

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Orangeburg County
Diane Schafer Goodstein, Circuit Court Judge

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S.C. Supreme Court

BAYAN ALEKSEY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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IX. There is no current requirement that the Court within this case impose a *per se* prohibition against part-time solicitors representing capital defendants, such a step should be taken only after appropriate rule-making hearings consistent with the governing of the practice of law. 98

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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?

ARGUMENT WHY CERTIORARI SHOULD BE DENIED

- I. **The appointment of Duffie Stone as counsel for Bayan Aleksey was not a conflict of interest under South Carolina. The PCR Court's conclusion that the fact that Stone was a part-time prosecutor in another circuit and maintained a private practice where he was assigned cases from the Insurance Reserve Fund representing public employees and agencies did not establish an actual conflict of interest which adversely affected his representation. In addition, the Petitioner waived any potential conflict of interest. The PCR Court's conclusions are a reasonable application of the Sixth Amendment and supported by probative evidence.**
[Petition, p. 8-29] [Order, App.p. 4990-5032].

Duffie Stone's Alleged Conflict of Interest.

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

The Sixth Amendment right to effective assistance of counsel under the federal Constitution includes the right to representation free from any conflict of interest that impairs counsel's efforts on behalf of his or her client. Mickens v. Taylor, 535 U.S. 162, 166, 171, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002). "Under the federal Constitution, when counsel suffers from an actual conflict of interest, prejudice is presumed. Cuyler v. Sullivan, 446 U.S. 335, 349, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) This presumption arises, however, 'only if the defendant demonstrates that counsel "actively represented

conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." ' Strickland v. Washington, 466 U.S. 668, 692, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) , citing Cuyler v. Sullivan, supra, at p. 348, 100 S.Ct. 1708.) An actual conflict of interest means 'a conflict that affected counsel's performance--as opposed to a mere theoretical division of loyalties.' Mickens v. Taylor To prove an actual conflict of interest, a defendant "must show that [his] interests diverge[d] with respect to a material factual or legal issue or to a course of action." Gilbert v. Moore, 134 F.3d 642, 652 (4th Cir.1998) (*en banc*).As the Supreme Court recognized in Mickens, "not all attorney conflicts present comparable differences," which results in a varying (and lesser) degree of scrutiny in criminal matters where, for example, "counsel previously represented another defendant in another substantially related matter, even where the trial court is aware of the prior representation." *Id.* at 1245-46. The Mickens Court further noted that "[B]reach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel." *Id.*

1. How the issue was presented at trial.

According to the records of the Clerk of Court for Orangeburg County, an Order of Appointment for Michael Deangelo (aka Bayan Aleksey) was entered on January 6, 1998 for Thomas Sims and Duffie Stone. The Orders of Appointment were entered by Judge Thomas L. Hughston.¹ [Note Judge Hughston - not Judge Brown - appointed Duffie Stone as Aleksey's counsel. Counsel Stone and

¹In his Petition, he incorrectly asserts that Judge Brown appointed Stone based upon a conversation with then Deputy Solicitor James Williams. Petition, p. 8. Judge Goodstein rejected that showing in the order denying the motion to alter because **Judge Hughston** appointed counsel in the case, not Judge Brown. Order, p. 5322-24. Stone's testified consistent with the Order that he was contacted by Judge Hughston who actually signed the order of appointment in this case. PCR Tr. 718, 823. Stone noted he had his first telephone contact with Sims on January 6. PCR Tr. 718. He stated that Judge Hughston (not Judge Brown) told him that there was a death penalty case in Orangeburg, but Stone advised him that he had not heard about it. Stone testified that he did not know where or why he was appointed, that he recognized that it was different now because you chose the county, but then the only way his name would have been on a list was because he handled cases in that county. PCR Tr. 823-24.

Sims initially appeared before Judge Hughston at a bond hearing on January 8, 1998. App.p. 5917-5924.

[Stone was misidentified in the record as Mr. Duffie].

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

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

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

A. [Aleksey] Yes.

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

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

Mr. Stone: That's best, your Honor. Your Honor, again I am doing part-time work in the 14th Circuit. Of course I don't have any jurisdiction outside of that. We spoke to Mr. Aleksey about that earlier on the record but if would, sir, just ask Mr. Aleksey if he would like me to continue on as his counsel knowing that.

The Court: Mr. Aleksey, please stand. You have heard the colloquy regarding Mr. Duffie who is the- -Duffie Stone or Stone Duffie?

Mr. Stone: Duffie Stone.

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

The Defendant: Yes, sir.

The Court: And you do consent to him to continue in this position?

The Defendant: Yes, sir.

The Court: Knowing that he is a part-time solicitor in another circuit.

The Defendant: Yes, sir.

The Court: All right, sir.

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

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

The Court: Stand up, Mr. Aleksey. You understand that one of your counsel is with the solicitor- -is a contract with the solicitor?

Mr. Stone: Basically, your Honor, yes, sir. That's correct, part-time with the 14th Circuit.

The Court: Part-time solicitor's office in another circuit. It has nothing to do with this circuit here in Orangeburg. Do you understand that?

Defendant Aleksey: Yes, your Honor.

The Court: You fully understood his position as part-time with the solicitor's office in Beaufort County?

Defendant Aleksey: Yes, your Honor.

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

Defendant Aleksey: Yes, your Honor.

The Court: Is that correct?

Defendant Aleksey: (Nods head) (Indicating affirmative response).

The Court: You may be seated.

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

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

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

ANALYSIS

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

Part-Time Prosecutor.

First, the PCR court correctly concluded that mere fact that Stone was a part-time prosecutor in Beaufort in the Fourteenth Circuit is not an actual conflict of interest concerning representation of Aleksey or any other defendant outside of the 14th Circuit. App.p. 5006-07. The South Carolina Supreme Court has not specifically addressed this issue upon a survey of its caselaw. The PCR Court's reliance on Beaver v. Thompson, 93 F.3d 1186 (4th Cir. 1996) was well founded. The Fourth Circuit held that there was no conflict of interest in defense counsel's representation of a capital defendant even though counsel was a part-time assistant prosecutor in a neighboring county. Like Stone, the counsel in Beaver had limited duties and had no working relationship with any of the particular witnesses at trial. Similar holdings have been made by various state courts. Hendricks v. State, 331 Mont. 47, 57, 128 P.3d 1017, 1025 (2006) (per se ineffective assistance on basis of alleged conflict of interest did not result

from counsel's simultaneous service as appointed defense counsel and as city attorney in overlapping jurisdiction); State v. Gleason, 277 Kan. 624, 88 P.3d 218 (2004)(simultaneously serving as defense counsel in one county and prosecutor in adjoining county does not create an actual conflict of interest); Ex Parte Borden, 769 So.2d 950 (Ala. 2000)(fact that defense counsel worked as special prosecutor in different county did not establish conflict of interest); People v. Herr, 658 N.E.2d 1032 (N.Y. 1995)(same); People v. Burchette, 628 N.E.2d 1014 (Ill. App. 1 Dist. 1993)(same); Bumgardner v. State, 401 N.W.2d 211 (Iowa App. 1986)(no conflict between burglary defense representation and part-time city prosecutor in same county where no city officers were involved in arrest, counsel dealt solely with municipal charges and counsel had no contact with county law enforcement agencies involved in arrest. Compare; State v. White, 114 S.W.3d 469 (Tenn.2003) (holding that counsel's dual roles as prosecutor and defense counsel in the same county were inherently antagonistic and, thus, created an actual conflict of interest that required disqualification); People v. Washington, 461 N.E.2d 393 (Ill. 1984)(conflict where some of city police officers involved in arrest); State v. Clark, 735 A.2d 1 (N.J. Sup. App. 1999)(conflict for part-time municipal prosecutor to defend in same county since it created an appearance of impropriety).² See also, See Ohio Sup.Ct. Bd. of Commrs. on Grievances and Discipline Op. No.2008-6 (recognizing that municipal attorneys who prosecute violations of municipal ordinances may represent criminal defendants when no municipal police officers from the municipality are involved, the criminal charges are based on alleged violations of state law, and the municipality is not directly or indirectly involved or affected). See also Greg Sarno, Annotation, *Circumstances giving rise to prejudicial conflict of interests between criminal defendant and defense counsel-state cases*, 18

² See S.C. Code Ann. § 1-7-370 declares: "The solicitors may defend any persons brought to trial before any criminal courts of this State when their duty shall not require them to prosecute such persons and their assistance shall not be required against such persons by the Governor or Attorney General."

ALR4th 360 (1982), §18(a), 18(b), 19(a), 19(b).

As the PCR Court found, Stone was appointed in compliance with S.C. Code Ann. Section 16-3-26. Stone had previously been appointed in another capital case in Lexington County. “This statute provides the exclusive procedure for appointment of counsel for indigent defendants charged with capital murder.” Subsequent to Stone’s appointment in July 2000, SCACR Rule 608 was implemented to regulate the appointment of attorneys for indigent defendants. Rule 608 expressly includes among active members who are exempt from appointment: (B) Members who are solicitors or assistant solicitors for a judicial circuit if those members do not engage in the private practice of law...” (emphasis added). Counsel Stone would not be exempt from appointment, as a matter of statutory law, based upon his assignment as a part-time prosecutor due to his then active civil private practice.³

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

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

Critical is the starting point of Stone’s analysis - did Stone reasonably believe that his part-time

³It was developed that Stone had made in Insurance Reserve Fund assignments \$67,000 in 1998, \$93,000 in 1999 and \$133,000 in 2000. PCR 753-754.

solicitor job in Beaufort or his civil representation of public employees would not adversely affect his ability to defend a criminal defendant, and in particular - Bayan Aleksey.

Stone was unequivocal - he felt then and now - that his representation of Aleksey would not be adversely affected. App.p. 3543-44, PCR 1131-32. The issue then shifts to whether that belief was reasonable. The PCR Court found that Stone's assessment was reasonable.

Initially, from Stone's perspective at the time [and since] it was reasonable. App.p. 5009. He was aware that part-time prosecutors in one county in South Carolina had defended criminal cases outside of that assigned jurisdiction in the past (and since). App.p. 3543-44, PCR 1130-31. Similarly, he was not aware that part-time prosecutors were prohibited from representing criminal defendants, particular outside their jurisdiction. App.p. 3398, PCR 984. Importantly, because of his part-time prosecutor status, he was of the opinion that he was not exempt from court appointments (and had been appointed in prior occasions including a lexington death penalty case and subsequently in Orangeburg in the Patti Syphrette case). App.p. 3397, 3543-44, PCR 985, 1131-32. Concerning review of South Carolina Bar Ethics Advisory opinions, Stone stated that he had received material from S.C. Bar Ethics, but did not recall specifically that he had looked at the items provided at the hearing. App.p. 3396, PCR 982.

The PCR court concluded that the chronology of the Ethics Advisory Opinions support Stone's actions based upon what a reasonable person would have found. App.p. 5010. Assuming arguendo, a reasonable lawyer would have searched those opinions, it is uncontradicted that the most recent ethics advisory opinion Stone would have found in 1997-98 addressing, in any manner, his issue is S.C. Bar Ethics Advisory Opinion 94-31 from January 1995, which stated: "additionally, we have held absent some prohibition of law, there is no *per se* ethical violation against an assistant solicitor representing criminal defendants in another circuit. Advisory Opinion 91-19." Assuming a reasonable lawyer/person

would continue to search and review Ethics Advisory 91-19, the Court concluded that he would have found the following language:

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

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

The Petitioner seeks to discount any potential reliance upon this advisory because it was not directed at the assistant prosecutor situation, but initially addressing a public defender scenario and therefore it was dicta. The PCR court found that it cannot be seriously questioned, however that a reasonable reading of the advisory would reveal that following:

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

The Applicant, relying upon Prof. Freeman's comments, suggests this was dicta in the 1991 opinion and

should have been ignored in favor of the 1982 opinion. Respondents respectfully submit that a reasonable lawyer, particular subject to a court appointment with knowledge of the part-time prosecutor employment, would not have ignored or discounted these comments and assumed the advice was correct that the 1990 Rule change removed any *per se* prohibition to representation of criminal defendants. The PCR Court concurred in Respondents assessment. App.p. 5011. Further, current Rule 608 supports that assessment where it only restrict those prosecutors not engaged a private practice.

Aleksey has still not pointed out precedent in a South Carolina court that Aleksey could have relied upon to address this inquiry other than Professor Freeman's opinion and interpretation of the so-called dicta of the ethics advisory. Assuming a reasonable lawyer would have then surveyed potentially binding precedent from the Supreme Court or United States Court of Appeals for the Fourth Circuit, the PCR Court found that he would have found the decision in Beaver v. Thompson, 93 F.2d 1186 (4th Cir. 1996), which held the fact that a defense counsel in a capital case was a part-time assistant prosecutor in an adjoining county did not establish a *per se* conflict of interest which would disqualify counsel from the representation.

Against this consistent backdrop, the PCR Court found that counsel Stone's impressions that he was not disqualified from his appointment were reasonable and that a reasonable lawyer in 1997 would have shared the same opinion. Assuming that Stone was reasonable in his belief that there was no *per se* conflict, he was reasonable in his belief that his representation of Aleksey would not be adversely affected by his representation as an assistant solicitor. Again, the credible testimony of Stone suggests he revealed undivided loyalty to Aleksey. There has been no showing that the loyalty to Aleksey was impaired when Stone could not consider, recommend or carry out any appropriate course of action on behalf of Aleksey based upon Stone's other duties. Simply put, Aleksey has failed to show in any manner that Stone's professional judgment was materially interfered with in considering alternatives

or foreclosing courses of action that should have been reasonably pursued on behalf of Aleksey.

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

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

Insurance Reserve Fund Representation.

Petitioner also contends that Stone's representation of civil clients pursuant to assignment from the Insurance Reserve Fund created an actual conflict of interest. Particularly, he asserted that prior assignments involving the South Carolina Highway Patrol and Orangeburg County, where the victim was a highway trooper and the matter was investigated by Orangeburg authorities created an actual conflict of interest. The PCR Court rejected the conclusion. App.p. 5012, 5026-5028. There is probative evidence to support the rejections.⁴

⁴ Duffie Stone declared that a large bulk of his private practice had been civil litigation assigned from the Insurance Reserve Fund. App.p. 3140-3144, PCR 725-27. He stated that he had represented state employees, including the Department of Corrections and highway patrolmen. App.p. 3144, PCR 729. Stone recalled speaking with Aleksey concerning his other employment on February 2, 1998. App.p. 3144-45. He recalled telling Aleksey about his work in Solicitor's Office, what a solicitor means [prosecutor] and also what he did for the Insurance Reserve Fund [I.R.F.] in representing agencies which include the highway patrol and Orangeburg County. App.p. 3144-45,

In his petition, Aleksey asserted that Stone suffered under a conflict because he had represented

PCR 729 -31. Stone explained to him he had never represented Trooper Lingard and never met him, to his knowledge. App.p. 3146, PCR 731.

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

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

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

Considering SCACR Rule 407, 1.7(b)(1) on whether he believed that the representation would be adversely affected, Stone stated, in hindsight, that his assessment of his Aleksey representation was that it would not have been different based upon either his role as a part-time prosecutor or his I.R.F. role. App.p. 3546-47, PCR 1133.

Stone acknowledged that in his role with assignments from the Insurance Reserve Fund, he had represented Orangeburg County, the Sheriff of Orangeburg County, South Carolina troopers, the Department of Public Safety and other entities. App.p. 3545-46, PCR 1132-34. **He declared that the ongoing representation did not impact his ability to defend Aleksey. App.p. 3546-47, 3549, PCR 1133-34, 1136.** To the contrary. Stone suggested that he had developed a knowledge of police procedures which probably would have worked to Aleksey's advantage. App.p. 3546, PCR 1133. Stone reiterated that he had discussed with Aleksey the fact of his representation of the state and county entities at the time of the trial. App.p. 3546-48, PCR 1134-35.

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

Stone stated his work with Orangeburg County did not impact his representation of Aleksey concerning the escape charge against his client. App.p. 3548, PCR 1135. He stated it had nothing to do with it and that the only thing relevant was to determine if it was "a real escape attempt." App.p. 3548, PCR 1135. He said he or Sims went to Willie Bamberg, the Director of the Detention Center to find out why Aleksey was charge with escape after looking at the window and determine that either he could not have gotten through the window, or if so the fences. App.p. 3548-49, PCR 1135-37. Stone opined that his other representation of S.C.D.C., Orangeburg County, SLED, and other entities did not cause him to hold back anything concerning his investigation of the statement. App.p. 3552, PCR 1139-40.

Stone stated that his role as a either a part-time prosecutor or with his I.R.F. work did not impact on his presentation of challenges at the *Jackson v. Denno* hearing. App.p. 3562, PCR 1149.

When Aleksey filed the series of *pro se* lawsuits, Stone stated he sent him a letter on March 10 confirming that he could not assist him any lawsuit against the S.C.D.C. and possibly Orangeburg County because of his Insurance Reserve Fund representation. App.p. 3636-38, PCR 1224-26.

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

On re-direct Stone stated he had represented Willie Bamberg, the head of the detention center in Orangeburg in the past, but was unclear if he was representing him while representing Aleksey. App.p. 3641, PCR 1229.

the Orangeburg County Sheriff, Willie Bamberg, the Director of the Detention Center and had dealings with Trooper Lynn Stack. It must be noted that none of the I.R.F. assigned cases handled by counsel Stone involved any incident or action by Bayan Aleksey. Instead, he claims the general interests of the State of South Carolina - of which the Insurance Reserve Fund is a part of - is adverse to Aleksey - and since Stone received a substantial part of his business and compensation from the IRF, his interests would be adverse. He suggests that the effect of that adverse interests is shown by Stone's refusal to assist Aleksey in *pro se* civil suit against the Department of Corrections. Petition , p. 24, citing App.p. 3185, l. 11-20. He claims this runs counter to the A.B.A. Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, p.3, 31 Hofstra L. Rev. 913 (2003)" "to pursue related litigation on the client's behalf outside of the confines of the criminal prosecution itself."⁵

When Aleksey attempted to file some lawsuits as set out in Petition, p. 21-22, Stone advised him he could not help him on those because he worked with the I.R.F. App.p. 3146-52, PCR 732, 734-35. When Aleksey filed the series of *pro se* lawsuits, Stone stated he sent him a letter during the representation confirming that he could not assist him any lawsuit against the S.C.D.C. and possibly Orangeburg County because of his Insurance Reserve Fund representation. App.p. 3185, 3636-37, App.p. 5838 (letter). Stone, however, re-affirmed that the letter and lawsuits against S.C.D.C. did not affect the manner he personally handled the defense. App.p. 3637, PCR 1225. The Petitioner contends counsel advise that he could not assist him in a civil action against the Department of Corrections which was unrelated to the defense of Aleksey in the killing of Trooper Lingard showed the existence of an actual conflict of interest that adversely affected his representation. However, those lawsuits were not

⁵In allegation D in the PCR Court , Aleksey initially had claimed that a conflict of interest was created because of assignment of civil cases from the Insurance Reserve Fund in which he handled some matters for the South Carolina Department of Corrections or certain specified correctional employees. In his third amended application, Aleksey asserted this ground was abandoned. The PCR Court dismissed the claim due to lack of prosecution *with prejudice*. App.p. 5028.

shown to have anything to do with Aleksey's defense, only that Aleksey was advising Stone that he had filed the lawsuits. An actual conflict of interest means 'a conflict that affected counsel's performance--as opposed to a mere theoretical division of loyalties.' Mickens v. Taylor . To prove an actual conflict of interest, a defendant "must show that [his] interests diverge[d] with respect to a material factual or legal issue or to a course of action." Gilbert v. Moore, 134 F.3d 642, 652 (4th Cir.1998) (*en banc*). The Petitioner had failed to show that Stone decision not to inject himself in Aleksey unrelated private litigation with S.C.D.C. (where Stone was not representing S.C.D.C in opposition to his suits) would have adversely affected counsel's performance in Aleksey defense to the killing.

