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 INSTUTITON SECURE FACILITY,

Respondents.

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

REPLY BRIEF

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REPLY BRIEF OF PETITIONER

Respondents' Brief in Opposition (BIO) does little to address the Questions Presented: whether the Fourth Circuit's findings with respect to the materiality of the exculpatory and impeachment evidence withheld by the State as to guilt and capital sentencing are both inconsistent and contrary to *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, applying the Due Process Clause of the Fourteenth Amendment to address situations such as this where the state withholds material exculpatory and impeachment information. Instead, Respondents misstate some facts and ignore others, neither defending nor even acknowledging the lower court's misapplication of this Court's precedent.

Because Respondents' arguments run afoul of the record and this Court's precedent, certiorari should be granted and the lower court's decision summarily vacated and remanded. Moreover, because neither the state nor the federal courts have engaged with this evidence in a reasonable fashion, the limitations on relief imposed by 28 U.S.C. § 2254 do not apply. For these and other reasons discussed below, this case merits the Court's intervention.

I. Respondents' Misstatement of the Case.

In a tact that underscores the significance of the evidence suppressed in this case, Respondents begin their misinformation campaign from the very beginning of the Statement of the Case by characterizing the underlying crime in ways that even the state's compromised witnesses did not profess. They describe the underlying

crime as an "execution style shooting," when the only purported witness to the shooting--Taiwan Gadson, who testified in exchange for a plea agreement to a greatly reduced sentence, and was a subject of the suppressed exculpatory and impeachment evidence—described it quite differently.[1] Joint Appendix in the Fourth Circuit (J.A.) 336.

Respondents continue with the misstatement of the case by omitting the facts implicating Travis Felder, another person initially charged in the case who (in exchange for a plea, J.A. 440-41, 1970) provided the only purported eyewitness testimony for the events surrounding the arson.[2] According to Respondents' misrepresentations, Felder's involvement began with Bowman knocking on Felder's door and "ask[ing] him for help parking a car." BIO at 8. That is not even what the State's witnesses at trial alleged. According to Carolyn Brown, Travis Felder, and Valorna Smith, Bowman knocked on Smith's door around 3:00 a.m. Brown recalled that Bowman asked Felder for a ride home. Smith recalled only that Bowman asked

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[1] Gadson claimed that after Martin drove herself, Bowman, and Gadson to Nursery Road, Bowman and Gadson left the car and, according to Gadson, Bowman told him that he intended to kill Martin because he thought she was "wearing a wire." When Martin walked toward them, Bowman abruptly shot at Martin five times, hitting her twice. Appendix (App.) 5-6. Respondents also misstate the facts by referring to state witness Katrina West as Bowman's sister. West is Bowman's first cousin. J.A. 91, 116-17.

[2] Felder claimed 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.

Felder to come outside. Only Felder testified that Bowman asked him for help parking a car. J.A. 398-400, 446-47, 471-72.

Respondents then rely on Felder's testimony that he followed Bowman, who was driving the victim's car, out to the murder scene, where he saw Bowman drag the victim's body from the woods and put it in the car, which he lit on fire. BIO at 8. Respondents ignore, however, Felder's sentencing testimony and videotape evidence that when he left Smith's apartment, he was seen shortly afterwards *without Bowman* in a convenience store purchasing gas in a gas jug. J.A. 1265-72. Thus, according to his own sentencing testimony, his trial testimony is not entirely truthful.

Respondents conclude their statement of the facts by omitting significant information. Just after discussing Bowman's arrest on unrelated charges, Respondents discuss the recovery of the murder weapon by Bowman's wife in a chair in her home after receiving a tip by Hiram Johnson—also the subject of the suppressed exculpatory and impeachment evidence. She, Bowman's sisters, and Bowman's father disposed of the gun in a river where it was later recovered. BIO at 9.

In recounting this evidence, Respondents make no mention of the fact that the only evidence that Bowman ever possessed a Hi-Point .380 pistol, the make of the murder weapon, came from *Gadson and Felder*. J.A. 340-41, 456, 584, 664-74. Respondents also omit additional facts that render Bowman's connection to the murder weapon questionable: namely, 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 Johnson knew the weapon was there, as it certainly was not mentioned in his trial testimony. 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 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.

