No. 22-

IN THE

Supreme Court of the United States

MARION BOWMAN, JR.,

Petitioner,

v.

BRYAN P. STIRLING, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS; LYDELL CHESTNUT, DEPUTY WARDEN OF BROAD RIVER CORRECTIONAL INSTUTITON SECURE FACILITY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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****CAPITAL CASE****

QUESTIONS PRESENTED

Marion Bowman's convictions and death sentence rest on the compromised testimony of three witnesses who identified Bowman as the murderer. Two—James Taiwan Gadson and Travis Felder—had significant credibility issues, as they were charged as co-defendants and testified in exchange for lenient plea agreements with which they were impeached at trial. The State, however, suppressed evidence that Gadson himself confessed to committing the murder and suffered from memory and substance abuse problems. The third key witness, Hiram Johnson, had no agreement with the State, which made his testimony the centerpiece of its case for conviction and death. While suppressing evidence that Johnson had multiple unrelated felony charges that were brought by the same prosecutor and pending at the time of his testimony, the State characterized Johnson as a friend of Bowman's with no incentive to lie, who thus lent credibility to its impeached witnesses. The Fourth Circuit Court of Appeals correctly recognized this suppressed evidence may have benefited Bowman but, ultimately, found none of the evidence—individually or cumulatively—material to his conviction or sentencing. In doing so, the Court of Appeals ignored this Court's clearly established standards for materiality under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, requiring summary reversal.

The questions presented are:

1. Was the Fourth Circuit's finding of no materiality of the suppressed evidence that identified another person as the perpetrator and

impeached two primary witnesses—one of whom was that alternative perpetrator—on the issue of guilt or innocence inconsistent with this Court's clearly established precedents?

2. Was the Fourth Circuit's finding of no materiality with respect to the capital sentencing based solely on a finding that there was sufficient evidence to prove guilt contrary to this Court's clearly established precedents?

LIST OF PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

STATEMENT OF RELATED CASES

This petition arises from a habeas corpus proceeding in which Marion Bowman, Jr., was the petitioner before the U.S. District Court for the District of South Carolina, and before the U.S. Court of Appeals for the Fourth Circuit. The Respondents are Bryan P. Stirling, Commissioner of the South Carolina Department of Corrections, and Lydell Chestnut, Deputy Warden of Broad River Secure Facility. There are no additional parties to this litigation.

State v. Bowman, 2001-GS-18-00348 & 2001, Dorchester County, South Carolina, sentenced on May 23, 2002.

State v. Bowman, No. 26,071, South Carolina Supreme Court denial of direct appeal relief on November 28, 2005.

Bowman v. South Carolina, No. 05-10282, U.S. Supreme Court denial of a petition for writ of *certiorari* on June 12, 2006.

Bowman v. State, 2006-CP-18-00569, Dorchester County, South Carolina, denial of state post-conviction relief on March 12, 2012.

Bowman v. State, No. 2012-213468, South Carolina Supreme Court denial of petition for writ of certiorari on April 15, 2016.

Bowman v. Stirling, CA 9:18-287-TLW, U.S. District Court for the District of South Carolina, denial of petition for writ of habeas corpus issued on March 26, 2020.

Bowman v. Stirling, No. 20-12, U.S. Court of Appeals for the Fourth Circuit, opinion and order issued on August 16, 2022, and order denying rehearing *en banc* issued on September 13, 2022.

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Marion Bowman, Jr., a South Carolina prisoner under sentence of death, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the United States District Court for the District of South Carolina's denial of his petition for habeas corpus.

OPINIONS BELOW

The decision of the Fourth Circuit, *Bowman v. Stirling*, 45 F.4th 740 (4th Cir. 2022), is reproduced in the Appendix at pages 1 through 35. It affirmed an unpublished order of the District Court, *Bowman v. Stirling*, CA 9:18-287-TLW (Mar. 26, 2020), which is reproduced at Appendix pages 37 through 112. The Report of the Magistrate Judge, *Bowman v. Stirling*, CA 9:18-00287-TLW-BM (Dec. 10, 2019), is included at Appendix 113 through 232.

The federal constitutional issues addressed in these opinions and orders were raised and denied on the merits in the South Carolina circuit court's post-conviction relief order, which is reproduced in the Appendix at pages 235 through 365. The South Carolina Supreme Court's order summarily denying certiorari review of the relevant issues, *Bowman v. State*, No. 2012-213468 (Apr. 15, 2016), is reproduced in the Appendix "App." at page 234.

JURISDICTION

The Court of Appeals issued its opinion on August 16, 2022, and denied rehearing *en banc* on September 13, 2022. On December 6, 2022, Chief Justice

Roberts extended petitioner's time for filing this petition for *certiorari* to February 10, 2023. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourteenth Amendment to the Constitution, which provides in relevant part:

> No State shall . . . deprive any person of life [or] liberty . . . without due process of law . . . .

STATEMENT OF THE CASE

Marion Bowman, Jr. was convicted of murder and arson in Dorchester County, South Carolina, for the death of Kandee Martin, who had been shot to death and—hours later—placed in the trunk of her car, which was set on fire. The primary witnesses implicating Bowman were Taiwan Gadson and Travis Felder, both of whom were charged in the case and testified in exchange for plea agreements to greatly reduced sentences, and Hiram Johnson, who attributed a cold-blooded, mirthful confession to Bowman. The prosecution pointed to Johnson as the centerpiece of its case in argument in both the guilt and sentencing phases.

1. *The Uncontested Trial Evidence.*

The state's evidence that was not reliant on Gadson, Felder, and Johnson was merely circumstantial. That evidence revealed Martin's body was recovered from the trunk of her burning car in a rural area alongside Nursery Road in the early morning hours of February 17, 2001. App. 3. An autopsy established that she was shot to death and deceased prior to the fire. *Id.* at 4. Shell casings, a fired bullet, blood evidence,

and the victim's shoe were recovered at the crime scene. *Id.* at 10. Bowman's DNA was identified from vaginal swabs taken during Martin's autopsy.[1] *Id.* at 6.

The next day, the police arrested Bowman on an outstanding warrant for an unrelated charge of receiving stolen goods. State Court Appendix ("SCA"), *Bowman v. Stirling*, CA 9:18-00287-TLW, ECF No. 11-12 at 350. The police subsequently arrested Gadson, Bowman, Felder, and numerous others, including Bowman's wife, sisters, and father for principal or accessory involvement in the crimes against Martin. The state subsequently entered into plea agreements with Gadson, Felder and everyone charged other than Bowman. App. 30.

At trial, the state presented evidence that Bowman had a pistol at a party on the afternoon of the murder. Later that day, Bowman saw Martin in conversation and attempted to speak with her, as she owed him money. When she rebuffed him, Bowman cursed at her and said she would be dead that night. App. 4-5.

That evening, Bowman was seen after midnight in the parking lot of a rural nightclub where Felder and others had gathered. J.A. 397.[2] Around 3:00 a.m., after all had departed from the club and returned to town, Bowman asked Felder for a ride. This request came thirty minutes before Martin's burning car was discovered, but seven hours after it was first seen on the side of the road, and seven hours after the neighbor who ultimately discovered it first heard gunshots. When arrested, Bowman

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[1] *See* note 10, *infra*.

[2] "J.A." refers to the Joint Appendix in the Fourth Circuit.

had Martin's wristwatch in the pocket of the pants he had worn the previous night. App. 9.

Some days later, after Johnson told Bowman's wife that the murder weapon was stuffed in a chair in her living room, she found the weapon and transferred it to Bowman's sisters who, at the direction of their father, dropped the gun from a bridge over the Edisto River. The gun was recovered by a team of divers and the shell casings recovered at the scene matched the pistol. *Id.* at 9-10.

2. *The testimony of Gadson, Felder, and Johnson.*

Given this circumstantial evidence, the State relied heavily on the testimony of Gadson, Felder, and Johnson, its primary witnesses. According to Gadson and Felder, two weeks before the murder, Bowman purchased a Hi-Point .380 pistol. App. 4. The murder weapon was a Hi-Point .380 pistol that was recovered from the Edisto River. App. 10; J.A. 662-75.

Gadson testified pursuant to a plea agreement that dismissed a murder charge—for which he could have faced the death penalty or a minimum of 30 years confinement[3]—and allowed him to plead guilty to accessory after the fact and misprision of a felony with a negotiated sentence of 20 years. J.A. 336. He provided the only purported eyewitness account of Martin's shooting and the aggravating circumstances found by the jury in sentencing: kidnapping and larceny while armed with a weapon.

[3] S.C. Code § 16-3-20(A).

Gadson offered a lurid account of Martin driving up to the outdoor party with Bowman, who told Gadson to get in the car before directing Martin to a remote rural location. Gadson claimed that once out of the car Bowman announced his intention to kill Martin "because she was wearing a wire." According to Gadson, Martin approached them and told Bowman she was scared. Gadson then described the three hiding in the woods as a car drove by and then, as they walked back towards her car, Bowman abruptly shot at Martin five times, hitting her twice. Between the shots, Gadson claimed that Martin pleaded with Bowman not to shoot her anymore because she had a child to take care of. After Martin fell to the ground, Gadson claimed Bowman dragged Martin to the woods. As they drove back to town in Martin's car, Gadson claimed Bowman bragged about shooting Martin in the head and threatened to "blow [Gadson's] brains out" if he reported what he had seen. App. 5-6.

As another key witness for the state, Johnson testified that he had seen Bowman with a weapon before and after the shooting.[4] Gadson and Johnson both testified that after Martin's shooting, Bowman drove Martin's car to the nightclub and distributed gloves for them to wear while in the vehicle. Johnson said Bowman told him the car was stolen. Johnson claimed Bowman tried to sell Martin's car to people in the parking lot of the club. App. 7.

[4] Only Gadson and Felder testified they saw Bowman with a weapon of the same make and model as the murder weapon on the day of the crime. App. 4.

Johnson also provided the only testimony that, during the ride back to Branchville after leaving the nightclub, Bowman had a pistol in his lap and laughed in a chilling manner saying "I killed Kandee, heh, heh heh." App. 4, 7. The centrality of Johnson's testimony is evidenced in the State's closing, which repeats the statement Johnson attributed to Bowman and "highlight[s] the absence of any deal with or charges against Johnson, [and] tell[s] the jury that he did not have 'any reason to say something [that] wasn't true.'" App. 30 (quoting J.A. 829).

Felder, who also testified pursuant to a plea agreement with the state,[5] provided the only purported eyewitness testimony for the events surrounding the arson, claiming that after Bowman asked him for a ride around 3:00 a.m., they drove to Nursery Road where Bowman dragged Martin's body from the woods, placed it in the trunk of her car, confessed to her murder, and lit the car on fire. Felder then dropped Bowman off at home. App. 8.

> The State's evidence in sentencing added little to its trial presentation.
>
> > At sentencing, the state incorporated the evidence from the guilt phase and introduced evidence of Bowman's prior third-degree burglary and petit larceny convictions before presenting additional postmortem photos of Martin and testimony from the pathologist who performed her autopsy as to the condition of her body, followed by pictures of her celebrating family occasions and victim-impact testimony from her mother and father.

[5] In accord with the agreement, the State dismissed Felder's accessory after the fact of murder and arson charges—for which he could have faced up to 30 years' confinement, J.A. 440-41—and allowed him to plead guilty to accessory after the fact of arson in the third degree, for which he was sentenced to three years suspended to three years' probation, J.A. 1970.

App. 11. The state sought to convince the jury of four aggravating factors: kidnapping, criminal sexual conduct, armed robbery, and larceny with a deadly weapon. J.A. 1371, 1409. The jury, however, rejected criminal sexual conduct and armed robbery. J.A. 1404.

Bowman presented significant mitigation evidence of trauma and neglect that permeated Bowman's childhood, including witnessing his father's violence towards his mother, his father's abandonment of the family, and then the poverty of the family and daily physical abuse by Bowman's mother with switches and belts. J.A. 1148-49.

Bowman also became the caregiver for his family when his mother began suffering from physical ailments when Bowman was barely out of elementary school. He began cooking and caring for her and his siblings. J.A. 1098, 1102-03. He would help his mother out of bed, change her when she used the bathroom, clean her, feed her, and do for the family what she was unable to do. J.A. 1109, 1151-52. Sometimes Bowman stayed home from school to care for the family. J.A. 1152.

Bowman's mother had a relationship with a man named Joseph Sims who became like a stepfather to Bowman, but Sims was often away driving trucks for a living and permanently left the Bowmans' lives when Bowman was about seventeen. J.A. 1099, 1112, 1157. A social worker, Jeffrey Yungman, testified that Sims leaving was one of several traumatic events Bowman suffered as a teenager, including being hit in the head with a baseball bat, losing a cousin who died after being administered the wrong medication at a hospital, losing another cousin to suicide, and losing his

maternal grandfather. J.A. 1156-58.[6] Yungman concluded the trauma, neglect, and other difficulties Bowman suffered weakened his decision-making ability. J.A. 1161-63.

The defense also called witnesses to testify about Bowman's positive behavior in pretrial detention and presented an expert in prison adjustment and future dangerousness, who testified that Bowman would adjust well to prison life and would never be released. App. 11.

Although they did not testify in sentencing, the state relied on Gadson and Johnson as the centerpiece of its case in aggravation. Specifically, the state argued in closing, based on their testimony, that this was a "cold-blooded murder" that called for the death penalty. The prosecutor argued that Bowman "enjoyed the act" of killing Martin, which was evidenced by Gadson's testimony that Bowman asked if he "hear[d] her head hit the pavement?" and Johnson's testimony that Bowman laughed while confessing he had killed her, which the prosecutor interpreted as Bowman "thought it was funny." J.A. 1323.

3. *The state post-conviction proceedings.*

In state post-conviction relief proceedings ("PCR"), Bowman discovered and presented three items of evidence suppressed by the state which impeached both Gadson and Johnson and indicated that Gadson himself confessed that he had killed

[6] Yungman also testified about Bowman being flagged as handicapped in school and suffering from a head injury in a car accident as a child. J.A. 1149-150.

Martin. Bowman asserted the state's failure to disclose this evidence deprived him of due process in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

The first piece of evidence was a memorandum written by Samuel Richardson, a prosecution investigator who interviewed a jailhouse informant who asserted that Gadson confessed to the murder ("Richardson Memo"). As summarized by the lower court:

> Rickie Davis, an inmate who was housed at separate times with both Bowman and Gadson, handwrote a note dated August 6, 2001, that states: "I Rickie Davis was on A side with Gadson and he said that he was the one that shot the Girl and gave Bowman back the gun that was used and He said that it didn't mat[t]er because [Bowman's family] had got caught with the gun He also that the police all he got to do is say [Bowman] did it." The State provided this note to defense counsel before Bowman's trial.
>
> The State sent Richardson to investigate. Richardson wrote a memorandum summarizing his conversation with Davis:
>
> > Ricky Davis states that he and James Taiwan Gadson along with 4 or 5 others were sitting at a table on the A-side. Gadson was talking to the group when he said something about killing a girl. He stated that they were going to rob someone. They thought she was wired and he shot her in the head with a .380.
> >
> > The conversation occurred about three weeks before he wrote the letter. (August 6, 2001).
> >
> > Afterwards, Davis was playing chess with Marion Bowman in Cell 8. Davis told Marion Bowman about the conversation he had with James Gadson. Bowman said "if you heard all this, write it down." Bowman showed him a picture of the dead girl. He also showed him a file from his attorney.

> Bowman said he had been smoking dope that day. He said it was him, James Gadson and the girl at the scene. The girl was suppose[d] to help them rob a house to get drugs and money. Bowman knew the intended victim.
>
> Bowman never admitted he shot anyone.
>
> Subsequent to this, Davis talked to James Gadson again. At this time, Gadson said that Bowman shot her.

App. 13-14 (internal citations omitted).

The second piece of suppressed evidence was a mental health report that was prepared following an evaluation to determine if Gadson was competent to stand trial ("Gadson Report"). App. 12-13. Gadson was diagnosed with cannabis dependence and a seizure disorder. The report also includes details that Gadson reported to the doctors that he suffered from blackouts, and his psychological testing showed memory problems. The report also reveals "he hears a voice and 'a little beeping noise.'" App. 16-17.

The third piece of suppressed evidence was unindicted charges brought by the same prosecutor in unrelated cases against Johnson, which were pending at the time of Bowman's trial. App. 13.

> During the PCR hearings, it came to light that Johnson had charges pending against him at the time of Bowman's trial. . . . for a burglary and larceny committed on September 26, 2000, and for receipt of stolen goods on November 2, 2000. . . .

App. 19. The warrants had been issued on November 13, 2000, and served on Johnson on May 29, 2001. J.A. 2867, 2878. These charges were not, however, on Johnson's rap sheet as disclosed to the defense prior to trial. J.A. 2890-91. All of these charges,

for which Johnson faced up to a maximum of 15 years' confinement,[7] were dismissed after Bowman had been sentenced to death. J.A. 2877, 2881.

The state PCR court, in an Order drafted by the Attorney General, concluded with respect to the Richardson memo that there was no "suppression of favorable evidence" and no materiality. App. 15; J.A. 3320-21. With respect to the Gadson mental health report, the state court concluded that the report was not suppressed—because defense counsel allegedly could have obtained the report by other means—was not favorable, and was not material. App. 18; J.A. 3278-79. With respect to Johnson's pending charges, the state court concluded that the impeachment value of these charges was "limited," and thus the charges were not material for *Brady* purposes. App. 19; J.A. 9864-65. With respect to each finding of immateriality in the trial, the state court repeatedly referenced the "overwhelming" and "very strong" evidence of Bowman's guilt. J.A. 3279-80; 3311-12; 3321. The state court never addressed cumulative prejudice and never addressed the impact on Bowman's death sentence. The South Carolina Supreme Court denied *certiorari* review of Bowman's *Brady* claim. App. 234.

[7] Burglary second degree is punishable by up to ten years in confinement. S.C. Code §16-11-312(C)(1). Grand larceny of goods of a value less than five thousand dollars is punishable by up to five years in confinement. S.C. Code §16-13-30(B)(1). Receiving stolen goods of a value less than $1,000 is a misdemeanor punishable by up to 30 days in confinement. S.C. Code §16-13-180(B)(1).

4. *The federal habeas corpus proceedings*.

Bowman presented his exhausted *Brady* claim in a federal habeas corpus petition. The district court ultimately found the state court was not unreasonable in denying Bowman's habeas petition. App. 20-21. The district court never addressed cumulative prejudice and never addressed the impact on the death sentence.

The Fourth Circuit granted Bowman a certificate of appealability ("COA") pursuant to 28 U.S.C. § 2553(c)(1)(A) as to his *Brady* claim and reviewed de novo whether the state court's adjudication of that claim was unreasonable under 28 U.S.C. § 2254(d)(1) and (2). The court "assume[d], without deciding, that the three pieces of evidence Bowman identified were favorable and suppressed," App. 25, and acknowledged that the state court had *not* addressed the cumulative materiality of these items under *Kyles v. Whitley*, 514 U.S. 419 (1995). The court declined to determine whether the state court's analysis of materiality with no cumulative materiality analysis required deference under 28 U.S.C. § 2254 as an "adjudica[tion] on the merits," App. 23-24, and instead held that the cumulative evidence was not material "even applying de novo review – the standard most favorable to and requested by Bowman." App. 25.

The court addressed "the value of each piece of evidence individually before weighing the prejudicial effect of their alleged suppression cumulatively." App. 25. The court held that the two items of evidence impeaching Gadson would have added "little" beyond the information already known to defense counsel, App. 27, the

"additional impeachment value would be slight," App. 28, and Gadson's testimony was nevertheless consistent with other evidence, App. 33. These consistencies included the location of the murder (citing both Gadson and Felder), as well as a driver passing by and observing a car, and Bowman's alleged confession to Felder. *Id.*

In addressing Johnson's pending charges of burglary, larceny, and receiving stolen goods, the court held "evidence of [these] unresolved charges pending against [Johnson] in the same prosecutor's office would have had independent impeachment value," and "[e]ven without any evidence of an agreement between Johnson and the state regarding those charges, a jury could infer that Johnson was motivated to curry favor with the prosecution so that the charges against him would be dropped or otherwise beneficially resolved." App. 30. The court also observed that evidence of the pending charges would also have undermined the state's closing argument because "the prosecutor could not have claimed . . . that there was no evidence of any charges against Johnson." App. 30.

In spite of its own analysis, the court then concluded that "there are reasons to think this information would have been of limited effect," including that (1) Johnson's testimony was corroborated by other evidence, (2) multiple witnesses testified pursuant to plea agreements for charges stemming from this murder, (3) Johnson was an "ancillary" witness and "by no stretch the centerpiece of the State's case," and

(4) "there is no evidence that the State had treated Johnson favorably at the time of trial or offered to do so." App. 30-31.

Turning to its "cumulative materiality" analysis, the court held that "[t]he evidence of Bowman's guilt was truly 'overwhelming'" even independent of the testimony of Gadson and Johnson. App. 31-32. The panel noted evidence that Bowman carried a weapon before and after the murder, complained that the victim owed him money, threatened to kill Martin on the day of her murder, and was driving her car on the evening of her death. App. 32. The panel also cited two items of evidence that it deemed "circumstantial and forensic evidence" of guilt: the presence of Bowman's DNA in a vaginal swab from Martin's autopsy; and the curious circumstances surrounding the recovery of a gun that state examiners determined was the murder weapon. App. 33.

In conclusion, "[g]iven the limited value of the three pieces of undisclosed evidence and the overwhelming evidence of Bowman's guilt," the panel found "the cumulative effect of the undisclosed evidence insufficient to 'undermine confidence' in the jury's verdict." *Id.* (citing *Kyles*, 514 U.S. at 435). In a footnote, the panel rejected the separate question of materiality in sentencing "for the reasons already explained." *Id.* n.7.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted in this capital case because the United States Court of Appeals for the Fourth Circuit committed egregious error in "decid[ing] an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Specifically, the Fourth Circuit committed a blatant violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny by denying relief for both the guilt and sentencing phases of trial based on a prejudice standard that is in direct conflict with this Court's established precedents. This Court should grant certiorari and summarily reverse.

I. Certiorari should be granted because the Fourth Circuit's finding of no materiality on the issue of guilt or innocence is inconsistent with this Court's clearly established precedents.

This Court held long ago that "[a] rule . . . declaring 'prosecutor may hide, defendant must seek'" is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004). Thus, "[t]he suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. Both impeachment and exculpatory evidence is "favorable" evidence under *Brady*. *United States v. Bagley*, 473 U.S. 667, 676 (1985); *see also Giglio v. United States*, 405 U.S. 150, 154 (1972) ("When the reliability of a given witness may well be determinative

of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule.") (internal citations omitted).

> There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

Strickler v. Greene, 527 U.S. 263, 281-82 (1999). In gauging the prejudice or materiality of the withheld evidence, "the omission must be evaluated in the context of the entire record." *United States v. Agurs*, 427 U.S. 97, 112 (1976). If the evidence of guilt is strong, regardless of whether the withheld evidence is considered, there is no materiality. *Id.* at 112-13. "On the other hand, if the verdict is already of questionable validity," the withheld evidence, even though it may seem "of relatively minor importance might be sufficient" to establish materiality. *Id.* at 113. "Even if the jury—armed with all of th[e] new evidence—*could* have voted to convict," reversal is required if the Court has "'no confidence that it would have done so.'" *Wearry v. Cain*, 577 U.S. 385, 394 (2016) (Per Curiam) (quoting *Smith v. Cain,* 565 U.S. 73, 76 (2012)).

The Court has explicitly held that application of the "materiality" standard requires a court to consider the "net effect" of the evidence withheld by the prosecution. *Kyles*, 514 U.S. at 421–22. This is particularly important where the state seeks the death penalty "[b]ecause 'our duty to search for constitutional error with

painstaking care is never more exacting than it is in a capital case.'" *Id.* at 422 (quoting *Burger v. Kemp*, 483 U.S. 776, 785 (1987)).

In *Kyles*, the Court emphasized "[f]our aspects of materiality under *Bagley*." 514 U.S. at 434. First:

> [A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). . . . *Bagley*'s touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Kyles, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678).

Second:

> [M]ateriality . . . is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Kyles, 514 U.S. at 434-35.

Third, "once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review." *Kyles*, 514 U.S. at 435.

"The fourth and final aspect of *Bagley* materiality" emphasized in *Kyles* is that "suppressed evidence" must be "considered collectively, not item by item." 514 U.S. at 436; *Wearry*, 577 U.S. at 394.

In applying this analysis and finding "materiality" in *Kyles*, the Court observed:

> [T]he question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same. Confidence that it would have been cannot survive a recap of the suppressed evidence and its significance for the prosecution.

514 U.S. at 453.

The Fourth Circuit misapplied this precedent. In finding the withheld evidence related to Gadson to be immaterial, the circuit court determined that, even if the *Brady* material had "reduce[d] Gadson's credibility, much of his eyewitness account remained consistent with the other evidence presented to the jury." App. 33. The consistencies relied upon, however, such as the location of the murder and a driver passing by and observing a car, *id.*, do not actually point to evidence of Bowman's guilt. *See, e.g., Smith,* 565 U.S. at 76 (finding evidence impeaching an eyewitness material where the state's other evidence was not "strong enough to sustain confidence in the verdict").

Likewise, the court's reliance on the consistency of Gadson's "eyewitness account of the murder" with other evidence, App. 33, ignores the fact that Gadson—*the first person arrested for the murder*—had the most motivation to point the finger at someone else (Bowman), admitted he was at the scene of the murder, and had

ample opportunity to review discovery and consult with counsel to ensure that any statement made would be "consistent" with other evidence such as the location of the murder and witness testimony as to when and where a car passed by the scene. *Id.* His testimony also evolved over time. For example, in Gadson's initial statements to law enforcement he denied any involvement in the murder. J.A. 2798-2801. He then confessed presence and involvement but pointed to Bowman as the sole killer. J.A. 2802-03. Still, after engaging in plea bargaining to avoid the possibility of a death sentence or murder conviction, Gadson made statements for the first time during trial, such as information that he had been present several weeks before when Bowman allegedly bought a Hi-Point .380 pistol, J.A. 341, which Gadson knew from discovery that SLED had identified as the murder weapon. Gadson also stated for the first time in his testimony that Bowman had threatened him into silence—"if I told anyone he was going to blow my brains out," J.A. 370, which he knew had been alleged by another potential witness, Darian Williams, in his pretrial statements. SCA, ECF No. 11-24 at 99-100. Likewise, Gadson admitted going to the nightclub in Martin's car after her death for the first time in his trial testimony, J.A. 373-76, only after he became aware that Johnson had informed police that Gadson had ridden in the car with Bowman, Johnson, and Williams, J.A. 2861.

Moreover, the court's reliance on Felder's testimony to corroborate Gadson, App. 33, similarly ignores that Felder had the same opportunity to fashion his testimony around both the state's theory and evidence *and Gadson* while securing

his lenient plea deal. *See, e.g., Martin v. State*, 832 S.E.2d 277, 280 (S.C. 2019) (rejecting the state's characterization of the evidence against the Petitioner as "overwhelming" in ineffective assistance of counsel reversal where "[t]he only people who placed Petitioner at the robbery were the three codefendants, two of whom conceded they testified in hopes of a favorable deal with the State and two of whom admitted lying to law enforcement during the investigation in an effort to exonerate themselves and their codefendants.").

More importantly, the circuit court simply assumed that the jury would have discounted evidence that Gadson confessed to the murder and suffered from blackouts, drug addictions, and hallucinations in the same fashion that the circuit court did. This ignores the appropriate inquiry of whether there is a reasonable probability of a different outcome, which is not the same as a more-likely-than-not inquiry. *Kyles*, 514 U.S. at 434. When the suppressed evidence "may well have been material to the jury's assessment," *Cone v. Bell*, 556 U.S. 449, 475 (2009), materiality has been established.

But the Circuit's errors are most acute as to Johnson, the witness the state relied upon both to implicate Bowman and to shore up its impeached witnesses. In addressing materiality of the withheld evidence of Johnson's multiple pending felony charges, the circuit court failed to address the evolving nature of Johnson's testimony from his pretrial statements. *Kyles*, 514 U.S. at 444 ("the evolution over time" of a witness' statement "can be fatal to its reliability"). For example, Johnson did not

mention any alleged confession to murder by Bowman in at least two pretrial statements. J.A. 2861. When testifying under looming felony prosecutions, however, he attested that Bowman not only confessed, but he did so while holding a pistol in his lap and laughing. J.A. 423.

Likewise, contrary to *Kyles*, the circuit court failed to recognize the likely materiality or "damage" of withheld impeachment evidence "is best understood by taking the word of the prosecutor" in his closing argument and viewing that against the true evidence. 514 U.S. at 444. Here, in closing argument, the prosecutor relied heavily on Johnson's testimony both on its own terms and to buttress the credibility of the other state witnesses—a gambit that worked only because of the suppressed evidence. The prosecutor had to acknowledge that most of the state witnesses had plea agreements for charges related to Martin's murder or had "a reason to lie" because they knew what happened or helped dispose of evidence. But Johnson, per the prosecutor, was a friend of Bowman's who had no charges pending and no reason to lie. J.A. 829.

While acknowledging Johnson's undisclosed felony charges had real impeachment value[8] and would have negated the prosecutor's ability to argue that he

[8] A witness in a South Carolina criminal trial may be impeached with evidence of pending criminal charges and the potential sentence faced in order to show "[b]ias, prejudice or any motive to misrepresent" per S.C.R.E. Rule 608(c). *See State v. Sims*, 558 S.E.2d 518, 522-23 (S.C. 2002); *State v. Mizzell*, 563 S.E.2d 315, 318-20 (S.C. 2002).

had no personal bias or motive, the circuit court determined that Johnson's testimony was corroborated by other evidence. That is untenable. No other witness testified to a confession from Bowman besides Gadson and Felder, who were motivated by their plea agreements and, as the only others present at the murder and arson according to their own testimony, to spare themselves. Moreover, Gadson and Felder testified to alleged statements made at different places and different times; and neither corroborates Bowman's alleged laughing confession to Johnson.

Likewise, the notion that the impeachment value of Johnson's pending felony charges was limited because other witnesses testified pursuant to plea agreements ignores how Johnson's testimony was used. The prosecutor distinguished Johnson from the state's other witnesses as the only person with no "kind of charge against him or any kind of a deal with the State, any reason to say something wasn't true." J.A. 829. The prosecutor used Johnson's supposed status as "a friend of [Bowman's] with no reason to lie" to buttress those witnesses that—as it had to acknowledge—*did* have "a reason to lie." J.A. 818. Those circumstances do not *DIMINISH* the materiality of Johnson's pending charges, they *ENHANCE* it.

Similarly, the circuit court's characterization of Johnson as an "ancillary" witness, App. 31, is flatly belied by the prosecutor's dependence on Johnson to redeem its other witnesses and the state's emphasis on the luridness of Johnson's statement, including that Bowman "laughed when he said that [he killed Kandee] . . . [h]is words were 'I killed Kandee, heh, heh, heh. Y'all recall that testimony." J.A. 829.

Particularly given the ample reasons to doubt the other state witnesses, these emphases on Johnson's testimony and his attributed (although false) qualities reveal him as a *key* witness, not an ancillary one.

The circuit court's finding of "no evidence that the State had treated Johnson favorably at the time of trial or offered to do so" is of little relevance. App. 31. As the court acknowledged, "a jury could infer that Johnson was motivated to curry favor with the prosecution so that the charges against him would be dropped or otherwise beneficially resolved." App. 30. It also ignores clearly established federal law making the "*possibility* of a reward" an *even stronger* "incentive to testify" in a manner pleasing to the prosecutor than a known "*promise* or binding contract." *Bagley*, 473 U.S. at 683 (emphases added).[9]

Finally, the court's characterization of the state's evidence as "overwhelming" even without Gadson and Johnson, App. 31-32, is plainly wrong. The remaining evidence *at most* points to Bowman as being present at the murder as an accomplice or accessory. This Court's precedent holds that such *Brady* evidence is material and that reversal is required. *Wearry*, 577 U.S. at 392-93 (evidence is material when it means the difference between being the actual killer and an accessory after the fact).

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[9] *See also Boone v. Paderick*, 541 F.2d 447, 451 (4th Cir. 1976) (a promise without assurance may be interpreted as contingent "upon the quality of the evidence produced," increasing the incentive to make the testimony "pleasing to the promisor"); *State v. Mizzell*, 563 S.E.2d 315, 318 (S.C. 2002) ("The lack of a negotiated plea, if anything," makes a witness with pending charges "more likely to engage in biased testimony in order to obtain a future recommendation for leniency.")

The court's citation of Bowman's DNA in Martin's vaginal swab as "forensic evidence" of his guilt of her murder is belied by the lack of an indictment, testimony, evidence, or even trial argument by the state that Bowman committed sexual assault; the jury, moreover, rejected "criminal sexual conduct" as a statutory aggravating circumstance in sentencing. App. 11-12. The presence of Bowman's DNA indicates nothing more than a sexual relationship with Martin as much as—or even more than—24 hours before her murder.[10]

Further, in connecting the murder weapon to Bowman, the circuit court ignored facts that render that connection questionable. In addition to Gadson and Felder—who received significant leniency—providing the only testimony linking Bowman to a weapon of the same make and model as the murder weapon on the day of the crime, the court also glossed over the fact that the weapon was found in Bowman's home only *AFTER* the home had been previously searched by law enforcement, *AFTER* Bowman was already in pretrial confinement, *AND AFTER* *Johnson* told Bowman's wife it was there. J.A. 553, 565. No evidence revealed how or when the weapon got in the chair or that Bowman put it there. The same is true of ammunition found in the chair more than *two months later*, when the chair was no

[10] As indicated in the lower court's opinion, a defense witness testified in sentencing that Bowman and Martin had been alone together in his bathroom for a while and then left his home together earlier that day. App. 11. Likewise, multiple witnesses testified that Bowman and Martin were friends, who were often seen together. J.A. 103, 388, 434. The forensic pathologist for the state acknowledged that the seminal fluid from which the DNA evidence was taken could have been present for as much as 48 hours prior to Martin's death. J.A. 309.

longer even in the Bowman home. J.A. 602-04. Likewise, the discovery of the weapon and its disposal in a river was never connected to the incarcerated Bowman; there was no evidence that he was even aware that a weapon had been found and thrown in a river until it was offered as evidence against him.

Finally, in the circuit court's purported analysis of "cumulative materiality," the court erred in stating that it would focus on the sufficiency of the evidence remaining if Gadson's and Johnson's testimony were ignored. App. 31. This is error in and of itself. *Kyles*, 514 U.S. at 434 ("[M]ateriality . . . is not a sufficiency of evidence test."). The Court also failed even to do what it set out to do, because in citing the evidence of guilt remaining, the court repeatedly cited the testimony of both Gadson and Johnson. App. 32. Moreover, the court relied heavily on the testimony of Felder, another witness who testified solely in support of a plea bargain to save himself from more serious convictions and time in confinement. All the while, the court ignored the fact that there is no physical evidence demonstrating that Bowman—as opposed to Gadson or someone else—committed the murder.

The circuit court's analysis of materiality was contrary to this Court's precedent and based on misrepresentations of the facts before the court. At minimum, there is a reasonable probability of a different outcome. *See, e.g., Wearry*, 577 U.S. at 392-93 (evidence material when it means the difference between being the actual killer and an accessory after the fact).

II. Certiorari should be granted because the Fourth Circuit's finding of no materiality with respect to the capital sentencing was contrary to this Court's clearly established precedents.

The Fourth Circuit provided no separate analysis to the question of materiality in sentencing. Rather, the court found no materiality in the capital sentencing for the same reasons the court discussed in finding no materiality to the convictions—the alleged "overwhelming" nature of the evidence of Bowman's guilt.[11] App. 35 n.7. In doing so, however, the court again committed egregious error because this Court has made it abundantly clear that "[e]vidence that is material to guilt will often be material for sentencing purposes as well; the converse is not always true." *Cone*, 556 U.S. at 473.

Analysis of *Brady* materiality is necessarily different in different contexts.

> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the

[11] The lower court preceded its summary denial of sentencing relief by asserting that Bowman did not challenge sentencing materiality in state court. App. 35 n.7. While the court was correct that Bowman did not explicitly assert in state court that materiality should be assessed with respect to sentencing, there is no requirement that Bowman make this separate assertion when he asserted that the suppressed evidence was material to his convictions and required reversal. Assertion of materiality to the underlying convictions necessarily includes the assertion of materiality for sentencing and the court must analyze the materiality in sentencing even if it finds the evidence immaterial to the convictions. *See, e.g., Brady*, 373 U.S. at 87-88; *Cone*, 556 U.S. at 469-75.

> balance of aggravating and mitigating circumstances did not warrant death.

Strickland v. Washington, 466 U.S. 668, 695 (1984).[12] A court makes a fundamental error in failing to "distinguish[] the materiality of the suppressed evidence with respect to [a defendant's] guilt from the materiality of the evidence with respect to his punishment." *Cone*, 556 U.S. at 452.

In making the materiality determination in sentencing, the court must evaluate the "totality of the available . . . evidence – both that adduced at trial, and . . . in the habeas proceedings." *Williams v. Taylor*, 529 U.S. 362, 398 (2000). Suppressed evidence can be material to sentencing "even if it does not undermine or rebut the prosecution's death-eligibility case." *Id.* at 398. Materiality in the capital sentencing context is expressed as "a reasonable probability that at least one juror would have struck a difference balance." *Wiggins v. Smith*, 539 U.S. 510, 537 (2003); *Cone*, 556 U.S. at 452 (court must determine "whether there is a reasonable probability that the withheld evidence would have altered at least one juror's assessment of the appropriate penalty"). Alternatively, as the Court described the prejudice analysis in *Rompilla v. Beard*, 545 U.S. 374, 393 (2005):

> [T]he undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Rompilla's] culpability," *Wiggins v. Smith*, 539 U.S., at 538, 123 S.Ct. 2527 (quoting *Williams v. Taylor*, 529 U.S., at 398, 120 S.Ct. 1495), and the likelihood of a different result if the evidence had gone in is "sufficient to undermine confidence in the

[12] The Court applies this same test for determining "materiality" in the *Brady* context and "prejudice" in the context of claims of the denial of the effective assistance of counsel under the Sixth Amendment. *Strickland,* 466 U.S. at 694.

> outcome" actually reached at sentencing, *Strickland*, 466 U.S., at 694, 104 S.Ct. 2052.

The circuit court's repeated characterization of the state's evidence as "overwhelming" even without the testimony of Gadson and Johnson, App. 31-32, violates *Kyles* where this Court made clear the question is "whether . . . he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles,* 519 U.S. at 434. In addressing materiality in sentencing, the circuit court failed to apply the proper sentencing materiality analysis where the focus is not simply on whether the state has proven guilt or a statutory aggravating circumstance. Because a jury considering a death sentence has already found the defendant guilty of murder and the existence of at least one statutory aggravating circumstance, S.C. Code §16-3-20, the sentencing phase focuses on "the particularized consideration of relevant aspects of the character and record" of the individual defendant and the circumstances of the offense, and not on his death-eligibility. *Woodson v. North Carolina,* 428 U.S. 280, 303 (1976); *see also Williams*, 529 U.S. at 398 ("Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case."). Relevant mitigating evidence includes any evidence that would be "mitigating" in the sense that it "might serve 'as a basis for a sentence less than death.'" *Skipper v. South Carolina,* 476 U.S. 1, 4-5 (1986) (quoting *Lockett v. Ohio,* 438 U.S. 586, 604 (1978)).

Evidence of residual doubt, particularly in a case where multiple persons were present and participating in the murder, is without doubt mitigating. Indeed, in a

study based on interviews of former South Carolina capital jurors, the Capital Jury Project found that "'[r]esidual doubt' over the defendant's guilt is the most powerful 'mitigating' fact[or]," Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 Colum. L. Rev. 1538, 1563 (1998), with 77.2% of jurors stating they would be less likely to impose a death sentence in the face of residual doubt of guilt or relative culpability, *id.* at 1559.

Impeachment evidence and evidence pointing to another trigger person is especially powerful when each juror explicitly has the option of rejecting a death sentence "for any reason or no reason at all" on a death-eligible defendant, which is the case in South Carolina. *State v. Atkins*, 399 S.E.2d 760, 764 (S.C. 1990). Likewise, the jurors need not weigh the mitigating factors against the aggravating factors; they are simply required to "consider" the mitigating factors. *State v. Bellamy*, 359 S.E.2d 63, 65 (S.C. 1987). Moreover, a death sentence is *never* required, regardless of the weight or even lack of mitigating circumstances. *See, e.g., Williams v. Ozmint*, 671 S.E.2d 600, 603 (S.C. 2008).

Bowman's jury was charged in accordance with these precepts. JA 1373-74; JA 1383-84. Nonetheless, the circuit court disregarded this clearly established federal and state law, rejecting the question of materiality in sentencing in a footnote "for the reasons already explained." App. 35 n.7. But the court's holding that the *Brady* evidence was not material because the evidence of Bowman's *guilt* was "overwhelming" in no way addresses whether that evidence created "a reasonable

probability that at least one juror would have struck a difference balance" as to *sentence*. *Wiggins*, 539 U.S. at 537.

That is particularly true here, where the state offered little in aggravation save evidence of guilt dependent on dubious witnesses. The state presented evidence of non-violent prior offenses for which Bowman was given youthful offender sentences, J.A. 1314, "photographs of the victim's burned body and a pathologist's testimony about the autopsy," and limited victim impact evidence. App. 11. Relying only on the guilt-innocence phase evidence, the jury found two aggravating circumstances (kidnapping and larceny with the use of a deadly weapon) and rejected two others (criminal sexual conduct and armed robbery). J.A. 1374–75, 1404. And, when arguing for death, the state relied once again on the guilt-innocence phase testimony of *Gadson and Johnson*, whose impeachment material it suppressed. The prosecutor highlighted Gadson's claim that the victim "begged for her life" while "she was thinking about her baby" in her last moments. J.A. 1308. Gadson's testimony was also the sole evidence of the statutory aggravating circumstances found by the jury. J.A. 1312. Similarly, the Solicitor's arguments that this was a "cold-blooded murder" that Bowman "enjoyed" relied on Gadson's testimony that Bowman had asked Gadson if he heard "her head hit the pavement" and Johnson's testimony that Bowman laughed about the murder because "[h]e thought it was funny." J.A. 1323; *see also* J.A. 1328 ("he laughed about it"). The centrality of these compromised witnesses to the state's case for death cannot be ignored. *Kyles*, 514 U.S. at 444 (the

likely materiality or "damage" of withholding impeachment evidence "is best understood by taking the word of the prosecutor" in his closing argument); *Monroe v. Angelone*, 323 F.3d 286, 314 (4th Cir. 2003) (considering, in determining materiality, the prosecution's closing argument emphasizing witness testimony that *Brady* evidence would have undermined); *see also Strickler*, 527 U.S. at 295 (finding impeachment evidence was not material where the witness's testimony "was not relied upon by the prosecution at all during its closing argument at the penalty phase").

Clearly, in the context where there was little aggravation evidence presented by the state that was not presented during the trial as evidence of guilt,[13] there is a reasonable probability that at least a single juror, *Wiggins*, 539 U.S. at 537, with knowledge of the impeachment evidence withheld by the state, would have harbored enough "lingering doubt as to [Bowman's] guilt and relative culpability," App. 35 n.7, to reject a death sentence.

The circuit court's finding of immateriality of the withheld evidence in sentencing is contrary to this Court's clear precedents. *See, e.g., Brady*, 373 U.S. at 88 (finding evidence related to the level of Brady's culpability and participation in the murder immaterial with respect to guilt or innocence but material with respect to sentencing).

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[13] The Solicitor was even willing to enter a plea agreement with Bowman for a life sentence and made this offer seven times prior to trial, J.A. 2074, 2402-03, including once on the record in a pretrial motions hearing, SCA, ECF No. 11-1 at 50.

CONCLUSION

Certiorari should be granted and the lower court's decision summarily vacated and remanded for consideration of the suppression and favorability determinations and proper consideration of the materiality determination pursuant to *Brady* and its progeny.

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February 10, 2023.

APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-12

MARION BOWMAN, JR.,

Petitioner – Appellant,

v.

BRYAN P. STIRLING, Commissioner, South Carolina Department of Corrections; LYDELL CHESTNUT, Deputy Warden of Broad River Correctional Secure Facility,

Respondents – Appellees.

Appeal from the United States District Court for the District of South Carolina, at Beaufort. Terry L. Wooten, Senior District Judge. (9:18-cv-00287-TLW)

Argued: October 28, 2021 Decided: August 16, 2022

Before NIEMEYER, AGEE, and RUSHING, Circuit Judges.

Affirmed by published opinion. Judge Rushing wrote the opinion, in which Judge Niemeyer and Judge Agee joined.

ARGUED: Teresa L. Norris, FEDERAL DEFENDERS OF WESTERN NORTH CAROLINA, INC., Charlotte, North Carolina, for Appellant. William Joseph Maye, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellees. **ON BRIEF:** Lindsey S. Vann, Megan E. Barnes, JUSTICE 360, Columbia, South Carolina, for Appellant. Alan Wilson, Attorney General, Donald J. Zelenka, Deputy Attorney General, Melody J. Brown, Senior Assistant Deputy Attorney General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA,

Columbia, South Carolina, for Appellees.

RUSHING, Circuit Judge:

When the prosecution suppresses favorable evidence material to a defendant's guilt or punishment, it violates the constitutional guarantee of due process. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963). Evidence is "material" when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Materiality is evaluated "in the context of the entire record." *Turner v. United States*, 137 S. Ct. 1885, 1893 (2017) (internal quotation marks omitted).

Marion Bowman was convicted of murdering Kandee Martin and sentenced to death. During his state post-conviction relief (PCR) and federal habeas proceedings, Bowman argued that the State of South Carolina's failure to produce three pieces of evidence violated his due process rights because he could have used that evidence to impeach prosecution witnesses. Considering the entire record and the overwhelming evidence of Bowman's guilt, every court to address this argument has deemed the undisclosed evidence not material. We agree.

I.

We begin with an overview of the evidence presented during the guilt and penalty phases of Bowman's trial. Then we summarize the state post-conviction and federal habeas proceedings to date.

A. Guilt Phase

Early in the morning on February 17, 2001, firefighters were called to the scene of a car fire. After extinguishing the flames, officers discovered Martin's body in the trunk.

An autopsy revealed that Martin had been shot to death before being placed in the trunk. Later that day, officers arrested Bowman. The State charged Bowman with murder and notified him of its intent to seek the death penalty.

1. Bowman's Gun Before the Murder

At trial, the State put on evidence that Bowman possessed a gun of the same make and model as the murder weapon on February 16, 2001, the day of the murder. Two witnesses—Travis Felder and Bowman's cousin James Taiwan Gadson—testified that Bowman had purchased a Hi-Point .380 semi-automatic pistol roughly two weeks earlier. On the morning of the murder, Gadson saw Bowman walking out of his house with a limp. Bowman explained to Gadson that he had the gun in his pants and it was cold against his leg. Throughout the day, a group of people—including Bowman—gathered in William Koger's yard to drink and socialize. Koger, Gadson, Joseph Fogle, and Bowman's cousin Hiram Johnson testified that Bowman placed his gun in a burn barrel for safekeeping while he ran an errand. When he returned, the gun was gone, and Bowman accused Gadson of stealing it. Johnson and Gadson testified that, before the altercation escalated, Johnson admitted that he had removed the gun, and Bowman reclaimed it. Johnson observed Bowman place the gun back in his pants as he left Koger's. Bowman's cousin Katrina West testified that Bowman had a gun with him later that afternoon.

2. Bowman's Comments About Martin Before the Murder

Several witnesses recounted comments Bowman made about Martin on the day she was murdered. Fogle testified that he gave Bowman a ride from Koger's house. Around that time, Bowman told Fogle that Martin owed him money.

That afternoon, Bowman rode to a pharmacy with his sister Yolanda and West. On their way to the pharmacy, Bowman saw Martin parked in front of a house talking to a group of individuals, including Edward Waters. Bowman had Yolanda stop the car so he could speak with Martin. Yolanda testified that Bowman said Martin owed him money and "I want my money today." J.A. 104. Yolanda and West testified that Bowman attempted to get Martin's attention, but Martin "held up her finger saying wait a minute." J.A. 98. According to Yolanda, Bowman responded, "Fuck it. . . . That bitch be dead by dark." J.A. 99. West testified that Bowman said, "Fuck that ride. That bitch will be dead dark fall." J.A. 121. Waters testified that Bowman said, "Fuck waiting a minute" and "I'm about to kill this bitch." J.A. 81.

3. Gadson's Eyewitness Account of the Murder

Gadson gave an eyewitness account of the murder. He testified that, around 7:00 or 7:30 p.m., Martin drove up to Koger's house with Bowman. Bowman told Gadson, who had been drinking most of the afternoon, to get in the car. Bowman then directed Martin to make various turns until the trio reached a remote location on Nursery Road. When they arrived, Gadson and Bowman exited the car. As they walked away from the vehicle, Bowman told Gadson that he was going to kill Martin because she was wearing a wire.

Gadson testified that Martin got out of the car, walked down the road, grabbed Bowman by the arm, and told him she was scared. Around that time, a car drove by, and

the three hid in the woods.[1] When they emerged, Martin walked toward her car and Bowman followed behind her. Gadson then heard three gunshots and saw three muzzle flashes. Martin ran toward Gadson and turned to face Bowman. Gadson testified that Martin said, "'Please, . . . don't shoot me no more, I have a child to take care of.'" J.A. 366. Bowman shot Martin twice more, and she fell to the ground. Gadson "messed in [his] pants" and jumped in the car. J.A. 368. Bowman, meanwhile, dragged Martin's body into the woods by her feet. A vaginal swab of Martin's body indicated the presence of male DNA consistent with Bowman's.

When Bowman returned to the car, he told Gadson "I shot that B in the head, heard her head hit the ground." J.A. 368. Bowman then drove Martin's car back into town. Gadson testified that Bowman threatened to "blow [his] brains out" if he told anyone what he had seen. J.A. 370.

4. Bowman's Confessions and Conduct After the Murder

Several witnesses gave an account of Bowman's actions immediately following the murder. Gadson testified that he returned to Koger's house and saw Bowman and Johnson driving Yolanda's car. Johnson corroborated this account, testifying that Bowman asked him to "go downtown." J.A. 416. James J. Gadson (James)—Gadson's father and Bowman's uncle—testified that Bowman and Johnson drove up to him. Bowman gave

[1] A driver testified that he observed a car that looked like Martin's parked on the side of the road shortly before 8:00 p.m. on the night of the murder.

James ten dollars and asked him to purchase four pairs of gloves. James and Johnson both testified that James did so and gave the gloves to Bowman.

Around midnight, Bowman, Gadson, Johnson, and Darian Williams drove to a club outside of town in Martin's car. Johnson testified that, when they first entered the car, Bowman told Johnson that he had stolen the vehicle. Bowman drove and distributed the gloves for the passengers to wear while in the vehicle. Gadson testified that he and Williams went into the club while Bowman and Johnson remained outside.[2] Several individuals, including Travis Felder, Keith Rivers, and Valorna Smith, verified that they observed Bowman at the club. Johnson testified that Bowman walked around the parking lot trying to sell Martin's car. Smith testified that, when she exited the club, she saw that Bowman had a pistol in his pocket.

A few hours later, having not succeeded in selling Martin's car, Bowman drove Gadson, Johnson, and Williams back to town. Johnson testified that, during their drive, Bowman said, "I killed Kandee, heh, heh, heh." J.A. 423.[3] He observed that Bowman had a gun in his lap.

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[2] Gadson admitted that he had been drinking and was "[n]ear about" drunk when he left the club. J.A. 376. He also testified that, when he was first approached by police, he told them that he knew nothing about Martin's murder. During cross-examination, the defense asked Gadson, who had also been charged for the murder, about his plea agreement with the prosecution. The defense also brought to light that Gadson owned the same type of gun as Bowman.

[3] During Johnson's cross-examination, Bowman's counsel asked questions regarding a brain injury that Johnson had suffered. Johnson admitted that he sometimes had problems with his recall or memory.

The State also presented eyewitness testimony that, after his unsuccessful attempt to sell Martin's vehicle, Bowman disposed of it and Martin's body. Felder testified that after returning from the club he was with Smith and Carolyn Brown at Smith's apartment. Brown and Felder testified that Bowman arrived sometime after 3:00 a.m. Felder testified that Bowman asked for help parking a car. Felder followed Bowman, who drove Martin's car to Nursery Road—the same location where, according to Gadson, Bowman had killed Martin and hidden her body. When the two arrived, Bowman entered the woods and returned a few minutes later, dragging Martin's body facedown by her feet. Felder watched Bowman tuck a Hi-Point .380 into his waist before placing Martin's body into the trunk of her car. Bowman turned to Felder and said, "You didn't think I'd do it." J.A. 453. Felder asked, "Did what?" J.A. 453. Bowman replied, "I killed Kandee Martin." J.A. 453.

Felder testified that Bowman then drove Martin's car into a field, parked it, and lit it on fire. Bowman climbed into Felder's car, and Felder told him, "I don't want nothing to do with this." J.A. 455. Felder testified that Bowman responded, "I ain't get you involved with it, don't worry about it, everything is taken care of." J.A. 455–456. Felder dropped Bowman off at home. Felder recalled the events taking between 30 and 40 minutes, but Smith and Brown testified that Felder was gone for 10 to 20 minutes.[4]

[4] On cross-examination, the defense questioned Felder's failure to speak with the police, and Felder admitted that he had entered a plea agreement with the State.

5. Bowman's Arrest

Later in the day on February 17 after the burning car was discovered, officers went to Bowman's house to arrest him. According to one officer, they found Bowman hiding behind a bed in his underwear. The officers retrieved pants for Bowman before leaving the house and, upon searching the pants, they discovered a woman's wristwatch in the pocket. At trial, Martin's mother identified the watch as belonging to her daughter. Bowman's wife, Dorothy, testified he had been wearing the same pants when he came home earlier that morning. The pants also matched descriptions of Bowman's clothing from the day before as recounted by Johnson, Felder, and West.

Officers searched Bowman's living room at the time of his arrest but did not find anything. Almost two months later, they discovered a box of Winchester .380 caliber handgun ammunition hidden in the sofa that had been in Bowman's house at the time of his arrest.

6. Family's Attempt to Dispose of the Gun

The State introduced evidence that Bowman's family attempted to dispose of the murder weapon after Bowman's arrest. Dorothy testified that, sometime in the two days following the arrest, Johnson told her that a gun was hidden in the chair in their living room, which deputies had searched at the time of Bowman's arrest. Bowman's sister Kendra testified that Dorothy brought the gun to her house shortly after Bowman's arrest. Kendra and Dorothy took the gun to Bowman's father, who placed it in the center console of his truck.

Kendra and Yolanda testified that, a few days later, they followed Bowman's father to a nearby church, where he retrieved the gun and placed it in the trunk of Kendra's car. Kendra and Yolanda then drove to a bridge, and Yolanda dropped the gun into the Edisto River. Ultimately, Kendra and Yolanda told officers what they had done, and a diver discovered the pistol in the river near where Yolanda dropped it.

7. Forensic Analysis of the Gun and Shell Casings

The State presented evidence derived from forensic analysis conducted on the gun found in the river and on six shell casings and a fired bullet discovered at the murder scene. This testing indicated that all the casings were Winchester-made and that five of the casings had been fired by the gun discovered in the river. As for the sixth casing and the fired bullet, the markings were inadequate to prove or disprove that the specific gun had discharged them, but markings on the fired bullet indicated that it was at least fired by a gun with similar rifling to the one discovered in the river.

8. Defense Case

After the prosecution rested, the defense presented no evidence. During closing argument, the defense emphasized that the State had entered into plea agreements with many witnesses—including Gadson, Felder, Yolanda, and Kendra—to secure their testimony. The defense highlighted Gadson's motivation to testify that Bowman was the shooter, along with potential discrepancies between Gadson's account of the murder and other evidence, such as the number of casings found at the scene compared to the number of shots Gadson recounted and the location of the bullets' entry on Martin's body. The defense also suggested that the murder weapon, which Dorothy found in the couch after a

tip from Johnson, may have been planted there after the officers searched the area because one door to Bowman's house could not be locked.

After approximately three hours of deliberations, the jury found Bowman guilty of murder and third-degree arson.

B. Penalty Phase and Direct Appeal

The case moved to the penalty phase. The State identified four aggravating circumstances to support the death penalty: that the murder occurred (1) in the commission of a kidnapping, (2) in the commission of criminal sexual conduct, (3) in the commission of robbery with a deadly weapon, and (4) in the commission of larceny with a deadly weapon. The State supplemented its guilt-phase evidence with evidence that Bowman had four prior convictions for larceny or burglary, including court records and victim testimony. The State also presented photographs of Martin's corpse and testimony from Martin's parents about the effect of her death on their lives and the life of her young son.

The defense then presented mitigation evidence, including testimony about the conditions of Bowman's upbringing and the effect of those events on his decisionmaking, the ways Bowman assisted his family growing up, and Bowman's good prison behavior and ability to adjust to prison life. The defense also called Frankie Martin (Frankie) to the stand. He testified that, around 12:00 or 1:00 p.m. on the day of the murder, Martin, Bowman, and Fogle were at his home for "[a] couple of minutes," during which time Bowman and Martin went "in the bathroom, talked for a minute, then they left." J.A. 1185–1186.

The defense also recalled Felder and played a video that depicted him purchasing gasoline at 3:14 a.m. on February 17, 2001. Felder conceded that he did not mention the purchase during his guilt-phase testimony. He testified that Bowman had given him a plastic jug to put the gasoline in and asked Felder to purchase two or three dollars' worth of gas. Felder purchased the gas and brought it to Nursery Road, where Bowman retrieved the gas from Felder's vehicle before setting Martin's car ablaze.

Following closing arguments and less than two hours of deliberation, the jury found two aggravating circumstances: that Bowman murdered Martin (1) in the commission of a kidnapping and (2) in the commission of larceny with a deadly weapon. The jury recommend the death penalty, which the judge imposed.

Bowman appealed to the Supreme Court of South Carolina, raising five issues. That court affirmed. *See State v. Bowman*, 623 S.E.2d 378, 380 (S.C. 2005). The United States Supreme Court denied Bowman's petition for a writ of certiorari. *See Bowman v. South Carolina*, 547 U.S. 1195 (2006).

C. State PCR Court Proceedings

After his direct appeal, Bowman applied for post-conviction relief in the South Carolina Court of Common Pleas. His initial application was based on claims of ineffective assistance of counsel that are not at issue here. During the PCR proceedings, three pieces of evidence came to light that serve as the bases for Bowman's *Brady* claims before us: (1) a memorandum written by Samuel Richardson, a prosecution investigator who interviewed a jailhouse informant who claimed that Gadson had confessed to the murder (Richardson Memo); (2) a mental health report that was prepared to determine if Gadson

was competent to stand trial (Gadson Report); and (3) unindicted charges pending against Johnson in an unrelated case at the time of Bowman's trial.

1. Richardson Memo

Rickie Davis, an inmate who was housed at separate times with both Bowman and Gadson, handwrote a note dated August 6, 2001, that states: "I Rickie Davis was on A side with Gadson and he said that he was the one that shot the Girl and gave Bowman back the gun that was used and He said that it didn't mat[t]er because [Bowman's family] had got caught with the gun He also that the police all he got to do is say [Bowman] did it." J.A. 2812. The State provided this note to defense counsel before Bowman's trial.

The State sent Richardson to investigate. Richardson wrote a memorandum summarizing his conversation with Davis:

> Ricky Davis states that he and James Taiwan Gadson along with 4 or 5 others were sitting at a table on the A-side. Gadson was talking to the group when he said something about killing a girl. He stated that they were going to rob someone. They thought she was wired and he shot her in the head with a .380.
>
> The conversation occurred about three weeks before he wrote the letter. (August 6, 2001).
>
> Afterwards, Davis was playing chess with Marion Bowman in Cell 8. Davis told Marion Bowman about the conversation he had with James Gadson. Bowman said "if you heard all this, write it down." Bowman showed him a picture of the dead girl. He also showed him a file from his attorney.
>
> Bowman said he had been smoking dope that day. He said it was him, James Gadson and the girl at the scene. The girl was suppose[d] to help them rob a house to get drugs and money. Bowman knew the intended victim.
>
> Bowman never admitted he shot anyone.

> Subsequent to this, Davis talked to James Gadson again. At this time, Gadson said that Bowman shot her.

J.A. 2873 (capitalization omitted). The Richardson Memo was not provided to the defense.

The parties developed evidence about this nondisclosure during the PCR hearings. Davis testified that he did not recall Gadson actually discussing the case with him or saying anything contained in his handwritten note. Rather, Davis claimed that Bowman had told him to write the note. Davis also testified that when his attorney, who coincidentally was also one of Bowman's trial counsel, approached Davis about the note in 2002, Davis told her that Bowman had asked him to write it. The attorney, Marva Hardee-Thomas, testified that she did not remember meeting with Davis or seeing the note.

