

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.

A P P E N D I X

ROBERT M. DUDEK
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South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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ATTORNEY FOR PETITIONER

APPENDIX

- 1. Order Denying Petition for Rehearing, Filed June 25, 2014..... A1**
- 2. Order Denying Writ of Certiorari, Filed May 22, 2014 A3**
- 3. Order Denying Application for Post-Conviction Relief, Filed February 5, 2010... A4**

The Supreme Court of South Carolina

Bayan Aleksey, Petitioner,

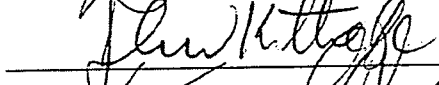
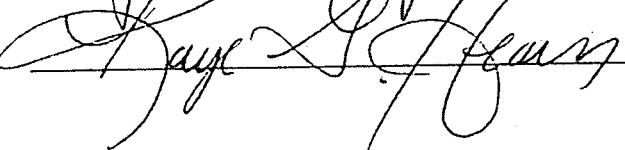
v.

State of South Carolina, Respondent.

Appellate Case No. 2010-173586

ORDER

The Petition for Rehearing filed in the above entitled matter is denied.

 C.J.
 J.
 J.
 J.
 J.

Columbia, South Carolina

June 25, 2014

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APPELLATE CLERK

cc:

Robert Michael Dudek, Esquire

Donald J. Zelenka, Esquire

The Supreme Court of South Carolina

Bayan Aleksey, Petitioner,

v.

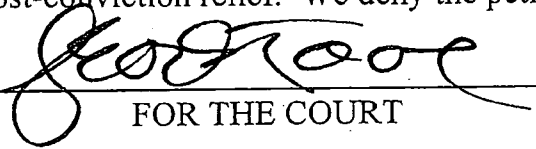
State of South Carolina, Respondent.

Appellate Case No. 2010-173586

Lower Court Case No. 2000-CP-3800628

ORDER

This matter is before the Court on a petition for a writ of certiorari following the denial of petitioner's application for post-conviction relief. We deny the petition.



FOR THE COURT C.J.

Columbia, South Carolina

May 22, 2014

cc:

Elizabeth Anne Franklin-Best, Esquire

✓ Robert Michael Dudek, Esquire

Donald J. Zelenka, Esquire

Alan McCrory Wilson, Esquire

John W. McIntosh, Esquire

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MAY 22 2014

OFFICE OF
APPELLATE DEFENSE

STATE OF SOUTH CAROLINA)
 COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS
 OF THE FIRST JUDICIAL CIRCUIT

BAYAN ALEKSEY, #5059)

Case No. 2001-CP-38-628

Applicant,)

vs.)

ORDER DENYING
 APPLICATION FOR POST-CONVICTION
 RELIEF

STATE OF SOUTH CAROLINA,)

Respondent.)

This matter comes before this Court by an application for state post conviction relief filed on May 31, 2001, as amended on January 31, 2005. The hearing was conducted from November 12, 2002-November 15, 2002 and July 7, 2003 through July 10, 2003. The Applicant, through Counsel James Brown of Beaufort and David Tarr of Columbia made an Applicant's Brief Supporting Third Amended Application for Post-Conviction Relief on January 31, 2005. After receipt of Memorandum of Law from each party, this Court indicated its intention to dismiss the application and requested Respondent's Counsel to submit a proposed order consistent with the Court's letter of October 12, 2006. For reasons not clear to the Court, neither Counsel received the letter until March 1, 2007. This Order follows:

I. Procedural History

Petitioner, Bayan Aleksey, #5059, is currently a safekeeper under a sentence of death at the Lieber Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Orangeburg County. Mr. Aleksey was arrested on January 1, 1998. At the January 1998 term of the Court of General Sessions for Orangeburg

FILED FOR RECORD
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 CLERK OF COURT
 ORANGEBURG, SC
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 CLERK OF COURT
 ORANGEBURG COUNTY, SC

County, Mr. Aleksey was indicted for murder. 98-GS-38-0244. He was represented by court-appointed Counsel, Thomas R. Sims and I. McDuffie Stone, III. On August 24, 1998, the matter was called to trial before the Honorable Edward B. Cottingham. The matter was prosecuted by Walter M. Bailey, Jr., Solicitor of the First Judicial Circuit. On August 29, 1998, the jury entered a unanimous verdict of guilty for the crime of murder. R. 1804.

The sentencing phase began on August 31, 1998. R. 1856. After testimony was received the jury was instructed to consider whether the State had proven beyond a reasonable doubt the existence of the following statutory aggravating circumstance:

1. Killing of a law enforcement officer of the State of South Carolina while in the performance of his duties.

R. 2156:12-16; 2146:20-22. The jury was also directed to consider the following statutory mitigating circumstance:

The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

R. 2161:25 - 2162:13. The jury was also instructed that "you may consider any other mitigating circumstance which is supported by the evidence in this case." R. 2162:14-22. After two (2) hours and ten (10) minutes of deliberation, on September 1, 1998, the jury found the existence of the statutory aggravating circumstance and recommended a sentence of death. R. 2171-72. The jury was polled on its verdict. R. 2172-74. Counsel made a motion for a new trial and sentencing. R. 2179-80. Judge Cottingham denied the motion. R. 2180. The judge then sentenced Mr. Aleksey to death. R. 2181-82.

The Petitioner was represented on appeal by Robert M. Dudek of the South Carolina Office of Appellate Defense. In the appeal, Counsel raised the following issues:

I.

Whether the judge violated Due Process when he instructed the jury that it had "one single objective and that is to seek the truth," because the charge was burden-shifting and it diluted the reasonable doubt standard since the jury's sole function was to determine whether the state proved Appellant's guilt beyond a reasonable doubt?

II.

Whether the judge erred by refusing to suppress Appellant's confession where Appellant told the police "that's all I have to say" after his statement, the police turned the tape recorder off for two hours, continued to converse with Appellant, made promises, did not give him Miranda warnings again before interrogation continued. The police did not scrupulously honor the invocation of Appellant's right to silence in violation of Michigan v. Mosley, and the judge also impermissibly delegated this portion of his Miranda duties to the jury by not ruling?

III.

Whether the judge erred by refusing to allow Appellant to cross-examine Gloryvee Perez about nine other serious narcotics counts of a New Jersey indictment against her where she testified on direct examination she had been convicted of simple possession of cocaine, since her credibility was at issue as a witness, and the jury was left with a false impression of Ms. Perez Blackwell and her credibility as a result of the direct examination?

IV.

Whether the judge erred by refusing to redact references to a contract on Appellant's life from his statement where the solicitor candidly admitted the jury could conclude Appellant had mafia dealings, since Appellant had not placed his character in issue, and the references were an obvious suggestion Appellant was a bad person with a propensity to commit murder?

The South Carolina Supreme Court entered its opinion on November 13, 2000. Rehearing was denied on December 6, 2000. State v Bayan Aleksey, 343 S.C. 20, 538 S.E.2d. 248 (2000).

The Applicant sought certiorari to the United States Supreme Court. In his petition for certiorari, he raised the following issue:

Were petitioner's due process rights under Estelle v. McGuire, 502 U.S. 61 (1991), violated where the trial court instructed the jury that it "had but one single objective, and that is to seek the truth," where only petitioner or his girlfriend could have shot the state trooper, since there was a reasonable likelihood that the jury understood the instruction to mean that its duty was to decide which of the two actually shot the trooper, making the instruction burden-shifting and lessening the state's duty to prove petitioner's guilt beyond a reasonable doubt?

On May 14, 2001, the Supreme Court denied the petition. Aleksey v. South Carolina, 532 U.S. 1027, 121 S.Ct. 1974, 149 L.Ed.2d 766 (2001) (cert. denied).

Counsel for Mr. Aleksey filed a petition for stay on May 22, 2001. On June 5, 2001, the Court issued an order for stay assigning this Court to handle the matter. Prior to this assignment, on May 31, 2001, appellate Counsel for Mr. Aleksey, Mr. Dudek, prepared and filed an application for state post-conviction relief on his behalf.

II. Summary of State's Version of the Case.

On December 31, 1997, Sergeant Franklin L. Lingard of the South Carolina Highway Patrol was murdered while on duty in Orangeburg County, South Carolina.

On New Year's Eve 1997, Sergeant Lingard of the South Carolina Highway Patrol stopped a white Ford Mustang with a Delaware license plate for speeding on Interstate 95. Sergeant Lingard approached the driver's side of the Mustang and was shot to death by a gun fired from inside the car on the driver's side. Officer Lin Shirer, a narcotics officer with the Calhoun County Sheriff's Office, accompanied Sergeant Lingard on patrol that night. Officer

Shirer witnessed the shooting, but was unable to see inside the car to identify the shooter because of its dark tinted windows.

A multi-car chase ensued. An officer stopped the Mustang long enough for Gloryvee Perez Blackwell (Ms. Perez Blackwell is referred to as Gloryvee, Gloryvee Perez, and Gloryvee Perez Blackwell during the trial and PCR hearing, she will be referred hereafter as Ms. Perez Blackwell) and her two children to exit from the passenger side of the vehicle. While Ms. Perez Blackwell and the children were exiting the car, appellant held a gun to his head and threatened to kill himself if the officers came any closer to him. Appellant sped away and was eventually stopped again when an officer deliberately collided his vehicle with the Mustang.

Appellant was pulled unconscious from the car, treated at the scene by EMS, then taken to the hospital, and from there to the Orangeburg/Calhoun Regional Detention Center on New Year's Day. A background check on appellant revealed an extensive record of arrests for fraud-related activities, outstanding warrants, and numerous aliases. In addition, both the Mustang and its license tag were reported stolen.

On January 2nd, appellant gave two statements to officers from the State Law Enforcement Division (SLED). In the first, he claimed Ms. Perez Blackwell was driving and shot Sergeant Lingard, after which they stopped and changed seats. In the second, appellant confessed to the shooting.

III. ALLEGATIONS IN THE APPLICATION FOR POST-CONVICTION RELIEF

In the initial application for post-conviction relief filed by Mr. Dudek on May 31, 2001, the following allegations are raised:

I. Ineffective Assistance of Trial Counsel.

1. The failure of trial Counsel to investigate and procure available impeachment evidence on Gloryvee Perez Blackwell. Ms. Perez Blackwell was the only other suspect in the case, and the failure to investigate her background was highly prejudicial to petitioner.
2. The failure of trial Counsel to object to a host of "other bad acts" evidence, including evidence about petitioner's sex life and details about his relationships with women, since this evidence was not necessary to the jury's consideration of the trial issues.
3. The failure of trial Counsel to argue during the Jackson v. Denno hearing that the petitioner confessed based on a promise from the police that he would be moved into the general population. Petitioner was concerned for his life, and a confession in return for a promise of his safety should have rendered the confession inadmissible.
4. The failure of trial Counsel to properly impeach Gloryvee Perez Blackwell with the ten count New Jersey drug indictment against her. Ms. Perez Blackwell's denial of any knowledge of dismissed counts directly affected her credibility, and also showed her knowledge of leniency for cooperating with the police.
5. The failure of trial Counsel to investigate and present any meaningful case in mitigation regarding petitioner's background.
6. The failure of trial Counsel to object to the judge's instruction that the jury would "consider the aggravating circumstances against the mitigating circumstances, and you will decide whether you will recommend the death penalty or life imprisonment." R. 2165. This was an improper "weighing" instruction.

In the applicant's final and third amended application, dated January 31, 2005, the Applicant, through Counsel Brown and Tarr make the following claims:

- A. Applicant was denied his right to collateral review of his conviction and death sentence as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law by trial Counsels' failure to retain a copy of the trial Counsel file, as required by South Carolina Code Section 17-27-130.

- (1) After trial, and prior to filing the application for post-conviction relief, trial Counsel released their respective files to applicant without retaining a copy.

B. Applicant's right to Counsel, as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60, was violated as a result of his representation throughout the pre-trial and trial proceedings by trial Counsel who labored under an actual conflict of interest arising from trial Counsel's simultaneous employment with the Fourteenth Circuit Solicitor's Office of the State of South Carolina. See Mickens v. Taylor, 535 U.S. 162, 122 S.Ct. 1237 (2002); Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway, et al. v. Arkansas, 435 U.S. 475 (1978); and Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001).

(1) At the time of the crime for which Applicant was convicted and sentenced to death and during every proceeding leading up to and including the actual trial of the case, Applicant's lead trial Counsel, Isaac McDuffie Stone, III, was employed as a part time assistant solicitor with the Fourteenth Judicial Circuit Solicitor's Office of the State of South Carolina. Applicant was prosecuted in the First Judicial Circuit which shares a geographic border with the Fourteenth Judicial Circuit. Applicant did not receive adequate information from Attorney Mr. Stone from which he could make an intelligent decision regarding his representation by Mr. Stone. Furthermore, Applicant did not receive any advice from an attorney who did not labor under a conflict of interest, so that he was unable to make an informed decision regarding his representation by Mr. Stone.

(2) Counsel's performance was adversely affected by this actual conflict of interest.

C. Applicant's right to Counsel, as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60, was violated as a result of his representation throughout the pre-trial and trial proceedings by trial Counsel who labored under an actual conflict of interest arising from trial Counsel's simultaneous employment with the South Carolina Insurance Reserve Fund. See Mickens v. Taylor,

535 U.S. 162, 122 S.Ct. 1237 (2002); Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway, et al. v. Arkansas, 435 U.S. 475 (1978); and Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001).

- (1) At the time of the crime for which Applicant was convicted and throughout trial Counsel's preparation of the case and during the actual trial of the case, Applicant's lead Counsel, Isaac McDuffie Stone was also employed as an attorney for the South Carolina Insurance Reserve Fund. Attorney Mr. Stone's primary duties in that capacity included the defense of state agencies and state employees against lawsuits filed by various parties. The state agencies Mr. Stone represented at the time he represented Applicant included, but are not limited to: the South Carolina Highway Patrol and Orangeburg County. The charge for which Applicant was convicted occurred in Orangeburg County, involved the murder of a South Carolina Highway Patrolman, and was investigated by SLED in cooperation with the Orangeburg County Sheriff's Department.
- (2) Counsel's performance was adversely affected by this actual conflict of interest.

D. **Abandoned.** [Issue D concerned Counsel Stone's representation of the South Carolina Department of Corrections]

E. Applicant's right to Counsel, as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60, was violated as a result of the trial court's failure to procure a valid waiver from the Applicant of his lead trial Counsel's actual conflict of interest which arose from trial Counsel's simultaneous employment as an attorney for the South Carolina Insurance Reserve Fund. Mickens v. Taylor, 535 U.S. 162, 122 S.Ct. 1237 (2002); Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway, et al. v. Arkansas, 435 U.S. 475 (1978); and Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001).

- (1) No valid waiver of Mr. Stone's potential conflicts of interests were obtained from the Applicant. No waiver of any sort was obtained from Applicant regarding Mr. Stone's actual conflict of interest.
- (2) Counsel's performance was adversely affected by this actual conflict of interest.

F. Applicant's right to Counsel, as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60, was violated as a result of the constructive absence of Counsel at the hearings regarding Applicant's lead trial Counsel's conflicts of interests. See U.S. v. Cronin, 466 U.S. 648, 659 (1984); Brooks v. Tennessee, 406 U.S. 605 (1972); and Fratt v. State, 298 S.C. 54, 378 S.E.2d 249 (1988).

- (1) Applicant was only represented by Mr. Isaac McDuffie Stone, III, and Thomas R. Sims at the hearings regarding Mr. Stone's conflicts of interest. Mr. Sims failed to provide Applicant any advice regarding these conflicts. Mr. Stone's conflicts of interests prevented him from assisting Applicant during the hearings regarding these conflicts.
- (2) The actions of the government, in appointing Mr. Stone and failing to provide Applicant with two lawyers free from conflict during a critical stage, amounted to the constructive denial of Counsel to Applicant at a critical stage in the proceedings and prejudice is presumed.

G. Applicant was denied the effective assistance of Counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial Counsel's failure to provide enough information to Applicant to enable Applicant to make a voluntary, knowing, and intelligent waiver of an actual conflict of interest, which arose during Applicant's proceedings, or to insist upon the appointment of alternate Counsel who did not labor under a conflict of interest. Strickland v. Washington, 466 U.S. 668 (1984) and Thomas v. State, 346

S.C. 140, 551 S.E.2d 254 (2001) (Petitioner has shown an actual conflict of interest that adversely affected her attorney's performance. Further, her initial waiver of a potential conflict did not act as a waiver of this actual conflict.)

- (1) Applicant was never advised of the specific types of hazards which arose during the course of representation provided by Mr. Stone. Applicant never waived these actual conflicts of interests.
- (2) Trial Counsel's performance was adversely affected by this conflict and, but for Counsel's deficient performance, the outcome of the trial proceedings would have been different.

H. Applicant was denied the effective assistance of Counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial Counsels' failure in the Jackson v. Denno hearing to argue that Applicant's "confession" was improperly induced by a promise and involuntary. Strickland v. Washington, 466 U.S. 668 (1984).

- (1) During the Jackson v. Denno hearing, it was revealed that Mr. Aleksey's confession was induced by a promise which rendered its production involuntary. Trial Counsel failed to raise this issue.
- (2) But for Counsel's deficient performance, the outcome of the trial proceedings would have been different.

I. Applicant was denied the effective assistance of Counsel as guaranteed by the Sixth and Fourteenth Amendments and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by Counsels' failure to request a change of venue due to extensive and prejudicial pre-trial publicity involving the offense charged and the Applicant's character and failure to explore this publicity through voir dire. Strickland v. Washington, 466 U.S. 668 (1984).

- (1) An extremely large number of newspaper articles, television broadcasts, and other media sources publicized

accounts of the shooting of the victim and the subsequent investigation. Further, many of these media releases concerned the "bad character" of the Applicant outside of the context of the case in issue. (The extent of this coverage was evidence from the responses obtained during the voir dire of the jury panel. In fact, ten of the fourteen jurors who actually sat in the trial of the Applicant's case indicated prior knowledge of this case from some source outside of the judicial system. However, trial Counsel inexplicably failed to inquire into the substance of these jurors' prior knowledge about this case.

- (2) But for Counsel's deficient performance, the outcome of the trial proceedings would have been different.

J. Applicant was denied the effective assistance of Counsel as guaranteed by the Sixth and Fourteenth Amendments and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial Counsels' decision to imply to the jury, through voir dire questioning, that Applicant was a foreign national. Strickland v. Washington, 466 U.S. 668 (1984).

- (1) Trial Counsel consistently asked jurors whether they could be fair to a foreign national. Applicant is not a foreign national and is in fact a U.S. citizen by nature of his birth in the United States. Further, Applicant has never lived outside of the United States.

- (2) But for Counsel's deficient performance, the outcome of the trial proceedings would have been different.

K. Applicant was denied the effective assistance of Counsel as guaranteed by the Sixth and Fourteenth Amendments and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial Counsels' complete failure to question any member of the jury panel regarding her view of the death penalty. See U.S. v. Cronin, 466 U.S. 648, 659 (1984); Hamilton v. Alabama, 368 U.S. 52, 55 (1961); Frett v. State, 298 S.C. 54, 378 S.E.2d 249 (1988) and S.C. Code Section 16-3-20(D) & (F).

- (1) The transcript is clear that both Counsel for defendant completely failed to ask any member of the jury panel questions regarding her view of the death penalty. In fact, Counsel states, "The defense is specifically not going to ask them any questions concerning their feelings on the death penalty, although we have a statutory right to do so." Further, it was Counsel's position, stated in the record, that this case would not go to the penalty phase and, therefore, questioning jurors regarding their view on the death penalty would be unnecessary. Also, Counsel requested the court to prohibit the solicitor from asking similar questions. (This request was denied).
- (2) Trial Counsel completely failed to subject the prosecution's case to adversarial testing during voir dire and prejudice is presumed.

L. Abandoned. [Issue concerned claim of ineffective assistance of Counsel based upon the failure to attempt to rehabilitate juror who indicated that they could only vote for life].

M. Applicant was denied the effective assistance of Counsel as guaranteed by the Sixth and Fourteenth Amendments and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial Counsels' failure to exercise a peremptory strike against juror number 144. Strickland v. Washington, 466 U.S. 668 (1984).

- (1) Counsel for Mr. Aleksey possessed information which would cause a jurors provided [sic] reasonable attorney to exercise a peremptory strike. Trial Counsel failed to exercise all of their peremptory challenges.
- (2) But for Counsel's deficient performance, the outcome of the trial proceedings would have been different.

N. Abandoned. [Issue concerned ineffective assistance of Counsel based upon the failure to object to the trial judge's appointment of SLED Agent Buster Edwards as supervisor of bailiff team when he worked for lead agency and had signed discharge papers from the hospital and served the arrest warrant on the Applicant].

- O. Applicant was denied the right to the effective assistance of Counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 163-26(B)(1) and 17-23-60 at the guilt or innocence phase of his trial: Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495 (2000); Strickland v. Washington, 466 U.S. 668 (1984); Jolly v. State, 443 S.E.2d 566 (S.C. 1994).
- (1) Beginning with the opening statement and throughout the entire guilt or innocence phase of Applicant's trial, trial Counsel "opened the door" to alleged prior bad acts and bad character of Applicant.
 - (2) Trial Counsel failed to properly cross examine and impeach state's witness Yelena Batkiline. Counsel did not impeach this witness with evidence of prior criminal convictions, character evidence involving specific instances of prior dishonest conduct, or challenging [sic] her false testimony.
 - (3) Trial Counsel failed to properly cross examine and impeach state's witness Lisa Watson. Counsel did not impeach witness with character evidence involving specific instances or prior dishonest conduct or challenging her false testimony.
 - (4) Trial Counsel failed to properly cross examine and impeach state's witness, and Applicant's former co-defendant, Gloryvee Perez Blackwell. Counsel failed to impeach witness with evidence of her motive to commit crime of which Applicant was charged. Counsel failed to prove Perez Blackwell's character through character evidence involving specific instances or relevant dishonest conduct.
 - (5) Trial Counsel failed to properly cross examine and impeach state's witness Sara Pivcro. Counsel did not impeach witness with character evidence involving specific instances of prior dishonest conduct.
 - (6) Trial Counsel failed to properly cross examine SLED agent Mears. Counsel did not question agent Mears about Applicant's allegations of coercion during police

interrogation. Counsel failed to question Mears about certain evidence belonging to Gloryvee Perez Blackwell found in car that was evidence of her recent criminal activity and gave her motive to shoot Sergeant Lingard. Counsel failed to cross examine agent Mears about the missing SLED statement of Sara Pivero.

- (7) Trial Counsel failed to properly cross examine SLED agent Darnell. See (6) above.
- (8) **Abandoned.** [Issue concerned trial Counsel's advice that Applicant not testify, although bad character evidence and confession could not be explained without Mr. Aleksey's testimony].
- (9) Trial Counsel failed to fully investigate the crime charged and the state's witnesses and to present that information to the jury in a coherent and meaningful manner.
- (10) Trial Counsel failed to adequately investigate Gloryvee Perez Blackwell. Such an investigation would have uncovered a substantial amount of evidence that Ms. Perez Blackwell had a significant motive to shoot the victim.
- (11) **Abandoned.** [Issue concerned failure of defense to hire a false confession expert].
- (12) But for Counsel's deficient performance, the outcome of the trial proceedings would have been different.

P. Applicant was denied the right to effective assistance of Counsel at guaranteed by the Sixth and Fourteenth Amendments, of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections and S.C. Code Sections 16-3-26(B)(1) and 17-23-60 at the sentencing phase of his trial. Williams v. Taylor, 529 U.S. 362 (2000); Strickland v. Washington, 466 U.S. 668 (1984); Jolly v. State, 443 S.E.2d 566 (S.C. 1994).

- (1) **Abandoned.** [Issue concerned alleged failure of Counsel Sims to adequately cross-examine Theresa McCann with specific instances of prior dishonest conduct].

- (2) Trial Counsel failed to properly cross examine and impeach state's witness Jaime Farrell by attacking her testimony with specific instances of prior dishonest conduct and by challenging her false testimony.
- (3) Trial Counsel failed to properly cross examine and impeach state's witness Sara Pivero. See Ground O, number 5.
- (4) Trial Counsel failed to properly cross examine and impeach state's witness Lisa Watson. See Ground O, number 3.
- (5) Trial Counsel failed to investigate backgrounds of state's witnesses and their allegations. Such an investigation would have provided a substantial amount of impeachment material.
- (6) Trial Counsel failed to investigate fully and effectively Applicant's life and background and to present the information to the sentencing jury in a coherent and meaningful manner. Counsel failed to utilize properly the information their investigation uncovered and to find other information. Counsel failed to employ the services of a social worker. Counsel failed to employ the services of an adaptability expert to testify as to Applicant's likelihood to adapt to prison life if sentenced to life in prison.
- (7) But for Counsel's deficient performance, the outcome of the trial proceedings would have been different.

Q. Applicant was denied due process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law by the prosecution's failure to disclose material information which was favorable to the defense on issues of guilt and punishment. Brady v. Maryland, 373 U.S. 83 (1963) and Kyles v. Whitley, 514 U.S. 419 (1995).

- (1) The prosecutor knowingly failed to disclose evidence of Gloryvce Perez Blackwell's motive and recent criminal activity and affirmatively mislead trial Counsel regarding the existence and materiality of this evidence.

- (2) The state knowingly failed to disclose, to Applicant's trial Counsel, evidence of Yelena Batkilina's prior criminal record and other specific acts of dishonesty, fraud and wrongdoing.
- (3) The state knowingly failed to provide, to trial Counsel, a statement given by Sara Pivero to the agents of SLED.
- (4) The state knowingly failed to provide, to trial Counsel, evidence of fraud involving state's witness Lisa Watson.

R. Applicant was denied his right to due process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law as a result of the prosecution's presentation of false testimony and failure to correct the false impression created by that testimony. Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, (1959), and Mooney v. Holohan, 294 U.S. 103 (1935), and Miller v. Pate, 386 U.S. 1 (1967).

- (1) The prosecutor knowingly presented false testimony when state's witness Yelena Batkilina testified incorrectly about the date of purchase of the weapon in this case, not clarifying conflicting testimony between Ms. Batkilina and state's witness French and allowing Ms. Batkilina to testify falsely that she had not seen Applicant after either the purchase of this weapon or, alternatively, after Applicant's release on bond for a Pennsylvania charge. The prosecutor had information in his possession which informed him this testimony was patently false. Further, the prosecutor specifically relied on this false testimony during his closing argument.
- (2) The prosecutor knowingly presented false testimony when state's witness Jaime Farrell testified that she did not deposit money into a New Jersey bank.
- (3) The prosecutor knowingly presented false testimony when state's witness Jaime Farrell testified that she did not withdraw money from a New Jersey bank.
- (4) The prosecutor knowingly presented false testimony when state's witness Lisa Watson testified. in the guilt

phase of the trial, that she had reported the White Mustang stolen on October 5, 1997.

- (5) The prosecutor knowingly presented false testimony when state's witness Lisa Watson testified, in the sentencing phase of the trial, that Bayan Aleksey stole money from her husband's credit cards.
- (6) Abandoned. [Issue concerned claim that the prosecution presented false testimony when Theresa McCann testified that the Honda CBR motorcycle was purchased while she was at work].

S. Applicant was denied the effective assistance of Counsel as guaranteed by the Sixth and Fourteenth Amendments and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by appellate Counsel's failure to argue on direct appeal that trial Counsel's actual conflict of interest was so serious as to be unwaivable. Strickland v. Washington, 466 U.S. 668 (1984) and United States v. Schwarz, et al., 283 F.3d 76 (2d Cir. 2002).

- (1) Applicant was represented at trial by Counsel who labored under several serious conflicts of interest, including simultaneous employment with the Insurance Reserve Fund, the Fourteenth Circuit Solicitor's Office for the State of South Carolina and the South Carolina Department of Corrections.
- (2) Trial Counsel's conflicts were of such a serious nature that no rational defendant would knowingly and intelligently desire that attorney's representation, regardless of whether the defendant was willing to waive his right to conflict-free Counsel.

III. DISCUSSION OF THE ISSUES.

In his third amended application, he makes various allegations relayed to acts and omissions by his original trial Counsel, Duffie Stone and Thomas Sims. He has failed to satisfy his burden of proof showing of ineffective assistance of Counsel.

A. Standards Governing Claims of Ineffective Assistance of Counsel.

In his Application, he makes various allegations concerning the effective assistance of Counsel in the sentencing phase. Under the standard for evaluating claims of ineffective assistance of Counsel, the Applicant must establish that Counsel's representation fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668 (1984). Counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of Counsel's performance is whether he fell outside of the range of competence demanded of lawyers practicing criminal law. Butler, supra. The scrutiny of Counsel's acts or omissions must be highly deferential and a reviewing court must make every effort to remove the distorting effects of hindsight. Strickland, 466 U.S. at 689.

Competency is measured against what an objectively reasonable attorney would have done under circumstances existing at the time of the representation. Savino v. Murray, 82 F.3d 593, 598 (4th Cir. 1996). The Court should "decline to allow an ineffective assistance of Counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial." Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996).

As the Supreme Court made clear in Strickland:

... the reasonableness of Counsel's actions may be determined or substantially influenced by the defendants own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigations are reasonable depends upon such information . . . [W]hen a defendant has given Counsel reason to believe that pursuing certain investigations would be fruitless or

even harmful, Counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Strickland, 466 U.S. at 691; Barnes v. Thompson, 58 F.3d 971, 978 (4th Cir. 1995); Matthews v. Evatt, 105 F.3d 907, 919-20 (4th Cir. 1997). The mere fact that trial Counsel's strategy was unsuccessful does not render Counsel's assistance unconstitutionally ineffective. Strickland, 466 U.S. at 689; Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995).

While Strickland does not require Counsel investigate every conceivable line of mitigating evidence or require the submission of such evidence in every case, "strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgment support the limitations on investigation... A decision not to investigate thus must be directly assessed for reasonableness in all the circumstances." Wiggins v. Smith, 539 U.S. 510, 533, 123 S.Ct. 2527, 2541, 156 L.Ed.2d 471 (2003); Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004).

In Rompilla v. Beard, the Supreme Court reaffirmed that a trial Counsel's performance cannot be found adequate if it is supported by an unreasonably limited investigation. Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). Rompilla's mitigation evidence consisted of testimony from five of his family members who pleaded with the jury for mercy, and asserted that Rompilla was an innocent and good man. Id. at 378. Nonetheless, the jury found that the aggravating factors outweighed the mitigation evidence and sentenced Rompilla to death. Rompilla later presented a habeas claim for ineffective assistance of Counsel for trial Counsel's failure to present significant mitigating evidence about Rompilla's childhood, mental capacity and health, and alcoholism. Id. Rompilla argued that trial Counsel should have

examined his school records, especially considering several of his family members were unfamiliar with his childhood and trial Counsel knew that he had left school after the ninth grade. Id. at 382-83. Moreover, Rompilla asserted that trial Counsel should have investigated his juvenile and adult incarceration records considering that Counsel knew that he had a criminal history. Id. In addition, Rompilla faulted trial Counsel for not investigating whether he had a history of alcohol dependency in light of certain indications of alcohol abuse. Id. The Third Circuit found that defense Counsel was not ineffective given Counsel's efforts in investigating, including interviewing Rompilla, several of his family members, and consulting three mental health experts. Id. at 378-79. Moreover, the state court found that defense Counsel extensively interviewed Rompilla and several of his family members, and that Rompilla was often actively obstructive in assisting trial Counsel in his defense. Id. at 381-82, 398-99. The Supreme Court reversed the denial of habeas relief. The Court found that trial Counsel's investigation was unreasonable because Counsel failed to examine Rompilla's prior conviction file even though the prosecution had acknowledged that it was going to use Rompilla's prior convictions as an aggravating factor to push for the death penalty. Id. at 383-84. The Rompilla Court rejected the argument that trial Counsel sufficiently investigated Rompilla's prior convictions by reviewing his rap sheet. Id. at 385 n. 3. The Court held that if trial Counsel had examined Rompilla's prior conviction file, Counsel would have found information that would have made them skeptical of the impression of Rompilla's background they had gotten from the family members thus far. Therefore, Counsel would have undoubtedly investigated further and uncovered the voluminous mitigating evidence not introduced at trial. Id. at 390-91. The Court also rejected the contention that the efforts that Counsel did take--namely, extensively interviewing Rompilla and his family,

and consulting three mental health experts--were enough to release Counsel from investigating further. Id. at 387-89.

In addition to a burden of showing "deficient" performance, Counsel must also prove "prejudice" under the Sixth Amendment. In Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004), the South Carolina Supreme Court cited with approval the United States Supreme Court holding that the capital defendant had proven prejudice because there is a reasonable probability at least one juror would have struck a different balance and returned with a different sentence had the jury been confronted with the considerable mitigating evidence. Wiggins 539 U.S. at 536, 123 S.Ct. at 2543; see also Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (defendant's attorneys were ineffective in failing to investigate and present substantial mitigating evidence during penalty phase of capital case, including description of abuse and neglect during defendant's early childhood and testimony he was borderline mentally retarded; Counsel's error prejudiced defendant because omitted evidence might have influenced jury's appraisal of defendant's moral culpability).¹ In Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003), when reviewing a claim of ineffective assistance of Counsel at the penalty phase of a capital trial stated:

"In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), we made clear that, to establish prejudice, a defendant must show that

¹ In Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998), the South Carolina Supreme Court restated the "prejudice" prong in a capital sentencing proceeding as being established when "there is a reasonable probability that, absent [Counsel's] errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death," citing Strickland. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Jones, 504 S.E.2d at 823-824; accord Plath v. Moore, 130 F.3d 595 (4th Cir. 1997) ("given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and hence, the sentence imposed." Thus, in weighing the omitted evidence against that actually used to convict and sentence Plath, the mitigating evidence seems insufficient to shift the balance in Plath's favor.").

there is a reasonable probability that, but for Counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' *Id.* at 694. In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence."

Wiggins, 539 U.S. at 534. This Court concludes that Mr. Aleksey is unable to satisfy this burden of proof from his allegations.

B. Discussion of Specific Claims

- A. Applicant was denied his right to collateral review of his conviction and death sentence as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law by trial Counsel's failure to retain a copy of the trial Counsel file, as required by South Carolina Code Section 17-27-130. [Applicant's Memo., p. 50-55].

Failure to Retain Original Files by Trial Counsel

In his initial allegation, Mr. Aleksey contends that the federal constitution and state law demand that he is entitled to a new trial based upon the failure of his trial Counsel to retain custody of their entire file. The Applicant contends that S.C. Code Ann. Section 17-27-160 demands that custody be maintained by trial Counsel in capital cases and the failure to do so was error. He contends that trial Counsel's "improper disposal" of their file worked to the detriment of Mr. Aleksey because it compromised the ability of trial Counsel to state whether or not a particular document was in the file at least sixteen times during the hearing. In their memorandum, the Applicant notes several passages from the testimony of Counsel Sims and Mr. Stone where the lack of the file precluded their ability to refresh their recollection concerning their knowledge as supportive of their due process violation. See Applicant's Memo. p. 51-54. He now contends that this prejudiced their presentation and therefore demands a new trial.

S.C. Code Ann. § 17-27-130 provides for waiver of attorney-client privilege by allegation of ineffective prior Counsel and to prior Counsel's files during a state post-conviction relief proceeding. In its pertinent part, it states:

... In the case of a defendant who has been convicted of a capital offense and sentenced to death, the defendant's prior trial Counsel or appellate Counsel shall make available to the capital defendant's collateral Counsel the complete files of the defendant's trial or appellate Counsel. The capital defendant's collateral Counsel may inspect and photocopy the files, but the defendant's prior trial or appellate Counsel shall maintain custody of their respective files, except as to the material which is admitted into evidence in any trial proceeding.

(Emphasis added). The act was passed in 1996 and is clearly applicable to the present proceeding.

The record before this Court is uncontradicted that trial Counsel, upon request, turned their original file directly over to the Bayan Aleksey without keeping a complete copy of their own records. Counsel Thomas Sims testified that he sent his file back to Mr. Aleksey and did not maintain a copy. PCR R. 68. He stated that Mr. Aleksey wanted his entire file. He recalled that he spoke with Mr. Stone about it, after he received a call from someone in the grievance office of the Bar who said to give Mr. Aleksey the file. PCR R. 69. Mr. Sims stated that while he had a file during the representation, Mr. Stone's file was the central file. PCR R. 618. Simms stated that there was an attorney grievance filed by Mr. Aleksey limited to Mr. Aleksey receiving his file. PCR R. 660. Simms stated again that information he received from the grievance committee gave Simms the impression that he had no other choice but to turn his original file over to Mr. Aleksey. PCR R. 661. This was done in February 1999 before any post conviction proceedings had begun. PCR R. 661.

Counsel Duffie Stone testified that he had copies of some matters, that he retained, but none of the original file except for correspondence he received from Mr. Aleksey after the file was turned over to the applicant. Counsel stated that a copy of his computer time records were retained. On February 22, 1999, he stated he sent the original file to Mr. Aleksey. PCR R. 827.

As Mr. Stone stated in his letter to Mr. Aleksey:

"Please understand that you have the originals of this file. I have not made any copies nor retained anything other than what I have in my computer and my attorney notes. If you lose any of these materials it may compromise both your appeal and your post-conviction relief petition."

PCR R. 829.

Mr. Stone stated that in February 1999, he was unaware of the statute that required capital trial Counsel to maintain the original file; he remained unaware until he received a copy of the application for post conviction relief. PCR R. 829-830. Mr. Stone stated that he retained some work product, but not the discovery materials. Mr. Stone stated that he was unaware of the statute when Mr. Aleksey asked for the file, but still did not want to give it to him because he thought it was a bad idea. PCR R. 831. Mr. Stone noted that the January 28, 1999 letter he received from Mr. Aleksey demanded "the original, not a photocopy." Id. Since Mr. Stone felt it would have been a delay in turning the file over to Mr. Aleksey, after receipt of the disciplinary council correspondence, "I decided to move as quickly as humanly possible." Mr. Stone stated that he felt that he needed to hold the file until someone was appointed to represent Mr. Aleksey on appeal and then would turn the file over to them. PCR R. 1140. Mr. Stone was concerned about sending a file into the prison based upon his desire to preserve the attorney-client

privileged matters and also concerned about how much of the material Mr. Aleksey could keep or whether some of the file would be seized. PCR R. 1141.

Mr. Stone felt that when Mr. Aleksey grieved him over the file, he should turn it over to him on Feb. 19, 1999. PCR R. 1144. At that time Mr. Aleksey's appeal was still pending. Counsel Stone, prior to the release contacted Professor Adams at the U.S.C. Law School about Mr. Stone's ethical concern about turning over the file, and Professor Adams advised Mr. Stone to give up the file. There was no discussion about Section 17-27-130. PCR R. 1144. Mr. Stone stated that there was no place, like Kinko's Copy Center or other quick copying place in Beaufort nor was there someone he was willing to turn the file over to make copies. Mr. Stone felt that retaining a copy of his billing records and some of the other materials would be sufficient to refresh his memory about the case.

Mr. Stone stated he had discussions with Mr. Sims, but did not recall specifics. PCR R. 1146. Mr. Stone stated that when he received the grievance his first thought was to get rid of the file which is what he did. PCR R. 1146.

On redirect, Mr. Stone acknowledged that there was never any official order from the grievance committee mandating him to turn over the file, but based on his communications he felt directed to do so. PCR R. 1230.

Analysis

The Applicant makes various constitutional claims and implies that the state statute provides the remedy of a new trial if trial Counsel does not maintain their original file. There is nothing in the statute which creates such an occurrence.

It is undisputed that the appeal was still pending at the time of the January 1999 request by Mr. Aleksey for his original file. It is also undisputed that Mr. Aleksey received the entire original files of both Mr. Sims and Mr. Stone based on his insistence (e.g. complaints to grievance committee). Now, Mr. Aleksey asserts because he personally received the original file from his Counsel, he is entitled to a new trial because his actions may have impaired his ability to prove his PCR case (apparently Mr. Aleksey commingled his original files with independently received documents and materials from his own Freedom of Information Act (F.O.I.A.) requests).

Mr. Aleksey cannot gain a new trial where his own intentional conduct created the alleged technical violations. The hindrance and difficulty he complains of in presenting his case was caused when he demanded that Counsel not comply with the statute by demanding his original files. Further, his own actions in commingling the materials cannot be deemed to work to his benefit.

In conclusion, this Court must deny the Applicant's request for relief. It is clear from all the evidence presented that the reason trial Counsel did not retain a copy of the Applicant's file was because of the Applicant's persistence that he be given the file and Counsel's reasoned response to a grievance filed to obtain the file. Further, trial Counsel only released the file to Mr. Aleksey after they consulted with ethics experts on the issue. Furthermore, even assuming ineffective assistance of Counsel, Mr. Aleksey has failed to show prejudice. Mr. Aleksey has his file. As a result, the Court denies Applicant's request for relief as it pertains to Ground A.

- B. Applicant's right to Counsel, as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60, was violated as a result of his representation throughout the pre-trial and trial proceedings by trial Counsel who labored under an actual conflict of interest arising from trial Counsel's simultaneous employment with the Fourteenth Circuit Solicitor's Office of the State of South Carolina. See Mickens v. Taylor, 535 U.S. 162, 122 S.Ct. 1237 (2002); Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway, et al. v. Arkansas, 435 U.S. 475 (1978); and Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001). [Applicant's Memo., p. 84-117]

**Appointed Trial Counsel Stone's Part-time Employment
As Assistant Solicitor in Different County.**

In his allegation B, he contends that appointed trial Counsel Duffie Stone's part-time employment with the Fourteenth Circuit Solicitor's Office created a conflict of interest which should require a new trial. Relying on Howerton v. State, 640 P.2d 566, 566-67 (Okla. 1982), where the Oklahoma Court of Appeals determined that it was error to allow a part-time prosecutor from one jurisdiction to represent an indigent in another jurisdiction, Mr. Aleksey now contends that the conflict was unwaivable, or if waived, could not be intelligently waived. He further relies upon testimony from Professor John Freeman who opined that under S.C. Bar Ethics Advisory Opinion 77-2, referencing A.B.A. Formal Opinion 142 and A.B.A. Formal Opinion 262, a prosecutor is precluded from representing a criminal defendant while a part-time prosecutor in another jurisdiction. For the reasons set forth below, this Court is constrained to deny the requested relief.

The Sixth Amendment right to effective assistance of Counsel under the federal Constitution includes the right to representation free from any conflict of interest that impairs

Counsel's efforts on behalf of his or her client. Mickens v. Taylor, 535 U.S. 162, 166, 171, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002). Under the federal Constitution, when Counsel suffers from an actual conflict of interest, prejudice is presumed. Cuyler v. Sullivan, 446 U.S. 335, 349, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). This presumption arises, however, "only if the defendant demonstrates that Counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" Strickland v. Washington, 466 U.S. 668, 692, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (citing Cuyler, 446 U.S. at 348). An actual conflict of interest means "a conflict that affected Counsel's performance - as opposed to a mere theoretical division of loyalties." Mickens, 535 U.S. at 163. To prove an actual conflict of interest, a defendant "must show that [his] interests diverge[d] with respect to a material factual or legal issue or to a course of action." Gilbert v. Moore, 134 F.3d 642, 652 (4th Cir. 1998) (*en banc*); see also United States v. Tatum, 943 F.2d 370, 376 (4th Cir. 1991) (stating that an actual conflict adversely affecting representation can include an attorney's action taken on behalf of one client that is necessarily adverse to the defense of another or an attorney's failure to take action on behalf of one because it would adversely affect the other).

As the Supreme Court recognized in Mickens, "not all attorney conflicts present comparable differences," which results in a varying (and lesser) degree of scrutiny in criminal matters where, for example, "Counsel previously represented another defendant in another substantially related matter, even where the trial court is aware of the prior representation." Mickens 535 U.S. at 175. The Court noted that the circuit courts of appeals have engaged in an "expansive application" of the standard which "the language of Sullivan itself does not clearly establish, or indeed support." Id. In other words, the Supreme Court found that Sullivan's

concurrent representation standard had been applied in situations not envisioned by the Sullivan Court. The Court further noted that the "purpose" of the Sullivan and Holloway standards was "not to enforce the Canons of Legal Ethics, but to apply needed prophylaxis in situations where Strickland itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to Counsel." Id. "[B]reach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of Counsel." Id. (quoting Nix v. Whiteside, 475 U.S. 157, 165, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986)). In the end, however, because it was not presented with this issue squarely, the Court declined to resolve the scope of Sullivan, leaving it an "open question." Id. at 176.

In Longworth v. Ozmint, 302 F.Supp.2d 535 (D.S.C. 2003), the court stated that for practical purposes the Supreme Court made it clear that applying Sullivan "unblinkingly" to "all kinds of alleged attorney ethical conflicts," Mickens, 535 U.S. at 174 (quoting Beets v. Scott, 65 F.3d 1258, 1266 (5th Cir. 1995) (en banc)), is unwise, but has left intact (at least for the moment) circuit court opinions making such expansions. See also Moss v. United States, 323 F.3d 445, 461-64 (6th Cir. 2003) (noting the distinction drawn by the Mickens Court). The Mickens decision itself affirmed and left unchanged the holding and analysis on the conflict of interest issue set out by the Fourth Circuit in Mickens v. Taylor, 240 F.3d 348 (4th Cir. 2001). However, the court there only focused its analysis on the "adversely affect" portion of the standard, and not the "actively represented" portion.

Looking elsewhere, the Fourth Circuit has interpreted the "actively represented" standard to mean that the Petitioner must demonstrate that the attorney represented interests which "diverge[d] with respect to a material fact or legal issue or to a course of action." Gilbert v.

Moore, 134 F.3d 642, 652 (4th Cir. 1998) (en banc) (quoting Sullivan, 446 U.S. at 356 n. 3, 100 S.Ct. 1708 (Marshall, J., concurring in part and dissenting in part)).

The two requirements, an actual conflict of interest resulting in an adverse effect on Counsel's performance, are often intertwined, making the factual analyses of them overlap. An attorney has an actual conflict when he actively represents conflicting interests. Sullivan, 446 U.S. at 350, 100 S.Ct. 1708. His representation of conflicting interests, however, is not always as apparent as when he formally represents two parties who have hostile interests. He may harbor substantial personal interests which conflict with the clear objective of his representation of the client, or his continuing duty to former clients may interfere with his consideration of all facts and options for his current client. When the attorney is actively engaged in legal representation which requires him to account to two masters, an actual conflict exists when it can be shown that he took action on behalf of one. The effect of his action of necessity will adversely affect the appropriate defense of the other. Moreover, an adverse effect may not always be revealed from a review of the affirmative actions taken. Rather, the failure to take actions that are clearly suggested from the circumstances can be as revealing. United States v. Tatum, 943 F.2d 370, 375-76 (4th Cir. 1991).

1. How the issue was presented at trial.

The record reveals that on February 2, 1998, before Judge Brown, during the arraignment, information was presented concerning Mr. Stone's potential conflict. Particularly, Solicitor Bailey advised the Court that there may be a conflict based upon Mr. Stone's part-time Solicitor position and asked for the court to make inquiry.

Mr. Stone advised the Court:

...I explained to him earlier that when Judge Hughston appointed me on this case that I did part time solicitor work, and I explained to him, in fact, that a solicitor in South Carolina is a prosecutor. I believe he [Mr. Aleksey] understands that, but I don't have any problem, in fact, with asking you to go back over that. I also explained to him that I did insurance reserve fund work, which means I represented state agencies before, which would include police agencies and the highway patrol. I explained that to him, as well. ...I believe he understands that. He told me he wishes for me to continue. However, I would rather leave that to you to ask him.

Q. [Court] 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. [Mr. Aleksey] Yes.

Feb. 2, 1998 TR. 5-7, App. Ex. 70, PCR R. 737-39.

Subsequently on May 20, 1998 [misabeled in some of the trial transcript as May 28, 1998] before Judge Cottingham, Solicitor Bailey again requested that the Applicant's waiver of the potential conflict be placed upon the record again after Counsel's qualifications were placed on the record:

Mr. Stone: That's best, your Honor. Your Honor, again I am 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 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 Mr. 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 you do consent to him to continue in this 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.

R. 2192; see also PCR R. 740-43.

At the pretrial hearing on August 24, 1998, Solicitor Bailey again wanted to make the record clear that Mr. Stone was a part-time assistant solicitor in a different circuit and that Mr. Aleksey had been made aware of it and continued to desire to waive it. R. 180-81.

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 this circuit here in Orangeburg. Do you understand that?

Defendant Aleksey: Yes, your Honor.

The Court: You fully understood 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) (Indicating affirmative response).

The Court: You may be seated.

Mr. Stone: One other thing, your Honor, too, and we covered this at a prior hearing as well. I also do work with Insurance Reserve Fund which insures state agencies, which obviously includes the Department of Public Safety. I think we have gone through that on that record.

The Court: I think the record is abundantly clear on that.

R. 181-82.

2. The Post-Conviction Testimony

During the state post-conviction relief hearing, Counsel Stone and Sims both revealed their recollections of the representation and discussions with Mr. Aleksey.

a. Duffie Stone

Mr. Stone testified that at the time he represented Mr. Aleksey, he was a part-time prosecutor in the Fourteenth Circuit, exclusively in Beaufort. PCR R. 718-19. He stated this allowed him to have a private practice. He stated that throughout his practice, he never had any

dealings with Sergeant Lingard, the victim, although he had dealings with a number of troopers. PCR R. 723. He stated he began as a part-time prosecutor in 1997. PCR R. 724-25.

