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S.C. Supreme Court

ALAN WILSON
ATTORNEY GENERAL

December 31, 2014

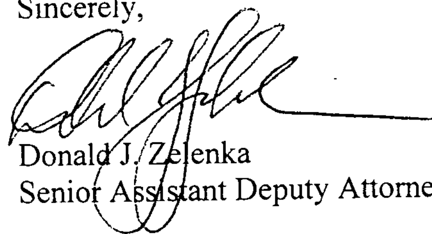
The Honorable Scott S. Harris
Clerk, United States Supreme Court
1 First Street, N.E.
Washington, DC 20543

Re: Bayan Aleksey, Petitioner vs. South Carolina, Respondent
No. 14-7320

Dear Mr. Harris:

Enclosed please find the original and ten (10) copies of the Brief in Opposition to the Petition for Writ of Certiorari dated December 31, 2014. By copy of this letter, opposing counsel is served with same.

Sincerely,



Donald J. Zelenka
Senior Assistant Deputy Attorney General

DJZ/mv
Enclosures

cc: Robert M. Dudek, Esquire, Chief Appellate Defender
The Honorable Daniel E. Shearouse, Clerk of South Carolina Supreme Court

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 2014
14-7320

BAYAN ALEKSEY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

PETITIONER'S QUESTIONS PRESENTED ON CERTIORARI
Capital Case

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

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

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

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II. Certiorari is not warranted where counsel made a decision after a reasonable investigation to neither retain a prison expert nor present questionable evidence of Petitioner's prison adaptability where the Petitioner's prison record had an escape charge, malicious injury to jail property in destroying a jail stool and breaking a window which led to his removal from the jail.

Further, 6th Amendment prejudice was not shown where in light of Aleksey's jail destruction evidence, the potential expert testimony that Aleksey would be going into a prison system that had the general ability to house and secure any inmate, including Aleksey, without undue risk of harm to staff, other inmates or the community because lethal force could be used against inmates does not undermine confidence in the verdict 16

III. Certiorari is not warranted where the PCR Court found that counsel was not ineffective in failing to pursue as a basis for suppression of the Petitioner's statement that his confession was the product of a physical beating by law enforcement where the PCR Court found that there was no evidence of physical force or threats, that counsel had received various and inconsistent versions about Aleksey's reason for giving the statement from Aleksey including his belated assertion of a beating, that there was no physical evidence to support the claim and his investigation and that counsel pursued a reasonable strategy to attempt to suppress the statements 28

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ARGUMENT WHY CERTIORARI SHOULD BE DENIED

I. The appointment of Duffie Stone as counsel for Bayan Aleksey was not a conflict of interest under South Carolina law. The PCR Court's conclusion that the fact that Stone was a part-time prosecutor in another judicial circuit and maintained a private practice including the assignment of civil cases from the South Carolina Insurance Reserve Fund representing public employees and agencies did not establish an actual conflict of interest which adversely affected his representation of Bayan Aleksey. In addition, the Petitioner waived any potential conflict of interest. The PCR Court's conclusions are a reasonable application of the Sixth Amendment and supported by probative evidence. [Order, App.p. 4990-5032].

In his first argument, Aleksey complains that the appointment of Duffie Stone as his defense counsel was an actual conflict of interest. First, he contends that it was error that requires a new trial because he was a part-time prosecutor with the Fourteenth Circuit Solicitor's Office which created a conflict of interest which should require a new trial. The PCR Court denied relief on this assertion. App.p. 4990-5027. Next, he contends that he had a conflict of interest in his private practice because of assignment of cases to him from the state Insurance Reserve Fund. The PCR Court denied relief on that issue. App.p. 5027-5028. Further, Aleksey contends that the conflict was unwaivable, or if waived, could not be intelligently waived. The PCR Court rejected this assertion. App.p. 5029-5032. Respondent submits that certiorari is not warranted.

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 v. Sullivan, supra, at p. 348, 100 S.Ct. 1708.) An actual conflict of interest means 'a conflict that affected counsel's performance--as opposed to a mere theoretical division of loyalties.' Mickens v. Taylor 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*). 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." Id. at 1245-46. The Mickens Court further noted that "[B]reach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel." Id.

1. How the issue was presented at trial.

According to the records of the Clerk of Court for Orangeburg County, an Order of Appointment for Michael Deangelo (aka Bayan Aleksey) was entered on January 6, 1998 for Thomas Sims and Duffie Stone by Judge Thomas L. Hughston.[Note Judge Hughston - not Judge Brown - appointed Duffie Stone as Aleksey's counsel. Counsel Stone and Sims initially appeared before Judge Hughston at a bond hearing on January 8, 1998. App.p. 5917-5924. [Stone was misidentified in the record as Mr. Duffie].

Subsequently, on February 2, 1998, before Judge Luke Brown, during an arraignment, information was presented to the circuit court concerning Stone's potential conflict of interest. Particularly, Solicitor Bailey advised Judge Brown that there may be a conflict based upon Stone's part-time Solicitor position in the Fourteenth Circuit and asked Judge Brown to make inquiry. Counsel Stone advised the Court:

...I explained to him [Aleksey] 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 [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. [Aleksey] Yes.

App.p. 5910-5912, Feb. 2, 1998 Tr. p. 5-7. App. Ex. 70. App.p. 3152-3154, PCR Tr. 737-39.

Subsequently on May 20, 1998, [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 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.

App.p. 2099-2100, ROA p. 2192-93. See also App.p. 3155-3159, PCR 740-43.

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

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.

App.p. 181-82, ROA 181-82.

ANALYSIS

The PCR Court properly found that the 6th Amendment and the precedent in Mickens does not require relief in this matter because Aleksey has failed to satisfy his burden of proof in showing that Aleksey suffered under an actual conflict of interest due to his employment as a part-time prosecutor in another circuit. App.p. 5006-5027.

Part-Time Prosecutor.

First, the PCR court correctly concluded that mere fact that Stone was a part-time prosecutor in Beaufort in the Fourteenth Circuit is not an actual conflict of interest concerning representation of Aleksey or any other defendant outside of the 14th Circuit. App.p. 5006-07. The PCR Court's reliance on Beaver v. Thompson, 93 F.3d 1186 (4th Cir. 1996) was well founded. The Fourth Circuit held that there was no conflict of interest in defense counsel's representation of a capital defendant even though counsel was a part-time assistant prosecutor in a neighboring county. Like counsel Stone, the defense lawyer in Beaver had limited duties and had no working relationship with any of the particular witnesses at trial. Similar holdings have been made by various state courts. Hendricks v. State, 331 Mont. 47, 57, 128 P.3d 1017, 1025 (2006) (*per se* ineffective assistance on basis of alleged conflict of interest did not result from counsel's simultaneous service as appointed defense counsel and as city attorney in overlapping jurisdiction); 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 o 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; State v. White, 114 S.W.3d 469 (Tenn.2003) (holding that counsel's dual roles as prosecutor and defense counsel in the same county were inherently antagonistic and, thus, created an actual conflict of interest that required disqualification); People v. Washington, 461 N.E.2d 393 (Ill. 1984)(conflict where some of city police officers involved in arrest); State v. Clark, 735 A.2d 1 (N.J. Sup. App. 1999)(conflict for part-time municipal prosecutor to defend in same county since it created an appearance of impropriety).[1] See also, See Ohio Sup.Ct. Bd. of Commrs. on Grievances and Discipline Op. No.2008-6 (recognizing that municipal attorneys who prosecute violations of municipal ordinances may represent criminal defendants when no municipal police officers from the municipality are involved, the criminal charges are based on alleged violations of state law, and the municipality is not directly or indirectly involved or affected). See also Greg Sarno, Annotation, *Circumstances giving rise to prejudicial conflict of interests between criminal defendant and defense counsel-state cases,* 18 ALR4th 360 (1982), §18(a), 18(b), 19(a), 19(b).

