VOLUME NINE OF FOURTEEN

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Appeal from Orangeburg County

Diane Schafer Goodstein, Circuit Court Judge

BAYAN ALEKSEY,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General
P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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** THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:

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APPLICANT'S EXHIBIT 42-A, AUDIO CASSETTE
APPLICANT'S EXHIBIT 26-A, PHOTOGRAPH
APPLICANT'S EXHIBIT 26-B, PHOTOGRAPH
APPLICANT'S EXHIBIT 26-C, PHOTOGRAPH
APPLICANT'S EXHIBIT 26-D, PHOTOGRAPH
APPLICANT'S EXHIBIT 26-E, PHOTOGRAPH
APPLICANT'S EXHIBIT 26-F, PHOTOGRAPH
APPLICANT'S EXHIBIT 26-G, PHOTOGRAPH
APPLICANT'S EXHIBIT 77, PHOTOGRAPH
APPLICANT'S EXHIBIT 78, PHOTOGRAPH

A. It says something about he forged my mother's name on the title and took the money, it was about 3 or $4,000. Bryan, Michael Bryan.

MR. BROWN: And I beg the Court's indulgence.

THE COURT: Okay.

(Pause in proceedings.)

Q. And I'd refer you to page 2 of that SLED statement and ask you to look about midway down the page. And it says -- there's a sentence that says "He told me he had gotten a wire transfer..."

A. It says that "He told me he got a wire transfer so, therefore, I withdrew the money."

Q. Okay.

A. "He told my mother that he would sell her car for her in Jersey so my mother said yes."

Q. Okay. I'm going to stop you there. But back up before the sentence about the car in Jersey, it's clear that she says in that statement that she withdrew the money?

A. That's according to her statement.

Q. Okay. Are you familiar with this statement having reviewed it as the case officer?

A. Yes. I remember receiving this statement from her.

Q. And George Darnell actually notarized that statement?
A. That's correct. I signed it as a witness.
Q. So you actually were a witness to that statement?
A. Correct.
Q. Okay. Do you recall during the trial -- because you sat in the trial as -- you weren't sequestered or subject to sequestration in the trial of Mr. Aleksey?
A. We were.
Q. There was a sequestration order, but I think Judge Cottingham specifically said two case agents could stay in the courtroom instead of one?
A. Right.
Q. Do you recall Ms. Farrell testifying at trial that she did not withdraw the money, that Aleksey withdrew the money?
A. I can't recall what she testified in the trial.
Q. Okay. The record speaks for itself. And --

MR. BROWN: Also on that note, Your Honor, is an interjection. My understanding Applicant's 73 is the handwriting analysis, the signature card is actually analyzed as an unknown and it's compared to other knowns of Ms. Farrell including, if I am not mistaken,

Applicant's 50 which is her SLED report, which I don't believe there's any dispute that she signed that and that the match made is with that.

THE COURT: Got you.

MR. BROWN: And point to tie that back in with the question that had been raised yesterday. And, Your Honor, I believe that's all my questions for this officer, for this witness.

THE COURT: Thank you so much, Mr. Brown.

All right, Mr. Zelenka.

MR. ZELENKA: Thank you, Your Honor.

MR. TARR: Your Honor, one thing. I just want to let the Court know I have not received a call from my next witness and I didn't know if you might want to have somebody contact Bamberg before the lunch hour and see what the status is over there.

THE COURT: You must have been feeling the brain vibes, Mr. Tarr.

MR. BROWN: I apologize for speaking out of turn. There's one other matter, it's not a question for this witness, there is something I would like to enter, I have not shown it to the

attorney general yet, but I think it is an appropriate time because it does deal with that last set of questions.

THE COURT: Sure. And what is the officer/agent's full name, his whole name?

THE WITNESS: George Darnell.

THE COURT: George Darnell. I didn't want to call up and say Darnell. George Darnell. I couldn't remember George. And you think so far as you know he's in Bamberg, general sessions in Bamberg?

MR. TARR: Uh-huh.

THE COURT: Okay. Sure. Thanks.

MR. TARR: He's supposed to be there first thing in the morning, so I don't know how long.

THE COURT: I'll call, see if maybe we can get an update. Maybe we can't. Thanks.

Did you want to admit...?

MR. BROWN: I am, Your Honor, I just want to let her mark it. I believe this is 82.

THE COURT: Eighty-two.

MR. BROWN: Your Honor, at this time we would move into evidence as Applicant's 82, a letter dated August 11th of 1998 and it's on the letterhead of Walter Bailey, solicitor, it's

signed at the bottom. It's been shown to the attorney general. This is a letter we received in response to a subpoena of Mr. Bailey, Solicitor Bailey's file, and it is addressed to Investigator Caruso with Commerce Bank, which is an investigator on the matter with Jamie Farrell's testimony.

THE COURT: Got you.

MR. BROWN: And I'm going to put that in the stack of exhibits right here with Ms. Farrell in case the attorney general --

THE COURT: Okay.

MR. BROWN: I'm not going to ask him any questions. Thank you, Your Honor.

(Entered into evidence was Applicant's Exhibit 82, letter.)

CROSS-EXAMINATION

BY MR. ZELENKA:

Q. Agent Mears, the file you brought with you today and the file that you're referring to, is that the file that was attached to the joint investigative case file report you did on March 6th, 1998?

A. That's correct.

Q. Was that the status of that file on March 6, 1998, or did you add matters to it?

A. This is the original file. If there were any additional additions to it, it would have been attached also with it.

Q. Okay. But that is the file as you knew it on March 6th, 1998 and then your file throughout the trial?

A. That's correct.

Q. Isn't it correct, however, that SLED and its various departments may have information, paperwork independent of that particular file?

A. That's true.

Q. And could your notes be in those other forensic files, lab report files and the like?

A. You're referring to personal notes?

Q. Yes.

A. Normally our personal notes we will keep ourselves. We will write the report for the case file from our personal notes.

Q. Okay.

A. And sometime they're destroyed, sometime they're kept, but this report is written from our notes.

Q. Okay. And who maintains custody of the -- of SLED records?

A. We keep -- the agents that work the case keep a case file. One copy is sent to the solicitor and

another copy is kept at headquarters in Columbia.
Q. Okay. And then in addition to that the forensic test data and the like would also be kept with their particular departments or not?
A. I don't know their procedure, but we get a copy of what -- of whatever we need we ask for it and they -- the different departments will supply the investigating agents with the necessary documents needed to complete the case file.
Q. Okay. In the work in preparation for trial, did you meet with Solicitor Bailey?
A. Yes, sir.
Q. Did you provide him, as you said, that document that you have in front of you, that SLED report as best you can recall?
A. That's correct.
Q. Now, earlier today there was -- before the testimony began I asked you to look at one area of that SLED file, I believe it's item number 44 in the file that had a reference to a Sara Pivero. Do you recall that discussion today?
A. That's correct.
Q. And in your particular file it does not reveal, or does not include any written statement by Sara Pivero; is that correct?

A. That is correct.

Q. Do you have any recollection as to why in your joint March 6th, 1998 investigative report you would have referenced a statement, although not quoting the statement, but referencing a statement in area 44 of your SLED report and for there not to be a statement there?

A. We -- George Darnell and myself interviewed Pivero and she was supposed to write a statement and mail it to us. She was -- I think she was sick one day we went there and she was at some other appointments and we could not stay. And she stated that she would supply us with a written statement and mail it to us.

We never did receive one on the second trip. Again, she said that she would prepare a statement for us, but she never did. That's the reason it's blank.

Q. Do you have any written documentation of your interviews with her about what statement or circumstances of the statement she might give?

A. I don't have any. Agent Darnell may have some. Since he was the lead agent he would keep up with the day-to-day documentation and confer with me on my notes so everything could be recorded.

Q. Okay. And in Agent Darnell's written report, and I believe you've got that in front of you right now.

A. That's correct.

Q. When he's referring, although it's in your joint name, he's the signatory and he frequently in that report is referring to somebody as the writer and that would be him rather than you; is that correct?

A. That's right.

Q. Okay. Now, during your direct examination there was an inquiry of you about recovery of items from the car. Do you recall some of that inquiry?

A. Right. I remember.

Q. And let me ask you to refer to the bottom of page 3 of that to the top of page 4 and see if that refreshes your recollection, if at all, concerning the circumstances of recovery of items.

A. Okay.

Q. Does that refresh your recollection at all concerning how those items --

A. Right. Even though it said that Special Agent Mears and this writer confiscated all paperwork, photographs, identification cards, credit cards pertaining to the occupants of the vehicle as evidence, a .9-millimeter pistol made by Jennings

Firearm, model Bryco 58, serial number 749485 was located in the driver's side floorboard, it said it was taken by a forensic agent.

This information was written by Darnell and apparently he got this information from forensics about the pistol and it going into evidence. I don't think he actually took possession of it.

Q. Okay. Well, what about the other paperwork confiscated from the automobile? The report would suggest that you and Darnell were actually the ones confiscating that paperwork and photographs, doesn't it?

A. There were some paperwork in the vehicle, but I am certain the forensic guys also got some of the paperwork out when they processed the vehicle.

Q. Okay. And the paper -- the photographs that you were shown taken by SLED forensics, that indicates at the time those photographs were taken SLED forensics is on the scene taking those photographs and they're still located in the vehicle; isn't that correct?

A. That's correct. Forensics did take the photographs.

Q. While we're looking at that document, let me ask you to refer to section 49 of that which would be

near the end, a copy of the criminal history of Gloryvee Perez Blackwell.

A. Okay.

Q. And what does that report indicate once you find it? I'm sorry.

A. Forty-nine?

Q. I believe it's 49, yes.

A. I have a -- is the card.

Q. Oops, go to 50. My bifocals aren't working quite right, I apologize.

A. Yes, sir.

Q. And what does that indicate her criminal history was at that time of this particular report?

A. Okay. It says warrant summons, agency Mercer County prosecutor's office 7/16/91, it look like if I'm correct, drug charges. Let me see if I got the right one.

Q. Maybe I can shorten it up a little bit. Does it reflect that there are any pending arrest warrants out for her at that time, based upon the report that you ran?

A. The one I'm looking at it says, disposition it's already been disposed of. Felony conviction, cocaine possession, disposition guilty. Summons, warrants, Bordertown Township, shoplifting, disposition guilty.

Q. Your records didn't reflect that there were any pending warrants out for her at the time this was run and provided to the solicitor; is that correct?

A. I don't see any indicated in the criminal -- in the criminal history.

Q. Okay. You were shown Applicant's Exhibit 29 and it was referred to as -- to some extent being Gloryvee's records, various things. But I would like you to direct your attention to an area that I'm bringing up with stating Westin Suites and would you please review matters behind that.

A. Okay.

Q. As to the individual names that are included in that material at the top.

A. Right. It says Vince Black, 3333 Comly Road, Philadelphia, PA, arrive 11/29/97, depart 12/16 of '97 in Westin Suites in Philadelphia.

Q. And just briefly to speed this up, on these various hotel documents just state the name that those are made out to. These are already matters in evidence, but I just want to make clear that there may be some things that related to --

A. From the beginning?

Q. Not the beginning, just from there on down.

A. Okay. Vince Black.

Q. There are a number of Vince Black ones?
A. There are several in the name of Vince Black, there's a Michael Toscani, T-o-s-c-a-n-i, several of those of that particular name.
Q. Okay. And those were attached to the documents, also Summerfield Suites and Ms. Gloria Perez and Ms. Gloria Blackwell's names also; isn't that correct?
A. That's correct.
Q. Do you recall if those names were also aliases that were reflected in your investigation as being consistent with Mr. Aleksey?
A. There were a number of aliases used by Aleksey, and again I can't recall all of those names.
MR. BROWN: Your Honor, for the record we'd concede that those two names are aliases that had been used. We tried to get the Vince Black one in earlier, so we certainly agree to that.
Q. Let me show you what is a photocopy of Applicant's Exhibit 28, matters turned over to Thomas Sims, who is Mr. Aleksey's attorney, by George Darnell, includes hotel, motel and telephone receipts. Do you recall anything about those matters being turned over, what those particular documents were that were turned over by Mr. Sims?

A. This appears to be personal items of Aleksey.
Q. And here is actually the original.
A. Okay.
Q. Thank you. Now, let me ask you to refer to the case report, you have section 52 of the case report.
A. Okay.
Q. Which is identified in your document as a copy of polygraph report on Gloryvee Perez.
A. Yes, sir. That's right.
Q. There was some reference to questions asked during the polygraph. Does that indicate the questions that were asked and provided in that report and provided to the solicitor at that time?
A. That's correct. It appears that the polygraph operator, Agent Heartly, asked two questions.
Q. And what were the two questions that were asked reflected in that statement?
A. "Did you shoot the trooper on I-95? Did you shoot the trooper on I-95 when you were with Aleksey?"
Q. Okay. And her answer to both those questions was what?

MR. BROWN: Your Honor, we would object to relevance.

MR. ZELENKA: It's a statement by

Ms. Perez, you've introduced the other statements, you brought it up in your direct examination.

THE COURT: I'll allow it.

MR. BROWN: And that was -- that's fine. That's fine.

A. There's no answer.

Q. Okay. It doesn't reflect what her answers were?

A. It says no deception indicated, but there's no answer.

MR. BROWN: We would object to the finding of the polygraph report for several reasons.

THE COURT: Okay.

MR. BROWN: One of which is under the Council Test we don't believe polygraph reports --

MR. ZELENKA: I'm not seeking to introduce the results of the polygraph test as being admissible as evidence in this court other than to the extent that Mr. Bailey stated he would have considered the polygraph reports in his charging decision for whatever they were worth and he also qualified that.

MR. BROWN: And we would accept that he would consider that and we would assume that the

inference would already be out there that she passed enough for him to make his own decision. We would still object to the actual findings of the analyst being made a part of the record.

THE COURT: The only relevance that it would have at all is just to corroborate what Solicitor Bailey said he would have considered and that would be the only value of it at all.

MR. ZELENKA: And that's a very narrow purpose that I'm seeking to introduce it.

THE COURT: Certainly for no other purpose other than it would only go to corroborate what Solicitor Bailey testified to as his motivation, and that would be the only relevance and the only limited admissibility, Mr. Brown. And for that purpose I'll accept it and that would be the only purpose.

MR. BROWN: And obviously our objection would be to any other purpose.

THE COURT: Indeed.

MR. BROWN: Yes, ma'am.

THE COURT: Indeed, absolutely.

MR. BROWN: Thank you.

BY MR. ZELENKA:

Q. Okay. Let me show you Applicant's Exhibit 38

and particularly items 3 and 4 of that, see if that refreshes your recollection concerning whether you saw any bank materials or checks.

A. Item 3 state there was a checkbook, item 4 box of extra checks.

Q. Okay. And that information is material which Mr. Darnell of SLED had turned over --

A. That's correct.

Q. -- directly to Ms. Blackwell; is that correct?

A. Right.

Q. In the -- did you review material that was seized from the automobile that Mr. Aleksey was driving that day?

A. Some of it I did review it.

Q. Okay. Let me refer you to section 26 of your report and see if that refreshes your recollection concerning the trace report.

A. All right, sir.

Q. Did you find it?

A. Eighty-five, yes.

Q. Does that refresh your recollection as to whether you received or had in your possession the SLED report which had been shown to you previously?

A. Yes, it does.

Q. All right. Let me also ask you to refer to page

5 of the second paragraph.

A. All right, sir. I have it.

Q. See if that may also refresh your recollection.

A. That's correct. The second paragraph states that this writing agent, Darnell, received a telephone call from ATF Agent Scott Ethridge stating that Lieutenant Ira Parnel of SLED firearms lab had requested his assistance in tracing the owner of the pistol found in the suspect's vehicle. Agent Ethridge advised this writer, again Darnell, that Yelena Batkilina had purchased the weapon.

Q. Okay. And in that document which you have in SLED it includes that same first page, isn't that correct, that's in Applicant's 4?

A. That is correct.

Q. It includes the same information in the notes, born in the Soviet Union, Batkilina involved in credit card scam, et cetera?

A. That's right.

Q. As far as you know that that information, that document, that format was to the best of your knowledge part of the materials which you also turned over to the solicitor; is that correct?

A. That's right.

Q. Also in your file you have information at items

18 from the New Rochelle Police Department, section 18; is that correct?

A. Section 17, 18, 19 says several telephone calls from law enforcement agencies, possible victims and witness from New York, New Jersey, Pennsylvania in reference to suspect Aleksey. It doesn't give reference to nothing in particular. Number 17 it looks like a warrant from the Commonwealth of Pennsylvania.

Q. And that's for who?

A. Defendant Michael Vicara.

Q. Okay.

A. And also on 18 from New Rochelle it's Bryan {sic} Aleksey, a warrant.

Q. Are there any other warrants in there from New Rochelle?

A. Bryan Aleksey from Commerce Bank.

Q. Stop there. Whose name is on that particular document, is it Vincent Caruso?

A. Complainant is Vincent Caruso.

Q. Okay.

A. Of the Commerce Bank security department. That's from New Rochelle.

Q. And is Mr. Aleksey the only one charged in each of those documents that you've seen so far?

A. He's the only subject.
Q. Okay.
A. Other than another name, Michael, which is an alias.
Q. Correct.
A. Another on Bryan Aleksey from Mineola, New York, warrants, police department, County of Nassau.
Q. Okay.
A. The name here is Sal Vicaro.
Q. That's for bail jumping?
A. Right, bail jumping in the second degree. There's another warrant from Sal Vicaro from New York, criminal possession of stolen property, that's charging Sal Vicaro and here's a list of some of the aliases used, Bryan Aleksey, a/k/a Frank Aleksey, Sal Vicaro, Michael DeAngelo, DeAngelo, that is a letter from Thomas Calatto of Nassau County to George Darnell.
Q. Okay. What's that next one?
A. That's statements.
Q. Okay. Let me ask you to refer to Applicant's 50 related to Jamie Farrell.

THE COURT: Counsel, let's -- we -- we need -- I need one -- Mr. Darnell is on the phone, okay.

MR. ZELENKA: What do you want us to do, Judge? I don't have many more questions of this witness.

MR. BROWN: And I have three questions on recross.

THE COURT: Okay.

(Pause in proceedings.)

THE COURT: I just told him to come on.

MR. ZELENKA: Okay.

THE COURT: For some reason he -- did you all serve him with a subpoena?

MR. TARR: Yes, Your Honor.

THE COURT: For some reason he didn't think he had to respond to it. I don't know. I'm not impressed. The message is to come on.

MR. TARR: Yes, Your Honor.

BY MR. ZELENKA:

Q. Let me ask you --

THE COURT: Go ahead.

MR. TARR: Jim?

MR. BROWN: I'm sorry.

Q. Let me ask you to refer to Applicant's Exhibit 50 which is the statement of Jamie Farrell and ask you if you see in this particular document the name of Detective Gado of New Rochelle?

A. I see a detective that look like G-a-d-o, Gado. That name does appear.

Q. Okay. Let me also ask you to refer to the front part of your investigative report where they list out potential witnesses. Let me know if the name Detective Gado appears in that list also?

A. Mark S. Gado.

Q. That's what, the New Rochelle Police Department?

A. New Rochelle Police Department, that's correct.

Q. Okay. Does that refresh your recollection about that? And in the March 6th report written by Mr. Darnell, the portion that you referred to at page 4, this writer received several telephone calls from law enforcement agency, possible victims and witnesses from New York, New Jersey and Pennsylvania in reference to suspect Aleksey, that writer again who's stating that he received those phone calls is Mr. Darnell, is that not correct, and not you?

A. That is correct.

Q. Okay.

A. Agent Darnell received the phone calls.

Q. Are you saying you never received any phone calls from law enforcement or merely Mr. Darnell's reporting that in his report?

A. I may have received, or answered them if Agent

Darnell was busy or was not available, but they were directed for Agent Darnell.

Q. Okay.

A. Again, the telephone call about the Western Union, this may have been one of those telephone calls that was received before the statement was taken, I can't answer that. Again, Agent Darnell received these calls.

Q. Okay. And let me ask you to refer to Applicant's Exhibit 14 which is introduced in evidence. Isn't it correct that in the August 11th, 1998 letter attached to that document Rickie Pattin, that it states that the contact person on Mrs. Watson is George Darnell?

A. Mrs. Watson was named in a murder trial of a state trooper at the State Law Enforcement Division in Charleston, South Carolina. The contact person is George Darnell.

Q. Okay. So that letter which you've just quoted from August 11th, 1998 from Western Union, that's a letter to -- again to -- that's a letter to another -- it's unclear who it's to, but it's just a letter within the Western Union file; is that correct?

A. That's correct.

MR. ZELENKA: I believe that's all the questions I have.

THE COURT: All right, Mr. Zelenka.

Yes. Redirect, Mr. Brown.

MR. BROWN: Very briefly, Your Honor.

THE COURT: Okay.

REDIRECT EXAMINATION

BY MR. BROWN:

Q. Okay. First you mentioned that you and George Darnell met with Sara Pivero and spoke with her, but she never gave a written statement. And my question just is do you have notes from that interview?

A. I don't have any; he may have.

Q. Okay. That answers the question.

You mentioned that the items in your March 6th report that you did not write, I understand that, that it mentioned Agent Mears and this writer confiscated all paperwork, photographs, identification cards and credit cards --

THE COURT: Hold on.

MR. BROWN: I apologize.

Q. -- pertaining to the occupants of the vehicle as evidence. And then Mr. Zelenka asked you forensics may have taken some of those documents. And my question to you is, do you know who at forensics took

the photographs, specifically the ones of the Penske truck receipt?
A. Special Agent Brett Baker, he's from forensics, and Special Agent Karen Goodwin.
Q. G-o-o-d-w-i-n?
A. Yes, sir.
Q. And you believe you they took the photos?
A. I'm certain that they worked the crime scene and took the photos.
Q. Thank you. Are they still with SLED?
A. Yes, sir.
Q. Okay.
MR. BROWN: And I know that may be more than three questions, I was --
THE COURT: That's okay, Mr. Brown.
Q. And the last question, Mr. Aleksey was never offered a polygraph test, was he? I'm not talking about any results, just whether he was ever offered.
A. I think he was offered and refused.
Q. Can you tell me how that offer was made? To his lawyer?
A. I think in his original interview we -- he was asked by myself and Darnell if he was willing to take a polygraph.
Q. And just to clarify, this is the one where he

confessed to shooting the trooper?
A. I can't -- I can't say specific which one it was, what interview it was.
Q. Was that the first interview you had with him? I know you met with him before, but the first to use your word "interview" was the one where it was taped and there's a statement that says Gloryvee did the shooting and then there's a gap and then he comes on and he's crying and says he did it. I think that was on the 2nd?
A. I don't know the first one, second one. I talked with him briefly at the hospital, just briefly.
Q. Sure. Would you believe that that -- do you believe that that's when that offer that you think may have been made was made?
A. It could have been, I don't know. I can't say. I can't say.
Q. Do you believe it was before that?
THE COURT: What's the that?
Q. Before -- do you believe the polygraph offer was before that interview on the 2nd, the taped interview?
A. Is that the first one or is that the second one, interview that you're referring to?

Q. Well, I consider that to be one interview even though there were two parts taped, there's a two-hour gap, there's no real break where he goes somewhere else so I consider that to be one interview. To my recollection that is the first real interview with him. I know there's some other questioning like at the hospital.

A. I don't -- I really -- Agent Darnell may can answer that for you.

Q. Okay.

A. I don't know if it was after the interview or before the interview or exactly when, but he was offered.

Q. And just to try to hone in, do you have any knowledge that the polygraph offer that you believe may have happened occurred before that interview, can you offer us any testimony saying that you believe it was before?

A. I don't know when it was.

Q. Okay.

MR. BROWN: And, Your Honor, that is that. I would like to refer to Applicant's 47 as a rap sheet of Ms. Farrell that has been already entered and just tell the Court that it does have the Absecon police report department arrest

on it. The record speaks for itself.

MR. ZELENKA: You may want to compare that one to the one he has in his file. I'm just saying that.

MR. BROWN: Sure.

Q. And I would just ask you, does this look like the one that's in your file?

A. I don't see a Jamie Farrell criminal history. I don't see a Jamie Farrell criminal history.

Q. Okay. You would agree though that's what 47 is? And I wasn't going to ask you questions --

A. Sure that is --

Q. A rap sheet on her?

A. -- a rap sheet.

Q. It shows some arrests from Absecon?

A. That's correct.

Q. It actually says for the disposition check with the local law enforcement agency?

A. With a missing disposition required do not contact the state bureau, contact the agency that furnished the pending data.

Q. And there's no disposition on that rap sheet?

A. No, sir.

Q. Okay. Okay.

MR. BROWN: And, Your Honor, I do want to

come, back it's a question I'd already asked.

Q. Agent Mears, can you offer -- besides your memory can you offer any notes or documentary proof that a polygraph test was offered to Mr. Aleksey either tape recording an offer or can you offer the Court any other -- anything else besides your memory which you --

A. That he was offered?

Q. Yes, sir.

A. Unless it is provided in his statement on the tape, it may be in there somewhere. Other than that there's no other way that I can prove it.

Q. Okay. So you can't prove he was offered it besides your memory. And I've already asked you about when it occurred and there's some uncertainty about some of that.

A. It may be in his taped statement or during the interview, I don't know. I have to see the interview statement.

MR. BROWN: That's it, Your Honor.

THE COURT: Very well. Any recross?

MR. ZELENKA: None.

THE COURT: Okay. Is this witness free to leave?

MR. BROWN: He is, Your Honor. Yes, ma'am,

Your Honor.

THE COURT: And that is probably your compatriot going have I got to come now. You tell him, yes, he does have to come. Tell him he's causing a big scene at the courtroom, but we're all waiting on him.

(Whereupon, the witness steps down from the witness stand.)

(Whereupon, a bench conference was held off the record.)

THE COURT: We're going to take a lunch break.

(Whereupon, lunch recess is taken from 1:25 p.m. to 2:37 p.m.)

THE COURT: All right, gentlemen, if you'd call your next witness.

MR. TARR: Your Honor, we call George Darnell, please.

THE COURT: Yes, sir. If you'd come along, please. From one court to the next.

THE WITNESS: Judge, it's been a rough week.

THE COURT: Well, hopefully next week will be much, much better. Would you raise your right hand?

(George Darnell, called as a witness, having first been duly sworn, is examined and testifies as follows:)

THE COURT: Thanks. If you would please be seated and state your full name for the record.

THE WITNESS: George Darnell.

THE COURT: And your witness.

MR. TARR: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. TARR:

Q. Are you still Special Agent Darnell, is that your title?

A. Senior agent.

Q. Senior agent?

A. Yes, sir.

Q. And back at the time of trial of this case you were the lead investigator from the arrest or the date of the incident all the way up through the trial?

A. Well, I was the case agent.

Q. Case agent. Would you consider yourself in charge, or did you and Agent Mears have a joint kind of partnership?

A. We worked together.

Q. Okay. Take you right back to the beginning,

December 31st or actually January 1st, did you immediately begin to investigate the case at that time?

A. I -- when I got the call I responded to the scene at I-95.

Q. Okay.

A. And Kenny, Agent Mears went down to Summerville where they had the suspect in custody.

Q. Okay. And there was some testimony by Mr. Mears that you ended up in the Santee area?

A. That's correct.

Q. And was that at the Mustang scene or was that somewhere else?

A. No, sir. I was right there at the --

Q. Not the Mustang, but 97, mile marker 97.

A. I was at 95 at the scene, Trooper Lingard was still, still laying there when I got there.

Q. Okay. Now, I know that there are other individuals involved, many other individuals from SLED who actually do perform different tasks in the investigation, including crime scene management and taking photographs and all that kind of stuff.

A. That's correct.

Q. But in your summary I guess, I don't know what you -- if you have -- let me show this to you, first

of all, it's a South Carolina Law Enforcement Division report dated March 6 to the case file from Agents Darnell and Mears, re: murder investigation of First sergeant Frankie Lingard.

A. Yes, sir.

Q. Is that a case summary?

A. Yes, sir.

Q. Okay. In this report on page 3 at the bottom it says the S. A, is that Special Agent or Senior Agent Mears?

A. Either way.

Q. Okay. Senior Agent Mears and this writer, which would be you I guess?

A. Yes, sir.

Q. Confiscated all photographs, identification cards, credit cards pertaining to the occupants of the vehicle as evidence. And the occupants of the vehicle basically would be Mr. Aleksey and Ms. Perez?

A. Right.

Q. Because the two children probably didn't have any of this, these types of belongings, they wouldn't have?

A. No, sir.

Q. And when you say confiscated, did you mean that you physically confiscated them at the scene, or did

you take them later after someone else processed the scene?

A. After they were through processing the scene we gathered up credit cards and so forth like that and took them in our custody at that time.

Q. Okay. And that would have been that night out there on the interstate?

A. No, sir.

Q. Oh.

A. No, sir.

Q. Summerville?

A. Mustang --

Q. Mustang --

A. Mustang was in Summerville. After everything was cleared up in the parking lot, the Mustang was towed to the Summerville Fire Department and put under a shed.

Q. Okay. And was -- anything that was photographed in the vehicle, would that have been done at that scene in Summerville?

A. Yes, sir.

Q. Okay. So any document -- documents wouldn't have been taken somewhere else and photographed, they were photographed there?

A. Everything was photographed right there.

Q. Okay. I want to show you three photographs, 26-B, 26-A and Applicant's 77 and ask you if you recognize those?
A. One is a rental form for looks like a lease truck.
Q. Okay. Just to help out, two of them are pictures of that same form.
A. Right. Right. Yes, sir. I remember seeing those.
Q. And the other picture, 77 I believe it was, do you see a brochure on the seat?
A. There was -- there was a brochure on the seat. And I don't remember seeing that. When I got there, when I left Santee and all, got down there they were starting to already process the car, sir.
Q. Okay.
A. I do not remember seeing that.
Q. All right. So, now, I know in some of these photographs they moved items to get better photographs.
A. Right.
Q. When you got there, had any of the things already been removed from the vehicle or were they still in the vehicle?
A. They were starting to move around some stuff and

then I helped them --
Q. Okay.
A. -- remove some of the clothing and so forth out the back because they had had pretty well loaded.
Q. But had anything -- I know some things had been moved before you had got there, but had anything been taken out of the vehicle by the time you got there?
A. I don't remember. I'm not positive.
Q. And let me ask you about this, these two again 26-A and B. Can you tell me, because it doesn't look like -- all the other photographs look like they're taken and you see the car in the background. And can you tell me what that background is? It looks like it kind of might be a state trooper car, silver, but it's definitely not the inside of this Mustang. Do you happen to know where those might have been taken?
A. No, sir. Like I say, we were up in that building, whether that was one of the pieces of fire equipment that might have been parked up in there or just something he laid it down on to take the photograph.
Q. Okay. And did you ever -- this brochure, did you ever -- I know you say you don't recall seeing it on the seat, did you ever look at that as possible evidence in the case?

A. I don't recall.
Q. I don't know if it would help you at all, but it's our belief that that is a Penske brochure, this would be a Penske truck rental receipt.
A. It may have been, I don't recall.
Q. All right. And do you recall whether or not after this photograph of the Penske truck rental receipts were taken, whether or not you examined those documents as possible evidence in the case?
A. I think we did review them and made -- if I recall, we did call that company and check to see who had rented that big truck.
Q. Yeah.
A. And I want to say that it was rented to haul or transport a vehicle.
Q. Okay. Did they say the truck was actually rented? And if you look at the receipt, I mean it's important in this case because the receipt is dated that the reservation was made the day before the killing of the state trooper and the actual pick up of the Penske truck was the day of the killing.
A. Okay.
Q. So that's why it's so important and I figured it would be a big, um, big part of your investigation.
A. Might be gotten confused. The warehouse that

was rented that we talked with some people about and he had hauled a truck or a car over there and a truck and put in a warehouse, that may have been what I'm thinking about.

Q. And you had given me an opportunity before this, your testifying, to look at your notes.

A. Yeah.

Q. And I did see something in there that you had talked to a guy named Al over at U-Haul. Would -- that may be what you're thinking of about the storage?

A. It may be. I'm not positive about this.

Q. Okay. Would you recall -- if you would take a minute to look at what that Penske document says, I just want to ask you a couple questions about it.

A. (The witness complies.) All right, sir.

Q. Does it indicate -- and actually if I could hold one of those so I can read off of it along with you.

A. (The witness complies.)

Q. Does it indicate the rental is made to a Gloryvee Perez?

A. Yes, sir. It does.

Q. And it's a 15 foot -- I'm just going to kind of read down, so if you want to follow me -- 15-foot T something truck with car carrier required?

A. Yes, sir.

Q. 1998 Ford Mustang and at the bottom, very left, it says taken 12/30/97 by Sal. And then up closer to the top right it says date out 12/31/97 which would have been the day the trooper was killed.

A. Yes, sir.

Q. Do you recall --

A. He was killed that night.

Q. Okay. And then over kind of on the left side just below the middle where it's folded do you see that it's a one-way destination to West Palm Beach, Florida?

A. Yes, sir.

Q. Okay. Now, having seen this document before and having questioned Ms. Perez the day or the day after the incident and her having told you that she had left from Philadelphia around one or two o'clock on the afternoon of the 31st and was going to Disney World for a week, after she told you that and knowing that you had already reviewed this receipt, did you ask her about this?

A. I don't remember.

Q. Because if you've got a person who's charged with murder and she's given a statement and she's telling you she's going to Disney World and you've

got a document that appears to be a one-way ticket to West Palm Beach, that's something you would want to clear up. At this point you were still trying to figure out who shot the trooper, right, when you were interviewing Gloryvee?

A. Yes, sir. We were.

Q. Okay. And so if you had information that was inconsistent with what she was telling you, you'd want to ask her about it?

A. I knew where she was that night.

Q. Right. But you'd want to ask her about where she had been that day if she told you she left at two o'clock?

A. We may have. We may have. If it's --

Q. Okay. Well, we know you didn't do it on -- in the actual written statement or the taped statement because it's -- you know, we have that. Do you have any notes of any other conversations with her?

A. No, sir.

Q. Okay.

A. You've seen what notes I've got.

Q. Okay. And I did see a note in there and it looked like it was from early on where you were talking to Gloryvee, she told you she was a certified medical assistant?

A. Yes, sir.
Q. Do you recall that?
A. I remember that.
Q. And that she was unemployed. Do you recall her telling you that?
A. I remember her telling us, you know, she was a medical assistant.
Q. Okay. And your notes reflect that she's unemployed at the time. And please feel free to review them if it will refresh your memory.
A. Okay.
Q. It's one of the legal pads you showed me near one of the first couple pages.
A. I left it on the bench right there. There on that bench. Thank you.
Q. And before you look at that, one last question on this Penske truck rental. Do you know where this document is today?
A. We may have returned it in some of their paperwork and stuff, I don't know. If it's not at headquarters then we returned it.
Q. Okay. Well, now that you mention that I'll ask you about the returning of property in this case. Applicant's 38 is from March 3rd, '98 and this is the property that you returned to Gloryvee.

A. Yes, sir.
Q. And I believe one of the notes on there is that you had returned some miscellaneous paperwork.
A. Yes, sir.
Q. And a folder with personal things in it.
A. That's probably where that's at.
Q. Okay. Did you ever show this or make a copy of it to give to Walter Bailey?
A. If it's not in my file then I didn't.
Q. Okay. Do you recall ever calling Penske or Sal to ask them about this reservation?
A. I want to say that either myself or Lieutenant Mears did and it didn't set off any alarm apparently.
Q. But you're saying you have a faint recollection you may have done it, you just can't be sure?
A. I'm not positive.
Q. Okay. All right. Now, also found in the Mustang, this is Applicant's 32, were two what look to be like payroll checks written on a doctor's account and then a series of blank checks from that same account.
A. Right.
Q. Do you recall these?
A. Yes, sir. And I -- these were from a doctor that she had been working for.

Q. And how did you know --
A. As well as I remember.
Q. -- that she had been working for that doctor?
A. I believe these came about in conversation with an investigator from New Jersey.
Q. Do you happen to remember the name of the investigator?
A. No, sir. I don't.
Q. All right. Do you happen to recall what he told you about it?
A. They -- if my memory serves me correct, they had written some checks on this doctor and cashed them before he realized what was going on.
Q. I've got a name here and I'll -- of a Trenton police officer who did a report about these stolen checks and see if it rings a bell. Actually I'm having a real hard time reading any of these names. I'll let you take a look at this Trenton police report and see if you can -- if any of these signatures ring a bell of somebody you might have talked to.
A. (The witness complies.)
Q. I'm sorry, if I could get the number of that exhibit for the record, it's Applicant's 34, it's the Trenton police report.

A. About the only thing I can make out is Sergeant looks like Smiddley (ph) and maybe a Russell Darecoat (ph).

Q. That's about the best I could do.

A. Yes, sir. We talked with some people up in there. I'm not sure what the names are.

Q. Okay. Do you recall what they told -- did they tell you that Gloryvee was accused of stealing these checks from her job and she got fired on December 24th for doing that?

A. I remember something in conversation about her getting fired. Let's see.

Q. I can tell you from reviewing your notes that you showed me I didn't see anything about this situation, so I mean you're welcome to keep looking but I didn't see anything.

A. Well, I thought maybe I wrote his name down. Go ahead.

Q. Okay. Did you happen -- do you remember whether or not this person told you that the Trenton police had been to the doctor's office looking for her to find out about the checks?

A. No, sir. I don't remember that.

Q. Okay. Did you recall -- did you ever talk to anyone from Summit Bank in Philadelphia or the

Philadelphia police in reference to a bank account Ms. Perez had opened from the forged check with the check she stole from the doctor's office?

A. I vaguely regular something about that, yes, sir.

Q. It's like $28,000?

A. Yes, sir.

Q. Something like that?

A. Good sum of money.

Q. And did you ever call the doctor's office to talk to them directly to find out what they knew about it?

A. Not to my recollection, I'm not sure.

Q. Did you ever hear from a Keith Randall at Burlington Lincoln Mercury that is also in New Jersey about a vehicle that Ms. Perez had attempted to buy right shortly after these checks were stolen?

A. We had -- yes, I remember something about that.

Q. Okay.

A. But they didn't pick it up, the check didn't go through.

Q. Okay.

MR. TARR: I apologize, I'm looking for an exhibit that I had right here.

THE COURT: Okay.

Q. While he's looking for that I'll just go ahead and ask you about it. There is a 13-page -- 13 pages of documents that a Jed Lechford from Mt. Laurel Police Department sent to you regarding Gloryvee and Bayan Aleksey's stay at Summerfield Suites hotel.

A. I remember that, yes, sir.

Q. And he advised you I think at that time that there were about $1,400 worth of bad checks that Ms. Perez had written to the hotel?

A. Quite a bit, yes, sir.

Q. Okay. Also on this Applicant's 38 it indicates that you returned a checkbook and a box of extra checks to Ms. Blackwell. Do you recall what account the checkbook was and what the extra checks were? Because as far as we know there was the checks from the bank account that she opened in Philadelphia with the stolen checks and then she had some checks from a Beaufort, South Carolina, bank account that were -- that was closed, but she had been writing. I was wondering if you recall what checks these were that you gave her back?

A. I want to say on Summit Bank, I'm not positive of that, but I think they were from up that way.

Q. Okay. Because I believe -- okay. I found it. I'm going to hand you, this is Applicant's 41, it's

the Summerfield Mt. Laurel Police Department documents that you received. It's got copies of the checks totalling about $1,400.

A. Okay.

Q. Written on a closed account of Gloryvee Blackwell, it's got Jed Lechford's card here with a little note telling him if you need anything else let him know, it's got a note saying the booking photos that you sent up on Ms. Perez and Mr. Aleksey, that the people at the hotel said these are the people staying there, it's got a copy of the receipt and telephone calls and that's basically it. Do you recall reviewing all of this?

A. Yes, sir. I remember going through it.

Q. Okay. Do you remember whether or not this might be something that might have been returned to Ms. Blackwell?

A. Those --

Q. Or do you know where these original documents are right now? Not necessarily original, but the copy that you had.

A. If they're not in my file at headquarters I'm not sure. Where did you get those? You didn't get those out of my file?

Q. Those came -- which, Applicant's 41?

A. Yeah.
Q. That came from a subpoena for SLED's file, I served it on the Columbia office.
A. That's where they're at then.
Q. Okay. Do you have any idea why they were never given to the solicitor in this case and why the defense at the trial never had access to those documents?
A. I don't know that they weren't.
Q. So are you testifying that you turned those over to Walter Bailey?
A. I'm not going to swear to that, but I would think that I had. I may not have.
Q. Would that be something that you would turn over unless some mistake were made? Are those the type of document -- is there any reason why you wouldn't have turned those over?
A. Not that I can think of right now, no, sir.
Q. Okay. And can you tell me the last time you saw that Penske truck rental receipt, not the photograph but the receipt? If you can't remember, I know it's been, you know, five years.
A. Five years and a lot of cases since then. No, sir. I don't remember the last time I saw it.
Q. And the reason I ask is because nobody in this

courtroom has seen that before and I'm trying to figure out where it is. Walter Bailey testified he never got it and the defense lawyers testified they never had it, and that's why I'm asking you do you know where that is --

A. That may be something that we gave her back in her belongings.

Q. Okay. Do you understand how that document could have been helpful to the defense had you turned it over to the solicitor's office and they turned it over to the defense if there's information on there that's inconsistent with testimony given by Ms. Perez in a capital case in South Carolina against Mr. Aleksey?

A. Right at this moment, no, sir, I don't.

Q. Okay. I'm going to show you Applicant's 26-G and you can tell me, I don't know if this is before you got the car or after that they had unfolded this and taken a picture of it. Do you recall where that was when you got there?

A. No, sir. I don't.

Q. Okay. Looking at Applicant's 26-G, can you tell me if it appears to be this receipt folded in the door? You can look at the receipt and tell how it was folded from the crease marks.

A. I can tell it was folded, but I can't tell what that is in that door.

Q. Okay. So you didn't actually see them pull it out of there and unfold it then?

A. I didn't see every move that was made there that day.

Q. I'm just asking.

A. No, sir.

Q. Okay.

A. No, sir.

Q. Okay. Let me show you Applicant's 26-E and F, these depict the driver's side floorboard of the Mustang, one of which has the floor mat pulled out a little bit so that you can see that there's a folder underneath there.

A. Yes, there is a folder under there.

Q. Okay. And this is Applicant's 30 which is a folder that was given to Mr. Aleksey after trial when he had some property returned to him. Does this look like the same folder? And see if you can see any markings on the folder that would indicate it was consistent with or possibly the same folder in the photograph.

A. Yes, this mark in here and this mark here is indicated on the back of that picture.

Q. Do you also see a yellow highlighter streak?
A. Yes.
Q. Okay. And do you recall seeing that at the crime scene, the folder?
A. I probably did if it was in the car.
Q. Okay. Let me show you Applicant's 29 and ask you if you recall these being inside the folder like this which would be like motel receipts and things like that from Summerfield and some other places where --
A. There were some documents in it, yes, sir.
Q. Do you recall going through and seeing what was there?
A. We did look through it, yes, sir.
Q. Okay. Can you look through Applicant's -- you can take the rubber band off if you like -- Applicant's 29 and see if that looks to be what was in the folder?
A. (The witness complies.) I remember looking through these documents, you know, showing where they had gotten Bacardi rum and groceries and so forth. I remember looking through them, yes, sir.
Q. Did you notice on the three different -- between the middle of December and the end of December right before the incident there are three sets of

hotel/motel receipts and on each one of them Ms. Perez changes her name?

A. I think she did do some changing her name around, yes, sir.

Q. In fact, after they left the Summerfield Suites is right at the same time she got fired from her job, went into another motel and changed her name using a different name and then did so again a couple days later.

A. She may have.

Q. Okay.

A. Yeah, she went from Perez and Blackwell, and then Michael Toscani that --

Q. Yeah, that would be from --

A. -- he used.

Q. November 14th through the 29th.

A. Yeah.

Q. Which I believe is prior to when Ms. Perez said she met him. And do you recall whether these were the documents that were in the folder along with possibly the doctor's checks?

A. I can't swear to that.

Q. Okay. But these were from the Mustang?

A. They had to be, that's the only way that we would have had our hands on them.

Q. Thank you.

MR. TARR: Your Honor, at this time we would like to move Applicant's 29 into evidence. It's been ID'd since November and we needed somebody to say they came from the Mustang, so....

MR. ZELENKA: No objection.

THE COURT: Yes, sir. Very well.

(Entered into evidence was Applicant's Exhibit 29, hotel/motel receipts.)

Q. Let me ask you if you ever ran across in your investigation up north from the Hamilton Township, this is Applicant's 79, Hamilton Township, New Jersey, it is a bench warrant for Ms. Perez for contempt of court.

A. I don't remember it.

Q. I mean, I don't have any information that you have seen it, I was just asking.

A. I don't remember it.

Q. Okay. Getting back to this Applicant's 29, all these receipts, and there's also some things from Dr. Bang's office and things like that, do you recall why these weren't turned over to the solicitor?

A. I don't know that they weren't.

Q. Okay. I mean, you don't know that they were, is

that your testimony, that you're just not sure?
A. I'm not sure.
Q. Okay. Did you ever ask Ms. Perez about all these criminal acts she had committed right before the murder of the trooper, once you had found out about them within the week or so after the incident?
A. We may have discussed them with her.
Q. Well, I mean, do you -- I'm asking if you remember discussing, not whether you might have. And if you don't remember, that's fine.
A. No, sir.

MR. ZELENKA: Your Honor, I don't know what criminal acts they're discussing that he knew about at that particular time.

MR. TARR: Well, he could question her at any time, Your Honor, I'm talking about.

MR. ZELENKA: You're defining something as criminal act based upon what he just saw, that's....

Q. Well, okay. Did you ever ask Ms. Perez about the activities or documentation that I just showed you, the doctor's checks, the Burlington Lincoln Mercury, the motel receipts where she changed her name and all the exhibits I just went over with you, did you ever ask her about them?

A. I'm not sure whether we went over that with her or not.

Q. Okay. You would agree that as a police officer investigating a murder case or a prosecutor prosecuting a case that all of the things I just went over with you could be construed as giving her a motive to avoid being apprehended by Trooper Lingard, if she thought the people were coming -- police were after her because of passing bad checks or stealing checks or trying to buy a car fraudulently or any of those things?

A. I don't see what that had to do with Trooper Lingard's death.

Q. Well, a big issue was made at trial about Mr. Aleksey having motive to shoot the trooper because he was wanted by the police for different criminal acts. And if that's the case, then the same logic would seem to apply to Ms. Perez if she was doing the same things, would you agree?

A. It could.

Q. I'm going to ask you about the statement that she gave that was taped, the four-page statement or four-page transcription of a statement you took from Ms. Perez along with Emory Rush.

A. Okay.

Q. This would have been -- this is Applicant's 42-B and it's January 1st, 1998 at 2:45 in the morning, which I guess is three hours after the shooting. Do you have a copy of that transcript?

A. I am looking for it right now. Yes, sir. I do.

Q. Okay. Now, Mr. Rush on page 2 asked, and this is a little bit more than halfway down, says "Do you know of any criminal record he may have?" talking about Mr. Aleksey.

And she says "Nope, I don't know of any criminal records at all. He didn't show to be that type of person." Do you see where it says that?

A. Yeah, I see where it says that.

Q. All right. And then the next page, third page near the bottom Mr. Rush again says "I asked you if you knew anything about a criminal record, if he had a record, you may not even know that."

And she says "Exactly, because --"

And then Mr. Rush says "Because you haven't known him that long."

And she says "I don't know him that long and even if I did, he might not have even said anything to me being the person that I am. He probably wouldn't have never said anything to me about any kind of criminal record." Do you see that?

A. Yes, sir.
Q. So basically what she's telling you in this statement --
MR. ZELENKA: I object. Calls for speculation.
THE COURT: Let me hear the question.
MR. TARR: I'm just rephrasing what she said.
Q. She is telling you here that he didn't present himself to be the type of person that would commit criminal acts?
THE COURT: Hold on. Sustained.
MR. TARR: Your Honor, I just quoted what she said and asked if that's what -- I mean, I'll just quote it then.
THE COURT: Did she say what she said? I mean, is that what you're asking him? Or are you asking him for his interpretation of what she said?
MR. TARR: I'll just let her statement stand on its own.
THE COURT: Okay.
MR. TARR: Okay.
Q. Did it concern you that she said that he did not appear to be that type of person and telling you she

didn't know anything about him being involved in crime?

A. Not at that moment it didn't, no, sir.

Q. No. I'm saying later on in the next few days when you were finding out about all the things she was doing with him, did you ever go back and re-question her about that?

A. We talked with her a number of times. We may have. I'm not sure.

Q. Did you ever have conversations about Ms. Perez with Walter Bailey, or was it always just you and Mr. Mears or you and another officer?

A. I don't recollect whether we did or not.

Q. Do you recall ever telling Mr. Bailey about all of these things that you found out about what Ms. Perez was doing in the weeks leading up to Trooper Lingard's death?

A. I don't recollect.

Q. Is it your testimony that you didn't tell him or that you don't remember?

A. I don't remember.

Q. Okay. Did you ever contact MCAS Marine Corps Air Station Credit Union about Ms. Perez, and those were the checks she was writing to Summerfield Suites and some other places?

A. I think we may have talked to her husband, former husband, whatever.

Q. Okay. Did he tell you that that account had been closed since like October of '97?

A. I don't remember.

Q. Now, do you recall finding some -- a couple money orders in the car written out to Gloryvee Blackwell? Here's a -- this is Applicant's 26-C, that's a picture of one of them. Do you recall seeing either?

A. I may have, sir. Seems like I recollect some money orders. Whether that's the exact one or not I couldn't say.

Q. Okay. And just one more thing on Ms. Perez before I move on. Did you ever when you were talking to the Trenton police and the doctor's office, did you ever talk to a Chris Sontag over at Summit Bank in Philadelphia, the bank where she opened up the account where those checks came from?

A. I don't remember.

Q. Okay. So do you -- if I could maybe refresh your memory, he may have -- if you had talked to him he could have told you about the Philadelphia police setting up a -- kind of a sting operation to try and get Ms. Perez to come in and try and withdraw the

money that she forged the checks?
A. I don't recollect that.
Q. Okay. Let me show you, this is Applicant's 40 and I believe this is something else that would have come from Mt. Laurel police, looks like this was the same type of note and it says this is the envelope and box of checks that was left in the room. Do you think those would be the box of checks from the Summit Bank that were returned to her?
A. Well, it's got Summit Bank up here. It may have been, yes, sir.
Q. Okay. Do you recall a cell phone being found in the car?
A. Seems like there was a cell phone in there.
Q. Do you recall receiving a call from somebody on the cell phone and talking to them, a Kenny that would have worked at Meineke up in Pennsylvania calling about a car that was -- Gloryvee had dropped off for work?
A. I remember something about a cell phone. Now, whether I talked to them or Agent Mears did, I'm not sure.
Q. Okay.
A. I remember something about a car being dropped off having work done to it.

Q. Okay. I'm going to move on to talk a little bit about Ms. Yelena Batkilina, she was the -- one of the girls that came down here, the Russian, of Russian descent.

A. Yes.

Q. Do you recall her? I believe she was the individual who testified that she had purchased the gun from Tom's Sporting Goods.

A. Right.

Q. That ended up being used in this shooting.

A. Right.

Q. Okay. And I believe during the Jackson v. Denno hearing you testified as well as Agent Mears that Bayan during the two-hour gap where the tape was turned off and then started back during his statement, that he had asked for a number of things one of which he said can you help me out, I got a friend who's got -- basically got criminal trouble down in Florida.

A. I remember that.

Q. And it was Ms. Batkilina?

A. Yeah.

Q. And you said we can't do anything about it, we're South Carolina authorities?

A. Right.

Q. Did you ever track down at least to find out what that criminal problem was she had since she was going to be a witness in the case?

A. I don't know whether we tracked it down or he told us what she was charged with. I don't recall what she was charged with down there.

Q. Did you ever find out that in March of -- two months after the incident that she was down in Florida pleading guilty to credit card fraud that she committed along with Mr. Aleksey?

A. I don't recall.

Q. Okay. Do you recall, and I did see this name in your notes and it looked like it had a telephone number, a Kathy Cauford, a police officer up in Philadelphia?

A. I talked to quite a few of them in Philadelphia, New Jersey and like that.

Q. This would have been in relation to Ms. Batkilina and Mr. Aleksey.

A. Okay.

Q. And if you -- like I said, five years is a long time.

A. I don't recall, no, sir.

Q. Okay. You don't recall.

Do you recall getting a fax from

another police agency up in the northeast that said that there was a possible victim of Mr. Aleksey's down in Florida and you might want to contact him? I believe the person's name was Joe Papesco.

A. I remember the name of Joe Papesco.

Q. Okay.

A. I don't remember whether it was Florida or New York.

Q. Do you remember if you ever called him?

A. No, sir. I don't.

Q. Okay. Now, this is just a general question in reference to all the women that came down to testify. Did you do investigation into the allegations that they were making about Mr. Aleksey or did you basically just take their word for what they said that he did to them?

A. I think we did call the police departments and got what was on file. I think some of them did send some warrants down on them.

Q. Okay. And since the warrants for Mr. Aleksey --

A. As far as doing actual investigation into their allegations, I don't think we got all that deep into it.

Q. Okay. You said warrants, you were talking about warrants sent down for Mr. Aleksey from out-of-state

jurisdictions?

A. Yes, sir.

Q. And do you recall when you served those on him? I believe it was February 2nd of '98 at the notice of intent to seek the death penalty hearing, right before it.

A. I know we served him and we filed them there at the Orangeburg County Courthouse.

Q. Okay.

A. I don't remember the exact date.

Q. And do you recall, was Mr. Mears with you when you did that?

A. He may have been. Wasn't a whole lot that was done that we weren't together.

Q. Do you recall whether you had a tape recorder with you and took a statement from Mr. Aleksey when you were serving the warrants?

A. An additional tape?

Q. Yes.

A. I don't know of an additional tape.

Q. Okay. But you would remember if you had a tape recorder and you were making a tape of it you would remember that?

A. Of reading the warrants to him?

Q. Or just anything that transpired while you were

serving the warrants on him.

A. I wouldn't have had a tape reporter.

Q. Okay. Do you recall whether Mr. Stone or Sims were present when you served these warrants on him? They had been appointed about three weeks earlier.

A. No, sir. I don't.

Q. Okay. I'm going to move on to talk about Ms. Lisa Watson, this is the woman she came down, she testified that -- I believe in both phases of the trial and she was the woman at the guilt phase that testified about Mr. Aleksey and the lease of the Mustang that was used that was -- actually ended up being the crime scene at mile marker 97.

She had given a statement to SLED concerning the purchase of the Mustang as well as some other scams basically that she said that she was victimized by Mr. Aleksey with.

A. Right.

Q. And one of the things that she told you about was her husband's credit cards?

A. Yes, sir.

Q. And that he had taken money off her husband's credit cards through Western Union or something like that.

A. Yes, sir.

Q. Okay. And y'all actually took her statement on January -- I'll give you a copy of it, this is Applicant's 20 -- January 21st of '98 about three weeks after the incident.

A. Yes, sir.

Q. Okay. I believe in that statement she says, among other things, that he took about $9,500 off her credit, husband's credit card?

A. Yes, sir.

Q. Okay. But I'm going to show you Applicant's 15, on January 7th, 1998 two weeks prior to that SLED, you and Mr. Mears had received that from Western Union and Rickie Pattin indicating that Ms. Watson was involved with those Western Union transactions.

A. Right. I remember this.

Q. Okay. And, in fact, do you recall why those documents weren't given to the solicitor?

A. I don't know that they weren't.

Q. Okay. So as to the other things I asked you about you're saying you don't know that they were, you don't know that they weren't?

A. Right.

Q. Okay. But I'll tell you that we got those from subpoenaing the SLED file about a year and a half ago and in that letter it references there's an audiotape

of a transaction.
A. Right. Right.
Q. And I believe you recall when I saw that letter and saw that there was a tape I called Mr. Brown at SLED and he said that he needed to contact you.
A. Right.
Q. And ended up going over to SLED and we called you and you ended up having this in your file I think at the house and then sent it down to --
A. I had it --
Q. This is Applicant's 16, a tape.
A. Yeah.
Q. Okay. And then that's how we got this.
A. Okay.
Q. Okay. Do you recall whether or not you made a copy of that tape and gave it to Mr. Bailey or made it available to the defense or the State?
A. No, sir. I don't.
Q. But you would agree if Ms. Watson was the one who signed those checks and was involved in stealing that money and she made a statement to SLED that said she didn't do it and he did it. And then testified at trial that he did it, that wouldn't be accurate?
A. I wasn't investigating Lisa Watson and what she did up there.

Q. Okay. Let me ask you this just in general terms: If you're at a trial, and I don't know in this case, did you sit at the counsel table with the solicitor or did you sit somewhere else at Mr. Aleksey's trial?

A. I think I was behind the solicitor.

Q. Okay. If you were sitting there and a witness gets on the stand and says something that you know is not true, would you tell Mr. Bailey?

A. I'm sure I would.

Q. Okay. At any time during the trial and when any of these witnesses were testifying, did you alert the solicitor that they might be testifying falsely, anybody?

A. I don't recollect.

Q. Okay. Now, in that letter it references that they're sending SLED the original drafts of the Western Union checks. And I'm just wondering if those would be at SLED?

A. You got this from SLED, didn't you?

Q. They're -- they're copies and I don't know if they made them from the original drafts or from another copy, or....

A. That's what they sent me, that's all I got.

Q. Okay. All right. Let me move on and talk about

Theresa McCann. She's the woman that came down, she really -- I think she just testified in the sentencing phase about some activity, things that she says that Mr. Aleksey had stolen from her, mainly a motorcycle and a jet-ski. Do you recall Ms. McCann?

A. I remember Ms. McCann.

Q. Okay. Do you remember speaking with any investigators up north regarding Ms. McCann and Mr. Aleksey? This specifically would be like Detective Carletto, Clarkstown Police Department, or Mark Gado with New Rochelle Police Department.

A. We talked with some of them up -- I remember New Rochelle rings a bell strongly.

Q. Okay. Okay.

MR. TARR: Just one moment.

THE COURT: Uh-huh (affirmative response).

(Pause in proceedings.)

Q. That's all I have on Ms. McCann. I'm almost done here. Mr. Darnell, I know you had a long week in Bamberg so hopefully I can get you out of here soon.

A. No problem.

Q. Jamie Farrell is another person who I had seen some notes in your notes about --

A. Yeah.

Q. -- when I looked earlier. She came down and testified against Mr. Aleksey. And one of the things she testified about was some checks that had been taken from Theresa McCann and written out to her.

A. Yeah.

Q. And deposited into a bank in New Jersey, Absecon, New Jersey, Commerce Bank and then money was taken out. Do you recall speaking to a Vincent Caruso with Commerce Bank and an investigator Faisst with the Absecon Police Department?

A. That rings a bell, yes, sir.

Q. Okay. And you recall that -- did they end up sending you some photographs, bank photographs showing the transactions?

A. I don't recall.

Q. Okay. Do you recall whether or not -- I can show you what I'm talking about here and see if it refreshes your memory, it would be Applicant's 48, it's a series of still photos from a bank camera. And those photos correspond with deposits and withdrawals made in this case.

A. These really don't ring a bell.

Q. I know they're not great photos, but basically you're saying you don't remember seeing those?

A. I'm saying I don't recollect seeing them. They

don't ring a bell.

Q. All right. And do you recall whether or not you had received a copy -- this is Applicant's 49, copies of the checks written out to cash totalling almost $10,000?

A. I don't remember.

Q. But do you recall from your conversation from Mr. Caruso and Mr. Faisst that Ms. Farrell was actually involved in the depositing and withdrawing of the $10,000 as opposed to being a victim of Mr. Aleksey?

A. It's according to how you look at it, but I recall that she seemed like she was involved.

Q. Okay. And do you recall that in her SLED statement, which is Applicant's 50, and I'm sure you don't recall this minute detail, but a little more than halfway down on page 2 when she's talking about this transaction, she says I withdrew the money and then at trial when she's asked by Solicitor Bailey who withdrew the money, she said Mr. Aleksey did.

A. She may have.

Q. Do you recall when you were sitting there at trial when her testimony was ongoing that that was inconsistent with what she had told you?

A. I don't -- I don't remember.

Q. All right. Do you recall just in general terms that the gist of her testimony --

A. No, sir. I don't.

Q. At all? Okay. One thing I forgot to ask you about Ms. Batkilina, this is Applicant's Number 4, ATF trace report on the gun.

A. Okay.

Q. Do you recall whether or not that was forwarded to Walter Bailey?

A. Wasn't a copy of that in this report?

Q. There are several of them in different places in the SLED file, but I don't know if there's one in that major case file.

A. I remember Lieutenant Ira Parnel with SLED requesting that we get ATF to do the trace on the gun and I remember that in the report, but --

Q. Do you recall the bottom right, I think there's a little box or it may be the left, I can't recall, that says Batkilina born in Russia involved in credit card scam, et cetera?

A. I don't remember that, no, sir. I might have seen it, but I would think that if we got that trace that, yes, sir, it would have been given to the solicitor.

Q. Okay.

MR. TARR: Just one moment, Your Honor.

THE COURT: Okay.

MR. TARR: I've got like one more question.

THE COURT: Sure.

(Pause in proceedings.)

Q. Applicant's 36 I forgot to ask you about, I believe these were receipts that were taken from the Mustang. Do you recall those?

A. I do remember something about a Chevrolet, you know, a Chevrolet dealership.

Q. Do you know if you ever contacted Distasio Chevrolet to ask them about that?

A. Something tells me we did and they never did pick up the car. The check bounced or something. I don't know. Something tells me they never did pick up the vehicle.

Q. And this is just a baby child-care receipt, no big deal, this Summit Bank receipt is showing a deposit of 28,500 with $50 available because they're I guess waiting to see if the check clears.

A. May have seen that.

Q. Okay. And that would be December 23rd which would be the day the checks were stolen from the doctor.

A. Okay. May have seen that.

Q. All right. Do you recall whether or not you turned this over to SLED, these three receipts, I mean to the solicitor's office?

A. I'm not sure whether we did or not. I would think so.

Q. Okay. I just want to make sure I'm clear on what your testimony is regarding these documents and then I'll be done with examination. The receipts, you don't recall whether they were turned over?

MR. ZELENKA: What document are we referring to?

MR. TARR: Applicant's 36, the last one I talked about.

Q. The Mt. Laurel documents pertaining to the bad checks at Summerfield Suites.

A. I'm not sure, sir. My thinking is anything that was dealing with this case we provided a copy of it.

Q. Okay. All I'm asking I guess --

A. Or may have sat down and went over them with him, you know, see whether they were pertinent or not. For me to sit here and say, yes, sir, I handed the solicitor each one of those documents five years ago, I could not tell you.

Q. Okay. But you -- so basically with all these documents that I asked you about that you said that

you can't remember, you can't remember whether you gave them to him and you can't remember whether you talked to him about them; is that correct?

A. I don't recollect.

Q. Okay.

MR. TARR: Your Honor, at this time I would like to move the seven-page case summary into evidence that he testified to.

THE COURT: Sure. Any objection?

MR. ZELENKA: I don't have any objection with the case summary being put into evidence. And since this is a partial document and refers to attachments, I don't have any objection with the case file itself which he has, that this is referring to, be in evidence because it gives meaning to the attachments that are listed in the case summary.

THE COURT: Okay.

MR. ZELENKA: So....

THE COURT: Okay. In other words, I would ask this of you, Mr. Tarr: Would it then be your intention the whole case file, which as I understand it would be attachments, would be made an exhibit?

MR. TARR: If we're talking about the case

file which consists of only these attachments and this summary, yes. I'm not talking about everything at SLED because --

MR. ZELENKA: Because this is just for the Court's understanding.

THE COURT: Okay.

MR. ZELENKA: The document says attachments and it's got 1 through 52 and within the summaries it's referring to see attachment 2, see attachment, so I think to give meaning to that document --

THE COURT: You need the attachment. All right. Any objection to that, Mr. Tarr?

MR. TARR: No, Your Honor.

THE COURT: Okay. Very well.

MR. TARR: We don't have a copy of it, so....

THE COURT: Oh, you don't have a copy of it with the attachments?

MR. TARR: We've got a copy of it. It's not like where they've got all together --

MR. BROWN: Can we do this, Your Honor? Can we enter this in? Because that's what we have. And they seem to have this and we have no objection to that being put --

MR. ZELENKA: Best evidence rule is right here. This is what I'm saying.

THE COURT: That's right.

MR. TARR: That's fine. We have no objection.

MR. BROWN: They got attachments only, the 52 attachments.

THE WITNESS: If this will help, Your Honor, the original of this is at headquarters.

MR. ZELENKA: I understand.

THE WITNESS: This is only a copy. But the original file with original attachments, original statements and everything is at headquarters.

THE COURT: All right. That shows 52 attachments were referred to in the summary of the report.

THE WITNESS: Yeah.

THE COURT: Very well. I think it's appropriate that --

THE WITNESS: I'm sure when they run you a copy they probably don't put it together like this one, you know, separated.

MR. TARR: They've got that, they've got all the other departments and stuff, too.

THE COURT: Okay. Very well.

MR. ZELENKA: This is a document referred to that --

THE COURT: Very well. Let's mark it and hand it to Ms. Keil.

MR. TARR: Applicant's 83, I guess.

MR. BROWN: Yes. And, Your Honor --

MR. ZELENKA: Attachment 52 is now missing which was there earlier today.

MR. TARR: The polygraph report.

MR. ZELENKA: Yeah.

THE WITNESS: I think it's one page.

MR. ZELENKA: It's there.

MR. TARR: This goes with that.

MR. BROWN: Your Honor, to clarify a point now that may be in contradiction.

MR. TARR: We're putting it all --

MR. BROWN: Fifty-two is a polygraph report --

THE COURT: Hold on y'all.

MR. BROWN: Attachment 52 is a polygraph report. Again as far as being entered to show what it is subject to the objection about the results being considered for what they're considered for limited.

In other words, we would object to the results coming in for anything other than being an attachment that is made and ties in with what some testimony that Solicitor Bailey had. And since that's already in we don't have a problem with it coming in, but we just want to voice the same objection.

THE COURT: Sure. And that would be the only purpose that it's in. It wouldn't be in for any other reason than that.

MR. BROWN: Yes, ma'am. Thank you.

THE COURT: Consistent with my prior ruling and consistent with the fact that it's now under the best evidence rule a part of the record because it is a part of the record.

MR. BROWN: Yes, ma'am.

MR. TARR: Thank you, Your Honor. And the only other thing we would ask, I would ask that either the notes themselves that are in the legal pads or copies thereof be entered into evidence as Applicant's 84, all of them.

THE COURT: What notes are you talking about?

MR. TARR: Mr. Darnell's notes.

THE COURT: Mr. Darnell's notes.

MR. TARR: The ones he was referring to I reviewed prior to his testimony.

THE COURT: Sure. Sure. Of course.

MR. ZELENKA: I don't have any objection to that.

MR. TARR: I would be happy to take the burden of copying them for him or whatever.

THE COURT: Sure.

MR. TARR: If he wants to keep a copy or the original.

THE COURT: I would think he probably would want to. Counsel, it's up to you based on what you think is more appropriate either to make the original notes exhibits and give Agent Darnell a copy or vice-versa, whatever.

MR. TARR: As long as they're readable I don't have a problem with copies.

MR. BROWN: We can do it. Right now we have a copy number downstairs.

MR. TARR: We'll do these real quick.

THE COURT: Thank you. I know Agent Darnell would appreciate that.

MR. TARR: And that's all I have, Your Honor. Thank you.

THE COURT: Very well. Cross-examination,

Mr. Zelenka.

(Entered into evidence was Applicant's Exhibit 83, case summary and file)

(Entered into evidence was Applicant's Exhibit 84, notes.)

CROSS-EXAMINATION

BY MR. ZELENKA:

Q. Agent Darnell, it's your testimony you were the co-agent, primary case agent along with Mr. Mears; is that correct?

A. Yes, sir. That's correct.

Q. And you worked with Solicitor Bailey in this matter, correct?

A. Yes, sir.

Q. As part of your investigation in the case, you stated, and I think it's reflected already, that certain materials were confiscated from the Mustang?

A. Yes, sir.

Q. And it's your recollection right now as refreshed by your March 6th, 1998 report that you participated in confiscating those matters out of the Mustang; is that correct?

A. Yes, sir.

Q. However, you can't state which particular documents, materials you pulled out of that

particular Mustang; is that also correct?
A. That's correct.
Q. You refreshed your recollection with some photographs, you noted that they were in the Mustang, but you're not clear even that they were there at the time you were looking at the Mustang; is that also correct?
A. Do that again.
Q. Okay. That was -- the photographs that you saw of the location of various folders.
A. Okay.
Q. Brochures, do you have a specific recollection of those folders, brochures being in the same place at the time you viewed the Mustang?
A. No, sir. I'm not sure whether they were or not.
Q. Okay. And there were other individuals involved in securing materials from the Mustang, as I understand it, other than just you and Mr. Mears; is that correct?
A. Yes, sir.
Q. That the crime scene agents with SLED were involved in that process, correct?
A. Crime scene agents were there, my captain, L. C. Knight, he was present and that's it.
Q. Okay.

A. And Kenny and I.
Q. And you were not the individual that took the photographs, that was Mr. Butler?
A. That was crime scene agents, yes, sir.
Q. Okay. Similarly with the documents returned to Gloryvee Perez, you don't have a specific recollection of the particular items that were given to her, just a general recollection; isn't that correct?
A. Just a -- we put everything in a folder and returned everything to her that we didn't see fit to keep.
Q. Okay. Do you recall going to the northeast with Solicitor Bailey --
A. Yes, sir.
Q. -- and interviewing Gloryvee Perez in her apartment? Do you have any recollection of that?
A. Yes, sir. We did.
Q. You do recall that now?
A. I remember that. Yes, sir, we did in her apartment.
Q. And you didn't exactly recall that on your direct examination, did you?
A. Well, when he asked that question my train of thought was on Orangeburg and I apologize.

Q. Okay. The taped material that you received that was an audiotape which you apparently made a copy of called the "Lisa Watson Fraud" tape, I believe you saw a photograph of that?

A. Right.

Q. Do you recall whether you, in fact, listened to that tape about the circumstances that were on that tape?

A. I think we did, yes, sir.

Q. Okay. Do you recall if you listened to the tape with Mr. Bailey present or not present, do you have any recollection of that?

A. I don't recall.

Q. Okay. Now, you've been asked a number of questions about some involvement activity by various females in this matter in direct examination; isn't that correct?

A. Yes, sir.

Q. And is it fair to say that in your investigation or collection of data and material in this matter that Mr. Aleksey was involved at each time from the information you received in that activity to secure money or goods or vehicles with each of these individuals that was represented? That may be a very confusing question. Let me back it up a little.

A. All right. My mind's running a little bit slow today. Try it again.

Q. With respect to Gloryvee Perez.

A. Okay.

Q. The materials that you had within your possession that was shown to you about her.

A. Right.

Q. She was involved in the activities with Mr. Aleksey based upon your understanding --

A. Right.

Q. -- of the nature of the case; isn't that correct?

A. Right.

Q. Those activities being the activities which occurred before the shooting of the trooper, correct?

A. Right.

Q. The receipts that you saw also included receipts from Mr. Aleksey's hotel stays or names utilized as you determined later by Mr. Aleksey in those situations --

A. Right.

Q. -- isn't that correct?

A. Yes, sir.

Q. The vehicle that he was driving at the time of the incident, albeit in Lisa Watson's name, you had

an understanding based upon your investigation that Mr. Aleksey was a participant in getting that particular lease --

A. Yes, sir.

Q. -- available; isn't that also correct?

A. Yes, sir.

Q. And at the time of this crime Lisa Watson wasn't using the vehicle, was she?

A. No, sir.

Q. Only Mr. Aleksey was using the vehicle at that time; isn't that correct?

A. That's correct.

Q. Did you have any understanding as to how the stolen license plate got on that vehicle? If you don't recall....

A. I don't recall. I remember something about the plate, but I don't recall.

Q. Okay. Did you have any information that Lisa Watson was involved in placing that license plate on that vehicle?

A. I vaguely remember something along those lines. I know she was involved with him getting the car and so forth.

Q. But do you have any specific recollection as to where you got that information?

A. No, sir. I don't, not at this time.
Q. Similarly Yelena Batkilina, about the purchase of the gun, did you have an understanding based upon your investigation that Bayan Aleksey was involved in having that purchase of the gun occur?
A. If I remember correctly he went with her to purchase it from the gun store where Sergeant French was working part-time.
Q. Okay. And the gun didn't end up on a New Year's Eve in the hands of Ms. Batkilina, did it?
A. No, sir. It didn't.
Q. And Ms. Batkilina was not in that automobile, was she?
A. No, sir. She wasn't.
Q. Mr. Aleksey was in that automobile, wasn't he?
A. Yes, sir.
Q. And at the time Mr. Aleksey had the gun, too; isn't that correct?
A. Yes, sir.
Q. Now, the materials that you don't have that has been presented to you on direct examination that you've indicated that you don't have a specific recollection of giving Mr. Bailey or not giving him, did you perceive anything in that information from your perspective that would have hurt the State's

case?

A. No, sir.

Q. Is there anything in any of that information that would suggest that there should be any reason why that should not have been turned over for any reason --

A. No, sir.

Q. -- by you either to the defense or to Mr. Bailey?

A. No, sir .

Q. Okay. In the statement that Ms. Perez gave to you, Applicant's Exhibit 42-B which is the taped interview, at one time she stated, isn't it correct, that he planned this trip to go to Miami, Florida; Orlando, Florida, to take the kids to Disney World; isn't that correct?

A. Yes, sir. I remember that.

Q. So it suggested that possibly under this statement that there was some intent to go to places in Florida other than just Disney World; isn't that correct?

A. Apparently, yes, sir.

Q. Let me ask you to refer to two places in the SLED case report that you have which has been -- let me ask you to refer to two areas of this, one is --

three areas actually, subsection 26 in this matter which I think is located there, firearms trace report.

A. Right.

Q. With that particular document, do you recall if that document was in this file on March 6th, 1998?

A. Yes, sir.

Q. Okay. Let me ask you to refer to subsection 44 which I think may have that green tab on the side.

A. (The witness complies.) Yes, sir.

Q. And is that a document suggesting a statement of Sara Pivero?

A. When we was putting the report together Sara Pivero -- when we -- when Agent Mears and I went up north the first time just he and I and we talked with her up there she kept finding excuses, she was busy not to sit down and write us a statement that time but would write it -- would mail it to us and we kept calling back and forth and at the time the report -- we needed to get it on to the solicitor and everything, we did not have it.

So what I did, and let me explain this, when we write these reports we carry them to the office. The secretary types them up for us and she adds the attachments. And so I just put a blank

piece of paper in there and put 44 on it so as not to mess her up with her attachment count. And I did -- never got that statement.

Q. Okay. And let me ask you to refer to attachment 35.

A. Thirty-five?

Q. Yes. Attachment 35 in this document which is stated in the summary, if I may.

A. Okay.

Q. Thirty-five in the summary subpoena and letter to Ford Motor Company and paperwork furnished by Ford.

A. Right.

Q. Okay. Did that include the subpoena for that material, correct?

A. Yes, sir.

Q. Ford Motor Corporation, also a letter from Solicitor Bailey January 7th, 1998 to Ford Motor Credit?

A. Well, it was written by --

Q. Jimmy Williams?

A. Jimmy Williams, deputy solicitor at that time now Judge Williams.

Q. Okay. And within those attachments is a series of pages, 1 through 6, I believe at the top stating

Lisa A. Watson?