Mr. Stone declared that a large bulk of his private practice had been civil litigation assigned from the Insurance Reserve Fund. PCR R. 725-27. He stated that he had represented state employees, including the Department of Corrections and highway patrolmen. PCR R. 729.

Mr. Stone recalled speaking with Mr. Aleksey concerning his other employment on February 2, 1998. He recalled telling Mr. Aleksey about his work in Solicitor's Office, what a solicitor means [prosecutor] and also what he did for the Insurance Reserve Fund [I.R.F.] in representing agencies which include the highway patrol and Orangeburg County. PCR R. 730-31. Mr. Stone explained to him he had never represented Sergeant Lingard and never met him, to his knowledge. PCR R. 731.

Mr. Stone noted at a later time, Mr. Aleksey attempted to file some lawsuits and Mr. Stone advised him he could not help him on those because he worked with the I.R.F. PCR R. 732, 734-35.

Mr. Stone stated that prior to the voir dire, on August 25, 1998, another similar inquiry was held in open court where the potential conflict as a part-time prosecutor was developed. PCR R. 744, R. 180-82. Mr. Stone stated that he specifically brought up the Insurance Reserve Fund at that time. PCR R. 745-47. At the PCR, Counsel Stone noted that there was no discussion about I.R.F. work at the May 1998 proceeding (although there was at the February 1998 hearing). PCR R. 747-49.

It was developed that Mr. Stone had made \$67,000 in 1998, \$93,000 in 1999 and \$133,000 in 2000 from his work with the I.R.F. PCR R. 753-54.

Inquiry was made of Mr. Stone concerning the South Carolina Bar Ethics Advisory Opinion 77-2 and the A.B.A. Ethics Opinions 142 and 262. PCR R. 980-83. Mr. Stone stated that he had always assumed that "full-time prosecutors could not have a private practice", but had not heard that part-time prosecutors were prohibited from representing defendants outside of their circuits. PCR R. 984. Mr. Stone stated that he was required to place himself on the appointment list for cases and a requirement that he put his name on the list for conflicts outside of his circuit. PCR R. 985.

On cross-examination, Mr. Stone stated that he had specific communication with Mr. Aleksey about explaining to him what his role as a solicitor was as well as explaining the Insurance Reserve Fund. PCR R. 1129. Mr. Stone stated that his work in the Fourteenth Circuit Solicitor's Office was limited to prosecuting cases in Beaufort County and had not tried any cases outside of that county. Id. Mr. Stone also stated while a part-time prosecutor, he had defended other cases outside of Beaufort, including appointment on another death penalty case in Orangeburg after this one, Patty Syphert. PCR R. 1130-31.

Mr. Stone stated at the time of his 1997 representation of Mr. Aleksey, he stated that he felt that court rules required him to put himself on conflict [appointment] list outside of places where he had a conflict. PCR R. 1131-32.

Mr. Stone stated that in 1997 he did not feel that he could not adequately represent Mr. Aleksey based upon his part-time status in the Fourteenth Circuit. PCR R. 1131. He stated that nothing occurred during the Mr. Aleksey representation that caused him to think or hold back on cross-examination or the development of evidence based upon in other role with the Fourteenth Circuit. PCR R. 1132:12-19.

Considering SCACR Rule 407, 1.7(b)(1) on whether he believed that the representation would be adversely affected,² Mr. Stone stated, in hindsight, that his assessment of his Mr. Aleksey representation was that it would not have been different based upon either his role as a part-time prosecutor or his I.R.F. role. PCR R. 1133.

Mr. Stone acknowledged that in his role with assignments from the Insurance Reserve Fund, he had represented Orangeburg County, the Sheriff of Orangeburg County, South Carolina troopers, the Department of Public Safety and other entities. PCR R. 1133-34. He declared that the ongoing representation did not impact his ability to defend Mr. Aleksey. PCR R. 1134. To the contrary, Mr. Stone suggested that he had developed a knowledge of police procedures which probably would have worked to Mr. Aleksey's advantage. PCR R. 1134. Mr. Stone reiterated that he had discussed with Mr. Aleksey the fact of his representation of the state and county entities at the time of the trial. PCR R. 1134-35.

Mr. Stone stated that Mr. Aleksey never sought, after the initial consultation, to have him removed and consistently consented to the representation. PCR R. 1135.

Mr. Stone stated that his work on Mr. Aleksey occurred at his Beaufort office and no material went to the Fourteenth Circuit. PCR R. 1135.

Mr. Stone stated his work with Orangeburg County did not impact his representation of Mr. Aleksey concerning the escape charge against his client. PCR R. 1136. He stated it had nothing to do with it and that the only thing relevant was to determine if it was "a real escape attempt." PCR R. 1136. He said he or Mr. Sims went to Willie Bamberg, the Director of the Detention Center to find out why Mr. Aleksey was charge with escape after looking at the

² Rule 1.7(b)(1): "The lawyer reasonably believes that the representation will be adversely affected."

window and determine that either he could not have gotten through the window, or if so the fences. PCR R. 1136-37.

Mr. Stone stated that Mr. Aleksey had told him, at some point, that the police had coerced a confession which would be an obvious defense to that evidence. However, Mr. Stone felt this assertion was not backed up by his taped interview with WIS-TV. However, his I.R.F. representation of various entities did not affect the manner he approached the claims. PCR R. 1137-38.

Mr. Stone stated that the confession itself revealed a two hour and seven minute gap between each statement. His obvious cross-examination would (and did) concern what happened in the gap. Mr. Stone recalled using a board during his cross-examination of the officers, outlining the time from and demeanor leading to the crying. PCR R. 1138. Further, he recalled using the confession form given Mr. Aleksey that he could stop answering questions at any time to emphasize what it means to them when a person says they don't want to talk anymore, which occurred at the end of Mr. Aleksey's first statement. The obvious point needed to be presented at trial in cross-examination and was done. PCR R. 1139.

Mr. Stone stated he also made a F.O.I.A. request to get every case the agents had handled to determine how many resulted in confessions and used that on cross-examination. PCR R. 1139. "But there was nothing in that that made me feel uneasy about cross-examining them." PCR R. 1139-40. Mr. Stone opined that his other representation of S.C.D.C., Orangeburg County, SLED, and other entities did not cause him to hold back anything concerning his investigation of the statement. PCR R. 1140.

Mr. Stone did not know if co-Counsel Sims ever discussed the conflict issue with Mr. Aleksey outside of his presence. PCR R. 1146. Mr. Stone reiterated that after he had disclosed to Mr. Aleksey his representation as a part-time prosecutor and the Department of Public Safety and the Highway Patrol, and that the victim was a trooper Mr. Aleksey never indicated he wanted him removed and in fact like the idea. PCR R. 1147.

Concerning the Jackson v. Denno issue, Mr. Stone stated that his client advised him that the confession was "coerced" or "pressured" but did not mention to him (or in the WIS interview) that he was beaten. PCR R. 1147. He stated he never received a vivid description of the coercion. PCR R. 1147. In his notes of March 23, Mr. Stone suggested nothing was new except allegations of beating the confession out of him. PCR R. 1147-48. Mr. Stone stated he noted then that Mr. Aleksey had not told WIS-TV about any beating and his response was only that he was under pressure; Mr. Stone did not recall him saying "they beat the confession out of him."

Mr. Stone stated he spoke with Mr. Aleksey a number of times concerning the confession and what caused him to give it. He told him he was coerced or pressured, but there was not any physical abuse.

Mr. Stone stated that they discussed with Mr. Aleksey testifying at the Jackson v. Denno hearing and they decided he would not. PCR R. 1149. Mr. Stone noted they were successful, nevertheless in keeping out a statement Mr. Aleksey made while in custody at the hospital concerning a Russian mob hit.

Mr. Stone stated that his role as either a part-time prosecutor or with his I.R.F. work did not impact on his presentation of challenges at the Jackson v. Denno hearing. PCR R. 1150.

When Mr. Aleksey filed the series of *pro se* lawsuits, Mr. Stone stated he sent him a letter on March 10 confirming that he could not assist him any lawsuit against the S.C.D.C. and possibly Orangeburg County because of his Insurance Reserve Fund representation. PCR R. 1225-26.

Mr. Stone, however, re-affirmed that the letter and lawsuits did not affect the manner he personally handled the defense. PCR R. 1226.

On re-direct Mr. Stone stated he had represented Willie Bamberg, the head of the detention center in Orangeburg in the past, but was unclear if he was representing him while representing Mr. Aleksey. PCR R. 1230.

b. Thomas Sims

Co-Counsel Thomas Sims testified that he spoke with Mr. Aleksey about the fact that he was a former prosecutor and during the conversation explained that Mr. Stone was currently a prosecutor part-time in another circuit. PCR R. 58-59. Mr. Sims, however, denied having any knowledge of what particular civil cases Mr. Stone was handling at that time. PCR R. 60-61. Mr. Sims acknowledged that a solicitor carried the same power of arrest any citizen had, but was unclear what, if any, power of arrest they had beyond that, although they frequently carried badges for identification purposes.³ Mr. Sims acknowledged that there is a procedure for the Attorney General to assign another solicitor to handle conflict matters in a different circuit. PCR R. 66. However, Mr. Sims stated that Mr. Stone had no jurisdiction in the First Circuit and had not been granted any authority by Solicitor Bailey or the Attorney General. PCR R. 67-68.

³ Solicitors and assistant solicitors do not possess a power of arrest greater than those of any citizen. The power of arrest is limited to "qualified" law enforcement officers certified through training at the Department of Public Safety. S.C. Code Ann. § 23-6-430 (1976).

On cross-examination, Mr. Sims stated he had discussions with Mr. Stone about whether his role in the Fourteenth Circuit would impact his ability to represent Mr. Aleksey. PCR R. 611. "At no time was I ever under the opinion or under the influence that he would not do what was required." PCR R. 611. He said Mr. Stone never suggested to him that he was acting under any conflicting loyalties. PCR R. 611. Mr. Sims never found that Mr. Stone suggested or failed to take any act based upon something that could impact other clients through the I.R.F., or for Orangeburg police or the detention center. PCR R. 611.

Mr. Sims declared that Mr. Aleksey never asked Mr. Stone to be removed from the case. PCR R. 612. Mr. Sims acknowledged that he talked with Mr. Stone about their experiences as prosecutors and how it gave them an understanding as to what a prosecutor might be looking for and how they would go about it. PCR R. 613.

c. Professor John Freeman

Professor Freeman, an expert in legal ethics, testified, over objection, concerning whether a conflict of interest existed in the representation by Mr. Stone and whether it was waivable. It was Professor Freeman's opinion that Mr. Stone should not have been in the case based upon his service as a part-time prosecutor, coupled with his civil work where he made money from representing law enforcement officials which compromised his independence and that somebody in this situation should not believe that representation would not be adversely affected. PCR R. 1453-54. He further opined that since this was a death penalty case the standards are high.

Professor Freeman opined that a conflict such as Mr. Stone's was not a waivable conflict. However, he opined that even if it was, the waivers were inadequate, particularly in a death penalty case because Mr. Aleksey was not informed of the potential negative side effects of Mr.

Stone's representation. PCR R. 1455. He stated more detail was necessary to cover the pluses, minuses and foreseeable consequences. PCR R. 1455-56.

Professor Freeman noted his reliance on S.C. Bar Ethics Advisory Opinion 77-2 which he opined had not been reversed which he summarized to find "a prosecuting attorney may not defend a criminal case in either federal or state court." PCR R. 1456. Also, he noted supportive of that conclusion A.B.A. Ethics Opinion 142. He noted that even if those opinions had been overturned, his opinion would be the same because the stakes are high in a death penalty case and the public is entitled to a proceeding that is squeaky clean and beyond reproach. PCR R. 1456-57.

On cross-examination, Professor Freeman noted that he felt the S.C. Bar Ethics Advisory Opinion he relied upon had not been revoked. Upon review of S.C. Bar Ethics Advisory Opinions 91-19 and 94-31, he noted there was no reference specifically revoking the opinion he referred to on direct. PCR R. 1458. He admitted that 94-31 stated:

Additionally, we have held that absent some prohibition of law there's no per se ethical violation against an assistant solicitor representing criminal defendants in another circuit, citing 91-19.

PCR R. 1460:3-7. Further, he admitted S.C. Bar Ethics Advisory Opinion 91-19 stated:

"In Ethics Advisory 82-26, Committee concluded that assistant solicitor, a public official, might have undue influence over the witnesses for a state, usually police officers or vice-versa. Rule 1.11 clearly prevents a lawyer from exploiting public office for the advantage of a private client.

Rule 1.7 prevents a lawyer from representing clients with adverse interest. If the attorney reasonably believes that his position as assistant solicitor will not be used for the benefit of a private client in that

his representation of the criminal defense client will not be adversely affected by his responsibilities as assistant solicitor, then he is free to undertake representation in other circuits."

PCR R. 1460. He was also not aware of Beaver v. Thompson, 93 F.3d 1186 (4th Cir. 1996), that holds that no conflict of interest exists [in a capital case] in trial Counsel's representation of a defendant, even though Counsel is a part-time prosecutor in a neighboring county. PCR R. 1461. Freeman declared, however, these don't change his view and "it's not the law of South Carolina." PCR R. 1461.

However, Professor Freeman admitted that Rule 1.7 does not state specifically that a part-time prosecutor cannot defend cases in another jurisdiction. He stated his interpretation is what a reasonable lawyer would conclude. Professor Freeman suggested a reasonable person would review South Carolina ethics advisory opinions in 1997 and 1998, but disagreed that a lawyer would have relied upon the 1991 and 1994 ethics opinions because he felt it was dicta because it did not pertain specifically to part-time prosecutors. PCR R. 1464. He noted that the 1982 opinion [82-26] precluded a part-time prosecutor from defending cases. He stated that the two more recent opinions are misrepresenting the earlier opinions and should be ignored.

Professor Freeman declared the practice of part-time solicitors defending defendants was wrong. PCR R. 1466.

Professor Freeman admitted that SCACR, Rule 608 required non-full time prosecutors to make themselves available for appointment in criminal cases. PCR R. 1467-68. Particularly, he agreed that Rule 608(d)(1) excluded from court appointment members of the Bar who are solicitors or assistant solicitors if those members do not engage in the private practice of law.

PCR R. 1468. However, he declared "it shouldn't be in a death case" or a murder case. PCR R. 1468.

Professor Freeman opined that he thought the on the record waivers were "superficial and improper waivers." He stated it was not explaining to his client that the fact that he worked with law enforcement and got along with law enforcement who is not the other side which would subconsciously make it more difficult to vigorously cross-examine law enforcement. PCR R. 1469-70. He opined that all the ramifications of the conflict were required to be disclosed, particularly under Bruce v. Leatherwood and an Oregon case.⁴ PCR R. 1470. Professor Freeman stated Mr. Aleksey was not advised why Mr. Stone's representation was something that he should not waive, if asked and why independent Counsel would be better for him. PCR R. 1471.

3. Analysis

This Court must find that Mickens 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

⁴ Apparently, Prof. Freeman was referring to Bankers Trust v. Bruce, 283 S.C. 408, 323 S.E.2d 523 (Ct. App. 1984). The Oregon case that he was referring to is In re: Boivin, 271 Or. 419, 533 P.2d 171 (1975).

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. Similar holdings have been made by various state courts. State v. Gleason, 277 Kan. 624, 88 P.3d 218 (2004)

... (simultaneously serving as defense Counsel in one county and prosecutor in adjoining county does not create an actual conflict of interest); Ex Parte Borden, 769 So.2d 950 (Ala. 2000) (fact that defense Counsel worked as special prosecutor in different county did not establish conflict of interest); People v. Herr, 658 N.E.2d 1032 (N.Y. 1995) (same); People v. Burchette, 628 N.E.2d 1014 (Ill. App. 1 Dist. 1993) (same); Bumgardner v. State, 401 N.W.2d 211 (Iowa App. 1986) (no conflict between burglary defense representation and part-time city prosecutor in same county where city officers were involved in arrest, Counsel dealt solely with municipal charges and Counsel had no contact with county law enforcement agencies involved in arrest); compare People v. Washington, 461 N.E.2d 393 (Ill. 1984) (conflict where some of city police officers involved in arrest); State v. Clark, 744 A.2d 109 (N.J. 2000) (conflict for part-time municipal prosecutor to defend in same county since it created an appearance of impropriety).⁵

In compliance with S.C. Code Ann. Section 16-3-26, defense Counsel Stone was appointed to represent Mr. Aleksey. "This statute provides the exclusive procedure for appointment of Counsel for indigent defendants charged with capital murder." State v. Brown, 289 S.C. 581, 585, 347 S.E.2d 882, 884 (1986). In July 2000, SCACR Rule 608 was implemented to regulate the appointment of attorneys for indigent defendants. While Rule 608

⁵ S.C. Code Ann. § 1-7-370 declares: "The solicitors may defend any persons brought to trial before any criminal courts of this State when their duty shall not require them to prosecute such persons and their assistance shall not be required against such persons by the Governor or Attorney General."

was not in place at the time of Counsel Stone's appointment, it would have similarly authorized his appointment. Rule 608 expressly includes among active members who are exempt from appointment: (B) Members who are solicitors or assistant solicitors for a judicial circuit if those members do not engage in the private practice of law... (emphasis added). Counsel Stone was not exempt from appointment.

Rule 407, SCACR, Rule 1.7 addresses "conflicts of interest." It states:

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (1) The lawyer reasonably believed the representation will not adversely affect the relationship with the other client; and
 - (2) Each client consents after consultation.
- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
 - (1) The lawyer reasonably believes the representation will not be adversely affected; and
 - (2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantage and risks involved.

Critical is the starting point of Mr. Stone's analysis - did Mr. Stone reasonably believe that his part-time solicitor job in Beaufort or his civil representation of public employees would not adversely affect his ability to defend a criminal defendant, and in particular - Bayan Aleksey. Mr. Stone was unequivocal - he felt then and now - that his representation of Mr. Aleksey would not be adversely affected. The issue then shifts to whether that belief was reasonable. This Court finds that the belief was reasonable.

Initially, from Mr. Stone's perspective at the time [and since] it was reasonable. He was aware that part-time prosecutors in one county in South Carolina had defended criminal cases outside of that assigned jurisdiction in the past (and since). PCR R. 1130-31. Similarly, he was not aware that part-time prosecutors were prohibited from representing criminal defendants, particular outside their jurisdiction. PCR R. 984. As a part-time solicitor, Counsel Stone was aware that he was not exempt from court appointment and was required to be placed upon an appointment list for either civil or criminal cases. PCR R. 985, 1131-32.

Concerning review of South Carolina Bar Ethics Advisory opinions, Mr. Stone stated that he had received material from S.C. Bar Ethics, but did not recall specifically that he had looked at the items provided at the hearing. PCR R. 982.

The chronology of the Ethics Advisory Opinions support Mr. Stone's actions based upon what a reasonable person would have found. Assuming arguendo, a reasonable lawyer would have searched those opinions, it is uncontradicted that the most recent ethics advisory opinion Mr. Stone would have found in 1997-98 addressing, in any manner, his issue is S.C. Bar Ethics Advisory Opinion 94-31 from January 1995, which stated: "additionally, we have held absent some prohibition of law, there is no per se ethical violation against an assistant solicitor

representing criminal defendants in another circuit. Advisory Opinion 91-19." Assuming a reasonable lawyer/person would continue to search and review Ethics Advisory 91-19, he would have found the following language:

The question presented also refers to SC Bar Advisory On 82-26 which concluded that an assistant solicitor in one county could not represent criminal defendants in another county. That opinion does not apply to the question presented here; however, the committee takes this opportunity to point out that, as a result of the adoption of the Rules of Professional conduct effective September 1, 1990, there now is nothing in the Rules which automatically prohibits the conduct addressed in Advisory Opinion 82-26, provided it is not in the same judicial circuit. The attorney should be aware, however, that there are specific circumstances in which such representation could result in a violation of the Rules of Professional Conduct.

In Advisory Opinion 82-26, the Committee concluded that the assistant solicitor as a public official might have undue influence over the witnesses for the state-usually police officers - or vice versa. Rule 1.11 clearly prevents a lawyer from exploiting public office for the advantage of a private client and Rule 1.7 prevents a lawyer from representing clients with adverse interests. If the attorney reasonably believes that his position as assistant solicitor will not be used for the benefit of a private client (see Rule 1.11) and that his representation of the criminal defense client will not be adversely affected by his responsibilities as assistant solicitor (see Rule 1.7(b)) then he is free to undertake such representation in other circuits.

The Applicant seeks to discount any potential reliance upon this advisory because it was not directed at the assistant prosecutor situation, but initially addressing a public defender scenario

and therefore it was dicta. It cannot be seriously questioned, however that a reasonable reading of the advisory would reveal the following:

1. S.C. Bar Advisory Op. 82-26 concluded an assistant solicitor in one county could not represent criminal defendants in another county.
2. The Committee opined that since the adoption of the 1990 Rules of Professional Conduct, "there is nothing in the rules which automatically prohibits the conduct addressed in Advisory Opinion 82-26, provided it is not in the same judicial circuit."
3. If the attorney reasonably believes that his position as assistant solicitor will not be used for the benefit of a private client and that his representation of the criminal defense client will not be adversely affected by his responsibilities, then he is free to undertake the representation in other circuits.

The Applicant, relying upon Professor Freeman's comments, suggests this was dicta and should have been ignored in favor of the 1982 opinion. Respondents respectfully submitted that a reasonable lawyer, particular subject to a court appointment with knowledge of the part-time prosecutor employment, would not have ignored or discounted these comments and assumed the advising was correct that the 1990 Rule change removed any per se prohibition to representation of criminal defendants. This Court concurs in Respondents assessment.

Mr. Aleksey has pointed out no precedent in a South Carolina court that Mr. Aleksey could have relied upon to address this inquiry. Assuming a reasonable lawyer would have then surveyed potentially binding precedent from the Supreme Court or United States Court of Appeals for the Fourth Circuit, he would have found the decision in Beaver v. Thompson, 93 F.2d 1186 (4th Cir. 1996), which held the fact that a defense Counsel in a capital case was a part-

time assistant prosecutor in an adjoining county did not establish a *per se* conflict of interest which would disqualify Counsel from the representation.

Against this consistent backdrop, 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 1997 would have shared the same opinion.

Assuming that Mr. Stone was reasonable in his belief that there was no *per se* conflict, he was reasonable in his belief that his representation of Mr. Aleksey would not be adversely affected by his representation as an assistant solicitor. Again, the credible testimony of Mr. Stone suggests he revealed undivided loyalty to Mr. Aleksey. There has been no showing that the loyalty to Mr. Aleksey was impaired when Mr. Stone could not consider, recommend or carry out any appropriate course of action on behalf of Mr. Aleksey based upon Mr. Stone's other duties. Simply put, Mr. Aleksey has failed to show in any manner that Mr. Stone's professional judgment was materially interfered with in considering alternatives or foreclosing courses of action that should have been reasonably pursued on behalf of Mr. Aleksey.

Counsel Stone declared that nothing occurred during the Mr. Aleksey representation that caused him to think or hold back either on cross-examination or the development of evidence during his other practice. PCR R. 1132. He felt throughout that his work in the Solicitor's Office and I.R.F. work did not impact his ability to defend Mr. Aleksey. PCR R. 1134. In fact, Mr. Stone thought that his prior work as a prosecutor had given him a knowledge of police procedures that was useful in their defense. PCR R. 1134.

Importantly, his co-Counsel Thomas Sims, corroborated Mr. Stone's undivided loyalty to Mr. Aleksey. He stated that they had discussions about it and Mr. Sims was never of the opinion

that Mr. Stone would not do what was required, never found that he failed to take any act based upon something that could impact other clients. PCR R. 611.

In his brief before this Court, for the first time, he suggested that Mr. Stone's employment adversely affected the representation for the following speculations:

1. Mr. Stone relief upon the same methods of law enforcement investigation conducted by SLED in his prosecution function that he was called upon to attack in Mr. Aleksey's defense. (Applicant's Memo., p. 99)
2. Mr. Stone's employment precluded a change of venue motion which might have allowed the case to be transferred to Beaufort County, where attorney Mr. Stone would have been unable to continue in his representation. (Applicant's Memo., p. 99-100).
3. Mr. Stone's alleged loyalty to the I.R.F. affected his failure to argue that Mr. Aleksey's confession was the product of coercion and brutality at the hands of SLED Agents Mears and Darnell. (Applicant's Memo., p. 100-08)
4. Mr. Stone's I.R.F. representation of Trooper Lynn Stack, who did not testify, could have testified that Mr. Aleksey's hands were not covered in blood prior to GSR test to impeach Detective Gallup's testimony that she saw blood on his hands where Stack's statement make no reference to blood. (Applicant's Memo., p. 108-09).
5. Mr. Stone's loyalty to Detention Center Director Bamberg caused him to fail to present him as a witness concerning the escape to have rebutted the state's characterization of the circumstances of the escape attempt. (Applicant's Memo., p. 109-14).

Respondents submit that these specifications about alleged deficiencies were not the product of any alleged conflict of interest.

a. Methods of Law Enforcement

First, Mr. Stone's knowledge of methods of law enforcement investigation never adversely affected his representation. Second, Mr. Stone's "reliance" upon the same methods" of law enforcement investigation by SLED did not impair his defense, in any manner. Mr. Stone saw that his past experience in the Solicitor's Office had caused him to develop a knowledge of police procedures that would have worked to Mr. Aleksey's advantage. PCR R. 1134. There was nothing inherently antagonistic based upon this knowledge of techniques and procedures.

b. Change of Venue

The Applicant next contends his "conflict" precluded him from pursuing a change of venue motion which adversely affected him. There is no evidence to support that assertion.

The record is clear that the reason that a change of venue was not pursued was solely based upon both Mr. Stone and unaffected Counsel Sims' belief that Orangeburg County was the best county for them to try the case, even with the prior press coverage. Mr. Stone declared that on March 30, 1998, Counsel Sims had initially expressed a need to seek a change of venue. PCR R. 833-34. He said venue was a running concern and research was done throughout due to the tremendous amount of press coverage, which was consistent. However, Mr. Stone stated that the decision came down to where they would want to try the case. From a defense perspective, Orangeburg was their preferred choice for a death penalty case. PCR R. 834-35. Around May 11, 1998, Counsel Stone and Sims discussed not filing a change of venue motion. PCR R. 837.

Additionally, Mr. Stone declared that the reasons for not filing the change of venue motion were the fact that the earlier press coverage included favorable information about the negative gunshot residue tests on Mr. Aleksey which was favorable to them and a focus of the defense strategy at trial; and that he had spoken with capital defense expert David Bruck concerning his decision not to change venue in the death penalty trial for Susan Smith and his thought on it.

Mr. Stone stated, however, that the main reason a change of venue was not sought was that Orangeburg County was a favorable place because "people are not shy about questioning law enforcement." PCR R. 839. Further, he contrasted the attitudes he had observed from his experience in Beaufort where civil rights cases are not brought because it is not a favorable venue, whereas Orangeburg is different. As Mr. Stone stated, "Orangeburg is the best county...from the standpoint of the defense." PCR R. 840. Further, Mr. Stone noted that co-Counsel Sims had fairly strong numbers when he had run for Solicitor and he believed Mr. Sims would know many people there. PCR R. 840-41. Mr. Stone reasonably contrasted those options with the going to another county where they would not know anyone like Lee County or Dillon County. Mr. Stone saw an advantage to keeping the trial in Orangeburg, even though Sergeant Lingard was from Orangeburg. PCR R. 841-42.

Mr. Stone noted that the problem was that any jury would be sensitive to the death of a state trooper, but that concern was outweighed by the other factors favorable to Orangeburg. PCR R. 842-43. Mr. Stone stated he reviewed the newspaper articles, including articles that revealed Mr. Aleksey's long history of bad acts known to law enforcement and the coverage of

the bond hearing where Solicitor Bailey had stated that Mr. Aleksey was a suspect in a New York murder and a great flight risk. PCR R. 854.

Mr. Stone reiterated on cross-examination that after considering a change of venue during the representation, they decided against it because they preferred Orangeburg County. PCR R. 1151. Mr. Stone believed that Orangeburg juries question law enforcement more than other counties and is not a "pro-law enforcement" jurisdiction based upon his experience in representing law enforcement there and a general desire he has experienced to settle rather than try cases in Orangeburg. PCR R. 1151-52.

Co-Counsel Thomas Sims corroborated the reasons behind not seeking a change of venue were not adversely affected by Mr. Stone's involvement with the Fourteenth Circuit or I.R.F. matters. He stated that they had discussed change of venue and that a decision was made not to seek a change of venue based upon their opinion that Orangeburg remained the best place to try the case. PCR R. 618-19. He stated that decision was based upon his own experiences with Orangeburg juries willingness, even in the face of overwhelming evidence, to find a person not guilty, the racial make-up of the juries, and Mr. Sims credibility with the Orangeburg community. PCR R. 620. Importantly, Mr. Sims noted that they were satisfied with the jury and had not used all their peremptory challenges. PCR R. 623,⁶ see also, PCR R. 70-82.

Contrary to the "*post hoc ergo propter hoc*" suggestions of the Applicant in his brief, the fact of Mr. Stone's employment with the Fourteenth circuit had no adverse impact on the decision on whether or not to seek a change of venue.

⁶ If a change of venue is sought on the basis of pretrial publicity, general practice is to postpone ruling until jury panel is voir dired. State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997). A defendant who seeks a change of venue bears the burden of showing actual juror prejudice. State v. Gardner, 332 S.C. 389, 505 S.E.2d 338 (1998).

c. Confession as a Product of Brutality

Mr. Aleksey now also asserts that the I.R.F. representation and part-time prosecutor adversely impacted upon the decision on whether to pursue "brutality" claims during the confession. The record, again, does not suggest this adverse impact.

First, the record reveals a Jackson v. Denno hearing was held on June 8, 1998. R. 2218-2331. During the hearing, testimony was received from SLED Agents Mears and Darnell. Counsel Stone argued that the transcribed statement should not be admitted because after a two-hour gap, after he had declared, "that's all I have to say," Mr. Aleksey comes back on the tape crying and declares "I shot the trooper." R. 2326-27. Mr. Stone complained that there were no notes and no recording of what took place in the gap. R. 2326. Judge Cottingham admitted the statement, concluding that Miranda was satisfied and the statement was freely and voluntarily given without duress, coercion or other inducement. R. 2330.

Subsequently, the confession was introduced at trial for the jury's consideration as a fact finder in the guilt phase in a redacted form: R. 1578-79. It was introduced subsequently in the penalty phase.

At neither the Jackson v. Denno hearing nor the guilt or penalty phase was there evidence presented that Mr. Aleksey's statement was the product of brutality or undue coercion. Applicant contends a factual basis for this presentation derives from comments that Mr. Aleksey made to Thomas Sims that SLED beat the crap out of him (PCR R. 134, 141) and in a letter to Mr. Stone concerning beating the confession out of him. PCR R. 878.

The Applicant asserts that the failure to present the evidence of the "beating" was an adverse effect of the alleged conflict with Mr. Stone's other employment. However, the record conclusively reveals it was the result of the investigation that caused this decision.

From Thomas Sims perspective, although Mr. Aleksey had told him that SLED had beaten him (PCR 134, 141), he asked him specific questions about it because he had said they were beating him when they got him out of the car. PCR R. 139. Mr. Sims problem was that there was a videotape from the Highway Patrol his removal which showed no beating. PCR R. 139. The claim that Mr. Aleksey had made to him that they had pulled him out of the car, onto the ground, and began kicking him simply was not revealed. PCR R. 140-41. All that he had at the confession was the existence of crying, without any witness to suggest why. PCR R. 140. Although Mr. Sims admitted crying may be indicative of a beating, he acknowledged that Mr. Aleksey had been crying during their own interviews. PCR R. 140. Mr. Sims further opined that in their investigation of the claims, there was no believable evidence or factual basis to support that there was either physical violence or threats during the two hour gap period. PCR R. 614-16.

Mr. Stone credibly testified that he had reviewed in March 1998, letters from Mr. Aleksey that suggested the confession was beaten out of him. PCR R. 877-78, 881-82. Mr. Stone said a problem with his belated assertions of beating was the lack of consistency with Mr. Aleksey's telephone call to WIS-TV. At one point Mr. Aleksey had described to him that one SLED agent hit him in the chest and another told him that he had killed a friend of his and that he would not get out alive. PCR R. 878, 881.

Mr. Stone stated that he investigated the matter by attempting to determine if the officers were "closers" and sought an F.O.I.A. to get their history with successful confessions. PCR R. 888-89. He stated he did not argue "beatings" where he sought to infer "something" happened in the two-hour gap. PCR R. 895.

Mr. Stone stressed that Applicant's comment about being coerced was inconsistent with his WIS interview. PCR R. 902, 1147. Mr. Stone recalled that during the WIS interview, which was a telephone call with a female reporter, the Applicant's response to the reporter was "he was under a lot of pressure to give that statement" or "[i]t was a lot of pressure" to the reporter's questions about what kind of pressure he was talking about involving making the statement. PCR R. 902. At no point during the interview, according to Mr. Stone's recollection, did the Applicant specifically say "they beat the confession out of him" when he had the opportunity. PCR R. 1147. Mr. Stone stressed that in his own discussions with Mr. Aleksey other than saying he was being coerced or pressured to confess, there was no physical contact evidence to present. Further, Mr. Stone had discussed with Mr. Aleksey testifying at trial or at the Jackson v Deno hearing and they decided he would not. PCR R. 1149.

Mr. Stone testified that his work with the Insurance Reserve Fund or solicitor's office did not impact his presentation challenging Mr. Aleksey's confession.

d. I.R.F. Representation of Trooper Lynn Stack

In his brief before this Court, Applicant asserts that his representation was adversely affected by Mr. Stone's I.R.F. representation of Trooper Lynn Stack. He contends that this conflict was revealed post hoc by the fact that Trooper Stack was not called by the defense to rebut an assertion that Mr. Aleksey had blood on his hands which would affect a gunshot residue test where Trooper Stack, like Detective Katherine Gallup failed to include that information in the written statement. See R. 1103, 1108, 1110. The prosecution used this evidence from Det. Gallup to explain by inference the lack of gunshot residue.

The Applicant asserts that Mr. Stone represented Trooper Lynn Stack through assignment from the Insurance Reserve Fund. Applicant's Memo., p. 108. The record does not support that assertion. Instead, it reveals that Mr. Stone never represented Lynn Stack. PCR R. 792, 805, 806. Mr. Stone did acknowledge that he had spoken with Trooper Stack about an incident involved in the civil litigation of L.F. Brown v. [Trooper] Sheldon. PCR R. 790-92. Mr. Stone was handling that matter until August 19, 1998, prior to the start of the Mr. Aleksey trial, but during Mr. Stone's representation of Mr. Aleksey. PCR R. 791. Mr. Stone admitted that he had spoken with Trooper Stack about the Brown case, but "I don't believe he was a part of that case." PCR R. 805.

Subsequent to the hearing before this Court, Mr. Aleksey, through Counsel, proffered Applicant's Exhibit 96, which is an affidavit of Trooper Anthony Lynn Stack, dated January 2, 1998, involving the December 31, 1997 incident. The affidavit makes no reference to the Applicant. The affidavit corroborates Deputy Lin Shirer's testimony that Trooper Stack was one

of the first people to arrive at the scene of the shooting and approached the body of Sergeant Lingard, but makes no reference to any contact with Mr. Aleksey.

The Applicant, at the hearing, referred to R. 970-71 where Calhoun County Deputy Lin Shirer testified that he was with Sergeant Lingard on December 31, 1997 when he attempted to stop Mr. Aleksey's mustang. R. 958. After describing the gunfire and seeing Sergeant Lingard fall to the ground, he described firing toward the Mustang. R. 964-70. After he made the call on the radio, he stated that Trooper Lynn Stack was among the first to arrive at the scene. R. 970. He stated that Trooper Stack was not at the scene long and he and Detective Casey Gallup left in pursuit.⁷ R. 970-71.

Detective Katherine Gallup testified that she was riding with Trooper Stack that evening. R. 1103. She described the arrival at the scene and then the departure two minutes later on I-95. R. 1107. She stated that when she arrived at the K-Mart parking lot, she observed a number of other police officers and a wrecked Mustang. Particularly, she saw Mr. Aleksey handcuffed laying on his stomach with blood on his hands and face with EMS working on him. R. 1108.

On cross-examination, Mr. Stone sought to impeach Det. Gallup by noting that there was nothing in her statement about blood on his hands. R. 1110.

Subsequently, Trooper Robert Beres also indicated Mr. Aleksey had blood on his hands and a cut on his face. R. 1118 (bleeding cut on forehead); p. 1125 (blood on hands).

Subsequently, in response to a telephone call from SLED Capt. L. C. Knight, Trooper Beres's requested that the nurses bag Mr. Aleksey's hands, which they did. R. 1126. On cross-examination of Trooper Beres, Counsel Stone questioned the manner in which Mr. Aleksey was

⁷ The Court notes that the Detective Casey Gallup referenced in the trial record is Detective Katherine Gallup.

handcuffed and the fact that nothing in Beres statement mentioned specifically Mr. Aleksey grabbing his hands or that Mr. Aleksey had blood on his hands. R. 1130.

EMS paramedic Tara Clark described arriving at the parking lot after Mr. Aleksey had already been handcuffed and described, on cross-examination from Counsel Sims, that Mr. Aleksey did not have profuse bleeding (R. 1145), but did not recall anything out of the ordinary about his hands. R. 1147. She did not recall if there was any blood on his hands, but noted that there was so much going on that night. R. 1148.

The state never called Trooper Stack to testify in this case. In light of this record, it would be incredible to suggest that Trooper Stack was not called by the defense to be affirmatively impeached about a speculative matter because of a conflict of interest; particularly when Mr. Stone, in fact, did cross-examine Trooper Beres, a state witness. The Applicant has failed to sustain his burden as it relates to the reason the defense failed to call Trooper Stack. As Counsel Stone unequivocally testified, if there had been something helpful in the affidavit, he would have called Trooper Stack as a witness. PCR R. 822.

c. Representation of Orangeburg Detention Center Director Willie Bamberg and Escape and Prison Adaptability Issues

In the memorandum, Mr. Aleksey claims that Mr. Stone's failure to present the testimony of Director Willie Bamberg was caused because of a conflict he had because he represented Mr. Bamberg in other civil actions. He contends that Mr. Bamberg should have testified to reveal that the "attempted escape" charge against Mr. Aleksey was made only as a matter of jail policy, not because they believed Mr. Aleksey actually intended to escape and that one event was the only infraction Mr. Aleksey had while at the Detention Center before he was then transferred to Lee Correctional Institution as a safekeeper.

Mr. Aleksey further alleges Mr. Stone's conflict in representing Mr. Bamberg impacted Mr. Stone's decision to present a prison adaptability expert, because it would then have invited the prosecution to call Mr. Bamberg as a witness and Mr. Stone would have been forced to cross-examine his own client - Mr. Bamberg.

Mr. Aleksey's speculation and re-creation of the facts ignores the fact that he failed to show an actual conflict of interest that adversely affected his representation. At trial, former Orangeburg Detention Center Officer Maurice Keitt testified on January 27, 1998, Mr. Aleksey told him that he had just knocked one of the small windows out. R. 1970. He stated he saw that the window was broken out and that Mr. Aleksey had broken a metal stool from the stand that was attached to the floor. R. 1971. When Mr. Keitt asked Mr. Aleksey why, he declared he was frustrated. R. 1972, 1974. He said Mr. Aleksey was sent to "safekeeping" shortly after this which, in his experience, was where people were sent if they might hurt themselves or escape or be a high risk. R. 1973.

Deputy Director of the Orangeburg Detention Center, Vernetia Dozier, testified that she had received a report that on January 27, 1998, Mr. Aleksey had taken a stool and ripped the stool off the wall and had broken the window out of the cell. R. 1978. She stated that based upon this conduct, they initially signed a warrant for the damage done to the jail and attempted escape and sent him to safekeeping. R. 1978. She described safekeeping as a place where they send inmates that are hard to handle or an escape risk. R. 1978.

On cross-examination, Counsel Stone had Ms. Dozier describe the movement from the normal cells to an upstairs room. Importantly, she stated that it was department policy to charge anyone who cracks or breaks a window with escape if it is an exterior window. R. 1979. Mr.

Stone had her describe that to escape, the inmate would have to get through the window, then through the jail yard, then over the fence with razor wire. R. 1979. Further, on re-direct, she declared no one had gotten through the type of small window Mr. Aleksey broke. R. 1980.

On re-cross, Ms. Dozier stated that Mr. Aleksey did not escape from his jail cell and she was informed that he called for help after he broke the window. R. 1981.

The next day of the sentencing hearing, Solicitor Bailey noted that Director Dozier had made an unresponsive comment that revealed there was a warrant for escape. R. 2024. Solicitor Bailey felt that a curative instruction to disregard the evidence about the escape warrant would be appropriate.

Counsel Stone requested the curative instruction "to disregard any of the questions concerning escape." R. 2024-25.

Judge Cottingham concluded that he would tell the jury to disregard that in its entirety and that there is no warrant for escape. R. 2025. During the instructions, the jury was instructed:

This defendant is not charged with escape. There is no escape warrant outstanding. You must disregard that testimony in its entirety. It has nothing to do with the trial of this case.

R. 2028:13-17.

Mr. Stone testified that he did not recall representing Willie Bamberg while he was representing Mr. Aleksey. PCR R. 782. However, Mr. Stone represented the named "John Doe, Warden" in Charles W. Tyler v. Sheriff Bing Jones, from July 31, 1996 through February 10, 1998. PCR R. 806-07; See Applicant's Exhibit 86.

Mr. Stone stated Mr. Bamberg was in an official capacity so his dealings would have been brief. PCR R. 822. Because Mr. Aleksey was charged with escape, but at some point he

felt that prison life would be discussed and Mr. Stone wanted to be sure that the escape charge was not a realistic escape and he thought that it was sewn up at trial and did not become an issue. PCR R. 823.

Mr. Stone stated that he did not hire a prison adaptability expert because he felt such testimony frequently backfires. PCR R. 1224. He was not aware of evidence to indicate that Mr. Aleksey was particularly adaptable to prison. PCR R. 1224. In addition to the damage to the chair and window, and there were lawsuits he had filed and Mr. Stone felt it was a big risk and not credible at that point. PCR R. 1225.

Mr. Stone stated he advised his client that he could not become involved in the lawsuits and wrote a letter and explained it to him on March 19. However, Mr. Stone testified that this letter did not affect the way the criminal defense was handled. PCR R. 1226.

Mr. Stone stated that his notes revealed at some point in the representation he or Mr. Sims spoke with Mr. Bamberg concerning the escape incident. PCR R. 1229. He stated that they learned anytime a window was broken they were going to call it escape. PCR R. 1229.

In preparation for the defense, Counsel had contacted Detention Center Director Bamberg who prepared an affidavit on May 20, 1998 [Exhibit 87]. In the affidavit, he described the fact the charges were made "because he threw a chair into the window in his cell. The window measures twenty-six and one-half inches long and five inches wide. This was the only infraction that the Defendant had during his stay in the Orangeburg Detention Center."

The Applicant has failed to show that his other representation including his apparent work with Willie Bamberg created an actual conflict which adversely affected his representation. First, it is clear it did not impede his investigation of alleged jail escape where the defense was

able to procure, without formal discovery, a favorable affidavit from Mr. Bamberg. Second, it did not interfere with Mr. Stone's ability to cross-examine the jail employees and develop similar information which limited the impact of their testimony. Contrary to the speculative claims of Mr. Aleksey, Mr. Stone decision not to present adaptability testimony was not based upon any fear of cross-examining his "clients", but his belief that such adaptability testimony has little persuasive value and can backfire. Further, the favorable information, - the unlikelihood of escape through the window, the policy to charge based upon a broken window and the lack of any other violation were presented to the jury. Applicant's claim for the reasons stated is denied on this basis.

Summary

The Sixth Amendment right to effective assistance of Counsel includes the right to representation free from any conflict of interest that impairs Counsel's efforts on behalf of his/her client. When Counsel suffers from an actual conflict of interest, prejudice is presumed. An actual conflict of interest means a conflict that affected Counsel's performance, as opposed to a mere theoretical division of loyalties. Thus, in order to prove that trial Counsel was acting under an actual conflict of interest, Mr. Aleksey must prove that his trial Counsel's interests diverged with respect to a material, factual or legal issue or a course of action. ...

In conclusion, Mr. Aleksey claims that Duffie Stone, one of Mr. Aleksey's trial attorneys, was acting under an actual conflict of interest at the time of trial, which deprived him of his Sixth Amendment right to effective assistance of Counsel. This Court finds that no such actual conflict existed. At the time of Mr. Stone's representation of Mr. Aleksey, Mr. Stone was a part

time solicitor in Beaufort County.⁸ Mr. Stone also performed work for the South Carolina Insurance Reserve Fund, which insures state agencies, including Detention Facilities and the Department of Public Safety. In this capacity, Mr. Stone represented employees of the Orangeburg County Detention Center as well as employees of the South Carolina Department of Public Safety, namely Highway Patrol troopers. It is uncontroverted that Mr. Stone disclosed these matters to Mr. Aleksey and to the Court repeatedly, and it is undisputed that Mr. Aleksey was advised by and examined by the Court three times regarding Mr. Stone's other representations. Mr. Aleksey on each occasion confirmed his understanding and desire to have Mr. Stone continue to represent him.

- C. **Applicant's right to Counsel, as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60, was violated as a result of his representation throughout the pre-trial and trial proceedings by trial Counsel who labored under an actual conflict of interest arising from trial Counsel's simultaneous employment with the South Carolina Insurance Reserve Fund. See Mickens v. Taylor, 535 U.S. 162, 122 S.Ct. 1237 (2002); Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway, et al. v. Arkansas, 435 U.S. 475 (1978); and Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001).**

Insurance Reserve Fund Conflict Issue

In ground C, the Applicant contends that Mr. Stone's representation of civil clients pursuant to assignment from the Insurance Reserve Fund created an actual conflict of interest. Particularly, he asserted that prior assignments involving the South Carolina Highway Patrol and

⁸ It should be noted that Mr. Stone never served as a prosecutor in Orangeburg County.

Orangeburg County, where the victim was a Highway Patrolman and the matter was investigated by Orangeburg authorities created an actual conflict of interest.

As stated in Ground B, the Applicant has failed to prove an actual conflict of interest.

For the reasons set forth therein, relief on this allegation must be denied. Accord Mickens v. Taylor, supra.

- D. Applicant's right to Counsel, as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60, was violated as a result of his representation throughout the pre-trial and trial proceedings by trial Counsel who labored under an actual conflict of interest arising from trial Counsel's simultaneous employment as an attorney for the South Carolina Department of Corrections. See Mickens v. Taylor, 535 U.S. 162, 122 S.Ct. 1237 (2002); Cuyler v. Sullivan, 466 U.S. 335 (1980); Holloway, et al. v. Arkansas, 435 U.S. 475 (1978); and Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001).

Insurance Reserve Fund - SCDC - Conflict Issue

In allegation D, Mr. Aleksey had claimed that a conflict of interest was created because of assignment of civil cases from the Insurance Reserve Fund in which he handled some matters for the South Carolina Department of Corrections or certain specified correctional employees. In his third allegation, Mr. Aleksey asserted this ground was abandoned. Therefore, it must be dismissed due to lack of prosecution with prejudice. Accord Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 493 S.E.2d 826 (1977) (court has inherent power to dismiss based upon failure to prosecute). See S.C. Rules of Civil Procedure, Rule 41(2); 41(b) (dismissed with prejudice for failure to prosecute).

- E. Applicant's right to Counsel, as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60, was violated as a result of the trial court's failure to procure a valid waiver from the Applicant of his lead trial Counsel's actual conflict of interest which arose from trial Counsel's simultaneous employment as an attorney for the South Carolina Insurance Reserve Fund. Mickens v. Taylor, 535 U.S. 162, 122 S.Ct. 1237 (2002); Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway, et al. v. Arkansas, 435 U.S. 475 (1978); and Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001).

Inadequate Waiver of Illegal Conflict of Interest

The Applicant contends that there was no valid waiver of the alleged conflict of interests. He relies upon the decision in U.S. v. Schwarz, 283 F.3d 76 (2nd Cir. 2002). In Schwarz, the Second Circuit recognized that in most cases where an attorney has an actual or potential conflict of interest, it was possible for a defendant to waive his right to conflict free Counsel in order to retain his Counsel of choice. However, the court also recognized that not all conflicts could be waived stating: "an actual or potential conflict cannot be waived if, in the circumstances of the case, the conflict is of such a serious nature that no rational defendant would knowingly and intelligently desire that attorney's representation. Schwarz, F.3d at 95-96. The court asserted that unwaivable conflicts were those where Counsel himself or herself was accused of participating in the criminal activity related to the defendant's crimes and his or her own "self-interest" or "self-preservation" to avoid criminal charges or reputational damage would affect virtually every aspect of the representation of the defendant. The court equated that conduct with the conflict in Schwarz where Counsel Worth's loyalties to the police union and a \$10,000,000.00 retainer. Concluding the Schwarz's representation was in conflict with his ethical obligation to the police union as a client, but his substantial self-interest in a two-year 10

million dollar retainer with the union, which was revocable, created a strong personal interest in refraining from any conduct which the union might object. The Applicant equates the self-interest in the \$10 million retainer and conflicting interest in placing blame upon another police officer, with Mr. Stone's alleged self-interest to curry favor with law enforcement and his hopes of further assignment of cases from the Insurance Reserve Fund. Those assertions are simply inadequate to raise the suggestion that Mr. Stone's representation would be guided by "self-preservation" as suggested in Schwarz.

