NO. 22-6772

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 Institution Secure Facility,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. 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?

II. 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

Respondents agree with Petitioner that the caption reflects all the appropriate parties.

STATEMENT OF RELATED PROCEEDINGS

Respondents agree with Petitioner's recitation of the Statement of Related Proceedings.

CAPITAL CASE
BRIEF IN OPPOSITION

INTRODUCTION

Certiorari should be denied, as Bowman's *Brady* claims are without merit and involve the unremarkable application of well-established law. Under AEDPA deferential standards, federal courts shall not grant habeas corpus relief "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). Here, the state court issued independent rulings as to each of the three *Brady* claims raised by Bowman. The Fourth Circuit articulated the AEDPA deference that must be shown to such rulings and demonstrated the propriety of those rulings. Further, Bowman asserted an unexhausted claim of cumulative materiality under *Brady* as a basis for habeas relief. As is permitted by 28 U.S.C. § 2254(b)(2), the Fourth Circuit Court of Appeals conducted a *de novo* review of the record and found that Bowman's *Brady* claims fell well short of demonstrating the requisite cumulative materiality required for relief under *Bagley* and *Kyles*. The Fourth Circuit's ruling was proper and certiorari is not warranted in this matter.

CITATIONS TO OPINIONS BELOW

The Fourth Circuit Court of Appeals' August 16, 2022, published Opinion affirming the holding of the district court and denying federal habeas relief is available at *Bowman v. Stirling*, 45 F.4th 740 (4th Cir. 2022), and is provided in the petition appendix at 1a. The District Court of South Carolina's March 26, 2020 order denying habeas relief is unreported but available at 2020 WL 1466005 (D.S.C. Mar. 26, 2020), and provided in the petition appendix at 37a.

JURISDICTIONAL STATEMENT

The petition was filed within the time granted in this Court's order extending the standard 90 days. Bowman claims jurisdiction is invoked under 28 U.S.C. § 1254(1). (Pet. 1).

STATUTORY PROVISIONS INVOLVED

Respondents contend that the relevant statutory provision is found in 28 U.S.C. § 2254(d):

> (d) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted 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.

And also in 28 U.S.C. § 2254(b)(2): "An application for writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."

STATEMENT OF THE CASE

Bowman is currently confined in the Broad River Correctional Institution Secure Facility of the South Carolina Department of Corrections as a result of his Dorchester County convictions and death sentence for the murder of victim, 21 year old Kandee Martin (hereinafter referred to as Victim), and third-degree arson. Bowman received a sentence of ten years for his arson conviction.

Victim's murder came as a result of an execution style shooting by Bowman. The arson followed as a result of Bowman's attempt to dispose of the body by setting Victim's car on fire with her body in the trunk.

A. Facts of the Crime:

On February 16, 2001, Bowman was with his sisters Yolanda Bowman and Katrina West. While on the way to the pharmacy, they saw Victim speaking with Edward Waters. (JA 56; JA 76-79; JA 91-95; JA 118-120). Bowman instructed Yolanda to pull up alongside Victim's car so that he could speak to her. He tried to get her attention through the open rear window of Yolanda's Volkswagen. However, in response Victim held up her finger to Bowman and told him to "hold on a minute". She then turned back to finish her conversation. (JA 79-80; JA 95-97; JA 119-121). Victim's gesture and response angered Bowman. Edward, Katrina, and Yolanda each heard Bowman express his intent to kill Victim. (JA 80-82; JA 99; JA 120-121).

Around 7:00 or 7:30pm that evening, Taiwan Gadson (hereinafter "Gadson") saw Bowman riding with Victim in her green Ford Escort. Bowman called over to Gadson and told him to get in the car. (JA 345; JA 348; JA 388). With Bowman directing the way, Victim drove out into the country, where they eventually ended up on Nursery Road. Once there, they stopped, turned off the car, and Bowman and Gadson got out of the vehicle. (JA 349-351; JA 388-390). Bowman and Gadson walked down the road a ways, during which time Bowman whispered to Gadson that he was going to kill Victim because she was wearing a wire. A car came down the road and the three individuals jumped into the woods until it passed.[1] (JA 352-354; JA 390-391). Victim then started walking back down the roadway with Bowman following. As Gadson came out of the woods behind them, he saw Bowman fire a gun three times at Victim. Victim ran towards Gadson, but stopped and turned to face Bowman. She begged, "Please Black, don't shoot me no more. I have a baby to take care of." [2] Bowman responded to her pleas by firing twice more, after which Victim fell to the ground.[3] (JA 352-358; JA 366-367; JA 391-392). Gadson, who said he "messed in his pants a little bit" from seeing the crime, jumped in the car while Bowman dragged Victim into the woods by her feet. Bowman then climbed in the driver's seat of Victim's car, remarking: "I shot that bitch in the head. Heard her head hit the

[1] Dorchester County resident Dennis Judy noticed a car on the side of Nursery Road, with two of its wheels on the shoulder. Finding it odd that the car was parked with its lights off and windows down, Judy stopped briefly, but continued on. (JA 137-140).

