State of South Carolina
The Circuit Court of the Fifteenth Judicial Circuit

STEVEN H. JOHN
RESIDENT JUDGE

1301 SECOND AVENUE, 3A30
CONWAY, SOUTH CAROLINA 29526
(843) 915-6696, FAX: (843) 915-5859

October 7, 2019

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re: State of South Carolina v. Luzenski Allen Cottrell, 2018-CP-26-05709

Dear Mr. Shearouse:

Pursuant to the Order of the South Carolina Supreme Court, dated November 8, 2018, on the above referenced Death Penalty Post Convection Relief Application. The above matter is scheduled for Trial on January 21 – 24, 2020. The Trial will be held on the third floor, courtroom 3B in the Horry County Judicial Complex, 1301 Second Avenue, Conway, SC 29526.

Please find enclosed a copy of the First Amended Application for Post-Conviction Relief. Please let my office know if you have any questions or if you require any additional attention to this matter.

With kindest personal regards, I remain

Sincerely yours,

STEVEN H. JOHN
Presiding Judge
By Special Assignment

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S.C. SUPREME COURT

SHJ/mc
Enclosures
cc: Tonnya Kohn, Director, SC Court Administration
cc: Renee N. Elvis, Horry County Clerk of Court

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	Case No. 2018-CP-26-05709
Luzenski Allen Cottrell, Applicant,	)	**First Amended Application for Post-Conviction Relief**
vs.	)	
State of South Carolina, Respondent.	)	

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S.C. SUPREME COURT

Pursuant to the Uniform Post-Conviction Relief Act, S.C. Code Ann. § 17-27-10 *et. seq.*, Luzenski Allen Cottrell submits this first amended application for post-conviction relief ("PCR").[1]

1) Mr. Cottrell is confined at the Broad River Correctional Institution. When he filed his initial PCR application, Mr. Cottrell was confined at the Kirkland R&E Center.

2) The Honorable Larry B. Hyman, Presiding Judge by Special Assignment of the South Carolina Supreme Court for the Court of General Sessions for Horry County, imposed the sentence.

3) There were not any co-defendants.

4) The sentence was imposed on indictment number 2003-GS-26-00020 for murder.

5) Judge Hyman sentenced Mr. Cottrell to death on September 27, 2014.

6) Judge Hyman imposed the sentence following a plea of not guilty and trial by jury.

[1] This pleading is based on Form 5, Revised 3/2003, which can be found on the South Carolina Judicial Department website. Mr. Cottrell reserves the right to amend his application for post-conviction relief. Rule 71.1(d), SCRCP; S.C. Code Ann. § 17-27-90 (expressly contemplating supplemental or amended PCR application); *Mangal v. State*, 421 S.C. 85, 99, 805 S.E.2d 568, 575 (2017) ("[T]he interests of justice require PCR courts to be flexible with procedural requirements *before* PCR applicants suffer procedural default on substantial claims.").

7) The South Carolina Supreme Court affirmed Mr. Cottrell's conviction and sentence on December 20, 2017. *State v. Cottrell*, 421 S.C. 622, 809 S.E.2d 423 (2017). The Supreme Court of the United States denied Mr. Cottrell's petition for writ of *certiorari* on October 1, 2018. *Cottrell v. South Carolina*, ___ U.S. ___, 139 S. Ct. 174 (2018).

8) Please see response to number 7 above for citations and other information about Mr. Cottrell's appeals.

9) Not applicable because Mr. Cottrell appealed his conviction and sentence.