In the lower court, Petitioner asserted different evidentiary reasons why there was a conflict. Each of the specifications and speculations presented in briefing before the lower court were rejected because there was either a sound strategic decision made by counsel. App.p. 5014-5027. He suggested that Stone's knowledge of "law enforcement methods" and his involvement with law enforcement in the other circuit would impair him from attacking them, yet Stone saw this as an advantage to his defense of Aleksey. App.p. 3546, PCR 1133. The decision to not seek to change venue was based on both counsel's beliefs that Orangeburg was the most favorable venue for the case for Bayan Aleksey since the demographics traditionally question law enforcement and Sims had a strong knowledge of the county. App. p. 3034-3036, 3248-3252, 3254, 3564, PCR 618-620, 833-37, 839, 1151.

Aleksey had claimed that his assignments from IRF and of Willie Bamberg of the Detention Center on independent law suits may have affected his ability to raise issues concerning adaptability to prison and issues related to the jail incident. Respondent incorporates by reference Issue 2 herein concerning adaptability to prison. The PCR Court concluded that Petitioner had failed to show an actual conflict of interest that adversely affected Aleksey's defense as it related to Stone's prior representation of the Director of the Detention Center. App.p. 5022-5026. Contrary to the claim of Petitioner, the

decisions concerning adaptability evidence were unrelated to his IRF representation of Willie Bamberg. In fact, Stone did not think or recall whether he was representing Bamberg while representing Aleksey. App.p. 3197, PCR 782. However, he did represent “John Doe, Warden” in Charles W. Tyler v. Sheriff Bing Jones, from July 1996 through February 1998. App.p. 3221-3222, PCR 806-807, Applicant Exhibit 86.

Passing reference is made to Trooper Lynn Stack in the Petition, p. 22, who was a potential state witness in the Aleksey incident. The PCR Court concluded that he had failed to prove that Mr. Stone represented Trooper Stack. App.p. 5020-5022. The testimony was properly summarized that counsel Stone knew Trooper Stack and spoke with him concerning the unrelated Brown v. Shelton case. App.p. 3205-32097, 3220-21, PCR Tr. 790-92, 805-06. The PCR Court denied a motion to alter, again concluding that Aleksey failed in his burden of proving that Stone actually represented Trooper Stack through specific assignment of the Insurance Reserve Fund in an attorney-client relationship. Further, Trooper Stack never testified at the Aleksey trial. App.p. 5325. Absent representation by Stone, there was no conflict.

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

In conclusion, Mr. Aleskey claims that Duffie Stone, one of Mr. Aleskey’s trial attorneys, was acting under an actual conflict of interest at the time of trial, which deprived him of his Sixth

Amendment right to effective assistance of counsel. However, there is record support for the PCR Court's finding that no such actual conflict existed. At the time of Mr. Stone's representation of Mr. Aleskey, Mr. Stone was a part time solicitor in Beaufort County, never in Orangeburg. 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. Aleskey and to the Court repeatedly, and it is undisputed that Mr. Aleskey was advised by and examined by the trial Court three times regarding Mr. Stone's other representations. Mr. Aleskey on each occasion confirmed his understanding and desire to have Mr. Stone continue to represent him. Certiorari should be denied.

Adequate Waiver of Alleged Conflict of Interest

In his Petition, p. 25-29, Aleksey contends that there was no valid waiver of the alleged conflict of interests. The PCR Court rejected this assertion finding, as stated above, a knowing and on the record waiver of the conflict of interest and desire to have Mr. Stone continue in the representation. App.p. 5029-5032. Respondent submits, as noted above counsel Stone and Sims made Petitioner aware of Stone's status as a part-time prosecutor and civil lawyer who represents cases assigned from the I.R.F. involving state and county employees, and the record includes inquiry by trial judges before the trial of Aleksey's knowledge. At no time after the inquiry did Aleksey ever seek to have Stone removed.

Aleksey relies upon the decision in U.S. v. Schwarz, 283 F.3d 76 (2nd Cir. 2002). In Schwarz, the Second Circuit recognized that in most cases where an attorney has an actual or potential conflict of interest, it was possible for a defendant to waive his right to conflict free counsel in order to retain his counsel of choice. However, the court also recognized that not all conflicts could be waived stating:

“an actual or potential conflict cannot be waived if, in the circumstances of the case, the conflict is of such a serious nature that no rational defendant would knowingly and intelligently desire that attorney’s representation. Schwarz, F.3d at 95-96. The court asserted that unwaivable conflicts were those where counsel himself was accused of participating in the criminal activity related to the defendant’s crimes and his own “self-interest” or “self-preservation” to avoid criminal charges or reputational damage would affect virtually every aspect of his representation of the defendant. The court equated that conduct with the conflict in Schwarz where counsel Worth’s loyalties to the police union and a \$10,000,000.00 retainer. Concluding the Schwarz representation was in conflict with his ethical obligation to the police union as a client and his substantial self-interest in a two-year 10 million dollar retainer with the union, which was revokable, it created a strong personal interest in refraining from any conduct which the union might object.

The Applicant equates the self-interest of the \$10 million retainer and conflicting interest in placing blame upon another police officer in Schwarz with Stone’s alleged self-interest to curry favor with law enforcement and his hopes of further assignment of cases from the Insurance Reserve Fund. Petition, p. 26-27. As the PCR Court found, those assertions are simply inadequate to raise the suggestion that Stone’s representation of any criminal defendant, including Aleksey would be guided by “self-preservation” as suggested in Schwarz.

He further asserts that Aleksey was not specifically informed that Stone’s employment as a part-time solicitor “would affect his ability to vigorously challenge law enforcement version of the events, especially with respect to the purported confession extracted by two SLED agents.” Petition, p. 26. However, as set out in Argument VI, the employment had no effect on the decisions related to the manner of seeking to suppress the confessions.

First, as set out the Applicant failed to prove an actual conflict of interest, as defined in Mickens

and Cuyler. Absent such interest, the question of waiver” is moot. Relief should not be granted. See, State v. Gregory, 364 S.C. 150, 612 S.E.2d 449 (2005)(actual conflict in representing defendant and assistant prosecutor handling defendant’s case).

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

While the Court concludes that Cuyler does not extend to “successive representations”, as suggested in Mickens, assuming that it does, it was a waivable conflict in this setting concerning Stone’s practice both as a part-time solicitor and civil practitioner with many public sector clients. As stated in Holloway v. Arkansas, 435 U.S. 475, 483 n.5 (1978), a defendant may waive his right to the assistance of counsel who is unhindered by conflicts. As set out above, there was on-the-record inquiry of Aleksey on February 2, 1998 (part-time solicitor, insurance reserve fund work, state agencies, police agencies, highway patrol)(Feb. 2, 1998, Tr. p. 5-7, PCR Tr. 737-39), May 20 [28], 1998 (part-time solicitor in 14th Circuit not connected with Orangeburg)(R. 2192-93); and August 28, 1998 (part-time solicitor contract with 14th Circuit in Beaufort, not the Orangeburg Circuit, Insurance Reserve Fund work which insures state agencies, including the Department of Public Safety)(R. 181-82). The PCR Court found that the the trial judge’s conclusions supported the waiver.

It has been stated that a valid waiver of a conflict of interest must be voluntary, knowing, and

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

As the PCR Court found, the waivers could have been more specific to speculate about potential events which did not occur, including whether Willie Bamberg or the Sheriff might be potential witnesses as to his adaptability to prison. However, the waivers were adequate to address what did occur, the potential for divided loyalties.

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

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

fully advised of any appearance of conflict, both by counsel and by the Court. As a result, certiorari should be denied.

II. Certiorari is not warranted where counsel made a decision upon a reasonable investigation which led him to not pursue a prison expert or present of the questionable evidence of Petitioner's prison adaptability where the Petitioner prison record had an escape charge, malicious injury to jail property in destroying a jail stool and breaking a window which led to his removal from the jail.

Further, 6th Amendment prejudice was not shown where in light of Aleksey's jail destruction evidence, the expert testimony that Aleksey would be going into a prison system jail that had the ability to house and secure any inmate, including Aleksey, without undue risk of harm to staff, other inmates or the community because lethal force could be used against inmates does not undermine confidence in the verdict. [Certiorari Petition, p. 30-41][Order, App.p. 5076-5085, Rule 59 Order, App.p. 5329-29].

IAC and Prison Adaptability Expert.

Aleksey asserts that trial counsel was ineffective in the penalty phase in failing to retain an expert on prison adaptability to testify that Aleksey was adaptable to prison life based upon the decision in Skipper v. South Carolina, 476 U.S. 1 (1986). He relies upon the PCR testimony of a former S.C.D.C. employee, James Aiken in support of his claim. The Circuit Court rejected this Sixth Amendment claim concluding that counsel had a strategic reason in not pursuing this type of evidence based upon the potential that it could lead to an emphasis of negative evidence from his present incarceration record which included an escape charge and removal of the facility to an SCDC prison as a safekeeper because the local facility could not handle him which would necessarily question the credibility any adaptability evidence. App.p. 5082-5085; Order, p. 119-122. Also, App.p. 5022-28; Order 59-65. (similar claim in the conflict of interest section). The PCR Court found that counsel had a strategic reason for not pursuing this type of evidence and was not deficient. Alternately, prejudice under Strickland has not been shown. In further explaining the rejection in the Order denying Rule 59 relief, Judge Goodstein declared:

...In viewing a Strickland analysis, it must be viewed from counsel's perspective at the

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

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

STANDARD OF REVIEW

An appellate court gives great deference to the PCR court's findings of fact and conclusions of law. Shumpert v. State, 378 S.C. 62, 66, 661 S.E.2d 369, 371 (2008). If matters of credibility are involved, then this court gives deference to the PCR court's findings because this court lacks the opportunity to directly observe the witnesses. Solomon v. State, 313 S.C. 526, 529, 443 S.E.2d 540, 542 (1994). Any evidence of probative value in the record is sufficient to uphold the PCR court's ruling. Caprood v. State, 338 S.C. 103, 109–10, 525 S.E.2d 514, 517 (2000).

Ineffective Assistance of Counsel Standards After Harrington v. Richter.

To establish deficient performance, a person challenging a conviction must show that “counsel’s representation fell below an objective standard of reasonableness.” Strickland v. Washington, 466 U.S. 668, at 688 (1984). A court considering a claim of ineffective assistance must apply a “strong

presumption” that counsel’s representation was within the “wide range” of reasonable professional assistance. *Id.*, at 689. The challenger’s burden is to show “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.*, at 687.

Strickland does not guarantee perfect representation, only a “‘reasonably competent attorney.’” 466 U. S., at 687 (quoting McMann v. Richardson, 397 U. S. 759, 770 (1970)); see also Gentry, *supra*, at 7. Representation is constitutionally ineffective only if it “so undermined the proper functioning of the adversarial process” that the defendant was denied a fair trial. Strickland, *supra*, at 686. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.

An attorney can avoid activities that appear “distractive from more important duties.” Bobby v. Van Hook, 558 U. S. ___, ___ (2009) (per curiam) (slip op., at 8). Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies. See Knowles v. Mirzayance, 556 U. S. ___, ___ (2009) (slip op., at 14–15); Rompilla v. Beard, 545 U. S. 374, 383 (2005); Wiggins v. Smith, 539 U. S. 510, 525 (2003); Strickland, 466 U. S., at 699.

Although courts may not indulge “post hoc rationalization” for counsel’s decisionmaking that contradicts the available evidence of counsel’s actions, Wiggins, 539 U. S., at 526–527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a “strong presumption” that counsel’s attention to certain issues to the exclusion of others reflects trial tactics rather than “sheer neglect.” Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different

strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. 466 U. S., at 688. Harrington v. Richter, _ U.S. __, 131 S.Ct. 770 (2011).

With respect to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.*, at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*, at 687. See Harrington v. Richter, _ U.S. __ (2011).

Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U. S. ___, ___ (2010) (slip op., at 14). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U. S., at 689–690. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.*, at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U. S., at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain

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

Aleksey claims that trial counsel should have employed an expert to opine on Aleksey's adaptability to prison. A capital defendant is given broad latitude to offer mitigating evidence because " 'the penalty of death is qualitatively different' " than any other sentence. See Lockett v. Ohio, 438 U.S. at 604, 98 S.Ct. at 2964 (quoting Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976)). The death penalty's irrevocable end has prompted the Supreme Court to require the sentencer in capital cases to consider a defendant's violent and troubled youth, see Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); good behavior in prison, see Skipper v. South Carolina, 476 U.S. at 1, 4-5, 106 S.Ct. at 1669, 1670-71 (1986); history of child abuse and emotional problems, see Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989); ineligibility for parole, see Simmons v. South Carolina, 512 U.S. 154, 162, 114 S.Ct. 2187, 2193, 129 L.Ed.2d 133 (1994); poverty-ridden childhood, see Hitchcock v Duggar, 481 U.S. at 397, 107 S.Ct. at 1823-24; good deeds as an affectionate uncle, see *id.*; and childhood habit of inhaling gas fumes, see *id.*; cf State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007) (evidence of the defendant's characteristics admissible in the sentencing phase of a capital trial may include prison conditions if narrowly tailored to demonstrate the defendant's personal behavior in those conditions).

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

At trial, former Orangeburg Detention Center Officer Maurice Keitt testified on January 27, 1998, Aleksey told him that he had just knocked one of the small windows out. App.p. 1878; R. 1970. He stated he saw that the window was broken out and that Aleksey had broken a metal stool from the stand that was attached to the floor. App.p. 1879; R. 1971. When Keitt asked Aleksey why, he declared he was frustrated. App.p. 1880, 1882; R. 1972, 1974. He said Aleksey was sent to "safekeeping" shortly after this which, in his experience, was where people were sent if they might hurt themselves or escape or be a high risk. App.p. 1881; R. 1973.

Deputy Director of the Orangeburg Detention Center, Vernetia Dozier, testified that she had received a report that on January 27, 1998, Aleksey had taken a stool and ripped the stool off the wall and broken the window out of the cell. App.p. 1886; R. 1978. She stated that based upon this conduct, they initially signed a warrant for the damage done to the jail and attempted escape and sent him to safekeeping. App.p. 1886; R. 1978. She described safekeeping as a place where they send inmates that are hard to handle or an escape risk. App.p. 1886; R. 1978.

On cross-examination, counsel Stone had Dozier describe the movement from the normal cells to an upstairs room. Importantly, she stated that it was department policy to charge anyone who cracks or breaks a window with escape if its an exterior window. App.p. 1887; R. 1979. Stone had her describe that to escape, the inmate would have to get through the window, then through the jail yard, then over the fence with razor wire. App.p. 1887; R. 1979. Further, on re-direct, she declared no one had gotten through the type of small window Aleksey broke. App.p. 1890; R. 1982.

On re-cross, Dozier stated that Aleksey did not escape from his jail cell and she was informed that he called for help after he broke the window. App.p. 1889; R. 1981.

The next day of the sentencing hearing, Solicitor Bailey noted that Director Dozier had made

an unresponsive comment that revealed there was a warrant for escape. App.p. 1932; R. 2024. Solicitor Bailey felt that a curative instruction to disregard the evidence about the escape warrant would be appropriate. Counsel Stone requested the curative instruction “to disregard any of the questions concerning escape.” App.p. 1932-1933; R. 2024-25. Judge Cottingham concluded that he would tell the jury to disregard that in its entirety and that there is no warrant for escape. App.p. 1933; R. 2025. During the instructions, the jury was instructed:

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

App.p. 1936; R.p. 2028, ll. 13-17.⁶

PCR TESTIMONY OF DUFFIE STONE

Stone testified at the PCR hearing that because Aleksey was charged with escape, at some point he obviously felt that prison life would be discussed (by the prosecution) and Stone wanted to be sure that the escape charge was not a realistic escape. Stone felt that he had sewn it up well at trial and that it did not become an issue. App.p. 3238; PCR 823. Stone stated that he did not receive any information from his forensic experts - Dr. Schwartz-Watts, Dr. Rosengard or Dr. Bachman - that would have suggested that Aleksey had a mental state that would be more adaptable to prison. Stone stated that he did not hire a prison adaptability expert because he felt such testimony frequently backfires to

⁶ At the time of Skipper v. South Carolina, in addition to jail and prison guards, forensic and clinical psychologists were the type of witness proffered concerning this issue of adaptability to prison life. See, State v. Patterson, 290 S.C. 523, 529, 351 S.E.2d 853 (1986) (error under Skipper to preclude a clinical psychologist to testify to her evaluation of Patterson relative to his future adaptability to prison life where the proffer in the form of a written report reciting Patterson's personality characteristics as constructed from a battery of psychological tests concludes with the opinion that “Mr. Patterson would be expected to adapt successfully to living within a prison population were he given a life sentence.”); State v. Riddle, 291 S.C. 232, 353 S.E.2d 138 (1987)(same); State v. Matthews, 291 S.C. 339, 353 S.E.2d 444 (1986) (similar)

the defendant's detriment. App.p. 3635; PCR 1223. He stated that under the circumstances "I thought it was a big risk putting somebody up on the stand to say he would adapt well to prison" and "I just didn't think it was credible at that time." App.p. 3636, l. 7-12 He was not aware of any evidence to indicate that Aleksey was uniquely adaptable to prison. App.p. 3636; PCR 1224. In addition to the damage to the chair and window, and there were lawsuits he had filed and Stone felt it was a big risk and not credible at that point. App.p. 3637; PCR 1225.

Stone stated that his notes revealed at some point in the representation he or Mr. Sims spoke with Bamberg concerning the escape incident. App.p. 3641; PCR 1229. He stated that they learned anytime a window was broken they were going to call it escape. PCR 1229.

In preparation for the defense, the defense had contacted Detention Center Director Willie Bamberg who prepared an affidavit on May 20, 1998 [Exhibit 87]. App.p. 4266. In the affidavit, Bamberg described the fact the charges were made "because he through a chair into the window in his cell. The window measures twenty-six and one-half inches long and five inches wide. This was the only infraction that the Defendant had during his stay in the Orangeburg Detention Center." App.p. 4266.

Contrary to the speculative claims of Aleksey, Stone decision not to present adaptability testimony was not based upon any fear of cross-examining his "clients," but his belief that such expert prison adaptability testimony has little persuasive value upon the jury and could backfire. Further, the favorable information, - the unlikelihood of escape through the window, the policy to charge based upon a broken window, and the lack of any other violation were presented to the jury.

PCR TESTIMONY OF THOMAS SIMS

Counsel Sims concurred in his testimony. He stated that the theory of defense was to show that Aleksey was not a bad person and although he had a criminal history, that it was consistently non-

violent. App.p. 3043, 3094-95; PCR 627, 679. Sims stated that he understood that Skipper allowed for evidence of rehabilitation and adaptability in prison to be presented, as to whether a person can adapt in prison or become a predator. App.p. 3119-3120; PCR 703-704.

Sims stated that he was aware prior to the trial of the existence a experts on prison adaptability. App.p. 3074; PCR 658. Additionally he was aware on the circumstances concerning the actions in jail and the escape charge. Sims declared at the time of his representation, he was aware of Skipper and that although Stone was dealing with the experts, he is sure it was discussed as potential evidence in mitigation. App.p. 3075-76; PCR 659-70. In fact, Sims recalled a case he handled where the Skipper issue was presented . Sims stated the reason that adaptability experts were not presented was not based upon any neglect of the law. App.p. 3076; PCR 660.

PCR TESTIMONY OF JAMES E. AIKEN

James Aiken, former warden at Central Correctional Institution and prison system administrator, testified as an expert in adaptability and correctional risk. App.p. 3897 [PCR 1485]. It was his opinion “that Aleksey could be properly housed and secured in a correctional facility for the remainder of his life and without presenting an undue risk of harm to staff, inmates or the community.” App.p. 3899; PCR 1487. He further opined the S.C.D.C. has adequate structure, staff, and authority “to use lethal force if required to adequately manage him. Id. Mr. Aiken, based on his review of the records opined that he did not see anything which would give him concern about providing injury to staff or other inmates, although he could provide injury to himself. App.p. 3900; PCR 1488. Mr. Aiken further attempted to explain Aleksey’s action at the jail when he broke the chair and window leading to the attempted escape charge. App.p. 3902-03; PCR 1490-91. He opined that Aleksey would have been unable to escape through the window and negotiate the perimeter fence, assuming he was restrained. App.p. 3903; PCR 1491.