[2] "Black" is Bowman's nickname. (JA 2526).

[3] Local resident Bryan Newhouse heard the gunshots that night, but did not see anything when he drove down the road to investigate. (JA 153-156; JA 158-160).

ground." Once they had returned to Branchville in Victim's car Bowman threatened to blow Gadson's brains out if he ever told anyone. (JA 367-370).

Around midnight, Bowman and some friends decided to go to the Allen Murray nightclub outside the town of Bowman, South Carolina. Bowman drove Victim's car, with Hiram Johnson, Gadson, and Darien Williams as passengers. During the drive Bowman told the men he had stolen the car and made them put on gloves. (JA 372-375; JA 418-420; JA 436). At the club, Bowman walked around the parking lot in an effort to sell Victim's car, but was unsuccessful. (JA 422). Johnson testified that on their way back from the club Bowman had the pistol sitting in his lap, and he remarked, "I killed Kandee, heh heh heh." (JA 376-377; JA 422-424).

At about 3:00 a.m., Bowman knocked on Travis Felder's door and asked him for help parking a car. (JA 397-400; JA 471-473; JA 474-475). Felder testified that he got in his own car and followed Bowman in the Ford Escort to Nursery Road. Bowman pulled over on the side of the road, cut his lights, and went into the woods for a minute. The next thing Felder saw was Bowman pulling a body by the feet face down. As Bowman opened the trunk and put the body inside, Felder could see by the trunk light it was Victim. (JA 448-452). Bowman looked back at Felder, and said, "You didn't think I would do it, did you? I killed Kandee Martin."

Bowman told Felder to go down the road and turn around, while Bowman drove the Escort up into a field. Felder watched as Bowman threw a light into the car, which erupted in flames. Felder then took Bowman back to town. (JA 453-456; JA 461).

The burned-out Ford Escort found by law enforcement was registered to Victim and her mother. (JA 184-186). Victim had been shot to death by two bullets, each equally fatal, with one to the back of the head, and another to the left portion of her back. (JA 299-405). The lungs were clear, indicating that Victim was dead before the fire started. (JA 309-310).

Law enforcement received information that Bowman had been with Victim the night before. Bowman was apprehended at his wife's home while hiding in his boxers beside the bed in a child's room. He was promptly arrested and mirandized. A pair of black jeans were retrieved for Bowman so that he could dress before leaving, and inside the pocket of the pants officers found a brown lady's watch. Victim's mother later identified the watch as belonging to Victim. Bowman's friends testified that Bowman had been wearing the pants the day before. (JA 484-487; 497; 505-507; 550-553; 562-563).

Bowman's wife, Dorothy, testified that Johnson told her where to find Bowman's gun. She located the gun, and with the help of Yolanda, Kendra, and Bowman's father, they worked to dispose of the gun for Bowman by tossing it into the Edisto River. (JA 523-533; JA 538-542; JA 553-559; JA 565-567; JA 713). With plea agreements reached for Bowman's wife and sisters, they assisted police in recovering the weapon from the river. (JA 90-91; JA 516; JA 522-523; 575-584). The gun was conclusively matched by SLED firearms examiner David Collins to five of the six Winchester .380 shell casings found at the Nursery Road scene. While the sixth

casing and spent bullet could not be conclusively matched to Bowman's .380, they were consistent. (JA 670-675).

B. Procedural History:

1. Trial Level Proceedings.

Bowman is confined in the Broad River Correctional Institution Secure Facility of the South Carolina Department of Corrections (SCDC) as the result of his Dorchester County convictions and death sentence for the murder of Kandee Martin and third-degree arson. The Dorchester County Grand Jury indicted Bowman during the June 18, 2001 Term of Court of General Sessions for Murder and Arson, Third Degree. On July 13, 2001, the State served Bowman with a Notice of Intent to Seek the Death Penalty and Notice of Evidence in Aggravation. (JA 925-926; JA1334).