II. Respondents continually overstate, misstate, and ignore relevant evidence in opposing the granting of certiorari due to the Fourth Circuit's unreasonable finding of no materiality on the issue of guilt or innocence.

Respondents assert flatly that the evidence withheld by the state at trial "is soundly immaterial" and even "negligible" under *Brady* in light of the overwhelming evidence of guilt. BIO at 19. Respondents can only support these conclusions, however, by misstating or ignoring relevant facts.

A. Sam Memo.

With respect to the "Sam Memo," Respondents assert that it "merely reiterates the critical information that Gadson supposedly confessed to Victim's murder." BIO at 19. Respondents fail to acknowledge, however, that the Sam Memo included information that was never provided to trial counsel, including that Gadson made

these statements in an open area of jail in front of at least four or five other inmates. App 13-14. Likewise, Respondents assert that trial counsel would not have done anything differently if they had possessed the Sam memo, BIO at 20, ignoring counsel's testimony to the contrary. Specifically, lead counsel testified that he would have called Sam Richardson to testify if he had known of the memo. J.A. 2110. Likewise, he would have investigated further and earlier to try to identify additional witnesses to Gadson's confession, which he could only have done if he learned those witnesses existed from the Sam Memo. J.A. 2522, 2526.

Respondents try to discredit the Sam Memo by relying on the post-conviction testimony of Ricky Davis, in which he recanted his prior statements that Gadson confessed to him and asserted that he only made the initial assertion because Bowman told him to do so. BIO at 20. This argument ignores, however, Gadson's post-conviction testimony acknowledging that he had seen Davis "in the holding cell" just before Davis' testimony and they "bump[ed] heads." J.A. 1719, 1792. Given that Gadson and Davis had an argument or conflict in the holding cell, the circumstances reveal that it is likely Davis's recantation, and not his prior statements, that is the product of threats.

B. Gadson Mental Health Report.

Respondents assert that impeachment of Gadson with the report would have had minimal impact because "Gadson's testimony is largely corroborated by other evidence presented at trial." BIO at 24. But Respondents, like the lower court, ignore

that Gadson—*the first person arrested for the murder*—had the most motivation and opportunity to shape his testimony to the discovery in the case and consult with counsel in order to make his story consistent with other evidence—as demonstrated by how his statements kept changing over time. It was not until he secured a very favorable plea agreement that he testified at trial, including a number of statements made for the very first time. *See* Petition at 18-19.

Likewise, the argument that Gadson's testimony was consistent with Felder 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. Petition at 19.

C. Johnson's Pending Charges.

Respondents' worst case of tunnel vision, however, manifests in their assertion that Johnson was not a "pivotal witness." BIO at 25. Respondents are correct that Johnson did not claim to be an eyewitness to either the murder or the arson. But the State relied heavily, even desperately, on Johnson's testimony both to implicate Bowman and to shore up Gadson and Felder. In closing argument, the prosecutor leaned on Johnson's testimony both on its own terms and to buttress the credibility of the other state witnesses who had plea agreements for charges related to Martin's murder or otherwise had "a reason to lie." *See Kyles v. Whitley*, 514 U.S. 419, 444 (1995) (the likely materiality or "damage" of withheld impeachment evidence "is best

understood by taking the word of the prosecutor" in his closing argument about the significance of evidence to the state's case).

Indeed, according to the prosecutor, Johnson was a friend of Bowman's who had no charges pending and no reason to lie; thus, his testimony could quell any doubts the jury had about Gadson and Felder, whose motivations were more apparent. J.A. 829. While Respondents dismiss this by claiming that the State's argument would have been altered only by saying Johnson had no charges *related to the murder in this case*, BIO at 25, that ignores the fact that the Solicitor's whole argument was that Johnson had no motive to lie, which is simply untrue in light of his pending charges.

Likewise, Respondents' arguments elsewhere in their brief reveal the falsity of the assertion that Johnson was only an "ancillary" witness. BIO at 25. In argument against the cumulative materiality of the suppressed evidence, Respondents assert that the evidence of Bowman's guilt was "truly overwhelming" even in the absence of the testimony of Gadson and Johnson. BIO at 27. That allegedly independent evidence of guilt, per the Respondents, includes that Bowman:

> 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 . . .

BIO at 27. *All* of these alleged facts rely *exclusively* on the testimony of Gadson, Felder, and Johnson.