Bowman's lead trial counsel, Norbert Cummings, testified that he had seen the note and had sent an investigator to question Davis about it before trial. Cummings recalled that the investigator reported back that Davis "recant[ed]," "never said what he allegedly said," and "ain't going to cooperate." J.A. 2519. Cummings relied on his investigator's synopsis. Consequently, Cummings made the "strategic decision [that] it was not worth it to call . . . Davis," affirming that if "Davis had gotten up on the stand and said, 'Marion Bowman told me to write that letter and I don't know anything about it,'" Davis's testimony would have created the appearance that Bowman fabricated evidence, prompting an inference of guilt. J.A. 2520.

Cummings did, however, testify that, had he known there was a "consistent statement to [Davis's handwritten note]," he would have "followed back up" with Davis. J.A. 2135–2136. The Richardson Memo would have "shed a different light" and could

have led to additional investigation. J.A. 2521. Cummings "wish[ed]" that he "would have had" the Richardson Memo. J.A. 2301. Still, Cummings conceded that, even if he had both documents, he "would [have been] in the same boat" if Davis continued to recant, J.A. 2527, reiterating that he would not have wanted "Ricky Davis . . . to come into court and testify that Marion Bowman told him to write that and made it all up," J.A. 2634.

The PCR court determined that the Richardson Memo could not sustain a *Brady* claim. First, it held that there was no "suppression of favorable evidence" because the Memo could have been used—at most—to impeach Davis if he had testified at trial and the State had already provided the defense with Davis's handwritten note, which contained the crucial fact that Gadson allegedly admitted to murdering Martin. J.A. 3319. The court noted that defense counsel never stated he would have called Davis to testify, given his investigator's conclusion that Davis was "full of bunk." J.A. 3320 n.6 (internal quotation marks omitted). As Cummings testified, the defense would have been "in the same boat" even if it had the Richardson Memo. J.A. 3320 (internal quotation marks omitted).

Additionally, the PCR court concluded that the Richardson Memo was not material. Davis previously told the defense's investigator and then also testified at the PCR hearing that his handwritten statement was not true, that he knew nothing about the case, and that he had written the note at Bowman's behest. The PCR court found that "the difference between possible impeachment with the disclosed handwritten statement in Davis's own hand, and impeachment with the [Richardson] Memo or testimony from [Richardson], [was] not so great that it undermine[d] confidence in the verdict under the standard for materiality." J.A. 3321.

The PCR court added that the Richardson Memo "especially" lacked materiality "given the overwhelming evidence of [Bowman's] guilt." J.A. 3321. The court summarized that evidence as follows: Several witnesses—including one of Bowman's sisters—testified that Bowman threatened to kill Martin on the day of the murder. Gadson testified that he saw Bowman shoot Martin, shoot her again as she begged for her life, and drag her body into the woods. Witnesses testified that Bowman drove Martin's car after the murder and required the passengers to wear gloves. Johnson testified that he heard Bowman admit he killed Martin. Felder testified that he saw Bowman drag Martin's body out of the woods, put it in the trunk of her car, and set the car on fire. He also testified that he heard Bowman admit he killed Martin. Martin's watch was in Bowman's pants pocket when he was arrested, and his DNA was found inside her body. Bowman's family testified that they found the gun—which was later matched to five bullet casings at the murder scene—and threw it in the river. In view of this evidence, the PCR court concluded, the additional impeachment value of the Richardson Memo was not material.

2. Gadson Report

Initially, Gadson was charged alongside Bowman for Martin's murder. To determine if he was competent to stand trial, the Dorchester County Court ordered a mental health evaluation, resulting in the Gadson Report. The Report diagnosed Gadson with a "History of Seizure Disorder" and "Cannabis Dependence" but concluded that he was competent to stand trial. J.A. 2805.

Regarding Gadson's diagnoses, the Report recounted three "seizure[]-like episodes" Gadson had suffered, during which he "blacked out." J.A. 2807 (internal quotation marks

omitted). The last episode occurred around December of 2000 and led to a hospital visit where Gadson was told that he had likely experienced a "light seizure." J.A. 2807 (internal quotation marks omitted). Despite the seizures, "MRI scan, EEG, and neurological evaluations were normal and did not demonstrate evidence of central nervous system pathology." J.A. 2807. The Report also stated that Gadson reported smoking large quantities of cannabis—up to six blunts a day. Indeed, two of his seizures coincided with marijuana use.

In addition to these diagnoses, the Report detailed the results of mental status and psychological exams. The examiners "found no evidence of long or short-term memory impairment" and concluded that Gadson displayed a good "ability to concentrate" and "the capacity for abstract reasoning." J.A. 2808. The Report noted that Gadson reported hearing "a voice and a little beeping noise" but concluded that his "description of this hallucination is atypical for mental illness." J.A. 2808 (internal quotation marks omitted). During a psychological test, Gadson "exhibited some mild impairment of verbal memory, but [his] verbal learning was good." J.A. 2808. According to the Report, "[o]ther areas of cognition that were assessed were adequate." J.A. 2808.

The Gadson Report was not provided to the defense. During the PCR hearings, Gadson acknowledged that he had undergone the relevant evaluation but denied ever saying that he heard a voice or beeping noise. Bowman's counsel testified that, had he received the Report, he would "hope and pray" that he would have asked Gadson about "hearing voices" and "blacking out." J.A. 2276. The Solicitor in charge of Bowman's

prosecution testified that the Report "arguably" would have had "some impeachment value." J.A. 2738.

The PCR court concluded that the Gadson Report was not suppressed, not favorable, and not material. As to suppression, the PCR court determined that defense counsel could have obtained the Report by other means. Gadson had been Bowman's co-defendant, and his mental health report was required by a court order, which was a public record. Had counsel reviewed the clerk of court records for Gadson, the PCR court reasoned, he would have realized a psychiatric report was available and could have requested a copy of the Report by subpoena.

Regarding favorability, the PCR court determined the Report "would have had no impeachment value" because it contained "no indication that Gadson suffered from any type of memory impairment that would have affected his ability to recall what occurred in this case." J.A. 3279. Further, the court explained, the Report did "not indicate that Gadson suffered from any mental illness other than cannabis dependence." J.A. 3279.

The PCR court also deemed the Report not material because it did not indicate Gadson suffered any memory loss from his seizures, there was no evidence he experienced a seizure or smoked marijuana on the day of the murder, and Gadson admitted at trial "that he drank alcohol all day on the day of the murder." J.A. 3279. Weighing the Report's additional impeachment value against the "overwhelming evidence of guilt" described above, J.A. 3279, the PCR court concluded that nondisclosure of the Report did not undermine confidence in the outcome of Bowman's trial.

3. Johnson's Charges

During the PCR hearings, it came to light that Johnson had charges pending against him at the time of Bowman's trial. The relevant documents indicated that a warrant for Johnson's arrest issued on May 29, 2001, for a burglary and larceny committed on September 26, 2000, and for receipt of stolen goods on November 2, 2000. Johnson was not indicted on these charges, however, until April 2003—almost a year after Bowman's trial. The charges were dismissed in April 2003 and December 2004.

The Solicitor in charge of Bowman's prosecution testified that there was no agreement concerning the charges, and Johnson testified that the dismissal of his charges had nothing to do with his testimony in Bowman's case. Defense counsel testified that he would have questioned Johnson about any pending charges if he had been aware of them.

The PCR court held that Bowman failed to establish materiality for the undisclosed charges. The charges were of limited impeachment value, the court reasoned, because there was no evidence that Johnson received any benefit for his testimony, the charges were unrelated to the murder, and the defense had already impeached Johnson at trial based on a head injury he sustained when he was shot by a police officer. The PCR court thus concluded that the charges were not material.

* * *

Given its conclusions that neither these nor any other claims were meritorious, the PCR court denied Bowman's application for relief. Bowman appealed, and the South Carolina Supreme Court denied his petition for certiorari as to the *Brady* claims at issue

here, granted certiorari on an unrelated ground, and affirmed. *See generally Bowman v. State*, 809 S.E.2d 232 (S.C. 2018).

D. Federal Habeas Proceedings

Bowman then sought a writ of habeas corpus in federal court, *see* 28 U.S.C. § 2254, raising seven grounds for relief in his petition, including the *Brady* claims discussed above. Pursuant to local rule, the case was referred to a magistrate, who recommended denying the petition. The district court agreed.

1. Richardson Memo

Regarding the Richardson Memo, the district court "found no basis to conclude that the PCR court was incorrect" in determining that nondisclosure was not material. *Bowman v. Stirling*, No. 9:18-cv-00287, 2020 WL 1466005, at *18 (D.S.C. Mar. 26, 2020). Although the district court acknowledged "the arguable impeachment value of the undisclosed information," it also held that the PCR court was not unreasonable in determining that favorable evidence was not suppressed because defense counsel already possessed Davis's handwritten note. *Id.*

2. Gadson Report

Addressing the Gadson Report, the district court determined that "the PCR court did not unreasonably apply federal law in concluding that there was no *Brady* violation because Bowman could have obtained the report by other means." *Id.* (discussing *Fullwood v. Lee*, 290 F.3d 663 (4th Cir. 2002), and *Banks v. Dretke*, 540 U.S. 668 (2004)). The district court did not discuss materiality because Bowman did not object to the magistrate judge's

conclusion that the PCR court was not unreasonable in finding the information in the Gadson Report not material.

3. Johnson's Charges

As for Johnson's pending charges, the district court observed that the PCR court considered the "extensive and varied evidence of guilt, which came from multiple witnesses," and the limited value of this information for impeachment. *Id.* The district court concluded that "the PCR court's determination that this information was not material was based on reasonable factual findings." *Id.*

* * *

The district court denied Bowman's habeas petition and his subsequent motion to alter or amend the judgment. Bowman then appealed to this Court. We granted a certificate of appealability on the *Brady* claims but denied it for the other claims Bowman sought to appeal. *See* 28 U.S.C § 2253(c)(1)(A) (prohibiting appeal absent a certificate of appealability).

II.

We review de novo the district court's order denying Bowman habeas relief. *Richardson v. Branker*, 668 F.3d 128, 138 (4th Cir. 2012). "In doing so, however, we are guided and restricted by the statutory language of 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 [AEDPA], and a wealth of Supreme Court precedent interpreting and applying this statute." *Horner v. Nines*, 995 F.3d 185, 197 (4th Cir. 2021) (internal quotation marks omitted). Under this statutory standard, federal courts "shall not" grant a writ of habeas corpus "with respect to any claim that was

adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

A *Brady* violation requires the defendant to prove three elements: (1) "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching"; (2) "that evidence must have been suppressed by the State, either willfully or inadvertently"; and (3) that evidence must be "'material either to guilt or to punishment.'" *Strickler v. Greene*, 527 U.S. 263, 280–282 (1999) (quoting *Brady*, 373 U.S. at 87); *see also United States v. King*, 628 F.3d 693, 701–702 (4th Cir. 2011) (defendant bears the burden of establishing a *Brady* violation). "'[E]vidence is "material" within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.'" *Smith v. Cain*, 565 U.S. 73, 75 (2012) (quoting *Cone v. Bell*, 556 U.S. 449, 469–470 (2009)).

When multiple pieces of evidence have been suppressed, materiality turns on "the cumulative effect of all such evidence." *Kyles v. Whitley*, 514 U.S. 419, 421 (1995). That effect must be evaluated "in the context of the entire record." *Turner*, 137 S. Ct. at 1893 (internal quotation marks omitted). In sum, the materiality question "is whether 'the favorable evidence,' 'considered collectively,' 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *United States v.*

Blankenship, 19 F.4th 685, 692 (4th Cir. 2021) (emphasis removed) (quoting *Kyles*, 514 U.S. at 435–436).

Bowman argues that we must consider the cumulative materiality of the alleged *Brady* evidence de novo. The PCR court ruled that each of Bowman's three items of evidence was, by itself, not material. But the PCR court did not rule on cumulative materiality, likely because prejudice was dispositive only for the Johnson charges (as the court also held that the Richardson Memo and Gadson Report were not favorable or suppressed). Still, the court did evaluate the materiality of each of the three withheld pieces of evidence.

We have no discretion to disregard the standards Congress has imposed for review of federal habeas petitions filed by state prisoners. But this deferential standard applies only to claims "adjudicated on the merits in State court." 28 U.S.C. § 2254(d); *see Johnson v. Williams*, 568 U.S. 289, 302 (2013). If the state court did not resolve the merits of a properly presented federal claim, then there is no decision to which we can defer and we review the question de novo. *Gordon v. Braxton*, 780 F.3d 196, 202 (4th Cir. 2015); *Monroe v. Angelone*, 323 F.3d 286, 297 (4th Cir. 2003). The same is true when the state court did not decide one element of a properly presented federal claim; if the federal court must consider that element, it does so de novo. *See Porter v. McCollum*, 558 U.S. 30, 39 (2009) (assessing de novo the deficient performance element of petitioner's ineffective assistance of counsel claim because the state court did not decide it but ruled solely on the prejudice element); *Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (assessing de novo the prejudice element of petitioner's ineffective assistance of counsel claim because the state

court did not decide it but ruled solely on the deficient performance element); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (same).

In an analogous case, we reviewed a state prisoner's claim of cumulative materiality de novo when the state court addressed the materiality of some items of evidence but did not have the opportunity to consider other evidence revealed for the first time during the federal habeas proceedings. *See Monroe v. Angelone*, 323 F.3d 286, 297–299 (4th Cir. 2003). As we explained, in that circumstance we had "no way of deferring to an earlier state court adjudication on materiality because no state court considered all of the *Brady* material" presented in federal court. *Id.* at 299. We therefore made "an independent assessment of whether the suppression of exculpatory evidence—including the evidence previously presented to the state courts—materially affected" the defendant's conviction. *Id.*

Bowman's case differs somewhat from *Monroe* in that all of the alleged *Brady* evidence here was before the PCR court, and it analyzed the materiality of each item individually but did not assess their collective import. The PCR court's item-by-item prejudice evaluations warrant deference as "adjudicat[ions] on the merits in State court." 28 U.S.C. § 2254(d). At the same time, we recognize that individual items of suppressed evidence that are not material on their own may, in the aggregate, "undermine[] confidence in the outcome of the trial." *Bagley*, 473 U.S. at 678; *see Kyles*, 514 U.S. at 421–422 (evaluating whether "the net effect of the [withheld] evidence" raises "a reasonable probability that its disclosure would have produced a different result").

We need not resolve the standard of review, however, because even applying de novo review—the standard most favorable to and requested by Bowman—the cumulative evidence is not material. We will therefore assume, without deciding, that the three pieces of evidence Bowman identified were favorable and suppressed. *See Nicolas v. Att'y Gen. of Md.*, 820 F.3d 124, 130–131 (4th Cir. 2016) (assuming that suppressed statements were favorable but denying habeas petition because they were not material); *see also Olvera v. Gomez*, 2 F.4th 659, 675 (7th Cir. 2021) (assuming deficient attorney performance but denying habeas petition because, on de novo review, the deficiencies were not prejudicial). We will also assume that we may review cumulative materiality de novo in this circumstance. Even granting all of these assumptions in Bowman's favor, his claim for federal habeas relief still fails, as we explain below.[5]

III.

We turn now to the alleged *Brady* evidence that was withheld during Bowman's trial. We discuss the value of each piece of evidence individually before weighing the prejudicial effect of their alleged suppression cumulatively. *See Kyles*, 514 U.S. at 436 n.10; *United States v. Bartko*, 728 F.3d 327, 340 (4th Cir. 2013).

[5] If we found in Bowman's favor that the state court's decision regarding the favorability or suppression of this evidence was unreasonable under the standard of Section 2254(d)—a question we do not decide—we would nevertheless affirm because the evidence, considered cumulatively, is not material. We therefore may take the unusual step of assuming the statutory question in Bowman's favor and proceed directly to the dispositive inquiry. *See* 28 U.S.C. § 2254(d) (requiring that the writ "shall not be *granted*" unless the state court adjudication of the claim was unreasonable in one of the ways specified in the statute (emphasis added)).

A.

We begin with the Richardson Memo. That document recorded the same critical information as Davis's handwritten note, which was provided to the defense: that Gadson allegedly confessed to Davis that he, not Bowman, killed Martin. The Memo also included additional details about Gadson's alleged confession and what Bowman said to Davis in response. Bowman argues that he could have used the Richardson Memo to question Richardson, Davis, or Gadson at trial and the Memo would have boosted his effort to paint Gadson as an alternative suspect.

As an initial matter, the Richardson Memo, which was an out-of-court statement recounting Davis's out-of-court statements about Gadson's out-of-court statements, constituted multiple layers of hearsay. *See* S.C. R. Evid. 801(c), 802; *see Walker v. Kelly*, 589 F.3d 127, 142–143 (4th Cir. 2009) (considering the path to admission at trial and the implications thereof when weighing materiality). Because of this, to question Richardson about the substance of his Memo, defense counsel likely would have had to present Davis as a witness, and Davis would have had to deny telling Richardson the information recorded in the Memo. *See* S.C. R. Evid. 801(d)(1) (identifying a prior inconsistent statement by a witness as "not hearsay").

But as defense counsel knew before trial—and the PCR hearings reinforced—Davis's testimony would have harmed, not helped, Bowman's case. During the PCR hearings, Davis testified that he never talked with Gadson about the murder. Rather, all his information about the case came from Bowman, and he wrote his note at Bowman's insistence, using information Bowman supplied. As Bowman's counsel testified at the

PCR hearing, this testimony would have been incredibly damaging to Bowman's case by implicating him in falsifying evidence to shift the blame. Certainly, if Davis testified and recanted the contents of his handwritten note, defense counsel could have used the Richardson Memo to cross-examine him, demonstrating that Davis had previously made a detailed statement consistent with the note to a law enforcement officer. But even with the Memo, defense counsel would not have wanted "Davis . . . to come into court and testify that Marion Bowman told him to write that and made it all up." J.A. 2634.

When it comes to impeaching Gadson, the Memo also was cumulative of Davis's handwritten note, which the defense already possessed. *See Turner*, 137 S. Ct. at 1894–1895 (reasoning that certain "undisclosed impeachment evidence" was not material because "it was largely cumulative of impeachment evidence [the defendants] already had"); *see also Johnson v. Folino*, 705 F.3d 117, 129 (3d Cir. 2013) ("Suppressed evidence that would be cumulative of other evidence . . . is generally not considered material for *Brady* purposes."). Both documents contain the central inconsistent statement—that Gadson had previously identified himself, not Bowman, as the murderer. The Memo's additional details about the crime were not inconsistent with Gadson's testimony, and his testimony was corroborated by other evidence at trial. Thus, for impeaching Gadson, the Memo offered little, if anything, beyond what the defense had already received.

B.

We turn next to the Gadson Report. Bowman argues that the Report would have been valuable to impeach Gadson's memory as the sole eyewitness to testify about the

murder.[6] Although the Report would not have bolstered Bowman's theory of Gadson as an alternative suspect, it would have provided some basis for additional impeachment questions on cross-examination. The Report was a double-edged sword, however, and its value for additional impeachment of Gadson's recall was minimal.

The Report states that Gadson suffered three seizure-like episodes in the years before the murder, with the last occurring around December of 2000, approximately two months before the murder. Two of those episodes coincided with marijuana use, and the Report diagnosed Gadson as cannabis dependent. The Report also noted that Gadson reported hearing "a voice and a little beeping noise" and that, during a psychological test, he exhibited "some mild impairment" in his ability to remember what he read or heard. J.A. 2808 (internal quotation marks omitted). Taken together, this evidence could have been used to question Gadson's memory and sanity before the jury.

But the Gadson Report's additional impeachment value would be slight. There is no evidence in the record that Gadson suffered a seizure the night of the murder; indeed, the Report states that his last episode was months before. Similarly, no evidence suggested that Gadson smoked marijuana on the day of the murder. Moreover, Gadson's memory of

[6] Bowman did not object to the magistrate judge's conclusion that the Gadson Report was not material and so has likely waived the right to appellate review of this issue. *See United States v. Midgette*, 478 F.3d 616, 621 (4th Cir. 2007). The State has not urged us to find the issue waived. We will assume—without deciding—that the State may waive the waiver, *see Hunt v. DaVita, Inc.*, 680 F.3d 775, 780 n.1 (7th Cir. 2012); *United States v. Quiroz*, 22 F.3d 489, 491 (2d Cir. 1994), or that the "interests of justice" warrant discretionary review of the waived issue, *Arakas v. Comm'r, Soc. Sec. Admin.*, 983 F.3d 83, 104–105 (4th Cir. 2020) (internal quotation marks omitted), because, even considering the Report, we ultimately must affirm.

the events had already been impeached through testimony that he had been drinking alcohol all afternoon before the murder and was "[n]ear about" drunk by the time he left the club with Bowman and the others later that night. J.A. 376.

Further, parts of the Report bolstered Gadson's memory and sanity. For example, the examiners found that Gadson "was able to recall significant past personal information," showed "no evidence of long or short-term memory impairment," had good concentration and "the capacity for abstract reasoning," and was of average intelligence. J.A. 2808. After noting Gadson's mild verbal memory impairment, the Report states that his "verbal learning was good" and "[o]ther areas of cognition that were assessed were adequate." J.A. 2808. Additionally, the Report indicates that Gadson's account of hearing a voice and a beeping noise was "atypical for mental illness." J.A. 2808. The Report's ultimate conclusion that Gadson was competent to stand trial would also undermine any defense effort to suggest that he was mentally unstable. If the defense had chosen to use the Gadson Report at trial, the State could have been expected to characterize the Report as a professional assessment that Gadson was sane and his memory reliable.

C.

Third, we consider Johnson's unindicted charges. Bowman contends that, had those charges been disclosed, defense counsel could have questioned Johnson about them during trial to suggest to the jury that Johnson was testifying against Bowman in hopes of receiving favorable treatment from the prosecution with respect to those unrelated charges. *See* S.C. R. Evid. 608(c) ("Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise

adduced."). Bowman emphasizes that, during closing argument for the guilt phase of trial, the State highlighted the absence of any deal with or charges against Johnson, telling the jury that he did not have "any reason to say something [that] wasn't true." J.A. 829. The State counters that Johnson had already been impeached about memory problems resulting from being shot in the head by a police officer, which suggested his involvement in criminal activity.

Although the defense did elicit testimony about Johnson's head injury, evidence of unresolved charges pending against him in the same prosecutor's office would have had independent impeachment value. Even without any evidence of an agreement between Johnson and the State regarding those charges, a jury could infer that Johnson was motivated to curry favor with the prosecution so that the charges against him would be dropped or otherwise beneficially resolved. Had the charges been disclosed, the prosecutor could not have claimed in closing argument that there was no evidence of *any* charges against Johnson, but only charges related to this crime.

At the same time, there are reasons to think this information would have been of limited effect. Other evidence at trial corroborated Johnson's account of events. And the jury heard that multiple witnesses were testifying pursuant to plea agreements with the State for charges stemming from this murder, including Gadson, Felder, Yolanda, and Kendra. Although Johnson's testimony was helpful to the prosecution—especially his memory that Bowman snickered as he confessed to the killing—he was by no stretch the centerpiece of the State's case. Johnson's ancillary role distinguishes this case from those on which Bowman relies. *See Giglio v. United States*, 405 U.S. 150 (1972); *Boone v.*

Paderick, 541 F.2d 447 (4th Cir. 1976); *Ruetter v. Solem*, 888 F.2d 578 (8th Cir. 1989). In those cases, the government suppressed evidence of agreements not to prosecute witnesses on whom the government's case "almost entirely" depended, *Giglio*, 405 U.S. at 154; *see Boone*, 541 F.2d at 452, 453 (witness was "by far the most important" and "critical to the conviction"), and evidence that the government delayed a sentence commutation hearing for its "principal witness" until after the defendant's trial, *Ruetter*, 888 F.2d at 580; *see also id.* at 581 (prosecution's case "depended almost entirely" on the witness's testimony). Here, there is no evidence that the State had treated Johnson favorably at the time of trial or offered to do so, nor was Johnson the State's central witness against Bowman. The undisclosed evidence of Johnson's pending charges was undoubtedly valuable for impeachment, but its importance does not rise anywhere close to the level of the suppressed evidence in *Giglio*, *Boone*, or *Ruetter*.

D.

We now assess the cumulative materiality of the three pieces of undisclosed evidence to determine whether the State violated Bowman's due process rights. *See Kyles*, 514 U.S. at 436–437; *Bartko*, 728 F.3d at 340. We must evaluate the withheld evidence "in the context of the entire record" at trial and determine "whether there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Turner*, 137 S. Ct. at 1893 (internal quotation marks omitted). Having done so, we conclude that there is no such reasonable probability.

The evidence of Bowman's guilt was truly "overwhelming," as the PCR court put it. J.A. 3279, 3321. And that evidence did not depend solely on Gadson and Johnson—

far from it. At least four witnesses testified that they saw Bowman carrying a gun consistent with the murder weapon on the day Martin was killed, and others testified to seeing Bowman with a pistol of some type both before and after the murder. Three different witnesses, including Bowman's own sister, testified that Bowman said Martin would "be dead by dark" or that he was "about to kill [Martin]." J.A. 81, 99, 121. Two witnesses testified that, on the day of the murder, Bowman complained that Martin owed him money. Two other witnesses, Felder and Johnson, testified that Bowman told them point-blank that he killed Martin. Felder—whose testimony is not affected by any alleged *Brady* evidence—further testified that, less than twelve hours after the murder, Bowman led Felder directly to where Martin's body was hidden, retrieved her body from the woods within "a minute, two minutes," put it in the trunk of her car, and then set both corpse and car ablaze. J.A. 451. Other witnesses corroborated Felder's account that he assisted Bowman with a car that night.

Several witnesses confirmed that Bowman was driving Martin's car the night of the murder. James testified that, at Bowman's request, he purchased four pairs of gloves for Bowman. Consistent with James's testimony, Johnson and Gadson testified that Bowman required them to wear gloves while riding in Martin's car. Johnson testified that he observed Bowman attempting to sell Martin's car at the nightclub, and other witnesses corroborated that Bowman and Johnson were at the club that night. Although the defense could have questioned Johnson's credibility based on the undisclosed evidence about his pending charges, his testimony was in large part corroborated by and consistent with that of other witnesses.

Then there is the circumstantial and forensic evidence. A vaginal swab of Martin's body indicated the presence of male DNA consistent with Bowman's. Officers found Bowman hiding in his home the day after the murder. Martin's wristwatch was in the pocket of the jeans that, according to Bowman's wife, Bowman had been wearing the night before—jeans that were consistent with those Johnson, West, and Felder described Bowman as wearing the day of the murder. Following Bowman's arrest, Bowman's wife found a pistol hidden in their living room. Bowman's sisters testified that they worked with Bowman's father to dispose of the gun in the Edisto River. In Bowman's couch, officers discovered a box of corresponding bullets that also matched those found at the murder scene. Forensic analysis of the casings found at the scene confirmed that five of the six were fired from the gun retrieved from the Edisto River and indicated that the sixth casing and a fired bullet found at the scene could have been fired by that gun.

All of this is without even considering Gadson's eyewitness account of the murder. Yet, even if the Gadson Report and the Richardson Memo had been admitted into evidence and reduced Gadson's credibility, much of his eyewitness account remained consistent with the other evidence presented to the jury. For example, Gadson's testimony about the location of the murder was consistent with Felder's testimony about the place to which Bowman later returned to retrieve Martin's body. Similarly, Gadson stated that Bowman dragged Martin's body into the woods after the murder, and Felder testified that Bowman dragged Martin's body out from the same woods. Gadson's testimony that a car drove by while he, Bowman, and Martin were on Nursery Road and that the three hid in the woods was corroborated by a driver, who testified that he observed a car consistent with Martin's

parked off Nursery Road at around the same time the trio would have been there. Even Gadson's testimony that Bowman fired the fatal shots is corroborated by Felder's independent testimony that Bowman confessed to him, "I killed Kandee Martin." J.A. 453.

In sum, the undisclosed evidence, at best, would have undercut Johnson's and Gadson's reliability in the eyes of the jury. But both men's testimony was consistent with the other evidence offered at trial. This was not a thin or circumstantial case, or one that relied on the testimony of one, or even two, crucial witnesses to connect Bowman to the crime. To the contrary, the State offered a veritable mountain of evidence linking Bowman to the murder. Even discounting their testimony based on Johnson's motivation to please the State, Gadson's mental health, and Davis's recanted story about Gadson confessing in prison, the evidence against Bowman remains forceful and compelling. *Cf. Smith*, 565 U.S. at 76 ("[E]vidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict."); *Strickler*, 527 U.S. at 292–296 (finding evidence impeaching an eyewitness account immaterial because of the strong evidentiary support for the defendant's guilt of capital murder); *United States v. Higgs*, 663 F.3d 726, 740–742 (4th Cir. 2011) (finding that exculpatory evidence was not material because of "overwhelming evidence" of guilt); *United States v. Robinson*, 627 F.3d 941, 952–953 (4th Cir. 2010) (finding evidence impeaching testifying officers not material because numerous other witnesses and physical evidence "amply proved the government's contentions"). Given the limited value of the three pieces of undisclosed evidence and the overwhelming evidence of Bowman's guilt, we find the cumulative effect

of the undisclosed evidence insufficient to "undermine confidence" in the jury's verdict. *Kyles*, 514 U.S. at 435; *see Turner*, 137 S. Ct. at 1895.[7]

IV.

Having granted every permissible assumption in Bowman's favor and having carefully considered all the undisclosed evidence in light of the entire record at trial, we conclude that Bowman has not carried his burden to prove a reasonable probability that, had he received the undisclosed evidence, the jury would not have convicted him of Martin's murder or recommended a sentence of death. We therefore must affirm the district court's denial of Bowman's petition for a writ of habeas corpus.

AFFIRMED

[7] Before the PCR court, Bowman did not contend that the undisclosed evidence was material to his sentence but only to the guilt phase of trial. In our Court, Bowman suggests that the undisclosed evidence could be material to his sentence because it would have created lingering doubt as to his guilt and relative culpability. Even assuming we may consider this argument, we reject it for the reasons already explained.

FILED: September 13, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-12
(9:18-cv-00287-TLW)

MARION BOWMAN, JR.

Petitioner - Appellant

v.

BRYAN P. STIRLING, Commissioner, South Carolina Department of Corrections; LYDELL CHESTNUT, Deputy Warden of Broad River Correctional Secure Facility

Respondents - Appellees

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

Marion Bowman Jr., PETITIONER v. Bryan P. Stirling, *Commissioner, South Carolina Department of Corrections*; Willie D. Davis, *Warden, Kirkland Correctional Institution*, RESPONDENTS	Case No. 9:18-cv-00287-TLW **Order**

This is a capital habeas corpus action brought pursuant to 28 U.S.C. § 2254 by Petitioner Marion Bowman Jr. against Respondents Bryan P. Stirling and Willie D. Davis (collectively, the State). For the reasons set forth below, the Court grants the State's motion for summary judgment and denies Bowman's habeas petition.

I. Factual and Procedural History

A. Trial and Sentencing

The South Carolina Supreme Court summarized the facts of Bowman's case as follows:

> On February 17, 2001, Kandee Martin's [] body was found in the trunk of her burned car. She had been shot to death before being placed in the trunk.
>
> The previous day, several people gathered at Hank Koger's house to socialize and drink alcohol. [Bowman], who was wearing black pants, arrived at Koger's house around 11:00 a.m. that day. He subsequently left to purchase meat. When [Bowman] returned, he became upset

because his gun had been moved. He accused James Tywan Gadson [] of taking the gun out of the trash barrel located on Koger's property. Hiram Johnson intervened and told [Bowman] he had moved the gun. The gun was a .380 caliber pistol that [Bowman] had purchased a few weeks before in the presence of Gadson and Travis Felder. After retrieving his gun, [Bowman] left Koger's house.

Later that afternoon, [Bowman] was riding in the car of his sister, Yolanda Bowman, with another woman, Katrina West. [Bowman], who had a gun in his back pocket, was sitting in the back seat. He instructed Yolanda to park beside [Martin's] car. At the time, [Martin] was speaking to a man. [Bowman] tried to get [Martin's] attention, but she indicated to him that he should wait a moment. The man, Yolanda, and Katrina testified as to what [Bowman] said next. The man stated that [Bowman] said, "Fuck waiting a minute. I'm about to kill this bitch." Yolanda stated that [Bowman] said, "Fuck it, that bitch. That bitch be dead by dark." Katrina stated that [Bowman] said, "Fuck that ride. That bitch be dead by dark fall." After [Bowman's] comments, Yolanda drove away and [Bowman] informed her [Martin] owed him money.

Around 7:30 p.m. that evening, [] Gadson saw [Bowman] riding with [Martin] in her car. They stopped and [Bowman] told Gadson to get in. Gadson had been drinking alcohol since 1:00 and was "feeling in good shape." [Martin] stopped for gas and they drove off without paying. [Bowman] allegedly instructed [Martin] where to drive and instructed her to stop on Nursery Road. Gadson and [Bowman] then exited the vehicle and walked down the road while [Martin] remained in the car. [Bowman] told Gadson he was going to kill [Martin] because she had on a wire. [Martin] then came down the road, grabbed [Bowman's] arm and stated she was scared. At this point, a car drove by and they all jumped into the woods. Then, [Martin] started walking to the car with [Bowman] following her. [Bowman] allegedly shot his gun three times. Gadson stated [Martin] ran toward him and then stopped and faced [Bowman] and told him to please not shoot her anymore because she had a child to take care of. Gadson stated [Bowman] shot two more times. [Martin] fell to the ground and [Bowman] dragged her body into the woods. Gadson stated he jumped into the car.

Afterwards, [Bowman] and Gadson parked [Martin's] car and later retrieved Yolanda's car. They then went to a store to purchase beer and went back to Koger's house around 8:00 p.m. Later, Gadson stayed at Koger's house and [Bowman] left. Around 11:30 p.m., [Bowman] and Hiram Johnson approached James Gadson, Gadson's father. [Bowman] gave him money to buy four pairs of gloves.

[Bowman], Gadson, Hiram Johnson, and Darian Williams, then drove to Murray's Club in [Martin's] car. [Bowman] handed out the gloves for the occupants to wear and stated he had stolen the car. They reached the club around midnight. Once at the club, [Bowman] tried to sell [Martin's] car. [Bowman], according to Hiram Johnson, said, "I killed Kandee, heh, heh, heh." [Bowman] had a gun with him while at the club. They left the club an hour or two after arriving there.

Three people, Carolyn Brown, Valorna Smith, and [] Felder, left the club together. They stopped by a gas station about 3:00 a.m. before proceeding to Valorna's home. Not long after they were there, [Bowman] knocked on the door and asked for [Felder]. [Felder] left and came back after a few minutes. He seemed normal upon his return.

[Felder] testified [Bowman], who was wearing black jeans at the time, stated he needed [Felder's] help to park a car which turned out to be [Martin's] car. [Felder] followed [Bowman] to Nursery Road. [Bowman] parked the car, went into the woods and pulled [Martin's] body out by her feet. [Bowman] then put her body in the trunk. While putting her body in the trunk, [Felder] saw a gun tucked into appellant's waist. [Bowman] allegedly told [Felder], "you didn't think I did it, did you?" [Felder] testified [Bowman] also stated, "I killed Kandee Martin." [Bowman] lit the car on fire. [Felder] then took [Bowman] to his home and went back to Valorna's house.

A resident of Nursery Road who had previously heard gunshots was awakened late in the night by a loud noise. He investigated and discovered a car on fire. The fire was reported at 3:54 a.m. There were .380 Winchester cartridge casings found not far from the scene. The casings, a blood stain, and a shoe were located with the help of a man who had driven by and seen [Martin's] car stopped on the road around 8:00 p.m. the previous evening.

The next day, police arrested [Bowman] at his wife's house and seized his black pants. His wife testified he had been wearing the pants when he arrived at the house. They found a wristwatch belonging to [Martin] in [Bowman's] pants.

After the police left, [Bowman's] wife [] found [Bowman's] gun in a chair in her home. She allegedly gave the gun to [Bowman's] father. The next day, [Bowman's] father, Yolanda, and [Bowman's] other sister, Kendra, took the gun and dropped it off a bridge into the Edisto River. It was later retrieved from the Edisto River and determined to be the gun that was used in the murder.

> The arson investigator testified there was the presence of a heavy petroleum product on [Bowman's] jeans, but the product was not gasoline. The items found in the car had gasoline on them indicating that was the product used to start the fire.
>
> While the following evidence did not come out during the guilt phase, during the sentencing phase, a video was introduced during [] Felder's testimony. The video showed [Felder] purchasing gasoline in a gasoline can at about 3:14 a.m. [Bowman] was not with him on the video. [Felder] stated [Bowman] gave him the can for the gas and told him he needed $2–3 worth. When [Bowman] set fire to [Martin's] car, he retrieved the gas can from [Felder's] car.

State v. Bowman (Bowman I), 623 S.E.2d 378, 380–82 (S.C. 2005) (footnotes omitted).

Bowman was indicted in June 2001 for murder and arson, third degree. He was represented by Norbert Cummings Jr. and Marva Hardee-Thomas in a jury trial that began on May 17, 2002. The jury returned a guilty verdict on both counts.

During the trial's sentencing phase, after hearing evidence and argument, the jury returned a recommendation of death on the murder conviction, finding as aggravating circumstances that the murder was committed while in the commission of kidnapping and while in the commission of larceny with the use of a deadly weapon. The presiding judge sentenced Bowman to death on the murder conviction and ten years on the arson conviction.

B. Direct Appeal

Bowman timely appealed and was represented on appeal by Robert Dudek, Assistant Appellate Defender with the South Carolina Office of Appellate Defense. On appeal, he raised issues relating to the trial court's jury instructions, evidentiary

rulings, denial of a mistrial, jurisdiction, and denial of a suppression motion. The South Carolina Supreme Court affirmed Bowman's conviction and sentence. *Bowman*, 623 S.E.2d at 387. He then submitted a petition for rehearing, which was denied.

After Bowman's petition for rehearing was denied, he filed a petition for a writ of certiorari from the United States Supreme Court, which was denied. *Bowman v. South Carolina*, 547 U.S. 1195 (2006).

C. PCR Action

While awaiting the United States Supreme Court's decision on his petition for a writ of certiorari, Bowman submitted an application for post-conviction relief (PCR). He was initially represented in the PCR action by James Brown Jr. and Charlie Johnson Jr., though Johnson was later replaced by John Sinclaire III. PCR counsel eventually submitted a fourth amended application raising numerous grounds for relief. After briefing and an evidentiary hearing, the PCR court denied his petition. He then filed a motion to alter or amend, which was also denied.

D. PCR Appeal

On appeal to the South Carolina Supreme Court, Bowman was represented by Robert Dudek, Chief Appellate Defender, and David Alexander, Appellate Defender, both with the South Carolina Commission on Indigent Defense, as well as Michael Anzelmo with Nelson Mullins Riley & Scarborough. Bowman's amended petition for a writ of certiorari raised the following issues:

1. Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth. and Fourteenth Amendments to the United States Constitution by failing to investigate and prepare for the impeachment of Taiwan Gadson and by failing to impeach the testimony of Taiwan Gadson in any meaningful way, including, but not limited to, the fact that the state threatened Gadson with the death penalty in his plea agreement, how Gadson's prior inconsistent statements showed that his story changed, and the fact Gadson had access to the murder weapon?

2. Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to investigate and prepare for the impeachment of Travis Felder and by failing to impeach the testimony of Travis Felder in any meaningful way, including impeaching Felder with a videotape that would have shown Felder lied to the jury about buying the gas to burn the decedent's car, impeaching Felder on bias with his original charges, and impeaching Felder with his prior inconsistent statements?

3. Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to investigate and prepare for the impeachment Hiram Johnson and by failing to impeach the testimony of Hiram Johnson by cross-examining Johnson on his prior inconsistent statement which, critically, did not include his allegation at trial that petitioner confessed to the murder?

4. Whether petitioner is entitled to a new trial because the state withheld information necessary for impeachment and necessary for defense in violation of petitioner's due process rights under the Fourteenth Amendment and under the rules of discovery, those items being a memorandum of a law enforcement interview with Ricky Davis who heard Gadson confess to the murder, Gadson' s mental health evaluation, and the fact that Hiram Johnson had unindicted pending charges at the time of his testimony?

5. Whether trial counsel rendered ineffective assistance of counsel because counsel had a conflict of interest between two of her clients—Petitioner Bowman and Ricky Davis—that caused counsel to fail to call Ricky Davis as a witness, despite Davis'

statement that exculpated Petitioner Bowman and established Gadson shot the victim?

6. Whether defense counsel was ineffective for failing to object to the solicitor's examination of James Aiken regarding favorable prison conditions and recreational facilities available to inmates since this Court had long ago in *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984), held such evidence was impermissible because it did not relate to the character of the defendant or the nature of his crime. This evidence was highly prejudicial in the eyes of the jury, and the failure to object to it properly at trial also barred consideration of this winning issue on petitioner's direct appeal?

7. Whether petitioner's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under state law were violated because the trial judge failed to properly consider his application as evidenced by the PCR court's wholesale adoption of the state's proposed order?

ECF No. 12-17 at 6–8.

The South Carolina Supreme Court granted the petition as to Question 6 and denied it as to the rest. After briefing and argument, the court affirmed the PCR court. *Bowman v. State (Bowman II)*, 809 S.E.2d 232, 246 (S.C. 2018).

E. Federal Habeas Action

Bowman commenced this action by filing a motion for a stay of execution and a motion to appoint counsel. ECF No. 1. The Court stayed his execution pending appointment of counsel. ECF No. 6. Bowman's appointed counsel then filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. ECF No. 17. The Court stayed his execution pending resolution of his habeas petition. ECF No. 24. He later filed an amended petition, which raises the following issues:

Ground 1: Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to investigate and prepare for the impeachment of Taiwan Gadson and by failing to impeach the testimony of Taiwan Gadson in any meaningful way, including, but not limited to, the fact that the state threatened Gadson with the death penalty in his plea agreement, how Gadson's prior inconsistent statements showed that his story changed, and the fact Gadson had access to the murder weapon.

Ground 2: Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to investigate and prepare for the impeachment of Travis Felder and by failing to impeach the testimony of Travis Felder in any meaningful way, including impeaching Felder with a videotape that would have shown Felder lied to the jury about buying the gas to burn the decedent's car, impeaching Felder on bias with his original charges, and impeaching Felder with his prior inconsistent statements.

Ground 3: Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to investigate and prepare for the impeachment Hiram Johnson and by failing to impeach the testimony of Hiram Johnson by cross-examining Johnson on his prior inconsistent statement which, critically, did not include his allegation at trial that petitioner confessed to the murder.

Ground 4: Petitioner is entitled to a new trial because the state withheld information necessary for impeachment and necessary for defense in violation of Petitioner's due process rights under the Fourteenth Amendment and under the rules of discovery, those items being a memorandum of a law enforcement interview with Ricky Davis who heard Gadson confess to the murder, Gadson's mental health evaluation, and the fact that Hiram Johnson had unindicted pending charges at the time of his testimony.

Ground 5: Trial counsel rendered ineffective assistance of counsel because counsel had a conflict of interest between two of her clients—Petitioner Bowman and Ricky Davis—that caused counsel to fail to call Ricky Davis as a witness, despite Davis' statement that exculpated Petitioner Bowman and established Gadson shot the victim.

Ground 6: Defense counsel was ineffective for failing to object to the solicitor's examination of James Aiken regarding favorable prison conditions and recreational facilities available to inmates since this evidence interjected an arbitrary factor into Petitioner's trial and violated his right to due process.

Ground 8: The trial court erred by refusing to instruct the jury on the statutory mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, since there was expert testimony of Petitioner's substance abuse problem, and evidence the parties were drinking alcohol throughout the day. The South Carolina Supreme Court's opinion, holding there was no evidence that Petitioner was intoxicated on the day of the murder, is based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

Ground 10: The court erred by refusing to grant a mistrial where the solicitor attempted to question James Aiken about the possibility of escape, since the solicitor injected an improper consideration and an arbitrary factor into the sentencing phase. The jury's attention is properly focused on the penalties of death and life without parole, and not speculative matters beyond Petitioner's control. Defense counsel correctly argued that the judge could not remove the taint through a curative instruction once escape was raised by the state as an issue.

Ground 11: Trial counsel rendered ineffective assistance of counsel for failing to object to the Solicitor's arguing to discount Petitioner's mitigation because there was no "nexus" between Petitioner's proffered mitigation and the crime.

Ground 12: Trial counsel rendered ineffective assistance of counsel by failing to call a number of witnesses who were available to

> trial counsel, and who would have provided the jury with highly mitigating evidence of Petitioner's dysfunctional childhood that the jury did not otherwise here.

ECF No. 36 at 7–8, 26, 41–42, 46, 58, 65, 75, 78, 83, 85.[1] The State filed a return to the amended petition and a motion for summary judgment. ECF Nos. 56, 57. Bowman filed a response in opposition to the summary judgment motion, ECF No. 70, and the State filed a reply, ECF No. 74.

With briefing complete, the magistrate judge issued a Report and Recommendation (Report), in which he recommended granting the State's summary judgment motion and denying the habeas petition. ECF No. 75. Bowman filed objections to the Report, ECF No. 81, and the State filed a reply to those objections, ECF No. 82.

This matter is now ripe for decision.

II. Standards of Review

A. Report and Recommendation

The magistrate judge issued his Report in accordance with 28 U.S.C. § 636(b)(1) and Local Civil Rule 73.02(B)(2)(c) (D.S.C.). The Report is a recommendation to the Court and has no presumptive weight. The responsibility to make a final determination rests with the Court. *See Mathews v. Weber*, 423 U.S.

[1] The petition does not include a Ground 7 or Ground 9, but the Court, like the magistrate judge, has maintained the numbering used in the petition. However, the Court, again like the magistrate judge, has renumbered the two additional grounds, which are found in his petition under the heading of "Unexhausted Claims," as Grounds 11 and 12.

261, 270–71 (1976). The Court conducts a *de novo* determination of any portion of the Report to which a specific objection is made, and the Court may accept, reject, or modify, in whole or in part, the magistrate judge's recommendation, or may recommit the matter to the magistrate judge with instructions. 28 U.S.C. § 636(b)(1). In the absence of an objection, the Court is not required to give any explanation for adopting the recommendation. *See Camby v. Davis*, 718 F.2d 198, 200 (4th Cir. 1983). The district court reviewed the cited transcripts, and references to transcripts included in the Report in evaluating the issues raised and addressed in this order. The Court also notes that the Report is 121 pages long, with significant detailed discussion of the positions taken by counsel for the parties, the PCR court's analysis, caselaw, and the many issues raised.

B. Summary Judgment

Summary judgment is appropriate when the materials in the record show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court must view the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A fact is material if it "might affect the outcome of the suit under the governing law." *Id.* at 248.

The party seeking summary judgment bears the initial burden of demonstrating to the Court that there is no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this

threshold showing, in order to survive summary judgment, the nonmoving party must demonstrate that specific, material facts exist that give rise to a genuine issue. *See id.* at 324.

C. Habeas Corpus Review

1. *Deference to state courts*

Any claim in a § 2254 petition that was adjudicated on the merits in a state court proceeding may not be granted unless the state court's adjudication of the claim

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

To meet this standard, the state court must have "arrive[d] at a conclusion opposite to that reached by [the Supreme] Court on a question of law or . . . decide[d] a case differently than [the United States Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). "[A] federal habeas court may overturn a state court's application of clearly established federal law only if it is so erroneous that there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents." *Nevada v. Jackson*, 569 U.S. 505, 508–09 (2013). "[A] federal court hearing a § 2254 petition may not substitute 'its independent

judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.'" *Tyler v. Hooks*, 945 F.3d 159, 166 (4th Cir. 2019) (quoting *Williams*, 529 U.S. at 411). This is a "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (citations omitted). "The Supreme Court has 'often emphasized that this standard is difficult to meet because it was meant to be.'" *Tyler*, 945 F.3d at 167 (quoting *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2558 (2018)).

2. *Ineffective assistance of counsel*

Criminal defendants have a constitutional right to the assistance of counsel. U.S. Const. amend. VI. "[T]he right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citation omitted).

To prevail on an ineffective assistance claim, a petitioner must show that (1) counsel's acts or omissions fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *See id.* at 687–88, 694. Failure of proof on either prong ends the matter. *United States v. Roane*, 378 F.3d 382, 404 (4th Cir. 2004). There is "a strong presumption that counsel's conduct falls within the wide range of professional assistance," and a petitioner has the burden of overcoming this presumption. *Strickland*, 466 U.S. at 689. "Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of

materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (citing *Strickland*, 466 U.S. at 689). "The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Id.* (citing *Strickland*, 466 U.S. at 690). An ineffective assistance of counsel allegation requires the submission of specific facts in support of the claim. *See United States v. Witherspoon*, 231 F.3d 923, 926 (4th Cir. 2000).

When *Strickland* is applied in the federal habeas context, it is an even taller hurdle to overcome. "The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so." *Harrington*, 562 U.S. at 105 (citations omitted). "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* Thus, relief would be appropriate only if the petitioner demonstrates that there is no reasonable argument that counsel satisfied *Strickland*.

3. *Exhaustion and procedural default*

A habeas petitioner may not obtain relief in federal court unless he has exhausted his state court remedies. 28 U.S.C. § 2254(b)(1)(A). "To satisfy the exhaustion requirement, a habeas petitioner must fairly present his claim to the state's highest court." *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997),

abrogated on other grounds by Miller-El v. Dretke, 545 U.S. 231 (2005). "To exhaust a claim, the petitioner must present the state court with 'both the operative facts and the controlling legal principles.'" *Gray v. Zook*, 806 F.3d 783, 798 (4th Cir. 2015) (quoting *Winston v. Kelly*, 592 F.3d 535, 549 (4th Cir. 2010)).

A petitioner's failure to raise in state court a claim asserted in a § 2254 petition "implicates the requirements in habeas of exhaustion and procedural default." *Gray v. Netherland*, 518 U.S. 152, 161 (1996). "[A] habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance," and has therefore procedurally defaulted those claims. *Coleman v. Thompson*, 501 U.S. 722, 732 (1991). "[T]he procedural bar that gives rise to exhaustion provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice for the default." *Gray*, 518 U.S. at 162.

In general, a federal court will not entertain a procedurally defaulted claim as long as the state's procedural requirement barring the court's review is adequate to support the judgment and independence of federal law. *See Martinez v. Ryan*, 566 U.S. 1, 9–10 (2012). However, "[t]he doctrine barring procedurally defaulted claims from being heard is not without exceptions. A prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law." *Id.* at 10.

A federal habeas petitioner cannot claim ineffective assistance of counsel in state post-conviction proceedings to establish cause for default because there is no constitutional right to counsel in state post-conviction proceedings. *See Coleman*, 501 U.S. at 752. However, the Supreme Court has recognized a "narrow exception" to *Coleman*, specifically that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Martinez*, 566 U.S. at 9. The Fourth Circuit has summarized the *Martinez* exception as follows:

> [A] federal habeas petitioner who seeks to raise an otherwise procedurally defaulted claim of ineffective-assistance-of-trial-counsel before the federal court may do so only if: (1) the ineffective-assistance-of-trial-counsel claim is a substantial one; (2) the "cause" for default "consists of there being no counsel or only ineffective counsel during the state collateral review proceeding"; (3) "the state collateral review proceeding was the initial review proceeding in respect to the ineffective-assistance-of-trial-counsel claim"; and (4) state law "requires that an ineffective-assistance-of-trial-counsel claim be raised in an initial-review collateral proceeding."

Fowler v. Joyner, 753 F.3d 446, 461 (4th Cir. 2014) (cleaned up) (quoting *Trevino v. Thaler*, 569 U.S. 413, 423 (2013)). Essentially, if initial-review collateral counsel was constitutionally ineffective in failing to raise the constitutional ineffectiveness of trial counsel, collateral counsel's ineffectiveness may excuse the petitioner's procedural default of a substantial claim of trial counsel's ineffectiveness.

III. Discussion

The Court will address each ground for relief that Bowman raised in his habeas petition.

A. Ground 1 – Ineffective assistance re: Taiwan Gadson

Ground 1 of the petition is as follows:

> Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to investigate and prepare for the impeachment of Taiwan Gadson and by failing to impeach the testimony of Taiwan Gadson in any meaningful way, including, but not limited to, the fact that the state threatened Gadson with the death penalty in his plea agreement, how Gadson's prior inconsistent statements showed that his story changed, and the fact Gadson had access to the murder weapon.

ECF No. 36 at 7–8.

1. *Bowman's claims*

Gadson was a significant witness in the State's case. He was with Bowman at various times before, during, and after the murder. He saw Bowman with a gun prior to the murder. He was the only witness who testified as to how the murder occurred. He rode in Martin's car with Bowman after the murder. At trial, he testified that he had been charged with Martin's murder, but that he had entered into an agreement with the State in exchange for his testimony at Bowman's trial. The agreement called for the murder charge to be dropped and for him to plead guilty to charges of accessory after the fact of murder and misprision of a felony, with a negotiated sentence of twenty years imprisonment.

Bowman asserts that counsel was ineffective regarding Gadson by failing to question him about his own exposure to the death penalty, by failing to confront him with evidence that he fired the murder weapon prior to the day of the murder,

and by failing to press him on inconsistencies in various statements he made to police regarding the murder.

As to Gadson's exposure to the death penalty, Bowman argues that counsel was ineffective for failing to specifically inform the jury that Gadson made a plea deal with the State to avoid a capital murder charge. This argument is primarily based on his plea agreement, which provides that if he did not cooperate against Bowman, then the State could move to vacate Gadson's plea and could "reinstate the murder charge and seek the death penalty against [him]." R. p. 1946 (ECF No. 11-23 at 196). Bowman argues that counsel was ineffective in "fail[ing] to emphasize that Gadson was testifying to avoid the death penalty." ECF No. 36 at 14.

As to Gadson's previous use of the murder weapon, Bowman argues that counsel was ineffective in failing to present evidence indicating that Gadson had fired the murder weapon about two weeks before the murder.

As to Gadson's inconsistencies, Bowman argues that counsel was ineffective in failing to cross-examine Gadson regarding inconsistencies in several statements he made to police regarding the murder.

2. *PCR order*

Importantly, regarding Bowman's claim of ineffective assistance regarding Gadson's death penalty exposure, the PCR court rejected that argument because "[Bowman's] allegation that Gadson expressly bargained to avoid a death sentence is not supported by the record." R. p. 9835 (ECF No. 11-27 at 65). Specifically, the

PCR court concluded that he did not bargain to avoid the death penalty, as the State never served him with a death notice. *Id.* The PCR court also determined that Bowman failed to establish prejudice based in part on its conclusion that Gadson credibly testified at the PCR hearing that he thought he was avoiding a potential life sentence, not a death sentence. *See id.* at 9836 (ECF No. 11-27 at 66).

Regarding Bowman's claim of ineffective assistance regarding evidence that Gadson had previously fired the murder weapon, the PCR court rejected that argument because Bowman had given Gadson the gun to fire, and counsel was not deficient in declining to introduce evidence that would indicate to the jury that Bowman had control of the murder weapon shortly before the murder. *See id.* at 9845 (ECF No. 11-27 at 75).

Regarding Bowman's claim of ineffective assistance regarding inconsistencies in Gadson's prior statements, the PCR court did not rule on this issue.

3. *Report*

In the Report, the magistrate judge concluded that the PCR court did not unreasonably apply federal law on either *Strickland* prong regarding Gadson's death penalty exposure. In particular, the magistrate judge noted that the PCR court evaluated the claim as "presented by PCR counsel—that Gadson expressly bargained to avoid a potential death sentence and that trial counsel should have pointed that out during cross-examination," ECF No. 75 at 20, not the slightly different claim asserted now—that Gadson should have been impeached "with the fact that he faced the death penalty," ECF No. 36 at 20. The magistrate judge also

noted that there was testimony before the jury that Gadson agreed to a twenty-year sentence on two lesser charges instead of facing a murder charge, and that counsel did ask the jury during closing to consider Gadson's bias as a result of the plea agreement. Finally, the magistrate judge noted the PCR court's determination that Gadson credibly testified at the PCR hearing that he thought he was avoiding a potential life sentence, not a death sentence, by entering into the plea agreement.

Regarding Gadson's prior use of the murder weapon, the magistrate judge concluded that the PCR court did not unreasonably apply federal law when it concluded that counsel was not ineffective in declining to pursue that line of questioning. The magistrate judge further concluded that the PCR court did not unreasonably apply federal law in determining that Bowman was not prejudiced by counsel's decision.

Regarding inconsistencies in Gadson's prior statements, the magistrate judge concluded that this argument was not properly raised and preserved in Bowman's state court proceedings, so it was procedurally barred. To the extent that he is seeking to bring this claim under *Martinez*, the magistrate judge also concluded that Bowman did not meet his burden of proving cause and prejudice in order to overcome the procedural default.

4. *Objections*

In Bowman's objections, he argues that counsel should have cross-examined Gadson about the provision in the plea agreement that provided that if he did not cooperate, the State could reinstate the murder charge and pursue the death

penalty. Bowman says that it should have been up to the jury to determine whether Gadson believed he was avoiding the death penalty by entering into the plea agreement. Bowman also argues that "[t]estimony that Gadson pled guilty to a lesser charge does not convey the magnitude of the incentive created by the possibility of avoiding a death sentence." ECF No. 81 at 3.

As to Gadson's prior use of the murder weapon, Bowman objects that counsel did not, in fact, have any reason not to question Gadson about his access to and use of the murder weapon prior to trial in light of other witnesses tying the gun to Bowman.

Bowman did not object to the magistrate judge's conclusion that his claim regarding Gadson's prior inconsistencies was procedurally defaulted.

5. *Analysis*

At the outset, the Court notes the deferential standard of review in this matter as set forth in the caselaw. The question is not whether counsel could have or should have more vigorously or thoroughly cross-examined Gadson. Instead, "[t]he question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard" by cross-examining Gadson the way that they did. *Harrington*, 562 U.S. at 105. The Court answers that question in the affirmative.

Regarding Gadson's plea agreement, as the magistrate judge recognized, the jury was informed that Gadson received the benefit of a plea agreement to twenty years as a result of his cooperation and counsel addressed this potential source of

bias in his closing argument. Hence, it is clear that the jury knew that Gadson was testifying in light of a plea offer and possible lessened sentence. Additionally, the PCR court made the credibility determination that Gadson did not think he was avoiding a death sentence, and that credibility determination is entitled to substantial deference by this Court. *See* 28 U.S.C. § 2254(e)(1); *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983). The fact that counsel could have explored this topic more specifically as asserted does not mean that the decision not to focus on it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. Furthermore, Bowman was not prejudiced by counsel's failure to cross-examine Gadson about the plea deal because, based on the PCR court's factual determination, he would have testified that he thought he was avoiding a potential life sentence, not a death sentence. This finding by the PCR court undermines the strength of Bowman's argument.

Regarding Gadson's prior use of the murder weapon, counsel testified at the PCR hearing that he did not want to invite evidence tying the murder weapon to Bowman. Bowman's response that there was other evidence in the record tying him to the gun is merely an indication that counsel could have pursued a different strategy. But that response does not overcome the presumption that this tactical decision "might be considered sound strategy." *Strickland*, 466 U.S. at 689 (citation omitted). As the PCR court determined, putting the gun in Gadson's hand for a

brief period of time two weeks prior to the murder would have had minimal benefit, as he only had the gun because Bowman gave it to him.

Regarding Gadson's inconsistent statements, the Court concludes that this claim is procedurally defaulted for the reasons set forth by the magistrate judge and Bowman did not meet his burden of proving cause and prejudice in order to overcome the procedural default.[2]

For these reasons, Bowman has failed to establish that the PCR court's denial of his claims in Ground 1 was contrary to or involved an unreasonable application of clearly established federal law, or was the result of unreasonable factual findings. *See* 28 U.S.C. § 2254(d); *Harrington*, 562 U.S. at 101. Accordingly, the Court concludes that he has not met his burden and is therefore not entitled to relief on Ground 1.

B. Ground 2 – Ineffective assistance re: Travis Felder

Ground 2 of the petition is as follows:

> Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to investigate and prepare for the impeachment of Travis Felder and by failing to impeach the testimony of Travis Felder in any meaningful way, including impeaching Felder with a videotape that would have shown Felder lied to the jury about buying the gas to burn the decedent's car, impeaching Felder on bias with his original charges, and impeaching Felder with his prior inconsistent statements.

ECF No. 36 at 26.

[2] As noted above, Bowman did not object to the magistrate judge's conclusions on this issue.

1. *Bowman's claims*

Bowman asserts that counsel was ineffective regarding Felder by failing to question him about him purchasing the gasoline that was used to burn Martin's car, about his original charges, and about his inconsistent statements.

Regarding Felder's gasoline purchase, Bowman argues that counsel was ineffective in not questioning Felder during the guilt phase of the trial about his purchase of the gasoline that was used to burn Martin's car. Bowman claims that leaving this out gave the jury the false impression that he acted alone in Martin's murder and that if the jury knew that Felder was involved in the crime, the outcome of the trial likely would have been different.

