⁷ See Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990) (petitioner's allegation that attorney did ineffective investigation does not support relief absent proffer of the supposed witness's favorable testimony); Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) (state's failure to object at PCR to hearsay testimony as to what another witness's testimony might have been does not relieve PCR applicant of burden of producing admissible testimony in accordance with the rules of evidence). Indeed, it is speculative as to whom McLean would have described discussing the incident, or whether those persons had actual knowledge of the events on Nursery Road. Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3rd Cir. 1991) (applicant cannot show deficiency "based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense"; rather, facts must be presented).

D. Trial Counsel was Not Ineffective in Crossing Coker About the Sworn Statements to Other Tribunals

In this claim, Applicant essentially reasserts the same claim that was raised in Sections I, D and II, D. For the reasons stated in those sections, the claim is denied. Counsel articulated valid strategic reasons in this regard, as Applicant was the source of information for early actions in the investigation, and eliciting such evidence would be damning in that it would show Applicant's connection to the crimes as well as his attempt to cover up his involvement and blame others. Counsel also did not want to elicit evidence of Applicant's earlier statements to police after the confession was excluded and the State elected not to put in any of Applicant's statements. {PCR Tr. 1272-78; 1367-69; 1909-14}. Moreover, because of these explanations, statements made in arrest warrants based on then-existing investigatory information, and in indictments based on concepts of accomplice liability do not amount to a reasonable probability of a different result. All are easily explainable.

VI. Conflicts of Interest:

A. Applicant Failed to Establish Hardee-Thomas Operated Under An Actual Conflict of Interest As a Result of Her Former Representation of Ricky Davis and Then Active Representation of Applicant

Marva Hardee Thomas was appointed to represent Ricky Davis on April 23, 2001. {Applicant's 12}. At the time, Davis faced two charges for armed robbery. {Applicant's 12, 19, 21}. On October 16, 2001, Davis was tried by a jury and convicted of one count of armed robbery. {See Applicant's 20}. He was sentenced to twenty (20) years confinement by the Honorable Diane Goodstein, Circuit Court Judge. Id. The second indictment against Ricky Davis was nol prossed with a right to restore on October 18,

2001.⁸ **{See Respondent's 14}**. Marva Hardee-Thomas filed a Notice of Appeal on Ricky Davis' behalf on October 24, 2001. **{Respondent's 14}**.

Marva Hardee-Thomas was appointed to represent Applicant. At the PCR hearing, Hardee-Thomas testified that she did not recall receiving the handwritten note written by Ricky Davis. **{PCR Tr. 1564}**. She did identify the notary block as being in her handwriting. **Id.** However, she did not recall seeing the statement and noted that the notary block was not witnessed by anyone. **Id.** She did not have any independent recollection of talking with Ricky Davis about the handwritten note. **{PCR Tr. 1601}**. She testified that she would not have had a discussion directly with Davis about the document. **{PCR Tr. 1602}**.

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92
Counsel was served with a copy of Ricky Davis' handwritten note on or about January 2, 2002. **{See Respondent's 36}**. At the PCR hearing, Hardee-Thomas testified that she did not know why Ricky Davis did not testify. **{PCR Tr. 1572}**. She did not have a strategic reason for not calling Ricky Davis, but noted that the decision to call Davis to the stand would be one left to the lead attorney in a death penalty case. **Id.** In Applicant's case, Cummings was the lead attorney. Hardee-Thomas guessed that Cummings made the decision to not call Ricky Davis as a witness because she did not make that decision. **{PCR Tr. 1573}**.

"The Sixth Amendment right to counsel attaches upon initiation of adversarial judicial proceedings and at all critical stages of a criminal trial." State v. Sterling, 377 S.C. 475, 479, 661 S.E.2d 99, 101 (2008). "To establish a violation of the Sixth Amendment

⁸ It appears that the victim in the second armed robbery could not be located.

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

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

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

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

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

329 S.C. 345, 355, 495 S.E.2d 768, 773 (1998). Moreover, the "Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction." Langford v. State, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993).

