

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2014

No. 14A-278

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S.C. Supreme Court

BAYAN ALEKSEY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

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QUESTIONS PRESENTED

Capital Case

1.

Whether trial counsel rendered ineffective assistance of counsel, in derogation of the Sixth Amendment to the United States Constitution, when he labored under an actual conflict of interest because trial counsel was also actively employed as a part-time prosecutor in a nearby circuit, and when trial counsel also represented several state entities including the Highway Patrol as an attorney for the state insurance reserve fund while simultaneously representing Aleksey in his capital trial for murdering a Highway Patrolman?

2.

Whether trial counsel rendered ineffective assistance of counsel, in derogation of the Sixth Amendment to the United States Constitution, when they forfeited Aleksey's right to present prison adaptability evidence, and when a reasonable investigation would have revealed that Aleksey was adaptable to prison?

3.

Whether trial counsel rendered ineffective assistance of counsel, in derogation of the Sixth Amendment to the United States Constitution, when they failed to advance Aleksey's claim that police officers beat his confession out of him during an unexplained two hour gap on the audiotape of the statement?

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STATE OF SOUTH CAROLINA,

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

Counsel for Bayan Aleksey petitions the Court to issue a writ of certiorari to review the decision of the South Carolina Supreme Court affirming his conviction for murder, and his death sentence.

CITATION TO ORDER BELOW

The Orangeburg Court of Common Pleas denied Petitioner's application for post-conviction relief on February 5, 2010. The order is reproduced in the Appendix at page 4. The South Carolina Supreme Court denied certiorari on May 22, 2014. The Order is reproduced in the Appendix at page 3. The Court denied the petition for rehearing on June 25, 2014. That order is reproduced in the Appendix at page 1. The Chief Justice extended the time for filing this certiorari petition until November 22, 2014.

JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1257(a), since Petitioner is asserting the deprivation of a right secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

This case further involves the Eighth Amendment to the United States Constitution, which provides in pertinent part, "Excessive bails shall not be required . . . nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

Procedural History

On New Year's Eve 1997, Aleksey, Glory Vee Perez Blackwell, and her two children were driving through South Carolina on Interstate 95 in a white Mustang when they were pulled over for speeding by Trooper Frankie Lingard. App. 927, l. 1 – 928, l. 2. Lingard approached the driver's side of the car. Four shots rang out. App. 932, ll.17-24. Four bullets entered Lingard's body and he died of his wounds. App. 928, ll. 1-9; app. 1005, l. 2. The car pulled back onto the highway and sped away.

Lin Shirer, a Calhoun County sheriff's deputy, was riding with Lingard that night. App. 925, ll. 13-18. He and Lingard had observed the white Mustang traveling at eighty miles an hour and so they stopped it. App. 926, l. 24 – 927, l. 11. As Lingard approached the Mustang, Shirer got

out and walked to the headlights of Lingard's patrol car. App. 932, ll. 1-2. The Mustang's windows were darkly tinted so he could not see in. App. 930, ll. 15-21. Shirer heard the gunfire and watched Lingard fall to the ground, but did not see who shot him. App. 941, ll. 1-8. He moved Lingard out of the roadway and then shot at the Mustang. App. 934, l. 17 – 935, l. 4. Shirer called law enforcement who arrived within a few minutes. App. 939, ll. 12-16; app. 940, ll. 3-7.

The white Mustang stopped in Holly Hill and Gloria Vee Perez Blackwell and her children got out of the car. App. 959, l. 11 – 960, l. 4; app. 1246, ll. 13-16. As police officers descended on the Mustang, Aleksey pointed a gun at his head and threatened to kill himself. He then sped away. App. 973, l. 1-25.

After a chase, Aleksey crashed his car at a K-Mart shopping center in Summerville and was rendered unconscious. App. 1086, l. 7 – 1088, l. 11. He was taken to the hospital, App. 1093, ll. 1-2; app. 1112, ll. 13-22, and then to the Orangeburg-Calhoun Detention Center. App. 1402, ll. 18-24. While at the Detention Center, he was interrogated by SLED agents George Darnell and Kenneth Mears. App. 1504, l. 6 – 1516, l. 14; app. 1534, l. 15 – 1538, l. 7. In his first statement, he informed the agents that Gloria Vee shot Lingard. App. 2321. After a two hour gap in the audiotape, and continued questioning and interrogation, a crying and much different sounding Aleksey, App. 1516, ll. 1-2, told the agents that he shot the victim. App. 2323.

While in pre-trial custody, Aleksey ripped a stool from the floor and broke a small window in his cell. App. 1878, l. 7; app. 1879, ll. 13-23; app. 4266. Based on this infraction, Walter Bailey, who prosecuted this capital case, requested that Governor Beasley order Aleksey sent to safekeeping at Lee Correctional Institute. App. 6559. With this petition, Bailey submitted two affidavits attesting to Aleksey's dangerousness, one authored by the Director of the Detention

Center, Willie Bamberg, and one by the Sheriff of Orangeburg County, James Johnson. App. 6560-6563. Governor Beasley issued the order, and Aleksey was sent to Lee Correctional to await trial. App. 6557.

On August 24, 1998, less than nine months after the shooting, Aleksey stood trial for murder. App. 1. The state submitted one aggravating circumstance to the jury during the penalty stage -- the death of a law enforcement officer while in the performance of his official duties. See S.C. Code §16-3-20 (C)(a)(7); App. 2063, ll. 12-16. One statutory mitigating circumstance was offered by the defense -- that Aleksey had no significant history of prior criminal convictions involving the use of violence against another person. See S.C. Code §16-3-20 (C)(b)(1); App. 2069, ll. 11-13. The jury found Aleksey guilty of capital murder, and then sentenced him to death. App. 1744, ll. 1-4; app. 2079, ll. 11-14.

WHY CERTIORARI SHOULD BE GRANTED

1.

Trial counsel rendered ineffective assistance of counsel, in derogation of the Sixth Amendment to the United States Constitution, when he labored under an actual conflict of interest because trial counsel was also actively employed as a part-time prosecutor in a nearby circuit, and when trial counsel also represented several state entities including the Highway Patrol as an attorney for the state insurance reserve fund while simultaneously representing Aleksey in his capital trial for murdering a Highway Patrolman.