Regarding Felder's original charges, Bowman argues that counsel was ineffective in failing to impeach Felder regarding his original charge of accessory to murder / arson. After he testified at Bowman's trial, Felder was allowed to plead to accessory after the fact of arson, for which he received a sentence of three years imprisonment suspended to three years probation.

Lastly, Bowman argues that counsel was ineffective in failing to impeach Felder regarding prior inconsistent statements that he had given to police, specifically a proffer letter written by his attorney and a statement given during a polygraph examination.

2. *PCR order*

Regarding Bowman's claim of ineffective assistance about Felder's gasoline purchase, the PCR court rejected that argument, crediting counsel's explanation that "he did not want it in because he felt it would corroborate [Bowman's] involvement in the plan to burn the car." R. p. 9861 (ECF No. 11-27 at 91). The PCR court also noted that the evidence was eventually introduced during the sentencing phase, but that this "was done at [Bowman's] insistence and was not in line with [counsel's] strategy." *Id.* When Felder testified about this incident during sentencing, he said that he purchased the gasoline at Bowman's direction and that Bowman provided the gasoline jug. *Id.* at 9861–62 (ECF No. 11-27 at 91–92). Thus, the PCR court concluded that counsel had "a valid, reasonable strategic reason" for not presenting this evidence of the purchase of gasoline by Felder for Bowman during the guilt phase and therefore denied the claim. *Id.* at 9862 (ECF No. 11-27 at 92). The PCR court also concluded that Bowman failed to establish prejudice because Felder's omission did not indicate that he was involved in Martin's murder, because cross-examination on this issue would not have exculpated Bowman from being a participant in the arson, and because there was overwhelming evidence of his guilt of both the murder and the arson. *Id.*

Regarding Felder's original charges, the PCR court concluded that "there is no evidence that supports the implication that the accessory before the fact to the murder charge was 'reduced' to accessory after the fact as a result of Felder's cooperation." *Id.* at 9859 (ECF No. 11-27 at 89). The PCR court also determined

that counsel had a strategic reason for not discussing Felder's initial charges: that his original charges were based on statements that Bowman gave to police, which could be used to further the theme that he tried to deflect blame by implicating others. *Id.* at 9860 (ECF No. 11-27 at 90). As to prejudice, the PCR court determined that there was no prejudice in light of the minimal benefit to be gained and the potentially harmful response to that line of inquiry. *Id.* at 9860–61 (ECF No. 11-27 at 90–91).

Regarding Felder's prior inconsistent statements, that claim was not directly addressed by the PCR court. However, the PCR court did note elsewhere that the proffer letter could not be used for impeachment purposes because it was not written by Felder. *Id.* at 9856 (ECF No. 11-27 at 86). The PCR also concluded that "[a]ny minor differences in the proffer letter and the trial testimony do not overcome the overwhelming evidence of [Bowman's] guilt presented in this case . . . ." *Id.*

3. *Report*

In the Report, the magistrate judge concluded that the PCR court did not unreasonably apply federal law on either *Strickland* prong regarding Felder's gasoline purchase. The magistrate judge concluded that the record supported the PCR court's determination that counsel had a strategic reason for keeping out Felder's testimony during the guilt phase of the trial and that he only introduced it during the sentencing phase due to Bowman's insistence. The magistrate judge also noted that the video, combined with Felder's testimony about why he bought the gasoline, fit a pattern throughout the trial where Bowman involved others in the

crime and directed their participation. As to prejudice, the magistrate judge determined that the PCR court did not make unreasonable factual findings or unreasonably apply federal law in finding no prejudice, due primarily to Felder's testimony that he was directed to purchase the gasoline by Bowman.

Regarding Felder's original charges, the magistrate judge concluded that the record supported the PCR court's determination that counsel had a strategic reason for not discussing Felder's initial charges.

Regarding Felder's prior inconsistent statements, the magistrate judge first noted that the PCR court didn't directly address this claim, but noted that some of the PCR court's other findings were relevant to this question. The magistrate judge also noted that, although counsel admitted that he did not have a strategic reason for failing to impeach Felder on his prior statement during a polygraph exam that he did not see Martin's body being placed in the car, if counsel had questioned Felder about that, it could have opened the door for the State to introduce evidence that Felder's response to that question indicated deception to the examiner. Finally, the magistrate judge found that Bowman failed to show that there was a reasonable probability that the result of the proceeding would have been different if counsel had tried to impeach Felder with this information.

4. *Objections*

Bowman's sole objection on this ground is that counsel's strategy of declining to question Felder about his gasoline purchase was unsound because it would have indicated that Bowman and Felder at least shared culpability for the arson.

Bowman did not object to the magistrate judge's conclusions regarding Felder's original charges and inconsistent statements.

5. *Analysis*

The Court again reiterates that the only relevant question "is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard" by declining to question Felder regarding his purchase of the gasoline. *Harrington*, 562 U.S. at 105. The Court concludes that, although counsel could have made a different strategic decision, there is certainly a reasonable argument that counsel's strategy did not "amount[] to incompetence under prevailing professional norms." *Id.*

As to Felder's original charges and prior inconsistent statements, the Court concludes that counsel was not ineffective for the reasons set forth by the magistrate judge.[3]

For these reasons, Bowman has failed to establish that the PCR court's denial of his claims in Ground 2 was contrary to or involved an unreasonable application of clearly established federal law, or was the result of unreasonable factual findings. *See* 28 U.S.C. § 2254(d); *Harrington*, 562 U.S. at 101. Accordingly, the Court concludes that he has not met his burden and is therefore not entitled to relief on Ground 2.

[3] As noted above, Bowman did not object to the magistrate judge's conclusions on these issues.

C. Ground 3 – Ineffective assistance re: Hiram Johnson

Ground 3 of the petition is as follows:

> Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to investigate and prepare for the impeachment Hiram Johnson and by failing to impeach the testimony of Hiram Johnson by cross-examining Johnson on his prior inconsistent statement which, critically, did not include his allegation at trial that petitioner confessed to the murder.

ECF No. 36 at 41–42.

1. *Bowman's claims*

Bowman asserts that counsel was ineffective regarding his impeachment of Johnson, whose most damaging testimony was when he told the jury that he heard Bowman say that he killed Martin. Specifically, he claims that counsel was ineffective in failing to ask Johnson about a prior written statement he gave to law enforcement that did not include Bowman's confession.

2. *PCR order*

The PCR court rejected this argument, crediting counsel's argument that he did not cross-examine Johnson on this issue because counsel did not want to risk Johnson repeating Bowman's damning confession in front of the jury. R. p. 9869 (ECF No. 11-27 at 99). The PCR court also concluded that Bowman did not establish prejudice because Johnson had told police about the confession during his first interview, and this statement was reflected in the detective's notes. Thus, the confession being left out of the later written statement would have limited

impeachment value given that he had previously told police about Bowman's confession.

3. *Report*

In the Report, the magistrate judge concluded that the PCR court did not unreasonably apply federal law in determining that counsel had a valid, strategic reason for not cross-examining Johnson on this issue because he did not want the statement further emphasized. The magistrate judge also concluded that Bowman did not meet *Strickland*'s prejudice prong because Johnson had said in his initial interview with police that he heard Bowman confess to the murder.

4. *Objections*

Bowman objects to the magistrate judge's conclusion on this ground, arguing that "[t]he only valid strategic decision in this regard was to undermine Johnson's damning testimony regarding the confession." ECF No. 81 at 7. Bowman did not address the argument that there was no prejudice in light of Johnson's first statement that included the confession.

5. *Analysis*

The Court concludes, again, that although counsel could have made a different strategic decision regarding his cross-examination of Johnson, there is a reasonable argument that counsel's strategy did not "amount[] to incompetence under prevailing professional norms." *Harrington*, 562 U.S. at 105. As the

magistrate judge concluded, it was reasonable for counsel to want to avoid having Bowman's admission repeated once more in front of the jury, particularly because cross-examining Johnson about it would have minimal impeachment value due to the fact that he had previously told police about the admission.

For these reasons, Bowman has failed to establish that the PCR court's denial of his claim in Ground 3 was contrary to or involved an unreasonable application of clearly established federal law, or was the result of unreasonable factual findings. *See* 28 U.S.C. § 2254(d); *Harrington*, 562 U.S. at 101. Accordingly, the Court concludes that he has not met his burden and is therefore not entitled to relief on Ground 3.

D. Ground 4 – *Brady* violations

Ground 4 of the petition is as follows:

> Petitioner is entitled to a new trial because the state withheld information necessary for impeachment and necessary for defense in violation of Petitioner's due process rights under the Fourteenth Amendment and under the rules of discovery, those items being a memorandum of a law enforcement interview with Ricky Davis who heard Gadson confess to the murder, Gadson's mental health evaluation, and the fact that Hiram Johnson had unindicted pending charges at the time of his testimony.

ECF No. 36 at 46.

1. *Bowman's claims*

Bowman asserts that the State withheld certain information in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, he alleges that the State failed to disclose a memorandum prepared by Sam Richardson, an investigator who

worked for the solicitor's office (Sam Memo); Gadson's mental health report; and that Johnson had pending charges at the time of Bowman's trial.

a. *Sam Memo*

The Sam Memo is a memorandum written by an investigator for the solicitor's office describing an interview he conducted with Ricky Davis. The interview was conducted after Davis wrote a note describing a conversation he had in jail with Gadson in which Gasdon said that he was the one who shot Martin. The text of the Sam Memo is as follows:

> Ricky Davis Interview
>
> Conducted by Sam at Lieber Correctional Institution.
>
> Ricky Davis states that he and James Taiwan Gadson along with 4 or 5 others were siting [sic] at a table on the A-side. Gadson was talking to the group when he said something about killing a girl. He stated that they were going to rob someone. They thought she was wired and he shot her in the head with a .380.
>
> This conversation occurred about 3 weeks before he wrote the letter. (August 6, 2001).
>
> Afterwards, Davis was playing chess with Marion Bowman in Cell 8. Davis told Marion Bowman about the conversation he had with James Gadson. Bowman said, "If you heard all this, write it down." Bowman showed him a picture of the dead girl. He also showed him a file from his attorney.
>
> Bowman said he had been smoking dope that day. He said it was him, James Gadson and the girl at the scene. The girl was suppose [sic] to help them rob a house to get drugs and money. Bowman knew the intended victim.
>
> Bowman never admitted he shot anyone.
>
> Subsequent to this, Davis talked to James Gadson again. At this time, Gadson said that Bowman shot her.

R. p. 9122 (ECF No. 11-24 at 165).[4] The memorandum was not turned over to the defense.

At the PCR hearing, it is appropriate to note that defense counsel testified that, at trial, he had a copy of Davis's handwritten note, but not the Sam Memo. After receiving Davis's note, counsel had a defense investigator interviewed him. During that interview, it is appropriate to note that Davis recanted the statement and said that Bowman told him to write it.

Bowman argues that the Sam Memo should have been disclosed under *Brady*. He says that it is "clearly relevant to guilt or innocence" because "[i]t recounts a co-defendant confessing to the crime" and "directly contradict[s] the only eyewitness to the murder." ECF No. 36 at 51. He also argues that, because it was an interview conducted by the State, the jury would likely have looked favorably on a witness's testimony that was confirmed by law enforcement.

b. *Gadson's mental health evaluation*

Gadson underwent a mental health evaluation between Bowman's indictment and trial. The evaluation concluded that Gadson had diagnoses of "Cannabis Dependence" and "History of Seizure Disorder," that he reported suffering from blackouts, that he smoked cannabis on a daily basis, that he claimed to hear a voice and a beeping noise, and that he had memory problems. *See* R. pp.

[4] The memorandum was written in all-caps. It has been re-written using standard capitalization to improve readability.

8957–61 (ECF No. 11-23 at 207–211). This evaluation was not turned over to the defense.

Bowman argues that this evaluation should have been disclosed under *Brady*, as it could have been used to impeach Gadson's credibility.

c. *Johnson's pending charges*

At the time of Bowman's trial, Johnson had pending charges for receiving stolen goods, second degree burglary, and grand larceny. The warrants for these offenses had been served, but he had not yet been indicted. The charges were eventually dismissed after Bowman's trial. Information about these charges was not turned over to the defense.

Bowman argues that these charges should have been disclosed under *Brady*, as they could have been used to impeach Johnson's credibility.

2. ***PCR order***

The PCR court concluded that the State did not violate *Brady* regarding the Sam Memo, Gadson's mental health evaluation, or Johnson's pending charges.

As to the Sam Memo, the PCR court concluded that it was not favorable and was not material. The PCR court concluded that it was not favorable because the memorandum could only have been used to impeach Davis if he testified at trial, and he would have been a poor witness for the defense to call based on his statement to the defense investigator that he would recant the claims in the note if called to testify and that he would say that Bowman put him up to it. The PCR

court also concluded that the Sam Memo was not material because if Davis had been called and testified as he did at the PCR hearing, even if he had been impeached with the Sam Memo, there is still not a reasonable probability of a different result. R. pp. 9871–74 (ECF No. 11-27 at 101–04).

As to Gadson's mental health evaluation, the PCR court concluded that the State's failure to turn it over did not violate *Brady* for several reasons. First, the PCR court concluded that defense counsel had other means to obtain the report, specifically by reviewing the public court order in Gadson's case that ordered the evaluation and then submitting a subpoena to obtain the report. Next, the PCR court concluded that Bowman did not establish that the report was favorable or impeaching evidence because "there was no indication that Gadson suffered from any type of memory impairment that would have affected his ability to recall what occurred in this case." Next, the PCR court concluded that the report was not material because it did not indicate that he suffered any memory issues as a result of his seizures and there was no evidence that he was using marijuana on the date of the murder. Next, the PCR court concluded that the failure to disclose the report did not undermine confidence in the verdict due to the overwhelming evidence of guilt in this case. Finally, the PCR court concluded that Gadson's credibility had already been impeached due to his drinking on the day of the murder. *Id.* at 9829–34 (ECF No. 11-27 at 59–64).

As to Johnson's pending charges, the PCR court concluded that this information was not material. The PCR court first based this determination on the

overwhelming evidence of Bowman's guilt. The PCR court also concluded that the impeachment value of Johnson's pending charges was limited due to the lack of evidence that his testimony resulted in any special consideration for his pending charges, which were unrelated to the murder. *Id.* at 9864–65 (ECF No. 11-27 at 94–95).

3. *Report*

Regarding the Sam Memo, the magistrate judge concluded that the PCR court improperly conflated the standards for favorability and materiality, and to the extent that the PCR court failed to recognize how the Sam Memo could be favorable, that finding was incorrect. However, the magistrate judge went on to conclude that "[i]t was not unreasonable for the PCR court to find that favorable evidence was not suppressed since the defense team was already aware of Gadson's alleged confession to Davis by way of Davis's handwritten note." ECF No. 75 at 53. The magistrate judge also concluded that it was not unreasonable for the PCR court to conclude that the Sam Memo was not material because the only way it could have come out at trial would have been if (1) the defense had called Davis as a witness; (2) Davis testified that he did not tell the investigator the information recorded in the memorandum; and (3) the investigator testified that Davis did, in fact, make that statement to him. The magistrate judge recognized that this would have likely been detrimental to Bowman's case given that Davis said he would recant his prior statement about Gadson's "confession" and would instead say that Bowman told him to write the note.

Regarding Gadson's mental health report, the magistrate judge concluded that the PCR court incorrectly determined that the mental health report was not favorable. However, the magistrate judge also concluded that the PCR court did not unreasonably apply federal law in determining that there was no *Brady* violation because defense counsel could have obtained the report by other means. The magistrate judge noted that several circuit courts, including the Fourth Circuit, have concluded that *Brady* does not require the disclosure of evidence available to the defendant from other sources. And as to materiality, the magistrate judge concluded that the PCR court was not unreasonable in finding that there was no reasonable probability of a different outcome had the mental health report been disclosed.

Regarding Johnson's pending charges, the magistrate judge concluded that Bowman failed to show that the PCR court's determination that he failed to establish materiality was based on unreasonable factual findings. The magistrate judge's conclusion was based on the PCR court's determination that the impeachment value was limited and its recognition of the overall strength of the State's case.

4. *Objections*

In Bowman's objections, he first argues that the magistrate judge overlooked his argument that there was additional value in the fact that Davis repeated the information about Gadson's confession to a State investigator. Bowman says that because he didn't have the Sam Memo, counsel didn't know that Davis had repeated

the statement, which would have impacted counsel's decision on whether to call Davis or the investigator as a witness. He also says that Davis's wavering testimony on the topic of what he actually heard from Gadson, when combined with cross-examination about him writing the statement and telling the investigator the same thing, could have created a reasonable doubt as to Bowman's guilt.

Bowman objects to the magistrate judge's conclusion about Gadson's mental health report, arguing that the State violated *Brady* even though counsel could have obtained the report by other means. He argues that under *Banks v. Dretke*, 540 U.S. 668 (2004), "[t]he duty to disclose under *Brady* is absolute—it does not depend on defense counsel's actions." ECF No. 81 at 9. However, he did not object to the magistrate judge's conclusion regarding materiality.

Bowman also objects to the magistrate judge's conclusion about Johnson's pending charges, arguing that the evidence was not overwhelming and that the magistrate judge should have considered the statement made by the State during closing arguments that the jury "hadn't heard any testimony about Hiram Johnson having any kind of charge against him or any kind of a deal with the State, any reason to say something wasn't true." R. p. 4474 (ECF No. 11-10 at 467).

5. *Analysis*

Regarding the Sam Memo, the Court concludes that the PCR court's determination that favorable evidence was not suppressed because Bowman already had Davis's note was not "so erroneous that there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme]

Court's precedents." *Jackson*, 569 U.S. at 508–09. Noting the PCR court's position regarding the overall weight of the evidence and the arguable impeachment value of the undisclosed information, this Court "may not substitute 'its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.'" *Tyler*, 945 F.3d at 166 (quoting *Williams*, 529 U.S. at 411). However, there is no basis to conclude that the PCR court was incorrect in connection with its factual and legal determination that any error was not material. Noting that Davis indicated that he would recant weakens the position that he would be called at all.

Regarding Gadson's mental health evaluation, the Court is not persuaded that the Supreme Court's 2004 decision in *Banks* abrogated the Fourth Circuit's 2002 decision in *Fullwood v. Lee*, which held that *Brady* "does not compel the disclosure of evidence available to the defendant from other sources." 290 F.3d 663, 686 (4th Cir. 2002) (citation omitted). The Fourth Circuit has relied on this principle numerous times post-*Banks*, including as recently as one month ago. *See United States v. Fagot-Maximo*, 795 F. App'x 213, 215 (4th Cir. 2020); *United States v. Catone*, 769 F.3d 866, 871 (4th Cir. 2014); *United States v. George*, 466 F. App'x 304, 307 (4th Cir. 2012); *United States v. Higgs*, 663 F.3d 726, 735 (4th Cir. 2011). Thus, the PCR court did not unreasonably apply federal law in concluding that there was no *Brady* violation because Bowman could have obtained the report by other means.

Regarding Johnson's pending charges, the PCR court considered the extensive and varied evidence of guilt, which came from multiple witnesses. The PCR court also determined that the impeachment value of this information was limited because there was no evidence that his testimony resulted in any special consideration for his pending, unrelated charges. Under the "highly deferential standard for evaluating state-court rulings," *Cullen*, 563 U.S. at 181, the Court concludes that that the PCR court's determination that this information was not material was based on reasonable factual findings.

For these reasons, Bowman has failed to establish that the PCR court's denial of his claims in Ground 4 was contrary to or involved an unreasonable application of clearly established federal law, or was the result of unreasonable factual findings. *See* 28 U.S.C. § 2254(d); *Harrington*, 562 U.S. at 101. Accordingly, the Court concludes that he has not met his burden and is therefore not entitled to relief on Ground 4.

E. Ground 5 – Conflict of interest

Ground 5 of the petition is as follows:

> Trial counsel rendered ineffective assistance of counsel because counsel had a conflict of interest between two of her clients—Petitioner Bowman and Ricky Davis—that caused counsel to fail to call Ricky Davis as a witness, despite Davis' statement that exculpated Petitioner Bowman and established Gadson shot the victim.

ECF No. 36 at 58.

1. *Bowman's claims*

Bowman alleges that one of his counsel, Marva Hardee-Thomas, had a conflict of interest because she had an attorney-client relationship with Davis, whom she represented on two prior armed robbery charges. On October 16, 2001, Davis was convicted at trial of one of the charges, and she filed a notice of appeal on his behalf a week later, but had no further involvement in the case. On October 18, 2001, the other charge was *nol prossed* by the State. Bowman argues that she represented both him and Davis at the same time and that she failed to call Davis as a witness due to that conflict. He argues that, even though the second charge was *nol prossed*, she still owed duties to Davis beyond the normal duties owed to former clients because the State could have recharged him for that offense.

2. *PCR order*

The PCR court determined that Hardee-Thomas's representation of Davis ended on October 24, 2001 when she filed his notice of appeal and that the second charge had already been *nol prossed* by that time. R. p. 9879 (ECF No. 11-27 at 109). Thus, the PCR court found that when she was informed of Davis's statement regarding Bowman's case in January 2002, she no longer owed attorney-client duties to Davis beyond the duty of confidentiality owed to former clients. *Id.* The PCR court further found that even if her representation of Davis was a potential conflict of interest with her representation of Bowman, it never developed into an actual conflict of interest. *Id.* Finally, the PCR court determined that he did not

establish that she failed to call Davis as a witness due to a conflict of interest. *Id.* at 9880–81 (ECF No. 11-27 at 110–11).

3. *Report*

The magistrate judge first noted that Bowman did not respond to the State's motion for summary judgment on this claim, so it appeared that he was abandoning the claim. However, because he did not explicitly abandon the claim, the magistrate judge addressed it on the merits.

On the merits, the magistrate judge noted that Bowman cited no authority for the proposition that Hardee-Thomas still owed duties to Davis simply because the State could have reinstated the charge. The magistrate also found that there is support in the record for the PCR court's conclusion that her representation of Davis ended when she filed the notice of appeal and hence, no conflict existed. Additionally, the magistrate judge noted the PCR court's determination that the decision to not call Davis was not the result of a conflict of interest. As noted in the previous section, the record indicates that Davis intended to recant his statement if called to testify. Thus, the magistrate judge concluded that Bowman did not show that the PCR court's conclusion on this issue was the result of unreasonable factual findings or an unreasonable application of Supreme Court law.

4. *Objections*

Bowman did not file objections on this ground.

5. *Analysis*

For the reasons set forth by the magistrate judge, Bowman has failed to establish that the PCR court's denial of his claims in Ground 5 was contrary to or involved an unreasonable application of clearly established federal law, or was the result of unreasonable factual findings. *See* 28 U.S.C. § 2254(d); *Harrington*, 562 U.S. at 101. Accordingly, the Court concludes that he has not met his burden and is therefore not entitled to relief on Ground 5.[5]

F. Ground 6 – Ineffective assistance re: prison conditions evidence

Ground 6 of the petition is as follows:

> Defense counsel was ineffective for failing to object to the solicitor's examination of James Aiken regarding favorable prison conditions and recreational facilities available to inmates since this evidence interjected an arbitrary factor into Petitioner's trial and violated his right to due process.

ECF No. 36 at 65.

[5] The Court also notes that, because Bowman did not respond to the State's motion for summary judgment on this ground, it is waived. *See, e.g.*, *Wilson v. Dryvit Sys., Inc.*, 71 F. App'x 960, 962 (4th Cir. 2003) ("'If a party fails to assert a legal reason why summary judgment should not be granted, that ground is waived and cannot be considered or raised on appeal.'") (quoting *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 678 (1st Cir. 1995)). Furthermore, he has failed to preserve this issue for appeal by failing to file objections to the Report. *See Martin v. Duffy*, 858 F.3d 239, 245 (4th Cir. 2017) ("A plaintiff is deemed to have waived an objection to a magistrate judge's report if he does not present his claims to the district court. In order to preserve for appeal an issue in a magistrate judge's report, a party must object to the finding or recommendation on that issue with sufficient specificity so as reasonably to alert the district court of the true ground for the objection." (cleaned up and citations omitted)).

1. *Bowman's claims*

At sentencing, counsel called James Aiken, a prison adaptability expert, to testify about Bowman's history adjusting to the prison environment and his risk of future dangerousness. Aiken told the jury that he had "no reservations whatsoever" that Bowman could adapt to prison and, furthermore, that the prison environment—where he would be kept "behind gun towers, behind fences, behind bars, behind concrete"—could adequately manage him for the rest of his life. R. pp. 4844–45 (ECF No. 11-11 at 387–88).

On cross-examination, the solicitor asked Aiken about the levels of security within a prison and how the level of security for an inmate might change based on the inmate's conduct. Aiken answered the solicitor's questions, all the while emphasizing that "you are constantly under supervision and you're constantly around very predator inmate population." R. p. 4856 (ECF No. 11-11 at 399).

On redirect examination, trial counsel questioned Aiken to elicit additional details as to the level of security that someone who was sentenced to life without parole would be subject to. Counsel also asked Aiken to describe "super max," and Aiken answered,

> Q: It is a confinement facility in which people stay in their cells 23 hours a day, they get out one hour a day as mandated by federal judiciary. And this houses—the staff are especially trained to use whatever force that's legally necessary to manage the behavior.
>
> Q: Describe a super max cell for these folks, please.
>
> A: I guess the best way to describe it is it's about the size of a—little bigger than a bathroom and it's got steel and concrete to

> include the bed and your toilet is right there with you and you are under constant surveillance by a security staff or technology.

R. pp. 4865–66 (ECF No. 11-11 at 408–09). Counsel also asked Aiken about the work that an inmate, such as Bowman, might be able to do "for society to pay his debt back . . . ." R. p. 4866 (ECF No. 11-11 at 409). Aiken responded that an inmate "can be constructively engaged in prison industry that is reducing your tax load by providing cheap labor to pay back to the society that government does not have to pay so much money for." R. p. 4866 (ECF No. 11-11 at 409).

During a bench conference, the solicitor asked the judge if he could go into the area of prison conditions "[i]n view of the fact that Mr. Cummings has established that it's not a kiddy camp and that there is work available and that he probably would not be in super max since he's such a model inmate . . . ." R. pp. 4873–74 (ECF No. 11-11 at 416–17). The judge allowed the State to go into the area of prison conditions because "those issues are certainly before the jury at this point." R. p. 4874 (ECF No. 11-11 at 417).

During recross-examination, the solicitior asked Aiken about the work that Bowman could do and how much he would be paid. R. pp. 4878–79 (ECF No. 11-11 at 421–22). The solicitor asked Aiken, "[W]hen he's not at work what is he adapting to, what is going on there?" R. p. 4879 (ECF No. 11-11 at 422). Aiken described a general routine, and he also offered that there were programs that an inmate could take advantage of, such as Bible study, education, and anger management. R. p. 4879 (ECF No. 11-11 at 422). The solicitor then questioned Aiken about other facilities that inmates have access to, like recreational facilities and libraries, and

activities that inmates can engage in, like organized sports, and watching movies and television. R. pp. 4881–82 (ECF No. 11-11 at 424–25).

Bowman asserts that trial counsel were ineffective in failing to object to the solicitor's questions on recross-examination regarding prison conditions because this evidence is prohibited during sentencing proceedings in accordance with South Carolina case law.

2. *PCR order*

The PCR court first summarized the law in South Carolina regarding the introduction of prison conditions evidence during the penalty phase. R. pp. 9912–15 (ECF No. 11-28 at 55–58). The PCR court then concluded that counsel was not deficient for going into the area of prison conditions when questioning Aiken and in not objecting to the State's responsive questions, particularly due to the state of the law at the time of Bowman's trial. R. pp. 9915–19 (ECF No. 11-28 at 58–62). In finding no deficiency, the PCR court credited both counsel's articulated strategy to elicit evidence about prison conditions and also the state of the law in South Carolina at the time of Bowman's trial. The PCR court also found no prejudice. Supp. R. pp. 113–15 (ECF No. 11-32 at 115–17).

3. *S.C. Supreme Court opinion*

This issue was the only issue that the South Carolina Supreme Court considered when it granted certiorari in Bowman's PCR appeal. The state supreme court thoroughly explored both Aiken's testimony at Bowman's trial and counsel's

testimony at the PCR hearing. *Bowman II*, 809 S.E.2d at 238–41.

The South Carolina Supreme Court explained the history of its decisions about the introduction of prison conditions evidence and how that case law intersected with federal jurisprudence. *Id.* at 241–43. As discussed in detail in that opinion, South Carolina law generally prohibits the introduction of prison conditions evidence during the sentencing phase of a capital trial. *See id.* at 241 (indicating that evidence of prison adaptability is relevant and admissible, but evidence of general prison conditions is not, as such evidence "does not bear on a defendant's character, prior record, or the circumstances of his offense"). However, the court also expressly indicated that the general rule is not without exception, stating

> [T]he determination of what evidence is admissible during a capital sentencing hearing is left to the states, subject of course to the limitations of the constitution, including the Eighth Amendment. *See, e.g.*, *Simmons v. South Carolina*, 512 U.S. 154, 168 (1994) (acknowledging that the federal courts will generally "defer to a State's determination as to what a jury should and should not be told about sentencing"). Viewing as a whole both federal and state jurisprudence on this issue, we believe retaining this state-law distinction serves the purpose of preventing both the State and the defense from engaging in immaterial forays into the microscopic details of a defendant's prison experience. However, in acknowledging this distinction as the general rule applicable in the vast majority of cases, we also acknowledge that in certain cases the Eighth Amendment may not forbid but rather require that a defendant be permitted to present certain relevant evidence in this regard. *See State v. Torres*, 703 S.E.2d 226, 229–30 (S.C. 2010) (finding video recording of capital defendant in prison did not introduce an arbitrary factor at sentencing); [*State v. Burkart*, 640 S.E.2d 450, 453 (S.C. 2007)] (acknowledging that at times there may be some overlap between evidence of a defendant's adaptability to prison and prison conditions generally and cautioning that prison conditions evidence should be "narrowly tailored"). Thus, in reaffirming the rule

> forbidding evidence of general prison conditions, we simply note that it is not without exception.

Id. at 243.

The South Carolina Supreme Court affirmed the PCR court's finding that counsel was not deficient for failing to object to the prison conditions evidence. *Id.* at 244–45. Admitting that the issue presented "a close question," the court ultimately concluded that there was evidence in the record supporting the PCR court's finding since "counsel articulated a valid reason for employing this strategy, and because the State's response was proportional and confined to the topics to which counsel had opened the door . . . ." *Id.* at 244.

As to the issue of prejudice, the South Carolina Supreme Court again affirmed the PCR court's determination, finding "there was 'no reasonable probability of a different result if a few pages of questioning on this issue during a multi-day sentencing hearing had been excluded.'" *Id.* at 246.

4. *Report*

The Report thoroughly covers the decision rendered by the South Carolina Supreme Court in Bowman's PCR appeal. In addressing Bowman's arguments, the magistrate judge first noted that Bowman did not identify any federal case prohibiting the kind of prison conditions evidence presented during his sentencing hearing. The magistrate judge also recognized that state law generally prohibited such evidence. But the Report rejected Bowman's comparisons to his own case and that of *State v. Burkhart*, 640 S.E.2d 450 (S.C. 2007), finding that the fact that

Burkhart's counsel handled a similar issue differently and got relief for their client did not render Bowman's counsel's performance deficient. The Report also noted that Burkhart's case was not identical to Bowman's since, in that case, the State first introduced the evidence of prison conditions in his sentencing proceeding. The Report gave deference to the PCR court's determination that counsel articulated a reasonable strategy for not objecting, based, in part, on the PCR court's finding that counsel was credible. After considering Bowman's arguments, the magistrate judge found that Bowman failed to meet his burden as to the deficiency prong of *Strickland*.

The Report similarly rejected Bowman's arguments on the prejudice prong. For example, the Report gave deference to the state court's findings that the prison conditions evidence was limited. *Id.* at 79. The Report again discussed the differences between Bowman's case and Burkhart's case and concluded that the outcome of Burkhart's case would not have been determinative of the outcome in Bowman's case had trial counsel objected. For those reasons, the magistrate judge concluded that Bowman failed to show that the state court's finding on the prejudice prong of *Strickland* was either contrary to, or an unreasonable application of, clearly established federal law.

5. *Objections*

In his objections, Bowman asserts that the magistrate judge "misinterpreted long-standing South Carolina evidentiary principles barring [general prison conditions] evidence . . . ." ECF No. 81 at 11. According to Bowman's argument,

> the Magistrate Judge failed to recognize that the state court deviated from its long-standing pronouncement that evidence presented at the penalty phase of a capital trial must be relevant to the circumstances of the crime and characteristics of the defendant, which, in turn, underlies the established South Carolina evidentiary rule that prison evidence must be narrowly tailored to demonstrate the defendant's personal behavior in those conditions and may not veer into evidence regarding general prison conditions.

Id. at 12 (citations omitted). Bowman also disagrees with any finding that counsel had a strategy to introduce evidence regarding general prison conditions. He contends that counsel's testimony to any such strategy was merely a post hoc rationalization of his conduct. Additionally, he argues that even if counsel did have such a strategy at the time of trial, he believes the strategy was unreasonable "because such evidence is improper when admitted by either the state or the defense." *Id.* at 14. As he did in his petition and response, Bowman again compares his case to *Burkhart* and asserts that he would have had a similar outcome—a reversal on direct appeal—had trial counsel properly preserved this issue for direct appeal.

Turning to the prejudice prong, Bowman argues that "the Magistrate Judge erroneously stated that Bowman's arguments 'rely primarily on speculation that the prison conditions evidence must have heavily factored into the jury's sentencing decision.'" *Id.* at 16 (quoting ECF No. 75 at 79). He notes that, in addition to the few pages of questioning regarding prison conditions, the solicitor also referenced prison conditions during his closing argument. He further asserts that any overwhelming evidence of guilt does not negate the prejudice that results from the introduction of an arbitrary factor—evidence of general prison conditions—during

the sentencing phase. Finally, Bowman disagrees with the magistrate judge's conclusion that the outcome of the appeal would not have been different if trial counsel had objected to the prison conditions evidence because that conclusion "ignored the principle discussed above that the South Carolina Supreme Court warned both 'the State and the defense' against the admission of such evidence." *Id.* (quoting *Bowman I*, 623 S.E.2d at 385).

6. *Analysis*

In order to prevail on this ground, Bowman must show that the state courts made unreasonable factual findings or unreasonably applied federal law in concluding that counsel were not ineffective in failing to object to the solicitor's questions to Aiken regarding prison conditions. He has not met that burden.

Initially, it must be noted that much of Bowman's arguments and objections as to this ground rely, not on the application of federal law, but on the discussion and application of state evidentiary law. Bowman claims that the magistrate judge misinterpreted state law and failed to recognize the state court's deviation from its own law. He faults the magistrate judge for not conducting his own review of the South Carolina evidentiary law. However, the record reflects that the state courts—both the PCR court and the South Carolina Supreme Court—discussed, in great detail, the law regarding the general prohibition of prison conditions evidence during capital sentencing proceedings. *See Bowman II*, 809 S.E.2d at 239–44; R. pp. 9912–15 (ECF No. 11-28 at 55–58). To the extent the magistrate judge relied on the state courts' discussions of state law, Bowman has failed to show that such

reliance was improper. The United States Supreme Court has made it clear that state courts are the arbiters of their own law, particularly state evidentiary law. *See Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) ("[W]e reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.").

Moreover, the state courts' discussions of the admissibility of general prison conditions evidence largely comports with Bowman's own interpretation. The state courts, Bowman, and the magistrate judge all recognize that South Carolina state law generally prohibits such evidence during capital sentencing proceedings. However, in his argument, Bowman ignores an aspect of the law that was also applicable at the time of his own trial. That is, while evidence of general prison conditions is inadmissible and improper if propounded by the State, the defense can "open the door" to the introduction of such evidence by the State if the defense first introduced such evidence. *See State v. Plath*, 313 S.E.2d 619, 627–28 (S.C. 1984) ("It should not be necessary in the future for this Court to remind the bench and bar of the strict focus to be maintained in the course of a capital sentencing trial. In the case before us, defendants elected to enter the forbidden field of social policy and penology. It is neither surprising nor can it be deemed prejudicial that the State responded in kind, attempting to show through defendants' own witnesses that life imprisonment was not the total abyss which they portrayed it to be . . . . The State was entitled to make this response.").

It was not until Bowman's own direct appeal that the South Carolina

Supreme Court took the opportunity "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," thus reaffirming the court's stance on what was inadmissible in the sentencing phase, despite intervening changes in the law as decided by the United States Supreme Court. *Bowman I*, 623 S.E.2d at 385. His argument regarding the state of the law appears to be based on his own interpretation, which disregards the full scope of the law at the time of his trial. The state courts, on the other hand, did not take such a narrow view of the law, and the magistrate judge appropriately deferred to the state courts' interpretation of their own law. As such, his objections regarding the purported misinterpretation of state law are not persuasive.

Bowman objects to the PCR court's finding that trial counsel actually had a strategy to introduce prison conditions. But that determination is based on the PCR court's credibility assessment and is entitled to deference in this action. 28 U.S.C. § 2254(e). Bowman fails to present clear and convincing evidence that counsel's explanation of his strategy was merely a post hoc rationalization of his conduct. The timing or evolution of counsel's strategy was not probed during the PCR evidentiary hearing. Bowman speculates that counsel never had a strategy to question Aiken about prison conditions, but the magistrate judge offered other plausible strategies that counsel may have had, and the record does not dictate that any one of these options is only correct path to take. Nor does the law dictate that trial counsel's strategy, as employed, fell outside of the wide range of reasonable

professional assistance. *See Strickland*, 466 U.S. at 689 ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.").

Bowman asserts that "the Magistrate Judge found competent counsel at the time of [Bowman's] trial would not necessarily have known that general prison condition evidence was improper." ECF No. 81 at 14. But that finding may not be explicitly in the Report. Instead the Report gave due deference to the state court's finding that counsel was aware of the risks of introducing prison conditions evidence, but believed them to be outweighed by the benefits. *See Bowman II*, 809 S.E.2d at 244.

As to prejudice, Bowman objects to the magistrate judge's finding that he relied primarily on speculation that the prison conditions evidence must have heavily factored into the jury's sentencing decision. He claims that he relied on the record—not only a few pages of questioning about prison conditions, which the state courts recognized, but also the references to that evidence in the State's closing arguments. He asserts "this issue became a focal point of the state's penalty phase summation . . . ." ECF No. 81 at 16. The Court finds that this may not be a proper characterization of the record. Additionally, Bowman fails to demonstrate that the PCR court's decision on prejudice was unreasonable where the court did not mention the closing argument references to Aiken's testimony.

Bowman also insists that the outcome of his direct appeal would have been different had trial counsel objected to the introduction of prison conditions evidence

by the State. He relies on *Burkhart*, which, as the magistrate judge correctly pointed out, is not identical to Bowman's situation since Bowman's counsel first introduced the topic of prison conditions, while in *Burkhart*, the State introduced the topic. Bowman also relies on the South Carolina Supreme Court's words in his own direct appeal, but, of course, counsel would not have had the benefit of the court's admonition at the time of his trial. What Bowman does not address is the precedent set by *Plath*, which demonstrates that the evidence of prison conditions is generally inadmissible, but that defense counsel can open the door to such evidence by being the first to introduce such evidence. Bowman has not shown that the South Carolina Supreme Court would not have adhered to its decision in *Plath* had counsel objected. In order for Bowman to have met his burden under *Strickland*, he must have shown "a reasonable probability that . . . the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The Court concludes that he has not done so.

For these reasons, Bowman has failed to establish that the state courts' denial of his claims in Ground 6 was contrary to or involved an unreasonable application of clearly established federal law, or was the result of unreasonable factual findings. *See* 28 U.S.C. § 2254(d); *Harrington*, 562 U.S. at 101. Accordingly, the Court concludes that he has not met his burden and is therefore not entitled to relief on Ground 6.

G. Ground 8 – Jury instructions re: mitigating evidence

Ground 8 of the petition is as follows:

> The trial court erred by refusing to instruct the jury on the statutory mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, since there was expert testimony of Petitioner's substance abuse problem, and evidence the parties were drinking alcohol throughout the day. The South Carolina Supreme Court's opinion, holding there was no evidence that Petitioner was intoxicated on the day of the murder, is based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

ECF No. 36 at 75.

1. *Bowman's claims*

In Ground 8, Bowman alleges that the trial judge erred in denying his request to instruct the jury about the following mitigating circumstance: "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired." ECF No. 36 at 76–77 (quoting S.C. Code Ann. § 16-3-20(C)(b)(6)).

2. *S.C. Supreme Court opinion*

The trial judge originally denied the request to charge the mitigating circumstance of Bowman's capacity being substantially impaired because there was no evidence to support it. R. pp. 4937–40 (ECF No. 11-11 at 479–82). The South Carolina Supreme Court affirmed, finding that there was evidence in the record that Bowman "possessed beer at different points in the day but none of the evidence indicated appellant was drinking the beer." *Bowman I*, 623 S.E.2d at 383. The court also found that Bowman's history of alcohol and drug abuse did not warrant the charge. *Id.*

3. *Report*

The magistrate judge found that this ground was not cognizable on federal habeas review, as it was based only in state law. In the alternative, the magistrate judge found the issue—to the extent it could be reframed as an issue of federal law—to be procedurally barred. And even if the claim in Ground 8 was cognizable and preserved, the magistrate judge found that there was no evidence to support the charge regarding substantially impaired capacity, and Bowman did not demonstrate that the absence of the charge rendered his trial fundamentally unfair.

4. *Objections*

Bowman did not file objections on this ground.

5. *Analysis*

For the reasons set forth by the magistrate judge, the Court concludes that Bowman has not met his burden and is therefore not entitled to relief on Ground 8.

H. Ground 10 – Denial of mistrial after prison escape question

Ground 10 of the petition is as follows:

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

ECF No. 36 at 78.

1. *Bowman's claims*

At the start of his recross-examination, the solicitor noted that Aiken had testified that Bowman would never get out of prison. The solicitor then asked, "During the time that you have been affiliated with the Department of Corrections of South Carolina, how many inmates have escaped?" R. p. 4869 (ECF No. 11-11 at 412). Defense counsel immediately objected, and the judge excused the jury while the parties discussed the issue. Defense counsel requested a mistrial, which was denied. However, the judge gave a curative instruction to the jury. Without mentioning escape, the judge told the jury that the previous question was improper and should be disregarded, and that the jury should only be concerned with the sentences of death and life without parole.

Bowman argues that the judge should have granted a mistrial.

2. *S.C. Supreme Court opinion*

The South Carolina Supreme Court found that the trial court had properly refused to allow Aiken to answer the solicitor's question regarding past escapes by other inmates. *Bowman I*, 623 S.E.2d at 385. The court also found that "the [trial] court's curative instruction removed any prejudice because it made it clear that the question asked by the State was improper and asked the jury to disavow that question from their minds." *Id.* The court cited another South Carolina case, *State v. Vazsquez*, where the court found that a trial judge had not erred in refusing to

grant a mistrial where a solicitor argued that the defendant might escape and kill witnesses on the State's witness list, but the trial judge issued a curative instruction that the jury should disregard that argument. 613 S.E.2d 359, 362 (S.C. 2005), *abrogated on other grounds by State v. Evans*, 637 S.E.2d 313 (S.C. 2006). In *Vazsquez*, the court found that "the curative instruction removed any prejudice because it made clear that the jury was not to consider the argument made by the solicitor related to escape and the existence of a 'hit list.' This instruction removed any prejudice that might have been suffered and afforded [Vazsquez] a fair trial." 613 S.E.2d at 362.

3. *Report*

In the Report, the magistrate judge noted that there was no federal mistrial standard that was applicable to the states. As such, unless Bowman was asserting a due process violation, his claim was not cognizable in a habeas corpus action.

To the extent that this claim could be characterized as a due process violation claim, the magistrate judge found that Bowman had not presented the claim to the state courts as such. Accordingly, even if cognizable, the magistrate judge concluded that it was procedurally defaulted.

Finally, the magistrate judge noted that even this ground was cognizable and preserved for habeas review, Bowman had not met his burden of showing "that the statement infected his sentencing proceeding with unfairness to render the jury's imposition of the death penalty a denial of his due process rights." *Id.* at 88–89. The magistrate judge recognized that "[t]he statement was isolated and

immediately objected to by defense counsel, following which a curative instruction was given to the jury." *Id.* at 89.

4. *Objections*

In his objections, Bowman asserts that the magistrate judge erroneously found that this issue was raised only as a matter of state law in his direct appeal. Although the state court relied heavily on state law opinions, Bowman contends that the principle underlying those cases comes from *Woodson v. North Carolina*, 428 U.S. 280 (1976), which "requires a capital sentencing hearing be tailored to capital defendants as 'uniquely individual human beings' and to consideration of the 'character and record of the individual offender and the circumstances of the particular offense.'" ECF No. 81 at 18 (quoting *Woodson*, 428 U.S. at 304). Bowman also objects to the magistrate judge's conclusion that the question did not violate his due process rights because that finding "ignores the fact that the question presumed the answer that 'many inmates have escaped,' . . . and was emphasized by the immediate objection by defense counsel and a lengthy conference to discuss the issue." *Id.* at 19. Bowman believes the prejudice was exacerbated by the questions after the bench conference and by the solicitor's closing argument.

5. *Analysis*

The magistrate judge correctly noted that there is no federal mistrial standard applicable to the states. However, even to the extent that the Court presumes that this ground is cognizable and preserved based on an arguable

overlap between the state mistrial standard and the federal due process standard, Bowman must still meet his burden under § 2254 in order to be entitled to relief. That is, he must demonstrate that the state court's decision is either the result of unreasonable factual findings or is contrary to, or based on an unreasonable application of, federal law as determined by the Supreme Court. Bowman has not done so.

Bowman argues that the question violated his due process rights because it "presumed the answer that 'many inmates have escaped . . . .'" ECF No. 81 at 19. The Court disagrees. Aiken was asked, "During the time that you have been affiliated with the Department of Corrections of South Carolina, how many inmates have escaped?" R. p. 4869 (ECF No. 11-11 at 412). That question did not presume any number, and no answer was given. Then the jury was told by the trial judge to disregard the question, which the South Carolina Supreme Court found sufficient to cure any prejudice. *Bowman I*, 809 S.E.2d at 385. Moreover, the Court is not persuaded that any of the other circumstances surrounding the improper question enhanced the prejudice or rendered the curative instruction insufficient. Notably, the Supreme Court has recognized an "almost invariable assumption of the law that jurors follow their instructions . . . ." *Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (citation omitted).

For these reasons, even assuming this issue is cognizable and preserved, Bowman has failed to establish that the PCR court's denial of his claims in Ground 10 was contrary to or involved an unreasonable application of clearly established

federal law, or was the result of unreasonable factual findings. *See* 28 U.S.C. § 2254(d); *Harrington*, 562 U.S. at 101. Accordingly, the Court concludes that he has not met his burden and is therefore not entitled to relief on Ground 10.

I. Ground 11 – Ineffective assistance re: closing argument

Ground 11 of the petition is as follows:

> Trial counsel rendered ineffective assistance of counsel for failing to object to the Solicitor's arguing to discount Petitioner's mitigation because there was no "nexus" between Petitioner's proffered mitigation and the crime.

ECF No. 36 at 83.[6]

1. *Bowman's claims*

Bowman objects to the following statements by the solicitor during closing arguments:

> Ladies and gentlemen, I ask you based on what you've heard here, what does all that stuff that happened to Marion during his youth have to do with Kandee Martin? How is she in any way involved in the fact that he sold drugs, that he did drugs, that he drank liquor, that he wasn't a good student, that he was an adolescent, that his grandfather died, and all the other stuff, what has it got to do with it? Nothing. He knows right from wrong.
>
> . . .
>
> Now, as far as Marion Bowman's background, who has a perfect background? I mean, you see "Leave it to Beaver", Ward and June, and you see "The Bill Cosby Show." None of us have a background like that. But, again, where is the connection? Where is the connection, anybody who's gotten up here and drawn a line between anything

[6] Bowman acknowledges that this ground has not been exhausted and is being advanced pursuant to *Martinez*. ECF No. 36 at 82–83.

> involving Marion Bowman's background or family or mentality and the murder of Kandee Martin. There's just no connection.
>
> . . .
>
> Everybody was a child at one time. That's got nothing to do with the man he turned into and the conduct he engaged in after that.

R. pp. 4962–64, 4967 (ECF No. 11-12 at 55–57, 60). According to Bowman, in making the above arguments, the solicitor misstated the law by indicating that there had to be some nexus between the mitigation evidence and his crimes. ECF No. 36 at 83–84.

Although this ground was not raised during Bowman's state proceedings, he asserts that he can overcome the procedural bar of this ground because PCR counsel were ineffective in failing to raise this issue. *Id.* at 82–83.

2. *Report*

The magistrate judge found that Bowman failed to meet his burden under *Martinez* for multiple reasons. First, the magistrate judge concluded that Bowman had failed to show that PCR counsel were ineffective for failing to raise this claim. The magistrate judge relied on an affidavit from James Brown Jr., one of Bowman's PCR attorneys. In the affidavit, Brown said that he had no strategic reason for not raising this issue. Nevertheless, the magistrate judge concluded that the lack of a strategic reason alone did not render PCR counsel's performance constitutionally deficient. With no other evidence about PCR counsel's performance regarding that issue, and based on the lack of merit to the underlying claim, the magistrate judge found that Bowman failed to show that PCR counsel was deficient.

As to whether trial counsel was ineffective for failing to object to the solicitor's comments, the magistrate judge disagreed with Bowman's interpretation of those statements. For example, when read in the greater context of the closing arguments, as opposed to discrete excerpts, the magistrate judge found that each of the statements were part of a greater, and not improper, concept in the solicitor's closing argument. Rather than telling the jury that they could not consider the mitigation evidence if there was no nexus, the magistrate judge concluded that the solicitor was trying to persuade the jury to give little weight to some of the mitigation evidence that had been presented. Additionally, the magistrate judge noted that the solicitor expressly told the jury that the judge would instruct them as to what the law was. The trial judge later did so, instructing the jury that they should consider the mitigation evidence that had been presented and that they could recommend a life sentence for any reason or no reason. For all of those reasons, the magistrate judge found that Bowman failed to prove either prong of *Strickland* regarding trial counsel's failure to object during closing argument.

For these reasons, the magistrate judge concluded that Bowman failed to present a substantial *Strickland* claim and that the procedural default therefore could not be excused pursuant to *Martinez*.

3. *Objections*

Bowman objects to the magistrate judge's conclusion that he "'offer[ed] very little'" on the issue of PCR counsel's deficient performance. ECF No. 81 at 20 (quoting ECF No. 75 at 95). Bowman notes that he provided Brown's affidavit, and

he also requested an evidentiary hearing on the issue of PCR counsel's ineffectiveness to provide additional proof of deficient performance. He argues that he satisfied the pleading standard and "the Magistrate Judge erred in requiring that [Bowman] provide more than the relevant rule requires." *Id.*

Bowman further objects to the magistrate judge's conclusion that he did not demonstrate that his underlying ineffective assistance of counsel claim had merit. He contends that the magistrate judge misconstrued the solicitor's arguments. He argues that the solicitor misstated the law. He argues that the Court should reject the Report and order an evidentiary hearing.

4. *Analysis*

As set forth above, in accordance with *Martinez*, for Bowman to overcome the procedural default of his ineffective assistance of trial counsel claim, he must show both that PCR counsel was ineffective for failing to raise the underlying claim and that the underlying claim itself has merit.

Bowman asserts that he adequately pled that PCR counsel was deficient and that he provided support for that pleading through PCR counsel's affidavit stating that he had no strategic reason for not raising the claim that trial counsel should have objected to the solicitor's closing argument. However, the standard for summary judgment is not whether Bowman's pleadings were adequate—summary judgment is appropriate when the record shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The magistrate judge appropriately considered PCR counsel's

affidavit as true for purposes of his review, but Bowman still did not meet his burden of showing deficient performance by PCR counsel. Bowman had to show that PCR counsel's representation was constitutionally deficient. Brown's affidavit and the strength of the underlying claim are insufficient to meet that burden for the reasons discussed by the magistrate judge.[7]

As to the merits of the underlying claim, the Court concludes that the jury did consider the mitigation evidence as instructed and does not find persuasive Bowman's asserted impact of the solicitor's closing argument on the jury in light of the instruction given. When considered in context with the remainder of the solicitor's closing argument, as is appropriate under the law,[8] the statements that Bowman believes were objectionable did not necessitate an objection. The solicitor never told the jury that they could not consider mitigation evidence unless there was some nexus to the crimes. The solicitor asked the jury to give the mitigation evidence little weight, and Bowman has not shown that such arguments were improper or objectionable. Furthermore, as highlighted in the Report, the solicitor made clear to the jury that the judge would deliver instructions on the law. The judge also instructed the jury that they should consider the mitigation evidence and

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[7] To the extent that Bowman believes he is entitled to an evidentiary hearing, the Court disagrees for the reasons discussed below.

[8] It is rarely appropriate to look at a statement in isolation as Bowman has done with respect to this ground. For example, when looking at whether a prosecutor's arguments deprived a defendant of due process, the Supreme Court considered not only the arguments themselves, but also how those arguments were responsive to arguments made by defense counsel. *Darden v. Wainwright*, 477 U.S. 168, 178–83 (1986).

that they could recommend a life sentence for any reason or no reason. Thus, even if he could make a substantial claim as to deficiency, Bowman cannot do so as to prejudice. Accordingly, he has failed to establish that there is some merit to his underlying claim of ineffective assistance of trial counsel.

For these reasons, the underlying ineffective assistance claim for this ground fails on the merits and Bowman therefore cannot rely on *Martinez* to overcome the procedural default. Accordingly, he is not entitled to relief on Ground 11.

J. Ground 12 – Failure to present additional mitigation evidence

Ground 12 of the petition is as follows:

> Trial counsel rendered ineffective assistance of counsel by failing to call a number of witnesses who were available to trial counsel, and who would have provided the jury with highly mitigating evidence of Petitioner's dysfunctional childhood that the jury did not otherwise here.

ECF No. 36 at 85.[9]

1. *Bowman's claims*

In Ground 12, Bowman asserts that counsel were ineffective for failing to present additional mitigation evidence during the sentencing phase of his trial. He has provided affidavits from numerous lay witnesses, some of whom testified at his trial, and those affidavits contain some information that was presented to the jury and some that was not. *See* ECF Nos. 36-1 (Joseph Sims), 36-2 (Kendra Bowman),

[9] Bowman acknowledges that this ground has not been exhausted and is being advanced pursuant to *Martinez*. ECF No. 36 at 82–83.

36-3 (Dorothy Denise Bowman), 36-4 (Glenn Miller Sr.), 36-5 (Oretta Miller), 36-6 (Tyler Dufford), 36-7 (Jennifer Thompson), 36-8 (Velma Young), 36-9 (Tiffany Grimmage), 36-10 (Dorothy Bowman).

The specifics of this ground were not raised during Bowman's state proceedings, although he did argue in his PCR action that counsel were ineffective for failing to adequately investigate and present mitigation evidence. He argues that he can overcome the procedural bar of this ground because PCR counsel were ineffective in failing to specifically raise this issue.

2. *Report*

As with Ground 11, the magistrate judge concluded that the simple fact that PCR counsel did not have a strategic reason for failing to raise this issue did not suffice to meet Bowman's burden of establishing the deficiency prong of *Strickland*.

The magistrate judge then delved into the merits of the underlying ineffective assistance claim, first considering whether Bowman had shown prejudice. The Report detailed the mitigation case that counsel presented during the sentencing phase of his trial. The Report then compared what was presented to the jury to what is contained in the affidavits. As to some of the evidence contained in the affidavits, the magistrate judge concluded:

> Many of the themes that [Bowman] argues should have been explored by trial counsel during their mitigation phase were explored, albeit sometimes through different witnesses or anecdotal evidence. To the extent the evidence in the affidavits was already presented to the jury by way of trial counsel's mitigation presentation, [Bowman] cannot meet his burden as to the prejudice prong of *Strickland*.

ECF No. 75 at 109. The magistrate judge then assessed the information that was never presented to the jury, such as evidence that Bowman's mother was "essentially a prostitute" and that children in his hometown were treated differently based on their race. *Id.* After considering the entirety of the evidence, the magistrate judge found that "'[t]he evidence that [Bowman] says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented to the [jury].'" *Id.* at 110 (quoting *Strickland*, 466 U.S. 699–700). Thus, the magistrate judge concluded that Bowman failed to meet his burden under *Martinez* as to the prejudice prong of the underlying ineffective assistance claim.

Regarding deficiency, the magistrate judge noted that most of Bowman's arguments regarding counsel's performance were based on evidence that had already been considered by the PCR court. The Report quoted extensively from the PCR court's order of dismissal, which rejected the argument that trial counsel had inadequately investigated and presented mitigation evidence. The Report stated, "In sum, the record shows that trial counsel hired appropriate service providers to investigate and present mitigating evidence for purposes of the sentencing phase." *Id.* at 117. In particular, the magistrate judge found that trial counsel had hired an experienced mitigation investigator who interviewed many of the witnesses whose affidavits Bowman now submits to the Court. The magistrate judge further noted that Bowman did not "identify any evidence indicating that a failure on [the mitigation investigator's] part to discover the mitigating evidence that [Bowman]

now presents can be attributed to trial counsel." *Id.* The magistrate judge concluded that Bowman failed to meet his burden of showing some merit to his claim of deficient performance.

For these reasons, the magistrate judge concluded that Bowman failed to present a substantial *Strickland* claim and that the procedural default therefore could not be excused pursuant to *Martinez*.

3. *Objections*

As with his other procedurally defaulted ground, Bowman asserts that he is entitled to a hearing because he has met the pleading standard. Additionally, he contends that the magistrate judge erred in finding that his claim had no merit without first granting him an evidentiary hearing. Bowman summarizes some of the evidence contained within the affidavits he submitted that was never presented to the jury and asserts as follows:

> This evidence is not exhaustive but is representative of what [Bowman] would present at a hearing on the merits of this ineffective assistance of counsel claim to demonstrate that there is a reasonable probability that at least one juror would have struck a different balance and voted for a life sentence if they had heard all of the available mitigating evidence.

ECF No. 81 at 24 (citations omitted).

4. *Analysis*

Bowman's objections are primarily based on the magistrate judge's denial of an evidentiary hearing. As to Bowman's contention that he is entitled to a hearing

because he met the pleading standard, there is no support for that argument.[10] As will be discussed in more detail below, Bowman has not established that he is entitled to an evidentiary hearing under the applicable habeas rules.

Bowman does not dispute the magistrate judge's evaluation of the impact of the newly-presented evidence when added to the mitigation presentation that the jury heard. Instead he argues that "[t]his evidence is not exhaustive but is representative of what [he] would present at a hearing on the merits of his ineffective assistance of counsel claim . . . ." ECF No. 81 at 24. But he did not seek authorization from the Court to conduct discovery and gather such additional evidence, either prior to filing his amended petition or prior to the State filing its motion for summary judgment. It is not procedurally appropriate for a party to submit threadbare or incomplete affidavits and then use those inadequate affidavits to justify an evidentiary hearing. Here, the affidavits and documentation submitted were sufficient to evaluate his claims, particularly if, as Bowman contends, the evidence he has already submitted is "representative" of what would be presented at an evidentiary hearing. *See Runningeagle v. Ryan*, 825 F.3d 970, 990 (9th Cir. 2016) ("Where documentary evidence provides a sufficient basis to decide a petition, the court is within its discretion to deny a full hearing."). And Bowman has not forecast what additional evidence could be presented at an evidentiary hearing, or how that evidence would go beyond that which he has already presented and which

[10] Bowman's reliance on Rule 8(a)(2) of the Federal Rules of Civil Procedure is not persuasive. He was required to meet that standard in order to sufficiently plead his claims, but that standard does not bear on whether he is entitled to an evidentiary hearing.

the magistrate judge considered as part of an expanded record. *Cf. Cardwell v. Greene*, 152 F.3d 331, 338–39 (4th Cir. 1998) ("Despite repeated assertions that analysis of his ineffective assistance claim requires an evidentiary hearing, Cardwell has failed to forecast any evidence beyond that already contained in the record, or otherwise to explain how his claim would be advanced by an evidentiary hearing."), *overruled on other grounds by Bell v. Jarvis*, 236 F.3d 149 (4th Cir. 2000).

Having reviewed the evidence that Bowman attached to his habeas petition and the mitigation evidence presented in state court, the Court agrees with the magistrate judge that the additional evidence would have done little to alter the sentencing profile presented to the jury. *See* ECF No. 75 at 110 (quoting *Strickland*, 466 U.S. 699–700). Contrary to Bowman's assertions and as discussed in detail by the magistrate judge, the record reflects that counsel did not present a weak mitigation case regarding his childhood and background. Such evidence was presented. Additionally, as the PCR court thoroughly explored, and the magistrate judge largely adopted, counsel's investigation was constitutionally adequate. Finally, the statement by PCR counsel that he had no strategic reason for not raising this claim is not sufficient to establish deficient performance, particularly in light of the lack of merit to the underlying ineffective assistance of counsel claim. The Court adopts the magistrate judge's reasoning and conclusion as to Ground 12.

