

**Hopkins, Debbie**

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**From:** Zelenka, Don  
**Sent:** Wednesday, June 24, 2015 3:05 PM  
**To:** Hopkins, Debbie  
**Subject:** Bayan Aleksey  
**Attachments:** Ltr to Ct Administration requesting judge be appointed for Aleksey successive PCR (00679294xD2C78).pdf

Debbi –

FYI, attached is a letter I sent out last night requesting a judge be appointed on a second PCR application (received by us) but showing filed. I copied you with the letter, but thought I should forward it to you by email since you will be out.

Donald J. Zelenka  
Senior Assistant Deputy Attorney General  
South Carolina Attorney General's Office  
P.O. Box 11549  
Columbia, S.C. 29211  
803-734-3601  
[dzelenka@scag.gov](mailto:dzelenka@scag.gov)

**RECEIVED**

JUN 24 2015

**S.C. Supreme Court**



ALAN WILSON  
ATTORNEY GENERAL

June 23, 2015

RECEIVED

JUN 24 2015

S.C. Supreme Court

Tracy Garrett  
Judge Scheduling Coordinator  
Court Administration  
Calhoun Building  
1015 Sumter Street, Suite 200  
Columbia, South Carolina 29201-3739

Re: Bayan Aleksey, #5059 vs. State of South Carolina  
C.A. No. 2015-CP-38-XXXX

Dear Ms. Garrett:

I am writing to respectfully request that a judge be appointed to hear this capital post-conviction relief action involving a second state PCR application from Orangeburg County death penalty inmate Bayan Aleksey. His prior state PCR hearing judge was the Honorable Diane Goodstein. As of today's date, the Orangeburg County Public Index does not show that this application has been filed or docketed and we have not received a copy from the Clerk of Court pursuant to S.C. Code Ann. Section 17-27-160. Mr. Aleksey mailed an application for post-conviction relief on June 9, 2015 in Orangeburg County. On the application, it was represented that Mr. Aleksey is represented by Teresa L. Norris, Esquire, and Elizabeth A. Franklin-Best, Esquire in this post-conviction relief action (who have been appointed to represent the Applicant in the pending federal habeas corpus action). His prior state post-conviction relief action was Aleksey v. South Carolina, 2001-CP-38-3016.

As set forth below, Mr. Aleksey currently has a federal habeas action pending in the United States District Court for the District of South Carolina, which is currently stayed pending resolution of this post-conviction relief action. Aleksey v. Stirling, 5:14-03016-JMC-KDW.

Mr. Aleksey had previously filed an Application for Post-Conviction Relief on May 22, 2001, after the conclusion of his direct appeal from his trial and death sentence. (C/A No. 2001-CP-38-3016). In that action, he was represented by James A. Brown, Jr., Esquire, and David Tarr, Esquire. As stated above, the matter was heard by the

Tracy Garrett  
Judge Scheduling Coordinator  
Court Administration  
June 23, 2015  
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Honorable Diane Goodstein, Circuit Court Judge. Judge Goodstein issued an Order of Dismissal with Prejudice on February 4, 2010. Judge Goodstein further denied a Motion to Alter and Amend on September 2, 2010. Mr. Aleksey appealed the matter to the South Carolina Supreme Court, and his petition for writ of certiorari was denied on May 23, 2014. In the PCR appeal, Aleksey was represented by Robert Dudek and Elizabeth Franklin-Best of the South Carolina Office of Appellate Defense.

He subsequently made a motion for stay of execution for a federal habeas action challenging his conviction and death sentence on June 26, 2014. A stay of execution in the federal habeas action was entered by the Honorable J. Michelle Childs, United States District Judge on July 28, 2014. Judge Childs appointed counsel Franklin-Best and Norris on July 28, 2014 to handle the federal habeas corpus matter. On June 8, 2015, counsel for Aleksey filed a petition for a writ of habeas corpus in the federal district court. On June 9, 2015, counsel made a motion to stay proceedings in the Federal District Court pending exhaustion of state remedies or, in the alternative motion for leave to file supporting memorandum of law in ninety days in the Federal District Court. On the same date, counsel for Petitioner mailed the application for post-conviction relief to Orangeburg County. The Federal District Court requested a response to the motion from the State of South Carolina by June 26, 2015. This federal court civil action number is presently Aleksey v. Stirling, 5:14-03016-JMC-KDW.

If further information is necessary, please advise me. Thank you for your cooperation in this matter.