As the PCR Court found, Stone was appointed in compliance with S.C. Code Ann. Section 16-3-26. Stone had previously been appointed in another capital case in Lexington County. "This statute provides the exclusive procedure for appointment of counsel for indigent defendants charged with capital murder." Subsequent to Stone's appointment in July 2000, SCACR Rule 608 was implemented to regulate the appointment of attorneys for indigent defendants. 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 would not be exempt from appointment, as a matter of

[1] See 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."

statutory law, based upon his assignment as a part-time prosecutor due to his then active civil private practice. [2]

Critical is the starting point of Stone's analysis pursuant to Rule 407, SCACR, Rule 1.7 (conflicts of interest) is whether Stone reasonably believed 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. Stone was unequivocal - he felt then and now - that his representation of Aleksey would not be adversely affected. App.p. 3543-44, PCR 1131-32.

The question then shifts to whether that belief was reasonable. The PCR Court found that Stone's assessment was reasonable. Initially, from Stone's perspective at the time [and since] it was reasonable. App.p. 5009. 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). App.p. 3543-44, PCR 1130-31. Similarly, he was not aware of any prohibition that part-time prosecutors could not represent criminal defendants outside their employed circuit. App.p. 3398, PCR 984. Importantly, because of his part-time prosecutor status, Stone was of the opinion that he was not exempt from court appointments (and had been appointed in prior occasions including a Lexington death penalty case and subsequently in Orangeburg in the Patti Syphrette case). App.p. 3397, 3543-44, PCR 985, 1131-32.

The PCR court concluded that the chronology of the various South Carolina Ethics Advisory Opinions supported Stone's actions based upon what a reasonable lawyer would have found. App.p. 5010. Assuming arguendo, a reasonable lawyer would have searched those opinions, it is uncontradicted that the most recent ethics advisory opinion Stone would have found in 1997-98 addressing, in any manner, his employment issue is S.C. Bar Ethics Advisory Opinion 94-31 from

[2]It was developed that Stone had made in Insurance Reserve Fund assignments $67,000 in 1998, $93,000 in 1999 and $133,000 in 2000. PCR 753-754.

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, the state PCR Court concluded that 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 layer 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 Petitioner discounts this 1991 advisory opinion in his Petition, instead relying upon earlier advisory opinions .See Petition, p. 10-12. However, the state PCR court found that it cannot be seriously questioned, however that a reasonable reading of the 1991 advisory opinion revealed:

- S.C. Bar Advisory Op. 82-26 had concluded an assistant solicitor in one county could not represent criminal defendants in another county [of the circuit].
- The 1991 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."
- 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 Petitioner, relying upon Prof. Freeman's comments, suggests this was dicta in the 1991 opinion and should have been ignored in favor of the 1982 opinion. Respondents respectfully submit 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 advice was correct that the 1990 Rule change removed any *per se* prohibition to representation of criminal defendants. The PCR Court concurred in Respondents assessment. App.p. 5011. Further, current Rule 608 supports that assessment where it only restrict those prosecutors not engaged a private practice. 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, the PCR Court found that he would have found the decision in Beaver v. Thompson, 93 F.3d 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, the PCR Court found that counsel Stone's belief that he was not disqualified from his appointment was reasonable and that a reasonable lawyer in 1997 would have shared the same opinion. Assuming that Stone was reasonable in his belief that there was no *per se* conflict, he was reasonable in his belief that his representation of Aleksey would not be adversely affected by his representation as an assistant solicitor. Again, the credible testimony of Stone suggests he revealed undivided loyalty to Aleksey. There has been no showing that the loyalty to Aleksey was impaired when Stone could not consider, recommend or carry out any appropriate course of action on behalf of Aleksey based upon Stone's other duties. Simply put, Aleksey has failed to show in any manner that 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 Aleksey.

Counsel Stone declared that nothing occurred during the Aleksey representation that caused him to hold back either on cross-examination or the development of evidence due to his other practice. App.p. 3535, PCR 1132. (See summary of Stone Testimony Order of Dismissal. App.p. 4996-5002; Thomas Sims summary. App.p. 5002-03). He felt throughout that his work in the Solicitor's Office and I.R.F. work did not impact his ability to defend Aleksey. App.p. 3547, PCR 1134. In fact, Stone thought that his prior work as a prosecutor had given him a knowledge of police procedures that was useful in their defense. App.p. 3547, PCR 1134.

Importantly, his co-counsel Thomas Sims, corroborated Stone's undivided loyalty to Aleksey. He stated that they had discussions about it and Sims was never of the opinion that Stone would not do what was required, never found that he failed to take any act based upon something that could impact other clients. App.p. 3026-3027, PCR 611.

Insurance Reserve Fund Representation.

Petitioner also contends that Stone's representation of civil clients pursuant to assignment from the South Carolina Insurance Reserve Fund created an actual conflict of interest. Particularly, he asserted that prior assignments involving the South Carolina Highway Patrol and Orangeburg County, where the victim was a highway trooper and the matter was investigated by Orangeburg authorities created an actual conflict of interest. The PCR Court rejected the conclusion. App.p. 5012, 5026-5028. There is probative evidence to support the state court denial and conclusion of no actual conflict of interest.[3]

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[3] Duffie Stone declared that a large bulk of his private practice had been civil litigation assigned from the Insurance Reserve Fund. App.p. 3140-3144, PCR 725-27. He stated that he had represented state employees, including the Department of Corrections and highway patrolmen. App.p. 3144, PCR 729. Stone recalled speaking with Aleksey concerning his other employment on February 2, 1998. App.p. 3144-45. He recalled telling 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. App.p. 3144-45, PCR 729 -31. Stone explained to him he had never represented Trooper Lingard and never met him, to his knowledge. App.p. 3146, PCR 731.

Stone noted at a later time, Aleksey attempted to file some lawsuits (against SCDC) and Stone advised him he could not help him on those because he worked with the I.R.F. App.p. 3147-52, PCR 732, 734-35.

In his petition, Aleksey asserted that Stone suffered under a conflict because he had represented the Orangeburg County Sheriff, Willie Bamberg, the Director of the Detention Center and had dealings with Trooper Lynn Stack. It must be noted that none of the I.R.F. assigned cases handled by counsel Stone involved any incident or action by Bayan Aleksey. Instead, he claims the general interests of the State of South Carolina - of which the Insurance Reserve Fund is a part of - is adverse to Aleksey - and since Stone received a substantial part of his business and compensation from the IRF, his interests would be adverse. He suggests that the effect of that adverse interests is shown by Stone's refusal to assist Aleksey in *pro se* civil suit against the Department of Corrections. Petition , p. 24, citing App.p. 3185, l. 11-20. He claims this runs counter to the A.B.A. Guidelines for the

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It was developed that Stone had made $67,000 in 1998, $93,000 in 1999 and $133,000 in 2000 from his work with the I.R.F. App.p. 3168, PCR 753-54.

On cross-examination, Stone stated that he had specific communication with Aleksey about explaining to him what his role as a solicitor was as well as explaining the Insurance Reserve Fund. App.p. 3541-42, PCR 1128-29.

Considering SCACR Rule 407, 1.7(b)(1) on whether he believed that the representation would be adversely affected, Stone stated , in hindsight, that his assessment of his 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. App.p. 3546-47, PCR 1133.