10) Grounds for Relief:

a) Mr. Cottrell's right to the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution, was violated when his trial attorneys failed to exercise peremptory strikes to remove two jurors whose views, expressed during voir dire, prevented or substantially impaired their ability to consider constitutionally relevant mitigating evidence. *Strickland v. Washington*, 466 U.S. 668 (1984).

b) Mr. Cottrell was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution, during the pre-trial phase of the proceedings regarding his constitutional and statutory rights to continuity of counsel. U.S. Const. Am. VI; S.C. Const. Art I, § 14; S.C. Code Ann. §§ 16-3-26, 17-3-20, and 17-23-60; *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006); *State v. Wilson*, 387 S.C. 597, 693 S.E.2d 923 (2010); *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005). S*ee also Strickland.*

c) Mr. Cottrell was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and

14 of the South Carolina Constitution, during the investigation of the guilt-innocence phase in order to present a defense that would have led the jurors to finding him not guilty because of self-defense or, alternatively, guilty of voluntary manslaughter. *Strickland; Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007).

d) Mr. Cottrell was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution, during the investigation of his social and life history in order to prepare and present a mitigation case that would have resulted in the jurors returning a life sentence. *Wiggins v. Smith*, 583 U.S. 510 (2003); *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008). S*ee also Strickland.*

e) Mr. Cottrell was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution, during the pre-trial phase of the proceedings when trial counsel failed to move for change of venue because of pre-trial publicity, annual memorials, continued coverage over twelve years, and the impact of Officer McGarry's death on the community. *Rideau v. Louisiana*, 373 U.S. 723 (1963); *see also* S.C. Code Ann. § 17-21-10, *et. seq.*

f) Mr. Cottrell was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution, during the guilt-innocence phase of his capital jury trial. S*ee also Strickland.*

g) Mr. Cottrell was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and

14 of the South Carolina Constitution, during the penalty phase of his capital jury trial. *See also Strickland.*

h) Mr. Cottrell was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution, during the direct appeal of his death sentence. *Strickland*; *see also Smith v. Robbins*, 528 U.S. 259 (2000); *Evitts v. Lucey*, 469 U.S. 387, 396 (1985); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999); *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002).

i) The prosecution withheld evidence, in violation of the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution, relevant to guilt-innocence and sentencing, that was exculpatory or otherwise necessary for preparing a defenses in the guilt-innocence phase and sentencing phase. *Kyles v. Whitley*, 514 U.S. 419, (1995); *Brady v. Maryland*, 373 U.S. 83, (1963); *Roviaro v. U.S.*, 353 U.S. 53 (1957); *Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006); Rule 5, SCRCrimP.

j) Mr. Cottrell is entitled to a new trial based on juror misconduct, in violation of the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution, that undermined the fundamental fairness of Mr. Cottrell's jury trial, influencing the other jurors and preventing the jurors from finding Mr. Cottrell not guilty because of self-defense or, alternatively, guilty of voluntary manslaughter. In the alternative, the juror misconduct influenced the other jurors and prevented the jurors from returning a life sentence. *Remmer v. U.S.*, 350 U.S. 377 (1956); *Remmer v. U.S.*, 347 U.S. 227 (1954); *State v. Bryant*, 354 S.C. 390, 581 S.E.2d 157 (2003).

11) Supporting Facts:

a) During voir dire, two jurors – Juror 450 and Juror 148 – stated unequivocally that they would not regard evidence of a defendant's "background characteristics" as "relevant" in selecting an appropriate penalty for murder. Tr. 328-329; 359. Defense counsel rightly recognized these statements as conclusive indicators that each juror lacked the capacity to perceive and give effect to mitigating evidence mandated by the Eighth Amendment, and objected to the jurors' qualification on the ground that each was "mitigation impaired." Tr. 341; 365-366. However, once the trial court overruled their objections, *see* Tr. 342-343; 367, trial counsel deficiently failed to exercise peremptory strikes necessary to ensure the unqualified jurors would not be seated on the jury. As a result, both unqualified jurors were seated, and both participated in the guilt-or-innocence and penalty determinations. Because of their self-professed unwillingness to consider a broad range of constitutionally relevant mitigating evidence, it is at least reasonably probable that one or both jurors adversely affected the outcome of the penalty phase deliberations, and that, absent their participation, the result of those deliberations would have been different.

