

VOLUME TWENTY-THREE
STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

RECEIVED

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S.C. Supreme Court

MARION BOWMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213468

APPENDIX

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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 – JACKSON v. DENNO..... 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 QUALIFICAITON 1637

JUROR VOIR DIRE

JUROR 26 – ALBERT BRITT

Examination By The Court 1662

VOLUME FIVE

JUROR347 – 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 Examination3766

DENNIS JUDY

Direct Examination.....3774
Cross Examination3794

GORDON B. NEWHOUSE

Direct Examination.....3798
Cross Examination3803

PERRY CHINNERS

Direct Examination.....3806
Cross Examination3811

JAMES P. KICKLIGHTER

Direct Examination.....3819
Cross Examination3823

ALVIN COKER

Direct Examination.....3829
Cross Examination3842

EDWARD A. PORTER

Direct Examination.....3847
Cross Examination3861
Redirect Examination.....3873
Recross Examination.....3873

JAMES HELMS

Direct Examination.....3874
Cross Examination3913
Redirect Examination.....3930
Recross Examination.....3931

DENNIE JUDY

Direct Examination.....3932
Cross Examination3934

JANICE E. ROSS

Direct Examination.....3939
Cross Examination3952

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
Voir 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 Examination4904

TRAVIS D. FELDER

Direct Examination.....4911
Cross Examination4922
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 CHARGE5015

VERDICT.....5051

SENTENCING.....5067

TRANSCRIPT OF JACKSON V. DENNO HEARING DATED APRIL 5, 20025069

TESTIMONY

TERRENCE ARNOLD VAN DORAN

Direct Examination.....5074
Cross Examination5082

ALVIN MICHAEL COKER

Direct Examination.....5111
Cross Examination5120

TERRENCE ARNOLD VAN DORAN

Direct Examination.....5161
Cross Examination5170
Redirect Examination.....5189
Recross Examination.....5190

TIM STEPHENSON

Direct Examination.....5191
Cross Examination5199

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 UNCONSITUTIONAL	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 SUPPRESS (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. Waters6752

POST-CONVICTION RELIEF HEARING TRANSCRIPT

DATED SEPTEMBER 29, 2008.....6766

TESTIMONY

JEFF YUNGMAN

Direct Examination by Mr. Brown.....6785

Cross Examination by Mr. Waters6843

Redirect Examination by Mr. Brown.....6878

Recross Examination by Mr. Waters6901

DR. CARL KISSIAH

Direct Examination by Mr. Brown.....6909

Cross Examination by Mr. Waters6927

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. Waters7131

Redirect Examination by Mr. Brown.....7183

VOLUME SEVENTEEN

DALE DAVIS

Recross Examination by Mr. Waters7206

Redirect Examination by Mr. Brown.....7208

Recross Examination by Mr. Waters7228

Redirect Examination by Mr. Brown.....7232

Recross Examination by Mr. Waters7241

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)**

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 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}.

#73
 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.

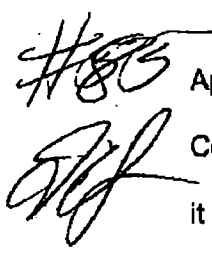
Further, Applicant's Exhibit 78 would not change this conclusion and somehow make counsel deficient for not raising a fundamental challenge to firearms identification. Applicant's 78 reflects a motion made to a federal court in Massachusetts in 2000 to exclude for various reasons a firearms examination 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 this Court was to consider it, 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.

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Def
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. 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 was 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 rare 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 at PCR 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}.

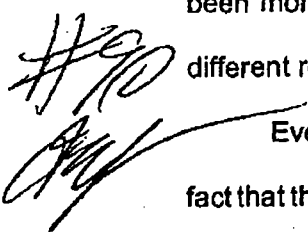
As to his specific finding in this case, Collins testified he found the possibility that the marks were made by a firearm other than Applicant's to be so remote and infinitesimal as to be a practical impossibility. He again pointed out that studies had confirmed this finding of uniqueness. {PCR Tr. 339-41; 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 are 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 firearms even though they had been consecutively manufactured. Applicant's attack on the validity of the 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 resulted. 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, as previously detailed. Given all this evidence of identity, it cannot be said that a mere challenge to the exclusivity but not the match 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

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 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 factor 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, *supra*.

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 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}.

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 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". {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, Burkhardt, 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 *affirmed* a death sentence despite issues related to the State's cross-examination and evidence responsive to a defense presentation "[demonstrating] the permanence and deprivation entailed in life imprisonment". Plath, 281 S.C. at 12, 313 S.E.2d at 626. In doing so, the court rebuked sentencing phase defenses which "sought to portray life imprisonment as preferable to capital punishment as a matter of social policy", or "drew a picture of life imprisonment as slavery, a condition of irretrievable loss". Plath, 281 S.C. at 14, 313 S.E.2d at 626-27.

The court stated that such defenses improperly "invite[d] the jury to intrude upon the strictly legislative function of determining the nature of crime and punishment", and concluded that "determinations as the time, place, manner, and conditions of execution or incarceration, as well as the matter of parole are reserved by statute and our cases to agencies other than the jury." Plath, 281 S.C. at 14-15, 313 S.E.2d at 627. However, the Plath court concluded the State's challenged questioning was only proper response to the defense presentation which brought up the subject matter in the first place. Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28.