A. Right.

Q. Okay. Can you hold that place just for a second?

A. Sure.

Q. Let me show you Applicant's Exhibit 36, I believe. Excuse me, Exhibit 21.

A. You mean 21 in here?

Q. No. Do these appear to be the same matters? I'm showing you Applicant's Exhibit 21.

A. Okay. All right. Yes, sir. They do.

Q. Okay. And would that material have been in there on March 6th, 1998?

A. Yes, sir.

Q. Okay. Again, let me show you a copy of Applicant's Exhibit 28, materials received in property by Thomas Sims looks like on 6/23/99, suggests that you turned over to Mr. Sims at that time --

A. Yes, sir.

Q. -- a series of materials including hotel receipts.

A. I did.

Q. Telephone records?

A. Yes, sir.

Q. Telephone receipts?
A. Yes, sir.
Q. And do you have a specific recollection or other additional documentation about what those particular items were?
A. No, sir. I do not.
Q. Okay.
A. We just packaged it all up and met attorney Sims at his office and turned it over to him.
Q. Okay. Did attorney Sims suggest that he was aware to you if you can recall at that time that there were hotel, motel, and telephone receipts in the vehicle at that time to be turned over, if you can recall?
A. I can't recall.
Q. Okay.

MR. ZELENKA: Court's indulgence, I think I'm through.

THE COURT: Surely.

(Pause in proceedings.)

MR. ZELENKA: No further questions.

THE COURT: Very well. Is there any redirect?

MR. TARR: One short question and one lengthy question, but only two questions.

THE COURT: Okay.

REDIRECT EXAMINATION

BY MR. TARR:

Q. You were asked about a number of people, whether or not they were in the Mustang on December 31st.

A. Okay.

Q. Gloryvee was in the Mustang?

A. Yes, sir.

Q. Okay. And I want to go back to this interview in Gloryvee's apartment in New Jersey with Walter Bailey present.

A. Okay.

Q. Did you discuss Dr. Bang there?

A. I don't recall.

Q. Did you discuss the fact that she was fired from Dr. Bang?

A. I don't recall what all was discussed there that day.

Q. Did you discuss whether or not she is writing bad checks to motels?

A. I know we had probably discussed it and we did discuss a lot of things, but specific --

Q. It might be easier if you tell me what you remember.

A. I don't remember what all was discussed with her

that day.

Q. I assume you talked about what her testimony was going to be at the trial?

A. Yes, sir.

Q. I mean, that would pretty much be the reason you go see her, she's going to be your main witness?

A. Right. Right.

Q. So basically other than in general terms talking about her testimony, you don't remember what was discussed then?

A. No, sir. I don't.

Q. That's all.

THE COURT: Very well. Any recross?

MR. ZELENKA: Nothing, Your Honor.

THE COURT: Is this witness free to leave?

MR. TARR: Yes, Your Honor.

MR. ZELENKA: Without objection.

THE COURT: All right. Very well. You best run.

THE WITNESS: Thank you very much.

THE COURT: Thank you very much.

(Whereupon, the witness steps down from the witness stand.)

THE COURT: All right. If you'd call your next witness.

MR. TARR: With the qualifications that all the live testimony we have to present as far as I know in this case. I had spoken to Your Honor briefly and I've talked to Mr. Zelenka about a request --

THE COURT: Leaving the record open for a limited period of time to supplement it in any regard that you all feel?

MR. TARR: Yes, Your Honor.

THE COURT: That's fine. That's fine.

MR. TARR: We would ask specifically at this time, I was thinking about it if we could have 30 days from the date that we get the final transcript in this case so that we can -- we want to do posttrial briefs where we cite to the record in this case so that the Court will have -- will not have to sift through 2,000 pages.

THE COURT: Sure. I have no problem with that at all, Mr. Tarr, except instead of doing it in the nature of a posttrial brief I would appreciate it if you did your brief in the form of an order, proposed order.

MR. TARR: Okay. Yeah. That would be --

THE COURT: You know, and I certainly have

no problem with there being 30 days from the date that you receive the transcript.

MR. TARR: And that would give us the time waiting on the transcript and then 30 days to get additional --

THE COURT: I'll tell you what, Mr. Tarr, I have no problem with this. Thirty days, within 30 days after you receive the transcript I'll expect an order from you unless you find that in some way the record needs to be supplemented and you get with Mr. Zelenka and you all either have some sort of agreement or you get with me and we'll handle it in that regard.

MR. TARR: Okay. And the only witness that I know of that we still have some question about is our social worker, Jan Boglesang (ph) and I should have by tomorrow an affidavit from Mr. Zelenka and then we can discuss whether or not he wants to do a deposition. But other than that, it just may be documents that come in that we may want to supplement with obviously --

THE COURT: All right. I understand. Do you have any concern about that, Mr. Zelenka?

MR. ZELENKA: About Ms. --

THE COURT: About leaving the record open?

MR. ZELENKA: No, I don't have any objection. We had discussed Ms. Boglesang and some conditions I placed on the report that she had given, so we're fine with that.

THE COURT: Sure.

MR. ZELENKA: My only concern, and unfortunately it's only because of a similar situation that I'm currently experiencing in another case, is I can't predict when I'm going to get the transcript to really be able to say that I'm going to be able to get it done within that 30-day period of time.

THE COURT: And that's a good place to leave it at this point. And what needs to happen is that once you all receive it, if you find that you all are in the middle of trial preparation or trial or the same with you, just I would suggest that you do this: What you all do is that you get together and see if you can come to an agreement and just submit, somebody send me a letter and I'll mark my calender accordingly and if there's a problem let me know.

MR. TARR: That's just an arbitrary date.

MR. ZELENKA: I don't have a problem with

30 days; but the problem --

MR. TARR: Exactly.

THE COURT: I know that it's a good place to start. It really is a good place to start because then as the transcript arrives and you know that that's the time to pay attention to it and then whatever is your trial schedule, I know all of you are extraordinarily busy because you're good, but y'all just let me know. It might be a down time, you never know. So just let me know.

But I think it's a good -- because if we say 60 days and it's a down time, gosh, you you'll wait until the 45th day and then there be a problem.

MR. ZELENKA: I've experienced that too, Judge.

MR. TARR: I guess the only other two things I would ask the Court for, one thing is obviously we need at some point to reconvene to argue about John Freeman's admissibility.

THE COURT: I think -- let me say this about that: I think that you all did an excellent job both just before he testified as well as during his testimony. I think that it's

going to be adequate if you do it on paper. I would say this to you: I certainly need the advisory opinions.

MR. TARR: We were going to make those a part of like a Court's Exhibit.

THE COURT: And if you would like a little separate memo about that issue I'm happy to have that, but I'll be honest with you I'd rather have it on paper than even the oral argument because I know that's the kind of issue that I'm going to read myself, I'm going to read your comments, I'm going to want your comments. And to be honest with you, if you'd argued that that's the kind of issue that I would simply get a disk from the court reporter so that I could read materials and read your argument.

MR. TARR: Okay. And so at some point in the near future we'll make available and make a Court's Exhibit, I guess it was the 94, 91, 82 and 77 advisory opinions, all the ones that were -- that he testified about.

THE COURT: Yes, referred to. And there was a case to that he referred to as well.

MR. ZELENKA: I referred to Beaver v. Thompson, U. S. v. Schwarz.

MR. TARR: I think we may have given you a copy of that in November, but we'll double check, we'll give you another one.

THE COURT: I still have my notes, of course, from November, my secretary interestingly is bringing them so I can put them all together, but what I would so much appreciate, if you can put your hands on another copy to do that when you do your memo that way I've got it together.

MR. BROWN: And, Your Honor, just to -- procedurally we called him as a witness. I guess the way this would be couched is like their motion to exclude him and we would reply to that?

I mean, I'm not trying to put words in their mouth, but it doesn't make much difference because we both have to submit something.

THE COURT: Two things about that. Two things about that. There are really two issues, because the substantive issue exists in this record irrespective.

MR. BROWN: Yes, ma'am.

MR. ZELENKA: Right.

THE COURT: And so the issue is a viable

issue irrespective of Professor Freeman's role in it. You know, irrespective of whether or not I consider Professor Freeman's testimony or I don't consider his testimony in a sense is of no moment, because all that occurred was instead of being a three-way lawyer discussion basically ended up being a four-way lawyer discussion which is probably one of the reasons why the courts have ruled as they have. But it doesn't really matter whether or not his testimony is considered sub -- as testimony or not because the issue is an issue in this case.

MR. BROWN: Sure.

THE COURT: Those advisory opinions are the heart of that issue.

MR. BROWN: Sure.

THE COURT: It's really of no moment whether or not I consider his testimony or I don't consider his testimony, because the issue is the one that's got to be considered. See what I'm saying?

MR. BROWN: I do.

THE COURT: So....

MR. TARR: So basically you'll take under advisement the ruling whether to include it

substantively?

THE COURT: Exactly. And let me say to you about that because I think it's important to be sure that I'm heard by you all and that simply is this: Professor Freeman testified, he didn't tell me a thing that y'all hadn't told me, you see what I'm saying?

MR. BROWN: Sure.

THE COURT: So whether I consider his testimony or I don't consider is really of no moment because it's the issue that's a relevant issue, the information that he provided was really duplicative of what you all have provided. So it's -- whether or not I consider it or don't consider it of substantive testimony is of no moment.

MR. BROWN: I understand.

MR. TARR: The last thing is, Your Honor, we would request this, I know that after two weeks of a hearing it's the last thing you want to hear, but be would ask Your Honor to consider once the proposed orders have been completed by both sides that we be allowed at least a minimal amount of time for argument, you know, obviously we would --

THE COURT: Let me ask you this question. Let me just ask you this question: Let's do this. Let's do this. Once the orders are submitted, you all get together and get a time that is good for you for only a status conference call.

MR. TARR: Okay.

THE COURT: And at that point once you've had an opportunity to look at each other's orders, then let's decide whether or not argument is more appropriate or a written response to the other order. Let's make that decision once you've got it in hand.

MR. TARR: Yes, Your Honor.

THE COURT: It very well may be that Mr. Aleksey, of course the victim's family, that's a participation that they would like to have. It may be that there's a decision made that that's more of a scholarly endeavor and again one of those times that I'll just have to go get a disk from our court reporter so that I can -- as I study can have benefit of your words.

So once you all have your orders done, then let's have just a very brief conference

call, status to see -- put our heads together, see what we think is more appropriate once you've seen your opponent's work product. Does that make sense to everybody?

MR. TARR: Yes, Your Honor. As far as the court reporter goes I was wondering if she could get me, if she can tell from looking at the -- her -- what she's typed up how much it's going to cost to do the transcript so I can go ahead and get the order done for funding for the transcript.

THE COURT: I know that floats her boat all over the place.

MR. TARR: Because last time there was a mixup, it took a little while, I just want to make sure if she knows how much it's going to be up front.

THE COURT: She'll have an estimate. That's just a great idea. You know Ms. Keil is such a professional, she'll have an estimate, I'm sure. She has like a per hour estimate at this point.

MR. BROWN: I have 84.

THE COURT: She won't dare let you get out of here until she's accounted for each and every

exhibit.

MR. ZELENKA: I have a witness too, Judge.

THE COURT: You have a witness? Because yesterday you said you didn't.

MR. ZELENKA: I know.

THE COURT: Only because you said you didn't do you. And I have a sneaking suspicion that I know who it is. Sure. Come on around, Mr. Bailey.

All right, Mr. Bailey, as you know you've already been sworn in this matter.

THE WITNESS: Yes, ma'am.

(Walter Bailey, called as a witness, having previously been duly sworn, is examined and testifies as follows:)

DIRECT EXAMINATION

BY MR. ZELENKA:

Q. Mr. Bailey, let me show you what's been marked as Applicant's Exhibit 83 and ask if you recall seeing that?

A. Yeah.

Q. Or a copy of that material?

A. Yeah, I do.

Q. And in that material is reflected a series of attachments; is that not also correct?

A. That's correct.
Q. One of those attachments is item number 26, do you see that?
A. Copy of trace report from ATF.
Q. Okay. Let me ask you to refer to item 26.
A. That's the three-page copy of the firearms trace report that I think was discussed in my previous testimony.
Q. Okay. And that report is the report which includes born in the Soviet Union, Batkilina involved in credit card scam, et cetera?
A. That's correct.
Q. Do you recall seeing that now?
A. Yeah, I do. I was able to retrieve that from my file. If I can explain what occurred there.
Q. Please.
A. The entire SLED report was sent to the defense on March 20th, 1998 which would have included the ATF report.
Q. It included everything?
A. It would have included everything that's in this Exhibit 83, Applicant's 83. What I did, I sent a copy of the entire report, I had a secretary copy it, sent that to the defense and then the documentation, the supporting documentation is not in a form where I

can really use it at trial.

I break the SLED report apart and if it's something that I think's irrelevant to my theory of the case, I would stick it under miscellaneous tab in the trial notebooks. If it pertains to a particular individual that I plan to call as a witness, I put it behind that witness's tab.

I couldn't locate it because I had an ATF agent, I think his name was Kelly, that I had on my witness list that I was going to call if for some reason Tom French couldn't make it down to corroborate Ms. Batkilina's testimony with the gun purchase. French did show up and I got whatever I needed to get in regarding the gun through those witnesses, so I never got to Mr. Kelly. And this ATF report was behind the tab I was going to use to get him to authenticate that.

Q. Okay.

A. So that's why I didn't have it and this was faxed to me after I left to come here today by my office and copied the three-page report.

Q. Okay. And what documentation do you have that you provided that March 8th, 1998 document series of exhibits?

A. My letter to Thomas Sims and Duffie Stone dated

March the 20th, 1998.

Q. Okay. So that was -- so the SLED report that you're referring to in that documentation is this?

A. That's correct.

Q. Okay. What indicates to you that that report includes the attachments as opposed to just the general summary, if anything?

A. I would just read the letter that would explain it. "Dear Gentleman: Please find enclosed herewith for each of you a copy of the SLED report in the above matter which includes a list of the attachments with this report." And then it goes on to something else in the letter which isn't responsive to your question.

Q. Okay. The attachments to the report, as you understand it, are the attachments we looked at in that particular exhibit?

A. Separated by the blue pages here.

Q. Okay.

A. And I might add that I had mentioned before that my secretary routinely would put a little check in the upper right-hand column. And the fax copy I got of the ATF trace firearms report, each page was checked indicating this was a backup that was sent to the defense.

Q. Okay. And also have you been involved in cases where Mr. James Aiken, former warden at Kirkland -- excuse me, at Central Correctional Institution has testified on adaptability?

A. Yeah, probably maybe three to four death penalty cases I've handled including the last one, Marion Bowman, Jr.

Q. In your handling of death penalty cases in preparation for that eventuality, how do you anticipate doing cross-exams, cross-examinations of Mr. Aiken when he may testify in these cases?

A. With regard to my prison adaptability expert I like to see them from prosecution point of view, because when they testify about adaptation to prison the next issue that arises that I can get into is what is he adapting to because adaptation doesn't mean anything unless the jury knows what you're adapting to.

That allows me to get into conditions in prison life and I can get into cable TV and basketball and recreational activities that then in my closing argument I can compare the amenities in prison to somebody being buried six feet underground and it's a very, very effective closing argument that I can get into my opinion. And I was denied that in

this case.
Q. Okay. Do you also discuss the variety between the present security the inmate may be under as opposed to the type of security he may be under in the general prison environment when he's not on a death row situation?
A. Yeah, get into that also.
Q. And has Mr. Aiken testified in any of your cases?
A. In about three or four cases.
Q. And what has been the result of those cases, if you recall?
A. I think in the majority of them, if not all of them, I got a death penalty verdict. And I can't say I got that because of Mr. Aiken testifying --
Q. Certainly.
A. -- but I think it helped.
Q. Okay. There was some testimony while you were present in the courtroom concerning whether, in fact, Mr. Darnell was with you or not when there was an interview of Gloryvee Perez. Do you recall that?
A. Yeah, I do.
Q. Do you recall where that interview occurred?
A. It occurred in her apartment in Bensalem, Pennsylvania, to the best of my recollection. They

had already talked to these people. I had not, I wanted to talk to them, they were all up in the northeast so I asked SLED, I think L. C. Knight was the captain, to basically let me have Mr. Mears, Mr. Darnell to go up there with me and locate these people and just facilitate my interview. That was the purpose of that trip.

Q. Okay. And it was your understanding that they may have been up in that area of the nation before you went on that trip?

A. I knew they already talked to everybody potentially. I was in court. Mr. Darnell said that they had talked to several. Sara Pivero I was under the impression they had not, but certainly all the rest of them we talked to from three different states up there. They briefly interviewed and I had statements from everybody except Mrs. Pivero, so really it was me conducting the interviews, they were just for my purposes and they were just there to facilitate and locate them.

Q. Okay. Have you been involved in cases when social workers testify in mitigation about the background of individuals?

A. Yeah. Yeah.

Q. In preparation for that testimony, what, if

anything, do you do as the prosecutor in anticipation of that information?

A. Actually not a whole lot as far as preparation for them. Generally I don't get their file. Usually the approach they take is they get up and they collect a lot of documentation and it gets to be kind of lengthy, generally the jury gets lost in the length of it and the relevance of all the materials that come out.

And again as with the prison adaptation expert, I think that I can make points in cross-examination because generally they're people in the same background, in some cases siblings, I don't think that was the case of Mr. Aleksey's case, but they grew up in the same environment and then in cross-examination I can point out that other people in that category don't end up being murderers and, you know, I think -- would like to think that it helps not only me but anybody prosecuting a death penalty case.

Q. Do you also have access -- maybe going back over some ground we went over yesterday -- to social histories which may have been done on the particular inmates if they had been sent to the state hospital in preparation?

A. Yeah. They do their own, they have a person that I think just does that for them, goes out and collects data. We send them anything we have. It's my understanding they try to contact the defense attorney and obtain documentation on prior hospitalizations, and on their own if they find out that he's been hospitalized somewhere they will try to get all the information they can on his background.

I've got a fairly extensive amount of paper in my file that came from different sources on him all of which the defense has so it was pretty thorough, it went into two prior hospitalizations and some school problems he had, it was fairly extensive as I recall.

Q. Okay. One last series of questions. You mentioned an open file policy as well as providing materials to the defense. Describe what that means, because some solicitors have a different definition of open file policy than others.

A. I'll provide the defense anything unless I consider it work product at the time I get it. In addition to that if they want to come look at my file that's fine, it's open to them and most of them know that.

Q. Did you make your file available to Mr. Sims or Mr. Stone in any way, shape, or form?
A. It was available to them. I can't recall whether or not they came down and looked at it or not. That happens, sometimes it doesn't. In this case I don't recall if it did or not.
Q. Okay. I have no further questions.
THE COURT: All right. Cross-examination.
MR. BROWN: Very briefly, Your Honor.
THE COURT: Sure.

CROSS-EXAMINATION

BY MR. BROWN:
Q. Solicitor Bailey, I'm going to show you what's marked as Applicant's 3 and 6 this is in regards to Ms. Yelena Batkilina and one of those would be a transcript of a guilty plea in Oceola, Florida, and one would be the information, like the indictment related to those charges.
A. Right.
Q. Did you ever provide those documents to the defense as possible impeachment material pursuant to Brady?
A. To the best of my knowledge I've never seen these so I could not have provided them to them.
Q. Are you familiar with any other fraud or credit

card scams Ms. Batkilina had in Florida besides what's in front of you?

A. As I said previously, the only thing I recall in regard to Ms. Batkilina was the reference that your client made to some problems she had down in Florida during that two-hour break. And also I would have read the ATF report at some point when I read over it, and I don't know whether it would have jumped out at me, I don't think it did at that time.

Q. But that would be impeachment material, what's in front of you, it was available at the time of trial and involves charges that appear to be -- I'm sorry, I don't mean to cut you off, that's one question.

A. I haven't read every page on this, but if she pled guilty to a criminal offense involving fraud it would be impeachment material, but it would appear to me would be impeachment material that your client knew about since he's the one asking for help from SLED about the problem in Florida they were both involved in as I understand it.

Q. I understand. And but nonetheless you have an obligation yourself -- let me put it to you differently, I'll withdraw that part of the question.

Did you check with the defense counsel

to see whether they already had this information that would relieve you of your obligation to provide it to them?

A. Not specifically, no. What I did was I provided them with the information in regard to the ATF report with a notation on it that went to the defense. And also there were -- of course the Jackson v. Denno hearing took place prior to the trial and there was testimony about her problems in Florida. So they knew as much about it as I did, if not more, since I had no access to Mr. Aleksey.

Q. And you were here for part of Agent Darnell's testimony. Did you hear him mention that he was familiar with some of the acts of Gloryvee prior to her arrest on murder charges here?

A. I was present for most of his testimony, I stepped out a couple of times, but I did hear most of his testimony.

Q. So he seemed to know about some of the scam involving Dr. Bang's check and the banks in Philadelphia, Summit Bank and then the Trenton police report and the Burlington Lincoln dealership?

A. It appeared to me that he had a very, very generalized knowledge of these events as I did.

Q. Did any of that information come up during the

questioning of Ms. Perez at her apartment in Pennsylvania?

A. Not that I was involved in and I was the one doing 90 percent, if not all, the questioning of her. My focus when I spoke with her was what she knew about the homicide. I'd had her written statement she gave to SLED and I reviewed that with her, I went over it with her to determine whether or not there's anything else involving the crime that I should know about to formulate my questions to her. That was my focus at that time.

Q. I understand. And the last thing I'm going to ask you, Ms. Jamie Farrell had testified about some deposits and withdrawals out of her account in Absecon, New Jersey, with Commerce Bank?

A. Yeah.

Q. I would show you what's been marked as Applicant's 50 which is a SLED statement of Ms. Farrell.

A. Okay.

Q. And I'll ask you to look at a sentence on page 2 and it starts with "He told me..."

A. "He told me he got a wire transfer so, therefore, I withdrew the money."

Q. That's the question I wanted to ask you about.

She testified at trial that Mr. Aleksey withdrew the money?

A. Well, yeah. Yeah, she did. And I've given some thought to that and I can't put myself inside of her head, but they were -- if that was her in the photograph, the surveillance photo at the bank in a convertible with Aleksey driving the car and she was riding passenger and he's the one beside the teller window, whatever it is, maybe in her mind he withdrew the money. I don't know. I mean, I'm making some assumptions here.

Q. Okay.

MR. BROWN: And that's it. No other questions, Your Honor.

THE COURT: Okay. Any redirect?

MR. ZELENKA: No redirect.

THE COURT: And is Solicitor Bailey free to go yet again?

MR. ZELENKA: No further questions, no further witnesses.

MR. BROWN: Nothing from us.

THE COURT: Thank you.

(Whereupon, the witness steps down from the witness stand.)

THE COURT: Great. All right. And any

additional witness on behalf of the attorney general?

MR. ZELENKA: None at this time, Your Honor.

THE COURT: Thank you. All right. Then just as we talked a few moments ago, that's how we're going to proceed. I know that you all will get with Ms. Keil and then I'll just look for an order regarding that expense money from you. And then as soon as Ms. Keil can get to it, I know she will, I know it's going to be a while and but I know that she's always so efficient. I know she will get this work done just as soon as she can and then you all will get together and see when you'll do your briefs, hopefully it will be 30 days, and then we'll get together once I've received them and see how you're going to respond to each other's proposed order, I should say, not brief.

MR. TARR: With regard when I send you an order for the transcript, I'll probably send some final bills for people.

THE COURT: I would expect that, Mr. Tarr. I really would.

MR. TARR: What I was going to say, there's

several people you already approved money for, it's in my trust account for people we didn't end up using, but some of the bills will probably go over so I'll probably submit an order asking you to convert so that I can use so I won't have to get more.

THE COURT: That will be great. Probably just for all of our purposes if you could just get somebody to do an accounting then we'll just sort of know where it all went, that would be super. Thank you.

MR. TARR: All right.

THE COURT: Obviously I'm going to await your proposed orders and then I'll take this matter under advisement. Great.

MR. TARR: Thank you, Your Honor.

THE COURT: Super.

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STATE OF SOUTH CAROLINA)
: C E R T I F I C A T E
COUNTY OF DORCHESTER)

I, Robin L. Keil, Registered Merit Reporter and First Judicial Circuit Court Reporter, certify that the preceding pages are a true and correct transcript of the proceedings had at the aforesaid time and place.

I certify that the same was reduced to typewritten form from my original stenograph notes by computer-aided transcription.

I further certify that I am not of counsel or kin to any of the parties to this cause of action, nor am I interested in any manner in its outcome.

IN WITNESS WHEREOF I have hereunto set my hand this the 11th day of March 2004.

Robin L. Keil

Robin L. Keil, RMR
Resident Court Reporter
First Judicial Circuit

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF ORANGEBURG)	C.A. No. 01-CP-38-628
BAYAN ALEKSEY, #5059)	
)	
Petitioner,)	
v.)	**THIRD AMENDED APPLICATION FOR POST CONVICTION RELIEF**
)	
STATE OF SOUTH CAROLINA)	
)	
Defendant.)	
)	

[Note: This application follows SCRCP Appendix of Forms, Form 5, as required by Rule 71.1(b), SCRCP.]

1. Applicant is detained at the Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, South Carolina, 29472.

2. The sentence was imposed by the Orangeburg County Court of General Sessions, the Honorable Edward B. Cottingham presiding.

3. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:

   (a) 98-GS-38-244 - Count One: Murder

4. The date upon which sentence was imposed and the terms of the sentence:

   (a) Sentenced on September 1, 1998 to death.

5. A finding of guilty on was made on August 29, 1998 after a plea of not guilty.

6. The applicant did appeal from judgment of conviction and sentence.

7. (a) The Courts to which applicant appealed:
   (i) The South Carolina Supreme Court.
   (ii) The United States Supreme Court.

(b) The result in each Court to which applicant appealed:
(i) Conviction and sentence of death were affirmed.
(ii) Petition for Writ of Certiorari denied.

(c) The date on which each Court affirmed the sentence or denied certiorari:
(i) Conviction and sentence were affirmed November 13, 2000.
(ii) Petition for writ of certiorari was denied on May 14, 2001.

(d) Citations of any written opinion or orders entered pursuant to such results:
(i) State v. Aleksey, 343 S.C. 20, 38 S.E.2d 248 (2000)
(ii) Aleksey v. South Carolina, 532 U.S. 1027, 121 S.Ct. 1974, 149 L.Ed.2d 766 (2001)

8. Not applicable.

9 & 10 Grounds for Relief and Concise Statement of Supporting Facts.[1]

Ground A

Applicant was denied his right to collateral review of his conviction and death sentence as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law by trial counsels' failure to retain a copy of the trial counsel file, as required by South Carolina Code Section 17-27-130.

Supporting Facts for Ground A

(1) After trial, and prior to filing the application for post conviction relief, trial counsel released their respective files to applicant without retaining a copy.

Ground B

Applicant's right to counsel, as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60, was violated as a result of his representation throughout the pre-trial and trial proceedings by trial counsel who labored under an actual conflict of interest arising from trial counsel's simultaneous employment with the Fourteenth Circuit Solicitor's Office of the State of South Carolina. See *Mickens v. Taylor*, __ U.S. __, 122 S.Ct. 1237 (2002); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway, et al. v. Arkansas*, 435 U.S. 475 (1978); and *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001).

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[1] Applicant reserves his right to amend this application.

Supporting Facts for Ground B

(1) At the time of the crime for which Appellant was convicted and sentenced to death and during every proceeding leading up to and including the actual trial of the case, applicant's lead trial counsel, Isaac McDuffie Stone, III., was employed as a part time assistant solicitor with the Fourteenth Judicial Circuit Solicitor's Office of the State of South Carolina. Applicant was prosecuted in the First Judicial Circuit which shares a geographic border with the Fourteenth Judicial Circuit. Applicant did not receive adequate information from Attorney Stone from which he could make an intelligent decision regarding his representation by Mr. Stone. Furthermore, applicant did not receive any advice from an attorney who did not labor under a conflict of interest, so that he was unable to make an informed decision regarding his representation by Mr. Stone.

(2) Counsel's performance was adversely affected by this actual conflict of interest.

Ground C

Applicant's right to counsel, as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and17-23-60, was violated as a result of his representation throughout the pre-trial and trial proceedings by trial counsel who labored under an actual conflict of interest arising from trial counsel's simultaneous employment with the South Carolina Insurance Reserve Fund. See *Mickens v. Taylor*, __ U.S. __, 122 S.Ct. 1237 (2002); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway, et al. v. Arkansas*, 435 U.S. 475 (1978); and *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001).

Supporting Facts for Ground C

(1) At the time of the crime for which applicant was convicted and throughout trial counsel's preparation of the case and during the actual trial of the case, applicant's lead counsel, Isaac McDuffie Stone was also employed as an attorney for the South Carolina Insurance Reserve Fund. Attorney Stone's primary duties in that capacity included the defense of state agencies and state employees against lawsuits filed by various parties. The state agencies Mr. Stone represented at the time he represented applicant included, but are not limited to: the South Carolina Highway Patrol and Orangeburg County. The charge for which applicant was convicted occurred in Orangeburg County, involved the murder of a South Carolina Highway Patrolman, and was investigated by SLED in cooperation with the Orangeburg County Sheriff's Department.

(2) Counsel's performance was adversely affected by this actual conflict of interest.

Ground D-Abandoned

Ground E

Applicant's right to counsel, as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and17-23-60, was violated as a result of the trial court's failure to procure a valid waiver from the applicant of his lead trial counsel's actual conflict of interest which arose from trial counsel's simultaneous employment as an attorney for the South Carolina Insurance Reserve Fund. *Mickens v. Taylor*, __ U.S. __, 122 S.Ct. 1237 (2002); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway, et al. v. Arkansas*, 435 U.S. 475 (1978); and *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001).

Supporting Facts for Ground E

(1) No valid waiver of Mr. Stone's potential conflicts of interests were obtained from the Applicant. No waiver of any sort was obtained from applicant regarding Mr. Stone's actual conflict of interest.

(2) Counsel's performance was adversely affected by this actual conflict of interest.

Ground F

Applicant's right to counsel, as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60, was violated as a result of the constructive absence of counsel at the hearings regarding applicant's lead trial counsel's conflicts of interests. See *U.S. v. Cronic*, 466 U.S. 648, 659 (1984) , *Brooks v. Tennessee*, 406 U.S. 605 (1972) and *Frett v. State*, 298 S.C. 54, 378 S.E.2d 249 (1988).

Supporting Facts for Ground F

(1) Applicant's was only represented by Mr. Isaac McDuffie Stone, III, and Thomas R. Sims at the hearings regarding Mr. Stone's conflicts of interests. Mr. Sims failed to provide applicant any advice regarding these conflicts. Mr. Stone's conflicts of interests prevented him from assisting applicant during the hearings regarding these conflicts.

(2) The actions of the government, in appointing Mr. Stone and failing to provide applicant with two lawyers free from conflict during a critical stage, amounted to the constructive denial of counsel to applicant at a critical stage in the proceedings and prejudice

is presumed.

Ground G

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to provide enough information to applicant to enable applicant to make a voluntary, knowing, and intelligent waiver of an actual conflict of interest, which arose during applicant's proceedings, or to insist upon the appointment of alternate counsel who did not labor under a conflict of interest. *Strickland v. Washington*, 466 U.S. 668 (1984) and *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001)(Petitioner has shown an actual conflict of interest that adversely affected her attorney's performance. Further, her initial waiver of a potential conflict did not act as a waiver of this actual conflict.)

Supporting Facts for Ground G

(1) Applicant was never advised of the specific types of hazards which arose during the course of representation provided by Mr. Stone. Applicant never waived these actual conflicts of interest.

(2) Trial counsel's performance was adversely affected by this conflict and, but for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground H

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure in the *Jackson v. Denno* hearing to argue that applicant's "confession" was improperly induced by a promise and involuntary. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground H

(1) During the Jackson v. Denno hearing, it was revealed that Aleksey's confession was induced by a promise which rendered its production involuntary. Trial counsel failed to raise this issue.

(2) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground I

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to request a change of venue due to extensive and prejudicial pre-trial publicity involving the offense charged and the applicant's character and failure to explore this publicity through voir dire. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground I

(1) An extremely large number of newspaper articles, television broadcasts, and other media sources publicized accounts of the shooting of the victim and the subsequent investigation. Further, many of these media releases concerned the "bad character" of the applicant outside of the context of the case in issue. The extent of this coverage was evident from the responses obtained during the voir dire of the jury panel. In fact, ten of the fourteen jurors who actually sat in the trial of the applicant's case indicated prior knowledge of this case from some source outside of the judicial system. However, trial counsel inexplicably failed to inquire into the substance of these jurors' prior knowledge about this case.

(2) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground J

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' decision to imply to the jury, through voir dire questioning, that applicant was a foreign national. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground J

(1) Trial counsel consistently asked jurors whether they could be fair to a foreign national. Applicant is not a foreign national and is in fact a U.S. Citizen by nature of his birth in the United States. Further, Applicant has never lived outside of the United States.

(2) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground K

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' complete failure to question any member of the jury panel regarding her view of the death penalty. *U.S. v. Cronic*, 466 U.S. 648, 659 (1984), *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961), *Frett v. State*, 298 S.C. 54, 378 S.E.2d 249 (1988) and S.C. Code Section 16-3-20(D)&(E).

Supporting Facts for Ground K

(1) The transcript is clear that both counsel for defendant completely failed to ask any member of the jury panel questions regarding her view of the death penalty. In fact, counsel states, "The defense is specifically not going to ask them any questions concerning their feelings on the death penalty, although we have a statutory right to do so." Further, it was counsel's position, stated in the record, that this case would not go to the penalty phase and, therefore, questioning jurors regarding their views on the death penalty would be unnecessary. Also, counsel requested the court to prohibit the solicitor from asking similar questions. (This request was denied.)

(2) Trial counsel completely failed to subject the prosecution's case to adversarial testing during voir dire and prejudice is presumed.

Ground L-Abandoned

Ground M

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to exercise a peremptory strike against juror number 144. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground M

(1) Counsel for Aleksey possessed information which would cause a jurors provided reasonable attorney to exercise a peremptory strike. Trial counsel failed to exercise all of their peremptory challenges.

(2) But for counsel's deficient performance, the outcome of the trial proceedings would

have been different.

Ground N-Abandoned

Ground O

Applicant was denied the right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 at the guilt or innocence phase of his trial. *Williams v. Taylor*, 120 S.Ct. 1495 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984); *Jolly v. State*, 443 S.E.2d 566 (S.C. 1994).

Supporting facts for Ground O

(1) Beginning with the opening statement and throughout the entire guilt or innocence phase of applicant's trial, trial counsel "opened the door" to alleged prior bad acts and bad character of applicant.

(2) Trial counsel failed to properly cross examine and impeach state's witness Yelena Batkilina. Counsel did not impeach this witness with evidence of prior criminal convictions, character evidence involving specific instances of prior dishonest conduct, or challenging her false testimony.

(3) Trial counsel failed to properly cross examine and impeach state's witness Lisa Watson. Counsel did not impeach witness with character evidence involving specific instances of prior dishonest conduct or challenging her false testimony.

(4) Trial counsel failed to properly cross examine and impeach state's witness, and applicant's former co-defendant, Gloryvee Perez. Counsel failed to impeach witness with evidence of her motive to commit crime of which applicant was charged. Counsel failed to prove Perez' character through character evidence involving specific instances of relevant dishonest conduct.

(5) Trial counsel failed to properly cross examine and impeach state's witness Sarah Pivero. Counsel did not impeach witness with character evidence involving specific instances of prior dishonest conduct.

(6) Trial counsel failed to properly cross examine SLED agent Mears. Counsel did not question Mears about applicant's allegations of coercion during police interrogation. Counsel failed to question Mears about certain evidence belonging to Gloryvee Perez found

in car that was evidence of her recent criminal activity and gave her motive to shoot Trooper Linguard. Counsel failed to cross examine Mears about the missing SLED statement of Sarah Pivero.

(7) Trial counsel failed to properly cross examine SLED agent Darnell. See (6) above.

(8) Abandoned

(9) Trial Counsel failed to fully investigate the crime charged and the state's witnesses and to present that information to the jury in a coherent and meaningful manner.

(10) Trial counsel failed to adequately investigate Gloryvee Perez. Such an investigation would have uncovered a substantial amount of evidence that Ms. Perez had a significant motive to shoot the victim.

(11) Abandoned.

(12) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground P

Applicant was denied the right to effective assistance of counsel at guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections and S.C. Code Sections 16-3-26(B)(1) and 17-23-60 at the sentencing phase of his trial. *Williams v. Taylor*, 120 S.Ct. 1495 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984); *Jolly v. State*, 443 S.E.2d 566 (S.C. 1994).

Supporting Facts for Ground P

(1) Abandoned

(2) Trial counsel failed to properly cross examine and impeach state's witness Jaime Farrell by attacking her testimony with specific instances of prior dishonest conduct and by challenging her false testimony.

(3) Trial counsel failed to properly cross examine and impeach state's witness Sarah Pivero. See Ground O, number 5.

(4) Trial counsel failed to properly cross examine and impeach state's witness Lisa Watson. See Ground O, number 3.

(5) Trial counsel failed to investigate backgrounds of state's witnesses and their allegations. Such an investigation would have provided a substantial amount of impeachment material.

(6) Trial Counsel failed to investigate fully and effectively applicant's life and background and to present the information to the sentencing jury in a coherent and meaningful manner. Counsel failed to utilize properly the information their investigation uncovered and to find other information. Counsel failed to employ the services of a social worker. Counsel failed to employ the services of an adaptability expert to testify as to applicant's likelihood to adapt to prison life if sentenced to life in prison.

(7) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground Q

Applicant was denied due process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law by the prosecution's failure to disclose material information which was favorable to the defense on issues of guilt and punishment. *Brady v. Maryland*, 373 U.S. 83 (1963) and *Kyles v. Whitley*, 514 U.S. 419 (1995).

Supporting Facts for Ground Q

(1) The prosecutor knowingly failed to disclose evidence of Gloryvee Perez' motive and recent criminal activity and affirmatively mislead trial counsel regarding the existence and materiality of this evidence.

(2) The state knowingly failed to disclose, to applicant's trial counsel, evidence of Yelena Batkilina's prior criminal record and other specific acts of dishonesty, fraud and wrongdoing.

(3) The state knowingly failed to provide, to trial counsel, a statement given by Sara Pivero to the agents of SLED.

(4) The state knowingly failed to provide, to trial counsel, evidence of fraud involving state's witness Lisa Watson.

Ground R

Applicant was denied his right to due process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law as a result of the

prosecution's presentation of false testimony and failure to correct the false impression created by that testimony. *Napue v. Illinois*, 79 S.Ct. 1173, 360 U.S. 264, 3 L.Ed. 2d 1217 (1959), and *Mooney v. Holohan*, 294 U.S. 103 (1935), and *Miller v. Pate*, 386 U.S. 1 (1967).

Supporting Facts for Ground R

(1) The prosecutor knowingly presented false testimony when state's witness Yelena Batkilina testified incorrectly about the date of purchase of the weapon in this case, not clarifying conflicting testimony between Ms. Batkilina and state's witness French and allowing Ms. Batkilina to testify falsely that she had not seen applicant after either the purchase of this weapon or, alternatively, after applicant's release on bond for a Pennsylvania charge. The prosecutor had information in his possession which informed him this testimony was patently false. Further, the prosecutor specifically relied on this false testimony during his closing argument.

(2) The prosecutor knowingly presented false testimony when state's witness Jaime Farrell testified that she did not deposit money into a New Jersey bank.

(3) The prosecutor knowingly presented false testimony when state's witness Jaime Farrell testified that she did not withdraw money from a New Jersey Bank

(4) The prosecutor knowingly presented false testimony when state's witness Lisa Watson testified, in the guilt phase of the trial, that she had reported the White Mustang stolen on October 5, 1997.

(5) The prosecutor knowingly presented false testimony when state's witness Lisa Watson testified, in the sentencing phase of the trial, that Bayan Aleksey stole money from her husband's credit cards.

(6) Abandoned

Ground S

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by appellate counsel's failure to argue on direct appeal that trial counsel's actual conflict of interest was so serious as to be unwaivable. *Strickland v. Washington*, 466 U.S. 668 (1984) and *United States v. Schwarz*, et al., 283 F.3d 76 (2d Cir. 2002).

Supporting Facts for Ground S

(1) Applicant was represented at trial by counsel who labored under several serious conflicts of interest, including simultaneous employment with the Insurance Reserve Fund, the Fourteenth Circuit Solicitor's Office for the State of South Carolina and the South Carolina Department of Corrections.

(2) Trial counsel's conflicts were of such a serious nature that no rational defendant would knowingly and intelligently desire that attorney's representation, regardless of whether the defendant was willing to waive his right to conflict-free counsel.

11 & 12. Applicant appealed his conviction and sentencing to the South Carolina Supreme Court and petitioned the United States Supreme Court for a writ of certiorari. Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in state or federal court.

13. None of the grounds set forth in (9) has been presented to this or any other Court, state or federal.

14. N/A

15. These grounds rely on additional facts outside the record which was before the previous courts.

16 & 17.
(a) Applicant was represented at his trial by I. McDuffie Stone, III, P.O. Box 155 Bluffton, SC 29910, Thomas Ray Sims, P.O Box 2016 Orangeburg, SC 29116
(b) Applicant was represented in his direct appeal by Robert M. Dudek, S.C. Office of Appellate Defense, 1122 Lady St., Suite 940 Columbia, S.C. 29201.
(c) Applicant was represented in his petition for certiorari to the United States Supreme Court by Robert M. Dudek, S.C. Office of Appellate Defense, 1122 Lady St., Suite 940 Columbia, S.C. 29201.

18. Applicant seeks the vacation of his convictions and sentences.

19. Applicant is not under sentence from any other court.

Respectfully submitted,

David B. Tarr
Attorney at Law
720 Main St., Suite 202
Columbia, SC 29201
(803) 252-9769

James A. Brown, Jr.
Attorney at Law
1111 Bay St., P.O. Box 592
Beaufort, SC 29901-0592
(843) 470-0003

Attorneys for Applicant
January 31, 2005.

STATE OF SOUTH CAROLINA)
)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS

C.A. No. 01-CP-38-628

BAYAN ALEKSEY, #5059

Petitioner,

v.

STATE OF SOUTH CAROLINA

Defendant.

APPLICANT'S BRIEF SUPPORTING THIRD AMENDED APPLICATION FOR POST-CONVICTION RELIEF

David B. Tarr
Attorney at Law
720 Main St., Suite 202
Columbia, SC 29201
(803) 252-9769

James A. Brown, Jr.
Attorney at Law
1111 Bay St., P.O. Box 592
Beaufort, SC 29901-0592
(843) 470-0003

Attorneys for Applicant
January 31, 2005

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STATE OF SOUTH CAROLINA)) COUNTY OF ORANGEBURG)	IN THE COURT OF COMMON PLEAS C.A. No. 01-CP-38-628
BAYAN ALEKSEY, #5059 Applicant, v. STATE OF SOUTH CAROLINA Defendant.	**APPLICANT'S BRIEF SUPPORTING THIRD AMENDED APPLICATION FOR POST-CONVICTION RELIEF**

This Brief supports Applicant's Third Amended Application for Post-Conviction Relief. Applicant comes before this court convicted of capital murder and under a sentence of death pursuant to Section 16-3-20 of the South Carolina Code of Laws. Applicant is represented in his pursuit of post-conviction relief by attorneys David Tarr and Jim Brown.

Following the submission of the Second Amended Application for Post-Conviction Relief, the Circuit Court, the Honorable Diane Schafer Goodstein presiding, convened a merits hearing to explore the allegations raised in the application. This hearing took place in the Orangeburg County Courthouse on the days of November 12-15, 2002 and in the Dorchester County Courthouse, in St. George, on the days of July 7-10, 2003.

The Applicant was present and represented by his counsel. The State of South Carolina was represented by Donald J. Zelenka. Witnesses at this hearing included Thomas J. Sims and Isaac McDuffie Stone, III, who served as Petitioner's trial counsel. Also testifying at this hearing were Walter Bailey, former Solicitor for the 1st judicial circuit, SLED agents George Darnell and Kenny Mears, Christopher Sontag, Jim Aiken, and Professor John Freeman. Jan Vogelsang

provided depositional testimony. Finally, Applicant did not testify during the proceedings.

Applicant raised 19 grounds in his second amended application. He developed testimony advancing these grounds during the examination of the witnesses listed above. Further, applicant submitted 84 items as exhibits during the hearing. The state presented 2 exhibits. All of these were admitted in evidence except Applicant's 12.

Along with this Brief, Petitioner further submits 13 proposed exhibits, number 58(b) and 85-96. Also submitted is a Third Amended Application for Post Conviction Relief, to conform to the evidence developed in this case.

Introduction

This is a death penalty case. Although litigated over the course of more than a week, Applicant's conviction suffers infirmity because it is based upon the ineffective assistance of counsel. Further, this representation was wrought with conflict which affected the representation of Aleksey. Also, the State obtained this conviction through the knowing presentation of false testimony and by failing to provide information to Aleksey's counsel which would have impeached the State's witnesses or advanced Aleksey's defense.

This brief is arranged topically with citations to the grounds contained in the Application.

Glory Vee (Perez)(Rivera) Blackwell-Grounds O(4), (9) & (10); O(1)

Mr. Aleksey is entitled to a new trial based upon the State's failure to turn over evidence involving Glory Vee in violation of the requirements of Brady v. Maryland, 373 U.S. 83 (1963). Alternately, Aleksey is entitled to a new trial because the State committed other acts of prosecutorial misconduct. As a third ground for relief, Aleksey's trial counsel was ineffective for failing to investigate and utilize exculpatory and impeachment evidence regarding Glory Vee.

Brady Violation

The United States Supreme Court has set out the three components or essential elements of a Brady prosecutorial misconduct claim: "The evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-282 (1999). Further, the government's duty to disclose evidence favorable to the accused encompasses evidence known by others acting on the government's behalf, even if not known by the prosecutor. Kyles v. Whitley, 514 U.S. 419 (1995). Kyles defines material evidence as that type of evidence which, if withheld, would result in a trial unworthy of confidence. Id.

Favorable to the Accused

Both parties agreed in this case that the driver of the automobile was the party responsible for the murder of Trooper Lingard. Tr. p. 1754, lines17-21. Further, both parties asserted that the shooter acted alone. Tr. p. 1752, lines 3-6. While there were four occupants of the white Mustang on December 31, 1997, only two of these persons were old enough to be suspected in the killing. Therefore, on January 1, 1998, the State charged both Glory Vee Blackwell (Perez,

Rivera) and Bayan Aleksey with murder. However, consistent with its position that only one person was criminally responsible for the shooting of Trooper Lingard, the State dismissed the charges against Glory Vee Blackwell.

Logically following this factual backdrop, evidence pointing to the guilt of Glory Vee pointed away from the guilt of Aleksey. In fact the State argued to the jury that the presence of motive on the part of Aleksey and the lack of motive on the part of Glory Vee was the number one reason they should convict Aleksey. Thus, Aleksey's defense would have greatly benefitted from evidence proving Glory Vee's competing motive to shoot Trooper Lingard.

While not introduced to the jury or provided to Aleksey's trial counsel, a plethora of evidence existed proving Glory Vee's motive and identity as the killer. The greatest amount of this evidence related to a scam to steal checks from her boss; use these checks to create a fraudulent bank account; and use this account to fraudulently obtain an automobile.

Dr. Bang/Summit Bank/Burlington Lincoln Mercury Scam

On December 22, 1997, Glory Vee visited the Burlington Lincoln Mercury dealership in Burlington, New Jersey. Applicant's 35. She spoke with a salesperson named Keith Randall. Applicant's 33. Glory Vee completed some paperwork in an effort to purchase a Lincoln Mark VIII valued at $49,811.80.

Glory Vee's employer at that time was Byung Kee Bang, MD of New Jersey. She was employed there as a phlebotomist. On or about December 23, 1997, a series of business checks belonging to Dr. Bang were stolen from his office. Applicant's 34.

Also on December 23, 1997, Glory Vee deposited two of Dr. Bang's checks into a new account with Summit Bank in Philadelphia, Pennsylvania. Applicant's 39. These two checks

totaled $28,500.32. Despite having no collateral, the bank allowed Glory Vee to withdraw $1000.00 cash against these checks. These checks were both forged. Applicant's 31 & 34.

Following the deposit of the checks at Summit Bank, Glory Vee took a copy of the deposit receipt to Burlington Lincoln Mercury in Burlington, New Jersey. She also filled out other documents related to the purchase of the Lincoln Mark VIII. She attempted to persuade the dealership to release the vehicle to her based upon the deposit receipt from Summit Bank.

Among the documents completed by Glory Vee at the dealership was a Promissory Note. This note acknowledged Glory Vee's obligation to pay $20,000.00 in certified funds or cash by December 26, 1997. Above her signature on this document appeared a warning that Glory Vee was bound by this note, could not cancel this obligation, and was subject to arrest under New Jersey law if the Note was not fully paid by December 26, 1997.

On December 24, 1997, Glory Vee returned to Dr. Bang's office. While there she discovered that the Trenton Police Department was investigating the theft of the checks. In fact, she told the Trenton Police Department that Mr. Aleksey must have been the thief. (Similar to Glory Vee's allegations made against Aleksey during the investigation of Lingard's death.) In the Trenton PD Investigative Report, Glory Vee was listed as a suspect in this theft. Applicant's 34. However, Glory Vee was obviously complicit in this theft, at a minimum.

After police questioning, Glory Vee checked out of the Summerfield Suites on Christmas Eve. Applicant's 29. She paid this bill with fraudulent checks written on a closed account from the Marine Corps Air Station Federal Credit Union in Beaufort, South Carolina. Applicant's 41. She checked into the Residence Inn in New Jersey, prepaying with $500.00 cash presumably obtained from Summit Bank. Applicant's 29. Even though registered at Summerfield Suites

under the last name of Perez, she registered at Residence Inn under the last name Blackwell.

On December 26, 1997, Glory Vee visited Distasio Chevrolet in Marlton, New Jersey. While there, she presented a check in the amount of $8756.57. Applicant's 36. This check appears to relate to the purchase of a 1998 Chevrolet Monte Carlo. A window sticker for this Monte Carlo was found in the white Mustang by SLED on January 1, 1998. Applicant's 29. SLED agent Darnell testified that he called the Distasio dealership and confirmed that Glory Vee passed the check, that the check bounced and that they did not receive the automobile. PCR, p. 1662, lines 6-16.

On December 27, 1997, Keith Randall telephoned Dr. Bang's office to inquire about Glory Vee's commitment to purchase the Lincoln. Applicant's 31 & 33. Mr. Randall was informed that Glory Vee was fired and that warrants were issued against her for the theft of these checks. Applicant's 33. Furthermore, Glory Vee presented Dr. Bang's checks at Giant Food World in New Hope Pennsylvania as part of a forgery scam.[1] Applicant's 31, paragraph 5.

Finally, Burlington Lincoln Mercury ran a credit check on Glory Vee. Applicant's 35. This credit check indicated her credit was accessed 7 times between December 12 and December 18, 1997. Among the businesses accessing Glory Vee's credit were three car dealerships, two banks and several other credit companies. This evidence raises an inference that Glory Vee committed other scams providing her a motive to fear apprehension by the authorities on December 31, 1997.

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[1]Sara Pivero worked at Giant Food World in New Hope Pennsylvana; raising the inference of her complicity with Glory Vee in the forgery scam. Applicant's 53, page 2. Also, Aleksey provided trial counsel with a letter which stated that "Sara cash a check for $330 dollars for Glory at her job Giant Super Market." Applicant's 23(a), paragraph 9.

Evidence of Flight/Penske Documents

On December 29, 1997, Glory Vee checked out of the Residence Inn in New Jersey. On December 30, 1997, she checked into the McIntosh Inn in Philadelphia, Pennsylvania. Again she paid with cash. While using Glory Vee Blackwell for the Residence Inn registry, she used GV Blackwell for registration purposes at the McIntosh. Applicant's 29.

Also on December 30, 1997, Glory Vee contacted Penske Rental Center in Manhattan, New York to make a Rental Reservation taken by Sal. Applicant's 26(a) & (b). This reservation documented efforts to secure rental items. Glory Vee sought use of a 15 foot truck with a car carrier to transport a Ford Mustang on a one-way trip to West Palm Beach, Florida.

Location of Glory Vee's Possessions on Driver's Side of Mustang

When SLED processed the Mustang following the stop on January 1, 1998, they found various items on the driver's side of this vehicle. To preserve the location of the these items for evidentiary reasons, SLED photographed their respective positions in the auto. Among these photos were items introduced as Applicant's 26.

Applicant's 26 A & B portrayed the Penske Rental Reservation. Applicant's 29 included various hotel receipts of Glory Vee's as well as the Distasio Chevrolet Monte Carlo window sticker and payroll documents from Dr. Bang's office. Applicant's 30, a manilla folder, was found under the driver side floor mat of the Mustang. Applicant's 26 E & F. A close inspection of Applicant's 26 E & F showed that the payroll documents, with the heading "Cliniforms" at the top, were located within Applicant's 30. Finally, Glory Vee's Penske Reservation was found in the driver's side door panel pocket. Applicant's 26 G.

Marine Corps Air Station Beaufort Federal Credit Union Checks

Also, during the month of December, 1997, Glory Vee wrote fraudulent checks on her account with the Marine Corps Air Station Beaufort Federal Credit Union. Only Glory Vee's name is listed on the checks. The face of the checks also indicate this account was closed at the time of negotiation through the bank.

As stated earlier, Glory Vee wrote at least three of the MCAS checks to Summerfield Suites in Mount Laurel, New Jersey. Applicant's 41. These three checks were all written on December 14, 1997. These checks were written for the amounts of $904.00, $50.00, and $400.00. These checks were returned to the hotel marked "account closed."

SLED contacted Jed Lechford, an officer with the Mount Laurel Police Department, and asked for his help identifying Glory Vee and Aleksey as the persons staying at the Summerfield Suites. PCR, page 1635, lines 1-6. SLED provided Lechford with the booking cards for Glory Vee and Aleksey. Lechford responded by affirming their stay at the Summerfield Suites. Applicant's 41.

Lechford also provided SLED the hotel records of their stay and a copy of the fraudulent checks. Applicant's 40 & 41. Lechford provided a handwritten note in which he indicated his willingness to further assist SLED. SLED agent Darnell confirmed that he spoke with Lechford and received 13 pages of materials. PCR, page 1635, lines 1-6 and Applicant's 40 & 41.

Also, records indicate that Glory Vee wrote at least four other checks on the MCAS account between December 20 and December 29, 1997. Applicant's 75. While the checks to Summerfield Suites were signed "Glory Vee Perez", the checks written on December 20 and December 21 payable to Com Data in the amounts of $530.99 and $217.99, were signed by "Glory Vee Blackwell." The other two checks, written on December 26 and December 29, were

made payable to All State Insurance for $438.33 and to Ampco Parking for $53.55. These seven MCAS checks, written over the course of two weeks, total $2594.86.

Glory Vee was unemployed after December 24, 1997 and was estranged from her husband. Applicant's 31 & 25. Further, the All State Insurance check was written for insurance in furtherance of the scam with the Burlington Lincoln Dealership. Applicant's 35-Motor Vehicle Retail Order form. Finally, the MCAS checks written to Com Data correspond with the Com Data money orders made payable to Glory Vee in the amounts of $500.00 and $200.00 when the "Com Check Fee" is taken into account. Applicant's 76 & 78.

Solicitor Bailey testified that he did not provide these materials to Aleksey's trial counsel in discovery. PCR page 1272, line 13- page 1273, line 23. Trial counsel were not familiar with these items. Attorney Sims did not specifically recall having seen the checks or material contained in Applicant's 41 and had not heard of Summerfield Suites until the November 13, 2002 PCR hearing. PCR, page 496, lines 7-10; page 497, lines 13-24. Attorney Stone also could not recall the Summerfield Suites documents including the MCAS checks. PCR, page 1000, lines 7-12. Finally, these MCAS fraudulent checks were not introduced to the judge or jury at the trial below.

Hamilton Township Bench Warrant

Finally, an arrest warrant for Contempt of Court in the Hamilton Township Municipal Court in New Jersey also provided Glory Vee a motive to avoid apprehension. Applicant's 79. As the Notice of Warrant indicates, Glroy Vee was informed of her "pending arrest" and was encouraged to post bail with the Trenton Police Department. It is clear from the face of this Notice that the warrant was issued for a failure to appear in court as opposed to being issued for a

traffic violation. This warrant was issued on March 8, 1995 and was still pending as of June 23, 2003.

Solicitor Bailey admitted he did not turn over the information contained in this document to the defense. PCR, page 1265, lines 16-20. In fact, he testified he had never seen this document before. PCR page 1259, lines 13-14. Bailey also admitted that the admission of this Notice of Warrant would have precluded portions of his closing argument. PCR, page 1260, lines 6-12. Specifically he would not have been able to argue that Glory Vee had no warrants against her or that she had no reason to avoid apprehension. PCR, page 1257, lines 1-23.

The State was on notice to investigate Glory Vee's background for wrongdoing in Trenton, New Jersey. SLED Agent Darnell testified he contacted the Trenton Police Department. PCR, page 1632, line 14-page 1633, line 6. Further, Glory Vee worked for a doctor in Trenton. Applicant's 34. Also, she had previously been charged in ten indictments for drug trafficking in Trenton, New Jersey. Applicant's 37. Finally, Glory Vee had her sister's ID card listing a Trenton address in her possession at the time of her arrest. Applicant's 24.

Failure to Disclose

Solicitor Bailey had sufficient awareness of this information so that a duty arose for him to investigate these incidents and reveal exculpatory information to the defense. At the PCR hearing, Bailey stated that he had a "generalized knowledge" of the scam involving Dr. Bang, Summit Bank, and the Burlington auto dealership. PCR, p. 1705, lines 19-24. In fact, when questioned about his knowledge of Dr. Bang, Solicitor Bailey stated that he understood that Glory Vee worked for him at one time and "she stole some checks at some point in time while she was employed there." PCR, p. 1270, lines 7-10.

SLED Agent Darnell testified that this information sounded familiar. PCR, p. 1631, line 17-p. 1634, line 22. Darnell was able to recall that Glory Vee stole checks from Dr. Bang, wrote these checks and tried to cash them. Darnell also recalled that Dr. Bang fired Glory Vee. Darnell remembered that Glory Vee tried to cash checks at Summit Bank. Finally, Darnell remembered that Glory Vee tried to purchase a vehicle at the Burlington dealership, "[b]ut they didn't pick it up, the check didn't go through." PCR, p. 1634, lines 14-21.

The State recalled Solicitor Bailey as a witness at the PCR hearing. This testimony followed that of Agent Darnell's cited above. Solicitor Bailey admitted he was present for "most" of Agent Darnell's testimony. In response to questioning about the Dr. Bang, Summit Bank, Burlington Dealership scam, Solicitor Bailey stated that he had the same "generalized knowledge of these events" as Agent Darnell did. PCR, p. 1705, lines 12-24.

However, trial counsel both indicated they were never provided this large amount of exculpatory information. PCR, page 366, lines 6-12; p. 378, lines 7-14; page 391, lines 7-10; page 401, lines 24-25; page 402, lines 4-16; page 415, lines 17-23; page 422, line 1-page 424, line 5; page 433, lines 13-15; page 933, lines 7-9; page 934, lines 12-17; page 943, line 20-946, line 20; page 953, lines 16-20; page 954, lines 3-11; page 1005, lines 21-23. And none of this evidence was admitted, argued, or used as impeachment evidence at trial. In fact, neither the trial judge nor jury ever heard any of this information related to the Dr. Bang, Summit Bank, and Burlington dealership scam.

Further, the solicitor did not dispute his failure to deliver this information. In fact, his argument to the jury during trial, contradicted by the facts revealed in Applicant's PCR exhibits and hearing testimony, reinforces the fact this material was not delivered to trial counsel. Had

trial counsel been cognizant of the materials, they surely wold have objected to the solicitor's closing argument contrary to the evidence outlined above.

Exculpatory Nature

The exculpatory nature of this evidence becomes apparent in light of the State's argument that motive identified the shooter of Trooper Lingard. Tr. p. 1752, line 3-1753, line 22 & Tr. p. 1755, line 22-1756, line 8. Specifically, the prosecutor argued in his closing in the guilt-innocence phase that there were eight factors indicating "Bayan Aleksey and only Bayan Aleksey murdered Frankie Lingard on New Year's Eve." The first factor argued by Solicitor Bailey was that:

> "Glory Vee 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."
>
> Tr. p. 1752, lines 7-9 & Tr. p. 1753, lines 15-22.

Obviously, Solicitor Bailey's argument was inaccurate in light of the evidence of Glory Vee's criminal activity in the weeks preceding Trooper Lingard's shooting. In fact, Glory Vee met with the Trenton Police and knew they were investigating her theft of Dr. Bang's checks. Further, Glory Vee signed documents exposing her to liability for violating New Jersey law. Also, Glory Vee's scam with Summit Bank and the Burlington Dealership violated federal wire and mail fraud provisions; producing a substantial motive for Glory Vee to "avoid apprehension." Finally, Glory Vee's recent separation from her husband and her temporary

custody of her children exacerbated her efforts to avoid apprehension.

Solicitor Bailey also argued that Aleksey was the driver of the automobile, therefore, he was the shooter of Trooper Lingard. He provided several evidentiary assertions in support of this claim. First, he directed the jury to the testimony of Glory Vee. Also, he discussed the location of various items in the automobile as proof of the identity of the driver/shooter.

When referencing Glory Vee's testimony, Bailey argued:

> "She got up here and testified under oath that she was a passenger in the car. She had just met this guy a few weeks earlier. She had poor judgment. She took up with this guy she had not known for too long. They are going down to Disney World. She doesn't know anything about his past. She doesn't even know his real name. She thinks he is, I think, Michael Toscani or Pivero or something. She knows him as Michael. She doesn't know who he is."
> Tr. p. 1755, line 23- 1756, line 8.

As he continued, discussing the location of items in the automobile, Solicitor Bailey stated: "We showed you these pictures of the personal property. All of Mrs. Blackwell's stuff is sitting on the passenger side of that car, not the driver's side." Tr. p.1758, lines 5-8.

Impeachment

Aside from exculpating Aleksey in the murder, the evidence cited above would have added substantial impeachment value to trial counsel's case. While Glory Vee was impeached with the only substantial conviction known, she was not impeached with the material presented above. Rule 608(b) provides that a witness may be impeached with evidence relating to the character of the witness for truthfulness or lack thereof. South Carolina case law explaining this rule makes clear that a witness may be impeached with specific bad acts constituting a crime, even without conviction, when these matters are probative concerning a lack of truthfulness. A

prime example of this is the commission of fraud by a witness.

It is abundantly clear that Glory Vee committed many acts of fraud. The greatest of these fraudulent acts relate to Glory Vee's efforts to pass forged and fraudulent checks written on Dr. Bang's account. She continued this fraud with both Summit Bank and the Burlington Dealership. Also, she defrauded Summerfield Suites and other businesses with the MCAS checks.

Finally, Glory Vee was subject to impeachment with documents which contradicted her trial testimony. The Penske document shows an intention to travel to West Palm Beach, not Disney World. Further, the use of a 15 foot rental truck is more consistent with a permanent move than a vacation. Finally, she was intimately aware of Aleksey's nature for criminal activity, in contradiction with her SLED statement and Bailey's closing argument. Applicant's 42 and 43 and Trial, page 1756, lines 3-4 ("She doesn't know anything about his past.").

Materiality

To understand the materiality of the evidence the State failed to disclose, one should examine the strengths and weaknesses of the State's case. As an initial matter, Aleksey's hands were tested for gun shot residue test by SLED. Defense trial exhibit 9. Even though the weight to be accorded this evidence was an issue at trial, both sides agreed that the results showed that the relevant levels of chemical elements were below the standards used to prove that a person had recently fired a gun. Tr. page, 1522-1526. However, Glory Vee's hands were never tested. But SLED experts testified that gun shot residue was found on the driver's side door panel of the vehicle. Tr. page 1514-1515.

The State relied heavily upon Aleksey's tape recorded statement in which he claimed he

shot Trooper Lingard. However, Aleksey also implicated Glory Vee as the shooter during the first part of that taped statement. Therefore, the jury was left to determine which part of Aleksey's recorded statements was truthful.

Also, Sara Pivero testified that Aleksey admitted shooting Trooper Lingard during a brief phone call placed from the Orangeburg/Calhoun Detention Center to Ms. Pivero's cell phone in Philadelphia. However, evidence admitted at trial and information presented in a later portion of this brief question the credibility of Ms. Pivero.

Finally, Glory Vee testified that Aleksey was the lone person responsible for Trooper Lingard's death. Because she claimed to be the only adult eyewitness to this shooting, her credibility and bias became a crucial issue at trial. Despite the existence of all of the evidence recited above, the impeachment of Glory Vee was very limited.

As an initial matter, the trial transcript only contained eighteen pages of cross examination by Aleksey's trial counsel . This was despite the fact that Glory Vee was initially charged with this murder and was the only other person possibly responsible for the killing of Trooper Lingard. The impeachment of Glory Vee with either prior convictions or specific instances of conduct was limited to the existence of one prior conviction for possession of cocaine. Further, this conviction was brought out during the State's direct examination and only generally mentioned during cross examination.

Glory Vee's cross examination was limited to only certain matters. First she was questioned about her knowledge of Aleksey's possession of the firearm obtained by Yelena Batkilina. Tr. pages 1311-1312. Second she was questioned about her last name and her previous marriages. Tr. pages 1312-1313. Further, she was questioned about her husband's

firearm and whether she ever fired Marcus Blackwell's gun. Tr. pages 1328-1329.

Also, she was questioned about meeting Aleksey as well as her work and domicile during December 1997. Tr. page 1329, line 13- page 1331, line 10. (Trial counsel appeared surprised that Glory Vee even had a job during December, 1997. Tr. page 1329, lines 17-20.) Glory Vee was questioned about her experiences driving the Mustang. Tr. page 1332. Finally, she was also questioned about her conversations with her children before they spoke to the police and about her conversations with the police prior to her preparation of her SLED statement. Tr. page 1339-1342.

Thus, the State's case was anchored upon Glory Vee's claim as an eyewitness to the shooting. Aleksey's counsel even testified that production of the non-disclosed evidence would have been helpful to Aleksey's defense. PCR, page 935, lines 2-11. Again, evidence pointing to Glory Vee's guilt not only impeached her credibility but pointed away from Aleksey's involvement in the shooting. Had the jury been presented with the incredible amount of evidence regarding Glory Vee's fraudulent crime spree during December, 1997 and her competing motive to avoid apprehension, there is a reasonable probability that the outcome of the trial would have been different.

Napue/Prosecutorial Misconduct/Misleading statements by Solicitor

The State's Solicitor made several statements to the jury which were false or misleading when compared to the evidence presented at the post conviction merits hearing. At the time of the making of the false statements, the Solicitor either knew or possessed sufficient knowledge of the existence of this evidence. As stated by the U.S. Supreme Court: "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is

any reasonable likelihood that the false testimony could have affected the judgment of the jury"; Napue v. Illinois, 360 U.S. 264, 269 (1959). There is a reasonable likelihood that the presentation of these false statements affected the judgment of the jury.

Nobody looking for her

The first of these false statements occurred during the State's closing argument in the guilt-innocence phase of Aleksey's trial. When arguing that Aleksey was the only person in the Mustang with motive to kill Trooper Lingard, Solicitor Bailey contrasted Aleksey's motive to avoid apprehension with Glory Vee's motive to avoid apprehension. To quote the State's position in this regard, Bailey stated:

> "Glory Vee 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."
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> Tr. p. 1752, lines 7-9 & Tr. p. 1753, lines 15-22.

Thus, the argument that Glory Vee had no motive to avoid apprehension is a false statement in light of the evidence presented at the post conviction hearing and referenced in the Brady portion of this brief above. Applicant's exhibits 25-43.

Solicitor Bailey had sufficient awareness of this information so that a duty arose for him to refrain from making the false statement. At the PCR hearing, Bailey stated that he had a "generalized knowledge" of the scam involving Dr. Bang, Summit Bank, and the Burlington auto dealership. PCR, p. 1705, lines 19-24. In fact, when questioned about his knowledge of Dr.

Bang, Solicitor Bailey stated that he understood that Glory Vee worked for him at one time and "she stole some checks at some point in time while she was employed there." PCR, p. 1270, lines 7-10.

SLED Agent Darnell testified that this information sounded familiar. PCR, p. 1631, line 17-p. 1634, line 22. Darnell was able to recall that Glory Vee stole checks from Dr. Bang, wrote these checks and tried to cash them. Darnell also recalled that Dr. Bang fired Glory Vee. Darnell remembered that Glory Vee tried to cash checks at Summit Bank. Finally, Darnell remembered that Glory Vee tried to purchase a vehicle at the Burlington dealership, "[b]ut they didn't pick it up, the check didn't go through." PCR, p. 1634, lines 14-21.

The State recalled Solicitor Bailey as a witness at the PCR hearing. This testimony followed that of Agent Darnell's cited above. Solicitor Bailey admitted he was present for "most" of Agent Darnell's testimony. In response to questioning about the Dr. Bang, Summit Bank, Burlington Dealership scam, Solicitor Bailey stated that he had the same "generalized knowledge of these events" as Agent Darnell did. PCR, p. 1705, lines 12-24.

And none of this evidence was admitted, argued, or used as impeachment evidence at trial. In fact, neither the trial judge or jury ever heard any of this information related to the Dr. Bang, Summit Bank, and Burlington dealership scam. Neither through statements of any trial counsel nor the presentation of any evidence could the jury divine the falsity of Solicitor Bailey's statements.

Does not know anything about his past.

Compounding the taint from the false statement that Glory Vee's lacked motive to avoid apprehension was Solicitor Bailey's argument in support of Glory Vee's credibility. In

characterizing Glory Vee's association with Aleksey, Bailey stated that she knew nothing about his past. Specifically, he declared:

> "She got up here and testified under oath that she was a passenger in the car. She had just met this guy a few weeks earlier. She had poor judgment. She took up with this guy she had not known for too long. They are going down to Disney World. She doesn't know anything about his past. She doesn't even know his real name. She thinks he is, I think, Michael Toscani or Pivero or something. She knows him as Michael. She doesn't know who he is."
>
> Tr. p. 1755, line 23- 1756, line 8.

Glory Vee certainly knew who Aleksey was. She was involved with him as early as November 30, 1997. Aleksey lived at the Westin Hotel when he phoned Glory Vee at Dr. Bang's office. Later, he checked into the Summerfield Suites hotel room, listed under Glory Vee's name and paid by Glory Vee's with fraudulent checks written on her closed MCAS account. Aleksey then traveled with Glory Vee from hotel to hotel as she changed her last name for use on the hotel registry to assist their collective effort to avoid apprehension.

This flight was financed through the Dr. Bang, Summit Bank scam centered in Trenton, New Jersey. Glory Vee fraudulently obatined $1,000.00 cash from Summit Bank, through the deposit of forged checks written on Dr. Bang's account. The Summit Bank internal investigator at the time, Chris Sontag, testified that he only wished his police trap would have captured Glory Vee and Aleksey because Trooper Lingard would then still be alive.

And again, Solicitor Bailey was aware of the truth, but instead mislead the jury. In fact, Bailey inflamed the misleading nature of his statement by vouching for SLED's credibility. Bailey stated that "[Agent Darnell] conducted further investigation (of Aleksey). They are

intelligent people at SLED. They don't look at the rap sheet at face value. They go into it...." Tr. page 1753, lines 4-7. Thus, when SLED investigated Aleksey's fraudulent activity during December 1997, they investigated Glory Vee's as well. Under the facts presented, Glory Vee could not have assisted her co-defendant in fraudulent activity without knowledge of the co-defendant's character.

Ineffective Assistance of Counsel

Failure to Investigate/Impeach/Introduce Character Evidence of Glory Vee

As an independent ground for relief, Aleksey's trial counsel failed to adequately investigate Glory Vee's background and failed to utilize the material available to undermine credibility in Glory Vee's testimony. Trial counsel's conduct in this regard fell below a reasonable standard for the performance of counsel in similar circumstances. Trial counsel had no reasonable strategy to excuse this failure. And if not for this failure, there is a reasonable probability that the outcome of Aleksey's trial would have been different.

Dr. Bang, Summit Bank, Burlington Scam

The largest failure on the part of trial counsel involved their inability to discover any of the large amount of evidence of Glory Vee's fraudulent activity, specifically occurring during December 1997. As indicated above, an incredible amount of evidence documents Glory Vee's fraud related to the Dr. Bang, Summit Bank, Burlington auto dealership scam. Generally, Applicant's 25-43. Even though almost none of these materials were provided to trial counsel by the prosecution, Mr. Aleksey provided trial counsel sufficient notice of Glory Vee's activities such that counsel had a duty to investigate her activities related to the Dr. Bang, Summit Bank, Burlington auto dealership scam.

Specifically, Aleksey informed Attorney Stone about Glory Vee's fraudulent activities with her boss. The most obvious proof of notice to trial counsel is found in Attorney Stone's notes dated March 25, 1998. Applicant's 65. To quote from these notes, Stone wrote:

> "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."
>
> Applicant's 65, page 2.

Further, three letters were submitted as Applicant's 23 (a), (b), (c). These letters were hand written by Aleksey. Attorney Stone admitted receiving these letters. PCR, page 930, lines 8-11. These letters provided defense counsel with sufficient notice to produce a duty for counsel to investigate Glory Vee's employer during December 1997.

The first of these letters was dated March 14, 1998 and contained information consistent with that referenced in Stone's notes. Specifically, Aleksey stated "[t]hey (SLED) have the checks that Glory stole from her job about thirty company checks. Doctor B(illegible) checks Trenton, New Jersey." Applicant's 23(a). In fact, Solicitor Bailey did provide, in discovery, checks found in the Mustang[2]. Applicant's 32.

The second letter was dated March 29, 1998, but contained no reference to the Dr. Bang scam. The third letter was dated April 19, 1998. In this letter, Aleksey informed his counsel that

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[2]Solicitor Bailey never informed trial counsel of the exculpatory nature of the checks, but merely provided copies of the checks, as submitted in Applicant's 32. Bailey himself asserted that these checks, standing alone, did not provide notice of Glory Vee's fraudulent activity. PCR, page 1285, line 5-page 1286, line 2.

Glory Vee worked in Trenton at a medical center. Aleksey provided the address as either Oslee Avenue or Fuld Street in Trenton. Further, the employer's name was listed as Dr. Band or Bang. As indicated in the Trenton Police Report, Dr. Bang's office was on Fuld Street in Trenton, New Jersey during 1998. Applicant's 34.

Also, in the April 19, 1998 letter, Aleksey referenced the Burlington auto dealership. In fact, he detailed Glory Vee's effort to pass a $20,000.00 false certified check to obtain a Lincoln Mark VIII. Finally, this letter detailed Glory Vee's movement from hotel to hotel, as portrayed above.

Aleksey's further conveyed information to his attorneys during telephone calls. Documentation of one such call was made by Danetta. Her notes from a March 30, 1998 telephone call were admitted as Applicant's 22. Attorney Sims verified that Danetta worked for him at the time, was authorized to speak with Aleksey and "guessed" that the handwriting on the note was hers. PCR, page 325, line 19-327, line 7. During this call, Aleksey informed Danetta that Glory "took checks from her job opened an account Summit Bank, Pennsylvania, Northeast Philadelphia, $26,000.00 total of the checks." These notes also referenced Aleksey's letter introduced as Applicant's 23 (b).

Danetta's notes also informed counsel about Glory Vee's bad checks. Below that notation, was reference to Glory Vee's account in Beaufort, South Carolina. Information about that account also appeared in the letter from March 29, 1998. Applicant's 23 (b). That letter listed the bank in Beaufort as "MCAB or something which had those letters." The letter continued by referencing Summerfield Suites, Penske truck rentals, and Com Check as recipients of Glory Vee's MCAS checks. Just as the case with Dr. Bang's scam, other exhibits introduced

at the PCR hearing prove the assertions Aleksey made to his trial counsel.