b) Trial counsel failed to investigate, develop, and present evidence in support of Mr. Cottrell's constitutional and statutory rights to have continuity of counsel in order to persuade the trial court to reconsider its decision to relieve Stewart Axelrod as trial counsel for Mr. Cottrell and to create a record sufficient enough for appellate review regrading the trial court's decision to relieve Mr. Axelrod. Mr. Cottrell was prejudiced by trial counsel's deficient performance because our Supreme Court "acknowledge[d] it is somewhat problematic that the record does not indicate with specificity what the allegations of misconduct and disagreement actually entail" that resulted in Mr. Axelrod's removal from Mr. Cottrell's case. *Cottrell*, 421 S.C. at 636, 809 S.E.2d at 431.

c) Because of lack of funding and access to investigative and expert services, and due to the accelerated scheduling, Mr. Cottrell is unable to provide facts to support this claim. With

access to funding for investigative and expert services, Mr. Cottrell will be able to provide facts sufficient to support this claim. *Hinton v. Alabama*, 571 U.S. 263, 134 S. Ct. 1081, 188 L. Ed. 2d 1 (2014); *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985); *Winkler v. State*, 418 S.C. 643, 663, 795 S.E.2d 686, 697 (2016) (Circuit Court abused its discretion in denying defendant's second motion for additional time); *Bailey v. State*, 309 S.C. 455, 424 S.E.2d 503 (1992); S.C. Code Ann. §§ 17-3-50 and 17-27-160(B).

d) Because of lack of funding and access to investigative and expert services, and due to the accelerated scheduling, Mr. Cottrell is unable to provide facts to support this claim. With access to funding for investigative and expert services, Mr. Cottrell will be able to provide facts sufficient to support this claim. *Hinton, Ake, Winkler, Bailey,* S.C. Code Ann. §§ 17-3-50 and 17-27-160(B).

e) The death of Officer McGarry resulted in an extraordinary amount of publicity not only at the time of the time of the incident but also continuing on a regular basis surrounding developments in the criminal prosecution of Mr. Cottrell and around anniversaries of the Officer McGarry's death. This extraordinary publicity was not limited to traditional news outlets, such as newspapers and television, but extended to social media such as Facebook. The community erected a memorial for Officer McGarry which was featured in news coverage and social media. Officer McGarry's death had a substantial impact on the community that the prosecution exploited by calling witnesses during penalty phase to testify about the impact of Officer McGarry's death on the community. This extraordinary publicity and the substantial impact of Officer McGarry's death on the community prevented the jurors from finding Mr. Cottrell not guilty because of self-defense or, alternatively, guilty of voluntary manslaughter. In the alternative, the extraordinary

publicity and the substantial impact of Officer McGarry's death on the community prevented the jurors from returning a life sentence.

f) Trial counsel's performance was both unreasonable and prejudicial under *Strickland* during the guilt-innocence phase of the proceedings in one or more of the following particulars:

1) Failing to object to the trial judge's statements to the jurors at the beginning of Mr. Cottrell's trial that the jurors' role is to "search for the truth as an effort to make sure that justice is done between the parties before the Court," R. 3257, when this statement and similar statements by the trial court were contrary to the prosecution's burden of proof to prove each element of the crime beyond a reasonable doubt. *Cage v. Louisiana*, 498 U.S. 39 (1990); *In Re Winship*, 397 U.S. 358 (1970); *State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012); *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004); *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857, (1998); *State v. Raffaldt*, 318 S.C. 110, 456 S.E.2d 390 (1995); *State v. Manning*, 305 S.C. 413, 409 S.E.2d 372 (1991).

2) Trial counsel failed to investigate, develop, prepare, and effectively present the testimony of Diane Teresa Serrio (f/k/a Diane Lawson), R. 3036-29, in one of more of the following particulars:

(i) Trial counsel should not have called Ms. Serrio as a witness when her testimony at trial undermined the defense. *McKnight v. State*, 378 S.C. 33, 661 S.E.2d 354 (2008) (counsel rendered ineffective assistance by calling a witness whose testimony undermined the defense).

(ii) In the alternative, trial counsel failed to properly prepare Ms. Serrio to testify at trial by meeting with her and allowing her to review her prior statements

and testimony, to refresh her memory, in order to prevent her from being confused on the witness stand.

