ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Diane Schafer Goodstein, Circuit Court Judge

RECEIVED

JUN 22 2011

S.C. Supreme Court

BAYAN ALEKSEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1.

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

2.

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

3.

Whether trial counsel rendered ineffective assistance of counsel, in derogation of the Sixth Amendment to the United States Constitution, when they forfeited Aleksey's right to *voir* dire the jury panel?

4.

Whether trial counsel rendered ineffective assistance of counsel, in derogation of the Sixth Amendment to the United States Constitution, when they interjected an adverse racial component during *voir dire*?

5.

Whether trial counsel rendered ineffective assistance of counsel, in derogation of the Sixth Amendment to the United States Constitution, when they did not use a peremptory challenge to remove juror 144 when that juror was married to a former law enforcement officer and personally knew the victim?

6.

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?

7.

Whether trial counsel rendered ineffective assistance of counsel, in derogation of the Sixth Amendment to the United States Constitution, when they did not investigate but had notice that, Gloria Vee Perez Blackwell had engaged in substantial criminal activity during the days before Trooper Lingard was murdered and where her activities provided a motive for her to be the shooter?

8.

Whether trial counsel rendered ineffective assistance of counsel, in derogation of the Sixth Amendment to the United States Constitution, when they failed to hire a social worker to present the substantial mitigation evidence collected by trial counsel's retained mitigation investigator?

9.

Whether this Court should impose a *per se* prohibition against part-time solicitors representing capital defendants?

STATEMENT OF FACTS

Petitioner Bayan Aleksey was charged with murder and the state sought the death penalty in connection with events that occurred on New Year's Eve, 1997. App. 2350. On that date, Aleksey, Glory Vee Perez Blackwell, and her two children were driving through South Carolina on Interstate 95 when they were pulled over for speeding by Trooper Frankie Lingard. App. 927, l. 1 – 928, l. 2. Lingard approached the driver's side of the white Mustang and four shots rang out. App. 932, ll.17-24. Four bullets entered Lingard's body and he suffered fatal wounds near mile marker 97 in Orangeburg County. App. 928, ll. 1-9; app. 1005, l. 2. The car pulled back onto the highway and sped away.

Lin Shirer, a Calhoun County sheriff's deputy, was riding and working with Lingard that night. App. 925, ll. 13-18. He testified he and Lingard observed the white Mustang traveling at a speed of eighty miles an hour and so they stopped the car. App. 926, l. 24 – 927, l. 11. As Lingard approached the Mustang, Shirer got out and walked to the headlights of Lingard's patrol car. App. 932, ll. 1-2. The windows were darkly tinted so he could not see into the car. App. 930, ll. 15-21. Shirer heard the gunfire and watched Lingard fall to the ground, but he did not see who shot him. App. 941, ll. 1-8. Shirer moved Lingard out of the roadway and then fired his gun at the Mustang. App. 934, l. 17 – 935, l. 4. Shirer called law enforcement to inform them about the shooting and law enforcement arrived within a few minutes. App. 939, ll. 12-16; app. 940, ll. 3-7.

The white Mustang stopped in Holly Hill and Gloria Vee Perez Blackwell and her children got out of the car. App. 959, l. 11 – 960, l. 4; app. 1246, ll. 13-16. As police officers descended on the Mustang, Aleksey pointed a gun at his head and threatened to kill himself. App. 973, ll. 1-18. He then sped away. App. 973, l. 25.

After a chase, Aleksey crashed his car at a K-Mart shopping center in Summerville and was rendered unconscious. App. 1086, l. 7 – 1088, l. 11. He was taken to the hospital, app. 1093, ll. 1-2; app. 1112, ll. 13-22, and then to the Orangeburg-Calhoun Detention Center. App. 1402, ll. 18-24. While at the Detention Center, he was interrogated by SLED agents George Darnell and Kenneth Mears. App. 1504, l. 6 – 1516, l. 14; app. 1534, l. 15 – 1538, l. 7. In his first statement, he informed the agents that Glory Vee shot Lingard. App. 2321. After a two hour gap in the audiotape, and continued questioning and interrogation, a crying and much different sounding Aleksey, app. 1516, ll. 1-2, told the agents that he shot the victim. App. 2323. The tape of that interrogation is on file with this Court. See State's Exhibit S-75.

While in pre-trial custody, Aleksey ripped a stool from the floor and broke a small window in his cell. App. 1878, l. 7; app. 1879, ll. 13-23; app. 4266. Based on this infraction, Walter Bailey, who prosecuted this capital case, requested that then Governor David Beasley issue an order sending Aleksey to safekeeping at Lee Correctional Institute. App. 6559. Along with this petition, Bailey submitted two affidavits attesting to Aleksey's dangerousness and authored by the Director of the Detention Center, Willie Bamberg, and the Sheriff of Orangeburg County, James Johnson. App. 6560-6563. Governor Beasley issued the order, and Aleksey was sent to Lee Correctional to await trial. App. 6557.

On August 24, 1998, less than nine months after the shooting, Aleksey stood trial for murder. App. 1. The state submitted one aggravating circumstance to the jury during the penalty stage -- the death of a law enforcement officer while in the performance of his official duties. See S.C. Code §16-3-20 (C)(a)(7); app. 2063, ll. 12-16. One statutory mitigating circumstance was offered by the defense -- that Aleksey had no significant history of prior criminal convictions

involving the use of violence against another person. See S.C. Code §16-3-20 (C)(b)(1); app. 2069, ll. 11-13. The jury found Aleksey guilty of capital murder, and then sentenced him to death. App. 1744, ll. 1-4; app. 2079, ll. 11-14.

ARGUMENT

1.

Trial counsel rendered ineffective assistance of counsel, in derogation of the Sixth Amendment to the United States Constitution, when he labored under an actual conflict of interest when trial counsel was also actively employed as a part-time solicitor in a nearby circuit, and when trial counsel also represented several state entities as an attorney for the Insurance Reserve Fund while simultaneously representing Aleksey in his capital trial for murdering a state highway patrol officer.

The Monday morning following Aleksey's arrest for murdering State Trooper Frankie Lingard on I-95 in Orangeburg County, the Deputy Solicitor for Orangeburg County urged Circuit Court Judge Luke Brown to appoint Issac "Duffie" Stone to represent Aleksey, to help get Stone's practice started. At the time of the appointment, Stone was a part-time assistant solicitor in nearby Beaufort County. He was also an attorney for the Insurance Reserve Fund, and in that capacity represented South Carolina State Troopers, app. 3545, ll. 22-23, the Sheriff of Orangeburg County, app. 3545, ll. 20-21, the Orangeburg-Calhoun Detention Center (where Aleksey was housed until charged with an attempted escape), app. 3180, ll. 1-13, the South Carolina Law Enforcement Division (SLED), app. 3179, ll. 19-22, and the South Carolina Department of Corrections, app. 3179, ll. 1-16. In 1998, the year Stone represented Aleksey, the Insurance Reserve Fund paid Stone $67,000. In 1999, the year after Aleksey was sentenced to death, the Insurance Reserve Fund's payments to Stone nearly tripled to $193,000. App. 3168, l. 17 – 3169, 1. 4; app. 5799.

As Aleksey's lead attorney, Stone, and second chair, Thomas Sims, failed to provide effective representation—they forfeited Aleksey's statutory and constitutional right to *voir dire* his capital jurors, See Argument 3, they declined to offer any evidence of prison adaptability even though such evidence was readily available, See Argument 2, they failed to challenge Aleksey's purported "confession" which Aleksey consistently maintained was beaten out of him by law enforcement, See Argument 6, and they failed to hire a social worker who could have testified to the volumes of mitigation evidence collected by their retained mitigation investigator, and the presentation of which would have entitled Aleksey to have additional statutory mitigating circumstances submitted to the jury. See Argument 8. Additionally, counsel failed to investigate the recent criminal activity of Aleksey's co-defendant, Glory Vee Perez Blackwell, which would have uncovered a motive for her to murder the victim, Frankie Lingard. See Argument 7. Aleksey's lead attorney, Duffie Stone, labored under an actual conflict of interest throughout the entirety of his representation of Aleksey. Aleksey was denied his right to conflict-free counsel in derogation of the Sixth Amendment and this state's well-settled law. This Court respectfully should reverse his convictions and sentence, and remand his case for a new trial and sentencing proceeding.

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

Duffie Stone, Aleksey's lead counsel, was a part-time solicitor in Beaufort County at the time he represented Aleksey in nearby Orangeburg County. App. 3133, l. 25 – 3134, l. 8. This was his first opportunity to be lead counsel, and his second death penalty trial. App. 3240, ll. 5-9. Assigned as second chair was Thomas Sims, a former assistant solicitor in Orangeburg

County. App. 3025, ll. 16-17. This was his first capital trial. App. 3033, l. 12. Sims also ran unsuccessfully for elected office as Solicitor of Orangeburg County in 1992. App. 3025, ll. 19-23. Stone explained that he carried about the same caseload as other assistant solicitors, but was not required to be in the office on a regular basis. App. 3135, ll. 12-15. In his role as a part-time solicitor, a large majority of Stone's witnesses were law enforcement officers. App. 3136, ll. 18-21. When questioned about his contacts with the Highway Patrol at the post-conviction hearing, he answered that he had significant dealings with highway patrolmen like the victim in this case:

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

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

Duffie Stone was appointed to represent Aleksey at the urging of the then Deputy-Solicitor for the prosecuting county—James C. Williams, Jr. App. 5315. Williams was elected Circuit Court judge in 1998 and held that position until 2010. Judge Williams submitted an affidavit, executed on May 19, 2009, in connection with this post-conviction relief action which outlines the manner in which Stone came to represent Aleksey. App. 5315. According to his affidavit, Williams suggested to the Honorable Luke Brown that Stone would be a good choice to appoint as counsel. App. 5315. There is no evidence to indicate that then Deputy Solicitor Williams informed the judge of Stone's position as a solicitor or his work with the Insurance Reserve Fund. Although appointments were generally made from a list of local attorneys who advertised in the Orangeburg phone book, Williams was not aware if Stone was on that list or

not. App. 5315. Instead, he, Judge Brown, and Thomas Sims discussed who to appoint, and Stone was offered the appointment. App. 5315.

> The PCR judge ruled that Stone did not labor under an actual conflict of interest. App. 5026.
>
> This Court must find that Mickens[1] does not require relief in this matter because Mr. Aleksey has failed to satisfy his burden of proof in showing that Mr. Stone suffered under an actual conflict of interest due to his employment as a part-time prosecutor in another circuit.
>
> First, the mere fact that Mr. Stone was a part-time prosecutor in Beaufort in the Fourteenth Circuit is not an actual conflict of interest. The South Carolina Supreme Court has not specifically addressed this issue upon a survey of its case law. In Beaver v. Thompson, 93 F.3d 1186 (4th Cir. 1996), the Fourth Circuit held that there was no conflict of interest in defense counsel's representation of a capital defendant even though counsel was a part-time assistant prosecutor in a neighboring county. Like Mr. Stone, the Counsel in *Beaver* had limited duties and had no working relationship with any of the witnesses at trial . . .

App. 5006-5007.

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

The PCR court committed an error of law, and should be reversed because it is inaccurate in its summation of the facts, and because it is an inaccurate statement of law. Stone labored under an actual conflict of interest throughout his representation of Aleksey due to his status as a part-time solicitor because he **did** simultaneously have a working, professional relationship with

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

the prosecuting entities in this case—specifically SLED and the Department of Public Safety, which oversees the state's highway patrolmen, and his representation of Aleksey constituted an actual conflict of interest under the line of United States Supreme Court precedent existing at the time of this trial -- Wood v. Georgia, 450 U.S. 261 (1981); Cuyler v. Sullivan, 446 U.S. 335 (1980); and Holloway v. Arkansas, 435 U.S. 475 (1978); Glasser v. United States, 315 U.S. 60 (1942). Had Stone observed this Court's holding in Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984), which cited Cuyler v. Sullivan, he would have known his appointment in this case was very problematic. The PCR court should therefore be reversed.

The PCR court further ruled that Aleksey waived any potential conflicts of interest that may have existed. App. 5029-5032. The PCR court was incorrect on this point as well, because Aleksey was never advised of the precise form the conflict would take and so he did not make a knowing and voluntary waiver of the conflict. United States v. Swartz, 975 F.2d 1042, 1049-50 (4th Cir. 1992) The order of dismissal should also be reversed for this reason.

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

At the February 2, 1998 pre-trial hearing, the issue of Stone's employment as a solicitor and his work with the Insurance Reserve Fund was addressed at Aleksey's arraignment:

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

THE COURT: That's a good choice.

MR. STONE: Thank you.

THE COURT: Alright.

App. 5912, ll. 3-12.

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

> MR. STONE: That's best, Your Honor. Your Honor, again I'm doing part-time work in the 14th circuit. Of course I don't have any jurisdiction outside of that. We spoke to Mr. Aleksey about that earlier on the record but if you would, sir, just ask Mr. Aleksey if he would like me to continue on as his counsel knowing that.
>
> THE COURT: Mr. Aleksey, please stand. You have heard the colloquy regarding Mr. Duffie who is the—Duffie Stone or Stone Duffie?
>
> MR. STONE: Duffie Stone.
>
> THE COURT. Duffie Stone. His employment as a part-time solicitor in another circuit not in any way connected with the Orangeburg Circuit. Do you waive or are you comfortable with the fact that he is representing you as a defendant attorney now?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And do you consent to him to continue in his position?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Knowing that he is a part-time solicitor in another circuit.
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: All right, sir.

MR. STONE: Thank you, Your Honor.

App. 2100, ll. 1-25.

On the day Aleksey's capital trial started, on August 24, 1998, the solicitor wanted to place on the record that Aleksey was consenting to Stone's continued representation of him. Stone's employment as a solicitor was addressed:

> THE COURT: Stand up, Mr. Aleksey. You understand that one of your counsel is with the solicitor—is a contract with the solicitor?
>
> MR. STONE: Basically, Your Honor, yes, sir. That's correct, part-time with the 14th Circuit.
>
> THE COURT: Part-time solicitor's office in another circuit. It has nothing to do with the circuit here in Orangeburg. Do you understand that?
>
> DEFENDANT ALEKSEY: Yes, Your Honor.
>
> THE COURT: You fully understand his position as part-time with the Solicitor's office in Beaufort County?
>
> DEFENDANT ALEKSEY: Yes, Your Honor.
>
> THE COURT: You have waived any possible conflict and are agreeing that he shall be your counsel in this case?
>
> DEFENDANT ALEKSEY: Yes, Your Honor.
>
> THE COURT: Is that correct?
>
> DEFENDANT ALEKSEY: (Nods Head.)
>
> THE COURT: You may be seated.