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. App.p. 3545-46, PCR 1132-34. **He declared that the ongoing representation did not impact his ability to defend Aleksey. App.p. 3546-47, 3549, PCR 1133-34**, 1136, To the contrary. Stone suggested that he had developed a knowledge of police procedures which probably would have worked to Aleksey's advantage. App.p. 3546, PCR 1133. Stone reiterated that he had discussed with Aleksey the fact of his representation of the state and county entities at the time of the trial. App.p. 3546-48, PCR 1134-35.

Stone stated that Aleksey never sought, after the initial consultation, to have him removed and consistently consented to the representation. App.p. 3547, PCR 1134-35.

Stone stated his work with Orangeburg County did not impact his representation of Aleksey concerning the escape charge against his client. App.p. 3548, PCR 1135. 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." App.p. 3548, PCR 1135. He said he or Sims went to Willie Bamberg, the Director of the Detention Center to find out why Aleksey was charge with escape after looking at the window and determine that either he could not have gotten through the window, or if so the fences. App.p. 3548-49, PCR 1135-37. 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. App.p. 3552, PCR 1139-40.

Stone stated that his role as a 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. App.p. 3562, PCR 1149.

When Aleksey filed the series of *pro se* lawsuits, 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. App.p. 3636-38, PCR 1224-26.

Stone, however, re-affirmed that the letter and lawsuits did not affect the manner he personally handled the defense. App.p. 3637, PCR 1225.

On re-direct 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 Aleksey. App.p. 3641, PCR 1229.

Appointment and Performance of Defense Counsel in Death Penalty Cases, p.3, 31 Hofstra L. Rev. 913 (2003)" "to pursue related litigation on the client's behalf outside of the confines of the criminal prosecution itself."

When Aleksey attempted to file some lawsuits as set out in Petition, p. 14-15, Stone advised him he could not help him on those because he worked with the I.R.F. App.p. 3146-52, PCR 732, 734-35. When Aleksey filed the series of *pro se* lawsuits, Stone stated he sent him a letter during the representation 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. App.p. 3185, 3636-37, App.p. 5838 (letter). Stone, however, re-affirmed that the letter and lawsuits against S.C.D.C. did not affect the manner he personally handled the defense. App.p. 3637, PCR 1225. The Petitioner contends counsel advise that he could not assist him in a civil action against the Department of Corrections which was unrelated to the defense of Aleksey in the killing of Trooper Lingard showed the existence of an actual conflict of interest that adversely affected his representation. However, those lawsuits were not shown to have anything to do with Aleksey's defense, only that Aleksey was advising Stone that he had filed the lawsuits. An actual conflict of interest means 'a conflict that affected counsel's performance - as opposed to a mere theoretical division of loyalties.' Mickens v. Taylor . 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*). The Petitioner had failed to show that Stone decision not to inject himself in Aleksey unrelated private litigation with S.C.D.C. (where Stone was not representing S.C.D.C in opposition to his suits) would have adversely affected counsel's performance in Aleksey defense to the killing of Trooper Lingard.

In the state lower court, Petitioner asserted different evidentiary reasons why there was a conflict. Each of the specifications and speculations presented in briefing before the lower court were

rejected because there was a sound strategic decision made by counsel. App.p. 5014-5027. He suggested that Stone's knowledge of "law enforcement methods" and his involvement with law enforcement in the other circuit would impair him from generally attacking the methods, yet Stone saw this knowledge as an advantage in his defense of Aleksey. App.p. 3546, PCR 1133. Further, the decision to not seek to change venue from Orangeburg County was based on counsel Stone and counsel Sims beliefs that Orangeburg was the most favorable venue for the case for Bayan Aleksey since the demographics traditionally questioned law enforcement and Sims had a strong knowledge of the county. App. p. 3034-3036, 3248-3252, 3254, 3564, PCR 618-620, 833-37, 839, 1151.

Aleksey had claimed that his assignments from I.R.F. and of Willie Bamberg of the Detention Center on independent law suits may have affected his ability to raise issues concerning adaptability to prison and issues related to the jail incident. Respondent incorporates by reference Issue 2 herein concerning adaptability to prison. The PCR Court properly concluded that Petitioner had failed to show an actual conflict of interest that adversely affected Aleksey's defense as it related to Stone's prior representation of the Director of the Detention Center. App.p. 5022-5026. Contrary to the claim of Petitioner, the decisions concerning adaptability evidence were unrelated to his I.R.F. representation of Willie Bamberg. In fact, Stone did not think or recall whether he was representing Bamberg while representing Aleksey. App.p. 3197, PCR 782. However, he did represent "John Doe, Warden" in Charles W. Tyler v. Sheriff Bing Jones, from July 1996 through February 1998. App.p. 3221-3222, PCR 806-807, Applicant Exhibit 86.

Passing reference is also made to Trooper Lynn Stack in the Petition, p. 15, who was a potential state witness in the Aleksey incident. The PCR Court concluded that he had failed to prove that Mr. Stone represented Trooper Stack. App.p. 5020-5022. The testimony was properly summarized that counsel Stone knew Trooper Stack and spoke with him concerning the unrelated Brown v. Shelton case. App.p. 3205-32097, 3220-21, PCR Tr. 790-92, 805-06. The PCR Court

denied a motion to alter, again concluding that Aleksey failed in his burden of proving that Stone actually represented Trooper Stack through specific assignment of the Insurance Reserve Fund in an attorney-client relationship. Further, Trooper Stack never testified at the Aleksey trial. App.p. 5325. Absent actual representation by Stone, there was no conflict.

Adequate Waiver of Alleged Conflict of Interest

In his Petition, p. 16-18, Aleksey contends that there was no valid waiver of the alleged conflict of interests. The PCR Court rejected this assertion finding a knowing and on the record waiver of the conflict of interest and desire to have Mr. Stone continue in the representation. App.p. 5029-5032. Respondent submits counsel Stone and Sims made Petitioner aware of Stone's status as a part-time prosecutor and civil lawyer who represents cases assigned from the I.R.F. involving state and county employees, and the record includes inquiry by trial judges before the trial of Aleksey's knowledge. At no time after the inquiry did Aleksey ever seek to have Stone removed.

Aleksey relies upon the decision in U.S. v. Swartz, 975 F.2d 1042 (4th Cir. 1992). According to petitioner, Stone had the self-interest to curry favor with law enforcement and his hopes of further assignment of cases from the Insurance Reserve Fund. Petition, p. 15-16. As the PCR Court found, those assertions are simply inadequate to raise the suggestion that Stone's representation of any criminal defendant, including Aleksey would be guided by "self-preservation" as suggested in Schwarz. He further asserts that Aleksey was not specifically informed that Stone's employment as a part-time solicitor "would affect his ability to vigorously challenge law enforcement version of the events, especially with respect to the purported confession extracted by two SLED agents." Petition, p. 15,17-18.

First, the state PCR court found Aleksey failed to prove an actual conflict of interest, as defined in Mickens and Cuyler. Absent such interest, the question of waiver is moot. Relief was properly denied. 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 U.S. v. Schwarz, 283 F.3d 76 (2nd Cir. 2002) which were unwaivable. Possible conflict that pertains 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 has 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 PCR Court concluded 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 Stone's practice both as a part-time solicitor and civil law 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 above, there was on-the-record inquiry of Aleksey on February 2, 1998 (part-time solicitor, insurance reserve fund work, state agencies, police agencies, highway patrol)(Feb. 2, 1998, Tr. p. 5-7, PCR Tr. 737-39), May 20 [28], 1998 (part-time solicitor in 14th Circuit not connected with Orangeburg) (R. 2192-93); and August 28, 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 PCR Court found that 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). As the PCR Court found, the waivers could have been more specific to speculate about potential events which did not occur, including whether

Willie Bamberg or the Sheriff might be potential witnesses as to his adaptability to prison. However, the waivers were adequate to address what did occur, the potential for divided loyalties.