Finally, Danetta's notes outlined the information available at the Penske truck leasing center in New York. These notes informed counsel to contact Al at Penske truck rental in Manhatten and listed Al as the manager. The information in these notes was consistent with that contained in Glory Vee's Penske truck leasing reservation. The March 29, 1998 letter also confirmed the need to contact Al at Penske in regards to bad checks written by Glory Vee. Applicant's 23 (b).

Prior Inconsistent Statements

Another instance of failure to impeach Glory Vee involved the discrepancy between her SLED statement and her trial testimony. Aleksey's trial counsel was privy to a tape interview between Glory Vee and SLED as well as Glory Vee's written SLED statement. Applicant's 42 & 43. These statements contradict Glory Vee's trial testimony. Also, the SLED statements are contradicted by evidence of the Dr. Bang scam cited above. However, she was not impeached with these inconsistencies.

Specifically, Glory Vee informs SLED that she was ignorant of Aleksey's criminal doings. Applicant's 42, p. 2 & p. 3. She states: "Nope, I don't know of any criminal records at all. He didn't show to be that type person."..... "I don't know him that long and even if I did, he might not have even said anything to me being the person that I am. He probably wouldn't have never said anything to me about any kind of criminal record." In fact, Glory Vee was Aleksey's accomplice in a month long crime spree, recited above.

Also, Glory Vee informed SLED that she "had nowhere to stay." Applicant's 42, p. 1. Further, she stated "Present address, I have none, I don't have a present address."... "I could call

a couple of people and see if I could stay with them." Applicant's 42, p. 3. But at trial, Glory Vee testified that she "was staying with my best friend." Tr. p. 1329, l. 22- p. 1330, l. 9. In fact, evidence of Glory Vee's homelessness coupled with her custody of her two children and the evidence of the December 1997 crime spree emphasizes Glory Vee's competing motive to avoid apprehension.[3]

This failure undermines confidence in the outcome of Aleksey's trial. Examination regarding these prior statements would have opened the jurors eyes to Glory Vee's lack of credibility. She lied to law enforcement and would lie to the jury to save her own skin.

Glory Vee's ability to "Cut a deal" and Shift Blame.

Further, defense counsel was ineffective for failing to impeach Glory Vee regarding her ability to "cut a deal" and shift blame. A part of this failure also resulted from inadequate investigation into the plea bargain cut by Glory Vee regarding her 10 prior indictments for drug dealing and into her involvement in the theft of Dr. Bang's checks. Also, the defense should have presented the jury with evidence that Glory Vee successfully shifted blame in two criminal investigations prior to Aleksey's trial.

First, the defense should have properly investigated Glory Vee's successful plea bargain regarding her Trenton drug dealing. Applicant's 37. A proper investigation would have revealed information that Glory Vee negotiated the dismissal of 9 felony drug indictments. In exchange for the dismissals, Glory Vee provided testimony for the government which placed her mother in prison for these same crimes. Applicant's 37, p. 7-10. However, this negotiation resulted in no

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[3]Glory Vee actually did lose custody of the children following her apprehension on January 1, 1998. Applicant's 27.

prison time for Glory Vee.

Next, proper investigation of the theft of Dr. Bang's checks would have revealed that Glory Vee told the police that Aleksey was the guilty party in this theft. Applicant's 34. By doing so, Glory was able to avoid arrest for this theft by shifting blame from her to another, just days before her arrest for murder in South Carolina. Thus, Glory's blame shifting activity constitutes evidence of a trait of Glory's character properly admissible under Rule 404(a) during Aleksey's trial.

Also, with the specific information that Glory in fact did cut a deal regarding the drug trafficking charges, the defense would have received permission to impeach Glory under Rule 608(c) as motive to misrepresent. This issue was decided correctly against the defense at trial, but without the benefit of the deal cutting evidence. Tr. p. 1316, l. 1-p. 1317, l. 20. Had the deal cutting evidence been discovered by the defense during investigation, presented to the trial judge and placed in the record on appeal, Glory would have been subject to impeachment under the rules of evidence. See State v. Jones, 541 S.E.2d 813, at 817 (SC 2001) ("Rule 608(c) preserves South Carolina precedent holding that generally, 'anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony.'") quoting State v. Brewington, 226 S.E.2d 249 (SC 1976)(citing 98 C.J.S. Witnesses § 460). Glory's credibility was a central issue in Aleksey's trial.

Obviously, the prejudice from this failure undermines credibility in the outcome of Aleksey's case. Instead of being impeached with two specific instances of blame shifting and motive to misrepresent, Glory was only impeached with evidence of one conviction. This is a

sharp contrast to the jury's awareness of sixteen arrests against Aleksey pending adjudication. Again, the jury's only question was whether Glory or Aleksey murdered Lingard.

Failure to Present Testimony of Elizabeth and Marcus Blackwell

Alekesy's trial counsel was also ineffective for failing to present the testimony of Marcus and Elizabeth Blackwell. Marcus Blackwell was one of Glory Vee's two estranged husbands at the time she was charged with Lingard's murder. Applicant's 25. Elizabeth Blackwell was Marcus' mother; who knew Glory Vee and Gloria Mai through this marriage. Applicant's 27. The failure to present their testimony undermines confidence in the outcome of the trial below.

Marcus Blackwell met Glory Vee through his military service in Philadelphia. Tr. p. 1328, l. 13-18. Following their marriage, the couple moved to Beaufort, South Carolina. Tr. p. 1328, l. 24-p. 1329, l. 2. This marriage lasted less than two years, but produced Glory Vee's third child-Mercedes Blackwell.[4]

As Glory Vee's mother in law, Elizabeth became familiar with Glory Vee's character. In fact, Glory Vee lived briefly with Elizabeth Blackwell in North Carolina following the separation from Marcus. Applicant's 27. Gloria Mai and Mercedez were released to Elizabeth's custody following family court proceedings and resided there prior to Aleksey's trial.

Marcus Blackwell would have testified that Glory Vee possessed a violent character. Specifically, Glory Vee shot Marcus' pistol in a residential neighborhood on Old Jericho Road in the City of Beaufort. Applicant's 25. Also, Glory Vee kicked out Marcus' automobile

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[4] Mercedes Blackwell was the infant in the white mustang on December 31, 1997 along with her sister Gloria Mai Perez.

windshield during an argument following a dinner date.[5]

Marcus would have also testified that Glory Vee bragged about being able to pass for her sister, Dominga Perez. Applicant's 25. Again, the state argued that evidence of Aleksey's motive was proof of identity of Lingard's killer. The state bolstered this argument by demonstrating Aleksey's use of fake identities. However, Marcus' testimony coupled with Glory Vee's possession of Dominga Perez' id at the time of the murder would constitute evidence that Glory Vee was also practiced in the art of avoiding apprehension. Tr. p. 1313, l. 2-13 & Applicant's 24.

Elizabeth would have testified that she questioned Gloria Mai about the events of December 31, 1997, prior to Aleksey's trial. Unlike her trial testimony, when Gloria Mai was questioned about the shooter's identity by Elizabeth Blackwell, she responded "Mommy told me Michael (Aleksey) was driving." Applicant's 25 but compare Tr. p. 1372. This response implies that Gloria Mai did not independently possess knowledge of the shooter's identity. Thus, Glory Vee was the only witness, other than Aleksey to the shooting.

Elizabeth also would have testified that Glory Vee told her, after arrest but pre-trial, that "They can not charge two people with the shooting." Applicant's 25. Further, Elizabeth's opinion of Glory Vee was that she was untruthful. See Rule 608(a) SCRE. Finally, Elizabeth's testimony would have been corroborated by her contemporaneous notes of these matters, still in her possession today. Applicant's 25.

The prejudice from the failure to present the Blackwell testimony is obvious. The

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[5]Marcus' testimony would have provided the trial judge with evidence that the windshield incident was one of violence. See Tr. p. 1324, l. 17-19.

impeachment of Glory Vee's testimony was very limited. However, the Blackwell testimony would have provided competing evidence for the jury to consider from the source most able to evaluate Glory Vee's character.

Sara Pivero- Grounds O(5) & (9); P(3) & (5); & O(3)

Brady Claim

The solicitor improperly withheld impeachment material, in violation of the provisions of Brady v. Maryland in regards to the guilt-innocence phase testimony of Sara Pivero. Brady v. Maryland, 373 U.S. 83 (1963). In Strickler v. Greene, 527 U.S. 263, 281-282, (1999), the United States Supreme Court set out the three components or essential elements of a Brady prosecutorial misconduct claim: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, at 281-282.

In Gibson v. State, the Supreme Court of South Carolina reversed a voluntary manslaughter plea based upon the petitioner's claims under the Brady case and its progeny. *Gibson v. State*, 514, S.E.2d 320 (SC 1999). There, the prosecution summarized witness statements during the establishment of a factual basis of the guilty plea entered by Mr. Gibson. Following the plea, Mr. Gibson became aware of a prior inconsistent statement provided by one of the prosecution's witnesses. Id. This inconsistent statement was known to the prosecution but not provided to the defense. The Court specifically found that the witness statement suppressed in Gibson was additional proof of the witness' alleged lies. Id. Finally, the Court stated that had the evidence been disclosed, Gibson's lawyer would have known that cross-examination would have impeached the witness instead of merely "hoping he could impeach" the witness. Id. at 326.

In the case at bar, the record establishes that the State of South Carolina held evidence of

a prior, inconsistent statement from Ms. Pivero which impeached her character for truthfulness. This inconsistent statement was not turned over to the defense and had the impeachment material been provided, there is a reasonable probability that the outcome of the trial would have been different.

As an initial matter, the defense filed, pre-trial, a Motion For Production of Material Under Brady and S.C. Criminal Rule 5. Applicant's proposed 94. This motion requested evidence from the prosecution including "any and all records, memoranda and documents, as well as a statement of the County Solicitor and all appropriate state, federal and local law enforcement agencies as to:....Any 'inconsistent' statements of a particular witness or between witnesses..."

During the guilt-innocence phase of Mr. Aleksey's trial, the government presented the testimony of Sara Pivero. During direct examination by the Solicitor, Ms. Pivero testified that Mr. Aleksey called her cellphone from the Orangeburg-Calhoun Detention Center on January 2, 1998 and confessed to killing a trooper. She also testified that Mr. Aleksey engaged in fraudulent conduct regarding the procurement of various automobiles.

On cross-examination, Ms. Pivero was questioned regarding her involvement in the procurement of an expensive Lexis automobile. While falsely minimizing her role in the Lexis scam, Ms. Pivero admitted that she was the author of fraudulent checks provided as a down payment for the Lexis. This trial court statement by Ms. Pivero was a truthful statement. The defense engaged in no cross examination regarding any prior inconsistent statements regarding the authorship of these checks.

During preparation for the merits hearing in the present case, the undersigned counsel

obtained by subpoena a copy of the Solicitor's file. Included in this file was a letter written by the Solicitor to the Doylestown, PA police department. Applicant's proposed 85, letter from Bailey to Dean Logan, dated July 16, 1998. As this letter indicates, Ms. Pivero told Solicitor Bailey during witness preparation that Mr. Aleksey was the author of these checks. Solicitor Bailey continued in this letter to request a copy of these checks written by Mr. Aleksey.

In response, Det. Dean Logan corrected Ms. Pivero's statement by informing Solicitor Bailey that Ms. Pivero was in fact the true author of these checks. Applicant's proposed 85, Dean Logan report dated July 23, 1998. Further, police reports compiled by Dean Logan document that Ms. Pivero had been untruthful to Det. Logan during his interview with her regarding the Lexis scam. Applicant's 55, Dean Logan report dated 10/11/96, p.1, par. 4; 10/17/96, p. 1, par. 3; 11/15/96, p. 2, par. 1; 11/20/96, p. 1, underlined portion.

Solicitor Bailey never informed the defense of the pre-trial inconsistent statement made by Ms. Pivero. The letter documenting Ms. Pivero's inconsistent statement was not addressed to defense counsel or provided to them as a carbon copy. Neither this statement nor the letter itself was listed on any of the discovery documentation from the Solicitor to the defense. Finally, the defense did not make use of this information during cross-examination.

This prior false statement to the prosecutor was material impeachment evidence in Aleksey's trial. Pivero testified that Aleksey confessed to her during a cell phone call on January 2, 1998. Further, Bailey stressed this confession during his closing argument. This proof that Pivero would lie to Bailey suggests that Pivero would lie to the jury.

Ineffective Assistance of Counsel Claim

Aleksey also argues in his petition that his trial counsel provided a constitutionally

deficient performance in relation to the testimony of Ms. Sara Pivero. Specifically, trial counsel provided a deficient performance in failing to adequately impeach Ms. Pivero. In order to prevail on this claim, Mr. Aleksey must demonstrate that trial counsel's performance fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different. A reasonable probability is one sufficient to undermine confidence in the trial's outcome.

In the trial below, Ms. Pivero testified in both the guilt-innocence phase and the penalty phase of the capital proceedings. Her testimony related to the guilt-innocence phase included testimony that Mr. Aleksey called Ms. Pivero's cell phone on January 2, 1998 and confessed to shooting Trooper Lingard. Tr. p. 1610-1612. The defense's cross examination of Ms. Pivero was limited and failed to impeach her with material within their possession. Tr. p. 1612-1621.

Specifically, the defense failed to impeach Ms. Pivero with the fact that she was convicted of five crimes related to the fraudulent procurement of an expensive Lexis automobile. According to Ms. Pivero's "rap sheet" provided by the state, Ms. Pivero was convicted on July 28, 1997 for three felony counts of Theft by Deception and two misdemeanor counts of Bad Checks. Applicant's 52. Under SC Rules of Evidence Rule 609, trial counsel was entitled to cross examine Ms. Pivero with the fact of these five convictions in an effort to attack her credibility.

Trial counsel failed to impeach Ms. Pivero with the fact of these convictions and offered no strategic reason to justify this failure. Further, the Solicitor indicated that Ms. Pivero's testimony was the "next strongest piece of evidence" offered at trial outside of Mr. Aleksey's taped statement. PCR, p. 1256, l. 7-9. Obviously her credibility was essential to this claim.

Also, trial counsel failed to impeach Ms. Pivero regarding her extensive involvement in the Lexis fraud. Tr. p. 1612-1621. Despite having been provided police reports from the prosecution indicating several instances of false statements made to Doylestown Detective Dean Logan, trial counsel failed to utilize this information. Applicant's 55, Dean Logan report dated 10/11/96, p.1, par. 4; 10/17/96, p. 1, par. 3; 11/15/96, p. 2, par. 1; 11/20/96, p. 1, underlined portion. This failure allowed her trial testimony, characterizing herself as a victim in the Lexis fraud, to go unchallenged.

First, Ms. Pivero testified at trial that she did not know that the checks related to the Lexis fraud were written on an account with insufficient funds. Tr. p. 1909. She elaborated by indicating that Mr. Aleksey was to have deposited checks into her account to cover the checks she wrote which were later determined to be worthless. However, police reports indicate that she was hoping to receive checks from a friend but that she did not know for certain whether she would ever receive these checks. Applicant's 55, Dean Logan report dated 11/15/96, p. 1, par. 3. In a later interview with Detective Logan, Ms. Pivero indicated that Michael (Bayan Aleksey) was to provide her with checks for lighting work. Applicant's 55, Dean Logan report dated 11/20/96, p. 4.

Second, Ms. Pivero testified during trial that she and Mr. Aleksey were boyfriend-girlfriend at the time of the Lexis fraud. Tr. p. 1608, l. 1-3. However, according to police reports provided to the defense in pre-trial discovery, Ms. Pivero alternately told Doylestown Police Detective Dean Logan that Aleksey was her brother or her half-brother. Applicant's 55, Dean Logan report dated 10/11/96, p. 1, par. 4 & report dated 11/15/96, p. 2, par. 1. Ultimately, Ms. Pivero admitted to Dean Logan that she was not related to Aleksey. Applicant's 11/20/96, p. 1,

underlined portion.

Third, Ms. Pivero testified at Aleksey's 1998 trial that she was employed at the time of trial as a hairdresser with an annual income of about $15,000.00. Tr. p. 1607, l. 1-6 & p. 1909, l. 21. The trial testimony indicated this employment was with Sensational Scissors for a period of four years. However, the credit application Ms. Pivero submitted in her handwriting to the Lexis dealership during the Lexis fraud indicated an annual income of $90,000.00. Applicant's 55. As further contradiction of her trial testimony, Ms. Pivero testified during her 1997 guilty plea that she lost her job because of Mr. Aleksey and worked at a grocery store. Applicant's 51, p. 4, l. 19-25. Her Indigency Affidavit from May 1, 1997 confirms her employment with a Giant grocery store franchise. Applicant's 53.

This information clearly shows that Ms. Pivero had trouble being truthful to law enforcement and the court system. The lies to Dean Logan and Solicitor Bailey portray a pattern of misrepresentation. Had the jury been exposed to Pivero's false statements and observed her impeachment, it is likely that the outcome of the trial would have been different.

Yelena Batkilina-Grounds O(2) & (9); O(2); and R(1)

Brady

The solicitor improperly withheld impeachment material, in violation of the provisions of Brady v. Maryland in regards to the testimony of Yelena Batkilina. In Strickler v. Greene, the United States Supreme Court set out the three components or essential elements of a Brady prosecutorial misconduct claim: "(t)he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." 527 U.S. 263, at 281-282, (1999). Here, the State failed to provide the defense with several items of impeachment value. Knowledge of the existence of these items is imputed to the prosecution and there is a reasonable probability that the outcome of the trial would have been different had these items been provided to defense counsel.

The first set of Brady material not provided relates to Ms. Batkilina's involvement in a scam in Florida. There she was convicted for attempt to commit fraudulent use of a credit card and conspiracy to commit grand theft. Applicant's 3 & 6. Under Rule 609, convictions of certain crimes may be used to impeach a witness' credibility. Further, evidence of the bad character of witness may be used for impeachment in some circumstances under Rule 608 (b).

Obviously, Batkilina's convictions for the two crimes in Florida were fair game for impeachment of her testimony by trial counsel. Nothing in the record indicates that these materials were provided in discovery by the State. Further, trail counsel was provided a rap sheet on Batkilina which did not include these convictions. However, the State was on notice regarding these convictions as indicated by the reference to a credit card scam contained in the

ATF trace report provided to SLED relating to the gun purchase. See Applicant's 4. Finally, Aleksey's told SLED about Ellen's legal problems in Florida. Tr. 2286, l. 1-7.

The second set of Brady material relates to Ms. Batkilina's scam to obtain a Volvo automobile through the use of a fraudulent check in the amount of $33,551.80. Applicant's 10. This fraudulent activity occurred within the Lower Moreland Township, Pennsylvania. A police investigation of this matter produced a police report and the victim of the fraud held detailed financial records related to the scam. Applicant's 9.

The police report was forwarded to the Fugitive Task Force and specifically provided to a member of that task force, Kathy Colfer. Applicant's 9, supplemental report p. 3 of 4. Also, SLED Agent Darnell's notes contain Task Force Agent Colfer's telephone number. Applicant's 84(a). Further, Agent Darnell testified that he "talked to quite a few of them in Pennsylvania...". PCR p. 1651, lines 16-17.

Had this material been provided to Aleksey's trial counsel, then the fraudulent conduct of Batkilina, in August 1997, could have been used to impeach Batkilina's implication that Aleksey stole the gun or obtain the gun from her against her will or absent her consent. SCRE Rule 608(b). Further, this testimony directly contradicts the government argument that Batkilina's was not aware of Aleksey' whereabouts after his February 1997 release on bond. Tr. p. 922-924 & p. 1763, l. 15-21 & Applicant's 5, p. 6, l. 19-23.

Ineffective Assistance of Counsel

Trial counsel for Aleksey were ineffective for failing to adequately investigate and impeach the testimony of Yelena Batkilina. This failure to investigate and impeach indicates a performance below a reasonable standard for such services and, but for these deficiencies, the

outcome of the trial below would have been different.

Ms. Batkilina, known alternately as Yelena and Ellen, testified as a state's witness in the gult-innocence phase of Mr. Aleksey's trial below. During this phase of the proceedings, she testified primarily about the purchase of the handgun which was determined to be the murder weapon. The state relied upon this testimony to argue that Aleksey stole the gun from Ms. Batkilina and then eluded Ms. Batkilina in her efforts to find Aleksey. Tr. p. 1763, lines 17-19 ("She carried the gun home. The gun disappears, he disappears and she sees it again here in court the next time.")[6]

However, the record indicates the State's evidence and argument implying that Aleksey disappeared from Ms. Batkilina's life shortly after the gun was purchased is false. At trial Batkilina testified in agreement with the statement that "November 2nd, that would have been" the last time she saw the gun. Tr. p. 920, lines 11-16. She then testifies that the last time she saw Aleksey was November of 1997.[7] Tr. p. 920, lines 17-20. Finally, Batkilina testified that she did not know where Aleksey went after his release on a bond posted by Batkilina in regards to a credit card charge in Buck's County, Pennsylvania. Tr. p. 922, line 15-923, line 3; & p.924, line 15-925, line 7 & Applicant's 5. Thus, this testimony supported an inference that the gun was purchased on November 2, 1997, that Aleksey was bonded out about this same time and was last

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[6]Even though not available until after Aleksey's trial, Applicant's 5 demonstrates the intended implication of Batkilina's testimony. ("I purchased the gun for myself and he stole it.") See Applicant's 5, p. 7, line 23- p. 8, line 25.

[7]Applicant contends that this date is accurate when viewed independent of the implication that the gun disappeared shortly after the November, 1996 purchase or that Aleksey disappeared after bonding out of jail or that these three events occurred in close temporal proximity to one another.

seen by Batkilina after the date the bond was posted.

After PCR investigation, it is clear that the date the gun was purchased, the date Batkilina last saw Aleksey, and the date of the posting of this bond are all different. Applicant's exhibit 4 clearly shows the gun purchase was finalized and the gun received by Ms. Batkilina on November 2, 1996, not 1997 as implied by Batklina's trial testimony. Also, Applicant's 5 demonstrates that Bakilina bonded Aleksey out of jail in Buck's County, Pennsylvania during February 1997.

Further, Batklina's relationship with Aleksey is documented in police reports through the end of August 1997, just months before his arrest. A review of Applicant's 6 indicates that Batkilina was charged with a scam occurring between April and May 1997. Applicant's 3 confirms that Aleksey was involved with Batkilina in this scam.

Applicant's 9 demonstrates that Aleksey and Batkilina perpetrated a scam at the Burdumy Volvo dealership during August 1997.

Also , Batkilina remained close enough to Aleksey that she used Aleksey's New York address as her home address on the New York driver's license she procured on September 30th, 1997. Applicant's 11. The address listed on this driver's license also appears as Aleksey's address listed in the transcribed statement Aleksey made to SLED. Tr. p. 2413.

Thus, Batkilina obviously knew of Aleksey's whereabouts after his release on bond. As Applicant's 3, 6, and 9 indicate, Batkilina and Aleksey were together after the bond date of February 1997. Again, Batkilina admitted she last saw Aleksey in November 1997. If the gun was missing after the November 1996 purchase date and Batkilina believed it stolen by Aleksey, it seems unlikely that she would have remained involved with him for another 12 months.

The defense could have discovered the inaccuracy of the statement about Aleksey's whereabouts after his bond date had they conducted an investigation into Batkilina's history. The Burdumy Volvo scam was documented in a police report from the Lower Moreland Township in Pennsylvania and this report was in the possession of a Federal Fugitive Task Force. Likewise, the scam documented in Applicant's 6 was referenced in both Aleksey's statement to SLED and in the ATF trace report conducted on the origin of the gun. Tr. p. 2286, lines 1-15; & Applicant's 4. Further, no strategic justification for this failure is indicated in the record. Finally, the defense's use of this material to impeach Ms. Batkilina would have prevented the jury's invitation to infer that Aleksey stole the gun, bonded out and disappeared in November 1997 as part of a crime spree culminating in Lingard' murder.

Lisa Watson-Grounds-Grounds O(3) & (9); P(4) & (5); Q(4); & R(4) & (5)

Napue Claim

The solicitor improperly failed to correct false testimony provided by Lisa Watson during the sentencing phase of Mr. Aleksey's trial. More specifically, Lisa Watson testified that Mr. Aleksey stole money and goods from her including money from her husband's credit card. However, Mrs. Watson actually stole the money from her husband's credit card with Mr. Aleksey's assistance.

According to the United States Supreme Court, "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury"; Napue v. Illinois, 360 U.S. 264, 269 (1959).

The State presented the testimony of Lisa Watson during both the guilt-innocence and sentencing phases of Mr. Aleksey's trial. Relevant to Mr. Aleksey's claim under the Napue line of cases, Mrs. Watson testified during the sentencing phase regarding financial losses she suffered as a result of Mr. Aleksey's actions. Among these losses, she included losses on her husband's credit cards.

During direct examination, Mrs. Watson testified concerning the amount of loss *she* suffered from her relationship with Mr. Aleksey. Tr. p. 1965. She stated that this loss totaled $42,000.00. Tr. p. 1965, l. 4-12. In a breakdown provided during this testimony she stated this total included losses to her husband's credit cards.

However, information provided to SLED by Western Union indicates the false nature of this testimony. In reality, Mrs. Watson suffered no loss from Mr. Aleksey's actions regarding

Mr. Watson's credit card. Instead Mrs. Watson was equally culpable regarding the fraudulent obtainment of this money at Mr. Watson's expense. Applicant's 13 & 14. Further, the evidence clearly indicates that Mrs. Watson received the proceeds from this Western Union fraud.

A breakdown of the evidence of this fraud is as follows. Review of the Western Union bank drafts by the undersigned counsel's questioned document expert reveals that Lisa Watson herself withdrew $7,500.00 from her estranged husband's credit card account. Applicant's 73. Furthermore, a copy of Lisa Watson's driver's license was presented to Western Union when the proceeds were delivered to Mrs. Watson. Applicant's 13, par. 4. Western Union photocopied this item and later provided a copy of this license to SLED agent Mears. Applicant's 15. A more complete breakdown of Lisa Watson's actual involvement appears in Applicant's 13, an affidavit from Western Union employee Rickie Pattin.

The prosecution was aware of the truth of Mrs. Watson's involvement and profiteering from the Western Union scam as indicated by several pieces of evidence and testimony. Most notably, Western Union employee Rickie Pattin provided detailed information to SLED agent Mears on January 7, 1998 (six days after Mr. Aleksey's arrest and eight months before trial.) See Applicant's 14. Further, SLED agent George Darnell's investigatory notes, compiled contemporaneously with the January 7, 1998 correspondence, indicate agent Darnell was informed of Lisa Watson's involvement, again, proven by Western Union's possession of a copy of Mrs. Watson's driver's license. Applicant's 84. Also, agent Darnell possessed a tape recording related to this transaction which agent Darnell himself titled "Lisa Watson Fraud". Applicant's 16.

Further, it is likely that Solicitor Bailey was apprized of the truthful evidence. In

Solicitor Bailey's own words at the PCR hearing, he indicated that the materials included in Applicant's 13, the affidavit prepared after Mr. Aleksey's trial, looked familiar. PCR, p. 1345, l. 12. Bailey later indicates that he may well have reviewed the materials included in Applicant's 14. PCR p. 1346, l. 4-20.

Also, agents Darnell and Mears served the prosecution as the lead law enforcement agents. In this capacity, they sat with Solicitor Bailey during the course of Mr. Aleksey's trial and were exempted from the court's sequestration order. These agents also accompanied Solicitor Bailey during his investigative junket to the northern seaboard in preparation for trial. PCR, p. 1682. Also, agent Darnell testified that he has no reason to believe the Western Union information was not provided to Solicitor Bailey. PCR , p. 1655, l. 16-18.

Nowhere in the trial did the State correct Lisa Watson's false testimony. Solicitor Bailey admits he did not correct Lisa Watson's testimony, but instead indicates he did not know of its false nature. PCR p. 1348, l 11-21. Allowed to remain uncorrected, the jury was free to believe that Lisa Watson was the victim in the fraud on Mr. Andrew Watson's credit card.

Mr. Aleksey suffered prejudice from this uncorrected false testimony. Aleksey's trial counsel was placed in the position of arguing that the jury should not sentence Mr. Aleksey to death because of his victimization of other women including Lisa Watson. Corrected, they could have argued that Lisa Watson was a co-perpetrator and profiteer of this same fraud. Finally, had the prosecution corrected this false testimony, Lisa Watson's credibility would have been thoroughly impeach without effort by Aleksey's trial counsel.

Brady

Based upon the same testimony regarding Lisa Watson cited in the Napue section above,

the prosecution failed to comply with the requirements of Brady v. Maryland. This failure occurred because the State failed to provide Aleksey's trial counsel with information favorable to the defense regarding impeachment of Lisa Watson. The information withheld was material to Mr. Aleksey's defense because it undermined Lisa Watson testimony that Mr. Aleksey stole the Mustang automobile.

During the PCR hearing, Mr. Aleksey's trial counsel both testified that they had never seen the materials included in Applicant's exhibits numbered 13-16. PCR, p. 256 & 1043. This is corroborated by the fact that these materials were not used to impeach Lisa Watson's testimony in either phase of the trial. Also, trial counsel indicated that they would have used these materials to impeach Lisa Watson had they been provided by the State. PCR, p. 1044.

Ineffective Assistance of Counsel

Aleksey's trial counsel provided constitutionally ineffective representation based upon their failure to investigate Lisa Watson and the failure to impeach her credibility with information within their possession. The failure to investigate primarily involves a failure to discover the information regarding the Western Union fraud committed in part by Lisa Watson. The failure to impeach involves both the failure to impeach with information of the Western Union fraud and information contained in reports from Ford Motor Credit.

Reviewing these allegations of ineffective assistance of counsel in the order cited above, the record is clear that Aleksey's trial counsel failed to investigate and discover the information related to the Western Union fraud. As cited above, both counsel testified they never saw the materials included in Applicant's exhibits numbered 13-16 before the PCR hearing. PCR, p. 256 & 1043. However, trial counsel was on notice that Lisa Watson would testify at Aleksey's trial

in relation to the Aleksey's possession of the White 1998 Ford Mustang. See Applicant's 18 and Trial pps. 1275-1295.

The Ford Motor Credit reports were provided to trial counsel in pre-trial discovery. Applicant's 18. Further, Lisa Watson made allegations related to her husband's credit card loss in her SLED statement. Applicant's 20. Finally, trial counsel chose a trial strategy in which they opened the door to bad acts of Aleksey in the guilt-innocence phase of the trial; essentially asserting a character defense. See Ground O(1). This choice of strategy made imperative the need to investigate fully the backgrounds of all potential witnesses for the prosecution.

Also, Aleksey's counsel failed to impeach Lisa Watson regarding her many inconsistent statements made regarding Aleksey's possession of the 1998 White Ford Mustang. As an initial matter, the Ford Motor Credit notes admitted as Applicant's exhibit 18 were provided as part of discovery to trial counsel. These notes contain six pages of summary regarding conversations between Lisa Watson and Ford Motor Credit related to the 1998 White Mustang stopped on December 31, 1997. Applicant's 18.

The most glaring information available but not used to impeach Lisa Watson's credibility pertained to the reporting of Aleksey's theft of this vehicle. At trial, Lisa Watson testified that she immediately reported the vehicle stolen within the first week following the September 30, 1997 purchase from the dealership in Pennsylvania. Tr. p. 1280, lines 6-9 and 1282, lines 1-2. However, as indicated by a police report from the 8th District of the Philadelphia Police Department, Lisa Watson did not report the vehicle missing until 2:30 p.m. on November 13, 1997. Applicant's 17. This is more than six weeks from the day the Mustang left the dealership. Finally, inconsistent with both of these statements, Lisa Watson told SLED that she reported the

car stolen on October 1 or 2, 1997 in person at the police department. Applicant's 20.

Also, Lisa Watson did not ever report the car stolen to the police, but instead asked the police to "try and locate" the vehicle she claimed she "lent" to Aleksey. Applicant's 17. However, at trial, in direct response to questioning by Solicitor Bailey, she claimed she reported "the car stolen up in Philadelphia." Tr. p. 1279, lines 18-22.

As a third inconsistency regarding Aleksey's use of the vehicle, Lisa Watson told Ford Motor Credit that Aleksey "stole" the car along with her "credit cards, keys and all info" regarding the Ford transaction. Applicant's 18, p. 5-phone call on November 19, 1997, 1547 hours. However, at trial Lisa Watson testified that she left the dealership before Aleksey left with the Mustang on September 30, 1997 and she never saw the car again. Tr. p. 1279, lines 23-25 and p. 1281, lines 1-2. In fact, as indicated by the Western Union information contained in Applicant's 13-16, Lisa Watson was with Aleksey on October 1, 1997, the day following the lease of the Mustang. Obviously, Aleksey was still with the Mustang from September 30, 1997-January 1, 1998 (the day of his arrest in the case below). Finally, Lisa Watson never indicated Aleksey stole her "credit cards, keys and all info" in either her trial testimony or the police report made to the 8th precinct of the Philadelphia Police Department.

As a final matter regarding failure to impeach Lisa Watson's credibility, attention should be made to trial testimony regarding an allegation that Aleksey pointed and presented a firearm at Lisa Watson to force her to sign the lease for the Mustang. At trial, Lisa Watson testified that she signed the lease after Aleksey pointed a gun at her. Further she indicated he was laughing while he did this. Tr. p. 1962, line 17-1963, line 17. However, in a statement given to SLED on January 21, 1998, Lisa Watson indicated that Aleksey pointed a gun at her while he was crying.

Applicant's 20.

The prejudice from this failure to impeach Lisa Watson's credibility becomes apparent in view of the inflammatory and uncorroborated comments she makes in her testimony. First, she testifies that Mr. Aleksey referred to himself as a Gambino; referencing a New York crime family. Tr. p. 1964, line 23-1965, line 3. Second, she indicated that Mr. Aleksey threatened to kill her for asking about the Mustang payments. Tr. p. 1963, lines 16-21 (He said "I'm talking to a dead person" and hung up the phone.). Third, she testified that Aleksey made callous and indifferent remarks regarding his alleged shooting at a motorist during an incident of road rage. Tr. p. 1963, lines 21-22 ("He said ....some asshole got in his way, so he shot him.").

If properly impeached, the jury likely would have viewed Lisa Watson as a co-conspirator and viscous liar instead of a scared victim. See Applicant's 18, p. 6-phone call on November 13, 1997, 1052 hours ([Lisa Watson] "said a lot of different things....seemed at times to be making it up as went along.").

Jaime Farrell-Grounds P(2) & (5), R(2) & (3)

Napue claim

During the trial below, the State allowed Jaime Farrell to testify falsely and failed to correct this false testimony. More specifically, Ms Farrell testified falsely at trial that Mr. Aleksey withdrew funds from her bank account, when in fact, Ms. Farrell withdrew these funds.

According to the United States Supreme Court, "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury"; Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

Jaime Farrell testified during the sentencing phase of Mr. Aleksey's trial as a witness for the prosecution. The main thrust of her testimony regarded a scam perpetrated, in part by Mr. Aleksey, to obtain funds through the use of forged documents. Tr. p. 1896-1900. According to the State, Mr. Aleksey forged two checks belonging to Teresa McCann and deposited those items into Jaime Farrell's Commerce Bank checking account in Absecon, New Jersey. Tr. p. 1870-1871. Ms. Farrell opened this account for the express purpose of allowing Mr. Aleksey to deposit funds. Tr. p. 1899.

At trial, Ms. Farrell was questioned by the Solicitor regarding the identity of the person who withdrew the funds from her Commerce Bank account. In response to the question, "Who withdrew it [the money]," Ms. Farrell testified, "Mr. Aleksey." Tr. p. 1900, l.3-4. However, according to her pre-trial statement made to SLED, Ms. Farrell there indicated that *she* withdrew these funds. Applicant's 50, p. 2, near the bottom.

Further, Vincent Caruso, an investigator with Commerce Bank, provided an investigatory

summary to the Absecon Police Department regarding this scam. Applicant's 46. In his summary, dated May 31, 1996, Investigator Caruso indicated that the funds were withdrawn by Ms. Farrell. Among the items on which Mr. Caruso based this statement were bank surveillance photos as well as the checks endorsed by Ms. Farrell. Applicant's 48.

Also, undersigned counsel submitted the report of a questioned document examiner who reviewed a copy of the checks presented to commerce bank to withdraw these funds. Applicant's 73. In preparing his report, the document examiner compared Ms. Farrell's known signature on her SLED statement to the checks used to withdraw these funds. According to his expert opinion, Ms. Farrell was "most probably the author" of these checks. This expert's report indicates an unqualified opinion of authorship is possible if the expert was able to review the original questioned documents. These originals were submitted in evidence by the State at Mr. Aleksey's trial, but were returned to New Jersey following the conclusion of the trial and have not been made available for review by Mr. Aleksey, his counsel, or their expert.

Further, Mr. Caruso's summary, the bank surveillance photos, and the original checks were provided on May 31, 1996 to Lt. Faisst of the Absecon Police Department in Absecon, New Jersey. Applicant's 46. Solicitor Bailey corresponded with Investigator Caruso less than two weeks before Mr. Aleksey's trial and obtained some items from Caruso related to Commerce Bank's investigation. Applicant's 81 & 82. Also, the Solicitor was aware of Ms. Farrell's truthful and contradictory statement provided to SLED.

However, the State never attempted to correct this false trial testimony. The admission of this false testimony provided the jury an impression that Aleksey victimized Farrell. In fact, the correct information suggests Farrell's involvement in the intricate workings of the fraud scam.

Thus, there is a reasonable likelihood that the jury's verdict of death was affected by this false testimony.

Ineffective Assistance of Counsel

Additionally, Mr. Aleksey's trial counsel were ineffective for failing to impeach Ms. Farrell regarding this false trial testimony. This failure deprived Aleksey of his effective assistance of counsel. And this failure undermines confidence in the outcome of the proceedings.

First, Aleksey's trial counsel were provided a copy of Farrell's SLED statement prior to trial. Applicant's 83. This statement contradicts Farrell's trial testimony, however, no impeachment occurred. Second, trial counsel did not investigate the Commerce Bank matter sufficiently to learn that Ms. Farrell was most probably the author of the checks used to withdraw the funds. A diligent effort by the defense would have produced a copy of the checks; thus, allowing for handwriting comparison by a questioned document expert. Mr. Aleksey's undersigned post conviction counsel were able to accomplish the same task years later.

Allowing Ms. Farrell's testimony to go uncorrected prejudiced Mr. Aleksey in the sentencing phase of his trial. Ms. Farrell's untruthful trial testimony implied that she was victimized by Mr. Aleksey in the Commerce Bank scam. In actually, she was a co-conspirator who suffered no more at the hands of Mr. Aleksey's actions than her own. The jury's impression of further bad acts on the part of Mr. Aleksey may well have influenced the jury's determination to render a death verdict. In fact, the failure to impeach Ms. Farrell forced Aleksey's trial counsel to argue at sentencing that the jury should not "kill someone (Aleksey) for taking money from Jaime Farrell." Tr. p. 2136, l. 7-8. Finally, Aleksey's trial counsel offered no valid strategic reason for the failure to adequately investigate and impeach Farrell's trial testimony.

Failure to retain copy of trial counsel file-Ground A

Aleksey was denied due process and the effective assistance of counsel, as well as subjected to punishment determined in a cruel way because his trial counsel failed to keep a copy of his trial court file possibly precluding effective collateral review. The failure to keep a copy of the file violated a statutory duty imposed upon trial counsel in capital proceedings. See SC Code Section 17-23-130. The prejudicial effect of this failure is related to the state's response to Aleksey's claims.

It violates fairness to allow the state to prevail on a failure of proof produced by counsel's improper disposal of their trial file.. Otherwise, trial counsel's ineffective performance would inhibit later revelation of this ineffectiveness. Due process is denied where the executive branch engages in conduct which "shocks the conscience" or engages in conduct that violates the "decencies of civilized conduct." See generally, Rochin v. California, 342 U.S. 165 (1952).

To allow the state to assert defenses to Aleksey' claim based upon trial counsel failure to retain the file would shock the conscience. Further, to allow the state to execute Aleksey following judgement and conviction with counsel whose performance review was hindered by their very failure violates the guarantee to effective assistance. Mr. Aleksey was hindered from effective collateral review of his conviction in the case at bar due to trial counsels' failure to retain a copy of their respective files in violation of South Carolina Code Section 17-27-130. In pertinent part, this statute requires that in all capital post-conviction relief actions in South Carolina, collateral counsel has a right to inspect, review, and photocopy the applicant's trial counsels' files, but that trial counsel must retain the original file.

It cannot be disputed that trial counsels' failure to abide by the requirements of Section

17-27-130 fell below an objective standard of reasonableness. Thus, the issue to be determined is whether or not Mr. Aleksey's right to collateral review of his conviction and death sentence was prejudiced by counsels' errors. Mr. Aleksey argues that the prejudice can be shown in two ways. One, generally, there is a prejudice in analyzing counsels' performance at trial, when they are no longer in possession of their respective files. For example, an argument that counsel was ineffective for not uncovering a particular document during their investigation of the case or not utilizing a document that they did have, can be compromised if trial counsel cannot say whether or not document was in file. Also, specifically, Mr. Aleksey's allegations regarding potential Brady violations by the solicitor in the discovery process leading up to his trial could be compromised if the state were to argue there is no evidence that a document in question was not provided to trial counsel. Below is a synopsis of references to trial counsels' files found in the post-conviction relief record in this case that make clear how Mr. Aleksey's right to collateral review of his conviction and death sentence could be prejudiced by trial counsels' failure to retain a copy of their respective files.

HEARING CITES:

Sims: 68- sent file back to Aleksey, didn't keep copy
69- Doesn't know whether or not he was aware of statute, but gave back file after grievance filed and was told to return it
70- When he released file he wasn't aware of ramifications
122- Doesn't remember specifically what letters he received from Bayan, but if he would have kept a copy of his file he would have the letters Bayan sent him. Zelenka begins to argue letters not authenticated as having come from trial counsel's file
123- Argument of whether or not trial counsel violated statute concerning maintaining file begins
125- Jim argues lack of file prohibits collateral review
126- Court says at this point we don't know what grievance people told Stone and Sims- assumes AG will get into that later
127- AG proposes that letters and other docs from file will be authenticated by counsel

saying, as officers of the court, that Aleksey says were in the file when given to him
133- AG objects again to authentication- Sims says it appears to be type of letter Aleksey would have written
168- Sims cant say wheter or not he's seen ATF trace report because he doesn't have his file
169- Doesn't recall seeing ATF document
170-174- Argument as to whether ATF doc admissible because not authenticated by Sims as having come out of file
220-229 Arguing about whether Duffie should receive copy of file before he testifies to help refresh his memory regarding what docs were or were not in his file
231-232- Court talking about difficulty attorneys are having remembering what as or was not in file
233- Court orders we give Sims and Stone opportunity to look at file
252- Doesn't recall whether he had SLED statement of Lisa Watson- doesn't have file
256- Doesn't recall seeing any western union docs because doesn't have his file
288- Mustang Doc's - Sims doesn't know if were in his file or not- because he doesn't have the file
309- 312- Sims demands his file. Court goes on to say that if he needs to look at specific portions of file to refresh memory he can but she will not stop proceedings for him to review whole file
315-316- Tarr put on record that we already gave Sims and Stone copies of all of their personal notes that were in the file .
325-328- Doesn't remember seeing Danetta's notes from conference call with Aleksey from 3/30/98
331- Sims doesn't know whether or not he saw other letters without having his file- App's 23
332-333- told court trial counsel's file consists of some files that Bayan marked "Sims" as having come from Sims file and unmarked items came from Stone's file
337-338- Sims suggests App. 23 could be letters Bayan sent to his mom after trial after he received Sims's file and court agrees that we are merely taking client at his word
424- Sims can't identify numerous items being introduced into evidence because doesn't have his file
437- Again says cant identify whether he knew about evidence or not because he gave up his file
496- Sims again can't identify documents w/o having file- App.41
538- Sims doesn't know w/o looking at his file whether or not he had info on Jaime Farrell that would have led them to investigate her more
549- Sims says doesn't know whether Farrell's rap sheet was in file
579-580- Sims makes reference to not having file again and I point out to court that we gave him copies of all of his notes
603-604- Sims says never considered statute when turned over file, so there was never a point where he felt like the disciplinary counsel overrode the statute

Sims Cross:

618- Sims had a file- Duffie had a central file
660- Turned over file after grievance filed
661- After hearing from grievance board, didn't feel like he had a choice
687- Cant say whether or not his investigator got any of the docs we introduced- doesn't remember

Stone:

825-826- File he has remaining is just his billing records and notes of his actions in the case on his computer. The rest sent to Aleksey
827- Introduce App. 71- Stone's letter to Bayan saying he's sending him all of file except for financial records
829- Was not aware of statute when he sent file. Disagrees that he didn't keep majority of file because he kept his computer notes that allow him to understand case
830- Did not retain any discovery
831- Will not agree that discovery is majority of file because he hasn't had opportunity to look at file in our possession
832- Did not keep original or copy of file because felt like he needed to turn over file immediately because of disciplinary counsel. Never spoke to disciplinary counsel directly, only through written correspondence
833- Did not ever call or write asking grievance board if he could make a copy of file. Agrees we gave him copies of his notes when he asked for them, but says he already had them
960-Zelenka brings up issue of making file available
962- Judge allows access to Sims, Stone, and Zelenka if they want to review file
963- Can make copies of parts if they need to
964-965- Don't have to show them index of files, but let them have some idea of how its organized
1085- Stone doesn't recall ever having info on Farrell and Commerce Bank but hasn't reviewed file
1089- Stone says if Farrell stuff is in file he saw it, if not, he didn't
1095- Stone says if Pivero stuff was in file he saw it, if not, he didn't

Stone Cross

1139- Wanted to keep file until Bayan had counsel appointed for PCR
1140- Not familiar w/statute- "I messed that up I guess"- thought it was a bad idea to release file to client
1142- When Bayan filed grievance, he decided to turn over the file
1143- Discussed with Prof. Adams at Law School and he advised Stone to give up file, but they didn't discuss statute and he doesn't think Adams was aware of it

1144- Sent Bayan whole file because he requested original and said Stone could make a copy if it did not delay him receiving original. May have discussed with Sims, but doesn't recall
1145-First thought when he was grieved was turn over file- not a gutsy person

Redirect

1229-Never ordered to turn the file over by grievance board
1230-Didn't make copy, because Bayan's letter said not to delay turning over the file

A review of these references to trial counsels' files found in the post-conviction relief hearing in this case is compelling evidence of the nature of the prejudice to Mr. Aleksey's presentation of his arguments and forms the basis for the conclusion that a new trial should be granted. An analysis of these references indicate that no less than 16 times during the hearing trial counsel could not remember whether a document sought to be introduced by collateral counsel was in trial counsels' files or not. Also, at one point in the hearing, Mr. Sims suggests some letters from Mr. Aleksey may have been sent after the trial, not sent prior to trial as argued by Mr. Aleksey. Finally, it is clear that trial counsel were not ordered by the grievance board to turn over their files to Mr. Aleksey. That decision was made independently by Mr. Stone and Mr. Sims, as a result of the involvement of the grievance board. For all of the foregoing reasons, Mr. Aleksey should receive a new trial because his right to collateral review of his conviction and death sentence was prejudiced when trial counsels' erred by not keeping custody of their respective files.

Failure to Request Venue Change due to Pre-Trial Publicity-Ground I

Bayan Aleksey should be granted a new trial because his attorneys failed to request either a change of venue or impanelment of a jury from another county due to excessive pre-trial publicity. This failure on the part of his counsel falls below a reasonable standard of performance for counsel in a similar situation. Finally, but for this deficient performance, there is reasonable likelihood that the outcome of Aleksey's trial would have been different.

As an introduction, American juris prudence provides a criminal defendant the right to a trial "by an impartial jury of the state and district wherein the crime occurred." Sixth Amendment, U.S. Constitution. The common law recognized this right as well as the appellate courts of South Carolina. State v. Manning, 495 S.E.2d 191, at 194 (SC 1997) citing 4 William Blackstone, Commentaries 349-50 ("The defendant's right to be tried in the county where the alleged crime was committed is an ancient right and well recognized at common law.") However, this venue right may be conditioned upon the ability to empanel an impartial jury in a certain county. Therefore, the South Carolina legislature has provided a statutory right to venue change.

As stated in the Code, a venue change may be requested "when a fair and impartial trial can not be had in the county.... where the prosecution has commenced." S.C. Code Section 17-21-85. Further, such a request may be made by any interested party, the solicitor of the circuit or the accused. Section 17-21-85. However, the State's right under this section is limited by the common law and constitutional rights of the accused. Manning.

The South Carolina Code also provides the trial judge discretion to empanel a jury from another county and provide for the use of this jury in a trial held in the county where "the

indictment was returned." S.C. Code Section 17-21-85. The judge may follow this procedure when the court is unable to impanel an "unbiased" jury in the county of indictment. Also, the Supreme Court of South Carolina has declared the effect of this provision to be sufficiently similar to venue change to warrant similar appellate review. Manning.

As explained in Irwin v. Dowd, a criminal defendant may be deprived of a fair trial by an impartial jury because of excessive pre-trial publicity. Irwin v. Dowd, 366 U.S. 717 (1961). There, the Supreme Court of the United States vacated a conviction for murder and a sentence of death because the jury was not impartial according to constitutional standards. As an initial point in the discussion, the Court stated the longstanding "theory of the law that a juror who has formed an opinion cannot be impartial." But, on the other hand, the Court found no requirement that jurors "be totally ignorant of the facts and issues involved." Irwin, at 722. Further, the Court stated that it is constitutionally "sufficient if a juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Irwin at 723 (internal citations omitted). However, the Court also noted that this rule "cannot foreclose inquiry as to whether, in a given case the application of that rule works a deprivation of the prisoner's life or liberty without due process of law." Irwin, at 723, quoting Lisenba v. California, 314 U.S. 219, at 236 (1941).

The Court elaborated on the procedure required to ensure an impartial jury. According to the Court a reviewing court may set aside the findings of the trial court regarding a prospective juror's opinion when error or prejudice is manifest. The Court continued that manifest prejudice may exist notwithstanding a juror's response that he could render an impartial verdict because "impartiality is not a technical concept....It is a state of mind." Irwin at 724 (internal quotations

omitted).

The Court, in Irwin, invalidated the conviction and sentence because it found that "the force of this continued adverse publicity caused a sustained excitement and fostered a strong prejudice among the people" of the county in which Irwin was tried. Further, this "pattern of deep and bitter prejudice shown to be present throughout the community" was "clearly reflected" by the "sum total of the voir dire examination of a majority of the jurors" finally seated. Irwin, at 727 (internal quotations omitted). Even though all of the jurors indicated they could be impartial to the accused, the Court found it could not agree that these jurors could "exclude this preconception of guilt" from their deliberations. The Court concluded by quoting a juror's statement that "(y)ou can't forget what you hear and see."

Like the situation in Irwin, the negative pre-trial publicity surrounding Aleksey's case was overwhelming. This Court need only refer to the voir dire proceedings in order to comprehend the severe prejudice the negative pre-trial publicity caused in Aleksey's trial.

After the general qualification process, the trial judge questioned the entire venire about whether or not each prospective juror had been exposed either directly or indirectly to pre-trial publicity. Tr. p. 158. At that time, so many jurors stood up that the Court decided to ask each prospective juror individually questions concerning exposure to pre-trial publicity. The number of prospective jurors who indicated they were exposed to either some form of pre-trial publicity or discussed the case with someone who had been so exposed was alarming.

In fact, of the 71 jurors who were individually voir dired, 56 indicated they were exposed to pretrial publicity. Furthermore, five of the 71 jurors were excused prior to being asked about potential exposure to pre-trial publicity. Therefore, of the 65 jurors who were questioned

regarding their exposure to pre-trial publicity, only 9 indicated that were not in fact exposed. Tr.p. generally 35-858.

As disturbing as these numbers are, they only get worse as the jury selection process culminates. 35 jurors were death qualified out of the 71 who were individually voir dired. Of those 35 jurors, 32 of them indicated that they had been exposed to pre-trial publicity.

The most shocking number of all is that all 12 of the jurors who actually sat on Mr. Aleksey's trial testified at voir dire that they were exposed to pretrial publicity. Also, of the two alternates seated, one had been exposed to pretrial publicity. It is interesting to note that of the 36 jurors disqualified, five of them indicated they had already made up their mind that Mr. Aleksey was guilty based upon their exposure to the prejudicial pre-trial publicity.

The State may argue that all of the pre-trial publicity was not necessarily prejudicial. However, a cursory review of the compilation of newspaper articles found in Applicant's exhibit 72 will provide ample evidence of the extremely inflammatory nature of the pre-trial publicity in Mr. Aleksey's case. Of the 116 newspaper articles in Applicant's 72, 50 of them came from either The Charleston Post and Courier, the Orangeburg Times and Democrat, and The State Paper. These are the papers that the majority of Orangeburg County residents would have read.

A review of the selected articles from these three newspapers reveals that they not only contained a great deal of prejudicial information related directly to the crime that Mr. Aleksey was charged with committing, but also were largely comprised of highly prejudicial information related to Mr. Aleksey's background and potential motive. The articles also contain numerous attempts to imply that Mr. Aleksey, and not Gloryvee Perez Blackwell, was the sole individual responsible for the murder of Trooper Frankie Lingard.

An example of the types of prejudicial pre-trial publicity concerning the crime itself that all 12 jurors were exposed to are as follows: State Trooper murdered; 40 mile police chase reaching speeds over 100 mph; co-defendant implicated Mr. Aleksey; Walter Bailey says evidence points to his guilt and that it looks like a clear-cut case; alleged confession; gun belonged to Aleksey; article erroneously stating that Gloryvee Perez had no criminal record and no motive; article featuring quotes from Gloryvee's friends and family giving their opinion that she was incapable of committing crime.

As if the pre-trial publicity concerning the crime itself was not prejudicial enough, the articles also contained an extensive amount of material that could have no other effect than to poison the jury pool and result in the denial of due process of law for Mr. Aleksey at his trial. Some of the most egregious examples of this type of information are as follows: Aleksey had more than 20 arrests for crimes like larceny, forgery, credit card fraud, and bail jumping; Aleksey had used over a dozen aliases; Aleksey was part of the New York jet set and affiliated with the Russian Mob; Six women fell in love with Aleksey, only to have their hearts broken, accounts plundered, and their money used by Aleksey to buy fancy cars; Aleksey strong suspect in a New York homicide (never substantiated); good liar and a snazzy dresser; Aleksey's trademarks were a pager on one hip, a cellphone on the other and changes identities and cars more often than most people mow the lawn; had an emotional radar for vulnerable women; stole $70,000 from Theresa McCann; conned Sara Pivero into spending $50,000; pulled a gun on Sara Pivero; 3,000 attended Trooper Lingard's funeral; Trooper Lingard eulogized with a showering of overwhelming praise; Walter Bailey quoted as saying Aleksey has something real, real serious to hide and that he is the greatest flight risk he has ever encountered; Aleksey tried to escape and will be moved from a

County Detention Center to safekeeper staus in the Department of Corrections; Walter Bailey seeking the death penalty; and charges dropped against co-defendant.

Even if jurors just skimmed the headlines in these three newspapers, they would have been exposed to the following negative publicity: Wanted man charged with killing trooper; Suspect in shooting had a t least 5 aliases; The life and times of a smooth talker; Slain trooper laid to rest amid tears, prayers; Others want suspect; Those who knew murder suspect insist she's innocent; Aleksey has long history of arrests; Solicitor: Aleksey strong suspect in N.Y. murder; No bail, more questions for suspect; "Something real, real serious to hide?"; Bailey: murder affront to society as a whole; Solicitor seeks to move Aleksey; broken jail window possible escape try; Blackwell gets her freedom, returns home; Woman cleared of killing goes home; and Confession admissible in slaying of local trooper.

These headlines are particularly disturbing when you consider the comments of Bonnie Zeigler. Ms. Zeigler was an actual juror in Mr. Aleksey's trial. She stated during voir dire that she paid particular attention to the newspaper articles she read every day "because it was big headlines". Tr. p. 434.

It is clear from a review of the voir dire process and the newspaper articles the jurors were exposed to that, as in Irwin, "the force of this continued adverse publicity caused a sustained excitement and fostered a strong prejudice among the people" of the county in which Aleksey was tried. Irwin, at 727. Aleksey could not have received a fair trial in Orangeburg County, unless a jury from another county had been impaneled, and therefore, trial counsel were ineffective for failing to request a change of venue or, in the alternative, the impanelment of a jury from another county. Consequently, Mr. Aleksey should be granted a new trial because this

deficient performance prejudiced Mr. Aleksey's trial such as to undermine confidence in the outcome.

Failing to Examine Prospective Jurors about their views on the death penalty – Ground K

Mr. Aleksey was denied the effective assistance of counsel by trial counsels' failure to question any member of the jury panel regarding her view of the death penalty. Even though this was a strategic decision, this decision was unreasonable. Finally, the employment of this unreasonable strategy undermines confidence in the outcome of the proceedings.

Aleksey's trial counsel admit the failed to question jurors about their views of the death penalty. Further, this was a strategic decision evidenced by Duffie Stone's statement to the Court during the voir dire process. At that time, Mr. Stone said "the defense is specifically not going to ask them any questions concerning their feeling of the death penalty, although we have a statutory right to do so." Tr. P. 178. Mr. Stone went on to state that his reason for not asking such questions was that he did not want the jury to "presuppose guilt" on the part of Mr. Aleksey.

During the post-conviction relief hearing, Mr. Stone reiterated this reason and expounded upon it. PCR p. 860-864. Mr. Stone went on to say that "he was trying to sell it to the judge" that the case was not going to get to the penalty phase, even though he said "I don't know that that was actually truthful". PCR p. 865. It is interesting to note that Thomas Sims, during his testimony in the post-conviction relief hearing, said that he thought they did ask jurors their views of the death penalty. PCR p. 86-93. Mr. Sims had a recollection that the questions propounded to the jury by the Court concerning their views of the death penalty were actually asked by him and Mr. Stone. PCR p. 93. In any event, the trial transcript speaks for itself; trial counsel asked no questions of the prospective jurors concerning their views of the death penalty.

Unlike most criminal cases in South Carolina, attorney conducted voir dire is allowed in capital cases. Moreover, not only is attorney conducted voir dire allowed in capital cases, it is

mandatory. § 16-3-20 (D). Also, under § 16-3-20 (E), a juror cannot be disqualified from serving on capital jury merely because of his views against capital punishment. If a juror can return a verdict according to the law, it is inconsequential that she may actually harbor negative feelings towards the death penalty in general.

It is hard to imagine a more fundamental breakdown of the adversarial process than was demonstrated here by trial counsels' decision to forego its mandatory obligation of examining prospective jurors regarding their views on capital punishment: U.S. v. Cronic, 466 U.S. 648 (1984). If it is mandatory that attorneys for capital defendants examine prospective jurors, it would follow that this examination should be tailored to include, at least, the most basic and fundamental questions that would lead to uncovering relevant information about these individuals. This would allow attorneys to make intelligent decisions regarding whether to seat or strike jurors.

Clearly, this golden opportunity of attorney conducted voir dire was not utilized in this case as envisioned by the legislature. Neglecting their duties in this regard, trial counsels' strategy led directly the breakdown of the adversarial process in this case. Consequently, Mr. Aleksey should receive a new trial, so that his attorneys may seek to ensure a more favorable jury on his behalf.

Improper Implication that Aleksey was a Foreign National-Ground J

Among the jury selection issues raised in Mr. Aleksey's application, the issue regarding the portrayal of Mr. Aleksey as a "foreign national" during the voir dire process is particularly important because this tactic served to incite latent feelings of an ethnocentric and nationalistic nature in the jurors. This strategy is made even more disturbing by the fact that Mr. Aleksey is, and always has been, a U.S. citizen by virtue of being born in New York City. Finally, it is also disturbing that this portrayal was made by Aleksey's own counsel.

At the time trial counsel first sought inquiry of the prospective jurors about their beliefs regarding whether or not foreign nationals deserve the same rights as U.S. citizens, both the trial judge and the solicitor indicated a hesitation to acquiesce to this request. Tr. p. 194. In fact, at that time, the solicitor notified the court that Mr. Aleksey was not a foreign national, but a U.S. citizen. The trial judge allowed trial counsel to ask jurors this question after trial counsel Stone noted that Mr. Aleksey's foreign sounding name, appearance and speech.

Stone also indicated he wished to explore any potential biases jurors harbored against foreigners. Trial counsel continued by commenting that Mr. Aleksey was a descendant of both a Russian and a Puerto Rican.[8] In contrast, at the PCR hearing, trial counsel Stone indicated his reasoning for asking this question was not as much out of concern for Mr. Aleksey's appearance, as it was a general question designed to elicit a response that would uncover more information about the prospective jurors in order to make a better decision of whether to seat or strike a prospective juror. PCR p. 858-859.

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[8]It should be noted that Mr. Aleksey is not a descendant of a Russian and a Puerto Rican but of a Russian and a Trinidadian.

Admittedly, an issue of this type would normally be brought up by appellate or collateral counsel in reference to the improper injection of erroneous and prejudicial information in the trial of a case by opposing trial counsel. However, when an applicant's own trial counsel injects such erroneous and prejudicial information into the trial of his case, applicant contends this is an even more egregious error.

Since the early days of the re-institution of capital punishment in the United States, the U.S. Supreme Court has demanded a higher level of representation by counsel in criminal cases where the ultimate penalty is sought. There is no better example of this requirement than in the case of Gregg v. Georgia, 428 U.S. 153 (1976). In Gregg at 188, the Court states "death is different in kind from any other punishment imposed under our system of criminal justice." In this instance, keeping in mind that "death is different" and that errors in such cases demand closer scrutiny, in order for Mr. Aleksey to prevail on this issue, he must show that trial counsel's performance fell below an objective standard of reasonableness, and but for counsel's errors, there is a reasonable probability the result at trial would have been different. A reasonable probability is one sufficient to undermine confidence in the trial's outcome.

In Mr. Aleksey's case, it would be difficult for the state to argue that trial counsel's identification of Mr. Aleksey as a foreign national and their subsequent failure to inform the jury that he was, in fact, a U.S. citizen fell below an objective standard of reasonableness. This is especially so given the courts' vigilance in keeping racial and nationalistic prejudice from infecting jury trials. Therefore, the issue becomes whether or not Mr. Aleksey can demonstrate prejudice in his being characterized as a foreign national.

In Toyota of Florence v. Lynch et al., 442 S.E.2d 611 (SC 1994), the S.C. Supreme Court

reviewed a civil case where one of the defendant's counsel drew offensive drawings depicting Japanese looking characters and used them during his closing to identify Toyota with Japanese, thus evoking potential nationalistic prejudices. In reversing judgement, the Court held "that even in the absence of a contemporaneous objection, a new trial motion should be granted in flagrant cases where a vicious, inflammatory argument results in clear prejudice". Toyota at 263. Furthermore, in recognizing how difficult it can be to show prejudice in issues involving improper information given to jurors in voir dire, the South Carolina Supreme Court employs the same test used to gauge improper comments made during an opening or closing. Dunn v. Charleston Coca-Cola Bottling Company, 426 S.E.2d 756 (SC 1993).

Looking to another jurisdiction for guidance in analyzing whether or not a defendant is prejudiced by the introduction of improper comments during his trial, the Court of Appeals of Virginia, in Smith v. Commonwealth, stated: "(w)hether a manifest probability exists that the improper evidence prejudiced the accused despite the cautionary instruction depends of the nature of the incompetent evidence when considered in relation to the nature of the charges, the other evidence in the case, and manner in which the prejudicial evidence was presented". Smith, 580 S.E.2d 481, 485 (VA. Ct. App. 2003).

In Mr. Aleksey's case, there appears ample probability that prejudice occurred under this analysis. The nature of the charge is capital murder. The nature of the incompetent evidence is that not only did a northerner come down to our state and kill a State Trooper on the side of the road, but that falsely, the jury is told that he is not a citizen of our country but a foreign national.

Finally the manner in which the prejudicial information was presented- by Mr. Aleksey's own lawyers- makes the false information even more believable and more damning. The trial

judge also failed to offer any curative or limiting instruction. For these reasons, Mr. Aleksey was denied the effective assistance of counsel in his trial by trial counsels' decision to label him inaccurately a foreign national during voir dire, thus he should be granted a new trial.

Failure to Exercise Peremptory Strike-Ground M

Bayan Aleksey should be granted a new trial because his Sixth Amendment right to the effective assistance of counsel was denied by his attorneys' failure to properly exercise a peremptory strike against juror 144. The failure to exercise a peremptory strike against this juror fell below a reasonable standard of performance for a lawyer in that position. Further, this failure undermines confidence in the verdict and sentencing in Aleksey's trial

During Aleksey's jury selection, individual voir dire was conducted with juror 144, Gigi Hayes. Aleksey's counsel both took contemporaneous notes of the voir dire. These notes contained the mental impression and observations of trial counsel during the voir dire of juror Hayes. Although juror Hayes never indicated to the trial judge that she knew the victim, Aleksey's counsel were both aware of this relationship.

Attorney Sims' notes indicate that Hayes was a "leader." Applicant's 1 & PCR, p. 97-99. Further, Sims testified that Hayes appeared to "be learning towards Walter (Bailey)." PCR, p. 98. Also, Sims wrote the word "NO" in the notes relating to juror Hayes followed by the statement "possibly knows deceased, talk to Charles." Applicant's 1 & PCR, p. 99.

Upon questioning, Sims indicated that Charles referred to Dr. Charles Kilgore, a pediatrician for Attorney Sims' children at the Family Health Center. PCR, p. 99. Juror Hayes was also employed at the Family Health Center. PCR, p. 99. Sims also testified that he inquired with Dr. Kilgore about whether juror Hayes would be a good juror for the defense. Dr. Kilgore indicated juror Hayes would be a good juror. PCR, 99-100.

Attorney Stone's notes indicated that juror Hayes' husband was a police officer in the military. Applicant's 61. Stone also wrote the word "leader" and underlined this word in his

notes. Applicant's 61. Finally, Stone's notes contain the phrase "get rid of" beside juror Hayes' name. Applicant's 61.

Stone testified that he remembered the selection of Hayes was an issue and that he discussed this matter with Sims following Sims' discussion with Dr. Kilgore. Following that discussion, both attorneys decided juror Hayes would be a good juror. PCR, 872. However, neither attorney could recall the content of the information that persuaded them that juror Hayes was a good juror.

Stone testified on cross that juror Hayes' knowledge of the victim concerned the defense. PCR 1161. Stone also indicated the he deferred to Sims' decision to seat juror Hayes. PCR, 1162. Finally, no notes regarding other potential jurors contained such warnings. Applicant's 1 & 61.

At the time juror Hayes was selected, the defense had only exercised 4 out of 10 strikes. Tr. p. 33-34. Upon selection, Juror Hayes became the 10th juror seated. At the conclusion of jury selection, the defense held 3 unused peremptory strikes.

There appears no factual basis for the defense to have seated juror Hayes considering her knowledge of the victim. Even though Dr. Kilgore indicated he believed Hayes would be a good juror, there is no indication why he thought this. Further, it is likely Dr. Kilgore made this determination without being cognizant of the relevant factors of the situation, such as Hayes' knowledge of Trooper Lingard or her husband's employment as a law enforcement officer.[9] Finally, both Sims and Stone, aware of these relevant factors, came to the same conclusion

[9]This reminds PCR counsel of the adage that a conservative is a liberal who has been the victim of a crime.

independent of Dr. Kilgore's opinion: that Hayes would be a bad juror.

The prejudice in this case is obvious. Trooper Lingard was a popular and well known local law enforcement officer. Conversely, Aleksey was an out of town defendant, presented as a foreign national, whose bad character was paraded through news articles seen by an overwhelming number of jurors. Specifically, Hayes indicated she was aware of the negative pre-trial publicity as were all eleven other jurors in Aleksey's case. See Ground I, regarding Venue Change. Finally, the state presented Lingard's family members and other victim impact evidence during the penalty phase of this trial.

Thus, the failure of trial counsel to exercise a peremptory strike against juror Hayes indicates performance below an objective standard of reasonableness. Further, this failure undermines confidence in the verdicts in the case below.

Involuntariness of Confession-Ground H

Trial counsel rendered ineffective assistance when they failed to challenge Aleksey's statement made to SLED on January 2, 1998 as being involuntarily given. Trial counsel should have moved to suppress this statement as induced by promise of leniency or reward. Further, if trail counsel would have challenged this statement's admission, it would have been excluded from evidence. Also, this failure falls below an objective standard of reasonableness for similarly situated counsel. Finally, but for counsel's deficient performance, there is a reasonable probability that the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668 (1984).

As a factual background, SLED agent Ken Mears and George Darnell questioned Bayan Aleksey on January 2, 1998 at the Orangeburg Regional Detention Center. Tr. 2218-2331 & 2423-2433. Mr. Aleksey was not yet represented by counsel. Applicant's 70. Further, he was incarcerated without bond.

Following a waiver of his Miranda rights, Aleksey provided a statement which was tape recorded. After Aleksey implicated Glory Vee Perez as the sole perpetrator in the death of Trooper Lingard and concluded with "that is all I have to say," the SLED agents stopped the tape recorder. When the tape recording resumed, two hours, twelve minutes later, Bayan Aleksey was crying. He then provided a statement in which he indicated he was the lone perpetrator in the death of Trooper Lingard. See State v. Aleksey, 538 S.E.2d 238, at 253-255 (SC 2000).

On June 8, 1998 the trial court conducted a Jackson v. Denno hearing regarding the voluntariness of this statement. Tr, 2218-2331. A redacted recording and transcript of this statement was introduced to the jury during the guilt/innocence phase of Aleksey's trial. Tr.

1578-1579. The complete recording and transcript of this statement was introduced to the jury during the penalty phase of Aleksey's trial. Tr. 2000-2001. Aleksey was represented at all times during these proceedings by Attorneys Stone and Sims.

Promise of Leniency or Reward

Because the statement was induced by a promise made by SLED to Aleksey that he would be returned from solitary confinement to general population at the Orangeburg Regional Detention Center, Aleksey should be granted a new trial.

A statement made pursuant to in-custody police interrogation is admissible if it is established that the statement was knowingly, intelligently, and voluntarily given under the totality of the circumstances. State v. Peake, 352 S.E.2d 487 (SC 1987). At the trial level, the State bears the burden to demonstrate the voluntary nature of the statement. State v. Washington, 370 S.E.2d 611, at 612 (SC 1988). A statement induced by a promise of leniency is involuntary if its production was so connected with the inducement as to be a consequence of the promise. Peake.

One factor considered by courts in cases involving statements induced by promise is a determination of whether a promised benefit is of a direct or collateral nature. The courts more closely scrutinize a promise offering a direct benefit to the defendant as opposed to one offering a collateral benefit. See State v. Kanive, 558 P.2d 1075, at 1078 (KN Ct. App. 1976). Other factors include the reasonableness of the accused's belief in the promisor's authority to fulfill the promise and the likelihood the promise would cause the accused to produce the statement. Kanive, at 1078. Further, one factor courts consider in determining the relationship between an inducement and the production of a statement is the temporal proximity between the two. Peake.

In Peake, the South Carolina Supreme Court reviewed on direct appeal a murder conviction obtained by use of a confession challenged as a product of an improper promise from the officer questioning the accused. During pre-trial proceedings, the following testimony developed:

Q. [Solicitor]: All right. And what else did you state to Mr. Peake?

A: I made a suggestion to him that the State would not ask for the death penalty in this case and that I would call the Solicitor and have him put it in writing to that effect, prior to me talking to him about it.

On cross examination of the investigating officer, the following colloquy took place:

Q. And yet you told Allen Peake that if he would give you a statement that you would guarantee to him that you would not seek the death penalty.

A. That's what I told him.

Following the officer's guarantee, Peak provided an incriminating statement.

Initially, the Court noted that the officer was a person with apparent authority regarding the promise offered to Peake. Then, the court found that the officer's statement was tantamount to a promise not to seek the death penalty if Peake provided the officer a statement. In reversing the conviction because of the improper admission of this statement, the Court implicitly found this promise of leniency to be so connected to the making of the statement as to render the statement involuntary.

The facts regarding the production of Aleksey's incriminating statement on January 1, 1998 are strikingly similar to those in Peake. Immediately before implicating himself as the murderer of Trooper Lingard, Aleksey received a promise to be moved from solitary confinement

to general population. This promise was made by SLED agents Darnell and Mears. Aleksey had reason to believe this promise because the agents contacted their supervisor, SLED Captain L.C. Knight, and Detention Center Deputy Director Vernetia Dozier prior to confirming the move to Aleksey.

The causal relationship between this promise and the inculpatory portion of the statement is best evidenced by Agent Mears' testimony at the Jackson v. Denno hearing. The below portion of the transcript details this testimony:

Solicitor Bailey:	All right, Sir. And what is it that specifically led up to the tape going back on?
Agent Mears:	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.
Bailey:	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?
Mears:	That's correct. It took some time. He (Agent Darnell) 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.
Bailey:	Okay. And then did he agree to go ahead and go back on tape?
Mears:	That's correct. That's when he agreed. He said he would tell us the truth.

Tr. 2314, line 13-2315, line 6.

Following this statement, Aleksey was moved from solitary confinement to general population, as promised.

Had Aleksey's trial counsel argued for suppression of the inculpatory statement based upon this improper promise, the trial court would have found that the state failed to carry its burden to prove its voluntary nature. Thus, trial counsel's conduct fell below an objective standard of conduct for similarly situated counsel. Finally, there is a reasonable likelihood that the outcome of the trial would have been different if the statement would have been suppressed. See Arizona v. Fulminante, 499 U.S. 279, at 292 (1991) dissenting portion of Justice White's opinion with internal citations omitted ("A defendant's confession is 'probably the most probative and damaging evidence that can be admitted against him,' so damaging that a jury should not be expected to ignore it even if told to do so, and because in any event it is impossible to know what credit and weight the jury gave to the confession.").

Failure to Present Evidence of Bayan Aleksey's Adaptability to Prison Life-Ground P(6)

Bayan Aleksey's sentence of death should be reversed because he was denied his Sixth Amendment right to the effective assistance of counsel at his sentencing hearing. Specifically, trial counsel failed to employ and present the testimony of an "adaptability expert" to testify as to applicant's likelihood to adapt to prison life if sentenced to life in prison. This failure also hampered applicant's Eighth Amendment right "to place before the sentencer relevant evidence in mitigation of punishment." Skipper v. South Carolina, 476 U.S. 1 (1986). This failure by trial counsel undermines confidence in the verdict of the sentencing proceeding.

In Skipper v. South Carolina, the United States Supreme Court reversed a sentence of death in a capital murder proceeding stating that the "exclusion.... of relevant mitigating evidence impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender." Skipper, at 8. In the trial of Skipper's case, the judge excluded testimony demonstrating the accused's good behavior during the 7 months of pre-trial detention. Also, the prosecutor, in Skipper, argued future dangerousness and failure to adapt during the closing argument.

The Supreme Court, in Skipper, reversed the sentence based upon prior court precedent which provided that "'the sentencer ... not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" Skipper, at 4, quoting Eddings v. Oklahoma, 455 U.S. 104, at 110 (1982) in turn quoting Lockett v. Ohio, 438 U.S. 586, at 604 (1978)(plurality opinion of Burger, C.J.) (emphasis in original). The Skipper Court concluded that "the exclusion from the sentencing hearing of the testimony petitioner proffered regarding

his good behavior during the over seven months he spent in jail awaiting trial deprived petitioner of his right to place before the sentencer relevant evidence in mitigation of punishment." Skipper, at 4.

Conversely, in Kelly v. South Carolina, the United States Supreme Court found that both evidence submitted in the trial and the argument of the prosecution could raise concerns over future dangerousness. Kelly v South Carolina, 534 U.S. 246 (2002). In fact, the Court found that evidence of violent behavior in prison[10] raised a strong implication of generalized future dangerousness. Kelly. Further, the Court stated that character evidence may demonstrate "characteristic" future dangerousness. Kelly, at 255. The Court defined such evidence as "evidence with a tendency to prove dangerousness in the future." Kelly, at 255. Finally, the Court noted that evidence of characteristic future dangerousness does not lose "its relevance to that point"... "merely because it might support other inferences or be described in other terms." Kelly, at 255.