Aiken stated that his concerns about Aleksey would not only derive from his attempted escape (low level), but his serious crime would require that he is placed at a maximum security institution. App.p. 3904; PCR 1492. He felt the series of grievances and lawsuits Aleksey filed against correctional officers would weigh in favor of adaptability since he is using the system to remedy his concerns. App.p. 3905; PCR 1493.

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

Aiken further admitted that if Aleksey had begun to tear up the jail, Aiken would use force up to death to manage him and had done that before with other inmates in his career. App.p. 3914; PCR 1502. Aiken also admitted that in the past, mistakes had been made in the South Carolina Department of Corrections in assessing inmates for future violence and placement. App.p. 3916; PCR 1504. Aiken summarized the fact that his opinion is that “any inmate”, including Aleksey can be managed at the South Carolina Department of Corrections based upon the capability of the use of lethal force.

ANALYSIS

The PCR Court relied upon the analysis by the United States Supreme Court in Sears v. Upton, 130 S.Ct. 3259 (June 29, 2010) in entering its final order. App.p. 5325, 5328-29. In Sears, the Court held that the state PCR court failed to apply the proper prejudice inquiry in determining that counsel's

facially inadequate mitigation investigation did not prejudice the defendant. The Court stated that the proper prejudice standard requires a probing and fact-specific analysis that considers the totality of the available mitigation evidence, both that adduced at trial and the evidence adduced at the PCR proceedings, in order to assess whether there is a reasonable probability that the defendant would have received a different sentence after a constitutionally sufficient mitigation investigation. The Court stated that this standard will necessarily require a court to speculate as to how much or how little mitigation evidence was presented during the initial penalty phase. Judge Goodstein also reasonably relied upon the analysis set out in Wiggins v. Smith, supra, that counsel was under a duty to do a reasonable investigation into the existence of mitigating evidence, including adaptability to prison.

The record reveals that defense counsel anticipated that Aleksey's lack of prison adaptability reflected in the destructive outburst at the jail and the removal from there to South Carolina Department of Corrections as a safekeeper would develop negative evidence on Aleksey. In trying to mitigate the effect and secure a favorable spin on the evidence Counsel Stone contacted the local jail, prepared an affidavit and developed an understanding of their potential testimony to mitigate the claims surrounding the incident.

The PCR Court found this decision was not based on either neglect nor ignorance. App.p. 5084. The Court found that counsel Stone and Sims were both aware of the right to present relevant and competent evidence of adaptability to prison life based upon the Skipper decision. Stone felt that adaptability evidence may "backfire" and felt that he was not aware of any evidence to suggest that he was particularly adaptable. His concern about the complaints and lawsuits that he had pursued caused him to think the presentation could not be credible. App.p. 3238, 3636, 3637; PCR 823, 1224, 1225.

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

“You can take a look at has Bayan Aleksey has *adapted to jail*, he has *adapted to prison*. This is a piece of metal furniture that was in the cell here in Orangeburg. How does he react to it. He becomes frustrated. Bayan doesn’t like being in that cell. So he rips this piece of metal furniture off the wall in that cell, smashes out the window and earns himself a trip up to safekeeping where Mrs. Dozier and Mr. Keitt told y’all they send people that are too unruly or just not suitable to be housed in a local jail. *That’s his adaptation. That’s how he adapt’s to a confined environment....*

“...As I said before, when you think of life without parole as an alternative for the death penalty, look at how he has adapted to jail. *Look at the only evidence of his adaptability to jail*, that broken window and this broken piece of furniture and his trip to safekeeping.”

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

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

1. Prison officials make mistakes in placements.
2. When Aiken said adaptable, he actually meant subject to be controlled, either by maximum and isolated jails, or by the use of lethal force.
3. Aleksey’s physical outburst at the Orangeburg jail, *according to Aleksey*, was that he was in a four-point restraint in a cell at the time in violation of SCDC policy, yet he was able to break a chair and destroy a window. App.p. 3011, 3920; PCR. 1508. Aiken, however, stated that Aleksey’s reason for the violence was to “get some attention.” App.p. 3920.
4. Aiken admitted “the best predictor of future behavior is past behavior.” App.p. 3920.
5. Aiken admitted that the local detention people opined he was not adaptable to their jail and that they were unable to maintain order and authority with Aleksey’s presence in their facility. App.p. 3910, 3912.
6. Aiken opined that violent behavior decreases with age and burn out in the prison setting. App.p. 3919.

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

App.-p. 5084. Judge Goodstein expressly found that Stone's assessment about "backfire" with Aiken's potential testimony was reasonable. App.p. 5084. Although the adaptability evidence was admissible as mitigating, counsel's experience (where similar general responses would be given) reflected the problem with such testimony.

The PCR Court also determined that Sixth Amendment prejudice [the second prong of Strickland] had not been shown by a reasonable probability that but for his failure to present adaptability evidence, the result of the proceeding would have been different. See Sears, supra. The evident conflict in evidence of speculative adaptability suggested by Aiken, contrasted with Aleksey's own actions in tearing up a jail cell and breaking a window and placement in a safekeeper program, shows how any probative value was minimized by Aleksey's actual behavior. The backfire suggested by counsel Stone was that it would emphasize Aleksey's own destructive actions in prison with an opinion that SCDC can handle Aleksey and all prisoners and that Aleksey's anti-social tendencies are consistent with many inmates. Further, his decision to forego further development must be viewed from counsel's perspective in 1999 where Solicitor Bailey's treatment of similar expert testimony was not in Petitioner's interest. see Orders, App.p. 5084-85, p. 5331

In his petition before this Court, Aleksey makes passing reference to Solicitor Bailey's testimony concerning how he handled prison adaptability expert testimony in the past as "an obstinate" attempt to undermine the subsequent decisions in State v. Bowman and State v. Burkhardt. To the contrary, as recognized by Judge Goodstein, this was to place a contemporary focus on what counsel Stone was seeing in 1998 and anticipating from Solicitor Bailey as a seasoned prosecutor. It cannot be ignored that Solicitor Bailey, essentially based upon his [documented writing] and reading of this Court's prior

opinions at that time- particularly State v. Plath (II), 313 S.E2d. 619(1984) had developed a strategy for cross-examination that defense counsel could anticipate. At the PCR hearing, Solicitor Bailey testified that he had been involved in prior cases where James Aiken testified. App.p. 4110; PCR 1698. Bailey stated that he like to see adaptability experts from the prosecution point of view. Bailey felt the jury would want to know in their assessment about what the defendant would be adapting to because adaptation does not mean anything unless a jury knew what he was adapting to. App.p. 4110. Bailey stated (at the time of the trial), this would allow him to develop a description of prison life in the general prison population – cable TV, recreation activities and amenities compared with the deceased death. Bailey stated that because an adaptability expert was not used, this contra-mitigation testimony in explaining actual prison life was not present. App.p. 4110-11; PCR 1698-99. Bailey noted that each time Aiken testified in his cases for the defense, the verdict was death. PCR 1699. In addition, he noted that he would get to describe the present security the prisoner would be under now, when on death row, and in the general prison population. App.p. 4111. As noted above, on balance, the risks of the adaptability testimony and the failure to present it in Aleksey’s case does not undermine confidence in the outcome. His claim otherwise must be denied.

The reason evidence about “good” prison conditions is problematic stems from four South Carolina cases – one that was in existence prior to this case and three that were handed down after Applicant’s trial, including Applicant’s on direct appeal.

In State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984), the court *affirmed* a death sentence despite issues related to the State’s cross-examination and evidence responsive to a defense presentation “[demonstrating] the permanence and deprivation entailed in life imprisonment”. Plath, 281 S.C. at 12, 313 S.E.2d at 626. In doing so, the court rebuked sentencing phase defenses which “sought to portray life imprisonment as preferable to capital punishment as a matter of social policy”, or “drew a picture

of life imprisonment as slavery, a condition of irretrievable loss”. Plath, 281 S.C. at 14, 313 S.E.2d at 626-27. The court stated that such defenses improperly “invite[d] the jury to intrude upon the strictly legislative function of determining the nature of crime and punishment”, and concluded that “determinations as the time, place, manner, and conditions of execution or incarceration, as well as the matter of parole are reserved by statute and our cases to agencies other than the jury.” Plath, 281 S.C. at 14-15, 313 S.E.2d at 627. However, the Plath court concluded the State’s challenged questioning was only proper response to the defense presentation which brought up the subject matter in the first place. Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28.⁷ This was the focus of Solicitor Bailey’s approach in the 1998-2005 experiences.⁸

⁷ In the Clary & Bailey, *The South Carolina Death Penalty Trial*, (S.C. Bar, 2001), p. 265., Bailey write addressing adaptability to prison life summarized State v. Plath (II), 281 S.C. 1, 313 S.E. 2d 619 (1984), a pre-Skipper case as “[W]here defense expert testifies on life in prison, tate did nor err by cross-examining him on prison conditions and on specific inmate who had escaped while serving a life term.” This same information was included in the 2009 edition. See Clary & Bailey, *The South Carolina Death Penalty Trial*, 2nd Edition (S.C. Bar 2009), p. 233. Solicitor Bailey developed his analysis and strategy from this portion of the Plath II opinion:

It should not be necessary in the future for this Court to remind the bench and bar of the strict focus to be maintained in the course of a capital sentencing trial. In the case before us, defendants elected to enter the forbidden field of social policy and penology. **It is neither surprising nor can it be deemed prejudicial that the State responded in kind, attempting to show through defendants' own witnesses that life imprisonment was not the total abyss which they portrayed it to be.** We read both the State's cross-examinations and subsequent jury arguments in light of the record as a whole. We find nowhere that the Solicitor sought to predict or to argue that these appellants would escape or would be improvidently released. Rather, his argument, particularly in its concluding passage, simply placed before the jury the stark choice between death and life imprisonment, emphasizing that his job was concluded and that the decision was to rest with them. His references to the cross-examinations just discussed strike the candid reader as merely reminders to the jury that life imprisonment was by no means as hopeless as defendants would have it believed. **The State was entitled to make this response.** The appellants have shown no prejudice therefrom.

State v. Plath, 281 S.C. 1, 15-16, 313 S.E.2d 619, 627 - 628 (1984).

⁸Nearly two decades later, and four months *before* Applicant’s trial, the United States Supreme Court issued Kelly v. South Carolina, 534 U.S. 246 (2002), which so broadly defined “future dangerousness” that it effectively ended years of litigation in South Carolina over whether a capital

inmate could have the specific charge that a life sentence would be without parole. Indeed, shortly after Kelly, the General Assembly passed a law requiring life without parole to be charged in all death penalty cases. 2002 Act. No. 278 § 1. Regardless, Kelly as a practical matter ensured Applicant at trial would get a charge that his life sentence would be without parole. It was in this new legal setting that Applicant went to trial a mere few months later.

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

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

State v. Bowman, 366 S.C. 485, 498-99, 623 S.E.2d 378, 384 (2005).

Subsequent to Bowman, the South Carolina Supreme Court addressed a case where the *solicitor* preemptively called a witness who extensively testified as to the conditions of confinement for a inmate serving life without parole. State v. Burkhardt, 371 S.C. 482, 640 S.E.2d 450 (2007). The defense objected to the state's evidence, and later put in its own evidence of "bad" prison conditions. Justice Moore was joined by Justice Waller and wrote the opinion of the Court. Justice Moore cited Plath and other cases from the 80s and 90s for the proposition that evidence outside of the circumstances of the crime and the characteristics of the defendant was inadmissible in a sentencing phase. This included conditions of incarceration, the process of execution, or the deterrent effect of capital punishment. Burkhardt, 640 S.E.2d at 453. Justice Moore noted that while the case at issue was tried before the decision in Bowman, its result was consistent with the "long-standing rule that evidence in the sentencing phase of a capital trial . . . be relevant to the character of the defendant or the circumstances of the crime". Id. Thus, Justice Moore concluded that reversible error had occurred, since the evidence of conditions of confinement "invited the jury to speculate about irrelevant matters" and injected an arbitrary factor in the proceedings in violation of S.C. Code Ann. § 16-3-25(C)(1) (2003).

In concurrence, Justice Pleicones wrote that he did not believe the court should apply the normal harmless error standard for constitutional violations to this issue, concluding that "once improper evidence of any kind injects an arbitrary factor into the jury's consideration, [the] Court cannot uphold the death sentence under § 16-3-25(C)(1)". Burkhardt, 640 S.E.2d at 454.

In dissent, the Chief Justice, joined by Justice Burnett, applied the normal rule that the introduction of evidence will not result in reversal unless it prejudiced the defendant. The Chief concluded that the issue was fully joined by both sides and used by the defendant to his advantage. 640 S.E.2d at 454-57.

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

III. Certiorari is not warranted where the PCR court reasonably concluded that defense counsel was not ineffective in limiting the amount of voir dire inquiry of jurors concerning the death penalty as a strategic reason to avoid the aspect of "conviction proneness" of a potential juror where the Court and prosecution asked questions in this area and defense counsel did follow-up when he deemed it necessary and prejudice was not shown under the Sixth Amendment. [Petition, p. 42-49], [PCR Order, p. 5052-5056].

Limiting Questioning on Voir Dire on Views on the Death Penalty as a Matter of Strategy - IAC

Aleksey contends that defense counsel was ineffective by failing to question any member of the jury panel concerning their views on the death penalty. He contends that it was an unreasonable strategic decision that fell below the standards of competence demanded of the criminal bar because it bypassed "it mandatory obligation of examining prospective jurors regarding their views on capital punishment,

Subsequent to Burkhart, the South Carolina Supreme Court decided State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007). There, although the solicitor (also Solicitor Bailey in that case) called *no* witness on conditions of confinement, the *defense* called an expert that testified in great detail as to the "dismal conditions of prison life in general", including testimony about the mean guards, the bad food, the uncomfortable furniture, and the incessant noise. Like Bowman, the Court reiterated that *defense* evidence on conditions of confinement was just as improper as State evidence on the subject.

” citing A.B.A. Guideline 10.10.2(B). He refers to this decision by counsel of limiting their inquiry to forfeiting Aleksey’s right to voir dire on the death penalty. However, in Sawyer v. Butler, 848 F.2d 582, 589(5th Cir. 1988), the circuit court similarly upheld failing to question jurors on their views of the death penalty where they were questioned by the state, there was no prejudice shown, and there was no showing rehabilitation of jurors was possible. (See also DeLozier v. Simons, 531 F.3d 1306, 1320-23 (10th Cir. 2008); Carpenter v. Vaughn, 888 F.Supp. 635 (M.D. Pa. 1995) revd on other grounds, Carpenter v. Vaughn, 296 F.3d 138 (3rd Cir. 2002).) The PCR Court found that the record reasonably revealed that the strategic decision to forego the questioning was the product of an informed decision. App.p. 5052-56. Further, where the jurors were qualified and questioned by the Court on their views on the death penalty, prejudice has not been shown.

WHAT THE JURORS SAID ABOUT THE DEATH PENALTY

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

Juror Sandra McWaters also revealed she was a number 3 juror. App.p. 278. Again, the solicitor specifically asked about whether she had thought about the death penalty before and declared her willingness to consider it but “I could only do it if I heard the facts...” App.p. 281. Counsel Stone stated to the juror that the Solicitor had asked a lot of questions about the death penalty, I am not too concerned about that, what I want to ask you is about guilt and innocence...” App.p. 282. Stone did

not ask any specific questions about the death penalty. App.p. 281-85.

Juror Duane Green opined to the court that he was in the third group (“I can or cannot depending on the facts”). App.p. 318. Solicitor Bailey made inquiry about the death penalty. App.p. 319-20. Counsel Sims asked questions about media exposure and bias, but not about the penalty. App.p. 320-22.

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

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

Juror Norris Gibson stated to the court he was in the third group. App.p. 403-04. Upon Solicitor Bailey’s questions, Gibson asserted that he had not discussed or thought about the death penalty before. App.p. 404. The solicitor focused on determining that if the case was bad enough whether he could vote for death. App.p. 404-06. Counsel Sims inquired about media, his opinion about the case, whether women should be held to the same standard as men, bumper stickers on his car, and the aforementioned foreign national question. App.p. 406-07.

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

Juror Bonnie Zeigler opined that she was in the third group and willing to listen to the evidence before deciding the sentence. Solicitor Bailey asked if the facts were bad enough, could she sentence a person to death. App.p. 433. Counsel Sims made similar inquiry as he had with other jurors about whether she had formed an opinion based upon media, and the trio of questions about women, foreign nationals, and bumper stickers. App.p. 434-35.

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

Juror Kedrain Pelzer stated that he was in the third group also. App.p. 493. He said he would “give the person a chance, ...hear the facts and whatever before really saying they were guilty.” App.p. 493. As to the death penalty, he said he would “hear everything and then decide.” App.p. 494. Solicitor Bailey inquired of Pelzer about his knowledge of counsel Sims and Patti Rhett of his office. He declared that he could vote for death if the facts were bad enough. App.p. 496. Counsel Stone inquired his similar question about whether he could find a person not guilty if the state did not prove its case, even a big case where someone was killed. App.p. 498-99. He closed with his women bias question. App.p. 498.

Juror Barbara Hanton asserted she was a third type juror. App.p. 552. Solicitor Bailey inquired of whether she could give the death penalty, if it was bad enough. App.p. 554. She declared she had “never, never” thought about the death penalty before but could deal with it. App.p. 555. Counsel Sims

inquired about the media exposure and whether she could find him not guilty if the state did not meet its burden. App.p. 557.

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

A. The Defense Did Ask Death Penalty Questions Of Some Venirepersons.

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

COUNSEL'S STATED STRATEGIC REASONS

A. THOMAS SIMS

During the PCR hearing, counsel Sims stated that there was a decision made with Stone to not specifically ask questions about the death penalty beliefs of the jurors. App.p. 3037, PCR 621. He stated the trial judge was advised of this position. App.p. 3037, PCR 621. See App.p. 177-79.⁹

⁹ The trial record reveals before the beginning of voir dire, counsel Stone indicated that the only reference to the penalty should be the questionnaire with the three types of jurors. App.p. 178. "The defense is specifically not going to ask them any questions concerning their feeling on the death penalty although we have a statutory right to do so."

Stone stated that the questions by the Solicitor's Office about the death penalty presupposes guilt. Stone asserted that the defense was specifically not trying to do that in their questions. App.p. 178.

At that time, Stone moved to preclude the State from asking questions, not as to bias of the jurors, but bias from the death penalty standpoint. App.p. 178. Judge Cottingham denied the motion. App.p. 178-179.

Sims stated the judge asked each juror about what position the jurors fit in: whether they were always in favor of death, always in favor of life, or would consider all the evidence before they would make a decision. App.p. 3038, PCR. 622.

Sims stated, concerning rehabilitating jurors, that there were some buy their adamant responses that the defense felt it would be useless to rehabilitate. App.p. 3039, PCR 623.

Counsel Sims asserted that he was aware that the defense had an absolute right to ask jurors their view on the death penalty. App.p. 2056, PCR 87.¹⁰

B. DUFFIE STONE

Counsel Stone stated that his reasoning in not pursuing this inquiry of jurors' views on the death penalty after the court's inquiry was based upon his own experience with jurors and death penalty cases. App.p. 3276. PCR 861. He stated that while a law clerk with the Solicitor's Office, he sat through a jury qualification where the court, prosecutor and defense spent their voir dire time talking about the penalty. App.p. 3276, PCR 861. Stone stated that he was struck at how a juror, without knowledge of any guilt, was exposed to the questions where everyone, especially the defense talks about penalty and presupposes the guilt of the defendant. App.p. 3276, PCR 861.¹¹ Although he did not know if studies backed him up, but in his discussions with other criminal defense attorneys the concept of "residual

¹⁰ On direct by Brown, Sims asserted that the defense always asked question about the jurors beliefs, until his recollection was re-freshed with the record. App.p. 2056-2059, PCR 87-90.

