No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

_____

Marion Bowman, Jr.,

Petitioner,

vs.

Bryan P. Stirling, Commissioner, South Carolina,
Department of Corrections, and The State of South Carolina,

Respondents.

_____

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF SOUTH CAROLINA

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PETITION FOR WRIT OF CERTIORARI

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****CAPITAL CASE****

QUESTION PRESENTED

Marion Bowman's capital trial counsel predicated his defense upon, and repeatedly injected, odious racial stereotypes about Bowman, a black man, and his relationship with the victim, Kandee Martin, a white woman. While Bowman maintained his innocence, and the State's case was built on incentivized testimony from others charged in Martin's murder, trial counsel pressured him to plead guilty because he believed any jury would convict him based on race. Despite that surety, trial counsel conducted no voir dire into the prospective jurors' biases. While introducing evidence in sentencing that Bowman sold drugs to support his family, trial counsel eschewed evidence in either the trial or sentencing documenting that Martin exchanged her possessions and sex for drugs – which would have undermined the most inculpatory evidence in the state's case – because he did not want to slander the "little white girl." Instead, trial counsel told the jury that *the prosecution* was trying to inflame them by suggesting a sexual relationship between a black man and a white woman – a notion he considered so provocative that he apologized for even mentioning it. As trial counsel's subsequent post-conviction testimony established, these arguments were informed by his own racialized preconceptions, which left him unable to believe that Bowman's interactions with Martin on the day of her death could have any explanation other than his murdering her. The Supreme Court of South Carolina nevertheless ratified these failures as trial strategy.

The question presented is:

Did trial counsel provide prejudicially deficient assistance of counsel by repeatedly introducing and amplifying noxious racial stereotypes about Bowman, as

condemned by this Court in *Buck v. Davis*, 580 U.S. 100, 121-22 (2017), and in contravention of this Court's precedents seeking the eradication of racial prejudices in the criminal justice system.

LIST OF PARTIES

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

RELATED CASES

This petition arises from a petition for a writ of habeas corpus proceeding in which Marion Bowman, Jr., was the petitioner before the Supreme Court of South Carolina in its original jurisdiction. The Respondents are Bryan P. Stirling, Commissioner of the South Carolina Department of Corrections, and the State of South Carolina. 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 affirming the District Court issued on August 16, 2022, and order denying rehearing *en banc* issued on September 13, 2022.

Bowman v. Stirling, No. 22-6722, U.S. Supreme Court denial of a petition for writ of certiorari on May 22, 2023.

Bowman v. Stirling, No. 2024-002113, South Carolina Supreme Court denial of petition for writ of certiorari on January 16, 2025.

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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 Supreme Court of South Carolina's denial of his petition for writ of habeas corpus in its original jurisdiction.

OPINION BELOW

The decision of the Supreme Court of South Carolina in its original jurisdiction is unreported but is attached in the Appendix to this petition. App. A, 1a.

JURISDICTION

The state court issued its opinion on January 16, 2025. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

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

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

This case also involves the Eighth Amendment's prohibition against "cruel and unusual punishments" and Section 1 of the Fourteenth Amendment to the Constitution, which provides in relevant part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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 then set on fire. All confidence in his convictions and death sentence was undermined by the deficiencies of Bowman's trial counsel, who filtered his

professional judgments through a presumption of racial bias by Bowman's jury, only to repeatedly introduce and assign pernicious and prejudicial racial stereotypes to Bowman and Martin. The injection of trial counsel's biases into the proceedings, as well as counsel's failure to adequately represent Bowman in both the trial and sentencing phases, was the result of his own racism and biases, and thereby embedded arbitrary factors into the proceedings in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

In advance of trial, the solicitor made multiple offers to allow Bowman to receive a life sentence in this case in exchange for Bowman's guilty plea. App. B, 8a, *Bowman v. State*, No. 2012-213468 (S.C.). Bowman's lead counsel was well-known for routinely trying to convince clients to plead guilty in criminal cases or settle in family court cases even when they had a triable case. App. C, 11a, Investigator Robert Minter Affidavit. And, true to form, Bowman's counsel in this case focused the bulk of their energies on trying to force a plea from Bowman starting at their first meeting up until the time of trial.[1] Indeed, Bowman informed the trial court early in his case that counsel was advising him to plead guilty, even without significant aspects of discovery, because Bowman was black, and Martin was white, and white jurors would convict him solely based on the differences in their race as a matter of racial prejudice. App. E, 15a, Undated Letter to Judge Goodstein.

Specifically, in a letter sent to trial judge Diane S. Goodstein, Bowman, who was only 20 years old at the time of his arrest, wrote:

Dear Honorable Judge Goodstein:

[1] Although he was a very experienced investigator retained by counsel, Minter was never given any direction or "investigative tasks" on the case. App. D, 13a, Robert Minter 2018 Affidavit. He was so underutilized that he did not recall meeting with Bowman or any fact witnesses. *Id.* Instead, he was tasked with "meet[ing] with Marion's mom about a plea offer." *Id.*

> I Marion Bowman Jr. am well aware of the offer Mr. Bailey has gave me [sic]. However, I'm so confused I don't what to do. Mr. Bailey is offering me a plea bargain of life without the possibility of parole, but is still giving me information concerning the case. And the fact that is an [sic] substantial amount of discovery I do not have it is very difficult to understand what is going on. My attorney is trying to convince me to accept this plea because he said and I quote "These white jurors whose skin is whiter than his is going to see a Black male verses, a white female victim, are going to convict me because of my skin color, and not based upon evidence."