Similar to the facts of Skipper and Kelly, adaptability to prison life and future dangerousness became an issue in Aleksey's trial. Specifically, the state presented information related to a January 27, 1998 incident in which Aleksey was charged with attempted escape and malicious injury to property. This testimony was introduced through the testimony of an administrator of the Orangeburg Regional Detention Center.

During the penalty phase of Aleksey's trial, the government called Deputy Director Vernetia Dozier as a witness. Ms. Dozier testified that the administration of the jail decided to

[10]In Kelly, the prosecutor introduced evidence that Kelly took part in escape attempts, carried a shank, and had been caught carrying a weapon and planning or participating in escape attempts.

charge Aleksey with attempted escape and to send him to safekeeping. She also testified that "safekeeping is where we send inmates that are hard to handle or we consider escape risks." Tr. 1978, l. 16-17. Ms. Dozier also testified that she had knowledge of "some escapes from the jail." T. 1980, l. 11-25.

The following day, out of the presence of the jury, Solicitor Bailey urged the court to provide a limiting instruction to the jury to disregard the fact a warrant was issued for escape. Tr. p. 2023-2024. Attorney Stone then argued that the court should provide an instruction that "escape has nothing to do with this case." Tr. 2024, l. 22-24. The court then charged the jury that "this defendant is not charged with escape. There is no escape warrant outstanding.[11] You must disregard that testimony in its entirety. It has nothing to do with the trial of this case." Tr. 2028, l. 13-17.

However, during closing argument in the penalty phase, Solicitor Bailey presented argument regarding Aleksey's adaptability to prison and future dangerousness. Despite the limiting instruction previously given, Bailey urged the jury to recall Dozier's testimony regarding why people were sent to safekeeping. Specifically, Bailey argued:

> "You can take a look at how 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.*"

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[11] Again, the escape charge remained pending until March 23, 1999 and this information was a matter of public record discussed in pre-trial publicity. Applicant's proposed 90.

> "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."

Tr. 2110, lines 8-23 and 2116, lines 2-7. (Emphasis Added).

Aleksey's counsel did not object to this argument nor did they request a limiting instruction. No reply to this argument was made in closing argument. In light of this argument, there is no question that the testimony of an adaptability expert would have been admissible to present other evidence for the "sentencer to consider in mitigation of punishment."

At the PCR hearing, Aleksey presented the testimony of Jim Aiken. PCR, 1475-1510. Mr. Aiken was qualified by the Court as an expert in the area of adaptability and correctional risk. PCR, 1485, l. 10-21. In his expert opinion, Mr. Aiken testified that had he or another adaptability expert been called to testify at Aleksey's 1998 trial, it was his "opinion that Mr. Aleksey could be properly housed and secured in a correctional environment for the remainder of his life." PCR, 1487, l. 6-8.

Further, Aiken opined that Aleksey's lifetime incarceration would not present an "undue risk of harm to staff, inmate or the community." PCR, 1487, l. 9-10. Aiken also testified about Aleksey's actions in ripping the metal chair and throwing it through the jail window. PCR, 1488-1491. Aiken testified he did not consider this a severe infraction given that Aleksey immediately told an officer what he did. He also contrasted Aleksey's "attempted escape" with more escape attempts.

However, Aleksey's trial counsel testified that an adaptability expert was not called

because he felt an adaptability expert's testimony would have undermined credibility with the jury. PCR, 1116-1118. He believed the jury would have found adaptability testimony incredible given the fact Aleksey ripped the metal seat during the January 27, 1998 incident at the Orangebuge jail. Attorney Stone had employed an adaptability expert in his only previous capital case, but did not consult one regarding Aleksey's trial. Thus, the strategy decision to not present an adaptability expert was made without proper investigation. See Wiggins v. Smith, 539 U.S. 510 (2003)(Holding that Strickland's test is met where counsel's strategic decisions were based upon inadequate investigation).

It is also possible that the presentation of adaptability evidence on behalf of Aleksey would have invited the state to call as witnesses other clients of attorney Stone. Again, as explained in the conflicts portion of this brief, Stone represented Willie Bamberg in his capacity as the director of the Orangeburg Regional Detention Facility. Also, Stone represented the South Carolina Department of Corrections, where Aleksey was housed for the majority of his time in pre-trial detention. Trial, 2203, l. 22-24. In fact, had adaptability been explored, the jury may have been presented testimony related to Aleksey's suits against various governmental agencies represented by Stone. PCR, 1492-1494 and Applicant's 58, proposed 58(b) and proposed 91.

Therefore, counsel's failure to present evidence regarding adaptability fell below a reasonable standard of performance. Also, any strategic decisions made in this regard were not reasonable given the failure to investigate adaptability in this case. Finally, this failure undermines confidence in the outcome of the sentencing phase.

Failure to Employ the Services of a Social Worker- Ground P(6)

Mr. Aleksey challenges trial counsels' decision not to employ a social worker to review the voluminous records gathered by mitigation specialist Toni Bovee related to his social, educational, and mental health history. Such a review would have been the type of further investigation required of attorneys representing defendants in capital cases under the case of Wiggins v. Smith, 539 U.S. 510 (2003). Only then, would the decision by Mr. Aleksey's trial counsel not to present such evidence potentially be deemed reasonable in any sort of objective standard analysis.[12] This failure falls below a reasonable level of performance and undermines confidence in the outcome of the trial.

During trial counsel's investigation, they employed the services of mitigation specialist Toni Bovee. PCR P. 1213. Ms. Bovee's job entailed interviewing family members, as well as others acquainted with Mr. Aleksey, and gathering relevant records that could be used as mitigation in the penalty phase of his trial. PCR p. 1213-1214. Ms. Bovee did a very thorough job.

The potentially mitigating evidence she uncovered was voluminous. She not only interviewed numerous individuals, but also gathered records that included: school records, psychiatric records, special education records, child abuse reports, social histories, Persons in Need of Supervision (PINS) reports, and vocational rehabilitation records. App proposed 93 p. 13-15. Ms. Bovee also incorporated all of this information into a family history time line of Mr. Aleksey.. App. Proposed 93 p.15-16. The voluminous and varied nature of this mitigation

[12]When analyzing the reasonableness of counsels' decision-making in this claim, it is only necessary to review Counsel Stone's strategic choices because according to counsel Sims, "Mr. Stone was basically dealing with the experts". P.C.R. Tr. P. 656-659.

gathered by Ms. Bovee begs the question of why a social worker was not hired to review the information and testify about what it all meant in terms of the development of Mr. Aleksey.

During the post conviction relief hearing there was some confusion on the part of Mr. Stone concerning whether or not a trial counsel employed a social worker at Mr.Aleksey's trial. At first, Mr. Stone testified that he did employ a social worker named Dr. Rosengard during the investigation of Mr. Aleksey's case. PCR p. 1214. However, it was later pointed out by Mr.Zelenka that Dr. Rosengard was a psychologist and not a social worker. PCR p. 1214.

As it turns out, Dr. Rosengard was not even hired by the defense, but was merely a psychologist who had treated Mr. Aleksey as a child. PCR p. 1251-1252. In any event, trial counsel never called Dr. Rosengard to testify at Mr. Aleksey's trial. In fact, the only person to testify on Mr. Aleksey's behalf in the penalty phase was his mother Vera Aleksey. Tr. P. 2069-2095.

In applicant's proposed exhibit 93 (deposition of Janet Vogelsang, licensed clinical social worker) on pages 57-60, Ms. Vogelsang testifies about her conclusions based on a professional review of the records gathered by Ms. Bovee and how she, or another licensed social worker, could have conveyed these conclusions to the jury in Mr. Aleksey's case in order to give them a better understanding of his life and development. Ms. Vogelsang concluded, among other things, that Mr Aleksey: was a special needs child; was emotionally disturbed and emotionally handicapped; was a special education student; was immature and enmeshed with his mother; had an alcoholic and abusive father; was a child that did not develop the kind of social skills that would help him in relationships with other people or in knowing how to function in the world outside his home; engaged in impulsive and self destructive behavior; does better in well-

structured environments where there is consistency; had a mother who sabotaged his therapy; attempted suicide at least once; and ultimately was at a very high risk to end up in incarceration and committing a serious act. It is not difficult to see how this testimony from a licensed professional expert could have been more persuasive and credible than that of a desperate mother begging for the life of her only child.

Under Wiggins v. Smith, the U.S. Supreme Court held that "(i)n assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further". Wiggins at 527. The Court went on to say "Strickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy".

In the case at bar, the investigation by defense counsel, by way of Toni Bovee, indicated that there was a tremendous amount of potentially mitigating evidence that could be utilized effectively at Mr. Aleksey's trial. At that point in time, reasonably competent attorneys would have consulted a social worker to gauge the significance of the fruits of their investigation and found out how the evidence might best be presented to a jury. Trial counsel in this case made a tactical decision to not employ the services of a social worker and that decision was not reasonable. Therefore, Mr. Aleksey's trial attorneys' performance was deficient and their errors in this aspect of the trial clearly undermine the verdict of the jury in the sentencing phase. Therefore, a new sentencing should be ordered, so that the mitigating evidence on Mr. Aleksey's behalf may be presented properly.

Conflicts of Interests -Grounds B, C, E, F, G, S

Bayan Aleksey should be granted a new trial because his Sixth Amendment right to conflict free counsel was violated. Because of the multiple conflicts explained below, petitioner was constructively denied the assistance of counsel at a critical stage in the proceeding. Alternately, counsel's performance was adversely affected by the conflict. Further, petitioner's counsel labored under conflict so serious as to be unwaivable Also, purported waivers obtained by the court were insufficient to waive client's interest in conflict free counsel. Following an introductory section regarding the general rules of conflicts, the different conflict issues present in Aleksey's case will be reviewed.

Introduction

The Sixth Amendment provides that a criminal defendant shall have the right to "the Assistance of Counsel for his defence." Sixth Amendment, United States Constitution. This right has been accorded, the courts have said, "not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." United States v. Cronic, 466 U.S. 648, 658 (1984). However, assistance which is ineffective in preserving fairness does not meet the constitutional mandate, see Strickland v. Washington, 466 U.S. 668, 685-686 (1984).

As a general matter, a defendant alleging a Sixth Amendment violation must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland at 694. The courts have traditionally spared the defendant the need of showing probable effect upon the outcome, and have simply presumed such effect, where assistance of counsel has been denied entirely or during a critical stage of the proceeding. When that has occurred, the likelihood that the verdict is unreliable is so high that a

case-by-case inquiry is unnecessary. See Cronic at 658-659; also see Geders v. United States, 425 U.S. 80, at 91 (1976) and Gideon v. Wainwright, 372 U.S. 335, 344-345 (1963). But only in "circumstances of that magnitude" do the courts forgo individual inquiry into whether counsel's inadequate performance undermined the reliability of the verdict. Cronic, at 659, n. 26.

Circumstances of that magnitude may arise when an accused's counsel actively represents conflicting interests. Mickens v. Taylor, 535 U.S. 162, at 166 (2002). As an initial matter, the courts have considered "joint representation of conflicting interests" to be "inherently suspect." Mickens, at 168 explaining underlying rationale of Holloway v. Arkansas, 435 U.S. 475 (1978). And Mickens suggests that multiple representation of interests which are not aligned are more closely scrutinized than multiple representation of interests which are aligned. Mickens, at 168. Further, "(j)oint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing." Wheat v. U.S., 486 U.S. 153, at 160, citing Holloway, at 489-490.

Multiple Representation Scenario

In a multiple representation setting, absent an objection, a defendant may prevail in a conflict claim by proving the conflict "actually affected the adequacy of his representation." Cuyler v. Sullivan, 446 U.S. 335, at 348-349. The test formulated in Cuyler v. Sullivan is then a two part burden on a petitioner seeking relief to show 1) that trial counsel represented conflicting interests and 2) that the conflict adversely affected the attorney's performance. Thus, a competing interests' influence upon trial counsel's strategic decisions suggests that an actual conflict of interest exists. Mickens, at 170. However, it must be cautioned that a showing of adverse effect does not require a probable effect upon the outcome or verdict. Mickens, at 174.

Actual Conflict

An actual conflict of interest "occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Fuller v. State, 557 S.E2d 664, 665 (SC 2001). In Mickens, the majority concluded that a defendant who demonstrates that counsel actively represented conflicting interests has also established the constitutional predicate for his claim of ineffective assistance of counsel. Mickens, at 175 citing Cuyler v. Sullivan, at 350 ("[U]ntil, a defendant shows that his counsel *actively represented* conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." (emphasis added in Mickens)). The Mickens court also noted the test in Cuyler v. Sullivan has been applied "when representation of the defendant somehow implicates counsel's personal or financial interests, including a book deal, United States v. Hearst, 638 F.2d 1190, at 1193 (9th Cir. 1980), (or) a job with the prosecutor's office, Garcia v. Bunnell, 33 F.3d 1193, at 1194-1195 & 1198, n.4 (9th Cir. 1994)." Mickens, at 174. In fact, the Ninth Circuit has held that there is no distinction in the test used in cases of conflict between multiple client representation and a conflict between a client and an attorney's personal interests. Hearst, 638 F.2d 1190, at 1193 (9th Cir. 1980).

Adverse Effect

However, there exists a split in the federal circuits regarding evidence of adverse effect. Some circuits hold that whenever counsel failed to pursue a "plausible" defense "that was inherently in conflict with or not undertaken due to the attorney's other loyalties," there is sufficient evidence of adverse effect to show a Sixth Amendment violation. See McFarland v. Yukins, 356 F.3d 688, 706 (6th Cir. 2004), citing Winkler v. Keane, 7 F.3d 304, 309 (2nd Cir.1993); U.S. v. Gambino, 864 F.2d 1064, 1070 (3rd Cir. 1988); United States v. Fahey, 769

F.2d 829, 836 (1st Cir.1985). But other circuits also require that the foregone defense be "reasonable." McFarland, citing Freund v. Butterworth, 165 F.3d 839, 860 (11th Cir.1999) (en banc) (showing of adverse effect requires proof of tactic foregone, of reasonableness of tactic on facts, and of a causal link between conflict and decision to forego tactic); Mickens, 240 F.3d 348, at 361 (4th Cir. 2001) (same) denial of habeas affirmed in Mickens v. Taylor 535 U.S. 162 (2002). Finally, the Fourth Circuit has held that a petitioner has adequately demonstrated adverse effect "if the attorney took action on behalf of one client that was necessarily adverse to the defense of the other or failed to take action on behalf of one because it would adversely affect the other." Williams v. French, 146 F.3d 203, 212 (4th Cir. 1998), cert. denied, 525 U.S. 1155, 119 S. Ct. 1061, 143 L. Ed. 2d 66 (1999).

Further, petitioner may prevail in a conflict claim even if trial counsel does not admit a causal link between a conflict of interest and choice of action on behalf of his client. In fact, a petitioner does not have to produce direct evidence, such as the lawyer's testimony, that the lawyer chose to do one thing rather than another in order to accommodate another client's interests. McFarland, at 706. Instead, causation can be proved circumstantially, through evidence that the lawyer did something detrimental or failed to do something advantageous to one client that protected another client's interests. McFarland, at 706.

Waiver

Introduction

When an accused's counsel operates under a conflict of interest, a trial court may allow an attorney to proceed despite this conflict "if the defendant makes a voluntary, knowing, and intelligent waiver." Garcia v. Bunnell, 33 F.3d 1193, 1195 (9th Cir. 1994). A waiver is an

intentional relinquishment or abandonment of a known right or privilege. Johnson v. Zerbst, 304 U.S. 458, at 464 (1938). Further, the validity of the waiver of an accused's Sixth Amendment rights depends "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Edwards v. Arizona, 451 U.S. 477, 482 (1981). Also, the protecting duty of the court imposes a "serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." U.S. v. Ellison, 798 F.2d 1102, at 1108 (7th Cir. 1986)(internal citations omitted). Finally, a reviewing court must "indulge every reasonable presumption against the waiver of fundamental rights." United States v. Allen, 831 F.2d 1487, 1498 (9th Cir. 1987) (internal citation omitted).

The federal appellate courts have identified several factors to be examined regarding the validity of a waiver involving trial counsel's conflict of interests. Also, the federal courts have identified situations where a conflict is so severe that a trial court should refuse to accept or override a waiver, even if the defendant validly waives the conflict. Further, as stated by Chief Justice Rehnquist in the majority opinion in Wheat v. U.S., "(n)ot only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation." Wheat v. U.S., 486 U.S. 153, at 160 (1988).

Factors of a Valid Waiver

As an initial matter, to waive the right to conflict-free representation, a "defendant must be provided with sufficient information or advice to permit choice between meaningful options." U.S. v. Ellison, 798 F.2d 1102 at 1108 (7th Cir. 1986). The first task of the trial court is to alert

the defendants to the substance of the dangers of representation by an attorney having divided loyalties in as much detail as the court's experience and its knowledge of the case will permit. U.S. v. Curcio, 680 F.2d 881, 888-890 (2nd Cir. 1982). A defendant must be informed, and he must have the capacity for making a rational decision. Id.

In assessing the level of each defendant's comprehension of the dangers, the court should devise a variety of methods for gaining the necessary insights. Curcio. Questions designed to elicit from the defendant a narrative statement of his understanding are preferable to questions designed to elicit mere "yes" or "no" answers. Id. Further, the court's inquiry in each instance should take place after the defendant is provided reasonable time to digest and contemplate the risks posed by the conflict. Curcio, 890 ("[T]he court should advise the defendant of his right to separate and conflict-free representation, instruct the defendant as to problems inherent in being represented by an attorney with divided loyalties, allow the defendant to confer with his chosen counsel, encourage the defendant to seek advice from independent counsel, and allow a reasonable time for the defendant to make his decision."). Finally, a court reviewing the validity of a waiver should consider whether an explanation of the risks was presented to the accused, whether the explanation was given by the trial court as opposed to conflicted counsel and the time for the accused to consider the matter. U.S. v. Iorizzo, 786 F.2d 52, at 59 (2nd Cir. 1986).

Also, upon discovery that a defense attorney suffers from only a *potential* conflict of interest, such that rational defendant could knowingly and intelligently desire conflicted attorney's representation, a court should "advise defendant of dangers arising from particular conflict; determine through questions that are likely to be answered in narrative form whether defendant understands those risks and freely chooses to run them; and give defendant time to

digest and contemplate risk after encouraging him to seek advice from independent counsel." U.S. v. Levy, 25 F.3d 146 (2nd Cir. 1994). Further, waiver of defense "counsel's potential conflict of interest does not foreclose possibility that actual conflict could adversely have affected adequacy of representation and thus violated defendant's Sixth Amendment right to counsel, though the conflict must be real, not some attenuated hypothesis having little consequence to adequacy of representation." U.S. v. Fahey, 769 F.2d 829 (1st Cir. 1985).

Finally, a trial court may "enforce ethical rules governing the legal profession with respect to both client-attorney communications and conflict-free representation, regardless of any purported waiver by defendant, when necessary to protect the important candor that must exist between client and attorney and to engender respect for the court in general." U.S. v. Moscony, 927 F.2d 742 (3rd Cir. 1991). The trial court may enforce the ethical rules by overriding a defendant's purported waiver when an actual conflict is "so egregious that no rational defendant would knowingly and voluntarily desire the attorney's representation" and cannot be waived. U.S. v. Martinez, 143 F.3d 1266 (9th Cir. 1998) citing U. S. v. Lussier, 71 F.3d 456, 461 (2d Cir. 1995).

New Waiver Required when Potential Conflict becomes Actual Conflict-Thomas v. State

In Thomas v. State, the Supreme Court of South Carolina reversed the drug trafficking conviction of Malissa Thomas based upon an actual conflict of interest which adversely affected her attorney's performance. Thomas v. State, 551, S.E.2d 254 (SC 2002). The trial attorney represented both Thomas and her husband as co-defendants regarding the drug charge. At the beginning of the case, the attorney obtained a waiver regarding the potential conflict posed by the joint representation of the co-defendants. However, the Supreme Court reversed the denial of

post conviction relief, finding that "(p)etitioner should have been given another opportunity to waive the conflict, if she so chose", when the actual conflict arose. Thomas, 256 The Supreme Court continued that a voluntary waiver must also be knowingly and intelligently made and that an accused can not waive what she does not know. Thomas, 256 citing Hoffman v. Leeke, 903 F.2d 280, 289 (4th Cir. 1990).

Thus, a waiver of an attorney's conflict may preclude an accused from later complaining about ineffectiveness related to the waived conflict. However, the waiver must be voluntarily, knowingly and intelligently entered and a presumption exists against waiver. Thus, not all purported waivers are constitutionally valid or effectively made.

Unwaivable

Some courts have found some conflicts of interests to be so egregious as to be unwaivable. The positions of these courts are consistent with that found in ethics advisory opinions applied to attorneys practicing in South Carolina. Finally, South Carolina ethics advisory opinions and an American Bar Association opinion specifically find unethical the representation of a criminal accused by some otherwise qualified counsel.

Prosecutors may not Defend-Howerton v. State

In Howerton v. State, the Oklahoma Court of Criminal Appeals reversed the conviction of a defendant charged with lewd molestation. The court expressly held that "a member of the bar who is a part-time district attorney may not be appointed to defend persons either within or outside the jurisdiction in which he serves as assistant district attorney." Howerton v. State, 640 P2. 566 (OK 1982). Further, the Howerton court found fundamental error when a part-time district attorney represented an indigent defendant. Id, at 567.

In so finding, the Howerton court described the conflict in this way, "A district attorney represents the State of Oklahoma to enforce its criminal laws. His first and foremost duty is to represent the State in criminal proceedings, and, he cannot represent a defendant where the State of Oklahoma is the opposing party. One cannot adequately serve two masters; *these positions are inherently antagonistic and irreconcilable.*" Howerton, at 566 (emphasis added). The court found support for this holding from "the Oklahoma Bar Association Board of Governors, in Advisory Opinion 254, quoting from an opinion by the Committee on Professional Ethics of the American Bar Association, Formal Opinion No. 142 (May 9, 1935) which stated, '(a) public prosecutor has as his client the State. It is obvious therefore he cannot, appear for any defendant in cases in which the state is an adverse party...'" Howerton, at 567.

Also the Howerton court described some specific risks of such a conflict noting that the "potential for conflicting interests are numerous. Effective representation may mandate that defense counsel attack the constitutionality of state laws, which in his prosecutorial function he is required to defend. He may as defense counsel be required to question and attack the methods used by law enforcement officials and the prosecution." Howerton, at 567. In conclusion, the Howerton court noted that its holding bore no relation to the "propriety or the effectiveness" of the accused's counsel performance because counsel had been ordered to represent the accused. Howerton, at 568, n. 2.

Unwaivable Conflict regarding Attorney's Self Interests-U.S. v. Schwarz

A panel of the United States Court of Appeals for the Second Circuit made a similar holding in U.S. v. Schwarz, 283 F.3d 76 (2nd Cir. 2002). In Schwarz, the Second Circuit reversed the conviction of a police officer convicted for a conspiracy to violate and a substantive violation

of the civil rights of a detainee, Abner Louima. The issue decided by the Second Circuit was "whether Schwarz's attorney labored under an unwaivable conflict of interest that required his disqualification." Schwarz, at 80.

After a detailed discussion of the law related to conflicts of interests, the Schwarz court noted that not all conflicts may be waived. The court described the test for unwaivable conflicts both actual and potential to be whether the circumstances of the case indicate "the conflict is of such a serious nature that no rational defendant would knowingly and intelligently desire that attorney's representation." Schwarz, at 95, (internal citation omitted). If such a conflict is present, the Schwarz court stated that "the attorney must be disqualified, regardless of whether the defendant is willing to waive his right to conflict-free counsel." Schwarz, at 96.

The conflict in Schwarz involved representation of co-defendants by two attorneys who were employed by a firm which entered into a retainer agreement with the Policeman's Benevolent Association (PBA). The government raised concerns about "potential conflicts" and raised these concerns in its request for the district court to hold a conflict hearing, pursuant to the dictates of U.S. v. Curcio, 680 F.2d 881 (2nd Cir. 1982). In response, Officer Schwarz and his counsel separately informed the court of Schwarz's intent to waive any potential conflicts. Schwarz, 81-82.

Through further correspondence between the parties, specific risks presented by the conflicts were discussed. These risks included dangers of joint representation of co-defendants and risks which might arise if officers or delegates of the PBA were called to testify. Following these discussions, the government took the position that the conflict between the attorneys' representation of the codefendants and the attorneys' obligation to the PBA was an actual conflict

which was unwaivable. Schwarz, at 82.

The district court then held its first conflict hearing. At this hearing, the court discussed risks presented by both the conflict of joint-representation of co-defendants and the conflict with the PBA. Regarding the PBA conflict, the court noted that the victim in the criminal case filed suit naming PBA and its president as defendants and alleging a conspiracy involving PBA and Schwarz. The court told the defendants that the outcome of the civil case could be greatly affected by the criminal proceeding. The district judge also informed the defendants that the interests of the PBA and of Schwarz may differ and that the attorneys advice to Schwarz may be hindered by the obligation to PBA. The court concluded by stating it would be unrealistic to believe the attorneys as beneficiaries of the PBA contract would be indifferent to PBA's liabilities regarding the outcome of Schwarz' proceedings. The court then scheduled a Curcio hearing to allow Schwarz time to digest the information provided and appointed independent counsel to advise Schwarz regarding the conflict. Schwarz, 82-83. The court also prohibited defense counsel firm from representing the PBA in the Louima suit.

At the Curcio hearing, the court engaged in an extended colloquy with Schwarz. The court asked Schwarz to provide narrative responses to questions regarding the conflict under which his counsel labored. These questions concerned Schwarz' view of the inconsistency of the defenses available to himself and his co-defendant. Schwarz admitted that situations could arise where his attorney may have another "agenda and may not be vigorous in his cross-examination of these witnesses. ..... my lawyer may be reluctant to call a witness who may be able to help me but who in his testimony may be harmful to" his other interests. Schwarz, 83. Also, independent counsel for Schwarz testified he provided advice to Schwarz regarding the conflict and that

Schwarz understood the risks involved. Schwarz then waived his attorney's conflict and the court accepted this waiver and allowed the questioned representation. Schwarz, 83-84.

During the trial, issues arose concerning whether Louima was assaulted by one officer (co-defendant Volpe, represented by separate counsel without conflict) or two and whether Schwarz was this second officer. Before the conclusion of the trial, Volpe pled guilty to the assault and testified during allocution that this assault occurred with assistance of a second person. The Schwarz jury was informed of the guilty plea, but not the statement of Volpe. The jury convicted Schwarz of all charges related to the station house assault. Schwarz, 84-88.

On appeal, Schwarz argued through new counsel that his trial attorney's loyalty to the PBA and the firm's retainer with the PBA created an actual conflict of interest which adversely affected the representation of Schwarz. Further, counsel argued that the conflict was so serious as to be "unwaivable." Schwarz also asserted that any purported waiver was ineffective because Schwarz "was not specifically apprised and had no reason to believe that (attorney's) interests in the PBA retainer would conflict with his defenses in the particular way that they did." Schwarz, 90.

The appellate court found that the conflict of loyalty to Schwarz and the PBA became an actual conflict when Louima filed the civil suit. While Schwarz' trial strategy included a possible defense that some other person was the second person involved in the assault, this theory of defense was antagonistic to the PBA defense in the civil suit. The court found an actual conflict of interest existed between the attorney's loyalty to Schwarz on the one hand and to the PBA and the attorney's self interest on the other. Schwarz, 91-92.

The court further found that this actual conflict caused Schwarz' trial counsel's failure to

pursue a "plausible alternate strategy" of defense. Instead of arguing that the second officer assaulting Louima was one other than Schwarz, as supported by some evidence, trial counsel argued only the theory of defense that one officer and only one officer was involved in the assault. The court rejected any notions that trial counsel made a strategic decision not to pursue this defense because the court found that Schwarz need not "prove that the forgone strategy was reasonable or that it would have affected the outcome of the trial, only that it was a plausible one and that it was forgone." Schwarz, 93.

The court also specifically found that pursuit of the "plausible alternate strategy" would have been "inherently in conflict" with the attorney's loyalty to the PBA and that trial counsel's "failure to pursue this strategy was almost certainly the result of this conflict." Schwarz, 94. After finding proof that an actual conflict existed and that this conflict caused an adverse affect on the outcome of the case, the court proceeded to review the validity of the proposed waiver of that conflict. Schwarz, 95.

The court framed the next issue as whether "(1) the conflict with respect to the PBA retainer was so severe as to be unwaivable, or (2) the Curcio waiver by Schwarz was not knowing and intelligent with respect to the specific conflict that led to the lapse in (attorney's) representation." Because the court found the conflict unwaivable, it declined to address the second issue. The court did find, however, that waiver of a conflict which is subject to waiver, effectively precludes a finding of ineffective representation because otherwise "such a result would eviscerate the very purpose of obtaining the waiver." Schwarz, 95.

The court then noted that not all conflicts were subject to waiver by the defendant. Schwarz, 96. The court further "distinguished between conflicts that implicate the attorney's

self-interest and those that implicate the attorney's ethical obligation to someone other than the defendant, noting that the former are 'of a different character' than the latter." Schwarz, 96 (internal citations omitted). The court finally concluded by noting that the rationale which applied to conflicts which the second circuit had previously "deemed to be per se violation of the Sixth Amendment right to counsel" applied to the facts of the Schwarz case. This rationale holds that "[a]dvice as well as advocacy permeated by counsel's self interest" creates an unwaivable conflict because "no rational defendant would knowingly and intelligently be represented by a lawyer whose conduct was guided" largely by the loyalty to the attorney's own self interest. Schwarz, 97 (internal quotation omitted).

Ethics Advisory Opinions

A lineage of ethics opinions support the prohibitions described in Howerton and Schwarz. In S.C. Bar Ethics Advisory Opinion 77-2, the question was presented whether a circuit solicitor could "continue to handle (his current) case to their termination after he assumes full-time status as circuit solicitor." The Opinion answered that question by finding no ethical prohibition against the prosecuting attorney engaging in the private practice of law except a "prosecuting attorney may not defend a criminal case in either federal or state courts." SC Bar Ethics opinion 77-2 citing ABA Formal Opinion 142 and ABA Formal Opinion 262.

In 1935, the ABA Standing Committee on Ethics and Professional Responsibility reviewed the propriety of an "Assistant Prosecutor, or his partners, appearing in defense of criminals in the court in which it is occasionally the Assistant Prosecutor's duty to substitute for the regular prosecuting officer." ABA Formal Opinion 142. The opinion answered the question stating it "is improper for an assistant prosecutor or his partner to defend a client in a criminal

case." Id. The Opinion reasoned that the "prosecutor has as his client the state." Further the Opinion noted other opinions held that a "prosecutor can not represent both the public and the defendant." Also, the Opinion continued that "no question of consent can be involved as the public is concerned and it cannot consent." Id., internal citations omitted. In conclusion, the Opinion cited an opinion from a year earlier which stated that one county attorney "undoing the work of another would present an appearance of confusion and pulling at cross purposes that would tend to diminish the public's confidence in and respect for law enforcement." Id., internal citations omitted.

Likewise, at the PCR hearing, Professor Freeman testified that he believed, as a factual matter revealed through research, that these opinions represented the current ethical bounds for attorneys practicing within the State of South Carolina. In fact, he easily distinguished the State's attempt to erode the holdings of these ethical opinions. Finally, he noted under cross examination that a case from the Fourth Circuit Court of Appeals was not the law of the State of South Carolina.

Case at Bar

At the time of the crime for which Appellant was convicted and sentenced to death and during every proceeding leading up to and including the actual trial of the case, applicant's lead trial counsel, Isaac McDuffie Stone, III., was employed as a part time assistant solicitor with the Fourteenth Judicial Circuit Solicitor's Office of the State of South Carolina. PCR, p. 718-719. Stone was also employed as a sub-contracted attorney for the South Carolina Insurance Reserve

Fund.[13] Attorney Stone's primary duties in that capacity included the defense of state agencies and state employees against lawsuits filed by various parties. The state agencies Mr. Stone represented at the time he represented applicant included, but are not limited to: the South Carolina Highway Patrol and Orangeburg County. PCR, p. 1132. The charge for which applicant was convicted occurred in Orangeburg County, involved the murder of a South Carolina Highway Patrolman, and was investigated by SLED in cooperation with the Orangeburg County Sheriff's Department.

Prosecutors may not Defend

Attorney Stone's representation of Aleksey while employed as a part-time prosecutor constitutes fundamental error. Aleksey was accused of the killing of a South Carolina Highway Patrol Officer. Further, this case was investigated by the South Carolina Law Enforcement Division. These agencies are bulwarks in the investigation and prosecution of criminal matters throughout the state of South Carolina. There is no question that Stone relied upon the same methods of law enforcement investigation conducted by SLED in his prosecutorial functions that he was called upon to attack in Aleksey's defense. Thus Stone's joint status as executive branch representative of the State of South Carolina and defender of Aleksey was "inherently antagonistic and irreconcilable" and constitutes "fundamental error" warranting reversal without any other showing required by Aleksey. See Howerton v. State, 640 P2d. 566-567.

Stone's Employment as Prosecutor Precluded Venue Change Motion

Again, Stone was employed as a prosecutor with the Fourteenth Circuit Solicitor's Office

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[13]Attorneys are assigned cases by the IRF by virtue of being placed on the list compiled and maintained by the Attorney General of South Carolina. The Attorney General has at all times since January 1, 1998 been aligned against Aleksey's interests. PCR, p. 794.

at the time of his representation of Aleksey. An actual conflict arose at the time Stone considered a change of venue motion. PCR, p. 839-843 & Ground I of Third Amended PCR Application. Had Stone or Sims requested this venue change, the trial judge could have moved the trial to a county within the Fourteenth Judicial Circuit.

First, this circuit contains five counties. Beaufort County is the largest of these counties. According to the South Carolina Bar directory, Beaufort County and Orangeburg County are more similar in population than Orangeburg County is to Lexington County. PCR, p. 71.

Also, Beaufort County is geographically close to Orangeburg County. In fact, a recent death penalty case involved jury selection from a Beaufort County jury venire for service on an Aiken County death penalty case. See State v. Wise, 596 S.E.2d 475 (SC 2004). If Aleksey matter would have involved jury selection from or complete transfer of venue to Beaufort, attorney Stone would have been unable to continue his representation Aleksey.

Nothing in the record indicates that Aleksey waived this conflict. In fact, there is no evidence that he was ever informed of the risk that Stone's representation would preclude the defense from seeking the venue change as a "plausible alternate strategy." Finally, this conflict is so serious as to be unwaivable. See Schwarz.

Conflict between Aleksey's claim of confession coerced by brutality and IRF liability

Further, the conflict between attorney Stone's loyalty to the South Carolina Insurance Reserve Fund (IRF) and the IRF clients created an actual conflict with Aleksey's defense of the underlying case. This conflict caused counsel to fail to pursue "plausible alternate strategies" of defense in the case below. Attorney Stone failed to argue that Aleksey's confession was the product of coercion and brutality at the hands of SLED agents Mears and Darnell. This

assertion; if proven, could have created liability on the part of the IRF. Finally, Aleksey did not waive this specific conflict or any potential or actual conflicts related to Stone's loyalty to the IRF and this conflict was unwaivable.

One of the strongest pieces of evidence against Aleksey was his own statement that he killed Trooper Lingard. Trial tr. p. 2423-2433. This statement was provided to SLED agents Mears and Darnell and recorded on audio tape during his January 2, 1998 interrogation at the Orangeburg Regional Detention Center. The defense strategy that Glory Vee, and not Aleksey was the killer necessarily implied that this statement was false.

However, Stone never specifically argued to the jury that SLED agents Mears and Darnell coerced this confession through physical and verbal assaults directed towards Aleksey at the January 2, 1998 interrogation. Further, Stone never argued to the trial court that this statement was involuntary due to these physical and verbal assaults. See PCR, p. 138, lines 13-16 (Statement of Attorney General Zelenka stipulating that brutality issue was not argued at the Jackson v. Denno hearing).

These allegations would have certainly offered the jury an explanation why Aleksey confessed. These allegations of brutality were corroborated by Aleksey's crying on the tape. Also the brutality was consistent with the tape being cut off by one SLED agent during the time Aleksey's changed his account of the events of December 31, 1997. Thus, Stone's conflict in loyalties caused him to forgo development of the plausible defense strategy that Aleksey confessed because he was beaten and threatened by the SLED agents.

Stone was aware that Aleksey asserted this confession was produced by improper coercion. In a newspaper article printed prior to his attorneys' appointment, Aleksey informed

reporters that he confessed "after being beaten and threatened by police." Applicant's 72, "Man says he didn't kill trooper", Times and Democrat, by Carol B. Barker, January 6, 1998. The allegation of improper coercion was also repeated by Aleksey through Attorney Sims at Aleksey's bond hearing on January 8, 1998. Applicant's 70, Bond Hearing Tr. p.5, lines 9-15.

Also, in a letter dated March 6, 1998, Aleksey told his attorneys that the agents "beat the shit out of him" in order to obtain his confession. Applicant's 2. This was repeated in a March 7, 1998 letter addressed to both of these attorneys, where Aleksey stated that he "was beaten into saying [he] did it." Applicant's 60. In fact, Stone's client conference notes detail the brutality. Applicant's 61.

These notes indicate that Aleksey told Stone during a pre-trial interview at Lee Correctional Facility that he was handcuffed and shackled during the interview and "threatened." The notes indicate the "black guy (Agent Mears) hit in chest" and he was told "you're not leaving alive, you killed a friend of mine, I'll beat it out of you" and that he was choked.[14] Applicant's 61 Finally, Attorney Sims agreed that Aleksey told him that the SLED agents "beat the crap out of him." PCR, p. 134, lines 10-12.

At the time of Stone's defense of Aleksey, he owed loyalty to the Insurance Reserve Fund. The loyalty stemmed from the fact Stone regularly performed work on behalf of the Insurance Reserve Fund to satisfy its obligation to defend agencies and employees of the government against claims of tortious conduct. Stone performed work for the IRF through another firm until July 1997, when he set up his own private practice in Beaufort, South

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[14]Curiously, Stone could not recall his prior knowledge of these brutality allegations during his cross examination by Attorney Zelenka. PCR, p. 1146, l. 5-17.

Carolina. Stone's revenue from the IRF fund is set out in Applicant's 57. During 1998, Stone received more than $67,000.00 from the IRF. This amount rivaled the compensation Stone received from the Aleksey matter for the year 1998.[15]

Stone's loyalty also created a tacit understanding that the IRF work would continue if the IRF was pleased with Stone's performance. This expectation proved reasonable as Stone received even more money from the IRF following the conclusion of the Aleksey case. While Stone derived no income after 1998 from the Aleksey case, his IRF income for the years 1999 and 2000 exceeded $330,000.00. Like the trial counsel in Schwarz, Stone owed a loyalty to the IRF such that a reviewing court must "assume that, under such circumstances, the distinct possibility existed that, at each point the conflict was felt, (attorney) would sacrifice (client's) interests for those of the (competing financial interest)". Schwarz, 96.

Had Stone competently argued the brutality claim in Aleksey's defense, he would have increased liability exposure on the part of the IRF. SLED is a state agency and liability incurred by SLED would fall upon the back of the State of South Carolina. Further the Insurance Reserve Fund is an arm of the State of South Carolina's Budget and Control Board, which is specifically designed to control and contain the state's liability exposure.

In fact, after consultation with Stone but without Stone's help, Aleksey filed suit in federal court against SLED for these actions during the pendency of the murder charge in General Sessions court.[16] The suit, docketed as 98-CV-1337, also listed Orangeburg County, the

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[15]Stone received $44, 750.00 in attorney fees for his representation of Aleksey. See OID Voucher contained in the Orangeburg Clerk of Court's file 98-GS-38-0244.

[16]Aleksey also filed suit against various employees of the South Carolina Department of Corrections, prior to the August 24, 1998 commencement of his trial. Applicant's 58 & proposed

"Orangeburg Jail" and Michael Moore as defendants in this claim for civil rights violations. Applicant's 58.[17] According to the Pacer documents, the suit was commenced by complaint received on May 18, 1998. Further, this suit was dismissed without prejudice shortly thereafter for failure to perfect the filing of the complaint according to the rules for pro se civil rights claims. Aleksey also filed "Tort Claim Forms" with the Insurance Reserve Fund. Applicant's proposed 91.

Further, Stone was cognizant of the conflict the lawsuit created upon his loyalties. Stone explained in a letter that his "involvement with the Insurance Reserve Fund" prevented his assistance of Aleksey because Stone would have "a conflict of interest bringing a civil lawsuit against an agency" he represented.[18] Further Stone's paralegal's time sheet indicates discussion between Stone's office and Aleksey's mother regarding "letters to IRF." Applicant's 66, entry for May 12, 1998. In fact, the time sheet includes entries for "telephone call with Ms Aleksey concerning representation of a civil trial" and telephone calls regarding Bayan's letter's corresponding with the letters informing Stone of the brutality claim. Applicant's 66, entries for March 10, 1998 and March 20, 1998.

Not only did Stone engage in "insurance reserve fund work," but he specifically defended

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92. Meanwhile, attorney Stone represented SCDOC through the Insurance Reserve Fund at the time of the filing of these suits as well.

[17]Attorney Stone's clients through the Insurance Reserve Fund also included Orangeburg County and the director of the Orangeburg Regional Detention Center.

[18]Although Stone's letterhead on Applicant's 59 states the letter was drafted February 19, 1999; this date reflects the day Stone printed and mailed a copy of the letter to Aleksey, months after Aleksey's conviction. Stone testified at PCR that the letter was sent around the time of the filing of the suit. PCR, pgs. 733-736.

various law enforcement officers, including highway patrolmen, against claims of brutality under color of law. The civil defense of these officers allowed Stone unusual access to high ranking members of the highway patrol, including one representing the patrol's interest in Aleksey's case. Other clients included Orangeburg County, Willie Bamberg in his capacity as director of the Orangeburg Regional Detention Center, and the South Carolina Department of Corrections.

Finally, the court never addressed the specific conflict posed by the brutality claims or the lawsuits premised thereon, because the court was never made aware of the actual conflict. And Stone admitted he never discussed with Aleksey the potential conflict regarding lawsuits against entities which he represented because he "didn't believe that ever came up." PCR, p. 736, l. 19-p. 737, l. 2. Never was Aleksey ever questioned regarding this specific conflict, either as a potential conflict or an actual one.

Aleksey never validly waived any general Insurance Reserve Conflict either. Between the time of Aleksey's arrest on January 1, 1998 and the conclusion of his sentencing on September 1, 1998, the trial court conducted three inquiries into Stone's conflict of interest. The first hearing occurred on February 2, 1998.

The first hearing was conducted by the Honorable Luke N. Brown. At this hearing, the State officially served Aleksey with the Notice of Intent to Seek the Death Penalty. Applicant's 70, February 2, 1998 Transcript of Hearing. Following the arraignment and service of the papers regarding the death penalty, Solicitor Bailey requested that the court address "one other matter, with regard to Mr. Stone's representation." Applicant's 70.

Stone explained to the court that he informed Aleksey about Stone's "part-time solicitor work." Applicant's 70, Feb. 2, 1998 Tr. p. 5, lines 19-23. Stone also continued by stating that he

explained that he "did insurance reserve fund work, which means that (he) represented state agencies before, which would include police agencies and the highway patrol." Applicant's 70, Feb. 2, 1998, Tr. p. 6,lines 1-3. In response to the court's question that "(h)e tells me that you still wanted him to be one of your attorneys, is that what you'd like to do?" Aleksey responds "yes." The court concludes by informing Aleksey, "that's a good choice." Feb. 2, 1998, Tr. p. 7, lines 6-9.

The second conflict hearing occurred on May 20, 1998. There, the Honorable Edward B. Cottingham presided over a general motion hearing. Again, at the request of the Solicitor, the court inquired of Aleksey regarding Attorney Stone's conflict. At this hearing, the court asks Aleksey whether he desires for Stone to continue representing him as a "defendant (sic) attorney" even though "he is a part-time solicitor in another circuit." The judge advises Aleksey that the part-time solicitor employment is "not in any way connected with the Orangeburg circuit." Trial Tr. p. 2192-2193. Aleksey replies "yes sir." No mention is made regarding attorney Stone's "insurance reserve fund work."

The third hearing regarding Stone's conflict of interest occurred following the motions regarding voir dire. Again, at the request of Solicitor Bailey, the trial judge questioned Aleksey regarding Stone's "contract with the solicitor...part-time with the Solicitor's office in another circuit. It has nothing to do with this circuit in Orangeburg. Do you understand that?" Trial tr. p. 181, lines 4-10. Aleksey replies "yes, your honor." Aleksey further replies with "yes, your honor" to questions about whether he has fully understood Stone's solicitor employment and whether he waives "any possible conflict." Trial tr. p. 181, lines 12-22. No mention is made of the Insurance Reserve Fund conflict.

Notably none of the hallmarks of a valid waiver are present. First, Aleksey was not provided sufficient information to permit a choice. Further, Aleksey was provided no meaningful options from which to choose, considering he did not choose Mr. Stone in the first place. Nor was Aleksey provided an explanation of the risks involved by the Court. In fact, the court never explzined one risk created by Stone's insurance reserve fund work.

Instead the first court explained that Aleksey decision to proceed despite "potential" conflicts was "a good choice." Likewise, the trial court at the second and third conflict hearing minimized the explanation of risks by characterizing the prosecution job as unconnected with Aleksey's case. Not one negative complication regarding conflicting loyalties or preclusion of defense strategies was ever explained.

Further, the trial judge did not devise any method to determine Aleksey's level of comprehension regarding the dangers posed by the divided loyalties. Unlike Schwarz, Aleksey was not prompted to explain his comprehension in narrative form. Instead, Aleksey's responses were limited to five or six "yes" responses over all three conflict hearings.

Also, unlike the Curcio proceeding devised by the Second Circuit of the U.S. Court of Appeals, Aleksey was not given the opportunity to confer with independent counsel regarding the conflict. In fact, Attorney Sims admitted he offered no independent advice to Aleksey regarding Stone's multiple conflicts of interests. Trial Tr. p. 57, l. 23-p. 59, l. 13.[19] Thus, Aleksey was

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[19]See Wheat v. U.S., 486 U.S. 158, 162-163 (1988) ("The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials. It is a rare attorney who will be fortunate enough to learn the entire truth from his own client, much less be fully apprised before trial of what each of the Government's witnesses will say on the stand. A few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple defendants. These imponderables are difficult enough for a lawyer to assess, and even more

forced to reach a decision regarding waiver with the assistance of only his limited intellectual functioning.[20]

Finally, Stone's conflict between Aleksey's claim of a brutality coerced confession and IRF liability was so serious as to be unwaivable. Eerily similar to Schwarz, no reasonable defendant facing execution would desire an attorney who would completely fail to challenge his confession with claims of brutality when the attorney knew these claims would create liability exposure for the other client to whom the attorney's conflicted loyalty was owed.

Multiple Representation of Aleksey and a Witness regarding Validity of GSR Test[21]

Stone also represented Aleksey while operating under an actual conflict of interest because of the loyalty he owed to South Carolina Highway Patrolman Lynn Stack. Stone represented Trooper Stack through arrangement with the IRF. PCR. p. 822-823. However, Trooper Stack was involved in the investigation of Lingard's murder. Applicant's proposed 96.

Specifically, Stack drove to Summerville with Orangeburg Detective Katherine Gallup. Tr. p. 1103, l. 24. Detective Gallup testified that she saw blood on Aleksey's hands. Tr. p. 1108, l. 11-12. Stone attempted to impeach Gallup's alleged observation by noting an absence of such

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difficult to convey by way of explanation to a criminal defendant untutored in the niceties of legal ethics. Nor is it amiss to observe that the willingness of an attorney to obtain such waivers from his clients may bear an inverse relation to the care with which he conveys all the necessary information to them.").

[20]Dr. Frierson testified, as a government witness, that Aleksey's "intelligence probably falls somewhere between 77 and 82" and he possessed borderline intellectual functioning. Tr. 2348, line 12-17.

[21] See People v. Washington, 461 N.E.2d 393 (Ill. 1984) (reversing a conviction where appointed counsel forced to discredit police officer and representative of municipality where attorney served as prosecutor.

testimony in Gallup's prior written statement to SLED. Tr. p. 1110, l. 13-18.

However, Trooper Stack never testified at trial. Had he been called as a witness, Stone could have argued that Stack's prior written statement to SLED also contained no allegation that Aleksey's hands were covered in blood prior to the gun shot residue testing. Applicant's proposed 96.

The prosecution implied that the blood seen by Gallup could explain the absence of gun shot residue on Aleksey. Tr. p. 1769, l. 11- p. 1770, l. 19. In light of Gallup's testimony, Stone offered no valid reason not to present Stack's SLED statement in evidence. PCR, p. 822, l. 24- p. 823, l. 6. In fact, it is most likely that Stone did not present Stack because he would have been forced to examine his client as an adverse witness to Aleksey, his other client.[22]

Multiple Representation of Aleksey and a Witness regarding Escape Charge

Attorney Stone represented Aleksey while operating under an actual conflict of interest because of the loyalty he owed to Willie Bamberg, the director of the Orangeburg Regional Detention Center. Stone represented Willie Bamberg, in his capacity as the director of the Orangeburg Regional Detention Center, by arrangement of the Insurance Reserve Fund. Further, during Stone's representation of Aleksey, Aleksey filed a pro se civil rights claim against the Orangeburg Regional Detention Center. Because of this conflict, attorney Stone failed to present the testimony of Willie Bamberg as a witness for Aleksey.

While detained pre-trial at the Orangeburg Regional Detention Center, Aleksey was charged with attempted escape. Willie Bamberg's testimony would have demonstrated that

[22]PCR testimony demonstrates that Stone has previously been in the position of representing parties adverse to one another. PCR, p. 793, l. 3- p. 799, l. 14.

Aleksey was only charged with escape as a matter of jail policy and not because the jail believed Aleksey sincerely attempted to flee from government custody. Tr. p. 2201, l. 8- p. 2202, l. 6 ("The head of the detention says anytime there is a break in the window, we're going to call it an escape.") This testimony would have rebutted the government's evidence implying that Aleksey actually tried to escape.

Bamberg's testimony would also have countered the government's closing argument in the penalty phase regarding Aleksey's status as a safekeeper inmate and the appropriateness of a life sentence. PCR, p. 1135, l. 14- p. 1136, l. 3 & applicant's proposed 87. The plausible alternate defense strategy of presenting Bamberg as a witness was forgone because of the conflict caused by Stone's multiple representation of Aleksey and Bamberg. Aleksey never waived this actual conflict. Finally, this conflict was so serious as to be unwaivable.

As a factual backdrop, Aleksey was held without bond from January 1, 1998 until the commencement of his trial on August 24, 1998. Originally, Aleksey was detained at the Orangeburg Regional Detention Center. The government alleged that Aleksey attempted to escape on January 27, 1998.

This allegation was formally made in an arrest warrant affidavit, signed on January 28, 1998. Applicant's proposed 89. The affiant for this arrest warrant affidavit was Vernetia Dozier, deputy director of the Orangeburg Regional Detention Center. Following this allegation, Aleksey was transferred from the Orangeburg jail to the Lee Correctional Institution within the South Carolina Department of Corrections, pursuant to the safekeeping procedures of the South Carolina Code of Laws.

During the penalty phase of Aleksey's trial, the government called Ms. Dozier as a

witness. Ms. Dozier testified that the administration of the jail decided to charge Aleksey with attempted escape and to send him to safekeeping. She also testified that "safekeeping is where we send inmates that are hard to handle or we consider escape risks." Tr. 1978, l. 16-17. Ms. Dozier also testified that she had knowledge of "some escapes from the jail." T. 1980, l. 11-25.

The following day, out of the presence of the jury, Solicitor Bailey urged the court to provide a limiting instruction to the jury to disregard the fact a warrant was issued for escape. Attorney Stone then argued that the court should provide an instruction that "escape has nothing to do with this case." Tr. 2024, l. 22-24. The court then charged the jury that "this defendant is not charged with escape. There is no escape warrant outstanding.[23] You must disregard that testimony in its entirety. It has nothing to do with the trial of this case." Tr. 2028, l. 13-17.

During closing argument in the penalty phase, Solicitor Bailey presented argument regarding the appropriateness of a sentence of life for Aleksey. Despite the limiting instruction previously given, Bailey urged the jury to recall Dozier's testimony regarding why people were sent to safekeeping. Specifically, Bailey argued:

> "*You can take a look at how 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."
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> .....

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[23] In fact, the escape charge remained pending until March 23, 1999 and this information was a matter of public record discussed in pre-trial publicity. Applicant's proposed 90.

> "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."*

Tr. 2110, lines 8- 23 and 2116, lines 2-7. (Emphasis added).

Aleksey's counsel did not object to this argument nor did they request a limiting instruction. No reply to this argument was made in closing argument.

Attorney Stone was aware that the escape matter was a potential issue in Aleksey's trial. According to Stone's testimony at the PCR hearing, "(a)s far as Willie Bamberg is concerned, the escape was certainly something that concerned me because he was charged with escape. And obviously I knew at some point, or at some point I had a good feeling we would be discussing prison life, so I wanted to be sure that escape not being a realistic escape, I think we sewed that up as well. I don't know that that became an issue at all." PCR, page 823, lines 8-15.

In this regard, Stone arranged for Bamberg to sign an affidavit which noted the dimensions of the cell window broken by Aleksey. Applicant's proposed 87. This affidavit also stated that the January 27, 1998 incident was the only infraction Aleksey incurred in prison. However, Bamberg did not testify at Aleksey's trial.

The affidavit was not entered or proffered as evidence at the trial either. Also, no adaptability expert testified regarding Aleksey's generally favorable adjustment to prison life. In fact, the defense presented no evidence allowed pursuant to Skipper v. South Carolina, even though this evidence was available at the time of trial.[24] Skipper v. South Carolina, 476 U.S. 1

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[24]Jim Aiken testified regarding the attempted escape and Aleksey's adjustment to prison life. PCR, p. 1486-1495. See Ground P, 6 of Third Amended Application for Post Conviction Relief.

(1986).

Stone's loyalty to Aleksey conflicted with that owed to Bamberg because Stone was actively defending Bamberg in a civil rights claim. Applicant's proposed 86 & 88. Bamberg appeared as a defendant in the case entitled Tyler v. Jones, 96-CV-28, brought in the United States District Court of South Carolina, Rock Hill. Although the Pacer documents list the defendant as "John Doe, warden" of the Orangeburg jail, Bamberg would have been substituted, pursuant to FRCP, Rule 25(d), on January 1, 1997 when he became the director of the Orangeburg facility. Applicant's proposed 88. Stone's representation of Bamberg was arranged through the Insurance Reserve Fund. Further, the lawsuit did not conclude until February 10, 1998, nearly two weeks after the escape charge was served upon Aleksey.

Also, Aleksey filed suit against the Orangeburg jail by complaint filed May 18, 1998. Applicant's 58 & proposed 58 (b). This complaint also alleged claims against SLED, as stated above. Further, as indicated earlier, it appears Aleksey's mother discussed representation of Aleksey in these civil matters with Stone's paralegal.

Further, Aleksey was never asked to waive his right to conflict free counsel able to counter the safekeeping arguments presented by the state during the penalty phase.. In fact, Aleksey was never presented any information regarding the Willie Bamberg conflict. Not one risk was explained by the trial court at any of the waiver hearings.

Finally, the conflict between Stone's loyalty to Aleksey and to Bamberg is so severe as to be unwaivable. Again, at the time of Stone's appointment, he was actively representing the warden of the jail holding Aleksey in pre-trial detention. Stone knew that pre-trial conduct was clearly fair game in the sentencing phase of a capital trial.

Conflict between Presentation of Adaptability Evidence and Representation of Willie Bamberg

Alternately, Stone's representation of Aleksey was adversely affected by Stone's loyalty to Willie Bamberg because this multiple representation prevented Stone from presenting adaptability evidence. Again, during Aleksey's pre-trial detainment, the administration of the Orangeburg Regional Detention Center charged him with attempted escape. Aleksey was moved to safekeeping. Further, the state argued Aleksey should be executed because the only evidence of adaptability was the attempted escape incident.

However, adaptability expert Jim Aiken testified during the PCR hearing that he did not consider the escape a valid attempt. PCR p. 1488-1491. In fact, he found Aleksey's actions in immediately contacting a guard to be inconsistent with a true escape plan. Further, Aiken generally testified that records of Aleksey's pre-trial detention supported a claim that he could "be properly housed and secured in a correctional environment for the remainder of his life." PCR, p. 1487, l. 6-8.

If Stone would have presented this testimony at trial, he would have invited the state to call Willie Bamberg or officials form the South Carolina Department of Corrections as witnesses against Aleksey. Stone would have been forced to cross examine his own clients.[25] Further, Aleksey never waived any actual conflicts related to the IRF or to Bamberg of the Department of Corrections. Finally, these conflicts are so serious in this capital case that they are unwaivable.

Constructive Denial of Counsel at Critical Phase of Proceeding-Cronic

Aleksey was denied his right to counsel because Stone's conflicts of interest operated to

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[25] Stone represented the South Carolina Department of Corrections as well as Bamberg and the Orangeburg Regional Detention Center. Tr. p. 2203, l. 22-24.

prevent his assistance of Aleksey during a critical stage of the proceedings, namely the waiver hearings regarding Stone's conflict. Pursuant to U.S. v. Cronic, prejudice is presumed in a Sixth Amendment violation scenario when there is a complete denial of counsel, when the defense completely fails to subject the prosecution's case to adversarial testing or when circumstances are such that no lawyer could provide effective assistance. U.S. v. Cronic, 466 U.S. 648 (1984). The Cronic court noted uniform findings of "constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." Cronic, at 659, n. 25.

Any advice Stone provided to Aleksey was tainted by the bias created by these conflicts.[26] And as a matter of logic, Aleksey never waived Stone's conflicts prior to receiving the advice tainted by the conflicts. In fact, courts have recognized that it is reasonable to assume that, "under such circumstances, the distinct possibility existed that, at each point the conflict was felt, (attorney) would sacrifice (client's) interests for those of the (competing financial interest). Schwarz, 96.

Further, even though two attorneys represented Aleksey, attorney Sims admitted he provided no advice to Aleksey regarding Stone's conflicts. And independent counsel was not appointed to represent Aleksey regarding conflict, even though the Second Circuit Court of Appeals encourages this arrangement. See Schwarz, citing Curcio. Finally, no trial judge provided Aleksey with any advice or explanation of risks regarding potential effects of Stone's conflicts upon Aleksey's defense of his life.

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[26]Upton Sinclair wrote: "It is difficult to get a man to understand something when his salary depends on his not understanding it."

The waiver hearings constituted a "critical stage" in the proceeding against Aleksey. As stated in U.S. v. Cronic, "(a)ssistance begins with the appointment of counsel, it does not end there." Cronic, 654, n. 11. In State v. Williams, the South Carolina Supreme Court defined the test for a "critical stage" as "whether the particular stage either requires or offers opportunity to take a procedural step which will have prejudicial effects in later proceedings, or whether events transpire that are likely to prejudice the ensuing trial." State v. Williams, 210 S.E.2d 298, 300 (1974). And one state court, relying on dicta from later U.S. Supreme Court precedent, has defined a "critical stage" as a proceeding where "the defendant is confronted with the intricacies of the law or the advocacy of the public prosecutor or prosecuting authorities." Williams v. State, 555 N.E.2d 133, 136 (Ind. 1990) citing U.S. v. Gouveia, 467 U.s. 180, 188-189 (1984).

More recent federal cases provide three factors useful in a determination of whether a stage is a critical one for Sixth Amendment purposes. Menefield v. Borg, 881 F.2d 696, 698-699 (9th Cir. 1989) internal citations omitted. The first factor is whether a failure to pursue strategies or remedies will result in a loss of significant rights. Id. The second factor is whether skilled counsel would be useful in helping the accused understand the legal proceedings. Id. The third factor is whether the proceeding tests the merits of the accused's case. Id.

Under any and all of these tests, the waiver hearing was a critical stage. First, the waiver hearing presented an opportunity for Aleksey to waive conflict free counsel, a procedural step which did prejudice later proceedings and the trial, as outlined above. Also, Aleksey was confronted with intricacies of the law during the decision to allow a prosecutor to defend him against execution. Lastly, a skilled lawyer would have assisted Aleksey in understanding the significance of the waiver proceeding.

Instead, Aleksey was forced to confront the decision of whether to accept counsel hobbled by incredible conflicts completely without the assistance of counsel. Further, Aleksey made this decision only relying upon his "approximate I.Q..... in the high 70's, possibly in the very low 80's"and with borderline intellectual functioning. Tr. 2348, line 12-17 & Tr. 2350, lines 17-19. Such a breakdown in the adversarial system can not be consistent with the Sixth Amendment's promise of the guiding hand of counsel.[27]

Respectfully submitted,

David B. Tarr
Attorney at Law
720 Main St., Suite 202
Columbia, SC 29201
(803) 252-9769

James A. Brown, Jr.
Attorney at Law
1111 Bay St., P.O. Box 592
Beaufort, SC 29901-0592
(843) 470-0003

Attorneys for Applicant
January 31, 2005

[27]"He (an intelligent and educated layman) requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." Cronic, quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

U.S. District Court

District of South Carolina (Rockhill)

CIVIL DOCKET FOR CASE #: 96-CV-28

Tyler v. Jones, et al

Filed: 01/04/96
Assigned to: Judge William B Traxler, Jr
Demand: $0,000
Nature of Suit: 550
Lead Docket: None
Jurisdiction: Federal Question
Dkt# in other court: None
Cause: 42:1983 Prisoner Civil Rights

CHARLES W TYLER plaintiff	Charles W Tyler #119682 [COR LD NTC] [PRO SE] Eastern Kentucky Correctional Complex Box 636 West Liberty, KY 41472
v.	
BING JONES, Sheriff of Calhoun County (South Carolina) defendant	Isaac McDuffie Stone, III 843-815-7801 [COR LD NTC] Duffie Stone Law Office PO Box 155 Bluffton, SC 29910 843-815-7800 Amy Lohr Gaffney 803-929-0927 [COR LD NTC] PO Box 11683

App. 86

	Columbia, SC 29211 803-799-7968
DENNIS BENNINGFIELD, Detective, Kentucky State Police defendant	Gail Lyndon Williams, Hon [COR LD NTC] 919 Versailles Road Frankfort, KY 40601 Isaac McDuffie Stone, III (See above) [COR LD NTC] Amy Lohr Gaffney (See above) [COR LD NTC]
MITCH BAILEY, Detective, Kentucky State Police defendant	Gail Lyndon Williams, Hon (See above) [COR LD NTC] Isaac McDuffie Stone, III (See above) [COR LD NTC] Amy Lohr Gaffney (See above) [COR LD NTC]
JOHN DOE, Warden defendant	Isaac McDuffie Stone, III 843-815-7801 [COR LD NTC] Duffie Stone Law Office PO Box 155 Bluffton, SC 29910 843-815-7800

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
1/4/96	--	** Added MAG flag indicating Magistrate Judge involvement.

(deck) [Entry date 01/09/96]

1/4/96	1	MOTION by plaintiff Charles W Tyler to proceed in forma pauperis (deck) [Entry date 01/09/96]
1/4/96	2	COMPLAINT. (deck) [Entry date 01/09/96]
1/23/96	6	AMENDMENT to COMPLAINT by plaintiff Charles W Tyler , amending [2-1] complaint to clarify. (deck) [Entry date 02/06/96]
1/25/96	3	ORDER granting [1-1] motion to proceed in forma pauperis and authorizing service of process; mld (signed by Magistrate Judge Bristow Marchant) (deck) [Entry date 01/26/96]
1/26/96	4	ORDER that plaintiff shall keep Clerk advised in writing of any change of address (by the Clerk) (deck) [Entry date 02/06/96]
1/26/96	5	SUMMONS(ES) issued for defendant Bing Jones, defendant Dennis Benningfield, defendant Mitch Bailey (deck) [Entry date 02/06/96]
2/9/96	7	RETURN OF SERVICE executed as to defendant Mitch Bailey 2/1/96 Answer due on 2/21/96 for Mitch Bailey (deck) [Entry date 02/13/96]
2/9/96	8	RETURN OF SERVICE executed as to defendant Bing Jones 2/2/96 Answer due on 2/22/96 for Bing Jones (deck) [Entry date 02/13/96]
2/9/96	9	RETURN OF SERVICE executed as to defendant Dennis Benningfield 1/30/96 Answer due on 2/19/96 for Dennis Benningfield (deck) [Entry date 02/13/96]
2/20/96	10	ANSWER to Complaint by defendant Bing Jones (Attorney Isaac McDuffie Stone III), (bbro) [Entry date 02/22/96]
2/20/96	11	ANSWER to Complaint by defendant Dennis Benningfield, defendant Mitch Bailey (Attorney Isaac McDuffie Stone III), (bbro) [Entry date 02/22/96]
3/7/96	13	AFFIDAVIT of Gail Williams Re: [12-1] motion for Gail Lyndon Williams to appear pro hac vice (bbro) [Entry date 03/14/96]

3/8/96	12	MOTION for Gail Lyndon Williams to appear pro hac vice (bbro) [Entry date 03/14/96]
3/14/96	--	Motion(s) referred: [12-1] motion for Gail Lyndon Williams to appear pro hac vice referred to Magistrate Judge Bristow Marchant (bbro)
3/14/96	--	** Added MO-MAR flag indicating motion(s) referred to Magistrate Judge Marchant. (bbro)
3/18/96	14	ORDER granting [12-1] motion for Gail Lyndon Williams to appear pro hac vice (signed by Magistrate Judge Bristow Marchant)EOD 3/19/96. (geva) [Entry date 03/19/96]
4/11/96	15	MOTION by plaintiff Charles W Tyler to amend [6-1] amended complaint to add additional parties (deck) [Entry date 04/15/96]
4/11/96	--	Motion(s) referred: [15-1] motion to amend [6-1] amended complaint to add additional parties referred to Magistrate Judge Bristow Marchant (deck) [Entry date 04/15/96]
7/12/96	16	ORDER granting in part, denying in part [15-1] motion to amend [6-1] amended complaint to add additional parties. Court denies the addition of party Lake as a defendant and grants motion as to remaining defendant. (signed by Magistrate Judge Bristow Marchant) eod and mld 7/16/96 (pmul) [Entry date 07/16/96]
7/12/96	--	Motion(s) no longer referred: [15-1] motion to amend [6-1] amended complaint to add additional parties no longer referred to Magistrate Judge Bristow Marchant (pmul) [Entry date 07/16/96]
7/12/96	--	** Removed MO-MAR flag. (pmul) [Entry date 07/16/96]
7/16/96	--	Deadline updated; Specific Document Filing 7/30/96 for Charles W Tyler (to file amended complaint) (ksmi)
7/29/96	17	AMENDED COMPLAINT by plaintiff Charles W Tyler , (Answer due 8/19/96 for Mitch Bailey, for Dennis Benningfield, for Bing Jones) Service due by 11/26/96 for John Doe; amending [2-1] complaint against defendant John Doe (ksmi) [Entry date 07/31/96]
7/31/96	18	SUMMONS(ES) issued for defendant John Doe (ksmi)

8/8/96	19	ANSWER to Complaint by defendant John Doe (Attorney Stone), (ksmi) [Entry date 08/09/96]
8/8/96	20	AFFIDAVIT by Isaac M. Stone Re: [19-1] answer (ksmi) [Entry date 08/09/96]
8/8/96	21	RETURN OF SERVICE executed as to defendant John Doe 8/5/96 (ksmi) [Entry date 08/09/96]
8/9/96	--	Deadline updated; set Status report due on 11/21/96 (ksmi)
8/26/96	22	AMENDED ANSWER to Complaint by defendant Dennis Benningfield, defendant Mitch Bailey : amends [11-1] answer (ksmi)
8/26/96	23	AMENDED ANSWER to Complaint by defendant Bing Jones : amends [10-1] answer (ksmi)
8/26/96	--	Deadline updated; set Status report due on 12/9/96 (ksmi)
8/26/96	24	AFFIDAVIT (Verification) by Jim Gordon Re: [23-1] answer (ksmi)
8/30/96	25	AFFIDAVIT (Verification) of Bing Jones by defendant Bing Jones Re: [23-1] answer (ttil) [Edit date 08/30/96]
12/10/96	26	ORDERed that the parties shall have 20 days to file dispositive motions. In the event neither party files a dispositive motion, the file will be forwarded to a US District Judge for trial. , sest motion filing deadline for 12/30/96 (signed by Magistrate Judge Bristow Marchant) EOD 12/10/96 mld (ksmi)
12/30/96	27	MOTION by defendant Bing Jones, defendant Dennis Benningfield, defendant Mitch Bailey for summary judgment (bbro) [Entry date 12/31/96]
12/30/96	28	MEMORANDUM by defendant Bing Jones, defendant Dennis Benningfield, defendant Mitch Bailey in support of [27-1] motion for summary judgment (bbro) [Entry date 12/31/96]
12/31/96	--	Motion(s) referred: [27-1] motion for summary judgment referred to Magistrate Judge Bristow Marchant (bbro)
12/31/96	--	** Added MO-MAR flag indicating motion(s) referred to

Magistrate Judge Marchant. (bbro)

1/2/97	29	ROSEBORO ORDER directing clerk to forward summary judgment explanation to plaintiff and directing that party to respond in 34 days. Deadline for response to [27-1] motion for summary judgment set for 2/10/97 for Charles W Tyler Signed by Magistrate Judge Bristow Marchant mld (ksmi) [Entry date 01/06/97]
1/13/97	30	RESPONSE by Charles W Tyler to [27-1] motion for summary judgment (Roseboro Order). (ksmi)
5/28/97	31	REPORT AND RECOMMENDATIONS of Magistrate Judge Bristow Marchant that the defendants' motion for summary judgment be granted with regard to plaintiff's first and fourth causes of action, and that defendants Bailey and Benningfield be dismissed as party defendants with regard to any remaining claims. FURTHER RECOMMENDED that as to the remaining defendants, Jones & Gordon, that the motion for summary judgment as to plaintiff's second and third causes of action be denied. Plaintiff's fifth cause of action should be dismissed without prejudcie. Re: [27-1] motion for summary judgment ; Motion no longer referred Objections to R and R due by 6/9/97 (ksmi) [Entry date 05/29/97]
5/28/97	--	** Removed MO-MAR flag. (ksmi) [Entry date 05/29/97]
6/9/97	--	Motion(s) no longer referred: [27-1] motion for summary judgment no longer referred to Magistrate Judge Bristow Marchant (ksmi)
6/9/97	32	Copy of signed extradition order received from defendants per the Report and Recommendation. (ksmi)
6/12/97	33	MOTION by plaintiff Charles W Tyler to extend time in which to file objections to the Report and Recommendation (ksmi) [Entry date 06/17/97]
6/16/97	34	OBJECTION by plaintiff Charles W Tyler to [31-1] report and recommendations (ksmi) [Entry date 06/18/97]
6/16/97	35	Stipulation by plaintiff Charles W Tyler to events related to claim of denial of counsel in South Carolina (ksmi) [Entry date 06/18/97]
6/18/97	40	ORDER granting [33-1] motion to extend time in which to file objections to the Report and Recommendation; MLD (signed by Judge William B. Traxler Jr.) (rowe)

[Entry date 08/05/97]

6/19/97	36	MOTION by plaintiff Charles W Tyler for admission of adjudicated facts and/or official documents from the US District Court for the Western Division of Kentucky (ksmi) [Entry date 06/23/97]
6/19/97	37	MOTION by plaintiff Charles W Tyler for discovery sanctions, or in the alternative to strike [32-1] defendants' introduction of governor's rendention order (ksmi) [Entry date 06/23/97]
7/21/97	38	ORDER granting in part, denying in part [27-1] motion for summary judgment; granting defendants summary judgment as to claims 1, 4 and 5; granting defendants Benningfield and Bailey summary judgment as to claims 2 and 3 and denying defendants Jones and Gordon summary judgment as to claims 2 and 3; MLD [Entry date: 7/21/97] (signed by Judge William B. Traxler Jr.) (rowe)
8/4/97	--	CASE NO LONGER REFERRED TO Magistrate Judge Bristow Marchant Case removed from docket of Magistrate Judge Bristow Marchant Per conversation with Mary Lee Mowry, this case is now ready for trial. (ksmi)
8/4/97	--	** Removed Mag Flag. (ksmi)
8/4/97	39	ORDER denying [37-1] motion for discovery sanctions, denying [37-2] motion to strike [32-1] defendants' introduction of governor's rendention order, mooting [36-1] motion for admission of adjudicated facts and/or official documents from the US District Court for the Western Division of Kentucky; MLD (signed by Judge William B. Traxler Jr.) (rowe) [Entry date 08/05/97]
1/5/98	41	MOTION by plaintiff Charles W Tyler for issue of subpoena for plaintiff's witnesses for trial (ksmi) [Entry date 01/06/98]
1/9/98	42	MOTION by plaintiff Charles W Tyler to extend time in which to file plaintiff's pretrial memorandum (ksmi) [Entry date 01/12/98]
1/13/98	43	Letter by Judge Traxler to plaintiff explaining subpoenas procedures. (rowe) [Entry date 01/14/98]
1/13/98	44	ORDER granting [42-1] motion to extend time in which to file plaintiff's pretrial memorandum, and Response to motion reset to 1/20/98 for [41-1] motion for issue of

		subpoena for plaintiff's witnesses for trial ; MLD (signed by Judge William B. Traxler Jr.) (rowe) [Entry date 01/14/98]
1/20/98	--	WRIT of Habeas Corpus ad Testificandum issued for Charles W. Tyler for 2/4/98 in case (ksmi) [Entry date 01/21/98]
1/26/98	45	MOTION by plaintiff Charles W Tyler for leave to file pretrial memorandum (ksmi)
2/4/98	--	Settlement conference held before Judge William B. Traxler Jr. Court reporter: Jane La Porte. Defendant agrees to pay plaintiff $5,000.00 and plaintiff accepts offer. Court advises all parties case has settled and no jury will need to be drawn. (mflo) [Entry date 02/06/98]
2/10/98	46	ORDERed, that this action is hereby dismissed without costs and without prejudice. If settlement is not consummated within a reasonable time, either party may within 60 days petition the court to reopen the action and restore it to the calendar. In the alternative, either party may within 60 days petition the court to enforce the settlement. The dismissal shall be with prejudice if no action is taken under either alternative within 60 days. (signed by Judge William B. Traxler Jr.) mld (ksmi) [Entry date 02/11/98]
2/10/98	--	Case closed (ksmi) [Entry date 02/11/98]

Case Flags:
CLOSED

END OF DOCKET: 0:96cv28

PACER Service Center		
Transaction Receipt		
10/14/2004 10:02:54		
PACER Login:	jb2649	**Client Code:**

Description:	docket report	Search Criteria:	0:96cv00028
Billable Pages:	8	Cost:	0.56

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

IN THE GENERAL SESSION'S COURT

C/A No. 98-GS-380244

The State of South Carolina

Plaintiff,

v.

Bayan Alelcasy

Defendant.

FILE

AFFIDAVIT

I am Willie J. Bamberg, the Director of the Orangeburg Detention Center. The Defendant, Bayan Alelcasy was charged with malicious injury to property and attempted escape because he through a chair into the window in his cell. The window measures twenty-six and a half inches long and five inches wide.

This was the only infraction that the Defendant had during his stay at the Orangeburg County Detention Center.

Further the affiant sayeth not.

I have read each page of this statement consisting of one (1) page. Each page bears my signature, and corrections, if any, bear my initials. I certify that this statement is true and correct to the best of my knowledge and belief.