Sincerely,



Donald J. Zelenka  
Senior Assistant Deputy Attorney General

DZ:lbb

cc: Teresa L. Norris, Esq.  
Elizabeth Franklin-Best, Esq.  
Hon. David Pascoe, Solicitor of the First Judicial Circuit.  
Debbie Hopkins  
Victims' Services

ATTORNEY GENERAL'S OFFICE

RECEIVED 6-10-15

**BLUME NORRIS & FRANKLIN-BEST, LLC** ADMINISTRATIVE INSTRUCTIONS

**ATTORNEYS AT LAW**

JOHN H. BLUME  
TERESA L. NORRIS  
Elizabeth Franklin-Best  
KEIR M. WEYBLE *OF COUNSEL*  
DAVID I. BRUCK *OF COUNSEL*

6-10-15

FILE  OPEN  END

900 Elmwood Avenue, Suite 101  
COLUMBIA, SOUTH CAROLINA 29201

ROUTE PHONE: (803) 765-1044  
FAX: (803) 765-1143

ORDER:  MANUSCRIPT

PEN RECORDS  CLEAN RECORDS

OTHER: \_\_\_\_\_

June 9, 2015

Honorable Winnifa B. Clark  
Orangeburg County Clerk of Court  
P.O. Drawer 9000  
Orangeburg, SC 29116

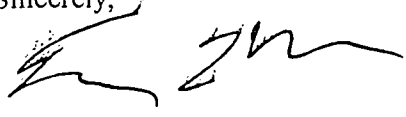
RE: *Bayan Aleksey v. State of South Carolina*

Dear Ms. Clark:

Please find enclosed for filing, with certificate of service, the original and one copy of Applicant's Application for Post-Conviction Relief. Please return the extra copy to me in the enclosed self-addressed stamped envelope after it is time stamped.

If you should have any questions, please do not hesitate to contact this office.

Sincerely,



Teresa L. Norris

cc: Donald J. Zelenka, Esq.

FORM 5

STATE OF SOUTH CAROLINA )

COUNTY OF ORANGEBURG )

BAYAN ALEKSEY, SK #5059 )  
Full name and prison number (if any) of Applicant. )

v. )

State of South Carolina )

IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

**INSTRUCTIONS - READ CAREFULLY**

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Correctional Institution, Ridgeville, SC
2. Name and location of Court which imposed sentence Orangeburg County Court of General Sessions
3. Name(s) of co-defendant(s) (if any) \_\_\_\_\_
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
  - (a) 98-GS-38-0244 Murder
  - (b) \_\_\_\_\_
  - (c) \_\_\_\_\_
5. The date upon which sentence was imposed and the terms of the sentence:
  - (a) September 1, 1998

- (b) \_\_\_\_\_
- (c) \_\_\_\_\_
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty \_\_\_\_\_
- (b) after a plea of not guilty X
- (c) after a plea of nolo contendere \_\_\_\_\_
7. Did you appeal from the judgment of conviction or the imposition of sentence?  
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Supreme Court
- ii. United States Supreme Court
- iii. \_\_\_\_\_
- (b) the result in each such Court to which you appealed:
- i. Affirmed
- ii. Petition Denied
- iii. \_\_\_\_\_
- (c) the date of each such result:
- i. November 12, 2000
- ii. May 14, 2001
- iii. \_\_\_\_\_
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000)
- ii. Aleksey v. South Carolina, 532 U.S. 1027 (2001)
- iii. \_\_\_\_\_
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) \_\_\_\_\_
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_
10. State concisely the grounds on which you base your allegation that you are being held in

custody unlawfully:

- (a) See Attached Grounds for Relief
  - (b) \_\_\_\_\_
  - (c) \_\_\_\_\_
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See Attached
  - (b) \_\_\_\_\_
  - (c) \_\_\_\_\_
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? Yes
  - (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? Yes
  - (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? Yes
  - (d) any other petitions, motions or applications in this or any other Court? Yes
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
    - i. Application for Post-Conviction Relief
    - ii. Petition for Writ of Certiorari
    - iii. Petition for Writ of Certiorari
    - iv. Petition for Writ of Habeas Corpus
  - (b) the name and location of the Court in which each was filed:
    - i. Orangeburg County Court of Common Pleas
    - ii. South Carolina Supreme Court
    - iii. United States Supreme Court
    - iv. United States District Court, District of South Carolina
  - (c) the disposition thereof:
    - i. Denied
    - ii. Denied