#61
Applicant has failed to establish that Hardee-Thomas acted under a conflict of interest in representing Applicant in this case. Hardee-Thomas' representation of Ricky Davis ended on October 24, 2001, the date she filed his Notice of Appeal with the circuit court. Rule 602(e)(3), SCACR (public defender automatically relieved after filing of Notice of Appeal to conviction). At that time, his second armed robbery charge had already been not prossed by the Solicitor's Office. {See Applicant's 22}. Thus, when counsel was presumably made aware that Davis had written a statement regarding Bowman's case on or around January 2, 2002, she did not represent Ricky Davis. At that point, she owed no duty to Ricky Davis other than to maintain his confidences from her representation of him on the two armed robbery charges. Since there was not a potential conflict of interest, Hardee-Thomas was not obligated to obtain a waiver from either Bowman or Davis.

Even if Hardee-Thomas' representation of Ricky Davis constituted a potential conflict of interest with her representation of Applicant, Applicant has failed to establish that the potential conflict developed into an actual conflict of interest. At no point were Ricky Davis' interests adverse to Applicant's interests. First, Davis' handwritten statement, if established to be true, would have benefitted Applicant because it indicated that Gadson, Applicant's co-defendant, was the one who killed Kandee Martin. Further, contrary to Applicant's assertions, there was no evidence presented in this PCR Action that indicated Ricky Davis' interests would have been at odds with Applicant's had he testified at trial. Applicant asserts that Ricky Davis would not testify because the solicitor's office could still

restore the nolle prossed charge against him as leverage. Applicant presented no evidence to show that the solicitor's office either used the nolle prossed indictment in such a fashion or that it could. Clearly, the disposition sheet on Ricky Davis' nolle prossed charge indicates that the case was dismissed because the State could not find the victim. {Applicant's 22}. There was no evidence presented at the PCR hearing that circumstances had changed, or that the solicitor's office was in a position to re-present the indictment to the grand jury. Thus, Applicant never established that Davis' interests were in a position contrary to Applicant's.

#62
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Applicant also failed to present credible evidence that Hardee-Thomas spoke to Davis about Applicant. The only person who testified that Hardee-Thomas met with Davis to talk about Applicant's case is Davis.⁹ {PCR Tr. 251}. Cummings testified that he sent Walt Mitchell to speak with Ricky Davis about Applicant. {PCR Tr. 1328}. Hardee-Thomas indicated she did not recall talking with Ricky Davis about the note and that she thought an investigator was sent out to talk to Davis about his handwritten note. {PCR Tr. 1603-04}. Further, Hardee-Thomas testified that she could not recall when she drafted the signature block she put on the handwritten note. {PCR Tr. 1601}. She noted that she likely would have received the paper from a guard at the jail. {PCR Tr. 1602}.

Overall, Applicant has failed to establish that trial counsel did not call Ricky Davis to testify as the result of an actual conflict of interest. Indeed, as noted before the credible evidence discloses a reasonable strategic decision that Davis was not a reliable witness and his testimony was likely to be damaging to Applicant's case. {PCR Tr. 1335, 1894-5,

⁹ His testimony indicates that he was not sure if she was the one from the defense team who spoke with him. {PCR Tr. 251}.

1901-02). There was no probative evidence at trial that indicated that any potential conflict of interest played a role in the decision making process. Applicant has failed to prove his claim and it is denied.

B. There was no Conflict of Interest As a Result of the Fact that Gene Dukes Represented Applicant's Co-Defendant Tawaln Gadson

#63
Applicant's second conflict of interest claim derives from the fact that Hardee-Thomas represented Applicant while the Chief Public Defender for Dorchester County represented a co-defendant. As already noted, Marva Hardee-Thomas, Esquire, a Dorchester County Public Defender, was appointed to represent Applicant. Gene Dukes, Esquire, another Dorchester County Public Defender, was appointed to represent Gadson, Applicant's co-defendant who later testified against him at trial. {Applicant's 77}. At the PCR hearing, Marva Hardee-Thomas testified that the Dorchester County Public Defender's Office was essentially a conglomeration of independent contractors. {See PCR Tr. 1535, 1548}. Gene Dukes was listed as the Chief Public Defender because he had the most seniority. {PCR Tr. 1540}. According to Hardee-Thomas, the Public Defenders did not share an office. {PCR Tr. 1541-43}. They each worked from their own separate office. {PCR Tr. 1541}. They were not full-time Public Defenders, so they each had their own separate practices. {See PCR Tr. 1535, 1550}. The public defender corporation did have one employee, Kathy Rogers, who was responsible for assigning cases. {PCR Tr. 1537}. The only common space the Dorchester County Public Defenders shared was a small conference room in the Dorchester County Courthouse in Saint George. {See PCR Tr. 1541, 1553}. Hardee-Thomas also testified that they would never have co-defendants in the conference room at the same time. {PCR tr. 1607}. They did not share personnel.

