VOLUME TEN OF FOURTEEN

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
JUN 22 2011
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

VOLUME TEN
PAGES 4502-5001

INDEX

INDEX i

TRIAL TRANSCRIPT 1

COURT REPORTER'S INDEX 2

COLLOQUY/JURORS EXCUSED 35

INTRODUCTION OF CASE 119

HARRY MIMS
Voir Dire Examination by the Court 183
Direct Examination by the Solicitor 185
Cross-Examination by the Defense 187

REBECCA BREWINGTON
Voir Dire Examination by the Court 198
Direct Examination by the Solicitor 200
Cross-Examination by the Defense 205

DENNIS BONNETTE
Voir Dire Examination by the Court 211
Direct Examination by the Solicitor 213
Cross-Examination by the Defense 216

TAMMY MORRIS
Voir Dire Examination by the Court 220

MATTIE JOHNSON
Voir Dire Examination by the Court 224
Direct Examination by the Solicitor 227
Cross-Examination by the Defense 228

NARONE FRANKLIN
Voir Dire Examination by the Court 230
Direct Examination by the Solicitor 234
Cross-Examination by the Defense 236

JASON COTE
Voir Dire Examination by the Court 240

Direct Examination by the Solicitor 243
Cross-Examination by the Defense 245

REGINALD BUTLER
Voir Dire Examination by the Court 248
Direct Examination by the Solicitor 253, 258
Cross-Examination by the Defense 256

JULIETTE RYANT
Voir Dire Examination by the Court 262, 267, 273
Direct Examination by the Solicitor 265, 270
Cross-Examination by the Defense 21

SANDRA McWATERS
Voir Dire Examination by the Court 276, 285
Direct Examination by the Solicitor 279
Cross-Examination by the Defense 282

WILLIE BLANDING
Voir Dire Examination by the Court 288

SABRINA ROBINSON
Voir Dire Examination by the Court 295
Direct Examination by the Solicitor 300
Cross-Examination by the Defense 301

DUANE GREEN
Voir Dire Examination by the Court 314, 32
Direct Examination by the Solicitor 318
Cross-Examination by the Defense 321

CHRIS CRABB
Voir Dire Examination by the Court 323
Direct Examination by the Solicitor 327
Cross-Examination by the Defense 329

HOMER THRAILKILL
Voir Dire Examination by the Court 335
Direct Examination by the Solicitor 338
Cross-Examination by the Defense 339

TYRONE GILLARD
Voir Dire Examination by the Court 346
Direct Examination by the Solicitor 349
Cross-Examination by the Defense 351

ELAINE WHETSTONE
Voir Dire Examination by the Court 354
Direct Examination by the Solicitor 356
Cross-Examination by the Defense 358

MELVIN RANSOM
Voir Dire Examination by the Court 360
Direct Examination by the Solicitor 364

VON JONES
Voir Dire Examination by the Court 367

ALVIN RICKENBAKER
Voir Dire Examination by the Court 368
Direct Examination by the Defense 372

WILLIE JOHNSON, JR.
Voir Dire Examination by the Court 374
Direct Examination by the Solicitor 378
Cross-Examination by the Defense 381

MICHAEL ANTHONY
Voir Dire Examination by the Court 385
Direct Examination by the Solicitor 389

CARL RAWLEIGH
Voir Dire Examination by the Court 391
Direct Examination by the Solicitor 393
Cross-Examination by the Defense 395

ANDREW RICE
Voir Dire Examination by the Court 396
Direct Examination by the Solicitor 399

NORRIS GIBSON
Voir Dire Examination by the Court 401
Direct Examination by the Solicitor 404
Cross-Examination by the Defense 406

VINCENT BOWMAN
Voir Dire Examination by the Court 408
Direct Examination by the Solicitor 412

JEREMIAH GATES
Voir Dire Examination by the Court 414

DEBRA SANFORD
Voir Dire Examination by the Court 422
Direct Examination by the Solicitor 424
Cross-Examination by the Defense 426

BONNIE ZEIGLER
Voir Dire Examination by the Court 429
Direct Examination by the Solicitor 432
Cross-Examination by the Defense 434

JAMES SCHRIMPF
Voir Dire Examination by the Court 436
Direct Examination by the Solicitor 440

ROBERT GOODWIN
Voir Dire Examination by the Court 442
Direct Examination by the Solicitor 447
Cross-Examination by the Defense 449

GIGI HAYES
Voir Dire Examination by the Court 451
Direct Examination by the Solicitor 454
Cross-Examination by the Defense 456

WILLIAM AYERS
Voir Dire Examination by the Court 460

SILAS ADAMS
Voir Dire Examination by the Court 463
Direct Examination by the Solicitor 469

FLOSTINE GREEN
Voir Dire Examination by the Court 471

KENNETH LEWIS
Voir Dire Examination by the Court 478

KAYE BONNETTE
Voir Dire Examination by the Court 483
Direct Examination by the Solicitor 487
Cross-Examination by the Defense 488

KEDRAIN PELZER
Voir Dire Examination by the Court 491
Direct Examination by the Solicitor 495
Cross-Examination by the Defense 498

PHYLLIS BRICKLE
Voir Dire Examination by the Court 501
Direct Examination by the Solicitor 503
Cross-Examination by the Defense 506

ERNEST MYERS
Voir Dire Examination by the Court 508
Direct Examination by the Solicitor 512
Cross-Examination by the Defense 515

LAKISHA DOWLING
Voir Dire Examination by the Court 517

LUTHER ALLEN
Voir Dire Examination by the Court 524
Direct Examination by the Defense 529

BARBARA HANTON
Voir Dire Examination by the Court 549
Direct Examination by the Solicitor 553
Cross-Examination by the Defense 556

MALCOLM SIMPSON
Voir Dire Examination by the Court 558
Direct Examination by the Solicitor 561
Cross-Examination by the Defense 563

SHARON GOODWIN
Voir Dire Examination by the Court 565

PATSY WILDER
Voir Dire Examination by the Court 569
Direct Examination by the Solicitor 575

ANGELA TOBIN
Voir Dire Examination by the Court 580

COLE HAYWOOD
Voir Dire Examination by the Court 584, 590
Direct Examination by the Solicitor 586, 591
Cross-Examination by the Defense 592

LAWRENCE LIVINGSTON
Voir Dire Examination by the Court 594

HAROLD HAILEY
Voir Dire Examination by the Court 598
Direct Examination by the Solicitor 600

JOANNE GLOVER
Voir Dire Examination by the Court 602
Direct Examination by the Solicitor 606, 612
Cross-Examination by the Defense 610

MACK STILLINGER
Voir Dire Examination by the Court 614

EMILY PINDAK
Voir Dire Examination by the Court 616
Direct Examination by the Solicitor 619, 623
Cross-Examination by the Defense 621, 624

MARY GRAMBLING
Voir Dire Examination by the Court 625
Direct Examination by the Solicitor 630
Cross-Examination by the Defense 632

BONNIE ANTLEY
Voir Dire Examination by the Court 641
Direct Examination by the Solicitor 648
Cross-Examination by the Defense 650

LATOYA WHITE
Voir Dire Examination by the Court 655

JUDY BRANTLEY
Voir Dire Examination by the Court 661
Direct Examination by the Solicitor 666
Cross-Examination by the Defense 669

HARRIETTE SEABROOKS
Voir Dire Examination by the Court 673, 681
Direct Examination by the Solicitor 676
Cross-Examination by the Defense 679

CHAS ENGLISH
Voir Dire Examination by the Court 683

STEPHEN FOGLE
Voir Dire Examination by the Court 689

CAROLINE FORD
Voir Dire Examination by the Court 692
Direct Examination by the Solicitor 697
Cross-Examination by the Defense 699

GEORGE STACK
Voir Dire Examination by the Court 702

MARY JAMISON
Voir Dire Examination by the Court 707, 715
Direct Examination by the Solicitor 712, 716
Cross-Examination by the Defense 716

MARY MOORE
Voir Dire Examination by the Court 720

MICHELLE JENKINS
Voir Dire Examination by the Court 724
Direct Examination by the Solicitor 727
Cross-Examination by the Defense 730

FRANK JOHNSON
Voir Dire Examination by the Court 735

FANNIE JOHNSON
Voir Dire Examination by the Court 739
Direct Examination by the Solicitor 746
Cross-Examination by the Defense 750

JEROME ASBERRY
Voir Dire Examination by the Court 754
Direct Examination by the Solicitor 757
Cross-Examination by the Defense 758

ROBERTA SEEGARS
Voir Dire Examination by the Court 761

PAUL DREW
Voir Dire Examination by the Court 765

LEVON TYLER
Voir Dire Examination by the Court 769
Direct Examination by the Solicitor 773
Cross-Examination by the Defense 773

WILLIE JOHNSON, JR. (IN CHAMBERS)
Voir Dire Examination by the Court 798, 802
Direct Examination by the Solicitor 800
Cross-Examination by the Defense 801

JURY IMPANELED 858

WITNESSES FOR THE STATE

THOMAS J. FRENCH (IN CAMERA)
Direct Examination by the Solicitor 833
Cross-Examination by the Defense 840
Redirect Examination by the Solicitor 847

JURY SWORN 852

OPENING STATEMENTS
By the Solicitor 858
By the Defense 877

WITNESSES FOR THE STATE

YELENA BATKILINA
Direct Examination by the Solicitor 882
Cross-Examination by the Defense 890
ReDirect Examination by the Solicitor 894
ReCross-Examination by the Defense 894

THOMAS J. FRENCH
Direct Examination by the Solicitor 895
Cross-Examination by the Defense 902
ReDirect Examination by the Solicitor 904

RONALD VINCENT MOSELY
Direct Examination by the Solicitor 907
Cross-Examination by the Defense 912
ReDirect Examination by the Solicitor 920

LIN SHIRER
Direct Examination by the Solicitor 923
Cross-Examination by the Defense 941

WILLIAM WATFORD
Direct Examination by the Solicitor 948
Cross-Examination by the Defense 962

ANDREW D. MYERS, JR. (IN CAMERA)
Direct Examination by the Solicitor 969
Cross-Examination by the Defense 975

ANDREW D. MYERS, JR.
Direct Examination by the Solicitor 978
Cross-Examination by the Defense 990
ReDirect Examination by the Solicitor 995

DR. JOEL S. SEXTON
Direct Examination by the Solicitor 996

TIMOTHY MICHAEL LLOYD
Direct Examination by the Solicitor 1021
Cross-Examination by the Defense 1034

JAMES A. WOODS
Direct Examination by the Solicitor 1038
Cross-Examination by the Defense 1054

ROBERT STEVEN CECIL
Direct Examination by the Solicitor 1054
Cross-Examination by the Defense 1062

CHARLES THOMAS FREDERICK, III
Direct Examination by the Solicitor 1064

KATHERINE CASE GALLUP
Direct Examination by the Solicitor 1072
Cross-Examination by the Defense 1080

ROBERT BERES
Direct Examination by the Solicitor 1083
Cross-Examination by the Defense 1097
Redirect Examination by the Solicitor 1102

TARA HOPE CLARK
Direct Examination by the Solicitor 1104
Cross-Examination by the Defense 1113

PAUL JOSEPH BROUTHERS
Direct Examination by the Solicitor 1119

DONALD BRETT BAKER
Direct Examination by the Solicitor 1131, 1135
Cross-Examination by the Defense 1135
Re-Cross-Examination by the Defense 1192

KERRI GOODWIN
Direct Examination by the Solicitor 1207

ANGELA CROWL
Direct Examination by the Solicitor 1211

LISA A. WATSON
Direct Examination by the Solicitor 1214
Cross-Examination by thee Defense 1219

GLORYVEE PEREZ BLACKWELL
Direct Examination by the Solicitor 1234
Cross-Examination by the Defense 1249

GLORYVEE PEREZ BLACKWELL (IN CAMERA)
Cross Examination by the Defense 1257, 1264

GLORYVEE PEREZ BLACKWELL
Cross-Examination by the Defense 1267
ReDirect Examination by the Solicitor 1282, 1289

GLORIA MARIA RIVERIA (IN CAMERA)
Direct Examination by the Solicitor 1298
Cross-Examination by the Defense 1301

GLORIA MARIA RIVERIA
Direct Examination by the Solicitor 1304
Cross-Examination by the Defense 1313

L. C. KNIGHT
Direct Examination by the Solicitor 1321
Cross-Examination by the Defense 1324

DR. JOHN CLETUS CHANDLER
Direct Examination by the Solicitor 1327
Cross-Examination by the Defense 1337

KENNETH M. MEARS
Direct Examination by the Solicitor 1340
Cross-Examination by the Defense 1348
ReDirect Examination by the Solicitor 1356
ReCross-Examination by the Defense 1363

JAMES WEINER
Direct Examination by the Solicitor 1365
Cross-Examination by the Defense 1368

KYLE V. WELCH
Direct Examination by the Solicitor 1372
Cross-Examination by the Defense 1378

BILLIE ALTHOUSE
Direct Examination by the Solicitor 1380

GEORGE DARNELL
Direct Examination by the Solicitor 1386
Cross-Examination by the Defense 1390

SUZIE WILSON
Direct Examination by the Solicitor 1392
Cross-Examination by the Defense 1395

CONNIE McKAY
Direct Examination by the Solicitor 1397

DONALD BRETT BAKER
Direct Examination by the Solicitor 1398

HUBERT RICKENBAKER
Direct Examination by the Solicitor 1401
Cross-Examination by the Defense 1406

VERNETIA DOZIER
Direct Examination by the Solicitor 1407

DOROTHY FULLER
Direct Examination by the Solicitor 1416
Cross-Examination by the Defense 1418
ReCross-Examination by the Defense 1474

JOSEPH DWAYNE POWELL
Direct Examination by the Solicitor 1474
Cross-Examination by the Defense 1491

GEORGE DARNELL
Direct Examination by the Solicitor 1502
Cross-Examination by the Defense 1525

KENNETH M. MEARS
Direct Examination by the Solicitor 1534
Cross-Examination by the Defense 1538
ReDirect Examination by the Solicitor 1544

SARAH PIVERO
Direct Examination by the Solicitor 1545
Cross-Examination by the Defense 1551
ReDirect Examination by the Solicitor 1560
ReCross-Examination by the Defense 1562

IRA PARNELL, JR.
Direct Examination by the Solicitor 1564
Cross-Examination by the Defense 1572

DONALD BRETT BAKER
Direct Examination by the Solicitor 1573
Cross-Examination by the Defense 1589

STATE RESTS 1601

WITNESSES FOR THE DEFENDANT

DR. DAVID BACHMAN
Direct Examination by the Defense 1601
Cross-Examination by the Solicitor 1614

JEFFREY MORRIS HOLLIFIELD
Direct Examination by the Defense 1626
Cross-Examination by the Solicitor 1650
Redirect Examination by the Defense 1659
ReCross-Examination by the Solicitor 1660
Redirect Examination by the Defense 1661

DEFENSE RESTS 1662

CLOSING ARGUMENTS
By the Solicitor 1683
By the Defense 1713

CHARGE OF THE COURT 1730

VERDICT OF THE JURY 1743

PENALTY STAGE

OPENING STATEMENTS
By the Solicitor 1764
By the Defense 1768

THERESA McCANN
Direct Examination by the Solicitor 1772

THERESA McCANN (IN CAMERA)
Direct Examination by the Solicitor 1789
Cross-Examination by the Defense 1793

JAIME FARRELL
Direct Examination by the Solicitor 1802
Cross-Examination by the Defense 1810

SARA PIVERO
Direct Examination by the Solicitor 1812
Cross-Examination by the Defense 1826

LUIS CRUZ (IN CAMERA)
Direct Examination by the Solicitor 1832
Cross-Examination by the Defense 1839

LUIS CRUZ
Direct Examination by the Solicitor 1848
Cross-Examination by the Defense 1858

MARIE MORAN
Direct Examination by the Solicitor 1861
Cross-Examination by the Defense 1868

LISA WATSON
Direct Examination by the Solicitor 1869
Cross-Examination by the Defense 1873

MAURICE KEITT
Direct Examination by the Solicitor 1976
Cross-Examination by the Defense 1881

VERNETIA DOZIER
Direct Examination by the Solicitor 1885
Cross-Examination by the Defense 1886

Redirect Examination by the Solicitor 1888
ReCross-Examination by the Defense 1889

DR. JOEL SEXTON (IN CAMERA)
Direct Examination by the Solicitor 1890

DONALD BRETT BAKER
Direct Examination by the Solicitor 1891

KENNETH M. MEARS
Direct Examination by the Solicitor 1907

LEON ROBINSON
Direct Examination by the Solicitor 1912

DAVID DEERING
Direct Examination by the Solicitor 1922

DORA LINGARD
Direct Examination by the Solicitor 1937

KEVA NICHOLE RILEY
Direct Examination by the Solicitor 1948

FRANK LINGARD
Direct Examination by the Solicitor 1952

LEATHA RAYSOR
Direct Examination by the Solicitor 1963

STATE RESTS 1972

WITNESSES FOR THE DEFENDANT

VERA ALEKSEY
Direct Examination by the Defense 1977

DEFENSE RESTS 2002

CLOSING ARGUMENTS
By the Solicitor 2006
By the Defense 2036
By the Defendant Aleksey 2038
By the Defense 2040

CHARGE OF THE COURT 2052

VERDICT OF THE JURY 2078

TRANSCRIPT DATED MAY 20, 1998 2092

MOTIONS 2092

JACKSON V. DENNO HEARING TRANSCRIPT DATED JUNE 8, 1998 2125

MOTIONS 2128

KYLE V. WELCH
Direct Examination by Mr. Bailey 2130
Cross Examination by Mr. Sims 2137

KENNETH M. MEARS
Direct Examination by Mr. Bailey 2147
Cross Examination by Mr. Sims 2153

BILLIE JOANNE ALTHOUSE
Direct Examination by Mr. Bailey 2157
Cross Examination by Mr. Sims 2162

HUBERT RICKENBAKER
Direct Examination by Mr. Bailey 2168
Cross Examination by Mr. Stone 2171

VERNETIA DOZIER
Direct Examination by Mr. Bailey 2176
Cross Examination by Mr. Sims 2177

WANDA DUKES
Direct Examination by Mr. Bailey 2179
Cross Examination by Mr. Stone 2180

GEORGE DARNELL
Direct Examination by Mr. Bailey 2183
Cross Examination by Mr. Stone 2199

KENNETH M. MEARS
Direct Examination by Mr. Bailey 2215
Cross Examination by Mr. Sims 2223

MOTIONS 2230

TRANSCRIPT DATED AUGUST 11, 1998 2243

MOTIONS 2246

RICHARD L. FRIERSON, M.D.
Direct Examination by Mr. Bailey 2247
Cross Examination by Mr. Stone 2259

MOTIONS 2273

RICHARD L. FRIERSON, M.D.
Cross Examination by Mr. Stone 2280

MOTIONS 2281

RICHARD L. FRIERSON, M.D.
Cross Examination by Mr. Stone 2283

MOTIONS 2285

COURT'S EXHIBIT NUMBER 2, INDICTMENT AND CONVICTION (GLORYVEE RIVERA) 2308

TAPED INTERVIEW/STATEMENT OF BAYAN R. ALEKSEY 2320

MOTION TO DISCLOSE 2341

ORDER FOR COMPETENCY EVALUATION AND CRIMINAL RESPONSIBILITY 2344

MOTION TO PRODUCE REPORTS OF EXAMINATION AND TESTS 2347

INDICTMENT 2350

APPLICATION FOR POST-CONVICTION RELIEF 2454

ORDER ON CONDITIONAL APPOINTMENT OF POST-CONVICTION RELIEF COUNSEL AND SCHEDULING ORDER 2389

AFFIDAVIT OF PETITIONER 2398

AFFIDAVIT OF COUNSEL 2399

SECOND AMENDED APPLICATION FOR POST-CONVICTION RELIEF 2401

NOTICE OF INTENT TO RELY UPON AFFIDAVITS AND OTHER DOCUMENTARY EVIDENCE 2416

POST-CONVICTION RELIEF TRANSCRIPT DATED NOVEMBER 12, 2002 2420

POST-CONVICTION RELIEF TRANSCRIPT DATED NOVEMBER 13, 2002 2658

POST-CONVICTION RELIEF TRANSCRIPT DATED NOVEMBER 14, 2002 2911

OPENING STATEMENT BY MR. TARR 2444

OPENING STATEMENT BY MR. ZELENKA.....2463

OPENING STATEMENT BY MR. BROWN 2469

THOMAS R. SIMS
Direct Examination by Mr. Brown.....2476
Cross Examination by Mr. Zelenka.....3025
Redirect Examination by Mr. Brown 3082
Recross Examination by Mr. Zelenka 3121
Redirect Examination by Mr. Brown 3126

POST-CONVICTION RELIEF TRANSCRIPT DATED NOVEMBER 15, 2002 3131

ISAAC McDUFFIE STONE, III
Direct Examination by Mr. Tarr.....3133
COLLOQUY 3375

POST-CONVICTION RELIEF TRANSCRIPT DATED JULY 7, 2003 3387

ISAAC McDUFFIE STONE, III
Direct Examination by Mr. Tarr.....3391

POST-CONVICTION RELIEF TRANSCRIPT DATED JULY 8, 2003 3487

MOTIONS 3488

ISAAC McDUFFIE STONE, III
Direct Examination by Mr. Tarr.....3495
Cross Examination by Mr. Zelenka.....3540
Redirect Examination by Mr. Tarr 3640
WALTER BAILEY
Direct Examination by Mr. Brown.....3667

COLLOQUY 3747

WALTER BAILEY
Direct Examination by Mr. Brown.....3756
Cross Examination by Mr. Zelenka.....3825
Redirect Examinaton by Mr. Brown 3847

COLLOQUY 3855

JOHN P. FREEMAN
Direct Examination by Mr. Tarr 3858
Cross Examination by Mr. Zelenka 3870
Redirect Examination by Mr. Tarr 3884

JAMES E. AIKEN
Direct Examination by Mr. Tarr 3887
Cross Examination by Mr. Zelenka 3907
Redirect Examination by Mr. Mr. Tarr 3920

KENNETH M. MEARS
Direct Examination by Mr. Brown 3927
Cross Examination by Mr. Zelenka 4006
Redirect Examination by Mr. Brown 4025

GEORGE DARNELL
Direct Examination by Mr. Tarr 4032
Cross Examination by Mr. Zelenka 4082
Redirect Examination by Mr. Tarr 4094

COLLOQUY 4096

WALTER BAILEY
Direct Examination by Mr. Zelenka 4106
Cross Examination by Mr. Brown 4115

THIRD AMENDED APPLICATION FOR POST-CONVICTION RELIEF 4123

APPLICANT'S BRIEF SUPPORTING THIRD AMENDED APPLICATION FOR POST-CONVICTION RELIEF 4136

APPLICANT'S EXHIBIT 87, AFFIDAVIT 4266

APPLICANT'S EXHIBIT 88, LETTER DATED DECEMBER 14, 2004 4267

APPLICANT'S EXHIBIT 89, ARREST WARRANTS 4269

APPLICANT'S EXHIBIT 90, GENERAL SESSIONS DOCKET REPORT FOR ORANGEBURG COUNTY 4271

APPLICANT'S EXHIBIT 91, TORT CLAIM FORM 4272
APPLICANT'S EXHIBIT 92, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS INMATE GRIEVANCE FORM 4275
DEPOSITION OF JANET VOGELSANG, DATED JANUARY 30, 2004 4276

DEFENDANT'S EXHIBIT 1, TONI BOVEE'S REPORT 4360

DEFENDANT'S EXHIBIT 2, TIME LINE 4369

DEFENDANT'S EXHIBIT 3, K. FISHERMAN'S SOCIAL HISTORY 4380

MOTION FOR PRODUCTION OF MATERIAL UNDER BRADY AND S.C. CRIMINAL RULE 5 4405

STATE'S MEMORANDUM IN RE: INTRODUCTION OF LYLE TESTIMONY 4410

APPLICANT'S EXHIBIT 96, VOLUNTARY STATEMENT OF ANTHONY LYNN STACK 4414

RESPONDENT'S POST-HEARING MEMORANDUM IN OPPOSITION TO APPLICATION FOR POST-CONVICTION RELIEF 4416

APPLICANT'S REPLY SUPPORTING THIRD AMENDED APPLICATION FOR POST-CONVICTION RELIEF 4804

APPLICANT'S OBJECTIONS TO THE COURT'S INTENTION TO ADOPT THE STATE'S PROPOSED ORDER 4834

MOTION TO CLARIFY THE STATE'S POSITION REGARDING A PROSECUTOR'S ELIGIBILITY FOR APPOINTMENT IN LIGHT OF CONFLICTS OF INTEREST 4856

MEMORANDUM DATED JANUARY 15, 2008 4863

LETTER TO BAR MEMBERS DATED JANUARY 17, 2008 4865

NEWSPAPER ARTICLES 4867

TRANSCRIPT DATED JANUARY 29, 2009 (EX PARTE HEARING) 4875

LETTER DATED APRIL 1, 2009 4936

EMAILS 4938

SUPPLEMENT TO MOTION TO CLARIFY THE STATE'S POSITION REGARDING A PROSECUTOR'S ELIGIBILITY FOR APPOINTMENT IN LIGHT OF CONFLICTS OF INTEREST 4940

MOTION TO CLARIFY THE STATE'S POSITION REGARDING A PROSECUTOR'S ELIBIBILITY FOR APPOINTMENT IN LIGHT OF CONFLICTS OF INTEREST 4943

ATTACHMENT ONE, MEMORANDUM DATED JANUARY 15, 2008 4952
ATTACHMENT TWO, BAR MEMBER LETTER, DATED JANUARY 17, 2008 4955

ATTACHMENT THREE, NEWSPAPER ARTICLES 4957

ORDER DENYING APPLICATION FOR POST-CONVICTION RELIEF 4964

APPLICANT'S MOTION TO ALTER AND AMEND JUDGMENT PURSUANT TO SCRCP RULE 59 5223

TRANSCRIPT DATED MAY 4, 2010 (59(e) HEARING) 5251

SUPPLEMENT TO MOTION TO CLARIFY THE STATE'S POSITION REGARDING A PROSECUTOR'S ELIGIBILITY FOR APPOINTMENT IN LIGHT OF CONFLICT OF INTEREST 5312

AFFIDAVIT OF JAMES C. WILLIAMS, JR. 5315

OBJECTION TO PROPOSED ORDER REGARDING APPLICANT'S MOTION TO ALTER AND AMEND JUDGMENT PURSUANT TO SCRCP RULE 59 5319

ORDER ON APPLICANT'S MOTION TO ALTER AND AMEND JUDGMENT PURSUANT TO RULE 59 5322

APPLICANT'S EXHIBIT 1, ATTORNEY NOTES 5338

APPLICANT'S EXHIBIT 2, LETTER DATED MARCH 6, 1998 5339

APPLCIANT'S EXHIBIT 3, YELENA BATKILINA PLEA/SENTENCING TRANSCRIPT ..5340

APPLICANT'S EXHIBIT 4, TRACE REPORT 5348

APPLICANT'S EXHIBIT 5, BOND HEARING TRANSCRIPT 5124

APPLICANT'S EXHIBIT 6, INFORMATION 5365

APPLICANT'S EXHIBIT 7, RAP SHEET 5373

APPLICANT'S EXHIBIT 8, PLYMOUTH TOWNSHIP INCIDENT REPORT 5375

APPLICANT'S EXHIBIT 9, LOWER MORELAND POLICE REPORT 5377

APPLICANT'S EXHIBIT 10, BURDUMY MOTORS DOCUMENTS 5383

APPLICANT'S EXHIBIT 11, YELENA KATKILINA NEW YORK DRIVER'S LICENSE....5389

APPLICANT'S EXHIBIT 12, PHILADELPHIA PD INCIENT REPORT 5391

APPLICANT'S EXHIBIT 13, AFFIDAVIT OF RICKIE PATTIN 5392

APPLICANT'S EXHIBIT 14, FAX DOCUMENT 5394

APPLICANT'S EXHIBIT 15, LETTER DATED JANUARY 7, 1998 5400

APPLICANT'S EXHIBIT 17, THREE PAGES OF DOCUMENTS.....5406

APPLICANT'S EXHIBIT 18, MULTI-PAGE DOCUMENT 5409

APPLICANT'S EXHIBIT 19, PENNSYLVANIA 5440

APPLICANT'S EXHIBIT 20, TWO PAGE STATEMENT 5441

APPLICANT'S EXHIBIT 21, MULTI-PAGE DOCUMENT 5443

APPLICANT'S EXHIBIT 22, DANETTA'S NOTES 5449

APPLICANT'S EXHIBIT 23-A, LETTER.....5450

APPLICANT'S EXHIBIT 23-B, LETTER 5451

APPLICANT'S EXHIBIT 23-C, LETTER 5452

APPLICANT'S EXHIBIT 24, GLORYVEE PEREZ.....5454

APPLICANT'S EXHIBIT 25, AFFIDAVIT OF MARCUS BLACKWELL.....5455

APPLICANT'S EXHIBIT 27, AFFIDAVIT OF ELIZABETH BLACKWELL.....5457

APPLICANT'S EXHIBIT 28, PROPERTY RECIEPT 5461

APPLICANT'S EXHIBIT 29, HOTEL, MOTEL, TELEPHONE RECEIPTS.....5462

APPLICANT'S EXHIBIT 30, FOLDER.....5597

APPLICANT'S EXHIBIT 31, AFFIDAVIT OF PAT CUBBERLY.....5599

APPLICANT'S EXHIBIT 32, COPY OF TWO CHECKS.....5601

APPLICANT'S EXHIBIT 33, AFFIDAVIT OF KEITH A. RANDALL 5605

APPLICANT'S EXHIBIT 34, TRENTON POLICE DIVISION INVESTIGATION REPORT .5607

APPLICANT'S EXHIBIT 35, BURLINGTON LINCOLN MERCURY DOCUMENTS.....5609

APPLICANT'S EXHIBIT 36, SUMMIT BANK DOCUMENTS 5632

APPLICANT'S EXHIBIT 37, GLORYVEE RIVERIA GUILTY PLEA TRANSCRIPT, TRENTON NEW JERSEY.....5633

APPLICANT'S EXHIBIT 38, PROPERTY RECEIPT OF GLORYVEE BLACKWELL.....5662

APPLICANT'S EXHIBIT 39, AFFIDAVIT OF CHRISTOPHER SONGTAG 5663

APPLICANT'S EXHIBIT 40, SUMMIT BANK NOTICE OF HOLD 5665

APPLICANT'S EXHIBIT 41, GLORYVEE BLACKWELL CHECKS 5666

APPLICANT'S EXHIBIT 42-B, TAPED INTERVIEW/STATEMENT OF GLORYVEE PEREZ BLACKWELL 5678

APPLICANT'S EXHBIT 43, SLED STATEMENT 5682

APPLICANT'S EXHIBIT 44, RENTAL INSTALLMENT CONTRACT AND SECURITY AGREEMENT 5684

APPLICANT'S EXHIBIT 45, NEW ROCHELLE POLICE REPORT/THERESA MCCANN .5686

APPLICANT'S EXHIBIT 46, AFFIDAVIT OF VINCENT CARUSO 5711

APPLICANT'S EXHIBIT 47, RAP SHEET.....5715

APPLICANT'S EXHIBIT 48, SEVEN PAGES OF PHOTOS 5717

APPLICANT'S EXHIBIT 49, TWO CHECKS.....5724

APPLICANT'S EXHIBIT 50, FARRELL STATEMENT 5726

APPLICANT'S EXHIBIT 51, GUILTY PLEA TRANSCRIPT PIVERO.....5730

APPLICANT'S EXHIBIT 52, RAP SHEET.....5736

APPLICANT'S EXHIBIT 53, FOUR PAGE PIVERO DOCUMENT.....5738

APPLICANT'S EXHIBIT 54, THREE PAGE INFORMATION 5742

APPLICANT'S EXHIBIT 55, FORTY FIVE PAGES OF DOCUMENTS 5745

APPLICANT'S EXHIBIT 56, LOVE LETTERS 5790

APPLICANT'S EXHIBIT 57, LETTER DATED OCTOBER 17, 2001 5799

APPLICANT'S EXHIBIT 58, LAWSUIT SUMMIT 5800

APPLICANT'S EXHIBIT 59, LETTER DATED FEBRUARY 19, 1999 5838

APPLICANT'S EXHIBIT 60, LETTER DATED MARCH 7, 1998 5839

APPLICANT'S EXHIBIT 61, MR. STONE'S NOTES 5840

APPLICANT'S EXHIBIT 62, LETTER DATED JANUARY 31, 1997 5871

APPLICANT'S EXHIBIT 63, TINA LAWINGS NOTES 5863

APPLICANT'S EXHIBIT 64, MEMO FROM TINA TO DUFFIE AND SIMS 5876

APPLICANT'S EXHIBIT 65, STONE'S TYPED NOTES 5877

APPLICANT'S EXHIBIT 66, TINA'S TIME SHEET 5880

APPLICANT'S EXHIBIT 67, LETTER DATED FEBRUARY 19, 1999 5897

APPLICANT'S EXHIBIT 68, BILL FROM QUANTICO 5898

APPLICANT'S EXHIBIT 69, CV SAUL KASSIN 5902

APPLICANT'S EXHIBIT 70, FEBRUARY 2, 1998 TRANSCRIPT 5906

APPLICANT'S EXHIBIT 71, LETTER DATED FEBRUARY 22, 1999 5926

APPLICANT'S EXHIBIT 72, NOTEBOOK OF NEWS PAPER ARTICLES 5928

APPLICANT'S EXHIBIT 73, REPORT OF HANS GIDION 6082

APPLICANT'S EXHIBIT 74, PHONE RECORD 6096

APPLICANT'S EXHIBIT 75, FOUR CHECKS 6103

APPLICANT'S EXHIBIT 76, MONEY ORDER 6107

APPLICANT'S EXHIBIT 79, NOTICE OF WARRANT 5883

APPLICANT'S EXHIBIT 80, LETTER 6111

APPLICANT'S EXHIBIT 81, LETTER DATED AUGUST 13, 1998 6112

APPLICANT'S EXHIBIT 82, LETTER 6113

APPLICANT'S EXHIBIT 83, SUMMARY CASE AND FILE 6118

APPLICANT'S EXHIBIT 84-A, AGENT MEARS NOTES 6517

NOTICE OF EVIDENCE IN AGGRAVATION OF THE PUNISHMENT 6554

TRANSFER ORDER 6557

LETTER DATED FEBRUARY 2, 1998 6558

LETTER DATED JANUARY 29, 1998 6559

AFFIDAVIT 6560

NOTICE TO DETAINEE'S ATTORNEY 6565

SENTENCE 6566

MOTION TO ADD QUESTIONS TO DEATH PENALTY JURY QUESTIONNAIRE 6567

FORENSIC SERVICES LABORATORY REPORT 6575

ORDER OF APPOINTMENT OF LEGAL COUNSEL FOR INDIGENT DEFENDANT 6582

JURY'S VERDICT ON PROOF OF AGGRAVATING CIRCUMSTANCES, PART I 6584

JURY'S VERDICT ON PROOF OF AGGRAVATING CIRCUMSTANCES, PART II 6585

SENTENCE 6586

INDICTMENT 6587

MOTION FOR PRODUCTION OF MATERIAL UNDER BRADY AND S.C. CRIMINAL RULE 5 6588

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

APPLICANT'S EXHIBIT 16, AUDIO CASSETTE
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

in the future[11] (Memo., p. 105), any risk from his insurance fund, (Memo., p. 107), nor any risk concerning his ability to counter safekeeping arguments. Memo., p. 113.