Bowman was tried by a jury before the Honorable Judge Diane S. Goodstein. At the trial, Bowman was represented by Mr. Cummings and Ms. Hardee-Thomas. The State was represented by Solicitor Bailey and Assistant Solicitor Lafond. The guilt phase of the trial lasted from May 17 to May 20, 2002. Bowman was convicted of both charges. (JA 919).

Bowman exercised his right to the twenty-four hour cooling-off period provided by S.C. Code Ann. § 16-3-20(B). (JA 924). The sentencing phase was conducted on May 22 and 23, 2002. Judge Goodstein submitted the following aggravating factors to the jury:

(1) The murder was committed while in the commission of a criminal sexual conduct;

(2) The murder was committed while in the commission of kidnapping;

(3) The murder was committed while in the commission of robbery with a deadly weapon; and

(4) The murder was committed while in the commission of larceny with the use of a deadly weapon.

(JA 1375-1378). Regarding mitigation, the judge submitted that the Defendant had no significant history of prior criminal convictions involving the use of violence against another person, the age or mentality of the defendant at the time of the crime, as well as the concept of non-statutory mitigating circumstances. (JA 1384-1385).

The jury found the existence of two of the four submitted aggravating factors: the murder was committed in the commission of a kidnapping, and the murder was committed during the commission of a larceny with the use of a deadly weapon. (JA 1404). The jury recommended Bowman be sentenced to death. (JA 1404). Judge Goodstein subsequently sentenced Bowman to death for the murder conviction, and ten years confinement for the third-degree arson conviction.

2. Direct Appeal Proceedings.

A timely Notice of Appeal was served and filed on May 24, 2002. On appeal, Robert M. Dudek, Esquire, Assistant Appellate Defender of the South Carolina Office of Appellate Defense, represented Bowman. (*See* JA 1410-1466; at 1541-1550). Assistant Attorney General S. Creighton Waters, Esquire, represented the State. (JA 1467-1540). On July 6, 2005, Bowman filed his Final Brief of Appellant. (JA 1410-1466). The State filed its Final Brief of Respondent on July 7, 2005. (JA 1467-1540). Bowman raised five grounds on direct appeal, however none of his direct appeal claims are the subject matter of his federal habeas claims in this matter. (JA 1416-

1417). Oral arguments were heard on October 6, 2005. The South Carolina Supreme Court affirmed Bowman's convictions in a published Opinion. *State v. Bowman*, 366 S.C. 485, 489, 623 S.E.2d 378, 380 (2005). A petition for rehearing was denied by the Court on January 6, 2006.

Bowman filed a Petition for Writ of Certiorari with the United State Supreme Court on April 5, 2006. This Court denied certiorari by Order dated June 12, 2006. (JA 1558).

3. State Collateral Action Proceedings.

Bowman next filed an Application for Post-Conviction Relief on April 7, 2006. (JA 1551-1557). The State filed a Return, Motion to Dismiss, and Motion for Summary Judgment on September 1, 2006. (JA 1561-1598). The Supreme Court of South Carolina stayed the execution for the post-conviction relief action and appointed the Honorable James E. Lockemy, Circuit Court Judge to hear the PCR case.

Judge Lockemy appointed James A. Brown, Jr., Esquire and Charlie Jay Johnson, Jr., Esquire to represent Bowman during the post-conviction relief action. By Order filed February 6, 2008, Mr. Johnson was relieved and John Sinclaire, III, Esquire was appointed to represent Bowman with Mr. Brown during the PCR action.[4] (JA 1657-1658). Bowman, through counsel, filed multiple amended applications,

[4] Bowman has been represented by counsel at every stage of his direct and collateral proceedings. For indigent defendants seeking capital post-conviction relief, South Carolina provides for the appointment of two attorneys with a heightened qualification requirement: "at least one attorney appointed pursuant to section 17- 27-160(B) must have either (1) prior experience in capital PCR proceedings, or (2) capital trial experience and capital PCR training or education." *Robertson v. State*, 795 S.E.2d 29, 36 (S.C. 2016); see also S.C. Code Ann. § 17-27-160 (B).

culminating in his Fourth Amended Application on June 5, 2009, after the evidentiary hearing.[5] (JA 1659-1667; JA 1672-1683; JA 1693-1709; JA 2908; JA 2927-3035). The State filed an Amended Return, Motion to Dismiss, and Motion for Summary Judgment on March 15, 2007. (JA 1599-1652).

The evidentiary hearing was held on September 15-18, 2008; September 29-30, 2008; November 24, 2008; and December 18, 19, and 22, 2008. The State filed its Post-Trial Brief in Opposition to Application for Post-Conviction Relief on August 10, 2009. (JA 3036). Bowman filed a Reply to Respondent's Brief in Opposition on September 16, 2009. (JA 3238-3266).