For these reasons, the underlying ineffective assistance claim for this ground fails on the merits and Bowman therefore cannot rely on *Martinez* to overcome the

procedural default. Accordingly, he is not entitled to relief on Ground 12.

K. Request for Evidentiary Hearing

For both of the procedurally defaulted grounds, Bowman asks the Court to grant an evidentiary hearing in order for him to more fully develop the factual basis for his claims. That request is denied.

Under the AEDPA, evidentiary hearings on habeas petitions are generally limited. *See Cullen*, 563 U.S. at 181 ("We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."). The Supreme Court has not specifically set forth a procedure for determining when evidentiary hearings are permitted or required for the resolution of *Martinez* claims. In general, the AEDPA disallows such hearings, except in limited circumstances:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). Nevertheless, federal courts have recognized that it is sometimes appropriate to expand the record or to hold an evidentiary hearing in certain situations, such as when determining whether cause and prejudice excuse a petitioner's defaulted claim. *Fielder v. Stevenson*, 2:12-cv-412-JMC, 2013 WL 593657, at *3 (D.S.C. Feb. 14, 2013) (citing *Cristin v. Brennan*, 281 F.3d 404, 416 (3d Cir. 2002)). Additionally, Rules 7 and 8 of the Rules Governing Section 2254 Cases provide for both expansion of the record and for evidentiary hearings.

Here, the magistrate judge exercised his discretion to expand the record and consider information not presented to the state court, including the affidavits described in Ground 12, in determining whether *Martinez* excuses the procedural default of Grounds 11 and 12. Though the magistrate judge expanded the record, for the reasons set forth above, Bowman failed to establish a substantial claim of ineffective assistance of counsel as to each claim. He had an ample opportunity to submit evidence in support of his claims, and he has done so.[11] The magistrate judge and this Court fully considered the evidence he submitted and took all of the new facts to be true, but concluded that he is not entitled to relief for the reasons

[11] Bowman implies that he is entitled to an evidentiary hearing because the affidavits that he submitted were not detailed enough. *See* ECF No. 81 at 24 ("[The affidavits are] not exhaustive but [are] representative of what [Bowman] would present at a hearing on the merits of his ineffective assistance of counsel claim . . . ."). It is not procedurally appropriate for a party to submit threadbare affidavits and then use those inadequate affidavits to justify an evidentiary hearing. Here, the affidavits and documentation submitted were sufficient to evaluate his claims. *See Runningeagle v. Ryan*, 825 F.3d 970, 990 (9th Cir. 2016) ("Where documentary evidence provides a sufficient basis to decide a petition, the court is within its discretion to deny a full hearing.").

discussed above. Accordingly, his request for an evidentiary hearing as to his unexhausted claims is denied.

IV. Conclusion

For the reasons stated, the Report, ECF No. 75, is **ACCEPTED**, and Bowman's objections to it, ECF No. 81, are **OVERRULED**. The State's motion for summary judgment, ECF No. 56, is **GRANTED**. Bowman's amended petition for relief pursuant to § 2254, ECF No. 36, is **DENIED**. This action is hereby **DISMISSED**.

The Court has reviewed this petition in accordance with Rule 11 of the Rules Governing Section 2254 Cases. In order for the Court to issue a certificate of appealability, Rule 11 requires that a petitioner satisfy the requirements of 28 U.S.C. § 2253(c)(2), which in turn requires the petitioner to make "a substantial showing of the denial of a constitutional right." The Court concludes, based on the analysis set forth, that Bowman has not made such a showing, and under Rule 11, it is therefore not appropriate to issue a certificate of appealability. However, this is a death penalty case, so review is anticipated and not opposed. Bowman is advised that he is entitled to seek a certificate from the Fourth Circuit Court of Appeals under Rule 22 of the Federal Rules of Appellate Procedure.

IT IS SO ORDERED.

s/ Terry L. Wooten
Terry L. Wooten
Senior United States District Judge

March 26, 2020
Columbia, South Carolina

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

MARION BOWMAN, JR., #6006, Petitioner, v. BRYAN STIRLING, Commissioner, South Carolina Department of Corrections, WILLIE DAVIS, Warden, Kirkland Correctional Institution, Respondents.	CIVIL ACTION NO. 9:18-287-TLW-BM **REPORT AND RECOMMENDATION**

Petitioner, an inmate with the South Carolina Department of Corrections, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This action was initiated on January 17, 2018, when Petitioner filed a motion for stay of execution and a motion to appoint counsel. (See Court Docket No. 1). The initial petition was filed on May 16, 2018 (Court Docket No. 17), and an amended petition was filed on January 10, 2019 (Court Docket No. 36).

The Respondents filed a return and motion for summary judgment pursuant to Rule 56, Fed.R.Civ.P., on May 10, 2019. (Court Docket Nos. 56, 57). Petitioner filed a response in opposition to the motion for summary judgment on August 5, 2019 (Court Docket No. 70), and Respondents filed a reply to the response in opposition to the motion for summary judgment on August 19, 2019. (Court Docket No. 74).

Appendix D

This matter is now before the Court for disposition.[1]

Procedural History

Petitioner was indicted in Dorchester County in June 2001 for murder [Indictment No. 2001-GS-18-0348] and arson, third degree [Indictment No. 2001-GS-18-0349]. (R.pp. 5254-57). In July 2001, Petitioner was served with the State's notice of intent to seek the death penalty, as well as notice of evidence in aggravation. (R.pp. 5260-61). The Honorable Diane S. Goodstein, Circuit Court Judge, held a number of pretrial hearings, during which Petitioner was represented by Norbert E. Cummings, Jr., Esq., and Marva A. Hardee-Thomas, Esq., collectively referred to as "trial counsel" herein. (R.pp. 1-1636). Jury qualification began on May 13, 2002, and the jury was selected on May 17, 2002. (R.pp. 1668-3586). The guilt phase of Petitioner's trial began on the afternoon of May 17, 2002. (R.p. 3634). On May 20, 2002, the jury found Petitioner guilty as charged. (R.pp. 4564-66). Following the twenty-four hour cooling off period allowed by state statute,[2] the sentencing phase of Petitioner's trial began on May 22, 2002.[3] (R.p. 4590). On May 23, 2002, Judge Goodstein submitted the following statutory aggravating factors to the jury to be considered during their deliberations on sentencing:

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

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[1] This case was automatically referred to the undersigned United States Magistrate Judge for all pretrial proceedings pursuant to the provisions of 28 U.S.C. § 636(b)(1)(A) and (B) and Local Rule 73.02(B)(2)(c) and (e), D.S.C. Respondents have filed a motion for summary judgment. As this is a dispositive motion, this Report and Recommendation is entered for review by the Court.

[2] See S.C. Code Ann. § 16-3-20(B).

[3] The transcript has a scrivener's error listing the year as 2003 instead of 2002. (R.p. 4587).

deadly weapon.

(R.p. 5018). The jury returned with a recommendation of death, having found the aggravating circumstances that the murder was committed while in the commission of kidnapping and while in the commission of larceny with the use of a deadly weapon. (R.pp. 5051-54). Petitioner was then sentenced to death for murder and to ten years' imprisonment for arson, third degree. (R.pp. 5066-67).

Petitioner timely appealed and was represented by Robert M. Dudek, Esq., Assistant Appellate Defender with the South Carolina Office of Appellate Defense. (R.p. 5427). On July 6, 2005, through appellate counsel, Petitioner filed a final brief asserting the following issues for appeal:

1.

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

2.

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

3.

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

4.

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

5.

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

(R.pp. 5433-34). Petitioner also filed a reply brief. (R.pp. 5558-67). On July 7, 2005, the State filed a final brief as well. (R.pp. 5484-557). On November 28, 2005, the South Carolina Supreme Court issued an opinion affirming Petitioner's convictions and sentence. State v. Bowman, 623 S.E.2d 378 (S.C. 2005). (Court Docket No. 12). On December 13, 2005, Petitioner filed a petition for rehearing. (Court Docket No. 12-1). Also on December 13, 2005, the State filed a petition for rehearing. (Court Docket No. 12-2). Both petitions for rehearing were denied by the court. (Court Docket No. 12-3). The remittitur was issued on January 6, 2006. (Court Docket No. 12-4).

Thereafter, Petitioner's execution was stayed while he pursued a Petition for writ of certiorari filed in the United States Supreme Court, asking "Whether the South Carolina Supreme Court's holding that the aggravating circumstances necessary to render a murder defendant eligible for a sentence of death under South Carolina law 'are sentencing factors, not elements of murder' is fundamentally inconsistent with this Court's application of the Sixth Amendment in Ring v. Arizona." (Court Docket No. 12-9 at 2). On June 12, 2006, the United States Supreme Court denied the petition for writ of certiorari. (R.p. 5575).

In the interim, Petitioner had also filed an application for post-conviction relief ("APCR") in state circuit court on April 7, 2006. Bowman v. State of South Carolina, No. 2006-CP-18-569. (R.pp. 5569-74). Petitioner was initially represented in the PCR action by James A. Brown, Jr., Esq., and Charlie Jay Johnson, Jr., Esq. However, Johnson was replaced as counsel by John Sinclaire, III, Esq., on January 16, 2008.[4] (See R.pp. 5674-75). Petitioner filed amended APCRs on February 23, 2007, May 19, 2008, and September 8, 2008. (R.pp. 5676-83, 5689-700, 5710-26). An evidentiary hearing began before the Honorable James E. Lockemy, Circuit Court Judge, on Petitioner's application on September 15, 2008. (R.pp. 5729-7997). At the conclusion of the hearing, the PCR judge heard closing arguments from each side and then asked the parties to prepare post-hearing memoranda. (R.pp. 7911-96). On June 5, 2009, Petitioner, through PCR counsel, filed a fourth amended APCR. (R.pp. 9442-60).

On June 12, 2009, PCR counsel submitted a brief in support of their fourth amended APCR. (R.pp. 9461-569). On August 10, 2009,[5] the State submitted a brief in opposition to the fourth amended APCR (R.pp. 9571-772), to which Petitioner filed a reply. (R.pp. 9773-801). In an order filed March 12, 2012 (dated February 27, 2012), the PCR judge denied Petitioner relief on his APCR. (R.pp. 9820-950). The PCR court addressed a number of claims in its order, including alleged errors by trial counsel and the State regarding the testimony of James Gadson, Travis Felder, Hiram Johnson, Ricky Davis, and Alvin Coker. (See R.pp. 9821-23). The order further addressed claims regarding the following types of allegations: conflicts of interest, ineffective assistance regarding evidence admitted in the guilt phase, failure to object to admission of ballistics evidence,

[4] Brown and Sinclaire are referred to collectively as "PCR counsel" herein.

[5]The date on the brief contains a scrivener's error of 2008 instead of 2009. (R.p. 9771).

failure to object to arbitrary factor of "good" prison conditions, failure to object to submission of kidnapping aggravator, ineffective investigation and presentation of mitigation evidence, and failure to request mitigating instructions on voluntary intoxication. (See R.pp. 9823-25). On March 19, 2012, PCR counsel filed a motion to alter or amend the judgment pursuant to Rule 59, SCRCP,[6] which was denied. (R.pp. 9951, 9970).

Petitioner filed a timely appeal of the PCR court's order. (R.pp. 9971-72). In his PCR appeal, Petitioner was represented by Robert M. Dudek, Esq., Chief Appellate Defender, and David Alexander, Esq., Appellate Defender, both with the South Carolina Commission on Indigent Defense, Division of Appellate Defense, as well as by Michael J. Anzelmo, Esq. (See Court Docket No. 12-17 at 1). On October 18, 2013, through counsel, Petitioner filed a petition for writ of certiorari in the South Carolina Supreme Court. (See Court Docket No. 12-18 at 8). The State filed a return on March 24, 2014. (Court Docket No. 12-18). On April 30, 2014, Petitioner submitted an amended petition for writ of certiorari. (Court Docket No. 12-17). The amended petition included the following issues:

1.

> Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to investigate and prepare for the impeachment of Taiwan Gadson and by failing to impeach the testimony of Taiwan Gadson in any meaningful way, including, but not limited to, the fact that the state threatened Gadson with the death penalty in his plea agreement, how Gadson's prior inconsistent statements showed that his story changed, and the fact Gadson had access to the murder weapon?

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[6] PCR counsel submitted a memorandum in support of their motion on April 25, 2012 (dated April 19, 2012). (R.pp. 9952-68).

2.

Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to investigate and prepare for the impeachment of Travis Felder and by failing to impeach the testimony of Travis Felder in any meaningful way, including impeaching Felder with a videotape that would have shown Felder lied to the jury about buying the gas to burn the decedent's car, impeaching Felder on bias with his original charges, and impeaching Felder with his prior inconsistent statements?

3.

Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to investigate and prepare for the impeachment Hiram Johnson [sic] and by failing to impeach the testimony of Hiram Johnson by cross-examining Johnson on his prior inconsistent statement which, critically, did not include his allegation at trial that petitioner confessed to the murder?

4.

Whether petitioner is entitled to a new trial because the state withheld information necessary for impeachment and necessary for defense in violation of petitioner's due process rights under the Fourteenth Amendment and under the rules of discovery, those items being a memorandum of a law enforcement interview with Ricky Davis who heard Gadson confess to the murder, Gadson's mental health evaluation, and the fact that Hiram Johnson had unindicted pending charges at the time of his testimony?

5.

Whether trial counsel rendered ineffective assistance of counsel because counsel had a conflict of interest between two of her clients—Petitioner Bowman and Ricky Davis—that caused counsel to fail to call Ricky Davis as a witness, despite Davis' statement that exculpated Petitioner Bowman and established Gadson shot the victim?

6.

Whether defense counsel was ineffective for failing to object to the solicitor's examination of James Aiken regarding favorable prison conditions and recreational facilities available to inmates since this Court had long ago in State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984), held such evidence was impermissible because it did not

> relate to the character of the defendant or the nature of his crime. This evidence was highly prejudicial in the eyes of the jury, and the failure to object to it properly at trial also barred consideration of this winning issue on petitioner's direct appeal?
>
> 7.
>
> Whether petitioner's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under state law were violated because the trial judge failed to properly consider his application as evidenced by the PCR court's wholesale adoption of the state's proposed order?

(Court Docket No. 12-17 at 6-8). On May 5, 2014, Petitioner filed a reply to the return to the petition for writ of certiorari. (Court Docket No. 12-19).

The South Carolina Supreme Court granted the petition for writ of certiorari as to Petitioner's Question 6 and denied it as to the remaining questions. (Court Docket No. 12-20). Petitioner filed his brief on August 8, 2016 (Court Docket No. 12-21) and the State filed its brief on December 16, 2016. (Court Docket No. 12-22). Petitioner then filed a reply on January 30, 2017. (Court Docket No. 12-23). The South Carolina Supreme Court heard argument on April 13, 2017, and in an opinion filed January 10, 2018, the court affirmed the PCR court. Bowman v. State, 809 S.E.2d 232 (S.C. 2018). (Court Docket No. 12-24). The Remittitur was sent down on January 26, 2018, and was filed with the Clerk of Court for Dorchester County on January 30, 2018. (Court Docket No. 12-25).

In his Petition for writ of habeas corpus filed in this United States District Court, Petitioner raises the following issues:

> **Ground One:** Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to investigate and prepare for the impeachment of Taiwan Gadson and by failing to impeach the testimony of Taiwan Gadson in any meaningfulway, including, but not limited to, the fact that the state threatened Gadson with the death penalty in his plea agreement, how Gadson's prior inconsistent statements showed that his story

changed, and the fact Gadson had access to the murder weapon.

Ground Two: Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to investigate and prepare for the impeachment of Travis Felder and by failing to impeach the testimony of Travis Felder in any meaningful way, including impeaching Felder with a videotape that would have shown Felder lied to the jury about buying the gas to burn the decedent's car, impeaching Felder on bias with his original charges, and impeaching Felder with his prior inconsistent statements.

Ground Three: Trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to investigate and prepare for the impeachment Hiram Johnson [sic] and by failing to impeach the testimony of Hiram Johnson by cross-examining Johnson on his prior inconsistent statement which, critically, did not include his allegation at trial that petitioner confessed to the murder.

Ground Four: Petitioner is entitled to a new trial because the state withheld information necessary for impeachment and necessary for defense in violation of Petitioner's due process rights under the Fourteenth Amendment and under the rules of discovery, those items being a memorandum of a law enforcement interview with Ricky Davis who heard Gadson confess to the murder, Gadson's mental health evaluation, and the fact that Hiram Johnson had unindicted pending charges at the time of his testimony.

Ground Five: Trial counsel rendered ineffective assistance of counsel because counsel had a conflict of interest between two of her clients—Petitioner Bowman and Ricky Davis—that caused counsel to fail to call Ricky Davis as a witness, despite Davis' statement that exculpated Petitioner Bowman and established Gadson shot the victim.

Ground Six: Defense counsel was ineffective for failing to object to the solicitor's examination of James Aiken regarding favorable prison conditions and recreational facilities available to inmates since this evidence interjected an arbitrary factor into Petitioner's trial and violated his right to due process.

Ground Eight: The trial court erred by refusing to instruct the jury on the statutory mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, since there was expert testimony of Petitioner's substance abuse problem, and the evidence the parties were drinking alcohol throughout the day. The South Carolina Supreme Court's opinion, holding there was no evidence that Petitioner was intoxicated on the day of the murder, is based on an unreasonable

determination of the facts in light of the evidence presented in the state court proceedings.

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

Ground Eleven: Trial counsel rendered ineffective assistance of counsel for failing to object to the Solicitor's arguing to discount Petitioner's mitigation because there was no "nexus" between Petitioner's proffered mitigation and the crime.

Ground Twelve: Trial counsel rendered ineffective assistance of counsel by failing to call a number of witnesses who were available to trial counsel, and who would have provided the jury with highly mitigating evidence of Petitioner's dysfunctional childhood that the jury did not otherwise here [sic].

Petition, pp. 7-8, 26, 41-42, 46, 58, 65, 75, 78, 83, 85.[7]

Discussion

Standards of Review

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56, Fed.R.Civ.P; see Habeas Corpus Rules 5-7, 11.

Many of the grounds raised in the petition concern some claim of ineffective assistance of counsel. With regard to any such claims that were also properly pursued in his PCR

[7] Petitioner did not include a Ground Seven or a Ground Nine in his petition. Therefore, the undersigned has maintained the numbering used in the petition for the sake of clarity. However, the undersigned has renumbered Petitioner's Unexhausted Grounds One and Two (which Respondents refer to as Grounds A and B) as Grounds Eleven and Twelve, respectively.

action, Petitioner had the burden of proving the allegations in his petition. Butler v. State, 334 S.E.2d 813, 814 (S.C. 1985), cert. denied, 474 U.S. 1094 (1986). However, the PCR court rejected these claims, making relevant findings of fact and conclusions of law in accordance with S.C.Code Ann. § 17-27-80 (1976), as amended. See Bowman v. South Carolina, No. 2006-CP-18-569. Some of these issues were also raised on appellate review by virtue of Petitioner's petition to the State Supreme Court. (See Court Docket No. 12-17).

Substantial deference is to be given to the state court's findings of fact. Evans v. Smith, 220 F.3d 306, 311-12 (4th Cir. 2000) ["We . . . accord state court factual findings a presumption of correctness that can be rebutted only by clear and convincing evidence."], cert. denied, 532 U.S. 925 (2001); Bell v. Jarvis, 236 F.3d 149 (4th Cir. 2000)(en banc), cert. denied, 112 S.Ct. 74 (2001).

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1). See also Fisher v. Lee, 215 F.3d 438, 446 (4th Cir. 2000), cert. denied, 531 U.S. 1095 (2001); Frye v. Lee, 235 F.3d 897, 900 (4th Cir. 2000), cert. denied, 533 U.S. 960 (2001). However, although the state court findings as to historical facts are presumed correct under 28 U.S.C. § 2254(e)(1), where the ultimate issue is a mixed question of law and fact, as is the issue of ineffective assistance of counsel, a federal court must reach an independent conclusion. Strickland v. Washington, 466 U.S. 668, 698 (1984); Pruett v. Thompson, 996 F.2d. 1560, 1568 (4th Cir. 1993), cert. denied, 114 S.Ct. 487 (1993) (citing Clozza v. Murray, 913 F.2d. 1092, 1100 (4th Cir. 1990), cert. denied, 499 U.S. 913 (1991)). Even so, with regard to the ineffective assistance of counsel

claims that were adjudicated on the merits by the South Carolina state court, this Court's review is limited by the deferential standard of review set forth in 28 U.S.C. §2254(d), as interpreted by the Supreme Court in Williams v. Taylor, 529 U.S. 362 (2000). See Bell v. Jarvis, supra; see also Evans, 220 F.3d at 312 [Under § 2254(d)(1) and (2), federal habeas relief will be granted with respect to a claim adjudicated on the merits in state court proceedings only where such adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding"]. Therefore, this Court must be mindful of this deferential standard of review in considering the ineffective assistance of counsel claims asserted by Petitioner.

Where allegations of ineffective assistance of counsel are made, the question becomes "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 694. In Strickland, the Supreme Court articulated a two-prong test to use in determining whether counsel was constitutionally ineffective. First, the Petitioner must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel's performance was below the objective standard of reasonableness guaranteed by the Sixth Amendment. Second, the Petitioner must show that counsel's deficient performance prejudiced the defense such that the Petitioner was deprived of a fair trial. In order to show prejudice Petitioner must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir.1996). As to Petitioner's ineffective assistance claims, for the reasons set forth and discussed hereinbelow, Petitioner has failed to meet his burden of

showing that his counsel was ineffective under this standard. Smith v. North Carolina, 528 F.2d 807, 809 (4th Cir. 1975) [Petitioner bears the burden of proving his allegations when seeking a writ of habeas corpus].

Facts of the Case

The South Carolina Supreme Court summarized the facts of Petitioner's case as follows:

> On February 17, 2001, Kandee Martin's (victim's) body was found in the trunk of her burned car. She had been shot to death before being placed in the trunk.
>
> The previous day, several people gathered at Hank Koger's house to socialize and drink alcohol. Appellant, who was wearing black pants, arrived at Koger's house around 11:00 a.m. that day. He subsequently left to purchase meat. When appellant returned, he became upset because his gun had been moved. He accused James Tywan Gadson (Gadson)[8] of taking the gun out of the trash barrel located on Koger's property. Hiram Johnson intervened and told appellant he had moved the gun. The gun was a .380 caliber pistol that appellant had purchased a few weeks before in the presence of Gadson and Travis Felder. After retrieving his gun, appellant left Koger's house.
>
> Later that afternoon, appellant was riding in the car of his sister, Yolanda Bowman, with another woman, Katrina West. Appellant, who had a gun in his back pocket, was sitting in the back seat. He instructed Yolanda to park beside the victim's car. At the time, the victim was speaking to a man. Appellant tried to get the victim's attention, but she indicated to him that he should wait a moment. The man, Yolanda, and Katrina testified as to what appellant said next. The man stated that appellant said, "Fuck waiting a minute. I'm about to kill this bitch." Yolanda stated that appellant said, "Fuck it, that bitch. That bitch be dead by dark." Katrina stated that appellant said, "Fuck that ride. That bitch be dead by dark fall." After appellant's comments, Yolanda drove away and appellant informed her the victim owed him money.
>
> Around 7:30 p.m. that evening, Tywan Gadson saw appellant riding with the victim in her car. They stopped and appellant told Gadson to get in. Gadson had

[8]In connection with the victim's murder, Gadson had a plea agreement wherein he would plead to accessory after the fact of murder and misprison of a felony and receive a twenty-year sentence.

been drinking alcohol since 1:00 and was "feeling in good shape." The victim stopped for gas and they drove off without paying. Appellant allegedly instructed the victim where to drive and instructed her to stop on Nursery Road. Gadson and appellant then exited the vehicle and walked down the road while the victim remained in the car. Appellant told Gadson he was going to kill the victim because she had on a wire. The victim then came down the road, grabbed appellant's arm and stated she was scared. At this point, a car drove by and they all jumped into the woods. Then, the victim started walking to the car with appellant following her. Appellant allegedly shot his gun three times. Gadson stated the victim ran toward him and then stopped and faced appellant and told him to please not shoot her anymore because she had a child to take care of. Gadson stated appellant shot two more times. The victim fell to the ground and appellant dragged her body into the woods. Gadson stated he jumped into the car.

Afterwards, appellant and Gadson parked the victim's car and later retrieved Yolanda's car. They then went to a store to purchase beer and went back to Koger's house around 8:00 p.m. Later, Gadson stayed at Koger's house and appellant left. Around 11:30 p.m., appellant and Hiram Johnson approached James Gadson, Gadson's father. Appellant gave him money to buy four pairs of gloves.

Appellant, Gadson, Hiram Johnson, and Darian Williams, then drove to Murray's Club in the victim's car. Appellant handed out the gloves for the occupants to wear and stated he had stolen the car. They reached the club around midnight. Once at the club, appellant tried to sell the victim's car. Appellant, according to Hiram Johnson, said, "I killed Kandee, heh, heh, heh." Appellant had a gun with him while at the club. They left the club an hour or two after arriving there.

Three people, Carolyn Brown, Valorna Smith, and Travis Felder, left the club together. They stopped by a gas station about 3:00 a.m. before proceeding to Valorna's home. Not long after they were there, appellant knocked on the door and asked for Travis. Travis left and came back after a few minutes. He seemed normal upon his return.

Travis testified appellant, who was wearing black jeans at the time, stated he needed Travis' help to park a car which turned out to be the victim's car. Travis followed appellant to Nursery Road. Appellant parked the car, went into the woods and pulled the victim's body out by her feet. Appellant then put her body in the trunk. While putting her body in the trunk, Travis saw a gun tucked into appellant's waist. Appellant allegedly told Travis, "you didn't think I did it, did you?" Travis testified appellant also stated, "I killed Kandee Martin." Appellant lit the car on fire. Travis

then took appellant to his home and went back to Valorna's house.[9]

A resident of Nursery Road who had previously heard gunshots was awakened late in the night by a loud noise. He investigated and discovered a car on fire. The fire was reported at 3:54 a.m. There were .380 Winchester cartridge casings found not far from the scene. The casings, a blood stain, and a shoe were located with the help of a man who had driven by and seen the victim's car stopped on the road around 8:00 p.m. the previous evening.

The next day, police arrested appellant at his wife's house and seized his black pants. His wife testified he had been wearing the pants when he arrived at the house. They found a wristwatch belonging to the victim in appellant's pants.

After the police left, appellant's wife, Dorothy Bowman, found appellant's gun in her chair in her home. She allegedly gave the gun to appellant's father. The next day, appellant's father, Yolanda, and appellant's other sister, Kendra, took the gun and dropped it off a bridge into the Edisto River. It was later retrieved from the Edisto River and determined to be the gun that was used in the murder.

The arson investigator testified there was the presence of a heavy petroleum product on appellant's jeans, but the product was not gasoline. The items found in the car had gasoline on them indicating that was the product used to start the fire.

State v. Bowman, 623 S.E.2d at 380-82.

I.

(Ground One: Alleged Ineffective Assistance of Counsel for Failure to Investigate and Prepare for and Then Effectively Cross-Examine Taiwan Gadson)

In his Petition, Petitioner asserts that trial counsel failed to adequately investigate and prepare for cross-examining Taiwan Gadson and, further, that trial counsel failed to effectively question Gadson. In particular, Petitioner identifies three areas where he believes trial counsel's performance fell short: (1) their failure to question Gadson about facing the death penalty himself, (2) their failure to confront Gadson with evidence that he fired the murder weapon prior to the day

[9]Travis entered into a plea agreement whereby he would be charged with accessory after the fact to third degree arson in exchange for his testimony.

of the murder, and (3) their failure to press Gadson on inconsistencies between his statements to police and his testimony at trial. See Petition, pp. 19-25. In their return to the petition ("Return"), Respondents argue that the PCR court did not err in rejecting Petitioner's claims of ineffective assistance of counsel with respect to the former two areas, and as to the third, that Petitioner's arguments are procedurally barred as they were not ruled upon by the PCR court. See Return, pp. 40-55. The undersigned addresses each claim in turn below.

Failure to Question Gadson About Facing the Death Penalty

Gadson's testimony was important to the State's case against Petitioner during the guilt phase of trial. According to his testimony, Gadson was with Petitioner at various times before, during, and after the murder. He saw Petitioner with a gun prior to the murder. (R.pp. 3984-85, 3988-90). He was the only witness who testified as to how the murder occurred. (R.pp. 3995-4002, 4011-14). He also rode in the victim's car after the murder. (R.pp. 4018-22). Gadson testified that he had been charged with the victim's murder, but had entered into a plea agreement with the State. (R.pp. 3980-82). In exchange for Gadson's testimony at Petitioner's trial, the murder charge would be dropped, and Gadson would be charged with accessory after the fact and misprision of a felony, with a negotiated sentence of twenty years' imprisonment. (Id.)

In his Fourth Amended APCR, Petitioner asserted that trial counsel were ineffective for failing to inform the jury "that Gadson cut a plea deal to avoid death, without objection, for capital murder." (R.p. 9451). However, the PCR court rejected this claim, finding as follows:

> Applicant's allegation that Gadson expressly bargained to avoid a death sentence is not supported by the record. At no point in time did the First Circuit Solicitor's Office file a Notice of Intent to Seek Death Penalty against Gadson. Gadson testified the [sic] neither he nor his counsel were ever served with a Notice of Intent to Seek the Death Penalty at trial and at the PCR hearing. **(R. 4024, PCR Tr. 121, 185**

(scrivener's error should be 186)).

> Applicant's argument relies upon the clause in paragraph 9(b) of Gadson's plea agreement which states that the State may reinstate the murder charges and seek the death penalty if Gadson did not comply with the terms of the plea agreement. Applicant's reliance upon this language in the agreement is misplaced. The language in the agreement does not constitute a Notice of Intent to Seek the Death Penalty. It merely outlines the fact that if Gadson did not tell the truth at trial, the State could reinstate the murder charge in its entirety against Gadson. There was no evidence that Gadson plea bargained to avoid the death penalty, and when Gadson pled guilty, he was not facing a death sentence. Thus, Applicant has failed to show that trial counsel was deficient.
>
> Moreover, Applicant has failed to show prejudice. Applicant has not presented any testimony or evidence that indicated that Gadson actually believed that he was avoiding a death sentence with his plea agreement. In fact, Gadson's testimony at the PCR hearing clearly demonstrated the opposite was true. Gadson noted in his testimony that he was never threatened with the death penalty. **{PCR Tr. 121}**. He noted that his attorney informed him after receiving the indictments that Gadson could get life for shooting and killing someone. **{PCR Tr. 209}.** He did not see that as being the same at the death penalty. Id.

(R.pp. 9835-36). Petitioner disagrees with the PCR court's assessment, and argues that the PCR court erred in "bas[ing] its conclusion on an irrelevant concern: whether Gadson was actually served with a death notice." Petition, p. 19.

Initially, the undersigned notes that the record supports the PCR court's finding that Gadson was not served with a death notice. (See R.p. 5915). Furthermore, it appears that the PCR court's analysis was directed to the specific claim that was presented to the court in the PCR action—that Gadson had bargained with the State to avoid the death penalty—and the PCR court found that the claim was overstated in light of the evidence. See (R.p. 9835 ["Applicant's allegation that Gadson expressly bargained to avoid a death sentence is not supported by the record."]). That is to say, if the only "threat" of the death penalty was in the plea agreement itself, then Gadson did not enter that agreement to avoid the death penalty. Accordingly, the PCR court did not erroneously

base its decision on "an irrelevant concern." Rather, the court addressed the claim as raised by Petitioner.

Even so, Petitioner further argues that the PCR court erred in finding that Gadson did not subjectively fear the death penalty. Petition, p. 19. Petitioner cites Gadson's testimony during the PCR evidentiary hearing where he discussed early correspondence that he filed in his murder case asking for a second attorney to be appointed:

> Q All right. And in there don't you say things like you want to know when you're going to get a second attorney in this death penalty case?
>
> A Yes, because that is what I was being charged.
>
> Q Okay. So, you thought you could get death, you feared death?
>
> A Yes.

(R.p. 5851). Those letters, where Gadson referred to his case as a capital case, were from July and October of 2001. (R.pp. 8940-43). However, Petitioner's claim that the PCR court erred in finding that Gadson subjectively did not fear the death penalty is based on an oversimplification of the PCR court's findings. See Response in Opposition to Motion for Summary Judgment ("Response"), pp. 6-7. The PCR court did not find that Gadson never feared the death penalty but, rather, that the evidence did not show that Gadson believed he was avoiding the death penalty *by entering into a plea agreement*. Indeed, Gadson's testimony showed that his concerns about potentially facing a death sentence evolved. Initially, he sent the aforementioned letters, which were drafted by a jailhouse lawyer and signed by Gadson, and which indicated that he was facing a capital charge. However, Gadson testified that he was not threatened with the death penalty. (R.pp. 5850, 5873). He also testified that he was advised about "the hand of one is the hand of all" around the time of his plea

negotiations, and was told that he would not get *life* in prison if he testified against Petitioner. (R.pp. 5900-02, 5916). Petitioner's arguments seem to rely on considering a portion of Gadson's testimony in a vacuum and disregarding his other testimony, which was found credible by the PCR court. Cf. Watkins v. Rubenstein, 802 F.3d 637, 643 (4th Cir. 2015) ["Section 2254 requires a federal court conducting collateral review of a state court adjudication to do so through a 'highly deferential lens.'" (quoting DeCastro v. Branker, 642 F.3d 442, 449 (4th Cir. 2011))]. The PCR court's finding is supported by the record and addresses the issue raised in the PCR application.

Petitioner also disagrees with the PCR court's Strickland analysis. After referencing trial counsel's testimony at the PCR evidentiary hearing, he quotes Cummings' testimony as to why he did not ask Gadson about a death sentence. Specifically, Petitioner quotes the following exchange between PCR counsel and Cummings about Cummings' cross-examination of Gadson:

> Q Now, when you cross-examined Tawain Gadson, one of the things you talked about was what sentence he would get pursuant to the plea deal, twenty years?
>
> A Yes.
>
> Q Okay. Why didn't you tell, cross-examine him about the fact that he faced a death sentence?
>
> A You asked me that before. I cross-examined him, it was murder, I didn't know if the Solicitor had ever served the death penalty notice on him.
>
> Q They threatened him with it?
>
> A They threatened.
>
> Q Why didn't you tell the jury he had been threatened with his life?
>
> A I guess it didn't flow from my brain at that time, I'm sorry, no strategy, clearly.

(R.pp. 7723-24). Based on that testimony, Petitioner asserts that Cummings admitted his deficiency.

Petition, p. 21. Petitioner then argues that trial counsel's deficiency prejudiced him because had the jury known that Gadson faced the death penalty if he broke his plea agreement, it "would have shown that Gadson was motivated—literally to save his life—to please the state in his testimony." Petition, p. 21. Petitioner further asserts that the threat of the death penalty against Gadson would have further impeached the State's case generally. Petition, pp. 21-22.

However, as referenced earlier, the PCR court's findings are a result of the claim that was presented by PCR counsel—that Gadson expressly bargained to avoid a potential death sentence and that trial counsel should have pointed that out during cross-examination. (See R.pp. 9471-72). The PCR court found, and the record supports, that Gadson was *not* facing the death penalty prior to entering his plea agreement. Now, instead of positing that trial counsel should have "inform[ed] the jury that Gadson expressly bargained to avoid the death penalty[,]" (R.p. 9471), Petitioner now argues that trial counsel were deficient for failing "to impeach Gadson with the fact that he faced the death penalty . . . [,]" Petition, p. 20. However, although Cummings recognized during his testimony that there was more that he could have done in cross-examining Gadson about the benefit of his plea bargain, that recognition does not render his performance constitutionally deficient. The record shows that when Cummings cross-examined Gadson, Solicitor Bailey had already questioned Gadson about being charged with murder and that he had entered a plea agreement to plead guilty to accessory after the fact and misprision of a felony in exchange for his testimony. (R.pp. 3980-82). The first matter that Cummings then covered in his cross-examination was Gadson's plea agreement and that he was facing fifteen years and five years incarceration for two lesser charges instead of facing a murder charge. (R.pp. 4022-24). All of this took place in front of the jury. Furthermore, despite having been unable to interview Gadson before his testimony, Cummings asked Gadson if

he had been served a death notice. (R.p. 4024). Cummings also followed up on his cross-examination of Gadson during closing arguments, when he asked the jury to think about Gadson's potential bias and pointed out that Gadson's testimony against Petitioner enabled him to face only twenty years for lesser charges. (R.p. 4494). Therefore, Petitioner has failed to demonstrate that the PCR court misapplied Strickland by finding that trial counsel were not deficient.

As for the PCR court's prejudice analysis, again, the PCR court focused on the claim as it was presented by Petitioner in his PCR action. The PCR court found credible Gadson's testimony at the PCR evidentiary hearing that he believed he was avoiding a life sentence, not the death penalty, by entering a plea agreement. (See R.p. 9836). It follows that, had trial counsel attempted to argue that Gadson had avoided the death penalty by testifying under a plea agreement, such an argument would not have been successful in the PCR court's view because the credible evidence did not support that specific argument. Petitioner has not shown that the PCR court unreasonably applied Strickland in finding Petitioner failed to demonstrate prejudice.

For all of the above reasons, Petitioner has failed to meet his burden under 28 U.S.C. § 2254 regarding his claim that trial counsel were ineffective for failing to question Gadson about facing the death penalty.

Failure to Question Gadson About Firing the Murder Weapon

Gadson was asked on cross-examination about whether he had ever purchased a High Power .380, and he indicated that he had purchased one in 2000. (R.p. 4031). However, Gadson was never asked whether he had ever fired Petitioner's gun. In Petitioner's PCR action, he asserted that trial counsel were ineffective for failing to question Gadson about whether, weeks before the murder, he had fired the same gun that the State alleged was the murder weapon. (R.pp. 9451, 9474-75). In

reviewing the relevant facts, the PCR court referenced the following evidence, which supported the fact that Gadson had fired Petitioner's gun two weeks before the victim's murder:

> According to the police statement given by Tiara Coleman, she and Gadson were walking around the Villas when Coleman got into an argument with someone else. **{Applicant's 30}.** *Applicant* gave Gadson a gun, which he shot into the air. Id. The casings from that shooting were recovered by another resident in the Villas, Margaret Hawkins. **{Applicant's 29}.** Those casings were fired by the same gun that killed the victim. **{R. 4315}.** At the PCR hearing, Gadson corroborated the sequence of events contained in Coleman's statements. **{PCR R. 161-62}.** He noted that Bowman let him borrow the gun for that shooting. **{PCR Tr. 195-96}.**
>
> Q Which .380 were you firing at the Villas that they were asking about?
>
> A The one Marion bought from the dude in Orangeburg.
>
> Q That was Marion's gun?
>
> A Uh-huh.
>
> Q He let you borrow it?
>
> A It was a dude standing in front of the apartments talking as if he had a knife, he handed me the gun, I started shooting it.
>
> Q Marion Bowman was there?
>
> A Yes, he was there.
>
> **{PCR Tr. 195}.**

(R.pp. 9844-45 (emphasis in original)). After briefly reviewing Cummings' testimony regarding that potential line of questioning, the PCR court found that trial counsel were not deficient and that Petitioner was not prejudiced by trial counsel's decision not to question Gadson about that event. (R.p. 9845).

Petitioner now asserts that the PCR court erred in finding that Cummings had a

strategic reason for not presenting that information. Petition, p. 23. Petitioner argues that "Cummings admitted he had no strategic reason for not informing the jury that Gadson had been seen shooting the same gun that the state claimed was the murder weapon." Id. However, while Petitioner correctly points out that Cummings initially testified that he had no strategy or reason for not telling the jury about the fact that Gadson had shot the murder weapon (see R.pp. 7410-11, 7426-27), later in his testimony he explained why he did not introduce such evidence, testifying, "this lady said Marion gave Tawain the gun to shoot up in the air. I didn't want that said[,]" (R.p. 7434). The PCR court apparently credited Cummings' explanation (that he did not want evidence identifying the murder weapon as belonging to his client) as a strategy, despite Cummings' earlier statement that he had no strategic reasons for not introducing such evidence. (See R.p. 9845 (citing R.pp. 7434-35)). Thus, the PCR court found that trial counsel were not deficient in deciding not to question Gadson about this incident (R.p. 9845), a decision based, in part, on credibility findings, which are entitled to great deference by this court in a habeas action. Wilson v. Ozmint, 352 F.3d 847, 858-860 (4th Cir. 2003); see also Marshall v. Lonberger, 459 U.S. 422, 434 (1983)["28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court . . . ."].

While a district court may, in an appropriate case, reject the factual findings and credibility determinations of a state court, Miller-El v. Cockrell, 537 U.S. 322, 340 (2003); the Court may not substitute its own credibility determinations for those of the state court simply because it may disagree with the state court's findings (assuming that were to be the case). See Cagle v. Branker, 520 F.3d 320, 324 (4th Cir. 2008) ["[F]or a federal habeas court to overturn a state court's credibility judgments, the state court's error must be stark and clear . . . . Indeed, 'federal habeas

courts [have] no license to redetermine credibility issues of witnesses whose demeanor has been observed by the state trial court, but not by them.'" (quoting Marshall, 459 U.S. at 434)]. Further, Petitioner has not shown that the state court's findings were unreasonable under § 2254(d), nor has Petitioner overcome the presumption accorded the PCR court's findings. See Pondexter v. Dretke, 346 F.3d 142, 147-49 (5th Cir. 2003) [finding that the district court "failed to afford the state court's factual findings proper deference" by "rejecting the state court's credibility determinations and substituting its own views of the credibility of witnesses"]; Evans, 220 F.3d at 312; see also Seymour v. Walker, 224 F.3d 542, 553 (6th Cir. 2000)["Given the credibility assessment required to make such a determination and the deference due to state-court factual findings under AEDPA, we cannot say that the trial court's finding was unreasonable under § 2254(d)(2)."].

Petitioner additionally asserts that "Cummings did not have all of the relevant information" because he "admitted that he 'didn't know it was the Edisto River gun.'" Petition, p. 23 (quoting R.p.7727); see also Response, p. 8-9. However, Cummings' testimony shows that he believed that the gun Gadson fired was the murder weapon found in the Edisto River. (See R.p. 7435 ["[T]his is the gun from the river?" "In my humble opinion."]). Again, Petitioner takes isolated statements from the record to support his contention that the PCR court's order is unreasonable. However, when Cummings' statement is considered with his other testimony, the record supports the PCR court's deficiency analysis.

Turning to the prejudice inquiry, according to Petitioner,

> The PCR court speculated that this information would have had "minimal benefit." App. 9845. This finding ignored that the only evidence the jury heard was that Petitioner controlled the murder weapon and was the only one who ever fired it. The only way to lessen the harmful impact of Gadson's testimony was to show that he also had access to the gun and had fired it. This places the murder weapon in Gadson's

> hands and gives the jury yet another reason to doubt the state's version of events and Gadson's credibility.

Petition, pp. 23-24. While Petitioner obviously disagrees with the PCR court's prejudice conclusion, he has failed to show that the PCR court's conclusion was unreasonable. In order to show prejudice, Petitioner is required to "show . . . a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. The undersigned does not find that introducing evidence that Gadson had fired the gun weeks before the murder would have resulted in a reasonable probability of a different outcome. Therefore, Petitioner has failed to show that the PCR court's prejudice determination was unreasonable.

Overwhelming Evidence of Guilt

Petitioner also asserts that the PCR court erred in relying on overwhelming evidence of guilt as part of its prejudice analysis in light of "all of trial counsel's failures regarding Gadson . . . ." Petition, p. 25. However, as discussed above, Petitioner has failed to meet his burden of showing that the PCR court unreasonably found trial counsel not to be deficient in how they handled Gadson's testimony. Furthermore, while Gadson's testimony was undoubtedly important to the State's case for guilt, as he was the only witness who testified to what occurred during the victim's murder, there was other overwhelming evidence of Petitioner's guilt apart from Gadson's testimony,[10] which included statements by Petitioner to multiple people, where he first threatened to

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[10] This evidence, as outlined by the South Carolina Supreme Court in Petitioner's appeal, is set forth in detail above. See discussion, infra. The PCR court also outlined the following evidence as indicative of the State's overwhelming case of guilt against Petitioner:

> Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. **{R. 3726, 3739-3744, 3764-66}.** Gadson saw Applicant shoot the victim. **{R. 4000-02}.** According to (continued...)

kill the victim and then later admitted to killing the victim. Furthermore, to the extent that Petitioner's argument relies upon cumulative error, that theory is not recognized by the Fourth Circuit. See Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998) [holding that ineffective assistance of counsel claims "must be reviewed individually, rather than collectively" and previously noting that "[h]aving just determined that none of counsel's actions could be considered constitutional error, . . . it would be odd, to say the least, to conclude those same actions, when considered collectively, deprived [the defendant] of a fair trial"]. For all of these reasons, the undersigned does not find that the PCR court erred in relying, in part, on overwhelming evidence of guilt in deciding that Petitioner was not prejudiced by any alleged errors by trial counsel regarding their handling of Gadson's cross-examination.

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[10](...continued)
Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. **{R. 4012}.** Applicant then dragged her body into the woods. **Id.** Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. **{R. 4018}.** They all wore gloves. **Id.** Hiram Johnson testified that Applicant said that he stole the victim's car and he made everyone wear gloves. **{R. 4065}.** He also testified that he heard Applicant admit to [sic] he killed the victim. **{R. 4068}.** Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. **Id.** Felder testified that he followed Applicant out to Nursery Road. **{R. 4094}.** He watched as Applicant pulled a body out of the woods. **{R. 4096}.** According to Felder, he saw it was the victim when Applicant put her body in the trunk. **{R. 4097}.** He testified that Applicant admitted that he killed the victim. **{R. 4098}.** He also observed Applicant set the car on fire. **{R. 4100}.** The victim's watch was recovered from Applicant's pants pocket when he was arrested. **{R. 4126-30; 4164-65}.** Applicant's family got rid of the gun that was used in the murder. **{R. 4177, 4185-86}.** The gun they threw in the Edisto River was conclusively matched the [sic] five of the casings at the murder scene. **{R. 4315}.** Also, Applicant's DNA was found in the victim at the scene. **{R. 4381}.** Overall, even without Gadson's testimony, there was a very strong case against Applicant.

(R.pp. 9832-33).

Failure to Question Gadson About Inconsistencies Between His Statements and his Trial Testimony

Petitioner asserts that trial counsel were ineffective for failing to cross-examine Gadson about prior inconsistent statements made during his polygraph examination. Petition, pp. 22-23. Initially, it should be noted that it is difficult to ascertain the specifics of this claim because Petitioner only refers to these inconsistent statements generally in his discussion, and merges his argument regarding this claim with his argument concerning trial counsel's failure to cross-examine Gadson about having previously shot Petitioner's gun. See Petition, pp. 22-25. The inconsistent statements Petitioner appears to reference in his argument concern whether Gadson "was involved in the shooting of Kandee Martin" and whether Petitioner played a part in the shooting. See R.pp. 7491-94. However, Respondents argue that this claim is procedurally barred, as it was not raised to and ruled upon by the PCR court, nor was it raised in Petitioner's Rule 59(e) motion to alter or amend the judgment. See Return, p. 48. The undersigned agrees.

Because Petitioner did not properly raise and preserve this issue in his state court proceedings, it is barred from further state collateral review; Whiteley v. Warden, Wyo. State Penitentiary, 401 U.S. 560, 562 n.3 (1971); Wicker v. State, 425 S.E.2d 25 (S.C. 1992); Ingram v. State of S.C., No. 97-7557, 1998 WL 726757 at *1 (4th Cir. Oct. 16, 1998); Josey v. Rushton, No. 00-547, 2001 WL 34085199 at * 2 (D.S.C. March 15, 2001); Aice v. State, 409 S.E.2d 392, 393 (S.C. 1991)[post-conviction relief]; see also White v. Burtt, No. 06-906, 2007 WL 709001 at *1 & *8 (D.S.C. Mar. 5, 2007)(citing Pruitt v. State, 423 S.E.2d 127, 127-28 (S.C. 1992)[issue must be raised to and ruled on by the PCR judge in order to be preserved for review]); cf. Cudd v. Ozmint, No. 08-2421, 2009 WL 3157305 at * 3 (D.S.C. Sept. 25, 2009)[Finding that where Petitioner attempted to

raise an issue in his PCR appeal, the issue was procedurally barred where the PCR court had not ruled on the issue and Petitioner's motion to alter or amend did not include any request for a ruling in regard to the issue]; Sullivan v. Padula, No. 11-2045, 2013 WL 876689 at * 6 (D.S.C. Mar. 8, 2013)[Argument not raised in PCR appeal is procedurally barred]; and as there are no current state remedies for Petitioner to pursue this particular claim, it is otherwise fully exhausted. Coleman v. Thompson, 501 U.S. 722, 735 (1991); Teague v. Lane, 489 U.S. 288, 297-98 (1989); George v. Angelone, 100 F.3d 353, 363 (4th Cir. 1996) ["A claim that has not been presented to the highest state court nevertheless may be treated as exhausted if it is clear that the claim would be procedurally defaulted under state law if the petitioner attempted to raise it at this juncture."], cert. denied, 117 S. Ct. 854 (1997); Aice, 409 S.E.2d at 393; Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997) ["To satisfy the exhaustion requirement, a habeas petitioner must fairly present his claim[s] to the state's highest court . . . the exhaustion requirement for claims not fairly presented to the state's highest court is technically met when exhaustion is unconditionally waived by the state ... or when a state procedural rule would bar consideration if the claim[s] [were] later presented to the state court."], cert. denied, 522 U.S. 833 (1997); Ingram, 1998 WL 726757 at *1.

Indeed, in his response to the motion for summary judgment, Petitioner does not deny that this particular claim is procedurally defaulted. See Response, p.5 n.5. Therefore, even though otherwise exhausted, because this claim was not *properly* pursued and exhausted by Petitioner in the state court, federal habeas review of the claim is now precluded absent a showing of cause and prejudice, or actual innocence. See Coleman, 501 U.S. at 750 ["In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate

cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage or justice."]. Petitioner "requests a hearing to prove that PCR counsel were ineffective in failing to present this evidence prior to the appeal of the denial of PCR in order to prove cause and prejudice to overcome the procedural default pursuant to Martinez v. Ryan, 566 U.S. 1, 14 (2012)." See Response, p. 5, n. 5.

As discussed in further detail with respect to Grounds Eleven and Twelve of the instant petition, ineffective assistance of PCR counsel can serve as cause and prejudice to overcome the procedural default of an ineffective assistance of trial counsel claim. See Martinez, 566 U.S. at 14 [indicating that a petitioner must demonstrate both that collateral counsel was ineffective under Strickland and that the underlying claim "has some merit" in order to overcome the procedural default]. However, Petitioner's bare assertion that his trial counsel was ineffective, coupled with his poor articulation of exactly what this underlying ineffective assistance of trial counsel claim consists of, is insufficient to meet his burden of demonstrating cause and prejudice due to PCR counsel error. Nor is Petitioner entitled to an evidentiary hearing on this issue. Schriro v. Landrigan, 550 U.S. 465, 474 (2007) ["In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief."]. Accordingly, this claim is procedurally barred from consideration by this Court, and should be dismissed.

II.

(Ground Two: Alleged Ineffective Assistance of Counsel for Failure to Investigate and Prepare for and Then Effectively Cross-Examine Travis Felder)

In Ground Two Petitioner contends that trial counsel were ineffective for failing to impeach Travis Felder regarding having purchased the gasoline used to burn the victim's car and regarding his original charges and inconsistent statements. In their return, Respondents argue that the PCR court did not err in denying Petitioner's PCR claims regarding how trial counsel cross-examined Felder.

Failure to Confront Felder with the Fact that He Purchased the Gasoline Used to Burn the Victim's Car

Based on the evidence presented at trial, Felder was not present when the victim was murdered. However, he was the only witness who testified as to how her body was placed in the trunk of her car and that the car was then burned. (R.pp. 4092-100). While testifying during the guilt phase, Felder did not tell the jury that he purchased the gasoline that was used to set the victim's car on fire. (See R.pp. 4092-94). In his PCR action, Petitioner argued trial counsel was ineffective for failing to question Felder about that fact during the guilt phase. (R.pp. 9494-96). However, the PCR court disagreed, finding as follows:

> Applicant fails to establish trial counsel was ineffective in not presenting evidence that Felder purchased the gasoline. Counsel elicited a valid and reasonable strategic reason explaining why he did not ask Felder about purchasing the gasoline. Further, Applicant has failed to show that there was a reasonable probability that the outcome at trial would have been different had counsel presented evidence and testimony that Felder purchased the gasoline during the guilt phase.
>
> As noted in response to Applicant's argument that the State failed to provide Applicant with information regarding Felder's purchase of the gasoline, trial counsel knew Felder had purchased the gasoline. At the PCR hearing, Cummings testified that he did not want the video of Felder purchasing the gasoline coming into evidence.

> **{PCR Tr. 1276}.** While he did not know why the State had not entered the video into evidence, he did not want it in because he felt it would corroborate Applicant's involvement in the plan to burn the car. **{PCR Tr. 1276}.** Cummings also testified that the entry of the video into evidence during the sentencing phase was done at Applicant's insistence and was not in line with his strategy. **{See PCR Tr. 1290}.** [FN2] This fear was well placed, as illustrated by Felder's testimony during the sentencing phase. Felder testified that he purchased the gasoline after being instructed to do so by Applicant. **{R. 4916-24}.** He also testified that Applicant provided the gas jug to be used in the purchase. **Id.** Clearly, trial counsel articulated a valid, reasonable strategic reason for not presenting the evidence of Felder purchasing the gasoline. As a result, this claim is denied.
>
> > [FN2] This testimony was also confirmed during Cummings' cross examination and is supported by the trial record. **{PCR Tr. 1290-91, see R. 4911-26}.**
>
> Applicant has also failed to establish prejudice. First, Applicant presents no evidence to support its contention that Felder's omission that he was the one who purchased the gasoline indicated he was involved in the murder of Kandee Martin. Second, Felder's testimony regarding the omission during the sentencing phase and during the PCR hearing clearly shows that cross-examination on this issue during the guilt phase would have done nothing to exculpate Bowman from being a participant in the arson. To the contrary, Felder's testimony clearly indicated that Bowman directed the arson to cover his crime. Third, as noted before, there was overwhelming evidence of Applicant's guilt in both the murder and the arson. Given this overwhelming evidence and the potentially harmful inferences from the gasoline evidence, the prejudice standard is simply not met.

(R.pp. 9861-62).

Petitioner asserts that the PCR court erred in finding that trial counsel had a strategic reason for not impeaching Felder with the fact that he purchased the gasoline. Petition, p. 34. According to Petitioner, the trial record "seemed to suggest that Cummings did not even realize that Felder had lied about the purchase of the gasoline. Petitioner was the first person to mention it." Id. at 34 (citing R.p. 4622). The record confirms that Petitioner asked the trial court if the jury could be shown the videotape showing Felder purchasing gasoline at the gas station. (R.p. 4622). However, Cummings explained to the court that there was an issue with the chain of custody for the tape. (R.p.

4622). He further stated,

> My client wanted to address Your Honor this morning about stating that he wants the tape shown and the tape shown in part of his mitigation case today. And I told him that he was going to stand up in front of Her Honor and say what he wanted to say. And I would not prohibit that to make sure the record shows that we are not at odds with Mr. Bowman or that we are not prohibiting him from presenting any mitigation facts that would be presented to the jury, ma'am.

(R.p. 4623). Subsequently, during the mitigation phase, and consistent with Petitioner's request, trial counsel presented Felder as a witness. (R.pp. 4911-28). The jury was also able to view the tape of Felder purchasing gas from the gas station. (R.pp. 4914-15). Cummings also cross-examined Felder as to why he had not told the jury that he purchased gas when he initially testified during the guilt phase. (R.pp. 4917-21). At the PCR evidentiary hearing, Cummings testified that he received the gas station tape in discovery, and while it was difficult to determine who was on the tape, Petitioner identified Felder as the person purchasing the gasoline. (R.p. 7013). Cummings stated that he knew Felder purchased the gasoline before he testified. (R.p. 7018). He also indicated that he and Petitioner disagreed about using the tape that showed Felder buying the gas. (R.pp. 7019-20). Cummings recalled what he had told Petitioner about the tape:

> I told him because it is a double edged sword, it can cut both ways, God bless him, I said this is your life, strategy wise I was scared to death of that tape so the jury would see one of his friends bought the gasoline and of course Marion asked him to go buy the gasoline, was Travis' testimony.

(R.p. 7021). Thus, contrary to Petitioner's assertions, the record supports the PCR court's finding that Cummings had a strategic reason for keeping out Felder's testimony about buying the gas and the accompanying video, but he eventually proceeded against his own plans because, in Cummings' own words, "We're in the penalty phase, I'm trying to save his life, he wants that in there." (R.p. 7021). Accordingly, Petitioner has failed to show by clear and convincing evidence that the PCR

court's factual findings on this issue were unreasonable.

Petitioner nonetheless argues that trial counsel's strategy was unreasonable. Petition, pp. 34-35. In particular, Petitioner highlights part of Cummings' testimony where he indicated that he was "frightened of the tape because 'there was no evidence against Marion that he bought the gasoline, that he poured the gasoline, that he did anything about burning this young white female in Dorchester County.'" Petition, pp. 34-35 (quoting R.p. 7006). Petitioner asserts that Cummings' thinking was incorrect, as his "claim that nothing tied Petitioner to the burning of the car ignores what Felder told the jury he saw at Nursery Road." Petition, p. 35. However, Petitioner's argument takes Cummings' statement out of context, as it is clear from reading the entirety of his answer that he believed that the tape corroborated Felder's story about what happened the night of the victim's murder. (R.p. 7006 ["I'm not going to play the tape to show that it might corroborate my poor kid being involved with this plan to murder, burn this little girl and the car."]). According to Petitioner, "any strategy that the tape would corroborate that Petitioner was involved with the plan to burn the car is unreasonable because the tape did not show Petitioner." Petition, p. 35. However, Petitioner's absence from the video is explained by Felder's testimony, as Felder testified that Petitioner asked him to get the gas and provided a gas can to him. (See R.pp. 4922-24). Moreover, other parts of Felder's testimony were corroborated by another witness. Valorna Smith testified that Felder went with her to her apartment after leaving the club, but that soon after they arrived, Petitioner showed up and asked Felder to come with him. (R.pp. 4116-18, 4120). According to Smith's testimony, Felder was gone for a short period of time and then returned. (R.pp. 4120-21).

Furthermore, the video showing Felder purchasing the gasoline, coupled with his explanation as to why he did so, fits a pattern demonstrated throughout Petitioner's trial, where

Petitioner involved others in his crimes while orchestrating their participation. (See R.pp. 3959-61 [testimony that Petitioner gave Gadson, Sr. money to purchase gloves for him]; 3992-4014 [testimony that Petitioner directed Gadson to get in the victim's car before he told the victim where to drive and then shot her]; 4064-67 [testimony that Petitioner admitted to stealing the victim's car and that he drove himself and others to the club where he attempted to sell the car]; 4092-101 [testimony that Petitioner told Felder to help him park a car and then directed Felder as to what to do once he parked the car]). Cummings' testimony reveals that he elected not to introduce the videotape based, in part, on his recognition of the double-edged nature of that evidence. Petitioner has failed to show that the PCR court unreasonably found trial counsel's strategic reason for not questioning Felder about the gas to be reasonable.

Finally, Petitioner argues that "Cummings ultimately admitted he had no strategic reason for not impeaching Felder[,]" and thus the PCR court erred in finding to the contrary. Petition, p. 35. In support of this argument, Petitioner cites to a portion of Cummings' testimony from December 19, 2008. Petition, pp. 35-37. During that testimony, Cummings indicated that he did not know why he did not question Felder about purchasing the gas when Felder was initially called to testify during the guilt phase. (See R.pp. 7665-67). However, other answers that Cummings gave when questioned about Felder provided reasons for his failure to impeach him. For example, in his answer immediately following the portion of the transcript that Petitioner excerpts, Cummings gave the following explanation for not wanting to question Felder about certain facts:

> I was not going to call Travis in my case in chief, obviously, or Gadson, so I wasn't going to try to put some helping information in through Gadson that everybody thinks would help and in my opinion might hurt Marion because there he is buying the gas for who, who told him to do it, who told him why? And if you believed everybody else's conversations throughout this case that he came back, got Felder out of an

> apartment, had a party late in the morning, early in the morning, and then asked him for some help. I knew what the help was for. I didn't want that wonder what the help was for to come out. I did not.

(R.p. 7668).