(iii) In the alternative, trial counsel failed to fully and effectively impeach Ms. Serrio with her prior statements and prior testimony. Rather trial counsel acquiesced when the prosecution objected, "Your Honor, he can't impeach his own witness when she's asked and answered that she didn't know that. This is his witness. He can't impeach her," and the trial judge ruled, "That's correct, Mr. McGuire. That's the rule," when both the objection and the ruling incorrectly stated and applied the law. *See* Rules 613 and 801, SCRE; *State v. Bixby*, 388 S.C. 528, 698 S.E.2d 572 (2010).

(iv) In the alternative, trial counsel failed to proffer the proposed impeachment in order to make a record for appeal, when her guilt-innocence phase testimony was inconsistent with her prior statements and prior testimony.

The Solicitor emphasized Ms. Serrio's testimony during the prosecutions guilt-innocence phase closing argument. E.g. R. 3814-15.

3) Trial counsel failed to properly prepare Lloyd Kendle to testify about witnessing an encounter between Mr. Cottrell and Officer McGarry. Mr. Cottrell was prejudiced because Mr. Kendal became confused during cross-examination about the date of this encounter, R. 3365, and the Solicitor exploited Mr. Kendle's confusion during the prosecution's guilt-innocence closing argument, R. 3816, and penalty phase closing argument, R. 4319.

4) Trial counsel failed to object to the Solicitor misstating the law during the prosecution's closing argument in the guilt-innocence phase in one or more of the following particulars:

(i) The Solicitor explained the definition of murder in such a manner that it conflated the elements for the crimes of murder and voluntary manslaughter in such a manner that if the jurors believed that Mr. Cottrell intended to fire his weapon, then that intent excluded consideration of voluntary manslaughter and self-defense. R. 3803-05, 3817-18.

(ii) The Solicitor's argument about the requirement of self-defense that a person exercising self-defense must be without fault in bringing on the difficulties misstated the law of self-defense. R. 3805-07.

(iii) The Solicitor shifted the burden of proof for self-defense by arguing, "You have a burden to get away from the threat," R. 3810, and implying Mr. Cottrell had the burden of proving all four elements of self-defense, R. 3816. *Bixby*; *State v. Burkhart*, 350 S.C. 252, 259, 565 S.E.2d 298, 302 (2002).

(iv) The Solicitor improperly argued malice by arguing the trial judge will

> charge you that malice may be inferred from conduct showing a total disregard for human life. He will talk about acts in preparation to do the act that was later accomplished. You can use that to say there is malice. This is malice. Tuck in that gun. The heft of that weapon is malicious. That preparation, going to a Dunkin' Donuts for coffee is malicious.

R. 3812.

(v) The Solicitor improperly argued that sufficient legal provocation for voluntary manslaughter would be satisfied only if the jurors found Officer McGarry

to be unlawfully "whooping" Mr. Cottrell or unlawfully having Mr. Cottrell "on the ground beating" him. R. 3814-17.

(vi) The Solicitor improperly argued the prosecution has a special rolè not shared by defense counsel by arguing:

> The Solicitor's office duty is to be a minister of justice and bring the truth to you.
>
> Mr. McGuire's duty is to zealously represent – and Ms. Norris – is to represent the interests of Mr. Cottrell

R. 3819-20.

5) Trial counsel failed to object to the trial judge's instruction on self-defense that shifted the burden to Mr. Cottrell and required him to establish the elements of self-defense. R. 3848-53. *Bixby, Burkhart.*

6) The cumulative effect of trial counsel's errors entitles Mr. Cottrell to a new trial. *Williams v. Taylor*, 529 U.S. 362 (2000); *Kyles v. Whitley*, 514 U.S. 419 (1995).

g) Trial counsel's performance was both unreasonable and prejudicial under *Strickland* during the sentencing phase of the proceedings in one or more of the following particulars:

1) Trial counsel failed to raise the issue of prosecutorial vindictiveness, following Mr. Cottrell's successful appeal of his conviction and sentence following his first trial, when the prosecution increased the number of aggravating circumstances to seek the death penalty. *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002). During Mr. Cottrell's first trial, the prosecution presented two aggravating circumstances, to wit: "(1) the killing of a police officer in the line of duty; [and] endangerment to other persons." Tr. (3/28/2005) 3451. During Mr. Cottrell's second

trial, the prosecution presented three aggravating circumstances, to wit: (1) "the murder was committed by a person with a prior conviction of murder," (2) "[t]he offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person," and (3) "the murder of a federal, state or local law enforcement officer . . . during or because of the performance of his official duties." R. 4355-56.

2) Trial counsel failed to object to expert testimony by Susan Safford, R. 4085-4091, when the trial judge allowed her to testify "based on her training and experience," about the potential uses of "a metal wire that had been braided," which included trying to create a "spark" from an electrical outlet "maybe to ignite [] a cigarette," "tattooing purposes," or as "a handcuff key, trying to manipulate a set of restraints." *Watson v. Ford Motor Company*, 389 S.C. 434, 699 S.E.2d 169 (2010) (summarizing three-part procedure for qualifying expert witnesses); *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009) (trial court's gatekeeping function in assuring reliability of expert testimony applies to nonscientific evidence). The Solicitor exploited this testimony in the prosecution's penalty phase closing argument by arguing, "We believe that we have shown you that [Mr. Cottrell] is able to get out of handcuffs and to fight other prisoners." R. 4326.

3) Trial counsel failed to object to irrelevant, impermissible, and inflammatory victim impact evidence that exceeded the scope of permissible victim impact testimony and injected passion, prejudice, and an arbitrary factor into the sentencing procedure. *Payne v. Tennessee*, 591 U.S. 808, 817 (1991); *see also State v. Hughey*, 339 S.C. 439, 457, 529 S.E.2d 721, 730 (2000) (South Carolina allows victim impact evidence for the purpose of demonstrating the "uniqueness" of the victim and the "specific harm committed

by the defendant.") *overruled on other grounds by Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009); S.C. Code Ann. § 16-3-25(C)(1). This objectionable victim impact evidence included:

(i) The victim's father, Joseph McGarry, testified that his deceased son's friend, David Kelly, committed suicide because Mr. Cottrell had murdered Mr. McGarry's son.

(ii) The victim's father, Joseph McGarry, and Chief of Police Warren Gall testified that Officer McGarry's death resulted in a loss to the law enforcement community and the entire community in general.

(iii) The victim's father, Joseph McGarry, ended his direct testimony with an emotional outburst, calling Mr. Cottrell a "piece of garbage." *See Stahl v. State*, 749 S.W.2d 826, 832 (Tex. Crim. App. 1988) (holding that a witness's emotional outburst posed significant potential to inflame the jury and demanded reversal); *Rodriguez v. State*, 433 So. 2d 1273, 1276 (3d Cir. 1983) (holding that a witness's impassioned statements evidencing hostility towards the defendant were prejudicial and demanded retrial).

4) Trial counsel failed to fully and effectively impeach Diane Teresa Serrio (f/k/a Diane Lawson) about her testimony during the penalty when she testified:

> Q. So you get back to North Myrtle Beach, to [address redacted]. Did Allen say anything about the murder of Jonathan Love?
>
> A. Fred and I were in the bedroom, and he had come in there. And he said, "I got to tell you something. I got to tell you something." And he was laughing. And he said, "You should have seen it when I shot him. There was a mushroom cloud above his head, and then he crapped himself."
>
> Q. He said the "S" word, not "crap"?

A. Yeah. I can't say that.

Q. Okay. He used the bathroom in his pants?

A. Yes, sir.

Q. Did he say anything else about Jonathan?

A. He was still gurgling, or he was still alive when they were covering him up.

Q. Okay. How did he know he had used the bathroom in his pants?

A. I have no idea.

Q. Okay. He was gurgling when they covered him up. And you say Cottrell was laughing?

A. Yes.

Q. Tell us about that.

A. He actually fell to the floor.

Q. Fell to the floor laughing?

A. Yes.

R. 4006-07. The Solicitor emphasized this testimony during the prosecution's penalty phase closing argument. R. 4314-15.

5) Trial counsel failed to request a hearing pursuant to Rule 404(b), SCRE and *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923) regarding the admissibility of unadjudicated bad acts.