¹¹ Stone testified that while observing the voir dire in that early case: "it was obvious to me that the defense had presupposed the defendant's guilt because all the questions in voir dire toward the individual jurors were about the death penalty." App.p. 1154, l. 4-14. Stone thought, after that experience to avoid giving the jurors the impression of presupposing guilt and his thought was to keep the discussion of the death penalty to a minimum. App.p. 3567. Stated differently, to keep the possibility of residual doubt alive if they reach a penalty phase, "my thought was the less I talk about the death penalty the better. App.p. 3567-68. He stated he tried to convince the judge to preclude the Solicitor from asking questions about the death penalty also. He stated that this was important, because a part of their strategy was that he was not the triggerman and to shift the focus to GloryVee Perez who they would portray as not getting the respect from the trooper and that she pulled the trigger. App.p. 3568-69.

doubt” of guilt is the best way to get a life sentence. App.p. 3277, PCR 862. Stone expressed the inquiry is difficult for the jurors without presupposing guilt. App.p. 3277, PCR 862.

Stone stated he wanted their voir dire efforts to focus on the jury understanding that they did not think he was guilty and try to carry that residual doubt, if convicted, into the penalty phase. App.p. 3277, PCR 862. Stone noted that Solicitor Bailey objected because, Stone speculated, he wanted the defense to talk about penalty as much as possible.¹²

Stone stated that the only exception would have been where certain jurors who asserted they would never give the death penalty, he might go in and talk about the penalty in hopes to have them qualified so the solicitor would use a strike. App.p. 3278, PCR 863.

Stone noted that this might appear inconsistent, but his general idea was to make sure that we did not presuppose guilt. App.p. 3278, PCR 863. Stone stated that after listening to the judge and responses to the solicitor’s questions, he had a pretty good idea that they did not need to also ask questions about penalty. App.p. 3278, PCR 863. Stone acknowledged that this was his theory that he sold on Sims. App.p. 3279, PCR 864.

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Stone’s fears about death qualification and conviction - prone jurors is shared by others in the legal community. See *Tribunals Organized to Convict, Searching for a Lesser Evil in the Capital Juror Death Qualification Process*, 2005 B.Y.U., L.Rev. 619. “Qualified to Convict...”, 22 Q.L.R. 359 (2003). See also, *State v. Griffin*, 251 Conn. 671, 741 A.2d 913 (1999) (citing *Bronson*, On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen, 42 U. Colo. L. Rev. 1 (1970); *Bronson*, Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some Evidence from California, 3 Woodrow Wilson L.J. 11 (1980); *Cowan et al.*, The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation, 8 J.L. & Hum. Behav. 53 (1984); *Fitzgerald & Ellsworth*, Due Process vs. Crime Control: Death Qualification and Jury Attitudes, 8 Law & Hum. Behav. 31 (1984); *Goldberg*, Toward Expansion of Witherspoon: Capital Scruples, Jury Bias, and Use of Psychological Data to Raise Presumptions in the Law, 5 Harv. C.R.-C.L.L. Rev. 53 (1970); *Haney*, On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process, 8 Law & Hum. Behav. 121 (1984); *Jurow*, New Data on the Effect of a "Death- Qualified" Jury on the Guilt Determination Process, 84 Harv. L. Rev. 567 (1971); *Oberer*, Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?, 39 Tex. L. Rev. 545, 547-48 (1961)).

Stone felt he received about the same information from listening to the response to others questions. He noted that it was how they answered. Stone clarified that he wanted to keep the concept of “residual doubt” in the jurors minds if they got to sentencing. App.p. 3280-82, 3567-68, PCR 865-67, 1154-55.

ANALYSIS

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

(4th Cir. 1989)(trial judge not required to rehabilitate by his personal questions jurors who could not put aside beliefs).

The PCR Court viewed the decision of the 11th Circuit decision in Brown v. Jones, 255 F.3d 1273, 1279 (11th Cir. 2001) for guidance and found it persuasive [App.p. 5059-5060]:

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

2. Prejudice Prong

In order to establish the prejudice prong, Brown would have to show that, but for McDonald's failure to engage in the reverse-Witherspoon inquiry during voir dire, the result of his trial would have been different. See Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. For several reasons we conclude that Brown has failed to make the required showing. First, during the penalty phase of the trial, the trial judge instructed the jurors that their verdict should be based on the evidence and the law and that there was no room for passion, prejudice, or other arbitrary factors. Brown argues that we should presume that some of the jurors were biased in favor of the death penalty and would have refused to follow the law. We have stated in numerous cases, however, that jurors are presumed to follow the court's instructions. See e.g., Ingram v. Zant, 26 F.3d 1047, 1053 (11th Cir.1994) ("Because we presume that jurors follow such instructions, we must assume that the jury put aside any biases it may have had, applied the legal standards as enunciated in the jury instructions, and based its sentencing decision on the facts introduced at trial and sentencing."); Raulerson v. Wainwright, 753 F.2d 869, 876 (11th Cir.1985) ("Jurors are presumed to follow the law as they are instructed."). Because we presume that the jurors followed the court's instructions to base their sentencing decision on the evidence and the law, and not on arbitrary factors, Brown's attempt to prove prejudice is undermined. See Stamper v. Muncie, 944 F.2d 170, 177 (4th Cir.1991) (holding that petitioner, who alleged ineffective assistance based on counsel's failure to "explore with certain members of the venire the 'reverse-Witherspoon' inquiry," failed "to demonstrate how any shortcoming on trial counsel's part constituted prejudice

sufficient to satisfy the second prong of the Strickland test"). [FN7] Second, Brown failed to adduce any evidence that any juror was biased in favor of the death penalty. Third, the heinous nature of the crime and the absence of any mitigating factors make this a case in which the prosecutor had a strong case for the death penalty. For these reasons, we conclude that Brown has failed to show that McDonald's decision not to engage in the reverse-Witherspoon inquiry with the jury resulted in prejudice sufficient to satisfy the second prong of Strickland.

Id.

Respondent submits that the PCR court's conclusion that deficient performance has not been shown was supported by probative evidence. App.p. 5060]. The Court expressly found that Counsel Stone's concerns about conviction - proneness of a jury in the nature of questioning was not unreasonable. Further, as revealed in the review of the voir dire of the other potential jurors, counsel revised the "avid death penalty question" strategy when jurors indicated a potential for rehabilitation from being a Witherspoon-excludable. App.p. 257, 270, 305-306, 450-451. Importantly, this was not abdication of voir dire by the defense, as the Petitioner continues to suggest, but an informed strategy based upon the particular 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 and innocence was still an issue. The PCR Court's conclusion that this was a legitimate trial strategy was supported by the evidence rather than the rhetoric within this argument. See McLaughlin v. State, 352 S.C. 476, 483-484, 575 S.E.2d 841, 844-845 (2003) (holding that where counsel articulates a valid reason for employing a certain trial strategy, such conduct will not be deemed ineffective assistance of counsel.) The claim was correctly dismissed.

PREJUDICE NOT SHOWN

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

revealed unquestionable qualification to sit. Like Jones, during the penalty phase of the trial, the trial judge instructed the jurors that their verdict should be based on the evidence and the law and that there was no room for passion, prejudice, or other arbitrary factors. App.p. 2073-74, R. 2166-67. Aleksey must be asserting that the Court should presume and speculate that some of the jurors were biased in favor of the death penalty and would have refused to follow the law. However, this would ignore the actual responses each of the seated jurors stated during their voir dire.

Courts have stated in numerous cases, however, that jurors are presumed to follow the court's instructions. See e.g., Ingram v. Zant, 26 F.3d 1047, 1053 (11th Cir.1994) ("Because we presume that jurors follow such instructions, we must assume that the jury put aside any biases it may have had, applied the legal standards as enunciated in the jury instructions, and based its sentencing decision on the facts introduced at trial and sentencing."); Raulerson v. Wainwright, 753 F.2d 869, 876 (11th Cir.1985) ("Jurors are presumed to follow the law as they are instructed."). Because it must be presumed that the jurors followed the court's instructions to base their sentencing decision on the evidence and the law, and not on arbitrary factors, Aleksey's speculative attempt to prove prejudice is undermined. See Stamper v. Muncie, 944 F.2d 170, 177 (4th Cir.1991) (holding that petitioner, who alleged ineffective assistance based on counsel's failure to "explore with certain members of the venire the 'reverse-Witherspoon' inquiry," failed "to demonstrate how any shortcoming on trial counsel's part constituted prejudice sufficient to satisfy the second prong of the Strickland test"). Further, Aleksey failed to adduce any evidence that any seated juror was biased in favor of the death penalty. Third, the heinous nature of the crime and the absence of any convincing mitigating factors make this a case in which the prosecutor had a strong case for the death penalty. For these reasons, Aleksey has failed to prove the existence of prejudice as defined in Strickland and Wiggins.

In conclusion, Respondent submits that the PCR Court's rejection was a reasonable application

of Strickland. The Petitioner failed to prove this ground (where some jurors were questioned by the defense about the death penalty) and counsel articulated a reasonable strategy. The Petitioner's statement in brief that defense counsel essentially expected a guilty verdict should not dissuade this Court about the reasonableness of the strategy where guilt was not conceded at trial. Even if deficient performance is assumed, any speculative prejudice that resulted from counsel's tactical decision for the following two reasons must fail. First, in South Carolina, there was a judge directed death penalty qualification Voir Dire, and thus, the jury panel is in fact examined in regards to their respective views of the death penalty and the opportunity to view and question the jurors. In fact, when the defense found it necessary to question about the death penalty - they did. (see Examination by Sims and Stone at Record 557, 237, 257, 270, 305, 450).¹³ Therefore, the Petitioner's basis for relief is without merit. However, even if the Applicant successfully met this burden, the Applicant failed to establish the prejudice that he suffered as a result of the violation. Certiorari must be denied.

**IV. Certiorari must be denied where defense counsel used a federal court juror questionnaire form about "foreign nationals" on voir dire intentionally to seek out hidden biases in a polite way which did not inject any arbitrary factor where the sentencing jury was aware the Aleksey was born in the U.S.A. from his mother's testimony. The PCR Court reasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984) in finding counsel's intentional act was informed and not deficient and prejudice was not shown. [Petition, p. 50-54][Order, App.p. 5049-5051].
Voir Dire Inquiry of Jurors About Foreign Nationals - IAC.**

The sentencing jury learned that Bayan Aleksey was born in the U.S.A. App.p. 1979-1980. However, due to Aleksey's unusual name and physical appearance, defense counsel Stone sought to determine the existence of potential hidden biases of the venire that could work to Aleksey's disadvantage in the penalty phase. Based upon his experience in federal court, Stone was aware that the

¹³Respondent would note that in its Volume One , page 459-500 are in reversed order beginning after 459.

federal juror questionnaire included a question about whether foreign nationals should have the same rights as people born in the U.S. Anticipating the prosecution's later opposition (App.p. 194), Stone filed a motion on May 14, 1998 (well before the trial) to allow the use of the federal court question. App.p. 6567-6574. Aleksey contends counsel was ineffective in jury selection when he made inquiry on voir dire concerning foreign nationals when Aleksey was, in fact a U.S. citizen, albeit a descendant of a Russian and a Trinidadian. Concluding that counsel's performance was reasonable, the PCR court denied relief. App.p. 5049-5051. Since probative evidence supports the reasonable application of Strickland by the PCR judge, certiorari should be denied.

HOW THE ISSUE WAS RAISED DURING THE TRIAL

Prior to the trial, counsel Duffie Stone made a motion to add questions to the death penalty questionnaire to allow three additional questions developed from the federal juror questionnaire. App.p. 6567. One of the questions was "do you feel that a foreign national should be afforded the same rights in a civil or criminal case as a citizen of the United States. App.p. 6573. The trial court did not include the requests in the written questionnaire, but permitted the questions in a pretrial. App.p. 189, l. 20-22. However, counsel Stone asked during the voir dire of Harry Mims:

Q. Do you believe that foreign nationals should have the same rights as non foreign nationals? [as people born here in America]
App.p. 189, ll. 1-2, [App.p. 189, ll. 10-11]. The Solicitor objected that it was a specific hypothetical, but Judge Cottingham permitted it. App.p. 188-189. Subsequently, the trial court inquired why are you concerned about their thoughts on a foreign national. App. 194. Solicitor Bailey noted he was not a foreigner and was born in Manhattan. Id. Counsel Stone explained:

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

App.p. 194. Judge Cottingham allowed the question. App.p. 194. Of the jurors who ultimately decided Aleksey's fate, only four were asked the question: Jason Cote (App.p. 246); Norris Gibson

(App.p. 407); Debra Sanford (App.p. 427); and Bonnie Ziegler (App.p. 434-35).¹⁴

Aleksey contends that since the state would not be able to suggest that Aleksey was a foreign national and fail to inform the jury that he was a citizen suggests that the defense injected racial and/or nationalistic prejudice into the case. He suggests that this was *per se* deficient performance by counsel and injected an arbitrary factor into the proceedings. We disagree. Particular deference is accorded to the judgment of counsel on voir dire. Gardner v. Ozmint, 511 F.3d 420, 426 (4th Cir. 2007). A defendant is entitled to an unbiased jury under Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222. The purpose of voir dire is to assist counsel in exercising peremptory challenges. See Mu Min v. Virginia, 500 U.S. 415, 431, 111 S.Ct. 1899, 1908, 114 L.Ed.2d 493 (1991). The presence of a biased juror is not subject to harmless error analysis. Miller v. Webb, 385 F.3d 666, 676 (6th Cir. 2004) which granted relief for counsel's failure to challenge a biased juror who admired a prosecution witness. However, tactical decisions about the manner of voir dire have been upheld by the Fourth Circuit. See Spencer v. Murray, 18 F.3d 229, 233 (4th Cir. 1994), where counsel elected not to voir dire on racial attitudes. Also, Sexton v. French, 163 F.3d 874 (4th Cir. 1998). In Sawyer v. Butler, 848 F.2d 582, 589 (5th Cir. 1988), the Court upheld counsel's decision not to question jurors about their views on the death penalty where they were questioned by the state, there was no prejudice shown, and no showing of rehabilitation possible. See also Brown v. Jones, 255 F.3d 1273, 1278-79 (10th Cir. 2001)(failure to pursue reverse - Witherspoon voir dire was neither deficient performance or prejudice ineffective).

The Petitioner attempts to equate this reasonable juror inquiry with the prosecutions comments about "domestic terrorism" which the Court found injected race improperly in Vasquez v. State, 388

¹⁴ During the voir dire, one venireperson, Homer Thrailkill, when asked the question about foreign national stated: "I assume he is a citizen, isn't he?" Sims responded "we can't get into that but I am asking you this question." He responded: Yes, I have no problem. He is a human being like everybody else. I wouldn't be prejudiced one way or another." App.p. 342.

S.C. 447, 698 S.E.2d 561 (2010). However, the questions here actually were used to prevent such a factor from being considered. It remains unclear the impact that Petitioner is asserting to suggest that the questioning would have reinforced the fact that Aleksey was not from South Carolina and not a member of the Orangeburg community. Evidence was presented throughout the trial that Aleksey was traveling through the state at the time of the incident on his way to Florida. His mother testified that he was born in Manhattan. There is no requirement that jurors be shielded from information that Petitioner now complains about. Nevertheless, counsel Stone thought it was to their strategic advantage to seek out this information - a decision that is entitled to deference. This is a far cry from the situation in Vazquez that the Court interpreted as inflammatory prosecutorial comment about 9/11 and domestic terrorism when the defendant was a Muslim.

Counsel Duffie Stone's Strategy

At the PCR hearing, Duffie Stone stated that Aleksey was not a foreign national. He denied that he ever asked any juror if they had a bias or prejudice against foreign nationals. Rather, he stated he asked them if they believed they should have the same rights as a natural born citizen. App.p. 3273, PCR 858. He stated he took it off the "federal jury questionnaire" along with other questions. App.p. 3273, 3565-66. See 6567-6573 (May 14, 1998 motion to allow). Stone stated that he had used the questions in each of the three death penalty cases he tried to either put it in the questionnaire or ask it himself. App.p. 3565, 1152-53. Stone stated that he found in his federal court experience that the question was a good indication of hidden biases and prejudices that jurors may have. App.p. 3273, l. 11-16, p. 3655, l. 10-20, PCR 858, 1152-53. He stated that the question developed an honest response about hidden biases "in a polite way." App.p. 3273, l. 21-24. Stone stated that it would give an idea about hidden prejudices because you cannot question a jury individually and ask them "are you prejudiced against anybody whether that would be against African-Americans or someone not from the

country and get an honest answer. App.p. 3566, 1153. Stone stated this was the reason he asks the question. App.p. 3273-3274.

Stone reiterated it was a general voir dire question he asked, but also related to Aleksey since he looked like a foreigner or potentially that he was not from this country and had a name that elicited such a question. App.p. 3274, 3566, PCR 859, 1153. Stone did not recall if he ever placed into the record that he was a U.S. citizen. Id. However, upon questioning by the defense at trial, Vera Aleksey testified that Aleksey was born in 1968 while she was living in N.Y. App.p. 1979-1980, ROA 2071-72. Thus the jury heard evidence that Aleksey was born in the U.S.A. and was not a foreign national.

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 Aleksey. Sims stated he agreed with the strategy. App.p. 3036-37, PCR 620-21.

ANALYSIS

The PCR Court found that there was no false or prejudicial information presented by the voir dire. App.p. 5051. His characterizations otherwise are not supported by the record. The PCR court had a probative factual basis to conclude that 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 Petitioner's claim, the reasoned inquiry by counsel was not damning to Aleksey. The PCR court found and it remains uncontradicted that the inquiry is a routine part of the federal jury questionnaire. App.p. 5051¹⁵. Since the Applicant failed to prove either prejudice or deficient performance, the allegation must be denied.

In conclusion, certiorari should be denied where the PCR Court reasonably concluded that

¹⁵ See www.scd.uscourts.gov/DOCS/JURYQUES.PDF. South Carolina District Court Juror Questionnaire.

counsel's decision was entirely an informed tactical one. Further, trial counsel's strategic decision was not deficient under Strickland. Further, even if the Applicant successfully established deficient performance, the Applicant has failed to establish prejudice to which he suffered as a result of the alleged violation.

- V. **Certiorari is not warranted where probative evidence support the PCR court's conclusion that counsel was not ineffective in failing to strike Gigi Hayes, juror 144, where the PCR court found that Petitioner had failed to prove that the juror knew the victim and based upon trial counsel's reasonable investigation of the particular juror and the comments she made on voir dire.**

[Petition, p. 55-58][Order, App.p. 5063-5071].

IAC and Failure to Use Peremptory Challenge to Strike Juror 144.

At the outset, this issue must fail because the PCR Court found that he Petitioner had failed to prove the historical fact that the knew actually knew the victim. App.p. 5068. Nevertheless, the Petitioner still contends that his counsel should have used an available peremptory challenge against Gigi Hayes, a black female juror 144. Petition, p. 55-58. Particularly, Petitioner contends that defense counsel were aware that juror 144 knew the victim, was a leader, and her husband was in law enforcement. However, the facts presented do not support his conclusion that the juror actually knew the victim. To the contrary, her failure to respond on general voir dire suggests otherwise. The PCR Court reasonably concluded that based upon n probative evidence of the reasons for selecting the juror and the proper deference due that decision concluded that counsel has failed to prove either deficient performance in failing to use a peremptory strike for a qualified juror or Sixth Amendment prejudice under Strickland. App.p. 5063-71. Certiorari should be denied.