App. 181, ll. 2-23.

For reasons to be discussed below, these limited colloquies did not amount to knowing and intelligently waivers of the conflicts.

Professor John Freeman's Testimony at PCR

Professor John Freeman, an ethics professor at the University of South Carolina School of Law, testified at the post-conviction relief hearing. App. 3858. In his opinion, Stone should not have represented Aleksey during his capital trial due to his status as a part-time solicitor and his employment with the Insurance Reserve Fund. App. 3866, ll. 10-22. Additionally, the purported waivers of conflict were inadequate to apprise Aleksey of the dangers of proceeding with conflicted counsel. App. 3867, ll. 1-24.

Professor Freeman specifically cited South Carolina Bar Ethics Advisory Opinion 77-02 which holds that there is no ethical prohibition against a prosecuting attorney engaging in the private practice of law where permitted by statute, except that the following restrictions must be observed (1) a prosecuting attorney may not defend a criminal case in either federal or state courts. App. 3868, ll. 8-21. In support of this proposition, the opinion cites ABA Formal Opinion 142 and 262. According to Professor Freeman, this opinion has not been reversed. App. 3868, ll. 22-24.

Additionally, Ethics Advisory Opinion 82-26 supports the claim that Stone should not have been representing Aleksey in this matter. The opinion states: "A part-time assistant solicitor who is also employed on a part-time basis by a private law firm may not represent criminal defendants in any courts; however, an associate in the law firm may represent criminal defendants in courts outside the county where the assistant solicitor is employed." App. 3877, ll. 11-17.

Freeman testified:

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

App. 3879, ll. 1-7.

The opinions that Professor Freeman relied on are still good authority in this state. App. 3876, l. 25 – 3877, l. 1.

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

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

App. 388, l. 22 – 3882, l. 3.

Professor Freeman testified that the waivers were unsatisfactory under South Carolina law. App. 3882, l. 6 – 3883, l. 18. Professor Freeman categorically stated that Duffie Stone should not have been representing Aleksey in this capital trial—"I don't think he should have been in this case period. Period." App. 3885, ll. 21-23.

Stone labored under an actual conflict of interest throughout his representation of Aleksey. The Sixth Amendment guarantees the right to counsel unencumbered by conflicts of interest. Mickens v. Taylor, 535 U.S. 162 (2001); Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway v. Arkansas, 435 U.S. 475 (1978). An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's. Fuller v. State, 347 S.C. 630, 557 S.E.2d 664 (2001). A defendant need not demonstrate prejudice if there is an actual conflict of interest. State v. Gregory, 364 S.C. 150, 612 S.E.2d 449 (2005); Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001); Duncan v. State, 281 S.C. 435, 315 S.E.2d 809 (1984) *citing* Cuyler v. Sullivan, 446 U.S. 335, 348-350 (1980).

This Court, in Duncan, set forth the following test to determine when an actual conflict of interest occurs:

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

Duncan at 438, *citing* Zuck v. State of Alabama, 588 F.2d 436, 439 (5th Cir. 1979).

Stone labored under an actual conflict of interest because, as a representative of the State of South Carolina in his capacity as an assistant solicitor, his interests were necessarily adverse to Aleksey, a person being prosecuted by the State of South Carolina. See People v. Rhodes, 12 Cal.3d 180, 183 (1974) (Defendant was tried for forgery and his appointed counsel's responsibilities were limited to violations of municipal ordinances, but "there nevertheless are

considerations of a practical nature which have a potentially debilitating effect on both the quality of the legal assistance rendered by a city attorney to criminal defendants and the ability of a city attorney to properly discharge his prosecutorial responsibilities.") At the time of the state's prosecution of Aleksey, Stone **simultaneously** had a working professional relationship, as an assistant solicitor, with the very same state government agencies that were involved in the prosecution of Aleksey, including SLED and the state highway patrol. It is of no consequence that Stone did not have "any jurisdiction" beyond Beaufort County because he had a professional, working relationship with South Carolina state law enforcement agencies at the time he was representing Aleksey. These relationships did not end at the county line.

Additionally, Stone's representation of the State of South Carolina was significant. As he testified, he carried the same caseload as other assistant solicitors. This is significantly different than the situation in Beaver v. Thompson, 93 F.3d 1186 (4th Cir. 1996), a case on which the PCR court relied, App. 5005, because in that guilty plea case, the putatively conflicted attorney's involvement in prosecuting in his neighboring jurisdiction was "very minimal, some 2-5%, other than brief writing on appeals." Id. at 1191. See, also, n. 6, at 1992 ("When Mr. Elder wanted to take vacation, which might be two weeks of the year, I would cover for him on these two weeks, which might mean I would hold general district court twice, possibly one circuit court situation."). Here, Stone was consistently functioning as a part-time assistant solicitor in a well populated area of the state. At the time of Stone's representation of Aleksey, Stone's time was "split between the Insurance Reserve Fund and the solicitor's office." App. 3401, ll. 17-18. Aleksey was denied his right to counsel "devoted solely to the interests of his client." Von Moltke v. Gillies, 332 U.S. 708, 725 (1948).

Stone testified at the PCR hearing that the court rules required him to take this appointment. App. 3398, l. 23 – 3399, l. 11. However, this was not accurate since the court rule, Rule 608, SCACR, which would have mandated an appointment was enacted on March 4, 1999, more than six months after Aleksey's trial. Only the death penalty statute, S.C. Code Ann. § 16-3-26 (B)(1) (1976) was in effect at the time of Stone's appointment which provided then, and still provides that: "Whenever any person is charged with murder and the death penalty is sought, the court . . . shall appoint two attorneys to defend such person in the trial of the action. One of the attorneys so appointed shall have at least five years experience as a licensed attorney and at least three years experience in the actual trial of felony cases . . . In all cases where no conflict exists, the public defender or member of his staff shall be appointed if qualified. If a conflict exists, the court shall then turn first to the contract public defender attorneys, if qualified, before turning to the Office of Indigent Defense." Id.

The order of dismissal recognizes that the appointments list, Rule 608, SCACR, was not in effect at the time that Stone was appointed to represent Aleksey. App. 5007-5008. Counsel requested an additional hearing to clear up Stone's testimony in this regard, but the PCR judge did not allow the hearing. App. 4856-4862. Stone was not obligated pursuant to any state rule to undertake the capital representation of Aleksey. At the Rule 59(e), SCRCP, hearing, held on May 4, 2010, counsel reiterated the context of Judge William's affidavit, and he reminded the court that Judge Williams (then Deputy Solicitor of Orangeburg County), gave Judge Brown Stone's name, and then Judge Brown telephoned Stone. App. 5256, l. 20 – 5257, l. 9.

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

In addition to his employment as an assistant solicitor, Stone also represented the State of South Carolina as an attorney for the South Carolina Insurance Reserve Fund, an entity created by the South Carolina Budget and Control Board and which insures government entities against various insurance claims.

As an attorney for the Insurance Reserve Fund, Stone represented the Sheriff of Orangeburg County and the Department of Public Safety, including S.C. State Highway troopers. App. 3545, ll. 15-25; app. 3199, l. 13 – 3202, l. 12. Stone also represented the South Carolina Department of Corrections. App. 3179, l. 1-16. In addition, Stone represented SLED. App. 3179, ll. 19-22. Stone testified he believed that he represented the Orangeburg-Calhoun County Detention Center, where Aleksey spent time in pre-trial detention. App. 3180, ll. 1-13. Stone represented a state trooper in a false imprisonment/ police brutality claim in the time just prior to Aleksey's trial. App. 3206, l. 1 – 3207, l. 2.

Stone also testified he represented Willie Bamberg, the director of the Orangeburg- Calhoun County Detention Center. Bamberg is significant because he executed an affidavit in this case on January 16, 1998 concerning Aleksey's purported escape attempt and in which he described Aleksey has a "dangerous individual" and "high escape risk" relative to his transfer to Lee Correctional Facility for safekeeping, App. 6560-61:

> A. That would have either been the director of the detention center or the sheriff depending on breakdown from Orangeburg

> County[2], and I don't know that off the top of my head. But it would have been one or the other of those people. **And I represented, I would have clearly represented both of them**.
>
> Q: Do you think it was possible it could have been Willie Bamberg?
>
> A: It could have been, yes.

App. 3187, l. 21 – 3188, l. 4. (emphasis added).

Stone was unsure whether he was representing Bamberg at the time he was representing Aleksey. App. 3641, ll. 3-10.

In 1998—the year he represented Aleksey—Stone received $67,000 from his work on behalf of the Insurance Reserve Fund. App. 3168, ll. 20-21; app. 5799. In 1999, he received $193,000, and in 2000, he received $133,000. App. 3168, l. 21; app. 5799. At the PCR hearing, Stone testified that he was at the "top level" for the Insurance Reserve Fund with respect to payment, and received $100 an hour based on his experience. App. 3172, ll. 15-16.

While in pretrial detention, Aleksey initiated a number of lawsuits against some of these government entities. On May 18, 1998, Aleksey filed a lawsuit against Michael Moore, Director of the South Carolina Department of Corrections (SCDC). App. 3178, l. 24 – 3179, l. 18. He also filed suit against Lee County Correctional Institute on June 26, 1998. App. 3189, ll. 19-22. On July 9, 1998, he filed another suit against SCDC and Michael Moore. App. 3189, l. 25 – 3190, l. 3. On July 14, 1998, he filed suit against the Medical Department of Lee Correctional Institution and therefore SCDC. App. 3190, ll. 6-8. On July 24, 1998 he filed suit against Benjamin Montgomery,

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[2] The Sheriff of Orangeburg County, James Johnson, also a Stone client, also executed an affidavit alleging that Aleksey was a "dangerous individual" and "high escape risk" on January 16, 1998 in connection with Aleksey's transfer to Lee Correctional. See App. 6562-63.

Warden of Lee Correctional. App. 3191, ll. 5-9. He filed suit against Lee Correctional and specifically Officer Martin, Shield Number 5117. App. 3191, ll. 10-15. He filed another suit on July 29, 1998 against SCDC. App. 3192, ll. 19-22. Finally, he filed suit against Don Stoner, RN, Ms. Johnson, RN and Ms. Montgomery, RN of SCDC. App. 3193, ll. 19-20. See App. 5800-5837.

Aleksey attempted to have Stone pursue his claims on its behalf, but Stone refused. He sent Aleksey a letter which read, in pertinent part:

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

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

Stone also had dealings with Trooper Lynn Stack, a potential witness in this case, in connection with litigation involving another state trooper. App. 3207, ll. 9-18. Neither the state nor defense called Stack at trial even though he was present at the scene when Aleksey was detained after his car crash. App. 3207, ll. 17-24; app. 939, ll. 20-23.

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

> Counsel Stone declared that nothing occurred during the Mr. Aleksey representation that caused him to think or hold back either on cross-examination or the development of evidence during his other practice. . . He felt throughout that his work in the Solicitor's Office and I.R.F. work did not impact his ability to defend Mr. Aleksey.

App. 5012.

> This Court finds that no such actual conflict existed. . . Mr. Stone also performed work for the South Carolina Insurance Reserve Fund, which insures state agencies, including Detention Facilities and the Department of Public Safety. In this capacity, Mr. Stone represented employees of the Orangeburg County Detention Center as well as employees of the South Carolina Department of Public Safety, namely Highway Patrol troopers. It is uncontroverted that Mr. Stone disclosed these matters to Mr. Aleksey and to the Court repeatedly, and it is undisputed that Mr. Aleksey was advised by and examined by the Court three times regarding Mr. Stone's other representations.

App. 5026-27.

Stone labored under an actual conflict of interest during his representation of Aleksey because of his position as an attorney with the State Insurance Reserve Fund. Actual conflicts of interest may arise from counsel's representation of different parties with competing interests. Wood v. Georgia, 450 U.S. 261 (1981); Holloway v. Arkansas, 435 U.S. 475 (1978); Glasser v. United States, 315 U.S. 60 (1942). With respect to his employment as an Insurance Reserve Fund attorney, Stone was conflicted in two ways. First, the interests of the State of South Carolina were adverse to Aleksey for the reasons detailed above -- The State of South Carolina's interests were necessarily adverse to Aleksey's. The Insurance Reserve Fund is a creature of the State Budget and Control Board and is responsible for insuring governmental entities against insurance claims. See S.C. Code Ann. §10-7-130 (1976), S.C. Code Ann. § 1-11-140 (1976) and §15-78-70 (1976).

Additionally, Stone received a *substantial part* of his compensation from the Insurance Reserve Fund, and he had a personal financial stake in continuing to receive appointments from a fund administered by the Attorney General's office. See People v. Meyers, 46 Ill.2d 149, 152 (1970) ("[I]t is difficult, if not impossible, to satisfactorily advise a defendant of the subtle effect

which a conflict of interests may have upon an appointed counsel's representation. In this case, there is no indication that the appointed counsel ever undertook to explain to defendant the subconsciously compromising effect which the contingent fee prospects could conceivably have upon his counsel's efforts.") And see People v. Pendleton, 52 Ill.App.3d 241, 247 (1977) ("The controlling aspect is not whether he personally would ever be assigned to assist in the prosecution of a murder case, but whether he is presently accepting and perhaps seeking future assignments from an office which possesses an interest adverse to defendant's").

Stone's conflict is nowhere more apparent than when he wrote a letter to Aleksey informing him that he would not pursue any legal action against the Department of Corrections on his behalf because of his Insurance Reserve Fund representation. App. 3185, ll. 11-20. Stone's actions, in addition to illustrating the actual conflict, run afoul of established ABA capital guidelines: "[T]hese Guidelines also recognize that capital defense counsel may be required to pursue related litigation on the client's behalf outside the confines of the criminal prosecution itself." Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, p. 3, 31 Hofstra L. Rev. 913 (2003) ("ABA Guidelines"). Given Stone's position on the prison issue, he was clearly unwilling to pursue any possible litigation on Aleksey's behalf if it involved one of his clients with the Insurance Reserve Fund. Aleksey was represented by counsel who was not willing to be placed in an adverse position with respect to his Insurance Reserve Fund clients, which included the Sheriff of Orangeburg County, the Director of the Orangeburg-Calhoun Detention Center, SLED, and the Department of Public Safety.