6) Trial counsel failed to properly prepare Lloyd Kendle to testify about witnessing an encounter between Mr. Cottrell and Officer McGarry. Mr. Cottrell was prejudiced because Mr. Kendal became confused during cross-examination about the date

of this encounter, R. 3365, and the Solicitor exploited Mr. Kendle's confusion during the prosecution's penalty phase closing argument, R. 4319.

7) Trial counsel failed to object to the Solicitor's sentencing phase closing argument that evidence of Mr. Cottrell's adaptability to prison was an ongoing fraudulent "trick," R. 4322, when our state's appellate courts consistently hold that it is improper to call a defendant a liar during closing argument. *Major v. Alverson*, 183 S.C. 123, 190 S.E. 449, 450 (1937) ("referring to defendant as a 'bare faced liar'" during closing argument required new trial); *State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000), *reversed on other grounds by State v. Blurton*, 352 S.C. 203, 573 S.E.2d 802 (2002). There is at least a reasonable probability that this improper argument influenced one or more jurors to impose a death sentence rather than a life sentence, as the Juror's first question during deliberations was, "Jurors would like to know if Mr. Cottrell remains in maximum security," which the trial judge interpreted "that would be 'would remain in maximum security.'" R. 4369.

8) Trial counsel failed to object to the Solicitor's factually incorrect, misleading, and highly prejudicial closing argument:

> We believe that we have shown you that he is capable of making ropes to get out of jail or confinement. We believe that we have shown you that he is able to get out of handcuffs and to fight other prisoners.

R. 4326. This argument misstated the highly speculative testimony of Susan Safford, R. 4085-4091, which provided multiple possible uses for the braided wire and never offered any potential use for the "rope" made from a red detention center uniform. This argument also misstated the testimony of Paul David Toller, Jr. about an incident where Mr. Cottrell,

while "[h]e still had on the handcuffs," was involved in an altercation with another inmate. R. 4136.

9) Trial counsel failed to object to misleading jury instructions, in violation of the Sixth and Eighth Amendments to the United States Constitution, which did not properly advise the jurors that whatever sentence they recommended would be the sentence imposed by the court rather than a recommendation to the court about the sentence to be imposed. R. 4346-68. *Hurst v. Florida*, 136 S. Ct. 616 (2016); *Ring v. Arizona*, 536 U.S. 584 (2002); *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985); *see also State v. Bellamy*, 293 S.C. 103, 259 S.E.2d 63 (1987), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

10) Trial counsel failed to object to the trial judge instructing the jurors that they must unanimously agree to recommend a sentence of life imprisonment without the possibility of parole when that instruction is contrary to S.C. Code Ann. § 16-3-20(C).

11) When the jurors sent the trial judge a note indicating they were split 11-1 between recommending a sentence of death or life imprisonment without the possibility of parole, trial counsel failed to move for the trial judge to terminate deliberations and impose a life sentence in accordance with S.C. Code Ann. § 16-3-20(C). R. 4370-73, 4479.

12) When the trial judge instructed the jurors to continue deliberating, R. 4373, trial counsel failed to request the trial judge instruct the jurors that "the verdict of the jury should represent the opinion of each individual juror," not "a mere acquiescence in the conclusion of his fellow[]" jurors, and the jurors in the majority should listen to the minority juror and consider the "correctness of a judgment which was not concurred in by the majority." *Allen v. United States*, 164 U.S. 492, 501 (1896).