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

II. Certiorari is not warranted where counsel made a decision after a reasonable investigation to neither retain a prison expert nor present questionable evidence of Petitioner's prison adaptability where the Petitioner's prison record had an escape charge, malicious injury to jail property in destroying a jail stool and breaking a window which led to his removal from the jail.

Further, 6th Amendment prejudice was not shown where in light of Aleksey's jail destruction evidence, the potential expert testimony that Aleksey would be going into a prison system that had the general ability to house and secure any inmate, including Aleksey, without undue risk of harm to staff, other inmates or the community because lethal force could be used against inmates does not undermine confidence in the verdict.

Aleksey asserts that trial counsel was ineffective in the penalty phase in failing to retain an expert on prison adaptability to testify that 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 a former South Carolina Department of Corrections employee, James Aiken in support of his claim. The Circuit Court rejected this Sixth Amendment claim concluding that counsel had a strategic reason in not pursuing this type of evidence based upon the potential that it could lead to an emphasis of negative evidence from his present incarceration record which included an escape charge and removal of the facility to an SCDC prison as a safekeeper because the local facility could not handle him which would necessarily question the credibility any adaptability evidence. App.p. 5082-5085; Order, p. 119-122. Also, App.p. 5022-28; Order 59-65. (similar claim in the conflict of interest section).The PCR Court found 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. In further explaining the

rejection in the Order denying Rule 59 relief, Judge Goodstein declared:

> . . .In viewing a Strickland analysis, it must be viewed from counsel's perspective at the time the case was tried in 1998, well before the Supreme Court's 2005 advisory in Bowman. When the Order was prepared, like the process recently stated in Sears v. Upton, this Court used a probing and fact-specific analysis that considered the totality of the available mitigating evidence produced at the trial and at the PCR proceeding in order to assess whether there was a reasonable probability that the defendant would have received a different sentence. As stated in the analysis in the Order, pages 113-122, the failure to present James Aiken did not undermine confidence in the outcome under Strickland.

App.p. 5328-29. Since there is probative evidence to support the findings of the PCR court and Judge Goodstein reasonably applied Strickland v. Washington, 466 U.S. 668 (1984) to the facts, certiorari should be denied on this claim.

Ineffective Assistance of Counsel Standards After Harrington v. Richter.

To establish deficient performance, a person challenging a conviction must show that "counsel's representation fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, at 688 (1984). A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. Id., at 689. The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id., at 687.

Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies. See Knowles v. Mirzayance, 556 U. S. 111, 123, 129 S.Ct. 1411 (2009); Rompilla v. Beard, 545 U. S. 374, 383 (2005); Wiggins v. Smith, 539 U. S. 510, 525 (2003); Strickland, 466 U. S., at 699. Although courts may not indulge " post hoc rationalization" for counsel's decisionmaking that contradicts the available evidence of counsel's actions, Wiggins, 539 U. S., at 526–527, neither may they insist counsel confirm every

aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam).

With respect to prejudice, a challenger must demonstrate "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. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id., at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id., at 687. See Harrington v. Richter, 562 U.S. 86 (2011).

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. See Wong v. Belmontes, 558 U. S. 15, 22-24 (2009) (per curiam); Strickland, 466 U. S., at 693. Instead, Strickland asks whether it is "reasonably likely" the result would have been different. Id., at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id., at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id., at 693. Harrington, supra.

B. Evidence of Aleksey's Jail Discipline Problems Presented At Trial.

At trial, former Orangeburg Detention Center Officer Maurice Keitt testified on January 27, 1998, Aleksey told him that he had just knocked one of the small windows out. App.p. 1878; R. 1970. He stated he saw that the window was broken out and that Aleksey had broken a metal stool from the stand that was attached to the floor. App.p. 1879; R. 1971. When Keitt asked Aleksey why, he declared he was frustrated. App.p. 1880, 1882; R. 1972, 1974. He said 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. App.p. 1881; R. 1973.

Deputy Director of the Orangeburg Detention Center, Vernetia Dozier, testified that she had received a report that on January 27, 1998, Aleksey had taken a stool and ripped the stool off the wall and broken the window out of the cell. App.p. 1886; 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. App.p. 1886; R. 1978. She described safekeeping as a place where they send inmates that are hard to handle or an escape risk. App.p. 1886; 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 is an exterior window. App.p. 1887; R. 1979. 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. App.p. 1887; R. 1979. Further, on re-direct, she declared no one had gotten through the type of small window Aleksey broke. App.p. 1890; R. 1982.

On re-cross, Dozier stated that Aleksey did not escape from his jail cell and she was informed that he called for help after he broke the window. App.p. 1889; 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. App.p. 1932; 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." App.p. 1932-1933; 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. App.p. 1933; 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.

App.p. 1936; R.p. 2028, ll. 13-17.

C. PCR TESTIMONY OF DUFFIE STONE

Stone testified at the PCR hearing that because Aleksey was charged with escape, at some point he obviously felt that prison life would be discussed (by the prosecution) and Stone wanted to be sure that the jury was aware that the escape charge was not a realistic escape. Stone felt that he had sewn it up well at trial and that it did not become an issue. App.p. 3238; PCR 823. Stone stated that he did not receive any information from his forensic experts - Dr. Schwartz-Watts, Dr. Rosengard or Dr. Bachman - that would have suggested that Aleksey had a mental state that would be more adaptable to prison. Stone stated that he did not hire a prison adaptability expert because he felt such testimony frequently backfires to the defendant's detriment. App.p. 3635; PCR 1223. He stated that under the circumstances "I thought it was a big risk putting somebody up on the stand to say he would adapt well to prison" and "I just didn't think it was credible at that time." App.p. 3636, l. 7-12 He was not aware of any evidence to indicate that Aleksey was uniquely adaptable to prison. App.p. 3636; PCR 1224. In addition to the damage to the chair and window, and there were lawsuits he had filed and Stone felt it was a big risk and not credible at that point. App.p. 3637; PCR 1225. Stone stated that his notes revealed at some point in the representation he or Mr. Sims spoke with Bamberg concerning the escape incident. App.p. 3641; PCR 1229. He stated that they learned anytime a window was broken they were going to call it escape. PCR 1229.

In preparation for the defense, the defense had contacted Detention Center Director Willie Bamberg who prepared an affidavit on May 20, 1998 [Exhibit 87]. App.p. 4266. In the affidavit, Bamberg described the fact the charges were made "because he through 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." App.p. 4266.

Contrary to the speculative claims of Aleksey, Stone's decision to not present adaptability testimony was not based upon any fear of cross-examining his "clients," but his belief that such expert prison adaptability testimony has little persuasive value upon the jury 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 – was presented to the jury.

D. PCR TESTIMONY OF THOMAS SIMS

Counsel Sims concurred in his testimony. He stated that the theory of defense was to show that Aleksey was not a bad person and although he had a criminal history, that it was consistently non-violent. App.p. 3043, 3094-95; PCR 627, 679. 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. App.p. 3119-3120; PCR 703-704. Sims stated that he was aware prior to the trial of the existence of experts on prison adaptability. App.p. 3074; PCR 658. Additionally he was aware on the circumstances concerning the actions in jail and the escape charge. Sims declared at the time of his representation, he was aware of Skipper and that although Stone was dealing with the experts, he is sure it was discussed as potential evidence in mitigation. App.p. 3075-76; PCR 659-70. In fact, Sims recalled a prior case he handled where the Skipper issue was presented. Sims stated the reason that adaptability experts were not presented was not based upon any neglect of the law. App.p. 3076; PCR 660.