First, as set out in allegation B, the Applicant failed to prove an actual conflict of interest, as defined in Mickens and Cuyler. Absent such interest, the question of waiver is moot. Relief should not be granted. See, State v. Gregory, 364 S.C. 150, 612 S.E.2d 449 (2005) (actual conflict in representing defendant and assistant prosecutor handling defendant's case).

Second, the alleged "conflicts" were not the type, as suggested in Schwarz that are unwaivable. Possible conflicts that pertain to someone other than the defendant or the self-interest of the Counsel must be considered subject to waiver. See; Duncan v. Alabama, 881 F.2d 1013 (11th Cir. 1989) (murder prosecution where attorney in defense Counsel's firm was representing victim at time of death); People v. Martinez, 869 P.2d 519 (Colo. 1994) (murder trial where defense represented state witness on unrelated charge); State v. Roman, 596 A.2d 930 (1991) (manslaughter charge where defense had represented victim); Chandler v. State, 859 S.W.2d 764 (Mo. Ct. App. 1993) (defense Counsel represented state witness and murder victim's brother).

While the Court concludes that Cuyler does not extend to "successive representations", as suggested in Mickens, assuming that it does, it was a waivable conflict in this setting concerning

Mr. Stone's practice both as a part-time solicitor and civil practitioner with many public sector clients. As stated in Holloway v. Arkansas, 435 U.S. 475, 483 n. 5 (1978), a defendant may waive his right to the assistance of Counsel who is unhindered by conflicts. As set out in this order, there was on-the-record inquiry of Mr. Aleksey on February 2, 1998 (part-time solicitor, insurance reserve fund work, state agencies, police agencies, highway patrol) (Feb. 2, 1998, TR. 5-7, PCR R. 737-39), May 20, 1998 (part-time solicitor in 14th Circuit not connected with Orangeburg) (R. 2192-93); and August 24, 1998 (part-time solicitor contract with 14th Circuit in Beaufort, not the Orangeburg Circuit, Insurance Reserve Fund work which insures state agencies, including the Department of Public Safety) (R. 181-82). The trial judge's conclusions supported the waiver.

It has been stated that a valid waiver of a conflict of interest must be voluntary, knowing, and intelligent, such that the defendant is sufficiently informed of the consequences of his choice. See Thomas v. State, 346 S.C. 140, 551 S.E.2d 245 (2001). There the Court held that the waiver of the potential conflict did not act as a waiver of the actual conflict which presented itself.

This Court recognizes that the waivers could have been more specific to speculate about potential events which did not occur. However, the waivers were adequate to address what did occur, the potential for divided loyalties.

While there is no question that Mr. Aleksey was aware of his right to Counsel wholly free of any potential conflicts, he agreed to and affirmatively informed the Court repeatedly he wished to continue with Mr. Stone's representation. The failure to more thoroughly explain possible dangers and consequences (which never arose) did not invalidate the waivers.

In summary, this Court concludes that Mr. Aleksey knowingly and intelligently waived any potential conflict which may have existed with regards to Mr. Stone's other representations. This issue is directly addressed by the South Carolina Bar Ethics Commission. The South Carolina Bar Ethics Advisory Opinion 94-31 states in part, "we have held that absent some prohibition of law, there's no per se ethical violation against an assistant solicitor representing criminal defendants in another circuit." Furthermore, the South Carolina Bar Ethics Advisory Opinion 91-19 states, "Rule 1.7 prevents a lawyer from representing clients with adverse interests. If the attorney reasonably believes that his position as an assistant solicitor will not be used for the benefit of a private client in that his representation of the criminal defense client will not be adversely effected by his responsibilities as an assistant solicitor, then he is free to undertake representations in other circuits." As a result of the reasons stated above, this Court finds that Mr. Aleksey has failed to prove that Mr. Stone was representing Mr. Aleksey while acting under an actual conflict of interest. Further, this Court finds that for any appearance of conflict, there was a knowing and intelligent waiver by Mr. Aleksey, and Mr. Aleksey was fully advised of any appearance of conflict, both by Counsel and by the Court. As a result, this Court denies the Applicant's request for relief on Ground E and G and as it pertains to Ground B and C on this alternative ground.

- F. Applicant's right to Counsel, as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60, was violated as a result of the constructive absence of Counsel at the hearings regarding Applicant's lead trial Counsel's conflicts of interests. See U.S. v. Cronic, 466 U.S. 648, 659 (1984); Brooks v. Tennessee, 406 U.S. 605 (1972); and Frett v. State, 298 S.C. 54, 378 S.E.2d 249 (1988).

Absence of Counsel at Conflict Hearings

On allegation F, Mr. Aleksey contends that there was a constructive absence of Counsel for Mr. Aleksey at the conflict hearings because Mr. Sims failed to adequately provide independent advice that Mr. Stone's representation was improper and Mr. Stone was unable to assist him. Applicant's Memo., p. 114-17. Mr. Aleksey expands the presumption of prejudice standard of U.S. v. Cronic, 466 U.S. 648, 104 S.Ct. 2035, 80 L.Ed.2d 657 (1984). For the reasons previously set out in grounds B through E, this Court must deny the relief requested.

The Applicant's reliance on Cronic is misplaced. Applicant attempts to equate Cronic's complete absence of Counsel, with Mr. Sims alleged deficiency in advice at the waiver hearings. The issue of critical" stage is not relevant because Counsel Sims, as well as allegedly conflicted Counsel Stone, was presented during the three (3) separate hearings.

In Florida v. Nixon, 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d. 565 (2004), the Supreme Court explained the Cronic's presumption of prejudice was only applicable in a few narrow settings. The Court instructed that the Cronic presumption would be in order "in circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." In Bell v. Cone, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002), the

Court held that for Cronic's presumed prejudice standard to be applied, Counsel's failure must be "complete." As asserted by Mr. Aleksey, the failure was not complete nor created a Cronic type circumstance.

This case does not present a complete denial of Counsel at a critical stage because Applicant had two appointed Counsel present at the hearing where waiver was addressed. See Cronic, 466 U.S. at 657. It was not proved that there was entire failure to subject the prosecution's case to meaningful adversarial testing. Compare, Florida v. Nixon, *supra*. (Confession of guilt does not lead to Cronic standard). Nor was it a belated designation of Counsel, immediately prior to trial. Cronic, *supra* (citing Powell v. Alabama, 287 U.S. 45 (1932)).

Counsel Sims testified that he had discussions with Mr. Stone, after Mr. Sims appointment about his knowledge of Mr. Stone's other representations and his loyalty to Mr. Aleksey. PCR R. 611-12; compare, PCR 66-68. Further, Mr. Sims testified that prior to the first waiver hearing he had discussions with Mr. Aleksey about Mr. Stone's role with the Fourteenth Circuit Solicitor's Office. PCR R. 611-12. However, Mr. Sims did not recall ever discussing about any potential conflict Mr. Stone had with defendants Mr. Aleksey sought to sue *pro se* (where Mr. Stone did not represent any of those individuals in those underlying civil actions). Mr. Sims further did not discuss the possibility that at some future time Mr. Stone could be a prosecutor in Orangeburg County. App. 67-68.

Contrary to the Applicant's claims, the applicant's waivers do not invoke the Cronic exceptions of constructive denial of Counsel. Under Cronic and its progeny, a defendant is denied Counsel when there is an "actual or constructive denial of the assistance of Counsel

altogether; when Counsel is burdened by an actual conflict of interest (under Cuyler v. Sullivan, supra); or where there are "various kinds of state interference with Counsel's assistance." Strickland, 466 U.S. at 692; see also Cronin, 466 U.S. at 658.

Here, the representation of Mr. Aleksey by Mr. Sims was not impaired by either a potential or actual conflict. Contrary to the claims of Mr. Aleksey, he was never without Counsel. Even if Mr. Stone was unable under Applicant's theory to provide advice on the conflict issues, Mr. Sims was available and could and did consult with Mr. Aleksey throughout. Applicant's claim of "actual or constructive denial of Counsel" during a critical stage claim must be denied. See Ex Parte McFarland, 163 S.W.3d 743, 752-53 (Tex. Crim.App. 2005) (there was no actual or constructive denial of Counsel where lead Counsel had postprandial naps during critical stages, where defendant had second, albeit less experienced Counsel present); see also, Annotation, Circumstances giving rise to prejudicial conflict of interests between criminal defendant and defense Counsel - state cases, 18 A.L.R. 4th 360.

- G. Applicant was denied the effective assistance of Counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial Counsels' failure to provide enough information to Applicant to enable Applicant to make a voluntary, knowing, and intelligent waiver of an actual conflict of interest, which arose during Applicant's proceedings, or to insist upon the appointment of alternate Counsel who did not labor under a conflict of interest. Strickland v. Washington, 466 U.S. 668 (1984) and Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001) (Petitioner has shown an actual conflict of interest that adversely affected her attorney's performance. Further, her initial waiver of a potential conflict did not act as a waiver of this actual conflict.)

Trial Counsel's Failure to Provide Mr. Aleksey Enough Information to Enable Mr. Aleksey to Make a Knowing and Intelligent Waiver

In ground G, Mr. Aleksey contends he was denied effective assistance of Counsel based upon trial Counsel's alleged failure to provide sufficient information to Mr. Aleksey to enable him to make a knowing and intelligent waiver of his right to Counsel. The Applicant asserts that (1) there was no evidence that Mr. Stone's representation would preclude the defense from seeking a change of venue motion as a "plausible alternate strategy"⁹ (Applicant's Memo., p. 100), that his I.R.F. representations would impair his ability to raise brutality claims¹⁰ (Applicant's Memo., p. 101, 105), that impact the *pro-se* lawsuits had against officers and or agencies that Mr. Stone had or might represent in the future¹¹ (Applicant's Memo., p. 105), any

⁹ There is no evidence that a change of venue motion would have been precluded by Stone's representation or otherwise. The matter was not pursued solely based upon the strategic decision.

¹⁰ As stated within ground B, the brutality claims were not raised based upon a lack of evidence and Aleksey's own public and inconsistent statements.

¹¹ Testimony was presented at the hearing that Stone wrote Aleksey and stated that he would not be able to help him with any lawsuit against the prison "as I explained this to you before...I would have a conflict of interest bringing a civil lawsuit against an agency I represent." Exhibit 59, PCR770. The reference in the Memo., p. 105, to

risk from his insurance fund, (Applicant's Memo., p. 107), nor any risk concerning his ability to counter safekeeping arguments. Applicant's Memo., p. 113.

As stated earlier in ground B, each of these were addressed at trial or the PCR hearing and did not evolve from any "conflict." The Applicant has failed to assert precisely what information Mr. Aleksey lacked concerning Mr. Stone's past representation or real risks, not sheer post hoc speculation unrelated to the conflict claimed.

For the reasons previously stated in this brief related to grounds B, C, E and H and above, Applicant has failed in his burden of proof to show any entitlement to his claim concerning waiver.¹²

- H. Applicant was denied the effective assistance of Counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial Counsel's failure in the Jackson v. Denno hearing to argue that Applicant's "confession" was improperly induced by a promise and involuntary. Strickland v. Washington, 466 U.S. 668 (1984).

IAC and Failure to Present Evidence of Alleged Promises of Leniency.

The Applicant contends that trial Counsel were ineffective based upon their failure to seek to have the confession suppressed based upon an assertion that it was induced by a promise

Stone's testimony about February 1998 on PCR 736-37 is out of context and pre-dates the filing of the lawsuits identified on Applicant's Exhibit 58, which were brought beginning May 1998. At no time was Stone, by virtue of his court appointment, authorized or obligated to bring civil actions on Aleksey's behalf.

¹² The court should note that Aleksey did not testify at the PCR hearing that he was either misadvised or inadequately advised about the waiver. More importantly, he failed to show a reasonable probability that the trial result would have been different had Aleksey's waiver interrogation by the Court resulted in Stone's removal.

of leniency or reward.¹³ Particularly, he contends that the statement given was induced by a promise that he would be returned from solitary confinement to the general prison population. He now contends this benefit, under the decision in State v. Peake, 291 S.C. 138, 352 S.E.2d 487 (1987).

1. How the issue was raised at trial

During the Jackson v. Denno hearing, SLED Agent Kenneth Mears testified about giving the Miranda warnings and an initial statement of Mr. Aleksey in which he declared, at the conclusion "that I have nothing else to say" or "all I've got to say." R. 2312, 2320. See also R. 2300 (Darnell). Agent Mears stated the tape was cut off, but Mr. Aleksey continued to talk and made reference to his concern about Ms. Perez Blackwell, the kids, and Ms. Batkilina. R. 2312. He also asked if he could get back into the general prison population. R. 2312:21-22. Agent Mears stated he contacted his supervisor, Capt. Knight and gave him the information. Agent Mears stated that he initially told Mr. Aleksey that they could not promise him movement, but would see what could be done. R. 2313. Agent Mears eventually contacted the Detention Center and inquired of the Assistant Director (Dozier) about Mr. Aleksey being in the general population or was there another secure place without being in the infirmary or lock-down. R. 2313.

Q. All right, sir. And what is it that specifically led up to the tape going back on?

A. He stated to us, when I say "he" I am talking about Mr. Aleksey, stated to us that if he told us the honest truth, if he could get back into

¹³ In ground B, the Applicant contended that Counsel's conflict precluded Counsel presenting a defense to the admission of the confession based upon allegations of brutality. This Court incorporates its order herein.

general population, that he didn't want anyone else to get into any trouble for something he did.

Q. And after you checked around and found out that he could possibly get back into general population, is that when- did you communicate that back to him?

A. That's correct. It took some time. He had to call the Charleston Office, they called back, he had to call the jail, they had to look around to see what could be done, and when we finally got the okay, we told him that he could go back into general population.

Q. Okay. And then did he agree to go ahead and go back on tape?

A. That's correct, that's when he agreed, he said he would tell us the truth.

Q. Okay. Other than trying to assist him in getting from the infirmary cell to general population, did you make any other promises to him or did you hear Agent Darnell make any promises to him?

A. No, sir, none.

Q. Did either one of y'all threaten him in any way?

A. No, sir, he never was threatened.

Q. Did you physically abuse him in any way?

A. No, sir.

R. 2314-15.¹⁴

¹⁴ The dichotomy of claiming on one hand that the statement was the product of physical abuse and on the other hand a product of lenient treatment is obvious to any reasonable observer.

SLED Agent Mears clarified the timing of the inquiry on cross-examination:

Q. When he first indicated to you by your statement that if he told you the truth would you put him back into the general population, was he told at that time about his rights or was the only time that he was told about his rights was when the tape was turned on and a general statement was made that he had signed some rights earlier?

A. He had signed the rights before the first statement. Then at the end of the first statement is when he stated if he told us the honest truth, if he could get back in the general population and the concerns of the other two ladies.

R. 2318:16-19:2.

At the Denno hearing, Counsel Stone argued about the time gap, "that's all I have to say" and crying when the tape was on after the gap. R. 2324-27. The trial judge determined, under the totality of the circumstances, that the statement was freely and voluntarily given, "without reward, without promise or hope of reward, without promise of leniency... and that such alleged incriminating statement was the voluntary product of the free and unconstrained will of the defendant." R. 2330.

At the trial, Deputy Director Dozier testified that she ordered Mr. Aleksey moved from the maximum security section of the Orangeburg Detention Center to an infirmary cell for his safety. R. 1470. After Mr. Aleksey had requested and seen a SLED agent, Mr. Aleksey was placed in the general population after receiving a call from the SLED agent. R. 1471-72.

Before the jury, Agent Darnell described the circumstances surrounding the statement. R. 1567-1580. He stated that at the conclusion of the first statement, among other things, Mr. Aleksey "asked us if he was truthful with us could get him out into the general prison population.

that he was in the infirmary cell by himself and that he did not want to go back over to the cell by himself." R. 1574. He described seeking information from the various sources. R. 1574-75.

After the Detention officials advised that they did not have a problem with it:

"We advised Mr. Aleksey we could do that, we could place him back in general population, the jail agreed to it. During this time, he started crying...and said he was sorry for what he did...and wanted us to relay to the family that he was sorry for what he had done. Then we advised him that we were going back on the tape...."

R. 1575:5-14; See also R. 1597-99 (Mears) (same).

2. Analysis

To determine the voluntariness of a confession and whether it is subject of coercion, courts commonly look to (1) the location of the questioning, (2) whether Miranda warnings were given, and (3) whether the accused initiated the contact. See Colorado v. Connelly, 479 U.S. 157, 170 (1986). In Connelly, the Court looked to the totality of the circumstances as to whether law enforcement had overborne the will of the accused by (1) the creation of the pressure and (2) the suspect's capacity to resist the pressure. Courts have generally held certain police practices insufficiently coercive to constitute a Fifth Amendment violation: (1) promises of leniency or psychiatric treatment, (2) confrontation of the accused with other evidence of guilt, (3) an interrogator's appeal to the defendant's emotions, and (4) an interrogator's false or misleading statements. See Annual Review of Criminal Procedure, 34 Geo.L.J. Ann.Rev.Crim.Proc., p. 180-81 (2005)(see cases collected, note 590-594). Obtaining testimonial evidence from a defendant by means of physical torture or other physical coercion violates the Constitution. Id.;

see Brown v. Mississippi, 297 U.S. 278, 286-87 (1936) (brutality extracted confession is a Due Process violation).

The Applicant relies upon State v. Peake, 291 S.C. 138, 352 S.E.2d 487 (1987), a case where the promise of leniency to avoid the death penalty if he gave a statement interpreted to require a new trial. Peake was distinguished in State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990) where the court held that a polygraph examiner's statement that it would be in the defendant's best interests to tell the truth was not an inducement or hope of a lighter punishment which the Peake court concluded undermined the will of the defendant.

Peake recognized that "a statement induced by a promise of leniency is involuntary only if so connected with the inducement as to be a consequence of a promise." Here, unlike Peake there was never any promise of a lighter punishment. Second, the inquiry was initiated by Mr. Aleksey, not the police, to see if he could be placed into the general population in Orangeburg and not remain in the infirmary where he had been placed for safety purposes.

Like Rochester, there has been no showing, under the totality of the circumstances that Mr. Aleksey was worn down by improper interrogation tactics such as lengthy questioning, trickery or deceit. Further, there was no showing that the confession was induced by force, ~~psychological or physical, or by direct or implied threats.~~ Standing alone, the requested bargaining by Mr. Aleksey was not for leniency or a lesser sentence.

Counsel cannot be deemed ineffective in failing to pursue the asserted strategy. See Thai v. Mapes, 412 F.3d 970 (8th Cir. 2005) (Counsel not ineffective in failing to assert statement was the product of a promise of leniency where police only asserted they would protect Thai after he expressed fear that members of a group would harm him if he gave a statement which was

neither a promise he would not be prosecuted or as a promise the authorities would be more lenient); Sumpter v. Nix, 863 F.3d 563 (8th Cir. 1988) (promise of treatment for alcoholism does not undermine voluntary statement).

Here, the test was whether Mr. Aleksey's will was overborne and his capacity for self-determination critically impaired. See Columbe v. Connecticut, 367 U.S. 568 (1981). Mr. Aleksey's request to see if he could be moved into the general population, as the Detention Center's agreement to do so, is not the type of coercion that undermines free will.

Here, Mr. Aleksey's statements were entirely self-motivated. To the contrary, the motivating cause of the decision to confess was neither pressures nor an inducement for a lesser sentence.

Counsel Stone admitted at the PCR hearing that he did not argue that the confession may have been induced by a promise to move him from isolation in the infirmary to the general population. PCR R. 891-98. Counsel stated that he believed his best argument was to urge it was a Miranda violation due to the comment that he had no more to say and the gap of two hours. PCR R. 893.

Counsel's strategic decision was not deficient under Strickland, supra. The comments ~~did not promise any lesser sentence or dropping of charges. As such, induced by his own~~ requests to law enforcement, it is difficult to assert that Applicant's will was overborne. Further Sixth Amendment prejudice has not been shown where the Applicant failed to show a reasonable probability the result would have been different if he had raised this objection to the statement. The Applicant has failed in his burden of proof.

In summary, with regards to Ground H, which claims that trial Counsel failed to argue that the Applicant's confession was improperly induced by a promise of leniency or reward, and therefore involuntary, this Court denies the Applicant's request for relief. This Court finds that trial Counsel was not ineffective on this issue: In fact, it appears that the issue of voluntariness was raised in the Jackson v. Denno hearing. However, despite the allegation that a promise that was made, specifically the promise to move Mr. Aleksey into the general population, the trial court determined that, based upon the totality of the circumstances, Mr. Aleksey's confession was voluntarily given. Furthermore, Mr. Stone testified that it was a tactical decision to argue that the confession was violative of Miranda, instead of arguing that the confession was the result of a promise which was improperly induced. This Court is constrained to find that the Applicant has failed to meet his burden that Counsel was ineffective for failure in pursuing the asserted strategy, and further, that Counsel's strategic decision was not deficient under Strickland.

- I. Applicant was denied the effective assistance of Counsel as guaranteed by the Sixth and Fourteenth Amendments and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by Counsels' failure to request a change of venue due to extensive and prejudicial pre-trial publicity involving the offense charged and the Applicant's character and failure to explore this publicity through voir dire. Strickland v. Washington, 466 U.S. 668 (1984).

IAC and Failure to Move to Change Venue

In his brief, p. 55-62, Mr. Aleksey contends that Counsel were ineffective based upon their failure to seek to have venue changed based upon pretrial publicity. This Court has previously addressed this matter within its response to Ground B. It is incorporated herein by reference.

The Applicant contended that fifty-six (56) potential jurors of the panel of 71 revealed on voir dire that they had heard something about the case and nine (9) indicated that they were not exposed. R. 35-858. He notes that of the thirty-five (35) who were qualified in the panel, thirty-two (32) asserted some exposure to publicity. He asserts that all twelve of the selected jurors revealed some exposure or knowledge about the case. Applicant's Memo., p. 58.

Mr. Aleksey further contends that a review of the articles reveal the nature of the crime and information about Mr. Aleksey's background and motive and varying roles of Mr. Aleksey and Gloryvee Perez Blackwell. The Applicant notes that one juror, Bonnie Zeigler, asserted that she read the paper everyday "because it was big headlines." R. 434.

A motion to change venue is addressed to the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion. State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997) (finding trial court abused discretion by granting State's motion to change venue based on pretrial publicity because no evidentiary facts supported finding of actual juror

prejudice toward State). When a trial judge bases the denial of a motion for a change of venue because of pretrial publicity upon an adequate voir dire examination of the jurors, his decision will not be disturbed absent extraordinary circumstances. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990).

When jurors have been exposed to pretrial publicity, a denial of a change of venue is not error when the jurors are found to have the ability to set aside any impressions or opinions and render a verdict based on the evidence presented at trial. State v. Manning, supra. Therefore, mere exposure to pretrial publicity does not automatically disqualify a prospective juror. *Id.* Instead, the relevant question is not whether the community remembered the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt of the defendant. *Id.* It is the defendant's burden to demonstrate actual juror prejudice as a result of such publicity. State v. Caldwell, supra; Sheppard v. State, 357 S.C. 646, 654, 594 S.E.2d 462, 467 (2004) (The nature of the crime, i.e., the killing of a police officer, and the fact that a large percentage of prospective jurors remembered pretrial publicity did not establish actual juror prejudice as result of pretrial publicity, and thus, change in venue was not required); see Hunt v. State, 940 So.2d 1041, 1062-63 (Ala.Crim.App. 2005) (Defendant convicted on three counts of capital murder did not establish that trial Counsel was ineffective for failing to adequately argue for change of venue based on pretrial publicity, in hearing on petition for post-conviction relief, where only evidence that defendant submitted was 25 newspaper articles, some of the articles were published after defendant's trial, and defendant did not introduce the voir dire examination of the prospective jurors nor any statements from any jurors); Walendzinski v. Renico, 354 F.Supp.2d 752 (E.D. Mich. 2005) (To establish ineffective assistance of Counsel for failing to move for a

change of venue due to prejudicial pre-trial publicity, a defendant must show that the trial court would have granted a change of venue motion; this requires a showing of the jury's actual or presumed prejudice); Bishop v. State, 882 So.2d 135 (Miss. 2004) (Counsel's failure to seek change of venue based on pretrial publicity after numerous members of venire stated they had heard about case, or to seek continuance to further assess pretrial publicity, was matter of reasonable trial strategy that did not support claim of ineffective assistance of Counsel, in capital murder trial; jurors who stated they had heard about case also affirmed that they could disregard what they had heard, that they could listen to evidence, and that they could be fair and impartial); State v. Bryan, 101 Ohio St.3d 272, 804 N.E.2d 433 (2004) (Defense Counsel's failure to request a change of venue, due to massive pretrial publicity regarding murder of police officer, was not ineffective assistance of Counsel in capital murder prosecution; defense Counsel questioned jurors about pretrial publicity, each impaneled juror stated that he or she either had not formed an opinion about defendant's guilt or could put aside such an opinion and render a verdict based on the law and evidence presented, and trial court took effective steps to protect defendant's rights, strongly and repeatedly advising jurors not to listen to news broadcasts, read newspapers, or talk to anyone about the case); Busby v. Dretke, 359 F.3d 708 (5th Cir. 2004) (prejudice sufficient to warrant a change of venue could not be presumed by virtue of pretrial press coverage, and therefore petitioner was not entitled to venue change absent proof that jurors were actually biased against him; newspaper, which ran at least a dozen articles on the case, had a paid circulation of approximately 5,500, local weekly paper, which gave the case much less prominent coverage, had a circulation of around 3,500, the two local papers' coverage of the killings was "largely

factual in nature," tracing developments in the case rather than engaging in sensationalism, and coverage tailed off markedly in the months preceding trial).

The Applicant has failed to show the existence of "actual juror prejudice." To the contrary, each juror who sat to decide the Applicant's case revealed their ability to set what they read or heard aside and base the verdict on the evidence. See Jason Cote (R. 241); Sandra McWaters (R. 276-77); Duane Green (R. 321-22); Tyrone Gillard (R. 346-47, 352); Elaine Whetstone (R. 354-55, 358); Norris Gibson (R. 402-03, 406); Debra Sanford (R. 423-24); Bonnie Zeigler (R. 430, 434); Gigi Hayes (R. 453, 458); Kedrairie Pelzer (R. 492-93); and Barbara Hanton (R. 550-51). The Applicant has failed to establish any actual juror prejudice where their sworn statements in open court revealed the ability to decide the case based upon the evidence.

Further, defense Counsel Stone and Sims strategically decided not to seek a change of venue based upon their assessment that Orangeburg County was the preferred county to try Mr. Aleksey. See PCR R. 833-37, 839-43, 854, 1151-52, 619-623. These matters were recited in the argument in ground B and are incorporated herein by reference. Simply put, defense Counsel reviewed the publicity, weighed the alternatives and decided not to seek a change of venue. He has failed to show either deficient performance or prejudice under Strickland, supra.

In conclusion, the Applicant's request for relief is denied. Counsel testified that they strategically decided not to seek a change of venue based upon their assessment that Orangeburg County was the preferred county to try the case. Orangeburg County was perceived by Counsel to be a venue where jurors were more suspicious of law enforcement and was positive for criminal defendants. Mr. Aleksey has failed to show deficient performance.

- J. Applicant was denied the effective assistance of Counsel as guaranteed by the Sixth and Fourteenth Amendments and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial Counsels' decision to imply to the jury, through voir dire questioning, that Applicant was a foreign national. Strickland v. Washington, 466 U.S. 668 (1984).

Inquiry of Jurors About Foreign Nationals - IAC

In ground J, Mr. Aleksey contends Counsel was ineffective in jury selection when he made inquiry on voir dire concerning foreign nationals when Mr. Aleksey was, in fact a U.S. citizen, albeit a descendant of a Russian and a Trinidadian. Applicant's Memo., p. 64-67. The record reveals that during the voir dire of Harry Mims, Counsel Stone asked the following question:

- Q. Do you believe that foreign nationals should have the same rights as non foreign nationals? [as people born here in America]

R. 189:1-2, [R. 189:10-11]. The Solicitor objected that it was a specific hypothetical, but Judge Cottingham permitted it. Subsequently, the trial court inquired why are you concerned about their thoughts on a foreign national. R. 194. Solicitor Bailey noted he was not a foreigner and was born in Manhattan. Id. Counsel Stone explained:

His name is Bayan Aleksey. He is a descendant of a Russian and Puerto Rican. Although he may very well not be a foreign national, he acts like it, looks like it, and sounds like it.

R. 194. Judge Cottingham allowed the question. R. 194. Of the jurors who ultimately decided Mr. Aleksey's fate, only four were asked the question: Jason Cote (R. 246); Norris Gibson (R. 407); Debra Sanford (R. 427); and Bonnie Ziegler (R. 434-35).¹⁵

¹⁵ During the voir dire, one venire person, Homer Thraikill, when asked the question about foreign national stated: "I assume he is a citizen, isn't he?" Mr. Sims responded "we can't get into that but I am asking you this question."

Mr. Aleksey contends that since the state would not be able to suggest that Mr. Aleksey was a foreign national and Counsel's failure to inform the jury that he was a citizen suggests that the defense injected racial and/or nationalistic prejudice into the case. He suggests that this was per se deficient performance by Counsel. Applicant's Memo., p. 65.

Tactical decisions about the manner of voir dire have been upheld by the Fourth Circuit. See Spencer v. Murray, 18 F.3d 229, 233 (4th Cir. 1994), where Counsel elected not to voir dire on racial attitudes; see also Sexton v. French, 163 F.3d 874 (4th Cir. 1998). In Sawyer v. Butler, 848 F.2d 582, 589 (5th Cir. 1988), the Court upheld Counsel's decision not to question jurors about their views on the death penalty where they were questioned by the state, there was no prejudice shown, and no showing of rehabilitation possible. See also Brown v. Jones, 255 F.3d 1273, 1278-79 (10th Cir. 2001) (failure to pursue reverse - Witherspoon voir dire was neither deficient performance or prejudice ineffective).

At the PCR hearing, Duffie Stone stated that Mr. Aleksey was not a foreign national. He denied that he ever asked any juror if they had a bias or prejudice against foreign nationals. Rather, he stated he asked them if they believed they should have the same rights as a natural born citizen. PCR R. 858. He stated he took it off the "federal jury questionnaire." *Id.* Mr. Stone stated that he found in his federal court experience that the question was a good indication of hidden bias that jurors may have. PCR R. 858. He stated that the question developed an honest response about hidden bias. Mr. Stone stated this was the reason he asks the question. PCR R. 858-59.

He responded: Yes, I have no problem. He is a human being like everybody else. I wouldn't be prejudiced one way or another." R. 342.

Mr. Stone reiterated it was a general voir dire question he asked, but also related to Mr. Aleksey since he looked like a foreigner. PCR R. 859. Mr. Aleksey did not recall if he ever placed into the record that he was a U.S. citizen.¹⁶ Id.

Contrary to the claims of Mr. Aleksey at this time, there was no false or prejudicial information presented by the voir dire. Mr. Aleksey's characterizations in his brief otherwise are not supported by the record.

Nevertheless, Counsel performed reasonably in questioning the jurors on the rights of foreign nationals to develop an understanding of biases on their part. Contrary to the Applicant's claim, the inquiry was not damning to Mr. Aleksey. It is further uncontradicted that the inquiry is a routine part of the federal jury questionnaire.¹⁷ Counsel Sims concurred that the reason for the inquiry was to ferret out potential jurors who may have a bias, not to create a bias against Mr. Aleksey. Mr. Sims stated he agreed with the strategy. PCR R. 620-21. Since the Applicant failed to prove either prejudice or deficient performance, the allegation must be denied.

In conclusion, this Court must find that Counsel's decision was entirely a tactical one. Further, the Court finds that trial Counsel's strategic decision was not deficient under Strickland, and therefore, the Applicants application for PCR would be denied with regards to this issue.

Further, even if the Applicant successfully established deficient performance, the Applicant has failed to establish prejudice to which he suffered as a result of the alleged violation. As a result, the Applicant's request for relief as it pertains to Ground J is denied.

¹⁶ Vera Aleksey testified that Mr. Aleksey was born in 1968 while she was living in N.Y. (R. 2071-72)

¹⁷ See http://www.scd.uscourts.gov/Forms/Jury/Standard_Jury_Questionnaire.pdf. South Carolina District Court Juror Questionnaire.

K. Applicant was denied the effective assistance of Counsel as guaranteed by the Sixth and Fourteenth Amendments and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial Counsels' complete failure to question any member of the jury panel regarding her view of the death penalty. See U.S. v. Cronin, 466 U.S. 648, 659 (1984); Hamilton v. Alabama, 368 U.S. 52, 55 (1961); Frett v. State, 298 S.C. 54, 378 S.E.2d 249 (1988) and S.C. Code Section 16-3-20(D) & (E).

**Failure to Question Voir Dire on Views on the Death
Penalty - IAC**

In ground K, Mr. Aleksey contends that defense Counsel was ineffective by failing to question any member of the jury panel concerning their views on the death penalty. Applicant's Memo., p. 62-64. He contends that it was an unreasonable strategic decision that fell below the standards of competence demanded of the criminal bar because it bypassed "it mandatory obligation of examining prospective jurors regarding their views on capital punishment." Applicant's Memo., p. 63. This Court finds that the record reveals that the strategic decision to forego the questioning was the product of an informed decision. Further, where the jurors were qualified and questioned by the court on their views on the death penalty, prejudice has not been shown.

A review of the voir dire of the actual panel selected revealed each member was questioned about their views on the death penalty. Juror Cote revealed that he was a "number 3" type juror. R. 242. Cote indicated, upon the Solicitor's questioning, that he sometimes feels it is appropriate and "there is a lot of cases that I feel it's just not appropriate and they find it's not appropriate." R. 243. Contrary to the claim in the Application, the record reveals that Counsel Sims asked Cote to confirm that he had said he had heard of situations where he did not think the death penalty was warranted. R. 245.

Juror Sandra McWaters also revealed she was a number 3 juror. R. 278. Again, the solicitor specifically asked about whether she had thought about the death penalty before and declared her willingness to consider it but "I could only do it if I heard the facts..." R. 281.

Counsel Stone stated to the juror that the Solicitor had asked a lot of questions about the death penalty, I am not too concerned about that, what I want to ask you is about guilt and innocence..." R. 282. Mr. Stone did not ask any specific questions about the death penalty. R. 281-85.

Juror Duane Green opined to the court that he was in the third group ("I can or cannot depending on the facts"). R. 318. Solicitor Bailey made inquiry about the death penalty. R. 319-20. Counsel Sims asked questions about media exposure and bias, but not about the penalty. R. 321-22.

Juror Tyrone Gilliard opined upon the court's questions that he was in the third group. R. 348-39. Solicitor Bailey made follow-up inquiry about the response. R. 349-50. Counsel Stone inquired about prior jury service, the seriousness of the case and whether the juror could vote not guilty if the state did not prove its case. R. 351-52.

Juror Elaine Whetstone indicated she would be in group three. R. 355. Solicitor Bailey confirmed her response about being a number three juror. R. 357. Counsel Stone inquired about media attention, the seriousness of the case, a willingness to give a not guilty verdict and a bias question related to men and women. R. 358-59.

Juror Norris Gibson stated to the court he was in the third group. R. 403-04. Upon Solicitor Bailey's questions, Gibson asserted that he had not discussed or thought about the death penalty before. R. 404. The solicitor focused on determining that if the case was bad enough

whether he could vote for death. R. 404-06. Counsel Sims inquired about media, his opinion about the case, whether women should be held to the same standard as men, bumper stickers on his car, and the aforementioned foreign national question. R. 406-07.

Juror Debra Sanford declared she was a number three juror. R. 424. Solicitor Bailey inquired about the death penalty and she responded that "if [the facts] were bad enough, I could." R. 425. Defense Counsel Sims inquired about whether she had formed any opinion based upon TV coverage, as well as the foreign nationals, women, and bumper sticker questions.

Juror Bonnie Zeigler opined that she was in the third group and willing to listen to the evidence before deciding the sentence. Solicitor Bailey asked if the facts were bad enough, could she sentence a person to death. R. 431. Counsel Sims made similar inquiry as he had with other jurors about whether she had formed an opinion based upon media, and the trio of questions about women, foreign nationals, and bumper stickers. R. 434-35.

Juror Gigi Hayes declared that she had not formed an opinion and was in the third group. R. 454. Solicitor Bailey inquired about her ability to vote for a death penalty. R. 454-56. Counsel Stone inquired about the impact her husband who is a military policeman would cause in the case involving the death of a police officer. R. 457. Mr. Stone inquired on whether the death penalty questioning made her feel that Mr. Aleksey was automatically guilty and followed up with inquiry about whether she would find a person not guilty. R. 457-59. Mr. Stone then asked media questions, as well as whether she held women to the same standard as men. R. 458.

Juror Kedrain Pelzer stated that he was in the third group also. R. 493. He said he would "give the person a chance, ...hear the facts and whatever before really saying they were guilty." R. 493. As to the death penalty, he said he would "hear everything and then decide." R. 494.

Solicitor Bailey inquired of Pelzer about his knowledge of Counsel Sims and Patti Rhett of his office. He declared that he could vote for death if the facts were bad enough. R. 496. Counsel Stone inquired his similar question about whether he could find a person not guilty if the state did not prove its case, even a big case where someone was killed. R. 498-99. He closed with his women bias question. R. 498.

Juror Barbara Hanton asserted she was a third type juror. R. 552. Solicitor Bailey inquired of whether she could give the death penalty, if it was bad enough. R. 554. She declared she had "never, never" thought about the death penalty before but could deal with it. R. 555. Counsel Sims inquired about the media exposure and whether she could find him not guilty if the state did not meet its burden. R. 557.

Juror Narone Franklin also declared he was a third type juror. R. 234. Solicitor Bailey inquired as to whether he could vote and sign his name for the death sentence. R. 235-36. Counsel Sims inquired as to whether he could find a defendant not guilty, about his exposure to talk and media about the case and the bumper sticker question. R. 237-38.

The record reveals that there were jurors the defense team did ask questions during voir dire concerning other venire persons opinions about the death penalty. Butler (R. 257:16-24); Ryant (R. 270:18-271:8); Sabrina Robinson (R. 305-06) (Solicitor Bailey states not qualified despite Mr. Sims' "Herculian efforts"); Goodwin (R. 450-51) (Mr. Stone: "I thought I had him, ...it came close for a second").

During the PCR hearing, Counsel Sims stated that there was a decision made with Mr. Stone to not specifically ask questions about the death penalty beliefs of the jurors. PCR R. 621. He stated the trial judge was advised of this position. PCR R. 621; see R. 177-79.¹⁸

Mr. Sims stated the judge asked each juror about what position the jurors fit in: whether they were always in favor of death, always in favor of life, or would consider all the evidence before they would make a decision. PCR R. 622.

Mr. Sims stated, concerning rehabilitating jurors, that there were some given their adamant responses the defense felt it would be useless to try to rehabilitate. PCR R. 623.

Counsel Sims asserted that he was aware that the defense had an absolute right to ask jurors their view on the death penalty. PCR R. 87.¹⁹

Counsel Stone stated that his reasoning in not pursuing this inquiry of jurors' views on the death penalty after the court's inquiry was based upon his own experience. PCR R. 861. He stated that while a law clerk, he sat through a jury qualification where the court, prosecutor and defense spent their voir dire time talking about the penalty. Id. Mr. Stone stated that he was struck at how a juror, without knowledge of any guilt, was exposed to the questions where everyone, especially the defense talks about penalty and presupposes the guilt of the defendant.

PCR R. 861. Although he did not know if studies backed him up, in his discussions with other criminal defense attorneys the concept of "residual doubt" of guilt is the best way to get a life

¹⁸ The trial record reveals before the beginning of voir dire, Counsel Stone indicated that the only reference to the penalty should be the questionnaire with the three types of jurors. R. 178. "The defense is specifically not going to ask them any questions concerning their feeling on the death penalty although we have a statutory right to do so."

¹⁹ On direct by Mr. Brown, Mr. Sims asserted that the defense always asked question about the jurors' beliefs, until his recollection was refreshed with the record. PCR R. 87-90.

sentence. PCR R. 862. Mr. Stone expressed the inquiry is difficult for the jurors without presupposing guilt. PCR R. 862.

Mr. Stone stated he wanted their voir dire efforts to focus on the jury understanding that they did not think he was guilty and try to carry that residual doubt, if convicted, into the penalty phase. PCR R. 862. Mr. Stone noted that Solicitor Bailey objected because, Mr. Stone speculated, he wanted the defense to talk about penalty as much as possible.²⁰

Mr. Stone stated that the only exception would have been where certain jurors who asserted they would never give the death penalty, he might go in and talk about the penalty in hopes to have them qualified so the solicitor would use a strike. PCR R. 863.

Mr. Stone noted that this might appear inconsistent, but his general idea was to make sure that we did not presuppose guilt. PCR R. 863. Mr. Stone stated that after listening to the judge and responses to the solicitor's questions, he had a pretty good idea that they did not need to also ask questions about penalty. PCR R. 863. Mr. Stone acknowledged that this was his theory that he sold to Mr. Sims. PCR R. 864.

Mr. Stone felt he received about the same information from listening to the response to others questions. He noted that it was how they answered. Mr. Stone clarified that he wanted to keep the concept of "residual doubt" in the jurors' minds if they got to sentencing. PCR R. 865-

67.

²⁰ Stone's fears about death qualification and conviction - prone jurors is shared by others in the legal community. See "Qualified to Convict...", 22 Q.L.R. 359 (2003); see also *State v. Griffin*, 251 Conn. 671, 741 A.2d 913 (1999) (citing *Jurow, New Data on the Effect of a "Death- Qualified" Jury on the Guilt Determination Process*, 84 Harv. L. Rev. 567 (1971); *Oberer, Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?*, 39 Tex. L. Rev. 545, 547-48 (1961)).

Analysis

As stated previously in Ground J, questions ask on voir dire generally fall within the concept of strategic decisions. An attorney's actions during voir dire are considered to be a matter of trial strategy and as such, cannot be the basis for a claim of ineffective assistance of Counsel unless Counsel's tactics are shown to be "so ill chosen that it permeates the entire trial with obvious unfairness". Burns v. State, 813 So.2d 668, 675-76 ¶ 22 (Miss. 2002) (citing Teague v. Scott, 60 F.3d 1167, 1172 (5th Cir. 1995)); see also Garland v. Maggio, 717 F.2d 199, 206 (5th Cir. 1983). Courts "will not second-guess trial strategy decisions such as those made in voir dire." State v. Cornwell, 86 Ohio St.3d 560, 569, 715 N.E.2d 1144 (1999) (citing State v. Mason, 82 Ohio St.3d 144, 157, 694 N.E.2d 932 (1998)). In a capital case in South Carolina, the defendant has a right to voir dire the potential jurors. S.C. Code Ann., § 16-3-20(D). However, it has been held that a defendant may waive his statutory right to voir dire. State v. Norris, 285 S.C. 86, 328 S.E.2d 339 (1985). In State v. Smart, 278 S.C. 515, 299 S.E.2d 686 (1982), the Court clarified that the purpose of statutory voir dire by Counsel was not to develop a personality profile, but to determine specific and real bias. In State v. South, 285 S.C. 529, 331 S.E.2d 775 (1985), the Court held it was appropriate to ask whether a juror could vote for either life or death. In Morgan v. Illinois, 504 U.S. 719 (1992), the Court held that upon a defendant's request, a judge is required in voir dire to conduct a direct inquiry into the views of the venire persons concerning capital punishment. See also Yeatts v. Angelone, 116 F.3d 255, 265-66 (4th Cir. 1999); Boggs v. Bair, 892 F.2d 1193, 1201 (4th Cir. 1989) (trial judge not required to rehabilitate by his personal questions jurors who could not put aside beliefs). The 11th Circuit decision in Brown v. Jones, 255 F.3d 1273, 1279 (11th Cir. 2001) is very persuasive:

...McDonald was not asked any questions during the Rule 20 hearing regarding his failure to engage in a reverse - Witherspoon inquiry. Although during voir dire the trial judge asked the potential jurors a few questions to determine whether any of them was unalterably opposed to the death penalty, this questioning was limited. Thus, McDonald may well have thought it better to avoid any focus on the death penalty. McDonald's decision not to ask potential jurors whether they would automatically vote to impose the death penalty if Brown were convicted of capital murder appears to have been a reasonable tactical decision, because it seems reasonable for trial Counsel to want to focus the jury on the idea of the death penalty as little as possible. Moreover, there is a strong presumption that McDonald's actions were the result of sound trial strategy. See Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. Nevertheless, we need not decide whether Brown failed to establish the performance prong on this claim, because we conclude that he failed to establish the prejudice prong.

2. Prejudice Prong

In order to establish the prejudice prong, Brown would have to show that, but for McDonald's failure to engage in the reverse - Witherspoon inquiry during voir dire, the result of his trial would have been different. See Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. For several reasons we conclude that Brown has failed to make the required showing. First, during the penalty phase of the trial, the trial judge instructed the jurors that their verdict should be based on the evidence and the law and that there was no room for passion, prejudice, or other arbitrary factors. Brown argues that we should presume that some of the jurors were biased in favor of the death penalty and would have refused to follow the law. We have stated in numerous cases, however, that jurors are presumed to follow the court's instructions. See, e.g., Ingram v. Zant, 26 F.3d 1047, 1053 (11th Cir.1994) ("Because we presume that jurors follow such instructions, we must assume that the jury put aside any biases it may have had, applied the legal standards as enunciated in the jury instructions, and based its sentencing decision on the facts introduced at trial and sentencing."); Raulerson v. Wainwright, 753 F.2d 869, 876 (11th Cir.1985) ("Jurors are presumed to follow the law as they are instructed."). Because we presume that the jurors followed the court's instructions to base their sentencing decision on the evidence and the law, and not on arbitrary factors, Brown's attempt to prove prejudice is undermined. See Stamper v. Muncie, 944

F.2d 170, 177 (4th Cir.1991) (holding that petitioner, who alleged ineffective assistance based on Counsel's failure to "explore with certain members of the venire the 'reverse - Witherspoon' inquiry," failed "to demonstrate how any shortcoming on trial Counsel's part constituted prejudice sufficient to satisfy the second prong of the Strickland test"). Second, Brown failed to adduce any evidence that any juror was biased in favor of the death penalty. Third, the heinous nature of the crime and the absence of any mitigating factors make this a case in which the prosecutor had a strong case for the death penalty. For these reasons, we conclude that Brown has failed to show that McDonald's decision not to engage in the reverse - Witherspoon inquiry with the jury resulted in prejudice sufficient to satisfy the second prong of Strickland.

Id. (footnote omitted).

This Court concludes that deficient performance has not been shown. Counsel Stone's concerns about conviction - proneness of a jury in the nature of questioning was not unreasonable. Further, as revealed in the review of the voir dire of the other potential jurors, Counsel revised the strategy when jurors indicated a potential for rehabilitation from being a Witherspoon excludable. Importantly, this was not abdication of voir dire by the defense, as the Applicant now suggests, but an informed strategy based upon the responses given by the venireman to the judge and the prosecution to develop the least "conviction-prone" juror and implicitly assert their defense strategy the guilt was still at issue. This Court finds that this was a legitimate trial strategy. See McLaughlin v. State, 352 S.G. 476, 483-484, 575 S.E.2d 841, 844-845 (2003) (holding that where Counsel articulates a valid reason for employing a certain trial strategy, such conduct will not be deemed ineffective assistance of Counsel.) The claim must be dismissed.

Even if deficient performance was found, prejudice under Strickland has not been proven. As set out above, the voir dire of the jurors who actual sat in the trial revealed unquestionable

qualification to sit. Like Jones, during the penalty phase of the trial, the trial judge instructed the jurors that their verdict should be based on the evidence and the law and that there was no room for passion, prejudice, or other arbitrary factors. R. 2166-67. Mr. Aleksey may be asserting that we should presume that some of the jurors were biased in favor of the death penalty and would have refused to follow the law. Courts have stated in numerous cases, however, that jurors are presumed to follow the court's instructions. See e.g., Ingram v. Zant, 26 F.3d 1047, 1053 (11th Cir. 1994) ("Because we presume that jurors follow such instructions, we must assume that the jury put aside any biases it may have had, applied the legal standards as enunciated in the jury instructions, and based its sentencing decision on the facts introduced at trial and sentencing."); Raulerson v. Wainwright, 753 F.2d 869, 876 (11th Cir. 1985) ("Jurors are presumed to follow the law as they are instructed."). Because it must be presumed that the jurors followed the court's instructions to base their sentencing decision on the evidence and the law, and not on arbitrary factors, Mr. Aleksey's speculative attempt to prove prejudice is undermined. See Stamper v. Muncie, 944 F.2d 170, 177 (4th Cir. 1991) (holding that petitioner, who alleged ineffective assistance based on Counsel's failure to "explore with certain members of the venire the 'reverse - Witherspoon' inquiry," failed "to demonstrate how any shortcoming on trial Counsel's part constituted prejudice sufficient to satisfy the second prong of the Strickland test"). Further, Mr. Aleksey failed to adduce any evidence that any seated juror was biased in favor of the death penalty. Third, the heinous nature of the crime and the absence of any convincing mitigating factors make this a case in which the prosecutor had a strong case for the death penalty. For these reasons, Mr. Aleksey has failed to prove the existence of prejudice as defined in Strickland and Wiggins.