As stated earlier in ground B, each of these were addressed at trial or the PCR hearing and did not evolve from any "conflict." The Applicant has failed to assert precisely what information Aleksey lacked concerning Stone's past representation or real risks, not sheer post hoc speculation unrelated to the conflict claimed.

For the reasons previously stated in this brief related to grounds B. -H and above, he has failed in his burden of proof to show any entitlement to his claim concerning waiver.[12]

---

11 Contrary to the assertion that the lawsuits brought by Aleksey were not discussed, testimony was presented at the hearing that Stone wrote Aleksey and stated that he would not be able to help him with any lawsuit against the prison "as I explained this to you before...I would have a conflict of interest bringing a civil lawsuit against an agency I represent." Exhibit 59, PCR770. The reference in the Memo., p. 105 to Stone's testimony about February 1998 on PCR 736-37 is entirely out of context and pre-dates the filing of the lawsuits identified on Applicant's Exhibit 58, which were brought beginning May 1998. At no time was Stone, in light of his court appointment, authorized to bring civil actions on his behalf.

12 The court should note that Aleksey did not testify at the PCR hearing that he was either misadvised or inadequately advised about the waiver. More importantly, he failed to show a reasonable probability that the result would have been different and resulted in Stone's removal.

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).**

IAC and Failure to Present Evidence of Alleged Promises of Leniency.

In his memorandum, p. 71-76, he contends that trial counsel were ineffective based upon their failure to seek to have the confession suppressed based upon an assertion that it was induced by a promise of leniency or reward.[13] Particularly, he contends that the statement given was induced by a promise that he would be returned from solitary confinement to the general prison population. He now contends this benefit, under the decision in State v. Peake, 291 S.C. 138, 352 S.E.2d 487 (1987). Respondents submit that he has failed in his burden of proof under Strickland by his failure to specifically assert this specification to the trial judge.

1. How the issue was raised at trial

During the Jackson v. Denno hearing, SLED Agent Kenneth Mears testified about giving the Miranda warnings and an initial statement of Aleksey in which he declared, at the conclusion "that I have nothing else to say" or "all I've got to say." R. 2312, 2320. See also r. 2300 (Darnell). Agent Mears stated the tape was cut off, but Aleksey continued to talk and made reference to his concern about Glory Vee, the kids, and Batkalina. R. 2312. He also asked if he could get back into the general prison population. R.p. 2312, ll. 21-22. Agent Mears stated he

---

[13] In ground B, the Applicant contended that counsel conflict precluded presenting a defense to the admission of the confession based upon allegations of brutality. Respondents incorporate its presentation herein, p. 53-56.

contacted his supervisor, Capt. Knight and gave him the information. Mears stated that he initially told Aleksey that they could not promise him movement, but would see what could be done. R. 2313. Agent Mears eventually contacted the Detention Center and inquired of the Assistant Director (Dozier) about Aleksey being in the general population or was there another secure place without being in the infirmary or lock-down. R. 2313.

Q. All right, sir. And what is it that specifically led up to the tape going back on?

A. He stated to us, when I say "he" I am talking about Mr. Aleksey, stated to us that if he told us the honest truth, if he could get back into general population, that he didn't want anyone else to get into any trouble for something he did.

Q. And after you checked around and found out that he could possibly get back into general population, is that when- -did you communicate that back to him?

A. That's correct. It took some time. He had to call the Charleston Office, they called back, he had to call the jail, they had to look around to see what could be done, and when we finally got the okay, we told him that he could go back into general population.

Q. Okay. And then did he agree to go ahead and go back on tape?

A. That's correct, that's when he agreed, he said he would tell us the truth.

Q. Okay. Other than trying to assist him in getting from the infirmary cell to general population, did you make any other promises to him or did you hear Agent Darnell make any promises to him?

A. No, sir, none.

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

A. No, sir, he never was threatened.

Q. Did you physically abuse him in any way?

A. No, sir.

R. 2314-15.[14]

SLED Agent Mears clarified the timing of the inquiry on cross-examination:

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

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

R.p. 2309, l. 16 - p. 2310, l. 2.

At the Denno hearing, counsel Stone argued about the one hour gap, "that's all I have to say" and crying when the tape was on after the gap. R. 2324-27. The trial judge determined, under the totality of the circumstances, that the statement was freely and voluntarily given, "without reward, without promise or hope of reward, without promise of leniency... and that such alleged incriminating statement was the voluntary product of the free and unconstrained will of the defendant." R. 2330.

---

14 The dichotomy of claiming on one had that the statement was the product of phusical abuse and on the other hand a product of lenient treatment is obvious to any reasonable observer.

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

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

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

R.p. 1575, ll. 5-14. See also, R. 1597-99 (Mears)(same).

2. Analysis

To determine the voluntariness of a confession and whether it is subject of coercion, courts commonly look to (1) the location of the questioning, (2) whether Miranda warnings were given, and 93) whether the accused initiated the contact. See Colorado v. Connelly, 479 U.S. 157, 170 (1986). In Connelly, the Court looked to the totality of the circumstances as to whether law enforcement had overborne the will of the accused by (1) the creation of the pressure and (2) the suspect's capacity to resist the pressure. Courts have generally held certain police practices

insufficiently coercive to constitute a Fifth Amendment violation: (1) promises of leniency or psychiatric treatment, (2) confrontation of the accused with other evidence of guilt, (3) an interrogator's appeal to the defendant's emotions, and (4) an interrogator's false or misleading statements. See Annual Review of Criminal Procedure, 34 Geo.L.J. Ann.Rev.Crim.Proc., p. 180-81 (2005)(see cases collected, note 590-594). Obtaining testimonial evidence from a defendant by means of physical torture or other physical coercion violates the Constitution. Id., see Brown v. Mississippi, 297 U.S. 278, 286-87 (1936)(brutality extracted confession is a Due Process violation).

The Applicant relies upon State v. Peake, 291 S.C. 138, 352 S.E.2d 487 (1987), a case where the promise of leniency to avoid the death penalty if he gave a statement interpreted to require a new trial. Peake was distinguished in State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990) where the court held that a polygraph examiner's statement that it would be in the defendant's best interests to tell the truth was not an inducement or hope of a lighter punishment which the Peake court concluded undermined the will of the defendant.

Peake recognized that "a statement induced by a promise of leniency is involuntary only if so connected with the inducement as to be a consequence of a promise." Here, unlike Peake there was never any promise of a lighter punishment. Second, the inquiry was initiated by Aleksey, not the police, to see if he could be placed into the general population in Orangeburg and not remain in the infirmary where he had been placed for safety purposes.

Like Rochester, there has been no showing, under the totality of the circumstances that Aleksey was worn down by improper interrogation tactics such as lengthy questioning, trickery or deceit. Further, there was no showing that the confession was induced by force, psychological

or physical, or by direct or implied threats. Standing alone, the requested bargaining by Aleksey was not for leniency or a lesser sentence.

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

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

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

Counsel Stone admitted at the PCR hearing that he did not argue that the confession may have been induced by a promise to move him from isolation in the infirmary to the general population. PCR 891-98. Counsel stated that he believed his best argument was to urge it was a Miranda violation due to the comment that he had no more to say and the gap of two hours. PCR 893.

Counsel's strategic decision was not deficient under Strickland, supra. The comments did not promise any lesser sentence or dropping of charges. As such, induced by his own requests to

law enforcement, it is difficult to assert that is will was overborne. Further Sixth Amendment prejudice has not been shown where the Applicant failed to show a reasonable probability the result would have been different if he had raised this objection to the statement. The Applicant has failed in his burden of proof.

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

In his brief, p. 55-62, Aleksey contends that counsel were ineffective based upon their failure to seek to have venue changed based upon pretrial publicity. The Respondents addressed this issue generally in the conflict ground, ground B, at pages 51-53. It is incorporated herein by reference.

The Applicant contended that fifty-six (56) potential jurors of the panel of 71 revealed on voir dire that they had heard something about the case and nine (9) indicated that they were not exposed. R. 35-858. He notes that of the thirty-five (35) who were qualified in the panel, thirty-two (32) asserted some exposure to publicity. He asserts that all twelve of the selected jurors revealed some exposure or knowledge about the case. Memo., p. 58.

Aleksey further contends that a review of the articles reveal the nature of the crime and information about Aleksey's background and motive and varying roles of Aleksey and Glory Vee Blackwell. The Applicant notes that one juror, Bonnie Zeigler, asserted that she read the paper everyday "because it was big headlines." R. 434.

A motion to change venue is addressed to the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion. State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997) (finding trial court abused discretion by granting State's motion to change venue based on pretrial publicity because no evidentiary facts supported finding of actual juror

prejudice toward State). When a trial judge bases the denial of a motion for a change of venue because of pretrial publicity upon an adequate voir dire examination of the jurors, his decision will not be disturbed absent extraordinary circumstances. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990).

When jurors have been exposed to pretrial publicity, a denial of a change of venue is not error when the jurors are found to have the ability to set aside any impressions or opinions and render a verdict based on the evidence presented at trial. State v. Manning, supra. Therefore, mere exposure to pretrial publicity does not automatically disqualify a prospective juror. Id. Instead, the relevant question is not whether the community remembered the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt of the defendant. Id. It is the defendant's burden to demonstrate actual juror prejudice as a result of such publicity. State v. Caldwell, supra.; Sheppard v. State , 357 S.C. 646, 654, 594 S.E.2d 462, 467 (2004)(The nature of the crime, i.e., the killing of a police officer, and the fact that a large percentage of prospective jurors remembered pretrial publicity did not establish actual juror prejudice as result of pretrial publicity, and thus, change in venue was not required). See Hunt v. State, _So.2d _, 2005 WL 2046326, *15 (Ala.Crim.App. Aug.24, 2005)(Defendant convicted on three counts of capital murder did not establish that trial counsel was ineffective for failing to adequately argue for change of venue based on pretrial publicity, in hearing on petition for post-conviction relief, where only evidence that defendant submitted was 25 newspaper articles, some of the articles were published after defendant's trial, and defendant did not introduce the voir dire examination of the prospective jurors nor any statements from any jurors); Walendzinski v. Renico, 354 F.Supp.2d 752 (E.D. Mich. 2005)(To establish ineffective assistance of counsel for

failing to move for a change of venue due to prejudicial pre-trial publicity, a defendant must show that the trial court would have granted a change of venue motion; this requires a showing of the jury's actual or presumed prejudice); Bishop v. State, 882 So.2d 135 (Miss. 2004) (counsel's failure to seek change of venue based on pretrial publicity after numerous members of venire stated they had heard about case, or to seek continuance to further assess pretrial publicity, was matter of reasonable trial strategy that did not support claim of ineffective assistance of counsel, in capital murder trial; jurors who stated they had heard about case also affirmed that they could disregard what they had heard, that they could listen to evidence, and that they could be fair and impartial); State v. Bryan, 101 Ohio St.3d 272, 804 N.E.2d 433 (2004) (Defense counsel's failure to request a change of venue, due to massive pretrial publicity regarding murder of police officer, was not ineffective assistance of counsel in capital murder prosecution; defense counsel questioned jurors about pretrial publicity, each impaneled juror stated that he or she either had not formed an opinion about defendant's guilt or could put aside such an opinion and render a verdict based on the law and evidence presented, and trial court took effective steps to protect defendant's rights, strongly and repeatedly advising jurors not to listen to news broadcasts, read newspapers, or talk to anyone about the case); Busby v. Dretke, 359 F.3d 708 (5th Cir. 2004) (prejudice sufficient to warrant a change of venue could not be presumed by virtue of pretrial press coverage, and therefore petitioner was not entitled to venue change absent proof that jurors were actually biased against him; newspaper, which ran at least a dozen articles on the case, had a paid circulation of approximately 5,500, local weekly paper, which gave the case much less prominent coverage, had a circulation of around 3,500, the two local papers' coverage of the

killings was "largely factual in nature," tracing developments in the case rather than engaging in sensationalism, and coverage tailed off markedly in the months preceding trial).

The Applicant has failed to show the existence of "actual juror prejudice." To the contrary, each juror who sat to decide the Applicant's case revealed their ability to set what they read or heard aside and base the verdict on the evidence. See, Jason Cote (ROA 241); Sandra McWaters (ROA 276-77); Duane Green (ROA 321-22); Tyrone Gillard (ROA 346-47, 352); Elaine Whetstone (ROA 354-55, 358); Norris Gibson (ROA 402-03, 406); Debra Sanford (ROA 423-24); Bonnie Zeigler (ROA 430, 434); Gigi Hayes (ROA 453, 458); Kedraine Pelzer (ROA 492-93); and Barbara Hanton (ROA 550-51). The Applicant has failed to establish any actual juror prejudice where their sworn statements in open court revealed the ability to decide the case based upon the evidence.

Further, defense counsel Stone and Sims strategically decided not to seek a change of venue based upon their assessment that Orangeburg County was the preferred county to try Aleksey. See PCR 833-37, 839-43, 854, 1151-52, 619-623. These matters were recited in the argument in ground B, p. 51-53 and is incorporated herein by reference. Simply put, defense counsel reviewed the publicity, weighed the alternatives and decided not to seek a change of venue. He has failed to show either deficient performance or prejudice under Strickland, supra. The allegation must be denied.

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

In ground J, Aleksey contends counsel was ineffective in jury selection when he made inquiry on voir dire concerning foreign nationals when Aleksey was, in fact a U.S. citizen, albeit a descendant of a Russian and a Trinidadian. Memo., p. 64-67. The record reveals that during the voir dire of Harry Mims, counsel Stone asked the following question:

> Q. Do you believe that foreign nationals should have the same rights as non foreign nationals? [as people born here in America]

R.p. 189, ll. 1-2, [R.p. 189, ll. 10-11]. The Solicitor objected that it was a specific hypothetical, but Judge Cottingham permitted it. Subsequently, the trial court inquired why are you concerned about their thoughts on a foreign national. R. 194. Solicitor Bailey noted he was not a foreigner and was born in Manhattan. Id. Counsel Stone explained:

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

R. 194. Judge Cottingham allowed the question. R. 194. Of the jurors who ultimately decided Aleksey's fate, only four were asked the question: Jason Cote (R. 246); Norris Gibson (R. 407); Debra Sanford (R. 427); and Bonnie Ziegler (R. 434-35).[15]

---

[15] During the voir dire, one venireperson, Homer Thrailkill, when asked the question about foreign national stated: "I assume he is a citizen, isn't he?" Sims responded "we can't get into that

Aleksey contends that since the state would not be able to suggest that Aleksey was a foreign national and fail to inform the jury that he was a citizen suggests that the defense injected racial and/or nationalistic prejudice into the case. He suggests that this was per se deficient performance by counsel. Memo., p. 65.

Tactical decisions about the manner of voir dire have been upheld by the Fourth Circuit. See Spencer v. Murray, 18 F.3d 229, 233 (4th Cir. 1994), where counsel elected not to voir dire o racial attitudes. Also, Sexton v. French, 163 F.3d 874 (4th Cir. 1998). In Sawyer v. Butler, 848 F.2d 582, 589 (5th Cir. 1988), the Court upheld counsel's decision not to question jurors about their views on the death penalty where they were questioned by the state, there was no prejudice shown, and no showing of rehabilitation possible. See also Brown v. Jones, 255 F.3d 1273, 1278-79 (10th Cir. 2001)(failure to pursue reverse - Witherspoon voir dire was neither deficient performance or prejudice ineffective).

At the PCR hearing, Duffie Stone stated that Aleksey was not a foreign national. He denied that he ver asked any juror if they had a bias or prejudice against foreign nationals. Rather, he stated he asked them if they believed they should have the same rights as a natural born citizen. PCR 858. He stated he took it off the "federal jury questionnaire." Id. Stone stated that he found in his federal court experience that the question was a good indication of hidden bias that jurors may have. PCR 858. He stated that the question developed an honest response about hidden bias. Stone stated this was the reason he asks the question. PCR 858-59.

---

but I am asking you this question." He responded: Yes, I have no problem. He is a human being like everybody else. I wouldn't be prejudiced one way or another." ROA 342.

Stone reiterated it was a general voir dire question he asked, but also related to Aleksey since he looked like a foreigner. PCR 859. Aleksey did not recall if he ever placed into the record that he was a U.S. citizen. Id. [Note: Vera Aleksey testified that Aleksey was born in 1968 while she was living in N.Y. (ROA 2071-72)].

In the brief, Aleksey ignores the actual voir dire question asked, and goes on a rhetorical rampage about the evils of nationalistic prejudice. Contrary to the claims of Aleksey at this time, there was no false or prejudicial information presented by the voir dire. His characterizations otherwise are not supported by the record.

Nevertheless, counsel performed reasonably in questioning the jurors on the rights of foreign nationals to develop an understanding of biases on their part. Contrary to the Applicant's claim, the inquiry was not damning to Aleksey. It is further uncontradicted that the inquiry is a routine part of the federal jury questionnaire.[16] Counsel Sims concurred that the reason for the inquiry was to ferret out potential jurors who may have a bias, not to create a bias against Aleksey. Sims stated he agreed with the strategy. PCR 620-21. Since the Applicant failed to prove either prejudice or deficient performance, the allegation must be denied.

---

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

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

In ground K, Aleksey contends that defense counsel was ineffective by failing to question any member of the jury panel concerning their views on the death penalty. Memo., p. 62-64. He contends that it was an unreasonable strategic decision that fell below the standards of competence demanded of the criminal bar because it bypassed "it mandatory obligation of examining prospective jurors regarding their views on capital punishment." Memo., p. 63. Respondents submit that the record reveals that the strategic decision to forego the questioning was the product of an informed decision. Further, where the jurors were qualified and questioned by the court on their views on the death penalty, prejudice has not been shown.

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

Juror Sandra McWaters also revealed she was a number 3 juror. R. 278. Again, the solicitor specifically asked about whether she had thought about the death penalty before and declared her willingness to consider it but "I could only do it if I heard the facts..." R. 281. Counsel Stone stated to the juror that the Solicitor had asked a lot of questions about the death penalty, I am not too concerned about that, what I want to ask you is about guilt and innocence..." R. 282. Stone did not ask any specific questions about the death penalty. R. 281-85.

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

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

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

Juror Norris Gibson stated to the court he was in the third group. R. 403-04. Upon Solicitor Bailey's questions, Gibson asserted that he had not discussed or thought about the death penalty before. R. 404. The solicitor focused on determining that if the case was bad enough whether he could vote for death. R. 404-06. Counsel Sims inquired about media, his opinion

about the case, whether women should be held to the same standard as men, bumper stickers on his car, and the aforementioned foreign national question. R. 406-07.

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

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

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

Juror Kedrain Pelzer stated that he was in the third group also. R. 493. He said he would "give the person a chance, ...hear the facts and whatever before really saying they were guilty." R. 493. As to the death penalty, he said he would "hear everything and then decide." R. 494. Solicitor Bailey inquired of Pelzer about his knowledge of counsel Sims and Patti Rhett of his

office. He declared that he could vote for death if the facts were bad enough. R. 496. Counsel Stone inquired his similar question about whether he could find a person not guilty if the state did not prove its case, even a big case where someone was killed. R. 498-99. He closed with his women bias question. R. 498.

Juror Barbara Hanton asserted she was a third type juror. R. 552. Solicitor Bailey inquired of whether she could give the death penalty, if it was bad enough. R. 554. She declared she had "never, never" thought about the death penalty before but could deal with it. R. 555. Counsel Sims inquired about the media exposure and whether she could find him not guilty if the state did not meet its burden. R. 557.

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

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

During the PCR hearing, counsel Sims stated that there was a decision made with Stone to not specifically ask questions about the death penalty beliefs of the jurors. PCR 621. He stated the trial judge was advised of this position. PCR 621. See R. 177-79.[17]

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

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

Counsel Sims asserted that he was aware that the defense had an absolute right to ask jurors their view on the death penalty. PCR 87.[18]

Counsel Stone stated that his reasoning in not pursuing this inquiry of jurors' views on the death penalty after the court's inquiry was based upon his own experience. PCR 861. He stated that while a law clerk, he sat through a jury qualification where the court, prosecutor and defense spent their voir dire time talking about the penalty. R. 961. Stone stated that he was

---

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

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

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

[18] On direct by Brown, Sims asserted that the defense always asked question about the jurors beliefs, until his recollection was re-freshed with the record. PCR 87-90.

struck at how a juror, without knowledge of any guilt, was exposed to the questions where everyone, especially the defense talks about penalty and presupposes the guilt of the defendant. PCR 861. Although he did not know if studies backed him up, but in his discussions with other criminal defense attorneys the concept of "residual doubt" of guilt is the best way to get a life sentence. PCR 862. Stone expressed the inquiry is difficult for the jurors without presupposing guilt. PCR 862.

Stone stated he wanted their voir dire efforts to focus on the jury understanding that they did not think he was guilty and try to carry that residual doubt, if convicted, into the penalty phase. PCR 862. Stone noted that Solicitor Bailey objected because, Stone speculated, he wanted the defense to talk about penalty as much as possible.[19]

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

---

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

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

Stone felt he received about the same information from listening to the response to others questions. He noted that it was how they answered. Stone clarified that he wanted to keep the concept of "residual doubt" in the jurors minds if they got to sentencing. PCR 865-67.

Analysis

As stated previously in argument J, questions ask on voir dire generally fall within the concept of strategic decisions. An attorney's actions during voir dire are considered to be a matter of trial strategy and as such, cannot be the basis for a claim of ineffective assistance of counsel unless counsel's tactics are shown to be "so ill chosen that it permeates the entire trial with obvious unfairness". Burns v. State , 813 So.2d 668 at 675-76 ¶ 22 (Miss. 2002) (citing Teague v. Scott, 60 F.3d 1167, 1172 (5th Cir. 1995). See also Garland v. Maggio, 717 F.2d 199, 206 (5th Cir.1983). Courts "will not second-guess trial strategy decisions such as those made in voir dire." State v. Cornwell (1999), 86 Ohio St.3d 560, 569, 715 N.E.2d 1144, citing State v. Mason (1998), 82 Ohio St.3d 144, 157, 694 N.E.2d 932. In a capital case in South Carolina, the defendant has a right to voir dire the potential jurors. S.C. Code Ann., § 16-3-20(D). However, it has been held that a defendant may waive his statutory right to voir dire. State v. Norris, 285 S.C. 86, 328 S.E.2d 339 (1985). In State v. Smart, 278 S.C. 515, 299 S.E.2d 686 (1982), the Court clarified that the purpose of statutory voir dire by counsel was not to develop a personality

profile, but to determine specific and real bias. In State v. South, 285 S.C. 529, 331 S.E.2d 775 (1985), the Court held it was appropriate to ask whether a juror could vote for either life or death. In Morgan v. Illinois, 504 U.S. 719 (1992), the Court held that upon a defendant's request, a judge is required in voir dire to conduct a direct inquiry into the views of the venirepersons concerning capital punishment. See also, Yeatts v. Angelone, 116 F.3d 255, 265-66 (4th Cir. 1999); Boggs v. Bair, 892 F.2d 1193, 1201 (4th Cir. 1989)(trial judge not required to rehabilitate by his personal questions jurors who could not put aside beliefs). The 11th Circuit decision in Brown v. Jones, 255 F.3d 1273, 1279 (11th Cir. 2001) is very persuasive:

> . . . McDonald was not asked any questions during the Rule 20 hearing regarding his failure to engage in a reverse-Witherspoon inquiry. Although during voir dire the trial judge asked the potential jurors a few questions to determine whether any of them was unalterably opposed to the death penalty, this questioning was limited. Thus, McDonald may well have thought it better to avoid any focus on the death penalty. McDonald's decision not to ask potential jurors whether they would automatically vote to impose the death penalty if Brown were convicted of capital murder appears to have been a reasonable tactical decision, because it seems reasonable for trial counsel to want to focus the jury on the idea of the death penalty as little as possible. Moreover, there is a strong presumption that McDonald's actions were the result of sound trial strategy. See Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. Nevertheless, we need not decide whether Brown failed to establish the performance prong on this claim, because we conclude that he failed to establish the prejudice prong.
>
> 2. Prejudice Prong
>
> In order to establish the prejudice prong, Brown would have to show that, but for McDonald's failure to engage in the reverse-Witherspoon inquiry during voir dire, the result of his trial would have been different. See Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. For several reasons we conclude that Brown has failed to make the required showing. First, during the penalty phase of the trial, the trial judge instructed the jurors that their verdict should be based on the evidence and the law and that there was no room for passion, prejudice, or other arbitrary factors. Brown argues that we should presume that some of the jurors were biased in favor of the death penalty and would have refused to follow the law. We have stated in numerous cases, however, that jurors are presumed to follow the court's instructions. See e.g., Ingram v. Zant, 26 F.3d 1047, 1053 (11th

> Cir.1994) ("Because we presume that jurors follow such instructions, we must assume that the jury put aside any biases it may have had, applied the legal standards as enunciated in the jury instructions, and based its sentencing decision on the facts introduced at trial and sentencing."); Raulerson v. Wainwright, 753 F.2d 869, 876 (11th Cir.1985) ("Jurors are presumed to follow the law as they are instructed."). Because we presume that the jurors followed the court's instructions to base their sentencing decision on the evidence and the law, and not on arbitrary factors, Brown's attempt to prove prejudice is undermined. See Stamper v. Muncie, 944 F.2d 170, 177 (4th Cir.1991) (holding that petitioner, who alleged ineffective assistance based on counsel's failure to "explore with certain members of the venire the 'reverse-Witherspoon' inquiry," failed "to demonstrate how any shortcoming on trial counsel's part constituted prejudice sufficient to satisfy the second prong of the Strickland test"). [FN7] Second, Brown failed to adduce any evidence that any juror was biased in favor of the death penalty. Third, the heinous nature of the crime and the absence of any mitigating factors make this a case in which the prosecutor had a strong case for the death penalty. For these reasons, we conclude that Brown has failed to show that McDonald's decision not to engage in the reverse-Witherspoon inquiry with the jury resulted in prejudice sufficient to satisfy the second prong of Strickland .

Id.

Respondents submit that deficient performance has not been shown. Counsel Stone's concerns about conviction - proneness of a jury in the nature of questioning was not unreasonable. Further, as revealed in the review of the voir dire of the other potential jurors, counsel revised the strategy when jurors indicated a potential for rehabilitation from being a Witherspoon excludable. Importantly, this was not abdication of voir dire by the defense, as the Applicant now suggests, but an informed strategy based upon the responses given by the venireman to the judge and the prosecution to develop the least "conviction-prone " juror and implicitly assert their defense strategy the guilt was still at issue. Respondents submit that this was a legitimate trial strategy. See McLaughlin v. State, 352 S.C. 476, 483-484, 575 S.E.2d 841, 844-845 (2003) (holding that where counsel articulates a valid reason for employing a certain

trial strategy, such conduct will not be deemed ineffective assistance of counsel.) The claim must be dismissed.

Even if deficient performance was found, prejudice under Strickland has not been proven. As set out above, the voir dire of the jurors who actual sat in the trial revealed unquestionable qualification to sit. Like Jones, during the penalty phase of the trial, the trial judge instructed the jurors that their verdict should be based on the evidence and the law and that there was no room for passion, prejudice, or other arbitrary factors. R. 2166-67. Aleksey may be asserting that we should presume that some of the jurors were biased in favor of the death penalty and would have refused to follow the law. Courts have stated in numerous cases, however, that jurors are presumed to follow the court's instructions. See e.g., Ingram v. Zant, 26 F.3d 1047, 1053 (11th Cir.1994) ("Because we presume that jurors follow such instructions, we must assume that the jury put aside any biases it may have had, applied the legal standards as enunciated in the jury instructions, and based its sentencing decision on the facts introduced at trial and sentencing."); Raulerson v. Wainwright, 753 F.2d 869, 876 (11th Cir.1985) ("Jurors are presumed to follow the law as they are instructed."). Because it must be presumed that the jurors followed the court's instructions to base their sentencing decision on the evidence and the law, and not on arbitrary factors, Aleksey's speculative attempt to prove prejudice is undermined. See Stamper v. Muncie, 944 F.2d 170, 177 (4th Cir.1991) (holding that petitioner, who alleged ineffective assistance based on counsel's failure to "explore with certain members of the venire the 'reverse-Witherspoon' inquiry," failed "to demonstrate how any shortcoming on trial counsel's part constituted prejudice sufficient to satisfy the second prong of the Strickland test"). Further, Aleksey failed to adduce any evidence that any seated juror was biased in favor of the death

penalty. Third, the heinous nature of the crime and the absence of any convincing mitigating factors make this a case in which the prosecutor had a strong case for the death penalty. For these reasons, Respondents submit that Aleksey has failed to prove the existence of prejudice as defined in Strickland and Wiggins . The allegation must be dismissed.

Ground 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).

IAC and Failure to Rehabilitate Life-Only Jurors on Voir Dire.

In this allegation, Aleksey contended that counsel failed to attempt to rehabilitate jurors who had indicated their belief that life was the only sentence they would consider. In the opening statement, counsel contended that voir dire was inadequate. In his third amended application, he stated that he abandoned this issue. 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).

Ground 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).**

IAC and Failure to Use Peremptory Challenge to Strike Juror Gigi Hayes.

In ground M, the Applicant contends that he should have used an available peremptory challenge against black female juror Gigi Hayes. Memo., p. 68-71. Particularly, in his brief he contends that defense counsel were aware that juror Hayes knew the victim, was a leader, and her husband was in law enforcement. Respondents submit that counsel has failed to prove either deficient performance in failing to use a peremptory strike for a qualified juror or Sixth Amendment prejudice under Strickland.

1. Voir Dire of Juror 144 - Gigi Hayes

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

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

During the general voir dire, the potential jurors were asked if "any of you related by blood or marriage to the deceased, Sergeant F. L. Lingard, or do any of you have any close personal relationships with him or his family?" R. 149-40. There was no response to the question.

2. PCR Testimony of Stone and Sims

During the PCR hearing, counsel Thomas Sims testified that when Hayes was selected as a juror he had six peremptory strikes remaining. PCR 95. He identified his trial notes [Applicant's Exhibit 1] which included information about Gigi Hayes including "leader" "Judge – looking directly at the judge, 3rd group", "Walter – leaning toward Walter; not any hardship", "Duffie – Briefly looked at def. Saw News", "No, "possibly knows the deceased talk with Charles." Applicant's Exhibit 1, PCR 97-98. Sims stated that "Charles" was Dr. Charles Kilgore, Sims' child's pediatrician. Sims stated he called Dr. Kilgore, with whom Hayes worked at Family Health Center, and received an assessment who she was and what she was all about. PCR 99. He said, based upon this conversation, "she would have been a good person." PCR 99. This was interpreted that Hayes would be a good juror. Memo., p. 68.

Sims stated that he thought that Hayes was either divorced or separated from her husband, the former military policeman. Sims, contrary to the claim, did not recall that Hayes knew Lingard, although he thought Stone had written it. PCR 101.

Stone testified that he had identified his contemporaneous trial notes and the section "Gigi Scoville-Hayes/" PCR 868, Applicant's Exhibit 61.[20] Stone stated that his comment about

---

[20] In Applicant's Exhibit 61, the notes are "husband - military police get rid of" "leader" "Family Health Center" "knows injured-".

"leader" meant if she gets on the jury she is a leader and affirmed that is a person who steers people to her view of the case. PCR 869. Counsel Stone could not recall where he developed information that Hayes knew the victim. PCR 871-72. However, he did recall that Sims contacted someone who knew her who advised him that "she would not be a bad juror." PCR 871.

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

On cross-examination, Stone emphasized the reason the strike was not used on Hayes was because "Sims told me that he thought she would be good." PCR 1161. He said based upon Sims knowledge about Orangeburg, he deferred to him on this matter. PCR 1162-63.

Stone recognized that his impression that Hayes knew the victim was of concern, but based upon information from someone who actually knew her, not just the two lawyers discussing it, gave them adequate assurance to pick jury, despite his initial reservations. PCR 1163.

Analysis

The South Carolina Supreme Court has held that the mere fact that person is friend or acquaintance of victim does not render him incompetent as juror in homicide trial. State v. Jones, 298 S.C. 118, 378 S.E.2d 594(1989). See also, State v. Clark, 340 So.2d 208, 215 (La.1976) (Even where a prospective juror knows a victim of the offense, the defense must show the juror's acquaintance with the victim is such that it is reasonable to conclude it would influence the juror in arriving at a verdict to warrant a cause challenge). The fact that a prospective juror knew the victim or the victim's family does not automatically disqualify the prospective juror for cause. Harris v. State, 632 So.2d 503, 521 (Ala.Crim.App.1992), aff'd, 632 So.2d 543 (Ala.1993), aff'd, 513 U.S. 504, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995). Unless the prospective juror indicates on voir dire that his relationship with the victim would prevent him or her from being fair and impartial, a challenge for cause should be denied. Dunning v. State, 659 So.2d 995, 997 (Ala.Crim.App.1994).