> A lawyer's duty of absolute loyalty to his client's interests does not end with his retainer. He is enjoined for all time, except as he may be released by law, from disclosing matters revealed to him

> by reason of the confidential relationship. Related to this principle is the rule that where any substantial relationship can be shown between the subject matter of the former representation and that of a subsequent adverse representation, the latter will be prohibited.

T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F.Supp.265, 268 (S.D.N.Y.1953).

Stone was prohibited from attacking the very governmental entities that were involved in Aleksey's prosecution, and he realized it. This amounted to an actual conflict of interest. Moreover, from his letter to Aleksey, it is clear which side Stone's perceived his loyalties had to be bound by—law enforcement, and not Aleksey. App. 3185, ll. 11-20; app. 5838. Stone's loyalty was clearly divided.

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

Aleksey did not knowingly and intelligently waive the conflicts of interest in this case. The entire court colloquies regarding these conflicts are recounted above and do not serve to show that Aleksey had any idea of the ramifications of the present conflicts in this case.

The PCR court found that "the waivers could have been more specific to speculate about potential events which did not occur. However, the waivers were adequate to address what did occur, the potential for divided loyalties." App. 5031.

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

App. 5031.

The PCR court erred for two reasons. First, her finding is error because the conflicts in this case were actual, and not merely potential, because Stone was actively representing these other entities throughout his representation of Aleksey. Also, her finding errs because Aleksey did not receive sufficient information to waive the conflicts of interest. To be valid, a waiver of a conflict of interest must not only be voluntary, it must be done knowingly and intelligently. Thomas v. State, 346 S.C. 140, 144, 551 S.E.2d 254, 256 (2001). See United States v. Swartz, 975 F.2d 1042, 1049-50 (4th Cir. 1992) (waiver not knowing, intelligent, voluntary unless the defendant knows the precise form of conflict of interest that eventually results); Hoffman v. Leeke, 903 F.2d 280, 289 (4th Cir. 1990) (Hoffman's waiver not intelligent "because Hoffman could not waive what he did not know."). The courts indulge every reasonable presumption against waiver of fundamental constitutional rights, and do not presume acquiescence in the loss of fundamental rights. Johnson v. Zerbst, 304 U.S. 458 (1938); Pitts v. North Carolina, 395 F.2d 182, 188 (4th Cir. 1968).

In this case, Aleksey was not informed that Stone's conflict of interest 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. See Karlin v. Wisconsin, 47 Wis.2d 452, 459, 177 N.W.2d 318, 321 (1970) ("[T]he temptation might well arise to not be too hard on a police witness who is against your client today but would be the star witness for your prosecution tomorrow."). See Argument VI, below.

Additionally, Aleksey was not informed that Stone derived a significant portion of his income representing the very government officials that he was attempting to sue while in pretrial detention. He was further not advised that Stone represented Willie Bamberg, the Director of the Orangeburg-Calhoun Detention Center, and a potential state's witness because he executed an

affidavit informing Governor Beasley that Aleksey is a "dangerous individual and is a high escape risk." App. 6557-6565. He was not informed that Stone represented the Sheriff of Orangeburg County who also executed an affidavit attesting to his dangerousness. In other words, Aleksey was not informed that Stone's clients would be essential witnesses for the State with regard to a defense decision to present highly mitigating prison adaptability evidence which ultimately counsel did not present. See Argument V, below. Aleksey was not informed that Stone would have to cross examine his own clients if the defense decided to put forward that evidence.

Aleksey did not receive information regarding the precise form of the conflicts that developed during his case. Wheat v. United States, 486 U.S. 153, 162-63 (1988) ("The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials . . . Nor is it remiss to observe that the willingness of an attorney to obtain such waivers from his clients may bear an inverse relation to the care with which he conveys all the necessary information to them."). And see Mickens at 168 ("The presumption (that conflicts undermine the adversarial process) was justified because joint representation of conflicting interests is inherently suspect, and because counsel's conflicting obligations to multiple defendants 'effectively sea[l] his lips on crucial matters' and make it difficult to measure the precise harm arising from counsel's errors." (quoting Holloway at 489-90)). See, also, State of Utah v. Brown, 853 P.2d 851 (1993) (recognizing the difficulty of offering a concrete showing of prejudice when a prosecutor is appointed to assist in the defense of an accused); Howerton v. Oklahoma, 640 P.2d 566, 568 (1982) (reversing and remanding the case while observing "it is difficult if not impossible to determine whether the defendant's representation was affected by the conflict.").

Additionally, in assessing the sufficiency of the information that was provided to Aleksey on the waiver issue, it is important to note that Aleksey was not from South Carolina, and, therefore, did not have any familiarity with our criminal justice system, and that he spent most of his schooling in special education classes. App. 4311, ll. 3-14. It is also clear that the judge indicated—on two occasions—that Aleksey should not seek to remove Stone as counsel. On the issue of whether Aleksey should have waived these conflicts, the judge should not have inserted his personal opinion that he should waive the conflicts. Quercia v. United States, 289 U.S. 466 (1933). All of these factors militate in favor of finding that Aleksey did not knowingly and intelligently waive the conflicts of interest in this case, assuming that they even could be waived.

This Court recently addressed conflicts of interest in State v. Gregory, 364 S.C. 150, 612 S.E.2d 449 (2005). In Gregory, this Court held that the trial court erred in denying defense counsel's motion to be relieved when counsel represented an assistant solicitor in a divorce action, who was not involved with the trial of the defendant's case (but with whom defense counsel had engaged in plea negotiations) because such relationship amounted to an actual conflict. This Court found the "situation inherently conducive to divided loyalties." Id. 154. This Court cited with approval Zuck v. Alabama 588 F.2d 436 (5th Cir. 1979) in that case, and which found an actual conflict when a law firm retained to represent a defendant in a murder trial also represented the state prosecutor in an unrelated civil trial. Gregory also cited with approval People v. Castro, 657 P.2d 932 (Colo. 1983), which found a defense attorney's representation of a district attorney on criminal charges of overspending his office budget while simultaneously representing a defendant in a criminal charge of murder amounted to a conflict of interest even though the district attorney did not participate in the trial of the case. In each of these cases,

there amounted "situation[s] inherently conducive to divided loyalties." The same is true here-- that Stone, throughout his representation of Aleksey, was in a position inherently conducive to divided loyalties because as an assistant solicitor, and as an attorney with the State Insurance Reserve Fund, Stone owed duties to nearly everyone involved in **both** the prosecution and defense of this capital case. See U.S. v. Levy, 25 F.3d 146, 157 (2nd Cir. 1994) (In a case in which there are myriad conflicts, each cannot be considered in isolation, but rather must be considered together when assessing whether there is a congruence of interests between the lawyer and his client.).

Aleksey was represented by counsel wholly conflicted. Appointed at the urging of the then Deputy Solicitor for the prosecuting county, Stone owed duties to the State of South Carolina, the Sheriff of Orangeburg County, the Director of the Orangeburg—Calhoun Detention Center, the South Carolina Law Enforcement Division, the South Carolina Department of Corrections, and the Department of Public Safety. Critically, he owned duties to these entities **while he represented Aleksey**, a defendant on trial for the murder of a State trooper. By his own admission, Stone was unwilling to take an adverse position with respect to his clients with the Insurance Reserve Fund. It is indisputable that had Aleksey's defense team advanced clearly admissible and highly mitigating prison adaptability evidence, Stone would have been in the position of cross-examining his clients who had attested to Aleksey's future dangerousness. Aleksey was never made aware of that fact, nor was he made aware that Stone had ongoing relationships with the law enforcement entities prosecuting him in this case, including SLED and the Department of Public Safety. Additionally, Aleksey never realized how much of a financial stake Stone had in continuing to receive appointments from the Insurance Reserve Fund. Aleksey was denied his right to conflict free counsel in derogation of the Sixth Amendment, and his conviction and sentence should be reversed and remanded for a new trial.

2.

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

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

However, as will be seen infra, at the PCR hearing James Aiken, the current president of a consulting firm and long time SCDC warden, was qualified as an expert in the areas of prison adaptability and correctional risk assessment. App. 3888, l. 1 – 3892, 1. 17. Aiken testified it was perfectly permissible for inmates to file lawsuits and SCDC would much rather have inmates filing lawsuits than setting fires, fighting, and engaging in other deviant behavior as a result of unfairness or perceived unfairness. App. 3905, ll. 17-24. Aiken also testified that Aleksey could be properly housed and secured in a correctional environment for the remainder of his life and without presenting an undue risk of harm to staff, inmates, or the community. App. 3899, ll. 6-10.

Stone testified that he was unaware of any information that would have shown that Aleksey was particularly adaptable to prison. App. 3636, ll. 17-19. However, this evidence was readily available and trial counsel's failure to investigate Aleksey's adaptability to prison was ineffective

because counsel knew that adaptability was going to be an issue and, had they investigated, they would have realized there was evidence of his Aleksey's adaptability to prison.

The failure to investigate this fertile ground of mitigation was unreasonable, especially since the evidence was available and compelling. Stone testified: "And obviously I knew at some point, or at some point I had a good feeling we would be discussing prison life . . .." App. 3238, ll. 10-12. See State's Notice of Evidence in Aggravation of the Punishment, App. 6554-6556:

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

Counsel, instead, called one witness during the penalty phase of Aleksey's capital trial—Aleksey's mother, Vera Aleksey. See State v. Robinson, 276 S.C. 435, 279 S.E.2d 372 (1981) (noting the comment "I will take judicial notice there is no love like a mother's love. I never had seen a mother did not love their child and I would be bad against one if they didn't love their child" was unnecessary but not prejudicial). Counsel's performance was wholly inadequate and Aleksey was denied his right to have the jury consider an important mitigating aspect of his character.

Counsel was aware that Aleksey, during pre-trial detention at the Orangeburg-Calhoun Detention Center, on January 27, 1998, was charged with attempted escape. On that date, Aleksey ripped a stool out of the floor and used it to break a window out of the cell. App. 1878, l. 7 – 1879, l. 23. The window was "rather small." App. 1877, ll. 12-14. After this incident, Aleksey was sent to safekeeping at Lee Correctional Institution. App. 1881, ll. 1-3.

At trial, the state called Maurice Keitt, a former correctional officer who worked at the Orangeburg-Calhoun Detention Center when this event occurred, to testify about these events and Aleksey's move to safekeeping. On cross-examination, Stone elicited the following information from Keitt:

> Q: In your experience as a correctional officer, when do ya'll send people to safekeeping?
>
> A: Well, when they maybe going to hurt their self or escape or high risk.
>
> Q: Shortly after this incident, Mr. Aleksey was sent up to safekeeping?
>
> A: Yes, sir.

App. 1881, 11. 7-13.

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

Vernetia Dozier, the Deputy Director of the Detention Center, testified during the penalty phase that officials with the detention center signed a warrant against Aleksey for attempted escape. App. 1886, ll. 10-11. Over objection, Dozier was also allowed to testify that inmates have escaped from the Orangeburg County Detention. App. 1888, ll. 11-17. Additionally, she testified there had been other escapes from the Detention Center and "they have gone over the razor wire and cut

through the razor wire." App. 1888, l. 23 – 1889, l. 8. She told the jurors that safekeeping is where they send inmates considered "hard to handle" or "escape risks." App. 1886, ll. 16-17. Recognizing the inflammatory nature of this testimony, at trial the next day, *the solicitor* asked the judge to give a curative instruction to the jury to disregard the evidence concerning a warrant for escape. App. 1931, l. 21 – 1932, l. 12.

> SOLICITOR BAILEY: Judge, of course, the defense did not object at that time, so they waived it.
>
> THE COURT: In fairness they did not. I understand that. In fairness to them though, I will charge the jury that they must disregard that in its entirety. I will tell them there is no warrant out there for escape.

App. 1933, ll. 7-14.

The judge informed the jury that Aleksey was not charged with escape. App. 1936, ll. 13-15. There was, however, actually a warrant for escape in existence at the time of trial that was later *nol prossed* by the state in 1999. App. 4271.

Counsel was so concerned about this purported attempted escape incident that they secured an affidavit from Willie Bamberg (a possible concurrent client of trial counsel's as well) that strongly appeared to contradict his safekeeping affidavit that Aleksey was a dangerous man who could not be housed or controlled in the county jail. The affidavit described the small window in Aleksey's cell and stated that transgression was his only infraction while at the Orangeburg County Jail. App. 4266. Bamberg was not called as a witness at trial to explain his seemingly contradictory affidavits. App. 5080. Counsel had to know this was a potential issue in this case.

Under these circumstances, it is indefensible that trial counsel did not conduct an investigation on this issue of Aleksey's adaptability to prison. Remarkably, at PCR, Stone testified

that he did not believe that Aleksey's purported escape attempt "became an issue at all." App. 3238, ll. 14-15. Yet, Solicitor Bailey, in his closing argument, talked to the jurors about Aleksey being a safekeeper, argued that there was no evidence Aleksey could adapt to prison, and said Aleksey would have nothing to lose being violent in prison if the jury gave him life imprisonment instead of death:

> [T]hink about this. If a man gets life without parole and he does something else short of murder, if he injures another inmate in prison, if he injures a guard, if he assaults a visitor to that facility, what are they going to do with him?
>
> They are going to say, 'We will give you another ten years on top of your life without parole.' There would be no controls over it. A life sentence without parole sentence is giving him a blank check to do in that prison system [anything] short of another homicide, and they can't give him one more day.
>
> If he decides he doesn't want to follow the rules, if he doesn't want to do any of the prison work, what are they going to do? Give him more time on top of life without parole? Think about that when you decide what sentence he ought to get. . .

App. 2116, l. 20 – 2117, l. 11.

> [A]s I said before, when you think of life without parole as an alternative for the death penalty, look at how he has adapted to jail. *Look at the only evidence of his adaptability to jail, that broken window and this broken piece of furniture and his trip to safekeeping . . . If the defense attorneys get up here and show y'all a picture of the inside of the Orangeburg jail cell where he broke that window remember that is the Orangeburg jail.*
>
> There has been no evidence that that has any bearing with the lifestyle he would undergo if he is sent to the general population in the Department of Corrections.