Id. (Errors in Original). Then on November 5, 2001, he again wrote to Judge Goodstein alerting her again that he was unwilling to plead guilty, even in exchange for a life sentence:

> Dear Judge Goodstein: Nov. 5, 2001
>
> I Marion Bowman Jr am writing to ask you may I see you while you are here in Dorchester County. Reason for this meeting is that I'm scared for my life and I'm aware of the offer Mr. Bailey has offered, which I refused to accept. I understand that Mr. Bailey has all of his facts to try this case, so I would like to request a evidential hearing AS SOON AS POSSIBLE. . . .

App. F, 17a, Letter to Judge Goodstein (Nov. 5, 2001). Judge Goodstein responded by informing Bowman that his counsel could request a hearing on the issue, which never happened. App. G, 18a, Goodstein Response Letter. He also wrote to the Governor and the South Carolina Bar seeking assistance. App. H, 19a, Governor & Bar Letters.

Despite warning Bowman that any jury would be racially biased against him, when the case proceeded to trial, lead counsel conducted no voir dire to even attempt to identify jurors with racial prejudices. Trial counsel stood mute during the state's case-in-chief, failing to object to the admission of prejudicial and minimally probative evidence. Finally, trial counsel affirmatively and repeatedly introduced and ratified racial stereotypes before the jury. The sole expert that trial counsel called in mitigation in sentencing rated his performance the worst by any capital defense counsel in all of the 29-30 capital cases he had worked on. App. I, 21a, Jeffrey Yungman.[2]

[2] Yungman was shocked by "the lack of communication and trial preparation" by counsel. App. J,

Competent counsel would have found much to challenge in the state's case, which was circumstantial and predicated upon incentivized testimony. The primary witnesses implicating Bowman were James ("Tawain") Gadson and Travis Felder, both of whom were charged in the case and testified in exchange for plea agreements to greatly reduced sentences.[3] The State's evidence that was not reliant on Gadson and Felder 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. *State v. Bowman*, 623 S.E.2d 378, 380, 382 (S.C. 2005). An autopsy established that she was shot to death and deceased prior to the fire. *Bowman,*, 45 F.4th at 743. Shell casings, a fired bullet, blood evidence, and the victim's shoe were recovered at the crime scene. *Id.* at 746. Bowman's DNA was identified from vaginal swabs taken during Martin's autopsy.[4] *Id.* at 744.

22a, Jeffrey Yungman 2018 Affidavit. "From my experience in 30 death penalty cases, they neglected to do any of the routine tasks attorneys regularly performed throughout their representation of capital clients." *Id.* Investigator Robert Minter, who was retained by Bowman's counsel, also noted that counsel was "not aggressive in represent[ing] his clients" and "did not like to try cases." He was lackadaisical to the extent that he did not care if his investigators did not complete their assigned tasks. He was also deliberately obstructive to Bowman's mitigation investigator because counsel "strongly disliked" her and "considered her too pushy and headstrong." Rather than assist her by issuing subpoenas and assisting her with other tasks, counsel "refused and resented her for trying to do her job." App. C, 11a, Investigator Robert Minter Affidavit.

[3] In the hours following the discovery of Martin's body, the police arrested Bowman on an outstanding warrant for an unrelated charge of receiving stolen goods. App. K, 24a-26a. 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 manipulated all these witnesses to change their pretrial statements and to testify against Bowman by entering into plea agreements to reduce their charges, or sentences in exchange for their testimony against Bowman. *Bowman v. Stirling*, 45 F.4th 740, 756 (4th Cir. 2022).

[4] A defense witness in sentencing testified that Bowman and Martin had been alone together in his bathroom for a while and then left his home together earlier that day. *Id.* at 746. Likewise, multiple witnesses testified that Bowman and Martin were friends, who were often seen together. App. L, 27a-29a. The forensic pathologist for the state acknowledged that the seminal fluid from which

At trial, the state presented evidence that Bowman had a pistol at a party on the afternoon of the murder. Later that day, according to Bowman's sister – who was also testifying pursuant to a plea agreement after being charged – and two other state witnesses, Bowman saw Martin in conversation and attempted to speak with her because she owed him money. They testified that when she rebuffed him, Bowman cursed at her and said she would be dead that night. *Id.* at 743-44.

That evening, Bowman was seen after midnight in the parking lot of a rural nightclub where Felder and others had gathered. Around 3:00 a.m., after all had departed from the club and returned to town, Bowman asked Felder for a ride home. 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 the neighbor, who ultimately discovered it, first heard gunshots. When arrested, Martin's wristwatch was found in the pocket of the pants Bowman reportedly had worn the previous night. *Id.* at 745-46.

Given this circumstantial evidence, the State relied heavily on the testimony of Gadson and Felder, its primary witnesses; both of whom were testifying pursuant to plea agreements. Gadson 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.

Gadson – who testified pursuant to a plea agreement that allowed him to avoid the death penalty in this case – 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.

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the DNA evidence was taken could have been present for as much as 48 hours prior to Martin's death. App. M, 30a-31a. The jury rejected the alleged aggravating factor of criminal sexual conduct during their sentencing deliberations. App. N, 33a-34a.

Gadson claimed that once out of the car Bowman announced his intention to kill Martin "because she was wearing a wire." *Id.* at 744. According to Gadson, Martin approached them and told Bowman she was scared. Gadson 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's body into 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. *Id.*.