Willie J. Bamberg

Sworn to and Subscribed to before me this 20th day of May, 1998.

Witness:

Notary Public for South Carolina

My commission Expires July 28, 2005

App. 87

** TOTAL PAGE.002 **

4266

RECEIVED DEC 17 2004

COUNTY OF ORANGEBURG

P.O. DRAWER 9000, ORANGEBURG, S.C. 29116-9000
TELEPHONE 803/533-1000
WWW.ORANGEBURGCOUNTY.ORG

Orangeburg County
2004
All-America City Finalist

COUNTY ADMINISTRATOR
BILL CLARK

COUNCIL MEMBERS
JOHN H. RICKENBACKER, CHM.
HARRY F. WIMBERLY, VICE CHM.
JANIE COOPER
CLYDE B. LIVINGSTON
HEYWARD H. LIVINGSTON
JOHNNY RAVENELL
JOHNNIE WRIGHT, SR.

December 14, 2004

Jim Brown
Attorney at Law
1111 Bay Street
Post Office Box 592
Beaufort, South Carolina 29901-0592

RE: Willie James Bamberg

Dear Attorney Brown:

Please find enclosed the documents requested on the above reference Willie James Bamberg. Mr. Bamberg was promoted to Director of the Orangeburg Calhoun Regional Detention Center on January 1, 1997.

See attached the County of Orangeburg Personnel Action Form indicating the promotion.

If you need additional information regarding Willie James Bamberg please call me at 533-6151.

Sincerely,
Marion Boyd Sr.
Marion Boyd, Sr.
Personnel Director

App 88

ORANGEBURG COUNTY PERSONNEL ACTION

4268

Date April 14, 1997

Name Willie J. Bamberg Effective Date January 1, 1997

Address Route 1, Box 23, Cypress Road, Bamberg, SC 29003

CHECK HERE FOR: (Explain)
☐ Change of Name
☐ Change of Address

So. Sec. No. [redacted] Employee No.

Department O.C.R.D.C. Division LEC Department No.

Position Title Director of O.C.R.D.C. (Acting)

Grade / Step 21 Pay Rate 36,313

Class Code 930DC Position No. 390502

TYPE EMPLOYMENT:
☒ Full time
☐ Temporary
☒ Part-time
☐ Other

EEOC
Function
Category
Sex

APPOINTMENT

☐ New Position ☒ Replacement James Gordon, Jr. (NAME) (POSITION NO.)

If Reappointment, Department, & Dates Employed (DEPARTMENT) (DATES)

ADJUSTMENTS

☒ Promotion
☐ Transfer
☐ Reclassification
☐ Demotion
☐ Merit Change
☐ Other (Explain)

Position Title To Director
Department To 9905
Class Code To 940 DC
Grade / Step or Pay Rate To 28 36,313 17.496
Position No. To 390501
Anniversary Date

Explanation

RELEASING DEPARTMENT HEAD'S SIGNATURE (TRANSFER ONLY)
Forward to Receiving Department for approval below—(Transfer only)

LEAVES OF ABSENCE OR SUSPENSION

Kind Date Expected To Return

Reason

OVERTIME REQUEST

☐ Permission ☐ Payment; Dates Hours

Reason

TERMINATION

Reason
Services were: ☐ Satisfactory ☐ Unsatisfactory
Would you rehire? ☐ Yes ☐ No. If no, explain

Was notice given? ☐ Yes ☐ No Resignation letter attached? ☐ Yes ☐ No
Credentials, Keys, & Equipment Surrendered? ☐ Yes ☐ No
Appointment for Exit Interview
(No final check issued until Exit Interview is complete)

APR 1997 RECEIVED

Remarks: Bill the JEC Commission wants Mr. Bamberg Pay to be Retroactive to January 1997. MBayd

☐ Incomplete (Please Resubmit)

15.458 - 13.654 = 1.804

424 hrs x $1.804 = $764.90 retro

I REQUEST THE ACTION INDICATED ABOVE. FOR "APPOINTMENT" OR "ADJUSTMENT" ACTIONS. I HEREBY CERTIFY THAT SALARY FUNDS ARE INCLUDED IN MY DEPARTMENTAL BUDGET FOR THE CURRENT YEAR AS APPROVED BY ORANGEBURG COUNTY COUNCIL AND THAT SUFFICIENT UNENCUMBERED SALARY FUNDS REMAIN IN MY BUDGET TO PAY FOR SAME.

Maria Bayd
PERSONNEL DIRECTOR

Joanne L. Hallman
CONTROL UNIT

Willie Bamberg
SIGNATURE OF DEPARTMENT HEAD

A-3

ARREST WARRANT

D- 952111

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

ORANGEBURG

98 FEB 11 AM 9:59

FILED FOR RECORD
D.C. MURDAUGH
CLERK OF COURT
ORANGEBURG S.C.

THE STATE
against

BAYAN ALEKSEY

Address: 1520 ELLIS AVE. (OCRDC)
ORANGEBURG SC 29116-

Phone: _____ SSN: [redacted]

Sex: M Race: W Height: 5 10 Weight: 160

DL State: _____ DL #: _____

DOB: [redacted] Agency ORI #: _____

Prosecuting Agency: ORANGEBURG COUNTY

Prosecuting Officer: CHIEF VERNITE DOZ

Offense: ATTEMPTED ESCAPE 952

Offense Code: 24-13--

Code/Ordinance Sec. 24-13-0410(B)(C)(E) SC

This warrant is CERTIFIED FOR SERVICE in the ☐ County/ ☐ Municipality of _____. The accused is to be arrested and brought before me to be dealt with according to law.

_____ (L.S.)
Signature of Judge

Date: _____

RETURN

A copy of this arrest warrant was delivered to defendant BAYAN ALEKSEY on 1-28-98

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

App. 89

4269

STATE OF SOUTH CAROLINA
☒ County/ ☐ Municipality of
ORANGEBURG

AFFIDAVIT

Form Approved by S.C. Attorney General July 26, 1990 SCCA 515

Personally appeared before me the affiant Vernetia CHIEF VERNITE DOZIER VBD who being duly sworn deposes and says that defendant BAYAN ALEKSEY did within this county and state on 1/27/98 violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of _____) in the following particulars:

DESCRIPTION OF OFFENSE: ATTEMPTED ESCAPE

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

THAT ON JANUARY 27, 1998 BETWEEN THE HOURS OF 7:00PM AND 8:00PM LOCATED AT THE ORANGEBURG COUNTY REGIONAL DETENTION CENTER, ONE BAYAN ALEKSEY DID COMMIT THE CRIME OF ATTEMPTED ESCAPE IN THAT HE DID BREAK OUT A WINDOW IN HIS JAIL CELL IN AN ATTEMPT TO ESCAPE. THIS INCIDENT OCCURRED IN ORANGEBURG COUNTY, STATE OF SOUTH CAROLINA.

CASE #0098001871

Sworn to and subscribed before me on 1/28/98

_____ (L.S.)
Signature of Issuing Judge

Vernetia B. Dozier
Signature of Affiant

Affiant's Address 1520 ELLIS AVE
ORANGEBURG SC 29116-

Affiant's Telephone (803)531-4659

STATE OF SOUTH CAROLINA
☒ County/ ☐ Municipality of
ORANGEBURG

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on 1/27/98 defendant BAYAN ALEKSEY did violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of _____) as set forth below:

DESCRIPTION OF OFFENSE: ATTEMPTED ESCAPE

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

_____ (L.S.)
Signature of Issuing Judge

Judge Code: 694

Judge's Address 1520 ELLIS AVE, PO BX 9000
ORANGEBURG SC 29116

Judge's Telephone (803)533-5880

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

4270

ARREST WARRANT

D- 952109

STATE OF SOUTH CAROLINA

☐ X County/ ☐ Municipality of

ORANGEBURG

98 FEB 11 AM 9:59

THE STATE against

FILED FOR RECORD
O.C. MURDAUGH
CLERK OF COURT
ORANGEBURG, S.C.

BAYAN ALEKSEY

Address: 1520 ELLIS AVE. (OCRDC)

ORANGEBURG SC 29116-

Phone: SSN: [redacted]

Sex: M Race: W Height: 5 10 Weight: 160

DL State: DL#:

DOB: [redacted] Agency ORI#:

Prosecuting Agency: ORANGEBURG COUNTY

Prosecuting Officer: CHIEF VERNITE DOZ

Offense: MALICIOUS INJURY TO REAL PROPERTY Offense Code: 636

Code/Ordinance Sec. 636

This warrant is CERTIFIED FOR SERVICE in the ☐ County/ ☐ Municipality of _____. The accused is to be arrested and brought before me to be dealt with according to law.

_____ (L.S.)
Signature of Judge

Date: _____

RETURN

A copy of this arrest warrant was delivered to defendant BAYAN ALEKSEY on 1-28-98.

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

STATE OF SOUTH CAROLINA)
☐ X County/ ☐ Municipality of)
ORANGEBURG)

AFFIDAVIT

Form Approved by S.C. Attorney General July 25, 1990 SCCA 518

Personally appeared before me the affiant CHIEF ~~VERNITE~~ Vernetia DOZIER VBD who being duly sworn deposes and says that defendant BAYAN ALEKSEY did within this county and state on 1/27/98 violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of _____) in the following particulars:

DESCRIPTION OF OFFENSE: MALICIOUS INJURY TO REAL PROPERTY LESS THAN $1,000.00

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

THAT ON JANUARY 27, 1998 BETWEEN THE HOURS OF 7:00PM AND 8:00PM LOCATED AT THE ORANGEBURG COUNTY REGIONAL DETENTION CENTER, ONE BAYAN ALEKSEY DID COMMIT THE CRIME OF MALICIOUS INJURY TO REAL PROPERTY IN THAT HE DID BROKE A METAL SEAT FROM A TABLE AND A JAIL CELL WINDOW VALUE BEING LESS THAN $1,000. THIS INCIDENT OCCURRED IN ORANGEBURG COUNTY, STATE OF SOUTH CAROLINA.

CASE #0098001871

Sworn to and subscribed before me on 1/28/98

(L.S.)
Signature of Issuing Judge

Vernetia B. Dozier
Signature of Affiant

Affiant's Address 1520 ELLIS AVE
ORANGEBURG SC 29116-

Affiant's Telephone (803)531-4658

STATE OF SOUTH CAROLINA)
☐ X County/ ☐ Municipality of)
ORANGEBURG)

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on 1/27/98 defendant BAYAN ALEKSEY did violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☐ Municipality of _____) as set forth below:

DESCRIPTION OF OFFENSE: MALICIOUS INJURY TO REAL PROPERTY LESS THAN $1,000.00

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

(L.S.)
Signature of Issuing Judge

Judge Code: 694

Judge's Address 1520 ELLIS AVE, PO BX 9000
ORANGEBURG SC 29116

Judge's Telephone (803)533-5880

Issuing Court: ☐ X Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

GENERAL SESSIONS DOCKET REPORT FOR ORANGEBURG COUNTY

REPORT RUN DATE - 01/26/2005

INDICTMENT NUMBER: 1998GS3800409

DEFENDANT NAME: ALEKSEY, BAYAN AKA:

ADDRESS:1520 ELLIS AVE (OCRDC) CITY:ORANGEBURG STATE:SC ZIP 29116

SOCIAL SECURITY NUMBER: [redacted] SEX:1 MALE RACE:1 WHITE

DATE OF BIRTH: [redacted] DRIVERS LICENSE STATE / NO.: /

MARITAL STATUS:

WARRANT OR TICKET NUMBER:D952111 COUNTS:01 OFFENSE CODE:2527

NO WARRANT? 0 NAME OF OFFENSE:ESCAPE / ESCAPE

DATE OF ARREST:01/28/1998 DATE RECD BY CLERK:02/11/1998

SUMMARY JUDGE:694

DISP DATE:03/23/1999 DISP TYPE:4 DISMISSED

DISP TYPE EXPLANATION:FOUND GUILTY OF MURDER

JUDGE CODE/NAME:097 MASTER/SOLICITOR COURT REPORTER:

CONVICTION: CTS:00 OFFENSE:0000 **********

SENTENCE:

DEFENSE ATTORNEY: PROSECUTING ATTORNEY:

APP. 90

ATTEST: TRUE COPY
Lisa W. Mizell
CLERK OF COURT
ORANGEBURG COUNTY, SOUTH CAROLINA

TORT CLAIM FORM

Date APRIL 14, 1998, 1998. No. 1

Person Making Claim: Mr. Bayan Alekseq.

Claim is hereby made against Orangeburg County Jail, Officers, Jenkins, Floyd, and other STAFF there, orangeburg County. No one there was helping me I can I'D them. (Lt's, Sgt's, Captains, etc.) for damage resulting from occurrence.

Date	Location of Occurrence	Amount Claimed
Jan, 1, 1998 to Feb, 2, 1998 Time ALL Times OF day & Night.	Address orangeburg Jail, S.C. 29116. County Orangeburg County.	$ 800 million Dollers. (Attach supporting bills, estimates, other documents)

The cause of damage or injury was as follows:

I was in handcuffs and leg irons Appox 25 days. I was beaten and Pushed down Stairs, and racially call thing. I was mistreated, I was assaulted By officers all times of the day & Night. No medical treatment, Tazir guns used on me. in a cell for 24 Hours A day. 7 day A week. I was Beaten after I called WIS-TV. No mattress, 1 shower A week, No things to keep Clean. and no clothes.

Reason you feel governmental agency is legally liable:

I was in the care of officels, They have mistreated me, Pain suffering, No medical AFT no Phone calls, Humaition, furture damages, nothing done to help me, Theres some one alwaly Beating me. I was hit with a mop on my side. I was Not getting any legal calls. I was only getting one meal A day. No water in my cell, one one cup of water A day. I Am innocent person.

App. 91

STATE OF SOUTH CAROLINA)
)
COUNTY OF Lee) AFFIDAVIT

Personally appeared before me Alton Hice, who, upon oath, says that the above claim is true, just, and that no part has been paid.

SWORN TO before me this 14 day of April, 1998

Alton Hice 8 April 2008

Bayan Alekseq 4-14-98 NCIC #555405UR
Claimant

Bayan Alekseq. 143-48 41st Ave #Flushing, Queens, New York 11355-1C Suite #1C.
Address

NOTE:
The acceptance of this claim form does not constitute an admission of legal liability on the part of the State or any of its subdivisions or agencies.



Right Hand finger prints
Bayan Alekseq

4273

B-5-157

TORT CLAIM FORM

Date April 14, 1998, 19 98 No. 2

Person Making Claim: Mr. Bayan Alexsey.

Claim is hereby made against Mr. George W. Darnell 5290 Rivers Ave. American Red cross Building, charleston, S.C. State Law enforcement Divison. S.L.E.D. for damage resulting from occurrence.

Date	Location of Occurrence	Amount Claimed
Appox Jan, 3, 98 to Feb, 2, 1998 Jan, 3, 4, 5 1998 Time 11 Am Appox.	captan; williams office. Across from orangeburg county Jail. Address Orangeburg Jail, & Captain Williams office. County Orangeburg County	$ 800 million Dollers. (Attach supporting bills, estimates, other documents)

The cause of damage or injury was as follows:

Pain & Suffering, No medical att, Beaten By officers when Mr. Darnell was there. wrongfully Jailed, No Attorney when ask for one. Beaten while in cuffs and leg irons. humalition, furture damages, He came in orangeburg jail and assaulted me with his partner.

Reason you feel governmental agency is legally liable:

I was not doing nothing wrong, I was beaten by mr darnell and his partner, they Provided No medical treatment, I was choked, there was about 5 other officers there when I was beaten. with A Kinght stick, I was wrongfully arrested and Jailed, called a white asstole, Racialy. Beaten because I was from P.A. they are resonable, I am a innocent person, Beaten and arrested I was beaten on Feb, 2, 1998 1998. on the way to Lee county C.I. I was choked and threated to be killed.

STATE OF SOUTH CAROLINA)
) AFFIDAVIT
COUNTY OF Lee)

Personally appeared before me Alton Hice, who, upon oath, says that the above claim is true, just, and that no part has been paid.

SWORN TO before me this 14 day of April, 1998

Alton Hice 8 April 2008

Mr. Bayan Alexsey NCIC # 55540540
Claimant

143-48 41st Avenue Flushing, Queens
Address New York, 11355-1C Suite #1C.

NOTE:
The acceptance of this claim form does not constitute an admission of legal liability on the part of the State or any of its subdivisions or agencies.



Right hand fingerprints.

Bayn Alexsey

TORT CLAIM FORM

Date April 14, 1998, 19 98 No. 2

Person Making Claim: Mr. Bayan Alekseq.

Claim is hereby made against Mr. George W. Darnell 5290 Rivers Ave. American Red cross Building. Charleston, S.C. STATE LAW enforcement Divison. S.L.E.D. for damage resulting from occurrence.

Date	Location of Occurrence	Amount Claimed
Appox Jan. 3, 98 to Feb, 2, 1998 Jan, 3, 4, 5 1998 Time 11Am Appox.	Captain Williams office. Across from orangeburg county Jail. Address Orangeburg Jail & Captain Wulams office. County Orangeburg County	$ 800 million Dollers. (Attach supporting bills, estimates, other documents)

The cause of damage or injury was as follows:

Pain & suffering, No medical att, Beaten By officers when Mr. Darnell was there. wrongfully Jailed, No Attorney when ask for one. Beaten while in cuffs and leg irons. humalition, furture damages, He came in orangeburg Jail and assaulted me with his partner.

Reason you feel governmental agency is legally liable:

I was not doing nothing wrong, I was beaten by Mr darnell and his partner, they Provided No medical treatment, I was choked, there was about 5 other officers there when I was beaten. with A Icingnt stick, I was wrongfully arrested and Jailed, Called a white asshole, Racely. Beaten because I was from P.R. They are resonable, I am a innocent person, Beaten and arrested I was beaten on Feb, 2, 1998 1998. On the way to Lee county C.I. I was choked and threated to be killed.

STATE OF SOUTH CAROLINA)
)
COUNTY OF Lee)

AFFIDAVIT

Personally appeared before me Alton Hice, who, upon oath, says that the above claim is true, just, and that no part has been paid.

SWORN TO before me this 14 day of April, 1998

Alton Hice 8 April 2008

Mr. Bayan Alekseq NCIC # 55540540

Claimant

143-48 41st Avenue Flushing, Queens

Address New York, 11355-1C Suite #1C.

NOTE:

The acceptance of this claim form does not constitute an admission of legal liability on the part of the State or any of its subdivisions or agencies.



Right hand fingerprints.

Bayn Alekseq

4275

SOUTH C OLINA DEPARTMENT OF CORRE ONS
INMATE GRIEVANCE FORM
STEP 1

Office Use Only
Grievance No. _____
Code: General _____
Nelson _____
Adj. Com. _____
Class. _____
Date Received [illegible]
IGC Initials _____

INMATE NAME: Mr. Alekey Bryan
SCDC NUMBER: SK 5110
INSTITUTION: Lee County C.I.
HOUSING UNIT: Safekeeping Cell 56. SMU
WORK ASSIGNMENT: xx none xxxxx none xxxx

STATE GRIEVANCE (include documentation, and date of incident; if SCDC Policy, indicate which policy; if Nelson Decree, specify which section of decree) On Tuesday, April, 28, 1998. officer Jony assaulted me while I in my cell. The officer had took all my stuff from my cell. He said I was kicking on the door. s not. Cell 57 was. I told him that. After he came back doing cell check I asked him please can I get my s back. He said yes. Later. Then he came back again and I ask again Jony can I get my things - He said OK back up to the door. He handcuffed me. Then he pushed me in the cell and started ing me. I said what ~~the~~ the fuck are you doing. He said go ahead you white fuck do something now. Then t go and I was trying to catch my breath. Then he hit me in my back with his fist. I fell to the He walked out and said fuck you and you are not getting you shit back. He then took the handcuffs And said fuck you. and walked away. I saw L.T. Johnson I yelled for him and said Johnson its an jay I need to see you. He never came. I told night shift. I don't Know what they did. I saw a nurse. I am still in pain. (This all started Because of a Legal Phone call)

ACTION REQUESTED: I ask that officer Jony be suspend without pay. AND I can get an investergate this officer. I am in fear of the officer. I am going to file Criminal Charges aginst him. He has ~~not~~ putting his hands on me. I am a county inmate. not a state. Please suspend him. I want some of action taken on this officer. This man should not be treating inmates like this. He must be held NABLE for what he has done.

SPECIFY HOW AND WHEN INFORMAL RESOLUTION WAS ATTEMPTED BY GRIEVANT:

ryed in go Faith to resove the problem. I asked him please I was nice to him. I tryed. But he it listen or try to help resove the problem. This is not the only time he has assaulted an inmate. ,k to speak to captain Snowden. He refused to call. I ask for medaid help he refused. ned. he is the only officer I have prembles with. 4-28-98.

(This was over A Phone call) (Just A legal call) Grievant Signature Date

INFORMAL RESOLUTION BY IGC:

Policy/procedure (INMATE GRIEVANCE SYSTEM, GA-01.12) states that inmates must attempt to resolve their issue with appropriate staff prior to filing a grievance. The resolution attempt you state is not sufficient, therefore your grievance is returned to you UNPROCESSED. You should first speak with or submit a request to your unit Captain or the Major. However, your complaint has been forwarded to Captain Snowden to allow him the opportunity to address and possible resolve the issue. I suggest you allow him ample time to do so.

App. 92

D. Disbell 5.1.98
IGC Signature Date

☒ I accept the informal resolution and consider the matter closed.
☒ I do not accept the informal resolution. I wish to appeal to the Warden.

N/A
Grievant Signature Date

SCDC 10-5 (Rev. April 1996)

(CONTINUED ON REVERSE SIDE)

State of South Carolina	)	In the Court of
County of Orangeburg	)	Common Pleas
	)	
	)	
Bayan Aleksey, #5059	)	No. 01-CP-38-628
Plaintiff,	)	
	)	
vs.	)	Deposition of
	)	JANET VOGELSANG
State of South Carolina,	)	January 30, 2004
	)	
Defendant.	)	
	)	

Deposition on oral examination of JANET VOGELSANG, reported by Cheryl Wiszowaty, Court Reporter and Notary Public in and for the State of South Carolina; said deposition taken pursuant to notice of deposition and in accordance with the South Carolina Rules of Civil Procedure, at the Law Offices of David B. Tarr, Esquire, 1720 Main Street, Columbia, South Carolina, commencing on Friday, January 30, 2004, at the hour of 10:15 a.m.

RECEIVED
MAR 14 2011
SC OFFICE OF
APPELLATE DEFENSE

APPEARANCES

Representing the Plaintiff:
DAVID B. TARR, ESQUIRE
Law Offices of David B. Tarr
1720 Main Street, Suite 202
Columbia, South Carolina 29201

-and-

JIM BROWN, ESQUIRE
Law Offices of Jim Brown, P.A.
1111 Bay Street
Post Office Box 592
Beaufort, South Carolina 29001

Representing the Defendant:
DONALD J. ZELENKA, ESQUIRE
Assistant Deputy Attorney General
Rembert C. Dennis Building
Post Office Box 11549
Columbia, South Carolina 29211

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This deposition is taken in accordance with the South Carolina Rules of Civil Procedure. It is agreed and stipulated by the deponent and respective counsel that the reading and signing of the deposition by the deponent is expressly not waived.

WHEREUPON:

JANET VOGELSANG, being duly sworn and cautioned to speak the truth, the whole truth and nothing but the truth, testified as follows:

MR. TARR: All right. We're here for the deposition of Jan Vogelsang. Before I start asking questions for the record, we're here for the purpose of providing testimony to the court in the postconviction relief action of Bayan Aleksey versus the State of South Carolina in lieu of reconvening the postconviction relief hearing and having the testimony done in open court.

EXAMINATION

BY MR. TARR:

Q. Could you state your name, please?

A. Janet Vogelsang.

Q. And what is your professional title?

A. I'm a licensed independent social worker in clinical practice.

Q. And where do you practice?

A. In Greenville, South Carolina.

Q. What degrees do you hold?

A. I have a master's degree in social work from the University of South Carolina and an undergraduate degree in psychology from Pepperdine University in California.

Q. And what licenses or certifications do you hold?

A. I'm licenced by the State of South Carolina's board of examiners in social work, and also I'm board certified by the America Board of Examiners in clinical social work.

Q. And does the clinical social work license in South Carolina allow you to diagnose and treat mental, emotional, and behavioral problems in individuals and families?

A. Yes.

Q. Could you describe your work experience, please?

A. After completing my internships at Greenville Area Mental Health Center, William Hall Institute and the Veteran's Administration Hospital in Salisbury, North Carolina, my first job was as a caseworker at the Los Angeles

Department of Public Social Services; and in that capacity I worked in child protection with activities around child abuse, physical abuse, sexual abuse, termination of parental rights, placement involved foster homes, adoptions, and also doing the biopsycholsocial assessments of families and testifying in court.

Also, during that time I helped to start a group home for teenage boys who had been sexually abused and were working the streets of Hollywood. And after completing that period of time, I was in private practice with Wilfred Vogelsang in Santa Monica diagnosing, treating individuals, families, and groups.

When I came back to South Carolina, my first job was with a United Way agency called Family Services Greenville, and I was the program director for their family violence program, and in that capacity worked with families where violence was an issue or physical abuse of women and children was an issue. And I also continued to testify both in family and criminal court about abuse and about violence.

In 1986, I went into private practice with Behavioral Consultants. This was a group of

clinical social workers. We brought on psychiatrists and psychologists and other paraprofessionals, continuing to do work in private practice, specializing in family systems, child welfare, trauma, and neurological problems that cause learning difficulties.

In 1992, I left Behavioral Consultants and went into a solo practice. I got additional training under Dr. Edna Copeland in neurological problems that cause learning disabilities and attention disorders. Continued to conduct biopsycholsocial assessments, both in my private practice with my private clients and also for the courts, both family and criminal.

Q. What are your professional affiliations?

A. I am a past president of the South Carolina chapter of the National Association of Social Workers and past president of the South Carolina chapter of Clinical Society and just an immediate past board member of the America Board of Examiners in clinical social work.

Q. And do you hold any other affiliations?

A. I'm affiliated with Marshall Pickens

Psychiatric Hospital and the Old Charter System. Now it's called Carolina Behavioral Health.

Q. Have you received any awards or recognitions for your work in your field?

A. I've received awards from the House of Representatives, South Carolina House of Representatives, for leadership in the field in South Carolina. The very same from the South Carolina Senate.

In 2002, I was social worker of the year, and I've also been given an award of recognition for leadership by the South Carolina Society for Clinical Social Workers, and, finally, was alumnus of the year for the College of Social Work, USC. That was in 2002.

Q. What is a clinical social worker?

A. A clinical social worker is a trained mental health professional. In South Carolina, as in most states in the country, clinical social workers diagnose and treat mental, emotional, behavioral disorders. They can be found in private practice, in psychiatric hospitals, in mental health centers and other settings where clinical skills are needed.

And they are also specially training

inducting the biopsycholsocial assessment and using that opinion either in their practices or to testify in court.

(Off-the-record discussion.)

BY MR. TARR:

Q. Like other mental and medical professionals, are clinical social workers asked to conduct professional reviews of documents and give their assessment or findings?

A. Yes.

Q. How does this differ from a biopsycholsocial assessment?

A. The biopsycholsocial assessment is much more extensive. It requires in-person interviews with family and nonfamily members, with other professionals. It typically includes a visit to the community or to the home, the production of visual aids and the interview of teachers and coaches and ministers, anyone who is significant to the client. And the purpose is, of course, to give opinions and then just assist the court in how they want to go about disposing the case.

The professional review of records is just a review of the records, just reading them

and either writing a report or testifying in a deposition or in court as to what your findings were from the records and just sort of summarizing them and assessing what you've learned in the records in terms of its content.

Q. All right. And, Ms. Vogelsang, what were you asked to do in the Bayan Aleksey case?

A. To do a professional review of the records.

Q. And did you interview Mr. Aleksey?

A. Actually, I did, and that came about -- that's not typical to do, an interview. It came about because it was early on in the case and a decision had not been made whether to do the review of the records or a complete biopsycholsocial assessment.

I happened to be at Lieber interviewing on another case and on the off chance that I would have to get in my car and turn around and go back to Lieber, which made no sense, I offered to go ahead and at least introduce myself to him, so I had a very brief meeting with him. And I have the date, if you want the date of that.

Q. Yes, if you could. Got it handy?

A. Let's see. I think I've got it.

That was September 16, 2002. It looks like I spent approximately two hours, maybe a little less, with him on that day.

Q. Okay. And what did you learn from your interview with him?

A. Not very much. My observations of him were that his behavior was consistent with what was in the records. You can see from my notes, which are less than one page, that I did not learn a lot from Mr. Aleksey. It was more -- it was more observing him.

He does not concentrate real well. He jumps around a lot. It was very difficult to get any history from him. He sort of speaks in short, quick, to-the-point-type sentences, and then he runs on to something else. He's very fidgety. He's always sort of looking around. He's physically very active and sort of in constant movement.

He was able to tell me his family was from New York. His mother was a hairdresser; that he had had mental health treatment, but he didn't really understand why. He said he couldn't believe he ever had it because he didn't know why he had to have it. He said his father was abusive

and that if someone would check, the police used to come to their house a lot.

He lived in Philadelphia and in Florida. I knew about Florida. I had no idea when he was in Philadelphia, and he couldn't remember.

He said he used to threaten his father if he continued to beat his mother. His mother is in her 60s. She would lock him out of the house when he was 10 years old. His mother is from Trinidad. His father is Russian. That literally was all I could get from him, and that was over the course of two hours, so.

Q. In your professional review of the records, what records did you review?

A. I interviewed records from the Long Island Jewish Hospital in New York, and these actually included a number of evaluations. I think there was a psychological evaluation, a psychoeducational evaluation, a social history.

There was a good bit of testing done, so that was probably the most extensive records I received on him. He attended a school, campus-type school, at Long Island Jewish called Hillside Medical, and so I also had the records

from that.

There was a mitigation specialist on the case way back then, and her name is Toni Bovee, B-o-v-e-e. She had done an interview with the mother and with doctor -- well, not doctor. This is a social worker, David Rosengard, R-o-s-e-n-g-a-r-d. So, those records had been purged. But she did interview him. And I think there was -- I believe there's a letter from Mr. Rosengard about Aleksey.

She also put together a time line from the birth of his parents through to, I believe, the time of the crime, and I looked at that time line and continued to refer to it because of the placements that Bayan was in.

I looked at an Adrien Block Middle School record, a Bleeker Middle School record, records from Creedmore Psychiatric Hospital, which also appear to include records from a program called the Clearview Community Program or Community Service; and at this point his records are following him, so mixed into all of these you'll have a little Long Island Jewish and Hillside, so it was a challenge to keep those straight.

I have a statement from Queens Guidance Center where Mr. Rosengard saw him for therapy. They purged their records, but it is his statement that he did attend there and how much they paid. A statement from New York Probation, the New York Board of Education evaluation, a child abuse report, various certificates.

There is a marriage certificate on his parents, his father's death certificate. There are some certificates when he was in special education for learning to use a telephone and for soccer and those sorts of activities.

There was another Board of Education special education sheet that sort of stated their findings and their goals for him. There was a social history by a woman named, the initial K. Fisherman, and I'll have to look. I'm not sure which record that was from.

There was a school psychological evaluation from a woman named Beverly Goodman. There was a form that was filled out at one of the hospitals, which is not identified, by a Dr. Hertz. There is an individual evaluation plan, known as an IEP, from April of '84, and actually, I reviewed a number of his IEPs. They

all basically said the same thing. I think I brought one with me.

A record that he attended the John Brown School and high school very briefly, a report by an R -- initial R. Kantor, K-a-n-t-o-r, who appeared to me to be a caseworker, perhaps, for their Social Services. There is a PINS report, P-I-N-S, a report by a Dr. Slowes, who I believe was a psychologist from the Board of Education and then a record from his attempts to apply at Vocational Rehab and get some vocational rehabilitation.

Now, there was the William Hall record, but I was asked to just do the family history, so I stopped at the time of the crime; so any records that were generated after the crime, I did not factor in to my assessment.

Q. All right. Is that the extent of the records?

A. Yes. I believe that's all the ones that I reviewed.

Q. And that included, I believe, a family history. Was that the time line Ms. Toni Bovee did?

A. It's a time line she did, but there

is an interview that she did, if you would like that date, with one interview with the mother. Let's see. Actually, I think there were more than one interview with the mother. And most of the family history was contained, and that's why she interviewed the mother, to get the family history.

The date was August 6, 1998, Toni Bovee interview with Vera Aleksey. That's the defendant's mother. This interview took place over three days in 1998; July 27, August 28, and August 29, in New York City.

Q. Was it July -- all three --

A. July 27 and then August 28 and 29 is what I believe she meant. 1998.

Q. And the trial was August 24?

A. Okay.

Q. So I guess it's possible.

A. Well, let me reread. Okay. She must have dictated this October the 6th. That may be the date of the report, August 6th. Interview with Vera Aleksey, defendant's mother, July 27, 28, and 29, New York City, 1998.

And then there is another interview with David Rosengard at the Queens Child Guidance Center, and the interview was done on January 27,

1998.

Q. All right. And other than those interviews, do you know of anything else that the specialist, Ms. Bovee, had done in regards to this case?

A. She created a time line of -- for Bayan Aleksey going from, I believe, the birth of his parents, skipping on to when they met, and then I think the one I used. I used up to the time of the crime. There may have been a couple of dates after, but I just used it up to the time of the crime.

Q. Okay. In addition to Ms. Bovee's investigation of the family history, did you find additional family history in Bayan's medical, mental health, school or other records --

A. Yes.

Q. -- that you talked about?

And do you have those records with you here today?

A. Yes.

Q. Ms. Vogelsang, when clinical social workers talk about human development, could you describe what they mean?

A. Well, first, they're talking about

the stages of development that children have to go through in order to grow into productive and safe and responsible adults, and the importance of those stages are that there are certain things that children need to learn at certain stages; and if they go through and don't learn those skills, it's very difficult for them to go back and pick them up again.

Most of the stages of development take place in the home of the parent, either both parents, a parent and a stepparent or a single parent; and the way it happens is that, of course, while food, shelter, clothing is important and basic, there are other things that have to be done by parents in order to help a child get through these stages of growth.

And we're talking about a lot of basic skills. We're talking about walking, talking, tieing your shoes, buttoning your clothes, and then things start to get a little more complicated. Children learn through play, learning how rules work, learning how to get along with other children.

There is a stage of development in which children need help separating from the

parents and forming their own identities. And then at some point, parents have to be very focused on setting limits and boundaries for their children and knowing how to do that. Teaching them consequences, teaching them responsibility and how to make responsible choices.

And not the least of this is teaching moral values, ethical values, and some sort of spiritual values according to that parent's wishes.

And the parent has to be there to provide support that is consistent. If parents have a special-needs child or a child with special developmental deficits, they need even greater patience and greater skills and greater involvement with that child in order to get them through these stages. And, of course, the goal is to produce a healthy, safe human being who can contribute to society.

Q. And were those developmental needs met for Bayan Aleksey?

MR. ZELENKA: Object.

BY MR. TARR:

Q. In your opinion, expert opinion, from reviewing the records in this case does it appear

to you that the developmental needs were met for Bayan Aleksey?

A. Well, certainly in terms of food, clothing and shelter. His mother was a single mother. She was a hairdresser. New York is very expensive, and I think this woman did her best to keep him in a -- you know, in an apartment that was livable, to make sure he had clothes, to make sure he had food. And to her credit, she did attend, later on, counseling sessions with him.

But in terms of all the other things I just mentioned that need to happen, and especially with a special-needs child, no, most of those elements were not present.

Q. What is Bayan's mother's name?

A. Vera, and I'll spell this next name, Chandrasic, C-h-a-n-d-r-a-s-i-c, Lall, L-a-l-l, Aleksey.

Q. Lall was her maiden name?

A. Yes.

Q. And could you give us a brief overview of his mother's history?

A. Vera was born in July, on July 14, 1940, and she was born on the Isle of Trinidad in the Port of Spain. Her father was the headmaster

of the school. His name was Jeremiah McLawrence Lall. Her mother was Esther, and I will spell, B-a-h-a-d-u-r, Lall, and she was a housewife.

Vera's reported that her child life -- home life as a child was happy; that she came from a well-educated family; that they were fairly well-off. Her mother died in childbirth when she was six years old, and her father then married her mother's sister, which would be her aunt.

She had two brothers and one sister by her biological parents. A brother, Nelson, was mentally ill and was beaten to death in New York City. He was into alcohol and drugs. A sister, Lucille, was a draftsman for the government. I did not know if that was in the States or in Trinidad. A brother, Irving, died of a heart attack in 1996.

She had four half-siblings. Sister, Leah, died of a rare disease while living in Germany. Her brother, Steven, in England, she heard had passed away. She did not know for sure. She has a brother, Winston, in Trinidad who owns his own business and a brother, Trevor, in Trinidad who owns his own business.

Her father wanted her to become a teacher, and she reported that she purposely failed the test she needed to take because all she ever wanted to do was come to the United States, and so her father finally gave in, helped her to come over. And she -- once she got over, she went to beauty school. She started out, I think, living at the YWCA and then ultimately got her own apartment. She lived with someone and then got her own apartment.

MR. ZELENKA: Now, I'm going to intercede a general objection to hearsay on this testimony.

MR. BROWN: And I would respond that an expert witness, which I think you would qualify her, is allowed to base an opinion on hearsay.

MR. ZELENKA: She's not basing an opinion. She's stating historical facts. Hearsay upon hearsay. The initial hearsay is --

MR. BROWN: Sure. I understand. All I can say is that under the Slocum case, it interprets the Rules regarding testimony of expert's opinion. I understand what you're saying.

MR. ZELENKA: She is allowed to give

an expert opinion.

MR. BROWN: Based on admissable evidence, and the evidence could even come in that's the basis for the evidence.

MR. ZELENKA: She's not giving an opinion. She stating historical facts, and that's the essence of the hearsay objection. I don't have a problem with her opinion.

MR. BROWN: Sure. Well, I think she's giving -- she's going to give an overall opinion and this is the basis for it because that case says that even if that's inadmissable, she could provide the admissible evidence that --

MR. ZELENKA: I will --

MR. BROWN: The truth of the matter asserted, but that's where she bases this opinion on.

MR. ZELENKA: I don't have any problem with her testifying that Bovee's notes reflected X, Y, and Z, but she's stating historical facts.

MR. BROWN: And maybe we just need to clarify that fact.

MR. ZELENKA: About the father consenting to certain things, she has no personal

knowledge of that, so under 608, since she lacks knowledge, she can't testify. You see what I'm saying?

MR. BROWN: Sure.

MR. ZELENKA: Her testifying is different.

MR. BROWN: And let me get in something else. I think at this stage the objections may be premature because I think objections are generally limited in depositions anyway.

MR. ZELENKA: But this is de bene esse.

MR. TARR: It's for the purpose of the testimony.

MR. ZELENKA: She is stating X happened X day, X happened Y day. She doesn't possess that knowledge. The only knowledge that she possesses is that Toni Bovee reported as a source another individual --

MR. BROWN: Sure. I'm following you.

MR. ZELENKA: -- about that information.

MR. BROWN: The hearsay is not the

answer. It's Ms. Bovee.

MR. ZELENKA: Well, yes. I mean, it's still that. I mean, I'm still objecting to hearsay. The way she's testifying, it's historical fact. She can't --

MR. BROWN: So you're objecting to the basic fact, not the fact that Ms. Bovee told it or the notes reflect that, because we're just saying that those are the notes she relied on.

MR. ZELENKA: I don't have any problem with the notes if she is testifying about what she has observed in her professional review, existed in somebody else's notes, but for her to say it's a historical fact that someone was beaten to death, she can't do that. That's beyond her personal knowledge.

MR. BROWN: Okay. And with that qualification, we would accept.

MR. ZELENKA: So she can state where the information is coming from, then we can go; but other than that, she not qualified.

MR. BROWN: We note your objection.

BY MR. TARR:

Q. Ms. Vogelsang, when you were given this history of Ms. Lall, Ms. Aleksey -- and in

the future you'll be talking about Mr. Aleksey's father and his history -- what are you relying on when you're stating these facts about the history?

A. Okay. I am relying on the interview that Toni Bovee did with Ms. Aleksey and also social histories that were found in some of the mental health records, which I have with me and would be glad to pull them out as we go along if you want me to.

Q. And is the extent, basically, of the mother's history what you just gave?

A. Yes.

Q. And what was Bayan Aleksey's father's name?

A. Ronald Francis Aleksey.

Q. And could you also give us a brief overview of his history?

A. Yes. And, again, this is coming from Toni Bovee's interview, and some of it is contained in other mental health records as well. Most of it is from Ms. Bovee.

MR. ZELENKA: Same objection.

MR. BROWN: I'll let David respond.

MR. TARR: Well, we're just --

MR. BROWN: We're just dividing this

up. The truth of the matter has already been identified that she is relying on this information provided to her.

MR. ZELENKA: Okay.

THE WITNESS: Mr. Aleksey was born in New York on May 28, 1939. He is of Polish and Russian descent. His father is Edward Aleksey. His mother is Stephanie, and I'll spell this last name, K-o-b-z-d-a. His father was a career Navy in the United States Navy, was rarely at home and drank a lot. This is according to Ms. Bovee's interview with the mother.

Ronald was the oldest child in the family by 14 years, the oldest of five children. Edward, his brother, was with the Department of Transportation in the City of New York. His brother, Douglas, was with the Social Security Department in New York City.

His sister, Monica, was with the Social Security Department, New York City. Brother, Stephen, was -- worked for a Japanese bank in New York City, and Ronald's uncle was a district attorney in New York City and later died of a stroke.

BY MR. TARR:

Q. And how did Bayan's parents meet and what was their relationship like?

A. Okay. They met in 1966 when Bayan's father, Ronald, was working as a maitre d' in a restaurant in New York City. He was separated from his wife at that time and had one daughter. She would go into this restaurant to eat and they just got to talking, and so that's how they met.

Q. All right. And from your review of the records and interviews that were done, what was their relationship like?

A. They dated for two years while he was going through a separation and divorce. He would take her over to Staten Island to meet with his mother. He had held many jobs before he went on disability and apparently was working and at that time receiving disability, so I have no idea what that arrangement was.

He had, over the course of time, gotten a degree from Pace College. He was a systems analyst with IBM. He had -- he had been beaten by the police according --

MR. ZELENKA: Objection. Hearsay.

THE WITNESS: He had been in Bellevue -- I'm sorry.

MR. TARR: Basically we're going to have the same response to the general hearsay objection, but these are records that she is relying upon to form her expert opinion.

MR. ZELENKA: It's Vera's, as I understand. That's hearsay on hearsay on hearsay. All right? It's alleged that before --

MR. BROWN: Ronald told Vera and --

MR. ZELENKA: Ronald told Vera that something happened in the '60s, '50s or '60s, before she met him, so hearsay to Vera, hearsay to Bovee, their relying upon, with respect to that. That's my objection.

MR. TARR: Okay.

THE WITNESS: Ronald had in the past been at Bellevue Psychiatric. He had psychotic episodes, paranoia, ulcers, pancreatic disease, cirrhosis of the liver and depression.

BY MR. TARR:

Q. When did they get married?

A. They married on May 26, 1968, at the City Hall in New York City, and at that time Vera was pregnant with Bayan and Ronald was working as a bartender.

Q. And when was Bayan born?

A. He was born on November 8, 1968, at Roosevelt Hospital in Manhattan.

Q. And what were the circumstances surrounding his birth?

A. When he was born his mother was 28 years old. During the first four months of her pregnancy she was extremely ill and at six months was hospitalized with bladder infections. Bayan was born one week late after 35 hours of labor. He had to be turned with forceps because he was in the wrong position.

Vera was very anemic and kept in the hospital for three weeks following his birth. He was born with a heart murmur. And she was very depressed; for several months, according to interview, and for three years according to some of the other social history records.

Q. And how would you characterize Bayan's family life during the early years of the marriage?

A. His father began drinking very heavily at the time of his birth. The mom and dad separated many times because of the drinking. Bayan was a very clingy child, very attached to his mother. He never wanted to leave her alone.

He was afraid of his father, afraid his father would come back to the apartment and harm his mother after they were separated.

In his earlier years, he witnessed his father abusing his mother and at the -- when he was 4 years old, his mother forced Ronald to leave the home for good; although, it seems over the years he would come back from time to time. Not to live but to have some involvement. She actually made him leave the home because of his treatment of Bayan, which is the first time you hear mention of there being a problem there.

Bayan's father did not form a close relationship with him. He did not think Bayan was very intelligent. He thought he could not be his child because he had a daughter by another marriage who was very smart. The problems that he had with Bayan during these early years is that Bayan did not talk until he was 3 years old.

He didn't hide his mistakes, and his father thought a smart child would hide his mistakes. He made sounds that were incomprehensible. He did things that made no sense. He repeated his mistakes. He couldn't seem to learn from consequences.

And also, during those early years, after the separation, he was left with a succession of baby-sitters, and we really don't know anything other than he was left a lot with baby-sitters.

Q. From your review of the interviews or the records, what was the impact of these early years on Bayan's development?

A. Of course, just reading the records and also just trying to go back that far, because I think Bayan is now 36, what I could glean from the records is that this was a child who had three or four different problems, and these problems can cause very similar types of behaviors; so when we look at the impact, it's important to remember that we're looking at a child who was learning disabled, a child who had been through some trauma, a child who had been labeled emotionally -- handicapped and emotionally disturbed and a child who had been in some psychiatric settings.

And so the behaviors that we see, that I would consider part of the impact: He was extremely afraid of other children. He didn't want to go out of the house. He was resistent to

school, to DayCare, and that seemed to be around these pervasive fears he had that were later described in his mental health records.

Not speaking until he was 3 years old, we don't know if that was developmental or that was due to the trauma of the violence that was going on in his home. It could be either one. But not speaking until three is somewhat unusual. Now, he was uttering sounds, but they were not comprehensible.

He was a child, very early on, that did not seem to remember consequences and, again, this is consistent with learning disabilities that we also learn later on through the records that he had very inconsistent parenting and some other problems, so there could be a number of reasons that this child did not respond to the consequences.

He had problems with concentration. He -- as a clingy child, he seemed to need more than the usual adult attention and adult contact. He is described as both immature and sexually immature; wanted to sleep with his mother far beyond the time when most boys would prefer to have their own room or privacy.

Had a perception of himself as insignificant and alone and, again, even as an older child wanting to stay at home, not wanting to leave his home.

Q. And you touched on this a little bit, but could you describe his early school years?

A. Yes. And let me begin answering that question by saying, during these early years, after the parents separated, the father did visit him. He took him one time, and Vera had to go to court and get an order of protection to get him back. And if I recall correctly, it was also during these early years, and I can look it up, but an abuse report was made, and it appears that it was investigated.

I could not determine if it was founded or not, but it is mentioned throughout, not just in this interview with the investigators, mentioned in three or four of the records that he was observed to have marks or bruises on his face and that there was a social worker involved.

So, that's all I have on the early years. I'm done.

Q. I was asking about his early school years. I think you had jumped back to that.

A. Sorry. Okay. His early school years were extremely difficult. As I said, he was very resistent to being removed from his mother, and what you see throughout the review of the records is that -- the comment that she uses is that they were enmeshed.

And what that means in mental health is that you have a parent and a child who literally have greater difficulty than normal being separated. It's called a symbiotic relationship. And so when you try to remove that child, and in this case this had to happen because the mother had to work, the child screams and yells, is extremely distraught.

And the way this is different from any child who is scared at his first day of school or has to go through an adjustment period, this goes on for weeks. This goes on for a month. This goes on over and over again. In other words, the child doesn't ever seem to be making the adjustment to the school. So, this went on in DayCare. This went on in first grade.

And it appears that he was frightened whenever he was removed from where they lived or he was removed from his mother. It appears that

he was frightened and that he was afraid of other children.

Bayan did not make friends easily. He did not learn like other children. He would leave the school even early on. If he could find his way home, he would leave the school and go home. He was identified by the school as having emotional problems, having -- it was noted in the school records he had had difficulty learning to talk. And at some point special education was requested, and I believe this was when he was repeating the fifth grade for the second time that the school finally said, We need to put him -- evaluate him for special education.

In the classroom, he would raise his hand as though to answer a question, but it would be clear that he didn't understand the questions, so he could not give an answer.

His stealing began very, very early on. He thought that if he gave other children money, they would be his friends, so he would take money from his mother's pocketbook.

MR. ZELENKA: Objection, hearsay.

MR. BROWN: I would just assert that at some time we'll tie this up with testimony from

the other witnesses, including Ms. Bovee and Ms. Aleksey, if necessary, so, subject to later on.

MR. ZELENKA: I mean, she can say if it came from Aleksey. I have no problem with that.

MR. BROWN: I understand, but I'm just saying, now that you've imposed another hearsay objection, I think we would ask that all of these objections be subject to being tied into properly admitted testimony at a later time.

MR. ZELENKA: I don't know how you can -- I mean, if she says she has personal knowledge of it, then I withdraw the objection, but she's making comments about Aleksey. She said she's interviewed Aleksey. I don't know if it's coming directly from him.

MR. BROWN: And I understand that. I'm just saying the general response, not just for this specific one.

MR. ZELENKA: She can tie it up now.

MR. BROWN: I understand that, and I'm just saying for all of them generally when we go back and read through it, we would like to be able to tie up all of them just as a general

response.

We did not interpose that response earlier, and I just wanted to interpose that; that for any of the ones that rely on information, because you mentioned that it was hearsay upon hearsay, that if it's Ms. Aleksey, then we'll just have her to come down for a deposition, or Ms. Bovee, and we'll -- generally to tie up all the ones obviously --

MR. TARR: Are you just asking where she got the information she is referring to?

MR. BROWN: On this specific one, yes, but as a more general response I'm saying to all of them. He's made multiple hearsay objections.

MR. ZELENKA: My objection to hearsay is she is saying a reason why Bayan Aleksey did something. Okay? Did that come from Aleksey? I mean, there is a different type of a hearsay objection then. I mean, it's -- clearly she does not have personal knowledge of that he stole things and his reasons for stealing things.

BY MR. TARR:

Q. Ms. Vogelsang, what are you relying on when you speak of his stealing things and his

belief that he stole things and gave it away to other kids that they would like him? Where are you getting that information from?

A. Well, the information came from the interview of Ms. Bovee with the mother, and I believe that particular information, I'll have to look because I brought, you know, the records with me that I relied on, but I believe that his mother, many years ago, also relayed this information to others who assessed him, other professionals or to teachers.

So that particular piece of information, I believe, is in more than one source.

Q. Now, you spoke of Bayan being evaluated.

A. Is it okay for me to finish the last question?

Q. Sure. Yes. I thought you were finished. I'm sorry.

A. When I spoke earlier about the stages of development and human development, one of the most important, as I mentioned, is forming relationships with other people and doing that through play and learning the rules and that sort

of thing, and so actually in the school records, I believe, and the mental health records he is described as a child that has not been socialized, an unsocialized child.

He was placed in Catholic school from the first to the seventh grade. During that period of time the Board of Education evaluated him, and he was found to be emotionally disturbed. He was placed in special education in the fifth grade, and he had to repeat the fifth grade twice.

And if I could just -- I believe I've got reference to those records in terms of where this information came from.

Q. Okay. Do you have a recollection from reviewing the records that he didn't speak at all in the first grade, in class?

A. There is one -- there is one point at which it is written that he did not speak at all, but there are other references to those first three years which say that he made sounds. They were just not comprehensible; that you couldn't be conversational with him. And then years later, when he is tested, he is found to have auditory discrimination problems, and those can certainly

cause these kinds of things to happen.

Now, as I stated earlier, you know, children who have been traumatized will quit speaking. Children who are learning disabled will have speech problems, can sometimes have speech problems. Children who have auditory discrimination problems can have speech problems.

So, I don't know and I don't think anyone in here knows for sure 100 percent why this child was not talking, but we do know that there was a problem with him verbalizing until he was 3 years old.

Q. And what were the results of the evaluations done on Bayan?

A. He was found, in terms of the school evaluations and the Board of Education evaluation, to be emotionally disturbed, emotionally handicapped, was placed in special ed-, found to be -- the testing said -- mostly said suggestive of learning disabled. I believe one special ed- record said learning disabled.

And he had auditory discrimination and visual motor integration problems.

Q. Was he on any medication?

A. According to the records, he at one

point was given Melleril, which is a major tranquilizer, and reportedly OD'd on it, overdosed on it in an attempt to calm himself down. I'll look up the age that he did that. I think he was --

Q. Fourteen?

A. -- around the teenager -- fourteen years old.

And then in the interview with Ms. Bovee, his mother mentioned several other drugs. I did not -- and those drugs are also listed from time to time in the records. It does not -- from the same source, from the mother.

It did not appear to me in the records that throughout this history that they were medicating him.

Q. All right. Was Bayan -- in reviewing the records, have you found anything in the records or interviews that would tend to show Bayan was abused outside of the family setting?

A. Yes. And, again, this is from the interview with Ms. Bovee and his mother, and this may be mentioned in one other record. I can't recall at the moment, but there was -- I had mentioned earlier that Bayan would try to make

friends by giving them things, and one boy that he gave something to had a guardian who had a boys' club, and he came to the door one day and asked if Bayan could attend his boys' club. The -- apparently he was trying to provide some fathering to these young boys, and so Vera let him go to this man's house that just knocked on the door.

And Bayan went over there for a couple of weeks to play games and he -- Bayan called his mother to come get him, said the man wanted him to shower with him and that when he would wake up from a nap, the man would be touching him.

Q. Okay. Was anything ever done about that by Ms. Aleksey?

A. She -- according to the interview with Ms. Bovee, she did not take any action against the man. She just made up an excuse and never let him go back.

Q. Could you describe Bayan's middle school history?

A. By this point Bayan is very embarrassed about being in special education. They got him started at Adrien Block. He is in special education. He's transferred over to

Bleeker in the seventh grade and stayed there for the seventh and eighth.

And it was from Bleeker and because of the problems they were having with him in the classroom and because he was having so much trouble learning that it was recommended that he, first, attend therapy with this David Rosengard, and then he was placed at the Hillside campus at Long Island Jewish.

And let me just check. He started middle school in the sixth grade. He had a lot of absences. He did receive a certificate of completion from Public School 21. He missed 32 days of school.

And this is when he actually starts junior high school. During his first year of junior high, he received the best grades he had ever gotten. Up until that point, he had gotten mostly Ds and Fs and low grades, even in special education, but in this particular class he got some average and above. His personal adjustment needs improvement. He missed 39 days of school.

Once he goes to Bleeker, he's not meeting the promotional requirements and may be held over in grade seven. Vera received a letter

from Adrien Block. He's scheduled to attend the emotionally handicapped program, and she is constantly at this point being warned about his absences.

And it's not like he's going out and running in the streets. He's going home. He does not want to be outside the home.

He got a certificate of effort from Bleeker High. Most of his progress says he needs improvement. He had not -- until this point in school, he had not been violent. What you see in the mental health records from the testing is that he has -- he is preoccupied with aggressive thoughts, but that's what they are. They are thoughts.

At some point Bayan starts sleeping with a knife under his pillow. Evaluations show these pervasive fears of being harmed. But he's not beating up the kids at school. He's not hurting anybody at this point.

And then it appears that one of the first confrontations that are mentioned and where there is concern was at Edward Bleeker High School, and he didn't like the way another child was eating his food, and he admitted it was his

fault. I don't think the record says actually the details of what happened.

During this time, and I think this is important about his schooling because it's consistent with his evaluations and mental health, the school tried to get his mother to attend a workshop, "How it feels to be a child with special needs," and she did not attend that.

She receives letters about his behaviors in school, mostly concerned with him not performing, not meeting the requirements for his age even in these classes. And at this point a letter is sent from the school because Ms. Aleksey believes that it's the school's fault. They're just not teaching him properly. And the school sends a very detailed letter back explaining why Aleksey cannot learn math, I believe.

At this point he has been diagnosed with specific developmental disorders. That means he's having problems in a number of subjects and it's developmental.

He went to the Hillside campus. This is part of the Long Island Jewish Hospital. Things pretty much continue on. He's unsatisfactory in personal adjustment. He's

discharged from Hillside in the ninth grade.

And his grades, for example -- in the ninth grade, he is now 15 years old. His grades are a 41 in English, 41 in math, 41 in social sciences. A 70 modified in science, typing 41, home economics -- so still not doing well.

The division of special education requests a meeting with his parents, and they do an annual review and, of course, state that he's -- just can't seem to learn. His attendance is poor.

So this -- all of this that I've described characterizes his middle school years, and they kind of just continue in this same way.

Q. What happened to Bayan's father during this time?

A. He just continues to have visitation. He doesn't see him too often. Bayan cries and begs to come home when he has to stay with him, and they have a very bad relationship throughout all of these adolescent- and late adolescent years.

Q. From the review of the interviews and the records, could you tell what impact, if any, this had on Bayan?

A. Well, his behavior is just becoming progressively worse. It is getting to the point now where Vera doesn't seem to be able to control him any longer. Again, from what I could gather during these years, he's not running with the wrong crowd. He's not using alcohol and drugs. He's not running in the streets yet. But at home his behavior is such that she just has no control of him.

And, of course, we learn from the mental health records that's he's got this impulse control problem and cannot -- simply cannot seem to control his behavior.

It appears in the records at some point that he has some awareness that he's different from other children; that he does not perform like other children. He would cry and say, Why did God make me this way, different, so different from everyone else?

He could not sit still or pay attention, but still at this point not violent. He's impulsive. He's truant. He's easily frustrated. He's socially isolated, which he really does to himself because of this fear of other children. He's sexually immature.

He has pervasive fears. He is depressed, and he has these aggressive preoccupations that he does not really -- except for a couple of these little incidents, he's not really acting out on the preoccupations at this point.

Q. Did his mother ever send him away?

A. She sent him at one point to stay with an uncle in Miami. He only lasted about three weeks. He called and cried and begged to come home, and she brought him back home.

Q. And you mentioned something about his increasingly uncontrollable or bad behavior. What kind of trouble was he getting into then?

A. Well, at some point, more maybe a little bit later in the late teens, but he starts getting in trouble for bad checks, for forgery, traffic violations, criminal mischief, stealing. Those are the kinds of offenses that I saw.

Q. Nothing violent at that time?

A. No, except for these, you know, couple of scrapes at school. At this point there is still -- there was at one point a note in one of the records that he -- and this was when he was getting older and more substantial in size; that

he threw a desk at a teacher, but it was not -- there was no detail about it, so I'm not sure of what the circumstances were, but he did throw a desk at a teacher ultimately.

And he is still at that point going in and out of psychiatric settings.

Q. Could you describe that psychiatric care over the years for Bayan?

A. When he kept having to repeat the fifth grade and because teachers were noting his impulsive lack of control and his moodiness and his fears, it was recommended that he see a psychotherapist, and he was sent to the Queens Guidance Center where he received therapy with his mother for three years; and their attendance was fairly frequent to that. The therapist was David Rosengard who is a social worker.

And what we learn -- those records have been destroyed. They were purged. But there is a letter from Mr. Rosengard describing those three years as he remembers them.

And at the end of those three years it was recommended that he be put in the school at the Long Island Jewish Hospital, Hillside campus, because, you know, he's going his third round with

the fifth grade and things aren't going very well, so they do that.

And this is where a lot of evaluations are done on him, and the most consistent comments that you see is that the mother is very inconsistent with her parenting. They are in an enmeshed relationship. The mother fails to follow professional recommendations; that there is just no follow-through.

And they also use a term "hierarchal imbalance" and they describe this inconsistency where at times he is treated like the impulsive, impaired child he is, and then in other times, transiently, he's treated like an adult and that there is just no consistency and no follow-through in the way he's being treated.

He's afraid of school. He has trouble controlling his impulses. He's increasingly anxious. He has made one suicidal gesture with Melleril. He is sleeping with a knife. He prefers the company of his mother. He has no friends. His father is unresponsive to requests for a meeting.

And at discharge, aggressive impulse discontrol, hypervigilance, no structure at home;

and this is the first time you see borderline personality as a diagnosis for him. Misaligned hierarchy, transient adulthood, auditory processing with problems in attention and concentration with visual motor integration problems.

The auditory discrimination problems can cause a child great difficulty, and having seen children with auditory discrimination problems in my practice, I would just say generally that it completely messes up the way you deal with the world, the way you deal with other people.

It doesn't mean you can't hear. You can hear the sounds. You're only getting -- Bayan, for example, was only getting pieces of words. Some children only get pieces of sentences, so it's almost like this scramble of information incoming; and so you've got to guess, or as children will do, pretend that you know what's going on when you really don't, and, of course, this can cause some problems with behavior.

Of course, it affects attention and concentration. These children know they're

different. They know they're not learning like the other kids. They can see the other kids catching on in school, and they try to cover up or they try to avoid school or they say they hate the teacher or it's the teacher's fault, and so a lot of the blaming that Aleksey would do probably was related to embarrassment over the fact that he just couldn't function like other children.

Now, there are later records, psychiatric records from Creedmore and Clearview, and all of those records are -- they're all pretty consistent in their perceptions of him in terms of his impulse control problems, adjustment disorders and borderline personality disorder.

Q. And those last two you mentioned, would that have been considered adult psychiatric care, or did he have other psychiatric care after that?

A. Creedmore happens right at about the age of 18. Admission note: Bayan is admitted to Creedmore Mental Health for suicidal precautions. And he is -- this is in August of 1987, so he's about -- he's going on 19, actually, getting closer to 19 because his birthday is in November.

But I -- in my list I had started, it

looks like he had the psychotherapy with Rosengard, the treatment or the evaluations and some treatment at Long Island, Creedmore twice, once at 18, once at 19, and then Clearview, which was a program at Creedmore, at 20. Those were the only ones I found.

Q. Is that everything that you wanted to say with regard to his adult period? Is there anything else that you wanted to add?

A. Well, that's all, in regard to the psychiatric.

Q. And after this point, did he continue to have legal problems?

A. Yes.

Q. Could you describe those, please?

A. Just going over and making sure I didn't leave anything out. I'd left one thing out. At the age of 18 -- you had asked about -- I think about the legal problems. He -- when he completes middle school, he is sent to John Brown High, and he did not stay there long. He failed out very quickly. I can look up the time, but we're talking, I think, less than a year.

And I think this is the point, at 17, when the serious stealing began, the credit cards,

the forgery, bad checks, and he did go to Nassau County jail for several months, was placed on probation. Now, I've seen probation letters. I did not see records from the Nassau County jail.

And his mother took out a family offense petition on him, and in the past she had taken out a PINS petition saying he needed special supervision. So I didn't want to leave that out, that he had gone to jail.

Q. And that PINS is Persons In Need Of Supervision?

A. Uh-huh.

Q. Ms. Vogelsang, could you summarize your findings from your professional review of all of the records and the interviews in this case?

A. Yes. I'm sorry that I seem to be running behind here. I want to make sure that I don't leave anything out.

When he was 22 and was having all of these legal difficulties, his father died in a fire in an apartment, was burned. Well, he died of smoke inhalation and no more details on that, but it says smoke inhalation on his death certificate.

And there was also a grand larceny

charge, and I'm not sure if that was connected with him going to jail. A grand larceny Class D felony. I think those were the two I did not mention.

And what I said was that from that point when he's now out of the home, these legal problems continue, as far as I can see. And also, he appears -- to me, in his relationships with females, there appears to be some sort of mutual exploitation going on in terms of financial arrangements.

And if I'm not clear on that, it's because I'm not real clear on that. But it appeared to me, that involved various women. They were involved in some of the bad checks and credit cards dealings and that sort of thing.

And then in 1997, he got an aggravated assault for firing a handgun through the car of Luis Cruz, and that resulted in his second trip to Creedmore Mental Hospital.

So I think that brings us up to or completes what I know about his legal problems.

Q. Okay.

A. I'm sorry. And then you asked me to summarize.

Q. That's the final question. Could you please summarize your findings from your professional review of the records in this case?

A. Well, in summary, what we have, I think, is a special-needs child who ultimately is diagnosed as -- by the schools at least or evaluated as emotionally disturbed and emotionally handicapped, placed in special classes. A child who by history is immature and enmeshed with his mother and has an alcoholic and abusive father.

In my opinion this child was not getting the consistent kind of help he needed considering that he was a special-needs child. His parent's marriage was unstable. This is a child that did not develop the kind of social skills that would help him in relationships with other people or in knowing how to function in the world outside of his home. He was a very anxious and fearful child.

I did not see in the records I reviewed any alcohol or drug use, but at some point, you know, his mother literally starts kicking him out and locking him out because of his impulsive and destructive behavior, much of which in the early years is self-destructive.

When he is placed in a setting with structure, he does better. When there is consistency, he does better. But there is no structure or consistency in the home. There is this imbalance in relationships with his mother where sometimes she is the mother and sometimes she is not. She is a friend or a cohort or -- but simply not providing a consistent adult/child relationship.

He, as a small child, witnessed the abuse of his mother. According to interview with Ms. Bovee, his father had a psychiatric diagnosis. There were times when it appeared that his mother was sabotaging therapy and his schoolwork by not showing up for -- following recommendations or showing up for various meetings or participating in things that might have been helpful to her.

There is at least one suicidal attempt or gesture -- it is referred to as both -- at the age of 14 with the drug Melleril. There is indication of organic disfunction, and this is referring to the learning disabilities, the auditory discrimination, the visual motor integration problems.

Overall, this was a child that certainly, not under supervision, would be at high risk out in the world to end up in some very serious trouble. He simply did not have the skills to manage himself as a safe, productive person we discussed early on where support and help with human development has been given.

He has documented mental health impairment. The most consistent diagnoses are borderline personality disorder. He is early on given the antisocial traits and later antisocial personality disorder, but certainly with that disorder you must rule in the environmental factors and take those into consideration as opposed to just a straight APD diagnosis, and those were from childhood.

There are indications of trauma with it being mentioned in the records that he is hypervigilant and overreactive. And in the end the most serious problem being the lack of impulse control which left him with no judgment, no insight, no decision-making powers, at least not good decision-making powers.

And so we have someone who both by virtue of his neurological problems, his mental

health problems, his environment, was at very high risk to end up in adult incarceration and committing a serious act.

MR. TARR: Off the record.

(Off-the-record discussion.)

(A short break transpired.)

MR. TARR: Before you get started, I just want to see if you can stipulate to Jan's qualifications as an expert in social work.

MR. ZELENKA: You better ask the question. Go ahead. You can reopen.

BY MR. TARR:

Q. I'll reopen briefly and go back to I initially was going over a number of qualifying questions with you. Let me just ask you a few more.

Have you testified in court? Let me go back for a second.

You've testified about your work, what you do for a living --

A. Yes.

Q. -- and the licenses you hold and the certifications, your professional affiliations, your work experience and your work as a clinical social worker and the awards and recognitions in

your field, and let me ask you: Have you ever been qualified as an expert in social work and testified in trials in this state?

A. Yes.

Q. Have you testified in other states?

A. Yes.

Q. What states or what jurisdictions have you testified in as an expert?

A. South Carolina, North Carolina, Virginia, Georgia, Florida, Texas, California, Alaska, Alabama.

Q. About how many times would you say you've testified or been qualified as an expert?

A. Just in death penalty cases or just --

Q. In any cases.

A. Well, in any type of cases, probably around a hundred times. In death penalty, I think over 14- or 15 years I've maybe done between 30 or 35.

MR. TARR: Okay. I'd like to offer her as an expert in the area of social work.

MR. ZELENKA: No objection.

EXAMINATION

BY MR. ZELENKA:

Q. Ms. Vogelsang, did you do a biopsycholsocial assessment in this matter?

A. No, I did not.

Q. Okay. And, again, just to clarify, tell me what a biopsycholsocial assessment is.

A. The biopsycholsocial assessment is a method of gathering extensive information on a client, or in this case a defendant, and his family, going back three-, four-, five generations, interviewing both family and nonfamily members, people such as school teachers, coaches, doctors, gathering numerous records, Social Services, or asking to have access to numerous records such as Social Services, medical, mental health, military, et cetera.

It includes looking at research and studies that relate to your findings. It includes consulting with other professionals or reading their records, or both, visiting the community, going to the home, and then creating visual aids that demonstrate your findings if you're going to testify in court. In private practice, it is used for treatment planning.

Q. Okay. So essentially all you did in this case was, other than that brief interview

with Mr. Aleksey, you reviewed the records that were provided to you by current counsel in the case; is that correct?

A. Yes.

Q. Did you ever interview or discuss any information with Toni Bovee?

A. No.

Q. Why did you not do that?

A. This was a review of records, and that was one of the records provided to me, and -- or one of the documents provided to me, and so I just stuck strictly by the records.

Q. Okay. Do you have the records of Ms. Bovee with you?

A. Yes, I do.

Q. Are they segregated out or are they in combination with everything else?

A. No, they're separated out.

MR. ZELENKA: I'd like to make Ms. Bovee's records an exhibit to this deposition in its entirety.

MR. TARR: No objection.

(DFT. EXH. 1, Toni Bovee's Records, was marked for identification.)

BY MR. ZELENKA:

Q. In those records did Ms. Bovee, according to your review of her records, have access to the other records that you've referred to?

A. I can't recall. Let me see if she mentions that. Well, no. I think the answer to that question is yes because in her chronology she makes reference to she has the records from Queens Guidance Center.

She quotes from the records from Creedmore. She is taking information for this chronology with the dates and his ages from his school records, from the Board of Education, so that would have had to come from those records.

Q. Okay. And that document that you're referring to right now is called "Time line of Bayan Aleksey"?

A. Yes.

Q. The date on that is August 7, 1998?

A. Yes.

MR. ZELENKA: We'd like to make that a separate exhibit also as Respondent's Exhibit No. 2, I would guess.

(DFT. EXH. 2, Time Line of Bayan Aleksey, was marked for identification.)

BY MR. ZELENKA:

Q. Okay. Are there any other notes of Ms. Bovee that you relied upon or are those documents that you have there in the left-hand pile the --

A. She also interviewed David Rosengard, the psychotherapist, and I have a copy of her interview with him.

MR. ZELENKA: I was wanting all of that information included in my first proffer. So you have one file, and that's basically Ms. Bovee's notes of --

MR. BROWN: Her notes.

MR. ZELENKA: -- her resolution and her assessment.

THE WITNESS: Yes.

BY MR. ZELENKA:

Q. Do you know Ms. Bovee's background?

A. I only know her by reputation. She -- it has been known for years as a jury and trial consultant and mitigation specialist. I think I met her one time, but I don't know her credentials or her background.

Q. Okay. All of that information that you reviewed appears to have at least been

assimilated by Ms. Bovee prior to August 7, 1998; isn't that right?

A. Yes.

Q. According to your record review?

A. Yes.

Q. So essentially did you understand that Ms. Bovee worked with counsel who were representing Mr. Aleksey, Duffy Stone and Mr. Sims, at the time of the trial?

A. I may have noticed at the time I was reading that because I saw Duffy Stone's name on there, that she was working with a different set of attorneys.

Q. Okay. Do you know what information Ms. Bovee, independent of those documents, related to the attorneys who represented Mr. Aleksey in this matter? Is there any indication in your notes of correspondence coming back from the attorneys, information from the attorneys to her in any way, shape or form?

A. No.

Q. Okay. Why did you stop, basically, your review of the records upon the event of the crime itself and not consider records prepared by the forensic evaluations which were done on

Mr. Aleksey subsequent to the arrest in this particular trial?

A. That's what was requested by the attorneys, that I strictly keep it to his history and not go into the crime or beyond the crime; that it strictly be historical.

Q. Okay. And doing a psychosocial assessment generally, a client that you would be treating, you would want that assessment to be as contemporaneous as possible to determine that person's present mental state; isn't that correct?

A. Well, I think my findings are based on the historical perspective. I don't really know except -- I mean, I wouldn't have given him a diagnosis when I saw him that day because that wasn't what I was asked to do; and certainly in private practice with a client, we would bring it right up to the present.

But in these cases typically -- and there have been a couple of exceptions, but typically I'm asked to just keep it to the family history.

Q. But you're asked by the lawyers.

A. Right. That's correct.

Q. But in your role as an expert in

social work, you would concede that in making an evaluation, if you're doing a biopsycholsocial evaluation, you certainly wouldn't stop two years before you saw the individual actually in making your assessment of his present mental state, would you?

A. No. No, I would say not. And --

Q. And the obvious reason for that would be -- go ahead and finish your answer.

A. Well, two things. Number one, I did not look at this as a biopsycholsocial assessment. This was a professional review of the records, and, you know, met the request, but -- I'm sorry. I've forgotten what the second point was. Repeat your question again.

Q. You wouldn't have stopped in determining a person's present mental state two years before you saw that individual.

A. That's correct.

Q. And you wouldn't stop if you were aware that the person had been subject to testing, interviews, possible treatment or analysis of mental illnesses, would you?

A. Two years before the crime, no.

Q. Or if you had some knowledge that

there had been such testing or otherwise, you would seek to review those materials, wouldn't you?

A. Up to the time of the crime, yes.

Q. How about up until the time of your evaluation? I'm not putting you in your current state but putting you in your role as a licensed social worker.

A. No. If I were working with a private client, we would come right up to the present time.

Q. Okay. And you don't know the reasons, obviously, that counsel chose to stop at a time before the criminal event, do you?

A. No.

Q. Do you know if there was any -- they didn't indicate to you that there was any head trauma, any additional traumatic events which may have impacted or may impact on that individual?

A. Prior to the crime?

Q. Subsequent to the crime.

A. Subsequent to the crime, I don't know.

Q. On direct examination you made reference, and I want to understand if this is

your opinion or if there is some clarification needed, that Mr. Aleksey has no judgment, no insight, no decision-making power. That was a bit of an overstatement, wasn't it?

A. If I said no judgment, no insight, let me correct that by saying poor.

Q. Okay. Because you can't -- you conceded also you've not evaluated him this day, contemporaneously; isn't that correct?

A. That's correct. This is based strictly on the review of the records and what I learned from the records. But a personal evaluation or diagnosis on him, I did not make and would not make without including up to this date.

Q. Were there any documents or materials that you reviewed which stated that Mr. Aleksey had no judgment, no insight, no decision-making power?

A. There were, and I would have to look through, but there were evaluations that talked about his judgement being very poor or his insight being very poor, and it was related to the lack of impulse control.

Q. Okay. But it was poor as opposed to totally lacking, correct?

A. As I recall, yes.
Q. Okay. At one point of time was there an order of protection sought by Mr. Aleksey's parents. In your review of the records, what was the requested reason for that order of protection and was it granted by the court, if you know?
A. Let me look just one second and see if I can find it. I'm sorry. I thought I brought it with me. Let me look in here. Do you remember the age? I don't remember the age he was. I think he was a teenager at that point.
Q. I had written age 16.
A. Okay. Let me look right here. Okay. He was ordered not to assault, menace or harass or recklessly endanger the petitioner, to stay away from the petitioners' home, and may enter petitioners' home with written permission given by petitioners only. This petition was modified and continued.
Q. Okay. Is there any indication that you received from the petition that he had been violent at that time towards either of his parents?
A. Yes. He, Bayan, was becoming less and less in control of himself. He was very

resentful when the father was allowed in the home. I think the father went with the mother, if I recall correctly, to file that petition. The mother had begun calling upon the father for a little help with Bayan, and he simply was out of control in the home.

He was out of control at school. He, as I recall, was not attacking the mother, but she was fearful that he would. He was not using a knife, but he was sleeping with a knife. His behavior was becoming increasingly worse, and I think there was a real fear that the aggressive preoccupations were going to finally translate.

He would badger her. He, you know, would just constantly be emotionally demanding on her. She just felt like she absolutely -- just could handle him a little more when he was younger. She felt she couldn't handle him once he started getting up around that age, so I think there came a time when she started feeling afraid of him.

Q. Okay. Is that -- just for some clarification. In some of your earlier notes is that order of protection requested, and then in some of your notes that had been provided to me

previously there was a statement about a family offense petition September 9, 1986. Are those the same matters or are those separate?