The Monday following Aleksey's arrest, the Deputy Solicitor for Orangeburg County urged Judge Luke Brown to appoint Issac "Duffie" Stone to represent Aleksey, to help get

Stone's practice started. At the time of the appointment, Stone was a part-time assistant solicitor in nearby Beaufort County. He was also an attorney for the Insurance Reserve Fund, and in that capacity represented State Troopers, App. 3545, ll. 22-23, the Sheriff of Orangeburg County, App. 3545, ll. 20-21, the Orangeburg-Calhoun Detention Center (where Aleksey was housed until charged with an attempted escape), app. 3180, ll. 1-13, the South Carolina Law Enforcement Division (SLED), App. 3179, ll. 19-22, and the Department of Corrections, App. 3179, ll. 1-16. In 1998, the year Stone represented Aleksey, the Insurance Reserve Fund paid Stone \$67,000. In 1999, the year after Aleksey was sentenced to death, the Insurance Reserve Fund's payments to Stone nearly tripled to \$193,000. App. 3168, l. 17 – 3169, l. 4; App. 5799.

Aleksey's lead attorney, Stone, and second chair, Thomas Sims, failed to provide effective representation where, inter alia, they declined to offer any evidence of prison adaptability even though such evidence was readily available. See Argument 2. They failed to challenge Aleksey's purported "confession" which Aleksey consistently maintained was beaten out of him by law enforcement. See Argument 3. Lead attorney, Duffie Stone, labored under an actual conflict of interest throughout the entirety of his representation of Aleksey. Aleksey was denied his right to conflict-free counsel in derogation of the Sixth Amendment.

A. Stone had an actual conflict of interest because he was employed as a part-time assistant solicitor during his representation of Aleksey.

Stone, Aleksey's lead counsel, was a part-time prosecutor (solicitor) in Beaufort County at the time he represented Aleksey in nearby Orangeburg County. App. 3133, l. 25 – 3134, l. 8. This was his second death penalty trial, first as lead counsel. App. 3240, ll. 5-9. Sims, a former assistant solicitor in Orangeburg, was second chair. App. 3025, ll. 16-17. This was his first

capital trial. App. 3033, l. 12. Sims also ran unsuccessfully for Circuit Solicitor in 1992. App. 3025, ll. 19-23. Stone carried about the same caseload as other assistant solicitors, but was not required to be in the office on a regular basis. App. 3135, ll. 12-15. A large majority of Stone's witnesses were law enforcement officers. App. 3136, ll. 18-21.

HOW THE FEDERAL QUESTION WAS RAISED

At the post-conviction hearing, Stone conceded that he had significant dealings with highway patrolmen like the victim in this case:

That was full-time and I was a law clerk in that office for a couple years so I dealt with the patrol then as well [discussing prior employment with the 14th Circuit Solicitor's Office]. And I have absolutely no idea. **As many as you could imagine.** I mean, it certainly wasn't 10 or 15 or 20. But I can't tell you an exact number. It was a lot.

App. 3138, ll. 12-17. (emphasis added).

Stone was appointed to represent Aleksey at the urging of the then Deputy-Solicitor for the prosecuting county—James C. Williams, Jr. App. 5315. Williams, now a Judge, submitted an affidavit, which outlines how Stone came to represent Aleksey. App. 5315. Williams suggested to Judge Brown that Stone would be a good choice. App. 5315. No evidence shows that Williams informed the judge of Stone's position as a solicitor, or his work with the Insurance Reserve Fund. Although appointments were generally made from a list of local attorneys who advertised in the Orangeburg phone book, Williams was not aware if Stone was on that list or not. App. 5315. Instead, he, Judge Brown, and Sims discussed who to appoint, and Stone was offered the appointment. App. 5315.

The post-conviction relief (PCR) judge ruled that Stone did not labor under an actual conflict of interest. App. 5026:

This Court must find that Mickens¹ does not require relief in this matter because Mr. Aleksey has failed to satisfy his burden of proof in showing that Mr. Stone suffered under an actual conflict of interest due to his employment as a part-time prosecutor in another circuit.

First, the mere fact that Mr. Stone was a part-time prosecutor in Beaufort in the Fourteenth Circuit is not an actual conflict of interest. The South Carolina Supreme Court has not specifically addressed this issue upon a survey of its case law. In Beaver v. Thompson, 93 F.3d 1186 (4th Cir. 1996), the Fourth Circuit held that there was no conflict of interest in defense counsel's representation of a capital defendant even though counsel was a part-time assistant prosecutor in a neighboring county. Like Mr. Stone, the Counsel in *Beaver* had limited duties and had no working relationship with any of the witnesses at trial . . .

App. 5006-5007.

The PCR court continued to analyze the conflict issue with respect to the ethics opinions in existence at the time of Stone's appointment and ruled that "this Court must find that Counsel Stone's impressions that he was not disqualified from his appointment were reasonable and that a reasonable lawyer in 1998 would have shared the same opinion." App. 5012.

Discussion

Stone labored under an actual conflict of interest throughout his representation of Aleksey due to his status as a part-time solicitor because he also simultaneously had a working, professional relationship with the prosecuting entities in this case—specifically the South Carolina Law Enforcement Division (SLED) and the Department of Public Safety, which oversees the state's highway patrolmen, and his representation of Aleksey constituted an actual conflict of interest under this Court's extant precedent. Wood v. Georgia, 450 U.S. 261 (1981);

¹ Mickens v. Taylor, 535 U.S. 475 (2001).

Cuyler v. Sullivan, 446 U.S. 335 (1980); and Holloway v. Arkansas, 435 U.S. 475 (1978); Glasser v. United States, 315 U.S. 60 (1942).

The PCR court further ruled that Aleksey waived any potential conflicts. App. 5029-5032. However, Aleksey was never advised of the precise form the conflict would take and did not make a knowing and voluntary waiver of the conflict. United States v. Swartz, 975 F.2d 1042, 1049-50 (4th Cir. 1992).

The PCR court relied on three exchanges relating to Stone's employment to find that Aleksey waived these conflicts. The pertinent testimony is recounted **in full**.

On February 2, 1998, pre-trial, Stone's employment as a solicitor and work with the Insurance Reserve Fund was addressed:

Q: Did you understand when he explained it to you that he not only represents state agencies sometimes, but he also has been a state prosecutor, which we call solicitors, and he's also defended? He tells me that you still wanted him to be one of your attorneys. Is that what you'd like to do?

A: Yes.

THE COURT: That's a good choice.

MR. STONE: Thank you.

THE COURT: Alright.

App. 5912, ll. 3-12.