This Court denies the Applicant's request for relief. In this instance, the Applicant claims that Counsel was ineffective for their failure to question members of the jury panel about their views of the death penalty. This Court finds the Applicant has failed to prove this ground or assuming arguendo deficient performance, any prejudice that resulted from Counsel's tactical decision for the following two reasons. First, in South Carolina, there is a Judge-Directed Death Penalty Qualification Voir Dire, and thus, the jury panel is in fact examined in regards to their respective views of the death penalty, and further, this Court finds that the Applicant's trial Counsel did indeed question jurors about their views of the death penalty (see Examination by Mr. Sims at Record 555, 235, 257, 270, 305, 450). Therefore, the Applicant's basis for relief is without merit. However, even if the Applicant successfully met this burden, the Applicant failed to establish the prejudice that he suffered as a result of the violation. Relief on this basis is denied.

- L. Applicant was denied the effective assistance of Counsel as guaranteed by the Sixth and Fourteenth Amendments and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial Counsels' failure to attempt to rehabilitate any jurors who indicated in voir dire that they could only vote for life in a death penalty case. Strickland v. Washington, 466 U.S. 668 (1984) and S.C. Code Section 16-3-20(D)&(E). (ABANDONED IN THIRD AMENDED APPLICATION AND POST- HEARING BRIEF).**

IAC and Failure to Rehabilitate Life-Only Jurors on Voir Dire

In this allegation, Mr. Aleksey contended that Counsel failed to attempt to rehabilitate jurors who had indicated their belief that life was the only sentence they would consider. In the opening statement, Counsel contended that voir dire was inadequate. In his third amended

application, he stated that he abandoned this issue. Therefore, it must be dismissed due to lack of prosecution with prejudice. Accord Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 493 S.E.2d 826 (1977) (court has inherent power to dismiss based upon failure to prosecute). See S.C. Rules of Civil Procedure, Rule 41(2); 41(b) (dismissed with prejudice for failure to prosecute).

- M. Applicant was denied the effective assistance of Counsel guaranteed by the Sixth and Fourteenth Amendments and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial Counsels' failure to exercise peremptory strikes and challenge for cause during jury selection. Strickland v. Washington, 466 U.S. 668 (1984).

IAC and Failure to Use Peremptory Challenge to Strike Juror 144

In ground M, the Applicant contends that he should have used an available peremptory challenge against black female juror 144. Applicant's Memo., p. 68-71. Particularly, in his brief he contends that defense Counsel were aware that juror 144 knew the victim, was a leader, and her husband was in law enforcement. This Court concludes that Counsel has failed to prove either deficient performance in failing to use a peremptory strike for a qualified juror or Sixth Amendment prejudice under Strickland.

1. Voir Dire of Juror 144

The voir dire of Juror 144 is set out at R. 451-460. Revealed on individual voir dire was the fact that she was employed at Family Health Center as Assistant Director and that her husband had previously been employed as a military policeman with the United States Marine Corps. R. 452-53. She advised the judge that while she had read, heard, and seen TV coverage about the case, she had not formed an opinion. R. 453. She classified herself as a number three

(qualified) juror. R. 454. The solicitor's questions to juror 144 were consistent with that assertion. R. 454-56.

Counsel Stone inquired about whether the fact her husband had been a military policeman cause problems since this case involved the death of a police officer. R. 457. As set out above previously, the other inquiry was consistent with Counsel Stone's voir dire strategy. R. 457-59.

During the general voir dire, the potential jurors were asked if "any of you related by blood or marriage to the deceased, Sergeant F. L. Lingard, or do any of you have any close personal relationships with him or his family?" R. 149-50. There was no response to the question.

2. PCR Testimony of Mr. Stone and Mr. Sims

During the PCR hearing, Counsel Thomas Sims testified that when juror 144 was selected as a juror he had six peremptory strikes remaining. PCR R. 95. He identified his trial notes [Applicant's Exhibit 1] which included information about juror 144 including "leader" "Judge - looking directly at the judge, 3rd group", "Walter - leaning toward Walter; not any hardship", "Duffie - Briefly looked at def. Saw News", "No, "possibly knows the deceased talk with Charles." Applicant's Exhibit 1, PCR R. 97-98. Mr. Sims stated that "Charles" was Dr. Charles Kilgore, Mr. Sims' child's pediatrician. Mr. Sims stated he called Dr. Kilgore, with whom juror 144 worked at Family Health Center, and received an assessment who she was and what she was all about. PCR R. 99. He said, based upon this conversation, "she would have been a good person." PCR R. 99. This was interpreted that Juror 144 would be a good juror. Applicant's Memo., p. 68.

Mr. Sims stated that he thought that Juror 144 was either divorced or separated from her husband, the former military policeman. Mr. Sims, contrary to the claim, did not recall that Juror 144 knew Sergeant Lingard, although he thought Mr. Stone had written it. PCR R. 101.

Mr. Stone testified that he had identified his contemporaneous trial notes and the section "Gigi Scoville-Hayes" PCR R. 868, Applicant's Exhibit 61.²¹ Mr. Stone stated that his comment about "leader" meant if she gets on the jury she is a leader and affirmed that is a person who steers people to her view of the case. PCR R. 869. Counsel Stone could not recall where he developed information that Juror 144 knew the victim. PCR R. 871-72. However, he did recall that Mr. Sims contacted someone who knew her who advised him that "she would not be a bad juror." PCR R. 871.

Mr. Stone clarified that he did not think they had information that she did not know Sergeant Lingard and thought she knew him. PCR R. 871-72. However, he could not recall why they may have thought that, particularly when it was not presented at trial. PCR R. 872. However, Mr. Stone declared "I just remember Mr. Sims talking to someone that she worked for or with and coming back saying that she would be a good juror." PCR R. 872. He noted that the scratched out mark before Juror 144's name on his notes was the number of strikes, but he scratched it out after he talked to Mr. Sims. He stated this was based upon their information that she would be a good juror. PCR R. 872-74. After he spoke with Mr. Sims about the juror after he made the telephone call, Mr. Stone said he change his own mind from a strike to conclude she

²¹ In Applicant's Exhibit 61, the notes are "husband - military police get rid of," "leader," "Family Health Center," "knows injured."

would be a good juror, even if she knew the victim. PCR R. 873-74. Even though strikes were available, he chose not to use them. Id.

On cross-examination, Mr. Stone emphasized the reason the strike was not used on Juror 144 was because "Mr. Sims told me that he thought she would be good." PCR R. 1161. He said based upon Mr. Sims knowledge about Orangeburg, he deferred to him on this matter. PCR R. 1162-63:

Mr. Stone recognized that his impression that Juror 144 knew the victim was of concern, but based upon information from someone who actually knew her, not just the two lawyers discussing it, gave them adequate assurance to pick this juror, despite his initial reservations. PCR R. 1163.

Analysis

The South Carolina Supreme Court has held that the mere fact that person is friend or acquaintance of victim does not render him or her incompetent as juror in homicide trial. State v. Jones, 298 S.C. 118, 378 S.E.2d 594(1989); see also State v. Clark, 340 So.2d 208, 215 (La. 1976) (Even where a prospective juror knows a victim of the offense, the defense must show the juror's acquaintance with the victim is such that it is reasonable to conclude it would influence the juror in arriving at a verdict to warrant a cause challenge). The fact that a prospective juror knew the victim or the victim's family does not automatically disqualify the prospective juror for cause. Harris v. State, 632 So.2d 503, 521 (Ala.Crim.App. 1992), aff'd, 632 So.2d 543 (Ala.1993), aff'd, 513 U.S. 504, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995). Unless the prospective juror indicates on voir dire that his or her relationship with the victim would prevent

him or her from being fair and impartial, a challenge for cause should be denied. Dunning v. State, 659 So.2d 995, 997 (Ala.Crim.App. 1994).

Counsel who has failed to exercise a peremptory challenge has been found to be ineffective. Johnson v. Armontrout, 961 F.2d 748, 754-755 (8th Cir. 1992). However, prejudice is required or a negative effect on the outcome. Paradis v. Arave, 954 F.2d 1483, 1491 (9th Cir. 1992), vacated on other grounds, 507 U.S. 1026, 113 S.Ct. 1837, 123 L.Ed.2d 463 (1993), opinion on remand 20 F.3d 950 (9th Cir. 1994); see also U.S. v. Taylor, 832 F.2d 1187, 1195 (10th Cir. 1987). In Denham v. Deeds, 954 F.2d 1501, 1505 (9th Cir. 1992), the Ninth Circuit observed that a juror could have been challenged, but ineffectiveness was not shown where the juror nevertheless could be fair and the decision could in some way be tactical. See also U.S. v. Quintero-Barraza, 57 F.3d 836, 841 (9th Cir. 1995) (finding no ineffectiveness in failing to strike a facially biased juror where the decision was manifestly tactical and where due respect was paid to the juror's oath); Heath v. Jones, 941 F.2d 1126, 1136 (11th Cir. 1991) (juror could be fair and follow the law); Butler v. State, 872 S.W.2d 227 (Tex. Crim. App. 1994) (Failure of defendant's Counsel to use peremptory challenge against prospective juror in capital murder trial did not constitute ineffective assistance of Counsel; although prospective juror stated that she knew ~~members of family of victims of violent crime, thought defendant in that case deserved death~~ penalty, and felt "very strong" about death penalty, she never stated she had predisposition in favor of death penalty, and her answers showed she was willing to set aside her feelings regarding crime committed against family friend); Stead v. U.S., 67 F.Supp.2d 1064 (D.S.D. 1999) (Counsel for murder defendant was not ineffective in failing to exercise peremptory strike against prospective juror who stated during voir dire that he knew both victim, and victim's son.

where juror's connection with victim was remote, juror made it clear that he could be a fair and impartial juror, and juror was last remaining American Indian on panel, whose presence on jury could have been of benefit to defendant, who was also an American Indian).

This Court finds the Applicant has failed to prove deficient performance as defined in Strickland. First, Applicant failed to prove the factual predicate to his claim - that juror 144 knew the victim. As set out above, at the general voir dire, Juror 144 did not respond positively to an inquiry on whether she had any "close personal relationship with [Sergeant Lingard] or his family." R. 149-50. Second, Counsel Sims notes state "possibly knows the deceased." Applicant's Exhibit 1. Further, Mr. Sims stated that he did not know if she knew Sergeant Lingard and thought Mr. Stone had written it. Mr. Stone, on the other hand, thought he had received the information that Juror 144 knew the victim which apparently prompted Mr. Sims to check with Dr. Kilgore about the juror. Mr. Stone thought he learned about the alleged relationship from the trial proceedings, but the trial record is devoid of any reference to any knowledge of such a friendship - and suggests the opposite by the voir dire response.

However, even assuming the defense believed Juror 144 knew the victim, the strategic decision not to use a peremptory challenge on her was a reasonable trial strategy. It is ~~uncontradicted that pursuant to Mr. Sims's investigation of the juror, he believed from the~~ information he received from Dr. Kilgore that she would be a good juror. Dr. Kilgore had a business relationship with Mr. Sims as his child's pediatrician and Juror 144 worked with Dr. Kilgore. Counsel could reasonably base his opinion to strike or not strike on this independent information.

In his brief, the Applicant suggests that the decision to retain Juror 144 as a juror was delegated to Dr. Kilgore, who did not possess information about her friendship/knowledge of Sergeant Lingard or her husband's employment as a law enforcement officer. Applicant's Memo., p. 69. There is nothing in the record to support this alleged lack of knowledge on Dr. Kilgore's part - particularly when the suggestion made at the hearing was that the contact was made based upon Counsel's expectation that Dr. Kilgore would likely possess this knowledge about the co-worker stated in the "possibly knows the deceased talk to Charles," reference in his notes.

More importantly, there is no assertion by either Mr. Sims or Mr. Stone that the choice of this juror was turned over to Dr. Kilgore. Only, that with the additional information, she turned into a "good juror" in the eyes of the defense team. At all times, however, she was a "qualified" juror.

Turning this decision around, assuming arguendo that Juror 144 would have struck, with the independent information from a source that had a close working relationship with the potential juror and defense Counsel, aware that it was a death penalty case and involved the death of a police officer, opine that she would be a "good juror for the defense", from the favorable Orangeburg community; i.e., suspicious of law enforcement and the "best place to try death penalty case", would the defense's performance be reasonably competent in striking this juror from the panel where only one vote would be needed for a life sentence. See Wiggins v. Smith, supra. As suggested by the Applicant in these proceedings, such tactical decisions are not tactical, at all, but error *per se*. However, he ignores the realities of the responses, demeanor, and multiple factors which Counsel had in making their decision. What is extraordinary, but not

recognized by Mr. Aleksey, in hindsight, is that Juror 144 may in fact have been the best juror for the defense. Mr. Aleksey has failed to show otherwise by the speculative understanding that the juror "knew" Sergeant Lingard or the husband being a former military policeman. Those factors do not mandate discretionary exclusion when faced with favorable information.

Further, as noted in the earlier section, prejudice under Strickland has not been shown. The reasons set forth in ground L, the claim must be denied on this alternative basis. As Mr. Sims and Mr. Stone stated, they were very satisfied with the jury that they had selected. PCR R. 624. The Applicant has failed in his burden of proof as to ground M.

In summary, the Applicant claims that he was denied effective assistance of Counsel as a result of trial Counsel's failure to use a peremptory challenge against Juror No. 144. This Court finds that Counsel exercised strategic decision-making in deciding not to use a peremptory strike on Juror No. 144, as they determined that Juror No. 144 would be a good juror for their panel, based upon Counsel's investigation. This Court would therefore find that the Applicant has failed to prove deficient performance as defined in Strickland. As a result, this Court denies the Applicant's request for relief with regards to this Ground.

N. Applicant was denied the effective assistance of Counsel guaranteed by the Sixth and Fourteenth Amendments and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial Counsels' failure to object to the trial court's appointment of SLED Agent Buster Edwards to the position of supervisor of the sequestered jury panel. Strickland v. Washington, 466 U.S. 668 (1984). [ABANDONED IN THIRD APPLICATION AND BRIEF

**IAC and SLED Agent Buster Edwards as Supervisor
of Jury Panel Sequestration.**

In allegation N, Mr. Aleksey contended that he received ineffective assistance of Counsel when SLED Agent Buster Edwards was assigned to be the supervisor over the other bailiffs in handling the sequestered jury and their transportation. See R. 859-862. His complaint derived from the fact Edwards had signed discharge papers when Mr. Aleksey was released from the hospital, served the actual arrest warrant on him, and was involved in the transportation of him from the hospital to the Law Enforcement Center. In his third amended application, he stated that he abandoned this issue. Therefore, it must be dismissed due to lack of prosecution with prejudice. Accord Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 493 S.E.2d 826 (1977) (court has inherent power to dismiss based upon failure to prosecute); see S.C. Rules of Civil Procedure, Rule 41(2); 41(b) (dismissed with prejudice for failure to prosecute).

- S. Applicant was denied the effective assistance of Counsel guaranteed by the Sixth and Fourteenth Amendments and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by appellate Counsel's failure to argue on direct appeal that trial Counsel's actual conflict of interest was so serious as to be unwaivable. Strickland v. Washington, 466 U.S. 668 (1984) and United States v. Schwarz, et al., 283 F.3d 76 (2d Cir. 2002).

Ineffective Appellate Counsel and Unwaivable Conflict of Interest Issue

In his ground S, Applicant contends that his appellate Counsel, Robert M. Dudek of the South Carolina Office of Appellate Defense erred in performing ineffectively in failing to raise before the South Carolina Supreme Court in the direct appeal that trial Counsel's conflict of interest was unwaivable. This Court concludes the Ground must be rejected because deficient performance has not been proven. A PCR applicant has the burden of proving that appellate

Counsel's performance was deficient. Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003); Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). A defendant is constitutionally entitled to the effective assistance of appellate Counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990); Tisdale v. State, 357 S.C. 474, 475, 594 S.E.2d 166, 167 (2004); Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999).

The proper standard for assessing a claim of ineffectiveness of appellate Counsel is that set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Smith v. Robbins, 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (following Smith v. Murray, 477 U.S. 527, 535-36, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986)). The petitioner must show both (1) constitutionally deficient performance, by demonstrating that his Counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for Counsel's unprofessional error(s), the result of the proceeding – in this case the appeal – would have been different. Id. at 285 (applying Strickland).

Although appellate Counsel is required to provide effective assistance of Counsel, “appellate Counsel is not required to raise every nonfrivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (emphasis supplied)). “For judges to second – guess reasonable professional judgments and impose on ... Counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy....” Jones, 463 U.S. at 754, 103 S.Ct. 3308. Furthermore, to render effective assistance, an attorney is not required to raise every conceivable constitutional claim available at

trial and on appeal. Holladay v. State, 629 So.2d 673 (Ala.Cr.App. 1992); McCoy v. Lynaugh, 874 F.2d 954, 965-66 (5th Cir. 1989). Rather, Counsel must be given some discretion in determining which claims possibly have merit, and thus a better chance of success, and which claims do not have merit, and thus have little chance of success. Smith v. Murray, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986); Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); Davis v. State, 720 So.2d 1006, 1014 (Ala.Crim.App. 1998).

[E]xperienced advocates have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. Selecting the most promising issues for review has assumed a greater importance in an era when the time for oral argument is strictly limited in most courts and when page limits on briefs are widely imposed.

Jones v. Barnes, 463 U.S. 745, 746, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).²²

In applying the [Strickland] test to claims of ineffective assistance of Counsel on appeal the reviewing courts must accord appellate Counsel the "presumption that he decided which issues were most likely to afford relief on appeal." Pruett v. Thompson, 996 F.2d 1560, 1568 (4th Cir.1993); see also Smith v. South Carolina, 882 F.2d 895, 899 (4th Cir. 1989). Indeed, "winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." Smith v.

²² The purpose of ineffectiveness review is not to grade Counsel's performance. See Strickland, 104 S.Ct. at 2065; see also White v. Singletary, 972 F.2d 1218, 1221 (11th Cir. 1992) ('We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.'). Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Strickland, 104 S.Ct. at 2067. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or what is prudent or appropriate, but only what is constitutionally compelled. Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987).

Murray, 477 U.S. 527, 536, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) (quoting Jones, 463 U.S. at 751); see also Smith, 882 F.2d at 899 (Counsel's failure to raise a weak constitutional claim may constitute an acceptable strategic decision designed "to avoid diverting the appellate court's attention from what [Counsel] felt were stronger claims"). Although recognizing that "[n]otwithstanding Barnes, it is still possible to bring a Strickland claim based on Counsel's failure to raise a particular claim" on direct appeal, the Supreme Court has recently reiterated that "it [will be] difficult to demonstrate that Counsel was incompetent." Robbins, 120 S.Ct. at 765. "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of Counsel be overcome." Id. (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)); Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir. 2000) (en banc).

Appellate Counsel is not deficient for failing to raise on appeal an issue that was not preserved for review. Legge v. State, 349 S.C. 222, 562 S.E.2d 618 (2002); Gilchrist v. State, 612 S.E.2d 702, 705 (S.C. 2004) (appellate Counsel not ineffective where trial Counsel's submission of the request to charge, without any further explanation of his point, was insufficient to preserve for review the trial court's failure to charge the specific language regarding "a right to act on appearances."); see State v. Hicks, 330 S.C. 207, 499 S.E.2d 209, cert. denied, 525 U.S. 1022, 119 S.Ct. 552, 142 L.Ed.2d 459, (1998) (issue must be raised to and ruled upon by trial court to be preserved for review); State v. Dickman, 341 S.C. 293, 534 S.E.2d 268 (2000) (party may not argue one ground at trial and an alternate ground on appeal).

To prove prejudice, the applicant must show that, but for Counsel's errors, there is a reasonable probability he would have prevailed on appeal. Strickland, supra; Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). That is, the Applicant must prove prejudice by showing he

would have prevailed on appeal had a writ been filed by Counsel and granted by this Court. See Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (appellate Counsel ineffective in failing to raise issue, preserved below, which would have entitled defendant to reversal on appeal).

This asserted issue of an unwaivable conflict was never preserved for review in any manner by objection or otherwise. The Applicant has failed to show that there any exception to the Court well-established preservation rules to allow this to be raised de novo for the first time in a direct appeal to the Supreme Court. As stated in Legge, appellate Counsel cannot be deemed deficient in failing to do what the rules of court do not authorize him to do - raise an unpreserved ground.

Alternately, prejudice has not been shown. First, if raised without being preserved on objection below, the appellate court would have dismissed it. See State v. Hicks, supra (issue must be raised to and ruled upon by trial court to be preserved for review). Second, even if considered, for the reasons set out in response to ground A, the alleged conflicts was not unwaivable as a matter of law. This Court incorporates this section of this Order by reference. For this additional reason, the matter must be dismissed and denied as failing in the burden of proof to show ineffective assistance of Counsel.

In conclusion, with regards to Ground S, the Applicant claims he was denied effective assistance of Counsel by his appellate Counsel's, Robert Dudek, failure to argue on direct appeal that trial Counsel's actual conflict of interest was so serious as to be unwaivable. As previously stated in this Order, the Court has found that that Mr. Aleksey has failed to prove that his trial Counsel was representing Mr. Aleksey while acting under an actual conflict of interest. Further, the Court finds that for any appearance of conflict, there was a knowingly and intelligent waiver

by Mr. Aleksey, and Mr. Aleksey was fully advised of any appearance of conflict, both by Counsel and by the Court. Therefore, since there was no actual conflict, and because any appearance of conflict was properly waived and no objection raised or error preserved, this Court is constrained to find that Mr. Dudek's representation of Mr. Aleksey was not ineffective. As a result, this Court must deny Mr. Aleksey's application for PCR in this regard.

P(6). Trial Counsel failed to investigate fully and effectively Applicant's life and background and to present the information to the sentencing jury in a coherent and meaningful manner. Counsel failed to utilize properly the information their investigation uncovered and to find other information. Counsel failed to employ the services of a social worker. Counsel failed to employ the services of an adaptability expert to testify as to Applicant's likelihood to adapt to prison life if sentenced to life in prison.

IAC and Prison Adaptability Expert

In Applicant's allegation P(6) and brief, he asserts that trial Counsel was ineffective in the penalty phase in failing to retain an expert on prison adaptability to testify that Mr. Aleksey was adaptable to prison life based upon the decision in Skipper v. South Carolina, 476 U.S. 1 (1986). He relies upon the PCR testimony of former S.C.D.C. employee, James Aiken in support of his claim.²³ This Court incorporates by reference its earlier Order as to Ground A related to a

²³ Recently, in a decision made subsequent to the briefing in this case, the South Carolina Supreme Court issued a cautionary instruction to similar type testimony. In State v. Bowman, 366 S.C. 485, 498-499, 623 S.E.2d 378, 385 (2005), the Court stated:

"We take this opportunity, however, to caution the State and the defense that the evidence presented in a penalty phase of a capital trial is to be restricted to the individual defendant and the individual defendant's actions, behavior, and character. Generally, questions regarding escape and prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole. We emphasize that how inmates, other than the defendant at trial, are treated in prison; and whether other inmates have escaped from prison, is inappropriate evidence in the penalty phase of a capital trial. We admonish both the State and the

similar claim in the conflict of interest section. This Court finds that Counsel had a strategic reason for not pursuing this type of evidence and was not deficient. Alternately, prejudice under Strickland has not been shown. This specification is without merit and must be dismissed.

A capital defendant is given broad latitude to offer mitigating evidence because "the penalty of death is qualitatively different" than any other sentence. See Lockett v. Ohio, 438 U.S. at 604, 98 S.Ct. at 2964 (quoting Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976)). The death penalty's irrevocable end has prompted the Supreme Court to require the sentencer in capital cases to consider a defendant's violent and troubled youth, see Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), good behavior in prison, see Skipper v. South Carolina, 476 U.S. at 1, 4-5, 106 S.Ct. at 1669, 1670-71 (1986), history of child abuse and emotional problems, see Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), ineligibility for parole, see Simmons v. South Carolina, 512 U.S. 154, 162, 114 S.Ct. 2187, 2193, 129 L.Ed.2d 133 (1994), poverty-ridden childhood, see Hitchcock v. Dugger, 481 U.S. at 397, 107 S.Ct. at 1823-24, good deeds as an affectionate uncle, see id., and childhood habit of inhaling gas fumes, see id.

In this ground, he claims that trial Counsel should have employed an expert to opine on Mr. Aleksey's adaptability to prison. At trial, former Orangeburg Detention Center Officer Maurice Keitt testified on January 27, 1998, Mr. Aleksey told him that he had just knocked one

defense that the penalty phase should focus solely on the defendant and any evidence introduced in the penalty phase should be connected to that particular defendant."

Accord State v. Burkhardt, 371 S.C. 482, 640 S.E.2d 450 (2007) (evidence of the defendant's characteristics admissible in the sentencing phase of a capital trial may include prison conditions if narrowly tailored to demonstrate the defendant's personal behavior in those conditions).

of the small windows out. R. 1970. He stated he saw that the window was broken out and that Mr. Aleksey had broken a metal stool from the stand that was attached to the floor. R. 1971. When Mr. Keitt asked Mr. Aleksey why, he declared he was frustrated. R. 1972, 1974. He said Mr. Aleksey was sent to "safekeeping" shortly after this which, in his experience, was where people were sent if they might hurt themselves or escape or be a high risk. R. 1973.

Deputy Director of the Orangeburg Detention Center, Vernetia Dozier, testified that she had received a report that on January 27, 1998, Mr. Aleksey had taken a stool and ripped the stool off the wall and broken the window out of the cell. R. 1978. She stated that based upon this conduct, they initially signed a warrant for the damage done to the jail and attempted escape and sent him to safekeeping. R. 1978. She described safekeeping as a place where they send inmates that are hard to handle or an escape risk. R. 1978.

On cross-examination, Counsel Stone had Dozier describe the movement from the normal cells to an upstairs room. Importantly, she stated that it was department policy to charge anyone who cracks or breaks a window with escape if it's an exterior window. R. 1979. Mr. Stone had her describe that to escape, the inmate would have to get through the window, then through the jail yard, then over the fence with razor wire. R. 1979. Further, on re-direct, she declared no one had gotten through the type of small window Mr. Aleksey broke. R. 1980-81.

On re-cross, Dozier stated that Mr. Aleksey did not escape from his jail cell and she was informed that he called for help after he broke the window. R. 1981.

The next day of the sentencing hearing, Solicitor Bailey noted that Director Dozier had made an unresponsive comment that revealed there was a warrant for escape. R. 2024. Solicitor

Bailey felt that a curative instruction to disregard the evidence about the escape warrant would be appropriate.

Counsel Stone requested the curative instruction "to disregard any of the questions concerning escape." R. 2024-25.

Judge Cottingham concluded that he would tell the jury to disregard that in its entirety and that there is no warrant for escape. R. 2025. During the instructions, the jury was instructed:

This defendant is not charged with escape. There is no escape warrant outstanding. You must disregard that testimony in its entirety. It has nothing to do with the trial of this case.

R. 2028:13-17.²⁴

Mr. Stone testified that because Mr. Aleksey was charged with escape, at some point he felt that prison life would be discussed and Mr. Stone wanted to be sure that the escape charge was not a realistic escape and he thought that it was sewn up at trial and did not become an issue. PCR R. 823. Mr. Stone stated that he did not hire a prison adaptability expert because he felt such testimony frequently backfires. PCR R. 1224. He was not aware of evidence to indicate that Mr. Aleksey was particularly adaptable to prison. PCR R. 1224. In addition to the damage to the chair and window, and there were lawsuits he had filed and Mr. Stone felt it was a big risk and not credible at that point. PCR R. 1225.

²⁴ The Applicant criticizes the prosecution for commenting during their closing about the facts concerning the breaking of the chair window, his frustration, and the safekeeping. R. 2110, 2116. Contrary to the concerns about a "warrant" this evidence was not stricken from the record and was subject to fair comment about his character and non-adaptability.

Mr. Stone stated that his notes revealed at some point in the representation he or Mr. Sims spoke with Mr. Bamberg concerning the escape incident. PCR R. 1229. He stated that they learned anytime a window was broken they were going to call it escape. PCR R. 1229.

In preparation for the defense, the defense had contacted Detention Center Director Bamberg who prepared an affidavit on May 20, 1998 [Exhibit 87]. In the affidavit, he described the fact the charges were made "because he threw a chair into the window in his cell. The window measures twenty-six and one-half inches long and five inches wide. This was the only infraction that the Defendant had during his stay in the Orangeburg Detention Center." Mr. Stone's decision not to present adaptability testimony was not based upon any fear of cross-examining individuals at the detention center, but his belief that such adaptability testimony has little persuasive value and could backfire. Further, the favorable information - the unlikelihood of escape through the window, the policy to charge based upon a broken window, and the lack of any other violation, were presented to the jury.

Counsel Sims concurred in his testimony. He stated that the theory of defense was to show that Mr. Aleksey was not a bad person and although he had a criminal history, that it was consistently non-violent. PCR R. 627, 679. Mr. Sims stated that he understood that Skipper allowed for evidence of rehabilitation and adaptability in prison to be presented, as to whether a person can adapt in prison or become a predator. PCR R. 703-04.

Mr. Sims stated that he was aware prior to the trial of the existence of experts on prison adaptability. PCR R. 658. Additionally he was aware of the circumstances concerning Mr. Aleksey's actions in jail and the escape charge. Mr. Sims declared at the time of his representation, he was aware of Skipper and that although Mr. Stone was dealing with the

experts, he is sure it was discussed as potential evidence in mitigation. PCR R. 659-70. In fact, Mr. Sims recalled a case he handled where the Skipper issue was presented. Mr. Sims stated the reason that adaptability experts were not presented was not based upon any neglect of the law. PCR R. 660.

James E. Aiken

During the PCR hearing, James Aiken, former warden at Central Correctional Institution and prison system administrator, testified as an expert in adaptability and correctional risk. PCR R. 1485. It was his opinion "that Mr. Aleksey could be properly housed and secured in a correctional facility for the remainder of his life and without presenting an undue risk of harm to staff, inmates or the community." PCR R. 1487. He further opined the S.C.D.C. has adequate structure, staff, and authority "to use lethal force if required to adequately manage him. Id. Mr. Aiken, based on his review of the records opined that he did not see anything which would give him concern about Mr. Aleksey inflicting injury to staff or other inmates; although he could provide injury to himself. PCR R. 1488. Mr. Aiken further attempted to explain Mr. Aleksey's action at the jail when he broke the chair and window leading to the attempted escape charge. PCR R. 1490-91. He opined that Mr. Aleksey would have been unable to escape through the window and negotiate the perimeter fence, assuming he was restrained. PCR R. 1491.

Mr. Aiken stated that his concerns about Mr. Aleksey would not only derive from his attempted escape (low level), but his serious crime would require that he is placed at a maximum security institution. PCR R. 1492. He felt the series of grievances and lawsuits Mr. Aleksey filed against correctional officers would weigh in favor of adaptability since he is using the system to remedy his concerns. PCR R. 1493.

On cross-examination, Mr. Aiken acknowledged that an inmate, like Mr. Aleksey, who suffers from borderline, mixed personality, and antisocial features was the majority of his prison population. PCR R. 1498. He found they "most definitely" had problems with truth and were "manipulative, malingering, and con artists." PCR R. 1498. Mr. Aiken stated that he had reviewed the safekeeping petition of Orangeburg which revealed the outburst of Mr. Aleksey at the jail, required further restraint, and admitted the local facility opined that he was not adaptable to that transient jail setting. PCR R. 1500. Mr. Aiken explained that Mr. Aleksey was then sent to Lee Correctional Institution and would have been in isolation from the general population at that time. PCR R. 1501.

Mr. Aiken further admitted that if Mr. Aleksey began to tear up the jail, he would use force up to death (and had done that before) in order to control him. PCR R. 1502. Mr. Aiken also admitted that in the past, mistakes had been made in the South Carolina Department of Corrections in assessing inmates for future violence and placement. PCR R. 1504. Mr. Aiken summarized the fact that his opinion is that "any inmate", including Mr. Aleksey can be managed at the South Carolina Department of Corrections based upon the capability the institution's continuum of force up to and including that which is lethal.

Analysis

In Wiggins v. Smith, *supra*, the Supreme Court noted that Counsel was under a duty to do a reasonable investigation into the existence of mitigating evidence, including adaptability to prison. The record reveals that defense Counsel anticipated that Mr. Aleksey's lack of prison adaptability reflected in the destructive outburst at the jail and the removal from there to South Carolina Department of Corrections as a safekeeper would develop negative evidence on Mr.

Aleksey. Counsel contacted the local jail, prepared an affidavit and developed an understanding of their potential testimony to mitigate the claims surrounding the incident.

Counsel Stone and Sims were both aware of the right to present relevant and competent evidence of adaptability to prison life based upon the Skipper decision. Mr. Stone felt that adaptability evidence may "backfire" and felt that he was not aware of any evidence to suggest that he was particularly adaptable. His concern about the complaints and lawsuits that Mr. Aleksey had pursued caused him to think the presentation could not be credible. PCR R. 823, 1224, 1225.

The Applicant contends this investigation was unreasonable for two reasons. First, the Solicitor's argument emphasized the lack of adaptability evidence:

"You can take a look at how Bayan Aleksey has adapted to jail, how he has adapted to prison. This is a piece of metal furniture that was in the cell here in Orangeburg. How does he react to it? He becomes frustrated. Bayan doesn't like being in that cell.

So he rips this piece of metal furniture off the wall in that cell, smashes out the window and earns himself a trip up to safekeeping where Mrs. Dozier and Mr. Keitt told y'all they send people that are too unruly or just not suitable to be housed in a local jail. That's his adaptation. That's how he adapts to a confined environment....

...As 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."

R. 2110:8-23, 2116:2-7. (Emphasis Added). This argument was entirely fact-based from the record and indicated that the local jail officials had opined that Mr. Aleksey was not adaptable to the local facility causing the movement to South Carolina Department of Corrections.

Here, the defense team reasonably investigated by learning about Mr. Aleksey's adaptability to the jail setting. Mr. Stone's belief that adaptability experts can backfire was well-reflected in the testimony of Mr. Aiken who revealed:

- 1) Prison officials make mistakes in placements.
- 2) When Mr. Aiken said adaptable, he actually meant subject to be controlled, either by maximum and isolated jails, or by the use of force, which includes lethal force.
- 3) Mr. Aleksey's physical outburst at the jail, according to Mr. Aleksey was that he was in a four-point restraint in a cell, yet was able to break a chair and destroy a window. PCR R. 1508. Mr. Aiken stated that Mr. Aleksey's reason was to "get some attention."
- 4) Mr. Aiken admitted "the best predictor of future behavior is past behavior."
- 5) Mr. Aiken admitted that the local detention people opined he was not adaptable to their jail.
- 6) Mr. Aiken opined that violent behavior decreases with age and burn out in the prison setting.
- 7) Mr. Aiken admitted the majority of inmates are manipulative, malingering and con-artists who have problems with the truth.

Mr. Stone assessment about "backfire" was reasonable. Although the evidence was admissible as mitigating, Counsel's experience (where similar general responses would be given) reflected the problem with such testimony.

Further, prejudice has not been shown by a reasonable probability that but for his failure to present adaptability evidence, the result of the proceeding would have been different. At the hearing, Solicitor Bailey testified that he had been involved in prior cases where James Aiken testified. PCR R. 1698. Solicitor Bailey stated that he like to cross-examine experts like Mr.

Aiken from the prosecution point of view and present testimony about what the defendant is adapting to and develop a description of prison life in the general prison population – cable TV, recreation activities and amenities compared with the decedent's death. Solicitor Bailey stated that because an adaptability expert was not used, this contra-mitigation testimony in explaining actual prison life was not present. PCR R. 198-99. Solicitor Bailey noted that each time Mr. Aiken testified for the defense in the cases he had prosecuted, the verdict was death. PCR R. 1699. As noted above, on balance, the risks of the adaptability testimony and the failure to present it in Mr. Aleksey's case does not undermine confidence in the outcome. This Court finds that Applicant's claim must be denied on this basis.

IAC and Social Worker

The Applicant further contends that defense Counsel performed deficiently in failing to retain a social worker to review the records acquired by "mitigation specialist" Toni Bovee. The Applicant relies upon the deposition - testimony of Janet Vogelsang, a licensed clinical social worker, in support of their claim that Counsel was ineffective. Applicant's Memo., p. 81-83.

The Applicant summarizes social worker Vogelsang's conclusions about Mr. Aleksey as follows:

- A. A special needs child.
- B. Emotionally disturbed and emotionally handicapped.
- C. Special education student.
- D. Immature and enmeshed with his mother.
- E. Alcoholic and abusive father.
- F. Child that did not develop social skills that would help in relationships outside the home or able to function in world.

- G. Engages in impulsive and self-destructive behavior.
- H. Does better in well-structured environments where there is consistency.
- I. Had mother who sabotaged his therapy.
- J. Attempted suicide at least once.
- K. High risk to end up incarcerated and committing a serious act.

Applicant's Memo., p. 82-83; Janet Vogelsang Depo., p. 57-60. Applicant asserts this testimony from a social worker would have been more persuasive and credible than his mother's testimony. Id. This Court concludes that viewing the record as a whole, applicant has failed in his burden to prove either deficient performance or prejudice.

During the trial, in the penalty phase, the sole mitigation witness who testified was Mr. Aleksey's mother, Vera Aleksey. R. 2069-94.

In her testimony before the jury, she described her family development and movement from Trinidad to New York leading to her marriage to Ronald. R. 2072-74. She stated her husband had a severe drinking problem that affected her life and child. After Bayan was born, Ronald's drinking increased and he became angry, disruptive, and he struck her a couple of times. R. 2072-73.

She stated she left when Bayan was three. She said her husband attempted to see her later, while drinking and continued his violence. R. 2074-75.

She stated that Bayan had educational problems and emotional problems as a child. He was a late talker, timid, had problems with his school work and failed his homework. R. 2075-76. He use to leave his parochial school and come home during the day. R. 2075-76.

After Applicant was required to repeat the fifth grade his mom stated she went to a diagnostic education center for an evaluation and for professional help for Mr. Aleksey. They recommended and he was placed in a special education class. R. 2079.

She claimed he did not have friends at school. She claimed others would pick at him. He later started making friends in high school, but then suddenly did not want them around. R. 2080-81.

Mr. Aleksey's mother said he had therapy for three (3) years at Queens Guidance Center. R. 2081. Later, he had to go to a hospital for therapy for 3 to 4 months. R. 2081-82. After that he was supposed to go to a residential treatment center. R. 2083. However, she stated that she refused to go to court to have him sent there. She had other parents state they were not pleased with that facility, including one whose daughter committed suicide. R. 2083-84.

She attempted to have him in other Counseling, including group and family Counseling. R. 2084. After services could no longer be provided, he went back to junior high, but continued to have emotional and coping problems. R. 2084-85.

She said Mr. Aleksey did not finish high school and dropped out. R. 2086.

Mrs. Aleksey described Mr. Aleksey's attempted suicide when he was 14. Mr. Aleksey took an overdose while in therapy at Queens Guidance Center. The suicide attempt resulted in a hospital visit to Roosevelt Hospital. R. 2086-87. On a second overdose attempt when he was 19, Mr. Aleksey's mother took him to Creedmore Mental Hospital. R. 2087-89. After his release from Creedmore, he continued on medication which made him sleep through the day. R. 2088.

In therapy, Mr. Aleksey's anger and resentment toward his father was revealed. R. 2089. She said on a number of occasions between 3 and 19, Mr. Aleksey's father would show up and physically abuse her.

Mrs. Aleksey described trying to be both mother and father, but was financially unable to provide for the treatment and medication her son needed. R. 2089-91.

Mrs. Aleksey felt that they were close and her life was to take care of Bayan. R. 2090. She described that he left home when he was 19, but later attempted to return home. R. 2090-91. Unfortunately, she stated they would have arguments because he would not follow her rules. R. 2092.

During that same time, her husband died from alcoholism. R. 2092. She briefly described her relationship with her living brother in New York. R. 2092-93. She stated that she had no one to turn to when she learned of Bayan's predicament in South Carolina. R. 2093. She closed by stating she loved, cried, and prayed for her son. R. 2094.

Counsel's PCR Testimony

Counsel Stone testified that in addition to Mr. Sims, the defense retained Toni Bovee as a "mitigation expert or specialist." Her job was to investigate anything that could be presented in mitigation. PCR R. 1213. He said she met with Mr. Aleksey's family. Id.

Mr. Stone stated that Ms. Bovee, as a mitigation specialist, developed the same type of evidence that his experience with a social worker in a Lexington County death penalty case presented. PCR R. 1214. In addition, they contacted Dr. Rosengard in New York, who was a mental health person, either social worker or psychologist, but after he was brought from New York, they decided not to use him. PCR R. 1215.

Mr. Stone stated they also retained psychiatrist, Dr. Donna Schwartz-Watts, to assist and provide information about Mr. Aleksey's mental state and met with her several times about his psychiatric background. They did not call her as a witness because she could not uncover anything that could help them. PCR R. 1217. Dr. Schwartz-Watts recommended neurologist, Dr. David Bachman, who testified in the guilt phase concerning Mr. Aleksey's concussive trauma. PCR R. 1218; see R. 1662-1689.

Mr. Stone stated that his initial impression was that Dr. Rosengard would be a favorable witness, but then presented information when he arrived that he blamed the mother for Mr. Aleksey's problems as an angry child with a separation disorder due to his parents breakup and that caused him an inability to do well in school as well as caused him emotional problems. PCR R. 1220. He suggested that blame was due to lack of discipline. PCR R. 1220.

Mr. Stone stated this hurt their theory because they wanted to put Mrs. Aleksey on the stand to say things about Mr. Aleksey and Dr. Rosengard would have blamed it on her. PCR R. 1220.

Mr. Stone confirmed Ms. Bovee was a background investigator about mitigation, not a crime scene investigator. PCR R. 1221.

Solicitor Bailey testified that in preparation for trial he prepares for the use of social workers as potential witnesses. He notes that when a social worker testifies with a lot of documentation, it gets long and the jury gets lost in the length and relevance of the information. PCR R. 1701. He stated he attempts to make points on cross-examination. He notes that he would have had whatever social histories had been done in the state hospital evaluations and in

this case, he had records which he provided to the defense about the two prior hospitalizations and his school problems. PCR R. 1702.

Counsel Sims also stated that Toni Bovee was a mitigation expert to develop mitigation evidence, but she dealt mostly with Mr. Stone. PCR R. 656-67.

Jan Vogelsang described the records she reviewed in preparation for her testimony. Particularly, she reviewed and relied upon the records of Toni Bovee. Vogelsang Depo., p. 63. These records included Ms. Bovee's reports of interviews, reviews of mental health records, school records, and the August 7, 1998 Timeline she prepared concerning Mr. Aleksey. Vogelsang Depo., p. 64-66. Most importantly, she said that all the documents and reports she reviewed were those assimilated by Toni Bovee prior to the trial. Vogelsang Depo., p. 66, Exhibits 1, 2, 3.

On cross-examination, Ms. Vogelsang noted that there was information in the records that Mr. Aleksey's judgment was poor, that his parents (including his father) sought an order of protection from Mr. Aleksey when he was 16 because they feared violence and assault from him, particularly when he was sleeping with a knife. Vogelsang Depo., p. 72. In addition, Ms. Vogelsang described a violent confrontation Mr. Aleksey had with his mother in September 1986 when he verbally assaulted her and proceeded to throw furniture around the house. Vogelsang Depo. p. 73.

Included in the deposition were some of the work product that trial Counsel had from Ms. Bovee, including her extensive interview with Vera Aleksey on July 27, 28, 29, 1998. Vogelsang Depo., Exhibit 1. Further, the interview with David Rosengard MSW (Master in Social Work) at Queens Guidance Center on August 4, 1998, which describes his interaction

with Mr. Aleksey, his nonaggressive behavior, his anger directed at himself, his poor skills at solving problems as well as his mother's attempt to blame Mr. Aleksey's problems on others, and Mr. Aleksey's inability to see the consequences of his behavior. Ms. Bovee summarized the contact by stating that Rosengard did not feel that Mr. Aleksey would shoot someone in the manner described because he appeared more destructive to himself. Vogelsang Depo., Exhibit 1. Encompassed within Vogelsang Depo., Exhibit 2 is Ms. Bovee's extensive time line which categorizes events in Mr. Aleksey's life from his parent's birth and marriage through individual events until November 8, 1997 (1998). Particularly significant, the timeline includes the following: his many mental health therapy sessions; his school attendance and grade summary; his arrests; his commitment for suicide treatment; his traffic tickets; his complaint against police officers in 1993 for beating him; his complaint against the QHDM for \$10 million dollars for lack of medical treatment; his offer to drop lawsuits in return for a deal on criminal charges another comment about a \$5 million dollar lawsuit; his use of aliases in criminal activity; information that Sara Pivero was charged on November 20, 1996 by for bad checks and thefts by deception involving the Lexus (Vogelsand Depo., Exhibit 2, p. 10); and Ms. Pivero's arrest while visiting Mr. Aleksey at Bucks County Correctional Facility on February 1, 1997; as well as other matters. The final exhibit to the Vogelsang deposition is the Social History prepared by K. Fisherman dated February 24, 1976.

In Wiggins, the trial Counsel only alluded to Wiggins' difficult life and his clean criminal record at sentencing. Wiggins asserted that trial Counsel were ineffective for failing to retain a forensic social worker to prepare a social history even though the State made funds available for that purpose. If trial Counsel had prepared a social history Wiggins maintained, they would have

discovered the severe physical and sexual abuse he suffered. The state habeas court denied Wiggins relief because it found that Counsel's decision not to investigate and present certain mitigation evidence was based on trial strategy and was thus not ineffective. Moreover, the state court noted that trial Counsel obtained social service records that did detail some abuse and mental retardation; thus, trial Counsel were aware to some extent, and did conduct some investigation into Wiggins' unfortunate childhood.

In reversing the state habeas court, the Supreme Court restated that deference is owed strategic judgments made by trial Counsel. However, the Court emphasized that deference is owed strategic decisions only when the investigation supporting those judgments was adequate. Wiggins, 539 U.S. at 521-22, 123 S.Ct. 2527. Where trial Counsel has not "fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background," "Counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision." Id. at 522, 123 S.Ct. 2527 (quoting Williams, 529 U.S. at 396, 120 S.Ct. 1495). Therefore, the "principal concern in deciding whether [trial Counsel] exercised 'reasonable professional judgment' is not whether Counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting Counsel's decision not to introduce mitigating evidence of Wiggins' background was itself reasonable." Id. at 522-24, 123 S.Ct. 2527 (internal citations omitted). The Court held that Wiggins' trial Counsel's investigation was inadequate because "Counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." Id. at 524, 123 S.Ct. 2527 (citing the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6, p. 133 (1989) (stating that among the topics Counsel

should consider presenting are medical history, educational history, employment history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences)). Trial Counsel did obtain a psychologist to evaluate Wiggins. Trial Counsel also procured Wiggins' social services records and had available to them the presentence investigation report. However, the Court found that trial Counsel should have nonetheless arranged for a forensic social worker to compile a report of Wiggins' social history, and trial Counsel was found ineffective for not so doing.

The Court in Wiggins also held that the scope of trial Counsel's investigation was unreasonable in light of the investigation that they did conduct. In trial Counsel's investigation, they did discover that Wiggins' mother was an alcoholic, that he was shuttled between foster homes, and that his mother often left him and his siblings alone without food. The Court held that based on this information, a reasonably competent attorney would have further investigated Wiggins' background. "In assessing the reasonableness of an attorney's investigation, a court must consider not only the quantum of evidence already known to Counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Id. at 527, 123 S.Ct. 2527. The Court held that Wiggins' trial Counsel "chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible.... As a result, the court's subsequent deference to Counsel's strategic decision not 'to present every conceivable mitigation defense,' despite the fact that Counsel based this alleged choice on what we have made clear was an unreasonable investigation, was also objectively unreasonable." Id. at 527-28, 123 S.Ct. 2527; Accord Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456 (2005).

Deficient Performance Not Shown By The Failure To Retain A Social Worker

The Applicant has not shown that Counsel's investigation was deficient in failing to retain a licensed social worker. First, the defense retained a mitigation investigator, Toni Bovee, whose marshaling of materials was completely relied upon by Ms. Vogelsang in her deposition. It provided whatever information was necessary: A contrast of the testimony of Ms. Vogelsang with the testimony of Mr. Aleksey's mother revealed that Ms. Vogelsang testimony was merely a conduit of the information about which Ms. Mr. Aleksey had already testified. More importantly, since Ms. Vogelsang testimony was merely a hearsay summary of the records which defense Counsel necessarily were aware of in their investigation through the efforts of Ms. Bovee, it is difficult to discern how Mr. Aleksey can now assert Counsel was ineffective in their investigation in developing the same information. To the contrary, in a quest to prove prior Counsel ineffective, Applicant has proven that Counsel was reasonable in their investigation of his background by their interview of family; review of records of prior mental health professionals; and retention of an independent forensic psychiatrist and neurologist. Unlike Wiggins, where the Court determined the decision to cut off the investigation came prematurely, the team of Mr. Stone, Ms. Bovee, and Mr. Sims continued the quest up to the time of trial.