- iii. Denied
- iv. Pending
- (d) the date of each such disposition:
  - i. February 4, 2010
  - ii. May 22, 2014
  - iii. February 23, 2015
  - iv. Pending
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
  - i. Case No. 01-CP-38-628
  - ii. Case No. 2010-173586
  - iii. Aleksey v. South Carolina, 135 S. Ct. 1407 (2015)
  - iv. Case No. 5:14-cv-3016

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

Yes

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. All of the grounds have been raised in the federal habeas petition, but because they have not previously been exhausted in state court, the claims are presented in this application for the appropriate state court review.

ii. \_\_\_\_\_

iii. \_\_\_\_\_

(b) the proceedings in which each ground was raised:

i. Petition for Writ of Habeas Corpus

ii. \_\_\_\_\_

iii. \_\_\_\_\_

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) \_\_\_\_\_

(b) \_\_\_\_\_

(c) \_\_\_\_\_

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Isaac McDuffie Stone, P.O. Box 1880, Bluffton, South Carolina 29910, and Thomas Ray Sims, P.O. Box 2016, Orangeburg, South Carolina 29116

ii. Robert M. Dudek, 1330 Lady Street, Ste. 404, Columbia, South Carolina 29201

iii. David B. Tarr, 1313 Elmwood Avenue, Suite B, Columbia, South Carolina 29201, and James A. Brown, Jr., P.O. Box 592, Beaufort, South Carolina 29901

iv. Robert Dudek, 1330 Lady Street, Ste. 404, Columbia, South Carolina 29201, and Elizabeth A. Franklin-Best, 900 Elmwood Avenue, Ste. 101, Columbia SC 29201

v. Elizabeth A. Franklin-Best, 900 Elmwood Avenue, Ste. 101, Columbia SC 29201 and Teresa L. Norris, 900 Elmwood Avenue, Ste. 101, Columbia, SC 29201

(b) the proceedings at which each such attorney represented you:

i. Pretrial, trial, and sentencing

ii. Direct Appeal

iii. Application for Post-Conviction Relief;

iv. Petition for Writ of Certiorari

v. Petition for Writ of Habeas Corpus

19. State clearly the relief you seek in filing this application:

New trial and/or new sentencing

20. Are you now under sentence from any other court that you have not challenged?

No

Revised 3/2003

## Grounds for Relief

### **A. Applicant's Death Sentence Violates the Eighth and Fourteenth Amendments to the United States Constitution Because He is Intellectually Disabled.**

1. I.Q. tests administered both prior to and after Applicant's trial indicate that he has significantly subaverage intellectual functioning, deficits in adaptive functioning, and these problems were apparent before his 18th birthday.

2. The South Carolina death penalty statute defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." S.C. Code § 16-3-20 (1976). This is consistent with the clinical definitions of intellectual disability. Applicant meets this definition and his death sentence violates the Eighth and Fourteenth Amendments to the United States Constitution. *See Atkins v. Virginia*, 536 U.S. 304 (2002); *Hall v. Florida*, 134 S. Ct. 1986 (2014).

### **B. Applicant's Right to the Effective Assistance of Counsel as Guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution Was Violated By Trial Counsel's Failure to Adequately Investigate and Present Mitigation Evidence.**

1. Although lead trial counsel was appointed on January 6, 1998, counsel did not seek funding for a mitigation investigator until June 8, 1998. Thus, the investigator had only approximately 10 weeks to conduct the mitigation investigation and a funding limit of \$6,000, that included not only the investigator's time but also her expenses for travel to New York where Applicant was born and raised.

2. The investigator obtained a number of records, including school records, counseling records, vocational rehabilitation records, and mental health records, but interviewed only two witnesses.

3. The only mitigation witness called in Applicant's capital sentencing trial was

Applicant's mother.

4. If counsel had adequately investigated, retained appropriate experts, and presented the information, the evidence would have established intellectual deficits, organic brain dysfunction, a very dependent, enmeshed relationship with his mother that contributed to his problems, mental health problems, and adaptability to confinement.

5. Counsel's conduct was deficient and prejudicial and denied Applicant the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments. *Strickland v. Washington*, 466 U.S. 668 (1984). See also *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam); *Sears v. Upton*, 561 U.S. 945 (2010) (per curiam).