At a pre-trial hearing on May 20, 1998, Stone's employment as an assistant solicitor was addressed:

MR. STONE: That's best, Your Honor. Your Honor, again I'm doing part-time work in the 14th Circuit. Of course I don't have any jurisdiction outside of that. We spoke to Mr. Aleksey about that earlier on the record but if you would, sir, just ask Mr. Aleksey if he

would like me to continue on as his counsel knowing that.

THE COURT: Mr. Aleksey, please stand. You have heard the colloquy regarding Mr. Duffie who is the—Duffie Stone or Stone Duffie?

MR. STONE: Duffie Stone.

THE COURT. Duffie Stone. His employment as a part-time solicitor in another circuit not in any way connected with the Orangeburg Circuit. Do you waive or are you comfortable with the fact that he is representing you as a defendant attorney now?

THE DEFENDANT: Yes, sir.

THE COURT: And do you consent to him to continue in his position?

THE DEFENDANT: Yes, sir.

THE COURT: Knowing that he is a part-time solicitor in another circuit.

THE DEFENDANT: Yes, sir.

THE COURT: All right, sir.

MR. STONE: Thank you, Your Honor.

App. 2100, ll. 1-25.

On the day Aleksey's capital trial started, August 24, 1998, the *solicitor* wanted to place on the record that Aleksey was consenting to Stone's continued representation of him. App. 181, ll. 2-23:

THE COURT: Stand up, Mr. Aleksey. You understand that one of your counsel is with the solicitor—is a contract with the solicitor?

MR. STONE: Basically, Your Honor, yes, sir. That's correct, part-time with the 14th Circuit.

THE COURT: Part-time solicitor's office in another circuit. It has

nothing to do with the circuit here in Orangeburg. Do you understand that?

DEFENDANT ALEKSEY: Yes, Your Honor.

THE COURT: You fully understand his position as part-time with the Solicitor's office in Beaufort County?

DEFENDANT ALEKSEY: Yes, Your Honor.

THE COURT: You have waived any possible conflict and are agreeing that he shall be your counsel in this case?

DEFENDANT ALEKSEY: Yes, Your Honor.

THE COURT: Is that correct?

DEFENDANT ALEKSEY: (Nods Head.)

These colloquies fall woefully short of knowing and intelligently waivers.

Professor John Freeman's Testimony at PCR

John Freeman, an ethics professor at the University of South Carolina School of Law, testified that Stone should not have represented Aleksey due to his status as a part-time solicitor and his employment with the Insurance Reserve Fund. App. 3866, ll. 10-22. Additionally, the purported waivers were inadequate to apprise Aleksey of the dangers of proceeding with conflicted counsel. App. 3867, ll. 1-24.

Professor Freeman specifically cited South Carolina Bar Ethics Advisory Opinion 77-02 which holds that there is no ethical prohibition against a prosecuting attorney engaging in the private practice of law where permitted by statute, except that the following restrictions must be observed (1) a prosecuting attorney may not defend a criminal case in either federal or state courts. App. 3868, ll. 8-21. In support of this proposition, the opinion cites ABA Formal

Opinion 142 and 262. According to Professor Freeman, this opinion has not been reversed. App. 3868, ll. 22-24.

Additionally, Ethics Advisory Opinion 82-26 states: "A part-time assistant solicitor who is also employed on a part-time basis by a private law firm may not represent criminal defendants in any courts . . . App. 3877, ll. 11-17.

Freeman testified:

This is a death penalty case, it is a poster child for the type of case where you want to do things scrupulously correctly and where you got an ABA opinion, a South Carolina opinion and another South Carolina opinion saying in essence that Duffie Stone should not be representing Mr. Aleksey, then I think that means something.

App. 3879, ll. 1-7.

Freeman opined that the conflicts in this case were not subject to being waived. App. 3867, ll. 3-4. However, assuming arguendo they were, he opined that the purported waivers of conflict in this case were inadequate and superficial. App. 3881, ll. 9-10. The waivers did not explain the ramifications of the conflict. App. 3882, l. 21 – 3883, l. 18:

Its superficial, it's not explaining to the client the fact that you worked with law enforcement, the fact that you got to get along with law enforcement, the fact that law enforcement is on the other side of this case, the fact that that's-- may even subconsciously make it more difficult for you to cross-examine vigorously law enforcement, et cetera.

App. 388, l. 22 – 3882, l. 3.

Professor Freeman categorically stated that Stone should not have been representing Aleksey -- "I don't think he should have been in this case period. Period." App. 3885, ll. 21-23.

Stone had an actual conflict of interest throughout his representation of Aleksey. The Sixth Amendment guarantees the right to counsel unencumbered by conflicts of interest.

Mickens v. Taylor, 535 U.S. 162 (2001); Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway v. Arkansas, 435 U.S. 475 (1978). An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's. A defendant need not demonstrate prejudice if there is an actual conflict of interest. Cuyler v. Sullivan, 446 U.S. 335, 348-350 (1980).

South Carolina acknowledges this:

[W]hen a defense attorney places himself in a situation inherently conducive to divided loyalties . . . If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client. An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's.

Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809 (1984) *citing* Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir. 1979).

As a representative of the State in his capacity as an assistant solicitor, Stone's interests were necessarily adverse to Aleksey, a person being prosecuted by the State. It is of no consequence that Stone did not have "any jurisdiction" beyond Beaufort County. He had professional, working relationships with state law enforcement agencies. These did not end at the county line.

Stone's representation of the State of South Carolina was significant. He carried the same caseload as other assistant solicitors. This is far different from the situation in Beaver v. Thompson, 93 F.3d 1186 (4th Cir. 1996), a case on which the PCR court relied. App. 5005. In that guilty plea case, the putatively conflicted attorney's involvement in prosecuting in his

neighboring jurisdiction was “very minimal, some 2-5%, other than brief writing on appeals.” Id. at 1191. See, also, n. 6, at 1992 (“When Mr. Elder wanted to take vacation, which might be two weeks of the year, I would cover for him on these two weeks, which might mean I would hold general district court twice, possibly one circuit court situation.”). During Stone’s representation of Aleksey, Stone’s time was “split between the Insurance Reserve Fund and the solicitor’s office.” App. 3401, ll. 17-18. Aleksey was denied his right to counsel “devoted solely to the interests of his client.” Von Moltke v. Gillies, 332 U.S. 708, 725 (1948).