Similarly, the characterization of Johnson as an "ancillary" witness is belied by the Solicitor's emphasis on Johnson's claim 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.

D. Cumulative Materiality.

Respondents, like the court below, assert that the evidence of Bowman's guilt was "overwhelming" even without consideration of the testimonies of Gadson and Johnson. Notably, however, Respondents, as did the court below, relied heavily on the testimony of Felder in finding the suppressed evidence was not material while ignoring the fact that there is no physical evidence demonstrating that Bowman—as opposed to Gadson or someone else—committed the murder. This was error. While Felder may not have been a subject of the *Brady* claim, he testified solely pursuant to a plea bargain to save himself from more serious convictions and time in confinement. All of his statements were made for the first time during trial, and he admitted in sentencing that he did not completely tell the truth in his trial testimony. Furthermore, Felder did not even claim to have witnessed Martin's murder, only the arson.

Likewise, in addition to citing evidence that relied almost exclusively on Gadson, Felder, and Johnson, Respondents' list includes that Bowman "6) was

recently in proximity of Victim based upon the presence of DNA from Victim's vaginal swab." BIO at 27-28. But the "proximity" to the victim or even DNA is not evidence of guilt. It indicates nothing more than a sexual relationship with Martin as much as—or even more than—24 hours before her murder. Petition at 24.

The other alleged evidence of guilt of murder includes an argument that Bowman "7) was found hiding from police when they arrived at his home with an arrest warrant." BIO at 28. This is not evidence of guilt of murder. Bowman was arrested on an unrelated, outstanding warrant on a charge of receiving stolen goods. State Court Appendix, *Bowman v. Stirling*, CA 9:18-00287-TLW, ECF No. 11-12 at 350. It is just as likely that Bowman was attempting to evade arrest on that charge.

The list concludes with argument that evidence of Bowman's guilt could be based on evidence that "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." BIO at 28. Again, this ignores that *Johnson* was the informant of the weapon's location. There is no evidence connecting Bowman to this evidence, and the likelihood of such a connection is small, given the prior searches of the home by law enforcement after Bowman's arrest, the absence of any evidence that Bowman knew the weapon was in his home or found there or disposed of by his family particularly as he *was already in confinement*.

Finally, the state's characterization of the 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 v. Cain*, 577 U.S. 385, 392-93 (evidence is material when it means the difference between being the actual killer and an accessory after the fact). Likewise, evidence is material when the suppressed evidence "may well have been material to the jury's assessment." *Cone v. Bell*, 556 U.S. 449, 475 (2009).

III. Respondents simply ignore this Court's clear precedents in asserting that there could be no prejudice in sentencing because the evidence of Bowman's guilt was overwhelming.

Like the lower court, Respondents rely on the allegedly "overwhelming" nature of the evidence of Bowman's guilt to assert that the suppressed evidence was not material for sentencing. BIO at 29-30. Respondents view the legal analysis as the same and assert that there was no need for the lower court to "repeat itself." BIO at 30. As addressed in detail in the Petition at 26-31, this is an egregious misstatement of the applicable law. This Court has made clear that reviewing courts are required 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. Suppressed evidence can be material to sentencing "even if it does not undermine or rebut the prosecution's death-eligibility case" or overwhelming evidence of guilt. *Williams v. Taylor*, 529 U.S. 362, 398 (2000).

The suppression of the evidence of Gadson's guilt and impeachment evidence related to both Gadson and Johnson was *especially* prejudicial in sentencing because

the State, in seeking a sentence of death, 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"). While the Solicitor was making this argument he was holding up photos of pretty, blond-haired Kandee Martin while alive and photos of "her badly burned body" after death. Richard Walker, *'You Shall Suffer Death,'* The Times and Democrat, May 24, 2002, at A1. These pictures were held up while the Solicitor argued that the jury should look at the photos.

> This is before and after. He turned this into this with malice aforethought. This is his handiwork. . . . And I would ask you to look at that and think about a human being and what he did to her for no reason. And he laughed about it. Nothing the defense says when they give their closing statement to you can change that reality.

J.A. 1328.

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). And the words chosen by the prosecutor could only be said because the evidence that would have contradicted them was suppressed.

CONCLUSION

For the reasons asserted in the Petition and as addressed above, 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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