{PCR Tr. 1554}. There was no investigator for the Public Defender Corporation. Id. Instead, each public defender had to petition the Court for funds if an investigator was needed. {PCR Tr. 1554}.

Applicant has failed to establish there was an actual conflict of interest in this case. Applicant essentially argues there was a conflict of interest because both Gene Dukes and Marva Hardee-Thomas were Public Defenders. There was no evidence presented that indicated they discussed Applicant's case or any of the related cases. Further, there was no evidence presented that indicated they worked in concert in representing individual clients, or that they shared the confidences of individual clients with one another. This claim parallels a similar claim made the applicant in Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). In Jackson, the Applicant argued he was entitled to a new trial because of a conflict of interest because his co-defendant was represented by another public defender in the Richland County Public Defender's Office. Id. at 347-48, 495 S.E.2d at 769. The PCR Court found trial counsel was ineffective because he operated under a conflict of interest, among other things. Id. at 348, 495 S.E.2d at 769. On appeal, the South Carolina Supreme Court reversed.

In our opinion, respondent did not show any actual conflict of interest resulted from counsel's representation of him while others in counsel's office represented respondent's co-defendants. All respondent showed and the PCR judge found was a potential conflict of interest because counsel worked in the same office with the attorneys who represented the co-defendants. Counsel testified no conflict existed, and respondent could not point to an actual conflict. Thus, this potential conflict never ripened into an actual conflict. Nothing in the record suggests the potential conflict caused counsel to treat respondent's case in such a manner as to obtain more favorable consideration for respondent's co-defendants. Further, the fact that counsel never advised respondent of the potential conflict of interest does not affect the constitutionality of the conviction. See Langford v. State, 310 S.C. 357, 360, 426 S.E.2d 793, 794 (1993).

Id. at 354-55, 495 S.E.2d at 773. Here, as in Jackson, there was no evidence presented at the PCR hearing that an actual conflict of interest existed. As a result, this ground for relief is denied.

VII. Ineffective Assistance Regarding Evidence Admitted in Guilt Phase

Applicant next asserts counsel was ineffective in his handling of a number of items of evidence in the guilt phase.

A. Failure to move to exclude evidence of Bowman's DNA found in the victim's vagina

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). Applicant now contends his counsel was ineffective for failing to move to exclude this match from evidence.

1. There was no valid objection to this testimony.

As an initial matter, Applicant did not show either deficiency or prejudice as there was no sustainable objection that could be made to the DNA match. Regardless of Applicant's complaints that there was no testimony that Applicant and Kandee had sex out at the Nursery Road location, this evidence is undoubtedly relevant to and confirmatory of the identity of Applicant as the murderer, as it places Applicant in close presence of Kandee during the time period at issue. See Rule 401, SCRE (evidence is relevant if it would make a fact in issue more probable or less probable).

Admissibility is not affected by the fact that the DNA match might not necessarily establish the exact point when Applicant had sex with the victim, or because James

Gadson claimed he did not observe any sexual contact at the Nursery Road scene. As noted in State v. Benjamin, 345 S.C. 470, 480, 549 S.E.2d 258, 263 (2001):

All that is required is that the fact shown tends to make more or less probable some matter in issue and to bear directly or indirectly thereon. It is not required that the inference sought should necessarily follow from the fact proved. Evidence is relevant if it makes the desired inference more probable than it would be without the evidence.

(Emphasis added).