**C. Applicant's Right to the Effective Assistance of Counsel as Guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution Was Violated During Trial and Sentencing When Trial Counsel Failed to Object to Admission of the Victim's Blood-Stained Jacket Into Evidence and Failed to Adequately Object to the Jacket Continuously Hanging Directly in Front of the Jury Throughout the Trial and Sentencing Phase.**

1. During the trial, the State offered into evidence the victim's highway patrol jacket that he was wearing at the time of his death and the beginning of his autopsy. The jacket had bullet holes and "blood spots" that the pathologist had photographed and documented. Trial counsel did not object to admission of the jacket into evidence, despite the fact that the pathologist had photographs and diagrams of the injuries, and the jacket itself was not relevant or necessary to the pathologist's testimony.

2. The jacket was, thereafter, kept on display in the courtroom during "various stages of the trial," without any objection sufficient to preserve the error for appeal. The jacket was also continuously on display during the capital sentencing hearing.

3. Even during Applicant's personal closing statement to the jury in sentencing, the jacket was hanging between him and the jurors.

4. Admission into evidence, and more importantly, the continued display of the victim's bullet-riddled, blood-stained jacket on a headless torso mannequin in the courtroom was improper. This continuous display over an extended period of time displayed on a life-size mannequin was unduly prejudicial and improper. *See, e.g., People v. Blue*, 724 N.E.2d 920 (Ill. 2000).

5. Admission into evidence, and more importantly, the continued display of the victim's blood-stained jacket on a headless torso mannequin in the courtroom denied Applicant a fundamentally fair trial at both the trial and sentencing phases in violation of the due process clause of the Fourteenth Amendment. *See Osborne v. Wainwright*, 720 F.2d 1237 (11th Cir. 1983). The introduction of the jacket and continuous display in the courtroom also injected arbitrary and prejudicial elements into the decisions the jury made in this case, thereby undermining the reliability of the verdict and sentence in violation of the Eighth and Fourteenth Amendments. *Johnson v. Mississippi*, 486 U.S. 578, 585 (1988) (a death sentence cannot constitutionally "be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process'") (quoting *Zant v. Stephens*, 462 U.S. 862, 884-85, 887, n.24 (1983)). *See also Gardner v. Florida*, 430 U.S. 349 (1977).

6. Counsel's conduct was deficient and prejudicial and denied Applicant the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments. *Strickland v. Washington*, 466 U.S. 668 (1984).

**D. Applicant's Right to the Effective Assistance of Counsel as Guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution Was Violated When Trial Counsel Failed to Object to the Introduction of Overly Broad Victim Impact Evidence.**

1. The State was entitled to introduce evidence at the sentencing hearing about the impact of the victim's deaths on his family. *Payne v. Tennessee*, 501 U.S. 808 (1991). But, as *Payne* acknowledged, such evidence does risk inflaming the jury's passions and diverting its focus onto arbitrary considerations. *Id.*

2. Here, however, the State went beyond impact on the victim's family to impact on law enforcement, co-workers, and the community, including even publication of a magazine article from "South Carolina Trooper" about the victim that began: "A small part of every South Carolinian died beside Interstate 95 on December 31, 1997."

3. This evidence was improper because it was of a "qualitatively different character" than the loss of a family member. *United States v. Fields*, 516 F.3d 923, 947 (5th Cir. 2008) (stating "the loss of a co-worker . . . is very far afield from the personal loss discussed in cases following the Supreme Court's initial approval of victim-impact evidence from family members in *Payne*")

4. Admission of this overly broad evidence was improper and prejudicial and denied Applicant a fundamentally fair sentencing trial in violation of the due process clause of the Fourteenth Amendment. This improper evidence also injected arbitrary and prejudicial elements into the decisions the jury made in this case, thereby undermining the reliability of the verdict and sentence in violation of the Eighth and Fourteenth Amendments. *Johnson v. Mississippi*, 486 U.S. 578, 585 (1988) (a death sentence cannot constitutionally "be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process'") (quoting *Zant v. Stephens*, 462 U.S. 862, 884-85, 887, n.24 (1983)). See also *Gardner v. Florida*, 430 U.S. 349 (1977).

5. Counsel's conduct was deficient and prejudicial and denied Applicant the

effective assistance of counsel in violation of the Sixth and Fourteenth Amendments. *Strickland v. Washington*, 466 U.S. 668 (1984).

**E. Applicant's Right to the Effective Assistance of Counsel as Guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution Was Violated When Trial Counsel Failed to Object to the State's Improper Closing Arguments in Sentencing.**

1. During closing arguments, the State essentially argued that the lack of mitigating evidence with any "nexus" to the crime was aggravating.