Felder provided the only purported eyewitness testimony for the events surrounding the arson. Felder claimed that after Bowman asked him to help park Martin's car around 3:00 a.m., they drove – with Bowman driving Martin's car and Felder following in his own car – 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. During the guilt phase of the trial, Felder testified that he followed Bowman straight to the place where Martin's body was, but when confronted by a security video during sentencing, he admitted that on the way out of town *he* stopped at the EZ Horizon Store and purchased the gasoline that was used to set fire to Martin's car and body. *Id.* at 745.

During the state's case, counsel failed to object to the admission of evidence of Bowman's DNA in seminal fluid taken from vaginal swabs obtained from Martin during her autopsy. This despite there being no dispute that Bowman and Martin knew one another and had been together in the hours before her death, and in spite of the fact that Bowman was not charged with any sexual offense. In closing arguments during the trial, the Solicitor's only mention of DNA evidence was

that it proved that blood recovered from the road where the murder was committed was Martin's. App. M, 30a.

When trial counsel rose to give closing argument during the guilt-innocence phase, there had not yet been any mention of race during jury selection, the trial evidence, or the Solicitor's argument. Nonetheless, trial counsel offered arguments that presumed and applied a prejudicial gloss to the evidence. Trial counsel tried to contest Gadson's testimony that Martin had hidden in the woods to avoid being seen by a passing car, arguing that Martin would instead have flagged down the car occupied by "white people" because, after all, she was "a young, white lady and she's out there with two young, black males." App. O, 49a.[5] Trial counsel then turned to the DNA evidence – the admission of which he had not challenged:

> [L]et's look at the DNA. It showed sometime that Miss Martin, who was friends with Mr. Bowman, Miss Martin who was friends with Mr. Gadson, Miss Martin who was friends with a lot of these folks in this community in Branchville, sometime Mr. Bowman and her had relations. Sometime. Do you think that was put there to try to poison you to get you angry? Do you think that was presented to want to get you to lash out? Do you think there was a reason? How can you tie that into this case? How?

App. O, 59a. Trial counsel also referred to Martin as a "little girl." App. O, 63a.

In sum, trial counsel accused the state of trying to prejudice the jury with evidence of "a

[5] The complete argument on that point is as follows:

> Gadson accordingly testifies that Miss Martin is so frightened that she jumps in the woods. That's Mr. Judy. They're white people. I hate to say this, and, again, please, don't hold this against Mr. Bowman, if anybody was frightened, why did they jump in the bushes? Why not flag the car down, jump the car? Does that make any sense to you? What is the reason why anybody would jump in the bushes if they're afraid?
>
> Especially Miss Martin is a young, white lady and she's out there with two young, black males. . . .

Id.

black man and white woman having sex." App. R, 180a. This argument necessarily rests on the assumption that the jury would be infuriated by such a relationship – which again invites the question of why trial counsel did not object to the admission of this evidence at trial, and why trial counsel would himself introduce make this argument. This would not have happened unless trial counsel's assessment of both the relevance and prejudicial impact of this evidence was filtered through that very same racial bias.

Trial counsel continued in this vein during sentencing. The defense, through Bowman's African-American second chair counsel, presented testimony that on the afternoon before her death, Bowman was alone with Martin in a bathroom for a while before leaving the home with her. App. P, 68-69a. During closing argument, she then argued that this was a consensual sexual encounter.

> Let's look at the facts. Murder was committed while in the commission of criminal sexual conduct. Did Mr. Bowman intend to commit CSC and a murder occurred? What did you hear? You heard from Frankie Martin, he was on that stand, he said Randee Martin was at his apartment. Mr. Fogle. And who came up? Marion Bowman and Mr. Fogle. They went into the bathroom together, Kandee and Marion. What do people do in the bathroom? Have consensual sex? Because if they didn't, they did come out of the bathroom. Frankie Martin was able to tell you nothing looked different to him, both of them looked okay, they went in her car. You would have heard something from Frankie Martin if anything was different. And they drove away.

App. Q, 71a. Lead trial counsel, however, barely acknowledged the topic.

> What was Miss Martin doing over at Frankie Martin's house? I don't know. Mr. Martin testified they were alone.

App. Q, 96a.[6] Trial counsel then returned to the argument that the state was trying to introduce racial prejudice by himself introducing racial prejudice.

[6] Lead trial counsel acknowledged during post-conviction testimony that he wanted to get away from this topic as quickly as possible rather than just arguing that Bowman and Martin had consensual sex – as his black co-counsel did. App. R, 180a.

> Why is there an aggravating factor in here about criminal sexual conduct? Has anybody testified to you in here of nonconsensual relations between a human being and another human being? It doesn't matter whether Miss Martin *who is shown in that picture*, Mr. Bowman *there as seated* there happen to be friends.

App. Q, 96a (emphasis added). These explicit invitations for the jury to contemplate Martin's picture and Bowman's appearance as he sat in court was clearly a head-nod to Martin being a "little [white] girl" with blonde hair, App. Q, 63a, App. S, 181a, and Bowman being a very dark-skinned black man with a cornrow hairstyle at the time of arrest,[7] App. T, 185a, News article from time of arrest with Bowman's picture; App. U, 186a, Recent News article with the same picture of Bowman in color.[8] Trial counsel then returned to his surety that the jury was offended by this relationship.

> That is not to anger you, that's not for me to anger you and I apologize. And I raised my voice for a moment to point something out and that is this: You've got to prove, the State has to prove to you folks there was nonconsensual sex. Other than that we just muddy up the water.