Nearly two decades later, and four months *before* Applicant's trial, the United States Supreme Court issued Kelly v. South Carolina, 534 U.S. 246 (2002), which so broadly defined "future dangerousness" that it effectively ended years of litigation in South Carolina over whether a capital inmate could have the specific charge that a life sentence would be without parole. Indeed, shortly after Kelly, the General Assembly passed a law requiring life without parole to be charged in all death penalty cases. 2002 Act. No. 278 § 1. Regardless, Kelly as a practical matter ensured Applicant at trial would get a charge that his life sentence would be without parole. It was in this new legal setting that Applicant went to trial a mere few months later.

Subsequently, 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 was improper about movies, television, and books in prison. The Court found the issue was not preserved, but added a cautionary instruction to both sides:

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

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

Subsequent to Bowman, the South Carolina Supreme Court addressed a case where the *solicitor* preemptively called a witness who extensively testified as to the

conditions of confinement for a inmate serving life without parole. State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007). The defense objected to the state's evidence, and later put in its own evidence of "bad" prison conditions. Justice Moore was joined by Justice Waller and wrote the opinion of the Court. Justice Moore cited Plath and other cases from the 80s and 90s for the proposition that evidence outside of the circumstances of the crime and the characteristics of the defendant was inadmissible in a sentencing phase. This included conditions of incarceration, the process of execution, or the deterrent effect of capital punishment. Burkhart, 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).

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[Signature]

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. 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 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).

There was no deficiency.

D. Applicability of a Strickland analysis to this issue

A normal Strickland analysis still applies to a claim that counsel did not object to introduction of conditions evidence. 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 described it as "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 under Strickland – none of which apply here. See Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878 (2006) (rare three exceptions are: (1) denial of counsel at critical stage; (2) failure of counsel to subject case to meaningful adversarial testing; and (3) extremely prejudicial circumstances surrounding trial where no lawyer could be effective). Nance concluded that “[a]bsent these narrow circumstances of presumed prejudice under Chronic, defendants must show actual prejudice under Strickland.” Id. at 880.

The conclusion that a prejudice analysis applies is consistent with the language of Strickland itself, despite Burkhart's view 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.

An example of this principle is found in Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001). There, the 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 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 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.

E. There was no prejudice.

There was no prejudice warranting reversal. 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

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 (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 Gadson never testified to anything Applicant did to inveigle or decoy Kandee Martin.

#111
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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 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 Kandee before the day was out. {Tr. 3726; 3744; 3766}. Gadson testified that Applicant was telling Kandee where to turn and led her to drive out to Nursery Road where she was murdered. {R. 3994-96}. And, Gadson 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 Kandee 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 (2004) (finding invalidation of armed robbery aggravator did not require reversal of death sentence where other aggravators remained).

The issue is 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. 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.

#113

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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.'

535 U.S. at 696-97 (emphasis added). See also Wright v. Van Patten, 128 S.Ct. 743, 746 (2008) (same). Finally, 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 698.¹³

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

¹³ See also Florida v. Nixon, 543 U.S. 175 (2004) (concession of guilt in a capital trial was reasonable and did not "rank as a 'fail[ure] to function in any meaningful sense as the Government's adversary.") See also Mickens v. Taylor, 535 U.S. at 188 (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").

an "extremely high showing" of deficient performance – and inapplicable where an otherwise incompetent counsel at least provided *some* representation to the client.¹⁴

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 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 credibly 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 Ostnowski, a DNA expert; Frank Bloomingburg, a

¹⁴ E.g. Young v. Catoe, 205 F.3d 750 (4th Cir. 2000) (applied only in "rare cases" and "extraordinary" situations); Childress v. Johnson, 103 F.3d 1221 (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) (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").

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 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, Applicant's present claim is certainly "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.

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.

Next, this Court concludes 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 behavior. {PCR Tr. 1062-65; 1077}. He admitted Dale Davis gave him a great deal of information. {PCR Tr. 1076}.

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 to use against them in the current process. She also conceded that she did have some contact with the attorneys, 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}.

#115
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 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 during her testimony to provide guidance as to how to answer those questions. While she complained that she did not think the information at trial was 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 to counsel and knew he had done these cases in the past. {PCR Tr. 1445-47}.

#119
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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}.

Aside from these telling admissions, counsel in large measure credibly 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 also credibly testified. He said 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".

#20
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{PCR Tr. 1807-08; 1816}. Counsel denied he ever refused to look at any information Davis sent or 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 testified 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}.

#21
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Thus, counsel's testimony credibly refutes Ms. Davis's claim that they refused to contact her and discuss the case with her. Indeed, Ms. Davis's credibility is suspect and her biases obvious, as proven by her 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 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).

Whether in the context of application of Cronic or an assessment of deficiency under Strickland, the issue is denied.

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 be of

emotional value to others. He contends this could have come from sister Kendra, wife Dorothy, and an expert in family psychology.

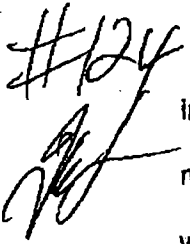
1. Counsel were not deficient.

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. {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}. Corroborative of this is the fact that counsel even mentioned "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. 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 thus unassailable under Strickland.

#124

 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 that any of the hired 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.¹⁵ Counsel was not deficient and the issue is denied.

2. There was no prejudice.

In any event, Applicant has not shown prejudice under Strickland. Again, 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

#125
 15 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).

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.

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. It is not enough simply to offer criticisms of counsel's performance – the applicant must actually present into evidence the “case that should have been”.¹⁶

Applicant has wholly failed to show prejudice. 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}. The Kendra information thus cannot be considered in a prejudice analysis. See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

#126
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¹⁶ 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. 1998) (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).

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.¹⁷

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 manner in which this crime was committed.