E. PCR TESTIMONY OF EXPERT JAMES E. AIKEN

James Aiken, former warden at Central Correctional Institution and prison system administrator, testified as an expert in adaptability and correctional risk. App.p. 3897 [PCR 1485]. It was his opinion "that 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." App.p. 3899; PCR 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 providing injury to staff or other inmates, although he could provide injury to himself. App.p. 3900; PCR 1488. Mr. Aiken further attempted to explain Aleksey's action at the jail when he broke the chair and window leading to the attempted escape charge. App.p. 3902-03; PCR 1490-91. He opined that Aleksey would have been unable to escape through the window and negotiate the perimeter fence, assuming he was restrained. App.p. 3903; PCR 1491. Aiken stated that his concerns about 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. App.p. 3904; PCR 1492. He felt the series of grievances and lawsuits Aleksey filed against correctional officers would weigh in favor of adaptability since he is using the system to remedy his concerns. App.p. 3905; PCR 1493.

On cross-examination, Aiken acknowledged that an inmate, like Aleksey, who suffers from borderline, mixed personality, and antisocial features was the majority of his prison population. App.p. 3910; PCR 1498. He found they "most definitely" had problems with truth and were "manipulative, malingering, and con artists." App.p. 3910; PCR 1498. Aiken stated that he had reviewed the safekeeping petition of Orangeburg which revealed the outburst of Aleksey at the jail, required further restraint, and admitted the local facility opined that he was not adaptable to that transient jail setting. App.p. 3912; PCR 1500. Aiken explained that Aleksey was then sent to Lee Correctional Institution and would have been in isolation from the general population at that time. App.p. 3913; PCR 1501.

Aiken further admitted that if Aleksey had begun to tear up the jail, Aiken would use force up to death to manage him and had done that before with other inmates in his career. App.p. 3914; PCR

1502. 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. App.p. 3916; PCR 1504. Aiken summarized the fact that his opinion is that "any inmate", including Aleksey can be managed at the South Carolina Department of Corrections based upon the capability of the use of lethal force.

ANALYSIS

The PCR Court reasonably relied upon the analysis by the United States Supreme Court in Sears v. Upton, 130 S.Ct. 3259 (June 29, 2010) in entering its final order. App.p. 5325, 5328-29. In Sears, the Court held that the state PCR court failed to apply the proper prejudice inquiry in determining that counsel's facially inadequate mitigation investigation did not prejudice the defendant. The Court stated that the proper prejudice standard requires a probing and fact-specific analysis that considers the totality of the available mitigation evidence, both that adduced at trial and the evidence adduced at the PCR proceedings, in order to assess whether there is a reasonable probability that the defendant would have received a different sentence after a constitutionally sufficient mitigation investigation. The Court stated that this standard will necessarily require a court to speculate as to how much or how little mitigation evidence was presented during the initial penalty phase. Judge Goodstein also reasonably relied upon the analysis set out in Wiggins v. Smith, supra, 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 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 and emphasize negative evidence on Aleksey. In trying to mitigate the effect and secure a favorable spin on the evidence Counsel Stone contacted the local jail, prepared an affidavit and developed an understanding of their potential testimony to mitigate the claims surrounding the incident.

The PCR Court found this decision was not based on either neglect nor ignorance. App.p. 5084. The PCR Court found that 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. 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 he had pursued caused him to think the presentation could not be credible. App.p. 3238, 3636, 3637; PCR 823, 1224, 1225.

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

> "You can take a look at has Bayan Aleksey has *adapted to jail*, 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."

App.p. 2017, 2023; ROA p. 2110, ll. 8-23 and p. 2116, ll. 2-7. (Emphasis Added). However, this argument was entirely fact-based from the record and indicated that the local jail officials had opined that Aleksey was not adaptable to the local facility causing the movement to South Carolina Department of Corrections as a safekeeper.

The PCR Court found that counsel's reaction was reasonable in light of the evidence presented at the PCR hearing. App.p. 5084. Here, the defense team reasonably investigated Aleksey adaptable by learning about his adaptability to the particular jail setting. Stone's belief that adaptability experts evidence can backfire was reflected in the testimony of Aiken which included:

- Prison officials make mistakes in placements.

- When Aiken said adaptable to prison, he actually meant an inmate, like any inmate, subject to be controlled, either by maximum and isolated jails, or by the use of lethal force.

- Aleksey's physical outburst at the Orangeburg jail, *according to Aleksey*, was that he was in a four-point restraint in a cell at the time in violation of SCDC policy, yet he was able to break a chair and destroy a window. App.p. 3011, 3920; PCR. 1508. Aiken, however, stated that Aleksey's reason for the violence was to merely "get some attention." App.p. 3920.

- Aiken admitted "the best predictor of future behavior is past behavior." App.p. 3920.

- Aiken admitted that the local detention people opined he was not adaptable to their jail and that they were unable to maintain order and authority with Aleksey's presence in their facility. App.p. 3910, 3912.

- Aiken opined that violent behavior decreases with age and burn out in the prison setting. App.p. 3919.

- Aiken admitted the majority of inmates are manipulative, malingering and con-artists who have problems with the truth. App.p. 3910.

App.-p. 5084.

Judge Goodstein expressly found that Stone's assessment about the "backfire" potential in Aiken's testimony was reasonable. App.p. 5084. Although the adaptability evidence was admissible as mitigating, counsel's experience (where similar general responses would be given) reflected the problem with such testimony. See Lucas v. Warden, Georgia Diagnostic and Classification Prison, 771 F.3d 785 (11th Cir, 2014) (evidence was a two-edged sword and counsel had sound strategy in not introducing it); Wong v. Belmontes, 558 U.S. 15, 24, 27–28, 130 S.Ct. 383, 388–89, 391, 175 L.Ed.2d 328 (2009) (concluding § 2254 petitioner could not establish prejudice because expert testimony about petitioner's "mental state, seeking to explain his behavior, or putting it in some favorable context" would have opened the door to the State introducing rebuttal evidence of petitioner's previous murder).

The PCR Court also determined that Sixth Amendment prejudice [the second prong of

Strickland] had 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. See Sears, supra. The evident conflict in evidence of speculative adaptability suggested by Aiken, contrasted with Aleksey's own actions in tearing up a jail cell and breaking a window and placement in a safekeeper program, shows how any probative value was minimized by Aleksey's actual behavior. The "backfire" suggested by counsel Stone was that it would emphasize Aleksey's own destructive actions in prison with an opinion that SCDC can handle Aleksey and all prisoners and that Aleksey's anti-social tendencies are consistent with many inmates. Further, his decision to forego further development must be viewed from counsel's perspective in 1999 where Solicitor Bailey's treatment of similar expert testimony was not in Petitioner's interest. App.p. 5084-85, p. 5331