A. Give me that date again. September 9 --

Q. Nine, 1986.

A. I think those are different because he was 17 years old when she got the family offense petition and that four days before, he verbally abused her using violent, abusive language. He was loud and unruly. He threw furniture around the home.

He's uncontrollable but does not stay out all night without permission or knowledge; has a history of -- I don't know what that means -- physiological problems. I think they meant psychological. Dropped out of school. Does not have a job. He's on probation for a criminal offense.

She asked the court to order him to seek psychiatric help and be observed in a hospital setting. That's different. That's another one.

Q. All right. You also referred to, I believe it was, K. Fisherman's social history, if

I wrote that down correctly. Do you have that there and available?

A. Yes, I do. It's right here.

Q. All right. And that's dated February 24, 1976?

A. Yes.

MR. ZELENKA: We'd like to make that part of the record as Exhibit 3.

(DFT. EXH. 3, Social History from K. Fisherman, was marked for identification.)

BY MR. ZELENKA:

Q. You referred to letters from Mr. -- social worker Rosengard?

A. Uh-huh. Let me see if I can find that. Okay. Oh, I'm sorry. When I said letter, I'm sorry. I was referring to the interview that Ms. Bovee had with Rosengard which you had already asked for. There is a letter from Mr. Rosengard when he wrote Bayan a letter when he was down in Florida, just sort of to say hello. How are you doing? Thinking about you.

So I was confusing this letter with the interview, but it is -- it's the interview, I think, that you've already requested that has all the information from Mr. Rosengard because they

had purged the records at Queens Center.

Now, there is -- there is the financial record from Queens to show the attendance.

Q. Okay. Could I see the notes of the interview you took with Mr. Aleksey?

A. Uh-huh.

Q. One reference on here, if you could just clarify. Your third line down: Lots of MH. I assume that's history?

A. Treatment.

Q. And then it says, Can't believe it. What's that in reference to?

A. He just couldn't believe that he had to see a therapist all of those years and that, you know, he just thought he was okay.

Q. Okay. And that interview with Aleksey lasted two hours?

A. I had set aside a two-hour slot. As I recall, I think I saw two other people that day. As I recall, I was not with him for two hours, but that was kind of the time slot I had set aside.

Q. Okay. Just some clarification. It looks like at the top, something 6:30?

A. I left Greenville at 6:30 in the morning to get down to Lieber.

Q. And Lieber is located outside of --

A. Charleston.

Q. -- Charleston, Moncks Corner, out in that area.

A. Yes. And normally in my interviews, I'll have sometimes a whole notebook more, so I think it's a real indication of how brief and how, you know, it was good to observe him. It was good to see him, but I really did not learn much from him.

Q. Okay. Now, in the materials that you had, you noted, didn't you, that Vera had reported to Ms. Bovee that she had lived in a very happy family that was well-educated; isn't that correct?

A. That is correct.

Q. Frequently did things together as a family, financially well-off, and didn't have to support herself before coming to the States; isn't that correct?

A. That's correct.

Q. Now, in the notes that you had given previously to counsel, there may have been an indication that his father died earlier on in his

adolescent period, but you're clear that he died when Mr. Aleksey was 22?

A. I double checked that yesterday -- and, actually, I think I have the death certificate, and it's confirmed in the chronology of -- I think I had that right. I do want to make it clear that that was a draft, and I have not proofed.

Q. Absolutely. That's been indicated to me.

A. Okay. I believe I have the death certificate, so we can -- let's see. Date of death: December 15, 1990. So, he was born in '68, so actually he would have been --

MR. TARR: Twenty-two?

THE WITNESS: -- twenty-two. That's right.

BY MR. ZELENKA:

Q. You have not spoken with either Counsel Stone or Counsel Sims about this case at all, have you?

A. No.

MR. ZELENKA: No further questions.

MR. BROWN: The only thing I would mention is procedural matters. Now that you've

got some specific facts of her testimony and interviews, I want to go back to those hearsay objections and see if we're now allowed to go into the information.

MR. TARR: Well, she already testified about it.

MR. ZELENKA: Yes. You indicated when I objected that you were going to call Ms. Bovee and the others to testify.

MR. BROWN: We would reserve the right to do that.

MR. ZELENKA: That's not what you said.

MR. BROWN: Well, okay. That we wanted to be able to -- well, okay. That's fine. I'm just saying.

MR. ZELENKA: I mean, I'm not saying you can't -- I mean, it's your witness.

MR. TARR: I've just got one on redirect.

REEXAMINATION

BY MR. TARR:

Q. From your review of the records, is there any indication to you that Mr. Stone and Sims engaged the -- hired a social worker to

perform a biopsycholsocial assessment on Mr. Aleksey before trial?

A. As far as I could determine -- well, I can only judge from what I've got. Ms. Bovee is a mitigation specialist, and attorneys do get confused sometimes and they think when they've hired a mitigation specialist they have hired a social worker to do a biopsycholsocial assessment, and I don't know what their thinking was.

I don't know what they thought they had hired, but it looks to me as though they retained a mitigation specialist who is an investigator who investigates mitigation.

That information is usually later turned over to a clinical social worker and other experts like, you know, the doctors, and then they put their clinical look at the records and the interviews and they decide who they need to see and do the rest of their work.

Just from the records, it looks to me like this was strictly a mitigation investigator who went out and got records and did some interviews.

MR. ZELENKA: Let me just do a follow-up.

REEXAMINATION

BY MR. ZELENKA:

Q. Are you aware of some people who hold out to be mitigation specialists who have a background in social work in this state?

A. Yes, and there are -- you are right. There are. And they are encouraged to never wear both hats. Now, I don't know --

Q. Okay. Why --

A. And there are court orders issued by judges. Even when you say to the attorney, I am not a mitigation specialist. Please do not confuse things. I am a clinical social work expert. And still they'll get a court order for me that says mitigation specialist, so there is a lot of confusion.

But there are many -- one can be a social worker or have degrees in many other things and be a mitigation specialist. You can only be a clinical social worker or not a clinical social worker.

A clinical social worker could choose only to be a mitigation investigator and never testify, but that distinction always needs to be made and made clear. It's really an important

point. And I can only judge from what I have, that she was the mitigation specialist, slash, investigator.

MR. ZELENKA: Okay. That's it.

MR. TARR: That's it.

(The deposition concluded at about 12:24 p.m.)

CERTIFICATE OF REPORTER

I, Cheryl A. Wiszowaty, Court Reporter and Notary Public in and for the State of South Carolina at Large, do hereby certify that I reported the deposition of Janet Vogelsang on the 30th day of January, 2004; that the witness was first duly sworn by me, and that the foregoing 81 pages constitute a true, accurate and complete transcription of my stenographic notes of the said deposition.

I further certify that I am neither attorney nor counsel for, nor related to or employed by any of the parties connected with this action, nor am I financially interested in said cause.

I further certify that the original of said transcript was thereafter sealed by me and delivered to David B. Tarr, 1720 Main Street, Columbia, South Carolina.

This sealed original transcript shall be retained by the above party who shall be responsible for filing same with the court prior to trial or any hearing which might result in a final order on any issue.

Witness my hand, I have hereunto affixed my official seal this 14th day of February, 2004, at Lexington County, South Carolina.

Cheryl Wiszowaty

Cheryl Wiszowaty,
Notary Public for the
State of South Carolina

My commission
expires 8/20/07

Verification of Deponent

I, _____, have read the foregoing deposition consisting of 81 pages which was reported by Cheryl A. Wiszowaty, Court Reporter and Notary Public in and for the State of South Carolina at large, on January 30, 2004.

I find the transcript of this deposition to be a true and accurate transcript according to my testimony on that date, with the exception of _____ changes and/or corrections listed on the attached errata sheet which was filled in by me.

_____

(Deponent's signature)

_____, 2004.

TONI K. BOVEE
JURY AND TRIAL CONSULTANT MITIGATION SPECIALIST
2300 Blairhouse Court Charlotte, North Carolina 28270
704-366-3100 Phone 704-442-1972 Fax

CONFIDENTIAL MITIGATION MEMORANDUM
ATTORNEY/CLIENT PRIVILEGE

TO: Duffy Stone
DATE: August 6, 1998
CASE: Bayan R. Aleksey
RE: Interview with Vera Aleksey, defendant's mother on July 27, 28, and 29, 1998 in New York. 143-48 41st Ave., Apt. 1-C. Flushing, New York 11355. 718-321-3802.

Vera Chandranie Lall Aleksey was born on the Island of Trinidad, Port of Spain, and British West Indies on [redacted] Her father **James Lall** (Jeremiah McLawrence Lall) was a head master at a school her mother **Esther Bahadur Lall** was a housewife. Esther died in childbirth when Vera was six or seven years old and her father married her mother's sister **Phyllis**. Her mother and father had four children together and four more children were born after he married Phyllis. Her brothers and sisters are:
Irving who died in 1996 of a heart attack
Lucille who lives in Trinidad and is a draftsman for the government
Vera
Nelson who died in 1992 in New York.
Her ½ brothers and sisters are:
Leah who died of a rare disease in 1983 in Germany
Steven who lives in England (Vera heard he had passed away)
Winston who now lives in Trinidad and had his own business (Bayon lived with him for a short time)
Trevor who lives in Trinidad and owns his own business

None of the brothers or sisters other than Nelson had a criminal history, drug or alcohol problem, and history of mental illness. Nelson had alcohol problems and lived with Vera a short time. Nelson lived with them for four months in 1990 when he was recovering from a beating where he lost his eye. Vera made him move out when he started drinking again. He died in an emergency room after being beaten for the second time in New York in 1992. Vera said he never came to the house when he was drunk.

Vera said she grew up in a very happy family that was well educated. Her father was a family man and very strict. They always did things together as a family. Everyone in town knew her family. They were financially well off and she never had to support herself before coming to the states and getting married. They had people who worked for

DT EXHIBIT 1
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TONI K. BOVEE
JURY AND TRIAL CONSULTANT MITIGATION SPECIALIST
2300 Blairhouse Court Charlotte, North Carolina 28270
704-366-3100 Phone 704-442-1972 Fax

them regarding cooking and housekeeping. Her father wanted her to become a teacher and she purposely did not do well on her test because she did not want to do that. She wanted very much to come to the states and her father had friends who lived in New York. Her father finally consented to let her come to New York to go to beauty school in 1966. She lived with her aunt for a short time and then went to live at the YWCA on the Eastside. Towards the end of 1966 she met **Ronnie Aleksey** who was working as a Maitre D at a restaurant she would go to for ice cream. He talked to her when she would go and told her about being separated from his wife. He said he had a daughter who lived with her mother. Vera was not aware of his alcohol problem and he did not drink a lot in front of her until after they were married.

Ronald Francis Aleksey was born to a Polish mother **Stephanie Kobzda Aleksey** and a Russian father **Edward Aleksey**. He was born in New York on [redacted] Ronald's father was a Career Navy man who served in the USN. He was rarely home and when he was he drank a lot. Ronnie was the oldest by 14 years. His mother and father had three more sons and one daughter.
Ronald
Edward who worked for the City of New York in the Transportation Dept.
Douglas who worked for the Social Security Dept. in New York City
Monica (twin) who also worked for the Social Security Dept. in New York City.
Stephen (twin) who works for a Japanese bank in New York.

Ronnie's father also had a brother who was a District Attorney in New York who died after having a stroke a few years ago.

Vera said that before they were married that he would take her to his family's house on the weekends and the family was nice to her. Ronnie would help his mother financially and loved going to see her. He was very close to her. However, after she died Ronnie did not see or hear from his family. She died at the Staten Island Veteran's hospital.

During his first marriage Ronnie apparently had good jobs and made a lot of money. He worked at IBM as a systems analyst and consultant for companies. IBM they sent him to night school for additional degrees. He graduated on the dean's list at Pace College. He apparently had problems with his wife and eventually lost his job. They owned a co-op and had one daughter.

Ronnie told Vera that in the late 50-s or early 60's police had beaten him. He was seeing his wife one-day while she was pregnant and when he left the son of a cop made a comment to him. Ronnie lashed out at him. His father came after Ronnie and beat him so bad that he ended up in a mental hospital. She believes the name of the hospital was **ISLIP** in Long Island. Ronnie was given disability after that and lived with his mother

TONI K. BOVEE
JURY AND TRIAL CONSULTANT MITIGATION SPECIALIST
2300 Blairhouse Court Charlotte, North Carolina 28270
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until he and Vera got married. Vera said he also told her of being in several hospitals for his alcoholism. She never told anyone about these things and is not sure what hospitals he was in other than Beth Israel (for drinking). She feels something happened regarding his x-wife and that caused his drinking and the rift with his family. Ronnie was hospitalized in Bellevue Hospital when his room caught on fire and his leg was burned. He came to live with her during that recovery. She also believes he was at Lincoln Hospital. Vera believed his permanent disability was for psychotic episodes that included paranoia. He also had ulcers, pancreatitis, and cerosis of the liver. His arthritis became so bad that he could not hold things very well. After his mother died Vera said he became very depressed and lost a lot of weight. His hair was totally gray prematurely. Ronnie's brothers and sisters would never help him when he needed it.

Ronnie and Vera were married at City Hall on May 20, 1968. This date was important because it was Ronnie's birthday and also the day her father died suddenly in Trinidad of a heart attack. Vera was pregnant when they got married and they move to an apartment 216 West 78th Street in New York. Ronnie worked as a bartender and waiter in restaurants. She and Ronnie got along great and he did not drink where it became a problem until after Bayon was born in November of that year. Things began to change and Ronnie became more and more emotional and he drank more and more. She had Ronnie move out in 1972 because started drinking more and becoming more abusive towards her. Vera denied that Ronnie every hurt Bayon, but does know Bayon saw her being abused. She said that Bayon did not want to leave her alone because he was afraid his father would come back to the house. She took out restraining orders against him and called the police on a multitude of occasions.

Very said she was 28 when Bayan was born at the Roosevelt Hospital in Manhattan. During the first 4 months of her pregnancy she was very sick. When she was six months along she had to be put in the hospital with bladder infections. Bayon was born one week after her due date. She was in labor for 35 hours. Her doctor's name was Stephens. During her labor they had "to turn Bayan because when they x-rayed her they saw that his face would be flattened by the delivery." Forceps were used and she became very anemic after his birth. She was kept in the hospital for three weeks due to anemia and depression. Other than a heart murmur Bayon was normal and never sickly. He weighed 7 lbs. 12 oz. at birth. Vera's depression lasted for several months after she came home.

Vera's life had changed drastically as well when Ronnie left. She said she had always been very naïve about life. She had always had a car and never had to do a lot of housework. Ronnie had done a lot of this until their separation and when she made him go she had to grow up in order to take care of herself and Bayon. She worked part time as a hairdresser. Even after he left in 1972, (they were never formally separated or divorced) Ronnie wanted to get back together. Very told him to go back to school, which

TONI K. BOVEE
JURY AND TRIAL CONSULTANT MITIGATION SPECIALIST
2300 Blairhouse Court Charlotte, North Carolina 28270
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he did. He received two additional degrees and saw a counselor by the name of Morales. Things would be good for awhile but then he would start drinking. She would make him leave.

Vera said that Ronnie would get angry with Bayon because he had problems and he was not smart like he was. He made a comment in jest one time that he must not be his because his older daughter was very smart. He would say that no son of his would leave tracks every time he did something wrong. Bayon did things that made no sense and showed no signs of thought. Until afterwards he would not even know it was wrong she said. Ronnie really wanted Bayon's attention but Bayon always wanted to be with her. One night while she was at work Ronnie came to her apartment and picked up Bayon from the Baby sitter. Ronnie was a very strong man and Vera had to get a neighbor to help her get Bayon back. She went to court to get an order for protection after that. The judge gave Ronnie custody every other weekend, which upset Vera. Bayon would cry and call his mother to come get him. Ronnie would also come to the house and beat on the door for Vera to let him in.

In 1975 Vera moved to her current apartment in Queens. Vera started working full time when Bayon started school. She noticed that Bayon did not make friends easily. One summer her friend and babysitter offered to take Bayon with her on vacation to Pittsburgh. When he came home from vacation, Bayon was obsessed with cars. Apparently, her family owned a car and Bayon had never been inside one. He cried for day's for his car and would pass cars on the street and say they were his. (This baby sitter was black)

When Ronnie started Pre school he cried for three months when she would leave him. He would lay prostrate on the floor and scream. He did not learn the same as the other children. He also had difficult time in-groups. When he started his first grade at PS 20, which was only two blocks from her house, he was constantly leaving school to go home. He said he was afraid of children in his class. The school called and told her that he had problems and thought he was unable to talk. He was extremely quiet and shy. They tested him and the schools would send tutors to the house for him and requested special education. The tutors would tell her they could not help him that he did not want to work. Bayon also never liked to be alone a night and hated to be outside when it got dark.

In second grade she was called all the time because he would not want to do him homework and would never bring it home. The teacher would put the assignments on the chalkboard and he told her he could see them. She went one day to the school and thought the class was unruly and took him out and placed him into a Catholic school.

TONI K. BOVEE
JURY AND TRIAL CONSULTANT MITIGATION SPECIALIST
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St. Michael's was a Catholic School several blocks down the street from where they lived. Bayon did not do well even with the help of a tutor. He would not do his work. After he was there for three years the school felt he had problems and suggested that he get help and get tested. Vera pursued this and he was put in special education. Bayan fabricated stories about his family to the school children and would tell the other children that his mother was rich and had a lot of Cadillac's. One time Vera said he took her money and was giving it to all the kids in school. Most of the time when he took things he would give them away in order to make friends.

Vera related a story to me about an incident that happened during the time Bayon was at St. Michael's. Bayon gave one of the boy's at school a fifty dollar bill that he had taken from her purse. The boy and his guardian she assumed brought the money to her house that night. He was an older man in his 60's or 70's and he told her that he had a type of boy's club for young boys to come to on Friday to play games and little league. Vera told her about his not being able to make friends and thought it would be a good idea. Bayon went to this mans house on Friday and was picked up on Sunday the first two weeks. On the third week Bayon called his mother whispering that he wanted her to come get him. Vera said she immediately called the man and said she had to have Bayon home due to an emergency. The man brought him home and asked if there was a problem. She denied to him that there was a problem. When the man left, Bayon cried and told his mother that the man wanted to get in the shower with him and touch him, he also said that when he would wake up the man would be touching him. Vera said she did not say anything to her husband for fear of what he would do. She told the man that Bayon had different activities and would not be able to come back. Vera said she never talked to Bayon about this again. Vera said she thought she mentioned this to David Rosengard when she talked to him in one of her sessions.

Bayon's records were sent to PS214Q but Vera took Bayon to be tested at Forest Hills in Regal Park at the suggestion of one of her clients. After that testing she was told to take him to Colden Street where they tested for Special Education Classes. She was told about Queens Guidance Center and he started seeing David Rosengard. Bayon started going to IS25.1 and was put on medication. He had problems because he was always sleepy. Vera told me that Brian had always been very sensitive when people touched him and tended to overreact. Bayon had to repeat the fifth grade and also had to go to summer school. He graduated from grade school. (I have a photo of that graduation with his only friend a young black boy with their arms around each other)

Bayon was very embarrassed about being in special education and when and if any kids would come by and want to go to school together he would wait because he did not want them to know he went to a special education school. Vera said Bayon never had anyone over for dinner or to spend the night. When Bayon started getting in trouble Ronnie

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would always come over and try to help her in any way. Bayon liked to play with matches but would only do it when others were around. He loved animals and was very loving and caring about them. Vera told me several stories's about Bayon and his cat "Frisky". Bayon was never violent towards her, only towards himself. He compulsively took things from the apartment, her purse anywhere she said.

Bayon went from IS25 to Adrian Block Junior High, he then transferred in the 7th grade to Bleeker 185 in the 7th and 8th grade. From Bleeker he went to Hillside campus for treatment. He was there from May 13, 1983 until January of 84. He went to summer school as well that year. In June, he applied for job Corp, which he was not accepted. Bayan's records were sent from Hillside to Bleeker. He left school and went to Florida. In January of 1986 he went to High School at John Bowne. This was short lived.

When he was fourteen he tried to kill himself when he was about fourteen by taking an overdose of mellaril that had been prescribed for him. After that he went to Long Island Jewish Hospital, the Adolecent Pavilion. While there he went to school and was in therapy. When his time was up there she was advised to place him in a residential program or at least a PINS program. She said she had heard horrible stories about the residential program and did not want to have to go to court to place him in the PINS program. Rosengard suggested a school in Lakewood but she could not get him in there.

Bayon did not run around in the streets and did not have a lot of friends. He was happiest inside the house and would stay for long periods of time. She would lock him out hoping he would do something with himself. He would beg her to let him come home. When Ronnie was found dead after he burned to death in his hotel room, Vera said Bayon would not go to his funeral. After that she said Bayon acted even worse and got into more trouble. She tried to get him in the service but because he was on probation he couldn't enlist. She also tried to get him in a trade school but he would go. Vera said that Bayon would cry and say "Mother, why did God make me like this, so different from everyone else." Bayon could never seem to control himself and couldn't sit still or pay attention for long. He was always getting in to trouble. He was not a very happy child.

Bayon was doing well at school and would not go so Vera sent him to live with her brother in Miami for awhile. David Rosengard and the people at the clinic thought it would be good for him. He went down in January 22, 1985 and after a while he started wanting to come home. He started getting in trouble there as well she thought. He was out of school for almost a year. During the time he was there David Rosengard wrote him a letter.

He was sent to Creedmore State Hospital in a lock in unit at first. However, as soon as he was taken off lock in he would leave the hospital everyday. He had found a van and

TONI K. BOVEE
JURY AND TRIAL CONSULTANT MITIGATION SPECIALIST
2300 Blairhouse Court · Charlotte, North Carolina 28270
704-366-3100 Phone 704-442-1972 Fax

would take it and work and then come back to the hospital at night. He was caught one day and place in lock up again. Bayon managed to get the key and left the facility. He was arrested and taken to Queens Detention Home. He told them he wanted to kill himself and was put on a watch she said. The doctor told her that if he continued to act the way he did that he needed to be placed in a mental hospital. Some of the medications she recalled he was on were mellaril, atarax one tablet 3 times a day, cogentin 1mg per day and Thorazine 25mg at bedtime. (I have the bottles of some of them). The medications came from different drug stores and she doesn't remember where she got them all.

Bayon was never really strong and could not do a lot of physical work due to his heart murmur. Once she told me he was beaten up by the police and had to wear a heart monitor for awhile after his chest was kicked. He told her that he would always shoot himself before he would go back to jail after that.

When Bayon started getting involved with girls Vera said it was more for their families and not just them. She said that if I looked I would see every girl either had a house, child, animal or parents. He loved being part of a "real" family she said. She said the girls would call her and asked her if she was as rich as he said she was. Vera said she would laugh. Vera said she had no more security left because of all the charges he had put on her card. Between bailing him out and his stealing she had very little left.

Vera said she never knew Bayon to have a gun, he was never a violent person. The Tuesday night before he left for South Carolina Vera said he came by herself and asked her for some money. He told her that he had not eaten in two days. He told her that he had met a girl who was going to Florida where she had relatives and he was going to go with her. When she got home from work he was parked outside the building in a white car. He asked her to come over and say hello. There was a girl and two children in the car. Vera said she remember that she told them to be sure the children were buckled in their seats. She gave Bayon $100.00 and said that was all she had when he wanted more. When they were walking back to her door Bayon told her that he had a funny feeling that something bad was going to happen. She didn't think he was real happy about going. She said she told him to be very careful driving. That was the last time she saw Bayon.

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TONI K. BOVEE
JURY AND TRIAL CONSULTANT MITIGATION SPECIALIST
2300 Blairhouse Court Charlotte, North Carolina 28270
704-366-3100 Phone 704-442-1972 Fax

CONFIDENTIAL MITIGATION MEMORANDUM
ATTORNEY/CLIENT PRIVILEGE

TO: Duffy Stone
DATE: August 4, 1998
CASE: Bayon R. Aleksey
RE: Interview with David Rosengard MSW at Queens Child Guidance Center, 41-25 Kissena Blvd, Suite 118, Flushing, NY 11355. Phone 718-358-8288 Fax 718-358-5265

On January 27, 1998, I spoke with David Rosengard by phone regarding meeting. He advised me that even though he did not have records of sessions that he remembered Bayon and his family well. A time was set up for the next day at 2:30 p.m. We met and the potential situation regarding Bayon's charges was discussed. The following information was obtained.

David has been working at Queens Child Guidance Center since September 1971. The area is now predominately black, Spanish and Oriental. There are two housing projects near by and they are mostly black. During the 80's there were more Japanese, Indian whereas now there are mostly Chinese, Koreans, Black and Spanish. Most of the signs on office buildings and outside on the streets were in Chinese.

The fees are based on income. The income at the time Bayon's mother first took him in was $6616/year. She was a part time hairdresser. Bayon's mother was charged $8.00 per visit.

Bayon started coming in to see David on June 3, 1980. He was referred to Queens Child Guidance Center by the Special Education department of PS 214 (Elementary School he had been attending) at the end of the school year. Although most visits were either with Bayon or Bayon and his mother, his father also attended a few sessions. In the fall of 1980 Bayon started attending group sessions as well. Bayon got along well with the kids in the group, was kind and well liked. There was never any sign of racism exhibited during the time David Rosengard had him as a patient.

Bayon was seen by a Psychiatrist on July 1980, June 81, June 91 and Nov. 91. Medicines were prescribed.

David reported that Bayon stopped coming in to see in May of 1983. Bayon came back in and started regular visits again in January of 1984. In April or May of 1995 Bayon

TONI K. BOYEE
JURY AND TRIAL CONSULTANT MITIGATION SPECIALIST
2300 Blairhouse Court Charlotte, North Carolina 28270
704-366-3100 Phone 704-442-1972 Fax

quit coming in due to a suicide attempt. His mother continued to see David. (Bayon took an overdose of a prescription that had been given to him by the staff psychiatrist.) He was taken to the hospital and referred to Long Island Jewish Hospital, Adolescent Pavilion. After that he was sent to Creedmore where he obtained the keys and left the facility. It was advised that he be placed in a residential program or at the very least a PINS petition be obtained. (PIN's is where they take the child to court and warn him if he does not straighten up within a time period that he will have to be placed in non voluntary residential program or jail). Bayon's mother started the PINS petition but then backed out. She only wanted to place him on a voluntary basis. The PINS petition and residential treatment were only applicable through age 16, David said he fell through the cracks because he was not sick enough to be hospitalized and optional treatment would have cost too much. Nobody wanted him.

David stated that when Bayon first came he was 11 ½ years old. As he remembered he was being stubborn and not able to learn I school. He wanted to be free of rules at home and school. He especially did not want to read. He liked working with his hands and loved to work on models. Bayon was embarrassed about being in special education. He never thought about the consequences of his actions. David said the family was "emeshed" and there was a real separation problem with the mother. The mother was chronically depressed and Bayon would pick up her depression and try to help her. David was aware of the mother and fathers problems and the severe alcohol problem that the dad had.

Bayon had poor impulse control and was very oppositional to rules. He would get very angry and irritable. The parents wanted him put in a residential facility because he was out of control. Bayon was very non-aggressive however and his anger was based at himself. He had poor skills at solving problems. The mother was unable to set limits, which complicated things. She would blame the teachers for his problems.

Bayon never saw the consequences of his behavior, David said. He remembered several things that Bayon had done during the time he was seeing him.

- Vera would let Bayon drive her car without a driver's license. Bayon had an obsession about cars. However, Bayon wanted to add things constantly to make the car better. One time David said he bought police blue lights and put them on the car. He was quickly pulled over, but he never thought about getting caught, just having blue lights.

- Another time he threatened to throw motor oil all over the house.
- David remembered the mother talking to him about an incident that the mother related to me. [When Bayon was going to the Catholic school and started taking

TONI K. BOVEE
JURY AND TRIAL CONSULTANT MITIGATION SPECIALIST
2300 Blairhouse Court Charlotte, North Carolina 28270
704-366-3100 Phone 704-442-1972 Fax

money to give to the children to make friends. One day a man brought a young boy by that Bayon had given $50.00 that he had taken out of Vera's purse. The man (in his 60's or 70's) said that he let boy's come to his house and he took them to play ball and played games with them. He invited Bayon to start coming. The boys would come on Friday and be picked up on Sunday. Vera said she thought this was great, because she was a single mother and hoped it would help him make friends. After the third week Bayon called her one night and said he wanted to come home, he sounded afraid. When he was home and they were alone Bayon told her the man wanted to take showers with him and when he would wake up at night the man would be touching him. Vera never let him go back to the mans house and told the man that Bayon had other activity's and would not be able to attend anymore. She never spoke about it to Bayon again or his father who she was sure would hurt the man.]
*Need to talk to Bayon about this.

David said he would continue to look for the Clinic records and as of August 4, 1998 had not found them. He is most willing to help Bayon and doesn't feel that Bayon would be able to shoot someone in the manner the police officer was shot. Bayon was more destructive to himself. He will testify if needed.

Legend for Financial Record cards:
M-mother
C-child
B-broken appointment
G-Group
Dr.-Psychiatrict or Medical appt.

Similar

Time Line of Bayan Aleksey

Date Age Activity 8-7-98

09-31-83		Bayan is given a Medicaid Card- Case No. 85187791. He continues to get them through April of 1984.
05-28-39		Ronald F.J.Aleksey is born in New York City, New York. His parents were Edward Aleksey and Stephanie Kobzda
07-14-40		Vera Chandranie Lall is born in Trinidad, Port of Spain, West Indies. Her parents were James and Esther Bahadur Lall.
05-28-68		Ronald F.J. Aleksey and Vera C. Lall were married In New York City
11-08-68		Bayan Aleksey was born at Roosevelt Hospital in Manhatten, New York. He weighed 7lb. 12 oz at birth. He was was normal except the delivery was 35 hours and he had to be turned prior to delivery. At birth he had a heart murmer. Vera had to stay in the hospital for three weeks after he was born due to severe anemia and depression that did not leave for months.
11-08-69	1	Bayan's 1st Birthday
11-08-70	2	Bayan's 2nd Birthday
11-08-71	3	Bayan's 3rd Birthday
01-01-72		Vera ask Ronnie to move out due to his drinking. They never get a formal separation agreement or divorce. He returns off and on to live.
11-08-72	4	Bayan's 4th Birthday
11-08-73	5	Bayan's 5th Birthday
06-28-74	ES	Bayan receives a certificate from the El Coque' Day Care Center for pre-school instruction in the use of the telephone. He also received his a kindergarten diploma. His teacher was Sherene Samii.
09-08-74	ES	Bayan starts the first grade at William Lloyd Garrison a Special Primary School 31, in the Bronx, NY. His teacher is Miss Newman.
11-08-74	6	Bayan's 6th Birthday
06-01-75	ES	Bayan completes the first grade. His report card states that he is very immature, needs self-control and needs special attention, Home work is a problem. He receives non-satisfactory in personal and social development and work habits. He misses a total of 7 days. He is promoted to the 2nd grade.
09-08-75		Bayan starts the second grade, NO RECORDS.
11-08-75	7	Bayan's 7th Birthday
09-01-76	ES	Bayan starts the third grade at St. Michael's Catholic School. His teacher is Sister Gail. Bayan started out the year doing well however his grades rapidly fell the second and third grading period. Problems completing his work, respect, cooperation, and carrying out his responsibility. Bayon misses 9 day's of school and is late one day. Notes from teacher state that he needs help with home studies, disappointment in his personal and scholastic progress and needs to read and do more math during the summer. There were six parent interviews.
11-08-76	8	Bayan's 8th Birthday
09-01-77	ES	Bayan starts the fourth grade at St. Michael's. His teacher is Mrs.J. De Bellis, Bayan's grades for that year were all F's except for one D in Christian Doctrine. His reading was on a minus 4 level and it was suggested that he attend remedial reading and math classes during the

EXHIBIT 2
Deponent Angel Santiago
Date 1-30-04 Rptr. CW
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		summer. He continues to have problems writing clearly and completing work. He misses 21 days and is late 11 days. There were three parent interviews. He is promoted to the fifth grade.
11-08-77	9	Bayan's 9th Birthday
06-04-78		Bayan's father graduates with another degree from Pace University
09-01-78	E5	Bayan starts the fifth grade at St. Michael's. His teacher is Mrs. Veronica Denning.
11-08-78	10	Bayan's 10th Birthday
06-01-79	E5	Bayan receives all F's for the year. He is absent twenty days and there are 3 parent meetings. His report reflects that he has no self-control, does not carry out responsibilities, he does not express himself clearly nor completes study and written work on time. The teacher states that he is a problem to the teacher constantly and he refuses to work. He is not promoted to the sixth grade. Special education classes were suggested.
10-15-79	5th (+?)	Bayan enters the fifth grade at PS214 his teachers name is Simon. He is present 42 days and absent 5. He is retained.
11-08-79	11	Bayan's 11th Birthday
11-21-79		Bayan's records are sent to PS 214 Q from St. Micheals
01-03-80	4th 7.37	Bayan starts 5th grade at P21. His teacher is Gross. He is present 100 days and is absent 15. He is promoted to the sixth grade
06-01-80		Bayan begins psychotherapy with Lester David Rosengard, CSW
06-03-80		Bayon is in the fifth grade at PS 214 Special Ed and is referred to the Queens Child Guidance Center. His mother comes in prior to him being seen on 6-20-80. David Rosengard is the therapis that they will see on a regular basis one on one, in group and with his mother. This therapy is based on a parents ability to pay. At the time they applied his mother is making $6616.00 per year. Each visit cost $8.00.
06-10-80		Vera Aleksey goes to Rosengard for a session
06-20-80		Bayan goes in for his first therapy session with David Rosengard
07-08-80		Bayon and Mother attend session at QCGC
07-10-80		Bayan, his mother and the doctor meet at the Child Guidance Center
07-15-80		Bayon is seen at QCGC
08-16-80		The mother in seen at QCGC
09-01-80	MS	Bayan starts the sixth grade at P21Q. His teacher is T.Gross again. He is present 156 days and absent 28. He is promoted to Jr. High. 185
09-22-80		Bayan and his father are seen at QCGC
09-23-80		Mother is seen at QCGC
09-29-80		Bayan is seen at QCGC
09-30-80		Mother is seen at QCGC
10-06-80		Bayan is seen at QCGC
10-14-80		Mother and Bayan are seen at QCGC
10-21-80		Mother and Bayan are seen at QCGC
10-28-80		Mother and Bayan are seen at QCGC
11-03-80		Mother and Bayan are seen at QCGC for a medical appt.
11-08-80	12	Bayan's 12th Birthday.
11-10-80		Broken appt. at QCGC
11-11-80		Broken appt. at QCGC
11-12-80		Broken appt. at QCGC
11-17-80		Mother attends group meeting at QCGC

11-18-80		Bayan and his mother attend QCGC
11-19-80		Bayan attends his first group session at QCGC
11-24-80		Mother breaks appt. at QCGC
11-25-80		Bayan attends appt. at QCGC
11-26-80		Bayan attends group at QCGC
12-01-80		Mother attends group at QCGC
12-02-80		Bayan and mother attend QCGC
12-02-80		Bayan and his mother attend session at QCGC
12-08-80		Mother attends group at QCGC
12-09-80		Mother and Bayan attend session at QCGC
12-10-80		Bayan attends group at QCGC
12-16-80		Mother and Bayan attends session at QCGC
12-17-80		Bayan attends group session at QCGC
12-23-80		Bayan attends session at QCGC
12-24-80		Bayan attends group session at QCGC
01-06-81		Mother attends session at QCGC- Bayan breaks appt.
01-07-81		Bayan attends group session at QCGC
01-09-81		Bayan breaks appts at QCGC
01-12-81		Mother attends QCGC
01-13-81		Bayan attends session at QCGC
01-14-81		Bayan attends group session at QCGC
01-20-81		Mother and Bayan attend session at QCGC
01-21-81		Bayan attends group session at QCGC
01-21-81		Bayan attends group session at QCGC
01-27-81		Bayan attends session at QCGC
01-28-81		Bayan attends group at QCGC
02-02-81		Mother attends session at QCGC
02-04-81		Bayan attends groups at QCGC
02-11-81		Bayan attends group at QCGC
02-17-81		Mother and Bayan attend group at QCGC
02-18-81		Bayan attends group at QCGC
02-24-81		Mother and Bayan attend group at QCGC
02-25-81		Bayan attends group at QCGC
03-03-81		Mother and Bayan attend QCGC
03-04-81		Bayan attends group at QCGC
03-10-81		Bayon's mother attends a planning conference with four teachers to plan his individualized educational program for special education
03-10-81		Mother and Bayan attend session at QCGC
03-11-81		Bayan attends group at QCGC
03-17-81		Bayan and mother attend session at QCGC
03-18-81		Bayan attends group session at QCGC
03-24-81		Broken appt. at QCGC
03-25-81		Bayan attend group at QCGC
03-26-81		Bayan and his mother attend QCGC
03-31-81		Bayan and his mother attend QCGC
06-25-81	MS	Bayan receives a certificate of completion from Public School 21. He misses 32 (2-13-17)days of school. He is reading below level. He started the year out doing okay and progressively declined.
09-01-81	MS	Bayan starts Junior High School 185. His teacher is Ms. Marlene Simon.

	MS	During this year Bayon receives the best grades he has received to date. They are all average ability and above. However in his personal adjustment he receives almost all "needs improvement". Bayan misses 39 days (11-20-8) and is late 16 (1-8-7)
11-08-81	13	Bayan's 13th Birthday
01-01-82	MS	A letter from Edward Bleeker Junior High School states that a review of Bayan's progress indicates that he is not meeting the promotional requirements and may have to be held over in Grade Seven unless the Central Board of Education accepts the exclusion from Promotion Policy for his started in his IEP. His reading score must be 6.2 or higher and his math 5.7. His current score is 5.5 and there is no math.
01-31-82	MS	Bayan's mother receives a letter from the A. Bock JHS where he ws. scheduled to attend the EH Program. As of this day he had missed 15 days of school and she was warned that his position would be given to another child if he did not return.
06-01-82	MS	Bayan receives a certificate of Effort from Edward Bleeker Junior High School, 185.
06-01-82	MS	Bayan is in the 7th grade. His teacher is Simon. He is absent 59 days and late 20. He receives 75 in Eng., SS80, Math 70 and Sci. 75, Health Edu 85. He is promoted to the 8th grade
11-03-82	MS	Bayan receives a Certificate of Effort in Soccer from Edward Bleeker Junior High 185.
11-08-82	14	Bayan's 14th Birthday
11-19-82	MS	A weekly progress report is sent to Bayon's mother regarding his work. Most of his progress is "Needs Improvement". His teachers name is Mrs. Levetan
12-03-82	MS	In a daily report of Bayan's progress and attendance for the 8th grade most of his conduct is reported as poor or unsatisfactory, his effort is poor. (this report was for 12-3-82 through 1-6-83)
12-08-82	MS	Edward Bleeker Junior High School No. 185 sends letter to Bayon's mother that he was involved in a confrontation with another student. Bayon apparently did not like the way other student was eating his own food in the cafeteria. She is told that Bayan admitted that it was his fault and she is warned that he will be suspended if it happens again.
12-15-82	MS	The school sends an invitation to Vera Aleksey to attend a workshop for parents that she is unable to attend. The workshop is about "How it Feels to be a Child With Special Needs".
01-07-83	MS	A letter was sent to Bayan's mother regarding his math work or lack of it. Samples were sent. She is told that he is exhibiting the same negative behavior and attitude of selecting when and if he will make any effort. He is being placed conditionally in Class 8-306 (EH) to be reevaluated in four weeks. If it becomes apparent that the issues surrounding Bayan's emotional difficulties have not dissipated, they will have to explore other educational alternatives. His performance in the citywide math test given in Spring 82 indicated that his numeration skills were 4.3 grade level, computational skills 6.2, application skills 4.3 and his cumulative total score 5.0. He was far below his grade level. It is stated to the mother in a scathing letter that she has unrealistic goals for her son and is not dealing with his problems.
05-12-83		A financial plan for Long Island Jewish-Hillside Medical Center. An

		income of 2200/6months is stated. On the application it states that he has no prior admissions and patient and family will apply to Medicaid for payment of liability if any.
05-13-83	MS	Bayan is admitted to the Hillside Campus School –P 255Q in grade 8. His last school was Bleecker J.H. S.
06-01-83		Bayan finishes the year with 16 absenses and 14 tardy's . His teacher is Levitan. His grades for the year are all 65 in each subject. He is sent to a joint 7/8th grade class.
06-17-83		A check sheet for Bayan at Hillside Campus AP unit. States that he is cooperative but a little restless.
06-20-83		Bayans transcript was sent to Job Corp from PS 21
06-28-83		The term at Hillside ends and he had been present 31 days. His teacher was Doris Levy.
06-28-83	MS	A scholarship report from Hillside Campus School (PS255Q)for the 8th grade notes that Bayan is a new student. His H.R. teacher is D. Levy. He is in the AP unit of the hospital.
08-17-83		Bayan goes to summer school and takes reading (65) and Horticulture (60). His teacher is Benjamin Glassher Jr.
09-01-83	MS	Junior High 25 Report card states that he is in Mr. Arkins class and he was not in class long enough to properly evaluate his academic performance. His grades were from the fourth quarter and reflect unsatisfactory is personal adjustment. He was absent 22 days and late 6.
09-23-83		Letter sent from Long Island Jewish-Hillside Medical Center in Glen Oaks states their policy regarding lateness, cutting and unexplained absentees. If he misses he can be cut from the program.
11-08-83	15	Bayan's 15th Birthday
12-27-83		A petition (Person in Need of Supervision) was taken out in the Family Court of the State of NY-Queens by Vera Aleksey stating that he is incorrigible; has poor attitude in home and has been known to steal from home and school setting. She states that he has been verbally abusive at home and refuses to obey.
01-05-84		Vera writes letter to a Mrs. Golden referring to docket No. S3448/83, stating that she is dropping the Pin's Petition against her son and would like all records to be expunged.
01-09-84	MS	Bayan in discharged from Hillside Campus in the 9th grade. His transcript was sent to D25 COH. His grades from 9/84 through this date are: Eng.41, Math 41, SS 41, Sci.70 modified, Typing 41, Home Eco. 41, Horticulture 65 Modified, and Music 80. His guidance counselor is Natalie Rosen.
01-09-84		Vera writes to a Mrs. Charlotte Schwartz, IS237 that she would like Bayan to have a re-evaluation for a placement into a Special Educational Class. She states he has been attending the Hillside Campus 225 from June 1983 and as of January 6, 1984 he is not attending school.
03-27-84	MS	Division of Special Education sent a letter requesting a meeting to discuss Bayan's needs. It had to be rescheduled at parents request. Committee on the Handicapped.
06-01-84		PS records reflect insufficient data on his transcript for this year. His teacher is Towers and he is placed in a 7/8grade class. He is absent 71 days and tardy 32
06-05-84		At an annual review of Bayan's I IEP skills, it was stated that he is quiet

	MS	and moody-often sad. He holds back much anger and has difficulty making friends. He has poor attendance and often leaves school during the day, He is reading and spelling below his grade level. He is having problems with fractions. And decimals.
08-09-84		Letter to the Social Security Administration from Queens Child Guidance Center, Inc stating that Vera and Bayan are patients at the center and receive weekly psychotherapy sessions.
09-01-84	MS	Bayan starts school at Adrien Block Junior High 25. His homeroom teacher is Mr. Arkin. In the first reporting period the teacher noted that Bayan is absent too much to receive a fair grade. His first period he averaged 59, second 39, and was not present third grading period.
11-08-84	16	Bayan's 16th Birthday
12-18-84		An Order of Protection was issued to Ronald and Vera Aleksey regarding Bayan. He was ordered not to assault, menace or harass or recklessly endanger petitioner, stay away from the petitioner's home and may enter petitioner's home with written permission given by petitioners only. This petition was modified and continued
01-22-85		Bayan goes to visit his maternal uncle, Winston Lall in Miami and sends keys and cards to her.
02-14-85		David Rosengard writes Bayan a letter in Miami wishing him the best.
02-15-85		Bayan writes his mother that he needs to come home, things are not working out and he will go to school if he can come home. He made a mistake.
03-01-85		Bayan returns to New York after being with his uncle in Miami.
03-11-85		A meeting request was scheduled to discuss Bayan's educational needs was scheduled.
04-25-85		Letter from Adrian Block IS 25 states that the special program, which he applied to Thomas Edison –Special Education, is not available to him due to the lack of space. There is space available in a academic-comprehensive high school if so chooses.
05-01-85		Bayan terminates psychotherapy with Rosengard, CSW
06-01-85	MS	The term ending on this date Bayan received 65 in Eng.; 65 in SS, 60 in Math, and 70 in Sci. He was absent 25 days and late 2. His homeroom teacher was Arkin. He received a diploma from junior high and both his mother and father were present at his graduation.
06-16-85	MS	Bayan receives a Diploma for completing the requirements of Junior High School.
06-20-85		A letter to Vera regarding her interest in the office of Vocational Rehabilitation for Bayan. An application was sent.
06-26-85		A letter from the Seetate Education Department states that they have received his application and scheduled an appt. for him to come in.
10-31-85 16	HS	In a report card from John Bowne HS, Bayan failed all classes in his first term. Failure to report to class does not meet responsibilities, excessive absence from class, cutting class, lack of participating in class. Are all mentioned in comments. He is absent 13 days during that grading period.
11-08-85	17	Bayan's 17th Birthday
11-18-85		Bayan arrested in Westbury (Nassau Co.)for Criminal Mischief-3rd- Dismissed DKT #31094/85
12-11-85	HS	In a report card from John Bowne HS, Bayan continues to fail all classes.

		Comments are excessive absence from class, does not meet responsibilities, absent on test days, missing homework, unprepared for class.
12-28-85		NYSED-Vocational Rehab Application of Bayan. Where it is stated that he has an emotional inability to deal with people, difficulty in learning academic subjects and has a 5th grade level ability.
01-13-86	17	Bayan starts school at John Bowne high School EC
03-10-86		Bayan is sentenced in Nassau Co and in jail until 7-9-86 when he is discharged. Probation in NY.C.–Queens
06-20-86	175	Letter from John Bowne High School stating that Bayan has been discharged from their school as of 1-13-86.
09-29-86		Vera gets a Family Offense Petition against Bayan in the Family Court of Queens. It states that four days before that he did verbally abuse the petitioner using vile and abusive language in a loud and unruly manner. He threw furniture around the home breaking different items. Petitioner states that he is uncontrollable and doesn't stay out all night without permission or knowledge. It also states that he has a history of physiological problems and dropped out of school and does not have a job. He is on probation for a criminal offense. She asks that the court order him to seek Physchiatric help and be observed in a hospital setting.
11-08-86	18	Bayan's 18th Birthday
11-28-86		Application for Vocational Rehabilitation, stating that he is unable to deal with people he does not know. He gets nervous and disoriented when dealing with strangers and unusual situations. He likes working with his hands and tools. He would like to be in the auto mechanic field.
12-17-86		Letter to Bayon from Risa Sha –Vocational Rehab telling him that she had made arrangements for his evaluation in Auto Mechanics. Set up appt for he and his mother for 12-23-86 to discuss it.
02-02-87		Bayan is sent letter from Vocational Rehab welcoming to the program at North Shore University Hospital. He is to start the program 2-9-87. 516-829-9666
02-17-87		Letter from the State Education Dept. Office of Vocational Rehabilitation to Bayan regarding canceling his evaluation at North Shore Hospital on March 12, 1987 because of his difficulty getting to Center by Public Transportation and the fact that he had not kept any appt. for the general medical examinations. Risa Sha Vocational Rehab Counselor 718-271-9346
07-27-87		A prisoner's property form is filled out for a pair of shoelaces by the 109 Precinct.
08-04-87	18	Admission note where Bayan is admitted to Creedmore Mental Health for suicidal precautions on an emergency basis. His C number is 107994 and he was assigned to ward 126. Hx of disturbed behavior starting at age 8. He was in the adolescent unit prior to this admission following an overdose at age 11. At the time he was admitted he was on probation for breaking into a car and passing bad checks. Dropped out of school two years ago and does not work. His diagnosis is Axis I: Major depression-recurrent 296.32, Axis II: Borderline personality 301.83
08-05-87		Admitted to Creedmoor Psychiatric Center, M. Mannino,TTL, CPC Bldg 40, Phone 464-7500 Ext. 4143
09-09-87		Letter from Donald R. Schechter to Bayan regarding return of

		fingerprint records. 718-263-4450
10-13-87		Letter from Dept. of Probation to Bayon regarding his being required to attend counseling sessions at the Family Conflict Unit. From Laura B. Balcom Counselor.718-990-5642
10-21-87		Letter from NYSOMH to Vera Aleksey regarding filing a Medicaid application for hospitalizations at Creedmoor Psychiatric Center. Request for Bayon's birth certificate. Michael Barnett, Patient Resources Agent 718-465-7661
11-08-87	19	Bayan's 19th Birthday
12-09-87	19	Admission Note to Creedmore Mental Hospital on a voluntary basis for unmanageable behavior at home.
12-09-87		Notice of Status of Rights- Voluntary or Minor Voluntary Status for the State of New York Office of Mental Health. Bayon enters Creedmoor Psychiatric Center.
05-13-88		Letter sent from Creedmoor P.C. to Mr. and Mrs. Aleksey (second request) wanting to discuss out patient services.
06-29-88		Letter from Clearview Community Services, Creedmoor PC regarding missed appt: on this day.
08-24-88		Letter from Fred Krellenstein for Creedmore Psy. Center stating that Bayan had not attended clinic since August 8, 1988 .States if he does not make appt he will be terminated on Sept. 8, 1988. A copy of letter was sent to probation.
10-28-88		Letter from Fred Krellenstein for Creedmore Psy. Center stating that Bayan had missed his appt.
11-08-88	20	Bayan's 20th Birthday
11-18-88		Bayon signs contract to undergo treatment at Clearview Community Services. It is a voluntary and he is supposed to attend weekly psychotherapy sessions with Dr. Krellenstein and periodic medication evaluation sessions with Dr. Rolando Baloy. Clearview Clinic is a part of NYState Mental Health and is located at Creedmoor Psychiatric Center in Queens.
12-22-88		Bayon is issued a ticket in Queens
02-23-89		Letter from Fred Krellenstein for Creedmore Psy. Center stating that Bayan had only attended one session at the clinic this month and had not been since 1-7-89. States if he does not make appt he will be terminated.
04-11-89		Letter from Creedmore Psychiatric Center stating that he had not attended the clinic since 3-10-89 and he would be terminated if he edid not attend by 4-26-89. Fred Krellenstein-Asst. Psychologist
07-13-89		A ticket is issued to Bayan for Falsely Reporting and Incident by 109 Pct.
11-01-89		Bayon is issued a ticket in Queens
11-08-89	21	Bayan's 21st Birthday
02-10-90		Letter from Department of Probation to Bayan regarding his failure to appear on 12/6/89, 1/10/90/ and 1/31/90. By Leroy Geodue at the Queens Adult Supervision Branch "J", Jamaica, New York. Phone number 520-6218
08-16-90		Bayon is issued a ticket in Queens
08-16-90		Bayon is issued two different tickets in Queens
11-08-90	22	Bayan's 22nd Birthday
12-15-90		Bayan's father Ronald dies in an apartment fire, 250 West 77th Street in

		Manhattan at 11:00P.M. He was 51 years of age and immediate cause of death was smoke inhalation other conditions mentioned on death certificate were acute and chronic alcoholism. His death was listed as an accident. His social security No. 122-30-0273. His occupation was listed as a computer operator for offices. His brother Stephen filled out the death information and he was cremated and buried on 12-21-90 at Stobierski Lucas Gardenview FH Ltd. 161 Druggs Ave. Brooklyn, NC
12-30-90		Bayon is issued a ticket in Queens
12-31-90		Bayon is issued a ticket in Queens
02-14-91		Bayon is issued a ticket in Queens
04-19-91		Arrested for Class E Felony, Crim. Impersonation, Crim Possession of Stolen Goods. DKt 91X016285 –NYCP48
06-22-91		Bayon is issued a ticket in Queens
06-22-91		Bayon is issued a ticket in Queens
11-08-91	23	Bayan's 23rd Birthday
11-19-91		Bayan arrested for Grand Larceny-3rd Warwick Town PD
05-03-92		Det. Balfe of the 102 Detective Squad left his card on the door for her to call. 718-805-3212
08-06-92		Bayan is arrested by the Lackawanna Co District Attorney's office and charged with being a fugitive from Justice out of Orange County New York.
11-08-92	24	Bayan's 24th Birthday
12-21-92		Letter from attorneys Selig, Kohl, and Selig, P.C. regarding G.W. Green Inc. to Bayon regardin contempt of court and fine.
01-12-93		Bayan arrested for Class D Fel by NYCPD 108th DKT93006632
02-10-93		Collection Request for AT&T and LEC returns-RZ for $1171.70 *5
02-26-93		Bayan fills out a complaint for personal injury by two police detectives from the 108Pct. He said he was beaten while in cuffs. This happened at 166-32 Willis Point Blvd. Whitestone in Queens. *4
02-27-93		Bayan arrested for Class C Fel by NCPD 108th DKT93Q008811-14
03-18-93		Bayan files a personal injury case for 10 Million dollars for being beat by police at the QMDM and refused medical treatment. *4
03-25-93		Bayan writes that he is in QHDM (441-93-2309), Location 6LA-4 for Grand Larceny (five counts). I is requesting a deal from DA in turn he will drop lawsuits against city.
04-02-93		Hospital Record Authorization regarding lawsuit against the NYCDC for being asaulted by officers and Judy Jones, Sheild # 6018 or 6057. Filling a 5 million-dollar lawsuit. This assault happened on 8-10-92
04-12-93		A charge of Grand Larceny is made against Bayon Aleksey by Marina Musso, Jacqueline Suarez and Catrina Vicari
04-20-93		Letter written to Bayan regarding his failure to appear on 5-5-93, by Deborah Fox Rush staff attorney of The Legal Aid Society of Bronx County Office
04-30-93		Letter from J. Ende attorney for The Legal Aid Society in Kew Gardens, NY stating that a bench warrant had been issued for his arrest.
05-05-93		Letter written to Vincent Aleksey by Sabrina Blain staff Attorney of the The Legal Aid Society of Orange County, Inc. Goshen, NY regarding appearance in the Town of Warwick, NY
09-01-93		Bayan starts the 9th grade at Hillside Campus.
09-07-93		Bayan is dismissed from Bleecker

11-08-93		Sal Viccaro (Bayon) is indicted for criminal possession of stolen property in the third degree in Minelola, NY (Nassau County).
11-08-93	25	Bayan's 25th Birthday
11-09-93		Affidavits from Bibi Mohan to Vito Vaccaro regarding 75,000 loan, ability to represent her in court, and use of her name on the lease of a car. Signed and notized.
11-08-94	26	Bayan's 26th Birthday
12-31-94		Letter to Bayon stating his NY Drivers license has been suspended 11 times for failure to pay fines.
07-10-95		Bayan arrested for Class A Misd by NASA co. PD DKT13907/93
11-08-95	27	Bayan's 27th Birthday
06-01-96		Sarah Pivero states in Police interview that this is when she met Michael and he traded in her Jetta for a Passat and she wrote out a check for $2500 for a Cadillac for him.
06-30-96		A warrant was issued for Bayan's arrest by the City of New Rochelle, NY. He was charged with CPSP 4 Credit Card
07-01-96		Sarah states to police she had an accident and car had to be towed. No accident report written. Car is still not repaired. She also states she leased a Jeep from McCafferty Jeep/Eagle, Rt. 1 in Langhorne, Pa. She signed the lease and Michael was going to make the lease payments. Ellen later leased a Toyota 4 Runner that she and Michele used and she used the Jeep. Michael did not put anything in his name due to a bankruptcy and no license. She signed papers and wrote out a check.
08-01-96		Sarah states to Police that she and Michael went to McCafferty Ford and she financed a 1996 Ford Mustang for Michael. She does not recall who filled out paper work but believes she wrote out check. Michael later returned car due to mechanical problems. They later went to Thompson Lexus and traded in the 1996 Toyota 4 Runner and leased a Lexus LX450. It was in her name and it was for Michael. She filled out paper work and gave a bogus W2form. Both her checks bounced. She has no money and she was going to use money that Michael was supposed to get for a job he did for a club. He did not get check. She is now using a rental car because the jeep had been repossessed.
08-20-96		Det. Bob Tedesco, Nassau PD leaves his card on Vera's door- 516-573-6355.
11-08-96	28	Bayan's 28th Birthday
11-11-96		Bayon uses Carole Pivero (Sara's mother's credit cards to place orders)
11-20-96		Bayan is admitted to Bucks County Correctional Facility as Michael De Angelo..
11-20-96		Sarah is advised that she is ultimately responsible for bad checks issued by her to Thompson Lexus and that she could be charged with Bad Checks and Theft by Deception if she does not pay Lexus. She was later charged for those things that day .
11-20-96		Taken into custody by the Lower Southampton Police Department on the warrant. He had a $30,00 10% cash bail. He was taken to Bucks County Jail.
11-22-96		A DETAINER WAS DELIVERED TO THE Bucks county Correctional facility for New York.
12-09-96		Criminal Complaint from Carol Pivero (Sara's mother) that on Nov. 11, 1996 , Michael (Bayon) used her credit hard , Made phone orders

		charged to her in the amount of $2,119.85. He then placed another order for $884.93. He is charged with 2 counts of credit cards and theft by deception.
12-19-96		Bayan's case was dismissed by the Magistrate due to officers not being present regarding chain of evidence.
01-02-97		Bayan writes a kite for block to be taken off his phone. He is in G29 Module and Cell and his Bucks County Prison number is 64125W96. He is using the name of Michael DeAngelo.
01-04-97		Steven Smoluk inmate at BCCF (PA) makes complaint about Greg Washington and his sexual overtures. *3
01-08-97		Bayan (Michael DeAngelo) writes a complaint about cell mate Greg Washington *1
01-12-97		Makes complaint regarding care at BCCF *2
01-28-97		Arraignment Notice for Bucks County- 42-9121 Uniform Extradition Act. For fleeing from the state of New York county of Nassau with outstanding charges of criminal possession of stolen property in the third degree and has been declared a fugitive of Justice.
02-01-97		Sarah Pivero was taken into custody while visiting at BCCF and charged with bad checks and theft by deception. She was released on $7,000 unsecured bail.
09-28-97		Bayan is charged with Aggravated Assault (PACC 2702A4 for firing a handgun through the car door of Luis Cruz. Present were Sandra Hearn and Angela Ruzes. This was in Bucks County on US Rt. 1 and Stoney Hill Roads. About 1630hours. Plate number of car DDH-7930
11-08-97	29	Bayan's 29th Birthday
11-08-98	30	Bayan's 30th Birthday

Steve. tap
knock 3rd

10-7-97
S/o "Vee" Inlaws
W. Inlaws
N Braunfels.

12-25-97 calls Marcus. (Things are great - better than ever)

Q 51656 N

SOCIAL HISTORY

(K. Fisherman)

ALEKSEY, Bayan -

2-24-76 - Bryan Aleksey was referred to the BCG because of disruptive classroom behavior and difficulties with peer relationships. This second grade youngster attended first grade in the Bronx, moved to Queens in September, 1975.

A recent class change has him presently in a 2nd grade bilingual class on an unofficial basis because of large class registers in the other classes in the grade. Although described as active and oftentimes disruptive here, the teacher notes some improvement as the class is smaller in size and consequently more manageable.

Mrs. Aleksey, 35 years old has been a hair-dresser for the past nine years. She is a native of Trinidad and attended three years of high school there but came here ten years ago under a paid program, to learn hairdressing. She stayed on. She has no family members here at this time. Her desire, as a child, she says, was to be a teacher. Her father, now deceased, was a headmaster of a school in Trinidad.

For the past five years, she has been separated from her husband, a bartender, whom she described as an alcoholic. Clearly, considerable marital friction existed as she described the numerous fights and arguments which went on. She left, she said, because she could not take any more of it. She sees her husband only infrequently now. He does not give any support for Bayan and she receives supplementary assistance from Welfare.

Bayan was a full term youngster but Mrs. Aleksey went through a very difficult and extended delivery. During pregnancy she had a bladder infection and was diagnosed as anemic as well. It was necessary for her to stay in the hospital for three weeks following delivery before she was medically able to go home. Delivery was difficult because he was not "positioned" right, she said.

Although a healthy infant, Bayan was born with a heart murmur, which she states he is now "outgrowing" according to a recent examination. This, however, did nc interfere with physical activity, she noted, and has not been any problem.

Toilet training and walking were within normal time periods. Talking, however, was delayed and it was not until Bayan was 3½ that she could understand everything he was saying.

She cared for him during his first two years but returned to work and had a succession of baby sitters to watch him. She continues to use baby sitters at this time because she returns home late and works Saturday's as well. She has had difficulty in getting some one to stay on steady, they come and go, she said.

At three, Bayan went to day care. Mrs. Aleksey described him as "quiet" but on the other hand said that he had difficulty in relating to other children while there. However, it was really in first grade that things opened up and his behavior got worse.

EXHIBIT 3
Deponent Vogelsang
Date 1-30-04 Rptr. CW
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SOCIAL HISTORY

(K. Fisherman)

ALEKSEY, Bayan

She moved, she said, because she had only one room in the Bronx and needed more space. Here she has two rooms. However, we feel that Bayan's poor first grade adjustment also influenced her move to Queens, her expectation being that he would do better in a new environment.

Lately, she has been having the problem of Bayan waking up in the middle of the night and wanting to come into her bed. She has not been letting him, she said, but it continues to bother her. We feel this is yet another indication of Bayan's unmet needs, which he has been expressing all along apparently. She describes him as being very "close" to her. On the other hand, there are times she described when she seemed to very resistive to him and has taken out her frustration on him in physical punishment.

Bayan, sees himself as being insignificant and alone. For all social purposes, he does not know his father, has been cared for by a succession of aby sitters and, although his mother seemed to do her best with him, evertheless is distant and oftentimes unrelated. He seems to seek an inordinate amount of attention and many of his activities appear to be anti-social in nature, that is, lying, stealing, destructiveness.

Bayan was tested more than one year ago by the school psychologist. Because of present change of environment as well as being older, re-evaluation might prove of some value, particularly towards some consideration of possible special class placement. Mrs. Aleksey appears to be cooperative in regard to future school planning and she can benefit from all the help she can get.

KF:mp
912F

KF

TONI K. BOVEE
JURY AND TRIAL CONSULTANT MITIGATION SPECIALIST
2300 Blairhouse Court Charlotte, North Carolina 28270
704-366-3100 Phone 704-442-1972 Fax

CONFIDENTIAL MITIGATION MEMORANDUM
ATTORNEY/CLIENT PRIVILEGE

TO: Duffy Stone
DATE: August 6, 1998
CASE: Bayan R. Aleksey
RE: Interview with Vera Aleksey, defendant's mother on July 27, 28, and 29, 1998 in New York. 143-48 41st Ave., Apt. 1-C. Flushing, New York 11355. 718-321-3802.

Vera Chandranie Lall Aleksey was born on the Island of Trinidad, Port of Spain, and British West Indies on [redacted] Her father James Lall (Jeremiah McLawrence Lall) was a head master at a school her mother Esther Bahadur Lall was a housewife. Esther died in childbirth when Vera was six or seven years old and her father married her mother's sister Phyllis. Her mother and father had four children together and four more children were born after he married Phyllis. Her brothers and sisters are:
Irving who died in 1996 of a heart attack
Lucille who lives in Trinidad and is a draftsman for the government
Vera
Nelson who died in 1992 in New York.
Her ½ brothers and sisters are:
Leah who died of a rare disease in 1983 in Germany
Steven who lives in England (Vera heard he had passed away)
Winston who now lives in Trinidad and had his own business (Bayon lived with him for a short time)
Trevor who lives in Trinidad and owns his own business

None of the brothers or sisters other than Nelson had a criminal history, drug or alcohol problem, and history of mental illness. Nelson had alcohol problems and lived with Vera a short time. Nelson lived with them for four months in 1990 when he was recovering from a beating where he lost his eye. Vera made him move out when he started drinking again. He died in an emergency room after being beaten for the second time in New York in 1992. Vera said he never came to the house when he was drunk.

Vera said she grew up in a very happy family that was well educated. Her father was a family man and very strict. They always did things together as a family. Everyone in town knew her family. They were financially well off and she never had to support herself before coming to the states and getting married. They had people who worked for

EXHIBIT 1
Deponent VOGELSANG
Date 1-30-04 Rptr. AW
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TONI K. BOVEE
JURY AND TRIAL CONSULTANT MITIGATION SPECIALIST
2300 Blairhouse Court Charlotte, North Carolina 28270
704-366-3100 Phone 704-442-1972 Fax

them regarding cooking and housekeeping. Her father wanted her to become a teacher and she purposely did not do well on her test because she did not want to do that. She wanted very much to come to the states and her father had friends who lived in New York. Her father finally consented to let her come to New York to go to beauty school in 1966. She lived with her aunt for a short time and then went to live at the YWCA on the Eastside. Towards the end of 1966 she met **Ronnie Aleksey** who was working as a Maitre D at a restaurant she would go to for ice cream. He talked to her when she would go and told her about being separated from his wife. He said he had a daughter who lived with her mother. Vera was not aware of his alcohol problem and he did not drink a lot in front of her until after they were married.

Ronald Francis Aleksey was born to a Polish mother **Stephanie Kobzda Aleksey** and a Russian father **Edward Aleksey**. He was born in New York on 5-28-1939. Ronald's father was a Career Navy man who served in the USN. He was rarely home and when he was he drank a lot. Ronnie was the oldest by 14 years. His mother and father had three more sons and one daughter.
Ronald
Edward who worked for the City of New York in the Transportation Dept.
Douglas who worked for the Social Security Dept. in New York City
Monica (twin) who also worked for the Social Security Dept. in New York City.
Stephen (twin) who works for a Japanese bank in New York.

Ronnie's father also had a brother who was a District Attorney in New York who died after having a stroke a few years ago.

Vera said that before they were married that he would take her to his family's house on the weekends and the family was nice to her. Ronnie would help his mother financially and loved going to see her. He was very close to her. However, after she died Ronnie did not see or hear from his family. She died at the Staten Island Veteran's hospital.

During his first marriage Ronnie apparently had good jobs and made a lot of money. He worked at IBM as a systems analyst and consultant for companies. IBM they sent him to night school for additional degrees. He graduated on the dean's list at Pace College. He apparently had problems with his wife and eventually lost his job. They owned a co-op and had one daughter.

Ronnie told Vera that in the late 50-s or early 60's police had beaten him. He was seeing his wife one-day while she was pregnant and when he left the son of a cop made a comment to him. Ronnie lashed out at him. His father came after Ronnie and beat him so bad that he ended up in a mental hospital. She believes the name of the hospital was **ISLIP** in Long Island. Ronnie was given disability after that and lived with his mother

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JURY AND TRIAL CONSULTANT MITIGATION SPECIALIST
2300 Blairhouse Court Charlotte, North Carolina 28270
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until he and Vera got married. Vera said he also told her of being in several hospitals for his alcoholism. She never told anyone about these things and is not sure what hospitals he was in other than **Beth Israel** (for drinking). She feels something happened regarding his x-wife and that caused his drinking and the rift with his family. Ronnie was hospitalized in **Bellevue Hospital** when his room caught on fire and his leg was burned. He came to live with her during that recovery. She also believes he was at **Lincoln** Hospital. Vera believed his permanent disability was for psychotic episodes that included paranoia. He also had ulcers, pancreaitis, and cerosis of the liver. His arthritis became so bad that he could not hold things very well. After his mother died Vera said he became very depressed and lost a lot of weight. His hair was totally gray prematurely. Ronnie's brothers and sisters would never help him when he needed it.

Ronnie and Vera were married at City Hall on **May 20, 1968**. This date was important because it was Ronnie's birthday and also the day her father died suddenly in Trinidad of a heart attack. Vera was pregnant when they got married and they move to an apartment **216 West 78th Street** in New York. Ronnie worked as a bartender and waiter in restaurants. She and Ronnie got along great and he did not drink where it became a problem until after Bayon was born in November of that year. Things began to change and Ronnie became more and more emotional and he drank more and more. She had Ronnie move out in 1972 because started drinking more and becoming more abusive towards her. Vera denied that Ronnie every hurt Bayon, but does know Bayon saw her being abused. She said that Bayon did not want to leave her alone because he was afraid his father would come back to the house. She took out restraining orders against him and called the police on a multitude of occasions.

Very said she was 28 when Bayan was born at the Roosevelt Hospital in Manhattan. During the first 4 months of her pregnancy she was very sick. When she was six months along she had to be put in the hospital with bladder infections. Bayon was born one week after her due date. She was in labor for 35 hours. Her doctor's name was Stephens. During her labor they had "to turn Bayan because when they x-rayed her they saw that his face would be flattened by the delivery." Forceps were used and she became very anemic after his birth. She was kept in the hospital for three weeks due to anemia and depression. Other than a heart murmur Bayon was normal and never sickly. He weighed 7 lbs. 12 oz. at birth. Vera's depression lasted for several months after she came home.

Vera's life had changed drastically as well when Ronnie left. She said she had always been very naïve about life. She had always had a car and never had to do a lot of housework. Ronnie had done a lot of this until their separation and when she made him go she had to grow up in order to take care of herself and Bayon. She worked part time as a hairdresser. Even after he left in 1972, (they were never formally separated or divorced) Ronnie wanted to get back together. Very told him to go back to school, which

TONI K. BOVEE
JURY AND TRIAL CONSULTANT MITIGATION SPECIALIST
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he did. He received two additional degrees and saw a counselor by the name of Morales. Things would be good for awhile but then he would start drinking. She would make him leave.

Vera said that Ronnie would get angry with Bayon because he had problems and he was not smart like he was. He made a comment in jest one time that he must not be his because his older daughter was very smart. He would say that no son of his would leave tracks every time he did something wrong. Bayon did things that made no sense and showed no signs of thought. Until afterwards he would not even know it was wrong she said. Ronnie really wanted Bayon's attention but Bayon always wanted to be with her. One night while she was at work Ronnie came to her apartment and picked up Bayon from the Baby sitter. Ronnie was a very strong man and Vera had to get a neighbor to help her get Bayon back. She went to court to get an order for protection after that. The judge gave Ronnie custody every other weekend, which upset Vera. Bayon would cry and call his mother to come get him. Ronnie would also come to the house and beat on the door for Vera to let him in.

In 1975 Vera moved to her current apartment in Queens. Vera started working full time when Bayon started school. She noticed that Bayon did not make friends easily. One summer her friend and babysitter offered to take Bayon with her on vacation to Pittsburgh. When he came home from vacation, Bayon was obsessed with cars. Apparently, her family owned a car and Bayon had never been inside one. He cried for day's for his car and would pass cars on the street and say they were his. (This baby sitter was black)

When Ronnie started Pre school he cried for three months when she would leave him. He would lay prostrate on the floor and scream. He did not learn the same as the other children. He also had difficult time in-groups. When he started his first grade at PS 20, which was only two blocks from her house, he was constantly leaving school to go home. He said he was afraid of children in his class. The school called and told her that he had problems and thought he was unable to talk. He was extremely quiet and shy. They tested him and the schools would send tutors to the house for him and requested special education. The tutors would tell her they could not help him that he did not want to work. Bayon also never liked to be alone a night and hated to be outside when it got dark.

In second grade she was called all the time because he would not want to do him homework and would never bring it home. The teacher would put the assignments on the chalkboard and he told her he could see them. She went one day to the school and thought the class was unruly and took him out and placed him into a Catholic school.

TONI K. BOVEE
JURY AND TRIAL CONSULTANT MITIGATION SPECIALIST
2300 Blairhouse Court Charlotte, North Carolina 28270
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St. Michael's was a Catholic School several blocks down the street from where they lived. Bayon did not do well even with the help of a tutor. He would not do his work. After he was there for three years the school felt he had problems and suggested that he get help and get tested. Vera pursued this and he was put in special education. Bayan fabricated stories about his family to the school children and would tell the other children that his mother was rich and had a lot of Cadillac's. One time Vera said he took her money and was giving it to all the kids in school. Most of the time when he took things he would give them away in order to make friends.

Vera related a story to me about an incident that happened during the time Bayon was at St. Michael's. Bayon gave one of the boy's at school a fifty dollar bill that he had taken from her purse. The boy and his guardian she assumed brought the money to her house that night. He was an older man in his 60's or 70's and he told her that he had a type of boy's club for young boys to come to on Friday to play games and little league. Vera told her about his not being able to make friends and thought it would be a good idea. Bayon went to this mans house on Friday and was picked up on Sunday the first two weeks. On the third week Bayon called his mother whispering that he wanted her to come get him. Vera said she immediately called the man and said she had to have Bayon home due to an emergency. The man brought him home and asked if there was a problem. She denied to him that there was a problem. When the man left, Bayon cried and told his mother that the man wanted to get in the shower with him and touch him, he also said that when he would wake up the man would be touching him. Vera said she did not say anything to her husband for fear of what he would do. She told the man that Bayon had different activities and would not be able to come back. Vera said she never talked to Bayon about this again. Vera said she thought she mentioned this to David Rosengard when she talked to him in one of her sessions.

Bayon's records were sent to PS214Q but Vera took Bayon to be tested at Forest Hills in Regal Park at the suggestion of one of her clients. After that testing she was told to take him to Colden Street where they tested for Special Education Classes. She was told about Queens Guidance Center and he started seeing David Rosengard. Bayon started going to IS25.1 and was put on medication. He had problems because he was always sleepy. Vera told me that Brian had always been very sensitive when people touched him and tended to overreact. Bayon had to repeat the fifth grade and also had to go to summer school. He graduated from grade school. (I have a photo of that graduation with his only friend a young black boy with their arms around each other)

Bayon was very embarrassed about being in special education and when and if any kids would come by and want to go to school together he would wait because he did not want them to know he went to a special education school. Vera said Bayon never had anyone over for dinner or to spend the night. When Bayon started getting in trouble Ronnie

TONI K. BOVEE
JURY AND TRIAL CONSULTANT MITIGATION SPECIALIST
2300 Blairhouse Court Charlotte, North Carolina 28270
704-366-3100 Phone 704-442-1972 Fax

would always come over and try to help her in any way. Bayon liked to play with matches but would only do it when others were around. He loved animals and was very loving and caring about them. Vera told me several stories's about Bayon and his cat "Frisky". Bayon was never violent towards her, only towards himself. He compulsively took things from the apartment, her purse anywhere she said.

Bayon went from IS25 to Adrian Block Junior High, he then transferred in the 7th grade to Bleeker 185 in the 7th and 8th grade. From Bleeker he went to Hillside campus for treatment. He was there from May 13, 1983 until January of 84. He went to summer school as well that year. In June, he applied for job Corp, which he was not accepted. Bayan's records were sent from Hillside to Bleeker. He left school and went to Florida. In January of 1986 he went to High School at John Bowne. This was short lived.

When he was fourteen he tried to kill himself when he was about fourteen by taking an overdose of mellaril that had been prescribed for him. After that he went to Long Island Jewish Hospital, the Adolecent Pavilion. While there he went to school and was in therapy. When his time was up there she was advised to place him in a residential program or at least a PINS program. She said she had heard horrible stories about the residential program and did not want to have to go to court to place him in the PINS program. Rosengard suggested a school in Lakewood but she could not get him in there.

Bayon did not run around in the streets and did not have a lot of friends. He was happiest inside the house and would stay for long periods of time. She would lock him out hoping he would do something with himself. He would beg her to let him come home. When Ronnie was found dead after he burned to death in his hotel room, Vera said Bayon would not go to his funeral. After that she said Bayon acted even worse and got into more trouble. She tried to get him in the service but because he was on probation he couldn't enlist. She also tried to get him in a trade school but he would go. Vera said that Bayon would cry and say "Mother, why did God make me like this, so different from everyone else." Bayon could never seem to control himself and couldn't sit still or pay attention for long. He was always getting in to trouble. He was not a very happy child.