On March 12, 2012, the PCR Court filed its Order of Dismissal. (JA 3267). The Order of Dismissal addressed more than forty alleged claims for relief, including the *Brady* issues now raised on appeal. Bowman filed a Motion to Alter or Amend Judgment on March 19, 2012, and a memorandum in support of the motion on April 25, 2012. (JA 3398-3415). The State filed a letter response to the motion on May 2, 2012. (JA 3416). The PCR Court filed its Order to the Motion to Alter or Amend Judgment on October 31, 2012. (JA 3417).

Bowman appealed. Again, appellate counsel Dudek and Alexander filed his Petition for Writ of Certiorari to the South Carolina Supreme Court on October 18, 2013, which among other arguments, included the relevant issues now on appeal before this Court. Bowman submitted an Amended Petition for Writ of Certiorari on April 30, 2014. (JA 3418-3504). The State made its Return to the Petition for Writ of

[5] Under Rule 29(b), Bowman also filed a Motion for New Trial Based Upon After Discovered Evidence on September 8, 2008. The Motion was denied December 20, 2009.

Certiorari on March 24, 2014, and then its Return to the Amended Petition for Writ of Certiorari on May 6, 2014. (JA 3574). The Amended Petition set forth seven grounds for relief, including the *Brady* issues now on appeal. Bowman made his Reply to the Return on May 5, 2014.

The South Carolina Supreme Court issued its Order granting Certiorari as to Question 6, but denied certiorari on the remaining questions presented, including the issues now before this Court. (JA 3600). The parties then submitted briefing as to Question 6. (JA 3612-3678). The Supreme Court issued its published Opinion, *Bowman v. State*, 422 S.C. 19, 809 S.E.2d 232 (2018), filed January 10, 2018, wherein it affirmed Bowman's conviction and sentence. (JA 3679-3699).

It was at that point that Bowman turned to the federal courts.

4. Section 2254 Habeas Action

Bowman was represented by attorneys Elizabeth Franklin-Best and Laura Young in the litigation of his Petition for Federal Habeas Corpus Relief before the South Carolina District Court. Bowman filed his Petition for Writ of Habeas Corpus on January 10, 2019, along with corresponding memorandum and exhibits in support. (JA 3700-3807).

Respondents filed their Motion for Summary Judgment, along with the Return and Memorandum in Support on May 10, 2019. (JA 3809-3925). Bowman filed his Petitioner's Traverse and Response in Opposition to Respondents' Motion for Summary Judgment on August 5, 2019. (JA 3926). Respondents then filed their Reply to Petitioner's Response in Opposition on August 19, 2019. (JA 3965).

The Honorable Bristow Marchant, United States Magistrate Judge, issued a Report and Recommendation finding that Bowman had failed to satisfy his burden for federal habeas relief. The magistrate recommended that summary judgment be granted and the action denied. (JA 3984-4103). Counsel for Bowman filed his Objections to the Report and Recommendation on February 14, 2020. (JA 4105-4129). Respondents filed their Reply to Bowman's Objections to the Report and Recommendation on February 28, 2020. (JA 4131-4137). The Honorable Terry L. Wooten, Senior United States District Judge, issued an Order accepting the Report and Recommendation, denying federal habeas relief, and denying a certificate of appealability on March 26, 2020. (JA 4138-4213).

Counsel for Bowman filed his Motion to Alter or Amend the Order of the District Court on April 22, 2020, along with a Memorandum in Support of Bowman's Motion to Alter or Amend Judgment, filed May 14, 2020. (JA 4215-4229). Respondents filed a Response in Opposition to the Motion to Alter or Amend Judgment on June 15, 2020. (JA 4231-4245). Counsel for Bowman followed by filing a Reply on June 30, 2020. (JA 4246-4250). On August 7, 2020, the District Court issued its Order denying the Motion to Amend. (JA 4252-4261).

Counsel for Bowman filed a Notice of Appeal on September 4, 2020. On February 5, 2021, Counsel for Bowman filed his opening brief raising his claims for relief to the United State Fourth Circuit Court of Appeals. Pursuant to 28 U.S.C. § 2553(c)(1)(A), the Fourth Circuit granted a Certificate of Appealability as to Bowman's *Brady* claims, but it denied appealability to the remaining issues.