In his petition before this Court, Aleksey makes passing reference to Solicitor Bailey's testimony concerning how he handled prison adaptability expert testimony in the past as an attempt to undermine the subsequent decisions in State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005) and State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007). To the contrary, as recognized by Judge Goodstein, this was to place a contemporary focus on what counsel Stone was seeing in 1998 and anticipating from Solicitor Bailey as a seasoned prosecutor in 1998. It cannot be ignored that Solicitor Bailey, essentially based upon his documented writing and reading of this Court's prior opinions at that time - particularly State v. Plath, 313 S.E2d. 619 (1984) had developed a strategy for cross-examination that defense counsel could anticipate. At the PCR hearing, Solicitor Bailey testified that he had been involved in prior cases where James Aiken testified. App.p. 4110; PCR 1698. Bailey stated that he like to see adaptability experts from the prosecution point of view. Bailey felt the jury would want to know in their assessment about what the defendant would be adapting to because adaptation does not mean anything unless a jury knew what he was adapting to. App.p. 4110. Bailey stated (at the time of the trial), this would allow him to develop a description of prison life in the

general prison population – cable TV, recreation activities and amenities compared with the deceased death. Bailey stated that because an adaptability expert was not used, this contra-mitigation testimony in explaining actual prison life was not present. App.p. 4110-11; PCR 1698-99. Bailey noted that each time Aiken testified in his cases for the defense, the verdict was death. PCR 1699. In addition, he noted that he would get to describe the present security the prisoner would be under now, when on death row, and in the general prison population. App.p. 4111. As noted above, on balance, the risks of the adaptability testimony and the failure to present it in Aleksey's case does not undermine confidence in the outcome. His claim otherwise must be denied.

The reason evidence about "good" prison conditions is problematic stems from four South Carolina cases – one that was in existence prior to this case and three that were handed down after Applicant's trial, including Applicant's on direct appeal. In State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984), the court *affirmed* a death sentence despite issues related to the State's cross-examination and evidence responsive to a defense presentation "[demonstrating] the permanence and deprivation entailed in life imprisonment". Plath, 281 S.C. at 12, 313 S.E.2d at 626. In doing so, the court rebuked sentencing phase defenses which "sought to portray life imprisonment as preferable to capital punishment as a matter of social policy", or "drew a picture of life imprisonment as slavery, a condition of irretrievable loss". Plath, 281 S.C. at 14, 313 S.E.2d at 626-27. The court stated that such defenses improperly "invite[d] the jury to intrude upon the strictly legislative function of determining the nature of crime and punishment", and concluded that "determinations as the time, place, manner, and conditions of execution or incarceration, as well as the matter of parole are reserved by statute and our cases to agencies other than the jury." Plath, 281 S.C. at 14-15, 313 S.E.2d at 627. However, the Plath court concluded the State's challenged questioning was only proper response to the defense presentation which brought up the subject matter in the first place. Plath, 281

S.C. at 15-16, 313 S.E.2d at 627-28.[4] This was the focus of Solicitor Bailey's approach in the 1998-2005 experiences.[5] As Judge Goodstein declared, recognizing that prison condition testimony is inadmissible unless very narrowly tailored, citing State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005) and State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007), that the PCR Court, at the time of the Order was aware of the progression of the prison condition issue through the Supreme Court. In viewing a Strickland analysis, it must be viewed from counsel's perspective at the time the case was tried in 1998, well before the Supreme Court's 2005 advisory in Bowman. Counsel should have anticipated that Solicitor Bailey could have approached the evidence in a similar [and documented] fashion. However, Stone's assessment was stronger since it was based upon the real destruction by his client. Strickland has not been satisfied.

III. Certiorari is not warranted where the PCR Court found that counsel was not ineffective in failing to pursue as a basis for suppression of the Petitioner's statement that his confession was the product of a physical beating by law enforcement where the PCR Court found that there was no evidence of physical force or threats, that counsel had received various and inconsistent versions about Aleksey's reason for giving the statement from Aleksey including his belated assertion of a beating, that there was no physical evidence to support the

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[4] In the Clary & Bailey, *The South Carolina Death Penalty Trial*, (S.C. Bar, 2001), p. 265., Bailey wrote in addressing adaptability to prison life and summarized State v. Plath (II), 281 S.C. 1, 313 S.E. 2d 619 (1984), a pre-Skipper case as "[W]here defense expert testifies on life in prison, State did not err by cross-examining him on prison conditions and on specific inmate who had escaped while serving a life term." This same information was included in the 2009 edition. See Clary & Bailey, *The South Carolina Death Penalty Trial*, 2nd Edition (S.C. Bar 2009), p. 233.

[5] Subsequently, the state supreme court decided State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005). There, Bowman contended that the solicitor's questioning was improper about movies, television, and books in prison. The Court found the issue was not preserved, but added a cautionary instruction to both sides:

> 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 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.

State v. Bowman, 366 S.C. 485, 498-99, 623 S.E.2d 378, 384 (2005). See State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007); State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007).

claim and his investigation and that counsel pursued a reasonable strategy to attempt to suppress the statements.

In his third argument, Aleksey asserts that his counsel was ineffective in failing to challenge the admission of his confession in either the Jackson v. Denno suppression hearing or before the jury based upon a claim of police brutality that lead to the statement.[6] Though not precisely presented in the same manner before the PCR court, Judge Goodstein rejected the underlying claim in three portions of her Order relating to "conflict of interest, failure to present evidence of alleged promises of return to the general prison population and failure to question the SLED agent adequately about the interrogation. App.p. 5017-19, 5038-5044, 5106-5107. In rejecting that counsel was deficient in failing to present a theory of physical coercion inducing the statement, Judge Goodstein concluded:

> . . .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 own presentation of Agent Mears testimony any material, document or evidence which would suggest that the statement of 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.

App.p. 5106-07. See also Order, App.p. 5042 (" . . . 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..."). There is probative evidence to

[6]In the PCR court, the Petitioner had a conflicting claim as to his reasoning for the entry of his statement which is abandoning before this court. He contended 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 of leniency or reward that he would be returned from solitary confinement to the general prison population. The PCR Court found that Aleksey had failed in his burden of proof under Strickland by his failure to specifically assert this reason for suppression to the trial judge. App.p. 5038-5044.

support these conclusions.[7] Certiorari should be denied.

The Petitioner takes issue with these conclusions because he notes that he had written defense counsel letters long after the incident during the course of the representation asserting that he had been beaten. However, as the PCR court recognized, during the course of representation of Aleksey, he made many inconsistent and unprovable statements to counsel and others concerning his reasons to confess. This was not the clear cut choice that Petitioner now suggests. Instead counsel was faced with a plethora of greatly revised stories and reasons why the confession was entered. Like counsel at trial, PCR counsel failed to prove the existence of the predicate fact - that Petitioner was beaten in the two hour gap immediately prior to the 7 PM statement. While Aleksey did prove that he had told counsel Sims at one point in writing that he had been beaten and that there was evidence on the tape that he was crying when the ultimate statement was entered, Aleksey failed to prove the existence of actual coercion or that a different investigation and presentation should have been done by reasonable counsel. Because of this failure of proof, the assertion should be denied as a basis for certiorari.

Counsel was faced with a record of tapes of the arrest, the statement and a call to a television station which presented strong evidence that Aleksey was not beaten as he now suggests upon arrest. This reasonable investigation by counsel of the statement included reviewing the tape that Aleksey had independently told the news reporter that the reason he confessed to killing the police officer was because he was pressure, but failed to assert anything about a beating to WIS TV, and that he failed to possess any physical evidence to support or suggest any physical beating. (A news report of the WIS TV interview from the WIS website is set out in App.p. 6301-6302). Further, Aleksey was not consistent in his versions to his counsel about the timing or existence of a beating. Faced with this minimal prospect after discussions with Aleksey, counsel did not pursue a "beating" strategy before

[7]Aleksey's statement of January 2, 1998 is set forth in the Appendix, App.p. 2320-2433. The second portion of the interview begins at the bottom of App.p. 2332 at 7:07 PM.

the judge or jury with Aleksey's knowledge. Counsel reasonably investigated the circumstances of the confession and made a reasonable presentation, albeit not one of "physical beating." There is probative evidence to support the PCR court's rejection.