#127
 17 See Williams v. Taylor, 529 U.S. 362 (2000) (trial counsel only presented a "scant" mitigation case, and 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); Wiggins v. Smith, 123 S.Ct. 2527 (2003) (trial counsel failed at all to have a social history performed, and did not have anything regarding the defendant's background save rudimentary information, overlooking that 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); Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004) (trial psychiatrist testified at PCR that he had not been provided with available medical and psychiatric records, and another psychiatrist who had extensively examined Petitioner found, a far more serious depressive condition to the point that his altered mental state made the murder *non-volitional*); Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (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).

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 could be construed as manipulative in an attempt to get Dorothy to help obstruct justice and lie to police to cover up Applicant's crime. {Applicant's 56}. Additionally, the Applicant lies in the letter by stating that he was not unfaithful to Dorothy, and did not have other girls "suck his dick", when the evidence of course shows Applicant's DNA was found in Kande. Applicant also asks Dorothy for money, which shows an ulterior motive. Thus, Dr. Kissiah and the letters would likely have done more to condemn Applicant than aid him.

Applicant simply has not shown prejudice. See Byram v. Ozmint, note 14, *supra*.

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, supra. 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, supra. Moreover, if Applicant failed to disclose his entire work history to Yungman, that is not a basis for 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 has not shown 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. Jones v. State, *supra*.

However, even if Applicant's 55 and 76 are considered, along with an "inference" that Applicant completed his restitution obligations, it still would not arise to the prejudice standard. 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 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' 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 Kandee 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 credibly set forth a reasonable strategic basis for avoiding any testimony Kandee was a crack addict or a prostitute, as he felt it could potentially prejudice the jury against his client, based in part from his negative experience in a prior case. This decision is reasonable and precludes a finding of deficiency. See generally Sexton v. French, supra; Bell v. Evatt, supra.

Regardless, Applicant has not shown 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, it does little to rebut testimony was that she loved to play with her son and they had a special bond. 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.

#132
 JJ
 During the 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 credibly 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}.

#133
 Counsel were not deficient nor was Applicant prejudiced. 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.¹⁸ 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, supra.

¹⁸ See State v. Davls, 306 S.C. 246, 411 S.E.2d 220 (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).

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. There was no evidence that Applicant 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 prejudice.

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 Gadson 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}.

#135
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 credibly testified as a strategic matter he would never have called Gadson back during the sentencing phase to elicit whether Applicant was drunk when he killed Kandee, because of the risk of what else Gadson 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 credible 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, 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 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}

Counsel was not deficient. Counsel strategically and reasonably 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 Gadson back to testify Applicant was drunk when he killed Kandee

– for fear of what other damaging information Gadson might offer or reiterate. These decisions were reasonable. See generally Sexton v. French, supra; Bell v. Evatt, supra.

Regardless, Applicant cannot show prejudice. Calling Gadson 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 the sentencer 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 Gadson 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 and reasonably would not have called Gadson 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

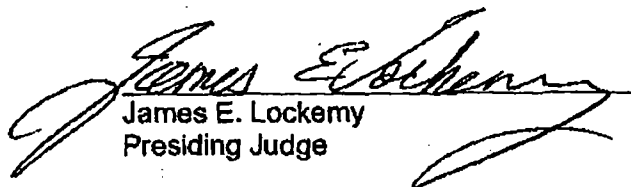
For the foregoing reasons, Applicant's APCR is denied and dismissed with prejudice.

Applicant is hereby advised that if he wishes to appeal this Order, a notice of intent to appeal must be filed within thirty (30) days of the receipt of this Order. Applicant's attention is also directed to Rules 203, 206, and 227 of the South Carolina Appellate Court Rules for appropriate procedures to follow after notice of Intent to appeal has been timely filed.

Therefore, it is ORDERED that:

1. The application for post-conviction is denied and dismissed with prejudice.
2. Applicant is remanded to the custody of the State of South Carolina.

This 27 day of February, 2012.


James E. Lockemy
Presiding Judge

Dillon, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

IN THE COURT OF COMMON PLEAS

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

MARION BOWMAN, #6006)

Petitioner,)

v.)

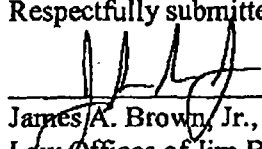
STATE OF SOUTH CAROLINA)
Respondent.)

MOTION TO ALTER OR AMEND
JUDGEMENT, PURSUANT TO
RULE 59

FILED - RECORDED
MAR 19 PM 4:01
CLERK OF COURT
DORCHESTER COUNTY

PETITIONER MOVES THE COURT for an Order altering and amending the
Judgement in this case, received by undersign counsel from the Clerk of Court on March 12,
2012. Petitioner will file a separate memorandum in support of this motion.

Respectfully submitted,


James A. Brown, Jr.,
Law Offices of Jim Brown, PA
1600 Burnside St., Suite 100, PO Box 592
Beaufort, SC 29901
(843) 470-0003

March 16, 2012
Beaufort, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing
pleading was mailed to all litigants of record in
this proceeding this 16th day of March, 2012.





STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)
)
 MARION BOWMAN, #6006)
)
 Applicant,)
)
 v)
)
 STATE OF SOUTH CAROLINA)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS

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

**MEMORANDUM IN SUPPORT OF
 APPLICANT'S MOTION TO ALTER
 OR AMEND JUDGEMENT PURSUANT
 TO RULE 59**

FILED - RECORDS
 2012 APR 25 AM 11:39
 CLERK
 DORCHESTER

The below-listed counsel for the Applicant respectfully provide the following.

Memorandum in support of Applicant's Motion to Alter or Amend Judgement Pursuant to Rule 59.