Respondents filed their Brief of Respondents on April 27, 2021, and Counsel for Bowman filed a Reply on May 24, 2021. On August 16, 2022, the Fourth Circuit Court of Appeals issued its published Opinion and Judgment affirming the decision of the district court. The Mandate was stayed pending Bowman's Petitioner for Rehearing *En Banc*. The Fourth Circuit later denied Bowman's petition for rehearing *en banc* by Order filed September 13, 2022. (App. 36a). The Mandate was issued on September 21, 2022.

Counsel for Bowman filed his Petition for Writ of Certiorari on February 10, 2023. Respondents' Brief in Opposition now follows.

ARGUMENT

I. In light of the overwhelming evidence of guilt and the independent negligible nature of the claims presented, the Fourth Circuit correctly concluded that each of Bowman's *Brady* claims carried, at best, only minimal value as impeachment evidence and such did not establish the cumulative materiality necessary to constitute a due process violation under *Bagley* and *Kyles*.

The ruling of the Fourth Circuit affirming the district court's denial of habeas corpus relief was proper. The Fourth Circuit identified the greatly deferential standard required under 28 U.S.C. § 2254. (App. 21a-22a). Based upon the state court record, Bowman's claims fail to satisfy the materiality element under *Brady*, both individually and cumulatively. As such, the Fourth Circuit found that "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." (App. 35a). The Fourth Circuit's holding was correct and the Petition fails to present an issue warranting review by this Court. Bowman is not entitled to relief and certiorari should be denied.

"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 (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 (1995). Evidence is favorable if it is either exculpatory or impeaching. See, e.g., *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). "[E]vidence 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." *United States v. Bagley*, 473 U.S. 667, 682 (1985). 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,'" 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 (quoting *Kyles*, 514 U.S. at 434-35). The assessment of materiality is made in light of the entire record. *United States v. Agurs*, 427 U.S. 97, 112 (1976). Materiality under *Brady* is based upon the cumulative evidence suppressed by the State. *Kyles*, 514 U.S. at 436 (citing *Bagley*, 473 U.S. 667).

An individual asserting a *Brady* violation must demonstrate that the disputed evidence is: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching. *Youngblood*, 547 U.S. 867, 869-70. Normally an appellate court would undertake an evaluation of each of these elements. However, the Fourth Circuit expedited its review by "assum[ing], without deciding," the first three *Brady* elements so as to address only the questions of materiality and cumulative materiality.[6] (App. 25a). The Fourth Circuit also aptly recognized a tension existing between the deference that must be given for the independent merit rulings reached by State court under AEDPA and the *de novo* review applied to the cumulative materiality analysis that was not addressed on the merits by the state court. The Fourth Circuit framed its analysis and opinion in such a way as to give Bowman the benefit of every permissible assumption. (App. 25a). And, despite accepting every permissible assumption in favor of Bowman, the Fourth Circuit still found that he had failed to satisfy his burden for habeas relief.

As a result, the case at hand presents unremarkable issues, a well-reasoned and proper ruling by the Fourth Circuit, and the absence of a basis for certiorari.

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[6] Petitioner also did not object to the absence of a ruling on the basis of cumulative materiality in state court, and the District Court aptly recognized the lack of necessity for such a ruling, having found a lack of suppression on two of the three Brady allegations. (App. 174a). The Fourth Circuit echoed that rationale. (App. 23a). In any case, exhaustion is not required to ***deny*** a claim for relief. 28 U.S.C.A. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.").

Substantively the evidence in dispute is soundly immaterial under *Brady*; the negligible nature of Petitioner's claims and overwhelming evidence of guilt lend themselves to no other reasonable conclusion.

a. The Sam Memo

The Fourth Circuit correctly identified the Sam Memo as cumulative evidence to that which was already provided to the Petitioner. As such, it lacked impeachment value distinct from what the defense already had at its disposal and chose not to utilize. Bowman's claim is without merit and does not warrant a grant of certiorari from this Court.

Bowman's first claim asserts that the State violated *Brady* by not providing him with a copy of typed notes (referred to as the Sam Memo) drafted by Samuel Richardson, an investigator for the First Circuit Solicitor's Office who was conducting the interview at the behest of the prosecutor in anticipation of the upcoming trial. Ricky Davis was already an established potential witness for trial, as he had previously provided law enforcement an un-notarized, handwritten statement indicating that he heard Gadson claim that he was the one who shot the Victim. (JA 2812). The Sam Memo merely reiterates the critical information that Gadson supposedly confessed to Victim's murder. (JA 2873).