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

There was not anything the defense could do to counter Solicitor Bailey's powerful closing argument about Aleksey's future dangerousness because the defense failed to produce evidence that Aleksey could adapt to prison. See Rompilla v. Beard, 545 U.S. 374 (2005) (Defense counsel's failure to examine the file on defendant's prior conviction for rape and assault at sentencing phase of capital murder trial fell below the level of reasonable performance, as required for ineffective assistance of counsel; counsel knew that the prosecution intended to seek the death penalty by proving defendant had a significant history of felony convictions indicating the use or threat of violence, an aggravator under state law, and, further, knew that the prosecution would attempt to establish his history of proving defendant's prior conviction for rape and assault, and would emphasize his violent character by introducing a transcript of the rape victim's testimony given in the earlier trial).

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

Aiken testified that, had he been called to testify at Aleksey's trial, he would have opined that Aleksey could be properly housed and secured in a correctional environment for the remainder of his life and without presenting an undue risk of harm to staff, inmates, or the community. App. 3899, ll. 6-10. He further testified that he has had inmates like him before and has managed those people very well. App. 3899, ll. 15-17. Aiken did not see anything that would lead him to believe Aleksey would pose a threat to others. App. 3900, ll. 6-9. Aiken testified he considered Aleksey at

the "lowest level in relationship to his conduct at that facility." App. 3904; ll. 12-13. Additionally, as stated above, Aleksey's availing himself of legal remedies, by filing numerous lawsuits, was further evidence of his adaptability:

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

App. 3905, ll. 17-24.

Aiken further reviewed some documentation regarding Aleksey's incarceration post-trial. App. 3907, ll. 5-8. There is nothing in those materials that would have affected the opinion he would have given at trial had he been called to testify. App. 3907, ll. 9-13. Aiken testified that the "probability is very miniscule" that Aleksey would have violent confrontations with other inmates or prison guards. App. 3919, l. 18.

It was relevant that Aiken's testimony at trial would have been from a disinterested party, and not the self-serving testimony of family members or friends. See Havard v. State, 988 So.2d. 322 (Miss. 2008).

All mitigating evidence should be presented unless "there are strong strategic reasons to forego some portion of such evidence." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.86(A) p. 25 (1989). The ABA Guidelines also provide that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigation evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." Id. 11.4.1(C), p. 93 (1989). The Supreme Court held in *Strickland* that "a court must

indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound legal strategy." 466 U.S. at 689. Before counsel can make a valid strategic decision, however, counsel must fulfill the "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691.

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

Aiken definitely testified at the PCR hearing that, had he been called to testify during Aleksey's trial, he would have opined that Aleksey could be properly housed and secured in a correctional environment for the remainder of his life and without presenting an undue risk of harm to staff, inmates, or the community. App. 3899, ll. 6-10. See also, Bond v. Beard, 539 F.3d 256, 289 (3rd Cir. 2008) ("Strategy is the result of planning informed by investigation, not guesswork."). See Nance v. Ozmint, 367 S.C. 547, 557 n. 8, 626 S.E.2d 878, 883 n. 8 (2006) (noting holding in Wiggins and concluding defense counsel in capital murder case should have, among other things, investigated and presented evidence of defendant's adaptability to confinement in presented mitigating social history evidence outlining the defendant's troubled childhood and mental illness and prison adaptability evidence).

The PCR court incorrectly accepted Stone's statement that adaptability evidence could "backfire" where he failed to investigate, and based upon Solicitor's Bailey contention that the testimony of James Aiken would have allowed him to "develop a description of prison life in the general prison population—cable TV, recreational activities, and amenities compared with the decedent's death." App. 4110, l. 8 – 4111, l. 1; app. 5083-5085. This Court's ruling and admonitions that prison conditions evidence was not admissible in State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005) and State v. Burkhart, 371 S.C. 482, 648 S.E.2d 458 (2007) were not made out of whole cloth. They were firmly anchored in this Court holding—fourteen years before the trial in this case in State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984)—wherein this Court strongly held, and instructed the bench and bar that the horrors of execution in the electric chair, and the conditions behind the prison walls were both impermissible matters to be placed before the sentencing jury.

Should the state argue that the defense offering prison adaptability mitigation evidence under Skipper v. South Carolina, 476 U.S. 1 (1986) allows the state to introduce former Solicitor Bailey's "prison as a small town with a restaurant" evidence, Aleksey would only respond that that ship sailed long ago in State v. Plath, and the state's attempts to argue otherwise can only be viewed now as, respectfully, obstinate.

The death penalty may not constitutionally be applied without "consideration of the character and record of the individual offender and the circumstances of the particular offense." Woodson v. North Carolina, 428 U.S. 280 (1976). The Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant

proffers as a basis for a sentence less than death. Lockett v. Ohio, 438 U.S. 586, 604; Eddings v. Oklahoma, 455 U.S. 104 (1982).

Prison adaptability evidence is clearly mitigating evidence. Skipper v. South Carolina, 476 U.S. 1, 5 (1986) ("[E]vidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating."); Simmons v. South Carolina, 512 U.S. 154, 162 (1994) ("[A] defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system."). This Court has recognized the importance of this kind of mitigation evidence. Nance v. Ozmint, 367 S.C. 547, 556, 626 S.E.2d 878, 882-883 (2006). ("For the reasons set forth below, we presume Petitioner was prejudiced . . . Fifth, defense counsel presented no adaptability evidence at the sentencing hearing.").

Trial counsel rendered ineffective assistance of counsel when they did not undertake to investigate Aleksey's adaptability to prison and then present that evidence, and when evidence of his adaptability was readily available. See Hall v. Washington, 106 F.3d 742 (7th Cir. 1997) ("In the context of a capital sentencing hearing, it is particularly important that counsel not be allowed to shirk her responsibility. Thus, while we defer to legitimate, strategic decision making, `[f]rom the perspective of strategic competence, we hold that defense counsel must make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury and to focus the attention of the jury on any mitigating factors.'" (quoting Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989)).

Trial counsel had a duty to investigate this issue because it was a reasonable decision to have done so. Wiggins v. Smith, 539 U.S. at 521-522 (2003) ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations

unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgment (quoting Williams v. Taylor, 529 U.S. 690-91)).

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

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

Additionally, Aleksey was denied his right to conflict-free counsel because, had defense counsel presented this evidence, Stone would have been in an adversarial position relative to the state's witnesses-- his former clients through the Insurance Reserve Fund, Willie Bamberg and James Johnson who both signed affidavits attesting to Aleksey's dangerousness and who were responsible for Aleksey's transfer to Lee Correctional for safekeeping. See Ferri v. Ackerman, 444 U.S. 193, 204 (1979) (stating that an indispensable element of the effective performance of [defense counsel's] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation) cited with approval in *Nance* at 558)). Aleksey was denied his right to conflict-free counsel in derogation of his rights under the Sixth amendment. See Mickens v. Taylor, *supra,* Cuyler v. Sullivan, *supra*, Holloway v. Arkansas, *supra,* State v. Gregory, *supra.*

3.

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 *voir dire* the jury panel.

Trial counsel rendered ineffective assistance of counsel when they forfeited Aleksey's right to *voir dire* the jury panel on their views of the death penalty or their ability to give effect to mitigation evidence the defense intended to offer on his behalf.

The Sixth and Fourteenth Amendments of the United States Constitution guarantee a capital defendant the right to a fair trial before a panel of impartial and indifferent jurors. Morgan v. Illinois, 504 U.S. 719, 728 (1992); Ross v. Oklahoma, 487 U.S. 81, 85 (1988); Duncan v. Louisiana, 391 U.S. 145, 147-158 (1968); Turner v. Louisiana, 379 U.S. 466, 471-473 (1965); Irwin v. Dowd, 366 U.S. 717, 722-723 (1961). This Court has repeatedly held that a capital defendant is entitled to a trial before a panel of jurors whose ability to properly interpret and apply the law will not be affected by their personal opinions about the death penalty. See State v. George, 323 S.C. 496, 501, 476 S.E.2d 903, 907 (1996); State v. Davis, 309 S.C. 326, 335, 422 S.E.2d 133, 140 (1990). Aleksey also had the statutory right to have his attorneys *voir dire* his potential capital jurors. S.C. Code Ann. §16-3-20(D) and (E). See State v. Atkins, 393 S.C. 214, 360 S.E.2d 302 (1987)[3] (error for the trial court to disqualify a juror before the defense has had the opportunity to *voir dire* the juror).

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[3] Overruled on others grounds in State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

Defense counsel motioned before trial to preclude the state from asking any questions regarding the death penalty. App. 177, l. 21 – 178, l. 19. The trial court judge overruled that motion finding "[o]ur cases are abundant and replete with the fact that you and the solicitor are entitled to ask those questions." App. 178, ll. 20-23. The court and counsel then conducted limited *voir dire* of the jurors, and defense counsel failed to question the jurors as to their beliefs regarding the death penalty or their ability to give effect to relevant mitigation. The state, however, ensured that the jurors would be able to render a death decision, sign their names to a death verdict form, and announce their decisions in open court. [Narone Franklin, App. 230; Jason Cote, App. 240; Sandra McWaters, App. 275; Duane Green, App. 313; Tyrone Gilliard, App. 345; Elaine Whetstone, App. 354; Norris Gibson, App. 401; Deborah Sanford, App. 422; Bonnie Ziegler, App. 428; Gigi Hayes, App. 451; Kaye Bonnette, App. 483; Kedrain Pelzer, App. 491; Barbara Hanton, App. 549; Malcolm Simpson, App. 558; Emily Pindak, App. 615]. During closing argument, the solicitor reminded the jurors of their "promises" made during *voir dire*:

> Then under oath each of ya'll said in regard to the death penalty that if the case was bad enough, you could bring back the death penalty for the crime of murder with malice aforethought.
>
> And each of ya'll said under that same oath, that same solemn oath, "if I vote for the death penalty after hearing that evidence, if the 11 other jurors vote for the death penalty also, I can sign my name to that verdict form.
>
> Each of ya'll said under that same solemn oath, "If I vote for the death penalty and I sign that verdict form, I can get up here when my name is called out and announce that verdict in front of the defendant and whoever else is out here.
>
> Each of ya'll said, "If the case is bad enough, I can vote for the imposition of the death penalty knowing that penalty will be

> carried out." Ladies and Gentlemen, when ya'll said that, I believed you or you would not be on this jury.

App. 2008, l. 15 – 2009, l. 8.

And,

> Last week when ya'll said under oath, "Yes, I could impose the death penalty if the case is bad enough," you had a mental image in your mind, "Is the case bad enough to warrant the death penalty" . . This is that case and that is that defendant that ya'll had in the back of your minds when ya'll said, "Yes, if the case is bad enough, I can vote for the death penalty."

App. 2011, ll. 2-12.

And,

> Again, each of ya'll raised your hands and you took a solemn oath. You said, "I can sign my name to that death verdict under the proper circumstances."

App. 2035, ll. 19-22.

At the PCR hearing, trial counsel, Stone, testified that he believed asking questions about the death penalty runs the risk of "presupposing the guilt of your client." App. 3567, l. 16. Counsel testified he believed the less he "talked about the death penalty, the better." App. 3567, l. 25 – 3568, l. 1. When counsel was a law clerk, he said he had been struck by the fact that *voir dire* questioning tended to suggest that a defendant was actually guilty of capital murder. App. 3276, l. 7 – 3277, l. 11.

However, counsel *conceded* at the PCR hearing that he believed Aleksey would be found guilty of murder and the case would head into the penalty phase:

> I was obviously trying to sell it to the judge that I didn't think we were going to get there. I don't know that that was actually truthful, but it was the best I could so.

App. 3280, ll. 20-23.

In determining whether trial counsel provided ineffective assistance of counsel, pursuant to the Sixth and Fourteenth Amendments, this Court applies the standards set forth in Strickland v. Washington, 466 U.S. 668 (1984). Under *Strickland,* the defendant "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." Id. at 688.

> Prevailing norms of practice as reflected in the American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides.

Id. at 688-89.

Trial counsel's decision to forfeit Aleksey's right to *voir dire* his capital jurors falls well below professional norms[4]. Trial counsel's reason for forfeiting Aleksey's constitutional and statutory right was unreasonable, especially given the fact that trial counsel expected Aleksey to be found guilty of murder during the guilt phase. The only issue obviously left during the penalty phase was whether Aleksey would be sentenced to death or life imprisonment. Trial counsel,

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[4] See ABA Guideline 10.10.2(B) Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding "death qualification" concerning any potential juror's beliefs about the death penalty. Counsel should be familiar with techniques:

(1) for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the defendant is death-eligible, regardless of the individual circumstances of the case;

(2) for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence; and

(3) for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.

admittedly, knew that these jurors would be asked to impose the penalty in this case. In these circumstances then, it makes no sense for counsel to decline an opportunity to explore these jurors' impartiality before they were seated on the jury. See Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008) ("[C]ounsel should have been aware that the defense accomplice theory was not that strong and that mitigation evidence was the only means of influencing the jury to recommend a life sentence.").

The PCR court found:

> [T]hat the record reveals that the strategic decision to forgo the questioning was the product of an informed decision. Further, where the jurors were qualified and questioned by the court on their views on the death penalty, prejudice has not been shown.

App. 5052.

> This Court concludes that deficient performance has not been shown. Counsel Stone's concerns about conviction-- proneness of a jury in the nature of questioning was not unreasonable. Further, and as revealed in the review of the voir dire of the other potential jurors, Counsel revised the strategy when jurors indicated a potential for rehabilitation from being a Witherspoon excludable. Importantly, this was not abdication of voir dire by the defense, as the Applicant now suggests, but an informed strategy based upon the responses given by the venireman to the judge and the prosecution to develop the least "conviction-prone" juror and implicitly assert their defense strategy that guilt was still at issue. This Court finds that this was a legitimate trial strategy.

App. 5060.

Trial counsel's failure to conduct any meaningful *voir dire* was unreasonable and prejudicial. *Strickland, supra.* One of counsel's "most essential responsibilities" was to protect Aleksey's "constitutional right to a fair and impartial jury by using *voir dire* to identify and ferret out jurors who are biased against the defense." Miller v. Francis, 269 F.3d 609, 615 (6th Cir. 2001).