In finding that Cummings' strategy was reasonable, the PCR court referenced other portions of Cummings' testimony where he provided additional reasoning for not questioning Felder about the gas purchase. (R.p. 9861 (citing R.p. 7006)). Petitioner asserts that the portion of testimony that he excerpts in his petition "conclusively shows that the PCR court's findings that Cummings strategically failed to impeach Felder is not based on any evidence." Petition, p. 37. However, Petitioner is incorrect. The record indicates that Cummings' testimony at the PCR evidentiary hearing spanned many days over the course of several months, and that Cummings testified on September 30, December 18, and December 19, 2008, which could explain the differences in Cummings' testimony when remembering his thinking from trial at some points and not at others. In any event, the PCR court credited the portions of Cummings' testimony where he gave an explanation as to why he did not impeach Felder, as opposed to where he stated he did not know what his reasoning was. See Devier v. Zant, 3 F.3d 1445, 1456 (11th Cir. 1993) ["Findings by the state court concerning historical facts and assessments of witness credibility are . . . entitled to the same presumption accorded findings of fact under 28 U.S.C. § 2254(d)."]; see also Grimsley v. Luttrell, No. 91-7225, 1993 WL 53150, at *2 (4th Cir. Mar. 2, 1993) ["A factfinder's choice between two plausible but contradictory versions of the facts is virtually never clear error. Factual findings premised on credibility determinations are entitled to even greater deference, given the trial court's special ability to observe witness demeanor." (internal citations omitted)]. Petitioner has failed to meet his burden of showing that the PCR court's determination was unreasonable. Smith,

528 F.2d at 809 [Petitioner bears the burden of proving his allegations when seeking a writ of habeas corpus].

Petitioner further argues that he was prejudiced by trial counsel's failure to impeach Felder as to his purchase of the gasoline that was used to burn victim's body and car. According to Petitioner, "[t]his failure to impeach Felder left his testimony unchallenged and gave the jury the impression that Petitioner essentially acted alone in Martin's murder." Petition, p. 37. However, as the PCR court recognized, there was no evidence connecting Felder's omission regarding the gas purchase to the murder of victim. (R.p. 9862). Felder was only implicated as a participant in the arson. Furthermore, even to the extent that Felder's credibility could have been damaged by his failure to disclose that he purchased the gas in his initial testimony, the PCR court found that "Felder's testimony clearly indicated that Bowman directed the arson to cover his crime." (R.p. 9862). Thus, as Cummings testified, the testimony was a double-edged sword. Petitioner has failed to show that the PCR court either made unreasonable factual findings or unreasonably applied federal law in finding that Petitioner failed to show prejudice.

Failure to Impeach Felder with His Original Charges

Petitioner next argues that the PCR court erred in denying and dismissing his claim that trial counsel were ineffective in failing to impeach Felder with the fact that he was originally charged as an accessory to murder and arson. The PCR court addressed this claim as follows:

> In this claim, Applicant asserts trial counsel was ineffective for not exposing the fact that Felder was initially arrested and charged with Accessory to Murder/Arson and Arson, Third Degree. According to the arrest warrant affidavit, the evidence utilized to establish probable cause for the charges consisted of a statement provided by Applicant. **{Applicant's 17 & 18}.** According to Applicant's statement, Gadson and Felder were the ones who shot the victim and burned the car. **{See Applicant's 17 & 18}.** After he was arrested, Felder did not give a statement to police. Instead,

he invoked his right to counsel. **{See Applicant's 16}.** During June 2001, Felder was indicted for Third Degree Arson and Accessory After the Fact to murder. **{Applicant's 43, 44}.** By all accounts, Felder did not have any contact with law enforcement or the solicitor's office until his attorney contacted the solicitor's office about a plea in March 2002. **{See Applicant's 64, PCR Tr. 2107-2110}.**

Applicant argues that trial counsel was ineffective for not pointing out that Felder was once charged with accessory before the fact to the murder and that the State could have sought the death penalty for such a charge. First, it should be pointed out that the South Carolina Supreme Court has held that one indicted for accessory before the fact cannot be eligible for the death penalty. State v. Bixby, 373 S.C. 74, 644 S.E.2d 54 (2007). Even though this decision came out after Applicant's trial, it was merely interpreting statutes on the books when Applicant was tried. This Court cannot assume that had the issue been raised to Applicant's trial judge he would have gotten it wrong. [FN1] Since the death penalty would not have been on the table, counsel cannot have been deficient nor Petitioner prejudiced for not cross-examining on it.

> [FN1] Strickland is clear that the Court must "presume . . . that the judge or jury acted according to law", and [sic] "and assessment of the likelihood of result must exclude the possibility of arbitrariness, whimsy, caprice, nullification, or the like". 466 U.S. at 695. "A defendant has not [sic] entitlement to the luck of a lawless decisionmaker." Id.

Regardless, there is no evidence that supports the implication that the accessory before the fact to the murder charge was "reduced" to accessory after the fact as a result of Felder's cooperation. In fact, the evidence clearly points to the contrary. The charge was reduced to Accessory After the Fact when Felder was indicted in June 2001. At that point, Felder had not given any statement to law enforcement other than his initial denial of all involvement. Thus, since there was no basis to imply that Felder's cooperation at trial was to avoid being charged with accessory before the fact, counsel could not have made that inference. It was accurately brought out to the jury, however, that Felder's charges were reduced to a single accessory to Arson 3rd based on his cooperation. **{R. 4085-86; 4108-09}.** There was no deficiency.

Additionally, counsel expressed a valid strategic reason for not getting into the initial charges from Felder. Cummings testified that it was his understanding that Felder was initially charged based upon a statement given to police by Applicant. **{PCR Tr. 1971}.** Counsel noted on several occasions that he did not want any of Applicant's statements to come into evidence. **{PCR Tr. 1827-29; 1834-37; 1908-14; 2004-05}.** Obviously, questioning along this line could elicit that the charge was based on Applicant's attempt to deflect blame by implicating others.

> Second, trial counsel did attempt to elicit testimony from Felder regarding how much time he was facing under his plea agreement. Counsel asked Felder "[h]ave you been told a possible sentence?" **{R. 4108}.** Felder responded, "[n]o sir." **Id.** Counsel did attempt to show bias in this regard, and thus counsel cannot be deficient.
>
> As to claims that counsel should have somehow raised that fact that the State had "a long-held belief" that Gadson and Felder were the ones who killed the victim and burned the car, the claim is without merit. Applicant's position relies solely upon the arrest warrant affidavits, which of course refer only to probable cause. However, this probable cause was based solely in the fact of the statement from Applicant trying to deflect blame to other people. It was very early in the investigation. Cummings testified that he did not want any of Applicant's statements admitted into evidence, and he was surprised that the State did not present those statements. Obviously, there was little to be gained from such an examination, and this strategic decision was reasonable.
>
> Finally, Applicant fails to establish prejudice, given the overwhelming evidence as set forth in the prior subsections, the extent of cross-examination and impeaching information otherwise elicited at trial, and the minimal value and potentially harmful character of the initial charges given that the jury could conclude they stem from Applicant's attempt to blame others for his crimes. This claim for relief is denied.

(R.pp. 9858-61).

Petitioner disagrees with the PCR court's conclusion that trial counsel was reasonable in not cross-examining Felder about his initial charges. According to Petitioner, "the PCR court credits Cummings with a reasonable trial strategy based on the idea that if he cross-examined Felder about his original charges, that Petitioner's written statements would come into evidence[,]" but "[s]uch a notion cannot form the basis of reasonable trial strategy because it is not based on an accurate understanding of the rulings at trial." Petition, p. 38. Initially, the undersigned notes that the PCR court did not find that Petitioner's statements *would* come into evidence if trial counsel asked Felder about his initial charges, but that they *could* come into evidence. (R.p. 9860).

Essentially, the PCR court found that it was valid for trial counsel to be concerned that asking Felder about his initial charges might propel the State to introduce Petitioner's statements to law enforcement, since Felder's charges were apparently based on one of those statements. (See R.p. 8975, 9860). Cummings indicated that he tried to keep all of Petitioner's statements out, which is confirmed by the trial court record. (R.pp. 7734-36; see also R.pp. 1356-58). While Petitioner admits that he gave a number of statements after his arrest, his arguments only seem to recognize the potential damage of such statements to the extent they inculpate him in any crimes, discounting the negative impact that the statements could have had based on the variability between those statements and, as the PCR court notes, how those statements "attempt to deflect blame by implicating others."[11] (R.p. 9860). According to the record, Petitioner gave at least three oral statements and four written statements to law enforcement, and the trial court found all of those statements to be admissible except for the fourth written statement. (R.pp. 1334-58). Petitioner's claims about what occurred the night of the victim's death and who was responsible for her death varied from statement to statement. For example, in his first and second written statements, Petitioner implicated Terry Kelly as the killer. (See R.pp. 9214-19). In his third written statement, Petitioner implicated both Gadson and Kelly. (See R.pp. 9220-21). In his second oral statement, Petitioner indicated that Gadson shot the victim. (R.p. 482). In his final oral statement, Petitioner first stated that Charlie Fralick shot the victim, but when he was confronted with his prior statements and statements by his co-defendants, Petitioner indicated "that he and Mr. Gadson actually got together inside the jail and had decided to come up with the story about Charlie Fralick to try to take the heat off themselves." (R.p. 516; see

[11] While being questioned at the PCR evidentiary hearing, Cummings demonstrated how questions about the basis of a warrant could become unflattering to Petitioner. (See R.p. 7645).

also 529-30). Petitioner then identified Gadson as the shooter. (R.p. 529-30).

Furthermore, to the extent Petitioner argues that trial counsel erroneously believed that Petitioner's fourth written statement, which the trial court had deemed involuntary, could be rendered admissible if trial counsel somehow opened the door to that information, there is some support for that argument in the record. Cummings was specifically questioned about his understanding of the admissibility of statements that had been deemed involuntary:

> Q But your understanding, the door can be opened to use an involuntarily, coerced statement to impeach the defendant?
>
> A I believe Judge Goodstein had a hard time suppressing that statement and the State argued, as you guys have read, every chance he got to open that back in because that would have been the nail in the coffin, and I was cautioned by the judge in chambers, I was cautioned don't give Mr. Bailey the chance to bring it back out, I followed it. So, that is what I did.
>
> . . . .
>
> Q And I want to make sure I understand. Was it your understanding of evidence and law regarding the use of involuntary statements altered by the judge in her instructions to you or did you always believe that it could be used for impeachment?
>
> A I thought once it was ruled inadmissible for violations of our protections both in federal and state constitutions that it would not be admissible. Then I was cautioned that it could be if I opened the door, and I said okay, and we talked about it. There ain't no way in heck I was going to open up the door for those statements.

(R.pp. 7696-97). Petitioner correctly notes that the belief that an involuntary statement could be rendered admissible is based on a mistake of law. See Petition, p. 39 (citing Mincey v. Arizona, 437 U.S. 385, 397-98 (1978); New Jersey v. Portash, 440 U.S. 450, 459 (1979)). However, the PCR court in its order of dismissal did not base its decision on that testimony in finding that trial counsel had articulated a valid strategy for not questioning Felder about his initial charges. (R.pp. 9858-61). Cf.

Harich v. Duggar, 844 F.2d 1464, 1470-71 (11th Cir. 1988) [concluding, without an evidentiary hearing on whether counsel's strategy arose from his ignorance of the law, that trial counsel's performance was competent because hypothetical competent counsel reasonably could have taken action at trial identical to actual trial counsel], overruling on separate grounds recognized in Davis v. Singletary, 119 F.3d 1471, 1481-82 (11th Cir. 1997). Thus, trial counsel's mistaken belief is of no moment when considering the factual findings and application of law in the order of dismissal.

Petitioner argues that "the PCR court's ruling is not based on any evidence produced at the PCR hearing." Petition, p. 39. However, as set forth above, and as referenced in the order of dismissal, there was evidence presented at the PCR evidentiary hearing, particularly through Cummings' testimony, to support the PCR court's conclusion that trial counsel was not deficient for failing to cross-examine Felder about his initial charges. Petitioner references a number of facts regarding Felder's plea deal, but he fails to recognize that, as the PCR court noted in its order of dismissal, Felder was no longer facing accessory to murder at the time of his plea deal, as he had been indicted for third degree arson and accessory after the fact to murder in June 2001. (R.p. 9858). Furthermore, the record indicates that the lessening of the charges had nothing to do with Felder's cooperation, but was the result of further police investigation, since "[b]y all accounts, Felder did not have any contact with law enforcement or the solicitor's office until his attorney contacted the solicitor's office about a plea in March 2002." (R.p. 9858). The record also reflects that Cummings did attempt to question Felder about the time he was potentially facing by entering a plea agreement, but Felder did not know what his sentence could be as a result of his cooperation. (R.pp. 4108-4109). This claim is without merit.

Failure to Impeach Felder with Inconsistent Statements

Petitioner also asserts that trial counsel should have impeached Felder with inconsistencies between the proffer letter and his polygraph statement and his testimony at trial. Petition, p. 40. Specifically, Petitioner notes that Felder's proffer letter omitted the fact that he purchased the gas and that he saw Petitioner put the victim's body in the trunk of her car. Petition, p. 32 (citing R.p. 9118). Additionally, in his polygraph statement, Felder denied having seen the victim's body placed in her car. Id. (citing R.p. 8973).[12] While this claim was not dealt with directly by the PCR court, some of the other findings by the PCR court are applicable to whether trial counsel were ineffective. For instance, the PCR court found that the proffer letter could not be used for impeachment purposes, as "[i]t was not a statement made by Felder. It was simply a reflection of what Felder's attorney provided the solicitor's office as it opened negotiations for a plea agreement." (R.p. 9856). Furthermore, the PCR court found that "[a]ny minor differences in the proffer letter and the trial testimony do not overcome the overwhelming evidence of Applicant's guilt presented in this case . . . ." (R.p. 9856). As for Felder's polygraph examination denial of having seen the victim's body put into the car, Cummings admitted that he failed to impeach Felder with that prior inconsistent statement, and that he had no strategic reason for that failure. (R.pp. 7038-48). However, that testimony does not necessarily render trial counsel's performance constitutionally deficient.[13] Moreover, had Cummings questioned Felder regarding that statement as a prior

[12]However, the polygraph results also indicated deception as to that issue. Id. (citing R.p. 8973).

[13] The Eleventh Circuit described the applicable standard as follows:

> We look at the acts or omissions of counsel that the petitioner alleges are

(continued...)

inconsistent statement, the State could have asked to introduce evidence that Felder's response to that question indicated deception. See State v. Council, 515 S.E.2d 508, 519-520 (S.C. 1999) ["This Court has consistently held the results of polygraph examinations are generally not admissible because the reliability of the tests is questionable. . . . However, in light of the adoption of the SCRE, admissibility of this type of scientific evidence should be analyzed under Rules 702 and 403, SCRE and the Jones factors." (internal citations omitted)]. If the State had been able to introduce that the polygraph showed deception when he denied having seen the victim's body being put in her trunk, that could have been detrimental to Petitioner's case. In any event, Petitioner has failed to show that, had trial counsel attempted to impeach Felder with the inconsistent statements from his proffer letter or from his polygraph examination, there is a reasonable probability that the result of the proceeding would have been different. See Strickland, 466 U.S. at 694 ["Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect."]. Therefore, this claim is without merit.

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[13](...continued)
unreasonable and ask whether some reasonable lawyer could have conducted the trial in that manner. Because the standard is an objective one, that trial counsel (at a post-conviction evidentiary hearing) admits that his performance was deficient matters little. See Tarver v. Hopper, 169 F.3d 710, 716 (11th Cir. 1999) (noting that "admissions of deficient performance are not significant"); see also Atkins v. Singletary, 965 F.2d 952, 960 (11th Cir. 1992) ("[I]neffectiveness is a question which we must decide, [so] admissions of deficient performance by attorneys are not decisive.").

Chandler v. United States, 218 F.3d 1305, 1315 n.16 (11th Cir. 2000).

III.

(Ground Three: Alleged Ineffective Assistance of Counsel for Failure to Investigate and Prepare for and Then Effectively Cross-Examine Hiram Johnson)

In Ground Three, Petitioner alleges that trial counsel was ineffective for failing to cross-examine Hiram Johnson on the fact that he omitted from his written statement to the police the fact that Petitioner had confessed to killing the victim. Petitioner further claims that the PCR court's denial of that same claim is based on unreasonable factual findings and is contrary to, or an unreasonable application of, Strickland v. Washington. Petition, p. 45. Respondents argue that the PCR court was not unreasonable in denying the ineffective assistance of counsel claim relating to trial counsel's handling of Johnson's cross-examination. The undersigned agrees.

During his testimony at Petitioner's trial, Johnson testified to being with Petitioner on February 16, 2001, at Hank Koger's house. (R.pp. 4057-58). While there, Petitioner confronted Gadson about moving a gun from a barrel where Petitioner had hidden it, but Johnson intervened and said that he had moved Petitioner's gun to an apartment. (R.pp. 4058-60). Johnson testified that he then saw Petitioner put the gun in his pants after retrieving it. (R.p. 4060). Johnson testified that he saw Petitioner again later that evening when he went with Petitioner to the Horizon EZ Store, where Petitioner asked James Gadson, Sr. to buy four pairs of gloves. (R.pp. 4060-63). Petitioner, Johnson, Taiwan Gadson, and Darian Williams then wore the gloves when they went to the Allen Murray Club in the victim's car. (R.pp. 4064-65). According to Johnson, Petitioner directed everyone to wear the gloves and told them that he had stolen the car. (R.p. 4065). Johnson testified that Petitioner attempted to sell the car at the club. (R.pp. 4066-67). The four eventually left the club in the victim's car, and Petitioner then stated, "'I killed Kandee, heh, heh, heh.'" (R.p. 4068). Johnson testified that

Petitioner had his gun in his lap on the way back from the club. (R.p. 4068).

Johnson gave multiple statements to the police. He first spoke with them on February 22, 2001. (R.p. 6657). At the PCR evidentiary hearing, Alvin Coker with the Dorchester County Sheriff's Office testified that Johnson provided the following information in that first statement:

> According to my notes he said he had gone to the club with Marion, Tawain and Darien and that he had seen Marion with a gun in his lap while Marion was driving to the club and that Marion told, had told Trina West about killing Kandee Martin and he was not clear on the time frame as to when Marion told Trina West or how he knew Marion told her.

(R.p. 6659). On that same day, Johnson turned over a pair of brown cotton gloves to police. (R.pp. 6663-64). On April 5, 2001, Johnson provided a one-page written statement to police. (R.pp. 6659-60, 9053-54). That one-page statement includes details about the purchase of the gloves and about going to the Allen Murray Club in the victim's car. (R.p. 9054). In his written statement, Johnson also indicated that Petitioner confessed to having stolen the car, but he did not indicate that Petitioner confessed to killing the victim. (R.p. 9054).

The PCR court found that Petitioner failed to meet either prong of Strickland with regard to his claim that trial counsel was ineffective for failing to question Johnson about omitting Petitioner's murder confession, finding:

> Trial counsel gave a valid strategic reason for not crossing Johnson on this issue. Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial). See generally Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute nor prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy). Cummings indicated that he did not want to risk having Johnson repeat the statement in front of the jury. Cummings noted it was the worst thing that Johnson

> said about Applicant at trial. **{PCR Tr. 1386}.** Counsel cannot be found deficient in this regard. See Moss v. Hofbauer, 286 F.3d 851, 865 (6th Cir. 2002) (reviewing court must consider potential risk that cross-examination would have led to damaging testimony being repeated).
>
> Finally, Applicant has not established prejudice. Johnson had indicated to police that he knew Bowman had confessed to killing Kandee Martin. Detective Coker noted as much in his investigative notes regarding his first interview with Hiram Johnson. **{See Applicant's 47}.** Thus, any impeachment would be limited, particularly in view of the overwhelming evidence of guilt, as detailed before. This claim for relief is denied.

(R.pp. 9869-70).

Petitioner fails to identify how the PCR court made unreasonable factual findings based on the evidence. Rather, he disagrees with the Court's conclusion that it was a valid strategic decision for Cummings to decide not to impeach Johnson in order to avoid Johnson mentioning Petitioner's confession again. See Petition, pp. 45-46. Petitioner argues, "It was impossible for the jury to overlook such a damaging piece of evidence as a confession." Petition, p. 45; see also Response, pp. 11-12. He further asserts, "Given the damaging nature of this evidence, it was unreasonable not to cross-examine Johnson on the serious omission in his written statement." Petition, p. 45. Notably, neither Cummings nor the PCR court indicated that the jury might *overlook* the confession. Cummings characterized Petitioner's statement to Johnson as "the worst evidence in the world . . . ." (R.p. 7117). And,when asked if Johnson had referenced that statement before his trial testimony, Cummings stated, "No, but I darned sure didn't want him to ask him twice 'Did you run a redlight' on direct and then cross him and get him to say he ran a redlight again." (R.p. 7117). Petitioner argues that trial counsel's strategy did not make sense. Response, p. 11. However, trial counsel is not deficient for failing to cross-examine a witness about an issue that counsel does not want to emphasize. See Bryant v. Brown, 873 F.3d 988, 996 (7th Cir. 2017) ["A 'decision not to

impeach a particular witness is normally considered a strategic choice within the discretion of counsel.'"]; Cancer v. Ercole, Civ. No. 9:07-CV-808 (TJM/RFT), 2010 WL 1729103 at *5 (N.D.N.Y. Feb. 5, 2010) [finding counsel's decision not to impeach with a prior inconsistent statement was reasonable and that counsel had otherwise vigorously cross-examined the witness and challenged the witness's credibility and, thus, was not ineffective] Report and Recommendation adopted, 2010 WL 1729344 (N.D.N.Y. Apr. 29, 2010); Dunham v. Travis, 313 F.3d 724, 732 (2d Cir. 2002) [agreeing with a state court that counsel's strategic decision not to impeach with earlier statements was reasonable, particularly where counsel did not want to bring certain evidence to the factfinder's attention]. The undersigned cannot find that the PCR court unreasonably applied federal law in finding that Cummings articulated a valid, strategic reason for not cross-examining Johnson on Petitioner's statement where he clearly did not want that statement further emphasized.

Petitioner also argues that "it confounds belief that such an important piece of evidence was omitted." Petition, p. 46. It is unclear why Johnson omitted the confession from his written statement because he remembered very little about his discussions with police by the time of the PCR evidentiary hearing. (See R.pp. 6252-56, 6265-69). However, as the PCR court noted, the impeachment value of Johnson's omission was limited, particularly since he had indicated in his first statement to police that he overheard Petitioner confess to the murder. (See R.pp. 9869-70). Johnson also indicated in his PCR testimony that he believed Petitioner was kidding when he confessed, both because Johnson did not know that the victim was dead and because Petitioner always "joke[d] around." (R.pp. 6294-95, 6298). Johnson also agreed that during his deposition, he had made the following observations about Petitioner generally— that "there is no telling what Marion Bowman would do" and that "he had a pretty rough reputation and nobody wanted to cross him . . . ." (R.p.

6297). Petitioner has failed to demonstrate that the PCR court unreasonably applied Strickland in finding that Petitioner failed to show either deficiency or prejudice with regard to the ineffective assistance of counsel claim raised in Ground Three.

Finally, Petitioner disagrees with the PCR court's reliance on the overwhelming evidence of guilt against Petitioner based on his contention that trial counsel erred in cross-examining Gadson, Felder, and Johnson. Response, p. 12. However, as already discussed herein, the PCR court did not find that trial counsel was deficient in handling the cross-examination of any of those three witnesses, and Petitioner has failed to show that the PCR court's order was unreasonable as to those issues. Since Petitioner has failed to show error, he cannot rely upon cumulative error for the prejudice analysis. See Moore v. Reynolds, 153 F.3d 1086, 1113 (10th Cir. 1998) ["Cumulative error analysis applies where there are two or more actual errors; it does not apply to the cumulative effect of non-errors."]. Furthermore, the undersigned notes that multiple state courts have commented on the overwhelming evidence of guilt against the Petitioner, which not only includes the direct evidence of his guilt provided through the testimony of Gadson, Felder, and Johnson, but which also includes indirect evidence provided through the testimony of other witnesses. (See R.pp. 9832-33); see also Bowman, 809 S.E.2d at 246 n.8 ["Evidence pointing to Petitioner as the murderer was overwhelming, including eyewitness testimony and other evidence linking Petitioner to the murder and arson."]. This claim is without merit.

IV.

(Ground Four: Alleged Brady Violations)

In Ground Four, Petitioner alleges three separate Brady violations by the State, all of which were raised in his PCR action, and all of which were denied by the PCR court. The

undersigned addresses each of the alleged Brady violations, in turn, below.

The United States Supreme Court has provided the following guidance on what constitutes a Brady violation:

> A Brady violation occurs when the government fails to disclose evidence materially favorable to the accused. See [Brady v. Maryland,] 373 U.S. [83,] 87 [(1963)]. This Court has held that the Brady duty extends to impeachment evidence as well as exculpatory evidence, United States v. Bagley, 473 U.S. 667, 676 (1985), and Brady suppression occurs when the government fails to turn over even evidence that is "known only to police investigators and not to the prosecutor," Kyles [v. Whitley,] 514 U.S. [419,] 438 [(1995)]. See id. at 437 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"). "Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,'" Strickler v. Greene, 527 U.S. 263, 280 (1999) (quoting Bagley, supra at 682 (opinion of Blackmun, J.)), although a "showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal," Kyles, 514 U.S. at 434. The reversal of a conviction is required upon a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 435.

Youngblood v. West Virginia, 547 U.S. 867, 869-70 (2006). Thus, there are three components to a Brady violation—(1) evidence must be favorable; (2) evidence must have been suppressed by the government; and (3) evidence must be material.

Failure to Disclose the Sam Memo

The so-called "Sam Memo" is a memorandum that was prepared by Sam Richardson, an investigator who worked for the Solicitor's Office, in which Richardson detailed an interview he conducted with Ricky Davis. (See R.pp. 9122, 9871-72). Based on the evidence presented at the PCR evidentiary hearing, Davis had written a note indicating that Gadson had told him "that he was the one that shot [th]e Girl and gave Bowman back the gun . . . ." (R.p. 8966). Davis's handwritten note further referenced that Petitioner's family had gotten caught with the gun and that the police had

indicated that Gadson could blame Petitioner. (See R.p. 8966). Based on the Sam Memo, when Richardson interviewed Davis, Davis provided greater detail regarding the context in which Gadson had confessed to the shooting. (R.p. 9122). Davis also told Richardson about a conversation he had with Petitioner, in which Davis told Petitioner what Gadson had said, and Petitioner encouraged Gadson to "write it down . . . ." (Id.) Davis further reported to Richardson that he and Petitioner also discussed the events surrounding the victim's murder, but Petitioner never admitted to shooting anyone. (Id.) Davis told Richardson that he spoke with Gadson again after his conversation with Petitioner, and Gadson then said that Petitioner shot the victim. (Id.)

At the PCR evidentiary hearing, Davis testified that he could not remember if Gadson told him that he shot the victim. (See R.pp. 5992-94). Davis testified that he was "pretty sure" that Gadson had not told him the information memorialized in the note, and he further confirmed that he and Gadson had not really spoken about the case when Davis wrote the note. (See R.pp. 6002, 6005-06). Rather, Davis testified that Petitioner told him the information in the handwritten note. (See R.pp. 5994-95, 6004-05).

Cummings testified at the PCR evidentiary hearing that trial counsel had been provided a copy of Davis's handwritten note, but they did not have a copy of the Sam Memo. (R.pp. 7058-65). According to Cummings, trial counsel sent an investigator to interview Davis and, at that time, Davis recanted the statement. (R.pp. 7066-67). Nevertheless, Cummings subpoenaed Davis during Petitioner's trial, thus making him available even though "he told [the defense team] he was not going to help us in any way." (R.p. 7068). Cummings testified that his investigator told him that if he put Davis on the stand "he would say that Marion told him to do this, Marion had it created." (R.p. 7071). Cummings testified that he ultimately did not call Davis as a witness, and he agreed with

the statement that if Davis testified that he did not know anything about the murder and that Petitioner had told him to write the note, that would show that Petitioner "was trying to get somebody to lie for him and say somebody else was the shooter . . . kind of make him look devious and ultimately confirm his guilt . . . ." (R.p. 7626). Cummings testified that he would have liked to have had the Sam Memo prior to trial, and it might have led him or his investigators to do more investigation, but he also agreed that if he had the Sam Memo in addition to the other information he already had about Davis—the handwritten note and the defense investigator's interview with Davis—he "would still be in the same boat . . . ." (R.pp. 7631-33).

The PCR court found that the State did not violate Brady by not disclosing the Sam Memo for multiple reasons. First, the PCR court concluded that Petitioner failed to show that the State had suppressed favorable evidence. (R.pp. 9872-73). As part of that conclusion, the PCR court noted that "'evidence' that is inadmissible is not evidence at all, and thus cannot affect the outcome of trial." (R.p. 9872 (citing Wood v. Bartholomew, 516 U.S. 1, 6 (1995) (per curiam) [holding that inadmissible materials that are not likely to lead to the discovery of admissible exculpatory evidence are not subject to disclosure under Brady])). Accordingly, the PCR court concluded that "[a]t best, the notes could be considered evidence that could be used to impeach Ricky Davis if he testified at trial." (R.p. 9872). The PCR court then noted that Davis would not have been a good witness based on the defense team's investigation, and that Cummings testified that he would have been in the "same boat" even with the Sam Memo. (R.pp. 9872-73). The PCR court further concluded that "in substance the Sam Memo did not contain anything the defense was not already provided, and the Sam Memo merely represented nothing more than the prosecution's trial preparation interview based on their possession of the handwritten statement . . . ." (R.p. 9873). As such, the PCR court ultimately

found "there was no suppression of favorable evidence." (R.p. 9873).

Second, the PCR court found that the Sam Memo was not material, based on the following analysis:

> Assuming that Davis had been called, testified as he did at PCR, and then was impeached with the Sam Memo, it simply cannot be said that a reasonable probability of a different result would occur from such impeachment, especially when the defense already possessed the statement written in Davis's own hand, and could have called him and impeached him with that but decided against it. Said another way, the difference between possible impeachment with the disclosed handwritten statement in Davis's own hand, and impeachment with the Sam Memo or testimony from Sam, is not so great that it undermines confidence in the verdict under the standard for materiality. This is especially so given the overwhelming evidence of guilt, as detailed above.

(R.p. 9874).

Petitioner contends that the PCR court erred in finding that the Sam Memo was not favorable, arguing that it was relevant to guilt or innocence as it recounts the confession of a co-defendant, and that it constitutes impeachment evidence as "it directly contradict[s] the only eyewitness to the murder." Id. at 51. As noted, the PCR court handled the issues of whether the Sam Memo was favorable and whether it was suppressed together. While the PCR court did not explicitly find that the Sam Memo was not favorable, to the extent that the order of dismissal seems to fail to recognize how the Sam Memo was favorable, the undersigned agrees with Petitioner that such a finding would be incorrect. Furthermore, it does appear that the analysis used by the PCR court conflates the standards for favorability and materiality. (See R.p. 9872). According to the United States Supreme Court, both "[i]mpeachment evidence . . . [and] exculpatory evidence . . . fall[] within the Brady rule." United States v. Bagley, 473 U.S. 667, 676 (1985). The evidence in the Sam Memo is exculpatory as it relates to an alleged confession by Gadson that he shot the victim. However, the order of dismissal discounts the exculpatory nature of the Sam Memo since the memorandum itself

presumably would be inadmissible as evidence. But the issue of the admissibility of the evidence, or how it could be used by the defense, is one of materiality, not favorability. See Wood, 516 U.S. at 6 [discussing inadmissible evidence as part of the determination of whether evidence was material under Brady]. The Sam Memo could also arguably be the basis for a question to Gadson on cross-examination regarding whether he had ever confessed to Davis that he shot the victim. Thus, it could serve as the basis for impeachment of one of the State's witnesses.

Rather than separately address whether the Sam Memo was favorable, the order of dismissal finds "there was no suppression of favorable evidence" based, in part, on the fact that the information in the Sam Memo was essentially already provided to the defense team by way of Davis's handwritten note. (R.p. 9873). It was not unreasonable for the PCR court to find that favorable evidence was not suppressed since the defense team was already aware of Gadson's alleged confession to Davis by way of Davis's handwritten note. Cf. Owens v. Guida, 549 U.S. 399, 417 (6th Cir. 2008) ["Brady does not apply when the defendant 'knew or should have known the essential facts permitting him to take advantage of any exculpatory information.'" (quoting Coe v. Bell, 161 F.3d 320, 344 (6th Cir. 1998))]. Thus, trial counsel could have asked Gadson whether he told Davis that he shot the victim even without the Sam Memo, as trial counsel already possessed that information by way of Davis' handwritten note.

As to the PCR court's determination that the Sam Memo was not material, Petitioner asserts that that finding was erroneous because "[t]he PCR court's order inaccurately states that Cummings would not have called Ricky Davis as a witness or changed his strategy had he known about the Sam Memo." Id. at 52. However, the PCR court never found that Cummings would not have called Davis or would not have changed his strategy—instead, the PCR court focused on

Cummings' testimony, noting that Cummings *did not testify* that he would have called Davis as a witness had he had the Sam Memo, and that he would have been "in the same boat" if he had had the Sam Memo in addition to the other information he already knew about Davis from his own investigation. (See R.p. 9873 n.6). Therefore, the PCR court's order is consistent with Cummings' testimony at the PCR evidentiary hearing.

In any event, having heard Davis' testimony, the PCR court found that the Sam Memo was not material—that is, it did not undermine confidence in the outcome of the trial. Strickler, 52 U.S. at 280. Davis' testimony was not helpful to Petitioner. Rather than testifying that Gadson confessed to shooting the victim, Davis instead testified that Petitioner gave him the information that he recorded in his handwritten note and that he wrote the note at Petitioner's request. (R.pp. 5992-95). In addition, no one even asked Davis at the PCR evidentiary hearing whether he had told Richardson the information in the Sam Memo. (See R.pp. 5978-6020). When Gadson testified at the PCR evidentiary hearing, he denied ever having told Davis that he killed anyone. (R.pp. 5854-55 ["I know him as Crab. I don't know him by his real name. . . . I remember seeing his face but I ain't never told him I killed nobody."]). Petitioner gives great weight to Cummings' testimony that he would have called Richardson as a witness if he had been provided the Sam Memo. See Petition, p. 52 (quoting R.p. 7069); Response, p. 13. However, Richardson was not called as a witness at the PCR evidentiary hearing. Thus, it is unclear what his testimony would have been. Moreover, even assuming that Richardson's testimony would have been consistent with his memo, had counsel attempted to question Richardson about the information included in the Sam Memo, presumably that would have been objected to as hearsay, absent some denial by Davis at trial that he told Richardson that information. See Rule 801(c) & (d)(1), SCRE [defining hearsay and identifying a prior

inconsistent statement by a witness as "not hearsay"]. Thus, it seems that in order for Richardson to have testified to the information in his memo, trial counsel would have had to present Davis as a witness, and Davis would have had to deny telling Sam the information recorded in the memo. As already discussed above, Davis' testimony was particularly detrimental to Petitioner's case because it not only did not support that Gadson was the shooter, but instead implicated Petitioner in trying to create evidence to shift blame from himself. Therefore, based on the information provided to the PCR court, it was not unreasonable for the court to conclude that the Sam Memo was not material under the standard set forth by Brady. Strickler, 52 U.S. at 280 [Evidence is "material" if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the trial would have been different].

Failure to Disclose Gadson's Mental Health Report

Petitioner also claims that the State committed a Brady violation by failing to provide the defense team with a copy of a report detailing a psychiatric evaluation of Gadson that was prepared pursuant to a court order. The PCR court found that there was no Brady violation for a number of reasons—(1) trial counsel could have obtained the psychiatric report through other means, (2) the psychiatric report was not favorable, and (3) the psychiatric report was not material. (R.pp. 9831-32). Petitioner disagrees with all of the reasons provided by the PCR court. Petition, pp. 53-54.

In a footnote, Petitioner asserts that the PCR court incorrectly stated the law when it found that he failed to meet his burden under Brady because trial counsel could have obtained the psychiatric report by other means. Petitioner relies upon the following excerpt from Kyles v. Whitley:

> [T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation . . . , the prosecution's responsibility for failing to disclose known, favorable evidence rising

to a material level of importance is inescapable.

514 U.S. at 437-38. In his response to the motion for summary judgment, Petitioner asserts that "[c]ontrary to the PCR court's order, the Supreme Court has never embraced a rule that the prosecution has no obligation to produce evidence otherwise available to defense counsel." Response, p. 15. However, the applicable standard is not whether the Supreme Court has *embraced* the reasoning employed by a state court, but whether the decision by a state court "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). While Petitioner believes it is contrary to Supreme Court precedent to reason that Brady is not violated where defense counsel could have obtained information by other means, Petitioner had not identified a case that specifically addresses that issue. Cf. United States v. Agurs, 427 U.S. 97, 109 n. 16 (1976) [footnoting a concurring opinion by Justice Fortas that states "This is not to say that convictions ought to be reversed on the ground that information merely repetitious, cumulative, or embellishing of facts otherwise known to the defense or presented to the court, or without importance to the defense for purposes of the preparation of the case or for trial was not disclosed to defense counsel" (quoting Giles v. Maryland, 386 U.S. 66, 98 (1967) (J. Fortas, concurring))].

Indeed, other circuits have recognized that evidence is not "suppressed" where it is otherwise available to a defendant, with the PCR court specifically relying upon one such case from the Fourth Circuit. See (R.pp. 9830-31 (quoting United States v. Kelly, 35 F.3d 929, 937 (4th Cir. 1994) ["[T]he Brady rule does not apply if the evidence in question is available to the defendant from other sources; thus, when defense counsel could have discovered the evidence through reasonable diligence, there is no Brady violation if the government fails to produce it." (internal quotations

omitted)])). While Petitioner faults the PCR court for relying on a case decided prior to the Supreme Court's 1995 opinion in Kyles v. Whitley; see Response, p. 15; the Fourth Circuit as well as other federal courts of appeals have applied the same reasoning post-Kyles. See United States v. Graham, 484 F.3d 413, 417 (6th Cir. 2007) ["'Brady is concerned only with cases in which the government possesses information which the defendant does not. Further, there is no Brady violation if the defendant knew or should have known the essential facts permitting him to take advantage of the information in question, or if the information was available to him from another source.'" (quoting Carter v. Bell, 218 F.3d 581, 601 (6th Cir. 2000))]; Ienco v. Angarone, 429 F.3d 680, 683 (7th Cir. 2005) ["Evidence is suppressed for Brady purposes when (1) the prosecution failed to disclose the evidence in time for the defendant to make use of it, and (2) the evidence was not otherwise available to the defendant through the exercise of reasonable diligence." (citing United States v. O'Hara, 301 F.3d 563, 569 (7th Cir. 2002))]; Fullwood v. Lee, 290 F.3d 663, 686 (4th Cir. 2002) ["The Brady rule 'does not compel the disclosure of evidence available to the defendant from other sources, including diligent investigation by the defense.' Thus, '[n]ondisclosure . . . does not denote that no exculpatory evidence exists, but that the government possesses no exculpatory evidence that would be unavailable to a reasonably diligent defendant.' (internal citations omitted)]. Petitioner has failed to establish that the PCR court's conclusion is either contrary to or an unreasonable application of the law as set forth by the Supreme Court as to whether the psychiatric report was suppressed.

Petitioner additionally disagrees with the PCR court's conclusion that the information in the psychiatric report was not favorable. See Response, p. 16. The PCR court rejected Petitioner's Brady claim, in part, based on a finding that Petitioner failed to show that the psychiatric report was impeaching or favorable since "the report [did] not call into question Gadson's short and long term

memory[,]" and "the report [did] not indicate that Gadson suffered from any mental illness other than cannabis dependence." (R.pp. 9831-32). Ultimately, the PCR court concluded that "[s]ince there was no indication that Gadson suffered from any type of memory impairment that would have affected his ability to recall what occurred in this case, the report would have had no impeachment value in that regard." (R.p. 9832). However, as noted, Gadson was diagnosed as having Cannabis Dependence in the psychiatric report. (See R.p. 9051). Additionally, there was information in the psychiatric report that Gadson reported "that he hears a voice and 'a little beeping noise.'" (Id.) The order of dismissal does not acknowledge the impeachment value of such information, choosing instead to focus on whether there was information in the psychiatric report regarding Gadson's ability to recall the murder. (See R.pp. 9831-32). However, the Supreme Court has not placed such strict limits on what can be considered impeachment evidence. Cf. Giglio v. United States, 405 U.S. 150, 154 (1972) ["When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule." (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959))]. Indeed, later in the order of dismissal, the PCR court seems to recognize that there was at least some impeachment value to the psychiatric report. (R.p. 9834 [comparing "the *limited* impeachment value of Gadson's psychiatric report [to] the overall strength of the case against Applicant . . . ."]) (emphasis added). Again, the order of dismissal seems to conflate the favorability and materiality requirements of Brady. Accordingly, the undersigned agrees with the Petitioner that the PCR court incorrectly found that the psychiatric report was not favorable or impeaching. Even so, as the evidence was not suppressed (see, discussion, supra), this finding does not afford Petitioner any relief.

Finally, Petitioner argues that the PCR court erroneously found that the information

in the psychiatric report was not material. The order of dismissal notes that the "report does not indicate that Gadson suffered any memory issues as a result of his seizures." (R.p. 9832). Furthermore, after comparing the overwhelming evidence of Petitioner's guilt to the "limited impeachment value" of the psychiatric report, the PCR court concluded that Petitioner "failed to prove by a preponderance of the evidence that the confidence in the verdicts in this case was undermined by the nondisclosure of Gadson's psychiatric report." (R.p. 9834). The undersigned cannot say that the PCR court's decision is based on unreasonable factual findings or is contrary to or an unreasonable application of federal law. Evans, 220 F.3d at 311-312 ["We . . . accord state court factual findings a presumption of correctness that can be rebutted only by clear and convincing evidence."]. Petitioner asserts that "[h]ad the jury heard that [Gadson] had memory problems, blackouts, heard voices and beeping noises, it would have undermined Gadson's credibility." Petition, p. 54. However, while a cross-examination that explored Gadson's statements during his psychiatric evaluation may have impacted the jury's view on his credibility,[14] it was not unreasonable for the PCR court to describe the impeachment value of the psychiatric report as "limited." As the PCR court noted, there was no evidence that Gadson had used marijuana the day of the murder or that he had blacked out or had a seizure that day. (See R.p. 9832). There were also no issues with Gadson's long- or short-term memory according to the psychiatric report. (R.p. 9051). Moreover, there is no support for Petitioner's claim that the psychiatric report "would have supported a defense theory that Gadson was the murderer." See Petition, p. 54. Petitioner has therefore failed to show that the PCR court unreasonably found that there was no reasonable probability that the result of the

[14] As Gadson was not asked about the information in the psychiatric report during his PCR testimony, the undersigned can only hypothesize that he would have agreed with the information therein.

proceeding would have been different had Petitioner's counsel had the information in Gadson's psychiatric report.

In sum, while the PCR court incorrectly found the psychiatric report as having no favorable or impeaching information, the other findings by the PCR court were not based on unreasonable factual findings and were not contrary to or based on an unreasonable application of federal law. Those other findings—that the report was not suppressed because it was available to the defense and that the report was not material—bar relief on this Brady claim. Hence, Petitioner has failed to show that he is entitled to relief.

Failure to Disclose Johnson's Pending Charges

Petitioner also claims that the State committed a Brady violation when it failed to disclose Hiram Johnson's charges of receiving stolen goods less than $1000, burglary – second degree, and grand larceny, which were all pending at the time of Petitioner's trial. Petition, pp. 54-57. The PCR court rejected that argument, finding that Petitioner failed to establish materiality; first, due to the overwhelming evidence of Petitioner's guilt and, second, due to the limited value of the impeachment evidence. (See R.pp. 9864-65). Petitioner argues that the United States Supreme Court has disapproved the approach used by the PCR court. Petition, p. 56. However, the case cited by Petitioner, Holmes v. South Carolina, 547 U.S. 319 (2006), does not concern a Brady violation. Instead, in that case the Supreme Court considered "whether a criminal defendant's federal constitutional rights are violated by an evidence rule under which the defendant may not introduce proof of third-party guilt if the prosecution had introduced evidence that, if believed, strongly supports a guilty verdict." 547 U.S. at 321. Petitioner fails to articulate how the PCR court's order is contrary to Holmes, and it is not otherwise apparent as the Supreme Court does not discuss either

Brady or Strickland in that opinion. While, in Holmes, the Court stated "that, by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt[,]" 547 U.S. at 331, it does not appear that the PCR court took such an approach in this case. Rather, the PCR court specifically found that "[i]n light of the overwhelming evidence of Applicant's guilt in this case, coupled with the limited impact of an impeachment on the suppressed charges, Applicant has failed to establish this Brady claim." (R.p. 9865). Thus, the PCR court compared the strength of the State's case with the limited value of the impeachment information in determining materiality. As such, and contrary to Petitioner's argument, the PCR court's approach appears to comport with the Supreme Court's guidance on how courts should determine materiality. See United States v. Bagley, 473 U.S. at 682 ["We find the Strickland formulation of the Agurs test for materiality sufficiently flexible to cover the 'no request,' 'general request,' and 'specific request' cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."].

Petitioner disagrees with the PCR court's assessment of the impeachment evidence as having limited value and highlights the Solicitor's closing arguments where he mentioned that Johnson lacked any reason for bias. See Petition, p. 56 (quoting R.p. 4474 ["You hadn't heard any testimony about Hiram Johnson having any kind of charge against him or any kind of a deal with the State, any reason to say something wasn't true."]). However, Petitioner has failed to show by clear and convincing evidence that the PCR court's determination was based on unreasonable factual

findings, particularly in light of the extensive and varied evidence of guilt, which was provided through multiple witnesses. See supra, n. 10.

Cumulative Effect of Failures to Disclose

Finally, Petitioner asserts that the PCR court should have considered the materiality of the suppressed evidence collectively in accordance with the Supreme Court's jurisprudence on Brady violations. However, during the PCR action Petitioner did not object to the PCR court's findings based on a failure to consider the alleged Brady violations cumulatively. (See R.pp. 9951-68). Although Respondents have not addressed this argument or whether it is procedurally barred in their Return (see Return, pp. 80-90), based on the PCR court's findings, the Sam Memo and the psychiatric report were not suppressed favorable evidence, even if the information contained within those documents was material. With the PCR court determining that other necessary elements of a Brady violation were not met for both of those documents, it was not necessary for the PCR court to consider the materiality of such evidence along with the details about Johnson's criminal charges. Cf. Fisher, 163 F.3d at 852 ["Having just determined that none of counsel's actions could be considered constitutional error, . . . it would be odd, to say the least, to say that those same actions, when considered collectively, deprived [the defendant] of a fair trial." (internal citations omitted)].

Furthermore, the undersigned would note that Petitioner has overstated the effect of the evidence. For example, there is no support in the record for Petitioner's allegation that "[t]he state suppressed the fact that its star witness had confessed to a police investigator." Petition, p. 57. Rather, Ricky Davis, who did not testify for the State, and who trial counsel elected not to call because his testimony was ultimately detrimental to Petitioner, told a police investigator that Gadson had confessed to him while the two men were incarcerated. As discussed above, neither Gadson's

nor Davis' testimony at the PCR evidentiary supported the fact that such a confession had ever occurred. Therefore, even when considered collectively, the effect of the evidence that could have been presented is not enough that it creates a reasonable probability that the outcome of the trial would have been different.

For all of the foregoing reasons, Petitioner has failed to show that he is entitled to habeas relief as to any of the various Brady violation allegations he raises in his petition. Accordingly, he is not entitled to relief on his Ground Four.

V.

(Ground Five: Alleged Conflict of Interest)

In Ground Five, Petitioner asserts that he received ineffective assistance of counsel because trial counsel Hardee-Thomas represented Petitioner even though she had a conflict of interest. Specifically, Petitioner believes that Hardee-Thomas represented both him and Davis at the same time, and that she failed to call Davis as a witness at trial due to the conflict of interest created by her simultaneous representation of the two. The PCR court found that Petitioner failed to establish that Hardee-Thomas represented Petitioner while under an actual conflict of interest (see R.pp. 9876-81), and the Petition fails to identify how the PCR order of dismissal reflects either unreasonable factual findings or an unreasonable application of Supreme Court law.

In his Petition, Petitioner argues generally that "[t]he PCR court erred in determining that the actual conflict of interest of Petitioner's Bowman's co-trial counsel, Marva Hardee-Thomas did not amount to ineffective assistance of counsel." Petition, p. 58. In seeking summary judgment on this claim, Respondents assert that "Petitioner's claim is wholly without merit", as the PCR court's order "is reasonable as to both law and fact . . . ." Return, p. 90. Significantly, Petitioner did not

respond to the motion for summary judgment as to this ground. See Eady v. Veolia Transp. Servs., Inc., 609 F. Supp. 2d 540, 560-61 (D.S.C. 2009) ["The failure of a party to address an issue raised in summary judgment may be considered a waiver or abandonment of the relevant cause of action." (citations omitted)]. Even so, he has also not specifically abandoned this claim. Therefore, out of an abundance of caution, the undersigned has considered and addressed Petitioner's Ground Five below.

It is well-established that the Sixth Amendment guarantees a criminal defendant the effective assistance of counsel. Strickland, 466 U.S. at 685-86. To provide effective assistance, counsel should be free from conflicts that will hinder their representation and ultimately prejudice their clients. However, the United States Supreme Court has also held "that the possibility of a conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). Further, "until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Id. In contrast to the normal burden under Strickland, however, in which a defendant must show both deficiency and prejudice, "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not [also] demonstrate prejudice in order to obtain relief." Id. at 349-50.

The PCR court found that Petitioner failed to show an actual conflict of interest. The record reflects that Hardee-Thomas had initially been appointed to represent Davis on April 23, 2001, on two armed robbery charges. (R.p.9876). On October 16, 2001, Davis was tried by a jury and convicted of one count of armed robbery, and on October 18, 2001, the second count of armed

robbery was nol prossed by the State with a right to restore (apparently because the victim of that armed robbery could not be located). (R.pp. 9876-77). The PCR court found that Hardee-Thomas's representation of Davis thereafter concluded on October 24, 2001, when she filed a Notice of Appeal on Davis's behalf. (R.pp. 9877-79). Therefore, according to the PCR court,

> [W]hen counsel was presumably made aware that Davis had written a statement regarding Bowman's case on or around January 2, 2002, she did not represent Ricky Davis. At that point, she owed no duty to Ricky Davis other than to maintain his confidences from her representation of him on the two armed robbery charges. Since there was not a potential conflict of interest, Hardee-Thomas was not obligated to obtain a waiver from either Bowman or Davis.

(R.p. 9879). The PCR court further concluded that even if there was a potential conflict of interest, it never developed into an actual conflict of interest because Petitioner's interests and Davis's interests were never adverse. (Id.) Moreover, the PCR court also determined that Petitioner had failed to meet his burden of establishing that trial counsel did not call Davis as a witness due to a conflict of interest, noting its earlier finding that "the credible evidence disclose[d] a reasonable strategic decision that Davis was not a reliable witness and his testimony was likely to be damaging to Applicant's case." (R.pp. 9880-81).

Petitioner disagrees with the PCR court's finding that, at the time trial counsel learned about Davis's statement, Hardee-Thomas no longer actively represented Davis. Petitioner argues that Hardee-Thomas's "obligations to Davis did not cease because the solicitor certainly retained discretion on whether to recharge Davis for the matter that was *nol prossed*." Petition, p. 61. However, Petitioner cites no authority for that statement,[15] while the PCR court addressed the

[15] Petitioner later cites the South Carolina case of Mackey v. State, 595 S.E.2d 241, 242 (S.C. 2004), for the proposition that there is no bar to a charge that is nol prossed being pursued at a later time, as long as the nolle prosequi is entered prior to the jury being sworn. See Petition, p. 62. (continued...)

argument that Davis' nol prossed charge could be reinstated as follows:

> Applicant presented no evidence to show that the solicitor's office either used the nolle prossed indictment in such a fashion or that it could. Clearly, the disposition sheet on Ricky Davis' nolle prossed charge indicates that the case was dismissed because the State could not find the victim. **{Applicant's 22}.** There was no evidence presented at the PCR hearing that circumstances had changed, or that the solicitor's office was in a position to re-present the indictment to the grand jury.

(R.p. 9880). There is also support in the record for the PCR court's finding that Hardee-Thomas's active representation of Davis concluded as of the date she filed the notice of appeal. For example, Hardee-Thomas testified that even if the armed robbery charge were to be restored within a few months of the time it was nol prossed, another public defender could be assigned to the case. (R.p. 7287). Petitioner has failed to show by clear and convincing evidence that the PCR court's conclusion that Hardee-Thomas's representation of Davis concluded on October 24, 2001 was based on unreasonable factual findings.

Petitioner's argument that Hardee-Thomas had an actual conflict of interest that adversely affected her performance is predicated on his belief that Hardee-Thomas decided not to call Davis as a witness due to her prior representation of Davis. However, Petitioner offers no probative facts or evidence to support that belief. Indeed, Petitioner ignores the evidence presented at the evidentiary hearing, which was found credible by the PCR court, that Davis was not called as a witness because his statement that Gadson confessed to killing the victim was not credible. (See

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[15](...continued)
However, the issue is not whether the dismissed charge could be pursued at some later date. Indeed, the PCR court recognized during the hearing that "almost any of them could restore. They could always go back to the grand jury. If they didn't say leave to restore they could go back to the grand jury." (R.p. 7287). Rather, the issue is what obligations Hardee-Thomas owed to Davis after his charge was nol prossed, and whether her responsibilities to Davis were directly adverse to her responsibilities to Petitioner at the time she represented Petitioner.

R.pp. 9880-81). The PCR court also cited Cummings' testimony that Davis was not a credible witness. (See id. (citing R.pp. 7065 ["[W]e sent Mr. Walter Mitchell up there to go check with Ricky Davis and Ricky Davis denied his signature, denied giving the statement."], 7625-26 [Cummings testifying that the defense investigator told counsel "It's not going to do us any good" to call Davis and, further, Cummings agreeing with the statement "[y]ou ultimately made the strategic decision it was not worth it to call Ricky Davis"], 7632-33)). Hardee-Thomas also confirmed in her testimony that it was Cummings who made the decision not to call Davis. When asked if she had any strategic reason for not calling Davis, she responded, "I don't. That would be something for the . . . head person in the death penalty case on the defense side, Norbert Cummings." (R.p. 7302). Petitioner has failed to rebut the presumption of correctness by clear and convincing evidence. Therefore, the PCR court's factual findings underlying the conclusion that trial counsel reasonably decided not to call Davis are entitled to deference in this case. See 28 U.S.C. § 2254(d)(1).

Finally, it is noted that much of Petitioner's argument that Hardee-Thomas had an actual conflict of interest is based upon speculation and reliance on isolated statements from the state court record without regard to the full context of those statements. However, the United States Supreme Court has made clear that "'an actual conflict of interest' mean[s] precisely a conflict *that affected counsel's performance*—as opposed to a mere theoretical division of loyalties." Mickens v. Taylor, 535 U.S. 162, 171 (2002). While Petitioner speculates that Hardee-Thomas "likely felt that there was a potential for retribution if Davis was called" (Petition, p. 63), that statement is wholly unsupported by the record. Indeed, Hardee-Thomas testified that Cummings must have made the decision about whether to call Davis because she did not make the decision. (R.p. 7303). Petitioner's arguments also detail a theoretical division of loyalties, which appears to be based primarily on

speculation, as opposed to trial counsel's testimony as to why Davis was not called as a witness. However, the PCR court found "[t]here was no probative evidence at trial that indicated that any potential conflict of interest played a role in the decision making process." (R.p. 9881).

Petitioner has failed to show that the PCR court's conclusion was the result of either unreasonable factual findings or an unreasonable application of Supreme Court law. Therefore, he has failed to meet his burden under 28 U.S.C. § 2254 as to Ground Five, and this claim should be dismissed.

VI.

(Ground Six: Alleged Ineffective Assistance of Trial Counsel for Failure to Object to Prison Conditions Evidence)

In Petitioner's Ground Six, he argues that trial counsel was ineffective for failing to object to testimony elicited by the State from one of Petitioner's expert witnesses during his mitigation presentation. That testimony was given by James Aiken, a prison adaptability expert, and it concerned prison conditions and other aspects of prison life, which Petitioner argues was inadmissible. The PCR court considered and rejected Petitioner's claim of ineffective assistance of counsel, and the same issue was considered by the South Carolina Supreme Court on appeal, which found no deficiency and no prejudice. Petitioner asserts that the court's rejection of his claim is based on unreasonable factual findings and an unreasonable application of federal law.

The South Carolina Supreme Court issued a very thorough and well-reasoned opinion on this issue. The Court began by summarizing the evidence presented during the guilt phase of Petitioner's trial regarding the victim's murder and Petitioner's involvement. Bowman, 809 S.E.2d at 234-37. The Court then described the evidence presented during the sentencing phase of Petitioner's trial. Id. at 237-39. The Court went into great detail about Aiken's testimony:

Aiken opined that Petitioner had adjusted well to prison in the past, and relayed the security measures at correctional facilities—including gun towers, fences, bars, concrete structures, constant supervision, and no possibility of parole. Aiken did not believe Petitioner would pose a risk of future dangerousness. On cross-examination, the Solicitor elicited testimony from Aiken about the various levels of security that exist within a prison environment (i.e. minimum, medium, maximum, and "super max") and that inmates may be assigned to less restrictive environments within prison as an incentive for their good behavior. Aiken acknowledged that while in prison, Petitioner would have the ability to move within the facility, including to perform work duties and access secure outdoor recreation areas; however, Aiken explained that, due to the seriousness of the offense of which Petitioner had been convicted, he would never be eligible for work release and would never be permitted to leave the prison facility.

In response to the Solicitor's question regarding what incentive Petitioner would have to follow the rules, Aiken explained,

> The incentive that he has is . . . that the management of that prison system has authority to ensure that his behavior is appropriate. And that's anywhere from sanctioning him . . . [to] using lethal force against that individual . . . We are not in the business of motivation when you deal with a life without parole [sentence]. Our business is incapacitation. We're not preparing you to go anywhere. You're going to stay with us as long as you are breathing, so we're not talking about trying to prepare you for anything. What we're talking about is that we do a good job of keeping you behind bars and behind fences and in gun towers for the remainder of your life.

On redirect examination by defense counsel, Aiken gave a more detailed description of super max confinement and testified that Petitioner would not be going to "kiddy camp" or a place where he would be "mollycoddled" or have "picnic lunches outside the gate." Aiken explained that all inmates are expected to work to perform cheap labor to reduce the burden on taxpayers and repay society and reiterated, "I don't care how well he does, he will never get out of that prison." Nevertheless, Aiken explained that Petitioner could salvage the rest of his young life and have some redeeming qualities.

On re-cross, the Solicitor attempted to elicit information about how often inmates generally escape from prison, but defense counsel's objections to this irrelevant evidence was sustained. Following a curative charge by the judge as to the escape question, the Solicitor elicited from Aiken testimony about general prison conditions, asking "what is he adapting to, what is going on there?" Aiken described the daily routine an inmate would likely have including going to work, eating meals, and sleeping, cautioning "you have to understand that this is in a prison environment

and this is not in a community environment . . . . It's just like the police being in your home and writing you up for any violation." Aiken explained that inmates are under 24-hour supervision and inmates are cited for administrative violations such as speaking too loudly, being disrespectful, or disobeying a direct order. Then the Solicitor asked:

Q. And are there recreational facilities available?

A. Yes, sir.

Q. What type of recreational facilities?

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

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

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

Q. Are there movies they can watch?

A. Yes, sir.

Q. Television?

A. In some instances, yes, sir.

Q. Softball, do they play softball?

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

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

It is counsel's failure to object to this particular prison-conditions exchange upon which Petitioner's ineffective assistance of counsel claim is based.

Id. at 238-39.

The South Carolina Supreme Court then discussed the Strickland standard and the following

considerations:

> At the intersection of Petitioner's claims, we find three factors present. First, we acknowledge the wide path extended to a capital defendant to introduce mitigation evidence pursuant to the Eighth Amendment to the United States Constitution.
>
> Second, we must recognize our state law that draws a sharp admissibility dividing line between prison adaptability evidence and general prison condition evidence. Third, we must consider the practical, strategy decisions made by trial counsel.

Id. at 239.

The Court then summarized parts of Cummings' testimony from the PCR evidentiary hearing that were relevant to his decision-making regarding the presentation of Aiken as a witness and his handling of the prison conditions evidence elicited during trial. Id. at 240-41. In particular, the Court noted that

> Counsel explained that he put James Aiken on the stand to show that there were sufficient security measures in prison such that Petitioner would never pose a threat to society again if Petitioner did not receive the death penalty. Counsel stated that the strategy was to show the jury that "this is going to be so horrible the rest of his life that this is going to be sufficient punishment and you don't have to give him death."