Counsel attempted to justify his approach during his testimony during the post-conviction relief ("PCR") evidentiary hearing, but only corroborated the racialized lens through which he viewed the case and his client. Even though Gadson's prior statement about events at the crime scene included information that Martin was smoking crack in the vehicle at the crime scene, App. Y, 202a, counsel did not present that information in sentencing – when Bowman had already been

[7] "[C]ornrows . . . are . . . most closely associated with Black people. NYC Commission on Human Rights, Legal Enforcement Guidance on Race Discrimination on the Basis of Hair, available at https://www.nyc.gov/site/cchr/law/hair-discrimination-legal-guidance.page#:~:text=While%20a%20range%20of%20hair,closely%20associated%20with%20Black%20people (last visited on December 14, 2024).

[8] Bowman was picked on growing up "because his skin is so dark, darker than everyone else's." App. V, 190a, Kendra Bowman Affidavit. People nicknamed him "Black" so much that he and his family finally just accepted it and started using "Black" as a nickname. *Id. See also* App. W, 195a-196a, Bowman (aka "Black") picture from sentencing; App. X, 198a-202a.

convicted of the offenses. When asked why he did not present available evidence during sentencing that Martin was known to prostitute herself for drugs with Bowman and others, even while counsel affirmatively presented evidence of Bowman dealing drugs to support his family, counsel said:

> What I'm saying is, it does no good, I tried that Gardner case up here where they tried to portray that white girl being with five African American men and, Mr. Brown, you *slander* a victim, you know the little girl is dead, they got those nasty pictures in there in this penalty phase with her burned body, the statement allegedly, "Black, please don't shoot me, I got a baby." Marion would have known she had a child, he grew up with her. I tried to stay away from hurting Miss Martin in any way because all the evidence and all the facts show she got shot in the back.

App. R, 113a-114a. Trial counsel's response is revealing. He did not offer an explanation for evidence that inculpated his client because stating that a "white girl" had sexual relationships with "African American men" is "slander." He then justifies his omission by voicing his own revulsion at the crime and reciting specious reasons – e.g., Bowman's knowledge that she had a child – to accept the incentivized testimony of the state's witnesses.

Trial counsel next argued that he would not "portray my guy as the reason why she's dead, dope, sex, drugs" and was "making, the State prove their case," ignoring that Ms. Martin's drug use and sexual relationship with Mr. Bowman was all that could undermine the State's case for death. App. R, 115a. Finally, while being questioned in this line, counsel spontaneously confessed his true views, which he addressed directly to Bowman:

> Marion, what are you doing on Nursery Road at that time of the morning with a white female and African American males in Dorchester County? Really. This is 2001 but what good are you doing out there on a dirt road? . . .

App. R, 116a.[9] When PCR counsel noted that Bowman might have been out on that dirt road at

[9] According to Jim Brown, Bowman's counsel during state post-conviction relief proceedings, counsel was looking at Bowman and speaking directly to him. It was so shocking that everyone in the courtroom was stunned and there was a long silence before the questioning continued. App. Z, 205a, Jim Brown Affidavit.

that time of the morning so that the victim could "smoke crack," App. R, 118a, or potentially prostitute herself in exchange for crack – which would be consistent with Bowman being innocent and Gadson being the killer – trial counsel responded nonsensically that most people would use drugs by "stay[ing] inside," App. R, 118a-119a. Trial counsel also confessed his own personal view of the case, which – overrode his professional judgment – was that Bowman and Gadson "planned to bring this girl out there and dispose of her." App. R, 119a.

Trial counsel next acknowledged that Ms. Martin's autopsy showed that she had cocaine in her system but testified that he wanted to keep that information from the jury, along with any information "about whether or not people had ever touched Miss Kandee Martin in a certain way, degrading, sexual way." App. R, 122a-123a.[10] While counsel conceded that he knew of the victim's general reputation as a drug user who prostituted herself for drugs, her prior conviction for drug possession, and "an indecent exposure case involving sex on the town square of Branchville," App. R, 162a,[11] trial counsel asserted that presenting that truthful evidence would only be "hurting the victim." App. R, 123a-124a. He did not even want to suggest that Bowman had her watch because she pawned it to him for drugs, despite viewing Bowman's possession of the watch as "tremendously" hurting Bowman's innocence defense. App. R, 158a.[12]

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[10] Again, counsel clearly assumed that Martin was sexually assaulted while alive or dead rather than even considering the possibility that she engaged in consensual relations with Bowman. Thus, counsel's view was that he was simply trying to avoid argument by the solicitor that a "young African American male wanted to go play with a dead [white] girl, oh, my God, think about that." App. R, 179a.

[11] Dale Davis, the mitigation specialist retained by counsel, also provided evidence that during her investigation, she learned that Martin "was known in the Branchville law enforcement community to have been involved in loitering/prostitution activities in the area of Highway 78." App. AA, 209a.

[12] And, inexplicably, whether to present this evidence, per counsel's thinking, was also tied to the fact that Bowman's jury was "twelve people . . . that don't look like him," App. R, 165a, presumably meaning that it would only be acceptable for counsel to argue that Bowman dealt drugs

> [H]urting the victim I think would have hurt Marion more, maybe helped him a little bit evidentiary wise that she did dope. What I was worried about, I guess, where she got her dope from, and everybody in the world knew, and it came out in the penalty phase also, that Marion lived on the street, he was self supporting, he tried to find ways to support himself and he sometimes delved into something he shouldn't have delved into.
>
> But I also had the horrible experience dealing with the Missy McLaughlin trial where that lady was also accused of using her body for drugs, and believe me, it didn't sit well with that jury.

App. R, 124a.[13] Although counsel affirmatively presented evidence in mitigation that Bowman "was basically kicked to the curb at a young age and he would do what he had to do to survive," *id.*, including dealing drugs,[14] trial counsel again did not want to "hurt" the victim more by presenting evidence that she was prostituting for drugs and sometimes getting those drugs from Bowman, App. R, 124a.