1. Voir Dire of Gigi Hayes, Juror 144

During the general voir dire, the potential jurors were asked if "any of you related by blood or marriage to the deceased, Sergeant F. L. Lingard, or do any of you have any close personal relationships

with him or his family?” App.p. 149-40. There was no response to the question by any potential jurors, including juror Gigi Hayes.

The voir dire of Juror 144 is set out at App.p. 451-460. Revealed on individual voir dire was the fact that she was employed at Family Health Center as Assistant Director and that her husband had previously been employed as a military policeman with the United States Marine Corps. App.p. 452-53. She advised the judge that while she had read, heard, and seen TV coverage about the case, she had not formed an opinion. App.p. 453. She classified herself as a number three (qualified) juror. App.p. 454. The solicitor’s questions to juror 144 were consistent with that assertion. App.p. 454-56.

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

2. PCR Testimony of Stone and Sims

During the PCR hearing, counsel Thomas Sims testified that when juror 144 was selected as a juror he had six peremptory strikes remaining. App.p. 2514, PCR 95. He identified his trial notes [Applicant’s Exhibit 1] which included information about juror 144 including “leader” “Judge – looking directly at the judge, 3rd group”, “Walter – leaning toward Walter; not any hardship”, “Duffie – Briefly looked at def. Saw News”, “No, “possibly knows the deceased talk with Charles.” App.p. 2516-2517, PCR 97-98. See Applicant’s Exhibit 1 [App.p. 5338]. Sims stated that “Charles” was Dr. Charles Kilgore, Sims’ child’s pediatrician. Sims stated he called Dr. Kilgore, with whom juror 144 worked at Family Health Center, and received an assessment who she was and what she was all about. App.p. 2518, PCR 99. He said, based upon this conversation, “she would have been a good person.” App.p. 2518, PCR 99. This was interpreted that Juror 144 would be a good juror. Sims stated that he thought that Juror 144 was either divorced or separated from her husband, the former military

policeman. Sims, contrary to the claim, did not recall that Juror 144 knew Lingard, although he thought Stone had written it. App.p. 2520, PCR 101.

Stone testified that he had identified his contemporaneous trial notes and the section “Gigi Scoville-Hayes/” App.p. 3283, PCR 868, Applicant’s Exhibit 61[App.p. 5338].¹⁶ Stone stated that his comment about “leader” meant if she gets on the jury she is a leader and affirmed that is a person who steers people to her view of the case. App.p. 3284, PCR 869. Counsel Stone could not recall where he developed information that Juror 144 knew the victim. App.p. 3286-87, PCR 871-72. However, he did recall that Sims contacted someone who knew her who advised him that “she would not be a bad juror.” App.p. 3287, PCR 871.

Stone clarified that he did not think they had information that she did not know Lingard and thought she knew him. App.p. 3286-87, PCR 871-72. However, he could not recall why they may have thought that, particularly when it was not presented at trial. App.p. 3287, PCR 872. However, Stone declared “I just remember Mr. Sims talking to someone that she worked for or with and coming back saying that she would be a good juror.” App.p. 3287, PCR 872. He noted that the scratched out mark before Juror 144’s name on his notes was the number of strikes, but he scratched it out after he talked to Sims. He stated this was based upon their information that she would be a good juror. App.p. 3287-88, PCR 872-74. After he spoke with Sims about the juror after he made the telephone call; Stone said he change his own mind from a strike to conclude she would be a good juror, even if she knew the victim. App.p. 3288-89, PCR 873-74. Even though strikes were available, he chose not to use them. Id.

On cross-examination, Stone emphasized the reason the strike was not used on Juror 144 was

¹⁶ In Applicant’s Exhibit 61, the notes are “husband - military police get rid of” “leader” “Family Health Center” “knows injured-”. App.p. 5860.

because “Sims told me that he thought she would be good.” App.p. 3573-74, PCR 11-60-1161. He said based upon Sims’s knowledge about Orangeburg, he deferred to him on this matter. App.p. 3574-76, PCR 1161-63.

Stone recognized that his impression that Juror 144 knew the victim was of concern, but based upon information from someone who actually knew her, not just the two lawyers discussing it, gave them adequate assurance to pick the juror, despite his initial reservations. App.p. 3575, PCR 1162. Stone also was of the opinion that he thought it was a good jury that they had selected. App.p. 3564, l. 21- p. 3565, l. 4. He stated that Sims changed his mind about one juror that he made a note about. App.p. 3565.

ANALYSIS

The PCR Court concluded that Petitioner failed to prove that juror Hayes actually knew the victim. App.p. 5068, ¶1. The finding of fact by the state PCR court is entitled to deference in this court. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). App.p. 5068. Since this predicate finding to the claim was rejected by the lower court, his claim must fail.

Further, Failure to strike a juror, however, requires a showing of actual bias by the juror against the defendant. Goeders v. Handley, 59 F.3d 73, 75-76 (8th Cir. 1995), citing Smith v. Phillips, 455 U.S. 209, 215-17, 102 S.Ct. 940, 944-46, 71 L.Ed.2d 78 (1981). In U.S. v. Quintero-Barraza, 78 F.3d 1344, 1349-50 (9th Cir. 1995), the court found no ineffectiveness based on the juror's oath even though the juror admitted on the record to bias. See also Wilson v. Henry, 185 F.3d 986, 991 (9th Cir. 1999) upholding as discretionary, counsel’s decision not to strike a juror. Where juror responses showed no bias, there was no ineffectiveness in failure to strike them. Odle v. Calderon, 919 F.Supp. 1367, 1389 (N.D. Cal. 1996), rev’d on other grounds, Odle v. Woodford, 238 F.3d 1084 (9th Cir. 2001.)

Although not applicable under the findings of Judge Goodstein, this Court has held that the mere

fact that person is friend or acquaintance of victim does not render him incompetent as juror in homicide trial. State v. Jones, 298 S.C. 118, 378 S.E.2d 594(1989). See also, State v. Clark, 340 So.2d 208, 215 (La.1976) (Even where a prospective juror knows a victim of the offense, the defense must show the juror's acquaintance with the victim is such that it is reasonable to conclude it would influence the juror in arriving at a verdict to warrant a cause challenge).¹⁷

Respondent submits that there is probative evidence to support the PCR Court's findings that Aleksey failed to prove deficient performance as defined in Strickland. The PCR Court made the following critical fact findings:

1. "First, they failed to prove the factual predicate to their claim - that juror 144 knew the victim. As set out above, at the general voir dire, Juror 144 did not respond positively to an inquiry on whether she had any "close personal relationship with [Trooper Lingard] or his family." App.p. 149-50. App.p. 5068.
2. Second, counsel Sims notes stated only that she "possibly knows the deceased." Applicant's Exhibit 1. App.p. 5068.
3. Further, Sims stated that he did not know if she knew Lingard and thought Stone had written it. Stone, on the other hand, thought he had gotten information that Juror 144 knew the victim which apparently prompted Sims to check with Dr. Kilgore about the juror. He thought he learned about the alleged relationship from the trial proceedings, but the trial record is devoid of any reference to any knowledge of such a friendship -

¹⁷ Turning this decision around, assuming *arguendo* that Juror 144 would have been struck, with the independent information from a source that had a close working relationship with the potential juror and defense counsel, aware that it was a death penalty case and involved the death of a police officer, opine that she would be a "good juror for the defense," from the favorable Orangeburg community; i.e., suspicious of law enforcement and the "best place to try death penalty case", would the defense perform reasonably competent in striking this juror from the panel where only one vote would be needed for a life sentence. See, Wiggins v. Smith, *supra*. As suggested by the Applicant in these proceedings, such tactical decisions are not tactical, at all, but error *per se*. However, he ignores the realities of the responses, demeanor, and multiple factors which counsel had in making their decision. What is extraordinary, but not recognized by Aleksey, in hindsight, is that Juror 144 may in fact have been the best juror for the defense. Aleksey has failed to show otherwise by the speculative understanding that the juror "knew" Lingard or the husband being a former military policeman. Those factors do not mandate discretionary exclusion when faced with favorable information. No reasonable counsel would have been mandated by the Constitution to remove Juror 144 from the process. Sims and Stone were not required to do so either.

and suggests the opposite by the voir dire response. App.p. 5068.

The PCR Court's alternative conclusions still defeat his present claim. The PCR Court concluded that, "even assuming the defense believed Hayes knew the victim, the strategic decision to not use a peremptory challenge on her was a reasonable trial strategy." It is uncontradicted that pursuant to Sims investigation of the juror, he learned from Dr. Kilgore that she would be a good juror. Dr. Kilgore had a business relationship with Sims as his child's pediatrician and Juror 144 worked with Dr. Kilgore. Counsel could reasonably base his opinion to strike or not strike on this independent information.¹⁸

In summary, the Applicant claims that he was denied effective assistance of counsel as a result of trial counsel's failure to use a peremptory challenge against Juror No. 144. Further, as noted in the earlier section, prejudice under Strickland has not been shown. As Sims and Stone stated, they were very satisfied with the jury that they had selected. App.p. 3040, PCR 624. Counsel exercised strategic decision-making in deciding not to use a peremptory strike on Juror No. 144, as they determined that Juror No. 144 would be a good juror for their panel, based upon counsel's investigation. The PCR Court reasonably found based upon the probative evidence presented that the Applicant has failed to prove deficient performance as defined in Strickland. As a result, certiorari should be denied.

VI. Certiorari is not warranted where the PCR Court found that counsel was not ineffective in failing to pursue as a basis for suppression of the Petitioner's statement that his confession was the product of a physical beating by law

¹⁸ The Petitioner has suggested that the decision to retain Juror 144 as a juror was delegated to Dr. Kilgore, who did not possess information about her friendship/knowledge of Trooper Lingard or her husband's employment as a law enforcement officer. As the PCR court concluded, "[T]here is nothing in the record to support this alleged lack of knowledge on Dr. Kilgore's part - particularly when the suggestion made at the hearing was that the contact was made based upon counsel's expectation that Dr. Kilgore would likely possess this knowledge about the co-worker stated in the "possibly knows the deceased talk to Charles", reference in his notes." App.p. 5068.

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

enforcement where the PCR Court found that there was no evidence of physical force or threats, that counsel had received various and inconsistent versions about Aleksey's reason for giving the statement from Aleksey including his belated assertion of a beating, that there was no physical evidence to support the claim and his investigation and that counsel pursued a reasonable strategy to attempt to suppress the statements.

[Petition, p. 59-65][Order, App.p. 5017-5019, 5038-5044, 5106-5107]

Confession as a Product of Brutality.

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

... Aleksey contends that counsel failed to question SLED Agents Mears and or Darnell about the allegations of coercion during the police interrogations. As noted above, the Applicant failed to assert what this "coercion" was either to the trial court or counsel. Counsel failed to present any evidence of actual coercion and failed to assert at any time in their own presentation of Agent Mears testimony any material, document or evidence which would suggest that the statement of Aleksey was the product of any undue coercion. He failed in his burden of proof of showing either deficient performance or prejudice. There has been no showing of any omission of defense counsel, which to a reasonable probability the result of either the Jackson v. Denno hearing, the guilt and/or the penalty phase result would have been different. The allegation to the contrary must be dismissed.

App.p. 5106-07. See also Order, App.p. 5042 ("... There has been no showing under the totality of the circumstances that Mr. Aleksey was worn down by improper interrogation tactics such as lengthy questioning, trickery or deceit. Further, there was no showing that the confession was induced by force,

¹⁹In the PCR court, the Petitioner had a conflicting claim as to his reasoning for the entry of his statement which is abandoning before this court. He contended that trial counsel were ineffective based upon their failure to seek to have the confession suppressed based upon an assertion that it was induced by a promise of leniency or reward. Particularly, he contended that the statement given was induced by a promise that he would be returned from solitary confinement to the general prison population. He now contends this benefit, under the decision in State v. Peake, 291 S.C. 138, 352 S.E.2d 487 (1987). The PCR Court found that Aleksey had failed in his burden of proof under Strickland by his failure to specifically assert this reason for suppression to the trial judge. App.p. 5038-5044.

psychological or physical, or by direct or implied threats...”). There is probative evidence to support these conclusions.²⁰ Certiorari should be denied.

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

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

²⁰Aleksey’s statement of January 2, 1998 is set forth in the Appendix, App.p. 2320-2433. The second portion of the interview begins at the bottom of App.p. 2332 at 7:07 PM.

in his versions to his counsel about the timing or existence of a beating. Faced with this minimal prospect after discussions with Aleksey, counsel did not pursue a “beating” strategy before the judge or jury with Aleksey’s knowledge. Counsel reasonably investigated the circumstances of the confession and made a reasonable presentation, albeit not one of “physical beating.” There is probative evidence to support the PCR court’s rejection.

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

In Aleksey’s situation counsel did a reasonable investigation concerning the circumstances of the statement and whether there was physical beating at the time of the interrogation. Unlike Dupree, the statement was taped. Unlike Dupree, Aleksey made various statements concerning the circumstances of the statement, including the WIS recording. Unlike Dupree, Petitioner first belatedly claimed he was actually beaten months after his arrest in a revised version to counsel yet never possessed any injuries consistent with his portrayal of the statement. Unlike Dupree who refused to confirm the statement was voluntary, on the tape at the conclusion of the taped statement Aleksey confirmed that he had not been threatened in any way by SLED Agents Darnell and Means, or anyone connected with the Highway Patrol, the Orangeburg Sheriff’s Department or Solicitor’s Office. App.p. 2340, l. 25-39. Unlike Dupree, defense counsel in Aleksey investigated various angles in the statement, including those suggested by

Aleksey. Where the PCR court in Aleksey concluded that he failed the coercion alleged - the physical beating - [App.p. 5106], the Court in Dupree found by a preponderance of the evidence that the voluntariness of Dupree's statement had not been proved - as supported by his failure to sign a statement that it was voluntary. As set forth below, there is probative evidence to support the PCR court conclusion that Aleksey failed in his burden of proof to show either deficient performance or prejudice.

First, the record reveals a Jackson v. Denno hearing was held on June 8, 1998. App.p. 2128-2238, R. 2218-2331. During the hearing, testimony was received from SLED Agents Mears and Darnell. Counsel Stone argued that the transcribed statement should not be admitted because after a two-hour gap, after he had declared, "that's all I have to say", Aleksey comes back on the tape crying and then declares "I shot the trooper." App.p. 2233-34, ROA 2326-27. Stone complained that there were no notes and no recording of what took place in the gap. App.p. 2233, R. 2326. Judge Cottingham admitted the statement, concluding that Miranda was satisfied and the statement was freely and voluntarily given without duress, coercion or other inducement. App.p. 2330, R. 2330. Subsequently, the confession was introduced at trial for the jury's consideration as a fact finder in the guilt phase in a redacted form. App.p. 1517-19, R. 1578-79. It was introduced subsequently in the penalty phase.

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

1. How the issue was raised at trial

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

- Q. All right, sir. And what is it that specifically led up to the tape going back on?
- A. He stated to us, when I say “he” I am talking about Mr. Aleksey, stated to us that if he told us the honest truth, if he could get back into general population, that he didn’t want anyone else to get into any trouble for something he did.
- Q. And after you checked around and found out that he could possibly get back into general population, is that when- -did you communicate that back to him?
- A. That’s correct. It took some time. He had to call the Charleston Office, they called back, he had to call the jail, they had to look around to see what could be done, and when we finally got the okay, we told him that he could go back into general population.
- Q. Okay. And then did he agree to go ahead and go back on tape?
- A. That’s correct, that’s when he agreed, he said he would tell us the truth.
- Q. Okay. Other than trying to assist him in getting from the infirmary cell to general population, did you make any other promises to him or did you hear Agent Darnell make any promises to him?

A. No, sir, none.

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

A. No, sir, he never was threatened.

Q. Did you physically abuse him in any way?

A. No, sir.

App.p. 2221-22, R. 2314-15. [The dichotomy of claiming on one had that the statement was the product of physical abuse and on the other hand a product of lenient treatment is obvious to any reasonable observer.]

SLED Agent Mears testified in the suppression hearing that Petitioner signed a voluntary waiver of rights form at 4:45 prior to the statement. Like Darnell, Mears testified that no threats were made to Aleksey between the statements during the gap period. App.p. 2217-2219. Mears again reiterated that no one physically abused Aleksey in any way. App.p. 2222, R. 2315. Agent Mears clarified the timing of the inquiry on cross-examination:

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

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

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

At the Denno hearing, counsel Stone argued about the one hour gap, "that's all I have to say" and crying when the tape was on after the gap. App.p. 2231-34, R. 2324-27. The trial judge determined, under the totality of the circumstances, that the statement was freely and voluntarily given, "without reward, without promise or hope of reward, without promise of leniency... and that such alleged

incriminating statement was the voluntary product of the free and unconstrained will of the defendant.” App.p. 2330, R. 2330.

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

Before the jury, Agent Darnell described the circumstances surrounding the statement. App.p. 1506-1519, R. 1567-1580. He stated that at the conclusion of the first statement, among other things, Aleksey “asked us if he was truthful with us could get him out into the general prison population, that he was in the infirmary cell by himself and that he did not want to go back over to the cell by himself.” App.p. 1513, R. 1574. He described seeking information from the various sources. App.p. 1513-14, R. 1574-75. After the Detention officials advised that they did not have a problem with it:

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

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

On cross-examination of Mears, counsel Stone inquired whether any threats were made to Aleksey or promises before the tape was turned back on. App.p. 1536. Mears denied it. App.p. 1536. Counsel Stone reiterated in his examination that Aleksey was sobbing. App.p. 1537. Similarly, SLED

Agent Kenneth Mears testified, without contradiction:

- Q. And during that entire roughly two hours or so when the tape was off, did you or did Mr. Darnell in your presence or anybody else threaten Mr. Aleksey in any way?
- A. No, sir, no threats.
- Q. Anybody Physically abuse him?
- A. No sir
- Q. In listening to that tape, Mr. Aleksey from time to time is sort of sobbing; is that correct?
- A. Yes, sir, that's correct.
- Q. Did either you or Mr. Darnell do anything to make Mr. Aleksey sob or cry or whatever on that tape?
- A. No sir, nothing was done.
- Q. Was there any type of coercion, undue influence, anything of that nature during the two hour period that would affect the voluntariness of that statement this jury has heard a few moments ago?
- A. No sir....

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

Thomas Sims

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

Other than his later letter, Sims stated all that he had at the confession concerning coercion was

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

Duffie Stone

Stone credibly testified that he had reviewed in March 1998, some letters from Aleksey that suggested the confession was beaten out of him. App.p. 3292-93, 3296-97, PCR 877-78, 881-82.²¹ Stone said a problem they had with presenting his belated assertions of the confession being beaten out of him was that it was not consistent with Aleksey's telephone call to WIS-TV. Counsel Stone recalled that Aleksey's story changed quite a bit over time. In describing the WIS- TV taped call, Stone stated that Aleksey when asked why he confessed Aleksey told the reporter that he was under a lot of pressure to give the statement and when asked what type of pressure would make you confess to the killing of a police officer Aleksey told the reporter had the it was just a lot of pressure. App.p. 3317, l. 3-18. Stone stated that Aleksey did not tell WIS that he was beaten or that he was promised he would get out of jail or that a woman would be helped. Stone agreed that he did not have to believe Aleksey , but saw that each time Aleksey spoke, he had a new story. App.p. 3317-3318, PCR. 902-903. At one point Aleksey

²¹The letter addressed to Sims and Stone read:

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

had described to him one SLED agent hit him in the chest and another had told him that he had killed a friend of his and that he would not get out alive and an earlier time stated that a person from New York had a contract on him and had sent the trooper to kill him. App.p. 3293, 3296, 3317-19, PCR 878, 881, 903-904. Stone acknowledged that there was no way for the trooper to have knowledge of the alleged mafia hit. Stone stated that he realized that there was no way that Aleksey would come across as credible and when he ultimately testified in the penalty phase, Stone did not think he came across as credible. App.p. 3319, PCR 903-904.