2. No "nexus" is required between mitigating evidence and the crime. *Tennard v. Dretke*, 542 U.S. 274, 287 (2004). The sentencer must be permitted to consider any mitigating evidence, *Eddings v. Oklahoma*, 455 U.S. 104 (1982), including evidence of adaptability to confinement, *Skipper v. South Carolina*, 476 U.S.1 (1986), that clearly has no nexus to the defendant's behavior at the time of the crime. Thus, it is improper for the State to argue that mitigating evidence must have a nexus to the crime, just as it is improper for the State to argue that the lack of mitigation evidence is actually aggravating. *See, e.g., Zant v. Stephens*, 462 U.S. 862, 885 (1983).

3. The State went further with the improper arguments by asking the jury to "send a message" to the community with the verdict that "the jurors of Orangeburg County are not going to tolerate this kind of a cold, brutal, inhuman murder in our county without that murderer paying the ultimate price allowed under the laws of the State of South Carolina." This argument was clearly improper. *Runyon v. United States*, 707 F.3d 475, 514 (4th Cir. 2013).

4. Counsel's conduct was deficient and prejudicial and denied Applicant the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments. *Strickland v. Washington*, 466 U.S. 668 (1984).

**F. Applicant's Right to the Effective Assistance of Counsel as Guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution Was Violated When Trial Counsel Introduced the Statutory Potential for a Thirty-Year Sentence in Arguments and Failed to Object When the Trial Court Included the Possibility of a Thirty-Year Sentence in the Sentencing Charge.**

1. Trial counsel informed the jury during closing arguments in sentencing that a thirty year sentence was a possibility under state law. Likewise, the trial court instructed the jury that a thirty year sentence was a possibility under state law.

2. These arguments and instructions were inaccurate. Given the clear presence of the aggravating factor that the victim was a law enforcement officer killed in the line of duty, Applicant was not eligible for any sentence less than life imprisonment without parole. S.C. Code § 16-3-20(A).

3. Inviting a jury to believe that a convicted murder might go free if given a sentence other than death is improper because a sentencing jury views a defendant that might one day go free "as a greater threat to society than a defendant who [will] not." *Simmons v. South Carolina*, 512 U.S. 154, 163 (1994) (plurality opinion). Thus, allowing the jury to believe that a convicted murderer may receive less than a life sentence "unquestionably tips the scales in favor of a death sentence." *Brown v. Texas*, 522 U.S. 940 (1997) (Opinion of Justice Stevens, joined by Souter, Ginsberg, and Breyer, JJ., respecting the denial of the petition for a writ of certiorari).

4. Counsel's conduct was deficient and prejudicial and denied Applicant the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments. *Strickland v. Washington*, 466 U.S. 668 (1984).

**G. Applicant's Right to the Effective Assistance of Counsel as Guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution Was Violated By Trial Counsel's Failure to Object to the Trial Judge's Improper "Weighing" Instruction to the Jury.**

1. In charging the jury during the sentencing phase, the trial judge instructed the

jury:

In your deliberations you will consider any statutory or nonstatutory mitigating circumstances which are supported by the evidence. *You will consider the aggravating circumstances you found against the mitigating circumstances, and you will then decide whether you will recommend the death penalty or life imprisonment.*

2. Under South Carolina law, the jury is required to “consider” both aggravating and mitigating circumstances, S.C. Code § 16-3-20(C), and should not be instructed to weigh aggravating circumstances *against* mitigating circumstances. *State v. Bellamy*, 359 S.E.2d 63, 65 (S.C. 1987).

3. Counsel’s conduct was deficient and prejudicial and denied Applicant the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments. *Strickland v. Washington*, 466 U.S. 668 (1984).

**H. Applicant’s Right to the Effective Assistance of Counsel as Guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution Was Violated When Trial Counsel Failed to Object to the Failure to Instruct in Sentencing That the Jury’s Decision on Mitigation Need Not be Unanimous.**

1. During the sentencing charge, the trial court informed the jurors that aggravating circumstances required a unanimous vote before they could be considered. Likewise, the court charged that a death sentence or a life sentence required a unanimous vote. In the midst of these charges, the court instructed the jury concerning mitigating circumstances, but never instructed that mitigating circumstances need not be found unanimously before they could be considered. Indeed, the court instructed that mitigating evidence “may be considered by you and given whatever weight, if any, that *you 12 feel* it should have.” (emphasis added).