Bayon was doing well at school and would not go so Vera sent him to live with her brother in Miami for awhile. David Rosengard and the people at the clinic thought it would be good for him. He went down in January 22, 1985 and after a while he started wanting to come home. He started getting in trouble there as well she thought. He was out of school for almost a year. During the time he was there David Rosengard wrote him a letter.

He was sent to Creedmore State Hospital in a lock in unit at first. However, as soon as he was taken off lock in he would leave the hospital everyday. He had found a van and

TONI K. BOVEE
JURY AND TRIAL CONSULTANT MITIGATION SPECIALIST
2300 Blairhouse Court · Charlotte, North Carolina 28270
704-366-3100 Phone 704-442-1972 Fax

would take it and work and then come back to the hospital at night. He was caught one day and place in lock up again. Bayon managed to get the key and left the facility. He was arrested and taken to Queens Detention Home. He told them he wanted to kill himself and was put on a watch she said. The doctor told her that if he continued to act the way he did that he needed to be placed in a mental hospital. Some of the medications she recalled he was on were mellaril, atarax one tablet 3 times a day, cogentin 1mg per day and Thorazine 25mg at bedtime. (I have the bottles of some of them). The medications came from different drug stores and she doesn't remember where she got them all.

Bayon was never really strong and could not do a lot of physical work due to his heart murmur. Once she told me he was beaten up by the police and had to wear a heart monitor for awhile after his chest was kicked. He told her that he would always shoot himself before he would go back to jail after that.

When Bayon started getting involved with girls Vera said it was more for their families and not just them. She said that if I looked I would see every girl either had a house, child, animal or parents. He loved being part of a "real" family she said. She said the girls would call her and asked her if she was as rich as he said she was. Vera said she would laugh. Vera said she had no more security left because of all the charges he had put on her card. Between bailing him out and his stealing she had very little left.

Vera said she never knew Bayon to have a gun, he was never a violent person. The Tuesday night before he left for South Carolina Vera said he came by herself and asked her for some money. He told her that he had not eaten in two days. He told her that he had met a girl who was going to Florida where she had relatives and he was going to go with her. When she got home from work he was parked outside the building in a white car. He asked her to come over and say hello. There was a girl and two children in the car. Vera said she remember that she told them to be sure the children were buckled in their seats. She gave Bayon $100.00 and said that was all she had when he wanted more. When they were walking back to her door Bayon told her that he had a funny feeling that something bad was going to happen. She didn't think he was real happy about going. She said she told him to be very careful driving. That was the last time she saw Bayon.

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TONI K. BOVEE
JURY AND TRIAL CONSULTANT MITIGATION SPECIALIST
2300 Blairhouse Court Charlotte, North Carolina 28270
704-366-3100 Phone 704-442-1972 Fax

CONFIDENTIAL MITIGATION MEMORANDUM
ATTORNEY/CLIENT PRIVILEGE

TO: Duffy Stone
DATE: August 4, 1998
CASE: Bayon R. Aleksey
RE: Interview with David Rosengard MSW at Queens Child Guidance Center, 41-25 Kissena Blvd, Suite 118, Flushing, NY 11355. Phone 718-358-8288 Fax 718-358-5265

On January 27, 1998, I spoke with David Rosengard by phone regarding meeting. He advised me that even though he did not have records of sessions that he remembered Bayon and his family well. A time was set up for the next day at 2:30 p.m. We met and the potential situation regarding Bayon's charges was discussed. The following information was obtained.

David has been working at Queens Child Guidance Center since September 1971. The area is now predominately black, Spanish and Oriental. There are two housing projects near by and they are mostly black. During the 80's there were more Japanese, Indian whereas now there are mostly Chinese, Koreans, Black and Spanish. Most of the signs on office buildings and outside on the streets were in Chinese.

The fees are based on income. The income at the time Bayon's mother first took him in was $6616/year. She was a part time hairdresser. Bayon's mother was charged $8.00 per visit.

Bayon started coming in to see David on June 3, 1980. He was referred to Queens Child Guidance Center by the Special Education department of PS 214 (Elementary School he had been attending) at the end of the school year. Although most visits were either with Bayon or Bayon and his mother, his father also attended a few sessions. In the fall of 1980 Bayon started attending group sessions as well. Bayon got along well with the kids in the group, was kind and well liked. There was never any sign of racism exhibited during the time David Rosengard had him as a patient.

Bayon was seen by a Psychiatrist on July 1980, June 81, June 91 and Nov. 91. Medicines were prescribed.

David reported that Bayon stopped coming in to see in May of 1983. Bayon came back in and started regular visits again in January of 1984. In April or May of 1995 Bayon

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TONI K. BOVEE
JURY AND TRIAL CONSULTANT MITIGATION SPECIALIST
2300 Blairhouse Court Charlotte, North Carolina 28270
704-366-3100 Phone 704-442-1972 Fax

quit coming in due to a suicide attempt. His mother continued to see David. (Bayon took an overdose of a prescription that had been given to him by the staff psychiatrist.) He was taken to the hospital and referred to Long Island Jewish Hospital, Adolescent Pavilion. After that he was sent to Creedmore where he obtained the keys and left the facility. It was advised that he be placed in a residential program or at the very least a PINS petition be obtained. (PIN's is where they take the child to court and warn him if he does not straighten up within a time period that he will have to be placed in non voluntary residential program or jail). Bayon's mother started the PINS petition but then backed out. She only wanted to place him on a voluntary basis. The PINS petition and residential treatment were only applicable through age 16. David said he fell through the cracks because he was not sick enough to be hospitalized and optional treatment would have cost too much. Nobody wanted him.

David stated that when Bayon first came he was 11 ½ years old. As he remembered he was being stubborn and not able to learn I school. He wanted to be free of rules at home and school. He especially did not want to read. He liked working with his hands and loved to work on models. Bayon was embarrassed about being in special education. He never thought about the consequences of his actions. David said the family was "emeshed" and there was a real separation problem with the mother. The mother was chronically depressed and Bayon would pick up her depression and try to help her. David was aware of the mother and fathers problems and the severe alcohol problem that the dad had.

Bayon had poor impulse control and was very oppositional to rules. He would get very angry and irritable. The parents wanted him put in a residential facility because he was out of control. Bayon was very non-aggressive however and his anger was based at himself. He had poor skills at solving problems. The mother was unable to set limits, which complicated things. She would blame the teachers for his problems.

Bayon never saw the consequences of his behavior, David said. He remembered several things that Bayon had done during the time he was seeing him.

- Vera would let Bayon drive her car without a driver's license. Bayon had an obsession about cars. However, Bayon wanted to add things constantly to make the car better. One time David said he bought police blue lights and put them on the car. He was quickly pulled over, but he never thought about getting caught, just having blue lights.

- Another time he threatened to throw motor oil all over the house.
- David remembered the mother talking to him about an incident that the mother related to me. [When Bayon was going to the Catholic school and started taking

TONI K. BOVEE
JURY AND TRIAL CONSULTANT MITIGATION SPECIALIST
2300 Blairhouse Court Charlotte, North Carolina 28270
704-366-3100 Phone 704-442-1972 Fax

money to give to the children to make friends. One day a man brought a young boy by that Bayon had given $50.00 that he had taken out of Vera's purse. The man (in his 60's or 70's) said that he let boy's come to his house and he took them to play ball and played games with them. He invited Bayon to start coming. The boys would come on Friday and be picked up on Sunday. Vera said she thought this was great, because she was a single mother and hoped it would help him make friends. After the third week Bayon called her one night and said he wanted to come home, he sounded afraid. When he was home and they were alone Bayon told her the man wanted to take showers with him and when he would wake up at night the man would be touching him. Vera never let him go back to the mans house and told the man that Bayon had other activity's and would not be able to attend anymore. She never spoke about it to Bayon again or his father who she was sure would hurt the man.] *Need to talk to Bayon about this.

David said he would continue to look for the Clinic records and as of August 4, 1998 had not found them. He is most willing to help Bayon and doesn't feel that Bayon would be able to shoot someone in the manner the police officer was shot. Bayon was more destructive to himself. He will testify if needed.

Legend for Financial Record cards:
M-mother
C-child
B-broken appointment
G-Group
Dr.-Psychiatrict or Medical appt.

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Sami

Time Line of Bayan Aleksey

8-7-98

Date	Age	Activity
09-31-83		Bayan is given a Medicaid Card- Case No. 85187791. He continues to get them through April of 1984.
05-28-39		Ronald F.J.Aleksey is born in New York City, New York. His parents were Edward Aleksey and Stephanie Kobzda
07-14-40		Vera Chandranie Lall is born in Trinidad, Port of Spain, West Indies. Her parents were James and Esther Bahadur Lall.
05-28-68		Ronald F.J. Aleksey and Vera C. Lall were married In New York City
11-08-68		Bayan Aleksey was born at Roosevelt Hospital in Manhatten, New York. He weighed 7lb. 12 oz at birth. He was was normal except the delivery was 35 hours and he had to be turned prior to delivery. At birth he had a heart murmer. Vera had to stay in the hospital for three weeks after he was born due to severe anemia and depression that did not leave for months.
11-08-69	1	Bayan's 1st Birthday
11-08-70	2	Bayan's 2nd Birthday
11-08-71	3	Bayan's 3rd Birthday
01-01-72		Vera ask Ronnie to move out due to his drinking. They never get a formal separation agreement or divorce. He returns off and on to live.
11-08-72	4	Bayan's 4th Birthday
11-08-73	5	Bayan's 5th Birthday
06-28-74	ES	Bayan receives a certificate from the El Coque' Day Care Center for pre-school instruction in the use of the telephone. He also received his a kindergarten diploma. His teacher was Sherene Samii.
09-08-74	ES	Bayan starts the first grade at William Lloyd Garrison a Special Primary School 31, in the Bronx, NY. His teacher is Miss Newman.
11-08-74	6	Bayan's 6th Birthday
06-01-75	ES	Bayan completes the first grade. His report card states that he is very immature, needs self-control and needs special attention, Home work is a problem. He receives non-satisfactory in personal and social development and work habits. He misses a total of 7 days. He is promoted to the 2nd grade.
09-08-75		Bayan starts the second grade, NO RECORDS.
11-08-75	7	Bayan's 7th Birthday
09-01-76	ES	Bayan starts the third grade at St. Michael's Catholic School. His teacher is Sister Gail. Bayan started out the year doing well however his grades rapidly fell the second and third grading period. Problems completing his work, respect , cooperation ,and carrying out his responsibility. Bayon misses 9 day's of school and is late one day. Notes from teacher state that he needs help with home studies, disappointment in his personal and scholastic progress and needs to read and do more math during the summer. There were six parent interviews.
11-08-76	8	Bayan's 8th Birthday
09-01-77	ES	Bayan starts the fourth grade at St. Michael's. His teacher is Mrs.J. De Bellis, Bayan's grades for that year were all F's except for one D in Christian Doctrine. His reading was on a minus 4 level and it was suggested that he attend remedial reading and math classes during the

EXHIBIT 2
Deponent Daniel Savage
Date 1-30-04 Rptr. CW
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		summer. He continues to have problems writing clearly and completing work. He misses 21 days and is late 11 days. There were three parent interviews. He is promoted to the fifth grade.
11-08-77	9	Bayan's 9th Birthday
06-04-78		Bayan's father graduates with another degree from Pace University
09-01-78	ES	Bayan starts the fifth grade at St. Michael's. His teacher is Mrs. Veronica Denning.
11-08-78	10	Bayan's 10th Birthday
06-01-79	ES	Bayan receives all F's for the year. He is absent twenty days and there are 3 parent meetings. His report reflects that he has no self-control, does not carry out responsibilities, he does not express himself clearly nor completes study and written work on time. The teacher states that he is a problem to the teacher constantly and he refuses to work. He is not promoted to the sixth grade. Special education classes were suggested.
10-15-79	5th (+?)	Bayan enters the fifth grade at PS214 his teachers name is Simon. He is present 42 days and absent 5. He is retained.
11-08-79	11	Bayan's 11th Birthday
11-21-79		Bayan's records are sent to PS 214 Q from St. Micheals
01-03-80	5th 7.37	Bayan starts 5th grade at P21. His teacher is Gross. He is present 100 days and is absent 15. He is promoted to the sixth grade
06-01-80		Bayan begins psychotherapy with Lester David Rosengard, CSW
06-03-80		Bayon is in the fifth grade at PS 214 Special Ed and is referred to the Queens Child Guidance Center. His mother comes in prior to him being seen on 6-20-80. David Rosengard is the therapis that they will see on a regular basis one on one, in group and with his mother. This therapy is based on a parents ability to pay. At the time they applied his mother is making $6616.00 per year. Each visit cost $8.00.
06-10-80		Vera Aleksey goes to Rosengard for a session
06-20-80		Bayan goes in for his first therapy session with David Rosengard
07-08-80		Bayon and Mother attend session at QCGC
07-10-80		Bayan, his mother and the doctor meet at the Child Guidance Center
07-15-80		Bayon is seen at QCGC
08-16-80		The mother in seen at QCGC
09-01-80	MS	Bayan starts the sixth grade at P21Q. His teacher is T.Gross again. He is present 156 days and absent 28. He is promoted to Jr. High. 185
09-22-80		Bayan and his father are seen at QCGC
09-23-80		Mother is seen at QCGC
09-29-80		Bayan is seen at QCGC
09-30-80		Mother is seen at QCGC
10-06-80		Bayan is seen at QCGC
10-14-80		Mother and Bayan are seen at QCGC
10-21-80		Mother and Bayan are seen at QCGC
10-28-80		Mother and Bayan are seen at QCGC
11-03-80		Mother and Bayan are seen at QCGC for a medical appt.
11-08-80	12	Bayan's 12th Birthday
11-10-80		Broken appt. at QCGC
11-11-80		Broken appt. at QCGC
11-12-80		Broken appt. at QCGC
11-17-80		Mother attends group meeting at QCGC

11-18-80		Bayan and his mother attend QCGC
11-19-80		Bayan attends his first group session at QCGC
11-24-80		Mother breaks appt. at QCGC
11-25-80		Bayan attends appt. at QCGC
11-26-80		Bayan attends group at QCGC
12-01-80		Mother attends group at QCGC
12-02-80		Bayan and mother attend QCGC
12-02-80		Bayan and his mother attend session at QCGC
12-08-80		Mother attends group at QCGC
12-09-80		Mother and Bayan attend session at QCGC
12-10-80		Bayan attends group at QCGC
12-16-80		Mother and Bayan attends session at QCGC
12-17-80		Bayan attends group session at QCGC
12-23-80		Bayan attends session at QCGC
12-24-80		Bayan attends group session at QCGC
01-06-81		Mother attends session at QCGC- Bayan breaks appt.
01-07-81		Bayan attends group session at QCGC
01-09-81		Bayan breaks appts at QCGC
01-12-81		Mother attends QCGC
01-13-81		Bayan attends session at QCGC
01-14-81		Bayan attends group session at QCGC
01-20-81		Mother and Bayan attend session at QCGC
01-21-81		Bayan attends group session at QCGC
01-21-81		Bayan attends group session at QCGC
01-27-81		Bayan attends session at QCGC
01-28-81		Bayan attends group at QCGC
02-02-81		Mother attends session at QCGC
02-04-81		Bayan attends groups at QCGC
02-11-81		Bayan attends group at QCGC
02-17-81		Mother and Bayan attend group at QCGC
02-18-81		Bayan attends group at QCGC
02-24-81		Mother and Bayan attend group at QCGC
02-25-81		Bayan attends group at QCGC
03-03-81		Mother and Bayan attend QCGC
03-04-81		Bayan attends group at QCGC
03-10-81		Bayon's mother attends a planning conference with four teachers to plan his individualized educational program for special education
03-10-81		Mother and Bayan attend session at QCGC
03-11-81		Bayan attends group at QCGC
03-17-81		Bayan and mother attend session at QCGC
03-18-81		Bayan attends group session at QCGC
03-24-81		Broken appt. at QCGC
03-25-81		Bayan attend group at QCGC
03-26-81		Bayan and his mother attend QCGC
03-31-81		Bayan and his mother attend QCGC
06-25-81	MS	Bayan receives a certificate of completion from Public School 21. He misses 32 (2-13-17)days of school. He is reading below level. He started the year out doing okay and progressively declined.
09-01-81	MS	Bayan starts Junior High School 185. His teacher is Ms. Marlene Simon.

	MS	During this year Bayon receives the best grades he has received to date. They are all average ability and above. However in his personal adjustment he receives almost all "needs improvement". Bayan misses 39 days (11-20-8) and is late 16 (1-8-7)
11-08-81	13	Bayan's 13th Birthday
01-01-82	MS	A letter from Edward Bleeker Junior High School states that a review of Bayan's progress indicates that he is not meeting the promotional requirements and may have to be held over in Grade Seven unless the Central Board of Education accepts the exclusion from Promotion Policy for his started in his IEP. His reading score must be 6.2 or higher and his math 5.7. His current score is 5.5 and there is no math.
01-31-82	MS	Bayan's mother receives a letter from the A. Bock JHS where he ws. scheduled to attend the EH Program. As of this day he had missed 15 days of school and she was warned that his position would be given to another child if he did not return.
06-01-82	MS	Bayan receives a certificate of Effort from Edward Bleeker Junior High School, 185.
06-01-82	MS	Bayan is in the 7th grade. His teacher is Simon. He is absent 59 days and late 20. He receives 75 in Eng., SS80, Math 70 and Sci. 75, Health Edu 85. He is promoted to the 8th grade
11-03-82	MS	Bayan receives a Certificate of Effort in Soccer from Edward Bleeker Junior High 185.
11-08-82	14	Bayan's 14th Birthday
11-19-82	MS	A weekly progress report is sent to Bayon's mother regarding his work. Most of his progress is "Needs Improvement". His teachers name is Mrs. Levetan
12-03-82	MS	In a daily report of Bayan's progress and attendance for the 8th grade most of his conduct is reported as poor or unsatisfactory, his effort is poor. (this report was for 12-3-82 through 1-6-83)
12-08-82	MS	Edward Bleeker Junior High School No. 185 sends letter to Bayon's mother that he was involved in a confrontation with another student. Bayon apparently did not like the way other student was eating his own food in the cafeteria. She is told that Bayan admitted that it was his fault and she is warned that he will be suspended if it happens again.
12-15-82	MS	The school sends an invitation to Vera Aleksey to attend a workshop for parents that she is unable to attend. The workshop is about "How it Feels to be a Child With Special Needs".
01-07-83	MS	A letter was sent to Bayan's mother regarding his math work or lack of it. Samples were sent. She is told that he is exhibiting the same negative behavior and attitude of selecting when and if he will make any effort. He is being placed conditionally in Class 8-306 (EH) to be reevaluated in four weeks. If it becomes apparent that the issues surrounding Bayan's emotional difficulties have not dissipated, they will have to explore other educational alternatives. His performance in the citywide math test given in Spring 82 indicated that his numeration skills were 4.3 grade level, computational skills 6.2, application skills 4.3 and his cumulative total score 5.0. He was far below his grade level. It is stated to the mother in a scathing letter that she has unrealistic goals for her son and is not dealing with his problems.
05-12-83		A financial plan for Long Island Jewish-Hillside Medical Center. An

		income of 2200/6months is stated. On the application it states that he has no prior admissions and patient and family will apply to Medicaid for payment of liability if any.
05-13-83	MS	Bayan is admitted to the Hillside Campus School –P 255Q in grade 8. His last school was Bleecker J.H. S.
06-01-83		Bayan finishes the year with 16 absenses and 14 tardy's. His teacher is Levitan. His grades for the year are all 65 in each subject. He is sent to a joint 7/8th grade class.
06-17-83		A check sheet for Bayan at Hillside Campus AP unit. States that he is cooperative but a little restless.
06-20-83		Bayans transcript was sent to Job Corp from PS 21
06-28-83		The term at Hillside ends and he had been present 31 days. His teacher was Doris Levy.
06-28-83	MS	A scholarship report from Hillside Campus School (PS255Q)for the 8th grade notes that Bayan is a new student. His H.R. teacher is D. Levy. He is in the AP unit of the hospital.
08-17-83		Bayan goes to summer school and takes reading (65) and Horticulture (60). His teacher is Benjamin Glassher Jr.
09-01-83	MS	Junior High 25 Report card states that he is in Mr. Arkins class and he was not in class long enough to properly evaluate his academic performance. His grades were from the fourth quarter and reflect unsatisfactory is personal adjustment. He was absent 22 days and late 6.
09-23-83		Letter sent from Long Island Jewish-Hillside Medical Center in Glen Oaks states their policy regarding lateness, cutting and unexplained absentees. If he misses he can be cut from the program.
11-08-83	15	Bayan's 15th Birthday
12-27-83		A petition (Person in Need of Supervision) was taken out in the Family Court of the State of NY-Queens by Vera Aleksey stating that he is incorrigible; has poor attitude in home and has been known to steal from home and school setting. She states that he has been verbally abusive at home and refuses to obey.
01-05-84		Vera writes letter to a Mrs. Golden referring to docket No. S3448/83, stating that she is dropping the Pin's Petition against her son and would like all records to be expunged.
01-09-84	MS	Bayan in discharged from Hillside Campus in the 9th grade. His transcript was sent to D25 COH. His grades from 9/84 through this date are: Eng.41, Math 41, SS 41, Sci.70 modified, Typing 41, Home Eco. 41, Horticulture 65 Modified, and Music 80. His guidance counselor is Natalie Rosen.
01-09-84		Vera writes to a Mrs. Charlotte Schwartz, IS237 that she would like Bayan to have a re-evaluation for a placement into a Special Educational Class. She states he has been attending the Hillside Campus 225 from June 1983 and as of January 6, 1984 he is not attending school.
03-27-84	MS	Division of Special Education sent a letter requesting a meeting to discuss Bayan's needs. It had to be rescheduled at parents request. Committee on the Handicapped.
06-01-84		PS records reflect insufficient data on his transcript for this year. His teacher is Towers and he is placed in a 7/8grade class. He is absent 71 days and tardy 32
06-05-84		At an annual review of Bayan's I IEP skills, it was stated that he is quiet

	MS	and moody-often sad. He holds back much anger and has difficulty making friends. He has poor attendance and often leaves school during the day, He is reading and spelling below his grade level. He is having problems with fractions. And decimals.
08-09-84		Letter to the Social Security Administration from Queens Child Guidance Center, Inc stating that Vera and Bayan are patients at the center and receive weekly psychotherapy sessions.
09-01-84	MS	Bayan starts school at Adrien Block Junior High 25. His homeroom teacher is Mr. Arkin. In the first reporting period the teacher noted that Bayan is absent too much to receive a fair grade. His first period he averaged 59, second 39, and was not present third grading period.
11-08-84	16	Bayan's 16th Birthday
12-18-84		An Order of Protection was issued to Ronald and Vera Aleksey regarding Bayan. He was ordered not to assault, menace or harass or recklessly endanger petitioner, stay away from the petitioner's home and may enter petitioner's home with written permission given by petitioners only. This petition was modified and continued
01-22-85		Bayan goes to visit his material uncle, Winston Lall in Miami and sends keys and cards to her.
02-14-85		David Rosengard writes Bayan a letter in Miami wishing him the best.
02-15-85		Bayan writes his mother that he needs to come home, things are not working out and he will go to school if he can come home. He made a mistake.
03-01-85		Bayan returns to New York after being with his uncle in Miami.
03-11-85		A meeting request was scheduled to discuss Bayan's educational needs was scheduled.
04-25-85		Letter from Adrian Block IS 25 states that the special program, which he applied to Thomas Edison –Special Education, is not available to him due to the lack of space. There is space available in a academic-comprehensive high school if so chooses.
05-01-85		Bayan terminates psychotherapy with Rosengard, CSW
06-01-85	MS	The term ending on this date Bayan received 65 in Eng.; 65 in SS, 60 in Math, and 70 in Sci. He was absent 25 days and late 2. His homeroom teacher was Arkin. He received a diploma from junior high and both his mother and father were present at his graduation.
06-16-85	MS	Bayan receives a Diploma for completing the requirements of Junior High School.
06-20-85		A letter to Vera regarding her interest in the office of Vocational Rehabilitation for Bayan. An application was sent.
06-26-85		A letter from the Seetate Education Department states that they have received his application and scheduled an appt. for him to come in.
10-31-85 16	HS	In a report card from John Bowne HS, Bayan failed all classes in his first term. Failure to report to class does not meet responsibilities, excessive absence from class, cutting class, lack of participating in class. Are all mentioned in comments. He is absent 13 days during that grading period.
11-08-85	17	Bayan's 17th Birthday
11-18-85		Bayan arrested in Westbury (Nassau Co.)for Criminal Mischief-3rd.- Dismissed DKT #31094/85
12-11-85	HS	In a report card from John Bowne HS, Bayan continues to fail all classes.

		Comments are excessive absence from class, does not meet responsibilities, absent on test days, missing homework, unprepared for class.
12-28-85		NYSED-Vocational Rehab Application of Bayan. Where it is stated that he has an emotional inability to deal with people, difficulty in learning academic subjects and has a 5th grade level ability.
01-13-86	HS	Bayan starts school at John Bowne high School EC
03-10-86		Bayan is sentenced in Nassau Co and in jail until 7-9-86 when he is discharged. Probation in NYC –Queens
06-20-86	HS	Letter from John Bowne High School stating that Bayan has been discharged from their school as of 1-13-86.
09-29-86		Vera gets a Family Offense Petition against Bayan in the Family Court of Queens. It states that four days before that he did verbally abuse the petitioner using vile and abusive language in a loud and unruly manner. He threw furniture around the home breaking different items. Petitioner states that he is uncontrollable and doesn't stay out all night without permission or knowledge. It also states that he has a history of physiological problems and dropped out of school and does not have a job. He is on probation for a criminal offense. She asks that the court order him to seek Physchiatric help and be observed in a hospital setting.
11-08-86	18	Bayan's 18th Birthday
11-28-86		Application for Vocational Rehabilitation, stating that he is unable to deal with people he does not know. He gets nervous and disoriented when dealing with strangers and unusual situations. He likes working with his hands and tools. He would like to be in the auto mechanic field.
12-17-86		Letter to Bayon from Risa Sha –Vocational Rehab telling him that she had made arrangements for his evaluation in Auto Mechanics. Set up appt for he and his mother for 12-23-86 to discuss it.
02-02-87		Bayan is sent letter from Vocational Rehab welcoming to the program at North Shore University Hospital. He is to start the program 2-9-87. 516-829-9666
02-17-87		Letter from the State Education Dept. Office of Vocational Rehabilitation to Bayan regarding canceling his evaluation at North Shore Hospital on March 12, 1987 because of his difficulty getting to Center by Public Transportation and the fact that he had not kept any appt. for the general medical examinations. Risa Sha Vocational Rehab Counselor 718-271-9346
07-27-87		A prisoner's property form is filled out for a pair of shoelaces by the 109 Precinct.
08-04-87	18	Admission note where Bayan is admitted to Creedmore Mental Health for suicidal precautions on an emergency basis. His C number is 107994 and he was assigned to ward 126. Hx of disturbed behavior starting at age 8. He was in the adolescent unit prior to this admission following an overdose at age 11. At the time he was admitted he was on probation for breaking into a car and passing bad checks. Dropped out of school two years ago and does not work. His diagnosis is Axis I: Major depression-recurrent 296.32, Axis II: Borderline personality 301.83
08-05-87		Admitted to Creedmoor Psychiatric Center, M. Mannino, TTL, CPC Bldg 40, Phone 464-7500 Ext. 4143
09-09-87		Letter from Donald R. Schechter to Bayan regarding return of

		fingerprint records. 718-263-4450
10-13-87		Letter from Dept. of Probation to Bayon regarding his being required to attend counseling sessions at the Family Conflict Unit. From Laura B. Balcom Counselor.718-990-5642
10-21-87		Letter from NYSOMH to Vera Aleksey regarding filing a Medicaid application for hospitalizations at Creedmoor Psychiatric Center. Request for Bayon's birth certificate. Michael Barnett, Patient Resources Agent 718-465-7661
11-08-87	19	Bayan's 19th Birthday
12-09-87	19	Admission Note to Creedmore Mental Hospital on a voluntary basis for unmanageable behavior at home.
12-09-87		Notice of Status of Rights- Voluntary or Minor Voluntary Status for the State of New York Office of Mental Health. Bayon enters Creedmoor Psychiatric Center.
05-13-88		Letter sent from Creedmoor P.C. to Mr. and Mrs. Aleksey (second request) wanting to discuss out patient services.
06-29-88		Letter from Clearview Community Services, Creedmoor PC regarding missed appt: on this day.
08-24-88		Letter from Fred Krellenstein for Creedmore Psy. Center stating that Bayan had not attended clinic since August 8, 1988 .States if he does not make appt he will be terminated on Sept. 8, 1988. A copy of letter was sent to probation.
10-28-88		Letter from Fred Krellenstein for Creedmore Psy. Center stating that Bayan had missed his appt.
11-08-88	20	Bayan's 20th Birthday
11-18-88		Bayon signs contract to undergo treatment at Clearview Community Services. It is a voluntary and he is supposed to attend weekly psychotherapy sessions with Dr. Krellenstein and periodic medication evaluation sessions with Dr. Rolando Baloy. Clearview Clinic is a part of NYState Mental Health and is located at Creedmoor Psychiatric Center in Queens.
12-22-88		Bayon is issued a ticket in Queens
02-23-89		Letter from Fred Krellenstein for Creedmore Psy. Center stating that Bayan had only attended one session at the clinic this month and had not been since 1-7-89. States if he does not make appt he will be terminated.
04-11-89		Letter from Creedmore Psychiatric Center stating that he had not attended the clinic since 3-10-89 and he would be terminated if he edid not attend by 4-26-89. Fred Krellenstein-Asst. Psychologist
07-13-89		A ticket is issued to Bayan for Falsely Reporting and Incident by 109 Pct.
11-01-89		Bayon is issued a ticket in Queens
11-08-89	21	Bayan's 21st Birthday
02-10-90		Letter from Department of Probation to Bayan regarding his failure to appear on 12/6/89, 1/10/90/ and 1/31/90. By Leroy Geodue at the Queens Adult Supervision Branch "J", Jamaica, New York. Phone number 520-6218
08-16-90		Bayon is issued a ticket in Queens
08-16-90		Bayon is issued two different tickets in Queens
11-08-90	22	Bayan's 22nd Birthday
12-15-90		Bayan's father Ronald dies in an apartment fire, 250 West 77th Street in

		Manhattan at 11:00P.M. He was 51 years of age and immediate cause of death was smoke inhalation other conditions mentioned on death certificate were acute and chronic alcoholism. His death was listed as an accident. His social security No. 122-30-0273. His occupation was listed as a computer operator for offices. His brother Stephen filled out the death information and he was cremated and buried on 12-21-90 at Stobierski Lucas Gardenview FH Ltd. 161 Druggs Ave. Brooklyn, NC
12-30-90		Bayon is issued a ticket in Queens
12-31-90		Bayon is issued a ticket in Queens
02-14-91		Bayon is issued a ticket in Queens
04-19-91		Arrested for Class E Felony, Crim. Impersonation, Crim Possession of Stolen Goods. DKt 91X016285 –NYCP48
06-22-91		Bayon is issued a ticket in Queens
06-22-91		Bayon is issued a ticket in Queens
11-08-91	23	Bayan's 23rd Birthday
11-19-91		Bayan arrested for Grand Larceny-3rd Warwick Town PD
05-03-92		Det. Balfe of the 102 Detective Squad left his card on the door for her to call. 718-805-3212
08-06-92		Bayan is arrested by the Lackawanna Co District Attorney's office and charged with being a fugitive from Justice out of Orange County New York.
11-08-92	24	Bayan's 24th Birthday
12-21-92		Letter from attorneys Selig, Kohl, and Selig, P.C. regarding G.W. Green Inc. to Bayon regardin contempt of court and fine.
01-12-93		Bayan arrested for Class D Fel by NYCPD 108th DKT93006632
02-10-93		Collection Request for AT&T and LEC returns-RZ for $1171.70 *5
02-26-93		Bayan fills out a complaint for personal injury by two police detectives from the 108Pct. He said he was beaten while in cuffs. This happened at 166-32 Willis Point Blvd. Whitestone in Queens. *4
02-27-93		Bayan arrested for Class C Fel by NCPD 108th DKT93Q008811-14
03-18-93		Bayan files a personal injury case for 10 Million dollars for being beat by police at the QMDM and refused medical treatment. *4
03-25-93		Bayan writes that he is in QHDM (441-93-2309), Location 6LA-4 for Grand Larceny (five counts). I is requesting a deal from DA in turn he will drop lawsuits against city.
04-02-93		Hospital Record Authorization regarding lawsuit against the NYCDC for being asaulted by officers and Judy Jones, Sheild # 6018 or 6057. Filling a 5 million-dollar lawsuit. This assault happened on 8-10-92
04-12-93		A charge of Grand Larceny is made against Bayon Aleksey by Marina Musso, Jacqueline Suarez and Catrina Vicari
04-20-93		Letter written to Bayan regarding his failure to appear on 5-5-93, by Deborah Fox Rush staff attorney of The Legal Aid Society of Bronx County Office
04-30-93		Letter from J. Ende attorney for The Legal Aid Society in Kew Gardens, NY stating that a bench warrant had been issued for his arrest.
05-05-93		Letter written to Vincent Aleksey by Sabrina Blain staff Attorney of the The Legal Aid Society of Orange County, Inc. Goshen, NY regarding appearance in the Town of Warwick, NY
09-01-93		Bayan starts the 9th grade at Hillside Campus.
09-07-93		Bayan is dismissed from Bleecker

11-08-93		Sal Viccaro (Bayon) is indicted for criminal possession of stolen property in the third degree in Minelola, NY (Nassau County).
11-08-93	25	Bayan's 25th Birthday
11-09-93		Affidavits from Bibi Mohan to Vito Vaccaro regarding 75,000 loan, ability to represent her in court, and use of her name on the lease of a car. Signed and notized.
11-08-94	26	Bayan's 26th Birthday
12-31-94		Letter to Bayon stating his NY Drivers license has been suspended 11 times for failure to pay fines.
07-10-95		Bayan arrested for Class A Misd by NASA co. PD DKT13907/93
11-08-95	27	Bayan's 27th Birthday
06-01-96		Sarah Pivero states in Police interview that this is when she met Michael and he traded in her Jetta for a Passat and she wrote out a check for $2500 for a Cadillac for him.
06-30-96		A warrant was issued for Bayan's arrest by the City of New Rochelle, NY. He was charged with CPSP 4 Credit Card
07-01-96		Sarah states to police she had an accident and car had to be towed. No accident report written. Car is still not repaired. She also states she leased a Jeep from McCafferty Jeep/Eagle, Rt. 1 in Langhorne, Pa. She signed the lease and Michael was going to make the lease payments. Ellen later leased a Toyota 4 Runner that she and Michele used and she used the Jeep. Michael did not put anything in his name due to a bankruptcy and no license. She signed papers and wrote out a check.
08-01-96		Sarah states to Police that she and Michael went to McCafferty Ford and she financed a 1996 Ford Mustang for Michael. She does not recall who filled out paper work but believes she wrote out check. Michael later returned car due to mechanical problems. They later went to Thompson Lexus and traded in the 1996 Toyota 4 Runner and leased a Lexus LX450. It was in her name and it was for Michael. She filled out paper work and gave a bogus W2form. Both her checks bounced. She has no money and she was going to use money that Michael was supposed to get for a job he did for a club. He did not get check. She is now using a rental car because the jeep had been repossessed.
08-20-96		Det. Bob Tedesco, Nassau PD leaves his card on Vera's door- 516-573-6355.
11-08-96	28	Bayan's 28th Birthday
11-11-96		Bayon uses Carole Pivero (Sara's mother's credit cards to place orders)
11-20-96		Bayan is admitted to Bucks County Correctional Facility as Michael De Angelo..
11-20-96		Sarah is advised that she is ultimately responsible for bad checks issued by her to Thompson Lexus and that she could be charged with Bad Checks and Theft by Deception if she does not pay Lexus. She was later charged for those things that day .
11-20-96		Taken into custody by the Lower Southampton Police Department on the warrant. He had a $30,00 10% cash bail. He was taken to Bucks County Jail.
11-22-96		A DETAINER WAS DELIVERED TO THE Bucks county Correctional facility for New York.
12-09-96		Criminal Complaint from Carol Pivero (Sara's mother) that on Nov. 11, 1996 , Michael (Bayon) used her credit hard , Made phone orders

		charged to her in the amount of $2,119.85. He then placed another order for $884.93. He is charged with 2 counts of credit cards and theft by deception.
12-19-96		Bayan's case was dismissed by the Magistrate due to officers not being present regarding chain of evidence.
01-02-97		Bayan writes a kite for block to be taken off his phone. He is in G29 Module and Cell and his Bucks County Prison number is 64125W96. He is using the name of Michael DeAngelo.
01-04-97		Steven Smoluk inmate at BCCF (PA) makes complaint about Greg Washington and his sexual overtures. *3
01-08-97		Bayan (Michael DeAngelo) writes a complaint about cell mate Greg Washington *1
01-12-97		Makes complaint regarding care at BCCF *2
01-28-97		Arraignment Notice for Bucks County- 42-'9121 Uniform Extradition Act. For fleeing from the state of New York county of Nassau with outstanding charges of criminal possession of stolen property in the third degree and has been declared a fugitive of Justice.
02-01-97		Sarah Pivero was taken into custody while visiting at BCCF and charged with bad checks and theft by deception. She was released on $7,000 unsecured bail.
09-28-97		Bayan is charged with Aggravated Assault (PACC 2702A4 for firing a handgun through the car door of Luis Cruz. Present were Sandra Hearn and Angela Ruzes. This was in Bucks County on US Rt. 1 and Stoney Hill Roads. About 1630hours. Plate number of car DDH-7930
11-08-97	29	Bayan's 29th Birthday
11-08-98	30	Bayan's 30th Birthday

Stevie - tag Rock Hill

10-7-97 S/a - 9 Vet Witnesses in Courtroom

12-25-97 calls Marcus. (Things are great - better than ever)

Q 51656 N

SOCIAL HISTORY

(K. Fisherman)

ALEKSEY, Bayan -

2-24-76 - Bryan Aleksey was referred to the BCG because of disruptive classroom behavior and difficulties with peer relationships. This second grade youngster attended first grade in the Bronx, moved to Queens in September, 1975.

A recent class change has him presently in a 2nd grade bilingual class on an unofficial basis because of large class registers in the other classes in the grade. Although described as active and oftentimes disruptive here, the teacher notes some improvement as the class is smaller in size and consequently more manageable.

Mrs. Aleksey, 35 years old has been a hair-dresser for the past nine years. She is a native of Trinidad and attended three years of high school there but came here ten years ago under a paid program, to learn hairdressing. She stayed on. She has no family members here at this time. Her desire, as a child, she says, was to be a teacher. Her father, now deceased, was a headmaster of a school in Trinidad.

For the past five years, she has been separated from her husband, a bartender, whom she described as an alcoholic. Clearly, considerable marital friction expired as she described the numerous fights and arguments which went on. She left, she said, because she could not take any more of it. She sees her husband only infrequently now. He does not give any support for Bayan and she receives supplementary assistance from Welfare.

Bayan was a full term youngster but Mrs. Aleksey went through a very difficult and extended delivery. During pregnancy she had a bladder infection and was diagnosed as anemic as well. It was necessary for her to stay in the hospital for three weeks following delivery before she was medically able to go home. Delivery was difficult because he was not "positioned" right, she said.

Although a healthy infant, Bayan was born with a heart murmur, which she states he is now "outgrowing" according to a recent examination. This, however, did not interfere with physical activity, she noted, and has not been any problem.

Toilet training and walking were within normal time periods. Talking, however, was delayed and it was not until Bayan was 3½ that she could understand everything he was saying.

She cared for him during his first two years but returned to work and had a succession of baby sitters to watch him. She continues to use baby sitters at this time because she returns home late and works Saturday's as well. She has had difficulty in getting some one to stay on steady, they come and go, she said.

At three, Bayan went to day care. Mrs. Aleksey described him as "quiet" but on the other hand said that he had difficulty in relating to other children while there. However, it was really in first grade that things opened up and his behavior got worse.

EXHIBIT 3
Deponent Vogelsang
Date 1-30-04 Rptr. CW
WWW.DEPOBOOK.COM

SOCIAL HISTORY

(K. Fisherman)

ALEKSEY, Bayan

She moved, she said, because she had only one room in the Bronx and needed more space. Here she has two rooms. However, we feel that Bayan's poor first grade adjustment also influenced her move to Queens, her expectation being that he would do better in a new environment.

Lately, she has been having the problem of Bayan waking up in the middle of the night and wanting to come into her bed. She has not been letting him, she said, but it continues to bother her. We feel this is yet another indication of Bayan's unmet needs, which he has been expressing all along apparently. She describes him as being very "close" to her. On the other hand, there are times she described when she seemed to very resistive to him and has taken out her frustration on him in physical punishment.

Bayan, sees himself as being insignificant and alone. For all social purposes, he does not know his father, has been cared for by a succession of aby sitters and, although his mother seemed to do her best with him, evertheless is distant and oftentimes unrelated. He seems to seek an inordinate amount of attention and many of his activities appear to be anti-social in nature, that is, lying, stealing, destructiveness.

Bayan was tested more than one year ago by the school psychologist. Because of present change of environment as well as being older, re-evaluation might prove of some value, particularly towards some consideration of possible special class placement. Mrs. Aleksey appears to be cooperative in regard to future school planning and she can benefit from all the help she can get.

KF:mp
912F

KF

4405

STATE OF SOUTH CAROLINA	)	IN THE GENERAL SESSION'S COURT
	)	
COUNTY OF ORANGEBURG	)	Warrant Number: E784245
	)	
The State of South Carolina	)	C/A No. 98-GS-380244
	)	
v.	)	MOTION FOR PRODUCTION OF MATERIAL UNDER BRADY AND S.C. CRIMINAL RULE 5
	)	
Bayan Aleksey	)	
	)	
Defendant.	)	

COMES NOW the Defendant, Bayan Aleksey, aka Michael DeAngelo, by and through his undersigned counsel, and files this Motion for Brady and other favorable material and incorporated Memorandum of Law and, as grounds therefore, the undersigned would show as follows:

1. Under the United States Supreme Court decision in Brady v. Maryland, 373 US 83, 83 S.Ct. 1194 (1963), the Solicitor has an obligation to produce all Brady material for the Defendant well in advance of the scheduled trial date.

2. Defendant claims under Brady, and its progeny, as well as the language and spirit of Giglio v. United States, 405 US 150, 92 S.Ct. 763 (1972); and Napue v. Illinois, 360 US 264, 79 S.Ct. 1173 (1959); that she/he is entitled to any and all records, memoranda and documents, as well as a statement of the County Solicitor and all appropriate state, federal and local law enforcement agencies as to:

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(a) Any and all promises, rewards and inducements made to all witnesses herein, whether or not they have testified before any state or Federal Grand Jury, or other investigative agency, and regardless of whether they will testify at the trial herein.

(b) Any offers or grants of immunity in this case to any witness from loss of property, fine, forfeiture, prosecution, or punishment in this or any other case, related or otherwise.

(c) Whether any witness called before the Grand Jury or who has or will give testimony to any

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investigative agency or at trial has ever been psychiatrically hospitalized or undergone psychiatric examination, treatment, mental status examination or care, and, if so, a list of names and addresses of the psychiatrists, hospitals and copies of any and all relevant records and reports.

(d) Any "inconsistent" statements of a particular witness or between witnesses.

(e) Any and all "rap" sheets or histories of arrests or convictions of any indicted co-conspirator or State witness.

3. In addition, Defendant requests copies of any and all memoranda, reports and correspondence to and from the various law enforcement agencies of the United States and all state, county, municipal and local law enforcement agencies regarding the investigation herein.

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4. Defendant also contends that he/she is entitled to any statement or admissions by a witness for or on behalf of the State with respect to the witness' memory or loss thereof.

5. Defendant contends that this Court should specifically direct the Government in the spirit of fairness and equity, seek and produce for Defendant the documents, letters, records and other items sought, irrespective of the State's determination of whether a witness' statement or a particular letter or exhibit can "help" the Defendant. The Defendant and his/her defense and the documents relevant thereto and necessary in support of same.

6. To the extent that specifically is required to demonstrate the materiality of the requested information, see United States v. Agurs, 427 US 97 (1976), the Defendant submits that this requirement is satisfied in this Motion.

7. To disclose to counsel for the defense any and all evidence in the actual or constructive possession of the State which is of a favorable character for the Defendant in this case and material to the issue of guilt or innocence or to punishment in this case, pursuant to the due process clause of the Fourteenth Amendment to the United States Constitution, including, but not limited to, the following materials:

(a) Any oral, written or recorded statements made by any person to the police, to the Solicitor, or to the Grand Jury which tends to establish the Defendant's innocence, to mitigate punishment, or to impeach, discredit or contradict the testimony of any witness whom the Government will call at the trial of the cause.

(b) Any police investigation report made to the police which tends to establish the Defendant's innocence, to mitigate punishment, or to impeach, discredit, or contradict the testimony of any witness whom the State will call at trial of the cause. Giles v. Maryland, 386, US 66, 87 S.Ct. 793 (1967).

(c) The names and addresses of witnesses who might establish the Defendant's innocence, mitigate punishment, or impeach, discredit, or contradict the testimony of any witness whom the state will call at the trial of the case, and the statement of any witness, the existence of which is known, or by the exercise of due diligence may become know, to the attorney for the prosecution.

(d) Any information or material which tends to establish the Defendant's innocence, to mitigate punishment, or to impeach, discredit, or contradict the testimony of any witness whom the Government will call at the trial of the cause. Napue v. Illinois, supra; Giglio v. U.S., supra.

(e) Any scientific or medical report which tends to establish the Defendant's innocence, to mitigate punishment or to impeach, discredit or contradict the testimony of any witness whom the State will call the trial of the cause. Ashley v. Texas, 319 F.2d 80 (5th Cir.), cert. denied, 375 US 931, 84 S.Ct. 331 (1963).

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8. A copy of the Defendant's prior criminal record, if any, as is within the possession, custody, or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution.

9. All books, papers, document, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody, or control of the prosecution,

and which are material to the defense, or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the Defendant.

10. All results or reports or physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the prosecution, the existence of which is known, to the attorney for the prosecution, and which are material to the preparation of the defense or are intended for use by the prosecution as evidence in chief at the trial.

11. Names of any police officers or any other persons who informed Defendant of his Miranda rights, including the times and places where the rights were given.

WHEREFORE, the undersigned prays for such Order as is just and proper.

RESPECTFULLY SUBMITTED,

FILE COPY

Isaac M. Stoney III
1102 Craven Street, Suite 4
Beaufort, South Carolina 29902
Attorney for Defendant

Columbia, South Carolina

This ___ day of _____, 1998

5 JUNE 1998

Honorable Douglas C. Murdaugh
Orangeburg County Clerk of Court
Post Office Drawer 9000
Orangeburg, South Carolina, 29116-9000

IN RE: **State of South Carolina vs. Bayan Aleksey**
Indictment No. 98-GS-38-0244

Dear Doug:

Please find enclosed herewith for filing an original **State's Memorandum** in the above matter.

Thanking you and with kindest personal regards, I remain,

Sincerely,

Walter M. Bailey, Jr.

WMBJR:jgh

Enclosures: As stated

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF ORANGEBURG	)	INDICTMENT # 98-GS-38-0244
STATE OF SOUTH CAROLINA,	)	
	)	
-versus-	)	STATE'S MEMORANDUM
	)	IN RE: INTRODUCTION OF LYLE
BAYAN ALEKSEY,	)	TESTIMONY
	)	
Defendant.	)	

At trial, the State intends to introduce limited testimony that at the time of Sgt. Frankie Lingard's murder, the defendant, Bayan Aleksey, had outstanding arrest warrants from other states. It is the State's position that the defendant murdered Sgt. Lingard because the car he was driving had been reported stolen, the tags had been stolen off of another automobile and that an NCIC check would have disclosed the outstanding arrest warrants which would inevitably have lead to his arrest and extradition to face numerous charges. The State contends that testimony would clearly be relevant to establish a motive for murder under **Rule 404(b)** of the South Carolina Rules of Evidence and Lyle.

In a post-arrest taped statement to SLED, the defendant eluded to the warrants, i.e.:

I. "And all the times I've gotten in trouble or whatever in New York I had an Uncle who is a District Attorney in New York, alright. I would never, Never hurt, my mother didn't bring me up that way. I couldn't, I can't I can't hurt another person OK And I want you to just realize something here OK I want to, if you see my rap sheet and you talk to Katherine, OK, I have problems in the club in New York or whatever OK and I got problems OK But I much rather, I would not do something to fuck my life up like that. OK Katherine told me, Katherine said man, turn yourself in, OK it's minor crimes, but that's not what I'm really running from, I'm running from"

II.

K. Mears: Why did you shoot this officer, Trooper Lingard?
B. Aleksey: I don't know, I was scared.
K. Mears: Scared of what?
B. Aleksey: Scared of police itself.

III.

G. Darnell: Are there any outstanding warrants on you now through the Federal U.S. Marshall Service?
B. Aleksey: Yea.
G. Darnell: How long have they been outstanding on you?
B. Aleksey: Since last year.
G. Darnell: Have you ever made contact with them in an attempt to clear that up?
B. Aleksey: Yea.
G. Darnell: But you never did turn yourself in?
B. Aleksey: No.

The warrants were subsequently referred to in a conversation between the defendant and a local television station:

> "The reason why I took off because I knew I had problems in I had couples of warrants out in Philly and New York. So I paranoid I got scared I panicked and I left."

Our Supreme Court has allowed Lyle testimony in several death penalty cases when the other crime was proved by clear and convincing evidence and the prejudicial effect did not outweigh the probative value. **State v. Rusty Woomer (II),** 277 SE2d 696 (1981); **State v. Jonathan Simmons,** 427 SE2d 175 (1993); **State v. Robert Southerland,** 447 SE2d 862 (1994); **State v. Forney,** 468 SE2d 641 (1996).

In **Forney**, the Court allowed testimony that a car being operated by the defendant had been stolen in another state.

Other South Carolina death penalty cases have specifically dealt with the motive exception. In **State v. Robert South (I)**, 331 SE2d 775 (1985), the defendant was prosecuted for the murder of a law enforcement officer. The State's theory was that the defendant mistook the murdered police officer with another police officer who previously arrested him. Our Supreme Court found no error in introducing evidence of the defendant's prior arrest for resisting arrest and disorderly conduct (the defendant was convicted only of disorderly conduct) in order to show motive). (Emphasis added).

In another law enforcement officer murder death penalty case, **State v. Johnson, 410 SE2d 547 (1991)**, the testimony of a passenger in a van that the defendant had killed the van's driver and hidden the body in the van and that the defendant stated he would kill any police officer that stopped him so they would not find the body was appropriate Lyle testimony to establish motive and intent in the murder of a trooper who stopped the van. Lyle testimony was also used to establish motive in **State v. Bell, 393 SE2d 364 (1990).**

In a North Carolina law enforcement death penalty case, **State v. Williams, 233 SE2d 507 (1977)**, the defendant was wanted for a prior murder and armed robbery. The defendant was stopped for speeding while operating a stolen vehicle with stolen tags. The North Carolina Court found no error in the admission of testimony proving the prior crime in order to show motive for the subsequent murder of the police officer.

In summary, the State contends that the previously quoted excerpts from the defendant's statement as well as some evidence that the defendant did in fact have outstanding warrants is crucial to the State's case inasmuch as the State believes the defendant will falsely testify that his companion, Gloryavee Perez Blackwell, murdered Trooper Lingard.

Respectfully submitted.

WALTER M. BAILEY, JR., SOLICITOR
THE FIRST JUDICIAL CIRCUIT
140 NORTH MAIN STREET, SUITE 102
SUMMERVILLE, SOUTH CAROLINA, 29483
803-871-2640

JUNE 8, 1998

(NOT UNDER ARREST)

Anthony Lynn Stack am not under arrest for, nor am I being detained for any criminal offenses concerning the events I am about to make known to S/A W. Darnell a/k/a K. Mears. I understand I am free to walk away without saying anything, and I volunteer the following information of my own free will, for whatever purposes it may serve.

I am 31 years of age, and I live at 1380 Norway Rd Orangeburg S.C. 29115.

(can) cannot read and write and completed the 12th grade in school. DOB: [redacted].

Soc. No.: [redacted] Tel. No. H-531-6092 W-531-6240

On 12-31-97 at approximately 2325 pm (11:25), I Cpl. Lynn Stack and Task Force Deputy Casy Gallup were patroling S.C. 6 in the town of Santee. We pulled a car over in the Ramada Inn parking lot. During this traffic stop Task Force Deputy Lynn Shirer came across our patrol radio saying loudly Trooper Down, Trooper Down. I immediately jumped back into my patrol vehicle while proceeding back onto S.C. 6, Deputy Shirer (Lynn) stated over the radio that they were at the 97mm southbound. I proceeded off the exit ramp onto I-95 southbound. As I topped the bridge of the train over pass between the 97mm and 98mm, I could see a set of blue lights on the shoulder in the emergency lane at the 97mm. There was a Burgundy or Brown mini van about 6 car lengths in front of F/Sgt Lingards car. I pulled behind the van and backed up. Myself and Deputy Gallup ran back to F/Sgt. Lingard's car. F/Sgt Lingard was lying face down in the emergency lane and Deputy Shirer was standing over him. F/Sgt Lingard's hat was still in the middle of the interstate. I called for F/Sgt Lingard but got no response. He was not moving. He was not breathing. I went to touch him to turn him over but Deputy Shirer started hollering giving a description of the car. He stated it was a white Mustang G.T with Delaware tags. He stated that he thought he struck the Mustang with bullets. At that time Task Force Deputy Marty Journey pulled up and said lets go get the car. Myself and Deputy Gallup jumped back into my patrol car to give chase. All of this took about 30 seconds. We proceeded south bound on I-95. I called C'burg dispatch to let them know that they should call Dorchester County Units to

I have read each page of this statement consisting of 1 of 2 page(s), each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained herein are true and correct.

This statement was completed at _____ M. on the 2nd day of January 19 98

Signature of person giving voluntary statement

SWORN TO AND SUBSCRIBED TO BEFORE ME THIS 2nd DAY OF Jan., 19 98

Louise W. Darnell

NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: 8/25/2007

WITNESS: _____

WITNESS: _____

I certify that I have been given a copy of this statement consisting of 2 pages. _____

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SCDPS 5/95

4415

VOLUNTARY STATEMENT

SUPPLEMENTAL

L/Cpl. Anthony L. Stack

Statement of, Continued.

se on the lookout for the vehicle. I was listening to Deputy Gallup's radio. As we entered Dorchester County, I heard on Deputy Gallup's radio that Holly Hill police unit was chasing the white Mustang with no lights on. I turned around at the 82 mm and headed north bound. We then proceeded onto I-26 eastbound toward Charleston. I then heard the Holly Hill police unit state that he did not know whether the white mustang kept going on U.S. 176 towards Berkeley or gotten off on to S.C. 16. We got off on S.C. 16 towards Pinnapolis. I advise C-85 (L/Cpl. Guerdine) and C-106 (Trp R. C. Floyd) to proceed on down to U.S. 176 & I-26. When I got to S.C. 16 & U.S. 176 I switched over to Charleston channel 7 they then advise me that the patrol units were chasing toward Rivers Ave. Then the dispatcher stated that they had the vehicle stopped and subject in custody. Myself and Deputy Gallup proceeded into Summerville to the location of the apprehension and awaited for Lt. Robinson. A.L.S.

Person giving statement to place initials behind last word of statement as appears on last page.

Signature of person giving voluntary statement

COPY

STATE OF SOUTH CAROLINA)) COUNTY OF ORANGEBURG)	IN THE COURT OF COMMON PLEAS
BAYAN ALEKSEY, #5059 Applicant, vs. STATE OF SOUTH CAROLINA, Respondent.	C/A No. 01-CP-38 - 628 RESPONDENTS POST-HEARING MEMORANDUM IN OPPOSITION TO APPLICATION FOR POST-CONVICTION RELIEF

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B. Applicant's right to counsel, as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60, was violated as

a result of his representation throughout the pre-trial and trial proceedings by trial counsel who labored under an actual conflict of interest arising from trial counsel's simultaneous employment with the Fourteenth Circuit Solicitor's Office of the State of South Carolina. See *Mickens v. Taylor*, __ U.S. __, 122 S.Ct. 1237 (2002); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway, et al. v. Arkansas*, 435 U.S. 475 (1978); and *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001). [Applicant Memorandum, p. 84-117]

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C. Applicant's right to counsel, as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60, was violated as a result of his representation throughout the pre-trial and trial proceedings by trial counsel who labored under an actual conflict of interest arising from trial counsel's simultaneous employment with the South Carolina Insurance Reserve Fund. See *Mickens v. Taylor*, __ U.S. __, 122 S.Ct. 1237 (2002); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway, et al. v. Arkansas*, 435 U.S. 475 (1978); and *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001).

Insurance Reserve Fund Conflict Issue 68

D. Applicant's right to counsel, as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60, was violated as a result of his representation throughout the pre-trial and trial proceedings by trial counsel who labored under an actual conflict of interest arising from trial counsel's simultaneous employment as an attorney for the South Carolina Department of Corrections. See *Mickens v. Taylor*, __ U.S. __, 122 S.Ct. 1237 (2002); *Cuyler v. Sullivan*, 466 U.S. 335 (1980); *Holloway, et al. v. Arkansas*, 435 U.S. 475 (1978); and *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001).

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E. Applicant's right to counsel, as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution and Article 1,

Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60, was violated as a result of the trial court's failure to procure a valid waiver from the Applicant of his lead trial counsel's actual conflict of interest which arose from trial counsel's simultaneous employment as an attorney for the South Carolina Insurance Reserve Fund. *Mickens v. Taylor*, __ U.S. __, 122 S.Ct. 1237 (2002); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway, et al. v. Arkansas*, 435 U.S. 475 (1978); and *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001).

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F. Applicant's right to counsel, as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60, was violated as a result of the constructive absence of counsel at the hearings regarding Applicant's lead trial counsel's conflicts of interests. See *U.S. v. Cronic*, 466 U.S. 648, 659 (1984); *Brooks v. Tennessee*, 406 U.S. 605 (1972); and *Frett v. State*, 298 S.C. 54, 378 S.E.2d 249 (1988).

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G. Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to provide enough information to Applicant to enable Applicant to make a voluntary, knowing, and intelligent waiver of an actual conflict of interest, which arose during Applicant's proceedings, or to insist upon the appointment of alternate counsel who did not labor under a conflict of interest. *Strickland v. Washington*, 466 U.S. 668 (1984) and *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001)(Petitioner has shown an actual conflict of interest that adversely affected her attorney's performance. Further, her initial waiver of a potential conflict did not act as a waiver of this actual conflict.)

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H. Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South

Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure in the *Jackson v. Denno* hearing to argue that Applicant's "confession" was improperly induced by a promise and involuntary. *Strickland v. Washington*, 466 U.S. 668 (1984).

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I. Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by counsels' failure to request a change of venue due to extensive and prejudicial pre-trial publicity involving the offense charged and the Applicant's character and failure to explore this publicity through voir dire. *Strickland v. Washington*, 466 U.S. 668 (1984).

IAC and Failure to Move to Change Venue 86

J. Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' decision to imply to the jury, through voir dire questioning, that Applicant was a foreign national. *Strickland v. Washington*, 466 U.S. 668 (1984).

Inquiry of Jurors About Foreign Nationals - IAC 90

K. Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' complete failure to question any member of the jury panel regarding her view of the death penalty. See *U.S. v. Cronic*, 466 U.S. 648, 659 (1984); *Hamilton V. Alabama*, 368 U.S. 52, 55 (1961); *Frett v. State*, 298 S.C. 54, 378 S.E.2d 249 (1988) and S.C. Code Section 16-3-20(D)&(E).

Failure to Question Voir Dire on Views on the Death Penalty - IAC 93

L Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to attempt

to rehabilitate any jurors who indicated in voir dire that they could only vote for life in a death penalty case. *Strickland v. Washington*, 466 U.S. 668 (1984) and S.C. Code Section 16-3-20(D)&(E). (ABANDONED IN THIRD AMENDED APPLICATION AND POST- HEARING BRIEF).

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M Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to exercise peremptory strikes and challenge for cause during jury selection. *Strickland v. Washington*, 466 U.S. 668 (1984).

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N Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to the trial court's appointment of SLED Agent Buster Edwards to the position of supervisor of the sequestered jury panel. *Strickland v. Washington*, 466 U.S. 668 (1984). [ABANDONED IN THIRD APPLICATION AND BRIEF

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S Applicant was denied the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by appellate counsel's failure to argue on direct appeal that trial counsel's actual conflict of interest was so serious as to be unwaivable. *Strickland v. Washington*, 466 U.S. 668 (1984) and *United States v. Schwarz, et al.*, 283 F.3d 76 (2d Cir. 2002).

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P(6) Trial counsel failed to investigate fully and effectively Applicant's life and background and to present the information to the sentencing jury in a coherent and meaningful manner. Counsel failed to utilize properly the information their investigation uncovered and to find other information. Counsel failed to employ the services of a social worker. Counsel failed to employ the services of an

adaptability expert to testify as to Applicant's likelihood to adapt to prison life if sentenced to life in prison.

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O. Applicant was denied the right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 163-26(B)(1) and 17-23-60 at the guilt or innocence phase of his trial. *Williams v. Taylor*, 120 S.Ct. 1495 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984); *Jolly v. State*, 443 S.E.2d 566 (S.C. 1994).

(1) Beginning with the opening statement and throughout the entire guilt or innocence phase of Applicant's trial, trial counsel "opened the door" to alleged prior bad acts and bad character of Applicant.

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O. (Guilt Phase IAC continued)

6. Trial counsel failed to properly cross examine SLED agent Mears. Counsel did not question Mears about Applicant's allegations of coercion during police interrogation. Counsel failed to question Mears about certain evidence belonging to Gloryvee Perez found in car that was evidence of her recent criminal activity and gave her motive to shoot Trooper Linguard. Counsel failed to cross examine Mears about the missing SLED statement of Sarah Pivero.

7. Trial counsel failed to properly cross examine SLED agent Darnell. See (6) above. 148

GLORYVEE PEREZ BLACKWELL CLAIMS

Ground O. (IAC -Guilt) (4) .Trial counsel failed to properly cross examine and impeach state's witness, and Applicant's former co-defendant, Gloryvee Perez. Counsel failed to impeach witness with evidence of her motive to commit crime of which Applicant was charged. Counsel failed to prove Perez' character through character evidence involving specific instances or relevant dishonest conduct.

Ground O. (9)(IAC) Trial counsel failed to fully investigate the crime charged and the state's witnesses and to present that information to the jury in a coherent and meaningful manner.

Ground O. (10) (IAC) Trial counsel failed to adequately investigate Gloryvee Perez. Such an investigation would have uncovered a substantial amount of evidence that Ms. Perez had a significant motive to shoot the victim.

GROUND Q (BRADY) Applicant was denied due process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law by the prosecution's failure to disclose material information which was favorable to the defense on issues of guilt and punishment. *Brady v. Maryland*, 373 U.S. 83 (1963) and *Kyles v. Whitley*, 514 U.S. 419 (1995).

GROUND Q (1) The prosecutor knowingly failed to disclose evidence of Gloryvee Perez' motive and recent criminal activity and affirmatively mislead trial counsel regarding the existence and materiality of this evidence. 150

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GROUNDP(5)	Ineffective Assistance of Counsel at Sentencing
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STATE OF SOUTH CAROLINA)) COUNTY OF ORANGEBURG)	IN THE COURT OF COMMON PLEAS
BAYAN ALEKSEY, #5059)) Applicant,)))) vs.))) STATE OF SOUTH CAROLINA,))) Respondent.)	C/A No. 01-CP-38 - 628 RESPONDENTS POST-HEARING MEMORANDUM IN OPPOSITION TO APPLICATION FOR POST-CONVICTION RELIEF

The Respondents, above-named, hereby make a post-hearing memorandum to the application for state postconviction relief filed on May 31, 2001, as amended on January 31, 2005. The hearing was conducted from November 12, 2002-November 15, 2002 and July 7, 2003 through July 10, 2003. The Applicant, through counsel James Brown of Beaufort and David Tarr of Columbia made an Applicant's Brief Supporting Third Amended Application for Post-conviction Relief on January 31, 2005. This matter follows:

I. Procedural History.

Petitioner, Bayan Aleksey, # 5059, is currently a safekeeper under a sentence of death at the Lieber Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Orangeburg County. Aleksey was arrested on January 1, 1998. At the January 1998 term of the Court of General Sessions for Orangeburg County, Aleksey was indicted for murder. 98-GS-38-0244. He was represented by court-

appointed counsel, Thomas R. Sims and I. McDuffie Stone, III. On August 24, 1998, the matter was called to trial before the Honorable Edward B. Cottingham. The matter was prosecuted by Walter M. Bailey, Jr., Solicitor of the First Judicial Circuit. On August 29, 1998, the jury entered a unanimous verdict of guilty for the crime of murder. ROA. p. 1804.

The sentencing phase began on August 31, 1998. ROA. p. 1856. After testimony was received the jury was instructed to consider whether the State had proven beyond a reasonable doubt the existence of the following statutory aggravating circumstance:

> 1. Killing of a law enforcement officer of the State of South Carolina while in the performance of his duties.

ROA. p. 2156, ll. 12-16. Also, ROA. p. 2146, ll. 20-22. The jury was also directed to consider the following statutory mitigating circumstance:

> The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

ROA. p. 2161, l. 25 - p. 2162, l. 13. The jury was also instructed that "you may consider any other mitigating circumstance which is supported by the evidence in this case." ROA. p. 2162, ll. 14-22. After two (2) hours and ten (10) minutes of deliberation, on September 1, 1998, the jury found the existence of the statutory aggravating circumstance and recommended a sentence of death. ROA. p. 2171-72. The jury was polled on its verdict. ROA. p. 2172-74. Counsel made a motion for a new trial and sentencing. ROA. p. 2179-80. Judge Cottingham denied the motion. ROA. p. 2180. The judge then sentenced Aleksey to death. ROA. p. 2181-82.

The Petitioner was represented on appeal by Robert M. Dudek of the South Carolina Office of Appellate Defense. In the appeal, counsel raised the following issues:

I.

Whether the judge violated Due Process when he instructed the jury that it had "one single objective and that is to seek the truth," because the charge was burden-shifting and it diluted the reasonable doubt standard since the jury's sole function was to determine whether the state proved Appellant's guilt beyond a reasonable doubt?

II.

Whether the judge erred by refusing to suppress Appellant's confession where Appellant told the police "that's all I have to say" after his statement, the police turned the tape recorder off for two hours, continued to converse with Appellant, made promises, did not give him Miranda warnings again before interrogation continued. The police did not scrupulously honor the invocation of Appellant's right to silence in violation of Michigan v. Mosley, and the judge also impermissibly delegated this portion of his Miranda duties to the jury by not ruling?

III.

Whether the judge erred by refusing to allow Appellant to cross-examine Gloryvee Perez about nine other serious narcotics counts of a New Jersey indictment against her where she testified on direct examination she had been convicted of simple possession of cocaine, since her credibility was at issue as a witness, and the jury was left with a false impression of Perez and her credibility as a result of the direct examination?

IV.

Whether the judge erred by refusing to redact references to a contract on Appellant's life from his statement where the solicitor candidly admitted the jury could conclude Appellant had mafia dealings, since Appellant had not placed his character in issue, and the references were an obvious suggestion Appellant was a bad person with a propensity to commit murder?

The South Carolina Supreme Court entered its opinion on November 13, 2000. Rehearing was denied on December 6, 2000. *State v Bayan Aleksey,* 343 S.C. 20, 538 S.E.2d. 248 (2000).

The Applicant sought certiorari to the United States Supreme Court. In his petition for certiorari, he raised the following issue:

Were petitioner's due process rights under Estelle v.McGuire, 502 U.S. 61 (1991), violated where the trial court instructed the jury that it "had but one single objective, and that is to seek the truth," where only petitioner or his girlfriend could have shot the state trooper, since there was a reasonable likelihood that the

jury understood the instruction to mean that its duty was to decide which of the two actually shot the trooper, making the instruction burden-shifting and lessening the state's duty to prove petitioner's guilt beyond a reasonable doubt?

On May 14, 2001, the Supreme Court denied the petition. Aleksey v. South Carolina, 00-8921, _U.S._, 121 S.Ct. 1974 (2001), (cert. denied).

Counsel for Mr. Aleksey filed a petition for stay on May 22, 2001. On June 5, 2001, the Court issued an order for stay assigning this Court to handle the matter. Prior to this assignment, on May 31, 2001, appellate counsel for Mr. Aleksey, Robert Dudek, prepared and filed an application for state post-conviction relief on his behalf.

II. Summary Of State's Version of the Case.

On December 31, 1997, Sergeant Franklin L. Lingard of the South Carolina Highway Patrol was murdered while on duty in Orangeburg County, South Carolina.

On New Year's Eve 1997, Sergeant Franklin Lingard of the South Carolina Highway Patrol stopped a white Ford Mustang with a Delaware license plate for speeding on Interstate 95. Sergeant Lingard approached the driver's side of the Mustang and was shot to death by a gun fired from inside the car on the driver's side. Officer Lin Shirer, a narcotics officer with the Calhoun County Sheriff's Office, accompanied Sergeant Lingard on patrol that night. Officer Shirer witnessed the shooting, but was unable to see inside the car to identify the shooter because of its dark tinted windows.

A multi-car chase ensued. An officer stopped the Mustang long enough for Gloryvee Perez Blackwell (Blackwell) and her two children to exit from the passenger side of the vehicle. While Blackwell and the children were exiting the car, appellant held a gun to his head and

threatened to kill himself if the officers came any closer to him. Appellant sped away and was eventually stopped again when an officer deliberately collided his vehicle with the Mustang.

Appellant was pulled unconscious from the car, treated at the scene by EMS, then taken to the hospital, and from there to the Orangeburg/Calhoun Regional Detention Center on New Year's Day. A background check on appellant revealed an extensive record of arrests for fraud-related activities, outstanding warrants, and numerous aliases. In addition, both the Mustang and its license tag were stolen.

On January 2nd, appellant gave two statements to officers from the State Law Enforcement Division (SLED). In the first, he claimed Blackwell was driving and shot Sergeant Lingard, after which they stopped and changed seats. In the second, appellant confessed to the shooting.

III. ALLEGATIONS IN THE APPLICATION FOR POST-CONVICTION RELIEF

In the initial application for post-conviction relief filed by Mr. Dudek on May 31, 2001, the following allegations are raised:

I. Ineffective Assistance Of Trial Counsel.

1. The failure of trial counsel to investigate and procure available impeachment evidence on Gloryvee Perez Blackwell. Blackwell was the only other suspect in the case, and the failure to investigate her background was highly prejudicial to petitioner.

2. The failure of trial counsel to object to a host of "other bad acts" evidence., including evidence about petitioner's sex life and details about his relationships with women, since this evidence was not necessary to the jury's consideration of the trial issues.

3. The failure of trial counsel to argue during the *Jackson v. Denno* hearing that the petitioner confessed based on a promise from the police that he would be moved into the general population. Petitioner was concerned for

his life, and a confession in return for a promise of his safety should have rendered the confession inadmissible.

4. The failure of trial counsel to properly impeach Gloryvee Perez Blackwell with the ten count New Jersey drug indictment against her. Blackwell's denial of any knowledge of dismissed counts directly affected her credibility, and also showed her knowledge of leniency for cooperating with the police.

5. The failure of trial counsel to investigate and present any meaningful case in mitigation regarding petitioner's background.

6. The failure of trial counsel to object to the judge's instruction that the jury would "consider the aggravating circumstances against the mitigating circumstances, and you will decide whether you will recommend the death penalty or life imprisonment." R. 2165. This was an improper "weighing" instruction.

In the applicant's final and third amended application, dated January 31, 2005, the Applicant, through counsel Brown and Tarr make the following claims:

A. Applicant was denied his right to collateral review of his conviction and death sentence as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law by trial counsels' failure to retain a copy of the trial counsel file, as required by South Carolina Code Section 17-27-130.

(1) After trial, and prior to filing the application for post-conviction relief, trial counsel released their respective files to applicant without retaining a copy.

B. Applicant's right to counsel, as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60, was violated as a result of his representation throughout the pre-trial and trial proceedings by trial counsel who labored under an actual conflict of interest arising from trial counsel's simultaneous employment with the Fourteenth Circuit Solicitor's Office of the State of South Carolina. See *Mickens v. Taylor*, __U.S. __, 122 S.Ct. 1237 (2002); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway, et al.*

v. Arkansas, 435 U.S. 475 (1978); and *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001).

(1) At the time of the crime for which Applicant was convicted and sentenced to death and during every proceeding leading up to and including the actual trial of the case, Applicant's lead trial counsel, Isaac McDuffie Stone, III, was employed as a part time assistant solicitor with the Fourteenth Judicial Circuit Solicitor's Office of the State of South Carolina. Applicant was prosecuted in the First Judicial Circuit which shares a geographic border with the Fourteenth Judicial Circuit. Applicant did not receive adequate information from Attorney Stone from which he could make an intelligent decision regarding his representation by Mr. Stone. Furthermore, Applicant did not receive any advice from an attorney who did not labor under a conflict of interest, so that he was unable to make an informed decision regarding his representation by Mr. Stone.

(2) Counsel's performance was adversely affected by this actual conflict of interest.

C. Applicant's right to counsel, as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60, was violated as a result of his representation throughout the pre-trial and trial proceedings by trial counsel who labored under an actual conflict of interest arising from trial counsel's simultaneous employment with the South Carolina Insurance Reserve Fund. See *Mickens v. Taylor*, __ U.S. __, 122 S.Ct. 1237 (2002); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway, et al. v. Arkansas*, 435 U.S. 475 (1978); and *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001).

(1) At the time of the crime for which Applicant was convicted and throughout trial counsel's preparation of the case and during the actual trial of the case, Applicant's lead counsel, Isaac McDuffie Stone was also employed a an attorney for the South Carolina Insurance Reserve Fund. Attorney Stone's primary duties in that capacity included the defense of state agencies and state employees against lawsuits filed by various parties. The state

agencies Mr. Stone represented at the time he represented Applicant included, but are not limited to: the South Carolina Highway Patrol and Orangeburg County. The charge for which Applicant was convicted occurred in Orangeburg County, involved the murder of a South Carolina Highway Patrolman, and was investigated by SLED in cooperation with the Orangeburg County Sheriff's Department.

(2) Counsel's performance was adversely affected by this actual conflict of interest.

D. **Abandoned. [Issue D concerned counsel Stone's representation of the South Carolina Department of Corrections]**

E. Applicant's right to counsel, as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60, was violated as a result of the trial court's failure to procure a valid waiver from the Applicant of his lead trial counsel's actual conflict of interest which arose from trial counsel's simultaneous employment as an attorney for the South Carolina Insurance Reserve Fund. *Mickens v. Taylor*, __ U.S. __, 122 S.Ct. 1237 (2002); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway, et al. v. Arkansas*, 435 U.S. 475 (1978); and *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001).

(1) No valid waiver of Mr. Stone's potential conflicts of interests were obtained from the Applicant. No waiver of any sort was obtained from Applicant regarding Mr. Stone's actual conflict of interest.

(2) Counsel's performance was adversely affected by this actual conflict of interest.

F. Applicant's right to counsel, as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60, was violated as a result of

the constructive absence of counsel at the hearings regarding Applicant's lead trial counsel's conflicts of interests. See *U.S. v. Cronic*, 466 U.S. 648, 659 (1984); *Brooks v. Tennessee*, 406 U.S. 605 (1972); and *Frett v. State*, 298 S.C. 54, 378 S.E.2d 249 (1988).