There was no legitimate strategic reason for counsels' repeated failure to question the jurors. "The primary purpose of the *voir dire* of jurors is to make possible the empaneling of an impartial jury through questions that permit the intelligent exercise of challenges by counsel." United States v. Glount, 479 F.2d 650, 651 (6th Cir. 1973); *see also* Mu'Min v. Virginia, 500 U.S. 415, 431 (1991) (stating that *voir dire* "serves the dual purpose of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges."). There was no way to determine which jurors were unqualified to serve on Aleksey's jury apart from complete and effective questioning. See Morgan at 735-36 ("A defendant on trial for his life must be permitted on *voir dire* to ascertain whether his prospective jurors function under such misconception. The risk that such jurors may have been empaneled in this case and "infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized.") And see Hughes v. United States, 258 F.3d 453, 459 (6th Cir. 2001) (stating that potential jurors' biased attitudes must often be discovered through "circumstantial evidence" because jurors are reluctant to expressly admit them).

Additionally, the PCR court's finding on this issue conflicts with Morgan which holds that "general issues of fairness and impartiality" and "follow the law" questions do not comport with constitutional mandates regarding *voir dire*:

> As to general questions of fairness and impartiality, such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed. More importantly, however, the belief that death should be imposed *ipso facto* upon conviction of a capital offense reflects directly on that individual's inability to follow the law . . . It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so.

Id. at 735.

Trial counsel rendered ineffective assistance of counsel when they forfeited Aleksey's right to insure the impartiality of the jury panel through *voir dire* questioning. Believing that Aleksey would be found guilty of capital murder – the murder of a police officer while in the line of duty -- counsel cannot provide a legitimate strategic reason for abdicating their role as advocates on the essential issue in capital case. Trial counsel's inchoate belief, that questioning the jury on their thoughts of the death penalty presupposes the guilt of the client, was an unreasonable basis upon which to forfeit Aleksey's constitutional and statutory right to *voir dire* his capital jurors and falls well below professional norms. Counsel's performance was wholly substandard, and Aleksey was denied his right to due process on this critical issue.

The decision to forfeit the questioning was made by Counsel Stone, and acquiesced to by co-counsel Thomas Sims:

> Q: Also there was a decision again which may have been made by Mr. Stone not to specifically ask the questions about what position you would be in with respect to your beliefs about the death penalty; is that also not true?
>
> A: That's true.

App. 3037, ll. 18-23.

By forfeiting Aleksey's constitutional and statutory right to *voir dire* his capital jurors, counsel failed to render effective assistance of counsel "at a critical stage of his trial." See Gomez v. United States, 490 U.S. 858, 873 (1989) (Affirming that jury selection is "a critical stage of the criminal proceeding, during which the defendant has the constitutional right to be present and pointing out that it is "the primary means by which a court may enforce a defendant's right to be

tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability.") See, also, Snyder v. Massachusetts, 291 U.S. 97, 106 (1934), *overruled in part on other grounds sub nom.* Malloy v. Hogan, 378 U.S. 1 (1964) (A defendant's presence at jury selection "bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend" because "it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether." (citing Lewis v. United States, 146 U.S. 370 (1892)). Counsel's forfeiting this constitutional and statutory right effectively abdicated their role as advocates such that they failed to subject the proceedings to adversarial testing. United States v. Cronic, 466 U.S. 648 (1984); Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878 (2006). Indeed, even as the state ensured the death qualification of the jury and then used that to its advantage during closing arguments, counsel had to remain silent on the subject given the lack of *voir dire* to ensure promises of fairness for the defense as well. Instead, counsel was left to argue only that if Officer Lingard were not a law enforcement officer then there would not be any aggravating circumstance and to state that Aleksey's mother, the sole mitigation witness, was also a victim. App. 2041, l. 19 – 2042, l. 23; app. 2047, ll. 6-18. The failure to conduct *voir dire* to ensure the impartiality of the jury panel, or to ensure the ability of the jurors to give effect to relevant mitigation invalidates Aleksey's death sentence.

4.

Trial counsel rendered ineffective assistance of counsel, in derogation of the Sixth Amendment to the United States Constitution, when they interjected an adverse racial component during *voir dire.*

Repeatedly, throughout *voir dire*, trial counsel for Aleksey questioned potential jurors about their beliefs regarding foreign nationals and their right to be protected under the laws of the United States. Bayan Aleksey was born in Manhattan. App. 194, ll. 14-16. Four of these jurors decided his fate—Jason Cote, Norris Gibson, Debra Sanford, and Bonnie Ziegler:

> Q: And let me ask you (Jason Cote). Do you believe that foreign nationals should enjoy the same rights as American citizens? When they are charged with a crime, they have the same rights?
>
> A: A foreign national?
>
> Q: A foreigner, any foreigner. Well, let me put it—just a foreigner.

App. 246, ll. 11-17.

See, also, Norris Gibson at App. 407, ll. 12-14 ("One other question. Do you believe that foreign nationals should be given the same rights as United States citizens?"); Debra Sanford at App. 427, ll. 6-8 ("Do you believe that foreign nationals should receive the same kind of treatment in this country as American citizens?"); and Bonnie Ziegler at App. 434, ll. 23-25 ("And just a couple of other questions. What about foreign nationals, do you believe they should receive the same rights as American citizens?")

Over the state's objection that Aleksey "[i]s not a foreigner, Judge. I've got a birth certificate here. He was born in Manhattan," trial counsel was allowed to question whether

potential jurors "believe a foreign national deserves the same rights as a national." App. 192, ll. 13-16. Counsel argued:

> "His name is Bayan Aleksey. He is a descendent of a Russian and Puerto Rican.[5] Although he may very well not be a foreign national, *he acts like it*, looks like it and sounds like it."

App. 194, ll. 17-20. (emphasis added).

Trial counsel, Stone, testified that he got the idea to ask this question from the federal jury questionnaire. Counsel testified he thinks the question gives a "very good idea of the mentality" of the juror. App. 3565, l. 25 – 3566, l. 1. Counsel also conceded that he realized Aleksey was an American citizen but that he "looked like he potentially was not from this country." App. 3566, ll. 5-7. Counsel, Sims, testified that he agreed with this strategy. App. 3036, l. 12 – 3037, l. 17.

The PCR court found such irrelevant and prejudicial questioning reasonable in order to develop and understand, presumably, more general biases on the part of the jurors.

> At the PCR hearing, Duffie Stone stated that Mr. Aleksey was not a foreign national. He denied that he ever asked any juror if they had a bias or prejudice against foreign nationals. Rather, he stated he asked them if they believed that they should have the same rights as a natural born citizen. He stated he took it off the "federal jury questionnaire." Mr. Stone stated that he found in his federal court experience that the question was a good indication of the bias the jurors may have. He stated that the question developed an honest response about hidden bias.[6] Mr. Stone stated this was the reason he asks the question.
>
> Mr. Stone reiterated it was a general voir dire question he asked, but also related to Mr. Aleksey since he looked like a

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[5] Aleksey's mother was actually born in Trinidad.

[6] The state did not offer any evidence of Stone's federal trial experience.

> foreigner. Mr. Aleksey (sic) did not recall if he ever placed into the record that he was a U.S. citizen. . . ..
>
> Nevertheless, counsel performed reasonably in questioning the jurors on the rights of foreign nationals to develop an understanding of biases on their part. Contrary to the Applicant's claim, the inquiry was not damning to Mr. Aleksey. It is further uncontradicted that the inquiry is a routine part of the federal jury questionnaire. Counsel Sims concurred that the reason for the inquiry was to ferret out potential jurors who may have a bias, not to create a bias against Mr. Aleksey. Mr. Sims stated he agreed with the strategy. Since the Applicant failed to prove either prejudice or deficient performance, the allegation must be denied.
>
> In conclusion, this Court must find that Counsel's decision was entirely a tactical one. . .

App. 5050-51.

Trial counsel interjected an improper racial component into Aleksey's capital trial when they asked questions during *voir dire* that lacked any factual basis. Aleksey is an American citizen. Defense counsel filed a motion requesting to ask jurors if "felt that a foreign national should be afforded the same rights . . . as a citizen of the United States." App. 6567-6573. This was only one of the three out of the forty-two total questions from the federal questionnaire -- the other two pertained to the jurors primary source of news and bumper stickers on their car -- that defense counsel submitted from questionnaire. See App. 6567-6574. By asking this question to the four seated jury members, counsel created an impression that Aleksey was not a citizen of this country. Even if Aleksey had been from another country, it is not at all certain that he would have been entitled to have the jury questioned about his race or ethnicity. See Rosales-Lopez v. United States, 451 U.S. 182 (1981); Ham v. South Carolina, 409 U.S. 524 (1973). Only when there are . . . substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a

particular case does the trial court's denial of a defendant's request to examine the jurors' ability to deal impartially with the subject amount to unconstitutional abuse of discretion. Rosales-Lopez at 190. The result of counsel's improper questioning is that the jurors were led to believe that Aleksey was not from this country. It interjected an arbitrary factor into Aleksey's trial and he was denied the right to due process. See Vazquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010); Toyota v. Florence, Inc. v. Lynch, 314 S.C. 257, 442 S.E.2d 611 (1994).

The Eighth Amendment requires that capital sentencing be an individualized decision-making process—trial counsel had an obligation to ensure that only true and accurate information be placed before the jury that would decide his punishment. See, Jones v. United States, 527 U.S. 373, 381 (1999) ("In order for a capital sentencing scheme to pass constitutional muster, it must perform a narrowing function with respect to the class of persons eligible for the death penalty and must also ensure that capital sentencing decisions rest upon an individualized inquiry."; Buchanan v. Angelone, 522 U.S. 269, 274-75 (1998) (referring to "The Eight Amendment requirement of individualized sentencing in capital cases"); Zant v. Stephens, 462 U.S. 862, 879 ("What is important [from a constitutional standpoint] at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.") (emphasis in original). Trial counsel's "strategy" to uncover "hidden bias" by suggesting to the jury that their client was not a citizen of this country was unreasonable and fell below professional norms. That is particularly true where defense counsel waived critical *voir dire* to identify "death prone" jurors. Such questioning would only have reinforced the fact that Aleksey was not from this state and not a member of this particular community. Aleksey was prejudiced because four members of his capital jury could with good reason believe that he was foreigner. This injected an arbitrary, irrelevant, and

inflammatory factor into Aleksey's capital trial, and is sufficient to invalidate Aleksey's death sentence.

5.

Trial counsel rendered ineffective assistance of counsel, in derogation of the Sixth Amendment to the United States Constitution, when they did not use a peremptory challenge to remove Juror 144 where that juror was married to a law enforcement officer and personally knew the victim.

Trial counsel rendered ineffective assistance of counsel when they did not use an available strike to remove Gigi Scoville Hayes. Hayes, Juror #144, is an African American female and was the tenth juror seated in Aleksey's trial. App. 823, ll. 16-23. Her husband was employed as a military policeman in the United States Marine Corps. App. 452, ll. 13-17. She also personally knew the victim. App. 3287, l. 7. Counsel rendered ineffective assistance of counsel when they did not use an available strike to remove Ms. Hayes from Aleksey's jury panel because of this close relationship, and her personal connection to the victim.

Trial counsel testified at the PCR hearing that he believed Hayes knew the victim.

> I do not believe we found out information, at least from my memory that she did not know Lingard, I think that was just—I think that's a fact, I think she knew him. But my understanding or my memory is that we talked—
>
> Q: I'm sorry, you still to this day think she knew the victim?
>
> A: I don't know, *I don't recall anything that would indicate she didn't.* I don't know.

App. 3286, l. 23 – 3287, l. 6. (emphasis added).

The notes of Sims reflect that counsel believed Hayes was a "leader." App. 2517, ll. 8-12. Counsel knew that she worked with Sims' children's pediatrician, and counsel believes that he called the doctor to ask about this potential juror. App. 2518, ll. 4-8. Counsel Sims testified he

believes the doctor told him "she would have been a good person." App 2518, ll. 10-14. On his jury notes, Stone noted that she knew the victim, Frankie Lingard. This fact was underlined on his notes. App. 5860. He also had a note to "get rid of" her from the panel. App 3285, l. 11. Stone ultimately decided not to strike Ms. Hayes from the jury panel based on Sims' pediatrician's assessment that she would be a good juror. Trial counsel's failure to remove this juror is sufficient to invalidate Aleksey's death sentence.

Jurors who have close relationships to the crime tried before them are not qualified to serve. "Impartiality is not a technical conception. It is a state of mind." Dennis v. United States, 339 U.S. 162, 172 (1950). When a juror is closely related to the victim of an offense, it raises a significant possibility that the juror will be unable to be impartial. Wainwright v. Witt, 469 U.S. 412, 424 (1985) (the *Witherspoon* standard "does not require that a juror's bias be proved with 'unmistakable clarity'").

This principle has been widely recognized as necessary to protect the rights of defendants. See, United States v. Martin, 749 F.2d 1514, 1517 (11th Cir. 1985) (bank teller who was equivocal about whether she could put aside her experiences should be excluded from a bank robbery trial); Sims v. United States, 405 F.2d 1381, 1384 n.5 (D.C. Cir. 1968) (a taxicab driver should be excluded from a jury in a trial for the murder of a taxicab driver); Williams v. Virginia, 453 S.E.2d 575, 577 (Va. App. Ct. 1995) (prison guard properly excluded from trial for assault of a prison guard).

South Carolina has adopted this principle. A juror may not serve on a jury if "his opinions would prevent or substantially impair the performance of his duties as a juror in accordance with

this oath and instructions." State v. Green, 301 S.C. 347, 352, 392 S.E.2d 157, 159 (1990) (*citing* Witt, 469 U.S. 412).

The PCR judge concluded that counsel "exercised strategic decision-making in deciding not to use peremptory strike on Juror No. 144, as they determined that Juror No. 144 would be a good juror for their panel, based upon Counsel's investigation." App. 5070. This finding ignores the fact that jurors who have close connections to particular crimes or victims are not likely to be impartial. Given counsel's additional deficiency of purposefully avoiding any meaningful questioning concerning the death penalty in order not to "presuppose guilt", counsel continued to render ineffective assistance of counsel by not questioning a juror with such strong connections to the crime and victim about those connections.

Trial counsel rendered ineffective assistance of counsel because, knowing that this juror personally knew the victim and was married to a former military police officer, they failed to meaningfully question her about the effect these relationships would have on her ability to be a fair and impartial juror. The extent of counsel's questioning was as follows:

Q: You understand that this case is about the death of a police officer?

A: Yes, I do.

Q: Would that cause you any problems?

A: No.

Q: You could still sit on this jury and make a determination one way or the other?

A: Yes, I can.

App. 457, ll. 5-12.