Failure to exercise a peremptory challenge has been found to be ineffective counsel. Johnson v. Armontrout, 961 F.2d 748, 754-755 (8th Cir. 1992). However, prejudice is required or an effect on the outcome. Paradis v. Arave, 954 F.2d 1483, 1491 (9th Cir. 1992), vacated on other grounds, 507 U.S. 1026, 113 S.Ct. 1837, 123 L.Ed.2d 463 (1993), opinion on remand 20 F.3d 950 (9th Cir. 1994). See also U.S. v. Taylor, 832 F.2d 1187, 1195 (10th Cir. 1987). In Denham v. Deeds, 954 F.2d 1501, 1505 (9th Cir. 1992), the Ninth Circuit observed that a juror could have been challenged, but ineffectiveness was not shown where the juror nevertheless could be fair and the decision could in some way be tactical. (See also U.S. v. Quintero-Barraza, 57 F.3d 836, 841 (9th Cir. 1995), finding no ineffectiveness in failing to strike a facially biased

juror where the decision was manifestly tactical and where due respect was paid to the juror's oath. And see Heath v. Jones, 941 F.2d 1126, 1136 (11th Cir. 1991) (juror could be fair and follow the law); Butler v. State, 872 S.W.2d 227 (Tex Crim. App. 1994)(Failure of defendant's counsel to use peremptory challenge against prospective juror in capital murder trial did not constitute ineffective assistance of counsel; although prospective juror stated that she knew members of family of victim of violent crime, thought defendant in that case deserved death penalty, and felt "very strong" about death penalty, she never stated she had predisposition in favor of death penalty, and her answers showed she was willing to set aside her feelings regarding crime committed against family friend); Stead v. U.S., 67 F.Supp.2d 1064(D.S.D. 1999) (counsel for murder defendant was not ineffective in failing to exercise peremptory strike against prospective juror who stated during voir dire that he knew both victim, and victim's son, where juror's connection with victim was remote, juror made it clear that he could be a fair and impartial juror, and juror was last remaining American Indian on panel, whose presence on jury could have been of benefit to defendant, who was also an American Indian).

Respondents submit that the Applicant has failed to prove deficient performance as defined in Strickland. First, they failed to prove the factual predicate to their claim - that juror Gigi Hayes knew the victim. As set out above, at the general voir dire, Hayes did not respond positively to an inquiry on whether she had any "close personal relationship with [Trooper Lingard] or his family." R. 149-50. Second, counsel Sims notes state "possibly knows the deceased." Applicant's Exhibit 1. Further, Sims stated that he did not know if she knew Lingard and thought Stone had written it. Stone, on the other hand, thought he had gotten information that Hayes knew the victim which apparently prompted Sims to check with Dr. Kilgore about the

juror. He thought he learned about the alleged relationship from the trial proceedings, but the trial record is devoid of any reference to any knowledge of such a friendship - and suggests the opposite by the voir dire response.

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

In his brief, the Applicant suggests that the decision to retain Hayes as a juror was delegated to Dr. Kilgore, who did not possess information about her friendship/knowledge of Trooper Lingard or her husband's employment as a law enforcement officer. Memo., p. 69. There is nothing in the record to support this alleged lack of knowledge on Dr. Kilgore's part - particularly when the suggestion made at the hearing was that the contact was made based upon counsel's expectation that Dr. Kilgore would likely possess this knowledge about the co-worker stated in the "possibly knows the deceased talk to Charles", reference in his notes.

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

Turning this decision around, assuming arguendo that Gigi Hayes would have struck, with the independent information from a source that had a close working relationship with the potential juror and defense counsel, aware that it was a death penalty case and involved the death

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

Further, as noted in the earlier section, prejudice under Strickland has not been shown. The reasons set forth in ground L, pages 102-03, the claim must be denied on this alternative basis. As Sims and Stone stated, they were very satisfied with the jury that they had selected. PCR 624. The Applicant has failed in his burden of proof as to ground M.

GROUND 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**

IAC and SLED Agent Buster Edwards as Supervisor of Jury Panel Sequestration.

In allegation N, Aleksey contended that he received ineffective assistance of counsel when SLED Agent Buster Edwards was assigned to be the supervisor over the other bailiffs in handling the sequestered jury and their transportation. See, ROA 859-862. His complaint derived from the fact Edwards had signed discharge papers when Aleksey was released from the hospital, served the actual arrest warrant on him, and was involved in the transportation of him from the hospital to the Law Enforcement Center. In his third amended application, he stated that he abandoned this issue. 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).

Ground 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).

Ineffective Appellate Counsel and Unwaivable Conflict of Interest Issue

In his ground S, he contends that his appellate counsel, Robert M. Dudek of the South Carolina Office of Appellate Defense erred in performing ineffectively in failing to raise before the South Carolina Supreme Court in the direct appeal that trial counsel's conflict of interest was unwaivable. In the Brief before this court from the Applicant, he makes reference to "S" on page 84 along with the other allegations concerning conflict of interest, but from page 84-117 makes no reference to appellate counsel deficiency or prejudice or how this claim was even preserved for review before the South Carolina Supreme Court when no objection was raised. See Memo. P. 84-117. 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).

Assuming *arguendo* that it can be addressed, Respondents would submit that it must be rejected because deficient performance has not been proven. A PCR applicant has the burden of proving appellate counsel's performance was deficient. Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003); Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). A defendant is

constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990); Tisdale v. State, 357 S.C. 474, 475, 594 S.E.2d 166, 167 (2004) ; Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999).

The proper standard for assessing a claim of ineffectiveness of appellate counsel is that set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Smith v. Robbins, 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000)(following Smith v. Murray, 477 U.S. 527, 535-36, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986)). The petitioner must show both (1) constitutionally deficient performance, by demonstrating that his counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error(s), the result of the proceeding--in this case the appeal--would have been different. Id. at 285 (applying Strickland).

Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is not required to raise every nonfrivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) (emphasis supplied). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy...." Jones, 463 U.S. at 754, 103 S.Ct. 3308. "Furthermore, to render effective assistance, an attorney is not required to raise every conceivable constitutional claim available at trial and on appeal. Holladay v. State, 629 So.2d 673 (Ala.Cr.App.1992), McCoy v. Lynaugh, 874 F.2d 954, 965-66 (5th Cir.1989). Rather, counsel must be given some discretion in

determining which claims possibly have merit, and thus a better chance of success, and which claims do not have merit, and thus have little chance of success. Smith v. Murray, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986); Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982)." Davis v. State, 720 So.2d 1006, 1014 (Ala.Crim.App.1998).

> " '[E]xperienced advocates have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. Selecting the most promising issues for review has assumed a greater importance in an era when the time for oral argument is strictly limited in most courts and when page limits on briefs are widely imposed.'

Jones v. Barnes, 463 U.S. 745, 746, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). [21]

In applying the [Strickland] test to claims of ineffective assistance of counsel on appeal ..., reviewing courts must accord appellate counsel the "presumption that he decided which issues were most likely to afford relief on appeal." Pruett v. Thompson, 996 F.2d 1560, 1568 (4th Cir.1993). see also Smith v. South Carolina, 882 F.2d 895, 899 (4th Cir.1989). Indeed, " '[w]innowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." Smith v.

---

[21]The purpose of ineffectiveness review is not to grade counsel's performance. See Strickland, 104 S.Ct. at 2065; see also White v. Singletary, 972 F.2d 1218, 1221 (11th Cir.1992) ('We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.'). Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Strickland, 104 S.Ct. at 2067. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.' Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987).

Murray, 477 U.S. 527, 536, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) (quoting Jones, 463 U.S. at 751); see also Smith, 882 F.2d at 899 (counsel's failure to raise a weak constitutional claim may constitute an acceptable strategic decision designed "to avoid diverting the appellate court's attention from what [counsel] felt were stronger claims"). Although recognizing that "[n]otwithstanding Barnes, it is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim" on direct appeal, the Supreme Court has recently reiterated that "it [will be] difficult to demonstrate that counsel was incompetent." Robbins, 120 S.Ct. at 765. " 'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." ' Id. (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir.1986)). Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir.2000) (en banc).

Appellate counsel is not deficient for failing to raise on appeal an issue that was not preserved for review. Legge v. State, 349 S.C. 222, 562 S.E.2d 618 (2002): Gilchrist v. State, 612 S.E.2d 702, 705 (S.C. 2004) (appellate counsel not ineffective where trial counsel's submission of the request to charge, without any further explanation of his point, was insufficient to preserve for review the trial court's failure to charge the specific language regarding "a right to act on appearances."). See State v. Hicks, 330 S.C. 207, 499 S.E.2d 209, cert. denied, 525 U.S. 1022, 119 S.Ct. 552, 142 L.Ed.2d 459 (1998) (issue must be raised to and ruled upon by trial court to be preserved for review); State v. Dickman, 341 S.C. 293, 534 S.E.2d 268 (2000) (party may not argue one ground at trial and an alternate ground on appeal).

To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Strickland, supra; Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). That is, the Applicant must prove prejudice by showing he

would have prevailed on appeal had a writ been filed by counsel and granted by this Court. See, Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (appellate counsel ineffective in failing to raise issue, preserved below, which would have entitled defendant to reversal on appeal).

This asserted issue of an unwaivable conflict was never preserved for review in any manner by objection or otherwise. The Applicant has failed to show that there any exception to the Court well-established preservation rules to allow this to be raised de novo for the first time in a direct appeal to the Supreme Court. As stated in Legge , appellate counsel cannot be deemed deficient in failing to do what the rules of court do not authorize him to do - raise an unpreserved ground.

Alternately, prejudice has not been should. First, if raised without being preserved on objection below, the appellate court would have dismissed it. See State v. Hicks, supra. (issue must be raised to and ruled upon by trial court to be preserved for review). Second, even if considered, for the reasons set out in response to ground A, the alleged conflicts was not unwaivable as a matter of law. Respondents incorporate by reference, this memorandum , infra., at pages 22-78. For this additional reason, the matter must be dismissed and denied as failing in the burden of proof to show ineffective assistance of counsel.

GROUND 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.**

IAC and Prison Adaptability Expert

In his allegation P(6) and brief at pages 76-81, he asserts that trial counsel was ineffective in the penalty phase in failing to retain an expert on prison adaptability to testify that Aleksey was adaptable to prison life based upon the decision in Skipper v. South Carolina, 476 U.S. 1 (1986). He relies upon the PCR testimony of former S.C.D.C. employee, James Aiken in support of his claim. Respondents incorporate by reference its earlier response as to Ground A at pages 58-63 related a similar claim in the conflict of interest section. Respondents submit that counsel had a strategic reason for not pursuing this type of evidence and was not deficient. Alternately, prejudice under Strickland has not been shown. This specification is without merit and must be dismissed.

A capital defendant is given broad latitude to offer mitigating evidence because " 'the penalty of death is qualitatively different' " than any other sentence. See Lockett v. Ohio, 438 U.S. at 604, 98 S.Ct. at 2964 (quoting Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976)). The death penalty's irrevocable end has prompted the Supreme Court to require the sentencer in capital cases to consider a defendant's violent and troubled youth, see Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); good behavior in prison, see Skipper v. South Carolina, 476 U.S. at 1, 4-5, 106 S.Ct. at 1669,

1670-71 (1986); history of child abuse and emotional problems, see Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989); ineligibility for parole, see Simmons v. South Carolina, 512 U.S. 154, 162, 114 S.Ct. 2187, 2193, 129 L.Ed.2d 133 (1994); poverty-ridden childhood, see Hitchcock v Duggar, 481 U.S. at 397, 107 S.Ct. at 1823-24; good deeds as an affectionate uncle, see id.; and childhood habit of inhaling gas fumes, see id.

In this ground, he claims that trial counsel should have employed an expert to opine on Aleksey's adaptability to prison. 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 stated he saw that the window was broken out and that Aleksey had broken a metal stool from the stand that was attached to the floor. 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.[22]

Stone testified that because Aleksey was charged with escape, 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

---

[22] 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.

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 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." 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.

Counsel Sims concurred in his testimony. He stated that the theory of defense was to show that Aleksey was not a bad person and although he had a criminal history, that it was consistently non-violent. PCR 627, 679. Sims stated that he understood that Skipper allowed for

evidence of rehabilitation and adaptability in prison to be presented, as to whether a person can adapt in prison or become a predator. PCR703-704.

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

James E. Aiken

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

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

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

Aiken further admitted that if Aleksey began to tear up the jail, he would use up to death and had done that before. PCR 1502. Aiken also admitted that in the past, mistakes had been made in the South Carolina Department of Corrections in assessing inmates for future violence and placement. PCR 1504. Aiken summarized the fact that his opinion is that "any inmate", including Aleksey can be managed at the South Carolina Department of Corrections based upon the capability of the use of lethal force.

Analysis

In Wiggins v. Smith, supra, the Supreme Court noted that counsel was under a duty to do a reasonable investigation into the existence of mitigating evidence, including adaptability to

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

Counsel Stone and Sims were both aware of the right to present relevant and competent evidence of adaptability to prison life based upon the Skipper decision. Stone felt that adaptability evidence may "backfire" and felt that he was not aware of any evidence to suggest that he was particularly adaptable. His concern about the complaints and lawsuits that he had pursued caused him to think the presentation could not be credible. PCR 823, 1224, 1225.

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

> "You can take a look at has Bayan Aleksey has *adapted to jail*, he has *adapted to prison*. This is a piece of metal furniture that was in the cell here in Orangeburg. How does he react to it. He becomes frustrated. Bayan doesn't like being in that cell. So he rips this piece of metal furniture off the wall in that cell, smashes out the window and earns himself a trip up to safekeeping where Mrs. Dozier and Mr. Keitt told y'all they send people that are too unruly or just not suitable to be housed in a local jail. *That's his adaptation. That's how he adapt's to a confined environment....*
>
> "...As I said before, when you think of life without parole as an alternative for the death penalty, look at how he has adapted to jail. *Look at the only evidence of his adaptability to jail*, that broken window and this broken piece of furniture and his trip to safekeeping."

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

Here, the defense team reasonably investigated Aleksey adaptable by learning about his adaptability to the jail setting. Stone's belief that adaptability experts can backfire was well-reflected in the testimony of Aiken who revealed:

(1) Prison officials make mistakes in placements.

(2) When Aiken said adaptable, he actually meant subject to be controlled, either by maximum and isolated jails, or by the use of lethal force.

(3) Aleksey's physical outburst at the jail, according to Aleksey was that he was in a four-point restraint in a cell, yet was able to break a chair and destroy a window. PCR. 1508. Aiken stated that Aleksey's reason was to "get some attention."

(4) Aiken admitted "the best predictor of future behavior is past behavior."

(5) Aiken admitted that the local detention people opined he was not adaptable to their jail.

(6) Aiken opined that violent behavior decreases with age and burn out in the prison setting.

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

Stone assessment about "backfire" was reasonable. Although the evidence was admissible as mitigating, counsel's experience (where similar general responses would be given) reflected the problem with such testimony.

Further, prejudice has not been shown by a reasonable probability that but for his failure to present adaptability evidence, the result of the proceeding would have been different. At the hearing, Solicitor Bailey testified that he had been involved in prior cases where James Aiken testified. PCR 1698. He stated that he like to use them from the prosecution point of view and present testimony about what he is adapting to and develop a description of prison life in the general prison population – cable TV, recreation activities and amenities compared with the deceased death. Bailey stated that because an adaptability expert was not used, this contra-mitigation testimony in explaining actual prison life was not present. PCR 198-99. Bailey noted that each time Aiken testified in his cases for the defense, the verdict was death. PCR 1699. As noted above, on balance, the risks of the adaptability testimony and the failure to present it in Aleksey's case does not undermine confidence in the outcome. His claim otherwise must be denied.

IAC and Social Worker

The Applicant further contends that defense counsel performed deficiently in failing to retain a social worker to review the records acquired by "mitigation specialist" Toni Bovee. The Applicant relies upon the deposition - testimony of Janet Vogelsang, a licensed clinical social worker, in support of their claim that counsel was ineffective. Memo., p. 81-83.

The Applicant summarizes social worker Vogelsang's conclusions about Aleksey as follows:

A. A special needs child.

B. Emotionally disturbed and emotionally handicapped.

C. Special education student.

D. Immature and enmeshed with his mother.

E. Alcoholic and abusive father.

F. Child that did not develop social skills that would help in relationships outside the home or able to function in world.

G. Engages in impulsive and self-destructive behavior.

H. Does better in well-structured environments where there is consistency.

I. Had mother who sabotaged his therapy.

J. Attempted suicide at least once.

K. High risk to end up incarcerated and committing a serious act.

Memo., p. 82-83. Vogelsang Depo., p. 57-60. He asserts this testimony from a social worker would have been more persuasive and credible than the mother's testimony. Id. Respondents submit that viewing the record as a whole, he has failed in his burden to prove either deficient performance or prejudice.

During the trial, in the penalty phase, the sole mitigation witness who testified was Aleksey's mother, Vera Aleksey. R. 2069-94.

In her testimony before the jury, she described her family development and movement from Trinidad to New York leading to her marriage to Ronald. R. 2072-74. She stated her

husband had a severe drinking problem that affected her life and child. After Bayan was born, Ronald's drinking increased and he became angry, disruptive, and he struck her a couple of times. R. 2072-73.

She stated she left when Bayan was three. She said her husband attempted to see her later, while drinking and continued his violence. R. 2074-75.

She stated that Bayan had educational problems and emotional problems as a child. He was a late talker, timid, had problems with his school work and failed his homework. R. 2075-76. He use to leave his parochial school and come home during the day. R. 2077, 2079.

She stated she went to a diagnostic education center for an evaluation after he had to repeat the fifth grand for professional help. They recommended and he was placed in a special education class. R. 2079.

She claimed he did not have friends at school. She claimed others would pick at him. Later, after he started making friends in high school, he suddenly did not want them around. R. 2080-81.

She said he had therapy for three (3) years at Queens Guidance Center. R. 2081. Later, he had to go to a hospital for therapy for 3 to 4 months. R. 2081-82. After that he was supposed to go to a residential treatment center. R. 2083. However, she stated that she refused to go to court to have him sent there. She had other parents state they were not pleased with that facility, including one whose daughter committed suicide. R. 2083-84.

She attempted to have him in other counseling, including group and family counseling. R. 2084-85. After services could no longer be provided, he went back to junior high, but continued to have emotional and coping problems. R. 2085.

She said Aleksey did not finish high school and dropped out. R. 2086.

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

In therapy, Aleksey's anger and resentment toward his father was revealed. R. 2089. She said on a number of occasions between 3 and 19, Aleksey's father would show up and physically abuse her.

Mrs. Aleksey described trying to be both mother and father, but was financially unable to provide for the treatment and medication he needed. R. 2090-91.

She felt that they were close-knit and her life was to take care of Bayan. R. 2090. She described after he left home when he was 19, that he attempted to return home. R. 2090-91. Unfortunately, she stated they would have arguments because he would not follow her rules. R. 2092.

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

Counsel's PCR Testimony

Counsel Stone testified, that in addition to Sims, the defense retained Toni Bovee as a "mitigation expert or specialist." Her job was to investigate anything that could be presented in mitigation. PCR 1214. He said she met with Aleksey's family.

Stone stated that Bovee, as a mitigation specialist, developed the same type of evidence that his experience in Lexington County presented. PCR 1215. In addition, they contacted Dr. Rosengard in New York, who was a mental health person, either social worker or psychologist, but after he was brought from New York, they decided not to use him. PCR 1215.

Stone stated they also retained psychiatrist, Dr. Donna Schwartz-Watts, to assist and provide information about Aleksey's mental state and met with her several times about his psychiatric background. They did not call her as a witness because she could not uncover anything that could help them. PCR 1217. Dr. Watts recommended neurologist, Dr. David Bachman, who was used in the guilt phase concerning the concussive trauma. PCR 1218. See r. 1650-1662.

Stone stated that his initial impression was that Dr. Rosengard would be a favorable witness, but presented information when he arrived that he blamed the mother for Aleksey's problems as being an angry child with separation disorder due to the parents breakup and caused an inability to do well in school with emotional problems. PCR 1220. He suggested that blame was due to lack of discipline. PCR 1220.

Stone stated this hurt their theory because they wanted to put Mrs. Aleksey on the stand to say things about Bayan and Dr. Rosengard would have blamed it on her. PCR 1220.

Stone confirmed Bovee was a background investigator about mitigation, not a crime scene investigator. PCR 1221.

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

Counsel Sims also stated that Toni Bovee was a mitigation expert to develop mitigation evidence, but she dealt mostly with Mr. Stone. PCR 656-67.

Jan Vogelsang described the records she reviewed in preparation for her testimony. Particularly, she reviewed and relied upon the records of Toni Bovee. Depo., p. 63. These records included Bovee's reports of interviews, reviews of mental health records, school records, and the August 7, 1998 Timeline she prepared concerning Aleksey. Depo., p. 64-66. Most importantly, she said that all the documents and reports she reviewed were those assimilated by Toni Bovee prior to the trial. Depo., p. 66. Exhibits 1, 2, 3.

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

Included in the deposition were some of the work product that trial counsel had from Bovee, including her extensive interview with Vera Aleksey on July 27, 28, 29, 1998 (Vogelsang, Exhibit 1). Further, the interview with David Rosengard MSW (Master in Social Work) at Queens Guidance Center on August 4, 1998 in included which describes his interaction with Aleksey , his nonaggressive behavior, his anger based at himself, his poor skills at solving problems as well as his mother's attempt to blame it on others, and his inability to see the consequences of his behavior. Bovee summarized the contact by stating that Rosengard opined that he did not feel that Bayan would shoot someone in the manner described because he was more destructive ti himself. Vogelsang, Exhibit 1. Vogelsang Exhibit 2 is Bovee's extensive time line which categorizes events in Aleksey's life from his parents birth and marriage through individual events until November 8, 1997 (1998). Particularly significant, the timeline includes his many mental heath therapy sessions, his school attendance and grade summary, his arrests, his commitment for suicide treatment, his traffic tickets, his complaint against police officers in 1993 for beating, his complaint against the QHDM for $1o million dollars for lack of medical treatment, his offer to drop lawsuits in return for deal on criminal charges another comment about a $5 million dollar lawsuit, his use of aliases in criminal activity, information that Sara Pivero was charged on November 20, 1996 by for bad checks and thefts by deception involving the Lexus (Exhibit 2, p. 10), and Sara's arrest while visiting Aleksey at Bucks County Correctional Facility on February 1, 1997, as well as other matters. The final exhibit to the Vogelsang deposition is the Social History prepared by K. Fisherman dated February 24, 1976.

In Wiggins, the trial counsel only alluded to Wiggins' difficult life and his clean criminal record at sentencing. Wiggins asserted that trial counsel were ineffective for failing to retain a

forensic social worker to prepare a social history even though the State made funds available for that purpose. If trial counsel had prepared a social history, they would have discovered the severe physical and sexual abuse he suffered. The state habeas court denied him relief because it found that counsel's decision not to investigate and present certain mitigation evidence was based on trial strategy and was thus not ineffective. Moreover, the state court noted that trial counsel obtained social service records that did detail some abuse and mental retardation; thus, trial counsel were aware to some extent, and did conduct some investigation into Wiggins' unfortunate childhood.

In reversing the state habeas court, the Supreme Court restated that deference is owed strategic judgments made by trial counsel. However, the Court emphasized that deference is owed strategic decisions when the investigation supporting those judgments was adequate. Wiggins, 539 U.S. at 521-22, 123 S.Ct. 2527. Where trial counsel has not "fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background," "counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision." Id. at 522, 123 S.Ct. 2527 (quoting Williams, 529 U.S. at 396, 120 S.Ct. 1495). Therefore, the "principal concern in deciding whether [trial counsel] exercised 'reasonable professional judgment' is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background was itself reasonable." Id. at 522-24, 123 S.Ct. 2527 (internal citations omitted and emphasize in original). The Court held that Wiggins' trial counsel's investigation was inadequate because "counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set

of sources." Id. at 524, 123 S.Ct. 2527 (citing the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6, p. 133 (1989)(stating that among the topics counsel should consider presenting are medical history, educational history, employment history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences)). Trial counsel did obtain a psychologist to evaluate Wiggins. Trial counsel also procured Wiggins' social services records and had available to them the presentence investigation report. However, the Court found that trial counsel should have nonetheless arranged for a forensic social worker to compile a report of Wiggins' social history, and trial counsel was found ineffective for not so doing.

The Court also held that the scope of trial counsel's investigation was unreasonable in light of the investigation that they did conduct. In trial counsel's investigation, they did discover that Wiggins' mother was an alcoholic, that he was shuttled between foster homes, and that his mother often left him and his siblings alone without food. The Court held that based on this information, a reasonably competent attorney would have further investigated Wiggins' background. "In assessing the reasonableness of an attorney's investigation, 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." Id. at 527, 123 S.Ct. 2527. The Court held that Wiggins' trial counsel "chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible.... As a result, the court's subsequent deference to counsel's strategic decision not 'to present every conceivable mitigation defense,' despite the fact that counsel based this alleged choice on what

we have made clear was an unreasonable investigation, was also objectively unreasonable." Id. at 527-28, 123 S.Ct. 2527. Accord, Rompilla v. Beard , 125 S.Ct. 2456, --- L.Ed.2d ---- (2005).

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

The Applicant has not shown that counsel's investigation was deficient in failing to retain a licensed social worker. First, the defense retained a mitigation investigator, Toni Bovee, whose marshaling of materials was completed relied upon by Ms. Vogelsang in her deposition. It provided whatever information was necessary. A contrast of the testimony of Vogelsang with the testimony of Aleksey's mother revealed that Ms. Vogelsang testimony was merely a conduit of the information that Ms. Aleksey had already testified about. More importantly, since Ms. Vogelsang testimony was merely a hearsay summary of the records which defense counsel necessarily were aware of in their investigation and use of Ms. Bovee, it is difficult to discern how Aleksey can now assert counsel was ineffective in their investigation in developing the same matters. To the contrary, in a quest to prove prior counsel ineffective, they have proven that counsel was reasonable in their investigation of Aleksey background by interview of family, prior mental health professionals and retention of independent forensic psychiatrist and neurologist. Unlike Wiggins , where the Court determined the decision to cut off the investigation came prematurely, the team of Stone, Bovee, and Sims continued the quest up to trial.

The Applicant complaint against prior counsel is not one of deficiency in investigation, but a disagreement on style. Vogelsang testimony revealed nothing new for it relied completely on the reasonable investigation done before. Instead, it is a preference (and protection) for hearsay and summary over fact witness and credibility. This strategic dilemma came to a head on the decision to use Master in Social Work David Rosengard, who was involved in Aleksey

earlier treatment where his testimony might cast a negative impression on the mother's testimony. At that moment a decision had to be made, similar to the decision Aleksey now seeks on whether to present the social worker who had real and credible interaction with Aleksey and his family or go with the mother. Facing that choice, with the same information that Vogelsang possessed, defense counsel tactically chose to present the mother and leave her negative relationship to the risk, however unlikely, of Solicitor Bailey's cross-examination to break down that relationship. Now, he seeks to assert that another social worker - one more step removed from the facts than Rosengard and the other mental health professionals should have presented testimony about her review of the records, including Rosengard. The jury information was adequately presented under the Sixth Amendment.

The Applicant appears to assert a checklist type of claim that any time the death penalty is sought, defense counsel is required under the constitution to both retain and call a social worker to testify about that Applicant's background. This assertion is a misreading of the mandate of Wiggins. See Gudinas v. State, 816 So.2d 1095 (Fla. 2002)(counsel was not ineffective in failing to hire social worker, for presentation of mitigation evidence at penalty phase of capital murder trial; counsel hired and consulted with mental health experts for purpose of determining effect of defendant's social history on his life and on the case, and social worker's testimony would have been cumulative to the mental health and other mitigating evidence actually presented).

Additionally, the complaint about the decision to hire a social worker appears to be second-guessing by current counsel, rather than identification of a defect in trial counsel's strategy. The Strickland Court acknowledged, "Even the best criminal defense attorneys would not defend a particular client in the same way." 466 U.S. at 689, 104 S.Ct. 2052. "The standard is

not how present counsel would have proceeded, in hindsight, but rather whether there was both a deficient performance and a reasonable probability of a different result." Cherry v. State, 659 So.2d 1069, 1073 (Fla.1995). Duncan v. State, 2005 WL 628215 (Ala.Crim.App. 2005) (defendant failed to establish that trial counsel's failure to obtain assistance of social worker in murder prosecution was ineffective assistance of counsel where he failed to identify how such third person assistance would aid defense, and counsel did, in fact, obtain some expert assistance in preparing for trial).

Prejudice Not proven.

The Applicant has also failed in their burden of proof to show prejudice. Contrasting the testimony of the mother and Ms. Vogelsang, the jury was equipped with most of the same information. The assertions before this Court are similar to those raised in Jones v. State, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998). In Jones, the Court stated :

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

Further, the risk of the testimony of Vogelsang were revealed at the deposition. Evidence about his perceived violence toward the family was revealed on cross-examination. Background hearsay which formed the basis of the speculative opinion were not consistent. A different picture - one less favorable and more violent - was presented by the social history. To use the words acknowledged by James Aiken - the best predictor of future behavior is past behavior. The social worker presented evidence of possession of deadly weapons(gun and knife), firing a gun

at another person (Depo. P. 56), violent and abusive assaults against his mother, Depo. P. 71-72, throwing furniture (Depo . P. 73). Although the negative opinions concerning the mother were untouched, the use of the social worker made the possibility of Rosengard impressions able to be presented, yet know surrounded with Aleksey's social history of the assaults against and fear of his family members. Further, the solicitor recognized these risks for the defense in social work evidence generally by his prior casework involving similar testimony.

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

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.

Opening Statement and Non-Violent Bad Acts of Aleksey and IAC

In this allegation, Aleksey complains about the overall trial strategy of defense counsel. A review of the post-hearing memorandum of the Applicant does not include any specific reference to this specification of error, although in the third amended application, Aleksey does not suggest that it has been abandoned. Nevertheless, Respondents submit that it was reasoned strategy on the part of counsel based upon their theory in the case, and not done by neglect or ignorance.

This course must recognize that often times counsel for a defendant, and particularly a capital defense counsel, are faced with strategic decisions where benefits and risks exist with each alternative course. See Burdge v. Palmateer, 338 Or. 490, 497, 112 P.3d 320 (2005) (reasonable skill and judgment is exercised when counsel apprehends issue, sees a course of action that could benefit client, and concludes that the benefits of that course of action outweigh the risks). The United States Supreme Court reasonably acknowledge it in a setting where counsel concedes the guilt of his client as a sound trial strategy and that such a concession by counsel does not require petitioner's consent. Florida v. Nixon, 543 U.S. ----, 125 S.Ct. 551, 560-61, 160 L.Ed.2d 565 (2004) (provided that a defendant is informed of counsel's decision,

reasonable strategy of conceding guilt to murder in order to preserve the defendant's credibility did not require the defendant's express consent because it is not the functional equivalent of a guilty plea). Petitioner does not contend that he was not informed of his trial counsel's strategy to focus on a defense theory that the victim's death was the unintended consequence of a burglary. See Gorham v. Thompson, 332 Or. 560, 567, 34 P.3d 161 (2001) (reviewing court "will not second-guess a lawyer's tactical decisions in the name of the constitution unless those decisions reflect an absence or suspension of professional skill and judgment"); Young v. Catoe, 205 F.3d 750 (4th Cir. 2000) (admission of guilt not ineffectiveness when thrust was to avoid death penalty); U.S. v. Wilkes, 46 F.3d 640, 644 (7th Cir. 1995) (conceding lesser offense to enhance credibility).

In the defense opening statement, counsel; Stone stated:

> . . . we may see things or see people on the street and assume we don't like them. I will tell you right now. Bayan Aleksey is not anybody you are going to particularly like. **He has been arrested before. He has been charged before, forgeries, breach of trust, things like that. He has never been tried before because what you will learn either from the solicitor or me is that he has a couple of names. He's got a couple of fake ID's. When he gets arrested, he presents his fake ID. He makes bond and he leaves.**
>
> It kind of makes me wonder why somebody with that profile would shoot a police officer for speeding. Why would he panic. You will also learn a little bit more about GloryVee Perez Blackwell, the Solicitor's main witness. . ."

ROA 911-912.

The Applicant contends that this opened the door to bad acts which the state could not otherwise have introduced in the guilt phase of the trial, particularly if the defendant does not testify. He is correct on that point because much of the bad act evidence would not be admissible

under SCRE Rule 404(a)(1) and 404(b). The problem is that reasonable strategy is evident at the outset of his argument - why would an individual confronted with numerous arrest and evasions of responsibilities on this occasion uniquely chose violence, when in the past he chose peaceable deception. In other words, if the action taken is against the conformity of his past actions, the event did not occur in that manner. Under the defense theory, it must have been done by someone who did not have that conformity of conduct - GloryVee.

Strickland recites that there are countless ways to provide effective assistance in any given case and even the best criminal defense attorneys would not defend a particular client in the same way. 466 U.S. at p. 689, 104 S.Ct. at p. 2065. Under this principle, the courts have recognized reasonable defensive strategies even if they are unsuccessful. Flieger v. Delo, 12 F.3d 766, 774 (8th Cir. 1993). An attorney's conduct is not deficient simply because another (appellate counsel) would do differently. U.S. v. Chambers, 918 F.2d 1455, 1462 (9th Cir. 1990). Speculation that a different lawyer, or the same lawyer using a different strategy or tactics, would have changed the result is an insufficient showing of prejudice. Cooks v. Spalding, 660 F.2d 738, 740 (9th Cir. 1991).