Introduction

This matter involved litigation stretching over the better part of six years. The PCR merits hearing alone involved testimony taken over parts of four different months during the fall of 2008. The transcripts, pleadings and exhibits from both the trial and the merits hearing constitute over 10,000 pages of documents.

For this reason, undersigned counsel respectfully incorporate all claims, issues, and assertions appearing in the record into this memorandum. It is only within this context that any meaningful request to alter or amend judgement can be made. However, some items appearing in the signed Order merit specific attention.

These important items are contained in the table below. This table is taken nearly verbatim from Applicant's objections to the proposed Order previously submitted to this Court.

This table is being replicated because review suggests the content of the signed Order is identical to the content of the proposed Order.

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	<p>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.</p>	<p>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>).</p>
35	<p>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.</p>	<p>As indicated by Chief Justice Toal in her dissent in <i>Bixby</i>, 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.</p>
36	<p>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.</p>	<p>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.</p>

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 Kande 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, l.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, l. 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 murderer..."	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 & 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 accelerant 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. <i>see</i> 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. <i>see</i> 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

		<p>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 Cronic</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). See Applicant's Amended Brief Supporting the Fourth Amended Application for Post Conviction Relief 87-90.</p>
122	<p>Applicant can show neither deficiency nor prejudice with regard to the alleged failure to present evidence of Applicant's emotional value to others.</p>	<p>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.</p>
129	<p>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.</p>	<p>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</p>


		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)	Applicant's trial counsel labored under the mistaken belief that voluntary intoxication was an aggravating factor. For that reason, he failed to elicit

	(Supp.2000) or a specific non-statutory mitigator specifically related to voluntary intoxication.	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.
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Conclusion

For the reasons expressed above and in light of the entire record and all pleadings, briefings and applications, the Court should alter or amend its judgement in accordance with Rule 59.

Respectfully submitted,



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Attorneys for the Applicant

Beaufort, SC
April 19, 2012



ALAN WILSON
ATTORNEY GENERAL

April 30, 2012

The Honorable James E. Lockemy
South Carolina Court of Appeals
P.O. Box 750
Dillon, SC 29536

Re: Marion Bowman v. State, 06-CP-18-569

Dear Judge Lockemy,

I am in receipt of Applicant's memorandum in support of his Rule 59(e) motion. Please accept this letter in lieu of a formal response. From a review of the arguments made in the memorandum, it appears that they are an exact reiteration of the arguments Applicant made in support of his Objections to the proposed order. Those arguments were a reiteration of the arguments Applicant made at the conclusion of the evidentiary hearing and in the post-trial briefing process. The State of course would be happy to formally respond if the Court desires, but Applicant's points were already specifically addressed in the State's post-trial brief which this Court found persuasive.

Of course, please do not hesitate to contact me with any questions or concerns, and I stand ready to provide anything further as directed by the Court.

Regards,


S. Breighton Waters
Assistant Deputy Attorney General

cc: The Honorable Cheryl Graham, Dorchester Clerk of Court
Jim Brown, Esquire
John Sinclair, III, Esquire

FILED - RECORD
2012 MAY -2 AM 11:54
CHERYL GRAHAM
DORCHESTER CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)
)
 MARION BOWMAN, #6006,)
 Applicant,)
)
 v.)
)
 STATE OF SOUTH CAROLINA,)
 Respondent.)
 _____)

IN THE COURT OF COMMON
 PLEAS

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

ORDER

Carol M. Anderson
 CLERK OF COURT
 DORCHESTER COUNTY
 2012 NOV -5 AM 10:35
 CERTIFIED COPY

After careful consideration of Applicant's motion to alter or amend judgment pursuant to Rule 59(e), SCRCP, the motion is denied.

James E. Lockemy
 James E. Lockemy, Presiding

October 31, 2012

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas, Non Jury

James E. Lockemy, Circuit Court Judge

Case Number: 06-CP-18-569

Marion Bowman,.....Appellant.

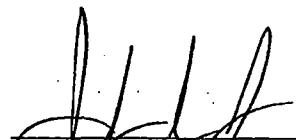
v.

The State.....Respondent.

Notice of Appeal

Marion Bowman appeals the judgment of the Circuit Court, the Honorable James E. Lockemy presiding, denying Applicant's request for post conviction relief. The Order was signed on February 27, 2012. and received by counsel for the Applicant on March 19, 2012. The Honorable James E. Lockemy, presiding, also denied Applicant's Motion to Alter and Amend Judgment pursuant to SCRCF Rule 59 on October 31, 2012 and received by counsel for Applicant on November 2, 2012

November 19, 2012



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas, Non Jury

James E. Lockemy, Circuit Court Judge

Case Number: 06-CP-18-569

Marion Bowman,.....Appellant.

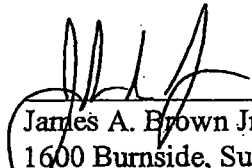
v.

The State,.....Respondent.

Proof of Service

I certify that I have served a copy of the Notice of Appeal on the State of South Carolina by depositing a copy of this Notice in the United States Mail, postage prepaid, on November 19, 2012, addressed to the State's attorney of record, Creighton Waters, Assistant Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211.

November 19, 2012


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Wanda H. Carter, Deputy Chief Appellate Defender

February 7, 2013

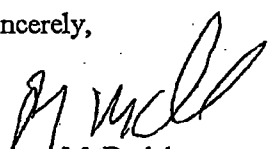
The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
PO Box 11330
Columbia, SC 29211

Re: The State v. Marion Bowman

Dear Mr. Shearouse:

Enclosed are an original and six copies of the Motion to Remand for a Reconstruction of the Record in the above-captioned case. Thank you for your assistance in this matter.