Here, the DNA match is objective scientific evidence that the victim and Applicant were in very close contact around the relevant time period of the murder, and this point alone is sufficient to make it admissible in trial – even if it only provides objective and indisputable corroboration to witness testimony that they were together at some point during the day Kandee was killed. Given the issues Applicant raised with the credibility of the fact witnesses, this indisputable scientific evidence aids a finding of identity, which was especially relevant in this case, where Applicant pled not guilty and put the State to its proof.¹⁰

Applicant contends the proof of sex is an inadmissible “bad act” pursuant to Rule 404(b), SCRE. First, though, is the point that the mere fact Applicant and Kandee had sex – which is all the semen evidence proves by itself – is not a “bad act” in the legal sense.

See Rule 404(b), SCRE. Although Applicant contends that fornication is criminal in South

¹⁰ See generally State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300, 311-12 (2001) (finding letters were relevant to show identity as murderer inasmuch as they referred to a safe and a safe was present at the murder scene, and rejecting claim that they were inadmissible because it was not established that the safe referenced in the letters was at the barbershop, where the incident referred to in the letter fit the general time frame of the barbershop killings); State v. Benjamin, 345 S.C. 470, 480, 549 S.E.2d 258, 263 (2001) (evidence defendant was willing active participant in later robbery was relevant to rebut claim of duress at earlier robbery, even though robbery being tried occurred later); State v. Daniels, 252 S.C. 591, 167 S.E.2d 621 (1969) (held evidence of a prior robbery admissible to show identity because it placed the defendant together with his alleged accomplice); State v. Varvill, 338 S.C. 335, 526 S.E.2d 248 (Ct. App. 2000) (in unlawful use of telephone prosecution, evidence defendant rode by victim's office and home was relevant to show his intent to harass her with his phone calls).

Carolina, that law is not enforced, and sex is not considered "criminal" or a "bad act" in the legal sense by modern social standards simply because it is out of wedlock.

The same goes for Applicant's contention that interracial sex between Applicant and the victim is a bad act or is unduly prejudicial. Applicant cannot assume racism on the part of the jury, which was subject to extensive *voir dire* and instructions from the judge on their ability to be fair and decide the case apart from bias or prejudice. There is no proof that the jury was racially biased in this case, and the mere fact of interracial sex does not constitute a "bad act" under contemporaneous values.

Even if adultery or interracial sex could be considered a "bad act", though, as noted before, "bad acts" under Rule 404(b) are still admissible if they show identity, which the DNA match does in this case. Thus, even if the sexual contact is a bad act, it would still be admissible. And, given that identity was the main issue in the case, it was more probative than prejudicial.¹¹

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

¹¹ See State v. Simmons, 310 S.C. 439, 427 S.E.2d 175 (1993) (where intent was contested on burglary charge, the probative value of defendant's prior attacks on elderly women outweighed the prejudicial effect); State v. Ford, 334 S.C. 444, 513 S.E.2d 385 (Ct. App. 1999) (because defendants disputed state's allegations about their motive and intent, evidence of prior robbery of victim was "highly probative"); State v. Waddle, 873 P.2d 171 (Idaho Ct. App. 1994) (where defendant denies being the perpetrator, evidence tending to establish identity is always relevant). See generally State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990) (Lyle evidence was not just admissible when "necessary", but is admissible whenever it is "relevant"); State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981) (evidence of other crimes admissible even though appellant's confession to the crimes was also admitted); State v. Green, 261 S.C. 366, 371, 200 S.E.2d 74, 77 (1973) (evidence logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused's guilt of another crime).

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).

2. Counsel had a valid strategic reason for admitting the testimony.

Even if there was a valid objection, there is no basis for relief because counsel had a valid strategic reason for admitting the intimate contact. At the PCR hearing, counsel Cummings testified that he did not elicit from Gadson that he observed no sex between Applicant and Kandee because:

[H]ere is my theory and this is what I want to show. Marion and Kandee were friends; they were intimate friends, if I can use the words. I wanted to show that this man would not hurt this little girl because he cared about her and she was an intimate friend of Mr. Bowman's.