The Applicant's complaint against prior Counsel is not one of deficiency in investigation, but a disagreement on style. Ms. Vogelsang's testimony revealed nothing new for it relied completely on the reasonable investigation done before. Counsels' strategic dilemma came to a head in the decision whether to use Master in Social Work David Rosengard, who was involved in Mr. Aleksey earlier treatment, where his testimony might cast a negative impression on Ms. Mr. Aleksey's testimony. At that moment a decision had to be made, whether to present the

social worker who had real and credible interaction with Mr. Aleksey and his family yet found Ms. Mr. Aleksey at fault in causing many of her son's problems or go with the mother allowing her to plead her son's case in mitigation. Facing that choice, with the same information that Ms. Vogelsang possessed, defense Counsel tactically chose to present the mother and leave her negative relationship to the risk, however unlikely, of Solicitor Bailey's cross-examination to break down that relationship. Now, he seeks to assert that another social worker - one more step removed from the facts than Rosengard and the other mental health professionals should have presented testimony about her review of the records, including Rosengard.

The Applicant appears to assert a checklist type of claim that any time the death penalty is sought, defense Counsel is required under the constitution to both retain and call a social worker to testify about that Applicant's background. This assertion is a misreading of the mandate of Wiggins. See Gudinas v. State, 816 So.2d 1095 (Fla. 2002) (Counsel was not ineffective in failing to hire social worker, for presentation of mitigation evidence at penalty phase of capital murder trial; Counsel hired and consulted with mental health experts for purpose of determining effect of defendant's social history on his life and on the case, and social worker's testimony would have been cumulative to the mental health and other mitigating evidence actually presented).

Additionally, the complaint about the decision to hire a social worker appears to be second-guessing by current Counsel, rather than identification of a defect in trial Counsel's strategy. The Strickland Court acknowledged, "Even the best criminal defense attorneys would not defend a particular client in the same way." 466 U.S. at 689, 104 S.Ct. 2052. "The standard is not how present Counsel would have proceeded, in hindsight, but rather whether there was both

a deficient performance and a reasonable probability of a different result." Cherry v. State, 659 So.2d 1069, 1073 (Fla.1995); Duncan v. State, 925 So.2d 245 (Ala.Crim.App. 2005) (defendant failed to establish that trial Counsel's failure to obtain assistance of social worker in murder prosecution was ineffective assistance of Counsel where he failed to identify how such third person assistance would aid defense, and Counsel did, in fact, obtain some expert assistance in preparing for trial).

Prejudice Not Proven

The Applicant has also failed in his burden of proof to show prejudice. Contrasting the testimony of the mother and Ms. Vogelsang, the jury was equipped with most of the same information. The assertions before this Court are similar to those raised in Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998). In Jones, the Court stated:

"Just because it was unsuccessful does not mean that Jones can now recharacterize the evidence and claim that Counsel did not adequately present mitigation evidence. The "new" evidence is the same as the "old" evidence. At best, it is a fancier mitigation case. If the evidence was not persuasive in the first case, the defendant does not get a second chance. Otherwise, there would never be an end to litigation."

Jones v. State, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998). Further, the risk of the testimony of Ms. Vogelsang was revealed at the deposition. Evidence about his perceived violence toward the family was revealed on cross-examination. Background hearsay which formed the basis of the speculative opinion were not consistent. A different picture - one less favorable and more violent - was presented by the social history. To use the words acknowledged by James Aiken - the best predictor of future behavior is past behavior. The social worker potentially could have presented evidence of Applicant's possession of deadly weapons (gun and knife); firing a gun at

another person (Vogelsang Depo. p. 56); applicant's violent and abusive assaults against his mother (Vogelsang Depo. p. 71-72); and applicant's throwing furniture (Vogelsang Depo. p. 73). Although the negative opinions concerning the mother were untouched and the use of the social worker make the possibility of Rosengard's impressions able to be presented, that tactically must be balanced against Mr. Aleksey's social history of assaults against and fear of him by his family members. The solicitor anecdotally recognized these risks for the defense in calling for social work evidence in his prior cases involving similar testimony.

Assuming Counsel erred in their approach regarding social work testimony, the error did not create a reasonable probability, absent the error, that the result of the proceeding would be different under Wiggins. Therefore, relief based upon this ground must be denied.

- O. Applicant was denied the right to the effective assistance of Counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 163-26(B)(1) and 17-23-60 at the guilt or innocence phase of his trial. Williams v. Taylor, 120 S.Ct. 1495 (2000); Strickland v. Washington, 466 U.S. 668 (1984); Jolly v. State, 443 S.E.2d 566 (S.C. 1994).

- (1) Beginning with the opening statement and throughout the entire guilt or innocence phase of Applicant's trial, trial Counsel "opened the door" to alleged prior bad acts and bad character of Applicant.

Opening Statement and Non-Violent Bad Acts of Mr. Aleksey and IAC

In this allegation, Mr. Aleksey complains about the overall trial strategy of defense Counsel. A review of the post-hearing memorandum of the Applicant does not include any specific reference to this specification of error, although in the third amended application. Mr.

Aleksey does not suggest that it has been abandoned. Nevertheless, this Court must find Applicant has failed in his burden of proof on this issue.

This Court must recognize that often times Counsel for a defendant, and particularly capital defense Counsel, are faced with strategic decisions which benefits and risks exist with each alternative course of action. See Burdge v. Palmateer, 338 Or. 490, 497, 112 P.3d 320 (2005) (reasonable skill and judgment is exercised when Counsel apprehends issue, sees a course of action that could benefit client, and concludes that the benefits of that course of action outweigh the risks). The United States Supreme Court reasonably acknowledge it in a setting where Counsel concedes the guilt of his client as a sound trial strategy and that such a concession by Counsel does not require petitioner's consent. Florida v. Nixon, 543 U.S. 175, 187-88, 125 S.Ct. 551, 560-61 (2004) (provided that a defendant is informed of Counsel's decision, reasonable strategy of conceding guilt to murder in order to preserve the defendant's credibility did not require the defendant's express consent because it is not the functional equivalent of a guilty plea). Petitioner does not contend that he was not informed of his trial Counsel's strategy to focus on a defense theory that the victim's death was the unintended consequence of a burglary. See Gorham v. Thompson, 332 Or. 560, 567, 34 P.3d 161 (2001) (reviewing court "will not second-guess a lawyer's tactical decisions in the name of the constitution unless those decisions reflect an absence or suspension of professional skill and judgment"); Young v. Catoe, 205 F.3d 750 (4th Cir. 2000) (admission of guilt not ineffectiveness when thrust was to avoid death penalty); U.S. v. Wilkes, 46 F.3d 640, 644 (7th Cir. 1995) (conceding lesser offense to enhance credibility).

In the defense opening statement, Counsel; Mr. Stone stated:

... we may see things or see people on the street and assume we don't like them. I will tell you right now. Bayan Aleksey is not anybody you are going to particularly like. He has been arrested before. He has been charged before, forgeries, breach of trust, things like that. He has never been tried before because what you will learn either from the solicitor or me is that he has a couple of names. He's got a couple of fake ID's. When he gets arrested, he presents his fake ID. He makes bond and he leaves.

It kind of makes me wonder why somebody with that profile would shoot a police officer for speeding. Why would he panic. You will also learn a little bit more about Gloryvee Perez Blackwell, the Solicitor's main witness. . ."

R. 911-912.

The Applicant contends that this "opened the door" to bad acts which the state could not otherwise have introduced in the guilt phase of the trial, particularly if the defendant does not testify. Applicant is correct that much of the bad act evidence would not be admissible under SCRE Rule 404(a)(1) and 404(b) during the guilt phase of the trial. The problem is that reasonable strategy is evident at the outset of his argument - why would an individual confronted with numerous arrest and evasions of responsibilities on this occasion uniquely chose violence, when in the past he chose peaceable deception. In other words, if the action taken is against the conformity of his past actions, the event did not occur in that manner. Under the defense theory, it must have been done by someone who did not have that conformity of conduct to wit Ms. Perez Blackwell.

Strickland recites that there are countless ways to provide effective assistance in any given case and even the best criminal defense attorneys would not defend a particular client in the same way. Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. Under this principle, the courts

have recognized reasonable defensive strategies even if they are unsuccessful. Flieger v. Delo, 12 F.3d 766, 774 (8th Cir. 1993). An attorney's conduct is not deficient simply because another (appellate Counsel) would do differently. U.S. v. Chambers, 918 F.2d 1455, 1462 (9th Cir. 1990). Speculation that a different lawyer, or the same lawyer using a different strategy or tactics, would have changed the result is an insufficient showing of prejudice. Cooks v. Spalding, 660 F.2d 738, 740 (9th Cir. 1991).

Thomas Sims declared that their theory of the case was that there was no violence in Mr. Aleksey. PCR R. 148. Mr. Aleksey may have been a bad person and done bad things, but there was never any violence in his background. PCR R. 627. Particularly, it was not in his character or his modus operandi to shoot the trooper. PCR R. 149. He felt that the bad act - no violence strategy and his strategy with the women witnesses - Ms. Perez Blackwell, Ms. Pivero, Ms. Batkilina and Ms. Watson was consistent. He said that all during the scenario with the women, it was shown that Mr. Aleksey would use a name, get the money with them or from them, have a good time, and then move on. PCR R. 632. Mr. Sims stated it was their intent not to object to matters consistent with their theory of showing that Mr. Aleksey was a con artist - get money from woman, do things. PCR R. 152. Mr. Sims noted that he cross-examined the women to reveal that they participated in the deeds and that so long as they were having a good time he was having a good time. PCR R. 150. Simply put, Mr. Sims stated that he had no problem letting the bad acts in. Id.

Counsel acknowledged that the solicitor made a Lyle motion, but that it was not argued and the defense did not object when it was introduced. PCR R. 151. Mr. Sims stated that once the decision was made as to how they were going to proceed it was their intent not to object.

PCR R. 152. Further, Mr. Sims believed that there was clear and convincing evidence based upon their investigation of the acts. Importantly, under Strickland, Mr. Aleksey admitted to Counsel that he had done the bad acts with each of the women. PCR R. 152.

Duffie Stone concurred in the strategy and opening statement was to set the tone for the defense. PCR R. 849. The issue was a trooper was killed from a gunshot coming out of a white Mustang on I-95. The trooper eyewitness failed to see who fired the gun. PCR R. 849. Mr. Stone was left with two potential shooters - Mr. Aleksey and Perez. He felt that the theme of the guilt phase was to remove the gun from Mr. Aleksey and place it into Gloryvee Perez Blackwell's hand. PCR R. 1165. The preeminent issue was who was the passenger and who was the driver. PCR R. 849-50. Mr. Stone testified although motive need not be proven, it is an essential consideration in the jury's mind. PCR R. 850. Mr. Stone felt that he must establish who had the motive to shoot, as a way of casting responsibility on Ms. Perez Blackwell and off of Mr. Aleksey. Id.

Although in a sense, his opening statement may have placed his client in a bad light, Mr. Stone declared that it was part of the bigger picture of the case. He stated that the first thing he was trying to do in the statement was to build credibility with the jury. PCR R. 1166. Mr. Stone said he believed that if the jury thought he was lying to them at that point it would be detrimental to his client both in the guilt phase and penalty phase. Additionally, he felt a "good bit" of information (about his bad acts) would come in any way to show motive.²⁵ Mr. Stone believed

²⁵ In the context of evidentiary law, State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), and its progeny protect a defendant from the unrestricted admission of bad act evidence. Lyle prohibits such evidence unless the evidence has a particular relevance to the crime charged and falls within at least one of five categories: motive, identity, common scheme or plan, absence of mistake or accident, or intent. Further, bad acts that are not the subject of conviction must be proved by clear and convincing evidence. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). This

that the state was going to try to show that Mr. Aleksey was running from the charges, that he was out on bond, and the reason for his actions was to avoid arrest. Mr. Stone did not think that the state would attempt to show that he was merely speeding and that was why he shot and killed the Highway Patrolman. PCR R. 1167. Knowing that the state would be attempting to prove his client was running from the other charges and jail, Mr. Stone stated he was attempting to turn the State's theory to their advantage by depicting Mr. Aleksey's conduct as nothing out of the ordinary for him.

Mr. Stone stated Mr. Aleksey had numerous false identifications on him at the time of the arrest. He had a consistent pattern of being stopped or being arrested and going to jail and presenting the false identification, bonding out and then never being seen or heard from again. PCR R. 850, 1167. Based upon the consistency of Mr. Aleksey actions when confronted with an actual or potential arrest, Mr. Stone theorized to be candid with the jury about Mr. Aleksey's past would diffuse the State's case regarding motive for Mr. Aleksey to be the shooter. PCR R. 1168. According to Mr. Stone, Mr. Aleksey had a way out with his ID's; however, he wanted to suggest that Perez would have had no such way out other than shooting the police officer. PCR R. 1168.

Mr. Stone felt that his investigation of Perez was supportive of their defense theory, in particular, the drugs and the history of her violent temper towards her husband. PCR R. 851, 1169. Also, she had a desire not to lose her children. PCR R. 851. Mr. Stone stated that they had

preliminary fact-finding by the judge ensures the evidence is subjected to some procedural safeguard before the jury hears it. See Rule 404(a)(1), SCRE ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same[.]").

a sense of confidence about that case. He hoped to link Perez with the drug trade and the I-95 high drug corridor. PCR R. 1169. He felt that if he could successfully link her to the drug trade that it would give her a reason for the shooting. Id.

Mr. Stone felt that Perez's prior conviction for cocaine was important to their theory, ... Perez was indicted with her mother and that her mother went to prison while Perez received probation. PCR R. 1169-70. Mr. Stone testified he learned Perez may have cut a deal against her own mother to avoid jail. Further, his investigation revealed that her family was involved with ballooning heroin. However, Judge Cottingham only allowed the impeachment of Ms. Perez Blackwell on the possession of cocaine plea. PCR R. 1170. Mr. Stone did feel that he was able to develop before the jury that I-95 was a drug corridor. Id.

Mr. Stone felt that another issue against Perez and helpful to Mr. Aleksey was they had learned that she had used a gun before; fired it before, indeed she had shot a gun at her ex-husband; kicked in his windshield and had a volatile temper. Mr. Stone stated that he was unable to develop this theory as much with the jury as they hoped. PCR R. 1171.

Mr. Stone stated that Mr. Aleksey had advised him about the stolen checks Perez had taken that he had deposited. Mr. Aleksey provided Mr. Stone a good deal of information that led him to believe that Perez and Mr. Aleksey were involved in a criminal operation together. PCR R. 1172. However, Mr. Aleksey told him that he had no knowledge of any involvement with drugs and that he saw Perez throw something out of the window. Id. Mr. Stone testified he perceived that the relationship between Mr. Aleksey and Perez as one of "boyfriend/girlfriend/co-conspirator." Id.

Mr. Stone admitted that he never saw any information that Perez asserted that she, not Mr. Aleksey, pulled the trigger. PCR R. 1172. Additionally, Mr. Stone did not interview Perez prior to the questioning at trial. She was represented by Mike Culler with whom he had many conversations when she objected to them going through her belongings. PCR R. 1173-74. However, Mr. Stone admitted it was merely a fishing expedition, not based upon something that his client told them to look for. PCR R. 1174.

Mr. Stone stated that he had conversations with Mr. Aleksey about each of the female witnesses. PCR R. 1177. Additionally, he spoke with Yelena Batkilina by telephone prior to trial. She stated that she was on probation at that time "because of him" and that she had already spoken to the solicitor about that case. Id. He noted that Mr. Sims cross-examined each of the women. PCR R. 1178. Mr. Stone stated that their theory was that he may have been a con artist or a womanizer, but he was not that type of person who would have done something violent.

Mr. Stone stated that he learned probably from her statement that Ms. Batkilina needed help for her trouble in Florida. PCR R. 1179. However, when they asked Mr. Aleksey for specifics on what information he had on the women, he gave them very little. PCR R. 1180.

Concerning the gun used in the shooting, Mr. Stone noted at trial that the manner in which the fingerprint was located on the gun suggested that it was in reverse order of his pointing the gun, it was as though Mr. Aleksey had taken it from someone. PCR R. 1181. However, the defense could not get around the fact that the gun was traceable to Ms. Batkilina and his association with her. PCR R. 1182. Also the connection to Ms. Batkilina was strong because she had acted as his girlfriend and posted bond previously for him and continued their friendship after the time he was in custody when she called Mr. Stone. Id.

At one point during Mr. Stone's conversations with his client, Mr. Aleksey told him that Ms. Batkilina held him at gunpoint, but at another time Mr. Aleksey maintained that Ms. Batkilina threw the gun on his lap or even handed it to him. PCR R. 1183. Mr. Stone indicated that his client's versions to him were inconsistent. Id.

Counsel also stated that he had spoken with Mr. Aleksey before the trial about Lisa Watson. PCR R. 1183-84. Mr. Stone stated that with regards to everything that they uncovered there always seemed to be the two of them involved. He recalled sending retained investigator and former FBI agent Davis to New York to check out information regarding Ms. Watson. Mr. Stone said when they checked out the events involving this woman, they consistently learned that Mr. Aleksey and Ms. Watson bought a Lexus together; bought the motorcycle together; their actions being consistent with a romantic relationship. Counsel's investigation also consistently showed that Mr. Aleksey knew how to get out of trouble when he needed to. PCR R. 1186. Mr. Stone said he felt that Mr. Aleksey appeared street smart and the defense clung to his theory throughout the trial, to wit, why would Mr. Aleksey take this inconsistent violent action? Id.

Mr. Stone stated, in hindsight, maybe they should have cross-examined more, but the big point was everything they were getting in was consistent with the defense theory, and there should be no shock value from the guilt phase. PCR R. 1186. It was their goal to use each of the witnesses to establish that Mr. Aleksey was non-violent, even those that stated he had handled a gun where they asserted that they did not take him seriously or that he was pitiful looking and almost-suicidal. PCR R. 1187. Mr. Stone testified their theory was he never hurt any of them and in fact once was beaten up by the girl. Id.

Albeit there was the problem area when Mr. Aleksey shot a gun at a car while up north. Mr. Stone felt that this act was harmful however this was the only bad act that he could recall that failed to advance their theory. PCR R. 1187.

This Court finds that the Applicant has failed in his burden of proof. Counsels' credible testimony reveals that the strategy had an aura of persuasion based upon his past conduct. Further, it was a strategy that developed enhanced credibility with each non-violent incident and arrest in which Mr. Aleksey was involved in. The structure of the defense was to have the state concur with the defense's case through much of their evidence. If the defense would have successfully challenged the admission of the evidence, their defense theory's foundation would have been destroyed. This strategy was not developed from ignorance or neglect, but directly from the client's versions presented, as supported by Perez's divergent history of drugs, hot temper and violence, and her apparent willingness to "sell out" her mother to avoid prison for herself. Relief on this ground is denied.

O. (Guilt Phase IAC continued)

6. Trial Counsel failed to properly cross examine SLED agent Mears. Counsel did not question Mears about Applicant's allegations of coercion during police interrogation. Counsel failed to question Mears about certain evidence belonging to Gloryvee Perez Blackwell found in car that was evidence of her recent criminal activity and gave her motive to shoot Trooper Lingard. Counsel failed to cross examine Mears about the missing SLED statement of Sara Pivero.

7. Trial Counsel failed to properly cross examine SLED agent Darnell. See (6) above.

In these two allegations, Mr. Aleksey contends that Counsel failed to question SLED Agents Mears and or Darnell about the allegations of coercion during the police interrogations.

As noted above, the 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 any 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 result would have been different. The allegation to the contrary must be dismissed.

Further, the claim about a failure to cross-examine either agent about the "missing" statement of Sara Pivero is without merit. The sole basis for this is the reference in the SLED report, Applicant's Exhibit 83 to an item styled Attachment 44 Sara Pivero Statement without any statement attached. According to the testimony of Agent Darnell, he described their attempts and expectations that she would prepare a written statement when they were putting the report together. PCR R. 1678-79. However, in the manner the report was prepared, he placed a piece of paper in there with the expectation that a statement from her would replace it. However, he declared that they never received a statement from her. PCR R. 1679.

This Court must conclude that defense Counsel was neither deficient nor has prejudice under Strickland been shown by failing to inquire of the agents concerning the statement they never received.

GLORYVEE PEREZ BLACKWELL CLAIMS**Ground O (4)****IAC – Guilt**

Trial Counsel failed to properly cross examine and impeach state's witness, and Applicant's former co-defendant, Gloryvee Perez Blackwell. Counsel failed to impeach witness with evidence of her motive to commit crime of which Applicant was charged. Counsel failed to prove Ms. Perez Blackwell's character through character evidence involving specific instances or relevant dishonest conduct.

Ground O (9)**IAC**

Trial Counsel failed to fully investigate the crime charged and the state's witnesses and to present that information to the jury in a coherent and meaningful manner.

Ground O (10)**IAC**

Trial Counsel failed to adequately investigate Gloryvee Perez Blackwell. Such an investigation would have uncovered a substantial amount of evidence that Ms. Perez Blackwell had a significant motive to shoot the victim.

Ground Q**BRADY**

Applicant was denied due process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law by the prosecution's failure to disclose material information which was favorable to the defense on issues of guilt and punishment. Brady v. Maryland, 373 U.S. 83 (1963) and Kyles v. Whitley, 514 U.S. 419 (1995).

Ground Q (1)**IAC**

The prosecutor knowingly failed to disclose evidence of Gloryvee Perez Blackwell's motive and recent criminal activity and affirmatively mislead trial Counsel regarding the existence and materiality of this evidence.

In these allegations, Mr. Aleksey contends that trial Counsel failed to investigate the background of Gloryvee Perez Blackwell. The record reveals that Ms. Perez Blackwell testified at the trial after an in camera hearing. R. 1295-1352. The record also reveals she was thoroughly cross-examined. R. 1310-18, 1318-28 (in camera), 1328-43. The Applicant further maintains that the prosecution failed to disclose appropriate documents under its constitutional obligation regarding the conduct of Ms. Perez Blackwell. This Court finds that he has failed in his burden of proof.

A. How Gloryvee Perez Blackwell Testified At Trial

During the state's case in chief in the guilt phase, the prosecution called the passenger in Mr. Aleksey's car, Gloryvee Perez Blackwell, about her knowledge concerning the shooting of Sergeant Lingard. Prior to her testimony, the prosecution stated its intent to reveal two prior convictions, but that its research did not reveal outstanding arrest warrants. R. 1288-89. At that time, the defense indicated that it was aware of other outstanding traffic warrants and the trial court suggested that it would permit it. R. 1290.

Gloryvee Perez Blackwell, on direct, testified that she previously had some problems with the law. Particularly, she declared that in 1992 she was convicted in New Jersey of "possession of cocaine" and in 1991 of "shoplifting." R. 1297:2-10. She further declared that she did not recall any "speeding tickets." R. 1297:11-14. She testified that she had been charged with murder in this case, but the charges were dropped. R. 1298:2-6.

She testified that in December 1997, she met Mr. Aleksey, who she knew as "Michael Toscani" in Philadelphia. She had previously separated from her husband who was in the

Marine Corps in South Carolina. She stated that Mr. Aleksey offered for her to move in with him. R. 1299-1300.

She stated that they left Philadelphia on December 31, 1997 to go to Disney World with her two children. Mr. Aleksey drove the entire trip and she sat in the passenger seat. Her children, Mercedes and Gloria Maria, were in the back seat of the Mustang. R. 1302.

At around 11 p.m., she recalled being pulled over when Mr. Aleksey woke her from her sleep. R. 1303-04. He told her that he had been speeding. With the driver's side window down, she heard the officer's voice say "hello folks or good evening folks" in a polite way and "how are you doing." At that point, Mr. Aleksey said "how are you doing officer?" and immediately fired a gun. R. 1304:17-25. Previously unaware that there was a gun in the car, she said she saw and heard the pops and flashes from three or four shots. R. 1305:6-15. She did not hear Sergeant Lingard say anything threatening at all. R. 1305:16-20.

Immediately after he shot, they took off speeding. When shots were fired back them, Mr. Aleksey said, "no, he went down, he went down." R. 1306:2-4. She said that she began screaming as they took off. When she asked him why he did it, he said "he wasn't going to jail, he was not going to jail." R. 1306:13-16. She described the car chase and begging him to pull over. R. 1306:07. She said that when he did, an officer had a shotgun pointed at him and Mr. Aleksey said "I will shoot myself" with his gun pointed at his own head. R. 1307:6-10. At that point, she stated she jumped out of the car, grabbed her children and went to the officer. R. 1307.

On cross-examination, defense Counsel Sims initially inquired about her prior conviction for drugs. R. 1313:20-23. The prosecution then objected to going into details of the conviction going into evidence and the court agreed. R. 1314:8-11.

The defense then asserted that the witness had been indicted on ten (10) separate counts and made a bargain and pled to one of the counts. R. 1316:1-4. He contended that the information was relevant on all ten (10) charges. The trial court stated that he would permit inquiry about what she pled guilty to and arrest warrants for speeding, but not into the nine (9) other matters that she was indicted, but not tried on. R. 1317:11-21.

The defense then made a proffer of the indictments. R. 1317:22-24. The defense, in camera inquired of the witness of each of the charges on whether she was indicted and she stated that she did not recall. R. 1318-19. She did recall that she pled to one of the counts and received three (3) years probation. R. 1319:14-16. Counsel Sims declared that she pled guilty to count five and that the remaining nine counts of the indictment were dismissed. R. 1319-20, 1322-23.

During the cross-examination, she denied that she was in the driver's seat or did the shooting. R. 1334-35. She further denied driving the car into South Carolina. R. 1340-41.²⁶

B. Ineffective Assistance of Counsel

In his claims related to Gloryvee Perez Blackwell, Mr. Aleksey claims that he received ineffective assistance of Counsel in various specifications. First, he contends trial Counsel failed to investigate Ms. Perez Blackwell's fraudulent activity involving Dr. Bang, Summit Bank and the Burlington Lincoln where Applicant had given Counsel notice and information concerning

²⁶ The witness' daughter, Gloria Maria Riveria, also testified that her mother was sitting in the passenger seat with her one (1) year old sister in the car seat in the back next to her. R. 1370-74.

the scams. Further, he complains that Counsel neglected to impeach Ms. Perez Blackwell based upon the inconsistency between the statements she gave to SLED, the Dr. Bang scam, and her trial testimony. Further, he contends Counsel should have developed Ms. Perez Blackwell's ability for self-protection by a history of cutting deals and shift blame involving her plea bargain on the Trenton drug case and her implication of Mr. Aleksey in the theft of Dr. Bang's checks. Lastly, he contends that Counsel should have called Marcus Blackwell, her estranged husband, about her violent temper, use of gun, and resemblance to her sister and his mother, Elizabeth Blackwell, on the influence Ms. Perez Blackwell had on Gloria Maria Rivera's statements. This Court must find as to each of these specifications, he has failed to show deficient performance or prejudice under Strickland v. Washington, 466 U.S. 668 (1984).

1. **Dr. Bang, Summit Bank, Burlington Lincoln Scam**

In his brief, the Applicant initially asserts that Counsel had the tools to investigate the fraudulent activity surrounding the theft of the checks from Dr. Bang and the fraud committed upon Summit Bank and ultimately Burlington Lincoln Mercury. In Wiggins v. Smith, supra, the Court recognized that Counsel has an obligation to do a reasonable investigation into matters which may mitigate or explain a criminal event. Further, in Strickland, the Court acknowledged that Counsel may be guided as to what is a reasonable course for an investigation by the conversations and communications they have with their client.

a. **What the Defense Knew From Their Client**

Counsel Stone specifically recalled that Ms. Perez Blackwell was fired from her job because she stole checks. PCR R. 960. Further, Counsel Stone noted on March 25, 1996, the following:

"I have reviewed the information that Bayan sent me in some letters. The only new information concerns what Gloria was doing prior to leaving Pennsylvania. Apparently, she was working with a doctor's office. Bayan deposited some checks that Gloria had given him. These checks were reported as stolen. We need to contact the doctor's office that Gloria worked for and find out if they had any checks there were stolen and if they were deposited by Mr. Aleksey for Gloria."

Applicant's 65, p. 2; PCR R. 920.²⁷ In addition, Counsel Stone confirmed that he received letters from Bayan Aleksey introduced as Applicant's Exhibit 23 A, B, C. PCR R. 930.

The March 14, 1998 letter from Mr. Aleksey revealed:

"They [SLED] have the checks that Glory stole from her job about thirty company checks Dr. B - - Trenton, N.J."

Applicant's 23(A).²⁸ The record reveals the Dr. Bang checks were provided by the prosecution in discovery. Applicant's 32.

On March 30, 1998, Danneta, Thomas Sims' employee, documented a telephone call with Mr. Aleksey and noted that Ms. Perez Blackwell "took checks from her job opened an account Summit Bank, Pennsylvania, Northeast Philadelphia, \$26,000 total of the checks." PCR R. 324-26, 924-25, Applicant's Exhibit 22.

In the April 19, 1998 letter to Counsel, Mr. Aleksey wrote:

...I remember SLED ask and telling me about a wire transfer to her acct in P.A. Summit Bank in Phila. and about some checks from her job. She worked in Trenton, N.J. at a Medical Center... It was on Field Street. Dr. Band or Bang (not sure)...

²⁷ The Court understands the reference to Gloria by Mr. Stone is in fact a reference to Ms. Perez Blackwell.

²⁸ The Court understands the reference to Glory by Mr. Aleksey is in fact a reference to Ms. Perez Blackwell

...She has a checking account in Beaufort, S.C. She went to a dealership in N.J. Burlington Lincoln Mercury Ford. She had a certified check for \$20,000 to get a Mark 8 Black.

Applicant's Exhibit 23(C). The letter also detailed their movement from hotel to hotel.²⁹

The Applicant also asserts that the notes from Danetta, Applicant Exhibit 22 made

reference to:

- 1) Call A1 (Manager) at Penske Truck Rental Company, 26th and 11th Ave., Manhattan, N.Y.
- 2) Summerfield Suites
- 3) Gloria has account in Beaufort
- 4) Gloria cashed check at Trump Casino

PCR R. 328-29.³⁰

Counsel Sims declared that Mr. Aleksey never said these things to him. PCR R. 330.

b. The Perez Blackwell - Aleksey Scam

The Applicant, in these proceedings, developed the details behind the comments made to trial Counsel. This Court finds that the evidence suggests the following: Bayan Aleksey, using an alias of Michael Toscani, and Gloryvee Perez Blackwell went to the Burlington Lincoln Mercury Ford dealership in Burlington, N.J. on December 22, 1997. "They indicated they desired to purchase a new 1998 Lincoln Mark VIII LSC." "They indicated the down payment would be \$20,000." Applicant Exhibit 33 (Keith Randall). Randall, a sales representation, advised them that the dealership would only accept the payment in certified funds or cash. Id.

²⁹ In addition, the April 19, 1998 letter stated: "We went to car dealers. She tryed (sic) to get a loan from Commerce Bank, Cors State Bank, Check her credit."

³⁰ The Court understands the reference to Gloria in the Applicant's Exhibit 22 is in fact a reference to Ms. Perez Blackwell.

Ms. Perez Blackwell was employed at that time by Dr. Byung Kee Bang of Trenton, N.J.

Applicant's Exhibit 31. Around December 23, 1997, checks belonging to Dr. Bang were stolen.

Applicant Exhibit 31, 34.

On the same date the checks were stolen, on December 23, 1997, a deposit of a check of \$28,532 was made at Summit Bank. Applicant Exhibit 36. PCR R. 472. The particular checks were two stolen checks from Dr. Bang which were forged in the amount of \$24,000 [7385] and \$4,532 [7361], both made out to Gloryvee Perez. Applicant's Exhibit 31, PCR R. 472.

With the deposit receipt in hand, Ms. Perez Blackwell and Mr. Aleksey returned to Burlington Lincoln on December 23. On that date, Ms. Perez Blackwell filled out various documents to purchase the car. Applicant's Exhibit 33. The car was not released to them on that date. However, a promissory note was signed to pay \$20,000 in funds or cash by December 26, 1997.

The early morning of December 24, 1997 at 9:30 a.m. Ms. Perez Blackwell and Mr. Aleksey went to Summit Bank. PCR R. 471. They met Christopher Sontag, the branch manager, and attempted to withdraw cash in a sum of approximately \$20,000. PCR R. 471-73. Ms. Perez Blackwell advised Sontag that it was an emergency and she had to have the money that date. PCR R. 473. To appease her, Sontag provided her with \$1000. PCR R. 473. Sontag then called Union Bank who informed him that the check was not good because the signature was not good and there was a problem involving her employer. PCR R. 473.

Sontag stated he told First Union not to do anything and planned a sting operation with the Philadelphia Police Department. However, when he called Ms. Perez Blackwell at her job to let her know the funds were available, the office manager, [Pat Cubberly] told him the Trenton

Police were there and Ms. Perez Blackwell was not there. Sontag stated he left several messages on her home answering machine, but Ms. Perez Blackwell never showed up. PCR R. 474. He stated the bank did not prosecute the case because it would cost them too much. PCR R. 474-75. Further, since she did not show up to collect the \$25,000, the Philadelphia Police opined it was not a crime. PCR R. 478. However, the witness was not advised of this fact. The "hold" notice was placed on the account. The record also reveals that Ms. Perez Blackwell would not have received notice from Summit Bank in the mail which was postmarked January 3. PCR R. 482, 486-87, Applicant's Exhibit 40.

After speaking with Sontag, Pat Cubberly contacted Trenton Police Department on December 24 after she determined the checks were stolen. Applicant's Exhibit 31 [This time frame varies from Sontag's testimony]. An incident report was made and the police responded to Dr. Bang's office. Applicant's Exhibit 31, 34 (Trenton Police Report). The police arrived at Dr. Bang's office around 11:03 and met with Pat Cubberly initially. Id. Ms. Cubberly advised them that she was initially contacted by Dr. Bang's bank, Core States concerning two checks deposited at Summit Bank and Dr. Bang advised her that they must be stolen. The Trenton policeman reported he spoke with Perez who denied taking any checks and depositing them in her account. However, Perez stated "a guy she had been seeing for approximately two weeks was at the office on 12/23/97 and that he must have stolen the checks without her knowing it." Trenton Police Report, Applicant's 34. Ms. Cubberly opined that it would be impossible, where the checks were kept, for anyone to have taken the checks without Ms. Perez Blackwell's knowledge. Applicant's 31. When Sontag contacted Ms. Cubberly, Ms. Perez Blackwell had left the office.

Subsequently, Ms. Perez Blackwell and Mr. Aleksey checked out of Summerfield Suites. Applicant Exhibits 29, 41. The check used was written from a closed account at the MCAS Beaufort Federal Credit Union. Applicant Exhibit 41.

They checked into the Residence Inn using \$500 of the \$1000 cash received that date from Summit Bank. Applicant Exhibit 29.

On December 27, 1997 Keith Randall of Burlington Lincoln contacted Dr. Bang's office concerning Ms. Perez Blackwell's commitment to purchase the car. He learned that she had been fired at that time. He asserts he was advised that warrants had been issued for her arrest for the theft of the checks.³¹ Applicant Exhibit 33.

c. Analysis

The Applicant contends that the alleged failure to further investigate the incident involving the conspiracy between Mr. Aleksey and Ms. Perez Blackwell to acquire the Lincoln through the use of checks stolen from her work was deficient because it would have undermined the Solicitor's argument that Mr. Aleksey was the triggerman. In particular, Mr. Aleksey has focused upon the Solicitor's closing argument in the guilt phase where he points out factors which suggested only Bayan Aleksey murdered Sergeant Lingard:

"Gloryvee Blackwell had no motive to kill Frankie Lingard. There is no motive whatsoever. Bayan Aleksey had a motive."... "The thing, the important thing, is that other than a couple of speeding tickets, she has not got anybody looking for her. There is no warrants out on her. There is no evidence she is wanted by anybody. She has got no motive to run from anybody. The only motive of anybody in that car to avoid apprehension is Bayan Aleksey."

³¹ It should be noted that no arrest warrants for the theft of checks have been produced, only the incident report.

R. 1752:7-9, 1753:15-22.

The defense team had knowledge of Ms. Perez Blackwell's involvement in the theft of the checks and passing of bad checks by Ms. Perez Blackwell with Mr. Aleksey from Mr. Aleksey. When the Solicitor argued, from this record, that no one was looking for her, this was an accurate argument based in the record (and Solicitor Bailey's knowledge). Counsel Stone was aware that Mr. Aleksey had deposited stolen checks that Ms. Perez Blackwell had given him. PCR R. 920. Further, the defense team was aware that Ms. Perez Blackwell had taken checks and deposited them into a Summit Bank account for \$26,000. PCR R. 324-26, 924-25. The defense was also aware that Mr. Aleksey had advised them she had gone to Burlington Lincoln Mercury with a certified check for \$20,000 to get a Mark 8. Applicant's 23(C). (Note: The record does not support that Ms. Perez Blackwell or Mr. Aleksey ever possessed or presented a \$20,000 cashier's check to Burlington Lincoln).

The state had provided the defense with a current "rap" sheet for Ms. Perez Blackwell which included no pending warrants at all and particularly no warrants for any matters arising from either the theft of checks from Dr. Bang or the fraudulent use of the checks in the deposit at Summit Bank. Further, it was developed at the PCR hearing that Ms. Perez Blackwell had a discussion with the Trenton Police on December 24 and denied involvement and was not arrested.

The Applicant contends that the additional information would have removed from Solicitor Bailey's argument the "motive factors" favoring Mr. Aleksey as the triggerman; that Ms. Perez Blackwell "has not got anybody looking for her" and the only person avoiding apprehension was Mr. Aleksey. Plainly, both Mr. Aleksey and Ms. Perez Blackwell were aware

of their involvement in the joint scam to acquire the Lincoln. Further, it is clear that if this additional evidence was presented, Solicitor Bailey, at least, would not have been able to say that no one was looking for Ms. Perez Blackwell, when someone should have been looking for Ms. Perez Blackwell (or that she would have known someone should be looking for Mr. Aleksey based upon what she told Trenton police).

The defense Counsel was inconsistent on why these factors, known to the team, were not presented. Counsel Sims stated that they sent investigators up to Pennsylvania to check out her background, but did not recall, at the hearing, what they had although he knew she had been employed. PCR R. 401-02. However, Mr. Sims, upon reviewing the submitted evidence concerning the check theft stated that she did not have convictions for these incidents so that they could not be used to impeach. PCR R. 416. Mr. Sims agreed they could be evidence of fraud, but was reticent about whether Judge Cottingham would have allowed it. However, Mr. Sims stated that it could have been presented under SCRE 608(b) as character evidence and evidence of "motive" for Ms. Perez Blackwell. PCR R. 417. Regarding the information concerning Dr. Bang, the Lincoln materials, and Summit Bank, Mr. Sims stated he would like to have had the documents because "it would have shown that she definitely had some problems, or that she was out doing all kinds of things, also." PCR R. 433.

Mr. Sims noted that in each of the impeachment matters of Ms. Perez Blackwell (and others), Mr. Aleksey was either a participant or beneficiary. PCR R. 333. Mr. Sims stated while they sent investigators to develop background on Ms. Perez Blackwell, they learned about the drug conviction and indictments. Mr. Sims asserted that he did not recall Mr. Aleksey ever asserting that the reason Ms. Perez Blackwell shot the trooper was because she was on the run

from law enforcement, but thought that issue probably came up and they sought to use the conviction to bring it out. PCR R. 640. Counsel had a concern that Ms. Perez Blackwell had drugs in her property in a diaper bag and sought to see if that was searched. He stated that if there was contraband in the bag, it may have prompted her to act the way she did and gave a reason for firing the fatal shots. PCR R. 641. However, the materials were already gone. PCR R. 641.

Counsel Sims indicated that he could not presently recall if he knew about Ms. Perez Blackwell's activities prior to trial, but stated that this information about her other activity "could have been helpful." PCR R. 682.

Counsel Stone confirmed that the focus of the case against Ms. Perez Blackwell was to develop impeachment and suggest that Ms. Perez Blackwell was the shooter. PCR R. 912. Counsel Stone concurred that at trial he stated that Ms. Perez Blackwell "has the same types of problems Mr. Aleksey does." PCR R. 915, R. 2374. Counsel recognized the fact that if they could have developed that Ms. Perez Blackwell had a "significant motive" in the case, it would have been good for the defense. PCR R. 917-18.

When asked about checking out the fact that Mr. Aleksey told them about Ms. Perez Blackwell and Mr. Aleksey taking checks from her job, and other items listed in Applicant's 22, Mr. Stone stated he recalled conversations with Mr. Sims concerning the car rental and other stuff, but not the specifics. PCR R. 925. Counsel was not sure that when he sent his investigator, Tommy Davis, up north in August prior to the trial that he went to Dr. Bang's office. PCR R. 953, 1246-47. However, his notes reflected that the investigator talked with the Trenton police. PCR R. 927-28. Also, Mr. Stone did not recall ever talking to Dr. Bang's office.

PCR R. 953. Mr. Stone stated he had prepared a document styled "Mr. Aleksey versus Blackwell comparing Blackwell's shoplifting, prior record of possession of cocaine, prior arrests for fraud, shoplifting, and drugs in Puerto Rico to Mr. Aleksey's prior arrests for fraud. PCR R. 959. Mr. Stone stated that he did not know if the Mr. Aleksey's fraud and Ms. Perez Blackwell's fraud, at the time, were the same thing. PCR R. 959. As he stated:

I don't know if I knew the details of her financial dealings with the doctor, although I think certainly I knew that she was - - - or at least I was on notice that she had some problems with the doctor and the doctor had fired her and I believe because she stole checks. But that's - - that is - - that's the extent of what I recall knowing about her other than the heroin situation which is totally different...

PCR R. 960.

Counsel Stone, though indicated, in reference to the fraudulent checks that Ms. Perez Blackwell and Mr. Aleksey wrote to Summerfield Suites [Mt. Laurel Police Dept.], that while he would not have cross-examined her about it on contradicting her statement that Mr. Aleksey was paying for everything, he would have used them on cross-examination to show they were bouncing checks. PCR R. 1001. Mr. Stone admitted that this might show she knew people were looking for her. PCR R. 1001.

On cross-examination, Mr. Stone admitted that Mr. Aleksey told him Ms. Perez Blackwell had stolen some checks that he had deposited and he received "a good amount of information that they were involved in criminal activity together." PCR R. 1172.

It should also be noted that in the second statement Mr. Aleksey gave to the police, revealed to the defense, he described the following:

K. Mears: Were you working?

B. Aleksey: No

K. Mears: Was Gloryvee working?

B. Aleksey: Yes

K. Mears: There were several checks in the vehicle that belonged to a doctor, do you know what checks I'm referring to?

B. Aleksey: Yea

K. Mears: Where did those checks come from?

B. Aleksey: From where she use to work at, she didn't know I had them.

K. Mears: How did you get them?

B. Aleksey: I was just picking her up from work and she wasn't there I just picked them up without her knowing, she didn't know I took them.

K. Mears: Did you cash any of them?

B. Aleksey: No

K. Mears: You never did cash any of them

B. Aleksey: Huh, huh

K. Mears: Did you wire any money into an account of yours or anyone's at any time?

B. Aleksey: Well, not wire, Gloria, it was Gloria's account, she didn't know and I deposited two checks to see if they would clear.

K. Mears: Did the checks clear?

B. Aleksey: No

K. Mears: What did the two checks amount to?

B. Aleksey: \$24,000 to \$28,000 something like that.

K. Mears: So while on this crime spree, who else was involved, if anyone, besides you?

B. Aleksey: No one.

K. Mears: So you are telling us that you committed this crime of shooting the South Carolina State Trooper by yourself.

B. Aleksey: Yea

K. Mears: Gloryvee was not involved in any way?

B. Aleksey: No

K. Mears: Speak up.

B. Aleksey: No

K. Mears: Are you telling the truth?

B. Aleksey: Yes

Taped Interview of Mr. Aleksey, p. 8-9.³² Applicant's Exhibit 83, Sec. 24. (Emphasis added).

As noted, on January 2, Mr. Aleksey stated that Ms. Perez Blackwell was unaware that he had taken the checks from her office or had deposited them to see if they would clear. He also claimed to have taken them without her knowledge.

Cross-examination must be objectively unreasonable and Counsel's refraining from certain lines of inquiry is entitled to deference under Strickland. Dows v. Wood, 211 F.3d 480, 487 (9th Cir. 2000). As noted above, the defense team was aware, at the time of trial directly from Mr. Aleksey, that Ms. Perez Blackwell had engaged with him in the activity of stealing the checks and depositing them. There is no issue that these events could have been used in the

cross-examination of Ms. Perez Blackwell. The reason for omission of this inquiry, however, is not reflected in the record, primarily because the Counsel who examined the witness did not have any specific recollection of the matter and necessarily did not illustrate his reasoning to the Court.

Assuming *arguendo* that such failure was deficient, Sixth Amendment prejudice has not been shown because there is no reasonable probability the result would have been different had the jury been presented with information about the check theft from Dr. Bang and the attempt to acquire monies and the car as a result.

The Applicant asserted that this would have defeated the claim by the prosecutor of a lack of motive to shoot by Ms. Perez Blackwell. Respondents concede that it does suggest that Ms. Perez Blackwell would have known it was likely that police were looking for them, not just her. Yet this intent to avoid apprehension by Ms. Perez Blackwell suggested by the Applicant is immediately defeated by the fact that after the shooting when Mr. Aleksey pulled the car over during the chase she jumped out of the car with her children and ran to the law enforcement officers. R. 1307. Presumably, the same desire to "avoid apprehension" based upon her bad check theft existed when she ran to the officer. R. 1307. Further, Solicitor Bailey remaining factors weighed in the favor of Mr. Aleksey as the shooter:

- A. The shots that killed Frankie Lingard were fired from the driver's side. (R. 1754).
- B. Bayan Aleksey was behind the wheel of the Mustang. (R. 1755)
 - (1) Police saw Ms. Perez Blackwell exit the car on the passenger side. R. 1757.

³² The Court understands the reference to Gloria by Mr. Aleksey is in fact a reference to Ms. Perez Blackwell.

- C. Mr. Aleksey led officers on a high speed chase. (R. 1759).
- D. Mr. Aleksey admits a suicide attempt in his statement but the gun jams. (R. 1760).
- E. The murder weapon is traced to Mr. Aleksey, not to Ms. Perez Blackwell. (R. 1761).
- F. Ms. Perez Blackwell prints not on gun, but Mr. Aleksey's prints are on the gun and the clip. (R. 1764).
- G. The Applicant confessed that he was the triggerman. (R. 1765).

While the motive argument may have been less available on whether Ms. Perez Blackwell had any need to avoid apprehension, it is evidence that she fled from the car and ran to the police when given the first opportunity. Further, the fraudulent activity Mr. Aleksey shared with Ms. Perez Blackwell arguably would only increase Mr. Aleksey's own need to avoid apprehension because he would have more reason to flee. The failure to inquire of Ms. Perez Blackwell about her conspiracy of fraud with Mr. Aleksey on cross-examination does not undermine confidence in the outcome. The Applicant has failed in his burden of proof.

2. **Penske Rental Center Document**

The Applicant also contends that Counsel should have further investigated the Penske Rental Center matters of December 30, 1997. He contends that the matters involved a rental reservation for a fifteen (15) foot truck with a car carrier. He asserts that the evidence would be useful to suggest planned evidence of flight and the stated intent was for the truck to go to West Palm Beach, Florida, whereas she declared in her testimony that they were headed to Disney World.

Certain salient factors must prevail to show this was neither deficient performance nor prejudicial. First, the truck was never rented nor used. Second, Mr. Aleksey indicated to Counsel that he thought he told them he was going to Disney World. PCR R. 1191. Further, in his statement to the police, he said they were going "to Florida." Applicant's Exhibit 83, § 24. (Transcribed Second Statement, p. 4). Further, during the trial, Mr. Sims stated that, to the best of his recollection, Mr. Aleksey did not indicate that Ms. Perez Blackwell was incorrect in her testimony that they were headed to Disney World. PCR R. 650. Nevertheless, he had told Counsel, like the police, they were going to Florida. PCR R. 649.

It is without question that the defense had access to the Penske truck rental document in the Mustang. See PCR R. 371-78, 699-701, 1006, 1125.

The Applicant asserts that the Penske rental receipt could have been used to impeach Ms. Perez Blackwell. Counsel Stone agreed it could have been used to show the possibility of an inconsistent statement. PCR R. 1006. Further, Mr. Aleksey had sought to have them contact Penske. Applicant's Exhibit 22; PCR R. 328-29.