Trial counsel's decision to keep the juror on the panel based on the pediatrician's assessment that she is a "good person" falls well below professional norms. This unreasonable decision was compounded by counsel's failure to meaningfully *voir dire* Hayes on the effect these relationships would have on her ability to be a fair and impartial juror. Indeed, counsel failed to question her at all about whether she personally knew the victim.

Even if this Court finds that counsel's decision to completely forfeit Aleksey's right to *voir dire* the panel on the death penalty was reasonable, it is still additionally unreasonable for counsel not to have questioned Hayes about her feelings about an accused cop killer when she was married to a former law enforcement officer, or her personal relationship to the victim. In other words, counsel's decision not to further question this particular juror about these relationships is further proof of counsel's ineffectiveness, and not simply an extension of the no-death penalty questions "strategy" counsel purported to be advancing.

Counsel decided not to strike a particular juror based on a pediatrician's assessment that she would be a good juror, knowing that she personally knew the victim and was married to a former military police officer. This was done without probing these facts to discover any potential bias. Counsel rendered ineffective assistance of counsel by not using a peremptory strike to remove Juror 144. Strickland v. Washington, *supra*; Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

6.

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

Trial counsel rendered ineffective assistance of counsel when they did not advance Aleksey's claim that his second statement was beaten out of him by law enforcement, and when Aleksey consistently maintained that was how his second statement was extracted.

Aleksey was interrogated by two veteran SLED agents, George Darnell and Kenny Mears, on January 2, 1998. App. 2320. Aleksey was in custody at the Orangeburg-Calhoun Detention Center and asked to speak with a SLED agent when he was informed that he had been moved to the infirmary cell from general population because SLED wanted him moved. App. 1405, l. 25 – 1406, l. 6; app. 2171, l. 13 – 2172, l. 24.

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

Aleksey consistently maintained that the agents inflicted physical violence on him to extract the second statement. An article in the Orangeburg Times & Democrat, dated January 6, 1998—5

days after Aleksey's arrest—reflects statements Aleksey made to a reporter with that paper, and he told her: "I was afraid . . . They said if I didn't tell them I did it they would make life hard for me . . . They said, 'If we have to beat it out of you, we'll beat it out of you' . . . They said if I didn't tell them what they wanted to hear I would have to go back to jail and things could happen to me, and I believe that . . . I told them, 'Listen. You want me to tell you I did it? Okay. I did it.'" App. 6023. And See App. 5300.

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

Regarding the decision not to raise this issue, Counsel Sims testified at the PCR hearing:

> If I recall, I believe that we had made the determination that there was no factual basis, we couldn't prove it or anything of that nature. There was no physical evidence that I know of that I can recall. And I think that was based upon a conversation or a collaboration between me and Mr. Stone.

App. 3032, ll. 2-8.

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

> And the reason that that was the first is because my summary of the letters that I received, that was two letters, my comment is "Nothing new except allegations of beating confession out of him,"

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

App. 3292, l. 13 – 3293, l. 15.

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

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

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

> So, number one, I didn't think he was going to throw it out anyway. Number two, is honestly I thought we had a very good angle with the fact that the *Miranda*[7] warning, even the written *Miranda* warning said you can stop talking at any time. And Mr. Aleksey said, and I'll never forget this, "That's all I've got to say."
>
> And that was the angle wanted to hit the hardest because I felt like that was the strongest, the strongest thing that I had. And if Judge Cottingham wasn't going to throw it out for that then he sure wasn't going to throw it out for any other reason.

App. 3308, ll. 4-16.

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[7] Miranda v. Arizona, 384 U.S. 436 (1966).

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

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

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

> Q: So basically you wanted them to draw the inference that something may have happened.
>
> A: Exactly.
>
> Q: Instead of spelling out the allegation?
>
> A: Exactly.

App. 3310, ll. 21-25.

The PCR court ruled:

> [T]he Applicant failed to assert what this "coercion" was either to the trial court or Counsel. Counsel failed to present any

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

App. 5107.

The PCR court should be reversed because Aleksey repeatedly informed counsel he had been beaten and that is why he confessed. This is inexplicable when taken in context with defense counsel pursuing Aleksey's factual innocence as the defense theory, and their "informed decision" not to conduct *voir dire* of the jury on the death penalty. Aleksey was simply ignored by counsel who did not believe him, and by their totally cynical belief that the trial judge would not even consider suppressing the confession based on the evidence Aleksey's confession was beaten out him because SLED thought he had killed a comrade. Stone, as seen, had an on-going professional relationship with SLED by virtue of his position as an assistant solicitor and attorney with the state Insurance Reserve Fund.

Counsel conceded that he recognized the importance of Aleksey's tearful second statement to the State's case. App. 3315, l. 19 – 3316, l. 7. He realized that the jury would have to doubt the truth of that statement for Aleksey to be found not guilty. App. 3315, ll. 16-18. Not only did defense counsel render ineffective assistance of counsel for failing to advance Aleksey's claim when Aleksey consistently maintained the confession was beaten out of him, but, as stated, the failure to raise this claim was baffling in light of counsel's decision not to conduct any *voir dire* because they insisted on maintaining Aleksey's factual innocence. In other words, counsel forfeited

Aleksey's right to *voir dire* the jury panel in order to advance a claim of innocence that they were not willing to pursue at trial.

Aleksey had the right to present a defense on this issue. Chambers v. Mississippi, 410 U.S. 284 (1973); Green v. Georgia, 442 U.S. 95 (1979); Holmes v. South Carolina, 547 U.S. 319 (2006). Counsel rendered ineffective assistance of counsel for failing to raise it. See Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 ("[T]rial counsel should have further investigated and more thoroughly challenged the gunshot residue test." (emphasis added)); United States v. Silva, 554 F.3d 13, 23 (1st Cir. 2009) ("Where an attorney 'fails to raise an important, obvious defense without any imaginable strategic or tactical reason for the omission, his performance falls below the standard of proficient representation that Constitution demands" (quoting Prou v. United States, 199 F.3d 37, 48 (1st Cir. 1999)).

Moreover, Aleksey's protestations were credible in light of the lengthy gap between the two statements, and Aleksey's obvious distress when the tape recorder resumed taping. There was clearly a factual basis to pursue this defense. *Cf.* People v. D'Arcy, 48 Cal. 4th 257, 287, 226 P.3d 949, 969 (2010) ("[D]efense counsel's traditional authority to control the conduct of the case does not include the authority to withhold the presentation of any defense at the guilt phase if the defendant openly and unequivocally expresses his desire to present a defense and if there exists some credible evidence to support it . . . Counsel, however, is not obligated to present a defense that lacks "credible evidentiary support." (internal citations omitted)). There was no downside to trial counsel's raising Aleksey's defense either at the pretrial or trial level. See Lamb v. Coursey, 238 Or.App. 647, 243 P.3d 130 (2010) ("[I]f a lawyer exercising reasonable professional skill would have recognized the existence of an issue and would have concluded under the circumstances that

the benefits of raising it out-weighed the risks of doing so, failing to raise the issue may constitute inadequate assistance."). Again, trial counsel's decision not to pursue this issue is all the more alarming since they waived their statutory right to *voir dire* jurors on juror attitudes about the death penalty because they were pursuing a not guilty verdict.

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

> This same potentially debilitating conflict of interest is operative when, as in the case at bench, the only police officers called as witnesses are members of neighboring law enforcement agencies. Neighboring and overlapping law enforcement agencies have close working relationships, and resentment engendered by a city attorney within the membership of such agencies could have an adverse effect on the relationship of the city attorney with members of his local police department. In addition, as a public prosecutor a city attorney is granted courtesies and assistance by the police departments and prosecuting authorities of the county and other municipalities. It is possible that a vigorous and determined representation of a criminal defendant might result in the withdrawal or weakening of this helpful cooperation and, therefore, a city attorney might be tempted to temper his advocacy accordingly.

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

Counsel rendered ineffective assistance of counsel in derogation of Aleksey's right to effective assistance of counsel under the Sixth Amendment, and he is entitled to a new trial. Strickland v. Washington, *supra*; Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

7.

Trial counsel rendered ineffective assistance of counsel, in derogation of the Sixth Amendment to the United States Constitution, when they did not investigate despite notice that Gloria Vee Perez Blackwell had engaged in substantial criminal activity during the days before Trooper Lingard was murdered and where her activities provided a motive for her to be the shooter.

Trial counsel rendered ineffective assistance of counsel when they failed to investigate Glory Vee Perez's substantial criminal conduct in the days before Frankie Lingard was killed. Had they conducted a proper investigation into the matters their client advised them of, they would have used that information to inform the jury that Perez's criminal conduct provided a motive for her to shoot Lingard. Counsel's performance was wholly substandard, and Aleksey was prejudiced by their performance.

Trial counsel's defense was that Glory Vee shot Officer Lingard, as Stone explained:

> That's right. Gloryvee Perez Blackwell I believe was her full name. But from the perspective of a defense in this case it had to be one or the other. And obviously from my standpoint I had to do everything I could to point the direction that she was the driver. . . .
>
> [G]loryvee Perez Blackwell had a prior possession I believe of cocaine conviction, she had drug exposure, she had a child which—from a divorced husband which gave her motive from the standpoint of not wanting to lose the child.

App. 3265, ll. 5- 3266, l. 9.

In the days leading up to the events of New Year's Eve 1997, Perez stole checks from her employer, a dentist, Dr. Byung Kee Bang in Trenton, New Jersey. App. 5599. These checks were stolen around December 23, 1997. App. 5599; App. 5607. Perez stole and forged checks in the amount of $24,000 and $4,532 and they were made out to her personally. App. 5599; Applicant's

App. 2889, l. 17 – 2891, l. 19. With the deposit receipt in hand, Perez and Aleksey then attempted to purchase a car at Burlington Lincoln in Burlington, New Jersey. On December 23, Perez filled out various documents to purchase a car. App. 5605. The car was not released to them on that date, but a promissory note was signed to pay $20,000 in funds or cash by December 26, 1997.

On December 24, 1997, Perez and Aleksey went to Summit Bank. They met the branch manager and attempted to withdraw cash in the sum of approximately $20,000. The branch manager called Union Bank and was informed that the check was not good and that there was a problem involving her employer. App. 2891, ll. 20-25. The branch manager then planned a sting operation with the Philadelphia Police Department. App. 2892, ll. 1-20. When the branch manager called Perez at her job to let her in that the funds were available, Dr. Bang's office manager told him the Trenton police were there and that Perez was not there. App. 2892, ll. 6-10. Perez never showed up at Summit Bank. App. 2892, ll. 16-20. The bank decided not to prosecute the case because it would cost too much, but Perez was not informed of that decision. App. 2892, l. 25 – 2893, l. 5.

The office manager from Dr. Bang's office contacted Trenton Police Department on December 24, 1997 after she determined the checks were stolen. An incident report was made and the police responded to Dr. Bang's office. App. 5599; App. 5607. A Trenton policeman reported he spoke with Perez and that she denied taking any checks, but informed him she believed Aleksey stole them. App. 5607. The office manager opined it would be impossible for anyone to take the checks without Perez's knowledge. App. 5599.

On December 27, 1997, Keith Randall of Burlington Lincoln contacted Dr. Bang's office concerning Perez's commitment to purchase the car. He learned that she had been fired at that time,

and was informed that there were warrants issued for her arrest for the theft of the checks. App. 5605.

Trial counsel did not investigate any of the above so they were unable to use this evidence to argue that Perez had as much motive to shoot the officer as Aleksey. Defense counsel knew about Perez's involvement in the theft of the checks because Aleksey informed them. He wrote counsel letters, and Stone recognized the need to contact the doctor's office to find out about the stolen checks. App. 3335, l. 18 – 3336, l. 5. At the PCR hearing, Stone confirmed he received letters informing him about these stolen checks. App. 3346, l. 16 – 3349, l. 11.; App. 5601. Stone admitted that Aleksey informed him that Perez had stolen some checks and that there was "a good amount of information that they were involved in criminal activity together." App. 3584, ll. 5-7. Also, revealed to the defense, was Aleksey's statement to SLED agent Mears which described the situation. App. 6118.

Additionally, an employee of Sims's, Danneta, documented a phone call with Aleksey which again informed them that Perez opened an account with $26,000 from the stolen checks. App. 2742, l. 19 – 2746, l. 3; app. 3339; app. 5449.

Counsel Sims testified at the PCR hearing that he would have liked to have had these documents (provided by defense counsel at the PCR hearing) because "it would have shown that she definitely had some problems, or that she was out doing all kinds of things, also." App. 2851, ll. 18-20. Sims further testified that he could not presently recall if he knew about her activities prior to trial, but stated that this information about her other activity "could have been helpful." App. 3098, ll. 1-6.

Stone acknowledged that the focus of the defense case was to suggest that Perez was the shooter. App. 3327, ll. 9-14. Indeed, their justification for not conducting any *voir dire* was to advance their theory that Perez was the shooter. Stone testified that if they could have developed that Perez had a "significant motive" in the case, it would have been helpful for the defense. App. 3332, l. 20 – 3333, l. 4.

Counsel also testified that he was unsure whether his investigator, Tommy Davis, who he sent "up north" prior to trial for purposes of investigating this case, ever went to Dr. Bang's office. App. 3368, ll. 4-5. Stone did not recall ever talking to Dr. Bang's office, either. App. 3368, ll. 10-12.

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

App. 3375, ll. 2-10.

The PCR court ruled:

> There is no issue that these events could have been used in the cross examination of Ms. Perez-Blackwell. The reason for omission of this inquiry, however, is not reflected in the record, primarily because the Counsel who examined the witness did not have any specific recollection of the matter and necessarily did not illustrate this reasoning to the Court.
>
> Assuming *arguendo* that such failure was deficient, Sixth Amendment prejudice has not been shown because there is no reasonable probability the result would have been different had the jury been presented with information about the check theft from Dr. Bang in the attempt to acquire monies and the car as a result.

App. 5123-5124 (emphasis in order).

During closing argument during the guilt phase, the solicitor argued:

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

App. 1691, ll. 7-9; app. 1692, ll. 15-22. (emphasis added).