#68
[Handwritten signature]

{PCR Tr. 1750}. Counsel stated that while he considered a Dorchester County jury to be a "small town jury", and while he was aware of concerns about adultery and interracial sex, he still wanted to show "they were intimate friends and . . . he had no ill motive or reason to kill this lady". {PCR Tr. 1752}. Counsel pointed out that since the DNA expert could not testify as to precisely when the DNA was put there, he wanted to "clean . . . up" any attempts of the State to sully the relationship, thus showing "he had no malice to this lady, had no reason to hurt her". Indeed, counsel hired his own DNA expert to verify that it could not be precisely determined when the Applicant deposited his semen into the victim. {PCR Tr. 1753-54; 1792; 1955; 1980-81}. Counsel stated he did not want to elicit that Kandee was around Applicant to get drugs, as that would obviously "dirty up" his attempt to show an intimate friendship. {PCR Tr. 1755}.

On cross by the State, counsel reiterated that he wanted to show Applicant and Kandee were friends and Applicant would not have killed her. He added that he was not

afraid of the DNA evidence because Applicant was not charged with criminal sexual conduct ("CSC") in the guilt phase, and counsel did not believe the State could prove CSC in the sentencing phase. Counsel stated that since Gadson never testified there was any sex at the scene, he saw no reason to broach the subject. {PCR Tr. 1866-67}.

Thus, counsel elicited a valid strategic reason for not objecting to the DNA evidence. He was not at all scared of it as he did not think CSC could be proven (especially since he had Applicant's statement suppressed in which Applicant talked of sexual contact with the victim's corpse), and he thought it could be used to undermine any motive to kill since Applicant and Kandee were lovers. Counsel accordingly was not deficient simply because the strategy did not work, particularly given the overwhelming evidence facing counsel in this case. See Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); 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, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

3. There was no prejudice.

In any event, there was no reasonable probability of a different result. The evidence of identity was overwhelming even if the DNA match was excluded, as set forth in preceding subsections. Moreover, as argued before, contemporary social values towards extramarital sex and interracial relationships preclude any *per se* finding of undue prejudice from those issues. Therefore, Applicant has not met his burden of showing prejudice.

Reed v. Norris, 195 F.3d 1004 (8th Cir. 1999) (failure to raise Batson issue not prejudicial under Strickland given overwhelming evidence).

B. Failure to move to exclude petroleum evidence

Applicant next asserts counsel failed to object to introduction of Applicant's pants, because the accelerant present on the pants – a "heavy" accelerant – was not the same as the substance used to ignite Kandee's car – which was gasoline, or a "medium" petroleum accelerant.

At trial, SLED chemist Grady Layton identified a medium petroleum accelerant on Kandee's pocketbook, and Layton was able to conclusively identify the presence of gasoline on the shirt, paper material, belt, and miscellaneous debris found in her car. {R.

4298-4299}. SLED Agent Helms concluded the fire was intentionally set. {R: 3889-90}.

Layton also found the presence of a heavy petroleum accelerant, but not gasoline, on Applicant's 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}.

Solicitor Bailey pointed out at PCR that the SLED arson expert had done a complete report, so he introduced testimony on all aspects of the report to avoid allowing the defense to assert or imply the State had not done a full and fair investigation. {PCR Tr. 2026; 2136}.

1. There was no valid basis for objection.

Given this evidence, as an initial matter there could be no deficiency for failure to object nor prejudice as there was no valid basis for objection. The pants themselves were undoubtedly 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. More importantly, the pants contained Kandee's watch, which was very relevant to the identity of the murderer. See Rule 401, SCRE (evidence is relevant if it would make a fact in issue more probable or less probable).

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As to the accelerant, counsel had no valid objection. It goes without saying that within reason a solicitor is certainly entitled to introduce evidence the complete investigation done by police, even if not necessarily incriminating, to avoid any defense contention that the State rushed to judgment or failed to fully investigate the case. A classic example, as this Court pointed out during argument {PCR Tr. 2249}, is calling the fingerprint expert to testify no prints were found despite investigation, in order to avoid later defense argument that the State failed to look for prints or that the lack of prints constitutes reasonable doubt. This is even more important in this post-"CSI" world, given that many jurors watch that TV show and expect such forensic evidence. See United States v. Fields, 483 F.3d 313, 355 n. 39 (5th Cir.2007) (citing an article discussing the "CSI effect" on jurors, and stating: "Some have claimed that jurors who see the high-quality forensic evidence presented on CSI raise their standards in real trials, in which actual evidence is typically more flawed and uncertain.").