Stone fatuously claimed at the PCR hearing that the court rules *required* him to take this appointment. App. 3398, l. 23 – 3399, l. 11. However, Rule 608, SCACR, which would have mandated an appointment was not enacted until March 4, 1999, more than six months after Aleksey’s trial. No Kafkaesque state rule forced Stone to take this case despite a blatant conflict. He had his fellow solicitors to get the judge to appoint him so could make money off the case.

B. Stone had a conflict of interest because of his employment as an attorney with the Insurance Reserve Fund during his representation of Aleksey.

Stone also represented the State as an attorney for the Insurance Reserve Fund, an entity created by the South Carolina Budget and Control Board which insures government entities.

As such, Stone represented the Sheriff of Orangeburg County and the Department of Public Safety, including State Highway troopers. App. 3545, ll. 15-25; app. 3199, l. 13 – 3202, l. 12. Stone also represented the Department of Corrections. App. 3179, l. 1-16. In addition, Stone represented SLED. App. 3179, ll. 19-22. Stone believed that he represented the Orangeburg-Calhoun County Detention Center, where Aleksey spent time in pre-trial detention. App. 3180, ll.

1-13. Stone represented a state trooper in a false imprisonment/ police brutality claim just prior to Aleksey's trial. App. 3206, l. 1 – 3207, l. 2.

Stone had represented Willie Bamberg, the director of the Orangeburg- Calhoun County Detention Center. Bamberg executed an affidavit in this case on January 16, 1998 concerning Aleksey's purported escape attempt describes Aleksey as a "dangerous individual" and "high escape risk."

Stone was unsure whether he was representing Bamberg at the time he was representing Aleksey. App. 3641, ll. 3-10. In 1998—the year he represented Aleksey—Stone received \$67,000 from the Insurance Reserve Fund. App. 3168, ll. 20-21; app. 5799. In 1999, he received \$193,000, and in 2000, he received \$133,000. App. 3168, l. 21; app. 5799. Stone testified that he was at the "top level" for the Insurance Reserve Fund with respect to payment. He received \$100 an hour based on his experience. App. 3172, ll. 15-16.

While in pretrial detention, Aleksey had initiated a number of lawsuits against some of these government entities. On May 18, 1998, Aleksey filed a lawsuit against the Director of the Department of Corrections (SCDC). App. 3178, l. 24 – 3179, l. 18. He sued Lee County Correctional Institute on June 26, 1998. App. 3189, ll. 19-22. On July 9, 1998, he filed another suit against SCDC and Director Michael Moore. App. 3189, l. 25 – 3190, l. 3. On July 14, 1998, he sued the Medical Department of Lee Correctional Institution, part of SCDC. App. 3190, ll. 6-8. On July 24, 1998 he sued Benjamin Montgomery, Warden of Lee Correctional. App. 3191, ll. 5-9. He filed suit against Lee Correctional and Officer Martin. App. 3191, ll. 10-15. On July 29, 1998 he again sued SCDC. App. 3192, ll. 19-22. Finally, he filed suit against Don Stoner, RN, Ms. Johnson, RN and Ms. Montgomery, RN of SCDC. App. 3193, ll. 19-20. See App. 5800-5837.

Aleksey asked Stone to pursue his claims. Stone wrote Aleksey:

I've received and reviewed all the letters, maps and other materials you sent me. I appreciate you keeping me informed of what is going on in prison. Unfortunately, I will not be able to help you with any lawsuit against the prison because of my involvement with the Insurance Reserve Fund. I know I explained this to you before, but I wanted to make sure you understood this. I would have a conflict of interest bringing a civil lawsuit against an agency I represent.

App. 3185, ll. 11-20; app 5838.

Stone also had dealings with Trooper Stack, a potential witness in this case, in connection with a suit involving another trooper. App. 3207, ll. 9-18. Stack was present when Aleksey was detained after his car crash. App. 3207, ll. 17-24; app. 939, ll. 20-23.

The PCR court concluded that Aleksey had failed to show that trial counsel labored under an actual conflict of interest due to his employment with the Insurance Reserve Fund.

Actual conflicts of interest may arise from counsel's representation of different parties with competing interests. Wood v. Georgia, 450 U.S. 261 (1981); Holloway v. Arkansas, 435 U.S. 475 (1978); Glasser v. United States, 315 U.S. 60 (1942). With respect to his employment as an Insurance Reserve Fund attorney, Stone was conflicted in two ways. First, the interests of the State were adverse to Aleksey.

Additionally, Stone received a *substantial part* of his compensation from the Insurance Reserve Fund, and he had a personal financial stake in continuing to receive appointments from a fund administered by the Attorney General's office. See People v. Meyers, 46 Ill.2d 149, 152 (1970) (“[I]t is difficult, if not impossible, to satisfactorily advise a defendant of the subtle effect which a conflict of interests may have upon an appointed counsel’s representation. In this case, there is no indication that the appointed counsel ever undertook to explain to defendant the

subconsciously compromising effect which the contingent fee prospects could conceivably have upon his counsel's efforts."); People v. Pendleton, 52 Ill.App.3d 241, 247 (1977) ("The controlling aspect is not whether he personally would ever be assigned to assist in the prosecution of a murder case, but whether he is presently accepting and perhaps seeking future assignments from an office which possesses an interest adverse to defendant's").

Stone's letter to Aleksey speaks for itself. Exacerbating the actual conflict, Stone ran afoul of established ABA capital guidelines: "[T]hese Guidelines also recognize that capital defense counsel may be required to pursue related litigation on the client's behalf outside the confines of the criminal prosecution itself." Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, p. 3, 31 Hofstra L. Rev. 913 (2003) ("ABA Guidelines").

C. The trial court judge did not obtain knowing and voluntary waivers of these conflicts of interest.

Aleksey clearly had no idea of the ramifications of Stone's conflicts. The PCR erred in ruling the waivers were adequate.

First, the conflicts in this case were actual, and not merely potential, because Stone was actively representing these other entities throughout his representation of Aleksey. Also, Aleksey did not receive sufficient information to waive the conflicts. To be valid, a waiver must not only be voluntary, it must be knowing and intelligent. The Courts indulge every reasonable presumption against waiver of fundamental constitutional rights, and do not presume acquiescence in the loss of fundamental rights. Johnson v. Zerbst, 304 U.S. 458 (1938). Nobody told Aleksey, Karlin v. Wisconsin, 47 Wis.2d 452, 459, 177 N.W.2d 318, 321 (1970) cogently observes that "[T]he

temptation might well arise to not be too hard on a police witness who is against your client today but would be the star witness for your prosecution tomorrow.”