In short, counsel's racialized view of the case and his client distorted his judgment. Presenting evidence explaining the DNA evidence and the presence of the watch, including evidence of the victim's addiction to crack, would be an "attack [on] the victim," *id.,*[15] or pitting

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in mitigation in order to survive and to truthfully argue that Martin prostituted herself for drugs if the jurors were people of color.

[13] McLaughlin was the murder victim in the Joseph Gardner case previously mentioned in counsel's testimony as one of his former clients. https://murderpedia.org/male.G/g1/gardner-joseph.htm; App. R, 113a-114a. While counsel clearly disbelieved the evidence presented that McLaughlin initially was voluntarily engaging in sexual acts with multiple men at the same time, it is notable that the South Carolina Supreme Court found that information as a matter of undisputed fact. *State v. Gardner*, 505 S.E.2d 338, 339 (S.C. 1998).

[14] He did this despite counsel's later admission that he viewed evidence of drug dealing, regardless of the reason, as evidence of Bowman's lack of "social redeeming value." App. R, 163a.

[15] PCR counsel was very clear that he was talking only about truthful evidence and not slanderous allegations. *See, e.g.*, App. R, 129a ("I'm not talking about attacking her, I'm talking about being truthful.")

"the white girl versus the black young man," App. R, 130a,[16] or "black versus white, white with a black man [sexual relations]," which counsel viewed as "dirty." App. R, 172-73a.[17] Presenting evidence that the victim was a drug user was saying she "should die for the use of dope." App. R, 132a. Presenting evidence in sentencing that the victim prostituted herself for drugs and had cocaine in her system at the time of her death was somehow opening the door or admitting that it was true that Bowman killed her "because she was going to rat him out for selling dope." App. R, 132a-133a.

This issue was raised in the court below. The state court interpreted this evidence not as trial counsel exhibiting racism, but as trial counsel executing "valid strategic decisions . . . in an attempt to defuse any racial animus the jury may have had against Bowman, [a black man,] who was indicted for murdering a white woman." App. A, 5a. Per the lower court, this was consistent with his concern "that the jury might view the circumstances of the murder through a racial lens." *Id.* Because it was trial counsel who viewed this case through a racial lens, and who performed in a prejudicially deficient manner as a result, certiorari should follow.

REASON FOR GRANTING THE WRIT

Certiorari is warranted in this capital case because the state court committed egregious error in "decid[ing] an important federal question in a way that conflicts with relevant decisions

[16] Counsel's bias against his own client is evident even in counsel's references to Martin as a "little white girl," and Bowman as a "man" or a "young man" several times, App. R, 172a ("I wanted to show that this man would not hurt that little girl); *see also* App. R, 130a, 155a-156a; when Bowman was 20 years old, App. BB, 212a, and Martin was 21 years old at the time of her death, App. CC, 218a.

[17] Again, counsel clearly viewed the suggestion that Martin had consensual sex with black men as demeaning, dirty, and hurting her, even though Martin was known as a person that "did not see race" and who dated black guys. App. V, 191a, Kendra Bowman Affidavit. Indeed, counsel, but perhaps not the jury, was aware that her son Tyler is biracial. App. DD, 219a-220a.

of this Court." Sup. Ct. R. 10(c). Specifically, Bowman's convictions and death sentence must be vacated under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution due to trial counsel's prejudicially deficient performance in insisting that Bowman plead guilty despite maintaining his innocence and by counsel's injection of odious racial prejudice into the case. Additionally, trial counsel rejected substantiated mitigating evidence and arguments because his own biases led him to assume his black client's guilt and to eschew Martin's documented history of drug addiction and pawning personal items or prostituting herself to pay for drugs as degrading and slandering a "little white girl."

In denying this claim, the South Carolina Supreme Court sanctioned trial counsel's preoccupation with these racist tropes by deeming his presumption of bias by the jury and injection of malignant stereotypes as trial strategy. This holding inverts this Court's case law, which recognizes that the introduction of such "powerful racial stereotype[s]" and "particularly noxious strain[s] of racial prejudice" is prejudicial, as "[s]ome toxins can be deadly [even] in small doses." *Buck v. Davis*, 580 U.S. 100, 121-22 (2017). "When a defendant's own lawyer puts in the offending evidence," moreover, "it is in the nature of an admission against interest, more likely to be taken at face value." *Buck,* 580 U.S. at 122.

Defense counsel, like the prosecutor in a capital case, must refrain from making racially biased arguments. *McCleskey v. Kemp*, 481 U.S. 279, 309 n.30 (1987) (It is beyond dispute that "[t]he Constitution prohibits racially biased prosecutorial arguments"); *Id.* at 309 (quoting (quoting *Batson v. Kentucky*, 476 U.S. 79, 85 (1986)) (This Court has "engaged in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system."); *Turner v. Murray*, 476 U.S. 28, 35 (1986) (plurality opinion) (Courts cannot avert their eyes from the risk that "racial prejudice infect[ed] a capital sentencing proceeding ... in light of the complete finality of the death

sentence."); *California v. Ramos*, 463 U.S. 992, 998-99 (1983) ("[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."); *Rose v. Mitchell*, 443 U.S. 545, 555 (1979) ("Racial prejudice, "odious in all aspects, is especially pernicious in the administration of justice.").