Petitioner relies upon DuPree v. State, 305 S.C. 285, 287, 408 S.E.2d 215, 216-217 (1991). Aleksey's case is readily distinguishable from Dupree. In Dupree, counsel had been told by the defendant that threats were made by the arresting officer to keep putting charges on him and that he would pay someone to testify against him and after giving a statement, the defendant refused to sign a statement that the statement was voluntarily made. Counsel in Dupree could not recall if the threats were allegedly made at the time of the interrogation. Like Aleksey's setting, the interrogator testified at the suppression hearing that no threats were made, but failed to pursue it at the suppression hearing.

In Aleksey's situation counsel did a reasonable investigation concerning the circumstances of the statement and whether there was physical beating at the time of the interrogation. Unlike Dupree, the statement was taped. Unlike Dupree, Aleksey made various statements concerning the circumstances of the statement, including the WIS recording. Unlike Dupree, Petitioner first belatedly claimed he was actually beaten months after his arrest in a revised version to counsel yet never possessed any injuries consistent with his portrayal of the statement. Unlike Dupree who refused to confirm the statement was voluntary, on the tape at the conclusion of the taped statement Aleksey confirmed that he had not been threatened in any way by SLED Agents Darnell and Means, or anyone connected with the Highway Patrol, the Orangeburg Sheriff's Department or Solicitor's Office. App.p. 2340, l. 25-39. Unlike Dupree, defense counsel in Aleksey investigated various angles in the statement, including those suggested by Aleksey. Where the PCR court concluded that Aleksey failed to prove the alleged physical beating - [App.p. 5106], the court in Dupree found by a preponderance of the evidence that the voluntariness of Dupree's statement had not been proved - as supported by his failure to sign a statement that it was voluntary. There is probative evidence to support the PCR

court's conclusion that Aleksey failed in his burden of proof to show either deficient performance or prejudice.

First, the record reveals a Jackson v. Denno hearing was held on June 8, 1998. App.p. 2128-2238, 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", Aleksey comes back on the tape crying and then declares "I shot the trooper." App.p. 2233-34, ROA 2326-27. Stone complained that there were no notes and no recording of what took place in the gap. App.p. 2233, 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. App.p. 2330, 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. App.p. 1517-19, R. 1578-79. It was introduced subsequently in the penalty phase.

At neither the Jackson v. Denno hearing or the guilt or penalty phase, the defense did not present evidence that Aleksey's statement was the product of brutality or undue coercion. He now contends the factual basis for this new presentation derives from comments that Aleksey made to Thomas Sims that SLED "beat the crap out of" him (App.p. 2553-2560, PCR 134, 141) and in a letter to Stone concerning beating the confession out of him. App.p. 3293, PCR 878. The Petitioner further speculates that the failure to present the evidence of the "beating" was an adverse effect of the alleged conflict with Stone's other employment. However, the record conclusively reveals it was the result of the reasonable investigation by counsel Sims and Stone that caused this decision.

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 Aleksey in which he declared, at the conclusion "that I

have nothing else to say" or "all I've got to say." App.p. 2219, 2227,R. 2312, 2320. See also App.p. 2237, R. 2300 (Darnell). Agent Mears stated the tape was cut off, but Aleksey continued to talk and made reference to his concern about Glory Vee, the kids, and Batkalina. App.p. 2219, R. 2312. He also asked if he could get back into the general prison population. App.p. 2219, R.p. 2312, ll. 21-22. Agent Mears stated he contacted his supervisor, Capt. Knight and gave him the information. Mears stated that he initially told Aleksey that they could not promise him movement, but would see what could be done. App.p. 2220, R. 2313. Agent Mears eventually contacted the Detention Center and inquired of the Assistant Director (Dozier) about Aleksey being in the general population or was there another secure place without being in the infirmary or lock-down. App.p. 2220, 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 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.

App.p. 2221-22, R. 2314-15. [The dichotomy of claiming on one had 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 testified in the suppression hearing that Petitioner signed a voluntary waiver of rights form at 4:45 prior to the statement. Like Darnell, Mears testified that no threats were made to Aleksey between the statements during the gap period. App.p. 2217-2219. Mears again reiterated that no one physically abused Aleksey in any way. App.p. 2222, R. 2315. 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.

App.p. 2225-26, R.p. 2318, l. 16 - p. 2319, l. 2.

At the Denno hearing, counsel Stone argued about the one hour gap, "that's all I have to say" and crying when the tape was on after the gap. App.p. 2231-34, 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." App.p. 2330, R. 2330.

At the trial, Deputy Director Dozier testified that she ordered Aleksey moved from the maximum security section of the Orangeburg Detention Center to an infirmary cell for his safety. App.p. 1409, R. 1470. After Aleksey had requested and seen a SLED agent, Aleksey was placed in the general population after receiving a call from the SLED agent. App.p. 1410-11, R. 1471-72.

Before the jury, Agent Darnell described the circumstances surrounding the statement. App.p. 1506-1519, R. 1567-1580. He stated that at the conclusion of the first statement, among other things, 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." App.p. 1513, R. 1574. He described seeking information from the various sources. App.p. 1513-14, 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...."

App.p. 1514, R.p. 1575, ll. 5-14. Darnell testified that Aleksey was not threatened in any way and that they did not physically or mentally abuse him in any fashion whatsoever. App.p. 1515, l. 5-10. Darnell described Aleksey's demeanor when the tape was turned back on at 7 PM on January 2, 1998 as "still crying a little bit, somewhat nervous but he knew what he was doing." App.p. 1516, l. 1-2. Darnell denied that Aleksey was crying because of anything they had done to him. App.p. 1516.

On cross-examination of Mears, counsel Stone inquired whether any threats were made to Aleksey or promises before the tape was turned back on. App.p. 1536. Mears denied it. App.p. 1536. Counsel Stone reiterated in his examination that Aleksey was sobbing. App.p. 1537. Similarly, SLED Agent Kenneth Mears testified, without contradiction:

> Q. And during that entire roughly two hours or so when the tape was off, did you or did Mr. Darnell in your presence or anybody else threaten Mr. Aleksey in any way?
>
> A. No, sir, no threats.
>
> Q. Anybody Physically abuse him?
>
> A. No sir ......
>
> .... Q. In listening to that tape, Mr. Aleksey from time to time is sort of sobbing; is that correct?

A. Yes, sir, that's correct.

Q. Did either you or Mr. Darnell do anything to make Mr. Aleksey sob or cry or whatever on that tape?

A. No sir, nothing was done.

Q. Was there any type of coercion, undue influence, anything of that nature during the two hour period that would affect the voluntariness of that statement this jury has heard a few moments ago?

A. No sir....

App.p. 1537, l. 7-p. 1538, l. 7, R. 1598-99.

Thomas Sims

From Thomas Sims perspective, although Aleksey had told him at one point that SLED had beaten him (App.p. 2533-2560, PCR 134, 141), Sims stated that he asked Aleksey specific questions about it because Aleksey had said they were beating him when they got him out of the car. App.p. 2558, l. 1-11, PCR 139. Sims's problem with that version was that there was a videotape from the Highway Patrol of it which showed no beating or kicking of Aleksey while on the ground as Petitioner had claimed. App.p. 2559, PCR 139. The claim that Aleksey had made to him was that they had pulled him out of the car, onto the ground, and kicking him was not revealed. App.p. 2559-2560, PCR 140-41.