Additionally, Aleksey was not informed that Stone derived a significant portion of his income representing the very government officials that he was attempting to sue. Nor was he advised that Stone represented Bamberg, the Director of Detention Center, a potential state's witness who executed an affidavit informing Governor Beasley that Aleksey is a “dangerous individual and is a high escape risk.” App. 6557-6565. He was not informed that Stone represented the Sheriff of Orangeburg County who also executed an affidavit attesting to his dangerousness. In other words, Aleksey was not informed that Stone's clients would be essential witnesses for the State if the defense presented prison adaptability evidence. Aleksey was not informed that Stone would have to cross-examine his own clients if the defense did its job and put forward that evidence.

Aleksey did not receive information regarding the precise form of the conflicts that developed during his case. Wheat v. United States, 486 U.S. 153, 162-63 (1988) (“The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials . . . Nor is it remiss to observe that the willingness of an attorney to obtain such waivers from his clients may bear an inverse relation to the care with which he conveys all the necessary information to them.”).

In assessing the sufficiency of the information that was provided, it is important to note that Aleksey was not from South Carolina. He spent most of his schooling in special education. App. 4311, ll. 3-14. The judge indicated --on two occasions --that Aleksey should not seek to remove Stone as counsel. The judge should not have inserted his personal opinion that he should waive the conflicts. Quercia v. United States, 289 U.S. 466 (1933).

Aleksey was never made aware of the fact that had mitigating prison adaptability evidence been presented Stone would be in the position of cross-examining his clients, nor was he made aware that Stone had ongoing relationships with the law enforcement entities prosecuting him in this case, including SLED and the Department of Public Safety. Additionally, Aleksey never realized the significant financial stake Stone had in continuing to receive appointments from the Insurance Reserve Fund. Aleksey was denied his right to conflict free counsel in derogation of the Sixth Amendment, and his conviction and sentence should be reversed and remanded for a new trial.

2.

Trial counsel rendered ineffective assistance of counsel, in derogation of the Sixth Amendment to the United States Constitution, when they forfeited Aleksey's right to present prison adaptability evidence, and when a reasonable investigation would have revealed that Aleksey was adaptable to prison.

Trial counsel did not present any evidence of Aleksey's adaptability to prison. Stone testified that he did not believe putting an expert on the stand to testify to Aleksey's adaptability was "credible" in light of the lawsuits that Aleksey attempted to file during pre-trial detention. App. 3636, ll. 11-12.

HOW THE FEDERAL ISSUE WAS RAISED

At the PCR hearing James Aiken, the current president of a consulting firm and long time SCDC warden, was qualified as an expert in the areas of prison adaptability and correctional risk assessment. App. 3888, l. 1 – 3892, l. 17. Aiken testified it was perfectly permissible for inmates

to file lawsuits and SCDC would much rather have inmates filing lawsuits than setting fires, fighting, and engaging in other deviant behavior. App. 3905, ll. 17-24. Aiken agreed that Aleksey could be secured in a correctional environment for the remainder of his life without an undue risk of harm to staff, inmates, or the community. App. 3899, ll. 6-10.

Despite Aiken's testimony, Stone baldly claimed he was unaware of any information that Aleksey was particularly adaptable to prison. App. 3636, ll. 17-19. This evidence was readily available and trial counsel's failure to investigate Aleksey's adaptability to prison was ineffective. Counsel knew that adaptability was going to be an issue and, had they investigated, they would have realized there was substantial, extant evidence of his Aleksey's adaptability to prison.

The failure to investigate this fertile ground of mitigation was unreasonable, especially since the evidence was available and compelling. Stone testified: "And obviously I knew at some point, or at some point I had a good feeling we would be discussing prison life" App. 3238, ll. 10-12.

See State's Notice of Evidence in Aggravation of the Punishment, App. 6554-6556:

The State will further present evidence, testimony, and exhibits as to the defendant's character and conduct while incarcerated in jails and/or prisons; disregard and violations of rules, regulations, laws and/or ordinances; disrespectful, disruptive and uncooperative actions and conduct; and all other such acts and conduct while incarcerated.²

Counsel was aware that Aleksey, during pre-trial detention at the Orangeburg-Calhoun Detention Center, had been charged with attempted escape. Aleksey ripped a stool out of the floor and used it to break a window out of the cell. App. 1878, l. 7 – 1879, l. 23. The window was "rather small." App. 1877, ll. 12-14. After this incident, Aleksey was sent to safekeeping at Lee

² Counsel, instead, called only Aleksey's mother, Vera Aleksey.

Correctional Institution. App. 1881, ll. 1-3.

The state called Maurice Keitt, a former correctional officer to testify about these events and Aleksey's move to safekeeping. On cross-examination, Stone unhelpfully elicited the following from Keitt:

Q: In your experience as a correctional officer, when do ya'll send people to safekeeping?

A: Well, when they maybe going to hurt their self or escape or high risk.

App. 1881, 11. 7-11.

Willie Bamberg, Director of the Orangeburg- Calhoun Detention Center and James Johnson, Sheriff of Orangeburg County filed affidavits requesting Aleksey's removal from Orangeburg-Calhoun Detention Center, and which was made part of the petition sent by Solicitor, Walter Bailey, to Governor Beasley. App. 6560-6563. In his affidavit, Bamberg wrote that Aleksey was a "dangerous individual and is a high escape risk and that the Orangeburg-Calhoun Regional Detention Center cannot adequately house this individual." App. 6560-6561. The request was granted. App. 6557.

Vernetia Dozier, the Deputy Director of the Detention Center, testified during the penalty phase that officials with the detention center had signed a warrant against Aleksey for attempted escape. App. 1886, ll. 10-11. Over objection, Dozier was also allowed to testify that inmates have escaped from Orangeburg County Detention. App. 1888, ll. 11-17. Additionally, she testified there had been other escapes from the Detention Center and "they have gone over the razor wire and cut through the razor wire." App. 1888, l. 23 – 1889, l. 8. She told the jurors that safekeeping is where they send inmates considered "hard to handle" or "escape risks." App. 1886, ll. 16-17.

Recognizing the inflammatory nature of this testimony, at trial the next day, *the solicitor* asked the judge to give a curative instruction to the jury to disregard the evidence concerning a warrant for escape. App. 1931, l. 21 – 1932, l. 12.

SOLICITOR BAILEY: Judge, of course, the defense did not object at that time, so they waived it.