Thomas Sims declared that there theory of the case was that there was no violence in Aleksey. PCR 148. Aleksey may have been a bad person and done bad things, but there was never any violence in his background. PCR 627. Particularly, it was not in his character or his modus operendi" to shoot the trooper. PCR 149. He felt that the bad act - no violence strategy and his strategy with the woman witnesses - Blackwell, Pivero, Batkilina and Watson was consistent with each other. He said that all during the scenario with the woman, it was consistently shown that he would use a name, get the money with them or from them, have a

good time, and then he would move on. PCR 632. He stated it was their intent not to object to matters consistent with their theory of showing that he was a con artist - get money from woman, do things . PCR 152. Sims noted that he cross-examined the girls to reveal that they participated in the deeds and that so long as they were having a good time he was having a good time. PCR 150.Simply put, Sims stated that he had no problem letting the bad acts in. Id.

Counsel acknowledged that the solicitor made a Lyle motion, but that it was not argued and the defense did not object when it was introduced. PCR 151. Sims stated that once the decision was made as to how they were going to proceed it was their intent not to object. PCR 152.

Sims believed that there was clear and convincing evidence based upon their investigation of the acts. Importantly, under Strickland, Aleksey admitted to counsel that he had done the bad acts with the girls. PCR 152.

Duffie Stone concurred in the reason and the reason for the opening statement to set the tone of the defense. PCR 849. The issue was a trooper was killed from a gunshot coming out of a white Mustang on I-95. The trooper eyewitness did not see anything. PCR 849. Stone was left with two people - Aleksey and GloryVee. He felt that the theme of the guilt phase was to remove the gun from Aleksey and place it into GloryVee Perez's hand. PCR 1165. The issue was who was the passenger, who was the driver. PCR 849-50. Although motive need not be proven, it is essential in the jury's mind. PCR 850. Stone felt that he must establish who had the motive to shoot. Id.

Although his opening statement may have placed his client in a bad light, Stone declared that it was part of the bigger picture of the case. He stated that the first thing he was trying to do

in the statement was to do what every lawyers seeks to do - build credibility with the jury. PCR 1166. He felt that if the jury thought he was lying to them at that point it would not matter what he said either in the guilt phase or penalty phase. Additionally, he felt a "good bit" of information (about his bad acts) would come in anyway to show motive. [23] Stone believed that the state was going to try to show that Aleksey was running from the charges, that he was out on bond, and the reason was to avoid arrest. Stone did not think that the state would attempt to show that he was merely speeding and that was why he was killing the policeman. PCR 1167. Knowing that the state would be attempting to prove the running from the other charges and jail theory, Stone stated he attempted to turn that to their advantages by Aleksey's normal actions.

Stone stated Aleksey had numerous false identifications on him at the time of the arrest. He had a consistent pattern of being stopped or being arrested and going to jail and presenting the false identification, bonding out and then never being seen or heard from again. PCR 850, 1167. Based upon the consistency of Aleksey actions when confronted with an actual or potential arrest, he felt this would be persuasive to the jury because nothing was different. PCR 1168. According to Stone, Aleksey had a way out with his ID's, but he wanted to suggest that GloryVee had no way out but shooting the police officer. PCR 1168.

---

[23] In the context of evidentiary law, State v. Lyle and its progeny protect a defendant from the unrestricted admission of bad act evidence. Lyle prohibits such evidence unless the evidence has a particular relevance to the crime charged and falls within at least one of five categories: motive, identity, common scheme or plan, absence of mistake or accident, or intent. Further, bad acts that are not the subject of conviction must be proved by clear and convincing evidence. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). This preliminary fact-finding by the judge ensures the evidence is subjected to some procedural safeguard before the jury hears it. See Rule 404(a)(1), SCRE ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same[.]").

Stone felt that his investigation of Glory Vee was supportive of their defense theory - the drugs and the history of her violent temper toward her husband. PCR 851, 1169. Also , she had a desire not to lose her child. PCR 851. Stone stated that they had a sense of confidence about that case. He hoped to link GloryVee with the drug trade and the I-95 high drug corridor. PCR 1169. He felt that if he could successfully link her to then drug trade that it would give her a reason for the shooting, fleeing, and everything. Id.

Stone felt that her prior conviction for cocaine was important in their theory, where she was indicted with her mother and the mother goes to prison while Glory Vee gets probation. PCR 1169-70. Also, he learned she may have cut a deal against her own mother to avoid jail. Further, his investigation revealed to him that her family was involved with ballooning heroin. However, Judge Cottingham only allowed the impeachment of GloryVee on the possession of cocaine plea. PCR 1170. Stone did feel that he was able to develop before the jury that I-95 was a drug corridor. PCR 1170.

Stone felt that another issue against GloryVee was that they had learned that she had used a gun before , fired it before , shot a gun at her ex-husband, kicked in his windshield and had a volatile temper. He stated that he could not develop it as much with the jury as they hoped. PCR 1171.

Stone stated that Aleksey advised him about the stolen checks GloryVee had taken that he deposited. Aleksey provided Stone a good deal of information that led him to believe that GloryVee and Aleksey were involved in a criminal operation together. PCR1172. However, Aleksey told him that he had no knowledge of the drugs and that he saw GloryVee through

something out of the window. PCR 1172. Stone perceived that the relationship between Aleksey and Glory Vee was consistent with the rest - a "boyfriend/girlfriend/co-conspirator relationship. PCR 1172.

Stone admitted that he had never seen any information that she asserted that she, not Aleksey, was the triggerman. PCR 1172. In addition, he did not interview prior to the questioning at trial. She was represented by Mike Culler and he had many conversations with him when she objected to them going through her belongings. PCR 1173-74. However, Stone admitted it was merely a fishing expedition, not based upon something that his client told them to look for. PCR 1174.

Stone stated that he had conversations with Aleksey about each of the female witnesses. PCR 1177. Additionally, he spoke with Yelena Batkilina by telephone prior to trial . She stated that she was on probation at that time"because of him" and that she had already spoken to the solicitor about that case. PCR 1177. He noted that Sims cross-examined each of the woman . PCR 1178. Stone stated that the theory was that he may have been a con artist or a womanizer, but he was not that type of person who would have done something violent.

Stone stated that he learned probably from the statement that Batkilina needed help for her trouble in Florida. PCR 1179. However, when they asked Aleksey for specifics on what he had on the women, he gave them very little. PCR 1180.

Concerning the gun, Stone noted at trial that the manner the fingerprint was located on the gun suggested that it was in reverse order of his pointing the gun, like Aleksey had taken it from someone. PCR 1181. However, the defense could not get around the fact that the gun was traceable to Batkilina and his association with her (rather than a distinct route to GloryVee). PCR

1182. Also the connection to Batkilina was strong because she had acted as his girlfriend and posted bond previously for him and continued their friendship after the time he was in custody when she called Stone. PCR 1182.

At one point during his conversations with Aleksey, he told him that she held him at gunpoint, but another time he maintained that she threw the gun on his lap or handed it to him. PCR 1183. Stone indicated that Aleksey's versions to him were inconsistent. PCR 1183..

Counsel also stated that he had spoken with Aleksey before the trial about Lisa Watson. PCR 1183-84. Stone stated that with everything that they uncovered there always seemed to be the two of them involved. He recalled sending retained investigator and former FBI agent Davis. To New York to check out something on Watson. Stone said when they checked out the events concerning the woman, they consistently learned that they went and bought the Lexus together, went and bought the motorcycle together, consistent with a romantic relationship. It also consistently showed how he knew how to get out of trouble if he needed to. PCR 1186. Stone felt that Aleksey appeared street smart and the defense clung to their theory as to why would he take this inconsistent action throughout the trial. PCR 1186.

Stone stated , in hindsight , maybe they should have cross-examined more, but the big point was everything they were getting in was consistent with the defense theory, and there would be no shock value from the guilt phase . PCR 1186. It was their goal to use each of the witnesses to establish that he was non-violent, even those that stated he had handled a gun where they asserted that they did not take him seriously or that he was pitiful looking and almost suicidal. PCR 1187. He never hurt any of them and in fact once was beaten up by the girl. PCR 1187.

The one problem area was that time he shot that gun at a car up north. Stone felt that this was bad and was the only bad stuff that he could recall. PCR 1187.

Respondents submit that the Applicant failed in their burden of proof. Counsel credible testimony reveals that the strategy had an aura of persuasion based upon his past conduct. Further, it was a strategy that developed enhanced credibility with each non-violent incident and arrest that Aleksey was involved in. The structure of the defense was to have the state create the defense case by their own credibility. If the defense would have successfully challenged the admission of the evidence, their defense theory's foundation would have been shattered. This strategy was not developed from ignorance or neglect, but directly from his client's versions presented to them, as supported by GloryVee's divergent history of drugs, hot temper and violence, and apparent willingness to sell out her mother to avoid prison for herself.

Similarly prejudice has not been shown. The objection to the non-motive evidence would have eviscerated support for the defense theory. This all or nothing defense at that time would have placed the defense in a less credible position if they did convict for the penalty phase when the rejected bad act evidence would be admissible as character evidence. Confidence in the outcome under Wiggins has not been undermined. The allegation must be dismissed.

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.

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

Further, the claim about a failure to cross-examine either agent about the "missing" statement of Sara Pivero is without merit. The sole basis for this is the reference in the SLED report, Applicant's Exhibit 83 to an item styled Attachment 44 Sara Pivero Statement without any statement attached. According to the testimony of Agent Darnell, he described their attempts and expectations that she would prepare a written statement when they were putting the report

together. PCR 1678-79. However, in the manner the report was prepared, he placed a piece of paper in their with the expectation that a statement from her would replace it. However, he declared that they never received a statement from her. PCR 1679.

Respondents submit that defense counsel was neither deficient nor has prejudice under Strickland been shown by failing to inquire of the agents concerning the statement they never received. The allegation to the contrary must be dismissed.

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.**

In these allegations, Aleksey contends that trial counsel failed to investigate the background of Gloryvee Perez Blackwell. The record reveals that Gloryvee Perez testified at the trial after an in camera hearing. ROA 1295-1358. The record also reveals she was throughly cross-examined. ROA 1310-18, 1318-28 (in camera), 1328-43. The Applicant further maintains that the prosecution failed to disclose appropriate documents under its constitutional obligation regarding the conduct of GloryVee. Respondents submit that he has failed in his burden of proof.

A. How GloryVee Testified At Trial.

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

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

She testified that in December 1997, she met Aleksey, who she knew as "Michael Toscani" in Philadelphia. She had previously separated from her husband who was in the Marine Corps in South Carolina. She stated that Aleksey offered her to move in with him. ROA. p. 1299-1300.

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

At around 11 p.m., she recalled being pulled over when Aleksey woke her from her sleep. ROA. p. 1303-04. He told her that he had been speeding. With the drivers side window down, she heard the officer's voice say "hello folks or good evening folks" in a polite way and "how are you doing." At that point, Aleksey said "how are you doing officer?" and immediately fired a

gun. ROA. p. 1304, ll. 17-25. Previously unaware that there was a gun in the car, she said she saw and heard the pops and flashes from three or four shots. ROA. p. 1305, ll. 6-15. She did not hear Sergeant Lingard say anything threatening at all. ROA. p. 1305, ll. 16-20.

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

On cross-examination, defense counsel Sims initially inquired about her prior conviction for drugs. ROA. p. 1313, ll. 20-23. The prosecution then objected to going into details of the conviction going into evidence and the court agreed. ROA. p. 1314, ll. 8-11.

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

The defense then made a proffer of the indictments. ROA. p. 1317, ll. 22-24. The defense, in camera inquired of the witness of each of the charges on whether she was indicted and she stated that she did not recall. ROA. p. 1318-19. She did recall that she pled to one of the

counts and received three (3) years probation. ROA. p. 1319, ll. 14-16. Counsel Sims declared that she pled guilty to count five and that the remaining nine counts of the indictment were dismissed. ROA. p. 1319-20, 1322-23.

During the cross-examination, she denied that she was in the drivers seat or did the shooting. ROA. p. 1334-35. She further denied driving the car into South Carolina. ROA. p. 1340-41.[24]

Ineffective Assistance of Counsel

In his claims related to Gloryvee Perez Blackwell, Aleksey claims in his memorandum, p. 20-29, that he received ineffective assistance of counsel in various specifications. First, he contends trial counsel failed to investigate Gloryvee's fraudulent activity involving Dr. Bang, Summit Bank and the Lincoln where Aleksey had given counsel notice and information concerning the scams. Further, he complains that counsel neglected to impeach Gloryvee based upon the inconsistency between the statements she gave to SLED, the Dr. Bang scam, and her trial testimony. Further, he contends counsel should have developed Gloryvee's ability for self-protection by a history of cutting deals and shift blame involving her plea bargain on the Trenton drug case and her implication of Aleksey in the theft of Dr. Bang's checks. Lastly, he contends that counsel should have called Marcus Blackwell, her estranged husband, about her violent temper, use of gun, and resemblance to her sister and his mother, Elizabeth Blackwell on the influence Gloryvee had on Gloria Mai Rivera's statements. Respondents submit as to each of

---

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

(3) Gloria has account in Beaufort
(4) Gloria cashed check at Trump Casino

PCR 328-29.

Counsel Sims declared that Bayan never said these things to him. PCR 330.

B. The Gloryvee - Aleksey Scam

The Applicant, in these proceedings, developed the details behind the comments made to trial counsel. Respondents submit that the evidence before this Court suggests the following: Bayan Aleksey, using an alias of Michael Toscani and Gloryvee Perez went to the Burlington Lincoln Mercury Ford dealership in Burlington, N.J. on December 22, 1997. "They indicated they desired to purchase a new 1998 Lincoln Mark VIII LSC." "They indicated the down payment would be $20,000." Applicant Exhibit 33 (Keith Randall). Randall, a sales representation ve advised them that the dealership would only accept the payment in certified funds or cash. Id.

Gloryvee was employed at that time by Dr. Byung Kee Bang of Trenton, N.J. Applicant's Exhibit 31. Around December 23, 1997, checks belonging to Dr. Bang were stolen. Applicant Exhibit 31, 34.

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

With the deposit receipt in hand, Gloryvee and Aleksey returned to Burlington Lincoln on December 23. On that date, Gloryvee filled out various documents to purchase the car.

Applicant's Exhibit 33. The car was not released to them on that date. However, a promissory note was signed to pay $20,000 in funds or cash by December 26, 1997.

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

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

After speaking with Sontag, Pat Cubberly contacted Trenton Police Department on December 24 after she determined the checks were stolen. Applicant's Exhibit 31 [This time frame varies from Sontag's testimony]. An incident report was made and the police responded to Dr. Bang's office. Applicant's Exhibit 31, 34 (Trenton Police Report). The police arrived at Dr.

Bang's office around 11:03 and met with Pat Cubberly initially. Id. Cubberly advised them that she was initially contacted by Dr. Bang's bank, Core States concerning two checks deposited at Summit Bank and Dr. Bang advised her that they must be stolen. The Trenton policeman reported he spoke with Perez who denied taking any check and depositing them in her account. However, Perez stated "a guy she had been seeing for approximately two weeks was at the office on 12/23/97 and that he must have stolen the checks without her knowing it." Trenton Police Report, Applicant's 34. Cubberly opined that it would be impossible, where the checks were kept, for anyone to have taken the checks without Gloryvee's knowledge. Applicant's 31. When Sontag contacted Cubberly, Gloryvee had left the office.

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

They checked into the Residence Inn using $500 of the $1000 cash received that date from Summit Bank. Applicant Exhibit 29.

On December 27, 1997 Keith Randall of Burlington Lincoln contacted Dr. Bang's office concerning Gloryvee's commitment to purchase the car. He learned that she had been fired at that time. He asserts he was advised that warrants had been issued for her arrest for the theft of the checks.[26] Applicant Exhibit 33.

Analysis

---

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

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

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

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

The defense team had knowledge of Gloryvee's involvement in the theft of the checks and passing of bad checks by Gloryvee with Aleksey from Aleksey. When the Solicitor argued, from this record, that no one was looking for her, this was an accurate argument based in the record (and Solicitor Bailey's knowledge). Counsel Stone was aware that Bayan had deposited stolen checks that Gloryvee had given him. PCR 920. Further, the defense team was aware that Gloryvee had taken checks and deposited them into a Summit Bank account for $26,000. PCR 324-26, 924-25. The defense was also aware that Aleksey had advised them she had gone to Burlington Lincoln Mercury with a certified check for $20,000 to get a Mark 8. Applicant's 23(C). (Note: The record does not support that Gloryvee or Aleksey ever possessed or presented a $20,000 cashiers check to Burlington Lincoln).

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

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

The defense counsel were inconsistent on why these factors, known to the team, were not presented. Counsel Sims stated that they sent investigators up to Pennsylvania to check out her background, but did not recall, at the hearing, what they had although he knew she had been employed. PCR 401-02. However, Sims, upon reviewing the submitted evidence concerning the check theft stated that she did not have convictions for these incidents so that they could not be used to impeach. PCR 416. Sims agreed they could be evidence of fraud, but was reticent about whether Judge Cottingham would have allowed it. However, Sims stated that it could have been able to be presented under SCRE 608(b) as character evidence and evidence of "motive" for Gloryvee. PCR 417. The information concerning Dr. Bang, the Lincoln materials, and Summit

Bank, Sims stated he would like to have had the documents because "it would have shown that she definitely had some problems, or that she was out doing all kinds of things, also." PCR 433.

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

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

Counsel Stone confirmed that the focus of the case against Gloryvee was to develop impeachment and suggest that Gloryvee was the shooter. PCR 912. Counsel Stone concurred that at trial he stated that Gloryvee "has the same types of problems Mr. Aleksey does." PCR 915, R. 2373-74. Counsel recognized the fact that if they could have developed that Gloryvee had a "significant motive" in the case, it would have been good for the defense. PCR 917-18.

When asked about checking out the fact that Aleksey told them about Gloria and Aleksey taking checks from her job, and other items listed in Applicant's 22, Stone stated he recalled

conversations with Sims concerning the car rental and other stuff, but not the specifics. PCR 925. Counsel was not sure that when he sent his investigator, Tommy Davis, up north in August prior to the trial that he went to Dr. Bang's office. PCR 953, 1246-47. However, his notes reflected that the investigator talked with the Trenton police. PCR 927-28. Also, Stone did not recall ever talking to Dr. Bang's office. PCR 953. Stone stated he had prepared a document styled "Aleksey versus Blackwell comparing Blackwell's shoplifting, prior record of possession of cocaine, prior arrests for fraud, shoplifting, and drugs in Puerto Rico to Aleksey's prior arrests for fraud. PCR 959. Stone stated that he did not know if the Aleksey fraud and Blackwell fraud, at the time, were the same thing. PCR 959. As he stated:

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

PCR 960.

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

On cross-examination, Stone admitted that Aleksey told him Gloryvee had stolen some checks that he had deposited and he received "a good amount of information that they were involved in criminal activity together." PCR 1172.

It should also be noted that in the second statement Aleksey gave to the police, revealed to the defense, he described the following:

K. Mears: Were you working?

B. Aleksey: No

K. Mears: Was Gloryvee working?

B. Aleksey: Yes

K. Mears: **There were several checks in the vehicle that belonged to a doctor, do you know what checks I'm referring to?**

B. Aleksey: Yea

K. Mears: **Where did those checks come from?**

B. Aleksey: **From where she use to work at, she didn't know I had them.**

K. Mears: How did you get them?

B. Aleksey: **I was just picking her up from work and she wasn't there I just picked them up without her knowing, she didn't know I took them.**

K. Mears: Did you cash any of them?

B. Aleksey: No

K. Mears: You never did cash any of them

B. Aleksey: Huh, huh

K. Mears: Did you wire any money into an account of yours or anyone's at any time?

B. Aleksey: **Well, not wire, Gloria, it was Gloria's account, she didn't know and I deposited two checks to see if they would clear.**

K. Mears: Did the checks clear?

B. Aleksey: No

K. Mears: **What did the two checks amount to?**

B. Aleksey: **$24,000 to $28,000 something like that.**

K. Mears: So while on this crime spree, who else was involved, if anyone, besides you?

B. Aleksey: No one.

K. Mears: So you are telling us that you committed this crime of shooting the South Carolina State Trooper by yourself.

B. Aleksey: Yea

K. Mears: Gloryvee was not involved in any way?

B. Aleksey: No

K. Mears: Speak up.

B. Aleksey: No

K. Mears: Are you telling the truth?

B. Aleksey: Yes

Taped Interview of Aleksey, p. 8-9. Applicant's Exhibit 83, Sec. 24. (Emphasis added). As noted, on January 2, Aleksey stated that Gloryvee was unaware that he had taken the checks from

her office or had deposited them to see if they would clear. He also claimed to have taken them without her knowledge.

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

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

The Applicant asserted that this would have defeated the claim by the prosecutor of a lack of motive to shoot by Gloryvee. Respondents concede that it does suggest that Gloryvee would have known it was likely that police were looking for them, not just her. Yet this intent to avoid apprehension by Gloryvee suggested by the Applicant is immediately defeated by the fact that she begged Aleksey, after the shooting to pull over when being chased, jumped out of the car with her child and ran to the officers. R. 1307. Presumably, the same desire to "avoid apprehension" based upon her bad check theft existed when she ran to the officer. R. 1307. Further, Solicitor Bailey remaining factors weighed in the favor of Aleksey as the shooter:

B. The shots that killed Frankie Lingard were fired from the driver's side. (ROA 1754).

C. Bayan Aleksey was behind the wheel of the Mustang. (ROA 1755)

(1) Police saw Gloryvee exit the car on the passenger side. ROA 1757.

D. Aleksey led officers on a high speed chase. (ROA 1759).

E. Aleksey admits a suicide attempt in his statement but the gun jams. (ROA 1760).

F. The murder weapon is traced to Aleksey, not to Gloryvee. (ROA 1761).

G. Gloryvee prints not on gun, but Aleksey's prints are on the gun and the clip. (ROA 1764).

H. The Applicant confessed that he was the triggerman. (ROA 1765).

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

Penske Rental Center Document

The Applicant also contends that counsel should have further investigated the Penske Rental Center matters of December 30, 1997. He contends that the matters involved a rental

reservation for a fifteen (15) foot truck with a car carrier. He asserts that the evidence would be useful to suggest planned evidence of flight and the stated intent was for the truck to go to West Palm Beach, Florida, whereas she declared in her testimony that they were headed to Disney World.

Certain salient factors must prevail to show this was neither deficient performance nor prejudicial. First, the truck was never rented nor used. Second, Aleksey indicated to counsel that he thought he told them he was going to Disney World. PCR 1191. Further, in his statement to the police, he said they were going "to Florida." Applicant's Exhibit 83, § 24. (Transcribed Second Statement, p. 4). Further, during the trial, Sims stated that, to the best of his recollection, Aleksey did not indicate that Gloryvee was incorrect in her testimony that they were headed to Disney World. PCR 650. Nevertheless, he had told counsel, like the police, they were going to Florida. PCR 649.

It is without question that the defense had access to the Penske truck rental document in the Mustang. See PCR 371-78, 699-701, 1006, 1125.

The Applicant asserts that the Penske rental receipt could have been used to impeach Gloryvee. Counsel Stone agreed it could have been used to show the possibility of an inconsistent statement. PCR 1006. Further, Aleksey had sought to have them contact Penske. Applicant's Exhibit 22. PCR 328-29.

Respondents submit that the failure to develop or pursue testimony related to the Penske rental paperwork does not prejudice under Strickland. First, there is no proof Gloryvee's testimony that they were headed to Disney World was incorrect. The mere fact that a truck rental indicated a possible destination of West Palm Beach rather than Disney World (Orlando) does

not mean that Disney World was never the destination on that date. Similarly, he asserts that the attempt to rent a truck suggests a permanent change of location. However, the truck was never used. The failure to present this information does not undermine confidence in the outcome.

Location of Paperwork Identified With Gloryvee on the Driver's Side

In the memorandum, the Applicant asserts that the apparent presence of the Penske rental reservation in Gloryvee's name, the Distacio Monte Carlo window sticker, various motel receipts, and payroll documents on the driver's side of the vehicle, indicate the prosecution was wrong in his assertion that all her personal possessions were on the passenger side. The record reveals, based upon the photographs taken by SLED, that these materials were located on the driver's side, either in the side door panel pocket or in a manila folder under the driver's side floor mat. Applicant's 26, 26A, 26B, 26E, 26F, 26G, 29, 30. PCR 364-381. It is also clear that these materials were provided by available photographs by SLED for defense viewing by the Solicitor's Office. PCR 941 (Stone went to SLED to view photographs). State Exhibit 2. ("I have in excess of 100 crime scene photographs... They are available for your inspection and review and I will have copies made of any particular photograph you pick out.")

At trial, in developing his theory of who was the likely shooter, Solicitor Bailey noted that Gloryvee's fingerprints were only on the passenger side that she was seen getting out of in Holly Hill during the chase and:

> "We showed 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."

R.p. 1758, ll. 4-9.

During her testimony, Gloryvee testified that when she exited the vehicle with her child, she left everything in the car. R. 1307-08. In referring to State 63, she pointed out her purse on the passenger side floor, her sunglasses, and baby bottle. On State Exhibit 61, it showed her key chain. R. 1308-09.

Sims testified that after the conviction, Aleksey asked Sims in May 1999 to acquire certain items indicating that they were his possessions. PCR 644. State Exhibit 1, 2. These items, that Aleksey was aware of and asked to be returned to him, were "phone bills, hotel receipts, $235.00 in cash, box of pictures and envelopes, a black case with negatives and lie detector test from Gloryvee." State Exhibit 1. PCR 644. Sims agreed that he received a volume of receipts as a result of the request. PCR 644. Sims said once he got the materials, he put them in a box and shipped them to Aleksey. PCR 645. See also PCR 358-60, 363. Applicant's Exhibit 28. Sims stated Aleksey asked him to write State Exhibit 1. However, Sims claimed that he did not recall ever seeing the particular items pretrial. PCR 690-91.

However, Sims declared these items, Applicant's Exhibit 29, included the folder which was present on the driver's side. PCR 364. However, Sims did not specifically recall reviewing the folder and its contents before the trial. PCR 365-66.

Counsel Stone conceded that he reviewed around 200 photographs. PCR 1006. He recalled seeing a large number of photographs. PCR 943. Stone acknowledged that in the folder, apparently on the driver's side were documents from where Gloryvee worked. PCR 946-47.

The emphasis in the Solicitor's comment was that all of Gloryvee's "stuff" was on the passenger side and not the driver's side. First, after Solicitor Bailey developed this concept on direct examination, the defense never developed that items identified with Gloryvee were located

on the driver's side. No questions were asked directly of Gloryvee about the location of the items. Gloryvee had unequivocally stated that she had never driven the Mustang. R.p. 1300, ll. 8-13; p. 1302, ll. 20-21; p. 1306, l. 1.

Like current counsel, the original defense team could have developed that paperwork identified with Gloryvee was located on the driver's side. Importantly though, this existence of the paperwork was not as powerful as Applicant now claims because it included paperwork related to their mutual scams. Even though the jury would have learned about the documents, the existence and location of personal use items of Gloryvee; her purse, sunglasses, and items for her baby were all still on the passenger side. Further, she testified that Aleksey had packed the car, which is not in dispute. R.p. 1301, ll. 20-21. The items Gloryvee actually used were still only on the passenger side. As Solicitor Bailey stated: "I'm looking at her personal items, the kind of things that she would normally have access to, hairbrush, purse ... sunglasses, baby bottle, stuff that you would be using if you were sitting in the seat of the car." PCR 1293. The personal use items were the probative matters related to this issue, not documents which Aleksey would later lay a claim to. The failure of the defense to develop the existence of the paperwork does not undermine confidence in the outcome.[27]

---

[27] According to the Clerk of Court records, on July 23, 1998, Solicitor Bailey wrote defense counsel and noted the existence of additional evidence made available for their viewing including:

(1) 1 unopened box of checks in the name of Gloryvee Perez;

(2) Numerous checks in the name of Byung-Kee Bang, M.D.;

(3) Copies of checks of Byung-Kee Bang, M.D.; and

Marine Corps Air Station Beaufort Federal Credit Union Checks. (MCAS Beaufort FCU)

The Applicant contends that the defense should have pursued and investigated the fact that checks written on a closed account at MCAS Beaufort FCU were used by Gloryvee to pay the bill at Summerfield Suites. These three (3) checks were dated December 14, 1997 at Summerfield Suites. Applicant's Exhibit 41. He contends that these would have show Gloryvee's fraudulent activity. The record reveals that Aleksey wrote defense counsel in a letter dated March 27, 1998 that Gloryvee had a checking account in Beaufort and had written checks for "$947, $50, and $400 dollars" and requested that counsel contact Summerfield Suites about it. Applicant's Exhibit 23-B. Applicant's Exhibit 41 consists of three checks written on the MCAS Beaufort FC account for $50, $400, and $964 to Summerfield Suites.[28]

The issue is whether counsel was deficient in failing to follow-up on Aleksey request to investigate the checks written by Gloryvee to Summerfield Suites. Although not argued specifically in his memorandum, p. 7-9, 22, as a basis for raising issues concerning the MCAS Beaufort FCU checks of Gloryvee, presumably he asserts it should have shown further fraudulent activity of Gloryvee. As noted before, the information from Aleksey concerning the Beaufort checks were presented to Danetta from Mr. Sims' office in her report of the conference call, Applicant's 22, and the letter to counsel, Applicant's 23(b), which referenced the Summerfield

---

(4) Hotel receipts, pocket calendar, phone bills and other miscellaneous paperwork from the Mustang.

Clerk of Court Record, July 23, 1998 Letter, Bailey to Sims and Stone.

[28] These items were materials SLED had received from Mt. Laurel Police Department. PCR 496. These were not located either in the Solicitor's or defense's file.

Suites matters. Clearly, Aleksey knew of the facts of the writing of the Summerfield Suites checks, had presented the circumstances to defense counsel in his letters and defense counsel, armed with that information, had a good faith basis to question Gloryvee about them.

However, certain salient factors were unresolved in the Applicant's presentation. First, although the account had been closed - did Gloryvee know it was a closed account. Second, no charges or warrants were ever made against Gloryvee in the check matters. As noted, for impeachment purposes, Gloryvee had been impeached by her prior record.

Further, the fact that after giving the checks on December 14, Gloryvee remained in the hotel suites for a significant period of time defeats the claim that she was "avoiding apprehension." The power of that evidence to suggest that toward Gloryvee then becomes insignificant. As Aleksey had clear knowledge of the checks, as revealed in Applicant's Exhibit 23-B, even to the extent of the amounts and able to quote someone's driver's license number, reveal involvement in the activity, as well as his own knowledge - increasing his own motive to avoid apprehension in an equal amount to Gloryvee. As noted above, the motive to avoid apprehension was merely one factor of the many factors which Solicitor Bailey pointed to as a basis of Aleksey being the driver of the Mustang. The Applicant has failed to show, but for the presentation of the MCAS Beaufort FCU checks from Summerfield Suites (or others), there is a reasonable likelihood that the result of the proceedings, either in guilt or penalty would be different.[29]

---

[29] Counsel Stone testified that he had reviewed a massive amount of paper from the Solicitor. PCR 989. Stone could not recall if he had seen various items, but did not think that those included a box of checks from either Beaufort MCAS or Summit Bank. PCR 990. Similarly, counsel Sims was not clear that he had ever

Hamilton Township Bench Warrant

In support of showing a motive to avoid apprehension, the Applicant presented an arrest warrant for "contempt of court" in Hamilton Township Municipal Court in New Jersey. Applicant's Exhibit 79. The matter involves a May 19, 1994 traffic summons for operating a motor vehicle in a careless manner and a subsequent March 8, 1995 warrant for "contempt of court" issued by the Trenton Police Department "due to the unanswered traffic summons." Applicant's 79.

Defense counsel could not be deemed deficient in failing to investigate or cross-examine on this matter. First, it occurred years prior to her association with Aleksey. Second, it was not included in any criminal record "rap" sheet provided either to the State or the defense. R. 1288-90. However, the record also reveals that the defense, at trial, was aware of the existence of traffic tickets after Solicitor Bailey advised the Court that Stone advised him that there were warrants on her that did not appear in the "rap sheet." R. 1288. Prior to Gloryvee's testimony, the following occurred:

> Sims: We have information on the name Gloryvee Rivera...Rivera was her married name...We have...maybe four copies of some warrants that are outstanding on her under the name Gloryvee Rivera.....
>
> Sims: ...They are traffic violations that warrants were issued on 8/24/94 in Trenton, New Jersey....

R. 1289. The trial court inquired and was advised that they were all traffic tickets. The Court responded: "I will let him ask about a traffic ticket if he wants to." R. 1289.

---

reviewed the checks and could not recall, despite the defense team notes of ever having heard of Summerfield Suites. PCR 496-503.

The trial court then asked about whether Sims wanted to cross-examine her on an outstanding warrant for traffic tickets. R. 1290. Sims responded that he did not want to get into where they were going. The trial court then stated that he did not want them to disclose their strategy: "If it's her, I will permit it." The trial court confirmed it would let the defense after being advised by the solicitor that Gloryvee had no recollection of the speeding tickets, although it was her name and address. R. 1294.

During the Solicitor's direct examination he inquired about the fact of the possession of cocaine conviction and shoplifting convictions in 1991 and 1992. R. 1297. The following then occurred:

Q. - - - Have you ever had a speeding ticket?

A. I don't recall any speeding tickets.

Q. It is possible you had some and don't remember?

A. I just don't recall any speeding tickets.

R. 1297. Despite the professed knowledge of existing warrants for traffic violations in New Jersey, the defense did not inquire of Gloryvee about any traffic warrants that was still pending. R. 1310-14, 1328-42.

Respondents submit that the defense, aware of the traffic warrants chose not to pursue those on cross-examination to suggest a motive for Gloryvee to run. However, the existence of the warrants since 1994 actually defeats the power of this motivating factor. This would suggest that Gloryvee had a motive to avoid apprehension since 1994 or at least 1995. Further, implicitly the defense apparently did not see the utility in presenting the known warrants to Gloryvee to either impeach her lack of knowledge or to suggest the motive.