While this Court has taken great pains to eliminate racism from the criminal justice system, studies of juries confirm that defendants remain vulnerable to racial bias, which they are "more likely" to face during trials for murder, assault, and robbery – offenses associated with a "black criminal stereotype." Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 Mich. St. L. Rev. 1243, 1246 (2018) (citing Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know about Race and Juries? A Review of Social Science Theory and Research*, 78 Chi.-Kent L. Rev. 997 (2003)). Tragically, these "stereotypes about Black men are a part of the American tradition," and implicate "a set of interrelated but unsubstantiated stereotypes as the myth of the Bestial Black Man, a myth 'deeply imbedded in American culture, that black men are animalistic, sexually unrestrained, inherently criminal, and ultimately bent on rape.'" Thompson, at 1250 (quoting N. Jeremi Duru, *The Central Park Five, The Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 Cardozo L. Rev. 1315, 1320 (2004)). This Court has recognized this "potent" and "powerful racial stereotype – that of black men as 'violence prone,'" and has recognized the danger that such "a particularly noxious strain of racial prejudice" risks the jury "making a decision on life or death on the basis of race." *Buck*, 580 U.S. at 121. The state court below, however, not only failed to condemn trial counsel's introduction of these stereotypes, but ratified it as trial strategy. This finding cannot be reconciled with this Court's condemnation of such racialized arguments or its precedent protecting a defendant's right to the effective assistance of counsel.

The South Carolina Supreme Court's determination that trial counsel's repetition and amplification of racist tropes, which reflect our national history of devaluing the lives of black men, denied Marion Bowman the right to effective, conflict-free counsel, and a fair trial and sentencing and this Court should grant the writ of certiorari to review this issue because this type of acceptance – and even approval of the injection of racism in the criminal justice system is a dangerous and slippery slope to allow odious and impermissible arguments in capital sentencing proceedings.

This Court has repeatedly emphasized the fundamental role of counsel in ensuring a defendant a fair trial. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963). Counsel, the Court has stated, is the means through which all other rights of the person on trial are secured. *United States v. Cronic*, 466 U.S. 648, 653 (1984); *see also United States v. Ash*, 413 U.S. 300, 307 (1973) (counsel serves as a "guide through complex legal technicalities"). This core component of our adversary system is meaningless, however, if counsel performs incompetently. Thus, the Court has held that the right to counsel necessarily encompasses "the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). "The benchmark for judging any claim of ineffectiveness must be 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." *Id.*

In determining whether trial counsel provided ineffective assistance of counsel, pursuant to the Sixth and Fourteenth Amendments, the courts must apply the standards set forth in *Strickland*. The *Strickland* standard is satisfied if a petitioner establishes both that his attorney's representation "fell below an objective standard of reasonableness," *id.* at 688, and that the petitioner was "prejudiced" by his attorney's substandard performance, *id.* at 692. *See also Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam); *Sears v. Upton*, 561 U.S. 945 (2010) (per curiam); *Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (per curiam);

Buck v. Davis, 580 U.S. 100 (2017); *Andrus v. Texas*, 590 U.S. 806 (2020) (per curiam). The *Strickland* "standard is necessarily a general one," *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009) (per curiam), that requires a case-by-case examination of the facts, *Williams*, 529 U.S. at 391. At minimum, however, counsel has a duty to conduct an "independent examination of the facts, circumstances, pleadings and laws involved." *Strickland*, 466 U.S. at 693.

Marion Bowman made clear that his objective to trial counsel was to be found innocent. *McCoy v. Louisiana*, 584 U.S. 414, 417 (2018) ("a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty"). Trial counsel failed to pursue a reasonable trial strategy to achieve this objective. Instead, trial counsel expressed concerns about potential juror racial bias. Rather than asking jurors to put aside any bias they may have, trial counsel pursued a trial strategy that inflamed potential bias.

Counsel admitted in PCR that he believed a white 21-year-old female would not voluntarily be with two similarly-aged black males in a remote area in the early hours of the morning under any circumstances. App. R, 116a. Thus, the black males – including his client – must have been there to commit sexual and violent crimes against the "little white girl." Similarly, counsel believed that evidence the victim was known to prostitute herself for drugs was just an attack on the victim, slandering her, pitting "the white girl versus the black young man," and saying that she deserved to die because of her drug use instead of presenting this evidence as a non-inculpatory explanation for why Bowman was in possession of her watch. And, worse, counsel imputed his racist views to the jurors.

While counsel did not make as many racist statements during the trial as he did during the PCR proceedings, he still clearly made the racist argument that the victim was "a little [white]

girl" and that the jury would be angered by the suggestion that she had consensual sexual relations with Bowman, a 20-year-old black male, who was also known to be her friend. This argument was made during both the guilt phase and sentencing closing arguments with counsel even apologizing for suggesting that there was a consensual sexual relationship between the two. App. Q, 96a ("That is not to anger you, that's not for me to anger you and I apologize."). There is no question that this argument was prejudicial during both the guilt phase and sentencing of Bowman's trial.

"Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." *Turner*, 476 U.S. at 35. Indeed, "[t]he risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence." *Id.* at 36. Specifically, in *Turner*, this Court recognized a number of ways that racial prejudice could be in play in a capital sentencing proceeding.

> [A] juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified . . . [of future dangerousness or a crime that was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim"]. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.