THE COURT: In fairness they did not. I understand that. In fairness to them though, I will charge the jury that they must disregard that in its entirety. I will tell them there is no warrant out there for escape.

App. 1933, ll. 7-14.

Counsel was so concerned about this purported attempted escape incident that they secured an affidavit from Willie Bamberg. (a possible concurrent client of Stone) that strongly appeared to contradict his contradict his previous affidavit that Aleksey was a dangerous man who could not be housed or controlled in the county jail. The affidavit described the small window in Aleksey's cell and stated that "transgression" was his only infraction while at the jail. App. 4266. Counsel had to know adaptability was a potential issue.

It is indefensible that trial counsel did not conduct an investigation on this issue of Aleksey's adaptability to prison. Amazingly, at PCR, Stone testified that he did not believe that Aleksey's purported escape attempt "became an issue at all." App. 3238, ll. 14-15. Yet, Solicitor Bailey, in his closing argument, emphasized that Aleksey was a safekeeper and argued that there was no evidence Aleksey could adapt to prison:

[T]hink about this. If a man gets life without parole and he does something else short of murder, if he injures another inmate in prison, if he injures a guard, if he assaults a visitor to that facility, what are they going to do with him?

They are going to say, 'We will give you another ten years on top of

your life without parole.’ There would be no controls over it. A life sentence without parole sentence is giving him a blank check to do in that prison system [anything] short of another homicide, and they can’t give him one more day.

If he decides he doesn’t want to follow the rules, if he doesn’t want to do any of the prison work, what are they going to do? Give him more time on top of life without parole? Think about that when you decide what sentence he ought to get. . .

App. 2116, l. 20 – 2117, l. 11.

[A]s I said before, when you think of life without parole as an alternative for the death penalty, look at how he has adapted to jail. *Look at the only evidence of his adaptability to jail, that broken window and this broken piece of furniture and his trip to safekeeping If the defense attorneys get up here and show y’all a picture of the inside of the Orangeburg jail cell where he broke that window remember that is the Orangeburg jail.*

There has been no evidence that that has any bearing with the lifestyle he would undergo if he is sent to the general population in the Department of Corrections.

App. 2116, ll. 2-7; app. 2120, ll. 15-22. (emphasis added).

Discussion

The defense could do nothing to counter Solicitor Bailey’s powerful closing argument since the defense failed to prepare available evidence that Aleksey could adapt to prison. See Rompilla v. Beard, 545 U.S. 374 (2005) (Counsel’s failure to examine the file on defendant’s prior conviction for rape and assault at sentencing phase of capital trial fell below the level of reasonable performance, required for effective assistance; counsel knew the prosecution intended to prove defendant had a significant history of felony convictions indicating the use or threat of violence, an aggravator under state law, and, further, knew that the prosecution would attempt to prove defendant’s prior conviction for rape and assault, and would emphasize his violent character by

introducing a transcript of the rape victim's prior testimony).

This Court long ago recognized the importance of adaptability evidence. Skipper v. South Carolina, 476 U.S. 1 (1986). In Skipper, this Court concluded that where the prosecution alludes in closing to the danger a defendant would pose if sentenced to prison the error is not harmless. 476 U.S. 1, 5, n. 1. The Skipper case overruled a state rule forbidding adaptability evidence. Here, the jury did not hear the readily available evidence due to the gross ineffectiveness of capital counsel.

James Aiken was the current president of a correctional consulting firm and qualified expert in the areas of adaptability and correctional risk. App. 3897, ll. 10-14. Aiken reviewed Aleksey's criminal history, his confinement history, his social history, the psychological information that was provided, and Aleksey's medical information. Additionally, he spoke with Aleksey on the day of his PCR testimony. App. 3898; ll. 21-23.

Aiken testified that, had he been called to testify in mitigation, he would have opined that Aleksey could be properly housed and secured in a correctional environment for the remainder of his life without presenting an undue risk of harm to staff, inmates, or the community. App. 3899, ll. 6-10. He further testified that he has had inmates like him before and has managed those people very well. App. 3899, ll. 15-17. Aiken did not see anything that would lead him to believe Aleksey would pose a threat to others. App. 3900, ll. 6-9. Aiken considered Aleksey at the "lowest level in relationship to his conduct at that facility." App. 3904; ll. 12-13. Additionally, Aleksey's availing himself of legal remedies was further evidence of his adaptability:

So the many lawsuits that you file is fine with me and that's the reason why we have a legal department and that's the reason why we have the Constitution. And it's appropriate behavior for an individual to follow those avenues versus setting fires, versus throwing things at people, versus fighting, getting weapons in doing other disruptive behaviors in order to get some attention.

App. 3905, ll. 17-24.

Aiken further reviewed documentation regarding Aleksey's incarceration post-trial. App. 3907, ll. 5-8. Nothing in those materials affected his opinion. App. 3907, ll. 9-13. The "probability is very miniscule" that Aleksey would have violent confrontations with other inmates or prison guards. App. 3919, l. 18.

All mitigating evidence should be presented unless "there are strong strategic reasons to forego some portion of such evidence." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.86(A) p. 25 (1989). The ABA Guidelines also provide that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigation evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." Id. 11.4.1(C), p. 93 (1989). This Court held in Strickland v. Washington, 466 U.S. 668 (1984) that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound legal strategy.'" 466 U.S. at 689. Before counsel can make a valid strategic decision, however, counsel must fulfill the "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691.

Counsel's conduct, in failing to present mitigating evidence, can "not be justified as a tactical decision" if counsel has not "fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background." Wiggins, 539 U.S. 510, 522 (2003) (quoting Williams v. Taylor, 529 U.S. 362, 396 (2000)). "In other words, the presumption of sound trial strategy founders . . . on the rocks of ignorance." White v. Roper, 416 F.3d 728, 732 (8th Cir. 2005).

Had Aiken been called to testify during Aleksey's trial, he would have opined that Aleksey could be properly housed and secured in a correctional environment for the remainder of his life and without presenting an undue risk of harm to staff, inmates, or the community. App. 3899, ll. 6-10. See Nance v. Ozmint, 367 S.C. 547, 557 n. 8, 626 S.E.2d 878, 883 n. 8 (2006) (noting the holding in Wiggins and concluding defense counsel in capital case should have investigated and presented evidence of defendant's adaptability to confinement and presented mitigating social history evidence outlining the defendant's troubled childhood, mental illness and prison adaptability).