13) The cumulative effect of trial counsel's errors entitles Mr. Cottrell to a new sentencing hearing. *Williams v. Taylor*, 529 U.S. 362 (2000); *Kyles v. Whitley*, 514 U.S. 419 (1995).

h) Appellate counsel's performance was both unreasonable and prejudicial during the appeal of Mr. Cottrell's death sentence by failing to challenge on appeal the trial judge singling out the lone holdout juror when the trial court instructed the jurors to continue to deliberate and trial counsel had objected pursuant to *Tucker v. Catoe*, 346 S.C. 483, 552 S.E.2d 712 (2001), and the trial judge was aware of the requirements of *State v. Hughes*, 336 S.C. 585, 521 S.E.2d 500 (1999). *See also Lowenfield v. Phelps*, 484 U.S. 231 (1988); *Dawson v. State*, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002).

i) Because of lack of funding and access to investigative and expert services, and due to the accelerated scheduling, Mr. Cottrell is unable to provide facts to support this claim. With access to funding for investigative and expert services, Mr. Cottrell will be able to provide facts sufficient to support this claim. *Hinton, Ake, Winkler, Bailey,* S.C. Code Ann. §§ 17-3-50 and 17-27-160(B).

j) Because of lack of funding and access to investigative and expert services, and due to the accelerated scheduling, Mr. Cottrell is unable to provide facts to support this claim. With access to funding for investigative and expert services, Mr. Cottrell will be able to provide facts sufficient to support this claim. *Hinton, Ake, Winkler, Bailey,* S.C. Code Ann. §§ 17-3-50 and 17-27-160(B).

12) Prior to filing this application for post-conviction relief, Mr. Cottrell has not filed any petitions, motions, or applications in any court, regarding this conviction, other than those listed in paragraphs 7 and 8 above.

13) Not applicable because Mr. Cottrell did not answer "yes" to number 12 above.

14) None of the grounds set forth in paragraph 10 above have been presented to this or any other court because this application for post-conviction relief is Mr. Cottrell's first opportunity to present allegations of ineffective assistance of counsel.

15) Not applicable because Mr. Cottrell did not answer "yes" to number 14 above.

16) Please see response to number 14 above.

17) Mr. Cottrell was represented by counsel during his capital jury trial and appeals to the South Carolina Supreme Court and the Supreme Court of the United States.

18) The following attorneys represented Mr. Cottrell:

a) Initially, Stuart M. Axelrod, Axelrod & Associates, P.A., 4701 Oleander Drive, Myrtle Beach, SC 29577, and Melissa J. Armstrong, 3213 Amherst Avenue, Columbia, SC 29205, represented Mr. Cottrell. Judge Hyman relieved Mr. Axelrod and Ms. Armstrong prior to trial.

b) After Judge Hyman relieved Mr. Axelrod and Ms. Armstrong, Teresa L. Norris, Charleston County Public Defender's Office, O.T. Wallace County Office Building, 101 Meeting Street, 5th Floor, Charleston, SC 29401, and William S. McGuire, S.C. Commission on Indigent Defense, 1330 Lady Street, Suite 401, Columbia, SC 29211, represented Mr. Cottrell during his capital jury trial.

c) Keir M. Weyble and Sheri Lynn Johnson, both of the Cornell Law School, Myron Taylor Hall, Ithaca, NY14853, and Robert M. Dudek, S.C. Commission on Indigent Defense, 1330 Lady Street, Suite 401, Columbia, SC 29211, represented Mr. Cottrell on his appeal to the South Carolina Supreme Court.

d) Mr. Weyble represented Mr. Cottrell on his appeal to the Supreme Court of the United States.

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	Case No. 2018-CP-26-05709
Luzenski Allen Cottrell,	)	
Applicant,	)	
	)	
vs.	)	
	)	
	)	
State of South Carolina,	)	
Respondent.	)	
	)	

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail,[2] postage prepaid, on the date reflected below, addressed to

Melody J. Brown, Esquire
S.C. Attorney General's Office
PO Box 11549
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September 3, 2019
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[2] Please note that a copy of this pleading was emailed to the Honorable Steven H. John, Presiding Judge by Special Assignment of the South Carolina Supreme Court, and Ms. Brown on September 2, 2019.