Respondents submit that the failure of the defense to use the known traffic violations (or locate the 1995 contempt of court citation) does not undermine confidence in the outcome under Strickland, supra. Importantly, the jury was advised by the Solicitor that other than for speeding tickets, Gloryvee did not have anyone looking for her. His claims otherwise are without merit.

Failure to Present Testimony From Either Elizabeth or Marcus Blackwell Concerning Gloryvee

In his memorandum, he contends that defense counsel erred in failing to call either Gloryvee's estranged husband, Marcus Blackwell, or his mother, Elizabeth Blackwell. In support of his claim he asserts, based upon Applicant's Exhibit 25, that Marcus would have testified about two instances during their marriage when Glory Vee exhibited a violent temper. Particularly, he averred that Gloryvee had "a violent temper and an untruthful character." Applicant 25. He stated on one occasion she was shooting a pistol in the neighborhood and during an argument following a dinner, she kicked the automobile windshield hard enough to crack it. The record also reveals that Stone's paralegal, Tina Lawring, met with Marcus and earlier his investigator met with him.

During the PCR hearing, counsel Stone testified that during their case against Gloryvee, the defense intended to present information that she shot at an ex-husband, kicked out his windshield, and had a volatile temper. PCR 1170-71. Stone stated that Judge Cottingham would not let them go into that matter to establish she could handle a gun. PCR 1171. Stone noted that the defense had testimony from some fo the witnesses to establish that she had fired a gun, had a volatile temper, and had experience in the drug trade. PCR 1171. Stone stated that the defense

did not call Marcus concerning the opinion that Gloryvee had an explosive temper because Judge Cottingham had not allowed them to develop similar testimony on cross-examination of Gloryvee. PCR 1234. Counsel Stone rejected current counsel's suggestion that if he proffered Marcus' potential testimony to Judge Cottingham, that he would have allowed him to ask Gloryvee the questions about her temper. PCR 1234-35.

Similarly, Thomas Sims testified that they spoke with Marcus Blackwell and they chose not to use him at trial. PCR 347. As Stone indicated, Sims felt that the reason they brought Blackwell to testify was on the issue of Gloryvee's violent temper. PCR 348. He felt that the defense had developed a sufficient record, without any proffer from Marcus Blackwell, about Judge Cottingham's refusal to allow the development of the evidence through Gloryvee, that the judge would not allow them to present it in their case. PCR 349.

Sims asserted that, although he never prohibited them from presenting Marcus, it was clear from his ruling that he would not allow information regarding the traumatic nature of their domestic affairs.. PCR 349-51.

The record supports counsel's recollection of Judge Cottingham's determination. During Gloryvee's cross-examination by Sims, an in camera proceeding occurred. R. 1321. Sims indicated to Judge Cottingham his intent to show Gloryvee's explosive and violent temper, including the fact she kicked her husband's windshield out and had experience in a semi-automatic weapon. R. 1322. Judge Cottingham allowed the defense to ask Gloryvee on whether she had shot a gun before and left open the potential impeachment with her husband's testimony. However, he stated: "We are not going into kicking any windows out in a domestic dispute." R. 1323.

Counsel Sims then asserted such evidence should be admissible under SCRE 405 concerning character and reputation. R. 1323. Judge Cottingham plainly stated "clearly you are not entitled to this. I will not let you do it. Period." R. 1323. "We are not going into her divorces...we are not going to talk about kicking out the window..." R. 1324. Counsel Sims then declared "in regard to the domestic information, her attitude and the violent temper that we want to pint out, we think it is germane to our case and that we should be able to proffer that so that the record would be clear." R. 1325.

At that point, in camera, Gloryvee testified that she did not kick out the window, but "I kicked it and it cracked." R.p. 1326, ll. 5-8. However, during the proffer, she denied shooting Marcus' gun and denied having the gun on his bed with the bullets surrounding it when he came home. R. 1326-27.

Before the jury, Sims continued to ask Gloryvee questions about Marcus and the fact he owns a semiautomatic gun. R. 1328-29. She declared she had never held Marcus' weapon and "I never shot the weapon." R. 1329.

Respondents submit that the defense was not deficient in failing to further attempt to present testimony from Marcus Blackwell about Gloryvee's violent temper based upon cracking the windshield. Plainly, the defense could reasonably rely upon their proffer of the testimony.

The only issue left available would be a potential impeachment of her testimony that she never held Marcus' gun or fired it. R. 1329. In Blackwell's affidavit, he states "Gloryvee was shooting a pistol in our residential neighborhood", but does not state it was his pistol. Applicant's 25. Further, Applicant's 64, Tina Lawring's summary of her conversation with Marcus does not indicate that Gloryvee ever shot his weapon, only that he would hide his gun in

his home and that she would find it and hide it and one time it was on the bed with bullets around it. Judge Cottingham left open the question on whether Sims could impeach her with her husband's testimony concerning shooting a gun. R. 1322-23. However, counsel declared they made the choice not to call Marcus Blackwell as a witness after their discussion. Respondents submit that they have failed to show either deficiency or prejudice.

Similarly, he contends that Marcus Blackwell should have been called to state that "Gloryvee claimed that she and her sister, Dominga Perez, looked so much alike that they could pass for twins." Applicant's 25. He contends this information could have been used to suggest that Gloryvee, like Aleksey, also used fake identities because she possessed her sister's identification at the time of her arrest. However, the record revealed Sims pointed out the fact that Gloryvee used many names and possessed many ID's based upon her marriages including Rivera, Perez, and Blackwell. R. 1312. She had five identifications in her possession at the time of arrest, including one that did not belong to her. R. 1313. On re-direct, Gloryvee stated that each of her id's reflected the name she had at the time and denied the use of any aliases. R.1344-45. Counsel Sims stated that Marcus never told them anything about Gloryvee or her sister looking like twins. PCR 351-52. Further, he stated he did not recall asking Marcus whether Gloryvee would use a fake ID or what the significance of Dominga Perez might be.

The Applicant attempts to assert that Gloryvee's possession of her sister's identification revealed an attempt to use an alias. See Applicant's 24. However, equating the possession of her sister's identification with use as a fake ID; without more is inadequate. As Sims state, he attempted to impeach her with the use of the various names. The jury had knowledge that she

possessed another's identification. R. 1313. There was no error in failing to call Blackwell to assert Gloryvee stated her sister looked like her twin. The claim otherwise must be dismissed.[30]

The Applicant also contends that the defense should have called Elizabeth Blackwell, Marcus' mother, to testify that Gloryvee's daughter, Gloria Mai Rivera, had told her after the incident that she woke up when she heard shooting and "Mommy told me Michael was driving." Applicant 27. She also felt that Gloryvee was not a truthful person. Id.

Sims stated he met with Elizabeth Blackwell. PCR 647. Sims recalled, upon review of his notes, Elizabeth telling him that Gloria Mai told her she woke up when she heard the shooting. PCR 697. Sims felt he cross-examined Gloria Mai on the fact she woke up when the shooting occurred and the fact that she had time to talk with her mother in the interim after the incident. PCR 697-98. Counsel Stone stated that they developed the fact from the police officer that Gloria Mai was left alone with her mother after the incident prior to anyone speaking with her. PCR 1196.

The record supports these recollections. First, Sims cross-examined 8 year old Gloria Mai Rivera. R. 1375-80. Sims developed from her that after they got out of the car when Aleksey put the gun to his head, she was with Gloryvee and her sister before they put them in a car. R. 1377. She confirmed that they waited awhile and then were taken somewhere else. She said she talked to some men and talked with her mother also. R. 1377. She denied talking to her mom between the time they talked to her the first and second times. R. 1378. Sims developed

---

[30] The Applicant claims that the twin comment put Gloryvee on the same ground as his use of multiple aliases and adopting of the women's names. Simply put, these names belong to Gloryvee, Aleksey's never did.

that subsequently she went to live in North Carolina with her grandmother and talked to her about what happened that night. R. 1379. She said she subsequently went home to her mother and that they had talked about what happened that night. R. 1449, 1451-52 (Darnell gets Gloryvee and daughter out of back seat of Cpl. Anderson's car). Although he did not develop the "Mommy told me" Aleksey was driving scenario, clearly the 8 year old child could have been aware who was driving when woken up by the gunshot from the car. The defense adequately developed the influence her mother could have had upon the child's testimony. In his closing statement, Sims emphasized the fact that Gloryvee was alone with her child after the incident and strongly suggested Gloria Mai ha been coached from January until she testified. R. 1779-80. Respondents submit that counsel was not deficient in attempting to present Elizabeth Blackwell's hearsay testimony about what Gloria told her about the incident.[31] The allegation to the contrary fails to prove either deficient performance or prejudice under Strickland.

Gloryvee's Ability to Cut a Deal

The Applicant contends that defense counsel was ineffective for failing to impeach Gloryvee concerning her ability to cut a deal and shift blame to others. Particularly, he notes that counsel should have investigated the circumstances surrounding her conviction in Trenton, N.J. to learn that she negotiated in return for her plea and agreement to provide testimony against her mother, the dismissal of nine (9) other felony drug indictments. Applicant Exhibit 37 (Dec. 9,

---

[31] In Applicant's Exhibit 64, the notes of Tina Lawring to counsel Stone reflect that Elizabeth Blackwell had talked to Gloria while in her custody and asserted that Gloria told her she was asleep and did not see anything and was protective of her mother. She told them that Gloria told her that her mother said Michael (Aleksey) shot the cop.

1991 Plea). He further contends that further investigation into Dr. Bang's check thefts would have revealed that Gloryvee initially denied taking or depositing the checks and stated that "a guy she had been seeing for approximate 2 weeks was at the office on 12/23/97 and that he [Michael Tosconi] must have stolen the checks without her knowing it." Applicant's Exhibit 31, 34. The Applicant contends that if this investigation would have occurred, particularly involving the drug trafficking charges, the defense would have been able to use them to impeach Gloryvee Perez, pursuant to SCRE Rule 608(c) but instead were properly denied the speculative use of such evidence by Judge Cottingham. R. 1316-17. He contends such evidence would have been inadmissible, relying on State v. Jones, 541 S.E.2d 813, 817 (S.C. 2001). He further contends Sixth Amendment prejudice was shown because Gloryvee's credibility was a central issue and rather than being impeached with only one conviction, this would have impeached her with "blame shifting and a motive to misrepresent." Memo., p. 25.

Counsel Stone testified that he was aware that Gloryvee had a drug conviction for possession cocaine, but what he thought was important was that she was charged in the indictments with her mother. PCR 1169. He said her mother ended up going to prison, yet she received a probationary sentence. PCR 1169. He asserted that she had cut a deal against her mother. PCR 1170.

Stone further indicated that if they had ordered the transcript of Gloryvee's 1991 plea transcript, that he did not feel that it would have made a difference with Judge Cottingham, but it might have helped. PCR 1237, 1239-41. See r. 1316-17.

Sims stated at trial they wanted to show that Gloryvee would cut a deal on her mother and her husband. PCR 445-46. Sims felt Judge Cottingham would only let in the conviction to

impeach, not the dismissed matters under Rule 609. PCR 446. Counsel Sims asserted that he had urged the trial court to allow the admission of the dismissed charges to reveal that Gloryvee was able to make deals and implicate others. PCR 451. Sims asserted that Judge Cottingham was not made fully aware of the New Jersey guilty plea which included the fact the prosecutor's recommendation for a non-custodial sentence was conditioned upon Gloryvee "making a truthful statement implicating Gloria Perez." PCR 450-51. Sims noted however, that it did not say why the other charges were dismissed. PCR 451-52..

The right to meaningful cross-examination of an adverse witness is included in the Sixth Amendment right to confront his accuser. State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994). The trial judge retains wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on cross-examination based on concerns about harassment, prejudice, confusion of issues, witness safety or interrogation that is repetitive or only marginally relevant. State v. Smith, supra. Before a defendant can be prohibited from attempting to demonstrate bias, the record must clearly show that the cross-examination is somehow inappropriate. State v. Smith, supra, State v. Graham, 314 S.C. 383, 444 S.E.2d 525, 527 (1994).

In denying relief in the direct appeal concerning the failure to assert the same suggestion, the South Carolina Supreme Court stated:

> Blackwell testified for the State as an eyewitness to the trooper's death. Appellant sought to cross-examine Blackwell concerning her indictments on ten separate narcotics charges. Blackwell had pled guilty to one indictment, possession of cocaine, and the other nine indictments were dismissed. The trial court refused to permit appellant to cross-examine Blackwell concerning the dismissed charges, but permitted appellant to proffer the questions for the record. During the proffer, Blackwell answered "I don't recall" to each of appellant's questions concerning the dismissed indictments.

> The right to a meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accusers. State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994). This does not mean, however, that trial courts conducting criminal trials lose their usual discretion to limit the scope of cross-examination. See State v. Lynn, 277 S.C. 222, 284 S.E.2d 786 (1981) (a trial court's ruling concerning the scope of cross-examination of a witness to test his credibility should not be disturbed on appeal absent a manifest abuse of discretion). On the contrary, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, witness' safety, or interrogation that is repetitive or only marginally relevant." Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).
>
> The trial court did not abuse its discretion in limiting the scope of cross-examination to comply with the South Carolina Rules of Evidence. Rule 609 permits impeachment of a witness by evidence of conviction of certain crimes. Rule 609, SCRE. Prior bad acts which are not the subject of conviction, such as the dismissed indictments here, may only be inquired into, "in the discretion of the court, if probative of truthfulness or untruthfulness." Rule 608(b), SCRE. Narcotics offenses are generally not considered probative of truthfulness. See, e.g., United States v. Turner, 104 F.3d 217, 223 (8th Cir.1997) ("Misconduct involving violations of narcotics laws is not an act involving dishonesty or untruthfulness and therefore may not be inquired into under Federal Rule of Evidence 608(b)."). **Nor are the dismissed indictments evidence of "bias, prejudice or any motive to misrepresent" under Rule 608(c).** The trial court properly limited the scope of cross-examination to Blackwell's actual convictions.

Aleksey, supra. at 255 (emphasis added).

The Applicant relies upon State v. Jones to support his assertion that further development of the record in the proffer to include the 1991 guilty plea would have revised the matter and allowed admission. The Applicant misreads Jones. In particular, in Jones, the Court distinguished Aleksey:

> In State v. Aleksey, supra, the defendant sought to impeach an eyewitness about specific charges which had been dismissed against her in New Jersey. That witness was neither the self-confessed accomplice to the murder for which the defendant was on trial, nor was there any evidence of her participation in the crime other than a retracted confession by the defendant. Obviously, there was no

> connection between the prosecutor's office in New Jersey which had dismissed the charges and the solicitor's office which was prosecuting the defendant.
>
> In this case, appellant sought to explore past dealings between Brown and the office prosecuting the current charges, not to impeach Brown through those dismissed charges, but rather to expose Brown's bias and prejudice in the present case. This excluded evidence had "a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity" of Brown's testimony. State v. Brewington, supra.
>
> We hold the trial judge committed reversible error under Rule 608(c) in refusing to permit appellant to conduct this cross-examination. In light of this holding, we need not reach appellant's argument that he should have been permitted to cross-examine Brown about the dismissed charges under Rule 608(b), SCRE.

State v. Jones.

Here, we submit that counsel Stone's assessment that the addition of the 1991 transcript would not have assisted the defense in having the matter presented to the jury. The plea reflected there was a negotiated non-custodial sentence recommendation conditioned upon Gloryvee testifying against her mother, but again, does not suggest why the other charges were dismissed. As the opinion set out, "[n]or are the dismissed indictments evidence of "bias, prejudice or any motive to misrepresent" under Rule 608(c)". Jones provides no solace to Aleksey in this instance because as Jones noted , they were dealing with the same prosecutor whereas in Aleksey, there is no connection with New Jersey.

Even if counsel should have presented this additional information to Judge Cottingham, he failed to prove 6th Amendment prejudice under Strickland. Assuming the impeachment would be allowed, confidence in the outcome was not undermined. Any error in exclusion of proper impeachment evidence is subject to a harmless error analysis under the various factors of Delaware v. Van Arsdall, 475 U.S. 673 (1986), including: the importance of the witness'

testimony to the prosecution's case, whether the testimony was cumulative, whether other evidence corroborates or contradicts the witness' testimony, the extent of cross-examination otherwise permitted, and the overall strength of the State's case. State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999), State v. Mitchell, 330 S.C. 189, 498 S.E.2d 642 (1998), State v. Cooper, 312 S.C. 90, 439 S.E.2d 276 (1994)(any error in excluding prior bad acts of witness held harmless where witness impeached by admission of numerous prior convictions and acknowledge he gave testimony in exchange for favorable treatment on pending charges), State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995)(any error in refusing to allow defense to impeach witness with "peeping tom" conviction was harmless), State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994)(erroneous limitation on impeachment of eyewitness who had pending charges against him for intent to distribute crack and possession and intent to distribute crack within one-half mile of school was harmless error where another eyewitness testified about the event in detail and also corroborated by pathologist and police and witness admitted being under charges for another crime).

Here, the witness was otherwise impeached by the admission evidence of the prior shoplifting and possession of cocaine convictions. The probative value that the Appellant sought to show the jury from the nine (9) dismissed counts was not that she was guilty of the offenses, but that she had previously received "a good deal". This confusing assertion did not go to her "truthfulness" and could only lead to jury confusion on the collateral issue. He further asserts that the state misportrayed her as a "simple user of cocaine" when the dismissed charges suggest more involvement. The problem with this approach is the facts that these charges were dismissed.

The Appellant admits that his underlying motive was to not be bound by the inquiry but "it would nonetheless have had a serious impact on the jury for it to hear these serious unproven counts of the indictment made so little impression on Perez that she could not recall them." Brief of Appellant, p. 39. As stated before, extrinsic evidence of prior misconduct is not admissible under Rule 608(b), so the indictment could not be introduced. As feared by the commentators, a witness cannot be expected to explain each allegation of misconduct against him. Accord, Truslow, supra. Here, the trial judge properly restrict the use of the indictment solely to the charge that he was convicted upon rather than the dismissed charges. He did not abuse his discretion under Rule 608, 611, or 403 in limiting the inquiry.

Further, any error was harmless beyond a reasonable doubt. The evidence before this Court revealed that the defendant, as the driver of the vehicle, throughout the car chase, including the escape of the witness and her children once stopped. This evidence was corroborated by the witness' child as well as the law enforcement officers who ultimately stopped the car on each occasion as Aleksey continued his flight and an ex-girl friend. ROA. p. 1301-06, 1371-72, 1376, 1611, 1613. See also, ROA. p. 990, 1012-14. Further, Aleksey gave a statement to the police absolving the witness of either knowledge or involvement in the shooting and admitted his own role as the shooter. State Exhibit 74, 75. ROA. p.2413-33. Importantly, the evening the statement was given he called his former girlfriend, Sarah Pivero, and told her that "he shot a state trooper." ROA. p. 1611, 1613. Further, the witness was otherwise impeached by prior crimes of moral turpitude-shoplifting and possession of cocaine. Under these factors, any error in failing to present the jury information that she had been charged previously with nine other drug related crimes is harmless beyond a reasonable doubt under Van Arsdall, supra.

The trial judge's expressed concern in precluding consideration of the dismissed counts of the New Jersey indictment was the fact that they were dismissed and that the mere fact that she was indicted on the charges was insufficient. Although Judge Cottingham stated, in dicta, at trial that "you can't say she made a bargain, they may not have had sufficient proof," the mere fact that proof that there was a bargain for a sentence based upon her agreement to testify against the mother does not undercut his ultimate reason for disallowing the dismissed counts. Counsel Stone, in hindsight was correct that it would not have made a difference to the trial judge.

The Respondents further submit that counsel was under no Sixth Amendment duty to present evidence that Gloryvee implicated Aleksey when initially questioned about the thefts at Dr. Bang's office. First, the defense apparently knew from Aleksey that he was involved in the theft and proceeds from the stolen checks from Dr. Bang. PCR 920, 924. A-22 ("when Gloria and him were together she took two checks from her job"). Also, PCR 328.. Counsel recalled sending an investigator to Pennsylvania to check on Gloryvee's background, but did not recall the results of the check concerning Dr. Bang. PCR 921. Further, counsel had checks from Dr. Bang in their files. PCR 413-14. However, Stone recalled that Gloryvee got fired because she had stolen the checks. PCR 960. However, he had never seen the incident report, Applicant's Exhibit 34, which implicated Aleksey (Tosconi) in the theft. PCR 950, 953-54.

Respondents submit that Sixth Amendment prejudice is not proven by the failure to present evidence that Aleksey was implicated as the thief of Dr. Bang's checks by Gloryvee. First, the accusation may not have been false based upon Aleksey's written comments about his knowledge and participation in the depositing of the checks. The question further was of limited probative value where Aleksey remained involved with Gloryvee subsequent to the December 24

thefts until his arrest. Further, the attempt to present the limited evidence that Gloryvee had implicated him could have easily been excluded as "confusing" under SCRE Rule 403 since proof of his involvement might have been at issue. The defense theory that Gloryvee would rat out on her mother to avoid imprisonment, a matter not admitted, is not dissimilar from her assertion that Aleksey stole the checks. Adding this element does not undermine confidence in the verdict. The question suggested is that does making Aleksey guilty of more crimes than previously shown create a reasonable probability that the result of the proceeding would have been different. Respondents submit that they have failed in their burden of proof to suggest they would. The assertion must be denied.

Gloryvee's Alleged Inconsistent Statements

The Applicant further contends that counsel was ineffective in failing to point out inconsistencies between her statement to SLED [Applicant's 42, 43] and her trial testimony. Particularly, he initially contends counsel should have challenged Gloryvee's statement that she was ignorant of Aleksey's "criminal record", when she had been an accomplice of his in a month long spree. Second, he contends that in her statement she indicated that she had "nowhere to stay" at the time and that she did not have a present address but could call people and stay with them. Applicant 42, p. 2-3. At trial, she testified on cross-examination by Sims that she was staying with her best friend, but she had problems, but Aleksey offered to get her out of that situation and she moved in with him about a week and one-half after meeting him. R. 1329-30. Also, R.p. 1299, ll. 4-7. The Applicant asserts that evidence of homeliness and custody of her children asserts a need to avoid apprehension for fear to lose her children.

At the PCR, counsel Stone stated that the current suggestion to specifically cross-examine her by contrasting the statement and her testimony about where she was living did not impress him as something she should be examined on. Stone said he did not think that attempting to show she was homeless rather than staying with friends would have helped the case. PCR 998-99. See also Sims' testimony, PCR 506-13.

Respondents submit that this failure to re-develop this inconsistency was not ineffective. Counsel clearly had possession of her statements where she declared that she had nowhere to stay. A-42-A, 42-B, A-43. During Gloryvee's testimony, counsel Sims questioned Blackwell asserting "you had no place to stay?" R.p. 1329, l. 22. She then described her travels, from friend to friend, hotel to hotel. R. 1329-31.

Cross-examination, as noted previously, is a matter vested in the strategic discretion of trial counsel. While the inconsistency was evident, the jury could have made the same recognition that current counsel did because the information was before them. Although the inconsistency was not emphasized, Sims south to develop the existence of the fact she had given more than one statement. R. 1340-42. See also ROA 1335.

Cross-examination must be objectively unreasonable and not flawless; an attorney's decision about the extent of cross-examination and refraining from certain lines of inquiry is entitled to great deference. Dows v. Wood, 211 F.3d 480, 487 (9th Cir. 2000); Phoenix v. Matesanz, 233 F.3d 77, 83 (1st Cir. 2000)(choice of emphasis in cross-examination is prototypical example of strategy). The question is not whether the prosecution witness was attacked on every conceivable pint, but whether the testimony was subjected to adversarial

testing. Johnson v. Nagle, 58 F.Supp.2d 1303, 1355, n.42 (N.D. Ala. 1999). The Applicant has shown neither deficient performance or prejudice.[32]

C. BRADY Issues

Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998) (citing Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)); Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Brady only requires disclosure of evidence that is both favorable to the accused and material to guilt or punishment. Taylor, 333 S.C. 159, 508 S.E.2d 870 (citing United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)).

A Brady claim is based on the requirement of due process. To establish a due process violation, an accused must demonstrate that the evidence was (1) favorable to the accused; (2) in the possession of or known to the prosecution; (3) suppressed by the prosecution; and (4) material to guilt or punishment. Gibson at 524, 514 S.E.2d at 324 (citing Kyles v. Whitley, 514 U.S. 419, 432-42, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); Brady, 373 U.S. at 87, 83 S.Ct. 1194;

---

[32] In this section, Aleksey asserts that defense counsel should have brought up on cross-examination her comment in the statement that she was not aware of Aleksey's criminal record. Remarkably, he asserts this should have been impeached because subsequent to her companionship with Aleksey she had seen him go on a crime spree.

The problem with his approach is that there may be truth to her comment that she was not aware of his "criminal record." The failure to develop that she had knowledge of his recent crime spree to refute that comment does not undermine confidence in the outcome of the case.

State v. Von Dohlen, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996)); State v. Jarrell, 350 S.C. 90, 107, 564 S.E.2d 362, 372 (Ct.App.2002), cert. denied. The rule applies to impeachment evidence as well as exculpatory evidence. Gibson at 524, 514 S.E.2d at 324 (citing Bagley, 473 U.S. at 676, 105 S.Ct. 3375).

There are three categories of Brady violations: (1) cases involving nondisclosed evidence or perjured testimony about which the prosecutor knew or should have known; (2) cases in which the defendant specifically requested the nondisclosed evidence; and (3) cases in which the defendant made no request or only a general request for Brady material. Gibson at 524-25, 514 S.E.2d at 325 (citing United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)). Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Kyles v. Whitley, 514 U.S. 419, 433-434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Moreover, the rule encompasses evidence "known only to police investigators and not to the prosecutor." Id., at 438, 115 S.Ct. 1555. In order to comply with Brady, therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." Kyles, 514 U.S., at 437, 115 S.Ct. 1555. Also Strickler v. Greene, 527 U.S. 263, 280-81, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). A " 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Id. Thus, although "the term 'Brady violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory [or impeachment] evidence--that is, to any suppression of so-called 'Brady material'--... strictly speaking, there is never a real 'Brady violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have

produced a different verdict." Strickler, 527 U.S. at 281, 119 S.Ct. 1936. For the reasons set forth below, Aleksey has failed in his burden of proof.

The Dr. Bang Summit Bank, Lincoln Scam

As set out above, evidence existed of a joint scam with Aleksey and Gloryvee involving the theft and use of checks from Dr. Bang's office to attempt to secure monies to purchase a Lincoln. Under the defense theory this evidence undermined the credibility of Gloryvee and the prosecution's assertion that Gloryvee, unlike Aleksey lacked any motive to flee, suggesting that Aleksey was the driver.

The Applicant contends that the prosecution had sufficient awareness of the scam to require the State to both investigate the incident and then reveal the fruits of the investigation. The Applicant bases this assertion on the generalized knowledge Bailey admitted of the scam. PCR 1705. He further points to Solicitor Bailey's remark that during the PCR that he understood Gloryvee had worked for Dr. Bang and "stole some checks while she was employed there." PCR p. 1280, ll. 7-10. Solicitor Bailey stated that he provided checks from Dr. Bang to defense counsel which were found in the Mustang. PCR 1282-86. Contrary to the Applicant's assertion though, Solicitor Bailey disagreed that the mere possession of the checks from Dr. Bang's office in the Mustang would have triggered in his mind that the checks were fraudulent or that there was anything wrong with the checks.

Solicitor Bailey stated when he initially interviewed Gloryvee after her release prior to trial, she was unemployed, but planning to return to work at a medical office. His notes of the interview did not include any reference to her prior employment. PCR 1289-92.

SLED Agent Darnell testified that he was aware that Gloryvee had been fired from her job. PCR 1633 Darnell testified that he had some familiarity with the fact that "they" did not pick up a vehicle because the check did not go through. PCR 1634. He vaguely remembered something about Gloryvee opening an account with a forged check. PCR 1634. Like Bailey, Agent Darnell had no recollection of ever going over the matters related to the doctor's check, motel receipts, and the Lincoln with Gloryvee. PCR 1643-44. Agent Darnell denied, in his mind, it could be a motive and stated that he did not see what that had to do with Trooper Lingard's death. PCR 1644.

The record reveals that the checks found in the vehicle were disclosed to the defense. See Clerk of Court Records, July 23, 1998 Letter from Bailey to Sims, Stone, item 8, 9, 10.

As noted above, defense counsel, through Aleksey, knew of the existence of the alleged scheme to purchase the Lincoln through the forged use of stolen checks by Aleksey and Gloryvee. Under Brady, the duty to disclose is required for any impeaching or exculpatory material. Respondents acknowledge the scam would be impeaching of Gloryvee as a dishonest act. However, these factors were known by the co-conspirator, Aleksey, and essentially revealed to the defense through him

Applying the same test as ineffective assistance of counsel for prejudice of reasonable probability the result of the proceeding would have been different, the Respondents submit that he has failed in his burden of proof. Respondents incorporate those matters previously set out herein by reference. In summary, confidence in the outcome is not undermined where the Applicant was aware of the facts of the scheme and ha revealed a version in his second oral statement. Since it did not reveal "warrants" were in existence against Gloryvee, the focus would

be on the impact of the events upon her mental state, something the Applicant and counsel were aware of. Since the disclosure would reveal something defense had already, but did not use, in "general knowledge", there is no reasonable probability the result of the proceeding would have been different.

The Penske Rental Document

The Applicant contends that the State had a duty to disclose the Penske Rental Reservation document. He asserts it would reveal a different destination of West Palm Beach and imply a permanent move rather than the suggestion of a vacation. Memo., p. 14. The problem with this claim is that the document was disclosed to the defense. The Applicant proved that it was present in the photographs of the vehicle which were presented to defense counsel in discovery. Since it was disclosed to the defense, he has failed to show any violation of Brady, supra.

Further, as noted above, Aleksey was personally aware of the communication with Penske rental. Not only was the document present in the vehicle he packed and was driving, he indicated to his defense counsel a desire that they independently contact Penske rental.

For the same reasons a with the prejudice prong for ineffective assistance, the Applicant failed to prove materiality under Kyles. See also PCR 1298, 1302-03 (Bailey noted Applicant Exhibit 77 - photograph reveals Penske brochure); 1547-50, 1626-29.

Miscellaneous Comments

The Applicant also contends that Solicitor Bailey made false comments to the jury or presented false evidence in violation of Giglio and Napue. The Applicant has failed in his burden of proof. As noted previously, one of Solicitor Bailey's prongs was nobody was looking

for her "other than for a couple of speeding tickets." R. 1752. In addition to the claimed scheme to steal Br. Bang and acquire the Lincoln through the use of a forged check by both, he claims that a further scheme to write checks for Summerfield Suites on the closed account from Beaufort should have revealed someone was out to look for her. However, Aleksey was aware of those matters as set forth above.

Importantly, the fact that there was evidence from Applicant's Exhibit 41 from law enforcement about a complaint concerning the checks, but that there was no warrant made for arrest does not reveal automatically what the Applicant asserts. As Solicitor Bailey noted, it was not clear who closed the account or whether Gloryvee was aware the account had closed to prevent its use. Nevertheless, since his theory was no warrants, his theory was essentially correct. It was not materially false nor does it undermine confidence in the verdict.

The Applicant also claims the Solicitor's argument that Gloryvee does not know anything about Aleksey's past was a false statement.

The Applicant takes issue with the following comments by Solicitor Bailey:

> "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 know 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."

R. 1755. Aleksey now claims that Gloryvee knew who Aleksey was by her dealings with him in the four weeks she had spent with him.

The problem with the Applicant's assertion is that Gloryvee did not know anything about his past. It was not a false statement or argument, but evolved directly from both Gloryvee's statement and testimony and Aleksey's own statements to the police. As stated in the evidence, Gloryvee had just met Aleksey within one month of the incident. Also, she had known him through an alias rather than through his real name. Although the Applicant's evidence suggests that she was always knowing pawn in the fraudulent activity of Aleksey after they began their relationship, that does not suggest knowledge about his past. His Svengali approach to women and dramatic and consistent use of aliases and deception prevented Gloryvee from knowing his past and naively chose to accept his presence. As stated above, "in order to prevail on a Giglio claim, a petitioner must establish that the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony, and that the falsehood was material." Tompkins v. Moore, supra. The Applicant has failed to show either materiality under Brady-Kyles or knowing use of false testimony under Giglio. The allegations must be dismissed.

Hamilton Township Warrants
(Applicant's Exhibit 79)

As noted in the ineffective assistance of counsel section, Solicitor Bailey was not aware of pending traffic warrants (nor any bench warrants for traffic citations) until the defense presented the matters to him at trial. R. 1288-90, 1297. Particularly, the criminal record sheets provided to Solicitor Bailey (and ultimately the defense) did not have this information. R. 1288. See Applicant's Exhibit 83, Item No. 50.[33] Further, at trial, upon inquiry of Gloryvee, she

[33] According to the Clerk Records, Gloryvee Blackwell's rap sheet of eight (8) pages was faxed to counsel Stone on May 22, 1998.

advised the prosecution and ultimately the court, under oath that she did not recall any speeding tickets. R. 1288, 1297.

The Applicant contends that the prosecution should have developed this information prior to trial. He bases this on the fact that SLED Agent Darnell contacted the Trenton Police Department about Gloryvee and that she worked and had a known criminal record for possession of drugs in Trenton. Memo., p. 10. PCR 1632-33.

Respondents submit that the Applicant has failed to prove a violation under Brady. First, Solicitor Bailey stated, consistent with his trial representations, that he had no recollection of ever seeing the information that there had been a "contempt of court" warrant for a pending traffic violation from 1994 pending at the time of the trial. PCR p. 1260, ll. 10-17. As Solicitor Bailey testified, he ran a "rap sheet" on her and there was nothing to indicate there were any outstanding warrants against her. He stated he would not have made the argument if he had been aware of the fact of the warrant and would have tailored his argument differently. PCR 1261. Solicitor Bailey also stated that when the traffic speeding violations independently discovered by the defense were brought to his attention, he only inquired of Gloryvee about her knowledge of the speeding tickets, but did not go beyond that witness. PCR 1263-64, 1266-68. Bailey confirmed that he did not talk with the Hamilton Township Police Department. PCR 1270. As Solicitor Bailey stated: "I don't know that I've got any duty to disclose to the defense something I don't know, but they know." R. 1270.