Sincerely,



Robert M. Dudek
Chief Appellate Defender

RMD/kam

Enclosure

cc: Donald Zelenka, Esquire
Mr. Marion Bowman

 COPY

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

James E. Lockemy, Circuit Court Judge

RECEIVED
FEB - 7 2013
S.C. Supreme Court

MARION BOWMAN,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

RECEIVED

FEB -7 2013

OFFICE
FEB 7 2013

APPELLATE CASE NO. 2012-213468

MOTION TO REMAND FOR A
RECONSTRUCTION OF THE PCR RECORD

The above named petitioner, through his undersigned counsel, would respectfully move this Court for a remand to the Dorchester County Court of General Sessions for a reconstruction of the record of hearings on the dates that follow. In support of this motion, counsel would respectfully show the Court:

1. Petitioner was convicted of murder and third degree arson following a jury trial on May 17-20, 2002 before the Honorable Diane S. Goodstein.

2. Petitioner filed his application for post-conviction relief on April 7, 2006. The state filed its return on August 18, 2006. An evidentiary hearing was held before the Honorable James E. Lockemy during the months of September, November, and December of 2008. James Arthur Brown and Jack Sinclair, III represented petitioner. An order of dismissal was filed on February 27, 2012.
3. Petitioner has all transcripts from the post-conviction relief hearing, which include the following dates: September 15-18, 2008; September 29-30, 2008; November 24, 2008; December 18-19, 2008; and December 22, 2008.
4. Mr. Brown and Mr. Sinclair notified petitioner of additional hearing dates before the post-conviction relief hearing, and all of the transcripts were requested on December 18, 2012. Petitioner has been unable to obtain the transcripts for these hearings because the records (tapes) from the hearings have been destroyed.
5. The first hearing was held on November 6, 2006 appointing Mr. Brown and Charlie Johnson as PCR counsel. In a letter dated December 28, 2012, the court reporter states the records from this hearing were destroyed. A copy of that letter is attached to this motion as Exhibit A. The qualifications of the respective attorneys were probably placed on the record during this hearing and therefore could possibly become relevant in the future.
6. The next hearing was held in December of 2006, and was for a funding request only. In an email correspondence dated January 10, 2013, the court reporter states the records from this hearing were destroyed. A copy of that email is attached to this motion as Exhibit B.
7. The next hearing date was March 14, 2007, where Judge Lockemy postponed a summary judgment hearing. In an e-mail correspondence dated January 3, 2013, the court reporter states the records from this hearing were destroyed.

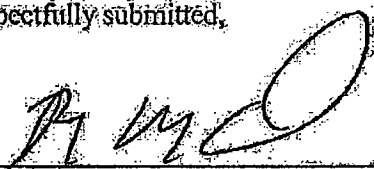
8. Another hearing on June 15, 2007 was also regarding a summary judgment, which was denied. In a letter dated January 7, 2012, the court reporter states the records from this hearing were destroyed. A copy of that letter is attached to this motion as Exhibit C.

9. During a hearing on December 12, 2007, Charife Johnson was relieved and Jack Sinclair was appointed. In an e-mail correspondence dated January 10, 2013, the court reporter states that she has no record of a hearing occurring on this date.

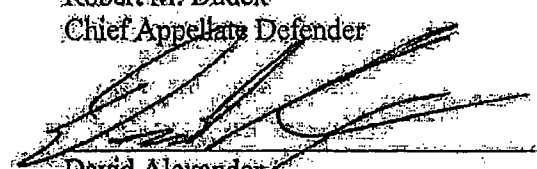
10. Counsel is hopeful that much of the reconstruction of the record in this case can be accomplished through stipulations once the case is remanded, and will result in minimum delay.

WHEREFORE, petitioner respectfully requests that his case be remanded to the Dorchester County Court of General Sessions for reconstruction of the above hearings where the records have been destroyed. Counsel further requests that the appeal be held in abeyance pending the outcome of this motion.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender



David Alexander
Appellate Defender

Attorneys for Petitioner

This 7th day of February, 2013

EXHIBIT A

Elizabeth B. Harris, CVR-M
Official Court Reporter - 5th Judicial Circuit
414 Autumn Circle
Columbia, SC 29206

EHarris@secourts.org

December 28, 2012

Kimberly McCall
SCCID
P.O. Box 11589
Columbia, SC 29211-1589

In Re: *Marion Bowman vs. State*
2006-CP-18-569

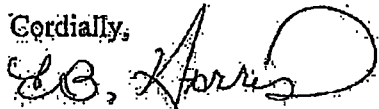
Dear Ms. McCall:

Thank you for your recent letter requesting the above-referenced transcript. Unfortunately, the records of this 2006 trial no longer exist.

By order of the South Carolina Supreme Court, reporters are required to keep all records for five years. Since this case was heard November 6, 2006, all materials were destroyed in December of 2011, the end of the five-year retention period.

I wish I had better news for you, but I'm afraid I don't.

Cordially,



Elizabeth B. Harris, CVR
Official Court Reporter

RECEIVED

JAN 2 2013

SC OFFICE OF
APPELLATE DEFENSE

EXHIBIT B

Kimberly McCall

From: Ozment-Cartee, Pamela [PCartee@sccourts.org]
Sent: Thursday, January 10, 2013 3:14 PM
To: Kimberly McCall
Subject: RE: Transcript Request - The State v Marion Bowman

Importance: High

Kimberly, I have researched my files and your request for a transcript in the above referenced matter The State v Marion Bowman. There was no hearing on 12/6/06. However there was a hearing on 12/12/06. Unfortunately, those files have been destroyed. My backup records indicate that there was no hearing on 12/12/07.