Stone stated that he investigated the confession matter by attempting to determine whether SLED agent Mears and Darnell had a high record of getting confessions. App.p. 3302. Stone stated he wanted to determine whether they were “closers” and sought an FOIA to get their history with successful confession. App.p. 3302-03, PCR 888-89. He opined that the agents percentage was “pretty good” and thought that was a strong angle to approach the witnesses. App.p. 3303. He stated that his angle was to prove that they were closers.

Stone stated that he did not argue “beatings” where he sought to infer something happened in the two-hour gap. App.p. 3310, PCR 895.

Stone stressed that his comment about coercion was inconsistent with his WIS interview. App.p. App.p. 3560, l. 5-16, PCR 1147. Stone stressed that in his own discussions with Aleksey, Aleksey advised him about being coerced or pressured to confess, there was no physical signs of evidence to present to support such a claim and the WIS statement made it a difficult issue to get around. App.p. 3560-61.

Stone stated that he and Sims had discussed with Aleksey that he could testify at the Jackson v. Denno hearing and “say whatever it is you need to say.” Stone further indicated to Aleksey that it was highly unlikely that the judge would throw out the confession. App.p. 3561, l. 11-20. He stated that

Aleksey and the defense decided not to testify. App.p. 3561-62, PCR 1149.²² Stone further opined that his work did not impact on the presentation challenging the confession. App.p. 3562.

2. Analysis

To determine the voluntariness of a confession and whether it is subject of coercion, courts commonly look to (1) the location of the questioning, (2) whether Miranda warnings were given, and (3) whether the accused initiated the contact. See Colorado v. Connelly, 479 U.S. 157, 170 (1986). In Connelly, the Court looked to the totality of the circumstances as to whether law enforcement had overborne the will of the accused by (1) the creation of the pressure and (2) the suspect's capacity to resist the pressure. Courts have generally held certain police practices insufficiently coercive to constitute a Fifth Amendment violation: (1) promises of leniency or psychiatric treatment, (2) confrontation of the accused with other evidence of guilt, (3) an interrogator's appeal to the defendant's emotions, and (4) an interrogator's false or misleading statements. See *Annual Review of Criminal Procedure*, 39 Geo.L.J. Ann.Rev.Crim.Proc., p. 199-205 (2010)(see cases collected, note 597-618). Obtaining testimonial evidence from a defendant by means of physical torture or other physical coercion violates the Constitution. *Id.*, see Brown v. Mississippi, 297 U.S. 278, 286-87 (1936)(brutality extracted confession is a Due Process violation).

The PCR Court specifically found that "... there has been no showing, under the totality of the circumstances that Aleksey was worn down by improper interrogation tactics such as lengthy questioning, trickery or deceit. **Further, there was no showing that the confession was induced by force, psychological or physical, or by direct or implied threats.** Standing alone, the requested bargaining by Aleksey was not for leniency or a lesser sentence." App.p. 5042. (Emphasis added) There

²²Stone testified that they were able to keep out Aleksey's statement while in the hospital about a contract being placed against him by the Russian mob and Aleksey's thoughts that the trooper was involved in the "hit." App.p. 3562, l. 1-12.

is probative evidence in the record to support this finding of fact.

Counsel cannot be deemed ineffective in failing to pursue the asserted strategy. See Thai v. Mapes, 412 F.3d 970 (8th Cir. 2005)(counsel not ineffective in failing to assert statement was the product of a promise of leniency where police only asserted they would protect Thai after he expressed fear that members of a group would harm him if he gave a statement which was neither a promise he would not be prosecuted or as a promise the authorities would be more lenient); Sumpter v. Nix, 863 F.3d 563 (8th Cir. 1988)(promise of treatment for alcoholism does not undermine voluntary statement).

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

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

Counsel Stone admitted at the PCR hearing that he did not argue that the confession may have been induced by a promise to move him from isolation in the infirmary to the general population. App.p. 3306-3313, PCR 891-98. Counsel stated that he believed his best argument was to urge it was a Miranda violation due to the comment that he had no more to say and the gap of two hours. App.p. 3308, PCR 893. However, counsel's decision not pursue a claim of beating was the product of the investigation that revealed a series of different stories about the basis for the statement, which did not include physical beating, the lack of physical proof to support the claim, the Petitioner's denial on the tape of a beating, the failure to claim that he was beaten in the WIS interview, and the decision by Aleksey to not testify in the suppression hearing.

Counsel's strategic decision was not deficient under Strickland, *supra*. Here, where the statement revealed it was induced by Aleksey's own requests to law enforcement, it is difficult to assert that it will was overborne. App.p. 2333-34, 2340. Further Sixth Amendment prejudice has not been shown where the Applicant failed to show a reasonable probability the result would have been different if he had raised this objection to the statement. The Applicant has failed in his burden of proof.

In summary, it appears that the issue of voluntariness was raised in the Jackson v. Denno hearing. However, despite the allegation that a promise that was made, specifically the promise to move Mr. Aleskey into the general population, the trial court determined that, based upon the totality of the circumstances, Mr. Aleskey's confession was voluntarily given. Furthermore, Mr. Stone testified that it was a tactical decision to argue that the confession was violative of Miranda, instead of arguing that the confession was the result of a promise which was improperly induced or that Petitioner was physically beaten. Respondent submits that certiorari should be denied where the PCR Court properly determined to find that the Applicant has failed to meet his burden that counsel was ineffective for failure in pursuing the asserted strategy, and further, that counsel's strategic decision was not deficient under Strickland. There is no reasonable probability that the statement would have been suppressed if the so-called beating argument would have been presented based upon the paucity of credible evidence to support the belated assertion of Aleksey against the plethora of evidence that he was unharmed during the statement. Certiorari should be denied.

- VII. Certiorari is not warranted where the defense team was aware from the Petitioner about GloryVee Perez's joint criminal involvement with him concerning the use of stolen checks used to create a scam and sent an investigator to investigate her background which was a reasonable investigation about her potential motive to avoid arrest at the time of the stop. Further, based upon the record as a whole, prejudice was not shown where there is no reasonable probability that had Perez been impeached with the scam evidence the result of the proceeding would have been different where other evidence, including the Petitioner's own statement pointed to Aleksey as the triggerman. [Petition, 66-73][Order 5108-5148].**

Aleksey contends that trial counsel failed to adequately investigate the criminal background of Gloryvee Perez Blackwell, particularly as it related to incidents in which she was involved in the theft of checks from Dr. Bang, her employer, and the attempted use of the checks with Aleksey to purchase a vehicle. He contends this information could have been used to suggest that the witness also had a motive to flee as much as Aleksey. The record reveals that counsel was aware of Perez's criminal involvement with Aleksey from Aleksey related to these items and reasonably investigated them. The PCR Court found as to this specification that Petitioner had failed in his burden of proof to show 6th Amendment prejudice. App.p. 5108, 5125, 5158. Certiorari is not warranted where there is evidence to support the claim.

A. How GloryVee Testified At Trial.

During the state case in chief in the guilt phase, the prosecution called the passenger in Aleksey's car, Gloryvee Perez (Blackwell), about her knowledge concerning the shooting of Sgt. Lingard. Prior to her testimony, the prosecution stated its intent to reveal two prior convictions, but that its research did not reveal outstanding arrest warrants. ROA. p. 1288-89. At that time, the defense indicated that it was aware of other outstanding traffic warrants and the trial court suggested that it would permit it. ROA. p. 1290. App.p. 1227-1229.

Gloryvee Perez Blackwell, on direct, testified that she previously had some problems with the law. Particularly, she declared that in 1992 she was convicted in New Jersey of "possession of cocaine" and in 1991 of "shoplifting." App.p. 1236, App.p. 1227, ROA. p. 1297, ll. 2-10. She further declared that she did not recall any "speeding tickets." App.p. 1236, ROA. p. 1297, ll. 11-14. She testified that she had been charged with murder in this case, but the charges were dropped. App.p. 1237, ROA. p. 1298, ll. 2-6.

She testified that in December 1997, she met Aleksey, who she knew as "Michael Toscani" in

Philadelphia. She had previously separated from her husband who was in the Marine Corps in South Carolina. She stated that Aleksey offered her to move in with him. App.p. 1238-39, ROA. p. 1299-1300.

She stated that they left Philadelphia on December 31, 1997 to go to Disney World with her two children. Aleksey drove the entire trip and she sat in the passenger seat. Her children, Mercedes and Gloria, were in the back seat of the Mustang. App.p. 1241, ROA. p. 1302.

At around 11 p.m., she recalled being pulled over when Aleksey woke her from her sleep. App.p.; 1243-43, ROA. p. 1303-04. He told her that he had been speeding. With the drivers side window down, she heard the officer's voice say "hello folks or good evening folks" in a polite way and "how are you doing." At that point, Aleksey said "how are you doing officer?" and immediately fired a gun. App.p. 1243, ROA. p. 1304, ll. 17-25. Previously unaware that there was a gun in the car, she said she saw and heard the pops and flashes from three or four shots. App.p. 1244, ROA. p. 1305, ll. 6-15. She did not hear Sergeant Lingard say anything threatening at all. App.p. 1244, ROA. p. 1305, ll. 16-20.

Immediately after he shot, they took off speeding. When shots were fired back them, Aleksey said, "no, he went down, he went down." App.p. 1245, ROA. p. 1306, ll. 2-4. She said that she began screaming as they took off. When she asked him why he did it, he said "he wasn't going to jail, he was not going to jail." App.p. 1245, ROA. p. 1306, ll. 13-16. She described the car chase and begging him to pull over. App.p. 1245-46, ROA. p. 1306-07. She said that when he did, an officer had a shotgun pointed at him and Aleksey said "I will shoot myself" with his gun pointed at his own head. App.p. 1246, ROA. p. 1307, ll. 6-10. At that point, she stated she jumped out of the car, grabbed her children and went to the officer. App.p. 1246, ROA. p. 1307.

On cross-examination, defense counsel Sims initially inquired about her prior conviction for

drugs. App.p. 1252, ROA. p. 1313, ll. 20-23. The prosecution then objected to going into details of the conviction going into evidence and the court agreed. App.p. 1253, ROA. p. 1314, ll. 8-11.

The defense then asserted that the witness had been indicted on ten (10) separate counts and made a bargain and pled to one of the counts. App.p. 1255, ROA. p. 1316, ll. 1-4. He contended that the information was relevant on all ten (10) charges. The trial court stated that he would permit inquiry about what she pled guilty to and arrest warrants for speeding, but not into the nine (9) other matters that she was indicted, but not tried on. App.p. 1256, ROA. p. 1317, ll. 11-21.

The defense then made a proffer of the indictments. App.p. 1256, ROA. p. 1317, ll. 22-24. The defense, in camera inquired of the witness of each of the charges on whether she was indicted and she stated that she did not recall. App.p. 1257-58, ROA. p. 1318-19. She did recall that she pled to one of the counts and received three (3) years probation. App.p. 1258, ROA. p. 1319, ll. 14-16. Counsel Sims declared that she pled guilty to count five and that the remaining nine counts of the indictment were dismissed. App.p. 1258-59, 1261-62, ROA. p. 1319-20, 1322-23.

During the cross-examination, she denied that she was in the drivers seat or did the shooting. App.p. 1273-74, ROA. p. 1334-35. She further denied driving the car into South Carolina. App.p. 1279-80, ROA. p. 1340-41.²³

Dr. Bang, Summit Bank, Burlington Lincoln Scam and Ineffective Assistance Claim

In his claims related to Gloryvee Perez Blackwell, Aleksey claims that he received ineffective assistance of counsel because trial counsel failed to investigate (or present evidence) of Gloryvee's fraudulent activity concerning a theft and scam involving Dr. Bang, Summit Bank and the Lincoln where Aleksey had given counsel notice and information concerning the scams and the failure to

²³ The witness' daughter, Gloria Riveria, also testified that her mother was sitting in the passenger seat with her one (1) year old sister in the car seat. ROA. p. 1370-73.

impeach Gloryvee based upon the Dr. Bang scam.²⁴ The PCR Court's rejection of the claim is supported by probative evidence. He has failed to show deficient performance or prejudice under Strickland v. Washington, 466 U.S. 668 (1984).

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

1. What the Defense Knew About the Scam From Their Client

Counsel Stone specifically recalled that Gloryvee was fired from her job because she stole checks. App.p. 3375, PCR 960. Stone noted on March 25, 1998 the following about the stolen checks that he learned from Aleksey in letters:

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

²⁴In the lower court, Petitioner also alleged that counsel was ineffective in failing to investigate issues related to a Penske Rental matter concerning a rental truck on December 30, 1997, crime scene photos concerning personal items of Perez and their location, matters concerning Marine Corps Air Station Federal Credit Union Checks. He also had raised issues that counsel should have developed Gloryvee's ability for self-protection by a history of cutting deals and shift blame involving her plea bargain on the Trenton drug case and her implication of Aleksey in the theft of Dr. Bang's checks. Lastly, he contends that counsel should have called Marcus Blackwell, her estranged husband, about her violent temper, use of gun, and resemblance to her sister and his mother, Elizabeth Blackwell on the influence Gloryvee had on Gloria Mai Rivera's statements. These issues have been abandoned in this appeal. They were specifically addressed in the PCR Court Order, App.p. 5126-5148.

App.p. 3335-3336, 5878, Applicant's 65, p. 2, PCR 920. Stone confirmed that he received letters from Bayan Aleksey introduced as Applicant's Exhibit 23 A,B,C. App.p. 3345, 5450-5453, PCR 930. The March 14, 1998 letter from Aleksey revealed:

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

App.p. 5450, Applicant's 23(A). The record reveals the Dr. Bang checks were provided by the prosecution in discovery. App.p. 5601, Applicant's 32.

On March 30, 1998, Danneta, Thomas Sims' employee, documented a telephone call with Aleksey and noted that "when Gloria and him were together she took two checks from her job & opened an account Summit Bank, Pennsylvania, Northeast Philadelphia, \$26,000 total of the checks." App.p. 2741-43, 3339-40, PCR 324-26, 924-25, Applicant's Exhibit 22.

In the April 19, 1998 letter to counsel, Aleksey wrote:

...I remember SLED ask and telling me about a wire transfer to her acct in P.A. Summit Bank in Phila. and about some checks from her job. She worked in Trenton, N.J. at a Medical Center... It was on Field Street. Dr. Band or Bang (not sure)...
...She has a checking account in Beaufort, S.C. She went to a dealership in N.J. Burlington Lincoln Mercury Ford. She had a certified check for \$20,000 to get a Mark 8 Black.

App.p. 5452, Applicant's Exhibit 23(C). The letter also detailed their hotel.

The Gloryvee - Aleksey Check and Car Scam

The PCR Court found the following facts in the scam created by Aleksey with Glory Vee based on the evidence Petitioner presented:

Bayan Aleksey, using an alias of Michael Toscani and Gloryvee Perez went to the Burlington Lincoln Mercury Ford dealership in Burlington, N.J. on December 22, 1997. "They indicated they desired to purchase a new 1998 Lincoln Mark VIII LSC." "They indicated the down payment would be \$20,000." App.p. 5605-06, Applicant Exhibit 33 (Keith Randall). Randall, a sales representation ve advised them that the dealership would only accept the payment in certified funds or cash. Id.

Gloryvee was employed at that time by Dr. Byung Kee Bang of Trenton, N.J. App.p. 5599, Applicant's Exhibit 31. Around December 23, 1997, checks belonging to Dr.

Bang were stolen. App.p. 5599-5600, 5607-09, Applicant Exhibit 31, 34.

On the same date the checks were stolen, on December 23, 1997, a deposit of a check of \$28, 500. 32 was made at Summit Bank. App.p. 5632, Applicant Exhibit 36. App.p. 2890, PCR 472. The particular checks were two stolen checks from Dr. Bang which were forged in the amount of \$24,000 [7385] and \$4532 [7361], both made out to Gloryvee Perez. App.p. 2889-91, 5724, Applicant's Exhibit 31, PCR 472.

With the deposit receipt in hand, Gloryvee and Aleksey returned to Burlington Lincoln on December 23. On that date, Gloryvee filled out various documents to purchase the car. App.p. 5605, Applicant's Exhibit 33. The car was not released to them on that date. However, a promissory note was signed to pay \$20,000 in funds or cash by December 26, 1997.

The early morning of December 24, 1997 at 9:30 a.m. Gloryvee and Aleksey went to Summit Bank, App.p. 2889, PCR 471. They met Christopher Sontag, the branch manager, and attempted to withdraw cash in a sum of approximately \$20,000. App.p. 2889-91, PCR 471-73. Gloryvee advised Sontag that it was an emergency and she had to have the money that date. App.p. 2891, PCR 473. To appease her, Sontag provided her with \$1000. App.p. 2891, PCR 473. Sontag then called Union Bank who informed him that the check's not good because the signature was not good and it was her employer. App.p. 2891, PCR 473.

Sontag stated he told First Union not to do anything and planned a sting operation with the Philadelphia Police Department. However, when he called Ms. Perez at her job to let her know the funds were available, the office manager, [Pat Cubberly] told him the Trenton Police were there and Ms. Perez was not there. Sontag stated he left several messages on her home answering machine, but Gloryvee never showed up. App.p. 2892, PCR 474. He stated the bank did not prosecute the case because it would cost them too much. App.p. 2892-93, PCR 474-75. Further, since she did not show up to collect the \$25,000, the Philadelphia Police opined it was not a crime. App.p. 2896, PCR 478. However, the witness was not advised of this fact. The "hold" notice was placed on the account. The record also reveals that Gloryvee would not have received notice from Summit Bank in the mail which was postmarked January 3. App.p. 2900, 2904-05, PCR 482, 486-87, Applicant's Exhibit 40.(App.p. 5665)

After speaking with Sontag, Pat Cubberly contacted Trenton Police Department on December 24 after she determined the checks were stolen. App.p. 5599, Applicant's Exhibit 31 [This time frame varies from Sontag's testimony]. An incident report was made and the police responded to Dr. Bang's office. App.p. 5591, 5607-08, Applicant's Exhibit 31, 34 (Trenton Police Report). The police arrived at Dr. Bang's office around 11:03 and met with Pat Cubberly initially. Id. Cubberly advised them that she was initially contacted by Dr. Bang's bank, Core States concerning two checks deposited at Summit Bank and Dr. Bang advised her that they must be stolen. The Trenton policeman reported he spoke with Perez who denied taking any check and depositing them in her account. However, Perez stated "a guy she had been seeing for approximately two weeks was at the office on 12/23/97 and that he must have stolen the checks without her knowing it." App.p. 5607-09, Trenton Police Report, Applicant's 34. Cubberly opined that it would be impossible, where the checks were kept, for anyone to have taken the checks without Gloryvee's knowledge. App.p. 5599-5600, Applicant's 31. When Sontag contacted Cubberly, Gloryvee had left

the office.

Subsequently, Gloryvee and Aleksey checked out of Summerfield Suites. App.p. 5462, 5666, Applicant Exhibits 29, 41. The check used was written from a closed account at the MCAS Beaufort Federal Credit Union. App.p. 5666-5677, Applicant Exhibit 41.

They checked into the Residence Inn using \$500 of the \$1000 cash received that date from Summit Bank. App.p. 5462-96, Applicant Exhibit 29.

On December 27, 1997 Keith Randall of Burlington Lincoln contacted Dr. Bang's office concerning Gloryvee's commitment to purchase the car. He learned that she had been fired at that time. He asserts he was advised that warrants had been issued for her arrest for the theft of the checks.²⁵ App.p. 5605-06, Applicant Exhibit 33.

App.p. 5114-5117.

ANALYSIS

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

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

App.p. 1691 -92, R.p. 1752, ll. 7-9; p. 1753, ll. 15-22.