The Applicant further relies upon testimony from SLED Agent Darnell. During the hearing, SLED Agent Mears testified that the rap sheet he reviewed did not reflect any pending arrest warrants for Gloryvee. PCR 1600-01. Further, Agent Darnell specifically reviewed

Applicant's Exhibit 79 and declared he did not remember anything in his investigation about a bench warrant for contempt of court arising from his investigation in New Jersey. PCR 1642.

The Applicant has failed to show any Brady violation. As stated earlier, even if a prosecutor does not possess Brady material, he has a duty to learn of any favorable evidence known to other government agents, including the police, if those agents are involved in the investigation. See Kyles v. Whitley, 514 U.S. at 437. However, the prosecutor does not have a duty to discover and disclose information held by other federal or local agencies that have no involvement in the investigation or prosecution at issue. U.S. v. Hawkins, 78 F.3d 348, 351 (8th Cir. 1996); Moon v. Head, 285 F.3d 1301, 1309-10 (11th Cir. 2002).

Here, Solicitor Bailey had no duty to disclose the Hamilton Township contempt of court warrant. First, he did not discover the matter during the running of the rap sheet. Second, the SLED agents, particular Agent Darnell, never learned of its existence during his search for information. Thirdly, there is no evidence anyone from either SLED, the Highway Patrol, Orangeburg County or the Solicitor's Office ever possessed this information. To the contrary, they were of the opinion it did not exist. Further, the Applicant's speculation that the mere fact that SLED or the Solicitor was aware that Gloryvee lived and worked in Trenton was enough to demand seeking and receiving this information is not sufficient to create a Brady duty to disclose. For this initial reason, the evidence does not establish a Brady violation.

Second, the defense already and independently had developed from their own investigation the existence of four traffic charges, apparently pending since 1994. The record reveals that the matters learned by the defense remained pending at the time of the 1998 trial. Since the defense was the actor that disclosed these matters to the prosecution, the defense was

"on notice" of the existence that warrants for the failure to resolve the traffic warrants existed. Since the defense possessed that information, Brady was not violated based upon the defense team's actual knowledge. See: U.S. v. Bender, 304 F.3d 161, 164 (1st Cir. 2002)(no Brady violation where defense on notice of information about witness' mental difficulties prior to testimony); U.S. v. Rodriquez, 162 F.3d 135, 147 (1st Cir. 1998)(no Brady violation in failure to disclose tactics used to induce witness cooperation because defendant knew of witness' long criminal history). Here, the defense knew of pending traffic violations. The evidence, as revealed then and now, was equally available to the defense as to the state. As Exhibit 79 reveals, defense counsel were able to acquire this information, independent of the prosecutor. Brady's duty to disclose has not been proven.

Further, the Applicant has failed to prove "materiality" of the information under Kyles. The record reveals that had the warrant been discovered, the prosecutor would have tailored his closing argument differently to the extent he would not be able to assert Gloryvee had no warrants pending against her. However, this slight change does not, to a reasonable probability, under confidence in the outcome of the case. The additional factors, noted by Solicitor Bailey, support the fact that Aleksey was the driver at the time of the shooting and the driver did not change during the post-shooting flight. Further, the failure of the defense to utilize the pending driving charges, which differ only slightly in degree to the "contempt", suggest the probative value of these matters were minimal.

As noted, Aleksey confessed to being the sole driver of the vehicle at the time of the shooter and confirmed Gloryvee's lack of knowledge in the incident. The power of the impeachment of Gloryvee was limited by the probative value of Aleksey confession, his

connection to acquire the gun independent of Gloryvee through Elena Batkilina, his connection to acquiring the Mustang, independent of Gloryvee through Lisa Watson, and his history of deception with all who came into contact with him. The Applicant failed in his burden of proof.

ALEKSEY'S OTHER WOMEN

SARA PIVERO CLAIMS

Ground O (5)	**IAC - Guilt (failed to impeach)**
	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.
Ground O (9)	**IAC - Guilt (failed to investigate)**
	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 P (3)	**IAC - Sentencing (failed to cross-exam and impeach)**
	Trial counsel failed to properly cross examine and impeach state's witness Sarah Pivero. See Ground O, number 5.
Ground P (5)	**IAC - Sentencing (failed to investigate background)**
	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
Ground Q (3)	**Brady - Failed to provide Pivero Statement**
	The state knowingly failed to provide, to trial counsel, a statement given by Sarah Pivero to the agents of SLED.[34]

In the claims related to Sara Pivero, Aleksey initially claims, in post-hearing pleadings for the first time, that the State violated the mandates of Brady v. Maryland, supra by failing to

---

[34] This issue was addressed above related to ineffective assistance of counsel in failing to question either Agent Mears or Darnell about it. As revealed in Darnell's testimony, there was no Pivero statement to reveal. PCR 1678-79. The allegation is without merit and must be dismissed.

disclose the fact that Pivero had given inconsistent statements to Solicitor Bailey and the Doylestown Police Department concerning who wrote the checks Aleksey or Pivero used for the down payment on the Lexus. He further contends that counsel were ineffective in failing to impeach Pivero with her record and inconsistent statements she made concerning her involvement in the Lexus purchase. For reasons set forth below, the Applicant has failed to show entitlement to relief under either Kyles v. Whitley, supra or Strickland v. Washington, supra.

A. Sara Pivero's Trial Testimony
1. Guilt Phase 1606-1625

Sara Pivero testified that she was 21 years old and employed as a hairdresser at Sensational Scissors for four years. R. 1606-07. She stated that she met Aleksey, then known as Michael Angelo, in May 1996 and developed a relationship with him. She stated they lived together as boyfriend-girlfriend until November 1996. R. 1608. She said he also used the name Batkilina and Michael Diangelo. Id.

She stated on January 2, 1998, she received a call on her cell phone and initially received a voice message from an operator about a call from a correctional facility and heard Michael's [Aleksey] voice say to call his mom. About 15 minutes later, she received a call around 8 pm and it was Michael. She stated he identified himself and said he was in jail in South Carolina. When she asked him what he did, he told her "that he shot a state trooper." R. 1611. When she said "shot as in hurt", he said he don't know. He said to her he knew he was in trouble, but that "maybe it was for the better because he was tired of running." R. 1611.

Pivero stated she got another call from him that evening and he told her to call his mother and let her know what was going on. R. 1611. The next day, January 3, she received another call

"and this time he was kind of frantic and said it wasn't him, it was Perez that pulled the trigger", although she did not know who Perez was. R. 1612. At that point, he had never told her anyone else was in the car and she did not know whether Perez was male or female. R. 1612.

On cross-examination, Sims attempted to question whether she might have heard "they said I shot the trooper", but she denied it because of what he said he did. R. 1613. She confirmed the next day he said "Perez pulled the trigger." R. 1613.

Sims developed that Pivero met Aleksey when she was driving with a girlfriend to Atlantic City and he was in a car next to them. R. 1613. She stated that they started talking at the casino, and they followed it with phone calls over the next couple of weeks and then he moved in with her. R. 1615.

She said that Aleksey proceeded to spend a lot of money. She claimed he asked to borrow her money because he was in trouble and promised to pay her back. R. 1615. She thought he set up investments in her name, which never existed. She claimed her statement from her investment company revealed a zero account balance. R. 1615. She stated that the various account balances probable totaled. $50,000. R. 1616.

Like Watson, Pivero stated Aleksey went to dealerships and picked out the car he wanted "and I put them in my name for him" because she had good credit and Aleksey claimed he had bad credit. R. 1616.

She stated she bought a 1996 Mustang which she wrote a check out for. R. 1616-17. She described a series of automobile transactions including getting a 1994 Eldorado Cadillac when he traded in her 1996 Jetta and got a Red Passat. R. 1617. She stated that Aleksey told her that the payments were taken care of and she signed her name to the lease. R. 1616-17. Pivero stated

that next was a 4-Runner that he had picked out. She said the paperwork was done and all she had to do after he handed her some cash was to sign the paperwork. She signed the papers and Aleksey drove off in his new car. R. 1618.

Next, after she had an accident and driving a rental, Aleksey wanted her to get a new Jeep. She told him she could not make payments on it because she was 19, trying to make a mortgage and working as a hairdresser. R. 1618. She said he would help her, so she got the Cherokee with him and he helped "using whatever means necessary." R. 1619.

Next was a 76 Corvette Stingray that she loaned him money for. She said he then paid cash for it and sold it a couple of weeks later, but she never saw any money. R. 1619.

Concerning a Lexus, Pivero stated that she received a call to come to Thompson's Lexus in Pennsylvania and see the car and fill out the credit application. R. 1619. She stated she filled out the application and "reluctantly" wrote the check. R.p. 1619, l. 20 - p. 1620, l. 6. She said Aleksey told her the money would be in the account. R. 1620.

However, she said he had deposited "bad checks" into the account and her checks bounced. "I bounced a little over $8000 in checks to the Lexus dealership, which I am now paying them back monthly." R. 1620.

Pivero stated at that time they were still technically together, but it had been pretty rough. R. 1620. She stated he had been staying with other people. Also, that Aleksey was incarcerated and when he got out he stayed with her and a girlfriend about a month and one half.

She said she was out of money from investments that no longer were in existence. R. 1621.

On re-direct, Pivero indicated that she received the $50,000 from a severe car accident in 1995 from an insurance company due to the loss of a dear friend. She said she had invested in mutual funds, a money market account, and two IRA's. R. 1621-22. She said it was gone in about two months. R. 1622. She said that she was upset with him, but never left his side, had no reason to hurt him because he took her money, because it wasn't that important. R. 1622. She said she had never denied talking to him and that she had told the truth about the call. R. 1622.

On re-cross, Sims confirmed that the call was on the cell phone not the house phone. R. 1623.[35]

b. Penalty Phase. ROA 1904-1923

Pivero testified as a state witness in the penalty phase. Particularly, she stated Aleksey had a black Toyota Supra when she met him in May 1996. R. 1905. She had invested $75,000 in proceeds she had received in insurance from an automobile accident. R. 1905. She stated, at Aleksey's instigation, she leased a Cadillac for him in her name. This was traded in for a Toyota 4-Runner for him in her name. Subsequently, there was a 1996 White Saline Mustang that he kept for around a month and one-half. R. 1906. Aleksey then traded in the 4-Runner for the Lexus LX 450. R. 1907.

Concerning the Lexus, Pivero stated that Aleksey wanted it. R. 1907. At the time, she was working as a hair stylist making $15,000. However, the Lexus cost around $60,000. R. 1907. The prosecutor introduced two checks that she said she made out: Exhibit 87 for $2060 on her bank account to Thompson Lexus for the start-up fees and first month's payment that she

---

[35] Pivero had testified earlier that she had given Aleksey her cell phone number previously. R. 1609.

signed (ROA 1908), and a second check she signed for $6,393 to pay off the 4-Runner in order to get the Lexus. R. 1909.

She said Aleksey wanted the Lexus. However, she was writing the checks because Aleksey told her that money was there, but the checks he was depositing into the account were "bad checks" and her account went negative a few thousand dollars. R. 1909.

Pivero identified a W-2 form that was faxed to the Thompson Lexus which indicated her income as being in excess of $78,000. She stated that she did not know how it came about and did not fill out the form. She stated she knew they asked for proof of income, but claimed she did not deal with them. "I only went there to sign the papers. I went there once to fill out the credit app and once to sign the papers." R. 1910. She stated again that she did not fill out a W-2 form. R.p. 1910, ll. 15-17. She stated she just signed the paperwork without looking at it. R. 1910.

Pivero said the two checks ended up bouncing, but claimed at the time she wrote the checks she thought they would clear. R. 1911. She said Aleksey had been depositing checks into the account, but it turned out they were bad. R. 1911.

Pivero stated she had a closed bank account with First National Bank. R. 1911-12. State exhibit 89 was an $18,014 check written to County Line Auto Sales dated August 1997. R. 1912. Pivero claimed this check was taken from her home where checks were kept. She identified Aleksey's handwriting on this check and forging her signature. R. 1912-13. She stated in August 1997, she had not talked with Aleksey for a couple of months and was unaware he was writing the check. R. 1913.

She stated Aleksey also got her mother's (Carol Pivero) credit card numbers and charged them for "a couple of thousand dollars." R. 1914.

Pivero also said at one time Aleksey had a Honda CVR 600 motorcycle that he claimed his girlfriend Theresa in New York purchased for him. R. 1914. She said she saw him dump it into a lake and he told her it was done "so it wouldn't be traced back to him." R. 1914-15.

Pivero described seeing Exhibit 5, a gun that he used to keep in a leather first aid box. She described in February 1997 when they got in an argument and threw her on the ground and put the gun to her forehead and said he was going to kill her. R. 1915. She said to pull the trigger because her life can't be worse, and he said "how could you do this to me, I love you." He then held the gun to his own head and said he was going to shoot himself and to walk out of the room. She said she would stay and Aleksey then curled up on the floor and fell asleep. R. 1916.

Pivero identified State 56 (Brown Purse) that belonged to Aleksey that she saw which had credit cards, Ids, and checks from his ex-girlfriend Theresa. The items had the name Theresa Fogle and Theresa McCann. R. 1916-17. Subsequently, some of her friends saw her own checks in the purse. R. 1917.

In May 1996, Pivero asserted that she had a conversation with Aleksey where he claimed Theresa had taken money and other things from him and claimed that he would get even with her one day when she wasn't expecting it and blow up her car. R. 1917-18.

On cross-examination, Sims initially emphasized the gun event and that he did not pull the trigger on her and threatened to kill himself and asked her to leave, but when she refused he laid on the floor and went to sleep and said "he was afraid to lay next to me because he thought I

would hit him." R. 1918-19. She described the event as scary, but that Aleksey would not pull the trigger on either. Pivero said that she felt he would not pull the trigger because they were in someone else's home with children. R. 1919-20.

Concerning the motorcycle, she said she knew he was going to ditch the motorcycle in advance and gave him a ride back. R. 1920.

Concerning the vehicle purchases, Pivero stated she really did not have a choice. She said Aleksey went to the dealerships and filled out the paperwork and "I trusted him so I signed." R. 1920. She said they were living together then and been dating for a while, so I trusted him. R. 1921. She thought it was odd how quickly he switched cars, but he seemed to love them and she didn't ask questions as long as the bills got paid. R. 1921. However, she stated:

> Unfortunately the bills were getting paid with his stolen credit cards, receipts and everything was kicking back and I was getting these lump sum bills for thousands and thousands of dollars. Not to mention rap sheets I have now, probation I'm on so I can pay back his car.

R. 1921. She said after Aleksey took off, she got a cell phone bill for $4,500.

Pivero stated at no time did she refuse to sign for the car because "he had the money up front." R. 1922. "He gave me the cash to go." Id. She said he never signed any of the documentation at the dealerships because he told her he had bad credit and had filed for bankruptcy, but needed a car and she was "trying to help him out." R. 1922.

B. Brady Claim

In his brief, the sole claim he asserts arises from material disclosed after the evidentiary hearings were completed. The Applicant presents documents disclosed to this Office on April

22, 2004 from the Doylestown Township Police Department as Applicant Exhibit 85, which supplements similar material received in court as Applicant's 55 that had been disclosed to defense counsel on February 16, 1998 according to the transmittal letters in the Clerk's Office. However, Doylestown materials include a July 16, 1998 letter from Solicitor Bailey to Detective Dean Logan in which he states:

> During the penalty phase of the trial, I am going to call Sara Pivero with regards to her dealings with Bayan Aleksey. Ms. Pivero has advised me that Aleksey altered her W-2 as well as forged her signature as the maker of two checks payable to Thompson Lexus...

Applicant's 85. The proposed exhibit also includes the following July 23, 1998 report by Lt. Logan stating:

> On July 22, 1998, I picked up the original $6393.88 check from Jim Cousart of Thompson Lexus and made telephone contact with Walter Bailey in reference to the letter. I advised him of the information related to Pivero signing the checks rather than Aleksey as Pivero had informed him...

Applicant's 85 (Report Date 07-23-98).

During the trial, Pivero consistently maintained that she signed both checks to Thompson Lexus, consistent with the investigation and her earlier guilty plea. R. 1619-20 (cross-exam)(guilt), R. 1908, 1911 (penalty).

In his memorandum, he asserts that there was a Brady violation because the Solicitor never disclosed to either defense counsel that Pivero at some time, had falsely indicated to him that Aleksey, rather than herself, had signed the Thompson checks. The Applicant contends that this inconsistent and false statement to Bailey was impeachment material that should have been

disclosed to the defense. Aleksey maintains that the mere fact that Pivero had apparently made a false statement to Bailey, even though she testified truthfully and contrary to that earlier statement qualified as Brady material because it suggested that she would lie to a jury if she would lie to Bailey.

Respondents note that due to the timing of the presentation of the issue, no testimony has been taken from either Bailey, Sims, or Stone concerning the disclosure or non-disclosure of either the Bailey July 16, 1998 letter or the information within the letter. The record does disclose that at some time Bailey traveled north and interviewed Pivero, although he was unable to receive any written statement from her. PCR 1422, 1423, 1431. Assuming the letter is accurate concerning the comments of Pivero related to the authorship of the checks, and assuming the information was not disclosed, a new trial is not warranted because the prejudice - materials prong of Brady and Kyles v. Whitley has not been satisfied.

First, it is without dispute that her trial testimony, brought out by the defense initially in the guilt phase, that she signed both of the Thompson Lexus checks was true, as Applicant presently concedes. Memo., p. 30-31. Second, information revealed in Applicant's 55 which was disclosed to the defense included the fact that Pivero was willing to make false statements to law enforcement officials about the circumstances of the Lexus transaction, including that Aleksey was her brother or half-brother, Michael Pivero, that her handwriting was/was not on the credit application, that she had used an erroneous address on the application. See Applicant 55, 11-15-96 Report. Further, defense was provided a "Rap Sheet", Applicant's Exhibit 52, which revealed guilty pleas to three counts of "theft by deception" and two counts of "bad checks" with

three years probation. At trial, upon defense questioning, Pivero revealed that she had "rap sheets...probation" and had to pay back his cars. R. 1921.

In Kyles, the Court held that undisclosed evidence was material if there was a reasonable probability that it would have changed the outcome of the proceeding. A "reasonable probability" is defined as a probability sufficient to undermine confidence in the outcome. Kyles, 514 U.S. 419, 434 (1995). As Kyles stated, the defendant must show "that the favorable evidence [withheld] could reasonably be taken to put the whole case in a different light as to undermine confidence in the outcome." Contrary to the claim of the Applicant, the mere fact that a document could be used for impeachment does not mean that Brady has been satisfied to require a new trial. See Campiti v. Matesanz, 333 F.3d 317, 322 (1st Cir. 2003)(nondisclosure of witness' wrongdoing not "material" because additional evidence against defendant meant there was o reasonable probability the result would have been different); U.S. v. Jackson, 345 F.3d 59, 73-79 (2nd Cir. 2003)(nondisclosure of impeachment evidence not "material" under Brady because incriminating evidence against defendant significant and defense could impeach without the non-disclosed material); U.S. v. Zuno-Arce, 339 F.3d 886, 8990-93 (9th Cir. 2003)(nondisclosure of further impeachment evidence not material because defense did impeach and new evidence did not undermine confidence in the outcome); U.S. v. Payne, 63 F.3d 1200, 1210 (2nd Cir. 1995)(no violation where government did not disclose impeachment evidence in prior affidavit of co-conspirator because con-conspirator's testimony was only a fraction of the case linking defendant to the crime). Here, the inconsistent statement about the check potentially made to Solicitor Bailey was similarly not material.

Confidence in the outcome of the case is not undermined by the apparent non-disclosure. First, it is clear that Aleksey was the active participant n the Lexus transactions, albeit that Pivero signed the checks, as she testified. The risky impeachment could have suggested Aleksey was more dominant or in fact, that Pivero had either misspoke about the Lexus checks or been misunderstood. As revealed in the Doylestown documents and her plea, all preceding her alleged comments to Bailey, there was no indication that she had ever denied to law enforcement or the court that she was the author of the Thompson checks. Further, the Thompson transaction was initially brought up by the defense in their cross-examination of Pivero in the guilt phase. At that phase, the telephone call was introduced and the attempt to impeach was not on whether the call occurred, but whether she heard it correctly. Respondents submit that the failure to disclose does not undermine confidence in the outcome. Respondents submits that they failed in their burden of proof.

D. Ineffective Assistance of Counsel

In his memorandum, p. 31-34, Aleksey contends counsel failed to adequately impeach Pivero on the fact of her particular criminal convictions, her involvement in the Lexus fraud, and whether she was truthful at trial in August 1998 when she claimed to be employed at Sensational Scissors as a hairdresser. For the reasons set out below, the Applicant has failed to meet his burden of proof under Strickland v. Washington, supra. As set out previously, where counsel has a valid strategic reason, he cannot be deemed deficient under Strickland.

At the time of the August 1998 trial, Sara Pivero had been convicted, by entry of a nolo contendere plea to three counts of "theft by deception" and two counts of "bad checks" and was serving a three year probation as of July 28, 1997 for her involvement in the lease of the Lexus.

It is also clear that in the guilt phase, counsel Sims did not attempt to impeach her with her prior criminal record, although it had been turned over to them upon request. PCR 575.

Counsel Sims acknowledged that he could have impeached her with her record, but did not do so at trial. PCR 578-79, 582. In hindsight, he thought he might have overlooked it.

Respondents submit that even if Sims overlooked the criminal record, it is clear that he developed on cross-examination in the guilt phase her involvement in the purchase of the Lexus. As counsel Stone stated, it was obvious from the beginning that she was part of the deception and that she did not come off as a good victim. PCR 1102-04. Importantly, the criminal convictions arose directly from the involvement with the Lexus, initially on the defense guilt phase cross-examination. R. 1618-20. A review of the Applicant's Exhibit 51 reveals that her statements to the court at the nolo contendere plea were consistent with her trial testimony in Aleksey. Further, in the penalty phase, Pivero stated during the cross-examination that she has a criminal record (rap sheet), was on probation and was required to make payments on the Lexus as a result of her involvement with Aleksey. With this information before the jury, the omission to particularize the crime on cross-examination does not undermine confidence in the outcome under Strickland, supra.

Aleksey further criticizes counsel concerning his failure to further develop on cross-examination specific circumstances surrounding the purchase of the Lexus. First, he now contends that counsel should have developed, from the Doylestown police reports, that Pivero was aware that the checks he wrote were from an insufficient account because she subsequently told police that she was hoping to receive funds "from a friend." See, R. 1909. As counsel Sims noted, he did not see the strategic benefit in parsing this item from the Doylestown report. He

felt that an alternative interpretation, based upon the entirety of the reports was that at the time she thought Aleksey, her friend, would make good on the checks. PCR 597, 602-03. Applicant's Exhibit 55 (and 85) support that approach where the police reports revealed when Sara was notified, Aleksey would expeditiously return the telephone calls. The police reports reflect that Aleksey, not Pivero, told Thompson Lexus to redeposit the checks and that he would make good on the checks. Applicant 55, [Report 10/08/96, p. 2; Report 10/10/96; Report 10-11-96, p.1-2]. Sims noted that his notes reflected that he had reviewed these Doylestown documents. PCR 597-99, 653. Sims felt all these notations suggested was that when he received notification of the problem with Lexus, she thought that Michael would give a good check. PCR 602-03.

Counsel Stone recognized the difficult factual area they were in. He stated that the strategy was to make her involved, but not as to be a co-conspirator that he would feel comfortable in revealing that he shot a trooper. PCR 1203.

The Applicant also asserts that the counsel should have impeached about the salary discrepancy of the W-2 of $78,984.25 (App. 55), the credit application of $7500 per month ($90,000) and her real income as a hairdresser ($12,000-15,000). First, she consistently denied that she filled out the fake W-2 form. However, she admitted, at some point, that she signed the credit application that had $7500 per month. The discrepancy between her real salary and reported salary was presented to the jury. R. 1619-20 (filled out the credit application)(cross-examination); 1907 ($15,000 salary as stylist); 1910 (fake W-2 for $78,000). The Applicant contends that this testimony should have been fully impeached by asserting that she additionally made a false representation about $7500 per month on the credit application. However, according to the police report, her response would have been Michael (Bayan) told her to do so.

PCR 601, Applicant 55. In light of the other evidence, it is difficult to see how the failure to ask the question would undermine confidence in the verdict.

The Applicant further asserts that on cross-examination the defense should have developed that Pivero had presented Aleksey to both the dealership and initially to police as her brother or half-brother, when in fact he was her boyfriend. Sims agreed he could have impeached her with these false statements, but did not. PCR 586-91. Sims acknowledged that he had reviewed the document which included this information. PCR 590-91. Respondents submit that the "impeachment" potential does not undermine confidence in the outcome. It would have further revealed Aleksey's consistent modus operandi in dealing with "the women" to suggest to the soon-to-be-defrauded that Aleksey was a family member. Respondents submit that the failure to present these statements did not prove Strickland prejudice..

The Applicant further seeks to suggest that the "love letters" which assert Pivero was taking the blame should have been used to impeach the claim that she was a victim and Aleksey was draining her account. However, Pivero's testimony at trial already explained this dichotomy - "I was upset, but I never left his side" and "I had no reason to hurt him. Yes, he took a lot of money from me, but it wasn't that important." PCR 1622. The jury was aware of a confusing relationship they shared - the additional information from the letter would not, to a reasonable probability, have mad a difference.

Similarly, Aleksey now questions the employment of Pivero at trial as being at Sensational Scissors when at her plea in 1997 she stated she worked at a grocery and lost her job as a hairdresser. The Applicant has failed to prove that Pivero was not employed as the hairdresser when she testified in 1998. Further, there was no showing that counsel was ever

aware that she was not employed, at the time of trial, at Sensational Scissors. PCR 570-76. Viewing counsel's conduct based upon what he knew at trial, it was neither deficient nor prejudicial. His claim otherwise must be denied.

For all the foregoing reasons, the allegations related to Sara Pivero are without merit for relief.

YELENA BATKILINA ISSUES

Ground O (2)	**IAC - Guilt (failed to adequately impeach)** 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.
Ground O (9)	**IAC - Guilt (failed to investigate)** 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 R (1)	**False Testimony - date of gun purchase** 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.
Ground Q (2)	**Brady - Failed to disclose prior record and acts of dishonesty** 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.

In this portion of the memorandum, pages 35-39, Aleksey asserts that the prosecution violated the mandates of Brady v. Maryland, supra in failing to disclose the full criminal history

of Yelena Batkilina from Florida and the Volvo scam from Lower Moreland, Pennsylvania and that counsel was ineffective in failing to adequately investigate or impeach Batkilina concerning her criminal record, the timing of the gun purchase, and her continuing association with Aleksey after either November 1996 or February 1997. In the application he also contended that false testimony was presented by the erroneous gun purchase date of 1996 rather than 1997. For the reasons set forth below, Respondents submit that Aleksey has failed in his burden of proof.

A. The Guilt Phase Testimony of Yelena Batkilina

The first witness for the state in the guilt phase was one of Bayan Aleksey's girlfriends Yelena Batkilina. R. 913-25. She testified that she lived in Philadelphia and was a new student at Temple University. In 1990 she moved from Russia to the U.S. R. 914.

In July 1996, she met Aleksey at a girlfriend's home. R. 914-15. At that time, he was known as Michael Pivero, and they developed a boyfriend-girlfriend relationship. R. 915.

Solicitor Bailey then asked her to recall October 17, 1997[36] and whether or not she went to Tom's Sporting Goods. R.p. 915, ll. 16-18. She went to the store to purchase a gun with Aleksey. She looked at the guns and picked out one she could hold. She came back on November 2 to pick up the gun, again with Aleksey. She verified her signatures on the paperwork she filled out at Tom's Sporting Goods. R. 918 (State Exhibit 3 [Record of Sale for Firearm], State Exhibit 4 [Firearms Transaction Record]). R. 918. She verified that the

---

[36] As revealed in the State Exhibit No. 3 and 4 and the testimony of Thomas French, R.p. 931, l. 14; p. 932, l. 19, the actual date was 1996, not 1997. During the PCR hearing, Solicitor Bailey explained his error and confusion about the dates and that 1996 was the arrest date. PCR 1303-04, 1308-10.

information on the forms were correct, including her social security number, name, and serial number for the pistol. R. 918-19. She verified that State Exhibit 5 (nine millimeter pistol) carried the same serial number as her purchased weapon. R. 919.

She stated that she paid cash. She brought the gun home and gave it to her mother (Galena) and she put it somewhere in her room. R. 920. Yelena stated that was the last time she saw the weapon on the date she picked it up and gave it to her mom. R. 920.

She also stated that the last time she saw Aleksey was in November. R. 920. She said she never saw him after November 1977. Id. At that time he had started using the name Michael Batkilina. R. 921. She described his normal dress as white turtleneck, blue jeans, white sneakers. R. 921.

Thomas Sims did the cross-examination of Yelena. He developed the fact that he used various names and had assumed her last name. R. 922. Without stating the date, he developed that while they were together she had posted $10,000 bond for him.[37] R. 922.

Sims also developed that she went to the Sporting Goods store to purchase a gun she could handle, not a big gun. R. 923. She acknowledged that she was the person buying the gun and felt this weapon was one a woman could easily handle. R. 924.

When she stood bond for him, she said he was known to her as Michael Pivero. R. 924. However, she stated that they bailed him out as "Bayan Aleksey." R. 924. She stated that when she posted bond for him, he did not show up at trial. R. 924.

---

[37] It was developed at the PCR hearing that the date of the bonding was February 1997 from Bucks County. Applicant's 5.

On re-direct, she stated that she did not know where he went when he did not show up for trial - "he didn't go." R. 925. She also clarified that she did not know or see Gloryvee Perez. R. 925.

On re-cross, Sims developed that the charge she stood bond on was fraudulent use of credit card. R. 925.

B. Brady Claims

In his memorandum, Aleksey contends that the prosecution withheld impeachment material from the defense. Particularly, he claims that Batkilina's convictions for "attempt to commit fraudulent use of a credit card", a misdemeanor first degree and "conspiracy to commit grand theft", a misdemeanor-first degree, which was entered in State v. Batkilina, in Kissimmee, Oscala County, Florida on March 12, 1998, should have been revealed to the defense as potential impeachment material.[38] She was placed on probation for two years as a result of her negotiated plea. Applicant's Exhibits 3, 6. She was also ordered on that date to have no further contact with Aleksey. A second set of alleged undisclosed Brady material consisted of alleged fraudulent conduct by Batkilina, again with Aleksey, concerning a $33, 551.80 back check to Burdumy Volvo in Huntingdon, Pennsylvania dated August 13, 1997 and made part of a police complaint at Lower Moreland Police Department. Applicant's Exhibit 9.

Under the Brady decision, evidence is material for purpose of determining whether the state is required to disclose it, only where there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different, and a reasonable

---

[38] It is noted that at the March 1998 plea, that Aleksey was the co-conspirator on the charges in Florida and was awaiting a murder trial. Applicant Exh. 3, p. 5.

probability is a probability sufficient to undermine confidence in the outcome. State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001). The Brady rule of disclosure extends to evidence that is not in the actual possession of the prosecution, but known by others acting on the prosecution's behalf in the particular case, including the police. State v. Kennerly, 331 S.C. 442, 503 S.E.2d 242 (S.C. App. 1998). See Johnson v. Catoe, 336 S.C. 354, 520 S.E.2d 617 (1999), State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996)(information concerning potential fraudulent activity of a witness known by a state agency, not imputed to solicitor's office).

It has generally been held under Brady that the prosecution has no duty to disclose or produce evidence outside of its control. State v. Jackson, 92 P. 3d 1263 (N.M. App. 2004). The state's failure to disclose prior convictions of state witnesses has been held not to violate disclosure rules when the state did not know of the existence of the prior convictions outside of its jurisdiction. State v. Linkhous, 460 S.E.2d 288 (1995). Compare, State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362 (S.C. App. 2002)(failure to disclose evidence of investigation of witness for an uncharged armed robbery was not Brady error where materiality not shown in murder case).

In Reddy v. Jones, 572 F.2d 979 (4th Cir. 1977), the Court held that state prosecutor was under no duty to disclose matters not within their custody or in the control by agencies not involved in the investigation of the particular crime. Accord, U.S. v. Casas, 356 F.3d 104, 115-16 (1st Cir. 2004)(no duty to gather material outside of prosecution control); U.S. v. Hawkins, 78 F. 3d 348, 351 (8th Cir. 1996)(no Brady violation despite failure of Missouri prosecutor to disclose exculpatory evidence held by Illinois prosecutors in connection with case pending against defendant which Missouri prosecutors were unaware); U.S. v. Beers, 189 F.3d 1297, 1304 (10th Cir. 1999)(no Brady violation by federal government's failure to disclose alleged

impeachment evidence obtained by Albuquerque police because no evidence of federal participation in state investigation); Moon v. Head, 285 F.3d 1301, 1309-10 (11th Cir. 2002)(no Brady violation despite failure to disclose information held by Tennessee investigator because there is no evidence that Tennessee law enforcement and Georgia prosecutors had worked together in prosecuting the case).

1. The 1998 Florida Convictions

Respondents submit that Solicitor Bailey had no duty to disclose the Florida convictions because he had no knowledge of their existence, nor did any law enforcement involved in the investigation. First, it is uncontested that the Solicitor's Office ran a criminal record check on Batkilina on June 11, 1998 and provided it to defense counsel. Applicant's Exhibit 7. It is also undisputed that this "rap sheet" did not include any information about Batkilina's Florida convictions on March 12, 1998, a time before the rap sheets were run. It is also uncontested that Solicitor Bailey was unaware of the Florida convictions. PCR 1315-18, 1418-19.