We are only required to obtain files for five years, and that recording has been destroyed.

If I may be of further assistance, please do not hesitate to contact me.

Sincerely,

Pamela Ozment-Cartee
 Circuit Court Reporter
 Fourth Judicial Circuit
 843.861.4251

From: Kimberly McCall [kmccall@sccid.sc.gov]
Sent: Friday, December 28, 2012 3:00 PM
To: Ozment-Cartee, Pamela
Subject: RE: Transcript Request - The State v Marion Bowman

Thank you so much!.....enjoy your vacation! :-)

-----Original Message-----

From: Ozment-Cartee, Pamela [mailto:PCartee@sccourts.org]
Sent: Friday, December 28, 2012 11:09 AM
To: Kimberly McCall
Subject: Transcript Request - The State v Marion Bowman

Kimberly, good morning. This email will confirm that you have requested 2 transcripts in the above subject line. I do know that the date for December 12, 2007 is incorrect. The date should be December 12, 2006. I am on vacation and will not return to the office until January 7, 2013. I will follow-up and see if the tapes and notes are still available as 2006 falls outside of the required time we retain transcripts. The December 6, 2006 date is also incorrect. My notes indicate that there was no hearing held that week in regards to Mr. Bowman. Thank you. Pam Cartee

Pamela Ozment-Cartee
 Circuit Court Reporter
 Fourth Judicial Circuit
 843.861.4251

EXHIBIT C

SUSAN "MIA" PERRON
CIRCUIT COURT REPORTER
POST OFFICE BOX 31865
CHARLESTON, SOUTH CAROLINA 29417-1865
1-706-231-6028 [cell]

RECEIVED

JAN 14 2013

OFFICE OF
SUSAN PERRON

January 7, 2013

Kimberly McCall
SECID
Post Office Box 11589
Columbia, South Carolina 29201-3332

In Re: State v. Marion Bowman [hearing date 6/15/07]
2006-CP-18-00569

Dear Ms. McCall:

In reference to your correspondence concerning the above-captioned case, we are only required to retain records for five years. These records have been destroyed.

If I can be of further assistance, please contact me at the above address or phone number.

Cordially,

Susan "Mia" Perron
Susan "Mia" Perron
Circuit Court Reporter

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

James E. Lockemy, Circuit Court Judge

MARION BOWMAN,

PETITIONER,

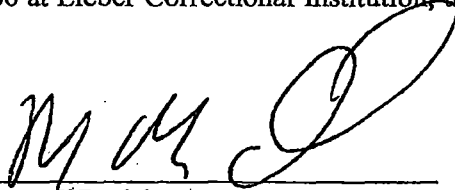
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE


The undersigned attorney hereby certifies that a true copy of the Motion to Remand for a Reconstruction of the PCR Record in the above referenced case has been served upon opposing counsel, Donald Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Marion Bowman, #6006 at Lieber Correctional Institution, this 7th day of February, 2013.

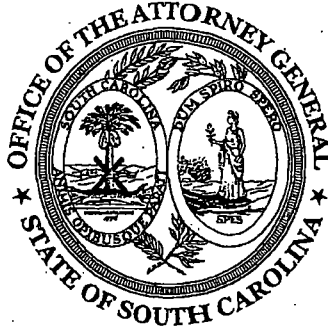


Robert M. Dudek
Chief Appellate Defender

Attorney for Petitioner

SUBSCRIBED AND SWORN TO before me
this 7th day of February, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013.



ALAN WILSON
ATTORNEY GENERAL

February 19, 2013

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211

FEB 19 2013

Re: Marion Bowman v. State of South Carolina
Appellate Case No. 2012-213468

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the *Return to Motion to Remand for a Reconstruction of the PCR Record* in the above-referenced case for filing. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Lonetta B. Brawley
Lonetta B. Brawley
Legal Assistant to Donald J. Zelenka
Senior Assistant Deputy Attorney General

/lbb
Enclosures

cc: ~~Robert M. Dicks, Esquire~~
Creighton Waters, Asst. Deputy Attorney General
Al Simons, Assistant Attorney General

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Appellate Case No. 2012-213468

MARION BOWMAN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent

**RETURN TO MOTION TO REMAND FOR A
RECONSTRUCTION OF THE PCR RECORD**

MB #1
The Respondent, State of South Carolina, hereby makes a Return to the Motion to Remand. At the outset, Respondent notes that it does have in its possession the following transcripts from the following hearings that Petitioner reported were missing and/or destroyed. Respondent has advised opposing counsel and provided them to him by email this date:

1. June 15, 2007 (74 pages) - Summary Judgment Hearing
2. October 11, 2007 (19 pages)

Respondent has also advised opposing counsel of an immediate need to order a January 16, 2008 transcript.

I.

Respondents have reviewed its records and discussed the matters with office counsel.

A. November 16, 2006 - Appointment Hearing

Respondent does not have a transcript of the matter in its possession. However, Respondent has notes that a hearing was held at 2 p.m. at the Dillon County Courthouse before Judge James Lockemy in Dillon County. Respondent's notes reflect that Charles Johnson and James Brown were present and appointed. Also, a November 9, 2006 letter from James Brown memorializing his events of hearing.

B. December 12, 2006 Hearing

No transcript ordered. Status hearing held at Chesterfield County Courthouse. Deadlines set. Counsel present. Respondent not aware if funding issues addressed ex parte.