The failure to develop or pursue testimony related to the Penske rental paperwork does not constitute prejudice under Strickland. First, there is no proof Ms. Perez Blackwell's testimony that they were headed to Disney World was incorrect. The mere fact that a truck rental indicated a possible destination of West Palm Beach rather than Disney World (Orlando) does not mean that Disney World was not the intended destination on that date. Similarly, Applicant asserts that the attempt to rent a truck suggests a permanent change of location. However, the truck was never used and the relevance slim at best. The failure to present this information does not undermine confidence in the outcome.

a. Location of Paperwork Identified with Ms. Perez Blackwell on the Driver's Side

In his memorandum, the Applicant asserts that the apparent presence of the Penske rental reservation in Ms. Perez Blackwell's name, the Distasio Monte Carlo window sticker, various motel receipts, and payroll documents on the driver's side of the vehicle, indicate the prosecution was wrong in the assertion that all of Ms. Perez Blackwell's personal possessions were on the passenger side. The record reveals, based upon the photographs taken by SLED, that these materials were located on the driver's side, either in the side door panel pocket or in a manila folder under the driver's side floor mat. Applicant's 26, 26A, 26B, 26E, 26F, 26G, 29, 30. PCR R. 364-381. It is also clear that these materials were provided by available photographs by SLED for defense's viewing by the Solicitor's Office. PCR R. 941 (Mr. Stone went to SLED to view photographs). State Exhibit 2. ("I have in excess of 100 crime scene photographs... They are available for your inspection and review and I will have copies made of any particular photograph you pick out.")

At trial, in developing his theory of who was the likely shooter, Solicitor Bailey noted that Ms. Perez Blackwell's fingerprints were only on the passenger side that she was seen getting out of in Holly Hill during the chase and:

"We showed pictures of the personal property. All of Mrs. Blackwell's stuff is sitting on the passenger side of that car, not the driver's side."

R. 1758:4-9.

During her testimony, Ms. Perez Blackwell testified that when she exited the vehicle with her child, she left everything in the car. R. 1307-08. In referring to State 63, she pointed out her

purse on the passenger side floor, her sunglasses, and diapers. On State Exhibit 61, it showed her key chain. R. 1308-09.

Mr. Sims testified that after the conviction, Mr. Aleksey asked Mr. Sims in May 1999 to acquire certain items indicating that they were his possessions. PCR R. 644. State Exhibit 1, 2. These items, that Mr. Aleksey was aware of and asked to be returned to him, were "phone bills, hotel receipts, \$235.00 in cash, box of pictures and envelopes, a black case with negatives and lie detector test from Ms. Perez Blackwell." State Exhibit 1. PCR R. 644. Mr. Sims agreed that he received a volume of receipts as a result of the request. PCR R. 644. Mr. Sims said once he got the materials, he put them in a box and shipped them to Mr. Aleksey. PCR R. 645; see also PCR R. 358-60, 363. Applicant's Exhibit 28. Mr. Sims claimed that he did not recall seeing the particular items pretrial. PCR R. 690-91.

However, Mr. Sims declared these items, Applicant's Exhibit 29, included the folder which was present on the driver's side. PCR R. 364. However, Mr. Sims did not specifically recall reviewing the folder and its contents before the trial. PCR R. 365-66.

Counsel Stone conceded that he reviewed around 200 photographs, PCR R. 1006. He recalled seeing a large number of photographs. PCR R. 943. Mr. Stone acknowledged that in the folder, apparently on the driver's side were documents from where Ms. Perez Blackwell worked. PCR R. 946-47.

The emphasis in the Solicitor's comment was that all of Ms. Perez Blackwell's "stuff" was on the passenger side and not the driver's side. First, after Solicitor Bailey developed this concept on direct examination, the defense never developed that items identified with Ms. Perez Blackwell were located on the driver's side. No questions were asked directly of Ms. Perez

Blackwell about the location of the items. Ms. Perez Blackwell had unequivocally stated that she had never driven the Mustang. R. 1300:8-13, 1302:19-20, 1305:25-1306:1.

Like current Counsel, the original defense team could have developed that paperwork identified with Ms. Perez Blackwell was located on the driver's side. Importantly though, this existence of the paperwork was not as powerful as Applicant now claims because it included paperwork related to their mutual scams. Even though the jury would have learned about the documents, the existence and location of personal use items of Ms. Perez Blackwell; her purse, sunglasses, and items for her baby were all still on the passenger side. Further, she testified that Mr. Aleksey had packed the car, which is not in dispute. R. 1301:20-21. As Solicitor Bailey stated, "I'm looking at her personal items, the kind of things that she would normally have access to, hairbrush, purse ... sunglasses, baby bottle, stuff that you would be using if you were sitting in the seat of the car." PCR R. 1293. The personal use items were the probative matters related to this issue, not documents which Mr. Aleksey would later lay a claim to. The failure of the defense to develop the existence of the paperwork does not undermine confidence in the outcome.³³

3. **Marine Corps Air Station Beaufort Federal Credit Union Checks. (MCAS Beaufort FCU)**

The Applicant contends that the defense should have pursued and investigated the fact that checks written on a closed account at MCAS Beaufort FCU were used by Ms. Perez

³³ According to the Clerk of Court records, on July 23, 1998, Solicitor Bailey wrote defense Counsel and noted the existence of additional evidence made available for their viewing including:

- (1) 1 unopened box of checks in the name of Gloryvee Perez [Blackwell];
- (2) Numerous checks in the name of Byung-Kee Bang, M.D.;
- (3) Copies of checks of Byung-Kee Bang, M.D.; and
- (4) Hotel receipts, pocket calendar, phone bills and other miscellaneous paperwork from the Mustang.

Clerk of Court Record, July 23, 1998 Letter, Bailey to Mr. Sims and Stone.

Blackwell to pay the bill at Summerfield Suites. These three (3) checks were dated December 14, 1997 at Summerfield Suites. Applicant's Exhibit 41. He contends that these would have shown Ms. Perez Blackwell's fraudulent activity. The record reveals that Mr. Aleksey wrote defense Counsel in a letter dated March 27, 1998 that Ms. Perez Blackwell had a checking account in Beaufort and had written checks for "\$947, \$50, and \$400 dollars" and requested that Counsel contact Summerfield Suites about it. Applicant's Exhibit 23-B. Applicant's Exhibit 41 consists of three checks written on the MCAS Beaufort FC account for \$50, \$400, and \$964 to Summerfield Suites.³⁴

The issue is whether Counsel was deficient in failing to follow-up on Mr. Aleksey request to investigate the checks written by Ms. Perez Blackwell to Summerfield Suites. Although not argued specifically in his memorandum, p. 7-9, 22, as a basis for raising issues concerning the MCAS Beaufort FCU checks of Ms. Perez Blackwell, presumably he asserts it should have shown further fraudulent activity of Ms. Perez Blackwell. As noted before, the information from Mr. Aleksey concerning the Beaufort checks were presented to Danetta from Mr. Sims' office in her report of the conference call, Applicant's 22, and the letter to Counsel, Applicant's 23(b), which referenced the Summerfield Suites matters. Clearly, Mr. Aleksey knew of the facts of the writing of the Summerfield Suites checks, had presented the circumstances to defense Counsel in his letters and defense Counsel, armed with that information, had a good faith basis to question Ms. Perez Blackwell about them.

³⁴ These items were materials SLED had received from Mt. Laurel Police Department. PCR R. 496. These were not located either in the Solicitor's or defense's file.

However, certain salient factors were unresolved in the Applicant's presentation. First, although the account had been closed - did Ms. Perez Blackwell know it was a closed account? Second, no charges or warrants were ever made against Ms. Perez Blackwell in the check matters. As noted, for impeachment purposes, Ms. Perez Blackwell had been impeached by her prior record.

Further, the fact that after giving the checks on December 14, Ms. Perez Blackwell remained in the hotel suites for a significant period of time defeats the claim that she was "avoiding apprehension." As Mr. Aleksey had clear knowledge of the checks, as revealed in Applicant's Exhibit 23-B, even to the extent of the amounts and ability to quote someone's driver's license number, reveal involvement in the activity, as well as his own knowledge - increasing his own motive to avoid apprehension in an equal amount to Ms. Perez Blackwell. As noted above, the motive to avoid apprehension was merely one factor of the many factors which Solicitor Bailey pointed to as a basis of Mr. Aleksey being the driver of the Mustang. The Applicant has failed to show, but for the presentation of the MCAS Beaufort FCU checks from Summerfield Suites (or others), there is a reasonable likelihood that the result of the proceedings, either in guilt or penalty would be different.³⁵

4. Hamilton Township Bench Warrant

In support of showing a motive to avoid apprehension, the Applicant presented an arrest warrant for "contempt of court" in Hamilton Township Municipal Court in New Jersey.

³⁵ Counsel Stone testified that he had reviewed a massive amount of paper from the Solicitor. PCR R. 989. Mr. Stone could not recall if he had seen various items, but did not think that those included a box of checks from either Beaufort MCAS or Summit Bank. PCR R. 990. Similarly, Counsel Sims was not clear that he had ever reviewed the checks and could not recall, despite the defense team notes of ever having heard of Summerfield Suites. PCR R. 496-503.

Applicant's Exhibit 79. The matter involves a May 19, 1994 traffic summons for operating a motor vehicle in a careless manner and a subsequent March 8, 1995 warrant for "contempt of court" issued by the Trenton Police Department "due to the unanswered traffic summons." Applicant's 79.

Defense Counsel could not be deemed deficient in failing to investigate or cross-examine on this matter. First, it occurred years prior to her association with Mr. Aleksey. Second, it was not included in any criminal record "rap" sheet provided either to the State or the defense. R. 1288-90. However, the record also reveals that the defense, at trial, was aware of the existence of traffic tickets after Solicitor Bailey advised the Court that Mr. Stone advised him that there were warrants on her that did not appear in the "rap sheet." R. 1288. Prior to Ms. Perez Blackwell's testimony, the following occurred:

Mr. Sims: We have information on the name Gloryvee Rivera...Rivera was her married name...We have...maybe four copies of some warrants that are outstanding on her under the name Gloryvee Rivera...

Mr. Sims: ...They are traffic violations that warrants were issued on 8/24/94 in Trenton, New Jersey....

R. 1288-89. The trial court inquired and was advised that they were all traffic tickets. The Court responded: "I will let him ask about a traffic ticket if he wants to." R. 1289.

The trial court then asked about whether Mr. Sims wanted to cross-examine her on an outstanding warrant for traffic tickets. R. 1290. Mr. Sims responded that he did not want to get into where they were going. The trial court then stated that he did not want them to disclose their strategy: "If it's her, I will permit it." The trial court confirmed it would let the defense after

being advised by the solicitor that Ms. Perez Blackwell had no recollection of the speeding tickets, although it was her name and address. R. 1294.

During the Solicitor's direct examination he inquired about the fact of the possession of cocaine conviction and shoplifting convictions in 1991 and 1992. R. 1297. The following then occurred:

Q. --- Have you ever had a speeding ticket?

A. I don't recall any speeding tickets.

Q. It is possible you had some and don't remember?

A. I just don't recall any speeding tickets.

R. 1297. Despite the professed knowledge of existing warrants for traffic violations in New Jersey, the defense did not inquire of Ms. Perez Blackwell about any traffic warrants that were still pending. R. 1310-14, 1328-42.

The defense, aware of the traffic warrants chose not to pursue those on cross-examination to suggest a motive for Ms. Perez Blackwell to run. However, the existence of the warrants since 1994 actually defeats the power of this motivating factor. This would suggest that Ms. Perez Blackwell had a motive to avoid apprehension since 1994 or at least 1995. Further, implicitly the defense apparently did not see the utility in presenting the known warrants to Ms. Perez Blackwell to either impeach her lack of knowledge or to suggest motive.

The failure of the defense to use the known traffic violations (or locate the 1995 contempt of court citation) does not undermine confidence in the outcome under Strickland, supra. Importantly, the jury was advised by the Solicitor that other than for speeding tickets, Ms. Perez Blackwell did not have anyone looking for her. His claims otherwise are without merit.

5. Failure to Present Testimony from Either Elizabeth or Marcus Blackwell Concerning Ms. Perez Blackwell

The Applicant contends that defense Counsel erred in failing to call either Ms. Perez Blackwell's estranged husband, Marcus Blackwell, or his mother, Elizabeth Blackwell. In support of his claim he asserts, based upon Applicant's Exhibit 25, that Marcus Blackwell would have testified about two instances during their marriage when Ms. Perez Blackwell exhibited a violent temper. Particularly, he averred that Ms. Perez Blackwell had "a violent temper and an untruthful character." Applicant 25. He stated on one occasion she was shooting a pistol in the neighborhood and during an argument following a dinner, she kicked the automobile windshield hard enough to crack it. The record also reveals that Mr. Stone's paralegal, Tina Lawring, met with Marcus Blackwell and earlier his investigator met with him.

During the PCR hearing, Counsel Stone testified that during their case against Ms. Perez Blackwell, the defense intended to present information that she shot at an ex-husband, kicked out his windshield, and had a volatile temper. PCR R. 1170-71. Mr. Stone stated that Judge Cottingham would not let them go into that matter to establish she could handle a gun. PCR R. 1171. Mr. Stone noted that the defense had testimony from some of the witnesses to establish that she had fired a gun, had a volatile temper, and had experience in the drug trade. PCR R. 1171. Mr. Stone stated that the defense did not call Marcus Blackwell concerning the opinion that Ms. Perez Blackwell had an explosive temper because Judge Cottingham had not allowed them to develop similar testimony on cross-examination of Ms. Perez Blackwell. PCR R. 1234. Counsel Stone rejected current Counsel's suggestion that had he proffered Marcus Blackwell's testimony to Judge Cottingham, he would have allowed Counsel to ask Ms. Perez Blackwell the questions about her temper. PCR R. 1234-35.

Similarly, Thomas Sims testified that they spoke with Marcus Blackwell and chose not to use him at trial. PCR R. 347. Just as Mr. Stone indicated, Mr. Sims stated that the reason they brought Mr. Blackwell to testify was regarding the issue of Ms. Perez Blackwell's violent temper. PCR R. 348. Mr. Sims believed that the defense had developed a sufficient record, without any proffer from Marcus Blackwell, about Judge Cottingham's refusal to allow the development of the evidence through Ms. Perez Blackwell. PCR R. 349.

Mr. Sims asserted that, although Judge Cottingham never prohibited them from presenting Marcus Blackwell, it was clear from his ruling that he would not allow information regarding the violent nature of their domestic relationship. PCR R. 349-51.

The record supports Counsel's recollection of Judge Cottingham's determination. During Ms. Perez Blackwell's cross-examination by Mr. Sims, an in camera proceeding was held. R. 1321. Mr. Sims indicated to Judge Cottingham his intent to show Ms. Perez Blackwell's explosive and violent temper, including the fact she kicked out her husband's windshield and had experience with a semi-automatic weapon. R. 1321-22. Judge Cottingham allowed the defense to ask Ms. Perez Blackwell whether she had shot a gun before and left open the potential impeachment with her husband's testimony. However, he stated, "We are not going into kicking any windows out in a domestic dispute." R. 1323.

Counsel Sims then asserted such evidence should be admissible under SCRE 405 concerning character and reputation. R. 1323. Judge Cottingham plainly stated "clearly you are not entitled to this. I will not let you do it. Period." R. 1323. "We are not going into her divorces...we are not going to talk about kicking out the window..." R. 1324. Counsel Sims then declared "in regard to the domestic information, her attitude and the violent temper that we want

to point out, we think it is germane to our case and that we should be able to proffer that so that the record would be clear." R. 1325.

At that point, in camera, Ms. Perez Blackwell testified that she did not kick out the window, but "I kicked it and it cracked." R. 1326:5-8. However, during the proffer, she denied shooting Marcus Blackwell's gun and denied having the gun on his bed with the bullets surrounding it when he came home. R. 1326-27.

Before the jury, Mr. Sims continued to ask Ms. Perez Blackwell questions about Marcus Blackwell and the fact he owns a semiautomatic gun. R. 1328-29. She declared she had never held Marcus Blackwell's weapon and "I never shot the weapon." R. 1329.

This Court finds that the defense was not deficient in failing to further attempt to present testimony from Marcus Blackwell about Ms. Perez Blackwell's violent temper based upon cracking the windshield. Plainly, the defense could reasonably rely upon their proffer of the testimony.

The only issue left available would be a potential impeachment of her testimony that she never held Marcus Blackwell's gun or fired it. R. 1329. In Mr. Blackwell's affidavit, he states "Gloryvee was shooting a pistol in our residential neighborhood", but does not state it was his pistol. Applicant's 25. Further, Applicant's 64, Tina Lawring's summary of her conversation with Marcus Blackwell does not indicate that Ms. Perez Blackwell ever shot his weapon, only that he would hide his gun in his home and that she would find it and hide it and one time it was on the bed with bullets around it. Judge Cottingham left open the question on whether Mr. Sims could impeach her with her husband's testimony concerning shooting a gun. R. 1322-23. However, Counsel declared they made the choice not to call Marcus Blackwell as a witness after

their discussion. This Court concludes that that Applicant has failed to show either deficiency or prejudice.

Similarly, Applicant contends that Marcus Blackwell should have been called to state that "Gloryvee claimed that she and her sister, Dominga Perez, looked so much alike that they could pass for twins." Applicant's 25. He contends this information could have been used to suggest that Ms. Perez Blackwell, like Mr. Aleksey, also used fake identities because she possessed her sister's identification at the time of her arrest. However, the record revealed Mr. Sims pointed out the fact that Ms. Perez Blackwell used many names and possessed many ID's based upon her marriages including Rivera, Perez, and Blackwell. R. 1312. She had five identifications in her possession at the time of arrest, including one that did not belong to her. R. 1313. On re-direct, Ms. Perez Blackwell stated that each of her ID's reflected the name she had at the time and denied the use of any aliases. R.1344. Counsel Sims stated that Marcus Blackwell never told them anything about Ms. Perez Blackwell or her sister looking like twins. PCR R. 351-52. Further, he stated he did not recall asking Marcus Blackwell whether Ms. Perez Blackwell would use a fake ID or what the significance of Dominga Perez might be.

The Applicant attempts to assert that Ms. Perez Blackwell's possession of her sister's identification revealed an attempt to use an alias. See Applicant's 24. However, equating the possession of her sister's identification with use as a fake ID, without more is inadequate. As Mr. Sims states, he attempted to impeach her with the use of the various names. The jury had knowledge that she possessed another's identification. R. 1313. There was no error in failing to

call Blackwell to assert Ms. Perez Blackwell stated her sister looked like her twin. The claim otherwise must be dismissed.³⁶

The Applicant also contends that the defense should have called Elizabeth Blackwell, Marcus Blackwell's mother, to testify that Ms. Perez Blackwell's daughter, Gloria Maria Rivera, had told her after the incident that she woke up when she heard shooting and "Mommy told me Michael was driving." Applicant 27. She also felt that Ms. Perez Blackwell was not a truthful person. Id.

Mr. Sims stated he met with Elizabeth Blackwell. PCR R. 647. Mr. Sims recalled, upon review of his notes, Elizabeth Blackwell telling him that Gloria Maria told her she woke up when she heard the shooting. PCR R. 697. Mr. Sims felt he cross-examined Gloria Maria on the fact she woke up when the shooting occurred and the fact that she had time to talk with her mother in the interim after the incident. PCR R. 697-98. Counsel Stone stated that they developed the fact from the police officer that Gloria Maria was left alone with her mother after the incident prior to anyone speaking with her. PCR R. 1196.

The record supports these recollections. First, Mr. Sims cross-examined 8 year old Gloria Maria Rivera. R. 1375-80. Mr. Sims developed from her that after they got out of the car when Mr. Aleksey put the gun to his head; she was with Ms. Perez Blackwell and her sister before they put them in a car. R. 1376-77. She confirmed that they waited awhile and then were taken somewhere else. She said she talked to some men and talked with her mother also. R. 1377. She denied talking to her mom between the time they talked to her the first and second

³⁶ The Applicant claims that the twin comment put Ms. Perez Blackwell on the same ground as his use of multiple aliases and adopting of the women's names. Simply put, these names belong to Ms. Perez Blackwell. Mr. Aleksey's never did.

times. R. 1378-79. Mr. Sims developed that subsequently she went to live in North Carolina with her grandmother and talked to her about what happened that night. R. 1379. She said she subsequently went home to her mother and that they had talked about what happened that night. R. 1449, 1451-52 (Darnell gets Ms. Perez Blackwell and daughter out of back seat of Cpl. Anderson's car). Although he did not develop the "Mommy told me" Mr. Aleksey was driving scenario, clearly the 8 year old child could have been aware who was driving when woken up by the gunshot from the car. The defense adequately developed the influence her mother could have had upon the child's testimony. In his closing statement, Mr. Sims emphasized the fact that Ms. Perez Blackwell was alone with her child after the incident and strongly suggested Gloria Maria had been coached from January until she testified. R. 1779-80. Counsel was not deficient in deciding not to present Elizabeth Blackwell's hearsay testimony about what Gloria Maria told her about the incident.³⁷ Applicant fails in his burden of proof to show either deficient performance or prejudice.

6. Ms. Perez Blackwell's Ability to Cut a Deal

The Applicant contends that defense Counsel was ineffective for failing to impeach Ms. Perez Blackwell concerning her ability to cut a deal and shift blame to others. Particularly, he notes that Counsel should have investigated the circumstances surrounding her conviction in Trenton, N.J. to learn that she negotiated in return for her plea and agreement to provide

³⁷ In Applicant's PCR Exhibit 64, the notes of Tina Lawing to Counsel Stone reflect that Elizabeth Blackwell had talked to Gloria Maria Riveria while in her custody and asserted that Gloria Maria told her she was asleep and did not see anything and was protective of her mother. She told them that Gloria Maria told her that her mother said Michael (Aleksey) shot the cop. PCR R. 1010-1013 (The PCR transcript at the location refers to her as Gloria Maria Rivcria).

testimony against her mother (Gloria Perez), the dismissal of nine (9) other felony drug indictments. Applicant Exhibit 37 (Dec. 9, 1991 Plea). He further contends that further investigation into Dr. Bang's check thefts would have revealed that Ms. Perez Blackwell initially denied taking or depositing the checks and stated that "a guy she had been seeing for approximate 2 weeks was at the office on 12/23/97 and that he [Michael Tosconi] must have stolen the checks without her knowing it." Applicant's Exhibit 31, 34. The Applicant contends that if this investigation would have occurred, particularly involving the drug charges, the defense would have been able to use the charges to impeach Ms. Perez Blackwell Perez, pursuant to SCRE Rule 608(c). Admissibility of the charges was denied by Judge Cottingham. R. 1316-17. Mr. Aleksey contends such evidence would have been admissible, relying on State v. Jones, 541 S.E.2d 813, 817 (S.C. 2001). He further contends Sixth Amendment prejudice was shown because Ms. Perez Blackwell's credibility was a central issue and rather than being impeached with only one conviction, this would have impeached her with "blame shifting and a motive to misrepresent." Applicant's Memo., p. 25.

Counsel Stone testified that he was aware that Ms. Perez Blackwell had a drug conviction for possession cocaine, but what he thought was important was that she was charged in the indictments with her mother. PCR R. 1169. He said her mother ended up going to prison, yet Ms. Perez Blackwell received a probationary sentence. PCR R. 1169. He asserted that Ms. Perez Blackwell had cut a deal against her mother. PCR R. 1170.

Mr. Stone further indicated that if they had the transcript of Ms. Perez Blackwell's 1991 plea transcript, that he did not feel that it would have made a difference with Judge Cottingham, but it may have helped. PCR R. 1237, 1239-41; see R. 1316-17.

Mr. Sims stated that at the trial they wanted to show that Ms. Perez Blackwell would cut a deal on her mother and her husband. PCR R. 445-46. Mr. Sims felt Judge Cottingham would only let in the conviction to impeach, not the dismissed matters under Rule 609. PCR R. 446. Counsel Sims conceded that he had urged the trial court to allow the admission of the dismissed charges to reveal that Ms. Perez Blackwell was able to make deals and implicate others. PCR R. 451. Mr. Sims asserted that Judge Cottingham was not made fully aware of the New Jersey guilty plea which included the fact the prosecutor's recommendation for a non-custodial sentence was conditioned upon Ms. Perez Blackwell "making a truthful statement implicating Gloria Perez." PCR R. 450-51. Mr. Sims noted however, that it did not say why the other charges were dismissed. PCR R. 451-52.

The right to meaningful cross-examination of an adverse witness is included in the Sixth Amendment right of confrontation. State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994). The trial judge retains wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on cross-examination based on concerns about harassment, prejudice, confusion of issues, witness safety or interrogation that is repetitive or only marginally relevant. State v. Smith, supra. Before a defendant can be prohibited from attempting to demonstrate bias, the record must clearly show that the cross-examination is somehow inappropriate. State v. Smith, supra; State v. Graham, 314 S.C. 383, 444 S.E.2d 525, 527 (1994).

In denying relief in the direct appeal concerning the failure to assert the same suggestion, the South Carolina Supreme Court stated:

Blackwell testified for the State as an eyewitness to the trooper's death. Appellant sought to cross-examine Blackwell concerning her indictments on ten separate narcotics charges. Blackwell had pled guilty to one indictment, possession of cocaine, and the other

nine indictments were dismissed. The trial court refused to permit appellant to cross-examine Blackwell concerning the dismissed charges, but permitted appellant to proffer the questions for the record. During the proffer, Blackwell answered "I don't recall" to each of appellant's questions concerning the dismissed indictments.

The right to a meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accusers. State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994). This does not mean, however, that trial courts conducting criminal trials lose their usual discretion to limit the scope of cross-examination. See State v. Lynn, 277 S.C. 222, 284 S.E.2d 786 (1981) (a trial court's ruling concerning the scope of cross-examination of a witness to test his credibility should not be disturbed on appeal absent a manifest abuse of discretion). On the contrary, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness' safety, or interrogation that is repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

The trial court did not abuse its discretion in limiting the scope of cross-examination to comply with the South Carolina Rules of Evidence. Rule 609 permits impeachment of a witness by evidence of conviction of certain crimes. Rule 609, SCRE. Prior bad acts which are not the subject of conviction, such as the dismissed indictments here, may only be inquired into, "in the discretion of the court, if probative of truthfulness or untruthfulness." Rule 608(b), SCRE. Narcotics offenses are generally not considered probative of truthfulness. See, e.g., United States v. Turner, 104 F.3d 217, 223 (8th Cir. 1997) ("Misconduct involving violations of narcotics laws is not an act involving dishonesty or untruthfulness and therefore may not be inquired into under Federal Rule of Evidence 608(b)."). Nor are the dismissed indictments evidence of "bias, prejudice or any motive to misrepresent" under Rule 608(c). The trial court properly limited the scope of cross-examination to Blackwell's actual convictions.

Aleksey, supra. at 255 (emphasis added).

The Applicant relies upon State v. Jones to support his assertion that further development of the record in the proffer to include the 1991 guilty plea would have revised the matter and allowed admission. The Applicant misreads Jones. In particular, in Jones, the Court distinguished Aleksey:

In State v. Aleksey, supra, the defendant sought to impeach an eyewitness about specific charges which had been dismissed against her in New Jersey. That witness was neither the self-confessed accomplice to the murder for which the defendant was on trial, nor was there any evidence of her participation in the crime other than a retracted confession by the defendant. Obviously, there was no connection between the prosecutor's office in New Jersey which had dismissed the charges and the solicitor's office which was prosecuting the defendant.

In this case, appellant sought to explore past dealings between Brown and the office prosecuting the current charges, not to impeach Brown through those dismissed charges, but rather to expose Brown's bias and prejudice in the present case. This excluded evidence had "a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity" of Brown's testimony. State v. Brewington, supra. We hold the trial judge committed reversible error under Rule 608(c) in refusing to permit appellant to conduct this cross-examination. In light of this holding, we need not reach appellant's argument that he should have been permitted to cross-examine Brown about the dismissed charges under Rule 608(b), SCRE.

State v. Jones, 343 S.C. 562, 571, 541 S.E.2d 813, 817-18 (2001).

Here, this Court finds that Counsel Stone's assessment that the addition of the 1991 transcript would not have assisted the defense in having the matter presented to the jury. The plea reflected there was a negotiated non-custodial sentence recommendation conditioned upon Ms. Perez Blackwell testifying against her mother, but again, does not suggest why the other charges were dismissed. As the opinion set out, "[n]or are the dismissed indictments evidence of 'bias, prejudice or any motive to misrepresent' under Rule 608(c)." Aleksey, 343 S.C. at 34.

538 S.E.2d at 255. Jones provides no solace to Mr. Aleksey in this instance because as Jones noted, they were dealing with the same prosecutor whereas in Aleksey, there is no connection with New Jersey.

Even if Counsel should have presented this additional information to Judge Cottingham, he failed to prove 6th Amendment prejudice under Strickland. Assuming the impeachment would be allowed, confidence in the outcome is not undermined. Any error in exclusion of proper impeachment evidence is subject to a harmless error analysis under the various factors of Delaware v. Van Arsdall, 475 U.S. 673 (1986), including: the importance of the witness' testimony to the prosecution's case, whether the testimony was cumulative, whether other evidence corroborates or contradicts the witness' testimony, the extent of cross-examination otherwise permitted, and the overall strength of the State's case. State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999); State v. Mitchell, 330 S.C. 189, 498 S.E.2d 642 (1998); State v. Cooper, 312 S.C. 90, 439 S.E.2d 276 (1994) (any error in excluding prior bad acts of witness held harmless where witness impeached by admission of numerous prior convictions and acknowledge he gave testimony in exchange for favorable treatment on pending charges); State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995) (any error in refusing to allow defense to impeach witness with "peeping-tom" conviction was harmless); State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994) (erroneous limitation on impeachment of eyewitness who had pending charges against him for intent to distribute crack and possession and intent to distribute crack within one-half mile of school was harmless error where another eyewitness testified about the event in detail and also corroborated by pathologist and police and witness admitted being under charges for another crime).

Here, the witness was otherwise impeached by the admission evidence of the prior shoplifting and possession of cocaine convictions. The probative value that the Appellant sought to show the jury from the nine (9) dismissed counts was not that she was guilty of the offenses, but that she had previously received "a good deal". This confusing assertion did not go to her "truthfulness" and could only lead to jury confusion on the collateral issue. He further asserts that the state misportrayed her as a "simple user of cocaine" when the dismissed charges suggest more involvement. The problem with this approach is the facts that these charges were dismissed.

This Court further finds that Counsel was under no Sixth Amendment duty to present evidence that Ms. Perez Blackwell implicated Mr. Aleksey when initially questioned about the thefts at Dr. Bang's office. First, the defense apparently knew from Mr. Aleksey that he was involved in the theft and proceeds from the stolen checks from Dr. Bang. PCR R. 920, 924, A-22 ("when Gloria and him were together she took two checks from her job")³⁸; see also PCR 328. Counsel recalled sending an investigator to Pennsylvania to reveal Ms. Perez Blackwell's background, but did not recall the results of the investigation concerning Dr. Bang. PCR R. 921. Further, Counsel had checks from Dr. Bang in their files. PCR R. 413-14. However, Mr. Stone recalled that Ms. Perez Blackwell got fired because she had stolen the checks. PCR R. 960. However, he had never seen the incident report, Applicant's Exhibit 34, which implicated Mr. Aleksey (Tosconi) in the theft. PCR R. 950, 953-54.

Additionally, Sixth Amendment prejudice is not proven by the failure to present evidence that Mr. Aleksey was implicated as the thief of Dr. Bang's checks by Ms. Perez Blackwell. First,

³⁸ The Court understands the reference to Gloria in the interview is in fact a reference to Ms. Perez Blackwell.

the accusation may not have been false based upon Mr. Aleksey's written comments about his knowledge and participation in the depositing of the checks. The question further was of limited probative value where Mr. Aleksey remained involved with Ms. Perez Blackwell subsequent to the December 24 thefts until his arrest. Further, the attempt to present the limited evidence that Ms. Perez Blackwell had implicated him could have easily been excluded as "confusing" under SCRE Rule 403 since proof of his involvement might have been at issue. The defense theory that Ms. Perez Blackwell would turn on her mother to avoid imprisonment, a matter not admitted, is not dissimilar from her assertion that Mr. Aleksey stole the checks. Adding this element does not undermine confidence in the verdict. The Applicant has failed in his burden of proof to suggest they would. Relief on this basis must be denied.

7. Ms. Perez Blackwell's Alleged Inconsistent Statements

The Applicant further contends that Counsel was ineffective in failing to point out inconsistencies between Ms. Perez Blackwell's statement to SLED [Applicant's 42-A, 42-B, and 43] and her trial testimony. Particularly, he initially contends Counsel should have challenged Ms. Perez Blackwell's statement that she was ignorant of Mr. Aleksey's "criminal record", when she had been an accomplice of his in a month long spree. Second, he contends that in her statement she indicated that she had "nowhere to stay" at the time and that she did not have a present address but could call people and stay with them. Applicant Exhibit 42-B, p. 2-3. At trial, she testified on cross-examination by Mr. Sims that she was staying with her best friend, but she had problems, and Mr. Aleksey offered to get her out of that situation so she moved in with him about a week and one-half after meeting him. R. 1329-30; see also R. 1299:4-7. The

Applicant asserts that evidence of homelessness and the issue of custody of her children assert a need to avoid apprehension for fear of losing her children.

At the PCR hearing, Counsel Stone stated that the current suggestion to specifically cross-examine Ms. Perez Blackwell by contrasting the statement and her testimony about where she was living did not impress him as something she should be examined on. Mr. Stone said he did not think that attempting to show she was homeless rather than staying with friends would have helped the case. PCR R. 998-99; see also PCR 506-13 (Mr. Sims' testimony).

This failure to re-develop this inconsistency was not ineffective. Counsel clearly had possession of her statements where she declared that she had nowhere to stay. PCR R. Applicant's Exhibits 42-A, 42-B, 43. During Ms. Perez Blackwell's testimony, Counsel Sims questioned Ms. Perez Blackwell asserting "you had no place to stay?" R. 1329:22. She then described her travels, from friend to friend, hotel to hotel. R. 1329-31.

Cross-examination, as noted previously, is a matter vested in the strategic discretion of trial Counsel. While the inconsistency was evident, the jury could have made the same recognition that current Counsel did because the information was before them. Although the inconsistency was not emphasized, Mr. Sims continued to develop the fact that she had given more than one statement. R. 1340-42; see also R. 1335.

Cross-examination must be objectively unreasonable in order to support a Sixth Amendment violation; an attorney's decision about the extent of cross-examination and refraining from certain lines of inquiry is entitled to great deference. Dows v. Wood, 211 F.3d 480, 487 (9th Cir. 2000); Phoenix v. Matesanz, 233 F.3d 77, 83 (1st Cir. 2000) (choice of emphasis in cross-examination is prototypical example of strategy). The question is not whether

the prosecution witness was attacked on every conceivable point, but whether the testimony was subjected to adversarial testing. Johnson v. Nagle, 58 F.Supp.2d 1303, 1355, n.42 (N.D. Ala. 1999). The Applicant has shown neither deficient performance nor prejudice.³⁹

C. Brady Issues

Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998) (citing Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)); Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Brady only requires disclosure of evidence that is both favorable to the accused and material to guilt or punishment. Taylor, 333 S.C. 159, 508 S.E.2d 870 (citing United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)).

A Brady claim is based on the requirement of due process. To establish a due process violation, an accused must demonstrate that the evidence was (1) favorable to the accused; (2) in the possession of or known to the prosecution; (3) suppressed by the prosecution; and (4) material to guilt or punishment. Gibson at 524, 514 S.E.2d at 324 (citing Kyles v. Whitley, 514 U.S. 419, 432-42, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); Brady, 373 U.S. at 87, 83 S.Ct. 1194; State v. Von Dohlen, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996)); State v. Jarrell, 350 S.C. 90, 107, 564 S.E.2d 362, 372 (Ct.App. 2002) (cert. denied). The rule applies to

³⁹ In this section, Mr. Aleksey asserts that defense Counsel should have brought up on cross-examination Ms. Perez Blackwell's comment in the statement that she was not aware of Mr. Aleksey's criminal record. Remarkably, he asserts this should have been impeached because subsequent to her companionship with Mr. Aleksey she had seen him go on a crime spree.

impeachment evidence as well as exculpatory evidence. Gibson at 524, 514 S.E.2d at 324 (citing Bagley, 473 U.S. at 676, 105 S.Ct. 3375).

There are three categories of Brady violations: (1) cases involving nondisclosed evidence or perjured testimony about which the prosecutor knew or should have known; (2) cases in which the defendant specifically requested the nondisclosed evidence; and (3) cases in which the defendant made no request or only a general request for Brady material. Gibson at 524-25, 514 S.E.2d at 325 (citing United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)). Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles v. Whitley, 514 U.S. 419, 433-34, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Moreover, the rule encompasses evidence "known only to police investigators and not to the prosecutor." Id. at 438, 115 S.Ct. 1555. In order to comply with Brady, therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." Kyles, 514 U.S. at 437, 115 S.Ct. 1555; see also Strickler v. Greene, 527 U.S. 263, 280-81, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). A "'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Id. Thus, although

the term 'Brady violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory [or impeachment] evidence--that is, to any suppression of so-called 'Brady material'--... strictly speaking, there is never a real 'Brady violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.

Strickler, 527 U.S. at 281, 119 S.Ct. 1936. For the reasons set forth below, Mr. Aleksey has failed in his burden of proof.

1. The Dr. Bang, Summit Bank, Lincoln Scam

As set out above, evidence existed of a joint scam with Mr. Aleksey and Ms. Perez Blackwell involving the theft and use of checks from Dr. Bang's office to attempt to secure monies to purchase a Lincoln. Under the defense theory this evidence undermined the credibility of Ms. Perez Blackwell and the prosecution's assertion that Ms. Perez Blackwell, unlike Mr. Aleksey lacked any motive to flee, suggesting that Mr. Aleksey was the driver.

The Applicant contends that the prosecution had sufficient awareness of the scam to require the State to both investigate the incident and then reveal the fruits of the investigation. The Applicant bases this assertion on the generalized knowledge Solicitor Bailey admitted of the scam. PCR R. 1705. Mr. Aleksey further points to Solicitor Bailey's remark that during the PCR he understood Ms. Perez Blackwell had worked for Dr. Bang and "stole some checks while she was employed there." PCR R. 1280:7-10. Solicitor Bailey stated that he provided checks from Dr. Bang to defense Counsel which were found in the Mustang. PCR R. 1282-86. Contrary to the Applicant's assertion though, Solicitor Bailey disagreed that the mere possession of the checks from Dr. Bang's office in the Mustang would have triggered in his mind that the checks were fraudulent or that there was anything wrong with the checks.

Solicitor Bailey stated when he initially interviewed Ms. Perez Blackwell after her release prior to trial, she was unemployed, but planning to return to work at a medical office. His notes of the interview did not include any reference to her prior employment. PCR R. 1289-92.

SLED Agent Darnell testified that he was aware that Ms. Perez Blackwell had been fired from her job. PCR R. 1633. Agent Darnell testified that he had some familiarity with the fact

that "they" did not pick up a vehicle because the check did not go through. PCR R. 1634. He vaguely remembered something about Ms. Perez Blackwell opening an account with a forged check. PCR R. 1634. Like Solicitor Bailey, Agent Darnell had no recollection of ever going over the matters related to the doctor's check, motel receipts, and the Lincoln with Ms. Perez Blackwell. PCR R. 1643-44. Agent Darnell denied, in his mind, it could be a motive and stated that he did not see what that had to do with Sergeant Lingard's death. PCR R. 1644.

The record reveals that the checks found in the vehicle were disclosed to the defense. See Clerk of Court Records, July 23, 1998 Letter from Solicitor Bailey to Mr. Sims, Mr. Stone, item 8, 9, 10.

As noted above, defense Counsel, through Mr. Aleksey, knew of the existence of the alleged scheme to purchase the Lincoln through the forged use of stolen checks by Mr. Aleksey and Ms. Perez Blackwell. Under Brady, the duty to disclose is required for any impeaching or exculpatory material. Respondents acknowledged the scam would be impeaching of Ms. Perez Blackwell as a dishonest act. However, these facts were known by the co-conspirator, Mr. Aleksey, who revealed them to the defense.

Applying the same test as ineffective assistance of Counsel for prejudice whether there is a reasonable probability the result of the proceeding would have been different, the Court finds that Applicant has failed in his burden of proof.

2. The Penske Rental Document

The Applicant contends that the State had a duty to disclose the Penske Rental Reservation document. Mr. Aleksey asserts it would reveal a different destination that Disney World, to wit West Palm Beach and imply a permanent move rather than a vacation. Applicant's

Memo., p. 14. The problem with this claim is that the document was disclosed to the defense. The Applicant proved that it was present in the photographs of the vehicle which were presented to defense Counsel in discovery. Since it was disclosed to the defense, Applicant has failed to show any violation of Brady, supra.

Further, as noted above, Mr. Aleksey was personally aware of the communication with Penske rental. Not only was the document present in the vehicle he packed and was driving, he indicated to his defense Counsel a desire that they independently contact Penske rental.

For the same reasons as with the prejudice prong for ineffective assistance, the Applicant failed to prove materiality under Kyles. See also PCR R. 1298, 1302-03 (Solicitor Bailey noted Applicant Exhibit 77 - photograph reveals Penske brochure), 1547-50, 1626-29.

3. Miscellaneous Comments

The Applicant also contends that Solicitor Bailey made false comments to the jury or presented false evidence in violation of Giglio v. US, 405 U.S. 150, 92 S.Ct. 763 (U.S. 1972), and Napue v. Illinois, 360 U.S. 264, 269-70, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). The Applicant has failed in his burden of proof. As noted previously, one of Solicitor Bailey's arguments was that nobody was looking for Ms. Perez Blackwell "other than for a couple of speeding tickets." R. 1753. In addition to the claimed scheme to steal checks from Br. Bang and acquire the Lincoln through the use of a forged check, Mr. Aleksey claims that a further scheme to write checks for Summerfield Suites on a closed account from Beaufort should have revealed someone was out looking for her. However, Mr. Aleksey was aware of those matters as set forth above.

Importantly, the fact that there was evidence from Applicant's Exhibit 41 from law enforcement about a complaint concerning the checks, but that there was no warrant made for arrest does not reveal automatically what the Applicant asserts. As Solicitor Bailey noted, it was not clear who closed the account or whether Ms. Perez Blackwell was aware the account had closed to prevent its use. Nevertheless, since solicitor's theory was there were no warrants, his theory was essentially correct. It was not materially false nor does this issue undermine confidence in the verdict.

The Applicant also claims the Solicitor's argument that Ms. Perez Blackwell did not know anything about Mr. Aleksey's past was a false statement.

The Applicant takes issue with the following comments by Solicitor Bailey:

She got up here and testified under oath that she was a passenger in the car. She had just met this guy a few weeks earlier. She had poor judgment. She took up with this guy she had not known for too long. They are going down to Disney World. She doesn't know anything about his past. She doesn't even know his real name. She thinks he is, I think, Michael Toscani or Pivero or something. She knows him as Michael. She doesn't know who he is.

R. 1755-56. Mr. Aleksey now claims that Ms. Perez Blackwell knew who Mr. Aleksey was by her dealings with him in the four weeks she had spent with him.

The problem with the Applicant's assertion is that Ms. Perez Blackwell did not know anything about his past. It was not a false statement or argument, but evolved directly from both Ms. Perez Blackwell's statement and testimony and Mr. Aleksey's own statements to the police. As stated in the evidence, Ms. Perez Blackwell had just met Mr. Aleksey within one month of the incident. Also, she had known him through an alias rather than through his real name. Although the Applicant's evidence suggests that she was an always knowing pawn in the

fraudulent activity of Mr. Aleksey that does not suggest knowledge about his past. As stated above, "in order to prevail on a Giglio claim, a petitioner must establish that the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony, and that the falsehood was material." Tompkins v. Moore, supra. The Applicant has failed to show either materiality under Brady-Kyles or knowing use of false testimony under Giglio. Relief is denied on this ground.

4. Hamilton Township Warrants (Applicant's Exhibit 79)

As noted in the ineffective assistance of Counsel section, Solicitor Bailey was not aware of pending traffic warrants (nor any bench warrants for traffic citations) until the defense presented the matters to him at trial. R. 1288-90, 1297. Particularly, the criminal record sheets provided to Solicitor Bailey (and ultimately the defense) did not have this information. R. 1288. See Applicant's Exhibit 83, Item No. 50.⁴⁰ Further, at trial, upon inquiry of Ms. Perez Blackwell, she advised the prosecution and ultimately the court, under oath that she did not recall any speeding tickets. R. 1288, 1297.

The Applicant contends that the prosecution should have developed this information prior to trial. He bases this on the fact that SLED Agent Darnell contacted the Trenton Police Department about Ms. Perez Blackwell and that she worked and had a known criminal record for possession of drugs in Trenton. Applicant's Memo., p. 10; PCR R. 1632-33.

⁴⁰ According to the Clerk Records, Ms. Perez Blackwell's rap sheet of eight (8) pages was faxed to Counsel Stone on May 22, 1998.

The Applicant has failed to prove a violation under Brady. First, Solicitor Bailey stated, consistent with his trial representations, that he had no recollection of ever seeing the information that there had been a "contempt of court" warrant for a pending traffic violation from 1994 pending at the time of the trial. PCR R. 1260:10-17. As Solicitor Bailey testified, he ran a "rap sheet" on her and there was nothing to indicate there were any outstanding warrants against her. He stated he would not have made the argument if he had been aware of the fact of the warrant and would have tailored his argument differently. PCR R. 1261. Solicitor Bailey also stated that when the traffic speeding violations independently discovered by the defense were brought to his attention, he only inquired of Ms. Perez Blackwell about her knowledge of the speeding tickets, but did not go beyond that question with the witness. PCR R. 1263-64, 1266-68. Solicitor Bailey confirmed that he did not talk with the Hamilton Township Police Department. PCR R. 1270. As Solicitor Bailey stated, "I don't know that I've got any duty to disclose to the defense something I don't know, but they know." PCR R. 1270.

The Applicant further relies upon testimony from SLED Agent Darnell. During the hearing, SLED Agent Mears testified that the rap sheet he reviewed did not reflect any pending arrest warrants for Ms. Perez Blackwell. PCR R. 1600-01. Further, Agent Darnell specifically reviewed Applicant's Exhibit 79 and declared he did not remember anything in his investigation about a bench warrant for contempt of court arising from his investigation in New Jersey. PCR R. 1642.

The Applicant has failed to show any Brady violation. As stated earlier, even if a prosecutor does not possess Brady material, he has a duty to learn of any favorable evidence known to other government agents, including the police, if those agents are involved in the

investigation. See Kyles v. Whitley, 514 U.S. at 437. However, the prosecutor does not have a duty to discover and disclose information held by other federal or local agencies that have no involvement in the investigation or prosecution at issue. U.S. v. Hawkins, 78 F.3d 348, 351 (8th Cir. 1996); Moon v. Head, 285 F.3d 1301, 1309-10 (11th Cir. 2002).

Here, Solicitor Bailey had no duty to disclose the Hamilton Township contempt of court warrant. First, he did not discover the matter during the running of the rap sheet. Second, the SLED agents, particular Agent Darnell, never learned of its existence during his search for information. Thirdly, there is no evidence anyone from SLED, the Highway Patrol, Orangeburg County, or the Solicitor's Office ever possessed this information. To the contrary, they were of the opinion it did not exist. Further, the Applicant's speculation that the mere fact that SLED or the Solicitor was aware that Ms. Perez Blackwell lived and worked in Trenton was enough to demand seeking and receiving this information is not sufficient to create a Brady duty to disclose. For this initial reason, the evidence does not establish a Brady violation.

Second, the defense already and independently had developed from their own investigation the existence of four traffic charges, apparently pending since 1994. The record reveals that the matters learned by the defense remained pending at the time of the 1998 trial. Since the defense was the actor that disclosed these matters to the prosecution, the defense was "on notice" of the existence that warrants for the failure to resolve the traffic warrants existed. Since the defense possessed that information, Brady was not violated based upon the defense team's actual knowledge. See U.S. v. Bender, 304 F.3d 161, 164 (1st Cir. 2002) (no Brady violation where defense on notice of information about witness' mental difficulties prior to testimony); U.S. v. Rodriguez, 162 F.3d 135, 147 (1st Cir. 1998) (no Brady violation in failure to

disclose tactics used to induce witness cooperation because defendant knew of witness' long criminal history). Here, the defense knew of pending traffic violations. The evidence, as revealed then and now, was equally available to the defense as to the state. As Exhibit 79 reveals, defense Counsel were able to acquire this information, independent of the prosecutor.

Brady's duty to disclose has not been proven.

Further, the Applicant has failed to prove "materiality" of the information under Kyles. The record reveals that had the warrant been discovered, the prosecutor would have tailored his closing argument differently to the extent he would not be able to assert Ms. Perez Blackwell had no warrants pending against her. However, this slight change does not, to a reasonable probability, undermine confidence in the outcome of the case. The additional factors, noted by Solicitor Bailey, support the fact that Mr. Aleksey was the driver at the time of the shooting and the driver did not change during the post-shooting flight. Further, the failure of the defense to utilize the pending driving charges, which differ only slightly in degree to the "contempt", suggest the probative value of these matters were minimal.

As noted, Mr. Aleksey confessed to being the sole driver of the vehicle at the time of the shooting and confirmed Ms. Perez Blackwell's lack of knowledge in the incident. The power of the impeachment of Ms. Perez Blackwell was limited by the probative value of Mr. Aleksey's confession, his connection to acquire the gun independent of Ms. Perez Blackwell through Yelena Batkilina, his connection to acquiring the Mustang, independent of Ms. Perez Blackwell through Lisa Watson, and his history of deception with all who came into contact with him. The Applicant fails in his burden of proof.