As to any concern that the mention of an accelerant might confuse the jury and was substantially more prejudicial than probative under Rule 403, SCRE, no such prejudice occurred. The SLED agent was clear 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}. Counsel also elicited that Dorothy used kerosene to heat her house. {R. 4831}. And, the

solicitor in argument never mentioned the accelerant on the pants or claimed it was indicative of anything. {R. 4461; 4476}. Thus, there is no indication this evidence was unfairly prejudicial or confusing to the jury, or that the State misused it.

Since the evidence was admissible, then counsel could not have been deficient nor Applicant prejudiced as a matter of law. See Hough v. Anderson, *supra*.

2. Counsel had a valid strategic reason for admitting the testimony.

Even if there was a valid objection to the testimony, Applicant cannot establish a valid claim for relief because counsel articulated a valid strategic reason for wanting the testimony to be admitted.

At PCR, counsel Cummings testified that he tried to suppress the seizure of the jeans, but that was overruled. He noted he did get family to say they used kerosene to heat the house, and he got the expert to say the accelerant on the jeans was not gasoline. {PCR Tr. 1706-07}. Counsel stated he did not consider objecting to any evidence about the petroleum accelerant found on the pants, because the expert was going to and indeed did testify that the accelerant was not gasoline, but kerosene like that which Applicant's wife used to heat the house. Counsel stated that had the solicitor not called the SLED arson expert, counsel probably would have to elicit that only kerosene was found on Applicant's pants. Counsel felt he needed to do this to counter the fact that the victim's watch was found in his pants and witnesses were saying Applicant burned the car. {PCR Tr. 1708-09; 1711-14}.

On cross by the State, counsel noted he had his crime scene expert review the arson report. The expert advised counsel that if all the State had was that a heavy

accelerant was on the pants, that was good for the defense. Counsel strategically decided to bring out that Applicant only had kerosene and not gasoline on his pants, and felt was had successfully taken a state's witness and "made him mine". Counsel pointed out he also elicited from Applicant's wife Dorothy that they used kerosene at home, and of course Dorothy's home is where the pants were found. {R. 4831; PCR Tr. 1845-46; 1854-55}.

Thus, counsel had a valid reason for allowing the evidence – it allowed him to use a State's expert to establish that nothing on Applicant's clothes forensically linked him with the crime, even though the State asserted those were the pants Applicant was wearing when he killed Kandee. Counsel accordingly was not deficient simply because the strategy did not work, particularly given the overwhelming evidence facing counsel in this case. See Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, trial tactics are not ineffective because they were unsuccessful).

3. There was no prejudice.

In any event, there was no reasonable probability of a different result. The evidence of identity was overwhelming, as previously detailed before in this Order. Moreover, the evidence introduced at trial was clear that the accelerant on the pants did not match the accelerant used to burn the car, and the solicitor in argument never contended otherwise. Given these circumstances, it could not possibly have been so prejudicial to create a reasonable probability of a different result. Applicant has not met his burden of showing prejudice. Reed v. Norris, *supra*. The issue is denied.

C. Failure to object to evidence of conspiracy to secrete Applicant's gun and examination on plea agreements

Applicant contends his counsel was ineffective for failing to object to evidence his relatives were engaging in a conspiracy to "secrete" the murder weapon, by arguing there is no evidence of such a conspiracy or Applicant's connection to it. He also asserts counsel was ineffective in failing to object to the solicitor's examination on plea agreements Applicant's family had with the State.

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 testified at trial with plea agreements to accessory to the fact of murder. {R. 3735-36; 4161; 4167-68}. Dorothy testified that a few days after the murder Hiram Johnson told her the gun was hidden in the sleeper sofa at her trailer. She found the pistol hidden in a "cuff" or "sleeve" of the couch, put it in her pocketbook, and went over to see Kendra at Applicant's grandmother's house. {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, a police diver 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 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 matched to Applicant's .380, they were consistent. {R. 4315-20}.

1. There was no valid objection to the conspiracy.

As an initial matter, counsel could not have been deficient nor Applicant prejudiced as there was no valid objection to be made to the evidence of concealment of the weapon by Applicant's family. First, the weapon was obviously 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 State v. Braxton, 343 S.C. 629, 634, 541 S.E.2d 833, 836 (2001) (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, also 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).