Id. at 34-35. Because of these concerns, the Court held that "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias" during voir dire. *Id.* at 36-37.[18]

[18] Notably, counsel's own bias was also on display during jury selection as he failed to avail himself on Bowman's behalf of the opportunity to conduct voir dire to determine whether any of Bowman's jurors were racially biased. Nonetheless, one honest juror disclosed upon simply being asked about "any bias or prejudice" without reference to race in the question that he didn't "get

This Court has also made it clear generally that racial arguments with no actual bearing on the crimes or the issues in a capital case are improper. *See Dawson v. Delaware*, 503 U.S. 159, 168 (1992) (admission of evidence in sentencing that the defendant was a member of a white racist prison gang was erroneous where the victim in the case was white, the evidence was not relevant to any issue before the jury in sentencing, and the evidence could not "be viewed as relevant 'bad' character evidence in its own right"). Similarly, the state court has condemned racist arguments that "inflame the passions or prejudices' of the jury." *State v. Bennett*, 632 S.E.2d 281, 288 (S.C. 2006); *see also State v. Vasquez*, 698 S.E.2d 561, 567 (S.C. 2010) (In a similar context involving a solicitor's arguments in a capital case based on religion, the court condemned the "religious prejudice" inherent in a solicitor's "inflammatory" references to domestic terrorism and the 9/11 terror attacks in a capital case that did not involve terrorism but involved a Muslim defendant as these arguments "served only to inflame the passions and prejudice of the jury.").

Likewise, this Court has specifically held that it is improper and amounts to ineffective assistance of counsel for defense counsel in a capital sentencing to present expert evidence and arguments that rely simply on racist stereotypes that a black defendant is "predisposed" to violent conduct simply because of his race. *Buck*, 580 U.S. at 119. While "[i]t would be patently unconstitutional for a State to argue that a defendant is liable to be a future danger because of his race," it is also improper for defense counsel to present such evidence and argument about his own client. *Id.* Indeed, it is more harmful when defense counsel makes the racist arguments because jurors expect to evaluate and question the state's evidence, but "[w]hen a defendant's own lawyer puts in the offending evidence, it is in the nature of an admission against interest, more likely to be taken at face value." *Id.* at 122; *see also Ingle v. State,* 560 S.E.2d 401, 403 (S.C. 2002)

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along with people of color too well" meaning both "[b]lacks, mixed." App. EE, 221-22a.

(recognizing that the impact of prejudicial evidence is heightened when "it came as part of what was supposed to be petitioner's defense."). In short, "[n]o competent defense attorney would introduce such evidence about his own client." *Buck,* 580 U.S. at 119; *see also People v. Sanders*, 182 N.E.3d 151, 153-56 (Ill. Ct. App. 2020) (holding that defense counsel's racist arguments for a black client, including his own personal racial biases and arguments that a "black man belongs in a squad car" and he would be scared in an "all-black area," in an aggravated battery case involving a white victim was ineffective assistance of counsel as "[t]he introduction of race into an argument is not permissible" where "[n]one of the racial comments were based on the evidence"); *State v. Davis*, 872 So.2d 250, 252 (Fla. 2004) (emphasis omitted) (holding that defense counsel's explicitly racist arguments in a capital case involving the rape of a white woman by a black man that he was "a white southerner" and did not "like black people" who "make me mad just because they're black," even when made allegedly to get jurors to admit their own racism, were "racist . . . expressions of prejudice" that "cannot be tolerated" and amounted to ineffective assistance of counsel); *Miller v. State*, 728 S.W.2d 133, 135 (Tex. Ct. App. 1987) (holding that defense counsel's racist arguments that the state's primary witness and the burglary victim in the case were both from Nigeria and likened them to "a man swinging from limb to limb with a banana or coconut in one hand" was a "damag[ing]" argument that amounted to ineffective assistance of counsel).

Also in 2017, in *Pena-Rodriguez v. Colorado*, 580 U.S. 206 (2017), this Court once again recognized that "[t]he duty to confront racial animus in the justice system is not the legislature's alone." *Id.* at 222. Thus, this Court again addressed the problem of racial bias in our justice system. The Court acknowledged that racial discrimination "odious in all aspects, is especially pernicious in the administration of justice." *Id.* at 222 (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)).

The Court identified the jury as a criminal defendant's "fundamental 'protection of life and liberty against race or color prejudice.'" *Id.* (quoting *McCleskey v. Kemp*, 481 U.S. 279, 310 (1987)). The Court stated that, based on this principle, the justice system must identify methods to ferret out racial prejudice among jurors. Otherwise, the integrity of the jury trial system will be compromised. The Court noted that racial bias is a "familiar and recurring evil that, if left un[checked], would risk systemic injury to the administration of justice." *Id.* at 224.

The *Pena-Rodriguez* Court recognized "that there are standard and existing processes designed to prevent racial bias in jury deliberations." *Id.* at 228.

> These safeguards include voir dire examination regarding racial bias, jury instructions addressing racial bias, observation of juror demeanor and conduct that might demonstrate racial bias, reports of racially biased comments or actions by jurors during trial, and non-juror evidence of racial bias after trial. The Court acknowledged that these safeguards may be insufficient at times and therefore added an additional one, holding that the Sixth Amendment requires trial courts to review evidence suggesting that racial bias was a motivating factor in a juror's decision to convict a criminal defendant even when the evidence of bias rears its head during otherwise non-impeachable jury deliberations.

Thompson, at 1243.

Here, the state court sought to excuse trial defense counsel's conduct as trying to defuse racism. This runs directly counter to *Pena-Rodriguez* and this Court's prior efforts to weed out racism wherever it exists in the criminal justice system. This also ignores that the state court offered no explanation or finding for why trial counsel paired his references to Martin as a "little girl" or "little white girl" with references to Bowman as an "African American" or black "man." App. R, at 172a ("I wanted to show that this man would not hurt that little girl); *see also* App. R, at 130a, 155a-156a. This is especially suspect since Martin was 21 years old at the time of her death, App. CC, 218a, and Bowman was only 20, App. BB, 212a.