SUMMARY ON GLORYVEE CLAIMS

With regards to Ground O, the Applicant claims he was denied the right to the effective assistance of Counsel during the guilt phase of trial. In his application, the Applicant addressed several specific instances of ineffective assistance of Counsel that support this ground, and this Court finds that each of the allegations presented to the Court by the Applicant rest entirely on tactical decisions made by trial Counsel. This Court finds that trial Counsel's strategic decisions were not deficient under Strickland, and therefore, the Applicant's application for PCR is denied with regards to each of these issues. Further, even if the Applicant successfully established his grounds for ineffective assistance of Counsel with regards to any of these allegations, this Court finds the Applicant has failed to establish prejudice to which he suffered as a result of the alleged violations considered either individually or collectively.

Specifically, in Ground Q(1), the Applicant maintains the prosecutor knowingly failed to disclose evidence of Ms. Perez Blackwell's motive and recent criminal activity and affirmatively misled trial Counsel regarding the existence and materiality of this evidence. This Court is constrained to find the Applicant has failed in his burden of proof with regards to this issue. It was revealed that the Applicant's trial Counsel knew of the existence of an alleged scheme to purchase a Lincoln through the use of stolen checks, as this was a scheme that was co-conspired to by Mr. Aleksey and Perez. Thus, the claims to which the Applicant asserts were claims that Counsel was aware. Further, the Applicant claims the State failed to disclose the Penske Rental Document to the defense. However, this Court finds that the Applicant failed in his burden of proof to show that he had no knowledge of such documents and that he failed in his burden of

proof to show that the state failed to disclose these documents. Accordingly, this Court finds that the Applicant has failed to establish a denial of due process.

**MR. ALEKSEY'S CLAIMS INVOLVING MS. PIVERO, MS. WATSON,
MS. BATKILINA, AND MS. FERRELL**

SARA PIVERO CLAIMS

- Ground O (5) IAC - Guilt (failed to impeach)**
- Trial Counsel failed to properly cross examine and impeach state's witness Sara Pivero. Counsel did not impeach witness with character evidence involving specific instances of prior dishonest conduct.
- Ground O (9) IAC - Guilt (failed to investigate)**
- Trial Counsel failed to fully investigate the crime charged and the state's witnesses and to present that information to the jury in a coherent and meaningful manner.
- Ground P (3) IAC - Sentencing (failed to cross-exam and impeach)**
- Trial Counsel failed to properly cross examine and impeach state's witness Sara Pivero. See Ground O, number 5.
- Ground P (5) IAC - Sentencing (failed to investigate background)**
- Trial Counsel failed to investigate backgrounds of state's witnesses and their allegations. Such an investigation would have provided a substantial amount of impeachment material
- Ground Q (3) Brady - Failed to provide Ms. Pivero Statement**
- The state knowingly failed to provide, to trial Counsel, a statement given by Sara Pivero to the agents of SLED.⁴¹

⁴¹ This issue related to ineffective assistance of Counsel in failing to question either Agent Mears or Darnell about Ms. Pivero's statement. As revealed in Agent Darnell's testimony, there was no Ms. Pivero statement to reveal. PCR R. 1678-79. The allegation is without merit and must be dismissed.

In the claims related to Sara Pivero, Mr. Aleksey initially claims, in post-hearing pleadings for the first time, that the State violated the mandates of Brady v. Maryland, supra, by failing to disclose the fact that Ms. Pivero had given inconsistent statements to Solicitor Bailey and the Doylestown Police Department concerning who wrote the checks Mr. Aleksey or Ms. Pivero used for the down payment on the Lexus. He further contends that Counsel were ineffective in failing to impeach Ms. Pivero with her record and inconsistent statements she made concerning her involvement in the Lexus purchase. For reasons set forth below, the Applicant has failed to show entitlement to relief under either Kyles v. Whitley, supra, or Strickland v. Washington, supra.

A. Sara Pivero's Trial Testimony

1. Guilt Phase

Sara Pivero testified that she was 21 years old and employed as a hairdresser at Sensational Scissors for four years. R. 1606-07. She stated that she met Mr. Aleksey, then known as Michael Angelo, in May 1996 and developed a relationship with him. She stated they lived together as boyfriend-girlfriend until November 1996. R. 1608. She said he also used the name Batkilina and Michael Diangelo. Id.

She stated on January 2, 1998, she received a call on her cell phone and initially received a voice message from an operator about a call from a correctional facility and heard Michael's [Mr. Aleksey] voice say to call his mom. About 15 minutes later, she received a call around 8 pm and it was Michael. She stated he identified himself and said he was in jail in South Carolina. When she asked him what he did, he told her "that he shot a state trooper." R. 1611.

When she said "shot as in hurt", he said he doesn't know. He said to her he knew he was in trouble, but that "maybe it was for the better because he was tired of running." R. 1611.

Ms. Pivero stated she got another call from him that evening and he told her to call his mother and let her know what was going on. R. 1611. The next day, January 3, she received another call "and this time he was kind of frantic and said it wasn't him, it was Perez that pulled the trigger", although she did not know who Perez was. R. 1612. At that point, he had never told her anyone else was in the car and she did not know whether Perez was male or female. R. 1612.

On cross-examination, Mr. Sims attempted to question whether she might have heard "they said I shot the trooper", but she denied it because of what he said he did. R. 1613. She confirmed the next day he said "Perez pulled the trigger." R. 1613.

Mr. Sims developed that Ms. Pivero met Mr. Aleksey when she was driving with a girlfriend to Atlantic City and he was in a car next to them. R. 1613. She stated that they started talking at the casino, and they followed their meeting with phone calls over the next couple of weeks and then he moved in with her. R. 1614-15.

She said that Mr. Aleksey proceeded to spend a lot of money. She claimed he asked to borrow her money because he was in trouble and promised to pay her back. R. 1615. She thought he set up investments in her name, which never existed. She claimed her statement from her investment company revealed a zero account balance. R. 1615. She stated that the various account balances probably totaled \$50,000. R. 1616.

Like Ms. Watson, Ms. Pivero stated Mr. Aleksey went to dealerships and picked out the car he wanted "and I put them in my name for him" because she had good credit and Mr. Aleksey claimed he had bad credit. R. 1616.

She stated she bought a 1996 Mustang which she wrote a check out for. R. 1616-17. She described a series of automobile transactions including obtaining a 1994 Eldorado Cadillac when he traded in her 1996 Jetta; and also he acquired a Red Passat. R. 1617. She stated that Mr. Aleksey told her that the payments were taken care of and she signed her name to the lease. R. 1617. Ms. Pivero stated that next was a 4-Runner that he had picked out. She said the paperwork was done and all she had to do after he handed her some cash was to sign the paperwork. She signed the papers and Mr. Aleksey drove off in his new car. R. 1618.

Next, after she had an accident and was driving a rental, Mr. Aleksey wanted her to get a new Jeep. She told him she could not make payments on it because she was 19, trying to make a mortgage and working as a hairdresser. R. 1618. He said he would help her, so she got the Cherokee with him and he helped by "using whatever means necessary." R. 1619.

Next there was a 76 Corvette Stingray for which she loaned him money. She said he then paid cash for it and sold it a couple of weeks later, keeping the money. R. 1619.

Concerning the Lexus, Ms. Pivero stated that she received a call to come to Thompson's Lexus in Pennsylvania and see the car and fill out the credit application. R. 1619. She stated she filled out the application and "reluctantly" wrote the check. R. 1619:20-1620:6. She said Mr. Aleksey told her the money would be in the account. R. 1620.

However, she said he had deposited "bad checks" into the account and her checks bounced. "I bounced a little over \$8000 in checks to the Lexus dealership, which I am now paying them back monthly." R. 1620.

Ms. Pivero stated at that time they were still technically together, but it had been pretty rough. R. 1620. She stated he had been staying with other people. Also, that Mr. Aleksey was incarcerated and when he got out he stayed with her and a girlfriend about a month and one half.

She said she was out of money from investments that no longer were in existence. R. 1621.

On re-direct, Ms. Pivero indicated that she received the \$50,000 from a severe car accident in 1995 from an insurance company due to the loss of a dear friend. She said she had invested in mutual funds, a money market account, and two IRA's. R. 1621-22. She said it was gone in about two months. R. 1622. She said that she was upset with him, but never left his side, had no reason to hurt him because he took her money, because it wasn't that important. R. 1622. She said she had never denied talking to him and that she had told the truth about the call. R. 1622.

On re-cross, Mr. Sims confirmed that the call was on the cell phone not the house phone. R. 1623.⁴²

2. Penalty Phase

Ms. Pivero testified as a state witness in the penalty phase. Particularly, she stated Mr. Aleksey had a black Toyota Supra when she met him in May 1996.⁴³ R. 1905. She had invested \$75,000 in proceeds she had received in insurance from an automobile accident. R. 1905. She

⁴² Ms. Pivero had testified earlier that she previously had given Mr. Aleksey her cell phone number. R. 1609.

stated, at Mr. Aleksey's instigation, she leased a Cadillac for him in her name. This was traded in for a Toyota 4-Runner for him in her name. Subsequently, there was a 1996 White Saline Mustang that he kept for around a month and one-half. R. 1906. Mr. Aleksey then traded in the 4-Runner for the Lexus LX 450. R. 1907.

Concerning the Lexus, Ms. Pivero stated that Mr. Aleksey wanted it. R. 1907. At the time, she was working as a hair stylist making \$15,000. However, the Lexus cost around \$60,000. R. 1907. The prosecutor introduced two checks that she said she made out: Exhibit 87 for \$2060 on her bank account to Thompson Lexus for the start-up fees and first month's payment that she signed (R. 1908), and a second check she signed for \$6,393 to pay off the 4-Runner in order to get the Lexus. R. 1909.

She said Mr. Aleksey wanted the Lexus. However, she was writing the checks because Mr. Aleksey told her that money was there, but the checks he was depositing into the account were "bad checks" and her account went negative a few thousand dollars. R. 1909.

Ms. Pivero identified a W-2 form that was faxed to the Thompson Lexus which indicated her income as being in excess of \$78,000. She stated that she did not know how it came about and did not fill out the form. She stated she knew they asked for proof of income, but claimed she did not deal with them. "I only went there to sign the papers. I went there once to fill out the credit app and once to sign the papers." R. 1910. She stated again that she did not fill out a W-2 form. R. 1910:15-17. She stated she just signed the paperwork without looking at it. R. 1910.

Ms. Pivero said the two checks ended up bouncing, but claimed at the time she wrote the checks she thought they would clear. R. 1911. She said Mr. Aleksey had been depositing checks into the account, but it turned out they were bad. R. 1911.

Ms. Pivero stated she had a closed bank account with First National Bank. R. 1911-12. State exhibit 89 was an \$18,014 check written to County Line Auto Sales dated August 1997. R. 1912. Ms. Pivero claimed this check was taken from her home where checks were kept. She identified Mr. Aleksey's handwriting on this check and forging her signature. R. 1912-13. She stated in August 1997, she had not talked with Mr. Aleksey for a couple of months and was unaware he was writing the check. R. 1913-14.

She stated Mr. Aleksey also got her mother's (Carol Pivero) credit card numbers and charged them for "a couple of thousand dollars." R. 1914.

Ms. Pivero also said at one time Mr. Aleksey had a Honda CVR 600 motorcycle that he claimed his girlfriend Theresa in New York purchased for him. R. 1914. She said she saw him dump it into a lake and he told her it was done "so it wouldn't be traced back to him." R. 1914-15.

Ms. Pivero described seeing Exhibit 5, a gun that he used to keep in a leather first aid box. She described in February 1997 when they got in an argument and threw her on the ground and put the gun to her forehead and said he was going to kill her. R. 1915. She said to pull the trigger because her life can't be worse, and he said "how could you do this to me, I love you." He then held the gun to his own head and said he was going to shoot himself and to walk out of the room. She said she would stay and Mr. Aleksey then curled up on the floor and fell asleep. R. 1916.

Ms. Pivero identified State's 56 which was a brown purse that belonged to Mr. Aleksey. She testified that she had seen it previously and it contained credit cards, Ids. and checks from his ex-girlfriend Theresa. The items had the names Theresa Fogle and Theresa McCann on

them. R. 1916-17. Subsequently, some of her friends said they saw her own checks in his purse. R. 1917.

In May 1996, Ms. Pivero asserted that she had a conversation with Mr. Aleksey where he claimed Theresa had taken money and other things from him and claimed that he would get even with her one day when she wasn't expecting it and blow up her car. R. 1917-18.

On cross-examination, Mr. Sims initially emphasized the gun event and that he did not pull the trigger on her and threatened to kill himself and asked her to leave, but when she refused he laid on the floor and went to sleep and said "he was afraid to lay next to me because he thought I would hit him." R. 1918-19. She described the event as scary, but she believed Mr. Aleksey would not pull the trigger on either. Ms. Pivero said that she felt he would not pull the trigger because they were in someone else's home with children. R. 1919-20.

Concerning the motorcycle, she said she knew he was going to ditch the motorcycle in advance and gave him a ride back. R. 1920.

Concerning the vehicle purchases, Ms. Pivero stated she really did not have a choice. She said Mr. Aleksey went to the dealerships and filled out the paperwork and "I trusted him so I signed." R. 1920. She said they were living together then and been dating for a while, so I trusted him. R. 1921. She thought it was odd how quickly he switched cars, but he seemed to love them and she didn't ask questions as long as the bills got paid. R. 1921. However, she stated:

Unfortunately the bills were getting paid with his stolen credit cards, receipts and everything was kicking back and I was getting these lump sum bills for thousands and thousands of dollars. Not to mention rap sheets I have now, probation I'm on so I can pay back his car.

R. 1921. She said after Mr. Aleksey took off, she got a cell phone bill for \$4,500.

Ms. Pivero stated at no time did she refuse to sign for the car because "he had the money up front." R. 1922. "He gave me the cash to go." Id. She said he never signed any of the documentation at the dealerships because he told her he had bad credit and had filed for bankruptcy, but needed a car and she was "trying to help him out." R. 1922.

B. Brady Claim

In Mr. Aleksey's brief, the sole claim he asserts arises from material disclosed after the evidentiary hearings were completed. The Applicant presents documents disclosed to the Attorney General on April 22, 2004 from the Doylestown Township Police Department as Applicant Exhibit 85, which supplements similar material received in court as Applicant's 55 that had been disclosed to defense Counsel on February 16, 1998 according to the transmittal letters in the Clerk's Office. However, Doylestown materials include a July 16, 1998 letter from Solicitor Bailey to Detective Dean Logan in which he states:

During the penalty phase of the trial, I am going to call Sara Pivero with regards to her dealings with Bayan Aleksey. Ms. Pivero has advised me that Mr. Aleksey altered her W-2 as well as forged her signature as the maker of two checks payable to Thompson Lexus...

Applicant's 85. The proposed exhibit also includes the following July 23, 1998 report by Lt.

Logan stating:

On July 22, 1998, I picked up the original \$6393.88 check from Jim Cousart of Thompson Lexus and made telephone contact with Walter Bailey in reference to the letter. I advised him of the information related to Pivero signing the checks rather than Mr. Aleksey as Pivero had informed him...

Applicant's 85 (Report Date 07-23-98).

During the trial, Ms. Pivero consistently maintained that she signed both checks to Thompson Lexus, consistent with the investigation and her earlier guilty plea. R. 1619-20 (cross-examination in guilt phase); R. 1908, 1911 (penalty phase).

The Applicant asserts that there was a Brady violation because the Solicitor never disclosed to either defense Counsel that Ms. Pivero at some time, had falsely indicated to him that Mr. Aleksey, rather than herself, had signed the Thompson Lexus checks. The Applicant contends that this inconsistent and false statement to Solicitor Bailey was impeachment material that should have been disclosed to the defense. Mr. Aleksey maintains that Ms. Pivero made a false statement to Solicitor Bailey, even though she testified during trial consistent with earlier statements, qualified as Brady material because it suggested that she would lie to a jury if she would lie to Solicitor Bailey.

Since this issue was raised after the PCR hearing, no testimony has been taken from either Solicitor Bailey, Mr. Sims, or Mr. Stone concerning the circumstances surrounding the alleged disclosure of either the July 16, 1998 letter from Solicitor Bailey or the information contained within the letter. The record does disclose that at some time Solicitor Bailey traveled north and interviewed Ms. Pivero, although he was unable to receive any written statement from her. PCR R. 1422, 1423, 1431. Assuming the letter is accurate concerning the comments of Ms. Pivero related to the authorship of the checks, and assuming the information was not disclosed, a new trial is not warranted because the prejudice - materials prong of Brady and Kyles v. Whitley has not been satisfied.

First, it is without dispute that her trial testimony, brought out by the defense initially in the guilt phase, that she signed both of the Thompson Lexus checks was true, as Applicant

presently concedes. Applicant's Memo., p. 30-31. Second, information revealed in Applicant's Exhibit 55 which was disclosed to the defense included the fact that Ms. Pivero was willing to make false statements to law enforcement officials about the circumstances of the Lexus transaction, including that Mr. Aleksey was her brother or half-brother, Michael Pivero; that she must have filled out the credit application since it was her handwriting and signature; and that she had used an erroneous address on the application. See Applicant Exhibit 55, 11-15-96 and 11-20-96 Reports. Further, the defense was provided a "Rap Sheet", Applicant's Exhibit 52, which revealed guilty pleas to three counts of "theft by deception" and two counts of "bad checks" with three years probation. At trial, upon defense questioning, Ms. Pivero revealed that she had "rap sheets...probation" and had to pay restitution for the cars. R. 1921.

In Kyles, the Court held that undisclosed evidence was material if there was a reasonable probability that it would have changed the outcome of the proceeding. A "reasonable probability" is defined as a probability sufficient to undermine confidence in the outcome. Kyles, 514 U.S. at 434. As Kyles stated, the defendant must show "that the favorable evidence [withheld] could reasonably be taken to put the whole case in a different light as to undermine confidence in the outcome." Contrary to the claim of the Applicant, the mere fact that a document possibly could be used for impeachment and was undisclosed under Brady does not mean there must be a new trial. See Campiti v. Matesanz, 333 F.3d 317, 322 (1st Cir. 2003) (nondisclosure of witness' wrongdoing not "material" because additional evidence against defendant meant there was a reasonable probability the result would have been different); U.S. v. Jackson, 345 F.3d 59, 73-79 (2nd Cir. 2003) (nondisclosure of impeachment evidence not "material" under Brady because incriminating evidence against defendant significant and defense

could impeach without the non-disclosed material); U.S. v. Zuno-Arce, 339 F.3d 886, 890-93 (9th Cir. 2003) (nondisclosure of further impeachment evidence not material because defense did impeach and new evidence did not undermine confidence in the outcome); U.S. v. Payne, 63 F.3d 1200, 1210 (2nd Cir. 1995) (no violation where government did not disclose impeachment evidence in prior affidavit of co-conspirator because co-conspirator's testimony was only a fraction of the case linking defendant to the crime). Here, the inconsistent statement about the check potentially made to Solicitor Bailey was similarly not material when viewed in light of all the other evidence available to challenge the credibility of the witness.

Confidence in the outcome of the case is not undermined assuming this non-disclosure. First, it is clear that Mr. Aleksey was an active participant in the Lexus transactions, albeit that Ms. Pivero signed the checks, as she testified. The risky impeachment could have suggested Mr. Aleksey was more dominant or in fact, that Ms. Pivero had either misspoken about the Lexus checks or been misunderstood. According to the Doylestown documents and her plea, all which preceded her alleged comments to Solicitor Bailey, there was no indication that she had ever denied to law enforcement or the court that she was the author of the Lexus checks. Further, the Lexus transaction was initially brought up by the defense in their cross-examination of Ms. Pivero in the guilt phase. The failure to disclose does not undermine confidence in the outcome and the Applicant has failed in his burden of proof on this issue.

C. Ineffective Assistance of Counsel

The Applicant contends Counsel failed to adequately impeach Ms. Pivero on the fact of her particular criminal convictions, her involvement in the Lexus fraud, and whether she was truthful at trial in August 1998 when she claimed to be employed at Sensational Scissors as a

hairdresser. For the reasons set out below, the Applicant has failed to meet his burden of proof under Strickland v. Washington, *supra*. As set out previously, where Counsel has a valid strategic reason, he cannot be deemed deficient under Strickland.

At the time of the August 1998 trial, Sara Pivero had been convicted, by entry of a nolo contendere plea to three counts of "theft by deception" and two counts of "bad checks" and was serving three years of probation as of July 28, 1997 for her involvement in the lease of the Lexus. It is also clear that in the guilt phase, Counsel Sims did not attempt to impeach her with her prior criminal record, although it had been turned over to them upon request. PCR R. 575. Counsel Sims acknowledged that he could have impeached her with her record, but did not do so at trial. PCR R. 578-79, 582. In hindsight, he thought he might have overlooked it.

This Court finds that even if Mr. Sims overlooked the criminal record, it is clear that he developed on cross-examination in the guilt phase her involvement in the purchase of the Lexus. As Counsel Stone stated, it was obvious from the beginning that she was part of the deception. PCR R. 1102-04. Importantly, the criminal convictions arose directly from the involvement with the Lexus, initially on the defense guilt phase cross-examination. R. 1618-20. A review of the Applicant's Exhibit 51 reveals that her statements to the court at the nolo contendere plea were consistent with her trial testimony in Mr. Aleksey's trial. Further, in the penalty phase, Ms. Pivero stated during cross-examination that she has a criminal record (rap sheet), was on probation and was required to make payments on the Lexus as a result of her involvement with Mr. Aleksey. R. 1921. With this information before the jury, the omission to particularize the crime on cross-examination does not undermine confidence in the outcome under Strickland, *supra*.

Mr. Aleksey further criticizes Counsel concerning his failure to further develop on cross-examination specific circumstances surrounding the purchase of the Lexus. First, he now contends that from the Doylestown police reports, Counsel should have developed that Ms. Pivero was aware that the checks she wrote were from an insufficient account because she subsequently told police that she was hoping to receive funds "from a friend." See R. 1909. As Counsel Sims noted, he did not see the strategic benefit in parsing this item from the Doylestown report. Mr. Sims stated that an alternative interpretation, based upon the entirety of the reports was that at the time she thought Mr. Aleksey, her friend, would make good on the checks. PCR R. 597, 602-03. Applicant's Exhibit 55 (and 85) supports that approach where the police reports revealed when Sara Pivero was notified by telephone, Mr. Aleksey would expeditiously return the telephone calls. The police reports reflect that Mr. Aleksey, not Ms. Pivero, told Thompson Lexus to redeposit the checks and that he would make good on the checks. Applicant 55, [Report 10/08/96, p. 2; Report 10/10/96; Report 10-11-96, p.1-2]. Mr. Sims stated that his notes reflected that he had reviewed these Doylestown documents. PCR R. 597-99, 653. Mr. Sims felt all these notations suggested was that when Mr. Aleksey received notification of the problem with Lexus, Ms. Pivero thought that Mr. Aleksey would give a good check. PCR R. 602-03.

Counsel Stone recognized the difficult factual area they were in. He stated that the strategy was to make her involved, but not as close as a co-conspirator that Mr. Aleksey would feel comfortable revealing to her that he shot a trooper. PCR R. 1203.

The Applicant also asserts that Counsel should have impeached about the salary discrepancy of the W-2 of \$78,984.25 (App. 55), the credit application of \$7500 per month (\$90,000) and her real income as a hairdresser (\$12,000-15,000). First, she consistently denied

that she filled out the fake W-2 form. However, she admitted, at some point, that she signed the credit application that had \$7500 per month. The discrepancy between her real salary and reported salary was presented to the jury. R. 1619-20 (filled out the credit application) (cross-examination); 1907 (\$15,000 salary as stylist); 1910 (fake W-2 for \$78,000). The Applicant contends that this testimony should have been fully impeached by asserting that she additionally made a false representation about \$7500 per month on the credit application. However, according to the police report, her response to this situation was that Michael (Mr. Aleksey) told her to do so. PCR R. 601, Applicant 55. In light of the other evidence as a whole, it is difficult to see how the failure to ask the question on the proposed topic would undermine confidence in the verdict.

The Applicant further asserts that on cross-examination the defense should have developed that Ms. Pivero had presented Mr. Aleksey to both the dealership and initially to police as her brother or half-brother, when in fact he was her boyfriend. Mr. Sims agreed he could have impeached her with these false statements, but did not. PCR R. 586-91. Mr. Sims acknowledged that he had reviewed the document which included this information. PCR R. 590-91. The "impeachment" potential does not undermine confidence in the outcome. It could have been viewed as Mr. Aleksey's modus operandi of manipulating women to their detriment. This Court concludes that the failure to present these statements does not prove ineffective assistance of Counsel or prejudice under Strickland.

The Applicant further seeks to suggest that the "love letters" which assert Ms. Pivero was taking the blame should have been used to impeach the claim that she was a victim and Mr. Aleksey was draining her account. However, Ms. Pivero's testimony at trial already explained

this dichotomy - "I was upset, but I never left his side" and "I had no reason to hurt him. Yes, he took a lot of money from me, but it wasn't that important." PCR R. 1622. The jury was aware of the relationship Mr. Aleksey and Ms. Pivero shared and the additional and consistent information from the letter, the Court finds it would not have altered the jury's verdict.

Similarly, Mr. Aleksey now questions the employment of Ms. Pivero at trial as being at Sensational Scissors when at her plea in 1997 she stated she worked at a grocery and lost her job as a hairdresser. The Applicant has failed to prove that Ms. Pivero was not employed as the hairdresser when she testified in 1998. Further, there was no showing that Counsel was ever aware that she was not employed, at the time of trial, at Sensational Scissors. PCR R. 570-76. Viewing Counsel's conduct based upon what they knew at trial, it was neither deficient nor prejudicial to the Applicant and his claim must be denied.

SUMMARY AS TO PIVERO CLAIMS

For all the foregoing reasons, the allegations related to Sara Pivero are without merit for relief. In Ground Q(3), the Applicant claims the State knowingly failed to provide to trial Counsel a statement given by Sara Pivero to the agents of SLED. It was revealed during the testimony of SLED agent Darnell and the Court finds that there was never a statement given by Ms. Pivero. See PCR R. 1678-79. Therefore, I would find that the Applicant was not denied due process of law as to this issue, and I would deny the Applicant's request for relief.

With regards to Ground O, the Applicant claims he was denied the right to the effective assistance of Counsel during the guilt or innocence phase of trial and in Ground P as to sentencing. As to Ms. Pivero, this Court finds that each of the allegations presented to the Court by the Applicant rest entirely on tactical decisions made by trial Counsel. This Court finds that

trial Counsel's strategic decisions were not deficient under Strickland, and therefore, the Applicants application for PCR would be denied with regards to each of these issues. Further, even if the Applicant successfully established his grounds for deficient performance with regards to any of these allegations, I would find the Applicant has failed to establish prejudice to which he suffered as a result of the alleged violations considered either individually or collectively.

YELENA BATKILINA ISSUES

Ground O (2) IAC - Guilt (failed to adequately impeach)

Trial Counsel failed to properly cross examine and impeach state's witness Yelena Batkilina. Counsel did not impeach this witness with evidence of prior criminal convictions, character evidence involving specific instances of prior dishonest conduct, or challenging her false testimony.

Ground O (9) IAC - Guilt (failed to investigate)

Trial Counsel failed to fully investigate the crime charged and the state's witnesses and to present that information to the jury in a coherent and meaningful manner.

Ground R (1) False Testimony - date of gun purchase

The prosecutor knowingly presented false testimony when state's witness Yelena Batkilina testified incorrectly about the date of purchase of the weapon in this case, not clarifying conflicting testimony between Ms. Batkilina and state's witness French and allowing Ms. Batkilina to testify falsely that she had not seen Applicant after either the purchase of this weapon or, alternatively, after Applicant's release on bond for a Pennsylvania charge. The prosecutor had information in his possession which informed him this testimony was patently false. Further, the prosecutor specifically relied on this false testimony during his closing argument.

Ground Q (2) Brady - Failed to disclose prior record and

acts of dishonesty

The state knowingly failed to disclose, to Applicant's trial Counsel, evidence of Yelena Batkilina's prior criminal record and other specific acts of dishonesty, fraud and wrongdoing.

In this portion of the memorandum, pages 35-39, Mr. Aleksey asserts that the prosecution violated the mandates of Brady v. Maryland, supra, in failing to disclose the full criminal history of Yelena Batkilina from Florida and the Volvo scam from Lower Moreland, Pennsylvania and that Counsel was ineffective in failing to adequately investigate or impeach Ms. Batkilina concerning her criminal record, the timing of the gun purchase, and her continuing association with Mr. Aleksey after either November 1996 or February 1997. In the application he also contended that false testimony was presented by the erroneous gun purchase date of 1996 rather than 1997. For the reasons set forth below, this Court finds that Mr. Aleksey has failed in his burden of proof.

A. The Guilt Phase Testimony of Yelena Batkilina

The first witness for the state in the guilt phase was one of Mr. Aleksey's girlfriends Yelena Batkilina. R. 913-25. She testified that she lived in Philadelphia and was a new student at Temple University. In 1990 she moved from Russia to the U.S. R. 914.

In July 1996, she met Mr. Aleksey at a girlfriend's home. R. 914-15. At that time, he was known as Michael Pivero, and they developed a boyfriend-girlfriend relationship. R. 915.

Solicitor Bailey then asked her to recall October 17, 1997⁴³ and whether or not she went to Tom's Sporting Goods. R. 915:16-18. She went to the store to purchase a gun with Mr. Aleksey. She looked at the guns and picked out one she could hold. She came back on November 2 to pick up the gun, again with Mr. Aleksey. She verified her signatures on the paperwork she filled out at Tom's Sporting Goods. R. 917-18 (State Exhibit 3 [Record of Sale for Firearm], State Exhibit 4 [Firearms Transaction Record]). She verified that the information on the forms were correct, including her social security number, name, and serial number for the pistol. R. 918-19. She verified that State Exhibit 5 (nine millimeter pistol) carried the same serial number as her purchased weapon. R. 919.

She stated that she paid cash. She brought the gun home and gave it to her mother (Galena) and she put it somewhere in her room. R. 920. Ms. Batkilina stated that the last time she saw the weapon was on the date she picked it up and gave it to her mom. R. 920.

She also stated that the last time she saw Mr. Aleksey was in November. R. 920. She said she never saw him after November 1997. Id. At that time he had started using the name Michael Batkilina. R. 921. She described his normal dress as white turtleneck, blue jeans, and white sneakers. R. 921.

⁴³ As revealed in the State Exhibits No. 3 and 4 and the testimony of Thomas French. R. 931:14, 932:19, the actual date was 1996, not 1997. During the PCR hearing, Solicitor Bailey explained his error and confusion about the dates and that 1996 was the arrest date. PCR R. 1303-04, 1308-10.

Thomas Sims did the cross-examination of Ms. Batkilina. He developed the fact that Applicant used various names and had assumed her last name. R. 922. Without stating the date, he developed that while they were together she had posted \$10,000 bond for him.⁴⁴ R. 922.

Mr. Sims also developed that she went to the Sporting Goods store to purchase a gun she could handle, not a big gun. R. 923. She acknowledged that she was the person buying the gun and felt this weapon was one a woman could easily handle. R. 924.

When she stood bond for him, she said he was known to her as Michael Pivero. R. 924. However, she stated that they bailed him out as "Bayan Aleksey." R. 924. She stated that when she posted bond for him, he did not show up at trial. R. 924.

On re-direct, she stated that she did not know where he went when he did not show up for trial - "he didn't go." R. 925. She also clarified that she did not know or see Ms. Perez Blackwell. R. 925.

On re-cross, Mr. Sims developed that the charge she stood bond on was fraudulent use of a credit card. R. 925.

B. Brady Claims

The Applicant contends that the prosecution withheld impeachment material from the defense. Particularly, he claims that Ms. Batkilina's convictions for "attempt to commit fraudulent use of a credit card", a misdemeanor first degree and "conspiracy to commit grand theft", a misdemeanor-first degree, which was entered in State v. Batkilina, in Kissimmee, Osceola County, Florida on March 12, 1998, should have been revealed to the defense as potential

⁴⁴ It was developed at the PCR hearing that the date of the bonding was February 1997 from Bucks County, Applicant's 5.

impeachment material.⁴⁵ She was placed on probation for two years as a result of her negotiated plea. Applicant's Exhibits 3, 6. She was also ordered on that date to have no further contact with Mr. Aleksey. A second set of alleged undisclosed Brady material consisted of alleged fraudulent conduct by Ms. Batkilina, again with Mr. Aleksey, concerning a \$33,551.80 bad check to Burdumy Volvo in Huntingdon, Pennsylvania dated August 13, 1997 and made part of a police complaint at Lower Moreland Police Department. Applicant's Exhibit 9.

Under the Brady decision, evidence is material for purpose of determining whether the state is required to disclose it, only where there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different, and a reasonable probability is a probability sufficient to undermine confidence in the outcome. State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001). The Brady rule of disclosure extends to evidence that is not in the actual possession of the prosecution, but known by others acting on the prosecution's behalf in the particular case, including the police. State v. Kennerly, 331 S.C. 442, 503 S.E.2d 242 (S.C. App. 1998); see Johnson v. Catoe, 336 S.C. 354, 520 S.E.2d 617 (1999); State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996) (information concerning potential fraudulent activity of a witness known by a state agency, not imputed to solicitor's office).

It has generally been held under Brady that the prosecution has no duty to disclose or produce evidence outside of its control. State v. Jackson, 92 P. 3d 1263 (N.M. App. 2004). The state's failure to disclose prior convictions of state witnesses has been held not to violate disclosure rules when the state did not know of the existence of the prior convictions outside of

⁴⁵ It is noted that at the March 1998 plea, that Mr. Aleksey was the co-conspirator on the charges in Florida and was awaiting his murder trial. Applicant Ex. 3, p. 5.

its jurisdiction. State v. Linkhous, 460 S.E.2d 288 (1995); compare State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (S.C. App. 2002) (failure to disclose evidence of investigation of witness for an uncharged armed robbery was not Brady error where materiality not shown in murder case).

In Reddy v. Jones, 572 F.2d 979 (4th Cir. 1977), the Court held that state prosecutor was under no duty to disclose matters not within their custody or in the control of agencies not involved in the investigation of the particular crime. Accord U.S. v. Casas, 356 F.3d 104, 115-16 (1st Cir. 2004) (no duty to gather material outside of prosecution control); U.S. v. Hawkins, 78 F.3d 348, 351 (8th Cir. 1996) (no Brady violation despite failure of Missouri prosecutor to disclose exculpatory evidence held by Illinois prosecutors in connection with case pending against defendant which Missouri prosecutors were unaware); U.S. v. Beers, 189 F.3d 1297, 1304 (10th Cir. 1999) (no Brady violation by federal government's failure to disclose alleged impeachment evidence obtained by Albuquerque police because no evidence of federal participation in state investigation); Moon v. Head, 285 F.3d 1301, 1309-10 (11th Cir. 2002) (no Brady violation despite failure to disclose information held by Tennessee investigator because there is no evidence that Tennessee law enforcement and Georgia prosecutors had worked together in prosecuting the case).

1. The 1998 Florida Convictions

This Court finds that Solicitor Bailey had no affirmative duty to disclose the Florida convictions because he had no knowledge of their existence, nor did any law enforcement involved in the investigation. First, it is uncontested that the Solicitor's Office ran a criminal record check on Ms. Batkilina on June 11, 1998 and provided it to defense Counsel. Applicant's Exhibit 7. It is also undisputed that this "rap sheet" did not include any information about Ms.

Batkilina's Florida convictions on March 12, 1998, a time before the rap sheets were run. It is also uncontested that Solicitor Bailey was unaware of the Florida convictions. PCR R. 1315-18, 1418-19.

The Applicant asserts that the Applicant's comment during the statement he gave about Ms. Batkilina's trouble in Florida mandated the obligation on the prosecution to develop the information about the Florida conviction. As Solicitor Bailey stated, "There's no way for me to follow up, I did check the rap sheet and it did not appear on the rap sheet, and in order to do any follow up on that I would have had to notify every county, every municipality in the State of Florida until I found something... I assumed Mr. Aleksey knew what he was talking about, he was apparently with her when whatever was done and could provide his attorneys with the jurisdiction where those charges occurred and they could obtain what was needed." PCR R. 1419-20.⁴⁶

Further, under Solicitor Bailey's theory, the defense based upon Mr. Aleksey's comments, had better knowledge to develop the information. According to Counsel Stone, Ms. Batkilina, prior to trial, telephoned him and during the call advised Mr. Stone that she was on probation from her dealings with Mr. Aleksey. PCR R. 1013-15, 1017; cf. Anderson v. Leeke, 271 S.C. 45, 248 S.E.2d 120 (1978) (Brady applies to evidence the prosecution has that is unavailable to defense, where evidence is equally available to accused, obligation on part of state to furnish is relieved).

⁴⁶ Apparently, Mr. Aleksey was willing to do so in the PCR proceedings where this information was developed. The discovered information further revealed Mr. Aleksey's involvement in the matter. See Applicant's Exhibit 3, 6. However, at trial time, Mr. Aleksey was unwilling to disclose any particulars to the defense Counsel about Ms. Batkilina's Florida problems. PCR R. 164-66, 633-34, 1179-80.

It is clear that Brady does not apply to evidence the defendant possesses. See U.S. v. Rodriguez, 162 F.3d 135, 147 (1st Cir. 1998) (no Brady violation despite failure to disclose tactics to gain witness cooperation where defendant knew of witness' long criminal history); U.S. v. Bracy, 67 F.3d 1421, 1428-29 (9th Cir. 1995) (no Brady violation despite failure to disclose witness' criminal background in Florida and Wisconsin where defendant had sufficient information to develop information); U.S. v. Zuazo, 243 F.3d 428, 431 (8th Cir. 2001) (no Brady violation despite failure to disclose potential witness because witness had traveled with defendant and he was aware of witnesses potential testimony).

The Applicant has failed to show a violation of Brady by not disclosing the matter of the conviction. However, even if a duty to disclose existed, the criminal record (evolving from conduct with Mr. Aleksey), if disclosed, would not undermine confidence in the outcome under the test of Kyles v. Whitley, *supra*. First, the events in the Florida convictions involved Mr. Aleksey. Second, the defense was aware of the "probation" from their investigation. Third, there is no dispute that Ms. Batkilina purchased the gun in Mr. Aleksey's presence and that the gun she purchased ended up being in Mr. Aleksey's possession and was the murder weapon. Contrary to the statements in the Applicant's brief, there was no assertion at trial that Mr. Aleksey took the gun from either Ms. Batkilina or her mother "against her will." The only implication was that it was done without their knowledge. This fact had no bearing on the outcome of either phase.

Further, Counsel Stone stated that Ms. Batkilina was a good witness for the defense ("she didn't hurt us") and provided useful information for their theory. PCR R. 1014-15. Mr. Stone declared that she provided the testimony at the outset of the case that the gun was a woman's

gun. Ms. Batkilina noted that she had gotten Mr. Aleksey out on bond which helped the "non-violent upon arrest" theory. PCR R. 1016-17. The testimony revealed, early in the case, that Mr. Aleksey "knew how to get out of trouble" without violence. PCR R. 1023-24. There is no reasonable probability that the result of the trial would have been different if the State had proved the subject information.

This Court finds that the Applicant has failed in his burden of proof of either prong under Kyles.

2. Lower Moreland Police Department Incident Reports

The Applicant further contends that uncharged conduct of Ms. Batkilina with Mr. Aleksey in Huntingdon, Pennsylvania should have been disclosed. This relates to a \$33,551 check for a Volvo that bounced and ultimately resulted in the return of the Volvo by Ms. Batkilina's mother after Mr. Aleksey was threatened with arrest for either the theft of the vehicle or issuing a bad check. As with the above-record, Solicitor Bailey unlike Mr. Aleksey, was not aware of the incident involving the Volvo described in Applicant's Exhibit 9. PCR R. 1330-33. Although SLED Agent Darnell recalled speaking to police in Philadelphia and had Kathy Colfer's name in his handwritten notes [PCR R. 1651], he did recall receiving warrants on Mr. Aleksey. PCR R. 1651-54. Contrary to the claims of Mr. Aleksey, the fact that Lower Moreland Police Department sent its solved, uncharged, Volvo incident report to Philadelphia Fugitive Task Force member Kathy Colfer (Applicant's Exhibit 9, p. 3) does not mean this incident would be discussed or provided to SLED Agent Darnell. Simply put, they had failed to show an obligation to disclose what the state prosecution team never possessed.

Further, it is evident that Mr. Aleksey was aware of the information since he was involved in the return of the vehicle and threatened with arrest. Since he possessed the knowledge of the uncharged crime, he could have revealed it.

The Applicant contends that the Lower Moreland incident in August 1997 shows that Mr. Aleksey was with Ms. Batkilina after February 1997 when she bonded him out. He contends that had this information been provided, he could have impeached her statement that the last time she saw Mr. Aleksey was in November 1997. First, Solicitor Bailey asserted that his argument and presentation of Ms. Batkilina was to link Mr. Aleksey to the gun through Ms. Batkilina, not Ms. Perez Blackwell. PCR R. 1331; see also PCR R. 1310. Further, Solicitor Bailey asserted that he never sought to present any of Mr. Aleksey's women to be innocent people, but instead were the types he would associate with. PCR R. 1335. Solicitor Bailey also did not read his comments to suggest that the gun and Mr. Aleksey disappeared simultaneously or that the last time she saw Mr. Aleksey was the date she purchased the gun. PCR R. 1310-14. Solicitor Bailey stated that the testimony and introduction of the gun documents was to show Ms. Perez Blackwell was not in the picture when the gun was purchased - "the date was not that relevant." PCR R. 1312.

The problem with the Applicant's approach to the Brady claim is that Ms. Batkilina testified that she last saw Mr. Aleksey "somewhere in November" [November 1997]. R. 920. He asserts that the introduction would show that she was with him in August 1997. Whatever relevance his present theory has, it was not the theory the state had in its presentation. In fact, even the defense contended that he did not see how it would help Mr. Aleksey, in hindsight, to show the jury, in the guilt phase, that she was actually committing more crimes with him than she said. PCR R. 1023. Further, since he ultimately possessed the gun Ms. Batkilina purchase, it

is unclear how the difference in dates would prove he did not steal the gun. The Applicant has not shown, even if there was a duty to seek out and disclose that the failure to do so would undermine confidence in the outcome.

Further, the Lower Moreland report reveals that Mr. Aleksey had actual knowledge of the incident and bad check by Ms. Batkilina. The disclosure would merely have presented support for information that the defense had through their client, although not revealed. However, it is evident that the Applicant also had disclosed to them in the ATF report that Ms. Batkilina was involved in a "credit card scam" that was not presented on cross-examination and they were aware she was "in probation." The Court concludes that Mr. Aleksey has failed to show, as to the Lower Moreland matter, a reasonable probability the result of the proceeding would have been different.

C. Ineffective Assistance of Counsel

In his guilt phase ineffective assistance claim, he contends that Counsel should have impeached the theory that Mr. Aleksey disappeared from Ms. Batkilina's life shortly after the gun was purchased. First, as stated in the immediate section, the Applicant's current emphasis about the state's theory was in error and parses various testimony, particularly an erroneous date when the gun was purchased, to suggest that when she stated she last saw Mr. Aleksey in November 1997, that she actually meant November 1996 which would be a false statement. In fact, he attempts to suggest close temporal proximity of certain events when none was suggested. Simply put, as the jury would have been aware, Ms. Batkilina specifically testified that she last saw Mr. Aleksey in November 1997. She did not tie this to the date she purchased the weapon in her testimony. Supportive of the inference that the testimony was correct, in hindsight, was (1)

her driver's license issued September 1997 carried Vera Aleksey's address as her address. Applicant's 11; it is now known she had been involved with Mr. Aleksey in the August 1997 scheme with the Volvo, ultimately requiring the car's return by Ms. Batkilina's mother when the check bounced and after Mr. Aleksey was advised of the time it had to be returned or he would be charged with a bad check offense, Applicant's 9; the assertion that Ms. Batkilina bonded him out in February 1997 (although her mother advised law enforcement that she bonded him out in December 1996), Applicant, p. 5, Applicant Exhibit 9 (p. 3 of Supplemental Report); and, importantly, Mr. Aleksey told Counsel Sims that he was with Ms. Batkilina during the August 1997 period. PCR R. 215-216.

The Applicant contends the prosecution's closing argument where he stated "She carried the gun home. The gun disappears, he disappears and she sees it again here in court the next time", R. 1763, suggests a temporal misstatement in the state's theory of the case because the purchase of the gun and disappearance of Mr. Aleksey did not happen at the same time. While this interpretation is feasible, it was not the only interpretation from the comments or the evidence. As Solicitor Bailey stated, the only relevant factor, for the trial, was that Ms. Batkilina, not Ms. Perez Blackwell purchased the gun and Mr. Aleksey was last in possession of it. The claimed time differences would not impact, to a reasonable probability, the outcome of the case.

Further, the lawyer's failure to independently locate these matters was not deficient performance. As to Ms. Batkilina's alleged problems in Florida, Mr. Aleksey refused to explain to his lawyers what he was referring to in his statement to police, despite the ultimate fact of his involvement in the Florida scheme. PCR R. 158, 166, 202, 633-43, 1177-80. Further, Mr. Stone

was aware that Ms. Batkilina was "on probation" from her telephone call with him and could easily have resolved exactly what the charges were, but it was evident that they arose from a scheme she had with Mr. Aleksey. PCR R. 1176.⁴⁷ What Counsel did learn from Mr. Aleksey when he was fearing the women, was that he had stuff on them, but then refused to give specifics. PCR R. 1178-80. In fact, Mr. Aleksey told Mr. Sims that she had better not come down here and lie and that "I'll deal with her", but nothing specific about Florida. PCR R. 166.

In hindsight, Counsel stated that if they had the correct Florida convictions, they could have used them to impeach her. PCR R. 159-60. Similarly, Mr. Sims felt that use of the disclosed ATF Report of the unreferenceed "credit card scam", would be useful in impeachment as well. Similarly, with the Volvo bad act with the bounced check might have been useful for impeachment. However, the problem in each of the instances was that Mr. Aleksey possessed some knowledge and failed to reveal it. More probative, however, is that if the use of the material was to reveal a dishonest act on Ms. Batkilina's part, [except for the "Christina" lie on the Plymouth Township matter] because of Mr. Aleksey's continuous direct involvement it could have depicted an apparent Svengali⁴⁸ of Ms. Batkilina's fraudulent actions.

Although Counsel were unclear why they did not pursue further impeachment information from Ms. Batkilina on her probation, this alleged deficiency does not undermine confidence in the outcome. As with the Brady material, the critical part of her testimony appears accurate - she bought the weapon, it eventually ended up with Mr. Aleksey and she did not know

⁴⁷ Counsel Stone noted that Ms. Batkilina contacted him by telephone. PCR R. 1013-14, 1176-77, 1181-82.

⁴⁸ "Svengali" means "a person who completely dominates and controls another, usually for selfish or sinister motives. It is a literary illusion to the character Svengali, a hypnotist, in George du Maurier's 1894 novel Trilby."

Ms. Perez Blackwell. These facts were unimpeachable by any criminal record or further bad act history.

Counsel was of the opinion that Ms. Batkilina was a favorable witness for them inasmuch as she again revealed Mr. Aleksey's ability to extract himself from his schemes in a non-violent manner. This was presented through the evidence that she bonded him out. Also, she supported the theory that the gun purchased was for a female, not Mr. Aleksey, at the time of the purchase which could support his inference that it was ultimately Ms. Perez Blackwell's weapon, not his.⁴⁹ As Mr. Sims cautiously stated, "when you start talking about his involvement in that he was going to open more even more doors than we chose to open as it relates to his activities, we wanted to show him as a gigolo, we wanted to show him as a man who ... could, you know, con women, talk to them, get them to give him their money and get them to buy cars and expensive toys and have a good time in Atlantic City..." PCR R. 634. Mr. Sims sought to present Mr. Aleksey as the driving force in these women's activities - "his thing [was] to meet them, get what he could get and move on." PCR R. 634.

Finally, the misstatement (and arguably inferentially the misunderstanding of Solicitor Bailey) concerning the date of the gun purchase does not require a new trial based upon the defense's failure to further clarify it. First, the gun records introduced revealed the correct date, November 2, 1996. State Exhibit 3; State Exhibit 4. Further, Thomas French, the seller of the weapon, corrected the misstatement and unequivocally stated it was November 2, 1996. R. 931:14, 932:17-19. Any failure on defense Counsel's part to correct Ms. Batkilina's testimony

⁴⁹ Counsel Stone stated that he did not recall what Aleksey told him as to how he came into possession of the gun. PCR R. 1180-81.

(or impeach her memory) was corrected by the records and testimony of French. Under Strickland, prejudice was not shown by the independent presentation. This Court concludes that the failure to present the impeachment evidence as to Ms. Batkilina does not prove ineffective assistance of Counsel or prejudice under Strickland.

SUMMARY AS TO BATKILINA

In Ground Q(2), the Applicant claims the State knowingly failed to disclose evidence of Yelena Batkilina's prior criminal record and other specific acts of dishonesty, fraud and wrongdoing. This Court finds that the Applicant has failed in his burden of proof to show that the state's failure to disclose this information was a violation of the disclosure rules established by Brady and its progeny. Therefore, the Court denies the Applicant's request for relief with respect to this Ground.