While the Sam Memo was not disclosed, defense counsel were already in possession of the handwritten note prior to trial and were therefore aware of Gadson's supposed confession. *The defense team even made efforts to investigate it.* The PCR evidentiary hearing revealed that after defense counsel received Mr. Davis's written

letter they sent an investigator to interview Mr. Davis. However, in speaking with the defense's investigator, Mr. Davis explicitly recanted the contents of the handwritten note and informed the investigator that Bowman had told him to write it. (JA 2519). Defense counsel Cummings further testified that the investigator informed him that if he were to call Mr. Davis to testify at trial he would testify that Bowman told him to write the note and that Bowman had made up the information for him. (JA 2111-2112). Cummings agreed that presenting Mr. Davis as a witness would run the severe risk of demonstrating Bowman's effort to get another inmate to lie for him and ultimately confirm his own guilt. *Cummings conceded that even if he had possessed the Sam Memo, it would not have changed the circumstances they faced with Mr. Davis.* (JA 2106-2108; JA 2110; JA 2525-2527). The Sam Memo cannot constitute material evidence under *Brady*. See *Abdur'Rahman v. Colson*, 649 F.3d 468, 474 (6th Cir. 2011) (quoting *United States v. Clark*, 928 F.2d 733, 738 (6th Cir.1991) (per curiam)("No *Brady* violation exists where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information,") and *Byrd v. Collins*, 209 F.3d 486, 517 (6th Cir.2000) (applying same in context of impeachment information).

Mr. Ricky Davis testified at the PCR hearing as well. His PCR testimony again revealed that 1) he could not recall Gadson telling him he killed victim, 2) he drafted the statement at Bowman's instruction, and 3) that he did not know anything about the case other than what Bowman told him. (JA 1845-1848). Upon further examination, Mr. Davis explicitly testified that Gadson did not tell him anything that

was in the handwritten statement and that he did not have the document notarized because it was not true. (JA 1847; JA 1857).

The Fourth Circuit correctly found no error. It relied upon this Court's precedent that evidence of impeachment, cumulative to that which the defendant already possesses, fails to establish materiality under *Brady*. (App. 27a, citing *Turner v. United States*, 198 L. Ed. 2d 443, 137 S. Ct. 1885, 1894 (2017)). The Fourth Circuit reasoned that both documents contained the alleged confession from Gadson, the remaining portions of the notes were not inconsistent to Gadson's testimony at trial,[7] and therefore the Sam Memo would not have provided additional avenues of impeachment.

Moreover, in consideration of its materiality analysis the Fourth Circuit also noted the many hurdles that defense counsel would have faced had they called Ricky Davis to testify, their express decision not to attempt those hurdles, and the ultimate detriment the evidence in question would bring to the defense's case. The Fourth Circuit was correct to characterize the Sam Memo evidence as "offer[ing] little, if anything, beyond what the defense had already received" and finding it immaterial under *Brady*. (App. 27a). In looking at the entire record in this case, the Sam Memo would not have undermined confidence in the jury's verdict in this case and there is no "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

[7] Solicitor Bailey testified at the PCR evidentiary hearing that he did not think the Sam Memo was inconsistent with the handwritten Ricky Davis statement. (JA 2747-2748). Herein, the Fourth Circuit agreed.

S.Ct. 2188 (internal quotation marks omitted). In truth, not only would the "result" of the proceeding been the same, but the proceeding itself – absent any mention of Gadson's alleged confession – would have remained the same as well.

The Fourth Circuit's holding is correct and there is no basis for certiorari as to this matter.

b. The Gadson Mental Health Report.

Like the Sam Memo, the Fourth Circuit was again correct to find no error. The Gadson's mental health report would only have been of "minimal" value for additional impeachment of Gadson at trial. (App. 28a). The substance of Bowman's second *Brady* claim asserts that the State failed to provide the mental health report of witness Gadson, preventing him from impeaching Gadson's on the basis of his memory or sanity. The Fourth Circuit correctly rebuked such a claim noting that mental health report was a double-edged sword as to its impeachment value; it provided medical conclusions that starkly contradict the supposed basis of the impeachment. As such, the provision of the mental health report would not have led to a reasonable probability of differing result at trial and Petitioner has failed to demonstrate a basis for certiorari.