Id. at 240. The Court also referenced Cummings' PCR testimony that he had considered what testimony the Solicitor might elicit in response to Aiken's testimony that prison was a horrible environment, but he believed the trade-off was worth it. See id. Cummings had further noted that, at the time of Petitioner's trial, the law had changed and "life without parole charges were mandatory in every death penalty case, so we're kind of on the frontier in dealing with that and how it could be litigated and used by both the State and the defense in the sentencing phase of the capital trial." Id. The Court noted that the PCR court had found trial counsel's strategy to be reasonable. Id. at 241.

The South Carolina Supreme Court then went into a very in depth analysis of "the

constitutional framework surrounding the admissibility of mitigating evidence in the sentencing phase of a capital case." Id. Following various citations to Supreme Court precedent, the Court summarized, "In short, the Eighth Amendment demands that a capital defendant be given wide latitude to present any relevant evidence of potentially mitigating value that might convince the jury to impose a sentence of life in prison instead of death." Id. However, the Court further acknowledged a particular facet of South Carolina law—"the unique distinction South Carolina jurisprudence has drawn between evidence of prison adaptability, which we have held is relevant and admissible, and evidence of general prison conditions, which we have held is not." Id. The Court explained, "The rationale we have offered for excluding evidence of general prison conditions is that it does not 'bear on a defendant's character, prior record, or the circumstances of his offense.'" Id. (quoting State v. Koon, 298 S.E.2d 769, 774 (S.C. 1982) [affirming the exclusion of evidence of future adaptability to prison life as irrelevant to the jury's sentencing determination], abrogated by Skipper v. South Carolina, 476 U.S. 1 (1986) [holding evidence of adjustability to life in prison in constitutionally relevant], as recognized by Chaffee v. State, 362 S.E.2d 875, 877 (S.C. 1987)).

The South Carolina Supreme Court recognized the fine line between what is constitutionally required and what state law had deemed inadmissible, noting "the United States Supreme Court has characterized this distinction as 'elusive' and stated its precise meaning and practical significance' are 'difficult to assess,' [yet] we have nevertheless clung to this division." Id. at 242 (quoting Skipper, 476 U.S. at 7). The Court explained that the State's general exclusion of prison conditions evidence was rooted in United States Supreme Court precedent requiring that capital sentencing schemes be designed to avoid the death penalty being administered in an arbitrary or unpredictable manner. See id. 242-43. However, the United States Supreme Court itself had not

created such boundaries around what was admissible in the sentencing phase of a capital trial. See id. For example, as the South Carolina Supreme Court noted in the Bowman opinion,

> [T]he Court flatly rejected a challenge to the "wide scope of evidence and argument allowed" during the sentencing phase and found "[s]o long as the evidence introduced and the arguments made at the [sentencing] hearing do not prejudice a defendant, it is preferable not to impose restrictions. *We think it is desirable for the jury to have as much information before it as possible when it makes the sentencing decision*." Gregg [v. Georgia, 428 U.S. 153,] 203-04 (emphasis added).
>
> Thus, the character of the defendant and the circumstances of the crime are certainly a part of the individualized sentencing hearing the Eighth Amendment demands. However, there is nothing in the constitution or federal jurisprudence that forbids the consideration of anything which might serve as a mitigating circumstance. Skipper, 476 U.S. at 4 ("[T]he sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence" (emphasis added)); Caldwell v. Mississippi, 472 U.S. 320, 330-31 (1985) (observing a capital defendant has a constitutional right to the consideration of "'those compassionate or mitigating factors stemming from the diverse frailties of humankind,'" including a plea for mercy (quoting Woodson [v. North Carolina, 428 U.S. 280,] 304)).

Id. at 243. After reviewing United States Supreme Court jurisprudence, the South Carolina Supreme Court reaffirmed the distinction that had been made under state law rendering evidence of prison conditions inadmissible. Id. Nevertheless, the Court recognized that the general rule was not without exception, particularly to the extent that evidence of general prison conditions was intertwined with some other evidence that a defendant was constitutionally permitted to present. Id.

Finally, the South Carolina Supreme Court reviewed the PCR court's determination as to both prongs of Strickland. The Court noted that under state law "'otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence.'" Id. (quoting State v. Page, 663 S.E.2d 357, 360 (S.C. Ct. App. 2008) (citations omitted)). If such evidence is presented by a solicitor once the door is opened by the defendant, then the presentation of that evidence is considered an invited response and is appropriate unless it unfairly prejudices a

defendant. Id. at 243-44. Furthermore, according to the South Carolina Supreme Court, defense counsel is not deficient for failing to object to the evidence unless the solicitor's response is inappropriate or unfairly prejudicial. Id. The Court ultimately affirmed the PCR court's determination that trial counsel was not deficient, noting

> While we acknowledge that a close question is presented, in light of the state of the law at the time of Petitioner's trial and the narrowly tailored scope of the prison conditions evidence elicited, we find there is evidence in the record to support the PCR court's finding. There is evidence that counsel articulated a valid reason for employing this strategy, and because the State's response was proportional and confined to the topics to which counsel had opened the door, we affirm the finding that counsel was not deficient in failing to object to the State's line of questioning.

Id. at 244 (citations omitted).

The Court also chose to examine prejudice since there was some overlap between the deficiency and prejudice prongs in Petitioner's case. Id. at 245 ["Indeed, woven into the PCR court's finding of no deficient representation is counsel's calculus of the potential benefits and risks associated with his strategic decision."]. The Court clarified an issue of state law regarding whether a harmless error analysis was appropriate when an arbitrary factor had been introduced to the jury, and holding that it was, the Court then turned to whether any prejudice resulted from the introduction of prison conditions evidence in Petitioner's case. Id. at 245-46. The Court concluded as follows:

> [T]he PCR court found there was "no reasonable probability of a different result if a few pages of questioning on this issue during a multi-day sentencing hearing had been excluded." We agree. See Franklin v. Catoe, 552 S.E.2d 718 (2001) (finding ineffective assistance of counsel claims based on statutory violations in capital sentencing procedures are subject to both the deficiency and the prejudice prongs of the Strickland analysis). Because the evidence of guilt and aggravating factors is overwhelming,[FN] there is ample evidence to support the PCR court's determination that Petitioner failed to establish prejudice. Cf. Humphries v. State, 570 S.E.2d 160, 168 (2002) (finding petitioner was not prejudiced by solicitor's improper comments in the sentencing phase of a capital murder trial where there was strong evidence of guilt and the petitioner presented a full mitigation case).

> [FN] The facts of the crime are especially heinous, as described above. Evidence pointing to Petitioner as the murderer was overwhelming, including eyewitness testimony and other evidence linking Petitioner to the murder and arson.

Id. at 246.

Petitioner suggests that federal law prohibits the sort of prison conditions evidence that was elicited by the State in this action. See Petition, pp. 73-74. However, while he cites to cases which indicate that a death sentence should be "based on factors related to the offender as an individual including the background, character, mental state, and the crime itself[,]" id. at 73, he fails to identify any Supreme Court precedent that specifically forbids evidence, such as prison conditions, in the sentencing phase of a capital trial. As discussed in detail in the South Carolina Supreme Court's decision, United States Supreme Court precedent seems to favor few restrictions on the evidence that can be introduced to a jury during a capital sentencing phase, leaving the decision as to what is inadmissible largely up to the states. See Bowman, 809 S.E.2d at 243 (quoting Gregg, 428 U.S. at 203-04 ["[S]o long as the evidence introduced and the arguments made at the [sentencing] hearing do not prejudice a defendant, it is preferable not to impose restrictions. *We think it is desirable for the jury to have as much information before it as possible when it makes the sentencing decision.*" (emphasis added)]).

As Petitioner correctly notes, and as the State Supreme Court addressed in the PCR appeal, South Carolina law did prohibit prison conditions evidence from being introduced during the sentencing phase of a capital trial when Petitioner's case was tried. See id. at 244. However, state case law also indicated that the admission of such inadmissible evidence was not reversible error where defense counsel had opened the door to its introduction. See id. (citing State v. Plath, 313 S.E.2d 619, 627-28). Furthermore, in January 2002, just a few months before Petitioner's trial began,

the United States Supreme Court had decided Kelly v. South Carolina, 534 U.S. 246 (2002), holding that due process required that a jury in a capital case must be informed that a life sentence meant life without parole. The South Carolina Supreme Court took into account the state of the law—both state and federal—when it found that trial counsel was not deficient in failing to object to the State's line of questioning regarding prison conditions. Bowman, 809 S.E.2d at 245.

Petitioner compares trial counsel's actions in this case to those of trial counsel in State v. Burkhart, 640 S.E.2d 450 (S.C. 2007), asserting as follows:

> In 2000, prior to Petitioner's trial, and before the decision in Petitioner's direct appeal, trial counsel for Troy Alan Burkhart objected to favorable prison conditions evidence presented during the penalty phase of Burkhart's capital trial. The trial judge overruled the objection and Burkhart was convicted and sentenced to death. On direct appeal, the South Carolina Supreme Court stated in no uncertain terms that "[w]e have *long held* that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime." State v. Burkhart, 640 S.E.2d 450, 453 (S.C. 2007) (emphasis added) (citing State v. Copeland, 300 S.E.2d 63 (S.C. 1982)). Despite the fact that the case was tried before the ruling in Bowman I, the court applied its reasoning "because it is consistent with *our long-standing rule*" and held that "evidence of general prison conditions" was inadmissible. Burkhart, 640 S.E.2d at 453 (emphasis added). Because Burkhart's trial attorneys properly understood South Carolina law and objected to the admission of prison condition evidence, the Supreme Court reversed Burkhart's death sentence. See Burkhart, 640 S.E.2d at 453 ("Here, unlike Bowman, appellant objected to the State's evidence regarding general prison conditions."). Burkhart was subsequently resentenced to life imprisonment.

Response, p. 19.[16] Essentially, Petitioner argues that Burkhart's trial counsel were not deficient

[16] It is noted that the timeline Petitioner has presented of his and Burkhart's trials is incorrect. Burkhart was initially tried and sentenced to death in March 2000, and his convictions and sentences were overturned in June 2002 based on an error in the jury instructions during the guilt phase. See State v. Burkhart, 565 S.E.2d 298 (S.C. 2002). Petitioner was tried, convicted, and sentenced to death in May 2002. See supra, pp. 2-3. Burkhart was retried in March 2004. See Burkhart, 640 S.E.2d 450. Petitioner's convictions and sentence were affirmed by the South Carolina Supreme Court in November 2005. Bowman, 623 S.E.2d 378. Thereafter, in January 2007, Burkhart's sentence was reversed, and his case was remanded for resentencing due to the improper introduction of prison (continued...)

because they objected to prison conditions evidence, while his own trial counsel were deficient for their failure to do so in light of the established law in South Carolina. However, that two sets of counsel handled an issue differently does not render one set's performance reasonable and one set's performance deficient. See Strickland, 466 U.S. at 689 ["There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."]. Furthermore, the South Carolina Supreme Court considered the state of the law at the time of Petitioner's trial—in particular, balancing the long-standing precedent set by state law with the potential that the landscape of the law might change—when it assessed trial counsel's performance. See Bowman, 809 S.E.2d at 243-45. While "acknowledg[ing] that a close question [was] presented . . . .", the Court ultimately affirmed the PCR court's finding of no deficiency. Id. at 244. The fact that Burkhart's counsel achieved a different outcome with a different strategy does not render Petitioner's trial counsel's strategy unreasonable.[17]

Petitioner further argues that "there is no reason trial counsel could not have objected even though they offered some evidence related to prison conditions." Response, p. 21. Again, this

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[16](...continued)
conditions evidence during the sentencing phase. See Burkhart, 640 S.E.2d 450. Petitioner's description of the timeline does not properly convey that Burkhart was tried twice—once before Petitioner's trial and once after Petitioner's trial—although both trials occurred prior to the decision in Petitioner's direct appeal.

[17] The undersigned additionally notes that, around the time of Petitioner's trial, counsel in other capital cases in South Carolina also did not object to favorable prison conditions evidence. See, e.g., Bryant v. Stirling, No. 13-2665, 2019 WL 1253235 at *30-*32 (D.S.C. Mar. 19, 2019) [indicating that state court found trial counsel were not deficient for failing to object to prison conditions evidence]. Again, the strategy employed by another set of counsel is not indicative of whether Petitioner's counsel provided effective representation. However, to the extent that Petitioner suggests his counsel were alone in believing the prison conditions evidence was not strictly prohibited based on the state the law, that is not the case.

suggested alternative strategy does not render trial counsel's performance constitutionally deficient. There's also no reason to believe that trial counsel would have been successful after first presenting evidence of prison conditions and then objecting when the State attempted to do the same. See Plath, 313 S.E.2d at 627 ["[D]efendants elected to enter the forbidden field of social policy and penology. It is neither surprising nor can it be deemed prejudicial that the State responded in kind, attempting to show through defendants' own witnesses that life imprisonment was not the total abyss which they portrayed it to be."]; see also Guarascio v. United States, 996 F. Supp. 2d 406, 412 (E.D.N.C. 2014) ["By definition, the Sixth Amendment does not require counsel to raise a meritless argument."]. Petitioner compares his situation to Burkhart, but it appears that, unlike in Petitioner's case, the State, not Burkhart, first introduced the prison conditions evidence to the jury. Burkhart, 640 S.E.2d 452-53. Thus, the comparison is not on all fours.

Finally, Petitioner asserts that the record contradicts the state court's finding that trial counsel had a strategy. Despite Cummings' testimony that it was part of his strategy to show that a sentence of life in prison was not a reward, (see R.pp. 7607-17), Petitioner believes that because Cummings did not ask about harsh prison conditions during his direct examination of Aiken, that was not actually the case. See Response, pp. 22-23. However, the PCR court found Cummings' testimony to be credible, (see R.pp. 9915-19), and Petitioner's own interpretation of the record is not enough to rebut the state court's factual findings. See 28 U.S.C. § 2254(e)(1) ["[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."]. Trial counsel could have always planned to make the point about prison being sufficient punishment after cross-examination, or trial counsel's strategy could have changed based on the nature of the State's cross-

examination. Furthermore, contrary to Petitioner's suggestion that Cummings asked only two questions about the harsh realities of prison life, Cummings asked more questions about the potential future that Petitioner faced if he were to receive a life sentence, and he highlighted that it was a particularly bleak outcome for a man as young as Petitioner. (See R.pp. 4865-67 [asking about super max, eliciting that Petitioner would "be around predator, dangerous, violent inmate population"]). Cummings also stressed that prison was not a reward during his closing arguments. (R.p. 4991, 4996-97). Therefore, for all of the above reasons, Petitioner has failed to show that the state court's decision on the deficiency prong of Strickland is contrary to, or an unreasonable application of, established Supreme Court precedent.

The Petition also takes issue with the South Carolina Supreme Court's determination that Petitioner was not prejudiced by the limited evidence regarding prison conditions that was admitted during the sentencing phase of Petitioner's trial. Petitioner's arguments rely primarily on speculation that the prison conditions evidence must have heavily factored into the jury's sentencing decision. See Petition, p. 74 ["[T]he jury surely would have considered whether it was appropriate to sentence Petitioner to a life where he could be paid for his work, and allowed recreational privileges. By sentencing petitioner to life in prison, the jury must have believed they would be 'rewarding' him with educational and work opportunities. It is hardly a leap to assert that this evidence and the solicitor's powerful argument capitalizing on it was a factor in at least one juror's decision to not choose a life sentence."]. However, the state court viewed the evidence differently, noting that the prison conditions evidence was limited in comparison to the entirety of evidence introduced during the sentencing hearing and, further, that "the evidence of guilt and aggravating factors [was] overwhelming." Bowman, 809 S.E.2d at 246. Petitioner's speculation is not clear and

convincing *evidence* to overcome the factual findings by the state court. See 28 U.S.C. § 2254(e)(1).

Petitioner also argues that "the state court asked the wrong question—whether the outcome of the trial (not the appeal) would have been different had trial counsel objected." Response, p. 23. Again, Petitioner compares his case to Burkhart's case, positing that if counsel had objected at his trial, then his appeal would have been granted like Burkhart's was. Id. However, Petitioner does not acknowledge that the posture of his counsel's objection would have been different from that of Burkhart's counsel's since the State was the first to introduce evidence of prison conditions in Burkhart's case, and it was Petitioner's own counsel who first introduced such evidence at his trial. While the South Carolina Supreme Court had cautioned counsel from both sides not to "enter the forbidden field of social policy and penology" in Plath, 313 S.E.2d at 627, that case also demonstrated that when defense counsel opens the door to such evidence, he could not also benefit by then arguing that the State introduced an arbitrary factor the jury, id. at 626-28. It is not evident that the outcome of Petitioner's trial would have been the same had trial counsel objected, and indeed, the South Carolina Supreme Court specifically referenced the concept of "opening the door" in its consideration of Petitioner's case. Bowman, 809 S.E.2d at 243-44.

Therefore, as outlined above, Petitioner has failed to show how the state court's finding on the prejudice prong of Strickland is either contrary to, or an unreasonable application of, clearly established federal law. For all of the above reasons, Petitioner has failed to meet his burden as to his Ground Six.

VII.

(No Ground Seven)

VIII.

(Ground Eight: Alleged Trial Court Error for Refusal to Instruct Jury as to Statutory Mitigating Circumstance)

In Ground Eight, Petitioner argues that the trial court erred in denying his request to instruct the jury as to the statutory mitigating circumstance of whether "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired." See S.C. Code Ann. 16-3-20(C)(b)(6); see also, Petition, pp. 76-77. Although the trial court's decision not to give that particular charge was affirmed by the South Carolina Supreme Court in Petitioner's direct appeal, Petitioner asserts that the state court's decision is the result of an unreasonable application of federal law and is based on unreasonable factual findings. Petition, p. 78. Respondents, on the other hand, assert that this ground is not cognizable because the issue raised to the state supreme court was solely a matter of state law. Return, p. 107. Moreover, to the extent a federal claim is raised, Respondents assert that it is procedurally barred. Id. Finally, because they contend that the state supreme court's decision was reasonable as to both law and fact, Respondents argue that Petitioner's Ground Eight is wholly without merit. Id. In his response in opposition to the motion for summary judgment, Petitioner does not respond to Respondents' arguments as to the cognizability or the procedural default of this ground.[18] See Eady, 609 F. Supp. 2d at 560-61 ["The failure of a party to address an issue raised in summary judgment may be considered a waiver or abandonment of the relevant cause of action." (citations omitted)].

[18] The petition itself only perfunctorily addresses the exhaustion of this claim, and it does not address the particular arguments raised in Respondents' return. See Petition, p. 78. Notably, Respondents made similar cognizability and procedural default arguments as to Petitioner's Ground Ten, which Petitioner did argue against in his response in opposition to the motion for summary judgment. See Response, pp. 25-27.

However, because he has not withdrawn this ground, out of an abundance of caution, the undersigned considers it below.[19]

In the Petition, Petitioner almost verbatim copies the argument he raised in his direct appeal concerning the trial court's refusal to charge the jury with the statutory mitigating circumstance in S.C. Code Ann. 16-3-20(C)(b)(6). See Petition, pp. 75-77; see also R.pp. 5448-50. He then adds a paragraph quoting the South Carolina Supreme Court's holding on this issue, and he includes the following paragraph:

> The trial court denied Petitioner's right to have the jury meaningfully consider the mitigation he offered in defense of his life. See Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982). The South Carolina Supreme Court unreasonably applied clearly established federal law as determined by the United States Supreme Court, and was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d)(1), (2).

Petition, p. 78.

However, the undersigned agrees with Respondents that the above issue—whether the trial court properly refused to give a particular jury charge—appears to be one of state, not federal, law. Generally speaking, claims of violation of state law are not cognizable on a petition for federal habeas corpus relief. Stuart v. Wilson, 442 F.3d 506, 513 n. 3 (6th Cir.2006)(citing Walker v. Engle, 703 F.2d 959, 962 (6th Cir.1983)); Estelle v. McGuire, 502 U.S. 62, 67–68, 112 S.Ct. 475, 116 L.Ed.2d

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[19]But compare, also Rodriguez-Reyes v. Molina-Rodriguez, 21 F. Supp. 3d 143, 145-46 (D.P.R. 2014):

> Due to plaintiffs' failure to engage in any type of legal discussion regarding defendants' insufficiency of the evidence argument, the Court is left "to do counsel's work, create the ossature for the argument, and put flesh on its bones." United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990). The Court declines to do so, not only because "judges are not expected to be mind-readers," id. at 17, but also because perfunctory arguments deserve little attention when a party engages in lazy lawyering.

385 (1991)["It is not the province of a federal habeas court to re-examine state-court determinations on state-law questions."]; Scott v. Jones, 915 F.2d 1188, 1190 (8th Cir.1990) [State law questions are not very often the basis of constitutional error under habeas review."]. Thus, this claim not cognizable in this action. See 28 U.S.C. § 2254(a) [indicating that habeas corpus relief can only be based "on the ground that [a petitioner] is in custody in violation of the Constitution or laws or treaties of the United States"].

To the extent Petitioner now attempts to reframe the instant claim as one of federal law by tacking on a conclusory paragraph including federal case law citations (with no discussion as to how such cases are applicable to this issue), this ground was not presented to the state courts as such. Therefore, even if cognizable, Petitioner's Ground Eight is procedurally defaulted in this habeas corpus matter. As Petitioner has failed to show cause or prejudice for the default, this claim is barred from consideration by this Court. Coleman, 501 U.S. at 750.

Furthermore, even if not defaulted, the undersigned can find no federal violation in the record. Other than citing to a Supreme Court decision, the Petitioner has made no arguments to show any federal violation with regard to this issue. Even with regard to the one federal case cited, Petitioner has not shown any connection between that case and the facts in his case. Federal courts must afford the states deference in their determinations regarding evidence and procedure; cf. Crane v. Kentucky, 476 U.S. 683, 690; and it is well-established that "a state court's misapplication of its own law [even if that were found to be the case] does not generally raise a constitutional claim. The federal courts have no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." Smith v. Horn, 120 F.3d 400, 414 (3d Cir.1997) (citations omitted), cert. denied, 522 U.S. 1109 (1998); Hannah v. Hendricks, No. 04–2497, 2006 WL

83106, *15 (D.N.J. Jan.11, 2006). In other words, federal habeas relief can be granted only "if the alleged error was so conspicuously bad that it fatally infected the trial and rendered it fundamentally unfair." Troupe v. Groose, 72 F.3d 75, 76 (8th Cir.1995). Hence, the issue before this federal court is not whether the trial court erred in failing to give this charge, but whether the Court's ruling resulted in a trial so fundamentally unfair as to deny Petitioner due process of law. Cf. Rainer v. Dep't of Corrections, 914 F.2d 1067, 1072 (8th Cir.1990), cert. denied, 489 U.S. 1099 (1991). No such evidence has been presented in this case. "To carry that burden, the petitioner must show that there is a reasonable probability that the error complained of affected the outcome of the trial-i.e., that absent the alleged impropriety the verdict probably would have been different." Anderson v. Goeke, 44 F.3d 675, 679 (8th Cir.1995).

The only evidence Petitioner cites[20] to, regarding his drinking, includes Youngman's testimony that Petitioner had a history of substance abuse (R.pp. 4789, 4794-4800, 4824), that early in the morning on the day of the murder Gadson testified that he saw Petitioner "put his beer out of the bag and put it [the gun] in the bag (R.pp. 3985-3986), and that Petitioner went to get more beer after he claimed Petitioner shot the victim (R.pp. 4015-4016). Petitioner also references other individuals' drinking, including Petitioner's mother and Gadson. (R.pp. 3992-3993, 4794-4800, 4824). However, the South Carolina Supreme Court found as follows:

> The trial court must submit for the jury's consideration any statutory mitigating circumstances supported by the evidence. State v. Vazquez, 364 S.C. 293, 613 S.E.2d 359 (2005). The trial judge must make an initial determination of which statutory mitigating circumstances have evidentiary support and then allow the defendant to request any additional statutory mitigating circumstances supported in the record. Id. Absent a request by counsel to charge the mitigating circumstances, the issue is not

[20]Since Petitioner did not address this issue in his memorandum in opposition, the undersigned has used all the evidence he referenced in his Petition.

> preserved for review. Id. However, when there is evidence the defendant was intoxicated at the time of the crime, the trial court is required to submit the mitigating circumstances in § 16–3–20(C)(b)(2), (6), and (7). Id. (citing State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002) (holding trial court is required to submit mitigating circumstances if there is evidence of intoxication regardless of whether they are requested)); see also State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986)4 (evidence of voluntary intoxication is proper matter for consideration by jury in mitigation of punishment). Where there is evidence the defendant was extremely intoxicated during the commission of the crime, the failure to instruct the jury on statutory mitigating circumstances (2), (6), and (7)5 is not harmless error. State v. Stone, supra.
>
> In the present case, there was evidence presented that appellant possessed beer at different points in the day but none of the evidence indicated appellant was drinking the beer. There was evidence appellant had a history of alcohol and drug abuse; however, his history is irrelevant to whether he was in fact intoxicated on the day of the murder. Appellant presented no evidence he was actually intoxicated at the time of the crime. The evidence indicated appellant may have been drinking that day, but this is not enough to warrant a charge to the jury for the mitigating factor outlined in § 16–3–20(C)(b)(6). See, e.g., State v. Vazquez, supra (holding that even though drinking was admitted, there was no evidence defendant was intoxicated at time crime was committed; therefore, court did not err by failing to charge the jury on mitigating circumstances relating to intoxication); State v. Drayton, 293 S.C. 417, 361 S.E.2d 329 (1987), cert. denied, 484 U.S. 1079, 108 S.Ct. 1060, 98 L.Ed.2d 1021 (1988) (same). Cf. State v. Young, 305 S.C. 380, 409 S.E.2d 352 (1991) (where there is evidence defendant was intoxicated at time of crime, trial judge required to submit mitigating circumstances relating to intoxication). Therefore, the trial court's decision not to charge the jury on the mitigating circumstances relating to intoxication was not in error.

State v. Bowman, 623 S.E.2d 378, 383 (S.C. 2005), abrogated by State v. Evans, 371 S.C. 27, 637 S.E.2d 313 (2006)[The Court in Evans discussed whether it was necessary for trial counsel to make a motion in order to preserve the issue].

Petitioner has not shown how evidence of him getting more beer after shooting the victim would affect his capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired" at the time when he shot the victim. Further, while Petitioner has presented evidence that others saw him in possession of alcohol, he has not presented any evidence to show that he was intoxicated at the time of the victim's death.

Therefore, Petitioner has not shown that even if this charge had been presented that there is a reasonable probability that the outcome of his trial would have been different, or that the trial Court's ruling resulted in a trial so fundamentally unfair as to deny him due process. Rainer, 914 F.2d at 1072; Evans, 220 F.3d at 312 [Federal habeas relief will not be granted on a claim adjudicated on the merits by the state court unless it resulted in a decision that was contrary to clearly established federal law or was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding]; Williams v. Taylor, supra. Therefore, this claim is without merit and should be dismissed.

IX.

(No Ground Nine)

X.

(Ground Ten: Alleged Trial Court Error for Refusal to Grant Mistrial After Question Regarding Possible Escape)

In Ground Ten, Petitioner argues that the trial court erred in failing to grant a mistrial when the Solicitor asked James Aiken a question regarding prison escape. Petition, pp. 78-79. As Petitioner acknowledges, the trial court sustained trial counsel's objection to the question and gave a curative instruction to the jury directing them to disregard the question because it was improper; however, the trial court denied Petitioner's motion for a mistrial. Id. at 79. On appeal, the state supreme court affirmed the trial court's denial of the mistrial. Petitioner claims that, in so doing, the South Carolina Supreme Court unreasonably applied federal law and made unreasonable factual findings. Id. at 81. Respondents disagree. Respondents argue that Petitioner's Ground Ten is not cognizable as the issue raised to the state supreme court was not one of federal law, and to the extent it could be interpreted as a federal issue, this ground is procedurally defaulted because the Supreme

Court relied on state law in affirming the trial court. Return, pp. 110-14. Additionally, even if the instant ground was preserved for this Court's review, Respondents argue that the state Supreme Court's decision was reasonable, and Petitioner is, therefore, not entitled to habeas relief.

The issue presented to the South Carolina Supreme Court in Petitioner's direct appeal was whether the trial court erred in denying a mistrial when the Solicitor asked Aiken about escapes by inmates during Aiken's time with the South Carolina Department of Corrections. (See R.pp. 5456-59); see also Bowman, 623 S.E.2d at 383-85. In South Carolina, "[a] mistrial should be ordered only when an incident is so grievous that prejudicial effect cannot be removed." State v. Vazsquez, 613 S.E.2d 359, 362 (S.C. 2005), abrogated on other grounds by State v. Evans, 637 S.E.2d 313 (S.C. 2006). The undersigned agrees with Respondents that this ground is not cognizable in federal habeas corpus, as there is no corresponding federal standard as to when a mistrial should be granted that is applicable to the states. Thus, except to the extent the failure to grant a mistrial may rise to the level of a due process violation, the question of whether a mistrial should have been granted is a matter of state law. See Estelle, 502 U.S. at 67-68 ["[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."]. While Petitioner does cite federal cases in his direct appeal brief (Response, p. 25), his mere citation to federal law does not render the issue one of federal law. Petitioner cites two United States Supreme Court cases to support his statements that an attempted escape is relevant to a defendant's character and ability to adapt to prison and that a defendant is entitled to introduce evidence that he can adapt to prison.[21] (R.p. 5458).

[21] Petitioner also relies upon federal case law to support his contention that "evidence related to other inmates escaping was inadmissible because Petitioner has no escape history himself." Response, p. 26. However, both the trial court and the state Supreme Court agreed with Petitioner on that issue. Where those courts disagreed with Petitioner was on the issue of whether a mistrial was (continued...)

However, the operative question presented to the South Carolina Supreme Court, and the question that the court ruled upon, was whether the trial court violated state law in refusing to grant a mistrial. That ground is not a cognizable federal habeas grounds or relief.

To the extent Petitioner asserts that his right to due process was violated by the trial court's refusal to grant a mistrial, that is a different ground than was presented in Petitioner's direct appeal. Thus, to the extent that Petitioner raises a cognizable claim in Ground Ten, that claim is procedurally defaulted. As Petitioner has failed to allege either cause or prejudice for the default, he is not entitled to federal habeas relief. Coleman, 501 U.S. at 750. Moreover, even if not defaulted:

> "As [the Supreme Court] held in Romano v. Oklahoma, 512 U.S. 1, 114 S. Ct. 2004, 129 L. Ed. 2d 1 (1994), it is not the role of the Eighth Amendment to establish a special 'federal code of evidence' governing 'the admissibility of evidence at capital sentencing proceedings.' " Kansas v. Carr, 136 S. Ct. 633, 644 (2016)(quoting Romano, 512 U.S. at 11-12). "Rather, it is the Due Process Clause that wards off the introduction of 'unduly prejudicial' evidence that would render the trial fundamentally unfair." Id. (quoting Payne v. Tennessee, 501 U.S. 808, 825 (1991); citing Brown v. Sanders, 546 U.S. 212, 220-21 (2006))(footnote added; internal quotations omitted). Therefore, [the defendant] may not challenge the admission of collateral-act evidence at his sentencing proceeding under the Eighth Amendment. "The test prescribed by Romano for a constitutional violation attributable to evidence improperly admitted at a capital-sentencing proceeding is whether the evidence 'so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process.' " Id. at 644-45 (quoting Romano, 512 U.S. at 12).
>
> The issue for this court is whether the admission of the collateral-act evidence – admitted during either the guilt phase, the sentencing phase, or both – violated Perkins's right to due process by so infecting his proceedings with unfairness as to deny him a fundamentally fair trial.

Perkins v. Dunn, No. 14-1814, 2019 WL 4538737, at *36 (N.D. Ala. Sept. 19, 2019).

Here, based upon the trial judge's immediate curative instruction, the statement at

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[21](...continued)
properly denied, which is a matter of state law.

issue, and the evidence in the case, Petitioner has not shown that the statement infected his sentencing proceeding with unfairness to render the jury's imposition of the death penalty a denial of his due process rights. The statement was isolated and immediately objected to by defense counsel, following which a curative instruction was given to the jury. Greer, 483 U.S. at 766 n.8 (quoting Richardson, 481 U.S. at 208; Bruton, 391 U.S. at 136; United States v. Lewis, 719 F. App'x at 218; United States v. Weinstein, 762 F.2d 1522, 1542 (11th Cir. 1985), modified and reh'g denied, 778 F.2d 673 (11th Cir. 1985)["a prejudicial remark may be rendered harmless by curative instructions to the jury."], cert. denied, 475 U.S. 1110 (1986); Adams v. Wainwright, 709 F.2d 1443, 1447 (11th Cir. 1983)[A curative instruction purges the taint of a prejudicial remark because "a jury is presumed to follow jury instructions."], cert. denied, 464 U.S. 1063 (1984). Furthermore, a crucial assumption underlying our constitutional jury system is that jurors carefully follow instructions, and juries are presumed to follow their instructions. Cf. United States v. Love, 134 F.3d 595, 603 (4th Cir.1998), cert. denied, 524 U.S. 932 (1998); Weeks v. Angelone, 528 U.S. 225, 234 (2000)["A jury is presumed to follow its instructions."]; United States v. Bryant, 655 F.3d 232, 252 (3d Cir. 2011)["[W]e generally presume that juries follow their instructions."].

For the above reasons, Respondents' motion for summary judgment should be granted as to Ground Ten.

XI.

(Ground Eleven: Alleged Ineffective Assistance of Counsel for Failure to Object to the State's Nexus Argument)

In Ground Eleven, Petitioner asserts that trial counsel was ineffective for failing to object to the following portion of the Solicitor's closing argument:

Now, as far as Marion Bowman's background, who has a perfect background?

> I mean, you see "Leave it to Beaver", Ward and June, and you see "The Bill Cosby Show." None of us have a background like that. But, again, where is the connection? Where is the connection, anybody who's gotten up here and drawn a line between anything involving Marion Bowman's background or family or mentality and the murder of Kandee Martin. There's just no connection.

Petition, pp. 83-84 (quoting R.p. 4964). In his response in opposition to the motion for summary judgment, Petitioner additionally quoted the following portions of the Solicitor's closing argument:

> Ladies and gentlemen, I ask you based on what you've heard here, what does all that stuff that happened to Marion during his youth have to do with Kandee Martin? How is she in any way involved in the fact that he sold drugs, that he did drugs, that he drank liquor, that he wasn't a good student, that he was an adolescent, that his grandfather died, and all the other stuff, what has it got to do with it? Nothing. He knows right from wrong.
>
> . . . .
>
> Everybody was a child at one time. That's got nothing to do with the man he turned into and the conduct he engaged in after that.

Response, pp. 27-28 (quoting R.pp. 4962-63, 4967). Petitioner believes that all of the above arguments were improper because they suggested that there had to be a causal nexus between the mitigation evidence and the crime, and the Supreme Court has rejected the notion that such a causal connection must exist for a circumstance to be mitigating. See Petition, p. 84 (citing Tennard v. Dretke, 542 U.S. 274 (2004)). Accordingly, Petitioner argues that trial counsel was ineffective for failing to object to the Solicitor's argument.

In their return, Respondents assert that Petitioner's Ground Eleven is procedurally defaulted, and Petitioner has failed to meet his burden under Martinez v. Ryan, supra. Return, pp. 114-15. Thus, Respondents argue that the procedural default of this ground cannot be excused, and summary judgment should be granted. Petitioner admits that his Ground Eleven is procedurally barred, as it was not raised to or ruled upon by the state courts in his PCR proceedings. However,

Petitioner asserts that PCR counsel were ineffective in failing to raise this ground. Thus, he contends that the procedural default should be excused.

Because this claim was not *properly* pursued and exhausted by Petitioner in the state court, federal habeas review of the claim is now precluded absent a showing of cause and prejudice, or actual innocence. State v. Powers, 501 S.E.2d 116, 118 (S.C. 1998); Martinez, 566 U.S. at 9-10; Wainwright v. Sykes, 433 U.S. 72 (1977); Waye v. Murray, 884 F.2d 765, 766 (4th Cir. 1989), cert. denied, 492 U.S. 936 (1989).

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman, 501 U.S. at 750. As to Petitioner's explanation for the procedural default of this ground, the United States Supreme Court has held that "if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State . . . Ineffective assistance of counsel, then, is cause for procedural default." Murray, 477 U.S. at 488; see also Coleman v. Thompson, supra; McCleskey v. Zant, 499 U.S. 467, 494 (1991); Noble v. Barnett, 24 F.3d 582, 586, n.4 (4th Cir. 1994)["[C]onstitutionally ineffective assistance of counsel is cause per se in the procedural default context"]; Smith v. Dixon, 14 F.3d 956, 973 (4th Cir. 1994)(en banc). However for the reasons set forth below, Petitioner has failed to show the necessary "cause" to overcome the procedural bar.

With respect to Petitioner's PCR counsel, while ineffective assistance of counsel can constitute "cause" for a procedural default, it will only constitute "cause" if it amounts to an independent violation; Ortiz v. Stewart, 149 F.3d 923, 932 (9th Cir. 1998); Bonin v. Calderon, 77

F.3d 1155, 1159 (9th Cir. 1996); and ineffective assistance of *PCR counsel* (as opposed to trial or direct appeal counsel) does not amount to an independent constitutional violation, and ordinarily does not therefore constitute "cause" for a procedural default. Murray v. Giarratano, 492 U.S. 1, 13 (1989) [O'Connor, J., concurring] ["[T]here is nothing in the Constitution or the precedents of [the Supreme] Court that requires a State provide counsel in postconviction proceedings. A postconviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the State to provide such proceedings, . . . nor does . . . the Constitution require [ ] the States to follow any particular federal model in those proceedings."]; Mackall v. Angelone, 131 F.3d 442, 447-49 (4th Cir. 1997); Ortiz, 149 F.3d at 932; Pollard v. Delo, 28 F.3d 887, 888 (8th Cir. 1994); Lamp v. State of Iowa, 122 F.3d 1100, 1104-05 (8th Cir. 1997); Parkhurst v. Shillinger, 128 F.3d 1366, 1371 (10th Cir. 1997); Williams v. Chrans, 945 F.2d 926, 932 (7th Cir. 1992); Gilliam v. Simms, No. 97-14, 1998 WL 17041 at *6 (4th Cir. Jan. 13, 1998).

However, in Martinez v. Ryan, the Supreme Court did carve out a "narrow exception" that modified

> "the unqualified statement in Coleman that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." Martinez, 566 U.S. at __, 132 S. Ct. at 1315. [F]or three reasons. First, the "right to the effective assistance of counsel at trial is a bedrock principle in our justice system . . . . Indeed, the right to counsel is the foundation for our adversary system." Id. at ___, 132 S. Ct. at 1317.
>
> Second, ineffective assistance of counsel on *direct appellate review* could amount to "cause", excusing a defendant's failure to raise (and thus procedurally defaulting) a constitutional claim. Id. at ___, 132 S. Ct. at 1316, 1317. But States often have good reasons for initially reviewing claims of ineffective assistance of trial counsel during state collateral proceedings rather than on direct appellate review. Id. at ___, 132 S. Ct. at 1317-18. That is because review of such a claim normally requires a different attorney, because it often "depend[s] on evidence outside the trial record," and

> because efforts to expand the record on direct appeal may run afoul of "[a]bbreviated deadlines," depriving the new attorney of "adequate time . . . to investigate the ineffective-assistance claim." Id. at ___, 132 S. Ct. at 1318.
>
> Third, where the State consequently channels initial review of this constitutional claim to collateral proceedings, a lawyer's failure to raise an ineffective assistance of counsel claim during initial-review collateral proceedings, could (were Coleman read broadly) deprive a defendant of any review of that claim at all. Martinez, supra at ___, 132 S. Ct. at 1316.
>
> We consequently read Coleman as containing an exception, allowing a federal habeas court to find "cause," thereby excusing a defendant's procedural default, where (1) the claim of "ineffective assistance of trial counsel" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law *requires* that an "ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding." Martinez, supra at ___, 132 S. Ct. at 1318-19, 1320-21.

Trevino v. Thaler, 569 U.S. 413, 422-23 (2013); see also Gray v. Pearson, 526 F. App'x 331, 333 (4th Cir. June 7, 2013) ["The Supreme Court had previously held in Coleman that because a habeas petitioner has no constitutional right to counsel in state post-conviction proceedings, the ineffectiveness of post-conviction counsel *cannot* establish 'cause' to excuse a procedural default. Coleman, 501 U.S. at 757. The Court established an exception to that rule in Martinez."].

Therefore, because, under South Carolina law, a claim of ineffective assistance of trial or appellate counsel is raised in an APCR; cf. State v. Felder, 351 S.E.2d 852 (S.C. 1986); Bryant v. Reynolds, No. 12-1731, 2013 WL 4511242, at *19 (D.S.C. Aug. 23, 2013); Gray, 526 F.App'x at 333 fn *; a petitioner's claim of ineffective assistance of PCR counsel as "cause"for his default may be considered under the revised standard of Martinez and Trevino. Even so, under the first requirement of the Martinez exception, the Petitioner must "demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the [petitioner] must demonstrate that

the claim has some merit." Gray, 526 F.App'x at 332. Petitioner has failed to do so.

Initially, the undersigned notes that Petitioner has provided very little support or argument for his claim that PCR counsel were ineffective for failing to raise this ground. In his petition, he briefly asserts that PCR counsel were ineffective at the beginning of his discussion of his unexhausted grounds. See Petition, pp. 82-83. He then later mentions an affidavit by one of the attorneys who served as PCR counsel, James Brown, Jr. Petition, p. 94. The portion of Brown's affidavit that is relevant to this ground states as follows:

> I did not raise the issue of trial counsel's rendering ineffective assistance of counsel for failing to object to the Solicitor's arguing to discount Bowman's mitigation because there was no "nexus" between Petitioner's proffered mitigation and the crime. I did not have any strategic reason for not doing so.

(Court Docket No. 36-12, ¶ 4). In his response in opposition to the motion for summary judgment, Petitioner again only briefly references PCR counsel's performance and the affidavit from Brown. See Response, p. 30. However, based on the evidence submitted, Petitioner has failed to show that PCR counsel were deficient for failing to raise this issue in the PCR action.

Taking as true Brown's statement that he did not have a strategic reason for not raising this issue, that evidence may be sufficient to rebut the presumption that PCR counsel's actions might have been strategic, but a lack of a strategy by one of Petitioner's PCR attorneys does not constitute per se deficient performance. See United States v. Diaz-Rivera, No. 11-500, 2013 WL 4763830 at *2 (E.D. Pa. Sept. 5, 2013) ["[O]vercoming the strategic presumption does not, in itself, entitle [the defendant] to relief. It merely gives him the opportunity to show that counsel's conduct fell below objective standards of attorney conduct. In other words, the petitioner must still establish that counsel's performance was objectively unreasonable." (quoting Thomas v. Varner, 428 F.3d 491, 501 (3d Cir. 2005)]. Hence, the applicable standard is still whether counsel's performance fell within the

wide range of constitutionally reasonable attorney performance. See Richter, 562 U.S. 86, 110 ["Representation is constitutionally ineffective only if it 'so undermined the proper functioning of the adversarial process' that the defendant was denied a fair trial. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." (internal citations omitted)]; see also Roe v. Flores-Ortega, 528 U.S. 470, 481 (2000) ["The relevant question is not whether counsel's choices were strategic, but whether they were reasonable."]. Petitioner offers very little on that issue, and has failed to establish deficient performance by PCR counsel. Furthermore, as discussed in further detail below, due to the lack of merit on the underlying claim, PCR counsel was not deficient for failing to raise this ground during the PCR action. See Hood v. United States, 342 F.3d 861, 865 (8th Cir. 2003) ["[Counsel's] representation of [Defendant] was not deficient for failing to advance a defense that was devoid of legal merit."]; cf. Jones v. Barnes, 463 U.S. 745, 751-52 (1983) ["Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues."].

As previously noted, while ineffective assistance of PCR counsel can constitute the necessary cause to excuse a procedural default, under the first requirement of the Martinez exception, the Petitioner must "demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the [petitioner] must demonstrate that the claim has some merit." Gray, 526 F. App'x at 333. Petitioner has failed to meet this requirement. As made clear by Supreme Court precedent, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466

U.S. at 690. Petitioner bears the burden to overcome this presumption, but he has offered only conclusory allegations and arguments that trial counsel were ineffective for failing to raise an objection in support of this claim. See Petition, pp. 83-85; see also Burt v. Titlow, 571 U.S. 12, 22-23 (2013) ["It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of professional assistance.'" (quoting Strickland, 466 U.S. at 689)].

As to whether competent counsel would have objected to the Solicitor's arguments, Respondents correctly point out in their return that the case Petitioner relies upon as the basis for the objection that he believes trial counsel should have made, Tennard v. Dretke, was decided after Petitioner's trial. Thus, trial counsel could not have relied upon that particular case as a basis for an objection to the Solicitor's argument. Indeed, in his response, Petitioner concedes that trial counsel could not have used Tennard to support an objection, but asserts that other Supreme Court holdings that pre-date Petitioner's trial established "that '[t]he Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence offered by petitioner.'" Response, p. 28 (quoting Boyde v. California, 494 U.S. 370, 377-78 (1990)). However, the question of whether trial counsel was constitutionally deficient for failing to object to the Solicitor's arguments is somewhat intertwined with the viability of the objection—that is, whether the Solicitor's arguments precluded the jury from considering any mitigation evidence. Petitioner argues that "the solicitor's arguments misstated the law regarding what mitigating evidence should or should not be considered by the jury in rendering its sentencing decision." Response, p. 29. Respondents, on the other hand, assert that "Petitioner mischaracterizes the arguments of the solicitor as a statement of law, which the record demonstrates is not what was conveyed to the jury. The solicitor's argument was simply

that—*an argument*." Reply to Petitioner's Response in Opposition ("Reply"), p. 7 (emphasis in original).

While the cases Petitioner references regarding this claim primarily concern what instructions a court gives to a jury regarding their consideration of mitigating evidence, some of the cases indicate that arguments by the prosecution could influence the jury's perception of the scope of their review. For example, in Boyde the United States Supreme Court stated,

> [A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, . . . and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law. Arguments of counsel which misstate the law are subject to objection and to correction by the court. This is not to say that prosecutorial misrepresentations may never have a decisive effect on the jury, but only that they are not to be judged as having the same force as an instruction from the court. And the arguments of counsel, like the instructions of the court, must be judged in the context in which they are made.

494 U.S. at 384-85 (internal citations omitted). With that directive in mind, based on what the Solicitor argued to the jury, the undersigned does not find that the Solicitor's argument misstated the law.

As other federal courts have recognized, "as long as the jurors are not told to ignore or disregard mitigators, a prosecutor may argue, based, on the circumstances of the case, that they are entitled to little or no weight." United States v. Johnson, 495 F.3d 951, 978 (8th Cir. 2007), cert. denied 555 U.S. 828 (2008). In the context of Petitioner's case, the challenged arguments were just that—part of the Solicitor's contention that the jury should give little or no weight to some of the mitigation evidence that had been presented to them. The fuller context in which the statements were made bears that out. For example, when the Solicitor argued, "[W]hat does all that stuff that happened to Marion during his youth have to do with Kandee Martin? . . . [W]hat has it got to do with

it? Nothing. He knows right from wrong[,]" (R.pp. 4962-63), he did not tell the jury to ignore the mitigation evidence. Rather, he argued that the mitigation evidence did not lessen Petitioner's culpability. Moreover, immediately prior to that argument, the Solicitor had discussed the testimony of one of Petitioner's experts, who, according to the Solicitor, had testified "that Marion Bowman had a problem making choices, that there was a bridge he had to cross to make those choices and that these things were affecting his ability to reach the right decision." (R.p. 4962). The full context thus demonstrates that the Solicitor was not stating that the jury should ignore the mitigating circumstance. He was instead arguing about the weight the jury should give to the testimony that had been presented to them.

In another part of the argument that Petitioner now challenges, the Solicitor indicated that no one had a perfect background and asserted "[W]here is the connection? . . . [A]nybody who's gotten up here and drawn a line between anything involving Marion Bowman's background or family or mentality and the murder of Kandee Martin. There's just no connection[,]" before stating, "He made his choices, to murder and burn that body beyond recognition." (R.p. 4964). That additional statement provides greater context to the Solicitor's argument—again, not as a limitation on the jury's consideration of the mitigating evidence, but as an argument that Petitioner made a choice in killing the victim and then burning her body. Other courts have found that such arguments do not run afoul of the Constitution or Tennard. See Allen v. United States, 2011 WL 1770929, at *40 (E.D. Mo. May 10, 2011) ["[P]rosecutors are free to argue that a given mitigator should not be given any weight in the circumstances of the case, so long as the prosecutor does not argue or assert that jurors are forbidden from considering it." (citing Abdul-Kabir v. Quarterman, 550 U.S. 233, 259 n.21 (2007) ["A jury may be precluded from [having a 'meaningful basis to consider the relevant qualities' of a

defendant's proffered evidence] not only as a result of the instructions it is given, but also as a result of prosecutorial argument dictating that such consideration is forbidden." (citations omitted)]; Johnson, 495 F.3d at 978 ["The prosecutor was not arguing that the jurors could choose to ignore the mitigators or exclude them from consideration, but rather that they were insufficient to outweigh the gravity of the offense . . . ."])]; United States v. Rodriguez, 581 F.3d 775, 799 (8th Cir. 2009) ["The . . . challenged remarks do not direct jurors to disregard mitigating factors because no nexus links them to the killing. Rather, the prosecutor argued that, despite [the defendant]'s troubled past, 'he is capable of choosing for himself' and has free will. This argument is permissible." (citing Johnson, 495 F.3d at 979 [finding no error when "[t]he prosecutor was arguing . . . that she [the defendant] had free will and an opportunity to make the right choices, her difficult childhood notwithstanding])].

Petitioner asserts that the Solicitor improperly stated, "Everybody was a child at one time. That's got nothing to do with the man he turned into and the conduct he engaged in after that." See Response, p. 28. But, again, the full context in which that statement was made sheds light on the greater argument that the Solicitor was making. Immediately prior to the statement, the Solicitor stated, "They showed some pictures of Marion Bowman as a child, some school pictures to get your sympathy. The judge will instruct you that you cannot make your decision based on passion, prejudice, sympathy, or any undue factor." (R.pp. 4966-67). Thus, the challenged statement was not part of some improper statement of the law in the context in which it was made.

In addition to the Solicitor's arguments being the type of statements that are not disallowed by Supreme Court precedent, the Solicitor told the jury many times during his closing argument that the judge would instruct them on the law and that they could and should consider the mitigating circumstances that had been presented. (R.p. 4961 ["I'm going to talk about the mitigating

circumstances. And the judge will instruct you to consider mitigating circumstances. And you should consider them. Look at them, you decide what significance to give them if you find that they, in fact, exist."], 4966 ["Judge Goodstein in her instructions is going to tell you that you can consider any mitigating circumstance or anything else that you want to consider in determining the appropriate penalty. . . . You look at everything."], 4972 ["The judge will instruct you that you can bring back a life sentence for any reason or no reason at all as an act of mercy. And that's what the defense will ask you to do. And that's within your power, you can do that. For any reason or no reason at all you can come back and extend mercy to this defendant."]). The portions of the Solicitor's closing argument that Petitioner now challenges are even more clearly arguments as to what weight the jury should give Petitioner's mitigating evidence, as opposed to misstatements of the law, when compared to what the Solicitor said about the law during his closing argument. For all of the above reasons, Petitioner has failed to show that trial counsel was deficient for failing to raise an objection that the Solicitor had improperly stated there had to be some nexus between the mitigating evidence and the crime for the jury to consider such evidence. See Moody v. Polk, 408 F.3d 141, 151 (4th Cir. 2005) [holding counsel was under no duty to make a frivolous motion].

Petitioner has also failed to make a substantial showing as to prejudice for many of the reasons discussed above—the jury was never misinformed about whether they could consider and give effect to the mitigation evidence that Petitioner presented. Additionally, the trial court properly instructed the jury that it should consider the mitigation evidence that had been presented, (see R.pp. 5029-34), and the trial court told the jury that it was free to recommend a life sentence "for any reason, or for no reason at all[,]" (R.p. 5033). Therefore, based on the state court record, Petitioner has not shown that, even if trial counsel were deficient in failing to object to the Solicitor's closing

argument, there was a reasonable probability of a different outcome if the objection had been sustained and the trial court had issued additional instructions that there need not have been a "nexus" between the mitigating evidence and the murder in order for the jury to consider it.

As Petitioner has failed to meet his burden as to any of the requirements of Martinez, he has failed to overcome the procedural bar of his Ground Eleven. Therefore, this claim is without merit.

XII.

(Ground Twelve: Alleged Ineffective Assistance of Counsel for Failure to Call Additional Witnesses as Part of Mitigation Presentation)

In his final ground for relief, Petitioner asserts that trial counsel were ineffective for failing to present additional mitigation evidence during their presentation at the sentencing phase of his trial. According to Petitioner, "[t]rial counsel offered only a small glimpse into the hectic life of Petitioner during the mitigation phase of Petitioner's trial." Petition, p. 85. Respondents disagree, arguing that "[t]he state court record demonstrates that there is substantial mitigation evidence addressing the same life circumstance theme that Petitioner suggest was not thoroughly explored." Reply, p. 12.

As with Ground Eleven, Petitioner has provided little evidence to support his contention that PCR counsel were ineffective for failing to raise this claim in Petitioner's PCR action. Aside from the affidavit from one attorney who represented Petitioner in PCR, indicating that he had no strategic reason for not raising this issue, Petitioner has offered little evidence that PCR counsel's representation fell outside the "wide range of reasonable professional assistance . . . ." Strickland, 466 U.S. at 689. Additionally, as discussed in further detail below, based on the merits of the underlying ineffective assistance of trial counsel claim, the undersigned does not find that PCR

counsel was ineffective in failing to raise this claim.

In order for Petitioner to meet his burden under Martinez, he must show that there is some merit to his claim that trial counsel were ineffective for failing to present additional mitigation evidence. For this ground, the undersigned first examines whether Petitioner has made a substantial showing that Petitioner was prejudiced by trial counsel's failure to introduce the additional mitigation evidence. See Strickland, 466 U.S. at 697 ["If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."].

Trial counsel presented the following witnesses to testify about Petitioner's life before his crimes[22]:

Kendra Bowman, Petitioner's older sister, testified that she and Petitioner were very close growing up, and that when her mother became disabled, Kendra and Petitioner were left to do the cleaning and cooking around the house. (R.pp. 4742-43). Kendra testified that their father, Marion Bowman, Sr., was never home, but her "stepfather, Joseph Sims . . . played the daddy part." (R.p. 4744). According to Kendra, Sims treated the children as his own, taking them on trips, "show[ing them] what a father supposed to do, . . . help[ing] discipline [them] . . . ." (Id.) Kendra testified that Bowman, Sr. was very abusive to her mother and the two separated when she was around

[22] In addition to the witnesses discussed, trial counsel called the following additional witnesses during their mitigation presentation: Margaret Baughman, a teacher at Dorchester County Detention Center (R.pp. 4760-68); Frankie Martin, a witness who saw Petitioner and the victim together before the murder (R.pp. 4830-31); James Aiken, an expert in prison classification relative to future dangerousness and prison adjustment issues (R.pp. 4832-82); Sharon Branch, an officer at the Dorchester County Detention Center (R.pp. 4882-90); Enrique Badillo, an officer at the Dorchester County Detention Center (R.pp. 4902-05); and Travis Felder, Petitioner's co-defendant (R.pp. 4911-28). None of these witnesses testified to details concerning Petitioner's childhood or early adolescence. As such, their testimony has not been summarized.

one. (R.p. 4748).

Dorothy Bowman, Petitioner's mother, testified that she and Bowman, Sr. got divorced when her youngest child was eighteen months old. (R.p. 4751). According to Dorothy, "[c]hild support wasn't an issue because he wouldn't pay it, so I had to take care of my kids myself. Then once Marion got big enough to mow grass, he mowed grass to make ends meet." (Id.) Dorothy testified that Petitioner had difficulty in school and only finished ninth grade. (R.pp. 4751-52). Dorothy testified that Petitioner was close with her family members, particularly his aunt, Lorraine Johnson, stating "When she need him he was always there. Well, anybody need him he was always there, he was a very helpful person." (R.p. 4753). Dorothy testified that she had debilitating back problems that required her to have help getting out of bed and getting dressed, and that she would stay in the bed until her children got back from school. (R.p. 4754). Dorothy conveyed that Petitioner tried to have a relationship with his father, but Bowman, Sr. was very unreliable. (R.p. 4755). Dorothy testified that she did not have school pictures of Petitioner because she did not have the money to purchase them. (R.p. 4756). Dorothy testified that Sims treated her children as a father would, and Petitioner "looked up at [Sims] like a real dad because . . . he was the only one took up a lot of time with him." (R.p. 4758).

Trial counsel also presented Jeffrey Youngman, M.A., who was qualified as an expert in the field of forensic psychosocial assessment. (R.p. 4786). As part of his assessment, Youngman interviewed Petitioner's mother, grandmother, sister, four aunts, two teachers, a principal, and the family doctor.[23] (R.p. 4789). Youngman also reviewed Petitioner's school records, medical records,

[23] There were some witnesses who Youngman testified he "could not talk to[,]" including Petitioner's wife. (R.p. 4782). Youngman also did not talk to Petitioner's sister, Yolanda Bowman, (continued...)

group counseling records, sheriff's office records, social services records, and a psychiatric evaluation of Petitioner. (Id.) Youngman testified that Petitioner's "functioning both social and emotional was affected by trauma that occurred in his childhood." (R.p. 4791). Youngman then gave a very detailed description of Petitioner's life from birth to around the time of his crimes - Youngman's narrative spans approximately thirteen pages of the record. (R.pp. 4791-804). Youngman testified that Bowman, Sr. was very abusive to Petitioner's mother, and gave a graphic description of some of her injuries. (R.p. 4792). Youngman also described how Petitioner desired to have a relationship with his father, to no avail. (R.pp. 4792-93). Youngman testified that Petitioner's family lived in poverty and that relatives described Petitioner and his sisters as being "deprived, they were dirty, they were wearing tattered clothes and they never had stuff like other kids had . . . ." (R.p. 4793). Youngman testified that Petitioner's mother was very strict and beat the children daily. (R.p. 4794). Additionally, according to Petitioner's relatives, his mother "was known to drink, also suspected of using drugs and she testified she was arrested once for possession of drugs." (Id.) Youngman testified that Petitioner "did pretty good in first, second, third grades", but began having problems in the fourth grade. (R.p. 4795). Youngman relayed an incident when Petitioner defecated in his pants after being refused a bathroom break at school and then being made to sit with feces in his pants all day. (Id.) Youngman testified that Petitioner's mother "went back the next day and put the pants on the teacher's desk and they had words." (Id.) Youngman testified that, after that incident, Petitioner had a number of problems with teachers or the school, but Petitioner's mother always took his side and refused to listen to the teachers or take the side of the school. (R.pp. 4795-96). Youngman

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[23](...continued)
or his friend, Hiram Johnson. (Id.)

testified that Petitioner's mother became bedridden when he was around nine years old, and he and his sisters began providing for the household. (R.p. 4796). As described by Youngman,

> [I]t really fell on those three kids and especially the two oldest, Marion and Kendra, to provide for their mother. They had to change her when she used the bathroom, they had to feed her, they had to clean the house, they had to do everything. They sometimes missed school because of this, sometimes they were late for school because of this.

(R.p. 4797). Youngman testified that Sims moved into Petitioner's home in 1990, and he changed how things were handled with Petitioner's disciplinary problems at school—"[Sims] would go to the school, he would listen to what the school would say, he would hold the kids accountable, he would be cooperative with the school, but he was a long distance truck driver so . . . he was on the road a lot." (Id.) Youngman testified that Petitioner began to experiment with alcohol in fourth grade. (R.pp. 4797-98). Petitioner had behavior problems in fourth grade (which he had to repeat), in sixth grade, and in seventh grade. (R.pp. 4797-99). Following a run-in with Bowman, Sr. in which Petitioner realized that his father would never support the family, Petitioner began making money by mowing lawns, but he also used that money to buy and sell drugs, and he began drinking regularly on weekends. (R.p. 4800). Youngman testified that when Petitioner was in ninth grade, his mother was notified twice that Petitioner was in danger of failing due to his grades, and he dropped out of school before finishing tenth grade. (R.pp. 4800-01). Youngman described the deaths of two of Petitioner's cousins, which were greatly distressing to Petitioner during his youth. (R.pp. 4801-02). Petitioner's cousin Orin fell and hurt his arm at school, but he died after he was taken to the hospital and given the wrong medication. (R.p. 4801). Then, Petitioner's cousin Patrick shot himself with a gun that Petitioner had stolen and had made available to Patrick, and Petitioner reported feeling responsible for Patrick's death. (R.pp. 4801-02). The same year that Patrick committed suicide, Sims

moved out. (R.p. 4802). Youngman testified that Petitioner was briefly incarcerated for third degree burglary, and when he was released, he held "a succession of construction and rebar jobs. He remained essentially employed most of that time until his most recent arrest." (Id.) Youngman also testified that Petitioner was very helpful to his relatives when he was growing up. (R.pp. 4802-03). Youngman testified that Petitioner married Dorothy Mae Williams, who already had two children, and Petitioner "had a very good relationship with [the children] and who reportedly love him." (R.p. 4803). Youngman testified that Dorothy Mae and Petitioner had a daughter in 2001, as well. (Id.)