2. Reversal is required because of the substantial probability that the jurors thought they were precluded from considering any mitigating evidence unless they unanimously agreed on the existence of a particular mitigating circumstance. *Mills v. Maryland*, 486 U.S. 367 (1988);

*McKoy v. North Carolina*, 494 U.S. 433 (1990).

3. Counsel's failure to object or to request an appropriate charge was deficient and prejudicial and denied Applicant the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments. *Strickland v. Washington*, 466 U.S. 668 (1984).

**I. Applicant's Right to the Effective Assistance of Counsel as Guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution Was Violated By Trial Counsel's Failure to Object to the Trial Court's Appointment of SLED Lieutenant Buster Edwards to the Position of Supervisor of the Sequestered Jury Panel.**

1. SLED Lieutenant Buster Edwards was present and introduced to the potential jurors prior to the jury qualification and voir dire. After the jury was selected they were sequestered under Lieutenant Edwards' supervision.

2. SLED conducted the investigation in this matter as the lead investigative agency. Lieutenant Edwards participated in the investigation and arrest. Lieutenant Edwards served the arrest warrant for murder on Applicant. In fact, Applicant was discharged from the Medical University of South Carolina, where he was treated following his arrest, into Lieutenant Edwards' care. Lieutenant Edwards then proceeded to transport Applicant to the Orangeburg County Law Enforcement Center from the hospital in Charleston.

3. Agent Edwards's intimate involvement with the investigation and arrest of Applicant made him unfit to be in charge of and in direct contact with the sequestered jurors. His involvement denied Applicant the right to fair trial by an impartial jury. *Duncan v. Louisiana*, 379 U.S. 466 (1965).

4. Counsel's conduct was deficient and prejudicial and denied Applicant the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments. *Strickland v. Washington*, 466 U.S. 668 (1984).

**J. Applicant Was Denied His Rights Guaranteed By The Sixth, Eighth, And Fourteenth Amendments Due To The Cumulative Effect Of The Errors During His Capital Trial And Sentencing.**

1. The relevant facts are set forth in Grounds A through J.
2. The United States Supreme Court has found that a reviewing court may consider the cumulative effect of constitutional errors. *See Chambers v. Mississippi*, 410 U.S. 284, 288 (1973) (viewing denial of right of confrontation in conjunction with claim concerning right to call witnesses); *see also id.* at 290, n.3 (“His claim, the substance of which we accept in this opinion, rests on the cumulative effect of those rulings in frustrating his efforts to develop an exculpatory defense”); *Taylor v. Kentucky*, 436 U.S. 478, 487, n.15 (1978) (“the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness”). *See also United States v. Basham*, 561 F.3d 302, 330 (4th Cir. 2009).
3. Additionally, a reviewing court must also consider the cumulative effect of counsel’s deficient performance. *Williams v. Taylor*, 529 U.S. 362, 399 (2000). *See White v. Thaler*, 610 F.3d 890 (5th Cir. 2010); *Goodman v. Bertrand*, 467 F.3d 1022 (6th Cir. 2006); *Martin v. Grosshans*, 424 F.3d 588 (7th Cir. 2005). *But see Fisher v. Angelone*, 163 F.3d 835, 853 (4th Cir. 1998).
4. Although each of the Grounds discussed above warrant the grant of habeas corpus relief, the cumulative effect of these errors also justify setting aside Applicant’s conviction and death sentence. *See, e.g., United States v. Whitten*, 610 F.3d 168 (2nd Cir. 2010); *DePew v. Anderson*, 311 F.3d 742 (6th Cir. 2002); *Alcala v. Woodford*, 334 F.3d 862 (9th Cir. 2003); *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003).

STATE OF SOUTH CAROLINA )  
 )  
County of Orangeburg )

VERIFICATION

I, Bayan Aleksey, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

*Bayan Aleksey*

SWORN to and subscribed before me this 9<sup>th</sup>  
day of June, 2015.

*Teresa L. Norris* (L.S.)

Notary Public

*Teresa L. Norris*

My Commission Expires: 1/15/25


**APPLICATION TO PROCEED WITHOUT PAYMENT  
OF COSTS AND AFFIDAVIT  
IN SUPPORT THEREOF**

I, Bayan Aleksey, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

  
\_\_\_\_\_  
Applicant

SWORN or affirmed to and subscribed before me this  
9<sup>th</sup> day of June, 2015

  
\_\_\_\_\_  
Notary Public  
Teresa L. Norris  
My Commission Expires: 1/15/25

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