The defense team had knowledge of Gloryvee's involvement in the theft of the checks and passing of bad checks by Gloryvee with Aleksey from Aleksey. When the Solicitor argued, from this record, that no one was looking for her, this was an accurate argument based in the record (and Solicitor Bailey's knowledge). Counsel Stone was aware that Bayan had deposited stolen checks that Gloryvee

²⁵ It should be noted that no arrest warrants for the theft of checks have been produced, only the incident report.

had given him. App.p. 3335, PCR 920. Further, the defense team was aware that Gloryvee had taken checks and deposited them into a Summit Bank account for \$26,000. App.p. 2741-43, 3339-40, PCR 324-26, 924-25. The defense was also aware that Aleksey had advised them she had gone to Burlington Lincoln Mercury with a certified check for \$20,000 to get a Mark 8. App.p. 5452, Applicant's 23(C). (Note: The record does not support that Gloryvee or Aleksey ever possessed or presented a \$20,000 cashiers check to Burlington Lincoln).

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

The Applicant contends that the additional information would have removed from Solicitor Bailey's motive factors favoring Aleksey as the triggerman that Gloryvee "has not got anybody looking for her" and the only person avoiding apprehension was Aleksey. Plainly, both Aleksey and Gloryvee were aware of their involvement in the joint scam to acquire the Lincoln. Further, it is clear that if this additional evidence was presented, Solicitor Bailey, at least, would not have been able to say that no one was looking for Gloryvee, when someone should have been looking for Gloryvee (or that she would have known someone should be looking for Aleksey based upon what she told Trenton police).

The defense counsel were inconsistent on why these factors, known to the team, were not presented. Counsel Sims stated that they sent investigators up to Pennsylvania to check out her background, but did not recall, at the hearing, what they had although he knew she had been employed. App.p. 2819-2820, PCR 401-02. However, Sims, upon reviewing the submitted evidence concerning the check theft stated that she did not have convictions for these incidents so that they could not be used

to impeach. App.p. 2834, PCR 416. Sims agreed they could be evidence of fraud, but was reticent about whether Judge Cottingham would have allowed it. However, Sims stated that it could have been able to be presented under SCRE 608(b) as character evidence and evidence of “motive” for Gloryvee. App.p. 2835, PCR 417. The information concerning Dr. Bang, the Lincoln materials, and Summit Bank, Sims stated he would like to have had the documents because “it would have shown that she definitely had some problems, or that she was out doing all kinds of things, also.” App.p. 2851, PCR 433.

Sims noted that in each of the impeachment matters of Gloryvee (and others), Aleksey was either a participant or beneficiary. App.p. 2750, PCR 333. Sims stated when they sent investigators to develop background on Gloryvee, they learned about the drug conviction and indictment. Sims asserted that he did not recall Aleksey ever asserting that the reason Gloryvee shot the trooper was because she was on the run from law enforcement, but thought that issue probably came up and they sought to use the conviction to bring it out. App.p. 3056, PCR 640. Counsel had a concern that Gloryvee had drugs in her property in a diaper bag and sought to see if that was searched. He stated that if there was contraband in the bag, it may have prompted her to act the way she did and gave a reason for firing the fatal shots. App.p. 3057, PCR 641. However, the materials were already gone. App.p. 3057, PCR 641.

Counsel Sims indicated that he could not presently recall if he knew about Gloryvee’s activities prior to trial, but stated that this information about her other activity “could have been helpful.” App.p. 3098, PCR 682.

Counsel Stone confirmed that the focus of the case against Gloryvee was to develop impeachment and suggest that Gloryvee was the shooter. App.p. 3372, PCR 912. Counsel Stone concurred that at trial he stated that Gloryvee “has the same types of problems Mr. Aleksey does.”

App.p. 2280-81, 3330, PCR 915, R. 2373-74. Counsel recognized the fact that if they could have developed that Gloryvee had a “significant motive” in the case, it would have been good for the defense. App.p. 3332-33, PCR 917-18.

When asked about checking out the fact that Aleksey told them about Gloria and Aleksey taking checks from her job, and other items listed in Applicant’s 22 (App.p. 5449), Stone stated he recalled conversations with Sims concerning the car rental and other stuff, but not the specifics. App.p. 3340, PCR 925. Counsel was not sure that when he sent his investigator, Tommy Davis, up north in August to check on Perez’s background prior to the trial and was unclear whether he specifically went to Dr. Bang’s office. App.p. 3368, PCR 953, 1246-47. However, his notes reflected that the investigator talked with the Trenton police. App.p. 3342-43, PCR 927-28. Also, Stone did not recall ever talking to Dr. Bang’s office. App.p. 3368, PCR 953. Stone stated he had prepared a document styled “Aleksey versus Blackwell comparing Blackwell’s shoplifting, prior record of possession of cocaine, prior arrests for fraud, shoplifting, and drugs in Puerto Rico to Aleksey’s prior arrests for fraud. App.p. 3374, PCR 959. Stone stated that he did not know if the Aleksey fraud and Blackwell fraud, at the time, were the same thing. App.p. 3374, PCR 959. As he stated:

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

App.p. 3375, PCR 960.

Counsel Stone, though indicated, in reference to the fraudulent checks that Gloryvee and Aleksey wrote to Summerfield Suites [Mt. Laurel Police Dept.], that while he would not have cross-examined her about it on contradicting her statement that Aleksey was paying for everything, he would have used them on cross-examination to show they were bouncing checks. App.p. 3415. PCR 1001. Stone

admitted that this might show she knew people were looking for her. App.p. 3415, PCR 1001.

On cross-examination, Stone admitted that Aleksey told him Gloryvee had stolen some checks that he had deposited and he received "a good amount of information that they were involved in criminal activity together." App.p. 3584, PCR 1171. Also, in Aleksey's admission he developed the joint activity related to the Dr. Bang checks which counsel knew:

K. Mears: Were you working?
B. Aleksey: No
K. Mears: Was Gloryvee working?
B. Aleksey: Yes
K. Mears: **There were several checks in the vehicle that belonged to a doctor, do you know what checks I'm referring to?**
B. Aleksey: Yea
K. Mears: **Where did those checks come from?**
B. Aleksey: **From where she use to work at, she didn't know I had them.**
K. Mears: How did you get them?
B. Aleksey: **I was just picking her up from work and she wasn't there I just picked them up without her knowing, she didn't know I took them.**
K. Mears: Did you cash any of them?
B. Aleksey: No
K. Mears: You never did cash any of them
B. Aleksey: Huh, huh
K. Mears: Did you wire any money into an account of yours or anyone's at any time?
B. Aleksey: **Well, not wire, Gloria, it was Gloria's account, she didn't know and I deposited two checks to see if they would clear.**
K. Mears: Did the checks clear?
B. Aleksey: No
K. Mears: **What did the two checks amount to?**
B. Aleksey: **\$24,000 to \$28,000 something like that.**
K. Mears: So while on this crime spree, who else was involved, if anyone, besides you?
B. Aleksey: No one.
K. Mears: So you are telling us that you committed this crime of shooting the South Carolina State Trooper by yourself.
B. Aleksey: Yea
K. Mears: Gloryvee was not involved in any way?
B. Aleksey: No
K. Mears: Speak up.
B. Aleksey: No
K. Mears: Are you telling the truth?
B. Aleksey: Yes

App.p. 6270-71, Taped Interview of Aleksey, p. 8-9. Applicant's Exhibit 83, Sec. 24. (Emphasis added). As noted, on January 2, Aleksey stated that Gloryvee was unaware that he had taken the checks from her office or had deposited them to see if they would clear. He also claimed to have taken them without her knowledge.

Cross-examination must be objectively unreasonable and counsel's refraining from certain lines of inquiry is entitled to deference under Strickland. Dows v. Wood, 211 F.3d 480, 487 (9th Cir. 2000). As noted above, the defense team was aware, at the time of trial directly from Aleksey, that Gloryvee had engaged with him in the activity of stealing the checks and depositing them. There is no issue that these events could have been used in the cross-examination of Blackwell. The reason for omission of this inquiry, however, is not reflected in the record, primarily because the counsel who examined the witness did not have any specific recollection of the matter and necessarily did not illustrate his reasoning to the Court.

Assuming *arguendo* that such failure was deficient, Sixth Amendment prejudice has not been shown because there is reasonable probability the result would have been different had the jury been presented with information about the check theft from Dr. Bang and the attempt to acquire monies and the car as a result.

The Applicant asserted that this evidence would have defeated the claim by the prosecutor of a lack of motive to shoot by Gloryvee. While it does suggest that Gloryvee would have known it was likely that police were looking for them, not just her. *Yet this intent to avoid apprehension by Gloryvee suggested by the Applicant is immediately defeated by the self-evident and conflicting fact that she begged Aleksey, after the shooting to pull over when being chased, jumped out of the car with her child and ran to the officers. App.p. 1246, R. 1307.* Presumably, the same desire to "avoid apprehension" based upon her bad check theft scam existed when she ran to the officer. App.p. 1246,

R. 1307. However, as the prosecution noted the remaining factors (other than the motive to run) still weighed in the favor of Aleksey as the shooter:

- The shots that killed Frankie Lingard were fired from the driver's side. (ROA 1754). App.p. 1693.
- Bayan Aleksey was behind the wheel of the Mustang. (ROA 1755). App.p. 1694.
- Police saw Gloryvee exit the car on the passenger side. ROA 1757. App.p. 1696.
- Aleksey led officers on a high speed chase. (ROA 1759). App.p. 1698.
- Aleksey admits a suicide attempt in his statement but the gun jams. (ROA 1760). App.p. 1699.
- The murder weapon is traced to Aleksey, not to Gloryvee. (ROA 1761). App.p. 1700.
- Gloryvee prints were not on gun, but Aleksey's prints are on the gun and the clip. (ROA 1764). App.p. 1703.
- The Applicant confessed that he was the triggerman. (ROA 1765). App.p. 1704.

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

VIII. Certiorari is not warranted where there is probative evidence to support the conclusion that trial counsel was not deficient in failing to retain or call a social worker (Jan Vogelsang), where counsel had used a mitigation investigator, a social worker who had evaluated previously from New York (Dr. Rosengard), a neurologist(Dr. Bachman) and a psychiatrist (Dr. Schwartz-Watts) in his reasonable investigation about Petitioner's mental and emotional background. Further, prejudice has not been shown by the proffered PCR testimony where the mother gave similar background testimony to the jury and negative aspects of violence would have been developed. {Petition, p 73-85}[Order, 5085-97, 5329]

IAC and Social Worker

The Petitioner contends that counsel was deficient in failing to retain an additional social worker - other than Dr. Rosengard - to review the material that retained mitigation investigator Toni Bovee obtained after her interviews with Vera Aleksey and Dr. David Rosengard, an MSW who had previous

contact with Aleksey and was prepared to testify about his opinion of the Aleksey family background.

The Petitioner relies upon the deposition testimony of Janet Vogelsang, a licensed clinical social worker, in support of their claim that counsel was ineffective. The PCR Court rejected the claim concluding that counsel reasonably investigated the Petitioner's background and chose a strategy to use the mother to present similar family background information rather than Dr. Rosengard, who would have blamed the mother for Petitioner's problems. App.p. 5085-97]. There is probative evidence to support the PCR court's conclusions.

The Petitioner asserts that counsel should have called a social worker to summarize the family background evidence, but ignores the fact that similar evidence was presented and that the defense had a strategic reason for not using Dr. Rosengard. At the PCR hearing Petitioner presented a different social worker, Jan Vogelsang to present family background testimony. Her conclusions can be summarized as follows: a). a special needs child; b). Emotionally disturbed and emotionally handicapped; c) Special education student; d) immature and enmeshed with his mother; e) alcoholic and physically and verbally abusive father; f) Child that did not develop social skills that would help in relationships outside the home or able to function in world; g) engages in impulsive and self-destructive behavior; h) does better in well-structured environments where there is consistency; i) mother sabotaged his mental health therapy; j) attempted suicide at least once; k) High risk to end up incarcerated and committing a serious act.

Petition, p. 76-77, 80. Vogelsang Depo., p. 57-60. (App.p. 4332-4335). He asserts this testimony from a social worker would have been more persuasive and credible than the mother's similar testimony. Id. Viewing the record as a whole, he has failed in his burden to prove either deficient performance or prejudice.

A. WHAT THE JURY HEARD FROM THE MOTHER AT TRIAL.

During the trial, in the penalty phase, the sole mitigation witness who testified was Aleksey's mother, Vera Aleksey. App.p. 1977-2002, R. 2069-94. Ms. Aleksey testified about the Petitioner's family background and the dysfunctional life he had. She described her family development and movement from Trinidad to New York leading to her marriage to Ronald. App.p. 1980, R. 2072-74. She stated her husband Ronald had a severe drinking problem that affected the lives of herself and the Petitioner. After Bayan was born, Ronald's drinking increased and he became angry, disruptive, and he struck her a couple of times. App.p. 1980-81, R. 2072-73. She stated she left her husband when Bayan was three. She said her husband attempted to see her later, but continued his drinking and violence. App.p. 1982-83, R. 2074-75.

She stated that Bayan had educational problems and emotional problems as a child. He was a late talker, timid, had problems with his school work. App.p. 1984-85, R. 2075-76. He would frequently leave his parochial school and come home during the day. App.p. 1985, 1987, R. 2077, 2079. She stated she went for professional help to a diagnostic education center for an evaluation of Petitioner after he had to repeat the fifth grade. They recommended for Aleksey to be placed in a special education class. App.p. 1987, R. 2079. She testified that Aleksey did not have friends at school and had been picked on. Later, after he started making friends in high school, he suddenly did not want the new friends around. App.p. 1988-1989, R. 2080-81.

She described mental health treatment that Aleksey received. She said Aleksey had therapy for three (3) years at Queens Guidance Center. App.p. 1989, R. 2081. Later, he had to go to a hospital for therapy for 3 to 4 months. App.p. 1989-91, R. 2081-82. After that Aleksey was supposed to go to a residential mental health treatment center. App.p. 1991, R. 2083. However, she stated that she did not have him sent there because she was told she would have to go to court to have that done. She stated that had other parents stated they were not pleased with that facility and she learned, including one

whose daughter committed suicide after treatment. App.p. 1991-92, R. 2083-84. She attempted to have him in other counseling, including group and family counseling. App.p. 1992-93, R. 2084-85. After services could no longer be provided, he went back to junior high, but continued to have emotional and coping problems. App.p. 1998, R. 2085. She said Aleksey did not finish high school and dropped out. App.p. 1999, R. 2086.

Mrs. Aleksey described Aleksey's attempted suicide when he was 14 when he took an overdose while in therapy at Queens Guidance Center resulting in the hospital visit to Roosevelt Hospital. App.p. 1994-95, R. 2086-87. On a second overdose attempt when he was 19, she took him to Creedmore Mental Hospital. App.p. 1995-97, R. 2087-89. After his release from Creedmore, he continued on medication which made him sleep through the day. App.p. 1996, R. 2088.

In therapy, Aleksey's anger and resentment toward his father was revealed. App.p. 1997, R. 2089. She said on a number of occasions between 3 and 19, Aleksey's father would show up and physically abuse her. Mrs. Aleksey described trying to be both mother and father, but was financially unable to provide for the treatment and medication he needed. App.p. 1998-99, R. 2090-91.

She felt that she and Aleksey were close-knit and opined that her life was to take care of Bayan. App.p. 1998, R. 2090. She described that he left home when he was 19, but later attempted to return home. App.p. 1998-99, R. 2090-91. She stated that unfortunately they would have arguments because he would not follow her rules. App.p. 2000, R. 2092.

During that same time, her husband died from alcoholism. App.p. 2000, R. 2092. She briefly described her relationship with her living brother in New York. App.p. 2000-2001, R. 2092-93. She stated that she had no one to turn to when she learned of Bayan's predicament in South Carolina. App.p. 2001, R. 2093. Ms. Aleksey's testimony concluded by stating she loved, cried, and prayed for her son. App.p. 2002, R. 2094.

Solicitor Bailey had no questions on cross-examination. App.p. 2001.

Counsel's PCR Testimony of Counsel

Counsel Stone testified the defense team retained Toni Bovee as a “mitigation expert or specialist.” Her job was to investigate anything that could be presented in mitigation. App.p. 3626, PCR 1214. He said Bovee met with Aleksey’s family and provided the information to counsel. Stone stated that Bovee, as a mitigation specialist, developed the same type of family background evidence that he had in his prior death penalty defense experience in a Lexington County case when he had a social worker and a mitigation investigator. Stone stated that he generally found that mitigation investigators and social workers were duplicitous. App.p. 3626-3627, PCR 1214-1215. In addition, they contacted Dr. David Rosengard in New York, who was a mental health person, either social worker or psychologist, but after he was brought from New York, they decided not to use him. App.p. 3630, PCR 1218.

Stone stated they also retained psychiatrist, Dr. Donna Schwartz-Watts, to assist and provide information about Aleksey’s mental state and met with her several times about his psychiatric background. App.p. 3627. They did not call her as a witness because she could not uncover anything that could help them. App.p. 3627-3629, PCR 1217. Dr. Watts recommended neurologist, Dr. David Bachman, who was used in the guilt phase concerning the concussive trauma after he had reviewed the trauma records concerning the accident when Aleksey was arrested.²⁶ App.p. 3630, PCR 1218. See

²⁶Dr. Bachman testified at trial that Aleksey suffered a concussion and a cervical spine injury, but no fracture as a result of the accident. App.p. 1605. He opined that the record of Aleksey had lost consciousness at the scene of the accident, but gradually regained consciousness. App.p. 1604, 1606. He opined that someone who had a concussion has a variety of symptoms that persist after the concussion including decreased attention, headache, a sense of dizziness and fatigue. App.p. 1607. He opined that a person tolerance for physical stress and mental stress would be diminished. He opined the symptoms could persist for several days, He opined that their ability to participate in physically or mentally strenuous activity would be limited. App.p. 1612-13.

App.p. 1601- 1625, R. 1662-1686.

Stone stated that his initial impression was that Dr. Rosengard (a Masters in Social Work) would be a favorable witness, but presented information to counsel when he arrived to testify that he blamed the mother for Aleksey's problems of being an angry child with separation disorder due to the parents breakup, He advised counsel that this caused an inability to do well in school with emotional problems. App.p. 3630-3632, PCR 1220. He suggested that blame was due to lack of discipline from the parent. App.p. 3631, PCR 1219.

Stone stated Dr. Rosengard's potential testimony hurt their strategy because the defense wanted to put Mrs. Aleksey on the stand to say things about Bayan. However, if they used Dr. Rosengard, he would have blamed Aleksey's problems on Vera Aleksey. App.p. 3631, PCR 1219. They chose not to use Dr. Rosengard due to the conflicting theory with Vera.

Counsel Thomas Sims also stated that Toni Bovee was a mitigation expert to develop mitigation evidence, but she dealt mostly with Mr. Stone. App.p. 3072-73, PCR 656-57.²⁷

SOCIAL WORKER JAN VOGELSANG'S PCR TESTIMONY

Jan Vogelsang described the records she reviewed in preparation for her testimony. Particularly, she reviewed and relied upon the records of Toni Bovee. App.p. 4338, Depo., p. 63. These records included Bovee's reports of interviews, reviews of mental health records, school records, and the August 7, 1998 Timeline she prepared concerning Aleksey. App.p. 4339-41, Depo., p. 64-66. Most importantly, she said that all the documents and reports she reviewed were those assimilated by Toni

²⁷Solicitor Bailey testified at the PCR hearing that in preparation for trial he prepares for the potential use of social workers by the defense. He notes that when a social worker testifies with a lot of documentation, it gets long and the jury gets lost in the length and relevance of the information. App.p. 4113, PCR 1701. He stated he attempts to make points on cross-examination. He notes that he would have had whatever social histories had been done in the state hospital evaluations and in this case, he had records which he provided to the defense about the two prior hospitalizations and his school problems. App.p. 4114, PCR 1702.

Bovee prior to the trial. App.p. 4341, Depo., p. 66. Exhibits 1, 2, 3.[App.p. 4359-4379].

On cross-examination, Vogelsang noted that there was information in the records that Aleksey's judgement was poor, that his parents (including his father) sought an order of protection from Aleksey when he was 16 because they feared violence and assault from him, particularly when he was sleeping with a knife. App.p. 4347, Depo., p. 72. In addition, Vogelsang described a violent conformation Aleksey had with his mother in September 1986 when he verbally assaulted her and proceeded to throw furniture around the house. App.p. 4347, Depo. P. 73.