Moreover, there was ample evidence from which the gun and its subsequent concealment could be tied to Applicant. Applicant was identified by his friends in possession of such a gun prior to the crime, and 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 at Applicant's request through his own communications or through Hiram Johnson, his wife, sisters, and father subsequently attempted to permanently hide or destroy the gun to protect Applicant. Again, Applicant overlooks that evidence can be relevant not just by what it directly shows, but also by reasonable inferences from the evidence. See State v. Benjamin, 345 S.C. 470, 480, 549 S.E.2d 258, 263 (S.C. 2001) ("It is not required that the inference sought should necessarily follow from the fact proved. Evidence is relevant if it makes the desired inference more probable than it would be without the evidence.").

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.¹²

¹² See Rule 801(d)(2), SCRE (admissions of party opponent). See also State v. Beckham, 334 S.C. 302, 513 S.E.2d 806 (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

Moreover, the gun and the events surrounding its recovery would still be admissible even if there was no evidence tying the attempt to conceal it to Applicant. 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. See State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) ("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"). "[T]he 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).

Obviously, the jury was entitled to know the circumstances surrounding the police's discovery of the murder weapon – particularly since the State had to explain why the firing pin broke during examination by Agent Collins, likely due to its long submergence in the river. Indeed, counsel testified at PCR he did not see any valid objection for keeping out the evidence as to how the gun was found by police. {PCR App. 1849}. Counsel was correct in this assessment.

Further, had counsel tried to exclude the evidence of the attempt to conceal the gun by arguing a lack of evidence tying it to Applicant, the State would have easily overcome that objection by introducing one of Applicant's letters to his wife, admitted at PCR as

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)).

Applicant's 56. In it, Applicant asks Dorothy to tell her lawyer she only found the gun after someone broke into her house and put blood in there (obviously to try to then claim the gun was planted by the "real killer") {R. 4360}, and goes on to ask her to tell Hiram to say he only saw Applicant with a .32 or .38 revolver (which is different from the murder weapon). Even assuming loose ends existed as to whether Applicant had knowledge of or instigated the concealment of the weapon, they would have more than been tied up by this letter. Counsel was adamant he in no way wanted this letter in evidence given all the incriminating admissions within it {PCR Tr. 1838-39}, as it clearly shows Applicant's attempt to encourage perjury and obstruct justice. Indeed, he also goes on to ask Dorothy to tell Travis Felder not to say anything, and to tell Travis that Applicant told his lawyer Travis had nothing to do with the crime and would clear him in court. {Applicant's 56}.

 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, supra.

2. There was no prejudice.

Even if there was somehow a valid objection to introduction of how police discovered the gun, there was no prejudice. As set forth previously, the evidence of guilt was overwhelming. Even if the story of how police found the gun was excluded, the gun itself combined with all the other evidence of identity would preclude a reasonable probability of a different result. Therefore, Applicant has not met his burden of showing prejudice. Reed v. Norris, supra.

3. There was no valid objection to the solicitor's reference to the plea agreements.

Next, there was no valid objection to be made to the solicitor's questioning of Dorothy, Yolanda, and Kendra on the plea agreements; thus, counsel could not have been deficient nor Petitioner prejudiced by the failure to make such an objection.

The law is clear that codefendants may testify even though they have agreed to a plea agreement, and additionally a plea or plea agreement is admissible not as substantive evidence of the defendant's guilt or innocence, but to support or attack the credibility of a testifying codefendant. See, e.g. U.S. v. Gray, 491 F.3d 138 (4th Cir. 2007) (testimony of codefendants testifying pursuant to a plea agreement or immunity agreement still admissible where product of free will, albeit a hard choice); State v. Moore, 337 S.C. 104, 522 S.E.2d 354, 355 n.2 (Ct. App. 1999) (while a codefendant's plea is not admissible as substantive evidence of the defendant's guilt or innocence, it is admissible to support or attack the credibility of a testifying codefendant).