In addition to giving a summary of Petitioner's experiences as a child and young adult, Youngman listed the following factors as affecting Petitioner's ability to make decisions: domestic violence in the home, abandonment by his father, financial difficulties at home, mother's incapacitation or invalid status, family history of alcohol abuse, mother's drug use and conviction for selling drugs, mother's uncooperativeness with school, trauma of various family members dying, "his chaotic, deprived childhood," and lack of school intervention. (R.pp. 4807-08). Youngman also testified that he was "astounded" that there were so few pictures of Petitioner and his sisters growing up because, even having worked with "some of the most deprived people that exist[,]" Youngman had not encountered so little photographic documentation of children's lives. (R.p. 4810). Youngman concluded from what he had found that "the family didn't really care much for the kids if they weren't going to keep pictures of them." (R.pp. 4810-11).

Finally, trial counsel also introduced an affidavit by Mary Johnson, Petitioner's aunt, who was disabled. (See R.pp. 4803, 4905-06).

Petitioner describes trial counsel's mitigation case as "sparse." Response, p. 32. He has submitted affidavits with additional mitigation evidence from the following witnesses: Joseph

Sims, Kendra Bowman, Dorothy Bowman (mother), Glenn Miller, Sr., Oretta Miller, Tyler Dufford, Jennifer Thompson, Velma Young, Tiffany Grimmage, and Dorothy Bowman (wife). (Court Docket Nos. 36-1 through 36-10). Petitioner also describes the additional mitigation evidence that he believes trial counsel should have presented, which he asserts presents "a dramatically different account of Petitioner's family environment and childhood." Response, p. 33. The additional mitigation evidence can be generally categorized as evidence regarding Petitioner's mother's behavior and her relationship with Sims, evidence regarding Petitioner's family's significant poverty, evidence regarding the burden placed on Petitioner and his sisters due to his mother's disabilities, and evidence regarding Petitioner's school experience. See Response, pp. 33-35. The affidavits also include some evidence that falls outside of those general categories, such as Oretta Miller's recollection that Petitioner brought her wildflowers on two occasions and that Petitioner was "so thoughtful and kind for a kid that age . . . ." (Court Docket No. 36-5 at 4).

In his response in opposition to the motion for summary judgment, Petitioner highlights some of the specific evidence that he believes trial counsel should have presented. For example, Sims' affidavit states that when he met Petitioner's mother, "[s]he was essentially a prostitute—she had sex in exchange for money or things she needed." (Court Docket No. 36-1, ¶ 4). In his affidavit, Sims further describes Petitioner's mother as "a gold digger", states that she "liked cocaine", and that she "constantly had different men, in and out of the house." (Court Docket No. 36-1 at¶ ¶ 3, 5, 12). He indicates that he never loved her, but "[s]he served a need," and he "kept seeing [her] for as long as [he] did because of the children. [He] was very fond of them and wanted to try to help improve their situation." (Court Docket No. 36-1, ¶ ¶ 4, 6, 10). Petitioner further provides anecdotal evidence relating to "the significant poverty suffered by Petitioner's family when

he was growing up." Response, pp. 33-34. Petitioner emphasizes the burdens placed on him at a young age as a result of his mother's disability. Response, pp. 34-35. With regard to the evidence pertaining to his school experiences, Petitioner points to statements from Sims' affidavit and Glenn Miller, Sr.'s affidavit, which indicate that black children and white children were treated differently at the time Petitioner was in school. Response, p. 35.

Having reviewed all of the mitigation evidence that Petitioner has submitted through affidavits, the undersigned agrees with Respondents that, by and large, "[t]he evidence referenced by Petitioner amounts to cumulative evidence already presented through various witnesses." Reply, p. 17. While Petitioner now minimizes how his mother was portrayed during trial counsel's mitigation presentation, the jury heard much more than that she was "a mother who merely did not discipline Petitioner and did not take his picture." Response, p. 36. As outlined above, the jury heard from Kendra, Dorothy, and Youngman about the extensive burdens placed on Petitioner and his sisters as a result of his mother's advanced disability. The jury also heard about Petitioner's mother's use of and involvement with drugs and alcohol. And they heard that she beat her children. The jury heard that Petitioner's mother handled his behavioral issues at school inappropriately and that Sims took a more rational approach to such problems when he became a part of Petitioner's life, a sentiment echoed by the affidavits Petitioner now submits from his former teachers and principal. Multiple witnesses testified to the significant poverty in which Petitioner's family lived, and that evidence was not just referenced generally. Youngman testified that Petitioner and his sisters were described as "deprived, . . . dirty, [and] wearing tattered clothes and [that] they never had stuff like other kids had . . . ." (R.p. 4793). Petitioner's mother testified that she did not even have enough money to order Petitioner's school pictures, and Youngman, who indicated that he had worked with extremely

impoverished individuals, conveyed that the lack of photographs was indicative of Petitioner not being cared about. Many of the themes that Petitioner argues should have been explored by trial counsel during their mitigation phase were explored, albeit sometimes through different witnesses or anecdotal evidence. To the extent the evidence in the affidavits was already presented to the jury by way of trial counsel's mitigation presentation, Petitioner cannot meet his burden as to the prejudice prong of Strickland.

Even so, Petitioner is correct that some of the specifics from the affidavits now presented by Petitioner were not provided to the jury in trial counsel's mitigation presentation. For example, the jury did not hear that Petitioner's mother was essentially a prostitute. They did not hear that children were treated differently in the Branchville school system based on their race (although Youngman did indicate that the schools did not properly intervene to help Petitioner, a problem that appeared to have been compounded by Petitioner's mother's anti-authoritarian views regarding school). However, to the extent Petitioner's affidavits provide additional evidence about Petitioner's life and the adversity he faced, the undersigned disagrees with Petitioner about the impact that such evidence would have had. Having reviewed the new and previously presented mitigating evidence, in conjunction with the aggravating evidence, the undersigned does not find that Petitioner has met his burden of showing a reasonable probability that the jury would have returned with a different sentence had they heard the evidence in these affidavits. See Strickland, 466 U.S. at 694 ["The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."]; see also Wiggins v. Smith, 539 U.S. 510 (2003) ["In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence."]. Trial counsel presented a thorough mitigation case—extensively

covering Petitioner's background, addressing his ability to adapt to prison life, and even attempting to lessen some of the particularly aggravating circumstances of Petitioner's crimes. However, the details and circumstances of Petitioner's crimes, as presented by the State, were very aggravating. When considered with the totality of evidence presented to the jury, the "[t]he evidence that [Petitioner] says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented to the [jury]." See Strickland, 466 U.S. 699-700. Accordingly, Petitioner has failed to meet his burden under Martinez as to the prejudice prong of his underlying ineffective-assistance-of-trial-counsel claim.

Petitioner has similarly failed to meet his burden with respect to the deficiency prong of Strickland. Petitioner primarily focuses his arguments in the Petition and in his response in opposition to the motion for summary judgment on the substance of the evidence that was and was not introduced to the jury. See Petition, pp. 85-94; Response, pp. 30-37. Petitioner asserts that "trial counsel were deficient in failing to investigate and present the evidence that has now been collected by undersigned counsel." Response, p. 35. However, Petitioner has failed to identify any testimony by trial counsel in the state court record, nor has he presented any new evidence by way of affidavits from or depositions of trial counsel, to demonstrate what their strategy was for investigating and presenting mitigation evidence. Instead, Petitioner relies upon statements by various service providers, who were retained by trial counsel, regarding their experience in being a part of the defense team and their perceptions as to trial counsel's performance. For example, Petitioner has attached to his Petition a copy of an affidavit from Robert Minter, one of two investigators who were part of the defense team. (R.pp. 7516-17). As described by Petitioner, in Minter's affidavit "he relates how he was never given any direction on the case, and was never provided with any specific investigative

tasks. He never interviewed any of the fact witnesses, and has no recollection of discussing the facts of the case with Petitioner." Petition, pp. 93-94; (see also Court Docket No. 36-11). In his response in opposition to the motion for summary judgment, Petitioner also references the PCR testimony of Dale Davis, who served as a mitigation investigator for the defense team, and Youngman. According to Petitioner,

> Davis described a lack of communication and direction from the trial attorneys in preparing Petitioner's case. Davis stated she "didn't know how he wanted [her] to proceed, [she] didn't know if there were certain things that he wanted [her] to do." App. 6960; see also American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.4.B (2003) ("Lead counsel bears overall responsibility for the performance of the defense team, and should allocate, direct, and supervise its work in accordance with [the ABA] Guidelines and professional standards."). Davis further testified that lead counsel Cummings ignored most of her work and said any information he would need he would "get from the State." App. 7213. The forensic social worker, Jeffrey Youngman, who testified at trial, testified in PCR that he never met with trial counsel about his proposed testimony and that there was no discussion of what testimony should or should not be presented. App. 6823.

Response, pp. 35-36.

However, it must be noted that Petitioner's deficiency argument is not particularized to the evidence that he now presents to this court—he argues (as PCR counsel did at PCR) that trial counsel failed to properly prepare and present mitigation evidence,[24] with support for that argument based largely on the testimony of Davis and Youngman. The PCR court already thoroughly examined that issue, and the undersigned finds the PCR court's conclusions to be highly relevant to the deficiency analysis of Petitioner's Ground Twelve:

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[24]While Petitioner concedes that he did not raise the issue in his PCR proceeding regarding the mitigation evidence set forth in Brown's affidavit [Court Docket No. 36-12], he did raise the issue in this PCR proceedings of trial counsel not presenting other mitigation evidence [see Court Docket No. 11-27, pp. 66-76].

Counsel Cummings . . . 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 Youngman, 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 Bloominburg, a polygrapher; and Sally Hayden, a speech and reading teacher who assessed Applicant and found he could read and write just fine (despite his lies to the trial court and apparently to counsel that he could not). **{PCR Tr. 1784-98}.** . . . Counsel 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 Youngman 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. . . .

Clearly, this is not a . . . 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 Youngman—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 [Bell v.] Cone, 535 U.S. [685,] 698 [(2002)]; [Florida v.] Nixon, 543 U.S. [175,] 189-92 [(2004)].

. . . .

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 Youngman complained that he did not have much contact with the attorneys, and Applicant introduced a letter in which Youngman complained to counsel that trial was upcoming and he did not know the strategy. **{PCR Tr. 1056-58}.** However, Youngman 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, Youngman 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 keeping 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}.**

On cross, Davis was led on an [sic] 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 Youngman. **{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 information herself, and she did in fact gather it and present it to Youngman and counsel. **{PCR Tr. 1445-47}.** She also conceded she suggested Youngman to counsel and knew he had done these cases in the past. **{PCR Tr. 1445-**

47}.

Under questioning by this Court, Davis could not give one specific example of anything she told Cummings but he ignored. **{PCR Tr. 1483-84}**, and conceded there was nothing wrong with the information in Youngman'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 [sic] the expertise to gather the social history. He noted she suggested Youngman. **{PCR App. 1789-90; 1806-07}.** Cummings admitted he had some disagreements with Davis towards the end of trial, but felt she had been sabotaging his relationship with Applicant. Cummings denied ever refusing phone calls from Davis or making himself unavailable to her. Counsel denied there was ever any "panic", and stated matter of factly, "we had what we had to work with". **{PCR Tr. 1807-08; 1816}.** Counsel denied he ever refused to look at any information Davis sent 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 Youngman and discussing his testimony. Counsel felt Youngman 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 Youngman's testimony would give reasons for why Applicant did what he did. He did not recall Youngman ever calling and saying he needed additional information. **{PCR Tr. 1809-12; 1873}.** Counsel also noted that he was impressed by Youngman's experience and resume and his prior employment as a police officer, which he thought would aid Youngman'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}.**
>
> . . . .
>
> 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 Youngman did. While Youngman and Davis might have wanted more guidance, counsel was clear he met with Youngman prior to trial and discussed the testimony, and also stated as a strategic matter he wanted Youngman's testimony to flow more freely from the heart than be robotically elicited. This was a reasonable decision, and counsel, Davis, and Youngman were all clear that Davis got all the information she could find, and she delivered it all to Youngman, and counsel got a copy of Youngman'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).

(R.pp. 9926-33).

Petitioner argues that "[b]ecause trial counsel did not consider or discuss their plans for trial, it cannot be said that trial counsel made a strategic decision to not present the evidence described above." Response, p. 36. That argument is a non sequitur. What some members of the defense team experienced is not determinative of whether trial counsel performed deficiently in this case, particularly in light of the evidence in the state court record concerning trial counsel's

preparation and investigation. Cummings testified at the PCR evidentiary hearing that Davis had already been retained as part of the defense team when he was appointed. (R.p. 7537). He described her role as follows:

> They're social workers. They go out and try to find out about the life of a the client, they know where to go get school records, hospital records, and that is what you pay them to do. You go, you tell them to go see the family, go get pictures, photographs, how they grew up.
>
> . . . .
>
> And you try to find what you can find out about the defendant and, you know, you are basically learning about their life.

(Id.) Cummings testified that trial counsel relied on Davis' expertise as to where to gather information about Petitioner's background, and they provided support to her when she requested it. (R.pp. 7537-40). The defense team also retained Jeffrey Youngman as part of the defense team, but he was hired as an expert to testify to the information that had been discovered in the mitigation investigation. (R.pp. 7541-43). As for trial counsel's strategy in the mitigation phase, Cummings indicated that they attempted to "paint the picture like they do for the victim, they grew up, there is a high school photo, here is the confirmation photo, here is the baptismal photo, try to do the same thing with Marion, paint him as a human being." (R.p. 7603). In portraying the "picture" of Petitioner's life, there was some negative information, such as Petitioner's drug-dealing, that was introduced, but as Cummings explained, "The only way to get his background in at that point in mitigation was to try and show that . . . he was basically kicked to the curb at a young age and he would do what he had to do to survive." (R.p. 7365). Cummings also explained that trial counsel was somewhat limited in their presentation based on the circumstances of Petitioner's case and Petitioner's own wishes. Cummings testified that "everybody in [Petitioner's] family was charged."

(R.p. 7550). Petitioner's mother "wouldn't meet with [trial counsel,]" and his wife "was reluctant to talk to [Cummings] in the courtroom." (R.pp. 7550-51). Petitioner also "expressed great concern about [calling his family members], didn't want his family hurt. . . . [H]e wanted [his wife and children] protected and he wanted them not to be hurt and not to hurt his family. He loved his family." (R.p. 7551).

In sum, the record shows that trial counsel hired appropriate service providers to investigate and present mitigating evidence for purposes of the sentencing phase. Davis had previously worked for the Charleston County Public Defender's Office as a mitigation investigator for capital cases, and at the time of her PCR testimony, she had worked on about thirty cases. (R.pp. 7133-35). She interviewed numerous witnesses during her mitigation investigation, with quite a bit of overlap between the witnesses she interviewed and those whose affidavits Petitioner now relies upon. For example, based on her PCR testimony, Davis interviewed Joseph Sims, Dorothy Bowman (mother), Dorothy Bowman (wife), Kendra Bowman, Jennifer Thompson, and Tyler Dufford. (R.pp. 7164-65). Whether she discovered the same information that Petitioner now asserts should have been presented to the jury is unclear from the evidence before this court. However, Petitioner has failed to identify any evidence indicating that a failure on Davis' part to discover the mitigating evidence that Petitioner now presents can be attributed to trial counsel. As the PCR court acknowledged, trial counsel hired Davis for her expertise in gathering mitigating evidence—she did not need an attorney micromanaging her work or telling her what evidence was mitigating. Essentially, Petitioner is asking this court to reevaluate whether trial counsel deficiently managed the mitigation investigation based on the same evidence that was already considered and rejected by the PCR court. The only new evidence Petitioner presents on this issue is the affidavit from Minter, which is of little relevance

compared to the evidence presented at the PCR evidentiary hearing from trial counsel and the members of the defense team who were a part of the mitigation investigation. Petitioner has failed to meet his burden under Martinez of showing that there is some merit to his claim that trial counsel were deficient in their investigation, preparation, and presentation of mitigating evidence during the sentencing phase of trial.

For all of the above reasons, Petitioner has failed to show that the procedural default of his Ground Twelve should be excused pursuant to Martinez. Accordingly, this claim is without merit.

XIII.

(Request for Evidentiary Hearing)

Petitioner has "request[ed] an evidentiary hearing so this Court can assess the evidence of both trial counsel and post-conviction relief counsel's ineffectiveness." Petition, p. 94. As this Court and others have recognized, it is sometimes appropriate to expand the record or grant an evidentiary hearing when considering whether there is cause and prejudice to excuse the procedural default of a claim in federal habeas corpus. See, e.g., Fielder v. Stevenson, No. 12-412, 2013 WL 593657, at *3 (D.S.C. Feb. 14, 2013) ["[C]ourts have held that § 2254(e)(2) does not . . . constrain the court's discretion to expand the record to establish cause and prejudice to excuse a petitioner's procedural defaults." (citing Cristin v. Brennan, 281 F.3d 404, 416 (3d Cir. 2002))]. "In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." Schriro, 550 U.S. at 474.

Here, however, Petitioner has failed to make such factual allegations. Indeed, as

discussed in detail above, for purposes of the summary judgment motion, even though the undersigned has considered the evidence presented by Petitioner as true, he has failed to meet his burden under Martinez of demonstrating that his underlying ineffective assistance of trial counsel claims have "some merit" or that PCR counsel were ineffective under Strickland. Cf. Brizendine v. Parker, 644 F. App'x 588, 596-97 (6th Cir. 2016) [granting an evidentiary hearing where Petitioner "established, for purposes of overcoming the procedural default of his first ineffective assistance of trial counsel claim, that there [was] 'some merit] to his arguments that his trial counsel's performance was defective and that such performance prejudiced him" and where Petitioner also "established that his post-conviction counsel was ineffective" but denying an evidentiary hearing where the underlying ineffective assistance of trial counsel claim was "without merit"].[25] Accordingly, Petitioner's motion for an evidentiary hearing should be denied.

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[25] The undersigned also finds the Fifth Circuit's reasoning in Segundo v. Davis, 831 F.3d 345 (5th Cir. 2016) to be instructive as to whether an evidentiary hearing is warranted in light of the evidence before the Court:

> [T]here "must be a viable constitutional claim, not a meritless one, and not simply a search for evidence that is supplemental to evidence already presented." Ayestas [v. Stephens, 817 F.3d 888,] 896 [(5th Cir. 2016), judgment vacated on other grounds by Ayestas v. Davis, 138 S. Ct. 1080 (2018)]. The decision to grant an evidentiary hearing "rests in the discretion of the district court." See Schriro v. Landrigan, 550 U.S. 465, 468 (2007) ("It follows that if the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing."); see also McDonald v. Johnson, 139 F.3d 1056, 1060 (5th Cir. 1998) ("The district court had sufficient facts before it to make an informed decision on the merits . . . and, accordingly, did not abuse its discretion in refusing to hold an evidentiary hearing."). . . . Given the extent of the factual development during trial and during the state habeas proceedings, the district court did not abuse its discretion in determining it had sufficient evidence and declining to hold a hearing.

831 F.3d at 351.

Conclusion

Based on the foregoing, it is recommended that the Respondents' motion for summary judgment be **granted**, and that the Petition be **dismissed**, with prejudice.

The parties are referred to the Notice Page attached hereto.

Bristow Marchant
United States Magistrate Judge

December 10, 2019
Charleston, South Carolina

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume
United States District Court
Post Office Box 835
Charleston, South Carolina 29402

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

The Supreme Court of South Carolina

Marion Bowman, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2012-213468
Lower Court Case No. 2006-CP-18-00569

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is granted as to Petitioner's Question 6 and denied as to the remaining questions. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 243(j), SCACR.

FOR THE COURT

BY _____
CLERK

Columbia, South Carolina

April 15, 2016

cc:
Robert Michael Dudek, Esquire
Alan McCrory Wilson, Esquire
John W. McIntosh, Esquire
Donald J. Zelenka, Esquire
David Alexander, Esquire
Michael J. Anzelmo, Esquire
Alphonso Simon, Jr., Esquire
S. Creighton Waters, Esquire
The Honorable Cheryl L. Graham

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STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF DORCHESTER)	
Marion Bowman, Jr., #6006)	C/A No. 2006-CP-18-569
Applicant,)	**ORDER DENYING APPLICATION FOR POST-CONVICTION RELIEF**
v.)	
The State of South Carolina,)	**(Capital Case)**
Respondent.)	

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CHERYL CRAWFORD
CLERK OF COURT
DORCHESTER COUNTY

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Before this Court is an Application for Post-Conviction Relief ("APCR"), filed by Marlon Bowman, Jr. ("Applicant"). This APCR stems from a murder conviction and death sentence. For the following reasons, this Court denies and dismisses the APCR.

PROCEDURAL HISTORY

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

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

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

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

On May 23rd, 2002, Applicant's jury found the existence of two of the four aggravating factors: the murder was committed in the commission of kidnapping, and in

the commission of larceny with the use of a deadly weapon. It recommended a sentence of death. **{R. 5051}**. Judge Goodstein sentenced Applicant to death for murder and ten years for arson.

A timely Notice of Appeal was filed and served with the South Carolina Supreme Court on May 24th, 2002. Assistant Appellate Defender Robert M. Dudek, of the South Carolina Office of Appellate Defense, was appointed to represent Applicant during his direct appeal. On July 6th, 2005, Dudek filed with the state supreme court a Final Brief of Appellant. The State, through Assistant Attorney General S. Creighton Waters, filed its Final Brief of Respondent on July 7th, 2005. Dudek followed with a Final Reply Brief of Appellant also dated July 6th, 2005.

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

On February 1st, 2006, the South Carolina Supreme Court granted a stay of execution so that Applicant could pursue certiorari review before the United States Supreme Court. Applicant through Mr. Dudek filed a Petition for Writ of Certiorari with the United State Supreme Court dated April 5th, 2006; the State through AAG Waters filed a Brief in Opposition on May 12th, 2006. The United States Supreme Court denied the certiorari petition by order dated June 12th, 2006.

While his certiorari petition before the United States Supreme Court was pending, Applicant filed this APCR on April 7th, 2006. On August 4th, 2006, Applicant filed with the state supreme court a Petition to Appoint Post-Conviction Relief Judge. The State filed a

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Return on August 18th, 2006, and a Motion to Set Execution Date on August 22nd, 2006. On August 28th, 2006, Petitioner filed a Motion for a Stay of Execution, or, in the Alternative to Appoint a Post-Conviction Relief Judge. The State filed a Return to the latest motion on August 29th, 2006. The State filed its initial Return, Motion to Dismiss, and Motion for Summary Judgment dated August 31st, 2006. The South Carolina Supreme Court issued an Order dated September 7th, 2006, in which it stayed the execution for this PCR and appointed this Court.

Applicant filed his First Amended Application, and his Second Amended Application prior to the evidentiary hearing. He also filed his Third Amended Application a week before the evidentiary hearing began in September 2008. The hearing took place over the course of various days in September, October, and December 2008. He filed his Fourth Amended Application in June 2009, some six months after the evidentiary hearing in this case had concluded. He also filed his Amended Brief Supporting Application for Post-Conviction Relief. The Respondent filed a Brief in Opposition. The Applicant then filed a Reply.

This Order of Dismissal follows.

ANALYSIS

Based on the factual findings and legal analysis set forth as follows for each issue, this Court denies relief.

I. James Tawain Gadson, Jr.

Applicant first raises a number of issues with regard to testifying witness James Tawain Gadson, who was at the scene when Kandee Martin was killed.

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

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

"A Brady violation occurs when the government fails to disclose evidence materially favorable to the accused." Youngblood v. West Virginia, 547 U.S. 867, 869, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006). Evidence that is not disclosed is suppressed for Brady purposes even when it is "known only to police investigators and not to the prosecutor." Kyles v. Whitley, 514 U.S. 419, 438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Evidence is favorable if it is either exculpatory or impeaching. See, e.g., Strickler v. Greene, 527

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U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (internal quotation marks omitted). However, a " 'showing of materiality does not require demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal,' " id. (quoting Kyles, 514 U.S. at 434, 115 S.Ct. 1555), but only a "'showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict,'" Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (quoting Kyles, 514 U.S. at 435, 115 S.Ct. 1555). The assessment of materiality is made in light of the entire record. United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 514 S.E.2d 320, 324 (1999) (citing Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). If a Brady violation is found to have occurred, PCR must be granted. Gibson, supra.

[T]he Brady rule does not apply if the evidence in question is available to the defendant from other sources; thus, when defense counsel could have discovered the evidence through reasonable diligence, there is no Brady violation if the Government fails to produce it." U.S. v. Kelly, 35 F.3d 929, 937 (4th Cir. 1994)(internal quotations omitted).

"[W]here evidence is equally available to the accused, the obligation on the part of the State to furnish such evidence to the accused is relieved." Anderson v. Leeke, 271 S.C. 435, 439, 248 S.E.2d 120, 122 (1978).

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

Second, Applicant's claim is rejected because he failed to establish Gadson's psychiatric report was favorable or impeaching evidence. Applicant argues that the psychiatric report "revealed serious mental health concerns and questions about Gadson's ability to recall events." **{Applicant's Brief, p. 4}.** This argument is not supported by the report. First, contrary to Applicant's argument, the report does not call into question

Gadson's short and long term memory. Specifically, the report found "no evidence of long or short-term memory impairment." **{Applicant's 8 & 31, at p. 3}**. Further, the report indicates that "[o]n the Repeatable Battery for the Assessment of Neuropsychological Status, he exhibited some mild impairment of verbal memory, but verbal learning was good." **{Applicant's 8 & 31, at p. 3}**. Overall, the report does not indicate that Gadson suffered from any mental illness other than cannabis dependence. Since there was no indication that Gadson suffered from any type of memory impairment that would have affected his ability to recall what occurred in this case, the report would have had no impeachment value in that regard.

The report was also not material. The William S. Hall report does not indicate that Gadson suffered any memory issues as a result of his seizures. In fact, based on the details provided about the seizures, it appears that he is able to recall what occurred before his seizures (i.e. his food consumption, use of marijuana, etc.). Regardless, neither Gadson nor any other witness testified that Gadson suffered a seizure on Nursery Road at the time of the shooting. Further, no witness testified at either trial or the PCR hearing that Gadson smoked marijuana on the day of the shooting. Gadson did admit at trial that he drank alcohol all day on the day of the murder. **{R. 3992-93; 4021; 4031}**. Absent some actual evidence that Gadson suffered a blackout on the scene, trial counsel could not have argued Gadson suffered a blackout.

Further, the overwhelming evidence of guilt in this case clearly shows that this evidence would not have undermined the confidence in the verdicts at trial. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten

to kill the victim on the day of the murder. **{R. 3726, 3739-3744, 3764-66}**. Gadson saw Applicant shoot the victim. **{R. 4000-02}**. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. **{R. 4012}**. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. **{R. 4018}**. They all wore gloves. Id. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. **{R. 4065}**. He also testified that he heard Applicant admit to he killed the victim. **{R. 4068}**. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testifled that he followed Applicant out to Nursery Road. **{R. 4094}**. He watched as Applicant pulled a body out of the woods. **{R. 4096}**. According to Felder, he saw it was the victim when Applicant put her body in the trunk. **{R. 4097}**. He testified that Applicant admitted that he killed the victim. **{R. 4098}**. He also observed Applicant set the car on fire. **{R. 4100}**. The victim's watch was recovered from Applicant's pants pocket when he was arrested. **{R. 4126-30; 4164-65}**. Applicant's family got rid of the gun that was used in the murder. **{R. 4177, 4185-86}**. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. **{R. 4315}**. Also, Applicant's DNA was found in the victim at the scene. **{R. 4381}**. Overall, even without Gadson's testimony, there was a very strong case against Applicant.

Moreover, Gadson's credibility had already been impeached by his testimony regarding his drinking. United States v. Amiel, 95 F.3d 135, 145 (2nd Cir. 1996) ("Suppressed evidence is not material when it merely furnishes an additional basis on

which to impeach a witness whose credibility has already been shown to be questionable."). In light of the fact that the limited impeachment value of Gadson's psychiatric report and the overall strength of the case against Applicant, Applicant has failed to prove by a preponderance of the evidence that the confidence in the verdicts in this case was undermined by the nondisclosure of Gadson's psychiatric report. As a result, Applicant has failed to sustain his burden of establishing there was a Brady violation in the handling of Gadson's William S. Hall report. As a result, this claim for relief is denied.

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

Applicant has asserted that trial counsel were ineffective because they failed to investigate, impeach, and introduce evidence of Gadson's plea deal and his true bias to avoid a death sentence. Applicant asserts the plea agreement threatened Gadson with a death sentence. Further, Applicant asserts the jury was left with the incorrect impression that Gadson would serve twenty years in prison under his plea agreement. Applicant's claims are denied because they are not supported by the record.

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

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

First, Applicant's allegation that Gadson expressly bargained to avoid a death sentence is not supported by the record. At no point in time did the First Circuit Solicitor's Office file a Notice of Intent to Seek Death Penalty against Gadson. Gadson testified the neither he nor his counsel were ever served with a Notice of Intent to Seek the Death Penalty at trial and at the PCR hearing. **{R. 4024, PCR Tr. 121, 185}.**

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Applicant's argument relies upon the clause in paragraph 9(b) of Gadson's plea agreement which states that the State may reinstate the murder charges and seek the death penalty if Gadson did not comply with the terms of the plea agreement. Applicant's reliance upon this language in the agreement is misplaced. The language in the agreement does not constitute a Notice of Intent to Seek the Death Penalty. It merely outlines the fact that if Gadson did not tell the truth at trial, the State could reinstate the murder charge in its entirety against Gadson. There was no evidence that Gadson plea bargained to avoid the death penalty, and when Gadson pled guilty, he was not facing a death sentence. Thus, Applicant has failed to show that trial counsel was deficient.

Moreover, Applicant has failed to show prejudice. Applicant has not presented any testimony or evidence that indicated that Gadson actually believed that he was avoiding a death sentence with his plea agreement. In fact, Gadson's testimony at the PCR hearing clearly demonstrated the opposite was true. Gadson noted in his testimony that he was never threatened with the death penalty. **{PCR Tr. 121}**. He noted that his attorney informed him after receiving the indictments that Gadson could get life for shooting and killing someone. **{PCR Tr. 209}**. He did not see that as being the same as the death penalty. **Id.**

Moreover, even without Gadson's testimony, there was overwhelming evidence presented of Applicant's guilt, as set forth in the preceding subsection. Thus, this claim of ineffective assistance of counsel is denied.

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

Applicant also failed to establish trial counsel was ineffective for not correcting Gadson's testimony at trial indicating that he would serve twenty (20) years in prison. At trial, Solicitor Bailey asked Gadson if he was testifying pursuant to a plea agreement:

> Q. Okay. And through Mr. Dukes, through his representation, you have entered into a plea agreement with the State of South Carolina; have you not?
>
> A. Yes, sir.
>
> Q. Okay. And would you tell the Court and the jury what that agreement is, your understanding of that agreement?
>
> A. Accessory after the fact and misprision of a felony.
>
> Q. All right, sir. And are you going to get a negotiated sentence of 20 years for that?

A. Yes, sir.

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

A. Yes, sir.

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

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

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Furthermore, Applicant fails to establish prejudice. First, there was no testimony offered at the PCR hearing that Gadson was aware at trial that he could serve substantially less than twenty years confinement under his plea agreement. See Moss v. Hofbauer, 286 F.3d 851, 864-65 (6th Cir. 2002) (speculation as to possible lines of cross-examination insufficient where no evidence presented how witness would have testified had the cross-examination been pursued); Zettlemoyer v. Fulcomer, 923 F.2d 284,298 (3rd Cir. 1991) (applicant cannot show deficiency "based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense"; rather, facts must be presented).

Second, Applicant can not show prejudice because of the overwhelming evidence of guilt, as set forth in the preceding sections. Thus, this claim for relief is denied.

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

Applicant asserts trial counsel was ineffective for not presenting evidence to the jury that the State had asserted that Gadson was the one who shot the victim in other court proceedings. Applicant has failed to meet his burden in this regard.

First, Applicant relies upon the fact that the lead detective in the investigation, Alvin Coker, submitted a affidavit for Gadson's arrest warrant that indicated there was evidence Gadson was the shooter. The affidavit states that there was probable cause to believe that Gadson murdered Kandee Martin. **{Applicant's 4}**. The affidavit clearly notes that the basis for the probable cause was a statement that *Applicant himself* gave to police, blaming the crime on others:

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

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

At the PCR hearing, Coker credibly testified that the affidavit to the arrest warrant was based upon the information and evidence the police had at that time. **{PCR Tr. 890}**. That information consisted of the statement provided by Marion Bowman. As for the

murder indictment against Gadson, Coker testified that he was the sole witness presented to the grand jury in this case. **{PCR Tr. 862}**. He testified to the facts as he knew them. Id. Coker testified that he told the grand jury that the evidence they had at the time indicated Gadson was present when the murder occurred, but Applicant was the one who fired the fatal shot. **{PCR Tr. 863-64}**.

Applicant has not established that trial counsel was deficient. First, "[i]t is well settled in this jurisdiction that affidavits are inadmissible in criminal cases." State v. Alexander, 303 S.C. 408, 409, 401 S.E.2d 167, 168 (1991) (citing State v. Stewart, 288 S.C. 232, 341 S.E.2d 789 (1986); State v. Lathan, 275 S.C. 550, 273 S.E.2d 772 (1981); State v. Smith, 230 S.C. 164, 94 S.E.2d 886 (1956)). Trial counsel cannot be found deficient for not introducing inadmissible evidence. See generally Strickland, supra. Thus, to the extent that Applicant asserts that Gadson's arrest warrant should have been introduced at trial, his claim is denied.

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More importantly, however, is the fact that the arrest warrant affidavit in no way indicates the State believed Gadson was the one who fired the fatal shot. All the arrest warrant affidavit shows is that early in the investigation the police thought there was probable cause to believe that Gadson may have been the shooter. Indeed, the arrest warrant was sworn out by Coker on February 17, 2001, the same day the victim's car and body were found. **{Applicant's 4}**.

Also, the arrest warrant affidavit was based upon the second statement provided to police by Applicant. Trial counsel provided a valid, strategic reason for not wanting any of Applicant's statements entered into evidence. He did not ask the question because he

knew the response would be that they relied upon Applicant's (obviously self-serving) statements in making the arrest. **{PCR Tr. 1914}**. That was not a road that he wanted to take at trial. Id. Further, Cummings pointed out that arrest warrants do not count any way, and that they can be amended and changed. **{PCR Tr. 1914}**. Furthermore, indictments supersede arrest warrants. Id. Thus, this claim is denied because trial counsel was not deficient.

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

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the one who shot the victim. Id. Bailey did not want to speculate as to what Coker may or may not have told the grand jury, but the only concern in the grand jury is whether there is sufficient evidence to continue prosecution under some legally valid theory. **{PCR Tr. 2140-41}**. Since as a legal and practical matter the language of the indictment does not mean the State believed Gadson was the actual shooter, counsel cannot be found deficient. Overall, Applicant has failed to show deficiency.

Applicant has also failed to establish prejudice. Not only was the jury informed Gadson's murder charge in this case was being reduced to accessory after the fact to murder and misprision of a felony in exchange for truthful testimony **{R. 3980-81}**, but there was overwhelming evidence of Applicant's guilt as set forth in the preceding subsections. Indeed, the supposed subjective "belief" of one officer or prosecutor at one time or another is not what is important and relevant in a criminal trial – what is important is what the *jury* believes after hearing actual evidence related to the crime itself. Since Applicant has failed to show deficiency or prejudice, this claim for relief is denied.

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E. Trial Counsel was Not Ineffective in Not Presenting Alleged Evidence from Wayne Mood

Applicant asserts that trial counsel should have presented the testimony of Wayne Mood, a jailhouse informant interviewed by the State about this case. According to the notes from Solicitor Bailey's interview with Wayne Mood, Gadson told Mood and another man that both he and Bowman shot Kandee Martin. **{Applicant's 68}**. The notes indicate that both Bowman and Gadson told Mood a similar story. They were with Kandee Martin and were planning to rob a house. Id. Bowman gave the victim some crack. At some point in time, the victim became afraid and ran towards Bowman. They argued. Bowman

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mentioned to Mood that the victim was supposedly wired. According to the statement, the initial story was Gadson shot her in the back first. The victim ran until she ran out of breath. She then begged for mercy. Shortly thereafter, Bowman shot her in the head. The note also indicates that Bowman threatened to kill Gadson if he told anyone, and it mentioned that Gadson defecated on himself. The notes also indicate that later on, Bowman and Felder went back to the scene, put the body in the trunk of the victim's car, and set the car on fire. It appears that Gadson's initial version had Bowman shooting first. However, the Wayne Mood notes also indicate that Gadson later admitted he shot the victim first.

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

Further, trial counsel gave a reasonable strategic reason for not calling Wayne Mood to testify. Cummings testified that he contacted Mood's attorney shortly after receiving the notes from Solicitor Bailey. **{PCR Tr. 1366-67; see Applicant's 70}.** Mood's counsel would not allow the defense to talk with Mood. Overall, in assessing the value of

Mood's potential testimony, Cummings noted that parts of what he was saying about Bowman had to do with Bowman shooting the victim in the back. **{PCR Tr. 1367-68}**. He did not want to put up a witness that was going to possibly implicate Applicant for any reason. **{PCR Tr. 1368}**. He did not even want to present testimony that would have indicated he was at the scene with Gadson with Gadson being the shooter. Id. He was concerned that presenting testimony that put Applicant at the scene could backfire. Id. Clearly, counsel's explanation for not calling Wayne Mood was reasonable trial strategy. As a result, Applicant failed to establish deficiency. Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial). See generally Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

Applicant also fails to establish prejudice. First, if Mood testified in accordance with the Solicitor's notes, then the testimony would not have been exculpatory. The notes clearly detail that Bowman admitted to Mood he was the one who shot Kandee Martin in the head after she begged for her life. The forensic pathologist who testified at trial indicated that both the head wound and the wound to the back were fatal wounds. **{R. 3945, 3949}**.

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Second, there was overwhelming evidence of Applicant's guilt, as set forth in Section I, *supra*. This claim for relief is denied.

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

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

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

A The one Marlon bought from the dude in Orangeburg.

Q That was Marion's gun?

A Uh-huh.

Q He let you borrow it?

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

Q Marion Bowman was there?

A Yes, he was there.

{PCR Tr. 195}.

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

Trial counsel was not deficient in not presenting this information that Gadson had access to the gun, as such testimony would have clearly indicated that the only reason he had access to the gun was because Applicant had it concealed on his person and just handed it to Gadson. Any cross-examination questions on this issue would have had minimal benefit to Applicant.

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Further, Applicant did not establish that he was prejudiced by trial counsel's decision not to introduce evidence of the shooting at the Villas, given the overwhelming evidence as as set forth in Section I, *supra*, and the minimal benefit this evidence could have had. This claim of ineffective assistance is denied.

G. Trial Counsel was Not Ineffective with Regard to Gadson's ownership of a .380 Handgun.

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

Applicant's claim lacks merit. First, Applicant did not establish deficiency. At trial, Cummings asked Gadson if he owned a high powered .380 pistol. **{R. 4026}.** Over the State's objection, Gadson was allowed to answer. **{R. 4027-31}.** He admitted that he had

purchased a .380 pistol in July 2000, and the pistol he purchased was the same color as Applicant's. **{R. 4031}**. Clearly, the jury was made aware that Gadson also had a weapon of the same caliber as the one used in the murder.

Applicant also failed to show prejudice. As already noted, the jury was informed of the fact that Gadson owned a .380. Further, there was no evidence that Gadson's gun was connected in any way to the murder. Gadson had legally purchased his gun, and although he claimed it had since been stolen, the gun Gadson bought a different serial number from the gun found in the river which was matched to the murder scene. **{PCR Tr. 195-96; 338; 991-1003; 1919-21}**. Finally, there was overwhelming evidence of Applicant's guilt, as set forth in Section I, *supra*. This ground for relief is denied..

II. Travis Felder

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

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

that he understood he was supposed to tell the truth the first time he was on the stand, but he omitted that part of the truth. **{R. 4926}**.

A state "denies a defendant due process by knowingly offering or failing to correct false testimony." Basden v. Lee, 290 F.3d 602, 614 (4th Cir.2002) (citing Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)). Furthermore, "[a] Napue claim requires a showing of the falsity and materiality of testimony." Id. False testimony is "material" when " 'there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' " Boyd v. French, 147 F.3d 319, 329-30 (4th Cir.1998) (quoting Kyles v. Whitley, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)).

First, Applicant failed to establish that the State knowingly offered false testimony. At the PCR hearing, Solicitor Walter Bailey testified that he did not know that Felder was the one who purchased the gasoline. **{PCR Tr. 2037}**. He testified that he never specifically asked Felder any questions about purchasing gasoline, and none of the versions of the facts provided to him by Felder included Felder's purchase of the gasoline. Id. Bailey noted that Felder had omitted that fact in both meetings he had with Felder and his attorney and in the proffer letter that was submitted by Felder's attorney. **{PCR Tr. 2040}**. Bailey recalled that he first heard that Felder was the one who purchased the gasoline from trial counsel Cummings. **{PCR Tr. 2037}**. Bailey reiterated several times that he never knew that Felder was the one who purchased the gasoline. **{PCR Tr. 2047}**. He could not correct the omission because he did not know there was an omission. **{PCR Tr. 2047-48}**.

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At the PCR hearing, Felder testified that he could not remember if he told Bailey he was the one who bought the gasoline. **{PCR Tr. 706, 711}**. He did agree that he said he told Bailey when he was deposed for these proceedings. **{PCR Tr. 671}**. However, he also noted that he could not say for sure that he told Solicitor Bailey. **{PCR Tr. 714}**. Overall, Felder testified that he did not have a specific memory of telling Bailey that he was the one who purchased the gasoline. **{PCR Tr. 729}**.

Without specific information from Felder, the State could not know for certain that Felder was the one who purchased the gasoline used in the arson. There was no mention of Felder being the one who purchased the gasoline in the proffer letter sent to Solicitor Bailey by Felder's counsel. **{See Applicant's 64}**. Also, Felder's role as the one who purchased the gasoline was not an issue he was questioned about during his polygraph. **{See Applicant's 15}**. It is also not mentioned in Solicitor's Bailey's outline for Felder's testimony. **{Applicant's 82}**. In light of the fact that neither Felder nor Bailey could recall Felder telling Bailey he was the one who purchased the gasoline, Applicant has failed to show by a preponderance of the evidence that Bailey knowingly presented false testimony in allowing Felder to omit the fact he was the one who purchased the gasoline. As a result, this claim for relief is denied.

Second, Applicant failed to show materiality. As already noted, false testimony is "material" when " 'there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' " Boyd v. French, 147 F.3d 319, 329-30 (4th Cir.1998) (quoting Kyles v. Whitley, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). Here, there is no reasonable likelihood that Felder's omission could have affected the

judgment of the jury. First, the omitted testimony did not indicate that Applicant was any less guilty of the crimes for which he was convicted. In fact, the omitted testimony further confirms that Applicant was guilty in the arson. At trial, Felder testified that he purchased the gasoline at Applicant's request. **{R. 4922-24}**. He further testified that Applicant was the one who provided the jug that was used. **{R. 4922}**. Felder confirmed that he purchased the gasoline at Applicant's request at the PCR hearing. **{PCR Tr. 699-700}**. Felder consistently maintained that he thought the gasoline was needed so that Bowman could go "park a car." **{PCR Tr. 699-700; R. 4092}**. Applicant offers no other probative evidence to show that Felder knew Bowman was going to burn the car.

Furthermore, no other witness testified that Felder assisted in the planning or participated in the burning of the car. In fact, at least two witnesses confirm that Felder was at a friend's apartment when Bowman came to him about the issue. Carolyn Brown testified that Applicant stopped by Boloma Smith's apartment and asked Felder for a ride home. **{R. 3711, 4045}**. Boloma Smith similarly testified that Applicant stopped by her apartment and asked Felder to come out and speak with him. **{R. 4117}**. She also noted that Felder left, and he came back later. **{R. 4117-18}**.

Even without Felder's testimony, there was overwhelming evidence of Applicant's guilt in this case. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. **{R. 3726, 3739-3744, 3764-66}**. Gadson saw Applicant shoot the victim. **{R. 4000-02}**. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. **{R. 4012}**. Applicant then dragged her body into the woods. Id. Gadson later rode

with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. **{R. 4018}**. They all wore gloves. Id. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. **{R. 4065}**. He also testified that he heard Applicant admit to he killed the victim. **{R. 4068}**. The victim's watch was recovered from Applicant's pants pocket when he was arrested. **{R. 4126-30; 4164-65}**. Applicant's family got rid of the gun that was used in the murder. **{R. 4177, 4185-86}**. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. **{R. 4315}**. Also, Applicant's DNA was found in the victim at the scene. **{R. 4381}**. In light of the overwhelming evidence of Applicant's guilt, it is highly unlikely that the testimony was material. The claim is denied.

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

#25

Applicant next contends that the State did not correct Felder's testimony as to the number of times he spoke with someone from the State. This claim is denied as it is not supported by the record. Solicitor Bailey properly corrected Felder's testimony in response to the question that was asked at trial.

At issue is the following exchange between trial counsel Cummings and Felder:

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

A. Excuse me?

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

A. Once.

Q. - - with the State? One time.

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

During redirect, Solicitor Bailey clearly corrected Felder's testimony as to the total number of meetings he had with Felder.

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

A. Yes.

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

A. Yes.

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

A. Yes, sir.

{R. 4110}.

Contrary to Applicant's assertions, there were no other meetings between representatives of the State with Felder regarding his testimony at trial. The other interactions that Felder had with state officials regarding preparation of actual testimony for trial. The first three meetings cited by Applicant were clearly interactions Felder had with law enforcement as they investigated the case. The first was when he was initially questioned by police. The second occurred when he was arrested. The third meeting occurred when Felder was polygraphed. Only in the last two meetings between Felder and Bailey did he actually discuss his testimony at trial. Thus, Bailey did properly correct Felder's testimony regarding how many times he met with a representative of the State

regarding his testimony. As a result, Applicant's claim is not supported by the record and is denied.

Regardless, given the other strong evidence in the case detailed before and the jury was apprised the State had met with Felder and that Felder had a plea agreement, Applicant has not established materiality.

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

Applicant next asserts that the State failed to provide the defense with Brady information regarding Travis Felder. As will be seen, each one of these contentions is denied.

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

#27

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

First, as already noted in Section II, A, it is not clear that the State had evidence that Felder purchased the gasoline used to burn the victim's car. At the PCR hearing, Solicitor Bailey consistently testified that he was not aware that Felder was the one who purchased the gasoline. **{PCR Tr. 2037, 2047-48}**. While Felder testified at the PCR hearing that he did say he told Solicitor Bailey he purchased the gasoline at his deposition, Felder indicated at the hearing that he did not have a specific memory of whether or not he did tell Bailey. **{See PCR Tr. 729}**. He was unable to confirm about telling Bailey because he simply could not remember. **{PCR Tr. 706, 714, 729}**.

Next, while the State had circumstantial evidence that it was Felder who purchased the small amount of gasoline from the EZ Horizon convenience store, they did not have any evidence indicating that the gasoline purchased by Felder was the gasoline used in the arson until Felder testified to as much during the penalty phase at trial. The proffer letter that was sent to Bailey did not include any discussion about Felder purchasing gasoline. **{Applicant's 64}**. Felder's polygraph report indicates Felder did not mention anything about purchasing the gasoline. **{Applicant's 15}**. Most telling, however, is the fact that Solicitor's Bailey's notes created in preparation for Felder's testimony also include no mention of Felder purchasing the gasoline. Clearly, the State would have had no reason not to present such testimony. Based on Felder's testimony during the penalty phase and at the PCR hearing, it would have assisted the State's case because Felder clearly testified that he purchased the gasoline on Applicant's instruction. **{R. 4922-24; PCR Tr. 699-700}**. None of the evidence presented at the PCR hearing indicated the State had evidence connecting the gasoline purchased by Felder to the arson.

indicated they knew who purchased the accelerant used in the arson and from where it was purchased.

Indeed, Cummings testified that while they could not tell if Felder was on the tape, *Applicant informed him that Felder was on the tape at 3:14 a.m.* purchasing the gasoline. **{PCR Tr. 1287}**. Cummings did not want Felder testifying about the fact that he purchased the gasoline because of the implication of Applicant's involvement in the planning of the arson. **{PCR Tr. 1289-90}**. Defense counsel had the tape and was aware of the evidence.

Second, Applicant has failed to show that any evidence that Felder purchased the gasoline was favorable. Felder testified that he purchased the gasoline at Applicant's request. **{R. 4922-24, PCR Tr. 699-700}**. According to Felder's testimony at trial, Applicant provided the container used to hold the gasoline. **{R. 4916, 4922}**. He has consistently testified that when he purchased the gasoline, he thought he was doing so to assist Applicant "park a car." **{R. 4916-4924; PCR Tr. 699-700}**. At best, the information could have had very limited impeachment value.

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Third, Applicant has failed to show that Felder's purchasing the gasoline used to burn the car was material evidence. There was overwhelming evidence of Applicant's guilt, as detailed before in previous sections, and whether Felder was the one who actually made the purchase of the gas to late burn the car does not rise to the level of materiality. **{R. 3711, 4117-18; 4045}**. This claim is denied.

2. The State Did Not Violate Brady When It Did Not Disclose the Proffer Letter from Felder's Attorney.

Applicant has failed to establish by a preponderance of the evidence that the State did not properly provide the defense with a proffer letter from Felder's attorney.

Solicitor Bailey testified that he received a letter from Felder's counsel during their negotiations regarding a possible plea agreement. **{See PCR Tr. 2109}**. The letter contained a proffer of what Felder could testify to if called upon at trial. **{PCR Tr. 2109, Applicant's 64}**. The letter indicated that Felder had seen Applicant, Gadson, Williams, and Johnson at the Allen Murray Club that night. **{Applicant's 64}**. The letter indicated Felder went to his girlfriend's apartment after returning from the Allen Murray Club. Id. About fifteen minutes later, Applicant stopped by and asked Felder for some assistance in parking a car. Id. According to the letter, Felder then followed Bowman down McAlhaney Road. Id. The letter noted that Bowman pulled up into a field, got out, and then the car was on fire. Id. Felder did not recognize the car; instead, according to the letter, he assumed it was one of Bowman's sister's car. Id. Bailey testified that he did not necessarily believe the contents of the proffer letter. **{PCR Tr. 2109}**. As a result, he had Felder take a polygraph examination to verify the veracity of Felder's statements. Id. Bailey testified that to the best of his recollection, he forwarded a copy of the proffer letter to defense counsel. **{PCR Tr. 2110}**. He also forwarded the results of the polygraph report to defense counsel after it was completed. **{PCR Tr. 2110, Respondent's 36}**. At the PCR hearing, Norb Cummings testified that he did not recall receiving a copy the proffer letter sent by Felder's attorney to Solicitor Bailey. **{PCR Tr. 1319}**. Cummings did recall that a few days before trial he got a phone call from the solicitor's office informing him Felder was going to testify. **{PCR Tr. 1294}**. He also recalled that he received a letter or fax that confirmed Felder was going to cooperate with the state. **{PCR Tr. 1294}**.

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Applicant has failed to establish that the State violated Brady by not providing the defense with a copy of the letter. First, this Court credits Solicitor Bailey's testimony that the proffer letter was sent to the defense. Suppression has not been established.

Next, Applicant has failed to establish by a preponderance of the evidence that the proffer letter was favorable to Applicant. The letter offers no exculpatory evidence for Applicant's case. Outside of the testimony regarding seeing the body in the car, it was consistent with Felder's testimony at trial during the guilt phase. More importantly, the evidence could not be used for impeachment purposes. It was not a statement made by Felder. It was simply a reflection of what Felder's attorney provided the solicitor's office as it opened negotiations for a plea agreement.

#32

Third, Applicant fails to show the proffer letter was material. Any minor differences in the proffer letter and the trial testimony do not overcome the overwhelming evidence of Applicant's guilt presented in this case, as set forth in prior subsections. The claim is denied.

3. There Was No "Wink Wink" Deal Between the State and Felder

Applicant contends there was an undisclosed "wink wink" deal for Felder's testimony. This Court finds there was no "wink wink" deal between the State and Felder, and thus the State could not have violated Brady in this regard.

Applicant's complaint derives from the fact that Felder received the benefit of his signed plea agreement with the State even though he omitted the fact he purchased the gasoline during his guilt phase testimony. At the PCR hearing, Solicitor Bailey testified that he was surprised to learn that Felder had purchased the gasoline used in the burning of

the victim's car. **{PCR Tr. 2040}**. The State and Felder reached a verbal agreement for Felder's testimony shortly before trial. **{PCR Tr. 1295, Applicant's 14}**. When Felder initially testified, Bailey noted they only had a verbal agreement. **{PCR Tr. 2045}**. The written agreement had been drafted and sent to Felder's attorney. Id. However, when Felder testified during the guilt phase, Bailey had not received the signed copy of the agreement from Felder's attorney. Id. The plea agreement was signed when Felder returned to testify during the penalty phase of trial. **{PCR Tr. 2128}**. Bailey noted that the verbal agreement would not have contained all of the specific terms that were included in the written agreement. **{PCR Tr. 2043}**.

Bailey explained that the plea agreement with Felder provided the State with the option to void the agreement. **{PCR Tr. 2042-43}**. He ultimately decided not to void the agreement because he felt that it was not worth it as far as utilizing court time and for whatever marginal benefit the State might have received with an increased sentence. **{PCR Tr. 2126-27}**. Further, Bailey indicated it may have been difficult to void the agreement because Felder did not tell an outright lie. **{PCR Tr. 2044}**. Bailey noted that neither he nor Cummings asked any questions that would have specifically elicited the testimony regarding Felder's purchase of the gasoline. **{PCR Tr. 2044}**. Ultimately, Felder did tell the jury of his involvement in purchasing the gasoline. **{PCR Tr. 2127}**. While Bailey wished that information would have come out the first time Felder testified, there was not much that he could do about it. **{PCR Tr. 2127}**.

To the extent that Applicant relies upon the fact that the State did not disclose the fact that Felder had lied in his attempt to garner the plea agreement, that claim is not

supported by the record. Bailey provided trial counsel with Felder's polygraph report by letter dated April 24, 2002. **{Respondent's 33, 44}**. On May 10, 2002, Bailey informed trial counsel that the State had reached an agreement with Bailey for his testimony. **{Res. Ex. 32}**. Clearly, Applicant was on notice that Felder was receiving a plea agreement despite the fact he had lied to the State at some point in time. **{See PCR Tr. 2144-46}**.

Overall, this Court credits Bailey's testimony and specifically finds that Applicant has not established the existence of a "wink wink" deal between Felder and the State. Since Applicant prove such a deal, his Brady claim for relief is denied.

D. Trial Counsel Was Not Ineffective for not Presenting Evidence of Felder's Original Arrest/Charge

#34

In this claim, Applicant asserts trial counsel was ineffective for not exposing the fact ~~that~~ Felder was initially arrested and charged with Accessory to Murder/Arson and Arson, Third Degree. According to the arrest warrant affidavit, the evidence utilized to establish probable cause for the charges consisted of a statement provided by Applicant. **{Applicant's 17 & 18}**. According to Applicant's statement, Gadson and Felder were the ones who shot the victim and burned the car. **{See Applicant's 17 & 18}**. After he was arrested, Felder did not give a statement to police. Instead, he invoked his right to counsel. **{See Applicant's 16}**. During June 2001, Felder was indicted for Third Degree Arson and Accessory After the Fact to the murder. **{Applicant's 43, 44}**. By all accounts, Felder did not have any contact with law enforcement or the solicitor's office until his attorney contacted the solicitor's office about a plea in March 2002. **{See Applicant's 64, PCR Tr. 2107-2110}**.

Applicant argues that trial counsel was ineffective for not pointing out that Felder was once charged with accessory before the fact to the murder and that the State could have sought the death penalty for such a charge. First, it should be pointed out that the South Carolina Supreme Court has held that one indicted for accessory before the fact *cannot* be eligible for the death penalty. State v. Bixby, 373 S.C. 74, 644 S.E.2d 54 (2007). Even though this decision came out after Applicant's trial, it was merely interpreting statutes on the books when Applicant was tried. This Court cannot assume that had the issue been raised to Applicant's trial judge he would have gotten it wrong.[1] Since the death penalty would not have been on the table, counsel cannot have been deficient nor Petitioner prejudiced for not cross-examining on it.

#35

Regardless, there is no evidence that supports the implication that the accessory before the fact to the murder charge was "reduced" to accessory after the fact as a result of Felder's cooperation. In fact, the evidence clearly points to the contrary. The charge was reduced to Accessory After the Fact when Felder was indicted in June 2001. At that point, Felder had not given any statement to law enforcement other than his initial denial of all involvement. Thus, since there was no basis to imply that Felder's cooperation at trial was to avoid being charged with accessory before the fact, counsel could not have made the inference. It was accurately brought out to the jury, however, that Felder's charges were reduced to a single accessory to Arson 3rd based on his cooperation. **{R. 4085-86; 4108-09}**. There was no deficiency.

[1] Strickland is clear that the Court must "presume . . . that the judge or jury acted according to law", and "and assessment of the likelihood of result must exclude the possibility of arbitrariness, whimsy, caprice, nullification, or the like". 466 U.S. at 695. "A defendant has not entitlement to the luck of a lawless decisionmaker." Id.

Additionally, counsel expressed a valid strategic reason for not getting into the initial charges from Felder. Cummings testified that it was his understanding that Felder was initially charged based upon a statement given to police *by Applicant*. **{PCR Tr. 1971}**. Counsel noted on several occasions that he did not want any of Applicant's statements to come into evidence. **{PCR Tr. 1827-29; 1834-37; 1908-14; 2004-05}**. Obviously, questioning along this line could elicit that the charge was based on Applicant's attempt to deflect blame by implicating others.

Second, trial counsel did attempt to elicit testimony from Felder regarding how much time he was facing under his plea agreement. Counsel asked Felder "[h]ave you been told a possible sentence?" **{R. 4108}**. Felder responded, "[n]o sir." Id. Counsel did attempt to show bias in this regard, and thus counsel cannot be deficient.

#36

As to claims that counsel should have somehow raised that fact that the State had "a long-held belief" that Gadson and Felder were the ones who killed the victim and burned the car, the claim is without merit. Applicant's position relies solely upon the arrest warrant affidavits, which of course refer only to probable cause. However, this probable cause was based solely in the fact of the statement from Applicant trying to deflect blame to other people. It was very early in the investigation. Cummings testified that he did not want any of Applicant's statements admitted into evidence, and he was surprised that the State did not present those statements. Obviously, there was little to be gained from such an examination, and this strategic decision was reasonable.

Finally, Applicant fails to establish prejudice, given the overwhelming evidence as set forth in the prior subsections, the extent of cross-examination and impeaching

information otherwise elicited at trial, and the minimal value and potentially harmful character of the initial charges given that the jury could conclude they stem from Applicant's attempt to blame others for his crimes. This claim for relief is denied.

E. Trial Counsel was not Ineffective in Not Presenting Evidence Felder Was the One Who Purchased the Gasoline During the Guilt Phase at Trial.

Applicant fails to establish trial counsel was ineffective in not presenting evidence that Felder purchased the gasoline. Counsel elicited a valid and reasonable strategic reason explaining why he did not ask Felder about purchasing the gasoline. Further, Applicant has failed to show that there was a reasonable probability that the outcome at trial would have been different had counsel presented evidence and testimony that Felder purchased the gasoline during the guilt phase.

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As noted in response to Applicant's argument that the State failed to provide Applicant with information regarding Felder's purchase of the gasoline, trial counsel knew Felder had purchased the gasoline. At the PCR hearing, Cummings testified that he did not want the video of Felder purchasing the gasoline coming into evidence. **{PCR Tr. 1276}**. While he did not know why the State had not entered the video into evidence, he did not want it in because he felt it would corroborate Applicant's involvement in the plan to burn the car. **{PCR Tr. 1276}**. Cummings also testified that the entry of the video into evidence during the sentencing phase was done at Applicant's insistence and was not in line with his strategy. **{See PCR Tr. 1290}**.[2] This fear was well placed, as illustrated by Felder's testimony during the sentencing phase. Felder testified that he purchased the

[2] This testimony was also confirmed during Cummings' cross examination and is supported by the trial record. **{PCR Tr. 1290-91, see R. 4911-26}**.

gasoline after being instructed to do so by Applicant. **{R. 4916-24}**. He also testified that Applicant provided the gas jug to be used in the purchase. Id. Clearly, trial counsel articulated a valid, reasonable strategic reason for not presenting the evidence of Felder purchasing the gasoline. As a result, this claim is denied.