The record strongly supports the Fourth Circuit's finding no error regarding this issue. Substantively, Gadson's mental health evaluation provided little in the way of value to the defense. For diagnoses, the report noted that Gadson suffered from a cannabis dependence and a history of seizure disorder. (JA 2806). The notes provided in the report indicate that Gadson had suffered from a total of three

seizures, none of which appear to have occurred at the time of Victim's murder. The first, Gadson described as [blacking out]. Gadson indicated that the second occurred while smoking marijuana, wherein he fell down. When he came too, he felt dizzy. The third took place approximately eight months prior to his evaluation in the presence of his cousin. He indicated that he had not eaten all day and had been smoking marijuana. Gadson's MRI, EEG, and neurological evaluations were normal. His exam results further indicate "no evidence of long or short-term memory impairment", was of average intelligence, possessed an average fund of knowledge, and the denial of "delusions". Gadson did report that he hears a voice and "a little beeping noise," which the report characterized as atypical for mental illness. (JA 2807-2808). Bowman's focus upon the minimal language of "some mild impairment of verbal memory", the limited and unrelated history of seizures, the cannabis dependence, and the hearing a voice and beeping do not support a deficiency in memory or sanity that Petitioner clings to as a lost opportunity for impeachment, and the report does nothing to detract from Gadson's clear and corroborated description of Bowman's callous murder of Victim.

The impeachment value of the report is further diminished by the fact that the defense was already able to impeach Gadson's memory due to his consumption of alcohol during the day. Gadson conceded that by the time they left the club (after the murder had taken place), he was "near about" drunk. Lastly, and of practical importance, Gadson's testimony is not the type of evidence for which an attack on the accuracy of his memory serves much benefit at trial. He was an eyewitness to Victim's

violent murder by Bowman in an isolated area. The gravity of his testimony is not diminished by insinuating to the jury that he may not remember certain details correctly. Though the Fourth Circuit did not articulate this practical shortcoming, it did recognize that Gadson's testimony is largely corroborated by other evidence presented at trial which it found to be "truly 'overwhelming' ". (App. 31a).

While the defense could have attempted to use the report to question Gadson's memory and sanity, a premise for which there is only the barest of inferences, the State could have pointed to the same document to demonstrate that the medical conclusions reached show Gadson to be competent, sane, and possessing a reliable memory. The Fourth Circuit was therefore correct to find the impeachment value minimal and materiality lacking. Certiorari is not warranted in this matter.

c. Johnson's Pending Charges

Bowman's third claim asserts that the State committed a *Brady* violation for failing to disclose that witness Hiram Johnson had unindicted criminal charges in a separate county of the First Judicial Circuit. Though there was no evidence of a plea agreement or favorable treatment, the Fourth Circuit agreed that there was independent impeachment value to the evidence. Nevertheless, the Fourth Circuit was correct to conclude that the value of that impeachment evidence would have been to "limited effect" given the absence of an agreement with the State, the ability to corroborate many of the facts Johnson testified to, and the overwhelming evidence of guilt presented by the State.

The Fourth Circuit fairly concluded that even in the absence of a plea agreement with the State, the pending charge could be used to infer Johnson testified in the hopes of currying favor. It further noted that the State's closing argument would have required alteration to indicate that Johnson did not possess any criminal *charges relating to Victim's murder* that would sway him to give false testimony. Nevertheless, the Fourth Circuit reasoned that impeachment on this pending charge would have been to a limited effect. Other evidence presented by the State corroborated much of Johnson's testimony which lends credence to its reliability, numerous other witnesses testified pursuant to plea agreements with the State, and Johnson was not one of the pivotal witness in the State's case.

In contrast to Gadson and Felder, Hiram Johnson was simply not a pivotal witness to the prosecution. Gadson's testimony demonstrated that he witnessed Petitioner murder Victim and drag her body into the woods. Felder's testimony, which the circuit court acknowledged is not impacted by any of Petitioner's *Brady* claims, corroboratively demonstrated that he witnessed Petitioner 1) drag Victim's body out of the woods in the same area, 2) confess to murdering her, 3) stuff her body into Victim's trunk, and then 4) set the car on fire. However, Johnson's testimony merely demonstrated a second confession and Petitioner's possession of a handgun in his lap. (JA 419-424). That is certainly damning evidence, but as the Fourth Circuit noted, it is ancillary to the two key witnesses and the overwhelming evidence of guilt collectively presented to the jury.