C. March 14, 2007 Hearing

No transcript ordered. According to our notes, hearing was held at 2 p.m. in Lancaster County with both counsel present. It was a motion hearing and status conference which set date for a final hearing on pre-trial motions. The hearing also addressed discovery issues. It set November 26 for evidentiary hearing, motions hearing for April 19 in Beaufort, final amended application on April 13 and final amended return on April 16.

D. May 23, 2007 - Telephone Conference Call

No transcript. Telephone conference call with Judge Lockemy, Creighton Waters, and Jim Brown. The issue concerned custody and transportation issues related to a weapon. This resulted in May 25, 2007 "Order to Transport Physical Evidence to Expert in Lilburn Georgia."

E. June 15, 2007 Summary Judgment Hearing

Transcript available. Provided to opposing appellate counsel on February 19, 2013.

F. October 11, 2007 - Status Conference

Not included on opposing counsel's list. Transcript available and provided to counsel on

February 19, 2013. Set merits hearing for March 31, 2008, and status conference for December 4, 2007 and directs Petitioner's counsel to respond to discovery requests of State.

G. December 4, 2007 - Status Conference (Cancelled)

There was a status conference set for December 4, 2007 in Dorchester County. On December 3, 2007, by email, the December 4 status conference was postponed until a later date.

There was no December 12, 2007 hearing.

H. January 16, 2008 - Hearing and Status Conference

[Not on Appellant's list]

(M) 3
#
 No current transcript. Advised opposing counsel to order transcript on February 15, 2013. Hearing held in Darlington County on January 16, 2008 at 2 p.m. Counsel Johnson relieved due to acceptance of position in Solicitor's Office. Jack Sinclair is appointed to replace him. According to notes, Sinclair given 15 days to meet with Applicant and counsel Brown. Schedules status conference for March 26, 2008 and evidentiary hearing for May 27 and June 2, 2008.

I. March 26, 2008 (Dillon County) (2 p.m.)

The conference was changed on March 21 to a telephone status conference. It re-scheduled the evidentiary hearing to September 15, 2008 based upon a continuance motion.

II.

WHEREFORE, Respondent submits the request to remand to reconstruct the hearings of June 15, 2007 (and October 11, 2007) are moot due to the existence of the transcript.

Respondent further requests opposing counsel to order the January 16, 2008 hearing transcript (which was not included on his list and was the hearing when counsel Johnson was relieved).

Respondent requests that a motion to remand for a reconstruction of a December 12, 2007 be

denied because no hearing occurred on that date in this matter.

Respondents leave it to the Court's discretion to remand and reconstruct the following hearings before Judge Lockemy:

1. November 6, 2006 - appointment hearing
2. December 12, 2006 - status conference
3. March 14, 2007 - status conference
4. May 23, 2007 - telephone status conference

WHEREFORE, Respondents have made Return to the Motion to Remand.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENT

By: 

Donald J. Zelenka
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
803-734-6305

February 19, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Appellate Case No. 2012-213468

MARION BOWMAN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served Respondents **Return to Motion to Remand for a Reconstruction of the PCR Record** in the foregoing action by depositing copies in the Inter Agency mail on:

Robert M. Dudek, Esquire
Chief Attorney
Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201

this 19th day of February, 2013.



DONALD J. ZELENKA
Senior Assistant Deputy Attorney General



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1357

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

February 21, 2013

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
PO Box 11330
Columbia, SC 29211

Re: The State v. Marion Bowman

Dear Mr. Shearouse:

Enclosed are an original and six copies of the Reply to the Return to Motion to Remand for a Reconstruction of the Record in the above-captioned case. Thank you for your assistance in this matter.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/kam

Enclosure

cc: Donald Zelenka, Esquire
Mr. Marion Bowman

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

FEB 21 2013

CLERK OF COURT

Certiorari to Dorchester County

James E. Lockemy, Circuit Court Judge

RECEIVED

FEB 21 2013

S.C. Supreme Court

MARION BOWMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-213468

REPLY TO THE RETURN TO MOTION TO REMAND FOR A
RECONSTRUCTION OF THE PCR RECORD

The above named petitioner, through his undersigned counsel, filed a motion to remand for a reconstruction of the PCR record on February 7, 2013. The respondent filed a return to the motion on February 19, 2013. In reply to the respondent's return, counsel would respectfully show the Court:

1. Counsel has supporting documentation from the court reporter that the records (the tapes) from the hearing held on November 6, 2006 appointment hearing – and referenced on page four of the

State's return -- are no longer available in this case. That documentation was attached as an exhibit to petitioner's motion to remand for a reconstruction hearing.

2. Counsel also has supporting documentation from the court reporter that the records (the tapes) from the hearing held on December 12, 2006 in Chesterfield County -- and referenced on page four of the State's return -- are no longer available. That documentation was also attached as an exhibit to petitioner's motion to remand for a reconstruction hearing.

3. Counsel has supporting documentation that the records (the tapes) from the hearing held on March 14, 2007 in Lancaster County are no longer available. That documentation was mistakenly not included in petitioner's motion to remand, but is attached to this reply as Exhibit A.

4. Counsel received the transcript from the hearing dated June 15, 2007 from respondent on Tuesday, February 19, 2013.

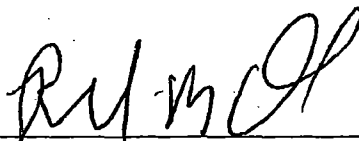
5. Counsel also received the transcript from the hearing dated October 11, 2007 from respondent on Tuesday, February 19, 2013.

6. Thus, this leaves the transcript for the remaining hearing dated January 16, 2008 not accounted for at this time. Counsel requested the transcript of this hearing on February 20, 2013 from the court reporter as evidenced by Exhibit B, which is attached to this reply.