The PCR court incorrectly accepted Stone's statement that adaptability evidence could "backfire" where he failed to investigate at all, and based upon Solicitor's Bailey contention that the testimony of James Aiken would have allowed him to "develop a description of prison life in the general prison population—cable TV, recreational activities, and amenities compared with the decedent's death." App. 4110, l. 8 – 4111, l. 1; App. 5083-5085. South Carolina's rule and admonitions that prison conditions evidence are not admissible in State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005) and State v. Burkhardt, 371 S.C. 482, 648 S.E.2d 458 (2007) were firmly anchored in the State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984) holding that conditions behind the prison walls were impermissible matters at sentencing.

Prison adaptability evidence is clearly mitigating evidence. Skipper v. South Carolina, 476 U.S. 1, 5 (1986) ("[E]vidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating."); Simmons v. South Carolina, 512 U.S. 154, 162 (1994) ("[A] defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system.").

Counsel had a duty to investigate this issue because it was an unreasonable decision to have

omitted this. Wiggins v. Smith, 539 U.S. at 521-522 (2003) (“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel’s judgment (quoting Williams v. Taylor, 529 U.S. 690-91)).

As seen above, Solicitor Bailey fully capitalized on the failure of the defense to offer prison adaptability evidence. App. 2116, l. 20 – 2117, l. 11; app. 2120, ll. 15-22; app. 2023, ll. 2-7. See Skipper n.1 at 5 (“The relevance of evidence of probable future conduct in prison as a factor in aggravation or mitigation of an offense is underscored in this particular case by the prosecutor’s closing argument, which urged the jury to return a sentence of death in part because petitioner could not be trusted to behave if he were simply returned to prison. Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only the rule of *Lockett* and *Eddings* that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death “on the basis of information which he had no opportunity to deny or explain.” (quoting Gardner v. Florida, 430 U.S. 349, 362 (1977)).

Trial counsel rendered ineffective assistance of counsel because they failed to investigate or present evidence of Aleksey’s adaptability to confinement when that evidence was readily available. Counsel’s failure is particularly problematic in light of counsel’s decision to only present one mitigation witness—Aleksey’s mother. As counsel acknowledged, they did not bother to investigate the adaptability issue and so did not consult with James Aiken who would have been available to testify and who would have offered significant mitigation evidence on Aleksey’s behalf.

Additionally, Aleksey was denied his right to conflict-free counsel because, had defense counsel presented this evidence, Stone would have been in an adversarial position relative to the state's witnesses-- his former clients through the Insurance Reserve Fund, Willie Bamberg and James Johnson who both signed affidavits attesting to Aleksey's dangerousness and who were responsible for Aleksey's transfer to Lee Correctional for safekeeping. See Ferri v. Ackerman, 444 U.S. 193, 204 (1979) (stating that an indispensable element of the effective performance of [defense counsel's] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation). Aleksey was denied his right to conflict-free counsel in derogation of his rights under the Sixth Amendment. See Mickens v. Taylor, *supra*, Cuyler v. Sullivan, *supra*, Holloway v. Arkansas, *supra*.

3.

Trial counsel rendered ineffective assistance of counsel, in derogation of the Sixth Amendment to the United States Constitution, when they failed to advance Aleksey's claim that police officers beat his confession out of him during an unexplained two hour gap on the audiotape of the statement.

Trial counsel rendered ineffective assistance of counsel when they did not advance Aleksey's claim that his second statement was beaten out of him by law enforcement, and when Aleksey consistently maintained this occurred. App. 6022-6025.

Aleksey was interrogated by two veteran SLED agents, Darnell and Mears, on January 2, 1998. App. 2320. Aleksey was in custody at the Orangeburg-Calhoun Detention Center and asked to speak with a SLED agent when he was informed that he had been moved to the infirmary cell from general population because SLED wanted him moved. App. 1405, l. 25 – 1406, l. 6; App.

2171, l. 13 – 2172, l. 24.

Audio-recorded, Aleksey denied shooting Trooper Lingard and averred that his passenger, Glory Vee Perez Blackwell, shot him. App. 1511, ll. 6-10. Aleksey informed the agents “that’s all I’ve got to say” at the conclusion of this statement. App. 2232, ll. 15-20; app. 2322. The tape recorder was then turned off for two hours. App. 1529, l. 25 – 1530, l. 1. When it was turned back on, a crying and distraught Aleksey was recorded confessing to Lingard’s murder. App. 1515, l. 23 – 1516, l. 2; app. 2323. This statement was introduced at trial during the state’s case in chief. App. 1516, l. 20 – 1518, l. 22.

The Orangeburg Times & Democrat, dated January 6, 1998 -- five days after Aleksey’s arrest --reflects statements Aleksey made to their reporter. He told her: “I was afraid . . . They said if I didn’t tell them I did it they would make life hard for me . . . They said, ‘If we have to beat it out of you, we’ll beat it out of you’ . . . They said if I didn’t tell them what they wanted to hear I would have to go back to jail and things could happen to me, and I believe that . . . I told them, ‘Listen. You want me to tell you I did it? Okay. I did it.’” App. 6023. And See App. 5300.

HOW THE FEDERAL ISSUE WAS RAISED

Second Chair Sims testified at the PCR hearing that he received a letter from Aleksey on March 6, 1998 informing him that Darnell and Mears beat him. App. 2552, l. 22 – 2553, l. 12; App. 3296, ll. 6-15. In addition to the letter, Aleksey actually told Sims that the SLED agents beat him. App. 2553, ll. 10-12. Sims admitted that their defense was that the second statement, the purported confession, was not a true statement. App. 2551, ll. 1-12.

Regarding the decision not to raise this issue, Sims testified:

If I recall, I believe that we had made the determination that there was no factual basis, we couldn't prove it or anything of that nature.

There was no physical evidence that I know of that I can recall. And I think that was based upon a conversation or a collaboration between me and Mr. Stone.

App. 3032, ll. 2-8.

Stone, too, was well aware that Aleksey said the agents used physical violence against him to extract the second statement. Stone testified at the PCR hearing that he received a letter on March 23, 1998 (actually dated March 7th, 1998, App. 3389) informing him that the agents had beaten Aleksey:

And the reason that that was the first is because my summary of the letters that I received, that was two letters, my comment is "Nothing new except allegations of beating confession out of him," which would have been the first time that I heard the confession. The problem, and that continue with my note on this, the problem is he didn't tell WIS television about this.