In support of its finding, the Fourth Circuit distinguished its ruling from multiple cases where the materiality was found for "principal witnesses" who possessed express agreements for leniency that were suppressed by the state. Witness Hiram Johnson possessed neither an agreement for leniency, nor critical testimony for which the prosecution's case was dependent, and thus the impact of the missing impeachment evidence does not rise to the requisite level of materiality discussed in other cases. (App. 30a, citing *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). The Fourth Circuit's findings are a well-reasoned conclusion based upon the entirety of the state court record. Bowman has failed to demonstrate why the pending charges against Johnson would put his trial into a completely different light such that there is a reasonable probability of a differing result had the evidence been disclosed. Certiorari is unwarranted.

d. Cumulative Materiality Analysis

Though the state court failed to rule on the matter of cumulative materiality and Bowman failed to object or seek additional findings thereto, AEDPA specifically allows for the federal court to *deny* habeas relief on unexhausted claims. 28 U.S.C.A. § 2254(b)(2). The Fourth Circuit has done so here. Through *de novo* review the Fourth Circuit's findings regarding each *Brady* allegation were in agreement with the reasoning and holdings set forth by both the PCR court and the AEDPA review conducted by the district court. With its own considerations of the *Brady* claims set forth, the Fourth Circuit correctly found that that there was also no cumulative

materiality constituting a *Brady* violation in this matter. As such, the lack of merit to Bowman's claim is plain and certiorari should be denied.

First, in light of the state court record, the ruling of the state court and the equivalent findings of the Fourth Circuit Court of Appeals, there is very little evidence to even consider on a "cumulative" basis under *Bagley* and *Kyles*. The Sam Memo was found to "offer[ ] little", if not completely lacking in impeachment value. (App. 27a). Similarly, the mental health report was found to offer, at best, minimal impeachment value. (App. 28a). An effective discrediting of Gadson is simply not likely to follow even if Bowman had received the disputed memo and report. Thirdly, Johnson's pending charges were arguably of "limited effect". (App. 30a). Collectively, across all three issues Bowman has offered little to no evidence of value to accumulate and he has failed to demonstrate a meritorious cumulative materiality argument under *Brady*.

As articulated in each of its independent findings, the evidence against Bowman was truly overwhelming in this case and was not dependent upon the testimony of Gadson and Johnson. The Fourth Circuit accurately summarized the abundant circumstantial evidence at trial that was mutually corroborative. Collectively, Bowman 1) was indisputably seen and heard announcing his intent to kill Victim on the day of the murder, 2) was seen driving Victim's car on the night of the murder, 3) confessed to stealing Victim's car, 4) attempted to sell the stolen car just hours after the murder took place, 5) was seen in possession of a pistol both before and after the time of the murder, 6) was recently in proximity of Victim based

upon the presence of DNA from Victim's vaginal swab, 7) was found hiding from police when they arrived at his home with an arrest warrant, 8) was in possession of Victim's wrist watch in his pants pocket, 9) those same pants were identified as Bowman's attire worn the prior day, 10) the murder weapon was removed from Bowman's home by his own family members and disposed of by throwing it into the Edisto river.

In addition to the circumstantial evidence, Travis Felder was one of the State's key witnesses and his testimony is not at all impacted by Bowman's *Brady* claims. He provides direct evidence that Bowman murdered Victim and disposed of her body and vehicle.

Bowman's Brady claims are substantively weak in the face of the substantial evidence of guilt independent from the testimony offered by Gadson and Johnson. However, his claims also fail to demonstrate that Gadson and Johnson's credibility would be irreversibly damaged from the allegedly suppressed impeachment evidence, especially considering the various corroborating facts that lend credence to the veracity of their testimony. As the Fourth Circuit noted, at best their testimony could have been "undercut". (App. 34a). It would not have been disregarded entirely. And even if one were to unreasonably assume, as the Fourth Circuit did for the sake of argument, that the jury would completely disregarded the testimony of Gadson and Johnson, the evidence "remains forceful and compelling" such that confidence in the verdict is not undermined. (App. 34a).

The Fourth Circuit taking every permissible assumption in favor of Bowman does yeoman's service toward demonstrating the utter lack of merit to his claims. Even with every assumption in his favor, Bowman's claims are inherently too weak and the evidence against him too abundant to find he has carried his burden of proof in showing cumulative materiality under *Brady*. Certiorari should be denied.

II. The Fourth Circuit correctly found that Bowman's *Brady* claims lack materiality, both individually and cumulatively, and that its reasoning applies to both guilt and sentencing.

Bowman claims certiorari should be granted because the Fourth Circuit failed to conduct a "separate analysis" of materiality as to the question of sentencing. Bowman is mistaken.

Bowman's second issue was soundly denied by the Circuit Court finding 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." (App. 35a). The Fourth Circuit addressed the issue further by footnote:

> 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.

In addition to demonstrating the doubtful exhaustion of the issue, the Fourth Circuit explicitly addressed the issue and held that the rationale and reasoning set forth in its opinion applies to both the matters of guilt and sentencing. (App. 35a, n. 7). The

disputed evidence was shown to be immaterial. The Fourth Circuit need not repeat itself. Certiorari is not warranted.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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