Trial counsel's inversion of their ages, and his constant harping on their different races

during his PCR testimony, echoes the ugliest and oldest of racist tropes: black men sexually preying on young white girls, which has been used to invoke fear and hatred and to justify violent punishment for centuries. The state court simply ignored all of trial counsel's "racially loaded"[19] references to Bowman's race or Martin's, and his distinctions between them as "little girl" and "man." *Cf. United States v. Runyon*, 707 F.3d 475, 493 (4th Cir. 2013) (Officer's comments about Runyon's race, "ethnicity and religion," had no proper place in capital sentencing proceeding); *State v. Tomlin*, 384 S.E.2d 707 (S.C. 1989) (prosecutor referred to black juror having "shucked and jived" when he walked to the microphone when called as one of several reasons to use a peremptory strike against him; "[t]he use of this racial stereotype is evidence of the prosecutor's subjective intent to discriminate" against black jurors). "The Constitution cannot control such prejudices but neither can it tolerate them." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (holding that concern that a white child might be subjected to "pressures and stresses" caused by living with a black stepfather was an improper consideration in deciding which of the child's white biological parents should have custody of the child); *see also Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 208 (2023) (quoting several prior cases) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.").

Moreover, this is not strictly a run-of-the-mill ineffective assistance of counsel claim under *Strickland*. It also involves a clear conflict of interest where counsel encouraged Bowman to plead

[19] For example, referring to a black defendant as King Kong and his girlfriend as the "blond lady" was a "racially loaded" reference to the movie King Kong that "involved a giant ape who escaped from captivity, kidnapped a white woman, and went on a murderous rampage." *Bennett v. Stirling*, 170 F. Supp. 3d 851, 865 (D.S.C.), *aff'd*, 842 F.3d 319 (4th Cir. 2016). These references unconstitutionally injected race in Bennett's capital sentencing, warranting reversal of his death sentence. *Id.*

guilty despite his assertion of innocence simply because counsel believed that Bowman would be convicted on the basis of his race alone. Likewise, in trial and sentencing, counsel refrained from making trial and sentencing arguments on Bowman's behalf because of his own racist opinions and beliefs that he did not want to "hurt[] the victim." App. R, 123a-24a.

This Court has long recognized that "[w]here a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 270 (1981); *see also Rubin v. Gee*, 292 F.3d 396 (4th Cir. 2002). When a conflict of interest is established that "adversely affected . . . counsel's performance," a petitioner is entitled to relief. *Mickens v. Taylor*, 535 U.S. 162, 174 (2002); *see also Cuyler v. Sullivan*, 446 U.S. 335, 348-49 (1980) (holding that, absent objection at trial, a defendant must demonstrate that "a conflict of interest actually affected the adequacy of his representation").

Appointed counsel "owes the client a duty of loyalty," *Strickland*, 466 U.S. at 688, which is "perhaps the most basic of counsel's duties," *id.* at 692. And, "an attorney who abandons his duty of loyalty to his client may by so doing create a conflict of interest." *Fraser v. United States*, 18 F.3d 778, 782 (9th Cir. 1994).

> In fact, an attorney who is burdened by a conflict between his client's interests and his own sympathies to the prosecution's position is considerably worse than an attorney with loyalty to other defendants, because the interests of the state and the defendant are necessarily in opposition.

Id. (quoting *United States v. Swanson*, 943 F.2d 1070, 1975 (9th Cir. 1991)); *see also Nance v. Ozmint*, 626 S.E.2d 878, 883 (S.C. 2006) (where counsel "abandoned his role as defense counsel and bolstered the state's argument in capital case that the defendant was "a sick man" who had done "sick things," counsel was "not acting as defense counsel and failed 'to function . . . as the Government's adversary'").

Prejudice is presumed is when "counsel is burdened by an actual conflict of interest" because in that instance counsel has "breach[ed] the duty of loyalty." *Id.* (citing *Sullivan*, 446 U.S. at 345-50). *See also Gonzales v. State*, 795 S.E.2d 835 (S.C. 2017) (finding an actual conflict of interest that adversely affected counsel's representation where counsel represented the juvenile defendant in a drug trafficking case and simultaneously represented the defendant's mother's boyfriend on other drug-related charges); *State v. Gregory*, 612 S.E.2d 449, 450-51 (S.C. 2005) (holding that where counsel represented the defendant and the assistant solicitor who was prosecuting him simultaneously in a separate divorce action, counsel "owed duties to a party whose interests were adverse" to his criminal defendant client and, thus, there was an actual conflict of interest which required no additional showing of prejudice in order for counsel's motion to be relieved to be granted); *Commonwealth v. Dew*, 210 N.E.3d 904, 913 (Mass. 2023) (holding that counsel's demonstrated bias against black people and Muslims, where his client was black and Muslim, was a conflict of interest whose affect "on the attorney's representation of the defendant is likely to be pervasive and unpredictable").

Nothing could present a clearer cut case of a conflict of interest than refraining from making arguments for Bowman because of counsel's own racist beliefs and concern for the victim's reputation rather than his client's defense. As this Court has long recognized, "The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence." *Turner*, 476 U.S. at 35. Moreover, "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *Id.* (quoting *California v. Ramos*, 463 U.S. 992, 998-99 (1983)). This Court should grant the writ of certiorari, address the merits of the claim, and vacate Bowman's convictions and sentences.

CONCLUSION

Certiorari should be granted.

Respectfully Submitted,

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