Applicant has also failed to establish prejudice. First, Applicant presents no evidence to support its contention that Felder's omission that he was the one who purchased the gasoline indicated he was involved in the murder of Kandee Martin. Second, Felder's testimony regarding the omission during the sentencing phase and during the PCR hearing clearly shows that cross-examination on this issue during the guilt phase would have done nothing to exculpate Bowman from being a participant in the arson. To the contrary, Felder's testimony clearly indicated that Bowman directed the arson to cover his crime. Third, as noted before, there was overwhelming evidence of Applicant's guilt in both the murder and the arson. Given this overwhelming evidence and the potentially harmful inferences from the gasoline evidence, the prejudice standard is simply not met.

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F. Trial counsel Was Not Ineffective for not Filing a Rule 29 Motion for a New Trial; Counsel Was Aware that Felder Was the One Who Purchased the Gasoline at Trial

Applicant asserts trial counsel was ineffective for failing to file a Rule 29(b) Motion for a New Trial because once Felder testified was the one who purchased the gasoline after the guilt phase was complete.

This claim is denied. Indeed, Applicant in fact filed a motion for a new trial in General Sessions Court on September 8, 2008, which Judge Goodstein denied by Order filed January 21, 2010. Specifically, Judge Goodstein ruled that the defense was well

aware of Felder's actions at the time of trial and thus the evidence was not "new" under the test for after-discovered evidence.

Such a finding has support in the record. Cummings testified at PCR that the defense received a copy of the video surveillance from the EZ Horizon convenience store. **{PCR Tr. 1933-34; Respondent's 34}**. It is also clear from the testimony of Cummings that Defendant was well aware that Felder was the one who purchased the gasoline. **{PCR Tr. 1274-76; 1287-88}**. Cummings testified it was Defendant who informed him that Felder purchased the gasoline. Id. At the PCR hearing, Cummings testified that he strategically did not want the video of Felder purchasing the gasoline coming into evidence. **{PCR Tr. 1276}**. Cummings stated did not want it in because he felt it would corroborate Defendant's involvement in the plan to burn the car. **{PCR Tr. 1276}**. Cummings added that the entry of the video into evidence during the sentencing phase was done at Defendant's insistence and was not in line with counsel's strategy. **{See PCR Tr. 1290}**.[3] Counsel's fear was well placed, as illustrated by Felder's testimony during the sentencing phase, which did nothing to exculpate Defendant other than by the impeaching nature of its inconsistency on one point.

This Court agrees that trial counsel was aware at the time of trial that Felder purchased the gasoline and that counsel mad a reasonable strategic decision not to present the evidence during the guilt phase. As such, counsel would not have had a factual basis for a motion for a new trial based upon newly discovered evidence. The claim is denied.

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[3] This testimony was also confirmed during Cummings' cross examination and is supported by the trial record. **{PCR Tr. 1290-91, see R. 4911-26}**.

III. Hiram Johnson

A. The State Did Not Violate Brady In Not Disclosing Hiram Johnson's then Pending Charges

Applicant's first Brady claim in reference to Hiram Johnson concerns Johnson's criminal charges. On May 29, 2001, Johnson was served with arrest warrants for Receiving Stolen Goods Less than $1000, Burglary - Second Degree, and Grand Larceny. **{Applicant's 48, 71}**. The Receiving Stolen Goods Less than $1000 charge stemmed from an incident on November 2, 2000. **{Applicant's 48}**. The Burglary charge and the Grand Larceny charge resulted from an incident in Orangeburg County on September 26, 2000. **{Applicant's 71}**. Applicant asserts that the prosecution violated Brady because it failed to disclose these charges to trial counsel.

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Applicant failed to establish materiality. First, there was overwhelming evidence of Applicant's guilt presented at trial outside of Hiram Johnson's testimony. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. **{R. 3726, 3739-3744, 3764-66}**. Gadson saw Applicant shoot the victim. **{R. 4000-02}**. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. **{R. 4012}**. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. **{R. 4018}**. They all wore gloves. Id. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. **{R. 4094}**. He watched as Applicant pulled a body out of the woods. **{R. 4096}**. According to Felder, he saw it was the victim when Applicant put her body in

the trunk. **{R. 4097}**. He testified that Applicant admitted that he killed the victim. **{R. 4098}**. He also observed Applicant set the car on fire. **{R. 4100}**. The victim's watch was recovered from Applicant's pants pocket when he was arrested. **{R. 4126-30; 4164-65}**. Applicant's family got rid of the gun that was used in the murder. **{R. 4177, 4185-86}**. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. **{R. 4315}**. Also, Applicant's DNA was found in the victim. **{R. 4381}**.

Second, the impeachment value of Johnson's pending charges was limited, particularly in view of the overwhelming evidence of guilt detailed above. There is no evidence Johnson actually got any special consideration for his charges due to testimony, and the charges were completely unrelated to the murder of Kandee Martin. Moreover, Johnson was impeached on whether he could remember what occurred as a result of his head injury, and on the fact that his head injury occurred after he was shot by a police officer. **{R. 4071}**. In light of the overwhelming evidence of Applicant's guilt in this case, coupled with the limited impact of an impeachment on the suppressed charges, Applicant has failed to establish this Brady claim. It is denied.

B. There Was No "Wink Wink" Deal Between the State and Johnson

In Applicant's second Brady claim, he asserts that the prosecution failed to provide Applicant's counsel with evidence of a "wink wink" deal between the State and Hiram Johnson for his testimony.

In this claim, Applicant essentially asserts that the Solicitor's Office attempted to use Hiram Johnson's pending charges for Burglary and Grand Larceny from a September 2000 incident, and charges for Receiving Stolen Goods less than or equal to $1000 from a

November 2, 2000, incident as leverage to obtain testimony favorable testimony from Johnson. Specifically, Applicant asserts that Solicitor Bailey used those pending charges to get Johnson to testify that Bowman admitted he killed Kandee Martin.

This Brady claim is not supported by the record. There was no testimony or evidence presented at the PCR hearing that indicated Solicitor Bailey or the police officers made a "wink wink" deal with Hiram Johnson. Detective Coker testified that he was not aware that Johnson had pending charges when he interviewed him.[4] **{PCR Tr. 927, 942}.** Bailey credibly testified there was no plea agreement with Johnson: to their knowledge, there were no charges against Johnson and Johnson just agreed to testify. **{PCR Tr. 2134}.**

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Indeed, the progression of those charges after Bowman's trial also indicates that his cooperation with the Solicitor's office had no effect on those charges. Johnson was indicted by the Orangeburg County Grand Jury on the all three charges during the April 14, 2003 term of the Orangeburg County Court of General Sessions. **{Applicant's 48, 71}.** While the Burglary and Grand Larceny indictments were later nol prossed because of a lack of credible evidence, those indictments remained pending for over one and one-half years before disposition. **{See Applicant's 48, 71}.** Resolution of Johnson's criminal charges were clearly not related to the Bowman case. **{See also Respondent's 39-42}.** Applicant has failed to establish there was a "wink wink" deal between the State and Hiram

[4] Coker also testified that he did not know that Johnson later filed a lawsuit against Orangeburg County deputies until later informed by Chief Walters from the Orangeburg County Sheriff's Department. **{PCR Tr. 942-43}.**

Johnson. Since there was no "wink wink" deal between the two, the prosecution could not have violated Brady by not turning over details of such a deal. The claim is denied.

C. Trial Counsel Was Not Ineffective in Not Cross Examining Johnson on the Absence of Bowman's Alleged Confession in Johnson's Prior Statements.

Applicant argues that trial counsel was ineffective because Cummings did not cross-examine Hiram Johnson on the fact that none of Johnson's prior statements indicated Applicant had confessed to killing Kandee Martin. Applicant has failed to establish ineffectiveness in this regard.

As has been noted: "In hindsight, there are few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would pass muster." Willis v. United States, 87 F.3d 1004, 1006 (8th Cir. 1996). The extent of examination and cross-examination of witnesses is an area of trial tactics left to the discretion of counsel. Yarrington v. Davies, 779 F.Supp. 1304, 1308 (D. Kan. 1991). Counsel is not required to raise every conceivable issue or pursue every avenue of inquiry, but is required only to exercise normal skill, judgment, and diligence. Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980).

At trial, Hiram Johnson testified that on the night of the murder, he went to the Allen Murray Club with Bowman, Gadson, and Darian Williams. **{R. 4064}**. They rode in the victim's Ford Escort. Id. Johnson testified that Applicant said he stole the car, and Bowman made them all were gloves. **{R. 4065}**. At the Allen Murray Club, Johnson sat in the victim's car in the parking lot while Applicant walked around the parking lot. **{R. 4066}**. Johnson also testified that Applicant attempted to sell the car in the parking lot. **{R.**

4067}. At some point during the evening, Johnson heard Applicant admit that "I killed Kandee, heh, heh, heh." **{R. 4068}**. At the PCR hearing, Johnson testified that he could not remember if he told police that Bowman said he had killed Kandee Martin. **{PCR Tr. 558-559}**. He also noted that he thought Applicant was kidding when he said it. **{PCR Tr. 560, 565}**. He did not know that the victim was dead when Applicant made the statement. **{PCR Tr. 565}**.

Detective Coker testified at the PCR hearing that he spoke with Johnson on two occasions. The first was on February 22, 2001 at the Branchville Police Department. **{PCR Tr. 927}**. According to Coker's notes, Johnson indicated he had gone to the club with Bowman, Gadson, and Darian Williams. **{PCR Tr. 929}**. The notes also indicated that Johnson saw Applicant with the gun in his lap while Applicant was driving, and that Johnson knew Applicant had admitted to Trina West that he killed the victim. Id. As noted above, trial counsel was provided with a copy of Detective Coker's notes as part of the Rule 5 discovery. **{See PCR Tr. 1285}**. Coker interviewed Johnson a second time on April 5, 2001. **{PCR Tr. 929}**. He testified that interview began at approximately 1:40 p.m. **{PCR Tr. 929}**. The interview was held at Johnson's father's fish market in Branchville. **{PCR Tr. 929-30}**.

Cummings testified that at trial, Johnson testified he overheard a confession from Applicant about killing Kandee Martin. **{PCR Tr. 1372}**. He also noted that the confession Johnson overheard was not included in his written statement from April 5, 2001. **{PCR Tr. 1386}**. Cummings noted that the testimony including the confession was not inconsistent with the written statement. **{PCR Tr. 1386}**. Cummings testified that he did not cross-

examine Johnson on the statement because he did not want to have Johnson repeat the statement during cross-examination. **{PCR Tr. 1387-88}**. Cummings also indicated that the first time he heard about the confession was at trial. **{PCR Tr. 1387}**.

Trial counsel gave a valid strategic reason for not crossing Johnson on this issue. Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial). See generally Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy). Cummings indicated that he did not want to risk having Johnson repeat the statement in front of the jury. Cummings noted it was the worst thing that Johnson said about Applicant at trial. **{PCR Tr. 1386}**. Counsel cannot be found deficient in this regard. See Moss v. Hofbauer, 286 F.3d 851, 865 (6th Cir. 2002) (reviewing court must consider potential risk that cross-examination would have led to damaging testimony being repeated).

Finally, Applicant has not established prejudice. Johnson had indicated to police that he knew Bowman had confessed to killing Kandee Martin. Detective Coker noted as much in his investigative notes regarding his first interview with Hiram Johnson. **{See Applicant's 47}**. Thus, any impeachment would be limited, particularly in view of the

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overwhelming evidence of Applicant's guilt, as detailed before. This claim for relief is denied.

D. Trial Counsel Was Not Ineffective for Not Cross-Examining Johnson on the Fact he was Not Charged with Possession of Stolen Vehicle.

Applicant also fails to establish ineffectiveness with regard to cross-examining Hiram Johnson on the fact he was not charged with possession of a stolen vehicle for riding with Applicant in Kandee's car.

Applicant did not establish that trial counsel was deficient in not asking Hiram Johnson whether he knew he could potentially be charged with possession of a stolen vehicle in Applicant's case. First, there was no testimony introduced at the hearing to support a finding that Hiram Johnson was aware that he could be charged with possession of a stolen vehicle. Detective Coker testified that he did not recall having any discussions with Hiram Johnson about charging him with possession of a stolen vehicle. **{PCR Tr. 937}**. Coker also noted that he did not have an explanation for why Johnson was not charged with possession of a stolen vehicle. **{PCR Tr. 938}**. He surmised that it was likely because their focus was on getting more information about the murder and arson. Id. Solicitor Bailey recalled that Hiram Johnson was not charged with possession of a stolen vehicle. **{PCR Tr. 2104}**. Bailey explained that no charge was filed because there were so many other individuals in the case that had already been charged with more serious offenses. Id. Bailey asserted that he did not feel that such a charge was warranted in Johnson's case. Id. Hiram Johnson was asked if he was aware that he could have been charged with possession of a stolen vehicle in this case. **{PCR Tr. 539}**. Hiram Johnson

never responded to the question.[5] **{See PCR Tr. 539-46}**. Since there was no evidence that Johnson was aware that he could be charged with possession of a stolen vehicle, Applicant has failed to show that such a method of impeachment would have been successful at trial. As a result, Applicant has failed to establish that trial counsel was deficient in not questioning Johnson in this regard.

Applicant also fails to establish prejudice given the minimal value of any impeachment and the overwhelming evidence of guilt as detailed before. The claim is denied.

IV. Ricky Davis

A. The Prosecution Did Not Violate Brady in Not Disclosing the "Sam Memo"

Applicant asserts that the prosecution violated Brady v. Maryland, 373 U.S. 83 (1963), by not providing Applicant with a copy of typed notes apparently drafted by Sam Richardson, an investigator for the First Circuit Solicitor's Office. The so-called "Sam Memo" appears to reflect the contents of an interview that Richardson conducted with Ricky Davis at Lieber Correctional Institution. **{Applicant's 67; see Applicant's 11}**.

At the PCR hearing, Solicitor Bailey testified that he was familiar with the Sam Memo. **{PCR Tr. 2021}**. He confirmed that it was prepared by Sam Richardson and noted that from the context of the notes, it appeared that it was prepared late in the proceedings.

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[5] The State objected to the question, and the court asked Applicant's counsel how the question was relevant. (PCR Tr. 539). After the discussion about the specific question regarding a potential charge of possession of a stolen vehicle, the objection argument moved on to whether Applicant's counsel was aware of the claim involving Johnson's other pending charges before they filed the third amended application. (PCR Tr. 544-550). At no point did counsel ever return to the question of whether Johnson knew he could be charged with possession of a stolen vehicle.

Id. Bailey did not recall seeing anything in his file that indicated he sent the Sam Memo to defense counsel. **{PCR Tr. 2130}**. He also testified that he considered the Sam Memo to be work product. Id. Typically, he did almost all of his own work in preparation for a death penalty trial except for typing his handwritten notes. Id. Ordinarily, he would have interviewed Ricky Davis personally. Id. However, he delegated the task of interviewing Davis to Sam Richardson because it was getting close to trial and so much other stuff was going on at that time. Id. Since Richardson interviewed Ricky Davis on Bailey's behalf in preparation for trial, Bailey considered his notes to be protected by attorney-client privilege. Id. More importantly, Bailey testified that he did not think the Sam Memo was inconsistent with the handwritten Ricky Davis statement. **{PCR Tr. 2130-31}**. Bailey noted that he would have disclosed any information that was inconsistent. **{PCR Tr. 2131}**. He also testified that the notes would have been in the Solicitor's file and trial counsel could have seen them in the file under the office's open file policy. Id.

Given these facts, the claim for relief is denied. First, Applicant fails to establish suppression of favorable evidence to his case. The Supreme Court has noted that "evidence" that is inadmissible is not evidence at all, and thus cannot affect the outcome of trial. Wood v. Bartholomew, 516 U.S. 1, 6, 116 S.Ct. 7 (1995) (per curiam) (holding that inadmissible materials that are not likely to lead to the discovery of admissible exculpatory evidence are not subject to disclosure under Brady). At best, the notes could be considered evidence that could be used to impeach Ricky Davis if he testified at trial. Here, the defense was aware of Ricky Davis's handwritten note which contained the crucial fact that Ricky claimed Gadson said he shot Kandee, but the defense did not call Davis

because Davis told the defense's investigator that his handwritten statement was false and Applicant put him up to it. Counsel also stated that he would still be in the "same boat" based on his investigator's assessment of Ricky even if he had the Sam Memo.[6] **{PCR Tr. 1335-37; 1339}**. Since in substance the Sam Memo did not contain anything the defense was not already provided, and the Sam Memo merely represented nothing more than the prosecution's trial preparation interview based on their possession of the handwritten statement, then there was no suppression of favorable evidence.

Second, the Sam Memo is not material. Evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (internal quotation marks omitted). Moreover, Applicant is incorrect that materiality is measured by the supposed impact the undisclosed notes on defense strategy:

> It has been argued that the standard should focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, rather than the materiality of the evidence to the issue of guilt or innocence. See Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defense, 74 Yale L.J. 136 (1964). Such a standard would be unacceptable for determining the materiality of what has been generally recognized as "Brady material" for two reasons. First, that standard would necessarily encompass incriminating evidence as well as exculpatory evidence, since knowledge of the prosecutor's entire case would always be useful in planning the defense. Second, such an approach would primarily involve an analysis of the adequacy of the notice given to the defendant by the State, and it has always been the Court's view that the notice com-ponent of due process refers to the charge rather than the evidentiary support for the charge.

[6] Trial counsel never stated that he would have called Ricky Davis to testify had he known about the information in the Sam Memo. Cummings noted that he tried to do more investigation into Ricky Davis based on the information he had, and nothing else came up in the defense's investigation. **{PCR Tr. 1901}**. He also agreed that even with the Sam Memo he would still be in the same boat in deciding whether to call Ricky Davis, because the defense's investigator indicated that Ricky Davis would not testify to what was in the handwritten document, and assessed that Davis was "full of bunk". **{PCR Tr. 1901-02}**.

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U.S. v. Agurs, 427 U.S. 97, 112 n.20, 96 S.Ct. 2392, 2401 n.20 (1976).

Here, as noted before, Ricky Davis told the defense investigator at the time of trial and testified at the PCR hearing that the handwritten statement was not true, and Bowman was the one who gave him all of the information for the handwritten note. **{PCR Tr. 263-64}**. Davis further professed that he did not know anything about this case. **{PCR Tr. 264}**. Assuming that Davis had been called, testified as he did at PCR, and then was impeached with the Sam Memo, it simply cannot be said that a reasonable probability of a different result would occur from such impeachment, especially when the defense already possessed the statement written in Davis's own hand, and could have called him and impeached him with that but decided against it. Said another way, the difference between possible impeachment with the disclosed handwritten statement in Davis's own hand, and impeachment with the Sam Memo or testimony from Sam, is not so great that it undermines confidence in the verdict under the standard for materiality. This is especially so given the overwhelming evidence of guilt, as detailed before.

Overall, Applicant has failed to establish he is entitled to relief upon this claim. As a result, this Brady claim is denied.

B. Trial Counsel was Not Ineffective in Not Presenting Ricky Davis' Testimony Regarding Tawain Gadson's Confession

Applicant alleges trial counsel was ineffective for not presenting evidence related to Gadson's alleged confession to Ricky Davis. At some point, the State was provided with a handwritten note from Ricky Davis, now an inmate in Lieber Correctional Institution for armed robbery. The statement, dated August 6, states "I Rickie Davis was on A side with Gadson and he said that he was the one that shot the girl and he gave Bowman back the

on cross-examination about it. Mr. McLean did not testify in PCR, and there has been no evidence presented that Mr. McLean could have been located at the time of trial, or that had he been located he would have testified in a manner favorable to Applicant.[7]

Indeed, given the overwhelming evidence detailed before and the lack of any detail as to what McLean heard and from whom, it cannot be said that the absence of any cross of Coker on the subject rises to the level of Strickland prejudice.

C. Trial Counsel was Not Ineffective in not Cross-Examining Detective Coker About Felder Being the One Who Purchased Gasoline

This is essentially the same claim that was raised by Applicant in Section II, particularly E and F. Thus, for the reasons stated there, this claim is denied.

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As an additional note, Applicant's assertion that presenting this evidence that Felder purchased the gasoline was exculpatory does not fit with other evidence that was presented at trial. For instance, two witnesses identified Applicant as the one who stopped by Felder's girlfriend's apartment after 3:00 a.m. **{R. 4044-4045; 4117-4120}**. Both also testified that Felder's girlfriend was loosening his braids when Applicant stopped by to ask for a ride. Id. Both indicated that Felder left with Applicant and returned fifteen minutes later. **{R. 3712, 4120}**.

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[7] See Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990) (petitioner's allegation that attorney did ineffective investigation does not support relief absent proffer of the supposed witness's favorable testimony); Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) (state's failure to object at PCR to hearsay testimony as to what another witness's testimony might have been does not relieve PCR applicant of burden of producing admissible testimony in accordance with the rules of evidence). Indeed, it is speculative as to whom McLean would have described discussing the incident, or whether those persons had actual knowledge of the events on Nursery Road. Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3rd Cir. 1991) (applicant cannot show deficiency "based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense"; rather, facts must be presented).

D. Trial Counsel was Not Ineffective in Crossing Coker About the Sworn Statements to Other Tribunals

In this claim, Applicant essentially reasserts the same claim that was raised in Sections I, D and II, D. For the reasons stated in those sections, the claim is denied. Counsel articulated valid strategic reasons in this regard, as Applicant was the source of information for early actions in the investigation, and eliciting such evidence would be damning in that it would show Applicant's connection to the crimes as well as his attempt to cover up his involvement and blame others. Counsel also did not want to elicit evidence of Applicant's earlier statements to police after the confession was excluded and the State elected not to put in any of Applicant's statements. **{PCR Tr. 1272-78; 1367-69; 1909-14}**. Moreover, because of these explanations, statements made in arrest warrants based on then-existing investigatory information, and in indictments based on concepts of accomplice liability do not amount to a reasonable probability of a different result. All are easily explainable.

VI. Conflicts of Interest:

A. Applicant Failed to Establish Hardee-Thomas Operated Under An Actual Conflict of Interest As a Result of Her Former Representation of Ricky Davis and Then Active Representation of Applicant

Marva Hardee Thomas was appointed to represent Ricky Davis on April 23, 2001. **{Applicant's 12}**. At the time, Davis faced two charges for armed robbery. **{Applicant's 12, 19, 21}**. On October 16, 2001, Davis was tried by a jury and convicted of one count of armed robbery. **{See Applicant's 20}**. He was sentenced to twenty (20) years confinement by the Honorable Diane Goodstein, Circuit Court Judge. Id. The second indictment against Ricky Davis was nol prossed with a right to restore on October 18,

2001.[8] **{See Respondent's 14}**. Marva Hardee-Thomas filed a Notice of Appeal on Ricky Davis' behalf on October 24, 2001. **{Respondent's 14}**.

Marva Hardee-Thomas was appointed to represent Applicant. At the PCR hearing, Hardee-Thomas testified that she did not recall receiving the handwritten note written by Ricky Davis. **{PCR Tr. 1564}**. She did identify the notary block as being in her handwriting. **Id.** However, she did not recall seeing the statement and noted that the notary block was not witnessed by anyone. **Id.** She did not have any independent recollection of talking with Ricky Davis about the handwritten note. **{PCR Tr. 1601}**. She testified that she would not have had a discussion directly with Davis about the document. **{PCR Tr. 1602}**.

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Counsel was served with a copy of Ricky Davis' handwritten note on or about January 2, 2002. **{See Respondent's 36}**. At the PCR hearing, Hardee-Thomas testified that she did not know why Ricky Davis did not testify. **{PCR Tr. 1572}**. She did not have a strategic reason for not calling Ricky Davis, but noted that the decision to call Davis to the stand would be one left to the lead attorney in a death penalty case. **Id.** In Applicant's case, Cummings was the lead attorney. Hardee-Thomas guessed that Cummings made the decision to not call Ricky Davis as a witness because she did not make that decision. **{PCR Tr. 1573}**.

"The Sixth Amendment right to counsel attaches upon initiation of adversarial judicial proceedings and at all critical stages of a criminal trial." State v. Sterling, 377 S.C. 475, 479, 661 S.E.2d 99, 101 (2008). "To establish a violation of the Sixth Amendment

[8] It appears that the victim in the second armed robbery could not be located.

right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance." Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001). "An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007).

"[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980) (citing Holloway v. Arkansas, 435 U.S. 475, 487-491 (1978). "But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Cuyler, 446 U.S. at 350 (citation omitted). "[A]n actual conflict of interest occurs:

> when a defense attorney places himself in a situation inherently conducive to divided loyalties.... If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) (quoting Zuck v. State of Alabama, 588 F.2d 436, 439 (5th Cir.1979)).

"The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." State v. Gregory, 364 S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005). Additionally, the fact that counsel does not advise a defendant of the potential conflict of interest does not affect the constitutionality of the conviction. Jackson v. State,

329 S.C. 345, 355, 495 S.E.2d 768, 773 (1998). Moreover, the "Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction." Langford v. State, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993).

Applicant has failed to establish that Hardee-Thomas acted under a conflict of interest in representing Applicant in this case. Hardee-Thomas' representation of Ricky Davis ended on October 24, 2001, the date she filed his Notice of Appeal with the circuit court. Rule 602(e)(3), SCACR (public defender automatically relieved after filing of Notice of Appeal to conviction). At that time, his second armed robbery charge had already been nol prossed by the Solicitor's Office. **{See Applicant's 22}**. Thus, when counsel was presumably made aware that Davis had written a statement regarding Bowman's case on or around January 2, 2002, she did not represent Ricky Davis. At that point, she owed no duty to Ricky Davis other than to maintain his confidences from her representation of him on the two armed robbery charges. Since there was not a potential conflict of interest, Hardee-Thomas was not obligated to obtain a waiver from either Bowman or Davis.

Even if Hardee-Thomas' representation of Ricky Davis constituted a potential conflict of interest with her representation of Applicant, Applicant has failed to establish that the potential conflict developed into an actual conflict of interest. At no point were Ricky Davis' interests adverse to Applicant's interests. First, Davis' handwritten statement, if established to be true, would have benefitted Applicant because it indicated that Gadson, Applicant's co-defendant, was the one who killed Kandee Martin. Further, contrary to Applicant's assertions, there was no evidence presented in this PCR Action that indicated Ricky Davis' interests would have been at odds with Applicant's had he testified at trial. Applicant asserts that Ricky Davis would not testify because the solicitor's office could still

restore the nolle prossed charge against him as leverage. Applicant presented no evidence to show that the solicitor's office either used the nolle prossed indictment in such a fashion or that it could. Clearly, the disposition sheet on Ricky Davis' nolle prossed charge indicates that the case was dismissed because the State could not find the victim. **{Applicant's 22}**. There was no evidence presented at the PCR hearing that circumstances had changed, or that the solicitor's office was in a position to re-present the indictment to the grand jury. Thus, Applicant never established that Davis' interests were in a position contrary to Applicant's.

Applicant also failed to present credible evidence that Hardee-Thomas spoke to Davis about Applicant. The only person who testified that Hardee-Thomas met with Davis to talk about Applicant's case is Davis.[9] **{PCR Tr. 251}**. Cummings testified that he sent Walt Mitchell to speak with Ricky Davis about Applicant. **{PCR Tr. 1328}**. Hardee-Thomas indicated she did not recall talking with Ricky Davis about the note and that she thought an investigator was sent out to talk to Davis about his handwritten note. **{PCR Tr. 1603-04}**. Further, Hardee-Thomas testified that she could not recall when she drafted the signature block she put on the handwritten note. **{PCR Tr. 1601}**. She noted that she likely would have received the paper from a guard at the jail. **{PCR Tr. 1602}**.

Overall, Applicant has failed to establish that trial counsel did not call Ricky Davis to testify as the result of an actual conflict of interest. Indeed, as noted before the credible evidence discloses a reasonable strategic decision that Davis was not a reliable witness and his testimony was likely to be damaging to Applicant's case. **{PCR Tr. 1335, 1894-5,**

[9] His testimony indicates that he was not sure if she was the one from the defense team who spoke with him. **{PCR Tr. 251}**.

1901-02}. There was no probative evidence at trial that indicated that any potential conflict of interest played a role in the decision making process. Applicant has failed to prove his claim and it is denied.

B. There was no Conflict of Interest As a Result of the Fact that Gene Dukes Represented Applicant's Co-Defendant Tawain Gadson

Applicant's second conflict of interest claim derives from the fact that Hardee-Thomas represented Applicant while the Chief Public Defender for Dorchester County represented a co-defendant. As already noted, Marva Hardee-Thomas, Esquire, a Dorchester County Public Defender, was appointed to represent Applicant. Gene Dukes, Esquire, another Dorchester County Public Defender, was appointed to represent Gadson, Applicant's co-defendant who later testified against him at trial. **{Applicant's 77}**. At the PCR hearing, Marva Hardee-Thomas testified that the Dorchester County Public Defender's Office was essentially a conglomeration of independent contractors. **{See PCR Tr. 1535, 1548}**. Gene Dukes was listed as the Chief Public Defender because he had the most seniority. **{PCR Tr. 1540}**. According to Hardee-Thomas, the Public Defenders did not share an office. **{PCR Tr. 1541-43}**. They each worked from their own separate office. **{PCR Tr. 1541}**. They were not full-time Public Defenders, so they each had their own separate practices. **{See PCR Tr. 1535, 1550}**. The public defender corporation did have one employee, Kathy Rogers, who was responsible for assigning cases. **{PCR Tr. 1537}**. The only common space the Dorchester County Public Defenders shared was a small conference room in the Dorchester County Courthouse in Saint George. **{See PCR Tr. 1541, 1553}**. Hardee-Thomas also testified that they would never have co-defendants in the conference room at the same time. **{PCR tr. 1607}**. They did not share personnel.

{PCR Tr. 1554}. There was no investigator for the Public Defender Corporation. Id. Instead, each public defender had to petition the Court for funds if an investigator was needed. **{PCR Tr. 1554}**.

Applicant has failed to establish there was an actual conflict of interest in this case. Applicant essentially argues there was a conflict of interest because both Gene Dukes and Marva Hardee-Thomas were Public Defenders. There was no evidence presented that indicated they discussed Applicant's case or any of the related cases. Further, there was no evidence presented that indicated they worked in concert in representing individual clients, or that they shared the confidences of individual clients with one another. This claim parallels a similar claim made the applicant in Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). In Jackson, the Applicant argued he was entitled to a new trial because of a conflict of interest because his co-defendant was represented by another public defender in the Richland County Public Defender's Office. Id. at 347-48, 495 S.E.2d at 769. The PCR Court found trial counsel was ineffective because he operated under a conflict of interest, among other things. Id. at 348, 495 S.E.2d at 769. On appeal, the South Carolina Supreme Court reversed.

> In our opinion, respondent did not show any actual conflict of interest resulted from counsel's representation of him while others in counsel's office represented respondent's co-defendants. All respondent showed and the PCR judge found was a potential conflict of interest because counsel worked in the same office with the attorneys who represented the co-defendants. Counsel testified no conflict existed, and respondent could not point to an actual conflict. Thus, this potential conflict never ripened into an actual conflict. Nothing in the record suggests the potential conflict caused counsel to treat respondent's case in such a manner as to obtain more favorable consideration for respondent's co-defendants. Further, the fact that counsel never advised respondent of the potential conflict of interest does not affect the constitutionality of the conviction. See Langford v. State, 310 S.C. 357, 360, 426 S.E.2d 793, 794 (1993).

Id. at 354-55, 495 S.E.2d at 773. Here, as in Jackson, there was no evidence presented at the PCR hearing that an actual conflict of interest existed. As a result, this ground for relief is denied.

VII. Ineffective Assistance Regarding Evidence Admitted in Guilt Phase

Applicant next asserts counsel was ineffective in his handling of a number of items of evidence in the guilt phase.

A. Failure to move to exclude evidence of Bowman's DNA found in the victim's vagina

SLED DNA analyst Fitts found human blood and semen in the vaginal swabs taken from Kandee at autopsy. While the mixture of female and male secretions in the vaginal swabs complicated identification, Agent Fitts was able to match Applicant to a probability of 1 in 5300. **{R. 4370-72; 4379-87}**. Applicant now contends his counsel was ineffective for failing to move to exclude this match from evidence.

1. There was no valid objection to this testimony.

As an initial matter, Applicant did not show either deficiency or prejudice as there was no sustainable objection that could be made to the DNA match. Regardless of Applicant's complaints that there was no testimony that Applicant and Kandee had sex out at the Nursery Road location, this evidence is undoubtedly relevant to and confirmatory of the identity of Applicant as the murderer, as it places Applicant in close presence of Kandee during the time period at issue. See Rule 401, SCRE (evidence is relevant if it would make a fact in issue more probable or less probable).

Admissibility is not affected by the fact that the DNA match might not necessarily establish the exact point when Applicant had sex with the victim, or because James

Gadson claimed he did not observe any sexual contact at the Nursery Road scene. As noted in State v. Benjamin, 345 S.C. 470, 480, 549 S.E.2d 258, 263 (2001):

> All that is required is that the fact shown tends to make more or less probable some matter in issue and to bear directly or indirectly thereon. *It is not required that the inference sought should necessarily follow from the fact proved.* Evidence is relevant if it makes the desired inference more probable than it would be without the evidence.

(Emphasis added).

Here, the DNA match is objective scientific evidence that the victim and Applicant were in very close contact around the relevant time period of the murder, and this point alone is sufficient to make it admissible in trial – even if it only provides objective and indisputable corroboration to witness testimony that they were together at some point during the day Kandee was killed. Given the issues Applicant raised with the credibility of the fact witnesses, this indisputable scientific evidence aids a finding of identity, which was especially relevant in this case, where Applicant pled not guilty and put the State to its proof.[10]

Applicant contends the proof of sex is an inadmissible "bad act" pursuant to Rule 404(b), SCRE, First, though, is the point that the mere fact Applicant and Kandee had sex – which is all the semen evidence proves by itself – is not a "bad act" in the legal sense. See Rule 404(b), SCRE. Although Applicant contends that fornication is criminal in South

[10] See generally State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300, 311-12 (2001) (finding letters were relevant to show identity as murderer inasmuch as they referred to a safe and a safe was present at the murder scene, and rejecting claim that they were inadmissible because it was not established that the safe referenced in the letters was at the barbershop, where the incident referred to in the letter fit the general time frame of the barbershop killings); State v. Benjamin, 345 S.C. 470, 480, 549 S.E.2d 258, 263 (2001) (evidence defendant was willing active participant in later robbery was relevant to rebut claim of duress at earlier robbery, even though robbery being tried occurred later); State v. Daniels, 252 S.C. 591, 167 S.E.2d 621 (1969) (held evidence of a prior robbery admissible to show identity because it placed the defendant together with his alleged accomplice); State v. Varvil, 338 S.C. 335, 526 S.E.2d 248 (Ct. App. 2000) (in unlawful use of telephone prosecution, evidence defendant rode by victim's office and home was relevant to show his intent to harass her with his phone calls).

Carolina, that law is not enforced, and sex is not considered "criminal" or a "bad act" in the legal sense by modern social standards simply because it is out of wedlock.

The same goes for Applicant's contention that interracial sex between Applicant and the victim is a bad act or is unduly prejudicial. Applicant cannot assume racism on the part of the jury, which was subject to extensive *voir dire* and instructions from the judge on their ability to be fair and decide the case apart from bias or prejudice. There is no proof that the jury was racially biased in this case, and the mere fact of interracial sex does not constitute a "bad act" under contemporaneous values.

Even if adultery or interracial sex could be considered a "bad act", though, as noted before, "bad acts" under Rule 404(b) are still admissible if they show identity, which the DNA match does in this case. Thus, even if the sexual contact is a bad act, it would still be admissible. And, given than identity was the main issue in the case, it was more probative than prejudicial.[11]

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Since the evidence was admissible, then counsel could not have been deficient nor Applicant prejudiced as a matter of law. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility

[11] See State v. Simmons, 310 S.C. 439, 427 S.E.2d 175 (1993) (where intent was contested on burglary charge, the probative value of defendant's prior attacks on elderly women outweighed the prejudicial effect); State v. Ford, 334 S.C. 444, 513 S.E.2d 385 (Ct. App. 1999) (because defendants disputed state's allegations about their motive and intent, evidence of prior robbery of victim was "highly probative"); State v. Waddle, 873 P.2d 171 (Idaho Ct. App. 1994) (where defendant denies being the perpetrator, evidence tending to establish identity is always relevant). See generally State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990) (Lyle evidence was not just admissible when "necessary", but is admissible whenever it is "relevant"); State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981) (evidence of other crimes admissible even though appellant's confession to the crimes was also admitted); State v. Green, 261 S.C. 366, 371, 200 S.E.2d 74, 77 (1973) (evidence logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused's guilt of another crime).

of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial).

2. Counsel had a valid strategic reason for admitting the testimony.

Even if there was a valid objection, there is no basis for relief because counsel had a valid strategic reason for admitting the intimate contact. At the PCR hearing, counsel Cummings testified that he did not elicit from Gadson that he observed no sex between Applicant and Kandee because:

> [H]ere is my theory and this is what I want to show. Marion and Kandee were friends; they were intimate friends, if I can use the words. I wanted to show that this man would not hurt this little girl because he cared about her and she was an intimate friend of Mr. Bowman's.

{PCR Tr. 1750}. Counsel stated that while he considered a Dorchester County jury to be a "small town jury", and while he was aware of concerns about adultery and interracial sex, he still wanted to show "they were intimate friends and . . . he had no ill motive or reason to kill this lady". **{PCR Tr. 1752}**. Counsel pointed out that since the DNA expert could not testify as to precisely when the DNA was put there, he wanted to "clean . . . up" any attempts of the State to sully the relationship, thus showing "he had no malice to this lady, had no reason to hurt her". Indeed, counsel hired his own DNA expert to verify that it could not be precisely determined when the Applicant deposited his semen into the victim. **{PCR Tr. 1753-54; 1792; 1955; 1980-81}**. Counsel stated he did not want to elicit that Kandee was around Applicant to get drugs, as that would obviously "dirty up" his attempt to show an intimate friendship. **{PCR Tr. 1755}**.

On cross by the State, counsel reiterated that he wanted to show Applicant and Kandee were friends and Applicant would not have killed her. He added that he was not

afraid of the DNA evidence because Applicant was not charged with criminal sexual conduct ("CSC") in the guilt phase, and counsel did not believe the State could prove CSC in the sentencing phase. Counsel stated that since Gadson never testified there was any sex at the scene, he saw no reason to broach the subject. **{PCR Tr. 1866-67}.**

Thus, counsel elicited a valid strategic reason for not objecting to the DNA evidence. He was not at all scared of it as he did not think CSC could be proven (especially since he had Applicant's statement suppressed in which Applicant talked of sexual contact with the victim's corpse), and he thought it could be used to undermine any motive to kill since Applicant and Kandee were lovers. Counsel accordingly was not deficient simply because the strategy did not work, particularly given the overwhelming evidence facing counsel in this case. See Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

3. There was no prejudice.

In any event, there was no reasonable probability of a different result. The evidence of identity was overwhelming even if the DNA match was excluded, as set forth in preceding subsections. Moreover, as argued before, contemporary social values towards extramarital sex and interracial relationships preclude any *per se* finding of undue prejudice from those issues. Therefore, Applicant has not met his burden of showing prejudice.

Reed v. Norris, 195 F.3d 1004 (8th Cir. 1999) (failure to raise Batson issue not prejudicial under Strickland given overwhelming evidence).

B. Failure to move to exclude petroleum evidence

Applicant next asserts counsel failed to object to introduction of Applicant's pants, because the accelerant present on the pants – a "heavy" accelerant – was not the same as the substance used to ignite Kandee's car – which was gasoline, or a "medium" petroleum accelerant.

At trial, SLED chemist Grady Layton identified a medium petroleum accelerant on Kandee's pocketbook, and Layton was able to conclusively identify the presence of gasoline on the shirt, paper material, belt, and miscellaneous debris found in her car. **{R. 4298-4299}**. SLED Agent Helms concluded the fire was intentionally set. **{R. 3889-90}**. Layton also found the presence of a heavy petroleum accelerant, but not gasoline, on Applicant's black Levi's – and a number of Appellant's friends testified at trial he was wearing black jeans the day before. **{R. 3763; 4058; 4093; 4193; 4297-98}**.

Solicitor Bailey pointed out at PCR that the SLED arson expert had done a complete report, so he introduced testimony on all aspects of the report to avoid allowing the defense to assert or imply the State had not done a full and fair investigation. **{PCR Tr. 2026; 2136}**.

1. There was no valid basis for objection.

Given this evidence, as an initial matter there could be no deficiency for failure to object nor prejudice as there was no valid basis for objection. The pants themselves were undoubtedly relevant to identity, as they were consistent with and corroborative of what

people said Applicant was wearing the night of the murders, and Applicant asked for them the next morning when he was arrested. More importantly, the pants contained Kandee's watch, which was very relevant to the identity of the murderer. See Rule 401, SCRE (evidence is relevant if it would make a fact in issue more probable or less probable).

As to the accelerant, counsel had no valid objection. It goes without saying that within reason a solicitor is certainly entitled to introduce evidence the complete investigation done by police, even if not necessarily incriminating, to avoid any defense contention that the State rushed to judgment or failed to fully investigate the case. A classic example, as this Court pointed out during argument **{PCR Tr. 2249}**, is calling the fingerprint expert to testify no prints were found despite investigation, in order to avoid later defense argument that the State failed to look for prints or that the lack of prints constitutes reasonable doubt. This is even more important in this post–"CSI" world, given that many jurors watch that TV show and expect such forensic evidence. See United States v. Fields, 483 F.3d 313, 355 n. 39 (5th Cir.2007) (citing an article discussing the "CSI effect" on jurors, and stating: "Some have claimed that jurors who see the high-quality forensic evidence presented on CSI raise their standards in real trials, in which actual evidence is typically more flawed and uncertain.").

As to any concern that the mention of an accelerant might confuse the jury and was substantially more prejudicial than probative under Rule 403, SCRE, no such prejudice occurred. The SLED agent was clear that while there was a heavy accelerant on Appellant's pants, it was NOT gasoline, and there is a difference. **{R. 4297-98; 4301-05}**. Counsel also elicited that Dorothy used kerosene to heat her house. **{R. 4831}**. And, the

solicitor in argument never mentioned the accelerant on the pants or claimed it was indicative of anything. **{R. 4461; 4476}**. Thus, there is no indication this evidence was unfairly prejudicial or confusing to the jury, or that the State misused it.

Since the evidence was admissible, then counsel could not have been deficient nor Applicant prejudiced as a matter of law. See Hough v. Anderson, *supra*.

2. Counsel had a valid strategic reason for admitting the testimony.

Even if there was a valid objection to the testimony, Applicant cannot establish a valid claim for relief because counsel articulated a valid strategic reason for wanting the testimony to be admitted.

At PCR, counsel Cummings testified that he tried to suppress the seizure of the jeans, but that was overruled. He noted he did get family to say they used kerosene to heat the house, and he got the expert to say the accelerant on the jeans was not gasoline. **{PCR Tr. 1706-07}**. Counsel stated he did not consider objecting to any evidence about the petroleum accelerant found on the pants, because the expert was going to and indeed did testify that the accelerant was not gasoline, but kerosene like that which Applicant's wife used to heat the house. Counsel stated that had the solicitor not called the SLED arson expert, counsel probably would have to elicit that only kerosene was found on Applicant's pants. Counsel felt he needed to do this to counter the fact that the victim's watch was found in his pants and witnesses were saying Applicant burned the car. **{PCR Tr. 1708-09; 1711-14}**.

On cross by the State, counsel noted he had his crime scene expert review the arson report. The expert advised counsel that if all the State had was that a heavy

accelerant was on the pants, that was good for the defense. Counsel strategically decided to bring out that Applicant only had kerosene and not gasoline on his pants, and felt was had successfully taken a state's witness and "made him mine". Counsel pointed out he also elicited from Applicant's wife Dorothy that they used kerosene at home, and of course Dorothy's home is where the pants were found. **{R. 4831; PCR Tr. 1845-46; 1854-55}.**

Thus, counsel had a valid reason for allowing the evidence – it allowed him to use a State's expert to establish that nothing on Applicant's clothes forensically linked him with the crime, even though the State asserted those were the pants Applicant was wearing when he killed Kandee. Counsel accordingly was not deficient simply because the strategy did not work, particularly given the overwhelming evidence facing counsel in this case. See Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, trial tactics are not ineffective because they were unsuccessful).

3. There was no prejudice.

In any event, there was no reasonable probability of a different result. The evidence of identity was overwhelming, as previously detailed before in this Order. Moreover, the evidence introduced at trial was clear that the accelerant on the pants did not match the accelerant used to burn the car, and the solicitor in argument never contended otherwise. Given these circumstances, it could not possibly have been so prejudicial to create a reasonable probability of a different result. Applicant has not met his burden of showing prejudice. Reed v. Norris, *supra*. The issue is denied.

C. Failure to object to evidence of conspiracy to secrete Applicant's gun and examination on plea agreements

Applicant contends his counsel was ineffective for failing to object to evidence his relatives were engaging in a conspiracy to "secrete" the murder weapon, by arguing there is no evidence of such a conspiracy or Applicant's connection to it. He also asserts counsel was ineffective in failing to object to the solicitor's examination on plea agreements Applicant's family had with the State.

As noted before, at a party the day Kandee disappeared, Applicant took out from his waistband a grey and black High Point .380 semiautomatic pistol – which he had bought a couple of weeks earlier – wrapped it in a paper bag, and put it into the barrel in Koger's yard. **{R. 3675-77; 3683-84; 3700; 3750-51; 3983-89; 4031-32; 4057-59; 4077-78; 4101}**. When Applicant returned, a number of people, including trial witnesses Koger, Fogle, and Carolyn Brown – saw Applicant get upset at Tywan because someone had taken his gun. However, Hiram Johnson interceded, and told Applicant he had taken the gun back to Katrina West's apartment in the projects. Applicant went across the street and got the gun, and put it back in his pants. **{R. 3677-79; 3684-85; 3690-91; 3701; 3985-90; 4058-60; 4077-78}**.

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

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

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

On May 28th, 2001, a police diver recovered the black and grey High Point .380 semiautomatic in the river bottom about 25 to 30 feet from the bridge. **{R. 4220-29}.** The gun was matched by SLED firearms examiner David Collins to five of the six Winchester .380 shell casings found at the Nursery Road scene. While the sixth casing and spent bullet could not be matched to Applicant's .380, they were consistent. **{R. 4315-20}.**

1. There was no valid objection to the conspiracy.

As an initial matter, counsel could not have been deficient nor Applicant prejudiced as there was no valid objection to be made to the evidence of concealment of the weapon by Applicant's family. First, the weapon was obviously relevant to identity. It shows Applicant's possession of a firearm matched with or at least consistent with the gun used to kill the victim during the time period that the victim was killed. See State v. Braxton, 343 S.C. 629, 634, 541 S.E.2d 833, 836 (2001) (testimony that witness knew appellant possessed a nine millimeter pistol was relevant because it tended to identify appellant as

the possessor of the murder weapon, also nine millimeter pistol); State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001) (prior murder was admissible to establish appellant's identity in the prosecution of the current murder, where the same weapon was used in both murders).

Moreover, there was ample evidence from which the gun and its subsequent concealment could be tied to Applicant. Applicant was identified by his friends in possession of such a gun prior to the crime, and Dorothy testified that on the night of the incident Applicant came in and slept in the chair where she later found the gun. **{R. 4193-94; 4198-99}**. It is certainly a reasonable inference from the evidence that Applicant hid the gun there, and at Applicant's request through his own communications or through Hiram Johnson, his wife, sisters, and father subsequently attempted to permanently hide or destroy the gun to protect Applicant. Again, Applicant overlooks that evidence can be relevant not just by what it directly shows, but also by reasonable inferences from the evidence. See State v. Benjamin, 345 S.C. 470, 480, 549 S.E.2d 258, 263 (S.C. 2001) ("It is not required that the inference sought should necessarily follow from the fact proved. Evidence is relevant if it makes the desired inference more probable than it would be without the evidence.").

Destruction of evidence is relevant to identity, and of course any admissions that Applicant made to his family about the gun – whether expressly testified to or implicit in the subsequent actions of the family – would be substantively admissible.[12]

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[12] See Rule 801(d)(2), SCRE (admissions of party opponent). See also State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) (destruction of evidence and evidence of flight relevant as incriminating circumstance, and to show guilty knowledge and intent); State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (evidence of flight admissible to show guilty knowledge and intent); State v. Ezell, 321 S.C. 421, 468 S.E.2d 679 (Ct. App. 1996) (in case where defendant ran and vial of crack was found nearby, evidence of

Moreover, the gun and the events surrounding its recovery would still be admissible even if there was no evidence tying the attempt to conceal it to Applicant. The description of how the gun was recovered was part of the *res gestae*, as it was necessary to tell the complete story of how the gun was recovered to show its link to Applicant and its relevance to this crime. See State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) ("One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case"). "[T]he jury is entitled to know the 'setting' of the case. It cannot be expected to make its decision in a void – without knowledge of the time, place, and circumstances of the acts which form the basis of the charge." United States v. Roberts, 548 F.2d 665, 667 (6th Cir. 1977), cited in Rebecca Smith, 309 S.C. at 453, 424 S.E.2d at 502 (Toal, J., dissenting).

Obviously, the jury was entitled to know the circumstances surrounding the police's discovery of the murder weapon – particularly since the State had to explain why the firing pin broke during examination by Agent Collins, likely due to its long submergence in the river. Indeed, counsel testified at PCR he did not see any valid objection for keeping out the evidence as to how the gun was found by police. **{PCR App. 1849}**. Counsel was correct in this assessment.

Further, had counsel tried to exclude the evidence of the attempt to conceal the gun by arguing a lack of evidence tying it to Applicant, the State would have easily overcome that objection by introducing one of Applicant's letters to his wife, admitted at PCR as

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flight shows guilty knowledge and intent). See also United States v. Robinson, 161 F.3d 463 (7th Cir. 1998) (evidence of flight shows consciousness of guilt under Rule 404(b)); United States v. Jackson, 886 F.2d 838 (7th Cir. 1989) (evidence of flight and concealment is probative of guilty consciousness under Rule 404(b)).

Applicant's 56. In it, Applicant asks Dorothy to tell her lawyer she only found the gun after someone broke into her house and put blood in there (obviously to try to then claim the gun was planted by the "real killer") **{R. 4360}**, and goes on to ask her to tell Hiram to say he only saw Applicant with a .32 or .38 revolver (which is different from the murder weapon). Even assuming loose ends existed as to whether Applicant had knowledge of or instigated the concealment of the weapon, they would have more than been tied up by this letter. Counsel was adamant he in no way wanted this letter in evidence given all the incriminating admissions within it **{PCR Tr. 1838-39}**, as it clearly shows Applicant's attempt to encourage perjury and obstruct justice. Indeed, he also goes on to ask Dorothy to tell Travis Felder not to say anything, and to tell Travis that Applicant told his lawyer Travis had nothing to do with the crime and would clear him in court. **{Applicant's 56}**.

Since the evidence surrounding recovery of the gun was admissible, then counsel could not have been deficient nor Applicant prejudiced as a matter of law. See Hough v. Anderson, *supra*.

2. There was no prejudice.

Even if there was somehow a valid objection to introduction of how police discovered the gun, there was no prejudice. As set forth previously, the evidence of guilt was overwhelming. Even if the story of how police found the gun was excluded, the gun itself combined with all the other evidence of identity would preclude a reasonable probability of a different result. Therefore, Applicant has not met his burden of showing prejudice. Reed v. Norris, *supra*.

3. There was no valid objection to the solicitor's reference to the plea agreements.

Next, there was no valid objection to be made to the solicitor's questioning of Dorothy, Yolanda, and Kendra on the plea agreements; thus, counsel could not have been deficient nor Petitioner prejudiced by the failure to make such an objection.

The law is clear that codefendants may testify even though they have agreed to a plea agreement, and additionally a plea or plea agreement is admissible not as substantive evidence of the defendant's guilt or innocence, but to support or attack the credibility of a testifying codefendant. See, e.g. U.S. v. Gray, 491 F.3d 138 (4th Cir. 2007) (testimony of codefendants testifying pursuant to a plea agreement or immunity agreement still admissible where product of free will, albeit a hard choice); State v. Moore, 337 S.C. 104, 522 S.E.2d 354, 355 n.2 (Ct. App. 1999) (while a codefendant's plea is not admissible as substantive evidence of the defendant's guilt or innocence, it is admissible to support or attack the credibility of a testifying codefendant).

Additionally, the law is clear that the State may elicit plea agreements on direct examination to avoid the perception it was hiding something when the defense inevitably cross-examines the witness on his or her deal with the State. See State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (S.C. 2001) ("Initially, it was not error for the Solicitor to introduce the plea agreement on direct examination because the Solicitor was entitled to anticipate the inevitable cross examination of a federal inmate and to dispel any notion he was hiding something from the jury."). Indeed, counsel Cummings pointed out that he was the trial attorney in the Shuler case, and thus saw no basis for objecting. **{PCR Tr. 1849-52}.**

Since the questioning was permissible, then counsel could not have been deficient nor Applicant prejudiced as a matter of law. See Hough v. Anderson, *supra*.

4. Counsel had a valid strategic reason for not objecting.

Although counsel did testify he did not see a valid objection to the plea agreements, he also expressed a valid strategic reason for wanting the plea agreements admitted into evidence. Counsel stated he "wanted the rest of the stuff about how they went after his whole family to get him", and "wanted everybody to know that everybody was charged, everybody, and the only one they went after was him". **{PCR Tr. 1702, 1704}**. Indeed, if counsel had NOT engaged in such common and basic impeachment as examining the State's witnesses on their deals with the State, surely then the allegation now would be ineffectiveness for failing to do so. The fact that Applicant's present counsel may have treated the issue differently is irrelevant as it is precisely the kind of hindsight Strickland forbids. See Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack).

5. There was no prejudice from admission of the plea agreements.

Even if there was somehow a valid objection to introduction of the plea agreements, there was no prejudice. As previously set forth, the evidence of guilt was overwhelming. Indeed, had counsel precluded testimony about the deals with the State, that might just as well have enhanced the credibility of the family members in the absence of such a common method of impeachment. Therefore, Applicant has not shown prejudice. Reed v. Norris, *supra*.

VIII. Failure to Object to Admission of Ballistics Evidence

Applicant next contends his counsel was ineffective for failing to object to admission of the opinion of the SLED firearms examiner that the casings at the scene matched Bowman's .380 to the exclusion of all other firearms.

Of course, after Applicant's sisters confessed to throwing Applicant's pistol in the river, a police diver recovered the black and grey High Point .380 semiautomatic in the river bottom about 25 to 30 feet from the bridge. **{R. 4220-29}**. The gun was matched "to the exclusion of all other firearms" by SLED firearms examiner David Collins to five of the six Winchester .380 shell casings found at the Nursery Road scene. While the sixth casing and spent bullet could not be conclusively matched, they were consistent. **{R. 4315-20}**.

A. Counsel was not deficient.

Despite having the gun transported to Atlanta for review by his expert for these PCR proceedings, Applicant presented no evidence that Collins's conclusion as to the match was invalid. His only attack goes to the validity itself of the discipline of firearms and toolmark examination, and the ability of that discipline to make an exclusive match.

However, even assuming the present validity of an attack on the discipline of firearms and toolmark identification or the relative conclusiveness of a match, counsel was not deficient. Two relevant principles for analyzing claims of ineffectiveness come into play here. First is the point that there is no constitutional claim of ineffective assistance of an expert witness. See Wilson v. Greene, 155 F.3d 396, 401 (4th Cir. 1998) (" The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness. To entertain such claims would immerse federal judges in an endless battle of the experts to determine whether a particular psychiatric examination was appropriate.");

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Waye v. Murray, 884 F.2d 765, 766-67 (4th Cir.1989). Lawyers are entitled to reasonably rely on their experts, and they are not required to second-guess their expert's conclusions or "expert shop" until they find one who will testify favorably. See Wilson v. Greene, 155 F.3d 396 (4th Cir. 1998); Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992). To be actionable, the failure must be of counsel in failing to obtain or present the expert testimony; the fact that the testifying expert did not identify "every possible malady or argument" is not a basis for relief. Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992).

Second is the principle that the reasonableness of counsel's actions must be viewed in the context of the time period they took place, and not in hindsight. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.") (quoting Strickland); Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006) ("Though hindsight may provide a different view of counsel's actions, Simpson is not entitled to a new trial for the sole purpose of presenting a 'fancier' case."). See also Harden v. State, 360 S.C. 405, 602 S.E.2d 48 (2004) ("An attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction.").

When these principles are considered, it is clear counsel could not have been deficient for failing to challenge the underlying discipline of firearms examination at the time of a trial in May 2002. Counsel testified he hired a recognized firearms examiner, Cleon Mauer, to review the State's firearms evidence. **{PCR Tr. 1794; 5316-17}.** Counsel stated that Mauer concurred with the State's findings of a match, and never once advised

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}**.

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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}**.

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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.

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.

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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 rate of zero to a subjective determination. {PCR Tr. 474-75}.

On cross, Dr. De Graef admitted that the "Ballistic Imaging" report only questioned whether uniqueness of toolmarks had been fully demonstrated, and conceded the report expressly did not challenge the validity of firearms identification or take any position on whether such evidence was admissible in court. Moreover, Dr. De Graef conceded that the report accepted the prospect that the same gun would produce the same marks as having a "baseline level of credibility" given "existing research" and its acceptance as evidence in courts for years. He ultimately admitted that assessing the validity of the assumptions behind the discipline were not within the scope of the report, and the only conclusion of the report was that further study was warranted. {PCR Tr. 453-58; 470-72}. Dr. De Graef further conceded that the only independent study conducted for the report did not at all assess the question of uniqueness, and Dr. De Graef had no idea whether Agent Collins had correctly or incorrectly identified a match in accordance with then-existing standards. {PCR Tr. 463-66; 472}. Finally, Dr. De Graef admitted that he did not even write the portion of the report which questioned whether uniqueness had been established, but instead wrote portions addressing how various imaging systems might be applied to a firearms database. {PCR Tr. 466-67}.

The expert who testified as to the match at trial, David Collins, is a member of the Association of Firearms and Tookmark 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 it its entirety the evidence was still overwhelming. There was no prejudice. Reed v. Norris, 195 F.3d 1004 (8th Cir. 1999) (failure to raise Batson issue not prejudicial under Strickland given overwhelming evidence); Simmons v. Taylor, 195 F.3d 346 (8th Cir. 1999) (failure to object to jail clothing not prejudicial under Strickland given the state's overwhelming evidence).

IX. Failure to object to arbitrary factor of "good" prison conditions

Applicant next contends his counsel was ineffective for failing to object to the solicitor's questioning of defense prison expert James Aiken on so-called "good" prison conditions, which he asserts introduced an arbitrary 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.

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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, Burkhart,* and *Bryant*

The reason evidence about "good" prison conditions is problematic stems from four South Carolina cases – one that was in existence prior to this case and three that were handed down after Applicant's trial, including Applicant's on direct appeal.

In State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984), the court *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:

> 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).

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.

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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 Kandeed and inveigled and decoyed her by leading her out to the deserted stretch of rural road where he killed her. There is no error.

Regardless, as argued before, even if the kidnapping aggravator was unsupported reversal is still not warranted given that South Carolina is a "consider" state and not a "weighing" state, and the larceny aggravator is unaffected. See State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (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

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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.

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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 166 (clarifying that Cronic is limited to cases where the magnitude of counsel's error is such that the verdict is almost certain to be unreliable) (citing Cronic, 466 U.S. at 659 & n. 26); Williams v. Taylor, 529 U.S. 362, 391, 396-97 (2000) (examining a claim under the Strickland standard where the petitioner's "trial lawyers failed to investigate and to present substantial mitigating evidence to the sentencing jury").

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}**.

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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}**.

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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}.**

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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}**.

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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}**.

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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". **{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}.**

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).

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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

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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).

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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.

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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. Kisslah, 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

[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).

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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).

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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. 1996) (rejecting claim that counsel was ineffective for failing to present mitigation evidence family members, where there was no proffer of this testimony); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990) (petitioner's allegation that attorney did ineffective investigation does not support relief absent proffer of the supposed witness's favorable testimony); Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3rd Cir. 1991) (applicant cannot show deficiency "based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense"; rather, facts must be presented).

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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.

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[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 Kandee. 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

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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 Clr. 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.

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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}**.

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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.

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}.**

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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. Davis, 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}.**

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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}**

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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 sentencerwould 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).

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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 Kandee, 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 mitgator 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").

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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