EVIDENCE OF THE MITIGATION DEFENSE COUNSEL HAD FROM BOVEE.

The record from Ms. Vogelsang's deposition also included some of the work product that trial counsel had received from mitigation investigator Bovee prior to the trial. This included Ms. Bovee's extensive interview with Vera Aleksey on July 27, 28, 29, 1998 that Vogelsang relied upon. App.p. 4359-4365, (Vogelsang, Exhibit 1). It is apparent that this information was also used by counsel at the trial in its examination of Ms. Aleksey. Further, Ms. Bovee's interview summary with David Rosengard MSW (Master in Social Work) at Queens Guidance Center on August 4, 1998 was included which describes his interaction with Aleksey, his nonaggressive behavior, his anger based at himself, his poor skills at solving problems as well as his mother's attempt to blame it on others, and his inability to see the consequences of his behavior. App.p. 4366-68. Bovee summarized the contact by stating that Rosengard opined that he did not feel that Bayan would shoot someone in the manner described because he was more destructive to himself. App.p. 4368 (last sentence). Vogelsang, Exhibit 1.

Vogelsang Exhibit 2 is Bovee's extensive time line for the defense counsel which categorizes events in Aleksey's life from his parents birth and marriage through individual events until November 8, 1997. App.p. 4369-4379, 4392-4402 (copy). Particularly significant, the timeline includes his many mental health therapy sessions, his school attendance and grade summary, his arrests, his commitment

for suicide treatment, his traffic tickets, his complaint against police officers in 1993 for beating, his complaint against the QHDM for \$10 million dollars for lack of medical treatment, his offer to drop lawsuits in return for deal on criminal charges another comment about a \$5 million dollar lawsuit, his use of aliases in criminal activity, information that Sara Pivero was charged on November 20, 1996 by for bad checks and thefts by deception involving the Lexus (Exhibit 2, p. 10)(App.p. 4378), and Sara Pivero's arrest while visiting Aleksey at Bucks County Correctional Facility on February 1, 1997, as well as other matters. The final exhibit to the Vogelsang deposition is the Social History prepared by K. Fisherman dated February 24, 1976. App.p. 4380-81.

ANALYSIS

To establish deficient performance under Strickland, a petitioner “must show that counsel's representation fell below an objective standard of reasonableness.” Strickland, 466 U.S. at 688, 104 S.Ct. 2052. The performance of counsel is measured in terms of “reasonableness under prevailing professional norms.” Id. at 688, 104 S.Ct. 2052. Evaluation of performance “must be highly deferential,” judged “on the facts of the particular case,” and considered “from counsel's perspective at the time.” Id. 689, 690, 104 S.Ct. 2052. The performance inquiry in this case centers on the nature of counsel's duty to investigate mitigating evidence for sentencing in a capital case. Strickland does not require defense counsel to “investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing.” Wiggins v. Smith, 539 U.S. 510, 533, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (citing Strickland, 466 U.S. at 689, 104 S.Ct. 2052). Instead, it imposes upon counsel “a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Strickland, 466 U.S. at 691, 104 S.Ct. 2052; see Wiggins, 539 U.S. at 533, 123 S.Ct. 2527.

“Prevailing norms of practice as reflected in the American Bar Association standards and the like

are guides to determining what is reasonable, but they are only guides.” Strickland, 466 U.S. at 688, 104 S.Ct. 2052; see also Meyer v. Branker, 506 F.3d 358, 372 (4th Cir.2007) (noting that although the ABA Guidelines can be relevant “in determining what constitutes reasonable performance in a capital trial, they certainly cannot be dispositive in and of themselves” (citations omitted)). According to the Supreme Court, it was a “well-defined norm[]” at the time of Gray’s trial that “investigations into mitigating evidence ‘should comprise efforts to discover all reasonably available mitigating evidence.’” Wiggins, 539 U.S. at 524, 123 S.Ct. 2527 (quoting American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1.C (1989) (ABA Guidelines)). The ABA Guidelines suggested that one avenue of investigation that counsel should consider is the condition of the defendant’s mental health. ABA Guidelines 11.8.3.F.2, 11.8.6.B. The Guidelines also advised that “[t]he assistance of one or more experts (e.g., social worker, psychologist, psychiatrist, investigator, etc.)” in the investigation, development, and presentation of relevant mitigating evidence “may be determinative as to [the] outcome” at sentencing. ABA Guideline 11.8.6 cmt.; see also id. 1.1 cmt., 5.1.1.A.v, 11.4.1. Counsel’s “strategic choices made after thorough investigation ... are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” Strickland, 466 U.S. at 690-91, 104 S.Ct. 2052. In evaluating an ineffective assistance claim, a court “must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” Id. at 690, 104 S.Ct. 2052. Gray v. Branker , 529 F.3d 220, 228 -229 (C.A.4 (N.C.),2008).

The PCR Court reasonably applied Strickland and Wiggins v. Smith in concluding that counsel was not deficient and performed a reasonable investigation of Petitioner’s background through the use of the mitigation investigator, Dr. David Rosengard, Dr. Schwartz-Watts and his mother. The Petitioner

contends that he was deficient because a social worker would have testified that Petitioner had impulse control problems and simply could not control his behavior (App.p. 4323, 4328), had been diagnosed with borderline personality disorder (App.p. 4326), that he had an unhealthy relationship with his mother (App.p. 4303, 4308) and that she had not followed the recommendations which sabotaged his therapy and school work. (App.p. 4326-28) Petition, p. 79, 81. He now states that such testimony would have supported additional statutory mitigating circumstances to be charged, including : (2) the murder was committed while the defendant was under the influence of mental or emotional disturbance; (6) that capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, and (7) the age or mentality of the defendant at the time of the crime. Petition, p. 82-83.

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

The PCR Court reasonably concluded that Petitioner had not shown that counsel's investigation was deficient in failing to retain a licensed social worker. App.p. 5094. There is probative evidence to support the conclusion. Deference must be given the decisions of defense counsel .Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. Harrington v. Richter, supra. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id., at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U. S., at 690.

First, the defense retained a mitigation investigator, Toni Bovee, whose marshaling of materials was completed relied upon by Ms. Vogelsang in her deposition. It provided whatever information was

necessary. The PCR Court determined that a comparison of the testimony of Vogelsang with the testimony of Aleksey's mother revealed that Ms. Vogelsang testimony was merely a conduit of the information that Ms. Aleksey had already testified about. App.p. 5094. More importantly, since Ms. Vogelsang testimony was merely a "hearsay summary of the records" which defense counsel necessarily were aware of in from their investigation and use of Ms. Bovee, it is difficult to discern how Aleksey can now assert counsel was ineffective in their investigation in developing the same matters. As the PCR Court found, to the contrary, in a quest to prove prior counsel ineffective, Petitioner has proven that counsel was reasonable in their investigation of Aleksey background by interview of family, prior mental health professionals, including social worker David Rosengard and the retention of independent forensic psychiatrist and neurologist. Unlike Wiggins, where the Court determined the decision to cut off the investigation came prematurely, the team of Stone, Bovee, and Sims continued the quest up to trial when a strategic decision had to be made whether to call the social worker which would undermine the benefit of the mother's testimony.

As the PCR Court found, the Petitioner's complaint against prior counsel is not one of deficiency in investigation, but a disagreement on style. App.p. 5094. Ms. Vogelsang's testimony revealed nothing critical new for it relied completely on the reasonable investigation done before by Ms. Bovee (and Dr. Rosengard). Instead, his current complaint is a preference (and protection) for hearsay and summary evidence over fact witnesses where credibility is subject to being tested by the fact-finder. The PCR Court found that this strategic dilemma came to a head in the decision to use as a witness Master in Social Work David Rosengard, who was involved in Aleksey's earlier treatment when his testimony would cast a negative impression on the mother's testimony, as revealed by Vogelsang's similar summary of Rosengard's conclusions. At that moment a strategic decision had to be made - similar to the decision Aleksey made in the PCR hearing on whether to present the social worker who had real and

credible interaction with Aleksey and his family or go with the mother and/or Aleksey himself or use another social worker. Facing that choice, with the same information that Vogelsang possessed from mitigation investigator Toni Bovee, defense counsel tactically chose to present the mother and leave her negative relationship with her son to the risk, however unlikely, of Solicitor Bailey's cross-examination to break down that relationship.²⁸ Now, he seeks to assert that another social worker (i.e., Jan Vogelsang) - one more step removed from the facts than David Rosengard and the other mental health professionals should have presented testimony about her review of the same records, including those of Rosengard. The same risks were presented by such testimony which should go to the deference of counsel's reasonable decisions after his reasonable investigation. The jury information was adequately presented under the Sixth Amendment.

The PCR court concluded that Petitioner is asserting a checklist type of claim that any time the death penalty is sought, defense counsel is required under the Constitution to both retain and present a social worker to testify about that Applicant's background. App.p. 5097. This assertion is a misreading of the mandate of Wiggins. See Gudinas v. State, 816 So.2d 1095 (Fla. 2002)(counsel was not ineffective in failing to hire social worker, for presentation of mitigation evidence at penalty phase of capital murder trial; counsel hired and consulted with mental health experts for purpose of determining effect of defendant's social history on his life and on the case, and social worker's testimony would have been cumulative to the mental health and other mitigating evidence actually presented). This Court's holding in Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008) does not revise the analysis of the Court. In Council, only very limited mitigation testimony was presented and no medical evidence was presented. Id. at 177, 670 S.E.2d at 365. Thus, this Court held, "there was very strong mitigating

²⁸This risk at trial to reveal a dysfunctional relationship between Aleksey and his mother was not followed up by the State who chose not to cross-examine Vera Aleksey. App.p. 2001.

evidence to be weighed against the [six] aggravating circumstances presented by the State. We believe, as did the PCR judge, this evidence may well have influenced the jury's assessment of [Council's] culpability." Id. at 176, 670 S.E.2d at 365. In contrast in Rosemond v. Catoe, 383 S.C. 320, 327, 680 S.E.2d 5, 9 (2009), this Court found counsel was deficient where he expressed an opinion that he was not allowed to put up mental health mitigation evidence after the trial court rejected his showing concerning the defendant's competency to stand trial. However in Aleksey's case, it was not based upon counsel's mistake in the law as in Rosemond, but a strategic decision in the mitigation presentation went beyond the mother's testimony because it was whether to risk the use of MSW David Rosengard. App.p. 5329.

Additionally, the complaint about the decision to hire a social worker appears to be second-guessing by current counsel, rather than identification of a defect in trial counsel's strategy. In sum, "[t]his is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face." Bobby v. Van Hook, — U.S. —, 130 S.Ct. 13, 19, 175 L.Ed.2d 255 (2009). "It is instead a case, like Strickland itself, in which defense counsel's 'decision not to seek more' mitigating evidence from the defendant's background 'than was already in hand' fell 'well within the range of professionally reasonable judgments.'" Id. (quoting Strickland, 466 U.S. at 699, 104 S.Ct. 2052). The Strickland Court acknowledged, "Even the best criminal defense attorneys would not defend a particular client in the same way." 466 U.S. at 689, 104 S.Ct. 2052. "The standard is not how present counsel would have proceeded, in hindsight, but rather whether there was both a deficient performance and a reasonable probability of a different result." Cherry v. State, 659 So.2d 1069, 1073 (Fla.1995). Duncan v. State, 2005 WL 628215 (Ala.Crim.App. 2005) (defendant failed to establish that trial counsel's failure to obtain assistance of social worker in murder prosecution was ineffective assistance of counsel where he failed to identify how such third person assistance would aid defense,

and counsel did, in fact, obtain some expert assistance in preparing for trial).

Prejudice Not proven.

The PCR Court found that Petitioner also failed in their burden of proof to show prejudice. App.p. 5096-97. The PCR Court found that comparing the testimony of the mother and Ms. Vogelsang, the jury was equipped with most of the same information. The second prong requires a showing “that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Strickland, at 694, 104 S.Ct. 2052. This requires “a probability sufficient to undermine confidence in the outcome,” *id.*, and means a “substantial, not just conceivable” likelihood of a different result, Harrington v. Richter, 131 S.Ct. at 791–92. “A careful prejudice inquiry requires that we ‘consider all the relevant evidence that the jury would have had before it if [counsel] had pursued [a] different path.’” Wong [v. Belmontes], [558] U.S. —, 130 S.Ct. [383] at 386 [(2009)]. This includes evidence that was adduced at trial as well as that which was not presented until postconviction review. See Porter [v. McCollum], — U.S. —, 130 S.Ct. [447] at 454 [175 L.Ed.2d 398 (2009)]. Stated differently, we must reconstruct the record and assess it anew. In so doing, we cannot merely consider the mitigation evidence that went unmentioned in the first instance; we must also take account of the anti-mitigation evidence that the Commonwealth would have presented to rebut the petitioner's mitigation testimony. See Wong, — U.S. —, 130 S.Ct. at 390 (stating that ‘the reviewing court must consider all the evidence—the good and the bad—when evaluating prejudice’). Once we have reconstructed the record, we must ‘reweigh the evidence in aggravation against the totality of available mitigation evidence.’ Wiggins v. Smith, 539 U.S. 510, 534, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Only then may we ask whether there is a reasonable probability that, but for counsel's ineffectiveness, the result of the proceeding would have been different.” Williams v. Beard, 637 F.3d 195, 227 (3rd Cir.2011).

“[I]n situations where the mitigating evidence has undeniable potency, a court evaluating an ineffective assistance claim may conclude that the evidence entails an inextricable aggravating component that offsets its mitigating effect, or that it would have inevitably opened the door to devastating rebuttal evidence had it been presented at trial. In either event, a failure to locate or present the mitigation evidence may be regarded as harmless.”

Kyle Graham, *Tactical Ineffective Assistance in Capital Trials*, 57 Am. U.L.Rev. 1645, 1683 (2008).

The assertions before this Court are similar to those raised in Jones v. State, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998). cf, Rosemond v. Catoe, supra. In Jones, the Court stated :

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

In this setting, the PCR Court found the negative risk of the hearsay testimony of Vogelsang were revealed at the deposition by the presentation of negative evidence about Aleksey's violent tendencies was revealed which damaged the portrayal of Aleksey as a mere con-man. App.p. 5096. Evidence about Aleksey's perceived violence toward the family was revealed on cross-examination. Background hearsay which formed the basis of the speculative opinion were not consistent. A different picture - one less favorable and more violent - was presented by the social history. To use the words acknowledged by James Aiken - the best predictor of future behavior is past behavior. The social worker presented evidence of possession of deadly weapons (gun and knife), firing a gun at another person (App.p. 4331, Depo. P. 56), violent and abusive assaults against his mother, (App.p. 4346-47, Depo. P. 71-72), throwing furniture (App.p. 4348, Depo. P. 73). Although the negative opinions concerning the mother were untouched at trial, the use of the social worker made the possibility of Rosengard impressions able to be presented, yet know surrounded with Aleksey's social history of the assaults against and fear of his family members. Further, the solicitor recognized these risks for the defense in social work evidence generally by his prior casework involving similar testimony.

Assuming counsel erred on the social work testimony, the error did not create a reasonable probability, absent the error, that the result of the proceeding would be different under Wiggins. Certiorari must be denied.

IX. There is no current requirement that the Court within this case impose a *per se* prohibition against part-time solicitors representing capital defendants, such step should be taken only after appropriate rule-making hearings consistent with the governing of the practice of law.

In his final argument before this Court, the Petitioner makes a suggestion that this Court impose an automatic *per se* requirement that a part-time prosecutor in this State be forbidden from representing a capital defendant. Implicit in the initial argument before this Court is that there was no federal constitutional violation in that representation based upon counsel Stone's status as a practicing civil lawyer with a limited employment as a part-time prosecutor in the 14th Circuit. The Petitioner, in reliance upon a series of cases from the 4th Circuit involving Virginia, California Oklahoma, Utah , Illinois and Vermont concerning a prohibition of a part-time prosecutor having a criminal defense practice.

Respondent is informed and believes that the appointment in this case is not unique. Part-time prosecutors - subject to the current guidance of Rule 608 - have been previously appointed in capital and non-capital cases other than Aleksey. South Carolina presenting subjects court appointments (not professional retention) in criminal cases to Rule 608, SCACR. Rule 608 expressly includes among active members *who are exempt from appointment*: (B) Members who are solicitors or assistant solicitors for a judicial circuit if those members do not engage in the private practice of law..." (emphasis added). Further *appointment* in death penalty cases are done through §16-3-26, §17-27-160 and SCACR Rule 608 (f)(1)(A), (4)(B). Prof. Freeman admitted that SCACR, Rule 608 required non-full time prosecutors to make themselves available for appointment in criminal cases. App.p. 3879-80,

PCR 1467-68. Particularly, he agreed that Rule 608(d)(1) similarly excluded from court appointment members of the Bar who are solicitors or assistant solicitors if those members do not engage in the private practice of law. App.p. 3880 PCR 1468. However, he declared “it shouldn’t be in a death case” or a murder case. App.p. 3880. PCR 1468. The Rule is silent about whether other part-time prosecutors (state, county, or municipal) are similarly exempt or that any of these would be precluded from being *retained*. But see, S.C. Code Ann. § 1-7-370(“The solicitors may defend any persons brought to trial before any criminal courts of this State when their duty shall not require them to prosecute such persons and their assistance shall not be required against such persons by the Governor or Attorney General.”)

As the stated within Ethic Advisory Ethics Advisory 91-19:

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

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

As noted in argument 1, there is not uniformity among the states concerning whether limited prosecutors are precluded from representing any criminal defendant as is proposed by Petitioner. See Greg Sarno, Annotation, *Circumstances giving rise to prejudicial conflict of interests between criminal defendant and defense counsel-state cases*, 18 ALR4th 360 (1982), §18(a), 18(b), 19(a), 19(b).

In Beaver v. Thompson, 93 F.3d 1186 (4th Cir. 1996), the Court 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 Stone, the counsel in Beaver had limited duties and had no working relationship with any of the witnesses at trial.

The approach taken in this case addresses the case by case analysis that arises in claims of conflict of interests. The step the Petitioner seeks in a revision of court rules which would automatically preclude members of the private bar from being retained or appointed in criminal cases because of limited employment with a prosecuting agency that is not involved in the particular prosecution is a step that should only be taken after appropriate hearings as is consistent with any rule-making that is done by this Court. The appropriate forum for this revision should be to the Rules Advisory Committee under Rule 608.

CONCLUSION

For all the foregoing reasons, Respondent submit that the Petition for Writ of Certiorari should

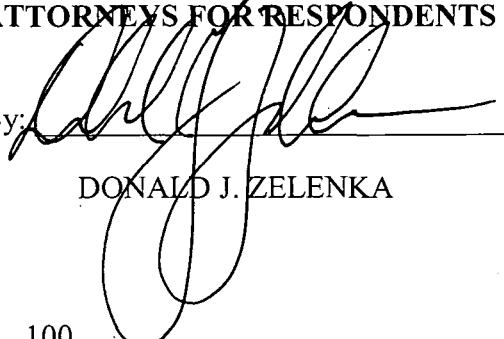
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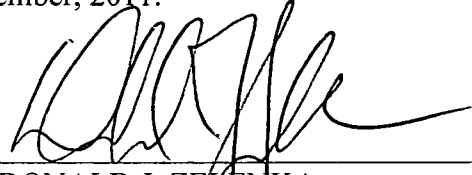
By: 

DONALD J. ZELENKA

November 16, 2011

CERTIFICATE OF SERVICE

I, **Donald J. Zelenka**, hereby certify that I have served the *Return to Petition for Writ of Certiorari* in the foregoing action by depositing copies in the InterAgency Mail to Robert M. Dudek and Elizabeth Franklin-Best, Esquires, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 16th day of November, 2011.



DONALD J. ZELENKA
Assistant Deputy Attorney General