The Applicant asserts that the Applicant's comment during the statement he gave about Batrkilina's trouble in Florida mandated the obligation on the prosecution to develop the information about the Florida conviction. As Bailey stated: "There's no way for me to follow up, I did check the rap sheet and it did not appear on the rap sheet, and in order to do any follow up on that I would have had to notify every county, every municipality in the State of Florida until I found something... I assumed Aleksey knew hat he was talking about, he was apparently with her

when whatever was done and could provide his attorneys with the jurisdiction where those charges occurred and they could obtain what was needed." PCR 1419-20.[39]

Further, under Bailey's theory, the defense based upon Aleksey's comments, had better knowledge to develop the information. According to counsel Stone, Batkilina, prior to trial, telephoned him and during the call advised Stone that she was on probation from her dealings with Aleksey. PCR 1013-15, 1017. Cf. Anderson v. Leeke, 271 S.C. 45, 248 S.E.2d 120 (1978)(Brady applies to evidence the prosecution has that is unavailable to defense, where evidence is equally available to accused, obligation on part of state to furnish is relieved).

It is clear that Brady does not apply to evidence the defendant possesses. See, U.S. v. Rodriquez, 162 F.3d 135, 147 (1st Cir. 1998)(no Brady violation despite failure to disclose tactics to gain witness cooperation where defendant knew of witness' long criminal history); U.S. v. Bracy, 67 F.3d 1421, 1428-29 (9th Cir. 1995)(no Brady violation despite failure to disclose witness' criminal background in Florida and Wisconsin where defendant had sufficient information to develop information); U.S. v. Zuazo, 243 F.3d 428, 431 (8th Cir. 2001)(no Brady violation despite failure to disclose potential witness because witness had traveled with defendant and he was aware of witnesses potential testimony).

The Applicant has failed to show a violation of Brady by not disclosing the matter of the conviction. However, even if a duty to disclose existed, the criminal record (evolving from

---

[39] Apparently, Aleksey was willing to do so in the PCR proceedings where this information was developed. The discovered information further revealed Aleksey's involvement in the matter. See Applicant's Exhibit 3, 6. However, at trial time, Aleksey was unwilling to disclose any particulars to the defense counsel about Batkilina's Florida problems. PCR 164-66, 633-34, 1179-80.

conduct with Aleksey), if disclosed, would not undermine confidence in th4e outcome under the test of Kyles v. Whitley, supra. First, the events in the Florida convictions involved Aleksey. Second, the defense was aware of the "probation" from their own investigation. Third, there is no dispute that Batkilina purchased the gun in Aleksey presence and that the gun she purchased ended up being in Aleksey's possession and was the murder weapon. Contrary to the illusions in the Applicant's brief, there was no assertion at trial that Aleksey took the gun from either Yelena or her mother "against her will." The only implication was that it was done without their knowledge. This transitional fact had no bearing on the outcome of either phase.

Further, counsel Stone conceded that Batkilina was a good witness for the defense ("she didn't hurt us") and provided useful information for their theory. PCR 1014-15. Stone declared she provided, at the outset, that it was a woman's gun. She noted that she had gotten him out on bond which helped their non-violent upon arrest theory. PCR 1016-17. It revealed, at the outset, that Aleksey "knew how to get out of trouble" without violence. PCR 1023-24. There is no reasonable probability that the result would have been different.

Respondents respectfully submit that the Applicant has failed in his burden of proof of either prong under Kyles.

2. Lower Moreland Police Department Incident Reports

The Applicant further contends that uncharged conduct of Batkilina with Aleksey in Huntingdon, Pennsylvania should have been disclosed. This relates to a $33,551 check for a Volvo that bounced and ultimately resulted in the return of the Volvo by Batkilina's mother after Aleksey was threatened with arrest for either the theft of the vehicle or issuing a bad check. As with the above-record, Solicitor Bailey unlike Aleksey, was not aware of the incident involving

the Volvo described in Applicant's Exhibit 9. PCR 1330-33. Although SLED Agent Darnell recalled speaking to police in Philadelphia and had Kathy Colfer's name in his handwritten notes [PCR 1651], he did recall receiving some warrants on Aleksey. PCR 1651-54. Contrary to the claims of Aleksey, the fact that Lower Moreland Police Department sent its solved, uncharged, Volvo incident report to Philadelphia Fugitive Task Force member Kathy Colfer (Applicant's Exhibit 9, p. 3) does not mean this incident would be discussed or provided to SLED Agent Darnell. Simply put, they had failed too show an obligation to disclose what the state prosecution team never possessed.

Further, it is evident that Aleksey was aware of the information since he was involved in the return of the vehicle and threatened with arrest. Since he possessed the knowledge of the uncharged crime, he could have revealed it.

The Applicant contends that the Lower Moreland incident in August 1997 shows that Aleksey was with Batkilina after February 1997 when she bonded him out. He contends that ha this information been provided, he could have impeached her statement that the last time she saw Aleksey was in November 1997. First, Solicitor Bailey asserted that his argument and presentation of Batkilina was to link Aleksey to the gun through Batkilina, not Gloryvee. PCR 1331. Also PCR 1310.. Further, Bailey asserted that he never sought to present any of Aleksey's women to be innocent people, but instead were the types he would associate with. PCR 1335. Bailey also did not read his comments to suggest that the gun and Aleksey disappeared simultaneously or that the last time she saw Aleksey was the date she purchased the gun. PCR 1310-14. Bailey stated that the testimony and introduction of the gun documents was to show

Gloryvee was not in the picture when the gun was purchased - "the date was not that relevant." PCR 1312.

The problem with the Applicant's approach to the Brady claim is that Batkilina testified that she last saw Aleksey "somewhere in November" [November 1997]. R. 920. He asserts that the introduction would show that she was with him in August 1997. Whatever relevance his present theory has, it was not the theory the state had in its presentation. In fact, even the defense contended that he did not see how it would help Aleksey, in hindsight, to show the jury, in the guilt phase, that she was actually committing more crimes with him than she said. PCR 1023. Further, since he ultimately possessed the gun Batkilina purchase, it is unclear how the difference in dates would prove he did not steal the gun. The Applicant has not shown, even if there was a duty to seek out and disclose that the failure to do so would undermine confidence in the outcome.

Further, the Lower Moreland report reveals that Aleksey had actual knowledge of the incident and bad check by Batkilina. The disclosure would merely have presented support for information that the defense had through their client, although not revealed. However, it is evident that the Applicant also had disclosed to them in the ATF report that Batkilina was involved in a "credit card scam" that was not presented on cross-examination and they were aware she was "in probation." Respondents submit that they have failed to show, as to the Lower Moreland matter, a reasonable probability the result of the proceeding would have been different.

D. Ineffective Assistance of Counsel

In his guilt phase ineffective assistance claim, he contends that counsel should have impeached the theory that Aleksey disappeared from Yelena's life shortly after the gun was

purchased. First, as stated in the immediate section, the Applicant's current emphasis about the state's theory was in error and parses various testimony, particularly an erroneous date when the gun was purchased, to suggest that when she stated she last saw Aleksey in November 1997, that she actually meant November 1996 which would be a false statement. In fact, he attempts to suggest close temporal proximity of certain events when none was suggested. Simply put, as the jury would have been aware, Batkilina specifically testified that she last saw Aleksey in November 1997. She did not tie this to the date she purchased the weapon in her testimony. Supportive of the inference that the testimony was correct, in hindsight, was (1) her drivers license issued September 1997 carried Vera Aleksey's address as her address. Applicant's 11. Further, now known, she had been involved with Aleksey in the August 1997 scheme with the Volvo, ultimately requiring its return by Batkilina's mother when the check bounced after Aleksey was advised of the time it had to be returned or he would be charged with it. Applicant's 9. Also, the assertion that Batkilina bonded him out in February 1997 (although her mother advised law enforcement that she bonded him out in December 1996). Applicant, p. 5. Applicant Exhibit 9 (p. 3 of Supplemental Report). Importantly, Aleksey told counsel Sims that he was with Batkilina during the August 1997 period. PCR 215-216.

The Applicant contends the prosecution's closing argument where he stated "She carried the gun home. The gun disappears, he disappears and she sees it again here in court the next time", [ROA 763], suggests a temporal misstatement in the state's theory of the case because the purchase of the gun and disappearance of Aleksey did not happen at the same time. While this interpretation is feasible, it was not the only interpretation from the comments or the evidence. As Solicitor Bailey stated, the only relevant factor, for the trial, was that Batkilina, not Gloryvee

purchased the gun and Aleksey was last in possession of it. The claimed time differences would not impact, to a reasonable probability, on the outcome of the case.

Further, the lawyer's failure to independently locate these matters was not deficient performance. As to Batkilina's alleged problems in Florida, Aleksey refused to explain to his lawyers what he was referring to in his statement to police, despite the ultimate fact of his involvement in the Florida scheme. PCR 158, 166, 202, 633-43, 1177-80. Further, Stone was aware that Batkilina was "on probation" from her telephone call with him and could easily have resolved exactly what the charges were, but it was evident that they arose from a scheme she had with Aleksey. PCR 1177.[40] What counsel did learn from Aleksey when he was fearing them, was that he had stuff on the women, but then refused to give specifics. PCR 1179-80. In fact, Aleksey told Sims that she had better not come down here and lie and that "I'll deal with her", but nothing specific about Florida. PCR 166.

In hindsight, counsel stated that if they had the correct Florida convictions, they could have used them to impeach her. PCR 159-60. Similarly, Sims felt that use of the disclosed ATF Report of the unreferenced "credit card scam", would be useful in impeachment as well. Similarly, with the Volvo bad act with the bounced check might have been useful for impeachment. However, the problem in each of the instances was that Aleksey possessed some knowledge and failed to reveal it. More probative, however, is that if the use of the material was to reveal a dishonest act on Batkilina's part, it would have revealed [except for the "Christina" lie

---

[40] Counsel Stone noted that Batkilina contacted him by telephone. PCR 1013 - 1014, 1177, 1182.

on the Plymouth Township matter] Aleksey's continuous direct involvement as the apparent Svengali[41] of Batkilina's fraudulent actions.

Although counsel were unclear why they did not pursue further impeachment information from Batkilina on her probation, this alleged deficiency does not undermine confidence in the outcome. As with the Brady material, the critical part of her testimony was clinically accurate - she bought the weapon, it eventually ended up with Aleksey and she did not know Gloryvee. These facts were unimpeachable by any criminal record or further bad act history. Aleksey failed in his burden of proof.

Counsel was of the opinion that Batkilina was a favorable witness for them inasmuch as she again revealed his ability to extract himself from his schemes in a non-violent manner. This was presented through the evidence that she bonded him out. Also, she supported the theory that the gun purchased was for a female, not Aleksey, at the time of the purchase which could support his inference that it was ultimately GloryVee's weapon, not his.[42] As Sims cautiously stated, when you start talking about his involvement in that he was going to open more even more doors than we chose to open as it relates to his activities, we wanted to show him as a gigolo, we wanted to show him as a man who . . .could con women, talk to them, get them to give him their money and get them to buy cars and expensive toys and have a good time in Atlantic City..."

---

[41] "Svengali" means "a person who completely dominates and controls another, usually for selfish or sinister motives. It is a literary illusion to the character Svengali, a hypnotist, in George du Maurier's 1894 novel Trilby.

[42] Counsel Stone stated that he did not recall what Aleksey told him as to how he came into possession of the gun. PCR 1180-81.

PCR 634. Sims sought to present Aleksey as the driving force in this women's activities - his thing to meet them, get what he could get and move on." PCR 634.

Finally, the misstatement (and misunderstanding of Solicitor Bailey) concerning the date of the gun purchase did not require a new trial based upon the defense's failure to further clarify it. First, the gun records introduced revealed the correct date, November 2, 1996. State Exhibit 3, State Exhibit 4. Further, Thomas French, the seller of the weapon, corrected the misstatement and unequivocally stated it was November 2, 1996. R.p. 931, l. 14; p. 932, ll. 17-19. Any failure on defense counsel's part to correct Batkilina's testimony (or impeach her memory) was corrected by the records and testimony of French. Under Strickland, prejudice was not shown by the independent presentation. Any assertion to the contrary must be denied.

LISA WATSON CLAIMS

Ground O (3)	**IAC - Guilt** 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.
Ground O (9)	**IAC - Guilt** 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 P (4)	**IAC - Sentencing** Trial counsel failed to properly cross examine and impeach state's witness Lisa Watson. See Ground O, number 3.
Ground P (5)	**IAC - Sentencing** 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.
Ground Q (4)	**Brady Prosecution Claim** The state knowingly failed to provide, to trial counsel, evidence of fraud involving state's witness Lisa Watson.
Ground R (4)	**Giglio - Prosecution Claims** 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.
Ground R (5)	**Giglio - Prosecution Claims**

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.

In his next portion of the memorandum, p. 40-46, Aleksey claims that either his counsel was ineffective in failing to investigate or impeach Lisa Watson with various inconsistent statements and evidence of her participation and benefit in Aleksey's schemes and/or that the prosecution failed to disclose such information and failed to correct false testimony by her. The Applicant contends that Watson testified falsely at trial in certain particulars which he contends the prosecution knew was false and failed to correct related to the loss on her husband's credit cards, when the state knew she was involved in a transaction involved in the fraud through Western Union. Similarly, the Applicant contends that there was a Brady violation of non-disclosure concerning the information elated to the fraud involving her husband's credit cards from Western Union. Finally, he claimed he received ineffective assistance of counsel related to the investigation and examination of Lisa Watson, in particular because:

(1) Failed to investigate the credit card fraud concerning Watson's husband related in the Watson SLED statement.

(2) Failed to investigate the fraud of Watson involving the lease of the Mustang.

(3) Failed to impeach Watson based upon her inconsistent statement concerning:

  (1) one visit verses three visits to dealership to sign papers;

  (2) whether the theft was reported immediately or six weeks later;

(3) whether it was reported as stolen or "try and locate."

(4) discrepancy between her testimony in the penalty phase about him putting a gun to her head (ROA 1962) and the Jan. 21, 1998 statement.

Respondents submit that he has failed in his burden of proof in these particulars.

(Insert Watson testimony)

1. Guilt Phase Testimony (ROA 1275-1286)

In the guilt phase, Lisa Watson testified that she met Aleksey in September 1997. R. 1276. She initially knew him as Joey Barkley, and later as Joey Gambino. R. 1276, 1278. She stated on September 30, 1997, she signed a leased agreement for the White Ford Mustang (which Aleksey was in possession of at the time of the incident). R. 1278. She said that Aleksey was allowed to use the car and was supposed to pay off the car, but never did. R. 1278-79. She said the Ford Motor Credit was "coming to her house every single day, three or four times." R. 1279. She said Aleksey would call and tell her there was a third party check, but she could not get the car back or get him to pay for it. She said she reported it stolen in Philadelphia. R. 1279.

Watson stated the last time she saw the Mustang was on the 30th after she signed the lease papers. R. 1279. She said she last saw Aleksey in the beginning of October, probably October 1. She claimed to have reported it stolen probably the first week of October. R. 1280.

On cross-examination by Thomas Sims, he noted the confused series of events - meeting of Aleksey at a gas station and then signing a lease on a car for him four weeks later. R. 1280-81. She said "he was good at what he did." R. 1281. She said Ford Motor Credit started calling

asking for payments after the second month. R. 1281. She said it was purchased September 30 and she may have reported it stolen on October 5, "maybe." 4. 1282.

Watson claimed that she reported it stolen to the 15th District. R. 1282. She stated they talked to her over the phone. She stated that she told Ford Motor Credit (FMC) that she had gotten the car for him. She also stated that Aleksey had told FMC that she was his aunt. Watson denied she got scared when FMC indicated they would do a replevin action, but stated she did get scared when she noticed things missing from her house. R. 1283.

Watson said Aleksey filled out the lease application and asserted that she was working and making a certain amount of money, but she was unemployed and no money was coming in. R. 1284. She had separated from her husband at that time. R. 1284. At the time she signed the lease, she said she didn't know what Aleksey had told them. She said she was there for ½ hour, signed the paper, and walked out the door. R. 1285. Watson stated that she did not recall FMC telling her that they were going to garnish her wages and denied telling them she didn't have a job so it wouldn't matter. R. 1285. She said Aleksey would call her "everyday" to see if she had reported the car stolen, and she told him no, even though she had already reported it. R. 1285-86. As to whether Aleksey would have known the car was reported stolen, Watson stated:

> If he didn't make payments on it and its been four months since I talked to him and he called me, no, I would not tell him it was stolen, I <u>wanted him caught</u>.

R. 1286. She stated she had never seen an arrest warrant for Joey Barkley because they had no information for him on the computer or if one is actually in existence. R. 1286-87.

A review of the closing argument of the state reveals no mention of Watson's testimony was made by the State or defense. R. 1744-1790.

2. Penalty Phase Testimony (ROA 1961-1967)

In addition to information about his aliases, Watson stated Aleksey was driving a Green Mustang when she first met him. R. 1961. Further, the White Mustang involved in the shooting was a car she leased and reported stolen because Aleksey "never" made any payments. R. 1961.

She said she agreed to lease the car in her name for Aleksey because:

> He told me he had bad credit and we had built a relationship. I trusted him and he said he was going to make full payments on the car. He wasn't even going to make payments. He was going to pay the car off completely and he never did.

R. 1962. She said she did not agree to sign at first because she was scared and didn't think everything was on the up and up. At one point he told her "that I should do it or he was going to kill me, when he was holding a gun, but she thought it was a joke and he was laughing" r. 1962-63. She said she was not afraid at that time. R. 1963.

Watson also testified that Aleksey around September 29th told her about an incident he had on the highway. R. 1963. She said he said "some asshole got in his way, so he shot him." R. 1963.

Watson stated that she kept calling FMC everyday to see if a payment had been made because Aleksey was not talking to her at that time. "He was going through my husband because he told my husband what happened." Aleksey could call her, but she never called him. At one time, Aleksey asked her if she knew who he was talking to on the other line and then he said: "I'm talking to a dead person and hung up the phone." She said she was frightened because she

thought it meant that she was going to die. R. 1964. He said that he was a Gambino in their next conversation, which meant a New York crime family. R. 1965.

Lisa Watson stated that her relationship with Aleksey cost her $42,000 because of the car, her husband's credit cards, and her credit cards. R. 1965.

On cross-examination, Thomas Sims developed that she thought Aleksey was playing and she was not afraid of him due to his laughing and joking manner. R. 1965-66. She went to the police after she found out what he was doing to her. R. 1966.

Sims developed that when she gave her statements although she knew Gambino was a name he used, she did not say he was in the Gambino family because she did not think he was in the family. R. 1966. She agreed that it was bravado on his part and she thought he was trying to scare her with the Gambino and that he was Joey Barkley. R. 1967. She thought "if the cops didn't get him, the Gambinos would", and was not concerned with him. R. 1967.

She confirmed she signed the lease agreement, with her two kids with her. R. 1967.

A state denies a criminal defendant due process when it knowingly uses perjured testimony at trial or allows untrue testimony to go uncorrected. Giglio v. United States, 405 U.S. 150, 153-54, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); Napue v. Illinois, 360 U.S. 264, 269-70, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). To succeed in showing a due process violation from the use of allegedly perjured testimony, a defendant has the burden of establishing that (1) the witness in question actually gave false testimony, (2) the falsity was material in that there was a reasonable likelihood that it affected the judgment of the jury, and (3) the prosecution used the testimony in question knowing that it was false. Giglio v. United States, 405 U.S. at 153-54.

Giglio error is a species of Brady error that occurs when "the undisclosed evidence demonstrates that the prosecution's case included perjured testimony and that the prosecution knew, or should have known, of the perjury." United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). "If false testimony surfaces during a trial and the government has knowledge of it, ... the government has a duty to step forward and disclose." Brown v. Wainwright, 785 F.2d 1457, 1464 (11th Cir.1986). "In order to prevail on a Giglio claim, a petitioner must establish that the prosecutor knowingly used perjured testimony, or failed to correct what he subsequently learned was false testimony, and that the falsehood was material." Tompkins v. Moore, 193 F.3d 1327, 1339 (11th Cir.1999).

The origins of the Giglio doctrine lie in the Supreme Court's decision in Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), which held that a prosecutor's failure to correct false testimony by the principal state witness that he had received no promise of consideration in return for his testimony violated the defendant's Fourteenth Amendment due process rights and required a reversal of the judgment of conviction. The Court explained that "it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." Id. at 269, 79 S.Ct. 1173 (citing Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935)). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Id. This principle, the Court observed, "does not cease to apply merely because the false testimony goes only to the credibility of the witness," since "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying

falsely that a defendant's life or liberty may depend." Id. Reversal was required because "the false testimony used by the State in securing the conviction may have had an effect on the outcome of the trial." Id. at 272, 79 S.Ct. 1173.

Subsequently, in Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the Supreme Court held that the government's failure to correct false testimony that its key witness (the defendant's coconspirator) had received no promise of nonprosecution in exchange for his testimony, as well as the prosecutor's false statement to this effect in closing argument, required that the defendant be granted a new trial. The Court explained that "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." Id. at 153, 92 S.Ct. 763 (citation and internal quotation marks omitted).

The Giglio Court made clear, however, that such errors do not require automatic reversal, and articulated a "materiality" standard to guide the determination of whether a new trial is warranted:

> We do not ... automatically require a new trial whenever a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. A finding of materiality of the evidence is required under Brady. A new trial is required if "the false testimony could.... in any reasonable likelihood have affected the judgment of the jury."

Id. (citations and internal quotation marks omitted) (quoting Napue, 360 U.S. at 271, 79 S.Ct. 1173). Because "the Government's case depended almost entirely on [the falsely testifying witness's] testimony," the Court reasoned, his "credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution

would be relevant to his credibility and the jury was entitled to know of it." Id. at 154-55, 92 S.Ct. 763. Accordingly, the Court reversed the judgment of conviction.

Since its decisions in Napue and Giglio, the Supreme Court "has consistently held that 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." United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct.2392, 2397, 49 L.Ed.2d 342 (1976) (footnote omitted) (emphasis added); see also Kyles v. Whitley, 514 U.S. 419, 433 & n. 7, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); United States v. Bagley, 473 U.S. 667, 677, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); accord Brown, 785 F.2d at 1465-66.[43] The "any reasonable likelihood" standard differs from the materiality standard applicable to other types of Brady violations because of the nature of the error. As the Supreme Court has explained, "the Court has applied a strict standard of materiality [to Giglio violations], not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process." Agurs, 427 U.S. at 104, 96 S.Ct. 2392.;

---

[43]Giglio error does not fall within the category of constitutional error that the Supreme Court has characterized as "structural," requiring automatic reversal of a tainted conviction. A structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Arizona v. Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). The Supreme Court has found structural error "only in a very limited class of cases," including those involving complete denial of counsel, a biased trial judge, racial discrimination in selection of a grand jury, denial of self-representation, denial of a public trial, and a defective reasonable doubt instruction. Neder v. United States, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (citation and internal quotation marks omitted).

BRADY

The principles governing Brady claims are well-settled. " '[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." ' Banks v. Dretke, 540 U.S. 668, 691, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) (quoting Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)). The Supreme Court has consistently held that the prosecution's duty to disclose evidence material to either guilt or punishment, i.e., the rule announced in Brady v. Maryland, applies even when there has been no request by the accused. Strickler v. Greene, 527 U.S. 263, 280, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); United States v. Agurs, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). This duty applies to impeachment evidence. United States v. Bagley, 473 U.S. 667, 676 & 685, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

Under clearly established Supreme Court precedent, there are three elements to a Brady claim: (1) the evidence must be favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must be "material," i.e., prejudice must have ensued from its non-disclosure. Banks v. Dretke, 540 U.S. at 691. Evidence is "material" under Brady where there exists a "reasonable probability" that had the evidence been disclosed the result at trial would have been different. Banks v. Dretke, 540 U.S. at 698.

[Insert Genocide Law]

A. Giglio - Napue Claim

In his brief, he contends that Solicitor Bailey essentially committed Giglio - Napue error in failing to correct certain testimony. As revealed in the testimony of Solicitor Bailey, he credibly contends that there was no knowingly false testimony presented by Lisa Watson related to the loss developed from the fraud involving her husband's credit card funds and when she reported the "theft" of the vehicle. The Applicant has failed in is his burden of proof.

The Applicant contends that Lisa Watson's guilt phase testimony that she had not seen the car since September 30 and that she reported it stolen around either the first week in October or October 5 was false testimony. R 1280, 1282-84. He now contends that Solicitor Bailey should have known this was false testimony because he contends it was not reported stolen until November 13, 1997 to the 8th District of Philadelphia Police Department with a "Try and Locate" complaint and incident report when she was quoted as stating that she had lent the car to "Joey Barkley who has failed to return same as of this date." Applicant's #17.

Solicitor Bailey stated first that everything he received from SLED in the investigation was turned over to the defense as part of his documented open file policy with records made at the Clerk's Office. PCR 1346-47. Bailey stated that he had no reason to correct the testimony of Watson concerning the report. He said "I had no reason to doubt that was the correct date." PCR 1364-65. Although the Applicant relies upon the Ford Motor Credit Reports, Applicant's 17, to suggest that the initial report was only made on November 13, 1997, after another call from FMC, the FMC reports are subject to various interpretations. See PCR 1364, 1421. As noted on cross-examination, the initial entry with Ford Motor Credit (Applicant's Exhibit 21) on October 15, 1997 suggested that Watson had called them about the vehicle and wanted it repossessed from "Joey Barclay", but that FMC advised her they could not do it at the time because payments

were not yet in default. Applicant's 21, p. 6. Importantly, it also revealed that Watson had told them that "detective from Paul's Township had called her about the unit" and that FMC on that date had advised her to contact police. Although the Applicant's Exhibit is dated November 13, 1997, it is with the 8th District. On cross-examination, the witness contended that she had spoken with the 15th District Department but that she had not signed anything. R. 1282-83.[44] It should be noted that in the penalty phase Watson stated she reported it stolen because Aleksey never made any payments. R. 1961.

Respondents submit that the Applicant has failed to prove a Napue-Giglio violation related to the date fo the stolen car reporting. In any manner, the exact date of the reporting was not a "material fact" - particularly when (1) the testimony was stated without exactness: "right after, probably October - -the first week of October" (R. 1280); "October 5th, maybe." It is further evident that the record support that Watson called FMC and reported car no longer in her possession, that she had not seen him for two weeks and wanted car re-possessed, but they could not because not in default. Also, the dealership stated that Watson had called then "sometime later" after car purchase and reported it stolen. Applicant Exhibit 21, p. 5 (11/20/97 entry). Giglio - Napue require a known discrepancy in a material fact. Watson's estimate when she reported it was inconsistent - when he had not made payments to the October dates. Contrary to the assertion, although possibly in factual error, there was no Giglio violation.

---

[44] It is evident in the cross-examination of Watson that defense counsel Sims had possession and used information from Applicant's 21 to question and impeach. However, the exhibit revealed that she had filed a police report on 11-13-99 with the Eighth District. Applicant's 21, p. 5 (11/19/97).

The Applicant also claims Giglio error in the penalty phase by the assertion that she lost $24,000 from her relationship with Aleksey, including her husband's credit cards and her credit cards. R. 1965. He claims, through the presentation of evidence from the Western Union investigation, that Watson was a co-conspirator in Aleksey's actions involving the husband's credit cards therefore her claim that it "cost her" that money, particularly from her husband's credit card was knowingly false. In support of this "knowledge", the Applicant asserts that the SLED statement, Applicant's 20, declared "he got $75,000 of my husband's and $3000 from another... the money he told was off my husband's credit cards for a total of 4,500..." Applicant's Exhibit 21 reveals on November 19, 1997, Watson had claimed third party (Aleksey) had stolen approximately $22,000 from credit cards [p. 5, 11/19/97], said "Barclay stole she and her husband's credit cards, first charged $11,000 and later $12,000.

The Western Union exhibits, Applicant's 13-16, revealed that Aleksey voice was identified with an October 1, 1997 fraudulent transaction involving the use of Andrew Watson's credit card and a wire transfer of $7500. It is clear that the information was that Lisa Watson was involved to the extent that she received and cashed the checks in Atlantic City on October 1, 1997.

Solicitor Bailey declared that he had an open file policy which would have provided such information that he had received to the defense. PCR 1347, 1353. He said he did not correct it because he accepted it and there was no reason to think she was not telling the truth. PCR 1348. Bailey stated that Aleksey would go in and do the paperwork in their name and that they would

go in and sign the documents. PCR 1349.[45] Bailey did not dispute that Watson wrote or cashed the checks, although Aleksey had various women in his schemes, but Bailey stated "as far as the specific dollars and cents and exactly how they came out, it wasn't something I was particularly interested in." PCR 1352. Bailey stated:

> My attempt was to show in general terms the character of Mr. Aleksey in the penalty phase of the trial, that he had a pattern of conduct of coming in, taking up with different women who were at a low point in their lives...but generally had money or assets or ability to get money and that together they would go out and do things inappropriate, and people would get taken advantage of, including the women he was with...

PCR 1354. When asked to show how the Western Union transaction took advantage of her, Bailey stated: "I didn't ask her that. My question was how much did it cost her. In response to that she said it included a loss to her husband's credit card which she attributed to some action on Aleksey's part." PCR 1354. Bailey stated he did not know if the $42,000 she said she was out included the Western Union $7500. PCR 1355. He clarified that he did not audit her transactions, but denied that he knew who got the Western Union $7500 and "I don't know what happened to the money...or whether he profited from it." PCR 1358-59. Bailey re-asserted that he always intended to suggest that Watson was intimately involved in the actions and had received a benefit. PCR 1420. A review of the Solicitor's penalty phase closing argument is consistent with his understanding of the facts and his theory. R. 2109-2110. ("used them, abused them, took them for all he could...a parasite on women...lived off of women he has taken

---

[45] Throughout his brief and hearing he contends Applicant's 20 states $7500 was lost from her husband's credit card. A review of the document reveals either 9500 or 4500.

in...bled them dry...takes their money..."). See also, R. 2112-13 ("Lisa Watson...conned into leasing this White Mustang for Aleksey...he scammed her..."), p. 2122, ll. 12-16 (that's his modus operandi...").

B. Brady Claims

Aleksey also claims that Bailey violated the mandates of Brady v. Maryland in failing to disclosed evidence which revealed Lisa Watson involved in a fraud scam with Aleksey involving her husband's credit cards.

Solicitor Bailey consistently testified that he maintained an "open file" policy and made the file available to them. PCR 1702-03. Further, SLED Agent Darnell testified that Attachments 35 in the SLED Report (Applicant's Exhibit 83) included the FMC summary subpoena, letter from Solicitor Bailey dated January 7, 1998, including the six page summary from FMC which is the same as Applicant's Exhibit 21. PCR 1679-80. He stated that it would have been there on March 6, 1998.

SLED Agent Kenneth Mears indicated that they contacted Western Union about Aleksey and Lisa Watson's involvement in the Western Union scam involving her husband's credit card. PCR 1570-71. Agent Mears acknowledged that in her statement to them (Exhibit 21) she indicated she was a victim of the scam. PCR 1571-72.

Solicitor Bailey stated that his practice "because there were hundreds of documents in the file, some probative, some not, but rather than try to make a call, I've got an open file policy and transmitted everything I got to the defense and sent it off to the defense". PCR 1347. However, Agent Darnell was unsure if Bailey was provided with the letter or the tape. PCR 1655-57.

The Applicant contends that both trial counsel testified that they had not seen the materials included as Applicant's Exhibits 14-16[46], citing PCR 256, 1043.

At the hearing the Applicant indicated that Applicant's 15 was neither in the prosecution's file or the defense counsel's file. PCR 254. However, he asserted that it was in the SLED file. Id.

Counsel Sims stated that he did not recall any fraud activity with Western Union by Lisa Watson. PCR 260, 272.

Sims stated that if he had this information about her increased involvement with Aleksey on the fraud, they could have shown, it would have made their cross-examination about her involvement with him stronger. PCR 277-78. He stated that when they spoke with Aleksey and asking him about information on these women, "we had no idea that these kind of things were going on because we weren't told." PCR 278. However, it was acknowledged that Watson's statement (Applicant's 20) was in trial counsel's file. PCR 295.

Sims stated, on cross-examination, importantly, that it was not important to the defense to suggest that she made inconsistent statements about the amount of money she had lost at the hands of Aleksey. Sims stated the theory was to show that Watson was having a good time and involved and was now scorned. PCR 638. He said inconsistent statements were not the focus of the defense theory. PCR 639.

---

[46] In his brief, he also identifies Applicant's Exhibit 13. However, Exhibit 13 was an October 22, 2002 affidavit obviously prepared prior to the PCR action. As to Applicant's 14, there is no evide4nce the state ever received the August 11, 1998 letter memorandum by Patten, only the Jan. 7, 1998 letter, Applicant's 15.

Similarly, counsel Stone did not have memory of receiving the Western Union material or letter to Agent Mears. PCR 1041-43. He felt, though, that it was something that could have been used in cross-examination.

Respondents concede that information concerning Lisa Watson's involvement with Aleksey in securing monies for Aleksey from the fraudulent use of her estranged husband's credit cards is the type of evidence required to be disclosed under Brady as potential impeachment material. See also, U.S. v. Bagley, 473 U.S. 667, 676-77 (1985). Assuming arguendo that Solicitor Bailey never received the Patten documents from SLED, this would not have relieved his responsibility from disclosure of the letter to Mears from Patten. See, Kyles v. Whitley, supra.

Assuming arguendo that the Patten letter was not expressly revealed to the defense, the Applicant's failure to show, but for the non-disclosure, the result of the proceedings, either the guilt or penalty phase would have been different. Clearly, Lisa Watson procured the vehicle ultimately used in Trooper Lingard's death for Aleksey. Any impact of impeachment of her in guilt would have had no impact on the guilty verdict. The same can be said about "her losses" or involvement with Aleksey in procuring the monies from the husband's credit card. First, Aleksey would have known about the shared involvement with Watson, since even under the defendant's theory they were together. Under the defense and state theory, these inconsistencies would not affect the ultimate verdict in the penalty phase where Watson was merely a part-victim, part-participant in the state's theory as well. Importantly, Aleksey was a co-conspirator in these activities with Watson, and it was evidence from Watson's statements that she was asserting a loss to herself, including some matters from the husband's credit card. Further, what

is equally implicit in the claimed loss from the use of the husband's credit card also is the same loss as the responsibility for the Mustang. In each, her involvement led to her financial obligation to repay the loss. Nevertheless, the alleged failure to disclose the matters, where evidence of her claimed actions in the husband's credit card had been revealed in her statement and the FMC documents, does not undermine confidence in the verdict under the Kyles test. His claim otherwise must be denied.