(1) Applicant was only represented by Mr. Isaac McDuffie Stone, III, and Thomas R. Sims at the hearings regarding Mr. Stone's conflicts of interest. Mr. Sims failed to provide Applicant any advice regarding these conflicts. Mr. Stone's conflicts of interests prevented him from assisting Applicant during the hearings regarding these conflicts.

(2) The actions of the government, in appointing Mr. Stone and failing to provide Applicant with two lawyers free from conflict during a critical stage, amounted to the constructive denial of counsel to Applicant at a critical stage in the proceedings and prejudice is presumed.

G. Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to provide enough information to Applicant to enable Applicant to make a voluntary, knowing, and intelligent waiver of an actual conflict of interest, which arose during Applicant's proceedings, or to insist upon the appointment of alternate counsel who did not labor under a conflict of interest. *Strickland v. Washington*, 466 U.S. 668 (1984) and *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001)(Petitioner has shown an actual conflict of interest that adversely affected her attorney's performance. Further, her initial waiver of a potential conflict did not act as a waiver of this actual conflict.)

(1) Applicant was never advised of the specific types of hazards which arose during the course of representation provided by Mr. Stone. Applicant never waived these actual conflict of interests.

(2) Trial counsel's performance was adversely affected by this conflict and, but for counsel's deficient performance,

the outcome of the trial proceedings would have been different.

H. Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure in the *Jackson v. Denno* hearing to argue that Applicant's "confession" was improperly induced by a promise and involuntary. *Strickland v. Washington*, 466 U.S. 668 (1984).

(1) During the *Jackson v. Denno* hearing, it was revealed that Aleksey's confession was induced by a promise which rendered its production involuntary. Trial counsel failed to raise this issue.

(2) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

I. Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by counsels' failure to request a change of venue due to extensive and prejudicial pre-trial publicity involving the offense charged and the Applicant's character and failure to explore this publicity through voir dire. *Strickland v. Washington*, 466 U.S. 668 (1984).

(1) An extremely large number of newspaper articles, television broadcasts, and other media sources publicized accounts of the shooting of the victim and the subsequent investigation. Further, many of these media releases concerned the "bad character" of the Applicant outside of the context of the case in issue. The extent of this coverage was evidence from the responses obtained during the voir dire of the jury panel. In fact, ten of the fourteen jurors who actually sat in the trial of the Applicant's case indicated prior knowledge of this case from some source outside of the judicial system. However, trial counsel inexplicably failed to inquire into the substance of these jurors' prior knowledge about this case.

(2) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

J. Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' decision to imply to the jury, through voir dire questioning, that Applicant was a foreign national. *Strickland v. Washington*, 466 U.S. 668 (1984).

(1) Trial counsel consistently asked jurors whether they could be fair to a foreign national. Applicant is not a foreign national and is in fact a U.S. citizen by nature of his birth in the United States. Further, Applicant has never lived outside of the United States.

(2) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

K. Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' complete failure to question any member of the jury panel regarding her view of the death penalty. See *U.S. v. Cronic*, 466 U.S. 648, 659 (1984); *Hamilton V. Alabama*, 368 U.S. 52, 55 (1961); *Frett v. State*, 298 S.C. 54, 378 S.E.2d 249 (1988) and S.C. Code Section 16-3-20(D)&(E).

(1) The transcript is clear that both counsel for defendant completely failed to ask any member of the jury panel questions regarding her view of the death penalty. In fact, counsel states, "The defense is specifically not going to ask them any questions concerning their feelings on the death penalty, although we have a statutory right to do so." Further, it was counsel's position, stated in the record, that this case would not go to the penalty phase and, therefore, questioning jurors regarding their view on the death penalty would be unnecessary. Also, counsel requested the court to prohibit the solicitor from asking similar questions. (This request was denied).

(2) Trial counsel completely failed to subject the prosecution's case to adversarial testing during voir dire and prejudice is presumed.

L. **Abandoned [Issue concerned claim of ineffective assistance of counsel based upon the failure to attempt to rehabilitate juror who indicated that they could only vote for life].**

M. Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to exercise a peremptory strike against juror number 144. *Strickland v. Washington*, 466 U.S. 668 (1984).

(1) Counsel for Aleksey possessed information which would cause a jurors provided reasonable attorney to exercise a peremptory strike. Trial counsel failed to exercise all of their peremptory challenges.

(2) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

N. **Abandoned.[Issue concerned ineffective assistance of counsel based upon the failure to object to the trial judge's appointment of S.L.E.D. Agent Buster Edwards as supervisor of bailiff team when he worked for lead agency and had signed discharge papers from the hospital and served the arrest warrant on the Applicant].**

O. Applicant was denied the right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 163-26(B)(1) and 17-23-60 at the guilt or innocence phase of his trial. *Williams v. Taylor*, 120 S.Ct. 1495 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984); *Jolly v. State*, 443 S.E.2d 566 (S.C. 1994).

(1) Beginning with the opening statement and throughout the entire guilt or innocence phase of Applicant's trial, trial

counsel "opened the door" to alleged prior bad acts and bad character of Applicant.

(2) Trial counsel failed to properly cross examine and impeach state's witness Yelena Batkilina. Counsel did not impeach this witness with evidence of prior criminal convictions, character evidence involving specific instances of prior dishonest conduct, or challenging her false testimony.

(3) Trial counsel failed to properly cross examine and impeach state's witness Lisa Watson. Counsel did not impeach witness with character evidence involving specific instances or prior dishonest conduct or challenging her false testimony.

(4) Trial counsel failed to properly cross examine and impeach state's witness, and Applicant's former co-defendant, Gloryvee Perez. Counsel failed to impeach witness with evidence of her motive to commit crime of which Applicant was charged. Counsel failed to prove Perez' character through character evidence involving specific instances or relevant dishonest conduct.

(5) Trial counsel failed to properly cross examine and impeach state's witness Sarah Pivero. Counsel did not impeach witness with character evidence involving specific instances of prior dishonest conduct.

(6) Trial counsel failed to properly cross examine SLED agent Mears. Counsel did not question Mears about Applicant's allegations of coercion during police interrogation. Counsel failed to question Mears about certain evidence belonging to Gloryvee Perez found in car that was evidence of her recent criminal activity and gave her motive to shoot Trooper Lingard. Counsel failed to cross examine Mears about the missing SLED statement of Sarah Pivero.

(7) Trial counsel failed to properly cross examine SLED agent Darnell. See (6) above.

(8) **Abandoned.[Issue concerned trial counsel's advice that Applicant not testify, although bad character evidence and**

confession could not be explained without Aleksey's testimony].

(9) Trial counsel failed to fully investigate the crime charged and the state's witnesses and to present that information to the jury in a coherent and meaningful manner.

(10) Trial counsel failed to adequately investigate Gloryvee Perez. Such an investigation would have uncovered a substantial amount of evidence that Ms. Perez had a significant motive to shoot the victim.

(11) Abandoned.[Issue concerned failure of defense to hire a false confession expert].

(12) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

P. Applicant was denied the right to effective assistance of counsel at guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections and S.C. Code Sections 16-3-26(B)(1) and 17-23-60 at the sentencing phase of his trial. *Williams v. Taylor*, 120 S.Ct. 1495 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984); *Jolly v. State*, 443 S.E.2d 566 (S.C. 1994).

(1) Abandoned.[Issue concerned alleged failure of counsel Sims to adequately cross-examine Theresa McCann with specific instances of prior dishonest conduct].

(2) Trial counsel failed to properly cross examine and impeach state's witness Jaime Farrell by attacking her testimony with specific instances of prior dishonest conduct and by challenging her false testimony.

(3) Trial counsel failed to properly cross examine and impeach state's witness Sarah Pivero. See Ground O, number 5.

(4) Trial counsel failed to properly cross examine and impeach state's witness Lisa Watson. See Ground O, number 3.

(5) Trial counsel failed to investigate backgrounds of state's witnesses and their allegations. Such an investigation would have provided a substantial amount of impeachment material.

(6) Trial counsel failed to investigate fully and effectively Applicant's life and background and to present the information to the sentencing jury in a coherent and meaningful manner. Counsel failed to utilize properly the information their investigation uncovered and to find other information. Counsel failed to employ the services of a social worker. Counsel failed to employ the services of an adaptability expert to testify as to Applicant's likelihood to adapt to prison life if sentenced to life in prison.

(7) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Q. Applicant was denied due process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law by the prosecution's failure to disclose material information which was favorable to the defense on issues of guilt and punishment. *Brady v. Maryland*, 373 U.S. 83 (1963) and *Kyles v. Whitley*, 514 U.S. 419 (1995).

(1) The prosecutor knowingly failed to disclose evidence of Gloryvee Perez' motive and recent criminal activity and affirmatively mislead trial counsel regarding the existence and materiality of this evidence.

(2) The state knowingly failed to disclose, to Applicant's trial counsel, evidence of Yelena Batkilina's prior criminal record and other specific acts of dishonesty, fraud and wrongdoing.

(3) the state knowingly failed to provide, to trial counsel, a statement given by Sarah Pivero to the agents of SLED.

(4) The state knowingly failed to provide, to trial counsel, evidence of fraud involving state's witness Lisa Watson.

R. Applicant was denied his right to due process, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and South Carolina law as a result of the prosecution's presentation of false testimony and failure to correct the false impression created by that testimony. *Napue v. Illinois*, 79 S.Ct. 1173, 360 U.S. 264, 3 L.Ed.2d 1217 (1959), and *Mooney v. Holohan*, 294 U.S. 103 (1935), and *Miller v. Pate*, 386 U.S. 1 (1967).

(1) The prosecutor knowingly presented false testimony when state's witness Yelena Batkilina testified incorrectly about the date of purchase of the weapon in this case, not clarifying conflicting testimony between Ms. Batkilina and state's witness French and allowing Ms. Batkilina to testify falsely that she had not seen Applicant after either the purchase of this weapon or, alternatively, after Applicant's release on bond for a Pennsylvania charge. The prosecutor had information in his possession which informed him this testimony was patently false. Further, the prosecutor specifically relied on this false testimony during his closing argument.

(2) The prosecutor knowingly presented false testimony when state's witness Jaime Farrell testified that she did not deposit money into a New Jersey bank.

(3) The prosecutor knowingly presented false testimony when state's witness Jaime Farrell testified that she did not withdraw money from a New Jersey bank.

(4) The prosecutor knowingly presented false testimony when state's witness Lisa Watson testified, in the guilt phase of the trial, that she had reported the White Mustang stolen on October 5, 1997.

(5) The prosecutor knowingly presented false testimony when state's witness Lisa Watson testified, in the sentencing phase of the trial, that Bayan Aleksey stole money from her husband's credit cards.

(6) **Abandoned.[Issue concerned claim that the prosecution presented false testimony when Theresa McCann testified that the Honda CBR motorcycle was purchased while she was at work].**

S. Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by appellate counsel's failure to argue on direct appeal that trial counsel's actual conflict of interest was so serious as to be unwaivable. *Strickland v. Washington*, 466 U.S. 668 (1984) and *United States v. Schwarz, et al.*, 283 F.3d 76 (2d Cir. 2002).

(1) Applicant was represented at trial by counsel who labored under several serious conflicts of interest, including simultaneous employment with the Insurance Reserve Fund, the Fourteenth Circuit Solicitor's Office for the State of South Carolina and the South Carolina Department of Corrections.

(2) Trial counsel's conflicts were of such a serious nature that no rational defendant would knowingly and intelligently desire that attorney's representation, regardless of whether the defendant was willing to waive his right to conflict-free counsel.

III. DISCUSSION OF THE ISSUES.

In his third amended application, he makes various allegations relayed to acts and omissions by his original trial counsel, Duffie Stone and Thomas Sims. Respondents submit that he has failed to satisfy his burden of proof showing of ineffective assistance of counsel.

A. Standards Governing Claims of Ineffective Assistance of Counsel.

In his Application, he makes various allegations concerning the effective assistance of counsel in the sentencing phase. Under the standard for evaluating claims of ineffective assistance of counsel, the Applicant must establish that counsel's representation fell below an objective standard of reasonableness. Strickland v Washington, 466 U.S. 668 (1984). Counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler v. State, 286 S.C. 441, 334 S.E.2d 813

(1985). The proper measure of counsel's performance is whether he fell outside of the range of competence demanded of lawyers practicing criminal law. Butler, supra. The scrutiny of counsel's acts or omissions must be highly deferential and a reviewing court must make every effort to remove the distorting effects of hindsight. Strickland, 466 U.S. at 689.

Competency is measured against what an objectively reasonable attorney would have done under circumstances existing at the time of the representation. Savino v. Murray, 82 F.3d 593, 598 (4th Cir. 1996). The Court should "decline to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial." Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996).

As the Supreme Court made clear in Strickland:

> . . . the reasonableness of counsel's actions may be determined or substantially influenced by the defendants own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigations are reasonable depends upon such information . . . [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Strickland, 466 U.S. at 691. Barnes v. Thompson, 58 F.3d 971, 978 (4th Cir. 1995); Matthews v. Evatt, 105 F.3d 907, 919-920 (4th Cir. 1997). The mere fact that trial counsel's strategy was unsuccessful does not render counsel's assistance unconstitutionally ineffective. Strickland, 466 U.S. at 689. Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995).

While Strickland does not require counsel investigate every conceivable line of mitigating evidence or require the submission of such evidence in every case, "strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgment support the limitations on investigation.... A decision not to investigate thus must be directly assessed for reasonableness in all the circumstances." Wiggins v. Smith, 539 U.S. 510, 533, 123 S.Ct. 2527, 2541, 156 L.Ed.2d 471 (2003). Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004).

Recently, in Rompilla v. Beard, the Supreme Court reaffirmed that a trial counsel's performance cannot be found adequate if it is supported by an unreasonably limited investigation. --- U.S. -----, 125 S.Ct. 2456, --- L.Ed.2d ----- (2005). Rompilla's mitigation evidence consisted of testimony from five of his family members who pleaded with the jury for mercy, and asserted that Rompilla was an innocent and good man. Id. at 2460-61. Nonetheless, the jury found that the aggravating factors outweighed the mitigation evidence and sentenced Rompilla to death. Rompilla later presented a habeas claim for ineffective assistance of counsel for trial counsel's failure to present significant mitigating evidence about Rompilla's childhood, mental capacity and health, and alcoholism. Id. at 2461. Rompilla argued that trial counsel should have examined his school records, especially considering several of his family members were unfamiliar with his childhood and trial counsel knew that he had left school after the ninth grade. Id. at 2463. Moreover, Rompilla asserted that trial counsel should have investigated his juvenile and adult incarceration records considering that counsel knew that he had a criminal history. Id. In addition, Rompilla faulted trial counsel for not investigating whether he had a history of alcohol dependency in light of certain indications of alcohol abuse. Id. The Third Circuit found that

defense counsel was not ineffective given counsel's efforts in investigating, including interviewing Rompilla, several of his family members, and consulting three mental health experts. Id. at 2461. Moreover, the state court found that defense counsel extensively interviewed Rompilla and several of his family members, and that Rompilla was often actively obstructive in assisting trial counsel in his defense. Id. at 2462-63, 2472. The Supreme Court reversed the denial of habeas relief. The Court found that trial counsel's investigation was unreasonable because counsel failed to examine Rompilla's prior conviction file even though the prosecution had acknowledged that it was going to use Rompilla's prior convictions as an aggravating factor to push for the death penalty. Id. at 2464. The Rompilla Court rejected the argument that trial counsel sufficiently investigated Rompilla's prior convictions by reviewing his rap sheet. Id. at 2464 n. 3. The Court held that if trial counsel had examined Rompilla's prior conviction file, counsel would have found information that would have made them skeptical of the impression of Rompilla's background they had gotten from the family members thus far. Therefore, counsel would have undoubtably investigated further and uncovered the voluminous mitigating evidence not introduced at trial. Id. at 2468. The Court also rejected the contention that the efforts that counsel did take--namely, extensively interviewing Rompilla and his family, and consulting three mental health experts--were enough to release counsel from investigating further. Id. at 2466-67.

In addition to a burden of showing "deficient" performance, counsel must also prove "prejudice" under the Sixth Amendment. In VonDohlen, the South Carolina Supreme Court cited with approval the United States Supreme Court holding that the capital defendant had proven prejudice because there is a reasonable probability at least one juror would have struck a different balance and returned with a different sentence had the jury been confronted with the considerable

mitigating evidence. Wiggins at 536, 123 S.Ct. at 2543, 156 L.Ed.2d at 495; see also Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (defendant's attorneys were ineffective in failing to investigate and present substantial mitigating evidence during penalty phase of capital case, including description of abuse and neglect during defendant's early childhood and testimony he was borderline mentally retarded; counsel's error prejudiced defendant because omitted evidence might have influenced jury's appraisal of defendant's moral culpability). [1] In Wiggins, when reviewing a claim of ineffective assistance of counsel at the penalty phase of a capital trial stated:

> "In Strickland [v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)], we made clear that, to establish prejudice, a 'defendant must show that there is 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, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence."

539 U.S. at 534. Respondents submit that Aleksey is unable to satisfy this burden of proof from his allegations.

B. Discussion of Specific Claims.

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[1] In Jones v. State, 332 S.C. 329, 504 S.E.2d. 822 (1998), the South Carolina Supreme Court restated the "prejudice" prong in a capital sentencing proceeding as being established when "there is a reasonable probability that, absent [counsel's] errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death," citing Strickland. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Jones, 504 S.E.2d at 823-824. Accord, Plath v. Moore, 130 F.3d 595 (4th Cir. 1997) ("given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and hence, the sentence imposed." Thus, in weighing the omitted evidence against that actually used to convict and sentence Plath, the mitigating evidence seems insufficient to shift the balance in Plath's favor.").

A. **Applicant was denied his right to collateral review of his conviction and death sentence as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law by trial counsels' failure to retain a copy of the trial counsel file, as required by South Carolina Code Section 17-27-130.** [Applicant's Memorandum, p. 50-55]

Failure To Retain Original Files By Trial Counsel

In his initial allegation, Aleksey contends that the federal constitution and state law demand that he is entitled to a new trial based upon the failure of his trial counsel to retain custody of their entire file, when upon Aleksey demand while the appeal was ongoing. The Applicant contends that S.C. Code Ann. Section 17-27-160 demands that custody be maintained by trial counsel in capital cases and the failure to do so was error. He contends that trial counsel's "improper disposal" of their file worked to the detriment of Aleksey because it compromised the ability of trial counsel to state whether or not a particular document was in the file at least sixteen times during the hearing. In their memorandum, the Applicant notes several passages from the testimony of counsel Sims and Stone where the lack of the file precluded their ability to refresh their recollection concerning their knowledge as supportive of their due process violation. See Applicant's Memo, p. 51-54. He now contends that this prejudiced their presentation and therefore demands a new trial.

S.C. Code Ann. § 17-27-130 provides for waiver of attorney-client privilege by allegation of ineffective prior counsel and to prior counsel's files during a state post-conviction relief proceeding. In its pertinent part, it states:

> . . .In the case of a defendant who has been convicted of a capital offense and sentenced to death, the defendant's prior trial counsel or appellate counsel shall make available to the capital defendant's collateral counsel the complete files of the defendant's trial or appellate counsel. ***The capital defendant's collateral counsel may inspect and photocopy the files, but the defendant's prior trial or***

> *appellate counsel shall maintain custody of their respective files, except as to the material which is admitted into evidence in any trial proceeding.*

(Emphasis added). The act was passed in 1996 and is clearly applicable to the present proceeding.

The record before this Court is uncontradicted that trial counsel, upon request, turned their original file directly over to the Bayan Aleksey without keeping a complete copy of their own records. Counsel Thomas Sims testified that he sent his file back to Aleksey and did not maintain a copy. PCR 68. He stated that Aleksey wanted his entire file. He recalled that he spoke with Stone about it. After he received a call from someone in the grievance office of the Bar and said to give Aleksey the file. PCR 69. Sims stated that while he had a file during the representation, Stone's file was the central file and made computer entries on it. PCR 618. He stated that there was a grievance made by Aleksey limited to receiving his file. PCR 660. He stated again that information he received from the grievance board gave him the impression that he had no other choice but to turn that original file over to him. PCR 661. Particularly, this was done in February 199 before any post conviction proceedings had begun. PCR 661.

Counsel Duffie Stone testified that he had copies of some matters he retained, but none of the original except for correspondence he received from Aleksey after the file was turned over to him. Counsel stated that a copy of his computer time records were retained. On February 22, 1999, he stated he sent the original file to Aleksey. PCR 827. As Stone stated in his letter to Aleksey :

> " Please understand that you have the originals of this file. I have not made any copies nor retained anything other than what I have in my computer and my attorney notes. If you lose any of these materials it may compromise both your appeal and your post-conviction relief petition."

PCR 829.

Stone stated that in February 1999, he was not aware of the statute that required capital trial counsel to maintain that original of the file, which he did not know until he received a copy of the application for post conviction relief. PCR 829-830. He stated that he retained some work product, but not the discovery materials. He stated that he was not aware of the statute when Aleksey asked for the file, but still did not want to give it to him because he thought it was a bad idea. PCR 831. He noted that the January 28, 1999 letter he received from Aleksey demanded "the original, not a photocopy." Id. Since he felt it would have been a delay in turning that matters over to Aleksey, since there was no Kinko's in Beaufort, after receipt of the disciplinary council correspondence, " I decided to move as quickly as humanly possible." Stone stated that he felt that he needed to hold the file until someone was appointed to represent him on appeal and that he would turn the file over to them. PCR 1140. He was concerned about sending a file into the prison based upon attorney-client privileged matters and how much of the material Aleksey could keep or what would be seized. PCR 1141.

Stone felt that when Aleksey grieved him over the file, he decided to turn it over to him on Feb. 19, 1999. PCR 1144. At that time the appeal was still pending. Counsel Stone, prior to the release contacted Prof. Adams at the U.S.C. Law School about his ethical concern in turning over the file who advised him to give up the file, although there was no discussion about Section 17-27-130. PCR 1144. He stated that there was no place, like Kinko's or fast copying place in Beaufort nor someone he was willing to turn it over to make copies. Stone felt that retaining a copy of his billing records and some other materials would be good as far as keeping his memory as to what the case involved.

Stone stated he had discussions with Sims; but did not recall the specifics but thought he would turn over his file. PCR 1146. Stone stated that when he received the grievance his first thought was to get rid of the file which is what he did. PCR 1146.

On redirect, Stone acknowledged that there was never any official order from the grievance people to turn over the file, but everyone assumed that. PCR 1230.

Analysis

In his memorandum, he makes various constitutional claims and implies that the state statute provides a remedy against the state of a new trial if trial counsel does not maintain their original file. There is nothing in the statute which creates the remedy he now asserts.

More importantly, Aleksey lacks standing to assert that claim he is claiming. It is undisputed that the appeal was still pending at the time of the January 1999 request by Aleksey for the original copy of his file. It is also undisputed that Aleksey received the entire files from both Sims and Stone. Now, Aleksey asserts because he personally received the original file from his counsel, he is entitled to a new trial because it may have impaired his ability to prove his PCR case, apparently due to his own commingling of the original files with independently received documents and materials from his own Freedom of Information Act requests. Extraordinarily, he contends that this hindrance in his ability to prove his case based upon his own actions and request enures to the executive branch and "shocks the conscious" and creates a due process violation, citing Rochin v. California, 342 U.S. 165 (1952).

"The doctrine of estoppel applies if a person, by his actions, conduct, words or silence which amounts to a representation, or a concealment of material facts causes another to alter his position to his prejudice or injury." Hubbard v. Beverly, 197 S.C. 476, 480, 15 S.E.2d 740, 741

(1941); see also Ott v. Ott, 182 S.C. 135, 140, 188 S.E. 789, 792 (1936) ("The final element of an equitable estoppel is that the person claiming it must have been misled into such action that he will suffer injury if the estoppel is not declared. That is, the person setting up the estoppel must have been induced to alter his position, in such a way that he will be injured if the other person is not held to the representation or attitude on which the estoppel is predicated."). In the famous opinion of Chief Justice Perley in Horn v. Cole, 51 N. H. 287, 289 (12 Am. Rep. 111), where it is said:

> "Equitable estoppels are admitted on the *** ground of promoting the equity and justice of the individual case by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth. *** As in other cases of fraud and dishonesty, the circumstances out of which the question may arise are of infinite variety; *** and in equity, the doctrine has been liberally applied to suppress fraud and enforce honesty and fair dealing, without any attempt to confine the doctrine within the limits of a strict definition." (Italics ours.).

Smith v. Williams, 139 S.E. 625, *630 (S.C 1927) . Estoppel by conduct is recognized and given application in numerous South Carolina decisions. Smith, supra.

Aleksey cannot gain a new trial where his own conduct created the alleged technical violations and hindrance and expressed difficulty in presenting his case when he demanded that counsel effectively not comply with the statute by demanding his original files. First, his letters demanding the original file.[2] Second, his apparent grievance action demanded the original files

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[2]Majority rule concerning the right of a former client to access an attorney's file is that, with narrow exceptions, upon termination of the attorney-client relationship and where no claim for unpaid legal fees is outstanding, the client is presumed to be entitled to full access to the attorney's file on a matter where the attorney represented the client. Restatement (Third) of Law Governing Lawyers § 46(2). Minority rule concerning the right of a former client to access an attorney's file is that "end product" documents, such as filed pleadings, final versions of documents prepared for the client's use, and correspondence with the client, opposing counsel, and witnesses, belong to the

be released to him. Further, his own actions in commingling the materials cannot be deemed to work to his benefit.

Alternately, if not estoppel, then Aleksey has clearly waived his right to claim any error under the statute by his own request for the original files. The assertion otherwise must be denied.

B. **Applicant's right to counsel, as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60, was violated as a result of his representation throughout the pre-trial and trial proceedings by trial counsel who labored under an actual conflict of interest arising from trial counsel's simultaneous employment with the Fourteenth Circuit Solicitor's Office of the State of South Carolina. See *Mickens v. Taylor*, __ U.S. __, 122 S.Ct. 1237 (2002); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway, et al. v. Arkansas*, 435 U.S. 475 (1978); and *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001). [Applicant Memorandum, p. 84-117]**

Appointed Trial Counsel Stone's Part -time Employment As Assistant Solicitor in Different County.

In his allegation B, he contends that appointed trial counsel Duffie Stone's part-time employment with the Fourteenth Circuit Solicitor's Office created a conflict of interest which should require a new trial. Relying on Howerton v. State, 640 P.2d 566-67 (Okla. 1982), where

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client, while non-end product materials remain the property of the attorney. See generally 7 Am.Jur.2d Attorneys at Law § 193 (1997). SCACR Rule 411, Rule 1.16(d) states: "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as ... surrendering papers and property to which the client is entitled...."; see also Annotated Model Rules of Professional Conduct Rule 1.16(d) commentary at 256 (3d ed.1996). It has been concluded that these same rules lead to a conclusion that a client's file belongs to the client, and upon request, an attorney must provide the client with the file. See Averill v. Cox , 145 N.H. 328, *339, 761 A.2d 1083, **1092 (2000).

the Oklahoma Court of Appeals determined that it was error to allow a part-time prosecutor from one jurisdiction to represent an indigent in another jurisdiction, Aleksey now contends that the conflict was unwaivable, or if waived, could not be intelligently waived. He further relies upon testimony from Professor John Freeman who opined that under S.C. Bar Ethics Advisory Opinion 77-2, referencing A.B.A. Formal Opinion 142 and A.B.A. Formal Opinion 262, a prosecutor is precluded from representing a criminal defendant while a part-time prosecutor in another jurisdiction.

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*); *see also* United States v. Tatum, 943 F.2d 370, 376 (4th Cir.1991) (stating that an actual conflict adversely affecting representation can include an attorney's action taken on

behalf of one client that is necessarily adverse to the defense of another or an attorney's failure to take action on behalf of one because it would adversely affect the other).

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 Court noted that the circuit courts of appeals have engaged in an "expansive application" of the standard which "the language of Sullivan itself does not clearly establish, or indeed support." Id. In other words, the Supreme Court found that Sullivan 's concurrent representation standard had been applied in situations not envisioned by the Sullivan Court. The Court further noted that the "purpose" of the Sullivan and Holloway standards was "not to enforce the Cannons of Legal Ethics, but to apply needed prophylaxis in situations where Strickland itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." Id. "[B]reach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel." Id. (quoting Nix v. Whiteside, [475 U.S. 157, 165, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986)]). In the end, however, because it was not presented with this issue squarely, the Court declined to resolve the scope of Sullivan, leaving it an "open question." Id. at 1246.

In Longworth v. Ozmint, 302 F.Supp.2d 535 (D.Ct. S.C. 2003), the court stated that for practical purposes the Supreme Court made it clear that applying Sullivan "unblinkingly" to "all kinds of alleged attorney ethical conflicts," id. at 1245 (quoting Beets v. Scott, 65 F.3d 1258, 1266 (5th Cir.1995) (en banc)), is unwise, but has left intact (at least for the moment) circuit

court opinions making such expansions. See also Moss v. United States, 323 F.3d 445, 461-64 (6th Cir.2003) (noting the distinction drawn by the Mickens Court). The Mickens decision itself affirmed and left unchanged the holding and analysis on the conflict of interest issue set out by the Fourth Circuit in Mickens v. Taylor, 240 F.3d 348 (4th Cir.2001). However, the court there only focused its analysis on the "adversely affect" portion of the standard, and not the "actively represented" portion.

Looking elsewhere, the Fourth Circuit has interpreted the "actively represented" standard to mean that the Petitioner must demonstrate that the attorney represented interests which "diverge[d] with respect to a material fact or legal issue or to a course of action." Gilbert v. Moore, 134 F.3d 642, 652 (4th Cir.1998) (en banc) (quoting Sullivan, 446 U.S. at 356 n. 3, 100 S.Ct. 1708 (Marshall, J., concurring in part and dissenting in part)).

The two requirements, an actual conflict of interest resulting in an adverse effect on counsel's performance, are often intertwined, making the factual analyses of them overlap. An attorney has an actual conflict when he actively represents conflicting interests. Sullivan, 446 U.S. at 350, 100 S.Ct. 1708. His representation of conflicting interests, however, is not always as apparent as when he formally represents two parties who have hostile interests. He may harbor substantial personal interests which conflict with the clear objective of his representation of the client, or his continuing duty to former clients may interfere with his consideration of all facts and options for his current client. When the attorney is actively engaged in legal representation which requires him to account to two masters, an actual conflict exists when it can be shown that he took action on behalf of one. The effect of his action of necessity will adversely affect the appropriate defense of the other. Moreover, an adverse effect may not always be revealed from a

review of the affirmative actions taken. Rather, the failure to take actions that are clearly suggested from the circumstances can be as revealing. United States v. Tatum, 943 F.2d 370, 375-76 (4th Cir.1991).

1. How the issue was presented at trial

The record reveals that on February 2, 1998, before Judge Brown, during the 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 and asked for the court to make inquiry.

Stone advised the Court:

> ...I explained to him 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.

Feb. 2, 1998 Tr. p. 5-7. App. Ex. 70. 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.

ROA p. 2192-93. See also 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. 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.

ROA 181-82.

2. The Post-conviction testimony.

During the state post-conviction relief hearing, counsel Stone and Sims both revealed their recollections of the representation and discussions with Aleksey.

a. Duffie Stone

Stone testified that at the time he represented Aleksey, he was a part-time prosecutor in the Fourteenth Circuit, exclusively in Beaufort. PCR 718-19. He stated this allowed him to have a private practice. He stated that throughout his practice, he never had any dealings with Trooper Lingard, the victim, although he had dealings with a number of troopers. PCR 723. He stated he began as a part-time prosecutor in 1997. PCR 724-25.

Stone declared that a large bulk of his private practice had been civil litigation assigned from the Insurance Reserve Fund. PCR 725-27. He stated that he had represented state employees, including the Department of Corrections and highway patrolmen. PCR 729.

Stone recalled speaking with Aleksey concerning his other employment on February 2, 1998. 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. PCR 730-31. Stone explained to him he had never represented Trooper Lingard and never met him, to his knowledge. PCR 731.

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

Stone stated that prior to the voir dire, on August 25, 1998, another similar inquiry was held in open court where the potential conflict as a part-time prosecutor was developed. PCR 744, ROA 180-182. Stone stated that he specifically brought up the Insurance Reserve Fund at that time. PCR 745-47. At the PCR, counsel Stone noted that there was no discussion about I.R.F. work at the May 1998 proceeding (although there was at the February 1998 hearing). PCR 747-49.

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. PCR 753-54.

Inquiry was made of Stone concerning the South Carolina Bar Ethics Advisory Opinion 77-2 and the A.B.A. Ethics Opinions 142 and 262. PCR 980-83. Stone stated that he had always assumed that "full-time prosecutors could not have a private practice", but had not heard that part-time prosecutors were prohibited from representing defendants outside of their circuits. PCR 984. Stone stated that he was required to place himself on the appointment list for cases and a requirement that he put his name on the list for conflicts outside of his circuit. PCR 985.

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. PCR 1129. Stone stated that his work in the Fourteenth Circuit Solicitor's Office was limited to prosecuting cases in Beaufort County and had not tried any cases outside of that county. Id. Stone also stated while a part-time prosecutor, he had defended other cases outside of Beaufort, including appointment on another death penalty case in Orangeburg after this one, Patty Syphert. PCR 1130-31.

Stone stated at the time of his 1997 representation of Aleksey, he stated that he felt that court rules [i.e. Rule 608] required him to put himself on conflict [appointment] list outside of places where he had a conflict. PCR 1131-32.

Stone stated that in 1997 he did not feel that he could not adequately represent Aleksey based upon his part-time status in the Fourteenth Circuit. PCR 1131. He stated that nothing occurred during the Aleksey representation that cause him to think or hold back on cross-examination or the development of evidence based upon in other role with the Fourteenth Circuit. PCR p. 1132, ll. 12-19.

Considering SCACR Rule 407, 1.7(b)(1) on whether he believed that the rep[resenataion would be adversely affected,[3] 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. 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. PCR 1133-34. He declared that the ongoing representation did not impact his ability to defend Aleksey. PCR 1134. To the contrary. Stone suggested that he had developed a knowledge of police procedures which probably would have worked to Aleksey's advantage. PCR 1134. 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. PCR 1134-35.

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[3] Rule 1.7(b)(1): "The lawyer reasonably believes that the representation will be adversely affected."

Atone stated that Aleksey never sought, after the initial consultation, to have him removed and consistently consented to the representation. PCR 1135.

Stone stated that his work on Aleksey occurred at his Beaufort office and no material went to the Fourteenth Circuit. PCR 1135.

Stone stated his work with Orangeburg County did not impact his representation of Aleksey concerning the escape charge against his client. PCR 1136. 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." PCR 1136. 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. PCR 1136-37.

Stone stated that Aleksey had told him, at some point, that the police had coerced a confession which would be an obvious defense to that evidence. However, Stone felt this assertion was not backed up by his taped interview with WIS-TV. However, his I.R.F. representation of various entities did not affect the manner he approached the claims. PCR 1137-38.

Stone stated that the confession itself revealed a two hour and seven minute gap between each statement. His obvious cross-examination would (and did) concern what happened in the gap. Stone recalled using a board during his cross-examination of the officers, outlining the time from and demeanor leading to the crying. PCR 1138. Further, he recalled using the confession form given Aleksey that he could stop answering questions at any time to emphasize what it means to them when a person says they don't want to talk anymore, which occurred at the end of

Aleksey's first statement. The obvious point needed to be presented at trial in cross-examination and was done. PCR 1139.

Stone stated he also made an F.O.I. request to get every case the agents had handled to determine how many resulted in confessions and used that on cross-examination. PCR 1139. "But there was nothing in that that made me feel uneasy about cross-examining them." PCR 1139-40. 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. PCR 1140.

Stone did not know if co-counsel Sims ever discussed the conflict issue with Aleksey outside of his presence. PCR 1146. Stone reiterated that after he had disclosed to Aleksey his representation as a part-time prosecutor and the Department of Public Safety and the Highway Patrol, and that the victim was a trooper Aleksey never indicated he wanted him removed and in fact like the idea. PCR 1147.

Concerning the Jackson v. Denno issue, Stone stated that his client advised him that it was "coerced" or "pressured" but did not mention to him (or in the WIS interview) that he was beaten. PCR 1147. He stated he never received a vivid description of the coercion. PCR 1147. In his notes of March 23, Stone suggested nothing was new except allegations of beating the confession out of him. PCR 1147-48. Stone stated he noted then that Aleksey had not told WIS-TV about it and his response was that he was under pressure, but did not recall him saying "they beat the confession out of him."

Stone stated he spoke with Aleksey a number of times concerning the confession and what caused him to do it. He told him he was coerced or pressured, but there were not any physical signs.

Stone stated that they discussed with Aleksey testifying at the Jackson v. Denno hearing and they decided not to do it. PCR 1149. Stone noted they were successful, nevertheless in keeping out a statement Aleksey made while in custody at the hospital concerning the Russian mob hit.

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. PCR 1150.

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. PCR 1225-26.

Stone, however, re-affirmed that the letter and lawsuits did not affect the manner he personally handled the defense. PCR 1226.

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. PCR 1230.

b. Thomas Sims

Co-counsel Thomas Sims testified that he spoke with Aleksey about the fact that he was a former prosecutor and during the conversation explained that Stone was currently a prosecutor part-time in another circuit. PCR 58-59. Sims, however, denied having any knowledge of what particular civil cases Stone was handling at that time. PCR 60-61. Sims acknowledged that a

solicitor carried the same power of arrest any citizen had, but was unclear what, if any, power of arrest they had beyond that, although they frequently carried badges for identification purposes.[4] Sims acknowledged that there is a procedure for the Attorney General to assign another solicitor to handle conflict matters in a different circuit. PCR 66. However, Sims stated that Stone had no jurisdiction in the First Circuit and had not been granted any authority by Solicitor Bailey or the Attorney General. PCR 67-68.

On cross-examination, Sims stated he had discussions with Stone about whether his role in the Fourteenth Circuit would impact his ability to represent Aleksey. PCR 611. "At no time was I ever under the opinion or under the influence that he would not do what was required." PCR 611. He said Stone never suggested to him that he was acting under any conflicting loyalties. PCR 611. Sims never found that Stone suggested or failed to take any act based upon something that could impact other clients through the I.R.F., or for Orangeburg police or the detention center. PCR 611.

Sims declared that Aleksey never asked Stone to be removed from the case. PCR 612. Sims acknowledged that he talked with Stone about their experiences as prosecutors and how it gave them an understanding as to what a prosecutor might be looking for and how they would go about it. PCR 613.

c. Professor John Freeman

Professor Freeman, an expert in legal ethics, testified, over objection, concerning whether a conflict of interest existed in the representation by Stone and whether it was waivable. It was

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[4] Solicitors and assistant solicitors do not possess a power of arrest greater than those of any citizen. The power of arrest is limited to "qualified" law enforcement officers certified through training at the Department of Public Safety. S.C. Code Ann. § 23-6-430 (1976).

Professor Freeman's opinion that Stone should not have been in the case based upon his service as a part-time prosecutor, coupled with his civil work where he made money from representing law enforcement officials which compromised his independence and that somebody in this situation should not believe that representation would not be aversely affected. PCR 1453-54. He further opined that since this was a death penalty case and the standards are high.

Prof. Freeman felt it was not a waivable conflict. However, he opined that even if it was, the waivers were inadequate, particularly in a death penalty case because Aleksey was not informed of the potential negative side effects of Stone's representation. PCR 1455. He stated more detail was necessary to cover the pluses, minuses and foreseeable consequences. PCR 1455-56.

Professor Freeman noted his reliance on S.C. Bar Ethics Advisory Opinion 77-2 which he opined had not been reversed which he summarized to find "a prosecuting attorney may not defend a criminal case in either federal or state court." PCR 1456. Also, he noted supportive of that conclusion A.B.A. Ethics Opinion 142. He noted that even if those opinions had been overturned, his opinion would be the same because the stakes are high in a death penalty case and the public is entitled to a proceeding that is squeaky clean and beyond reproach. PCR 1456-57.

On cross-examination, Prof. Freeman noted that he felt the S.C. Bar Ethics Advisory Opinion he relied upon had not been revoked. Upon review of S.C. Bar Ethics Advisory Opinions 91-19 and 94-31, he noted there was no reference specifically revoking the opinion he referred to on direct. PCR 1458. He admitted that 94-31 stated:

> Additionally, 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, citing 91-19.

PCR Tr. p. 1460, ll. 3-7. Further, he admitted S.C. Bar Ethics Advisory Opinion 91-19 stated:

> "In Ethics Advisory 82-26, Committee concluded that assistant solicitor, a public official, might have undue influence over the witnesses for a 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.
>
> Rule 1.7 prevents a lawyer from representing clients with adverse interest. If the attorney reasonably believes that his position as 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 affected by his responsibilities as assistant solicitor, then he is free to undertake representation in other circuits."

PCR 1460. He was also not aware of Beaver v. Thompson, 93 F.3d 1186 (4th Cir. 1996), that hold that no conflict of interest exists [in a capital case] in trial counsel's representation of a defendant, even though counsel is a part-time prosecutor in a neighboring county. PCR 1461. Freeman declared, however, these don't change his view and "it's not the law of South Carolina." PCR 1461.

However, Prof. Freeman admitted that Rule 1.7 does not state specifically that a part-time prosecutor cannot defend cases in another jurisdiction. He stated his interpretation is what a reasonable lawyer would conclude. Prof. Freeman suggested a reasonable person would review South Carolina ethics advisory opinions in 1997 and 1998, but disagreed that a lawyer would have relied upon the 1991 and 1994 ethics opinions because he felt it was dicta because it did not pertain specifically to part-time prosecutors. PCR 1464. He noted that the 1982 opinion [82-26] precluded a part-time prosecutor from defending cases. He stated that the two more recent opinions are misrepresenting the earlier opinions and should be ignored.

Prof. Freeman declared the practice of part-time solicitors defending defendants was wrong. PCR 1466.

Prof. Freeman admitted that SCACR, Rule 608 required non-full time prosecutors to make themselves available for appointment in criminal cases. PCR 1467-68. Particularly, he agreed that Rule 608(d)(1) 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. PCR 1468. However, he declared "it shouldn't be in a death case" or a murder case. PCR 1468.

Prof. Freeman opined that he thought the on the record waivers were "superficial and improper waivers." He stated it was not explaining to his client that fact that he worked with law enforcement and got along with law enforcement who is no the other side which would subconsciously make it more difficult to vigorously cross-examine law enforcement. PCR 1469-70. He opined that all the ramifications of the conflict were required to be disclosed, particularly under Bruce v. Leatherwood and an Oregon case.[5] PCR 1470. Prof. Freeman stated Aleksey was not advised why Stone's representation was something that he should not waive, if asked and why independent counsel would be better for him. PCR 1471.

3. Analysis

Respondents submit that 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.

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[5] Apparently, Prof. Freeman was referring to Bankers Trust v. Bruce, 283 S.C. 408, 323 S.E.2d 523 (Ct. App. 1984). An Oregon case that he was referring to is In re: Bovivin, 271 Or. 419, 533 P.2d 171 (1975)

First, the mere fact that Stone is a part-time prosecutor in the Fourteenth Circuit is not an actual conflict of interest. The South Carolina Supreme Court has not specifically addressed this issue upon a survey of its case. 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 counsel. Like Stone, the counsel in Beaver ha limited duties and had no working relationship with any of the witnesses at trial. Similar holdings have been made by various state courts. State v. Gleason, 277 Kan. 624, 88 P.3d 218 (2004)(simultaneously serving as defense counsel in one county and prosecutor in adjoining county does not create an actual conflict of interest); Ex Parte Borden, 769 So.2d 950 (Ala. 2000)(fact that defense counsel worked as special prosecutor in different county did not establish conflict of interest); People v. Herr, 658 N.E.2d 1032 (N.Y. 1995)(same); People v. Burchette, 628 N.E.2d 1014 (Ill. App. 1 Dist. 1993)(same); Bumgardner v. State, 401 N.W.2d 211 (Iowa App. 1986)(no conflict between burglary defense representation and part-time city prosecutor in same county where o city officers were involved in arrest, counsel dealt solely with municipal charges and counsel had no contact with county law enforcement agencies involved in arrest. Compare; 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).[6]

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[6] 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."

Defense counsel Stone was appointed to represent Aleksey pursuant to Stone's compliance with 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). Counsel Stone was not exempt from appointment, as a matter of statutory law, based upon his assignment.

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 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. The issue then shifts to whether that belief was reasonable. Respondents submit the belief was reasonable.

Initially, from Stone's perspective at the time [and since] it was reasonable. 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). PCR 1130-31. Similarly, he was not aware that part-time prosecutors were prohibited from representing criminal defendants, particular outside their jurisdiction. PCR 984. Importantly, because of his part-time prosecutor status, he was aware he was not exempt from court appointments under Rule 608 and the required to place his name on the appointment list. 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 ha looked at the items provided at the hearing. PCR 982.

The chronology of the Ethics Advisory Opinions support Stone's actions based upon what a reasonable person would have found. 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, 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 Applicant 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. It cannot be seriously questioned, however that a reasonable reading of the advisory would reveal the following:

1. S.C. Bar Advisory Op. 82-26 concluded an assistant solicitor in one county could not represent criminal defendants in another county.

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 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 advising was correct that the 1990 Rule change removed any per se prohibition to representation of criminal defendants.

Aleksey has pointed out no precedent in a South Carolina court that Aleksey could have relied upon to address this inquiry. 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, 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, Respondents submit 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, was he 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. PCR 1132. He felt throughout that his work in the Solicitor's Office and I.R.F. work did not impact his ability to defend Aleksey. 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. 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. PCR 611.

In his brief before this Court, for the first time, he suggests that Stone's employment adversely affected the representation for the following speculations:

1. Stone relief upon the same methods of law enforcement investigation conducted by SLED in his prosecution function that he was called upon to attack in Aleksey's defense. (Memo., p. 99)

2. Stone's employment precluded a change of venue motion which might have allowed the case to be transferred to Beaufort County, where attorney Stone would have been unable to continue in his representation. (Memo., p. 99-100).

3. Stone's alleged loyalty to the I.R.F. affected his failure to argue that Aleksey's confession was the product of coercion and brutality at the hands of SLED Agents Mears and Darnell. (Memo., p. 100-08)

4. Stone's I.R.F. representation of Trooper Lynn Stack, who did not testify, could have testified that Aleksey's hands were not covered in blood prior to GSR test to impeach Detective Gallup's testimony that she saw blood on his hands where Stack's statement make no reference to blood. (Memo., p. 108-09).

5. Stone's loyalty to Detention Center Director Bamberg caused him to fail to present him as a witness concerning the escape to have rebutted the state's characterization of the circumstances of the escape attempt. (Memo., p. 109-14).

Respondents submit that these specifications about alleged deficiencies were not the product of any alleged conflict of interest.

a. Methods of Law Enforcement

First, Stone's knowledge of methods of law enforcement investigation never adversely affected his representation. Second, Stone's "reliance" upon the same methods" of law enforcement investigation by SLED did not impair his defense, in any manner. Stone saw that his past experience in the Solicitor's Office had caused him to develop a knowledge of police procedures that would have worked to Aleksey's advantage. PCR 1134. There was nothing inherently antagonistic based upon this knowledge of techniques and procedures.

b. Change of Venue

The Applicant next contends his "conflict" precluded him from pursuing a change of venue motion which adversely affected him. There is no evidence to support that assertion.

The record is clear that the reason that a change of venue was not pursued was solely based upon both Stone and unaffected counsel Sims' belief that Orangeburg County was the best county for them to try the case, even with the prior press coverage. Stone declared that on March 30, 1998, counsel Sims had initially expressed a need to seek a change of venue. PCR 833-34. He said venue was a running concern and research was done throughout due to the tremendous amount of press coverage, which was consistent. However, Stone stated that the decision came down to where they would want to try the case which resolved, from a defense standpoint, Orangeburg was their preferred choice for a death penalty case. PCR 834-35. Around May 11, 1998, counsel Stone and Sims discussed not filing a change of venue motion. PCR 837.

Additionally, Stone declared the reasons for not filing the change of venue motion were the fact that the earlier press coverage included favorable information about the negative gun shot residue tests on Aleksey which was favorable to them and the focus of the defense strategy at

trial, that he had spoken with capital defense expert David Bruck concerning his decision not to change venue in Susan Smith and his thought on it.

Stone stated, however, that the main reason a change of venue was not sought was that Orangeburg County was a favorable place because "people are not shy about questioning law enforcement." PCR 839. Further, he contrasted the attitudes he had gained from his experience in Beaufort where civil rights cases are not brought because it is not favorable in that venue, whereas Orangeburg's different. As Stone stated: "Orangeburg is the best county...from the standpoint of the defense." PCR 840. Further, Stone noted that co-counsel Sims had fairly strong numbers when he ran for Solicitor and would know people there. PCR 840-41. Stone reasonably contrasted those options with the going to another county where they would not know anyone like Lee or Dillon. Stone saw an advantage to keeping it there, even though Trooper Lingard was from Orangeburg. PCR 841-42.

Stone noted that the problem was that any jury would be sensitive to the death of a state trooper, but thought it was outweighed. PCR 842-43. Stone stated he reviewed the newspaper articles, including articles that revealed Aleksey's long history of bad acts known to law enforcement and the coverage of the bond hearing where Solicitor Bailey stated Aleksey being either a strong suspect in a New York murder or a great flight risk would have weighed into those decisions. PCR 854.

Stone reiterated on cross-examination that after considering a change of venue during the representation, they decided against it because they preferred Orangeburg County. PCR 1151. It was his feeling that an Orangeburg jury questions law enforcement more than other counties and

is not a pro-law enforcement panel based upon his experience in representing law enforcement there and a desire to settle rather than try cases in Orangeburg. PCR 1151-52.

Co-counsel Thomas Sins corroborated the reasons behind not seeking a change of venue were not adversely affected by Stone's involvement with the Fourteenth Circuit or I.R.F. matters. He stated that they had discussed change of venue and that a decision was made not to seek a change of venue based upon their opinion that Orangeburg remained the best place to try the case. PCR 618-19. He stated that decision was based upon his own experiences with Orangeburg juries willingness, even in the fact of overwhelming evidence, to find a person not guilty, and the racial make-up of the juries, and Sims credibility with the Orangeburg community. PCR 620. Importantly, Sims noted that they were satisfied with the jury and had not used all their peremptory challenges. PCR 623.[7] See also, PCR 70-82.

Contrary to the "post hoc ergo propter hoc" suggestions of the Applicant in his brief, the fact of Stone's employment with the Fourteenth circuit had no adverse impact on the decision on whether or not to seek a change of venue.

c. Confession as a Product of Brutality

Aleksey now also asserts that the I.R.F. representation and part-time prosecutor adversely impacted upon the decision on whether to pursue "brutality" claims during the confession. The record, again, does not suggest this adverse impact.

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[7] If a change of venue is sought on the basis of pretrial publicity, general practice is to postpone ruling until jury panel is voir dired. State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997). A defendant who seeks a change of venue bears the burden of showing actual juror prejudice. State v. Gardner, 332 S.C. 389, 505 S.E.2d 338 (1998).

First, the record reveals a Jackson v. Denno hearing was held on June 8, 1998. 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 declares "I shot the trooper." ROA 2326-27. Stone complained that there were no notes and no recording of what took place in the gap. 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. 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. 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 contends a factual basis for this presentation derives from comments that Aleksey made to Thomas Sims that SLED beat the crap out of him (PCR 134, 141) and in a letter to Stone concerning beating the confession out of him. PCR 878.

The Applicant asserts 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 investigation that caused this decision.

From Thomas Sims perspective, although Aleksey had told him that SLED had beaten him (PCR 134, 141), he asked him specific questions about it because he had said they were beating him when they got him out of the car. PCR 139. Sims problem was that there was a

videotape from the Highway Patrol of it which showed no beating. PCR 139. The claim that Aleksey had made to him that they had pulled him out of the car, onto the ground, and kicking him was not revealed. PCR 140-41. All that he had at the confession was the existence of crying, without any witness to suggest why. PCR 140. Although Sims admitted crying may be indicative of a beating, he acknowledged that Aleksey had been crying during their own interviews. PCR 140. Sims further opined that in their investigation of the claims, there was no independent evidence or factual basis to support that there was either physical violence or threats during the gap period. PCR 614-16.

Stone credibly testified that he had reviewed in March 1998, some letters from Aleksey that suggested the confession was beaten out of him. PCR 877-78, 881-82. Stone said a problem with his belated assertions of beating the confession out of him was not consistent with Aleksey's telephone call to WIS-TV. At one point Aleksey had described to him one SLED agent hit him in the chest and another ha told him that he ha killed a friend of his and that he would not get out alive. PCR 878, 881.

Stone stated that he investigated the matter by attempting to determine that they were "closers" and sought an FOIA to get their history with successful confession. PCR 888-89. He stated he did not argue "beatings" where he sought to infer something happened in the two-hour gap. PCR 895.

Stone stressed that his comment about coercion was inconsistent with his WIS interview. PCR 1147. Stone stressed that in his own discussions with Aleksey other than being coerced or pressured to confess, there were no physical contact evidence to present. Further, he had discussed with Aleksey testifying and they decided not to do it. PCR 1149.

Stone opined that his work did not impact on the presentation challenging the confession.

d. I.R.F. Representation of Trooper Lynn Stack

In his brief before this Court, he asserts that Aleksey's representation was adversely affected by his I.R.F. representation of Trooper Lynn Stack. He contends that this conflict was revealed post hoc by the fact that Trooper Stack was not called in defense to rebut an assertion that Aleksey had blood on his hands which would affect a gunshot residue test where Stack, like Detective Katherine Gallup failed to include that information in the written statement. See R. 1103, 1108, 1110. The prosecution used this evidence from Det. Gallup to explain in inference the lack of gunshot residue.

In his memorandum, he asserts that Stone represented Trooper Lynn Stack through assignment from the Insurance Reserve Fund. Memorandum, p. 108. The record does not support that characterization. Instead, it reveals that counsel Stone did not ever represent Lynn Stack. PCR 792, 805, 806. Instead, counsel Stone merely acknowledged that he had spoken with Trooper Stack about the incident involved in the civil litigation of L.F. Brown v. [Trooper] Sheldon, PCR 790-92. He was handling that matter until August 19, 1998, prior to the start of the Aleksey trial, but during the representation. PCR 791. Stone admitted that he had spoken with Trooper Stack about the Brown case, but "I don't believe he was a part of that case." PCR 805.

Subsequent to the hearing before this Court, Aleksey, through counsel, proffered Applicant's Exhibit 96, which is an affidavit of Trooper Anthony Lynn Stack, dated January 2, 1998, involving the December 31, 1997 incident. The affidavit makes no reference to the Applicant. The affidavit reveals corroboration of Deputy Lynn Shriver's testimony that Trooper

Stack was one of the first people to arrive at the scene of the shooting and approached the body of Trooper Lingard, but makes no reference to any contact with Aleksey.

The Applicant, at the hearing, referred to R. 970-71 in which Calhoun County Deputy Lynn Shirer testified that she was with Trooper Lingard on December 31, 1997 when he attempted to stop Aleksey's mustang. R. 958. After describing the gunfire and seeing Trooper Lingard fall to the ground, she described firing toward the Mustang. R. 964-70. After she made the call on the radio, she stated that Trooper Lynn Stack was among the first to arrive at the scene. R. 970. She stated that Trooper Stack was not at the scene long and he and Detective Casey Gallup left in pursuit. R. 970-71.

Detective Katherine Gallup testified that she was riding with Trooper Stack that evening. R. 1103. She described the arrival at the scene and then the departure two minutes later on I-95. R. 1107. She stated that when she arrived at the K-Mart parking lot, she observed a number of other police officers and a wreaked Mustang. Particularly, she saw Aleksey handcuffed laying on his stomach with blood on his hands and face with EMS working on him. R. 1108.

On cross-examination, Stone sought to impeach Det. Gallup by noting that there was nothing in her statement about blood on his hands. R. 1110.

Subsequently, Trooper Robert Beres also indicated Aleksey had blood on his hands and a cut on his face. R. 118 (bleeding cut on forehead); p. 1125 (blood on hands). Subsequently, in response to a telephone call from SLED Capt. Knight, Trooper Beres's requested that the nurses bag Aleksey's hands, which they did. R. 1126. On cross-examination of Trooper Beres, counsel Stone sought to criticize and question the manner Aleksey was handcuffed and the fact that

nothing in his statement mentioned specifically grabbing his hands or blood on his hands. R. 1130.

EMS paramedic Tara Clark described arriving at the parking lot after Aleksey had already been handcuffed and described, on cross-examination from counsel Sims, that Aleksey did not have profuse bleeding (R. 1145), but did not recall anything out of the ordinary about his hands. R. 1147. She did not recall if there was any blood on his hands, but noted that there was so much going on that night. R. 1148.

The state never called Trooper Stack to testify in this case. In light of this record, it would be incredible to suggest that he was not called by the defense to be affirmatively impeached about a speculative matter due to an alleged actual conflict of interest, when counsel Stone, in fact, did not similar cross-examination on Trooper Beres, a state witness. The Applicant has failed to show any actual conflict of interest which adversely affect the defense as it relates to Trooper Stack. As counsel Stone unequivocally testified, if there was something helpful in the affidavit, he would have called Stack him as a witness. PCR 822.

e. Representation of Orangeburg Detention Center Director Willie Bamberg and Escape and Prison Adaptability Issues

In the memorandum, Aleksey claims that Stone's failure to present the testimony of Director Willie Bamberg was caused because of a conflict he had because he represented Bamberg in other civil actions. He contends that Bamberg should have testified to reveal that the "attempted escape" charge against Aleksey was made only as a matter of jail policy, not because they believed he actually intended to escape and that it was the only infraction Aleksey had while at the Detention Center before he was then transferred to Lee Correctional Institution as a safekeeper.

Aleksey further speculates this conflict in his representation of Bamberg impacted his decision to present a prison adaptability expert, because it would then have invited the prosecution to call Bamberg as a witness and would have been forced to cross-examine his own client - Bamberg.

Aleksey's speculation and re-creation of the facts ignores the fact that he failed to show an actual conflict of interest that adversely affected his representation. 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. R. 1970. He sated 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. R. 1971. When Keitt asked Aleksey why, he declared he was frustrated. 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. 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. 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. R. 1978. She described safekeeping as a place where they send inmates that are hard to handle or an escape risk. 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. 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. R. 1979. Further, on re-direct, she declared no one had gotten through the type of small window Aleksey broke. 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. 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. 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." 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. 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.

R.p. 2028, ll. 13-17.[8]

Stone testified that he did not recall representing Willie Bamberg while he was representing Aleksey. PCR 782. However, Stone represented the named "John Doe, Warden" in

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[8] In his memorandum, the Applicant criticizes the prosecution for commenting during their closing about the facts concerning the breaking of the chair window, his frustration, and the safekeeping. ROA 2110, 2116. Contrary to the concerns about a "warrant" this evidence was not stricken from the record and was subject to fair comment about his character and non-adaptability.

Charles W. Tyler v. Sheriff Bing Jones, 96-CV-28, from July 31, 1996 through February 10, 1998. PCR 806-07. See Applicant's Exhibit 86.

Stone stated Bamberg was in an official capacity so his dealings would have been brief. PCR 822. Because Aleksey was charged with escape, but at some point he felt that prison life would be discussed and Stone wanted to be sure that the escape charge was not a realistic escape and he thought that it was sewn up at trial and did not become an issue. PCR 823.

Stone stated that he did not hire a prison adaptability expert because he felt such testimony frequently backfires. PCR 1224. He was not aware of evidence to indicate that Aleksey was particularly adaptable to prison. 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. PCR 1225.

Stone stated he advised his client that he could not become involved in the lawsuits and wrote a letter and explained it to him on March 19. However, Stone testified that this letter did not affect the way the criminal defense was handled. PCR 1226.

Stone stated that his notes revealed at some point in the representation he or Mr. Sims spoke with Bamberg concerning the escape incident. 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 Bamberg who prepared an affidavit on May 20, 1998 [Exhibit 87]. In the affidavit, he described the fact the charges were made "because he threw 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."

The Applicant has failed to show that his other representation including his apparent work with Willie Bamberg created an actual conflict which adversely affected his representation. First, it is clear it did not impede his investigation of alleged jail escape where the defense was able to procure, without formal discovery, a favorable affidavit from Bamberg. Second, it did not interfere with Stone's ability to cross-examine the jail employees and develop similar information which limited the impact of their testimony. 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 adaptability testimony has little persuasive value 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. There was no actual conflict of interest. His claim otherwise is without merit.

Summary

Respondents submit that counsel Duffie Stone did not labor under an actual conflict of interest that adversely affected his representation of Aleksey. Like the defendant in Jones v. Polk, 401 F.3d 257 (4th Cir. 2005), a North Carolina capital case, Stone's representation of potential witnesses did not adversely affect his performance where other witnesses testified to essentially the same facts and counsel never constrained not to call the witness - Bamberg and Trooper Stack - because of any prior involvement with them either as an unnamed client (Bamberg) or potential witness (Stack). The United States Supreme Court decision in Mickens v. Taylor is clear - an actual "conflict of interest" means "a conflict that affected counsel's performance - as opposed to a mere theoretical division of loyalties."

This is the Applicant's failing in this matter - he has failed to show a "conflict that affected counsel's performance." In his quest to parse through the actions of counsel, he has attempted post hoc analysis to suggest, despite counsel (or unconflicted co-counsel's) protestations otherwise to suggest actions were not taken due to some divided loyalty on Stone's part. The problem, though, is that Stone's credible testimony, buttressed by Sims corroboration convincingly shows that there was no divided loyalty. His asserted failings in not seeking a change of venue were unrelated to his role as a prosecutor, but a reasoned course based upon what was best for Aleksey - an Orangeburg jury. His failure to present evidence of brutality were based upon the lack of supporting evidence, inconsistent statements by Aleksey and Aleksey's own perceived failings as a witness, not a speculative attempt to curry favor with his past or potential clients or to preserve the Insurance Reserve Fund fisc. Similarly, his failure to call either Trooper Stack or Director Bamberg as witnesses had nothing to do with any prior representation where he had spoken to Stack or represented Orangeburg county or the unnamed Warden, but was evidently based upon the fact that similar testimony was developed through cross-examination of the state's witnesses. In fact, his assertions concerning Bamberg are completely contradicted in the record because Stone and the defense team was able to secure, without available discovery, a useful affidavit from Bamberg. There was no divided loyalty that affected adversely Stone's representation of Aleksey. See also, Longworth v. Ozmint, 377 F.3d 437 (4th Cir. 2004). There was no showing that Aleksey's interests diverged with respect to any material factual or legal issue or course of action. His claim must be denied. See Cuyler, 446 U.S. at 350 (holding "that the possibility of a conflict is insufficient to impugn a criminal conviction."

Professor Freeman as Expert Witness Issue

During the hearing, the Respondents objected to the presentation of expert witness testimony from John Freeman. The Applicant called Professor John Freeman as an expert witness in legal ethics. The Respondents objected to the presentation of Professor Freeman's opinion on whether the appointment of Duffie Stone was a "conflict of interest", due to his practice as a part-time solicitor and/or representation of public entity or employees as assigned by the Insurance Reserve Fund. The objection was based upon the decisions of Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2002). As stated in Green, where an applicant sought to introduce expert opinion testimony from a criminal defense expert on whether trial counsel's performance was deficient under Rule 702, SCRE, the Court concluded:

> Relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. An **expert** may testify if such "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issues." Rule 702, SCRE; *see also Knoke v. South Carolina Dep't of Parks*, 324 S.C. 136, 478 S.E.2d 256 (1996).
>
> The **expert** offered no factual evidence. He proffered his opinion, assuming certain facts, trial counsel's actions fell below acceptable legal standards of competence. The testimony was not designed to assist the **PCR** court to understand certain facts, but, rather, was legal argument why the **PCR** court should rule, as a matter of law, trial counsel's actions fell below an acceptable legal standard of competence. Such "testimony" falls outside of Rule 702, SCRE.

Green, 351 S.C. at 198, 569 S.E.2d at 324. Interestingly, Green was cited as authority in Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003) where Professor Freeman's affidavit was rejected as inadmissible expert opinion on the law.

In Dawkins, the Supreme Court held that while it was true an opinion is not objectionable because it embraces an ultimate issue to be decided by the trier of fact under Rule 704, SCRE:

> Professor Freeman's affidavit inappropriately attempted to usurp the trial court's role in determining whether petitioner's were entitled to summary judgment.

The Court found that in general, expert opinion testimony on issues of law is inadmissible. Relying upon Green, the Court stated:

> *Green* is instructive to the instant case. Here, Professor Freeman's affidavit reads as if it could have been respondents' oral argument to the trial court at the summary judgment hearing. Although Professor Freeman arguably offered some helpful, factual information, the overwhelming majority of the affidavit is simply legal argument as to why summary judgement should be denied. For that reason, we hold the trial court correctly refused to consider it; and the Court of Appeals erred in finding otherwise. *See Green, supra; O'Quinn, supra.*

Id. 354 S.C. at 66, 580 S.E.2d at 437.

Similar cases from other jurisdictions are illustrative that similar proffered expert opinions on the law are inadmissible. The Ninth Circuit has excluded legal expert testimony concerning both what the law is and how it should be applied in a case. See Aguilar v. Int'l Longshoremen's Union Local #10, F.2d 443 (9th Cir. 1992). In Pinal Creek Group v. Newmont Mining Corp., 352 F.Supp.2d 1037 (D. Ariz. 2005), the Court found a law professor's proffered expert testimony regarding Maine law concerning piercing the corporate veil constituted

inadmissible expert opinion, where testimony offered nothing other than discussion of law and application of law. Accord, Steele v. D.C. Tiger Market, 854 A.2d 175 (D.C. 2004)(an expert may not state opinion on legal standards, nor may he state legal conclusions by applying the law to the facts); Lentini v. Urbancic, 686 N.W.2d 510 (Mich. App. 2004)(courts will not all even expert witness testimony on issues of law or the meaning of a legal term, because it is the exclusion responsibility of the trial court to find and interpret the applicable law).

This Court must similarly conclude that Professor Freeman's proffered testimony falls outside of Rule 702 because the testimony was not specialized knowledge that would assist the trial of fact or to determine a fact in issue. This conclusion springs from the testimony of Professor Freeman. First, he acknowledged that the source of his determination is in the rules of court and S.C. Bar ethical opinions. PCR 1460, 1463. Second, his opinion was based upon his understanding of the nature of Duffie Stone's employment and the applicability (or inapplicability) of ethics advisory opinions. Thirdly, and most importantly, he asserted the standard that his conduct should be reviewed was "what a reasonable lawyer would conclude" or a "reasonable person" standard. PCR 1462.

Further, in his proffer, Professor Freeman sought to express his opinion on what advisory opinions were binding, what was dicta, and how they should be read or ignored. PCR 1462-68. Further, he reviewed the trio of on-the-record waivers to suggest that they were inadequate since other undefined "ramifications" were not made inquiry by the trial judge. Again, this information is only an interpretation of evident facts which requires no specialized knowledge.

Like the situation in Green and Dawkins, the proffer does not reveal any specialized knowledge that would assist the trier of fact.. It is pure legal argument about facts in the based

upon court rules and legal standards that every member if the Bar and Judiciary is presumed to possess as a member of the Bar.

Respondents respectfully request the proffer of Professor Freeman be denied and to the extent appropriate stricken from the record.

C. **Applicant's right to counsel, as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60, was violated as a result of his representation throughout the pre-trial and trial proceedings by trial counsel who labored under an actual conflict of interest arising from trial counsel's simultaneous employment with the South Carolina Insurance Reserve Fund. See *Mickens v. Taylor*, __ U.S. __, 122 S.Ct. 1237 (2002); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway, et al. v. Arkansas*, 435 U.S. 475 (1978); and *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001).**

Insurance Reserve Fund Conflict Issue

In ground C, the Applicant 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.

As stated in the earlier section addressing ground B, the Applicant has failed to prove an actual conflict of interest which adversely affected the presentation. For the reasons set forth therein, the allegation must be denied. Accord, Mickens v. Taylor, supra.

D. **Applicant's right to counsel, as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60, was violated as a result of his representation throughout the pre-trial and trial proceedings by trial counsel who labored under an actual conflict of interest arising from trial counsel's simultaneous employment as an attorney for the South Carolina Department of Corrections. See *Mickens v. Taylor*, __ U.S. __, 122 S.Ct. 1237 (2002); *Cuyler v. Sullivan*, 466 U.S. 335 (1980); *Holloway, et al. v. Arkansas*, 435 U.S. 475 (1978); and *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001).**

D. Insurance Reserve Fund - SCDC - Conflict Issue

In allegation D, Aleksey 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 allegation, Aleksey asserted this ground was abandoned. Therefore, it must be dismissed due to lack of prosecution with prejudice. Accord, Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 493 S.E.2d 826 (1977)(court has inherent power to dismiss based upon failure to prosecute). See S.C. Rules of Civil Procedure, Rule 41(2); 41(b)(dismissed with prejudice for failure to prosecute).

E. **Applicant's right to counsel, as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60, was violated as a result of the trial court's failure to procure a valid waiver from the Applicant of his lead trial counsel's actual conflict of interest which arose from trial counsel's simultaneous employment as an attorney for the South Carolina Insurance Reserve Fund.** ***Mickens v. Taylor***, __ U.S. __, 122 S.Ct. 1237 (2002); ***Cuyler v. Sullivan***, 446 U.S. 335 (1980); ***Holloway, et al. v. Arkansas***, 435 U.S. 475 (1978); and ***Thomas v. State***, 346 S.C. 140, 551 S.E.2d 254 (2001).

Inadequate Waiver of Illegal Conflict of Interest

In his memorandum, p. 87-97, Aleksey contends that there was no valid waiver of the alleged conflict of interests. He 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, but his substantial self-interest in a two-year 10 million dollar retainer

with the union, which was revokable 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 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. Those assertions are simply inadequate to raise the suggestion that Stone's representation would be guided by "self-preservation" as suggested in Schwarz.

First, as set out in allegation B, the Respondents submit that 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 ha 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 we do contend 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 in this brief at pages 31-35, 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 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.

Respondents concede that the waivers could have been more specific to speculate about potential events which did not occur. However, the waivers were adequate to address what did occur, the potential for divided loyalties.

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. Respondents submit the failure to more thoroughly explain possible dangers and consequences (which never arose) did not invalidate the waivers.

Further, and alternately, even if the waiver was inadequate, as reflected in response to allegation B, he failed to prove an actual conflict of interest under Mickens, Cuyler, and Thomas. The allegation must be denied.

F. **Applicant's right to counsel, as guaranteed by the Sixth Amendment and Fourteenth Amendment of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60, was violated as a result of the constructive absence of counsel at the hearings regarding Applicant's lead trial counsel's conflicts of interests. See *U.S. v. Cronic*, 466 U.S. 648, 659 (1984); *Brooks v. Tennessee*, 406 U.S. 605 (1972); and *Frett v. State*, 298 S.C. 54, 378 S.E.2d 249 (1988).**

Absence of Counsel at Conflict Hearings

On allegation F, Aleksey contends that there was a constructive absence of counsel for Aleksey at the conflict hearings because Sims failed to adequate provide independent advice that Stone's representation was improper and Stone was unable to assist him. Memorandum, p. 114-17. Aleksey expands the presumption of prejudice standard of U.S. v. Cronic, 466 U.S. 648 (1984).

The Applicant's reliance on Cronic is misplaced. He attempts to equate Cronic's complete absence of counsel, with Sims alleged deficiency in advice at the waiver hearings. The issue of critical" stage is not relevant because counsel Sims, as well as allegedly conflicted counsel Stone, was presented during the three (3) separate hearings..

In Florida v. Nixon, 125 S.Ct. 551 (2004), the Supreme Court explained the Cronic's presumption of prejudice was only applicable in a few narrow settings. The Court instructed that the Cronic presumption would be in order "in circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." In Bell v. Cone, 535 U.S. 685 (2002), the Court held that for Cronic's presumed prejudice standard to be applied, counsel's failure must be "complete." As asserted by Aleksey, the failure was not complete nor created a Cronic type circumstance.

This is not a complete denial of counsel at a critical stage because he had two appointed counsel present at the waiver hearings. See Cronic, 466 U.S. at 657. Nor was it shown to be an entire failure to subject the prosecution's case to meaningful adversarial testing. Compare, Florida v. Nixon, supra. (Confession of guilt does not lead to Cronic standard). Nor was it a belated designation of counsel, immediately prior to trial. Cronic, supra, citing Powell v. Alabama, 287 U.S. 45 (1932).

Counsel Sims testified that he had discussions with Stone, after the appointment about his knowledge of Stone's other representations and his loyalty to Mr. Aleksey. PCR 611-12. Compare, PCR 66-68. Further, Sims testified that prior to the first waiver hearing he had discussions with Aleksey about Stone's role with the Fourteenth Circuit Solicitor's Office. PCR 611-12. However, he did not recall ever discussing about any potential conflict Stone had with defendants Aleksey sought to sue *pro se* (where Stone did not represent them in those actions) or the possibility that at some future time Stone could be a prosecutor in Orangeburg County. App. 67-68.

Contrary to the Applicant's claims, the settings of the waivers does not invoke the Cronic exceptions of constructive denial of counsel. Under Cronic and its progeny, a defendant is denied counsel not only when his counsel is denied because there is an "actual or constructive denial of the assistance of counsel altogether, when counsel is burdened by an actual conflict of interest (under Cuyler v. Sullivan), or where there are "various kinds of state interference with counsel's assistance." Strickland, 466 U.S. at 692; see also Cronic, 466 U.S. at 658.

Here, the representation of Aleksey by Sims was not impaired by either a potential or actual conflict. Contrary to the claims of Aleksey, he was never without counsel. Even if Stone

was unable under their theory to provide advice on the conflict issues; Sims was available and could/did consult with Aleksey throughout. His "actual or constructive denial of counsel" during a critical stage claim must be denied. See Ex Parte McFarland, 163 S.W.2d 743, 752-53 (Tex. Crim.App. 2005)(there was no actual or constructive denial of counsel where lead counsel had postprandial naps during critical stages, where defendant had second, albeit less experienced counsel present). See also, Annotation, *Circumstances giving rise to prejudicial conflict of interests between criminal defendant and defense counsel - state cases.* 18 A.L.R. 4th 360.

G. **Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to provide enough information to Applicant to enable Applicant to make a voluntary, knowing, and intelligent waiver of an actual conflict of interest, which arose during Applicant's proceedings, or to insist upon the appointment of alternate counsel who did not labor under a conflict of interest. *Strickland v. Washington*, 466 U.S. 668 (1984) and *Thomas v. State*, 346 S.C. 140, 551 S.E.2d 254 (2001)(Petitioner has shown an actual conflict of interest that adversely affected her attorney's performance. Further, her initial waiver of a potential conflict did not act as a waiver of this actual conflict.)**

Trial Counsel's Failure to Provide Aleksey Enough Information to Enable Aleksey to Make a Knowing and Intelligent Waiver

In ground G, Aleksey contends he was denied effective assistance of counsel based upon trial counsel's alleged failure to provide sufficient information to Aleksey to enable him to make a knowing and intelligent waiver of his right to counsel. In his memorandum, he asserts that (1) there was no evidence that Stone's representation would preclude the defense from seeking a change of venue motion as a "plausible alternate strategy"[9] (Memo., p. 100), that his I.R.F. representations would impair his ability to raise brutality claims[10] (Memo., p. 101, 105), that impact the *pro se* lawsuits had against officers and or agencies that Stone had or might represent

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[9] There is no evidence that a change of venue motion would have been precluded by Stone's representation or otherwise. The matter was not pursued solely based upon the strategic decision. Counsel and the court was under no duty to inform him of erroneous information which had no basis in fact or law.

[10] As stated within ground B, the brutality claims were not raised based upon a lack of evidence and Aleksey's own public and inconsistent statements.