That clearly was not true, and trial counsel rendered ineffective assistance of counsel because they had an obligation to conduct a reasonable investigation into their defense that Gloria Vee Perez Blackwell was the shooter, and that she had a motive not to be apprehended. Aleksey had the right to present this defense. Chambers v. Mississippi, 410 U.S. 284 (1973); Green v. Georgia, 442 U.S. 95 (1979); Holmes v. South Carolina, 547 U.S. 319 (2006). Counsel's failure to investigate to give effect to this defense fell well below professional norms. See Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 ("[T]rial counsel should have further investigated and more thoroughly challenged the gunshot residue test." (emphasis added)); United States v. Silva, 554 F.3d 13, 23 (1st Cir. 2009) ("Where an attorney 'fails to raise an important, obvious defense without any imaginable strategic or tactical reason for the omission, his performance falls below the standard of proficient representation that Constitution demands.'" (quoting Prou v. United States, 199 F.3d 37, 48 (1st Cir. 1999)).

While the scope of a reasonable investigation depends upon a number of issues, "at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) (quoting Troedel v. Wainwright, 667 F.Supp. 1456, 1461 (S.D.Fla. 1986), aff'd, 828

F.2d 670 (11th Cir. 1987)); Lounds v. State, 380 S.C. 454, 670 S.E. 2d 646 (2008). "Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of the guilt and penalty." American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003). Competent counsel is expected to undertake a "thorough investigation of law and facts relevant to plausible options" for the defense. Strickland v. Washington, 466 U.S. 668, 690 (1984). While this does not require counsel to investigate every conceivable defense, any limitation on counsel's investigation must be supported by a "reasonable professional judgment[]." Id. at 691.

Counsel performance fell well below professional norms because they failed to pursue the factual basis of the defense they advanced at trial, and they failed to do so when counsel expressly informed them of these events. See Couch v. Booker, 632 F.3d 241, 246 (6th Cir. 2011) ("That the report was readily accessible makes[defense counsel's] reluctance to ask for it all the more inexcusable and all the more removed from a "reasonable professional judgment[]."") See, also, Bigelow v. Haviland, 576 F.3d 284, 287-88 (6th Cir. 2009) (It is particularly unreasonable to fail to track down readily available and likely useful evidence that the client himself asks his counsel to obtain). And see Rompilla v. Beard, 545 U.S. 374 (2005) (Defense counsel's failure to examine the file on defendant's prior conviction for rape and assault at sentencing phase of capital murder trial fell below the level of reasonable performance, as required for ineffective assistance of counsel; counsel knew that the prosecution intended to seek the death penalty by proving defendant had a significant history of felony convictions indicating the use or threat of violence, an aggravator under state law, and, further, knew that the prosecution would attempt to establish his history of proving

defendant's prior conviction for rape and assault, and would emphasize his violent character by introducing a transcript of the rape victim's testimony given in the earlier trial).

Counsel's defense during the guilt phase of trial was that Perez shot Officer Lingard. Again, they were so committed to this version of events that they forfeited Aleksey's right to *voir dire* the jury. Advancing that theory then, counsel rendered ineffective assistance of counsel when they did not pursue a line of investigation that would have supported that theory, and when Aleksey repeatedly informed them that these events occurred.

Counsel absolutely knew that the state's theory of the case was that Aleksey was the shooter. It defied logic that they would not pursue a line of investigation tending to prove that someone else, Gloria Vee Perez Blackwell shot Trooper Lingard. See State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978) (evidence of prior crimes is admissible to prove defendant's motive for committing murder). Counsel did not provide a strategic reason for their failure to do so as the order of dismissal concedes. *Cf.* Lounds at 462, 650 ("We have recognized that when counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed an effective assistance of counsel."); Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Trial counsel rendered ineffective assistance of counsel, and Aleksey was prejudiced by their substandard performance. Strickland v. Washington, *supra*; Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

Finally, and in fairness to the trial judge, he may well have admitted this plethora of impeachment evidence against Gloria Vee Perez Blackwell had he known of the sheer magnitude of her prior crimes of dishonesty which also provided a motive for her to avoid apprehension rather

than just the bare bones impeachment evidence presented to him by trial counsel. See Rule 803, SCRE.

8.

Trial counsel rendered ineffective assistance of counsel, in derogation of the Sixth Amendment to the United States Constitution, when they failed to hire a social worker to present the substantial mitigation evidence collected by trial counsel's retained mitigation investigator

Trial counsel rendered ineffective assistance of counsel when they did not call a social worker during the penalty phase of Aleksey's capital trial to testify to the voluminous materials collected by their hired mitigation specialist, Toni Bovee, when that information was highly mitigating. Trial counsel's decision not to present this readily available mitigating evidence, which also would have supported charging the jury with additional statutory mitigators, was unreasonable and sufficient to invalidate Aleksey's death sentence.

Trial counsel presented one witness during the penalty phase of Aleksey's trial, his mother, Vera Aleksey. Her testimony comprises a mere 24 pages of trial transcript. App. 1977-2001

Penalty Phase Testimony

Vera Aleksey testified before the jury that she had a difficult pregnancy and there were complications with Bayan's birth. App. 1980, ll. 4-6. She testified that Bayan was born with a heart murmur, App. 1980, ll. 10-13, and that Bayan's father, her husband, had a drinking problem. App. 1980, ll. 20-25. Her husband hit her "a couple of times." App. 1981, ll. 14-15. When Bayan

was three years old, they moved out. App. 1981, ll. 116-19. Bayan's father was "not a constant figure," and that she tried to keep her son away from her husband. App. 1982, ll. 6-18.

Bayan was a late talker and did not like her to leave him at day care. App. 1983, ll. 1-11. She sent him to parochial school because he could not "cope" with the public school children. App. 1983, l. 20. He was very timid and very afraid of other kids. App. 1983, ll. 21-22. The principal of the parochial school informed Vera that her son needed counseling. He did not do well with his homework. During this time, Vera did not receive any financial support from Bayan's father. App. 1984, ll. 16-19.

Bayan would leave school and return home during the day. App. 1985, ll. 5-8. She also believed her son had a learning disability. App. 1986, ll. 17-18. Bayan had to repeat the fifth grade. App. 1987, l. 6. At that point she tried to get counseling for him. App. 1987, ll. 13-14. She had him evaluated, and was informed that parochial school was not a proper place for him because it involved "too much discipline." App. 1987, ll. 14-16. The Diagnostic Center where Bayan was receiving counseling recommended that he be placed in special education classes. Ultimately he was placed in these classes. App. 1987, ll. 16-20.

Her son did not have any friends. App. 1987, ll. 23-24.

Bayan attended counseling at Queens Child Guidance Center for three years. App. 1989, ll. 2-5. His counselor recommended he go into a hospital for treatment. App. 1987, ll. 16-17. His counselor had him admitted at Adolescent Pavilion, located in the hospital, where he was enrolled for a year. App. 1989, ll. 17-20. He stayed on campus between three to four months, enclosed in a unit. App. 1990. ll. 2-3. After that, he was allowed to spend weekends at home, but had to spend the week at the hospital. App. 1990, ll. 4-6. Eventually he attended school on the grounds at the

hospital. App. 1990, ll. 6-8. He was not able to continue attending that school because Vera could not afford it. App. 1990, ll. 9-18. Doctors recommended a residential treatment center for him, but Vera did not send him. App. 1991, ll. 7-15. For a short time after that he went back into therapy and attended group counseling. App. 1992, ll. 6-7. They could not provide any more services for him and so he stopped attending. App. 1992, ll. 8-13.

Bayan did not make good grades in junior high school. App. 1993, ll. 3-6. He had emotional problems and could not cope with schoolwork. App. 1993, ll. 8-9. He did not receive any more counseling, and he did not finish high school. App. 1993, ll. 8-24.

Bayan attempted suicide when he was fourteen-years-old by overdosing on medication. App. 1994, ll. 15-19. He was sent to Roosevelt Hospital. App. 1995, ll. 17-19. When he dropped out of high school, Bayan attempted to kill himself again and was taken to Creedmore Hospital by Vera. App. 1994, ll. 20-25. After his stay at Creedmore, he attended an outpatient clinic. App. 1996, ll. 7-8.

Bayan's psychologist informed her that her son was angry and resentful towards his father. App. 1997, ll. 17-19. She also testified that Bayan observed his father drunk on numerous occasions and that he witnessed physical violence against her by his father. App. 1997, ll. 10-22.

Even when Bayan was older, he would call his mother and ask her if he could come back home. App. 1999, ll. 16-22. Vera stated that there were problems when he would come home because they would have many arguments. App. 1999, l. 24 – 2000, l. 5. According to Vera's testimony, Bayan's father "got sick" and died. App. 2000, ll. 8-11. She testified that Bayan was the only person she had in life. App. 2001, ll. 1-7. Her testimony concluded, the defense rested its entire mitigation case. App. 2002, ll. 2-3.

PCR testimony

Janet Vogelsang testified by way of deposition on January 30, 2004 in connection with this matter. She is a licensed independent social worker and has a master's degree in social work from the University of South Carolina. App. 4280, ll. 4-13. She is licensed by the State of South Carolina's Board of Examiners in Social Work and is Board certified by the American Board of Examiners in Clinical Social Work. App. 4280, ll. 10-13. She was asked to perform a professional review of the records in this case. App. 4285, ll. 6-9. On September 16, 2002, she met with Aleksey at Lieber Correctional and interviewed him. App. 4285, l. 10 – 4286, l. 1.

In addition to meeting with Aleksey, Vogelsang also reviewed records from the Long Island Jewish Hospital in New York, including a number of evaluations and a social history. App. 4287, ll. 16-20. She reviewed the records from Hillside Medical. App. 4287, l. 23 – 4288, l. 1. Additionally, she also read the materials collected by trial counsel's mitigation specialist, Toni Bovee. App. 4288, ll. 2-4. She reviewed an interview Bovee conducted with David Rosengard, a social worker who treated Aleksey in New York. App. 4288, ll. 4-10. She reviewed an Adrien Block Middle School record, a Bleeker Middle School record, records from Creedmore Psychiatric Hospital, which also included records from a program called the Clearview Community Program. App. 4288, ll. 16-21. She read a statement from Queens Guidance Center which included a statement from Mr. Rosengard, a statement from New York Probation, the New York Board of Education, a child abuse report, and other certificates. App. 4289, ll. 1-7.

She further studied another Board of Education special education sheet that the stated the Board's findings and goals for him. App. 4289, ll. 13-18. In addition, she assessed a school psychological evaluation, and an individual evaluation plan (IEP) from April 1984. App. 4289, ll.

19-25. She reviewed a number of his IEP's. App. 4289, l. 25. She read a record from the John Brown School (a high school), a PINS ("Persons in Need of Supervision") report by Dr. Slowes, a psychologist from the Board of Education, as well as a record from Aleksey's attempts to apply to a vocational rehabilitation program. App. 4290, ll. 3-12. Vogelsang also reviewed an interview conducted by Bovee of Vera Aleksey, and she reviewed an additional interview with David Rosengard. App. 4291, l. 7- 4292, l. 1.

Had Vogelsang, or another licensed social worker who reviewed the materials, been called by defense counsel to testify, additional highly mitigating evidence relative to his mental state at the time of the crime would have been placed before the jury for its consideration in determining Aleksey's penalty.

Post-conviction relief

A social worker would have informed the jury that Aleksey's mother locked him out of the house when he was ten years old, app. 4332, ll. 22-25, and would also have testified that his maternal grandmother died in childbirth. App. 4296, ll. 7-8. The jury would have known that Aleksey's maternal uncle was mentally ill and beaten to death in New York City, and that he was involved in alcohol and drugs. App. 4296, ll. 11-14.

The jury also did not hear that Aleksey's paternal grandfather was rarely at home and was an alcoholic. App. 4302, ll. 9-11. When Vera met Aleksey's father, Ronald Aleksey, he was then going through a separation and divorce. App. 4303, ll. 3-13. Ronald held many jobs before he went on disability, but he received a degree from Pace College and was a systems analyst with IBM. App. 4303, ll. 15-21. It appears that Aleksey's father spent time in Belluvue Hospital, and that he

had psychotic episodes, paranoia, ulcers, pancreatic disease, cirrhosis of the liver and depression. App. 4303, l. 1- 4304 l. 18.

Additionally, Vera was kept in the hospital for three weeks following Aleksey's birth, and that she was very depressed for either several months according to an interview, or for 3 years according to some of the other social history records. App. 4305, ll. 6-17. The jury did not hear that Aleksey was afraid of his father, and afraid that his father would come back to the apartment and harm his mother after they were separated. App. 4306, ll. 1-3. Vera made Ronald leave the home because of his treatment of Bayan, suggesting that Bayan was also a target of his father's physical abuse. App. 4306, ll. 9-12. Aleksey's father questioned his paternity because he did not believe Bayan was very intelligent. App. 4306, ll. 13-19.

Aleksey was extremely afraid of other children and did not want to go out of the house. App. 4307, ll. 23-25. Aleksey had problems with concentration, and he needed more than the usual amount of adult attention and adult contact. App. 4308, ll. 19-21. He was described as both immature and sexually immature, and wanted to sleep with his mother far beyond the time when other boys would prefer to have their own room and privacy. App. 4308, ll. 22-25.

One time, Ronald took Bayan from the apartment and Vera had to obtain an order of protection to get him back. App. 4309, ll. 10-12. Additionally it appears that an abuse report was made, further suggesting that Bayan's father physically abused him. App. 4309, ll. 12-15.

Aleksey and his mother had a symbiotic relationship and there were great difficulties in getting Aleksey to be removed from his mother. App. 4310, ll. 1-14.

Aleksey has auditory discrimination and visual motor integration problems. App. 4315, l. 18 – 4316, l. 23. Vogelsang testified that auditory discrimination problems can cause a child great

difficulties, and that it "completely messes up the way you deal with the world, the way you deal with other people." App. 4327, ll. 11-13.

> Some children only get pieces of sentences, so it's almost like this scramble of information incoming; and so you got to guess, or as children will do, pretend that you know what's going on when you really don't, and, of course, this can cause some problems with behavior.

App. 4327, ll. 17-23.

There were indications that Aleksey was also abused outside of the family setting. Apparently there was a male figure who used to have a "boys' club" which Aleksey attended this at man's home. App. 4318, ll. 1-9. Aleksey informed his mother that the man wanted to shower with him and that when he would wake up from a nap, the man would be touching him. App. 4318, ll. 10-13. Vera did not take any legal action against his man, but made up an excuse and never allowed Aleksey to go to his home again. App. 4318, ll. 17-19.

Aleksey slept with a knife under his pillow, and evaluations showed he had pervasive fears of being harmed. App. 4320, ll. 16-18. Aleksey was diagnosed with specific learning disorders. App. 4321, ll. 18-19.