The next time—and that was the actual first time. I also believe that at some point I met with Mr. Aleksey and I've got notes that I've reviewed them at, that he indicated one of the SLED agents, and I don't recall which one, hit him in the chest and the other SLED agent told him I believe, if I'm not mistaken, that he had killed a friend of his, that he wasn't going to get out of here alive. And this was stuff that he told me on a face-to-face meeting.

App. 3292, l. 13 – 3293, l. 15.

Counsel did not challenge the statement advancing the brutality claim at either the Jackson v. Denno, 378 U.S. 368 (1964) hearing, nor to the jury. App. 2557, l. 18 – 2558, l. 7.

The solicitor admitted at the PCR hearing that Aleksey's "confession" was the strongest piece of evidence they had. App. 3667, ll. 20-22.

Stone testified at the PCR hearing that he did not believe that Judge Cottingham was going to "even contemplate throwing out that confession." App. 3307, ll. 20-21.

So, number one, I didn't think he was going to throw it out anyway.

Number two, is honestly I thought we had a very good angle with the fact that the *Miranda*³ warning, even the written *Miranda* warning said you can stop talking at any time. And Mr. Aleksey said, and I'll never forget this, "That's all I've got to say."

And that was the angle wanted to hit the hardest because I felt like that was the strongest, the strongest thing that I had. And if Judge Cottingham wasn't going to throw it out for that then he sure wasn't going to throw it out for any other reason.

App. 3308, ll. 4-16.

Discussion

In short, trial counsel did not advance Aleksey's defense that the confession was beaten out of him in this emotional case because they did not believe that the judge could dispassionately consider the evidence and apply the law. This was not a valid trial strategy.

In Dupree v. State, 305 S.C. 285, 287, 408 S.E.2d 215, 216-217 (1991), the South Carolina Supreme Court held defense counsel ineffective for failing to pursue the defendant's assertion that he had been threatened by the police and told they would pay someone to testify against him if he did not provide information about stolen property. The Court reasoned that the defendant stated he had told his lawyer about these threats, and his lawyer admitted at the PCR hearing he had been told about these threats. This Court found counsel was deficient for "failing to pursue the issue of the alleged threats of which he undisputedly had knowledge. "

Compounding counsel's ineffectiveness here is the fact that counsel wanted the jury to draw the inference that the second statement was extracted by threats of physical force. Stone testified that the PCR hearing that he attempted to raise that suggestion to the jury during trial. App. 3310, ll. 5-25.

³ Miranda v. Arizona, 384 U.S. 436 (1966).

Q: So basically you wanted them to draw the inference that something may have happened.

A: Exactly.

Q: Instead of spelling out the allegation?

A: Exactly.

App. 3310, ll. 21-25.

The PCR court ruled:

[T]he Applicant failed to assert what this “coercion” was either to the trial court or Counsel. Counsel failed to present any evidence of actual coercion and failed to assert at any time in their presentation of Agent Mears testimony any material, document or evidence which would suggest that the statement of Mr. Aleksey was the product of undue coercion. He failed in his burden of proof of showing either deficient performance or prejudice. There has been no showing of any omission of defense Counsel, which to a reasonable probability the result of either the Jackson v. Denno hearing, the guilt and/or the penalty phase would have been different. The allegation to the contrary must be dismissed.

App. 5107.

The mysterious two hour gap in the tape, reminiscent of Rose Mary Woods, and the uncontroverted change in Aleksey’s demeanor, provide evidentiary corroboration here. This audio tape can be made readily available to this Court. Aleksey repeatedly informed counsel he had been beaten and that is why he confessed. This is inexplicable when taken in context with defense counsel pursuing Aleksey’s factual innocence as the defense theory, leading to their “informed decision” not to conduct *voir dire* of the jury on the death penalty. Aleksey was simply ignored by counsel who did not believe him, and by their totally cynical belief that the trial judge would not even consider suppressing the confession based on the evidence Aleksey’s confession was beaten out him because SLED thought he had killed a comrade. And Stone, as seen, had an on-going

professional relationship with SLED by virtue of his position as an assistant solicitor and attorney with the state Insurance Reserve Fund.

Counsel recognized the importance of Aleksey's tearful second statement to the State's case. App. 3315, l. 19 – 3316, l. 7. He realized that the jury would have to doubt the truth of that statement for Aleksey to be found not guilty. App. 3315, ll. 16-18. Not only did defense counsel render ineffective assistance of counsel for failing to advance Aleksey's claim. Also, the failure to raise this claim was baffling in light of counsel's decision not to conduct any *voir dire* because they insisted on maintaining Aleksey's factual innocence. In other words, counsel forfeited Aleksey's right to *voir dire* the jury panel in order to advance a claim of innocence that they were not willing to pursue at trial.

Aleksey had the right to present a defense on this issue. See, Chambers v. Mississippi, 410 U.S. 284 (1973); Holmes v. South Carolina, 547 U.S. 319 (2006).

Additionally, Aleksey was denied his right to conflict-free counsel because it is certainly a fair inference that counsel failed to pursue this fertile ground of cross-examination when doing so would have meant that he would have to cross-examine witnesses employed at an agency with which he had a professional relationship both in his capacity as an assistant solicitor and as an attorney with the Insurance Reserve Fund.

This same potentially debilitating conflict of interest is operative when, as in the case at bench, the only police officers called as witnesses are members of neighboring law enforcement agencies. Neighboring and overlapping law enforcement agencies have close working relationships, and resentment engendered by a city attorney within the membership of such agencies could have an adverse effect on the relationship of the city attorney with members of his local police department. In addition, as a public prosecutor a city attorney is granted courtesies and assistance by the police departments and prosecuting authorities of the county and other municipalities. It is

possible that a vigorous and determined representation of a criminal defendant might result in the withdrawal or weakening of this helpful cooperation and, therefore, a city attorney might be tempted to temper his advocacy accordingly.

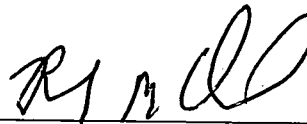
People v. Rhodes, 12 Cal. 3d 180, 184. (1974). See Mickens v. Taylor, *supra*, Cuyler v. Sullivan, *supra*, Holloway v. Arkansas, *supra*.

Counsel rendered ineffective assistance of counsel in derogation of Aleksey's right to effective assistance of counsel under the Sixth Amendment, and he is entitled to a new trial.

CONCLUSION

By reason of the foregoing arguments this Court should grant a writ of certiorari.

Respectfully submitted,



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November 24, 2014