The Applicant claims he was denied due process of law as a result of the prosecution's presentation of false testimony and their failure to correct the false impression created by that testimony in Ground R. In order for the Applicant to succeed on these grounds, the Applicant must show 1) the witness gave false testimony; 2) the falsity was material in that there is a reasonable likelihood that it affected the judgment of the jury; and 3) the prosecution used the testimony knowing it was false. Giglio v. US, 405 U.S. 150, 92 S.Ct. 763 (U.S. 1972). This Court finds with regards to each of the Grounds listed in his Application for Post-Conviction Relief, the Applicant has failed to meet his burden with respect to Giglio, particularly that the jury's judgment was affected. Therefore, the Court denies the Applicant's request for relief with respect to Ground R.

The Applicant claims he was denied the right to effective assistance of Counsel during the guilt phase of trial, and again, the Applicant lists numerous instances of what he believes amounts to ineffective assistance of Counsel. This Court finds that each of the allegations presented to the Court by the Applicant are rested entirely on tactical decisions made by trial Counsel. This Court finds that trial Counsel's strategic decisions were not deficient under Strickland, and therefore, the Applicants application for PCR is be denied with regards to each of these issues. Further, even if the Applicant successfully established his ground for deficient performance with regards to any of these allegations, the Court alternately finds that the Applicant has failed to establish prejudice to which he suffered as a result of the alleged violations.

LISA WATSON CLAIMS

Ground O (3)

IAC - Guilt

Trial Counsel failed to properly cross examine and impeach state's witness Lisa Watson. Counsel did not impeach witness with character evidence involving specific instances or prior dishonest conduct or challenging her false testimony.

Ground O (9)

IAC - Guilt

Trial Counsel failed to fully investigate the crime charged and the state's witnesses and to present that information to the jury in a coherent and meaningful manner.

Ground P (4)

IAC - Sentencing

Trial Counsel failed to properly cross examine and impeach state's witness Lisa Watson. See Ground O, number 3.

Ground P (5)

IAC - Sentencing

Trial Counsel failed to investigate backgrounds of state's witnesses and their allegations. Such an investigation would have provided a substantial amount of impeachment material.

Ground Q (4) Brady Prosecution Claim

The state knowingly failed to provide, to trial Counsel, evidence of fraud involving state's witness Lisa Watson.

Ground R (4) Giglio - Prosecution Claims

The prosecutor knowingly presented false testimony when state's witness Lisa Watson testified, in the guilt phase of the trial, that she had reported the White Mustang stolen on October 5, 1997.

Ground R (5) Giglio - Prosecution Claims

The prosecutor knowingly presented false testimony when state's witness Lisa Watson testified, in the sentencing phase of the trial, that Bayan Aleksey stole money from her husband's credit cards.

The Applicant claims that either his Counsel was ineffective in failing to investigate or impeach Lisa Watson with various inconsistent statements and evidence of her participation in and benefit from being involved in Mr. Aleksey's schemes and/or that the prosecution failed to disclose such information and failed to correct false testimony given by her. This testimony related to the loss involving her husband's credit cards, when the state knew she was directly involved in the fraudulent transaction involving Western Union. Similarly, the Applicant contends that there was a Brady violation in the state's failure to disclose this scheme. Finally, Applicant claims he received ineffective assistance of Counsel related to the investigation and examination of Lisa Watson, in particular because Counsel:

1. Failed to investigate the credit card fraud concerning Ms. Watson's husband related in the Ms. Watson SLED statement;
2. Failed to investigate the fraud of Ms. Watson involving the lease of the Mustang;
3. Failed to impeach Ms. Watson based upon her inconsistent statement concerning:
 - a. one visit verses three visits to dealership to sign papers;
 - b. whether the theft was reported immediately or six weeks later;
 - c. whether the event was reported as "stolen" or "try and locate."
 - d. failure to illuminate the discrepancy between her testimony in the penalty phase about him putting a gun to her head (R. 1962) and the Jan. 21, 1998 statement.

Applicant has failed to meet his burden of proof in these particulars as will be discussed.

A. Lisa Watson's Trial Testimony

1. Guilt Phase Testimony

In the guilt phase, Lisa Watson testified that she met Mr. Aleksey in September 1997. R. 1276. She initially knew him as Joey Barkley, and later as Joey Gambino. R. 1276, 1278. She stated on September 30, 1997, she signed a lease agreement for the White Ford Mustang (which Mr. Aleksey was in possession of at the time of the incident). R. 1278. She said that Mr. Aleksey was allowed to use the car and was supposed to pay off the car, but never did. R. 1278-79. She said that Ford Motor Credit was "coming to her house every single day, three or four times." R. 1279. She said Mr. Aleksey would call and tell her there was a third party check to

pay for the car, but she failed in getting the car back or getting him to pay for it. She said she reported the vehicle stolen in Philadelphia. R. 1279.

Ms. Watson stated the last time she saw the Mustang was on September 30th after she signed the lease papers. R. 1279. She said she last saw Mr. Aleksey in the beginning of October, probably October 1. She claimed to have reported the car stolen probably the first week of October. R. 1280.

On cross-examination by Thomas Sims, he noted the confused series of events - meeting Mr. Aleksey at a gas station and then signing a lease on a car for him four weeks later. R. 1280-81. She said "he was good at what he did." R. 1281. She said Ford Motor Credit started calling asking for payments after the second month. R. 1281. She said it was purchased September 30 and she may have reported it stolen on October 5, "maybe." R. 1282.

Ms. Watson claimed that she reported it stolen to the 15th District. R. 1282. She stated law enforcement talked to her over the phone. She stated that she informed Ford Motor Credit (FMC) that she had obtained the car for Mr. Aleksey. She also stated that Mr. Aleksey had told FMC that she was his aunt. Ms. Watson denied she got scared when FMC indicated they would do a replevin action, but stated she did get scared when she noticed things missing from her house. R. 1283.

Ms. Watson said Mr. Aleksey filled out the lease application and asserted that she was working and making a certain amount of money when in reality she was unemployed with no income. R. 1284. She had separated from her husband. R. 1284. At the time she signed the lease, she said she was unaware what Mr. Aleksey had told them. She said she was at the dealership for half an hour, signed the paper, and walked out the door. R. 1285. Ms. Watson

stated that she did not recall FMC telling her that they were going to garnish her wages and denied telling them she didn't have a job so it wouldn't matter. R. 1285. She said Mr. Aleksey would call her "everyday" to see if she had reported the car stolen, and she told him no, even though she had. R. 1285-86. As to whether Mr. Aleksey would have known the car was reported stolen, Ms. Watson stated:

If he didn't make payments on it and its been four months since I talked to him and he called me, no, I would not tell him it was stolen, I wanted him caught.

R. 1286. She stated she had never seen an arrest warrant for Joey Barkley because they had no information regarding him on the computer and she was unaware if a warrant was actually in existence. R. 1286-87.

A review of the closing argument of the state reveals no mention of Ms. Watson's testimony either by the State or defense. R. 1744-1790.

2. Penalty Phase Testimony

In addition to giving information about his aliases, Ms. Watson stated Mr. Aleksey was driving a Green Mustang when she first met him. R. 1961. Further, the White Mustang involved in the shooting was a car she leased and reported stolen because Mr. Aleksey "never" made any payments. R. 1961.

She said she agreed to lease the car in her name for Mr. Aleksey because:

He told me he had bad credit and we had built a relationship. I trusted him and he said he was going to make full payment on the car. He wasn't even going to make payments. He was going to pay the car off completely and he never did.

R. 1962. She said she did not agree to sign at first because she was scared and didn't think everything was on the up and up. At one point he told her "that I should do it or he was going to

kill me" when he was holding a gun, but she "thought it was a joke" and "he was laughing" R. 1962-63. She said she was not afraid at that time. R. 1963.

Ms. Watson also testified that Mr. Aleksey around September 29th told her about an incident he had on the highway. R. 1963. She said he said "some asshole got in his way, so he shot him." R. 1963.

Ms. Watson stated that she kept calling FMC everyday to see if a payment had been made because Mr. Aleksey was not talking to her at that time. "He was going through my husband because he told my husband what happened." R. 1964. Ms. Watson testified to the following: Mr. Aleksey could call her, but she never called him. At one time, Mr. Aleksey asked her if she knew who he was talking to on the other line and then he said: "I'm talking to a dead person and hung up the phone." She said she was frightened because she thought it meant that she was going to die. R. 1964. Mr. Aleksey said that he was a Gambino in their next conversation, which she understood meant a New York crime family. R. 1965.

Lisa Watson stated that her relationship with Mr. Aleksey cost her \$42,000 because of the car, her husband's credit cards, and her credit cards. R. 1965.

On cross-examination, Thomas Sims developed that Ms. Watson thought Mr. Aleksey was playing with the gun and not threatening her and she was not afraid of him due to his laughing. R. 1965-66. She stated she went to the police after she found out what he was doing to her. R. 1966.

Mr. Sims developed that when she gave her statements to law enforcement although she knew Gambino was a name he used, she did not say Mr. Aleksey was in the Gambino family because she did not believe he was in the family. R. 1966. She agreed with Mr. Sims that it was

bravado on his part and she thought he was trying to scare her with the Gambino name. She thought he was Joey Barkley. R. 1967. She thought "if the cops didn't get him, the Gambinos would", and was not concerned with him. R. 1967.

She confirmed she signed the lease agreement, with her two kids with her. R. 1967.

B. Giglio - Napue Claim

The state denies a criminal defendant due process when it knowingly uses perjured testimony at trial or allows untrue testimony to go uncorrected. Giglio v. United States, 405 U.S. 150, 153-54, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); Napue v. Illinois, 360 U.S. 264, 269-70, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). To succeed in showing a due process violation from the use of allegedly perjured testimony, a defendant has the burden of establishing that (1) the witness in question actually gave false testimony, (2) the falsity was material in that there was a reasonable likelihood that it affected the judgment of the jury, and (3) the prosecution used the testimony in question knowing that it was false. Giglio v. United States, 405 U.S. at 153-54.

Giglio error is a Brady error that occurs when "the undisclosed evidence demonstrates that the prosecution's case included perjured testimony and that the prosecution knew, or should have known, of the perjury." United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). "If false testimony surfaces during a trial and the government has knowledge of it ... the government has a duty to step forward and disclose." Brown v. Wainwright, 785 F.2d 1457, 1464 (11th Cir. 1986). "In order to prevail on a Giglio claim, a petitioner must establish that the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony, and that the falsehood was material." Tompkins v. Moore, 193 F.3d 1327, 1339 (11th Cir. 1999).

The origins of the Giglio doctrine lie in the Supreme Court's decision in Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), which held that a prosecutor's failure to correct false testimony by the principal state witness that he had received no promise of consideration in return for his testimony violated the defendant's Fourteenth Amendment due process rights and required a reversal of the judgment of conviction. The Court explained that "it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." Napue, 360 U.S. at 269, 79 S.Ct. 1173 (citing Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935)). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Id. This principle, the Court observed, "does not cease to apply merely because the false testimony goes only to the credibility of the witness," since "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." Id. Reversal was required because "the false testimony used by the State in securing the conviction may have had an effect on the outcome of the trial." Id. at 272, 79 S.Ct. 1173.

Subsequently, in Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the Supreme Court held that the government's failure to correct false testimony that its key witness (the defendant's coconspirator) had received no promise of nonprosecution in exchange for his testimony, as well as the prosecutor's false statement to this effect in closing argument, required that the defendant be granted a new trial. The Court explained that "deliberate deception of a court and jurors by the presentation of known false evidence is

incompatible with rudimentary demands of justice." Giglio, 405 U.S. at 153, 92 S.Ct. 763 (citation and internal quotation marks omitted).

The Giglio Court made clear, however, that such errors do not require automatic reversal, and articulated a "materiality" standard to guide the determination of whether a new trial is warranted:

We do not ... automatically require a new trial whenever a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. A finding of materiality of the evidence is required under Brady. A new trial is required if "the false testimony could ... in any reasonable likelihood have affected the judgment of the jury."

Id. (citations and internal quotation marks omitted) (quoting Napue, 360 U.S. at 271, 79 S.Ct. 1173): Because "the Government's case depended almost entirely on [the falsely testifying witness's] testimony," the Court reasoned, his "credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." Id. at 154-55, 92 S.Ct. 763. Accordingly, the Court reversed the judgment of conviction.

Since its decisions in Napue and Giglio, the Supreme Court "has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976) (footnote omitted) (emphasis added); see also Kyles v. Whitley, 514 U.S. 419, 433 & n. 7, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); United States v. Bagley, 473 U.S. 667, 677, 105

S.Ct. 3375. 87 L.Ed.2d 481 (1985); accord Brown, 785 F.2d at 1465-66.⁵⁰ The "any reasonable likelihood" standard differs from the materiality standard applicable to other types of Brady violations because of the nature of the error. As the Supreme Court has explained, "the Court has applied a strict standard of materiality [to Giglio violations], not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process." Agurs, 427 U.S. at 104. 96 S.Ct. 2392.

The Applicant contends that Solicitor Bailey essentially committed Giglio - Napue error in failing to correct certain testimony. As revealed in the testimony of Solicitor Bailey, he credibly contends that there was no knowingly false testimony presented by Lisa Watson related to the loss developed from the fraud involving her husband's credit card funds and when she reported the "theft" of the vehicle. The Applicant has failed in his burden of proof.

The Applicant contends Lisa Watson's guilt phase testimony, that she had not seen the car since September 30 and that she reported it stolen around either the first week in October or October 5, was false testimony. R 1280, 1282-84. He now contends that Solicitor Bailey should have known this was false testimony because he contends it was not reported stolen until November 13, 1997 to the 8th District of Philadelphia Police Department with a "Try and Locate" complaint and incident report when she was quoted as stating that she had lent the car to "Joey Barkley who has failed to return same as of this date." Applicant's Exhibit 17.

⁵⁰ Giglio error does not fall within the category of constitutional error that the Supreme Court has characterized as "structural," requiring automatic reversal of a tainted conviction. A structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Arizona v. Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). The Supreme Court has found structural error "only in a very limited class of cases," including those involving complete denial of Counsel, a biased trial judge, racial discrimination in selection of a grand jury, denial of self-representation, denial of a public trial, and a defective reasonable doubt instruction. Neder v. United States, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (citation and internal quotation marks omitted).

Solicitor Bailey stated first that everything he received from SLED in the investigation was turned over to the defense as part of his documented open file policy with records made at the Clerk's Office. PCR R. 1346-47. Solicitor Bailey stated that he had no reason to correct the testimony of Ms. Watson concerning the report. He said "I had no reason to doubt that was the correct date." PCR R. 1364-65. Although the Applicant relies upon the Ford Motor Credit Reports, Applicant's 17, to suggest that the initial report was only made on November 13, 1997, after another call from FMC, the FMC reports are subject to various interpretations. See PCR 1364, 1421. As noted on cross-examination, the initial entry with Ford Motor Credit (Applicant's Exhibit 21) on October 15, 1997 suggested that Ms. Watson had called them about the vehicle and wanted it repossessed from "Joey Barclay", but that FMC advised her they could not do it at the time because payments were not yet in default. Applicant's Exhibit 21, p. 6. Importantly, it also revealed that Ms. Watson had told them that "detective from Paul's Township had called her about the unit" and that FMC on that date had advised her to contact police. Applicant Exhibit 21, p. 6 (10/15/97 10:35 entry). Although the Applicant's Exhibit is dated November 13, 1997, it is with the 8th District. On cross-examination, the witness contended that she had spoken with the 15th District Department but that she had not signed anything. R. 1282-83.⁵¹ It should be noted that in the penalty phase Ms. Watson stated she reported it stolen because Mr. Aleksey never made any payments. R. 1961.

This Court finds that the Applicant has failed to prove a Giglio – Napue violation related to the date of the stolen car reporting. In any manner, the exact date of the reporting was not a

⁵¹ It is evident in the cross-examination of Ms. Watson that defense Counsel Sims had possession and used information from Applicant's 21 to question and impeach. However, the exhibit revealed that she had filed a police report on 11-13-99 with the Eighth District. Applicant's 21, p. 5 (11/19/97).

"material fact" - particularly when (1) the testimony was stated without exactness: e.g. "right after, probably October - -the first week of October" (R. 1280); "October 5th, maybe." R.1282. It is further evident that the record supports that Ms. Watson called FMC and reported the car was no longer in her possession, that she had not seen Mr. Aleksey for two weeks and that she wanted the car re-possessed, but they could not because payments were not in default. Also, the dealership stated that Ms. Watson had called "sometime later" after car purchase and reported it stolen. Applicant Exhibit 21, p. 5 (11/20/97 entry). Giglio - Napue requires a known discrepancy in a material fact. Ms. Watson's estimate when she reported it was inconsistent - when Mr. Aleksey had not made payments on the October dates. Contrary to the assertion, although possibly in factual error, there was no Giglio violation.

The Applicant also claims Giglio error in the penalty phase by the assertion that she lost \$24,000 from her relationship with Mr. Aleksey, including money from her husband's credit cards and her credit cards. R. 1965. He claims, through the presentation of evidence from the Western Union investigation, that Ms. Watson was a co-conspirator in Mr. Aleksey's actions involving the husband's credit cards therefore her claim that it "cost her" that money, particularly from her husband's credit card was knowingly false. In support of this "knowledge", the Applicant asserts that the SLED statement, Applicant's-20, declared "he got \$75,000 of my husband's and \$3,000 from another... the money he took was off my husband's credit cards for a total of 4,500..." Applicant's Exhibit 21 reveals on November 19, 1997, Ms. Watson had claimed a third party (Mr. Aleksey) had stolen approximately \$22,000 from credit cards [p. 5, 11/19/97], and said "Barclay stole she and her husband's credit cards, first charged \$11,000 and later \$12,000." Applicant Exhibit 21, p. 6 (11/13/97 10:52 entry).

The Western Union exhibits, Applicant's 13-16, revealed that Mr. Aleksey voice was identified with an October 1, 1997 fraudulent transaction involving the use of Andrew Watson's (Lisa Watson's husband) credit card and a wire transfer of \$7,500. It is clear that the information was that Lisa Watson was involved to the extent that she received and cashed the checks in Atlantic City on October 1, 1997.

Solicitor Bailey declared that he had an open file policy and would have provided the information that he had received to the defense. PCR R. 1347, 1353. He said he did not correct it because he accepted it and there was no reason to think she was not telling the truth. PCR R. 1348. Solicitor Bailey stated that Mr. Aleksey would go to the different businesses and do the paperwork in their name and that they would go in and sign the documents. PCR R. 1349.⁵² Solicitor Bailey did not dispute that Ms. Watson wrote or cashed the checks, but Solicitor Bailey stated "as far as the specific dollars and cents and exactly how they came out, it wasn't something I was particularly interested in." PCR R. 1352. Solicitor Bailey stated:

My attempt was to show in general terms the character of Mr. Aleksey in the penalty phase of the trial, that he had a pattern of conduct of coming in, taking up with different women who were at a low point in their lives...but generally had money or assets or ability to get money and that together they would go out and do things inappropriate, and people would get taken advantage of, including the women he was with...

PCR R. 1354. When asked to show how the Western Union transaction took advantage of her, Solicitor Bailey stated, "I didn't ask her that. My question was how much did it cost her. In response to that she said it included a loss to her husband's credit card which she attributed to

⁵² Throughout his brief and hearing he contends Applicant's 20 states \$7500 was lost from her husband's credit card. A review of the document reveals either 9500 or 4500.

some action on Mr. Aleksey's part." PCR R. 1354. Solicitor Bailey stated he did not know if the \$42,000 she said she was out included the Western Union \$7500. PCR R. 1355. He clarified that he did not audit her transactions, but denied that he knew who got the Western Union \$7500 and "I don't know what happened to the money...or whether he profited from it." PCR R. 1358-59. Solicitor Bailey re-asserted that he always intended to suggest that Ms. Watson was intimately involved in the actions and had received a benefit. PCR R. 1420. A review of the Solicitor's penalty phase closing argument is consistent with his understanding of the facts and his theory. R. 2109-2110 ("used them, abused them, took them for all he could...a parasite on women...lived off of women he has taken in...bled them dry...takes their money..."); see also R. 2112-13 ("Lisa Watson...conned into leasing this White Mustang for Mr. Aleksey...he scammed her..."), 2122:12-16 (that's his modus operandi...). The Applicant has failed to show knowing use of false testimony under Giglio. Relief on this ground is denied.

C. Brady Claims

The principles governing Brady claims are well-settled. "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Banks v. Dretke, 540 U.S. 668, 691, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) (quoting Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)). The Supreme Court has consistently held that the prosecution's duty to disclose evidence material to either guilt or punishment, i.e., the rule announced in Brady v. Maryland, applies even when there has been no request by the accused. Strickler v. Greene, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); United States v. Agurs, 427 U.S. 97, 107, 96 S.Ct. 2392, 49

L.Ed.2d 342 (1976). This duty also applies to impeachment evidence. United States v. Bagley, 473 U.S. 667, 676 & 685, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

Under clearly established Supreme Court precedent, there are three elements to a Brady claim: (1) the evidence must be favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must be "material," i.e., prejudice must have ensued from its non-disclosure. Banks v. Dretke, 540 U.S. at 691. Evidence is "material" under Brady where there exists a "reasonable probability" that had the evidence been disclosed the result at trial would have been different. Banks v. Dretke, 540 U.S. at 698.

The Applicant claims that Solicitor Bailey violated the mandates of Brady v. Maryland in failing to disclose evidence which revealed Lisa Watson involved in a fraud scam with Mr. Aleksey involving her husband's credit cards.

Solicitor Bailey consistently testified that he maintained an "open file" policy and made the file available to them. PCR R. 1702-03. Further, SLED Agent Darnell testified that Attachments 35 in the SLED Report (Applicant's Exhibit 83) included the FMC summary subpoena, letter from Solicitor Bailey dated January 7, 1998, including the six page summary from FMC which is the same as Applicant's Exhibit 21. PCR R. 1679-80. He stated that it would have been there on March 6, 1998.

SLED Agent Kenneth Mears indicated that they contacted Western Union about Mr. Aleksey and Lisa Watson's involvement in the Western Union scam involving her husband's credit card. PCR R. 1570-71. Agent Mears acknowledged that in her statement to them (Exhibit 21) she indicated she was a victim of the scam. PCR R. 1571-72.

Solicitor Bailey stated that his practice "because there were hundreds of documents in the file, some probative, some not, but rather than try to make a call, I've got an open file policy and transmitted everything I got to the defense and sent it off to the defense". PCR R. 1347. However, Agent Darnell was unsure if Solicitor Bailey was provided with the letter or the tape. PCR R. 1655-57.

The Applicant contends that both trial Counsel testified that they had not seen the materials included as Applicant's Exhibits 14-16⁵³. PCR R. 256, 1043.

At the hearing the Applicant indicated that Applicant's 15 was neither in the prosecution's file or the defense Counsel's file. PCR R. 254. However, he asserted that it was in the SLED file. *Id.*

Counsel Sims stated that he did not recall any fraud activity with Western Union by Lisa Watson. PCR R. 260, 272.

Mr. Sims stated that if he had this information about her increased involvement with Mr. Aleksey on the fraud, they could have shown, it would have made their cross-examination about her involvement with him stronger. PCR R. 277-78. He stated that when they spoke with Mr. Aleksey and asking him about information on these women, "we had no idea that these kind of things were going on because we weren't told." PCR R. 278. However, it was acknowledged that Ms. Watson's statement (Applicant's 20) was in trial Counsel's file. PCR R. 295.

Mr. Sims stated on cross-examination that it was not important to the defense to suggest that she made inconsistent statements about the amount of money she had lost at the hands of

⁵³ In his brief, he also identifies Applicant's Exhibit 13. However, Exhibit 13 was an October 22, 2002 affidavit obviously prepared prior to the PCR action. As to Applicant's 14, there is no evidence the state ever received the August 11, 1998 letter memorandum by Patten, only the Jan. 7, 1998 letter, Applicant's 15.

Mr. Aleksey. Mr. Sims stated the theory was to show that Ms. Watson was having a good time and involved and was now scorned. PCR R. 638. He said inconsistent statements were not the focus of the defense theory. PCR R. 639.

Similarly, Counsel Stone did not have memory of receiving the Western Union material or letter to Agent Mears. PCR R. 1041-43. He felt, though, that it was something that could have been used in cross-examination.

This Court finds, as Respondents conceded, that information concerning Lisa Watson's involvement with Mr. Aleksey in securing monies for Mr. Aleksey from the fraudulent use of her estranged husband's credit cards is the type of evidence required to be disclosed under Brady as potential impeachment material. See also U.S. v. Bagley, 473 U.S. 667, 676-77 (1985).

Assuming arguendo that Solicitor Bailey never received the Patten documents from SLED, this would not have relieved his responsibility from disclosure of the letter to Agent Mears from Patten. See Kyles v. Whitley, *supra*.

If the Patten letter was not expressly revealed to the defense, the Applicant must show, but for the non-disclosure, the result of the proceedings, either the guilt or penalty phase would have been different. Clearly, Lisa Watson procured the vehicle ultimately used in Sergeant Lingard's death for Mr. Aleksey. Any impact of impeachment of her in guilt would have had no impact on the guilty verdict. The same can be said about "her losses" or involvement with Mr. Aleksey in procuring the monies from the husband's credit card. First, Mr. Aleksey would have known about the shared involvement with Ms. Watson, since even under the defendant's theory they were together. Under the defense and state theory, these inconsistencies would not affect the ultimate verdict in the penalty phase where Ms. Watson was merely a part-victim, part-

participant in the state's theory as well. Importantly, Mr. Aleksey was a co-conspirator in these activities with Ms. Watson, and it was evidence from Ms. Watson's statements that she was asserting a loss to herself, including some matters from the husband's credit card. Further, what is equally implicit in the claimed loss from the use of the husband's credit card also is the same loss as the responsibility for the Mustang. In each, her involvement led to her financial obligation to repay the loss. Nevertheless, the alleged failure to disclose the matters, where evidence of her claimed actions in the husband's credit card had been revealed in her statement and the FMC documents, does not undermine confidence in the verdict under the Kyles test. The Applicant's claim on this ground is denied.

D. Ineffective Assistance of Counsel, re: Lisa Watson

Mr. Aleksey contends that Counsel was ineffective in the following particulars:

- A. Failed to impeach on inconsistent statements concerning the purchase of the Mustang.
- B. Failed to impeach as to statements when she reported car stolen.
- C. Failed to impeach about when she last saw Mustang.
- D. Failed to reveal that she had participated in use of husband's credit card.
- E. Failed to impeach on inconsistent statements about pointing the gun.

The Applicant has failed to prove a Sixth Amendment violation related to the investigation and cross-examination of Ms. Watson.

As stated previously, Mr. Aleksey asserts evidence existed that Ms. Watson had visited the dealership on more than one date to sign the documents, based upon the dates on the "Chris

Koch Ford" documents, Applicant's Exhibit 18. Defense Counsel had possession of these materials. PCR R. 292. Mr. Sims asserted that he did question Ms. Watson about whether she ever actually reported the car stolen. PCR R. 298. He stated he used the "Chris Koch Ford" and FMC documents to show that she had been calling in and that she claimed Mr. Aleksey was related to her. PCR R. 298, 300; see R. 1282-84. Mr. Sims stated that he used these documents to bring out that FMC had been making contact with her to try to find the car. PCR R. 300. Mr. Sims felt that he had developed that she had not told the truth to FMC about the whole ordeal. Mr. Sims stated that he chose to reveal Ms. Watson's complicity in the case in that manner. Mr. Sims stated that their whole theory was to show all the women had complicity with Mr. Aleksey and were buying things for him. PCR R. 301. Mr. Sims felt he tried the case appropriately, although he did not recall having the police report. Applicant's 17; PCR R. 302.⁵⁴

Clearly, this information would have questioned her statements on when she actually reported the vehicle stolen and her credibility. However, as noted above, there were indications that prior to November 13 she had made direct contact with FMC, to wit on October 15, 1997, and had earlier contact with Chris Koch Ford, and spoken with a detective from Paul's Township. These could have been available to the prosecutor to rehabilitate and were available within the information possessed by the defense in Applicant's Exhibit 21. Similarly, the inconsistency in the use of "lent" in the November 13 incident report and "stolen." during trial. Clearly, at the time of the December 31, 1997 incident, Mr. Aleksey remained in possession of the vehicle. It cannot be said, other than for simple impeachment of Ms. Watson that any value

⁵⁴ However, the defense did have the FMC Report, Applicant's 21, which revealed that Ms. Watson filed a police report on November 13, 1997 with the 8th District. Applicant's Exhibit 17, p. 5 [11/19/97 entry].

would develop from enhanced impeachment of Ms. Watson by this information. The jury understood her limited role and that she clearly was a pawn in Mr. Aleksey's varied schemes which resulted in his possession of the vehicle and monies from the Watsons.

Similarly, he contests the alleged failure to impeach her inconsistent statements on when she last saw the car of the date she let Mr. Aleksey borrow it, when she may have seen it in his possession afterwards while scheming with Mr. Aleksey on her husband's credit cards. As stated above, Mr. Sims' theory was to develop that she was involved with Mr. Aleksey, not to develop that she had claimed more or less loss from their brief relationship or the extent of the time period of their relationship. As Mr. Sims stated, the theory was to show the complicity of Ms. Watson with Mr. Aleksey. PCR R. 636-38.

Concerning the concept of putting the gun to her head, the Applicant contends this should have been impeached with her statement to SLED, Applicant's Exhibit 20, which mentioned the "gun to head" incident, but stated, unlike her testimony that he was crying (Applicant's 20), rather than laughing. R. 1962-63, 1966. Although inconsistent, Counsel developed that Mr. Aleksey was not serious with his comment on cross-examination. R. 1966. Clearly, this strategic decision could not be deemed ineffective.

The Applicant's attempt at retrospective hindsight does not reveal either deficient performance or prejudice. Counsel's actions were based not only on information they had received from the state, particularly the FMC reports, the SLED statement, and Chris Koch paperwork, but also Counsel's conversation with the client which revealed Mr. Aleksey as an active co-participant. Counsel's strategy was not deficient in failing to pursue each inconsistency in her testimony where it varied with their understanding. Counsel did reveal that

Ms. Watson was aware of the false information in the paperwork given to obtain the Mustang, although she claimed not to fill it out. See R. 1284-85. Her testimony was adequately questioned to the extent necessary for their strategy. The Applicant has failed in his burden of proof to show ineffective assistance of Counsel.

Similarly, as to the financial loss she allegedly had from her relationship with Mr. Aleksey, the variance between the statements to FMC, SLED, and her trial testimony reveals great disparity in her own perception of loss. The problem is that loss did occur, but with some involvement by Ms. Watson under all theories. The inquiry is, 'is it reasonably likely that the jury could have felt Ms. Watson was completely free of involvement in these matters?' The record as a whole would suggest they reasonably could not. However, even if they may not, Counsel's omissions do not, to a reasonable probability, show that the result of either guilt or sentence would be different. The Applicant has failed in his burden of proof.

SUMMARY AS TO WATSON CLAIMS

In Ground Q (4), the Applicant maintains that the State knowingly failed to provide to trial Counsel evidence of fraud involving the State's witness Lisa Watson. While the Court finds the Applicant has successfully shown that some of the evidence was not disclosed to trial Counsel and that the evidence is of the type that is required to be disclosed under Brady as potential impeachment material, this Court finds the Applicant has failed to show that, but for the non-disclosure, the result of the proceedings, either the guilt phase or the penalty phase, would have been different. Therefore, the Court denies the Applicant's request for relief with respect to this Ground.

The Applicant claims he was denied due process of law as a result of the prosecution's presentation of false testimony and their failure to correct the false impression created by that testimony. In order for the Applicant to succeed on under these grounds, the Applicant must show (1) the witness gave false testimony; (2) the falsity was material in that there is a reasonable likelihood that it affected the judgment of the jury; and (3) the prosecution used the testimony knowing it was false. Giglio v. US, 405 U.S. 150, 92 S.Ct. 763 (U.S. 1972). This Court finds that with regards to each of the Grounds listed in his Application for Post-Conviction Relief, the Applicant has failed to meet his burden with respect to Giglio, particularly that the jury's judgment was affected. Therefore, the Court denies the Applicant's request for relief with respect to Ground R.

The Applicant claims he was denied the right to effective assistance of Counsel during the guilt phase (Ground O) and the penalty phase (Ground P) of the trial, and again, the Applicant lists numerous instances of what he believes amounts to ineffective assistance of Counsel. This Court finds that each of the allegations presented to the Court by the Applicant rest entirely on tactical decisions made by trial Counsel. This Court finds that trial Counsel's strategic decisions were not deficient under Strickland, and therefore, the Applicants application for PCR is denied with regards to each of these issues. Further, even if the Applicant successfully established his ground for deficient performance with regards to any of these allegations, the Court alternately finds that the Applicant has failed to establish prejudice which he suffered as a result of the alleged violations.

JAMIE FERRELL CLAIMS**GROUND P (2) Ineffective Assistance of Counsel at Sentencing**

Trial Counsel failed to properly cross examine and impeach state's witness Jaime Farrell by attacking her testimony with specific instances of prior dishonest conduct and by challenging her false testimony

GROUND P (5) Ineffective Assistance of Counsel at Sentencing

Trial Counsel failed to investigate backgrounds of state's witnesses and their allegations. Such an investigation would have provided a substantial amount of impeachment material.

GROUND R (2) Prosecution Presentation of False Testimony

The prosecutor knowingly presented false testimony when state's witness Jaime Farrell testified that she did not deposit money into a New Jersey bank.

GROUND R (3) Prosecution Presentation of False Testimony

The prosecutor knowingly presented false testimony when state's witness Jaime Farrell testified that she did not withdraw money from a New Jersey bank.

In these allegations, Mr. Aleksey asserts that the State allowed Ms. Farrell to testify falsely and failed to correct the false testimony. Applicant's Memo. p. 47-49. Conversely, he contends that his trial Counsel was ineffective in failing to adequately investigate Ms. Farrell and impeach her with the false testimony. This Court concludes that he has failed in their burden of proof concerning these matters.

A. Jamie Ferrell Testimony at the Sentencing Proceeding

Jamie Ferrell testified in 1996, she developed an intimate relationship with Mr. Aleksey, who she knew as Michael Angelo. R. 1895-96. She stated that she went with Mr. Aleksey to Atlantic City, New Jersey, because he wanted to go away. R. 1896.

Ms. Farrell stated that while there, they opened a bank account at the Commerce Bank. R. 1896. She stated that she put \$20.00 into an account. She stated that it was Mr. Aleksey's idea to open the account because he said he had declared bankruptcy and could not open a bank account. R. 1897. She said she had met him in February 1996 and went to New Jersey in April with Mr. Aleksey.

Although she did not know Theresa McCann, she also claimed that she did not know two checks totaling almost \$10,000 had been deposited in her account. R. 1898. She denied being with him on May 10, 1996, when the checks were deposited. R. 1898:15-16. However, she admitted discussions with him about having money come into the account. Farrell said that Mr. Aleksey told her that he was getting a wire transfer for \$10,000 and that she had the routing number for the bank account that had \$20 in it. R. 1899. Farrell claimed that Mr. Aleksey then withdrew about \$10,000 that she thought was his money. R. 1900. She said "I never spent any of that money. R. 1899.

Ms. Farrell said she "got arrested by the State of New Jersey." R. 1900. She said she had to pay \$10,000 and was still paying on it. R. 1902. Ms. Farrell also said that Mr. Aleksey sold her mother's 1985-86 Camaro that was worth \$5,000 and he kept the money, denying it was sold. R. 1901.

Ms. Farrell stated that they were together for four months and then for two months said he would come back to New York and pick her up (but never did). R. 1901.

She also said that Mr. Aleksey cost her \$2,000 when he offered to pay for the transmission on her car that blew up while he was driving. R. 1902. However, he never paid for it. R. 1902.

On cross-examination, Counsel Sims developed evidence that she left her job (as a manager of a convenience store) shortly after she met Mr. Aleksey. She said Mr. Aleksey, known as Michael Angelo, was going to take care of Ms. Farrell and her daughter. R. 1903.

1. The alleged false evidence assertions

Mr. Aleksey now bases his false evidence assertion on two documents: (1) The affidavit from Vincent Caruso, an investigator with Commerce Bank (Applicant's Exhibit 46) and (2) the SLED statement given by Ms. Ferrell (Applicant's Exhibit 50). In Caruso's affidavit, the critical factors were set out as follows:

- 1) May 5, 1996, Ms. Ferrell opened a bank checking account.
- 2) "On May 10th Ms. Ferrell deposited a check, number 1826 dated May 10, 1996 in the amount of \$4,892 into her account." PCR R. 535. This check was made out to Ms. Ferrell and drawn on Theresa McCann's account.
- 3) "On May 11th, Ms. Ferrell withdrew \$4800 from her account..." Id.
- 4) "On May 13th check number 1846 dated May 10th, 1996 in the amount of \$5,000 payable to Ms. Ferrell and drawn on Ms. McCann's account was deposited in Ms. Ferrell's account." PCR R. 535.
- 5) "On May 14th Ms. Ferrell withdrew \$5,050 from the account. Id.

- 6) "Ms. Ferrell was charged, arrested, prosecuted and convicted of crimes relating to the above transactions." PCR R. 536.

In further support, the Caruso affidavit had attached to it another letter on Commerce Bank letter head dated May 31, 1996. PCR R. 536-37.⁵⁵

The Applicant further relied upon photographs acquired (Applicant's Exhibit 48). [Counsel Sims and Solicitor Bailey all identified Mr. Aleksey being in the photographs when the May 11, 1996 photographs were made with an unidentified female in the car with him on the date when the \$4,800 withdrawal made. See PCR R. 555-57, 1394, 1401, 1706-07.

In Applicant's Exhibit 50, Ms. Farrell's SLED statement, p. 2, it states: "He told me he got a wire transfer so, therefore, I withdrew the money..." PCR R. 564-565.

2. Solicitor Bailey's Response

During the PCR hearing, Solicitor Bailey sought to address the alleged variance between Caruso's affidavit which suggested Ms. Ferrell deposited and withdrew the funds with Ms. Ferrell's trial testimony that she was not with Mr. Aleksey when the checks were deposited. Solicitor Bailey stated that he never tried to present the women as anything other than participants in the scams. PCR R. 1397. He stated that she did get arrested for the scam. Solicitor Bailey states "I had no reason to correct something that I felt was correct at the time. That was Ms. Ferrell's testimony, and I think that was an accurate summary of what she testified to. I believed her testimony at that time. I had nothing to my knowledge at that time to indicate that was not a correct statement of the facts." PCR R. 1397-1398.

⁵⁵ Applicant's Exhibit 47, the criminal record "rap sheet" of Ms. Ferrell was run on June 11, 1998 and provided to defense Counsel. It included the Commerce Bank matters. PCR R. 547-548.

Solicitor Bailey acknowledged that some of the information, particularly her thoughts about the wire transfer into the account contrasts with the affidavit that Ms. Farrell deposited check number 1826 into her account. PCR R. 1398-1399. Solicitor Bailey stated the 1996 letter attached to Caruso's affidavit was "his interpretation of what occurred and that may or may not be correct..." PCR R. 1401. Solicitor Bailey further stated at the time she testified, her testimony "was consistent with Theresa McCann's testimony that her checks were taken from her [by Mr. Aleksey]. I had no reason to doubt what had occurred." PCR R. 1411. Concerning the difference as to who made the withdrawals and who did the deposit on May 10, Solicitor Bailey said he "didn't know that there was anything to correct." PCR R. 1413.

B. Giglio - Napue Claim

As set out above, a state denies a criminal defendant due process when it knowingly uses perjured testimony or allows untrue testimony to go uncorrected. Giglio, supra. To succeed, the defendant must show (1) the witness actually gave false testimony; (2) the falsity was material in that there is a reasonable likelihood that it affected the judgment of the jury; and (3) the prosecution used the testimony knowing it was false. Giglio, supra. The Court concludes that the Applicant has failed in his burden of proof.

This Court finds that the prosecution did not know Ms. Farrell's testimony was "false" in the manner presented. Under the state's theory, Ms. Farrell was a willing participant in Mr. Aleksey's scams of fraud. The state brought out that Ms. Farrell was arrested for and responsible for the \$10,000 loss and was aware that the withdrawals to her account were made. PCR R. 1397, 1412-1413; R. 1900-1902.

The first variance from the testimony to the Caruso affidavit was whether Ms. Farrell knew and participated in the actual deposit of the forged McCann checks into her account or did she believe that the monies got into the account by a wire transfer. Compare, R. 1899; PCR R. 564-565 (SLED Report, p. 2 [Exhibit 50]); with Caruso affidavit; PCR R. 535-536. Further, Solicitor Bailey, consistent with Ms. Farrell's testimony, stated that "Mr. Aleksey deposits ... he pulls the \$10,000 out. He's gone and who gets arrested? Jamie Ferrell." R. 2122.

Upon review of the copies of the forged checks, Solicitor Bailey noted that there was no indication who has signed for deposit of check #1847 made on May 10, 1996, and on check number 1826 for \$4,892 it indicated "for deposit only." PCR R. 1428. Specifically, it did not include Jamie Ferrell's signature. PCR R. 1428; see Respondent (State) Exhibit 3; see also Trial Exhibits 84 and 85. Further, at trial, Theresa McCann identified the writing on each of the forged checks as Bayan Aleksey's handwriting. See R. 1870-1871.

Contrary to the claims of the Applicant, he failed to show that the testimony of Ms. Farrell was knowingly false. There has been no showing that Ms. Farrell actually or physically deposited either of the forged checks, particularly when at least one revealed "for deposit only." Second, there is no showing, other than the fact of the arrest for the fraud, that Ms. Farrell's role was different than asserted and was known as such by Solicitor Bailey. The critical issue here is the "knowing use of perjured testimony." As to the "deposit" issue, this has not been proven.

As to the withdrawal issue, Ms. Farrell asserted Mr. Aleksey withdrew the funds, but admitted she knew he was withdrawing it. R. 1900. The gist of her testimony was that her bank account was being used for his funds, since he could not possess an account. With that background to her testimony, and common sense, her participation from her account would be

necessary for him to withdraw the funds. The evidence, in the light most favorable to Mr. Aleksey, was that he was present when the female withdrew the monies. Although she stated to SLED that "I withdrew the money" and that she gave it to him, her testimony was inaccurate, but not materially false, if done at his direction. See PCR R. 1706-1707.

The Applicant further failed to show the discrepancy was material in such a manner that there was a reasonable likelihood that it affected the judgment of the jury in the sentencing proceeding. Mr. Aleksey stole the checks, his handwriting forged the checks, and he personally acquired the proceeds from the forged documents, it is difficult to see how any effect occurred by the mere fact of the Farrell's knowledge in the matter. Mr. Aleksey now claims that he victimized Ms. Farrell and ignored that she was involved in the fraud scam. The problem is that her participation in the fraud scheme was recognized by the jury to be inconsistent since it resulted in her arrest and responsibility for the proceeds. Assuming the witness's "false testimony" was correct, there is no reasonable likelihood it affected the judgment of the jury.

In conclusion, the Applicant claims he was denied due process of law as a result of the prosecution's presentation of false testimony and their failure to correct the false impression created by that testimony. In order for the Applicant to succeed on under these grounds, the Applicant must show (1) the witness gave false testimony, (2) the falsity was material in that there is a reasonable likelihood that it affected the judgment of the jury, and (3) the prosecution used the testimony knowing it was false. Giglio v. US, 405 U.S. 150, 92 S.Ct. 763. This Court finds with regards to each of the Grounds listed in his Application for Post-Conviction Relief, the Applicant has failed to meet his burden with respect to Giglio, particularly that the jury's

judgment was affected. Therefore, the Court denies the Applicant's request for relief with respect to Ground R.

C. Ineffective Assistance of Counsel Claim Concerning the Failure to Investigate or Impeach Ms. Ferrell

The Applicant contends Counsel should have sought to impeach Ms. Farrell on her inconsistent statement with SLED about who withdrew the funds from the bank account. See Applicant's Exhibits 50, 83. He alleges Counsel should have investigated the Commerce Bank matter to learn that Ms. Farrell was most probably the author of the starter checks used to withdraw the funds (for Mr. Aleksey). He claims that this revealed that she was a co-conspirator with Mr. Aleksey, not a mere victim.

Counsel Sims testified that the strategy was to develop Mr. Aleksey's role as a non-violent con-man, who used women as willing participants or conduits for his financial gains. Mr. Sims testimony concerning Jamie Ferrell revealed his approach was consistent with her. PCR R. 530-70. Mr. Sims stated that he had been provided with a copy of Ms. Farrell's criminal record and was in trial Counsel's files. PCR R. 546-47. Mr. Sims identified Mr. Aleksey being present in the photographs at the teller when a withdrawal was being made with a female. PCR R. 555-60. It was presented to Mr. Sims that the checks used for the withdrawals were "most probably" Jamie Ferrell's. PCR R. 560-64. Mr. Sims acknowledged that this information could have been used at trial as well as her SLED statement. PCR R. 566. Mr. Sims acknowledged that they had been using bad acts in the trial. However, Mr. Sims stated that he felt there was information in her SLED statement that would hurt them. He also acknowledged that he could have impeached Ms. Farrell on the "withdrawal" matter.

Mr. Sims acknowledged that he discussed with Mr. Aleksey about the involvement of Ms. Farrell in the scheme. Mr. Aleksey told him that she wanted to do it and wanted to go and that they were going to gamble and have a good time. PCR R. 652.

Counsel Stone stated that he is not sure, in hindsight, how relevant these inquiries would have been. He thought it would have been important to know about the conviction. PCR R. 1088. Mr. Stone admitted that at the withdrawal, there were two people in the cars, one being Mr. Aleksey. PCR R. 1205. He stated this clearly shows that Mr. Aleksey is there with the person at the bank. PCR R. 1205-06.

This Court finds that even if Counsel was deficient in failing to point out these inconsistencies in impeachment, clearly there is no reasonable probability the result of the proceeding would have been different. Mr. Aleksey was involved in the fraudulent activity. Counsel Sims, on cross-examination, noted the naiveté of Ms. Ferrell or her desire that Mr. Aleksey provide for her. Further, the fact of the arrest had been presented. Under Strickland no Sixth Amendment prejudice was shown. Relief on this ground is denied.

SUMMARY AS TO FERRELL CLAIMS

In summary, the Applicant claims he was denied the right to effective assistance of Counsel during the sentencing phase of trial and lists numerous instances of what he believes amounts to ineffective assistance of Counsel. This Court finds that each of the allegations presented to the Court by the Applicant rest entirely on tactical decisions made by trial Counsel. This Court finds that trial Counsel's strategic decisions were not deficient under Strickland, and therefore, the Applicant's application for PCR would be denied with regards to each of these issues. Further, even if the Applicant successfully established his ground for deficient

performance with regards to any of these allegations, the Court alternately finds that the Applicant has failed to establish prejudice to which he suffered as a result of the alleged violations.

The Applicant also claims he was denied due process of law as a result of the prosecution's presentation of false testimony and their failure to correct the false impression created by that testimony. In order for the Applicant to succeed on under these grounds, the Applicant must show (1) the witness gave false testimony; (2) the falsity was material in that there is a reasonable likelihood that it affected the judgment of the jury; and (3) the prosecution used the testimony knowing it was false. Giglio v. US, supra. This Court finds that with regards to each of the Grounds listed in his Application for Post-Conviction Relief, the Applicant has failed to meet his burden with respect to Giglio, particularly that the jury's judgment was affected. Therefore, the Court denies the Applicant's request for relief with respect to Ground R.

CONCLUSION

Based on the foregoing, the application for post-conviction relief is denied in its entirety. Applicant has failed to show error, or if he established error, he failed to show prejudice such as would support the granting of either a new guilt proceeding, or a new sentencing proceeding.

This Court advises Applicant that if he chooses to appeal, he must serve a notice of intent to appeal within thirty (30) days from the receipt of written notice of the entry of judgment, and file same. His attention is directed to Rules 203 and 227 of the South Carolina Appellate Court Rules for the appropriate procedures.

AND IT IS SO ORDERED THIS 4 day of February 2010

 South Carolina


Diane S. Goodstein, Circuit Court Judge
First Judicial Circuit

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2014

No. 14A-278

BAYAN ALEKSEY,

Petitioner,

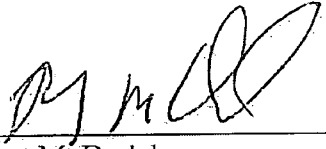
v.

STATE OF SOUTH CAROLINA,

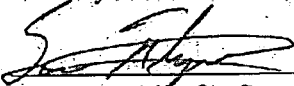
Respondent.

CERTIFICATE OF SERVICE

I certify that copies of the petition for writ of certiorari and appendix in this case have been served upon opposing counsel, Donald J. Zelenka, by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 on this 24th day of November, 2014. Counsel is also today, November 24, 2014 sending a copy of the petition for writ of certiorari and appendix to opposing counsel by electronic delivery to dzelenka@scag.gov.


Robert M. Dudek
Counsel of Record

SWORN TO BEFORE me this
24th day of November, 2014.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022