Additionally, the law is clear that the State may elicit plea agreements on direct examination to avoid the perception it was hiding something when the defense inevitably cross-examines the witness on his or her deal with the State. See State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (S.C. 2001) ("Initially, it was not error for the Solicitor to introduce the plea agreement on direct examination because the Solicitor was entitled to anticipate the inevitable cross examination of a federal inmate and to dispel any notion he was hiding something from the jury."). Indeed, counsel Cummings pointed out that he was the trial attorney in the Shuler case, and thus saw no basis for objecting. {PCR Tr. 1849-52}.

Since the questioning was permissible, then counsel could not have been deficient nor Applicant prejudiced as a matter of law. See Hough v. Anderson, supra.

4. Counsel had a valid strategic reason for not objecting.

Although counsel did testify he did not see a valid objection to the plea agreements, he also expressed a valid strategic reason for wanting the plea agreements admitted into evidence. Counsel stated he "wanted the rest of the stuff about how they went after his whole family to get him", and "wanted everybody to know that everybody was charged, everybody, and the only one they went after was him". {PCR Tr. 1702, 1704}. Indeed, if counsel had NOT engaged in such common and basic impeachment as examining the State's witnesses on their deals with the State, surely then the allegation now would be ineffectiveness for failing to do so. The fact that Applicant's present counsel may have treated the issue differently is irrelevant as it is precisely the kind of hindsight Strickland forbids. See Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack).

5. There was no prejudice from admission of the plea agreements.

Even if there was somehow a valid objection to introduction of the plea agreements, there was no prejudice. As previously set forth, the evidence of guilt was overwhelming. Indeed, had counsel precluded testimony about the deals with the State, that might just as well have enhanced the credibility of the family members in the absence of such a common method of impeachment. Therefore, Applicant has not shown prejudice. Reed v. Norris, *supra*.

VIII. Failure to Object to Admission of Ballistics Evidence

Applicant next contends his counsel was ineffective for failing to object to admission of the opinion of the SLED firearms examiner that the casings at the scene matched Bowman's .380 to the exclusion of all other firearms.

Of course, after Applicant's sisters confessed to throwing Applicant's pistol in the river, a police diver 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 matched "to the exclusion of all other firearms" 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, they were consistent. {R. 4315-20}.

A. Counsel was not deficient.

Despite having the gun transported to Atlanta for review by his expert for these PCR proceedings, Applicant presented no evidence that Collins's conclusion as to the match was invalid. His only attack goes to the validity itself of the discipline of firearms and toolmark examination, and the ability of that discipline to make an exclusive match.

However, even assuming the present validity of an attack on the discipline of firearms and toolmark identification or the relative conclusiveness of a match, counsel was not deficient. Two relevant principles for analyzing claims of ineffectiveness come into play here. First is the point that there is no constitutional claim of ineffective assistance of an expert witness. See Wilson v. Greene, 155 F.3d 396, 401 (4th Cir. 1998) ("The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness. To entertain such claims would immerse federal judges in an endless battle of the experts to determine whether a particular psychiatric examination was appropriate.");

Waye v. Murray, 884 F.2d 765, 766-67 (4th Cir.1989). Lawyers are entitled to reasonably rely on their experts, and they are not required to second-guess their expert's conclusions or "expert shop" until they find one who will testify favorably. See Wilson v. Greene, 155 F.3d 396 (4th Cir. 1998); Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992). To be actionable, the failure must be of counsel in failing to obtain or present the expert testimony; the fact that the testifying expert did not identify "every possible malady or argument" is not a basis for relief. Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992).

Second is the principle that the reasonableness of counsel's actions must be viewed in the context of the time period they took place, and not in hindsight. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.") (quoting Strickland); Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006) ("Though hindsight may provide a different view of counsel's actions, Simpson is not entitled to a new trial for the sole purpose of presenting a 'fancier' case."). See also Harden v. State, 360 S.C. 405, 602 S.E.2d 48 (2004) ("An attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction.").

When these principles are considered, it is clear counsel could not have been deficient for failing to challenge the underlying discipline of firearms examination at the time of a trial in May 2002. Counsel testified he hired a recognized firearms examiner, Cleon Mauer, to review the State's firearms evidence. {PCR Tr. 1794; 5316-17}. Counsel stated that Mauer concurred with the State's findings of a match, and never once advised