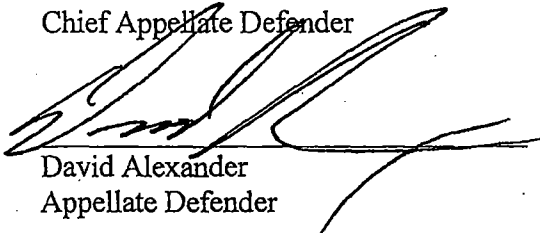
7. Since this is a death penalty case undersigned appellate counsel reiterates that a full record of the post-conviction proceedings should be available by certified transcripts, stipulations on remand, or testimony and exhibits reconstructing unavailable hearings on remand from this Court.

WHEREFORE, petitioner respectfully requests that this case be remanded to the Dorchester County Court of General Sessions for reconstruction of the above hearings where the records (the tapes) have been destroyed. Counsel further requests that the appeal in this case be held in abeyance pending the outcome of this motion.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender



David Alexander
Appellate Defender

Attorneys for Petitioner

This 21st day of February, 2013

EXHIBIT A

Kimberly McCall

From: Ambroziak, Karen [kambroziak@sccourts.org]
Sent: Thursday, January 03, 2013 10:13 AM
To: Kimberly McCall
Subject: Marion Bowman vs. State

Ms. McCall,

I have received your request for the above-referenced transcript from March 14, 2007. Per Rule 607(i), SCACR, court reporters are required to retain the primary and back-up tapes for a period of five years from the date of the proceeding if the transcript has not previously been transcribed. This transcript has not previously been transcribed. These records were disposed of at the expiration of five years, and this transcript is no longer available in compliance with Rule 607(i), SCACR.

Karen Ambroziak, RPR
Court Reporter for the Honorable G. Thomas Cooper, Jr.

EXHIBIT B



Division of Appellate Defense
 1330 Lady Street, Suite 401
 Columbia, South Carolina 29201-3332
 Post Office Box 11589
 Columbia, South Carolina 29211-1589
 Telephone: (803) 734-1330
 Facsimile: (803) 734-1387

Robert M. Dudek, Chief Appellate Defender
 Wanda H. Carter, Deputy Chief Appellate Defender

February 20, 2013

Ms. Hattie O. Gordon
 Circuit Court Reporter
 Post Office Box 597
 Wallace, SC 29596

Dear Ms. Gordon:

Please provide us with the following transcript:

Marion Bowman v. State of South Carolina Case #: 06-CP-18-569

County: Darlington Date of Trial: January 16, 2008

Presiding Judge: James E. Lockemy

To ensure prompt payment, please sign and complete the enclosed CID FORM 3500 and include the original criminal case number (Indictment number) where the space is provided.

Please number the lines on the paper from 1-25, and include any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments.

If you are aware of any co-defendants or if the Attorney General's Office has already requested a transcript, please let us know.

Sincerely,

Kimberly McCall
 Legal Assistant

cc: S.C. Supreme Court
 Attorney General's Office

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dorchester County

James E. Lockemy, Circuit Court Judge

MARION BOWMAN,

PETITIONER,

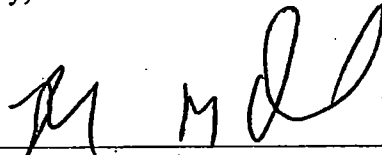
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Reply to the Return to Motion to Remand for a Reconstruction of the PCR Record in the above referenced case has been served upon opposing counsel, Donald Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Marion Bowman, #6006 at Lieber Correctional Institution, this 21st day of February, 2013.



Robert M. Dudek
Chief Appellate Defender

Attorney for Petitioner

SUBSCRIBED AND SWORN TO before me
this 21st day of February, 2013.



(L.S.)

Notary Public for South Carolina
My Commission Expires: October 2, 2013.

The Supreme Court of South Carolina

Marion Bowman, Petitioner,

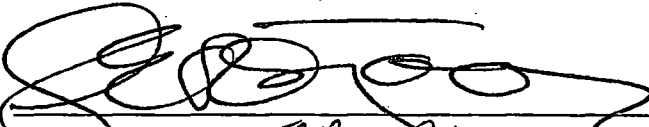
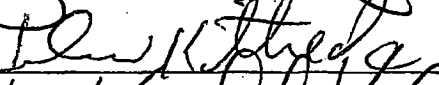
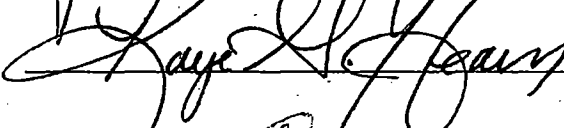

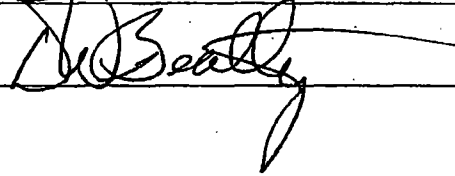
v.

State of South Carolina, Respondent.

Appellate Case No. 2012-213468

ORDER

Petitioner has filed a motion to remand for reconstruction of the records of certain hearings related to this capital post-conviction relief matter. The motion is denied.

	C.J.
	J.
	J.
	J.
	J.

We would grant the motion.

Columbia, South Carolina

March 21, 2013

cc:

RECEIVED

MAR 21 2013

OFFICE OF APPELLATE COUNSEL

10000

James Arthur Brown, Jr.
Robert Michael Dudek
Alan McCrory Wilson
John W. McIntosh
Donald J. Zelenka