When Aleksey had visitation with his father, he would cry and beg to come home. App. 4322, ll. 17-22. Significantly, the jury did not hear that Aleksey was diagnosed with an impulse control problem and simply could not control his behavior. App. 4323, ll. 10-13. Aleksey actually repeated the fifth grade twice. App. 4325, l. 25 – 4326, l. 1. The evaluations revealed that Aleksey's mother was very inconsistent with her parenting, and that she failed to follow professional recommendations. App. 4326, ll. 3-9.

Importantly, Aleksey was also diagnosed with borderline personality disorder. App. 4326, l. 24 – 4327, 1. 2. Later psychiatric records from Creedmore and Clearview were consistent in their perceptions of him as having impulse control problems, adjustment disorders and borderline personality disorder. App. 4328, ll. 9-14.

Aleksey's father actually died of smoke inhalation due to a fire in his apartment and not due to "sickness." App. 4330, ll. 20-24.

Counsel also failed to call David Rosengard, who was present and willing to testify at Aleksey's trial. App. 3631, ll. 19-22. Rosengard has a master's degree in Social Work and treated Aleksey at the Queens Guidance center. Counsel testified they decided not to have him testify because Rosengard would have blamed Vera for Aleksey's problems:

> When we set down with that meeting, the doctor said, well, the reason he was like that is because you never-- you never told him how to act in you never forced him, you never disciplined him.
>
> That kind of hurt our theory because we had Mrs. Aleksey that we were going to put up on the stand to say all these things about Bayan and at the same time about their relationship and had we put him up on the stand he would have blamed everything on her. That would not have gone well I don't think with our theory of mitigation.

App. 3631, l. 7-17.

A social worker would have provided a very different picture of Bayan Aleksey to the jurors. Even after family members have testified about events in the defendant's life, expert evidence is generally required to explain "how these events had affected [the defendant] psychologically." Ross v. State, 954 So. 2d 968, 1006 (Miss. 2007). This is because "the average juror is not able, without expert assistance, to understand the effect [the defendant's] troubled youth, emotional instability, and mental problems might have had on his culpability for the murder."

Turpin v. Lipham, 510 S.E.2d 32,42 (Ga. 1998). Utilizing the services of a social worker, trial counsel could have conveyed additional relevant mitigating evidence to the jury. The jury would have realized, for example, that Aleksey had been an unhealthy relationship with his mother, and that he did not receive the kind of help he needed considering that he was a special needs child. App. 4332, ll. 4-13. They would have seen that there was an imbalance in the relationship he had with his mother, and that she did not provide a consistent adult/child relationship. App. 4333, ll. 3-9. It appeared that his mother sabotaged her child's therapy and school work by not following recommendations—failing to show up for various meetings, or participating in things that might have been helpful to her son. App. 4333, ll. 13-18. There are indications of trauma in the records due to his being hypervigilant and overreactive. App. 4334, ll. 17-19. In short, the jury was never provided evidence of a highly mitigating character because trial counsel unreasonably decided not to offer a social worker who could have testified to these facts that were developed by their retained mitigation investigator. See Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) (evidence of a difficult family history and of emotional disturbance typically introduced by defendants in mitigation). American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 11.8.3(F)(1) (1989) (in preparing for the sentencing phase, the trial counsel should consider investigating [w]itnesses familiar with and evidence relating to the client's life and development, from birth to the time of sentencing, who would be favorable to the client); 11.8.6(B)(5) (stating that trial counsel should consider presenting in mitigation: Family, and social history . . .). Council v. State, 380 S.C. 159, 173- 174, 670 S.E.2d 356, 364 (2008) ("Even though funding was available, trial counsel chose not to hire a social history investigator. Instead, he relied on his law partner and private investigator to collect potentially relevant information. However,

neither of these individuals was qualified, in terms of social work experience, to evaluate the information to assess Respondent's background."). Significant omissions from the jury's consideration were the diagnoses of a personality disorder and his impulsivity issues. Aleksey had a significant psychiatric history that the jury never considered during their deliberations and which was mitigating evidence.

Counsel's failure to put up this evidence resulted in Aleksey's not having the jury charged on additional statutory mitigators to which he was entitled:

> MR. STONE: We have chosen as a matter of strategy to not pursue the statutory mitigating circumstances concerning any type of mental disorder. We feel the best thing at this point is to go with what I think is pretty clear mitigating evidence, as opposed to what I do not think is clear.
>
> THE COURT: There is really no testimony on that issue.
>
> MR. STONE: That's right.
>
> THE COURT: But this record is going to reflect that you specifically ask that I not even consider that as a mitigating circumstance.
>
> MR. STONE: Yes, Sir.

App. 2004, ll. 1-13.

Had counsel called a social worker to testify to the information they developed, Aleksey would have been entitled to have the jury consider additional statutory mitigating factors. He would have been entitled to additional mitigators: (2) the murder was committed while the defendant was under the influence of mental or emotional disturbance, (6) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was

substantially impaired, and (7) the age or mentality of the defendant at the time of the crime. S.C.Code Ann. 16-3-20 (1976).

The failure to place this evidence into the record when it was readily available renders Aleksey's capital sentence constitutionally infirm.

> "It is beyond dispute that in a capital case "'the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence less than death." " Eddings v. Oklahoma (quoting Lockett v. Ohio) .. . . The corollary that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence' " is equally "well established." (quoting Eddings) (citations omitted). . . .
>
> "Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute . . . by the sentencing court . . or by an evidentiary ruling. The same must be true with respect to a single juror's holdout vote against finding the presence of a mitigating circumstance." (internal citations omitted).

Mills v. Maryland, 486 U.S. 367, 374 (1988).

The jury in Aleksey's case was precluded from considering important mitigating evidence due to counsel's ineffective assistance of counsel when they failed to present readily available evidence that would have supported charging the jury with additional statutory mitigators. Had counsel simply called a social worker to place this information into evidence, Aleksey would have been entitled to have the jury consider, as a mitigating factor, these aspects of his character.

During the penalty phase closing argument, counsel chose to argue that the jury should not impose the death penalty because Gloryvee was not arrested and charged in connection with these events. App. 2041, ll. 12-18. He argued that it was not fair to impose the death penalty based on

the law enforcement aggravator since there are "many, many, many families in South Carolina who are hurting because their loved ones have been murdered" and their murderers are not eligible for the death penalty. App. 2041, l. 24 – 2042, l. 11. Counsel argued they should not impose the death penalty because it is not clear that Aleksey actually committed the crime. App. 2043. Counsel argued that he did not have any prior convictions. App. 2046, ll. 4-6. Counsel then argued to the jury not to impose the death penalty because Aleksey has a mother who cares about him. App. 2047, ll. 6-18. He also argued that he did not try to hurt anyone when he broke the seat and broke the window during pretrial detention (the purported escape attempt). App. 2048, ll. 4-15. At no time did counsel argue during closing argument that Aleksey's social history or well documented mental condition was relevant to their decision whether or not to impose the death penalty. After having developed significant amounts of mitigating evidence, counsel appears not to have recognized its mitigating character and made the decision not to present the evidence or argue it to the jury. Such conduct falls well below professional norms, and Aleksey was prejudiced by his counsel's substandard performance.

The PCR judge found that trial counsel's decision not to retain a social worker was reasonable. App. 5094. The PCR judge found that the decision to hire a social worker appears to be second guessing by current counsel rather than identification of a defect in trial counsel's strategy. App. 5095.

Trial counsel rendered ineffective assistance of counsel when they did not put forward information that was gathered by their mitigation specialist and when that information was highly mitigating and readily available. Evidence about a defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are

attributable to a disadvantaged background . . . may be less culpable. Penry v. Lynaugh, 492 U.S. 302, 319 (1989). And see Lockett v. Ohio, 438 U.S. 586 (1978) (stating that mitigating evidence includes any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death). Here, the jury heard very little of the available evidence because trial counsel, in possession of this mitigation evidence, decided not to present it. The Constitution requires that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor." Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). Counsel presented a superficial and ineffective mitigation case.

In assessing the prejudice to Aleksey because of counsel's substandard performance, it is relevant that the jury found him guilty of one aggravator—the death of a law enforcement officer. See Porter v. McCollum, 130 S.Ct 447, 454 (2009) ("On the other side of the ledger, the weight of evidence in aggravation is not as substantial as the sentencing judge thought . . . Had the judge and jury been able to place Porter's life history "on the mitigating side of the scale," and appropriately reduced the ballast on the aggravating side of the scale, there is clearly a reasonable probability that the advisory jury-- and the sentencing judge—"would have struck a different balance" quoting *Wiggins* at 537).

See State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000) ("We note the evaluation of the consequences of an error in the sentencing phase of a capital trial are more difficult because of the discretion that is given to the sentencing jury. A capital jury can recommend a life sentence for any reason or no reason at all.").

9.

This Court should impose a *per se* prohibition against part-time solicitors representing capital defendants

This Court should follow the course taken by other jurisdictions who have addressed this issue and impose a *per se* prohibition against part-time prosecutors representing indigent defendants. Other jurisdictions have acknowledged not only the high potential for conflicting loyalties, and the difficulty of proving prejudice in individual cases, but also the injurious effect the practice has on the public's perception of the integrity of the judicial system, and the unfairness of subjecting these prosecutors to charges that they failed in their attempts to effectively represent their clients.

In Goodson v. Peyton, 351 F.2d 905 (4th Cir. 1965), the Court expressed great concern with prosecutors from another circuit or county representing a criminal defendant and strongly urged that a *per se* bar on the practice. The Court noted the inherent conflict in representing criminal defendants and the State:

> The Commonwealth's Attorney is an official of the Commonwealth. His compensation is paid in part directly by the Commonwealth. While his duties of active prosecution are limited largely or entirely to the county in which he lives, that is only a part of his larger responsibility of enforcement of the laws of the Commonwealth. Each such attorney may have assigned to him a particular row to hoe, but the overall objective is the cultivation of the entire field. That objective can be achieved only if each Commonwealth's Attorney tends his row and does not obstruct his fellows. Loyal and effective representation of a person charged with crime in a state court may require defense counsel to question the

> constitutionality of state laws or to seek restrictive interpretations of them. He may find it necessary to attack the practices and conduct of law enforcement officials, including those of the prosecutors. In either of these events, if defense counsel is a Commonwealth's Attorney, he may find himself required as defense counsel to attack laws, interpretations, practices and conduct which, as Commonwealth's attorney, he is bound to defend and uphold in an adjoining county. He may be loath to a position as defense counsel which he would find embarrassing as Commonwealth's Attorney.

Id. at 908.

The Court also acknowledged that a defendant may be reluctant to confide in a lawyer who he knows to be a state prosecutor. Id. at 908-909. In the final analysis, the Court found in Goodson found it was an uncomplicated escape charge and that the defendant was not entitled to habeas relief since the record showed his attorney did an excellent job representing him. Nonetheless, the Court suggested a *per se* bar on state prosecutors representing criminal defendants was in order. State prosecutors were allowed to represent criminal defendants in other counties because they were paid less with the understanding that they could represent criminal defendants in other counties.

Unlike Goodson the present case is clearly not an uncomplicated one and it presents this Court with an example of why a *per se* bar should be imposed on part time solicitors representing criminal defendants in capital cases. Defense counsel in this case defended their decision not to seek a change of venue by stating that they thought they would have as sympathetic as possible jury in Orangeburg County despite the widespread publicity.

Further, the Supreme Court of California, in People v. Rhodes, 12 Cal.3d 180 (1974) recognized that the vigorous representation by a prosecutor of a defendant raised the possibility that that action could weaken the relationship between the prosecutor and law-enforcement agencies and thereby risk the successful prosecution of criminals. The Supreme Court of California also

recognized that prosecutors representing criminal defendants gave rise to the appearance of impropriety. Id. at 186. For this reason California erected a *per se* prohibition on this activity finding "the nature and duties of a public prosecutor are inherently incompatible with the obligations of the criminal defense counsel." Id. at 187.

In Howerton v. Oklahoma, 640 P.2d 566 (1982), the Court of Criminal Appeals held that the public had a right to absolute confidence in the integrity and impartiality of the administration of justice. This, and the Court's recognition that it is difficult to show prejudice in these cases, led the Court to impose a categorical bar. Id. at 568.

The Supreme Court of Utah, in State v. Brown, 853 P.2d 851 (1993), has also held that the "vital interests" of the criminal justice system were jeopardized when a city prosecutor is appointed to assist in the defense of an accused. Pursuant to that Court's inherent supervisory power over the courts, and their express power to govern the practice of law, the Court imposed a *per se* prohibition against this conduct. Id. at 856-57.

The appellate Court of Illinois, First District, Fifth Division, in People v. Pendleton, 52 Ill.App.3d 241, 367 N.E.2d 196 (1977) recognized the burden on prosecutors that this practice created because it exposed him unnecessarily to later charges that his representation was not completely faithful. Id. at 246,766. The Court also recognizes the difficulty of pointing to specific actions caused by potentially adverse interests. Id. at 247, 766. In Pendleton, the Court held that conflicted counsel's appointment *per se* denied the defendant the right to effective assistance of counsel. Id. at 248-49, 767.

Vermont, too, recognizes a *per se* bar:

> Such practice is unethical and improper and it should not be followed or countenanced. The state attorney in this state is not merely a prosecuting officer in the county in which he is elected. He is also an officer of the state, in the general matter of the enforcement of the criminal law. It is the state, and not the county that pays his salary and official expenses.

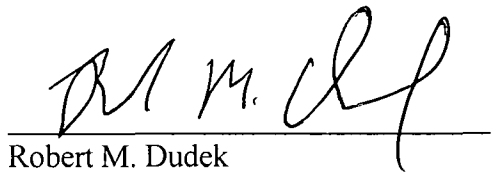
In re Wakefield, 107 Vt. 180, 177 A.319 (1935).

Capital cases are by their very nature complicated, and part-time prosecutors are subjected to the adverse scrutiny of law enforcement and their fellow prosecutors when they take ethically required action and attack law enforcement practices. Respectfully, this Court should also adopt a categorical prohibition, and declare that part-time solicitors cannot engage in the representation of indigent criminal defendants in capital cases.

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing on these issues.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

Elizabeth Franklin-Best
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ATTORNEYS FOR PETITIONER

This 22nd day of June, 2011.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Orangeburg County

Diane Schafer Goodstein, Circuit Court Judge

BAYAN ALEKSEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Donald J. Zelenka, Esquire this 22nd day of June, 2011.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day
of June, 2011.

(L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.