Other than his later letter, Sims stated all that he had at the confession concerning coercion was the existence of crying by Aleksey after the gap in the second statement at law enforcement center, without any witness to suggest why he was crying. App.p. 2559, PCR 140. Although Sims admitted crying may be indicative of a beating, he acknowledged that Aleksey had been crying to Sims during their own interviews. App.p. 2559, PCR 140. Sims further opined that in their investigation of the claims surrounding the confession, there was no independent evidence or additional factual basis to support that there was either physical violence or threats during the gap period. App.p. 3030-3032, PCR 614-16.

Duffie Stone

Stone credibly testified that he had reviewed in March 1998, some letters from Aleksey that suggested the confession was beaten out of him. App.p. 3292-93, 3296-97, PCR 877-78, 881-82.[8] Stone said a problem they had with presenting his belated assertions of the confession being beaten out of him was that it was not consistent with Aleksey's telephone call to WIS-TV. Counsel Stone recalled that Aleksey's story changed quite a bit over time. In describing the WIS- TV taped call, Stone stated that Aleksey when asked why he confessed Aleksey told the reporter that he was under a lot of pressure to give the statement and when asked what type of pressure would make you confess to the killing of a police officer Aleksey told the reporter had the it was just a lot of pressure. App.p. 3317, l. 3-18. Stone stated that Aleksey did not tell WIS that he was beaten or that he was promised he would get out of jail or that a woman would be helped. Stone agreed that he did not have to believe Aleksey , but saw that each time Aleksey spoke, he had a new story. App.p. 3317-3318, PCR. 902-903. At one point Aleksey had described to him one SLED agent hit him in the chest and another had told him that he had killed a friend of his and that he would not get out alive and an earlier time stated that a person from New York had a contract on him and had sent the trooper to kill him. App.p. 3293, 3296, 3317-19, PCR 878, 881, 903-904. Stone acknowledged that there was no way for the trooper to have knowledge of the alleged mafia hit. Stone stated that he realized that there was no way that Aleksey would come across as credible and when he ultimately testified in the penalty phase, Stone did not think he came across as credible. App.p. 3319, PCR 903-904.

Stone stated that he investigated the confession matter by attempting to determine whether SLED agent Mears and Darnell had a high record of getting confessions. App.p. 3302. Stone stated he

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[8]The letter addressed to Sims and Stone read:

I want you to know that when SLED was questioning me they told me if I say I did it that I would get out of jail in five years, that they would help me. When they were in the office the black SLED agent said to me and then the white agent Darnell said the same thing. The SLED agents then beat the shit out of me when I didn't agree. . . . App.p. 3296, l. 6-13. Another letter dated March 7, 1998 read " I was beaten into saying I did it. App.p. 3296, l. 16-19.

wanted to determine whether they were "closers" and sought an FOIA to get their history with successful confession. App.p. 3302-03, PCR 888-89. He opined that the agents percentage was "pretty good" and thought that was a strong angle to approach the witnesses. App.p. 3303. He stated that his angle was to prove that they were closers.

Stone stated that he did not argue "beatings" where he sought to infer something happened in the two-hour gap. App.p. 3310, PCR 895. Stone stressed that his comment about coercion was inconsistent with his WIS interview. App.p. App.p. 3560, l. 5-16, PCR 1147. Stone stressed that in his own discussions with Aleksey, Aleksey advised him about being coerced or pressured to confess, there was no physical signs of evidence to present to support such a claim and the WIS statement made it a difficult issue to get around. App.p. 3560-61.

Stone stated that he and Sims had discussed with Aleksey that he could testify at the Jackson v. Denno hearing and "say whatever it is you need to say. "Stone further indicated to Aleksey that it was highly unlikely that the judge would throw out the confession. App.p. 3561, l. 11-20. He stated that Aleksey and the defense decided not to testify. App.p. 3561-62, PCR 1149. [9] Stone further opined that his work did not impact on the presentation challenging the confession. App.p. 3562.

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 93) 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

[9] Stone testified that they were able to keep out Aleksey's statement while in the hospital about a contract being placed against him by the Russian mob and Aleksey's thoughts that the trooper was involved in the "hit." App.p. 3562, l. 1-12.

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*, 39 Geo.L.J. Ann.Rev.Crim.Proc., p. 199-205 (2010)(see cases collected, note 597-618). 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 PCR Court specifically found that " . . . there has been no showing, under the totality of the circumstances that 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 Aleksey was not for leniency or a lesser sentence." App.p. 5042. (Emphasis added) There is probative evidence in the record to support this finding of fact.

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 Aleksey's will was overborne and his capacity for self-determination critically impaired. See Columbe v. Connecticut, 367 U.S. 568 (1981). 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, Aleksey's statements to the police

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. App.p. 3306-3313, PCR 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. App.p. 3308, PCR 893. However, counsel's decision not pursue a claim of beating was the product of the investigation that revealed a series of different stories about the basis for the statement, which did not include physical beating, the lack of physical proof to support the claim, the Petitioner's denial on the tape of a beating, the failure to claim that he was beaten in the WIS interview, and the decision by Aleksey to not testify in the suppression hearing.

Counsel's strategic decision was not deficient under Strickland, supra. Here, where the statement revealed it was induced by Aleksey's own requests to law enforcement, it is difficult to assert that is will was overborne. App.p. 2333-34, 2340. 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.

CONCLUSION

Respondent submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,
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December 31, 2014

ATTORNEY FOR RESPONDENT

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 2014
14-7320

BAYAN ALEKSEY,

Petitioner,

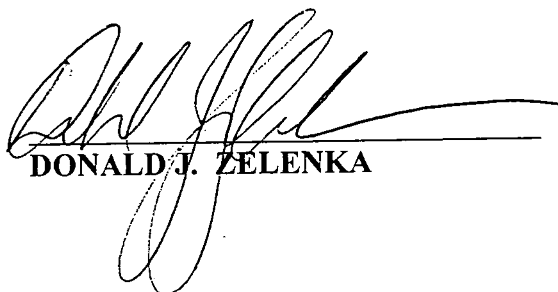
v.

STATE OF SOUTH CAROLINA,

Respondent

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served Respondent's ***Brief in Opposition to Petition for Writ of Certiorari*** on Robert M. Dudek, Esquire, PO Box 11589, Columbia, South Carolina 29211-1589 by depositing copies in the United States Mail, postage prepaid this 31st day of December, 2014.



DONALD J. ZELENKA

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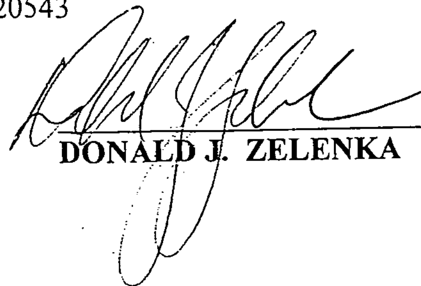
CERTIFICATE OF SERVICE BY MAIL

I hereby certify that I am a member of the Bar of this Court and that on December 31, 2014 I filed the Brief of Opposition to the Petition for Writ of Certiorari in the above-referenced case, together with the Certificate of Service on opposing counsel, by placing the original and ten copies of the same in the United States Mail, postage prepaid, and properly addressed to the Clerk of this Court, as follows:

The Honorable Scott S. Harris
Clerk, United States Supreme Court
1 First Street, N.E.
Washington, DC 20543



December 31, 2014
Columbia, SC

DONALD J. ZELENKA