C. Ineffective Assistance of Counsel

Aleksey contends that counsel was ineffective in the following particulars:

A. Failed to impeach on inconsistent statements concerning the purchase of the Mustang.

B. Failed to impeach as to statements when she reported car stolen.

C. Failed to impeach about when she last saw Mustang.

D. Failed to reveal that she had participated in use of husband's credit card.

E. Failed to impeach on inconsistent statements about pointing the gun.

Respondents submit that the Applicant has failed to prove a Sixth Amendment violation related to the investigation and cross-examination of Watson.

a. Inconsistent Statements Regarding the Purchase of the Mustang

As stated previously, Aleksey asserts evidence existed that Watson had visited the dealership on more than one date to sign the documents, based upon the dates on the "Chris Koch Ford" documents, Applicant's Exhibit 18. The counsel had possession of these materials. PCR

292. Sims asserted that he did question Watson about whether she ever actually reported the car stolen. PCR 298. He stated he used the "Chris Koch Ford" and FMC documents to show that she had been calling in and that she claimed Aleksey was related to her. PCR 298, 300. See R. 1282-84. Sims stated that he used these documents to bring out that FMC had been making contact with her to try to find the car. PCR 300. Sims felt that he had developed that she had not told the truth to FMC about the whole ordeal. Sims stated that he chose to reveal Watson's complicity in the case in that manner. Sims stated that their whole theory was to show all the women had complicity with Aleksey and were buying things for him. PCR 301. Sims felt he tried the case appropriately, although he did not recall having the police report. Applicant's 17, PCR 302.[47]

Clearly, this information would have questioned her statements on when she actually reported the vehicle stolen and her credibility. However, as noted above, there were indications that prior to November 13, she had made direct contact with FMC on October 15, 1997, had earlier contact with Chris Koch Ford, and spoken with a detective from Paul's Township. These could have been available to the prosecutor to rehabilitate and were available within the information possessed by the defense in Applicant's Exhibit 21. Similarly, the inconsistency in the use of "lent" in the November 13 incident report and "stolen." Clearly, at the time of the December 31, 1997 incident, Aleksey remained in possession of the vehicle. It cannot be said, other than for simple impeachment of Watson, that any value would develop from enhanced

---

[47] However, the defense did have the FMC Report, Applicant's 21, which revealed that Watson filed a police report on November 13, 1997 with the 8th District. Applicant's Exhibit 17, p. 5 [11/19/97 entry].

impeachment of Watson by this information. The jury understood her limited role and that she clearly was a pawn in Aleksey's varied schemes which resulted in his possession of the vehicle and monies from the Watsons.

Similarly, he contests the alleged failure to impeach her inconsistent statements on when she last saw the car of the date she let Aleksey borrow it, when she may have seen it in his possession afterwards while scheming with Aleksey on her husband's credit cards. As stated above, Sims' theory was to develop that she was involved with Aleksey, not to develop that she had claimed more or less loss from their brief relationship or the extent of the time period of their relationship. As Sims stated, the theory was to show the complicity of Watson with Aleksey. PCR 636-38.

Concerning the concept of putting the gun to her head, the Applicant contends this should have been impeached with her statement to SLED, Applicant's Exhibit 20, which mentioned the "gun to head" incident, but stated, unlike her testimony that he was crying (Applicant's 20), rather than laughing. R. 1962-63, 1966. Although inconsistent, counsel developed that Aleksey was not serious with his comment on cross-examination. R. 1966. Clearly, this strategic decision could not be deemed ineffective.

The Applicant's attempt at retrospective hindsight does not reveal either deficient performance or prejudice. Counsel's actions were based not only on information they had received from the state, particularly the FMC reports, the SLED statement, and Chris Koch paperwork, but also his conversation with his client - revealed as an active co-participant. Counsel's strategy was not deficient in failing to pursue each inconsistency in her testimony where it varied with their understanding. Counsel did reveal that Watson was aware of the false

information in the paperwork given to obtain the Mustang, although she claimed not to fill it out. See R. 1284-85. Her testimony was adequately questioned to the extent necessary for their strategy. He failed in his burden of proof to show otherwise.

Similarly, as to the loss she did or did not have from her relationship with Aleksey, the variance between the statements to FMC,. SLED, and her trial testimony reveals great disparity in her own perception of loss. The problem is that loss did occur, but with some involvement by Watson under all theories. Is it reasonably likely that the jury would have felt Watson was completely free of involvement in these matters. The record as a whole would suggest they would not. However, even if the opposite, counsel's omissions do not, to a reasonable probability show that the result of either guilt or sentence would be different. He failed in his burden of proof.

JAMIE FERRELL CLAIMS

GROUND P(2) - Ineffective Assistance of Counsel at Sentencing

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

GROUND P(5) - Ineffective Assistance of Counsel at Sentencing

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.

GROUND R(2) - Prosecution Presentation of False Testimony

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

GROUND R(3) - Prosecution Presentation of False Testimony

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

In these allegations, Aleksey asserts that the State allowed Ferrell to testify falsely and failed to correct the false testimony. Memo. p. 47-49. Conversely, he contends that his trial counsel was ineffective in failing to adequately investigate Ferrell and impeach her with the false testimony. Respondents submit that they have failed in their burden of proof concerning these matters.

a.) How Jamie Ferrell testified at the sentencing proceeding

Jamie Ferrell testified in 1996, she developed an intimate relationship with Aleksey, who she knew as Michael Angelo. ROA 1895-96. She stated that she went with Aleksey to Atlantic City, New Jersey, because he wanted to go away.

Ferrell stated that while there, they opened a bank account at the Commerce Bank. ROA 1896. She stated that she put $20.00 into an account. She stated that it was Aleksey's idea to open the account because he said he had declared bankruptcy and could not open a bank account. ROA 1897. She said she had met him in February 1996 and went to New Jersey in April with Aleksey.

Although she did not know Theresa McCann, she also claimed that she did not know two checks totaling almost $10,000 had been deposited in her account. ROA 1898. She denied being with him on May 10, 1996, when the checks were deposited. ROA 1898, l. 15-16. However, she admitted discussions with him about having money come into the account. She said that Aleksey told her that he was getting a wire transfer for $10,000 and that she had the routing number for the bank account that had $20 in it. ROA 1899. She claimed that Aleksey then withdrew about $10,000 that she thought was his money. ROA 1900. She said "I never spent any of that money. ROA 1899-1900.

Ferrell said she got arrested by New Jersey. ROA 1900. She said she had to pay $10,000 and was still paying on it. ROA 1902. Ferrell also said that Aleksey sold her mother's 1985-86 Camero that was worth $5,000 and he kept the money, denying it was sold. ROA 1901.

Ferrell stated that they were together for four months and then for two months said he would come back to New York and pick her up (but never did). ROA 1901.

She also said that Aleksey cost her $2,000 when he offered to pay for the transmission on her car that blew while he was driving. ROA 1902. However, he never paid for it. ROA 1902.

On cross-examination, counsel Sims developed evidence that she left her job (as a manager of a convenience store) shortly after she met Aleksey. She said Aleksey, known as Michael Angelo, was going to take care of Ferrell and her daughter. ROA 1903.

b.) The alleged false evidence assertions

Aleksey now bases his false evidence assertion on two documents: 1.) The affidavit from Vincent Caruso, an investigator with Commerce Bank (Applicant's Exhibit 46 and the S.L.E.D. statement given by Ms. Ferrell. In Caruso's affidavit, the critical factors were set out as follows:

(1) May 5, 1996, Ferrell opened a bank checking account.

(2) "On May 10th Ms. Ferrell deposited a check, number 1826 dated May 10, 1996 in the amount of $4,892 into her account." PCR 535. This check was made out to Ferrell and drawn on Theresa McCann's account.

(3) "On May 11th, Ms. Ferrell withdrew $4800 from her account . . ." *Id.*

(4) "On May 13th check number 1846 dated May 10th, 1996 in the amount of $5,000 payable to Ms. Ferrell and drawn on Ms. McCann's account was deposited in Ms. Ferrell's account." PCR 535.

(5) "On May 14th Ms. Ferrell withdrew $5,050 from the account. *Id.*

(6) "Ms. Ferrell was charged, arrested, prosecuted and convicted of crimes relating to the above transactions." PCR 536.

In further support, the affidavit of September 4, 2000 had attached to it another letter on Commerce Bank letter head dated May 31, 1996. PCR 536-537.[48]

---

[48]Applicant's Exhibit 47, the criminal record "rap sheet" of Ferrell was run on June 11, 1998 and provided to defense counsel. It included the Commerce Bank matters. PCR 547-548.

The Applicant further relied upon photographs it acquired (Applicant's Exhibit 48). [Counsel Sims, Solicitor Bailey all identified Aleksey being in the photographs when the May 11, 1996 photographs were made with an unidentified female in the car with him on the date when the $4,800 withdrawal made. See PCR 555-557, 1394, 1401, 1706-1707.

In Applicant's Exhibit 50, Ferrell's statement, p. 2, it states: "He told me he got a wire transfer so, therefore, I withdrew the money . . ." PCR 564-565.

c. Solicitor Bailey's Response

During the PCR hearing, Solicitor Bailey sought to address the alleged variance between Caruso's affidavit which suggested Ms. Ferrell deposited and withdrew the funds with Ms. Ferrell's trial testimony that she was not with Aleksey when the checks were deposited. Solicitor Bailey stated that he never tried to present the woman as anything other than participants in the scans. ROA 1397. He stated that she did get arrested for the scam. Bailey states "I had no reason to correct something that I felt was correct at the time. That was Ms. Ferrell's testimony, and I think that was an accurate summary of what she testified to. I believed her testimony at that time. I had nothing to my knowledge at that time to indicate that was not a correct statement of the facts." PCR 1397-1398.

Bailey acknowledged that some of the information, particularly her thoughts about the wire transfer into the account contrasts with the affidavit that Ferrell deposited check number 1826 . . . into her account. PCR 1398-1399. Bailey stated the 1996 letter attached to Caruso's affidavit was "his interpretation of what occurred and that may or may not be correct . . ." PCR 1401. Bailey further stated at the time she testified, her testimony was consistent with Theresa McCann's testimony that her checks were taken from her (by Aleksey). I had no reason to doubt

what had occurred." PCR 1411. Concerning the difference as to who made the withdrawals and who did the deposit on May 10, Bailey said "he didn't know that there was anything to correct."

d.) Analysis - Giglio - Napue Claim

As set out above, a state denies a criminal defendant due process when it knowingly uses perjured testimony or allows untrue testimony to go uncorrected. Giglio, supra. To succeed, the defendant must show 1.) the witness actually gave false testimony; 2.) the falsity was material in that there is a reasonable likelihood that it affected the judgment of the jury; and 3.) the prosecution used the testimony knowing it was false. Giglio, supra. Respondents submit that the Applicant has failed in his burden of proof.

Respondents submit that the prosecution did not know Ferrell's testimony was "false" in the manner presented. Under the state's theory, Ferrell was a willing participant in Aleksey's scams of fraud. The state brought out that Ferrell was arrested for and responsible for the $10,000 loss and was aware that the withdrawals to her account were made. PCR 1397, 1412-1413. ROA 1900-1901.

The first variance from the testimony to the Caruso affidavit was whether Ferrell knew and participated in the actual deposit of the forged McCann checks into her account or did she believe that the monies got into the account by a wire transfer. Compare, ROA 1899, PCR 564-565 (SLED Report, p. 2 [Exhibit 50] with Caruso affidavit; PCR 535-536. Further, Solicitor Bailey, consistent with Ferrell's testimony, that "Aleksey deposits . . . he pulls the $10,000 out. He's gone and who gets arrested? Jamie Ferrell." ROA 2122.

Upon review of the copies of the forged checks, Solicitor Bailey noted that there was no indication who has signed for deposit of check #1847 made on May 10, 1996, and on check

number 1826 for $4892 it indicated "for deposit only." PCR 1428. Specifically, it did not include Jamie Ferrell's signature. PCR 1428. See Respondent (State) Exhibit 3. See also Trial Exhibits 84 and 85. Further, at trial, Theresa McCann identified the writing on each of the forged checks as Bayan Aleksey's handwriting. See 1870-1871.

Contrary to the claims of the Petitioner, he failed to show that the testimony of Ferrell was knowingly false. There has been no showing that Ferrell actually or physically deposited either of the forged checks, particularly when at lease one revealed "for deposit only." Second, there is no showing, other than the fact of the arrest for the fraud, that Ferrell's role was different than asserted and was known as such by Bailey. The critical issue is "knowing use of perjured testimony." As to the "deposit" issue, this has not been proven.

As to the withdrawal issue, Ferrell asserted Aleksey withdrew the funds, but admitted she knew he was withdrawing it. ROA 1900. The gist of her testimony was that her bank account was being used for his funds, since he could not possess an account. With that background to her testimony, and common sense, her participation from her account would be necessary for him to withdraw the funds. The evidence, in the light most favorable to Aleksey, the creator and thief of the stolen and forged checks, was that he was present when the female withdrew the monies. Although she stated to S.L.E.D. that "I withdrew the money" and that she gave it to him, her testimony was inadequate, but not materially false, if done, as shown, at his direction. See PCR 1706-1707.

The Applicant further failed to show the discrepancy was material in such a manner that there was a reasonable likelihood that it affected the judgment of the jury in the sentencing proceeding. Where Aleksey stole the checks, his handwriting forged the checks and he

personally acquired the proceeds from the forged documents, it is difficult to see how any effect occurred by the mere fact of the conduit's knowledge in the matter. Aleksey now claims that Aleksey victimized Ferrell and ignored that she was involved in the fraud scam. The problem is that her participation in the fraud scheme was recognized by the jury to be inconsistent since it resulted in her arrest and responsibility for the proceeds. Assuming the witness's "false testimony" was correct, there is no reasonable likelihood it affected the judgment.

e.) Ineffective Assistance of Counsel Claim Concerning the Failure to Investigate or Impeach Ferrell

In his memorandum, p. 49, Aleksey contends counsel should have sought to impeach Ferrell on her inconsistent statement with S.L.E.D. about who withdrew the funds from the bank account. See Applicant's Exhibits 50, 83. Since, he contends counsel should have investigated the Commerce Bank matter to learn that Ferrell was most probably the author of the starter checks used to withdraw the funds (for Aleksey). He claims that this revealed that she was a co-conspirator with Aleksey, not a mere victim.

Counsel Sims testified, as noted above, that the strategy was to develop Aleksey's role as a non-violent con-man, who used women as willing participants or conduits for his financial gains. Sims testimony concerning Jamie Ferrell revealed his approach was consistent with her. PCR 530-570. Sims stated that he had been provided with a copy of Ferrell's criminal record and was in trial counsel's files. PCR 546-547. Sims identified Aleksey being present in the photographs at the teller when a withdrawal was being made with a female. PCR 555-560. It was presented to Sims that the checks used for the withdrawals were "most probably" Jamie Ferrell's. PCR 560-564. Sims acknowledged that this information could have been used at trial

as well as her SLED statement. PCR 566. However, Sims also stated that he felt there was information in her SLED statement that would hurt them. Sims acknowledged that they had been using bad acts in the trial. He also acknowledged that he could have impeached Ferrell on the "withdraw" matter.

Sims acknowledged that he discussed with Aleksey about the involvement of Ferrell in the scheme. Aleksey told him that she wanted to do it and wanted to go and that they were going to gamble and have a good time. PCR 652.

Counsel Stone stated that he is not sure, in hindsight, how relevant these inquiries would have been. He thought it would have been important to know about the conviction. PCR 1088. Stone admitted that at the withdrawal, there were two people in the cars, one being Aleksey. PCR 1205. He stated that this clearly shows that Aleksey is there with the person at the bank. PCR 1205-1206.

Respondents submit that even if counsel was deficient in failing to point out these inconsistencies in impeachment, clearly there is no reasonable probability the result of the proceeding would have been different. Aleksey was involved in the fraudulent activity. Counsel Sims, on cross-examination, noted either the naivete of Ferrell or her desire that Aleksey provide for her. Further, the fact of the arrest had been presented. It cannot be said, under Strickland, that 6th Amendment prejudice was shown. The allegation must be denied.

CONCLUSION

Respondents respectfully submit that the entire application be denied and dismissed. Respondents submit that any issue not briefed in the Applicant's Brief Supporting the Third Amended Application be deemed abandoned as a matter of law.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

Donald J. Zelenka

By:_____
ATTORNEY FOR RESPONDENTS

Post Office Box 11549
Columbia, South Carolina 29211

October 10, 2005

THIS PAGE INADVERTENTLY
LEFT BLANK

PAGES 4683-4803
HAVE INTENTIONALLY
BEEN LEFT BLANK

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 REPLY SUPPORTING THIRD AMENDED APPLICATION FOR POST-CONVICTION RELIEF

David B. Tarr
Law Office of David B. Tarr, LLC.
1720 Main St., Suite 202
Columbia, SC 29201
(803) 238-7967

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

Attorneys for the Applicant
January 19, 2006

TABLE OF CONTENTS

INTRODUCTION	1
BRADY	1
INEFFECTIVE ASSISTANCE OF COUNSEL	5
NAPUE/MISREPRESENTATIONS	9
CONFLICT	12
Prosecutors Shall Not Defend	13
Actual Conflict of Interest	15
Adverse Effect	17
Ineffective Appellate Counsel on Direct Appeal	20
FAILURE TO RETAIN FILE	23
TRIAL COUNSEL'S PRESENTATION OF ALEKSEY IN BAD LIGHT	24
CONCLUSION	26

INTRODUCTION

This Reply does not attempt to articulate support for every claim presented in the Third Amended Application for Post-Conviction Relief. Instead, support for every claim should be found in the record compiled by incorporation of the trial proceedings, testimony from the PCR merits hearing and PCR exhibits as well as supported by argument in the Brief. The failure of this Reply to examine any issue raised during the litigation should not be construed as the abandonment of any claims. Rather, this Reply should serve as a brief summary of responses to the State's Return.

To begin, the conviction of Mr. Aleksey's was based not upon physical evidence but instead primarily upon the testimony of Glory Vee and Sara Pivero as well as an alleged confession to law enforcement.

This conviction is not worthy of confidence because of the lack of adversarial testing of Glory Vee and Sara Pivero's credibility as well as the lack of challenge to the confession and interrogation tactics. This lack of adversarial testing resulted from a confluence of lapses of duty by trial counsel and the prosecuting attorney and sometimes both. Where ever the responsibility ultimately falls, the trial jury was not provided an accurate picture of the evidence as allowed by the court rules and law of this state[1].

BRADY[2]

To begin, a review of the number of times the State failed to disclose information is

---

[1]Reference is made to the 84 exhibits entered without objection as well as the thirteen proposed exhibits submitted along with Applicant's Brief Supporting Third Amended Application for Post Conviction Relief.

[2]See Brady v. Maryland, 373 US 83 (1963).

necessary. The state failed to disclose exculpatory or impeaching information related to Glory Vee, Sara Pivero, Yelena Batkilina, and Lisa Watson. This suppression of Brady material worked to blind the jury from the true facts of the case and character of the State's witnesses.

The largest failure to disclose concerns Glory Vee Perez (Blackwell) (Rivera). As the Court will recall, Glory Vee testified at trial that she witnessed Aleksey shoot Trooper Lingard. However, Glory Vee was also a possible suspect in the shooting. In fact, the physical evidence equally suggested she was the shooter.

But in the effort to distance Glory Vee from the shooting, the State failed to disclose information which demonstrated Glory Vee's competing motive to avoid apprehension[3]. The suppressed information included multiple crime sprees occurring during December, 1997. Contrary to the State's return, knowledge of the existence of this information is imputed to Prosecutor Bailey through the State's investigation in the New England area.

First, Bailey, Mears and Darnell all admit they traveled to New England to meet with State witnesses and to speak with law enforcement agencies. Further, documents indicate that SLED and other agencies were actively investigating witnesses and persons related to Aleksey from the first days of his arrest until the last weeks before trial. Exhibit 4, 14, 15. Finally, notations from Agent Darnell document discussions with agents from multi-jurisdictional task forces whose names also appear in previously undisclosed police reports. Exhibit 84.

Specifically related to Glory Vee, Solicitor Bailey admits knowledge of her crime spree victimizing Dr. Bang. PCR, p. 1705, lines 19-24. However, the transcript of the trial is devoid

[3]Although not an element of murder, the State argued motive as the number one evidence of guilt. Tr. Transcript, pg. 1752, lines 7-9

of any information related to this crime spree. Instead, Glory Vee was portrayed as a victim of Aleksey, who was unaware of Aleksey's character. Tr. p. 1755, line 23-1756, line 8. It is fundamentally unfair to allow the state to portray Glory Vee as innocently involved with Aleksey when the prosecutor knew of her guilt and complicity but failed to disclose this information.

Further, once placed on notice of the Brady material, the prosecutor had an affirmative duty to seek out this information. This information could have been as easily obtained in 1998 as it was in 2002 by PCR counsel. Finally, the materiality of the non-disclosed evidence is overwhelming.

Glory Vee's trial testimony went virtually unchallenged. She was impeached with only one minor conviction and allowed to tell the jury that she was unaware of Aleksey's background. Disclosure of the evidence, alone, would have prevented the State from presenting this false impression[4].

The next failure to disclose relates to Sara Pivero. As the court will recall, Ms. Pivero testified at trial that Aleksey alledgedly confessed to her during a collect call from the Orangeburg County Jail. During the PCR proceedings, Solicitor Bailey testified that Sara Pivero's testimony was the second strongest piece of evidence in the trial of Aleksey.

However, Prosecutor Bailey's failure to provide the defense with information that Sara Pivero lied to him the month before trial is a classic violation of the dictates of Brady and its progeny. Exhibit 85, July 16, 1998 letter from Bailey to Dean Logan and Dean Logan report dated July 23, 1998. Further, this factual scenario looks strikingly similar to the situation

---

[4]The only impeachment evidence within possession of trial counsel consisted of the rap sheet of Glory Vee provided by the State and traffic tickets for speeding.

presented to the South Carolina courts in the case of Gibson v. State, 514, S.E.2d 320 (SC 1999).

In the State's Return, several innocent explanations of Pivero's lie to Bailey are proffered. However, these explanations should have been presented by the State to the jury in response to Aleksey's counsel's confrontation of Pivero with the proof of this lie. It is hard to imagine more devastating evidence on cross examination than proof that a state witness lied to a prosecutor on the eve of trial.

Further, demonstrating the materiality of this failure to disclose is the fact that Sara Pivero never mentions any alleged confession in any discovery provided to trial counsel before trial. Exhibit 83. Nor did she make any allusion to such confession in any pre-trial interviews she provided to news media. Exhibit 82. Finally, conspicuously missing in the discovery of this case is any written statement provided to SLED by Ms. Pivero, in contrast to statements provided by every other fact witness. PCR Transcript, pg 1383-1384.

The third failure to disclose issue relates to Yelena Batkilina. As the court will recall, Ms. Batkilina testified regarding a relationship with Mr. Aleksey which included a gun purchase and dealings regarding the posting of bond in Pennsylvania. While the brunt of the testimony focused on linking the murder weapon to Mr. Aleksey and not Glory Vee, the State argued that Aleksey stole this gun and skipped out on bond. Tr. pg. 1763, line 15-19. The jury was allowed to consider this information during penalty phase deliberations.

However, the State was on notice that Ms. Batkilina had legal problems in Florida. In fact, an ATF gun trace conducted the morning of Trooper Lingard's death indicate that Ms. Batkilina was involved in a credit card scam in Florida. Exhibit 4. However, despite this notice, the State never obtained and provided these documents as part of its Brady obligation, even

though PCR counsel obtained these documents years later. Impeachment of Ms. Batkilina's testimony regarding the gun theft and bond jumping with the information of this fraudulent activity would have been proper under the rules of evidence. See SCRE Rule 608 & 609.

The fourth failure to disclose issue relates to Lisa Watson. Ms. Watson testified regarding the purchase of the Mustang involved in the fatal traffic stop in South Carolina. The State's main focus was to link the Mustang to Mr. Aleksey. However, the State also presented Ms. Watson as a victim of Mr. Aleksey's actions. Further, the jury was allowed to consider this information during the penalty phase deliberations[5].

But the State was also on notice that Ms. Watson was involved in the very fraudulent activity of which she blamed Mr. Aleksey. Specifically, SLED Agent Darnell possessed an audio cassette entitled "Lisa Watson Fraud." Exhibit 16. This tape concerned fraud involving Western Union and Lisa Watson's estranged husband.

Further, Agent Mears was provided written correspondence from Western Union detailing Ms. Watson's involvement in this fraud. Exhibit 15. In fact, the first correspondence was provided the day after Mr. Aleksey's arrest. Finally, Agent Darnell's notes contain references to this very same Western Union fraud by Lisa Watson. Exhibit 84.

INEFFECTIVE ASSISTANCE OF COUNSEL

In a similar vein, the evidence raised during the pendency of the case at bar demonstrates

---

[5]See Trial Transcript 2109-2110 ("You heard from Lisa Watson, you heard from [other women], you heard how Bayan Aleksey used them, and abused them, took them for all he could take and left them. Bayan Aleksey spent his entire adult life, the last four or five years, according to the testimony you have heard, as a parasite on women..... He has lived off of women he has taken in. He has bled them dry. He even takes their names. He takes their money. He takes their self-respect").

trial counsel's failure regarding investigation. This evidence also demonstrates trial counsel's failure to use available impeachment material. As detailed more fully in the Brief, these failures involved numerous factual issues and witnesses.

To begin, Aleksey's trial counsel failed to utilize the information in their possession to impeach Glory Vee's testimony. The State concedes that Mr. Aleksey provided rudimentary information about Glory Vee's criminal activity to his trial counsel via client conferences, letters and phones messages. Included in this information was reference to Glory Vee's fraudulent activities involving Dr. Bang's checks and other forged or fraudulent documents. However, trial counsel failed to uncover any meaningful information during the investigation of Glory Vee.[6] Further, they failed to conduct meaningful cross examination of Glory Vee, even with information such as that provided by Elizabeth and Marcus Blackwell or through discovery from the State.

One piece of information available to trial counsel involved the transcript from Glory Vee's 1991 guilty plea in Trenton, New Jersey. Trial counsel did attempt to provide the jury with information that Glory Vee was originally charged with 10 indictments, even though she ultimately pled to only one charge. The trial judge excluded this information, stating: "you can't say she made a bargain." Tr. Transcript, 1316, lines 6-7.

But the transcript of Glory Vee's guilty plea deal was available to trial counsel. Exhibit 37, p. 7-10. And, in fact, Glory Vee did make a bargain with the prosecutor to have the other 9 indictments dismissed in exchange for testimony against her mother. Thus, Glory Vee knew how

[6]Although appointed nearly eight months before trial, trial counsel's investigator only attempted investigation of Glory Vee in the last two weeks before trial.

to cut a deal. It is this very bias and motive to misrepresent that was fair game for impeachment purposes.

The case of State v. Jones supports this position despite the opinion's own internal attempt to distinguish the Aleksey case. 514 SE2d 813 (SC 2001). In Jones, Aleksey's case was distinguished without the Supreme Court's awareness that Glory Vee had specifically cut a deal to lessen her exposure in New Jersey, just as she later did in South Carolina.[7] With the hindsight of the material revealed at the post conviction proceedings, it is obvious that Glory Vee's charges here were not dismissed until she provided significant assistance to the prosecution, just as she did in New Jersey. Exhibit 37.

Trial counsel also failed to impeach Sara Pivero, characterized as the second strongest witness against Mr. Aleksey. Although not utilized by trial counsel, the defense was in possession of a rap sheet which contained a listing of Ms. Pivero's criminal convictions. Exhibit 52. Impeachment based upon these convictions was proper under the South Carolina Rules of Evidence. However, the fact of these convictions was not brought to the jury's attention. In its return, the State argues that the jury was informed that Ms. Pivero was on probation and was paying money back. However, more accurately, Ms. Pivero was convicted of 5 counts, including three charges specifically involving deception but the jury was never provided this specific information.

Further, trial counsel possessed police reports which indicated Pivero's numerous lies to

---

[7]Glory Vee was originally charged as a co-defendant along with Aleksey in the murder of Trooper Lingard. In fact, the characterization of Glory Vee as a "witness" without "any evidence of her participation in the crime" is contradicted by the probable cause presented to obtain her arrest warrant for murder.

law enforcement in Pennsylvania. Applicant's 55. Among these lies where false statements about her identity and her involvement in criminal activity. 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. Trial counsel never impeached Ms. Pivero with this material.

The impact of the foregone impeachment undermines the confidence in the outcome of Mr. Aleksey's trial as Solicitor Bailey argued that her testimony, and thus credibility, was of utmost importance.[8]

Likewise, trial counsel failed to investigate and utilize available impeachment material pertaining to Lisa Watson, Yelena Batkilina and Jaime Farrell. As to Ms. Watson, trial counsel had available Ford Motor Credit documents which contained pages of inconsistent statements regarding her relationship with Mr. Aleksey and her actions involving the Mustang. Exhibit 18. Trial counsel failed to use these inconsistencies in Mr. Aleksey's defense. Also, trial counsel failed to investigate Ms. Watson's involvement with Western Union.

Further, trial counsel failed to obtain information about Yelena Batklina such as her involvement in a credit card scam and grand theft. Trial counsel was made aware of the existence of this information through Aleksey's statement to SLED. Exhibit 83. Also, Ms. Batkliina informed Mr. Stone that she was on probation. Exhibit 61. However, trial counsel never impeached Ms. Batkilina with either conviction. Finally, trial counsel failed to correct the misleading testimony regarding the gun purchase date, the date Mr. Aleksey was bonded out of jail, and the date Ms. Batkilina last saw Mr. Aleksey.

---

[8]This assessment does not include the impeachment impact lost by the State's suppression of Ms. Pivero's lie to Solicitor Bailey shortly before trial. See Exhibit 85.

As to Ms. Farrell, trial counsel failed to investigate and impeach her testimony with evidence of her involvement in a scam involving Commerce Bank in Absecon, New Jersey. At trial, Ms. Farrell testified that Mr. Aleksey withdrew money from this account when, in fact, Ms. Farrell withdrew this money. Tr. pg. 1900, lines 3-4 but see Exhibits 46, 48, 49, & 50. Trial counsel's impeachment was possible by reference to Ms. Farrell's SLED statement alone. Exhibit 50. Further impeachment would have been possible if trial counsel would have obtained information from Vincent Caruso, the investigator at Commerce Bank. Exhibit 46.

NAPUE/MISREPRESENTATIONS

Even more troubling than the incidents of suppression of Brady material or ineffective assistance of counsel are the number of misrepresentations that were either presented to the jury by the prosecution or allowed to stand without correction. These misstatements mainly concern four of the state witnesses. The most egregious example concerns Glory Vee.

During the closing argument in the verdict phase, Solicitor Bailey indicated that the number one reason that Aleksey, and Aleksey alone, was the killer was his motive to avoid apprehension. Tr. p. 1752, lines 7-9 & Tr. p. 1753, lines 15-22. In contrast, Mr. Bailey argued, Glory Vee had no such motive. However, this argument was untrue.

As mentioned above and in the Brief supporting the application for relief, Glory Vee was involved in a month-long series of fraudulent acts. Taken in context, these acts were a desperate way for Glory Vee to provide a home for her and her two children during a cold December in the Trenton/Philadelphia area following her separation from her husband, Marcus Blackwell. Exhibit 25 & 27. These fraudulent acts included theft from her job which led to her termination. Exhibit 34 & 31. Further, Glory Vee obtained money from Summit Bank as part of this scam.

Exhibit 39.

Summit Bank security and the Philadelphia police set up a sting to capture Glory Vee for this fraud. Exhibit 39. However, Glory Vee was tipped off to the sting when she was questioned by the Trenton police regarding her boss' missing checks. Exhibit 31 & 34. Also, to further her run from the law, Glory Vee put her family up in hotels paid for with fraudulent checks written on an account which was solely hers and closed months before. Exhibit 41.

Thus, Solicitor Bailey's argument that "Glory Vee Blackwell had no motive" to avoid apprehension and that "she has not got anybody looking for her" was false. But instead of providing an accurate description of Glory Vee's competing motive, Solicitor Bailey exploited the very Brady violation discussed in an earlier portion of this return.[9] Therefore, the jury never heard the truth about Glory Vee's competing motive returning her as a suspect in the killing.

To a lesser degree, the State exploited misleading testimony presented by Yelena Batkilina. During her testimony, Ms. Batkilina stated that she last saw Mr. Aleksey when she bonded him out of jail in Pennsylvania. Tr. Transcript, 922, line 15-923, line 3; & 924, line 15-925, line 7 & Applicant's 5. Solicitor Bailey utilized this testimony to support his position that Ms. Batkilina was only a victim of Mr. Aleksey's and not a co-defendant and co-conspirator of a series of criminal acts. Tr. Transcript 2109-2110.

However, Ms. Batklina's testimony was false. Exhibits 5 & 11. Not only did she know of Aleksey's whereabouts after she bonded him out of jail, but she continued to commit criminal acts with him. Exhibits 3, 6, 8, 9, & 10. Further, Solicitor Bailey was on notice about the truth.

---

[9] Solicitor Bailey admitted at the PCR hearing that he had a "generalized knowledge" of the scam involving Dr. Bang, Summit Bank, etc. PCR, p. 1705, lines 19-24.

Again, the ATF trace report indicated Batklina's problems in Florida and cursory investigation of that incident contradicts Ms. Batklina's testimony. Therefore, had the State corrected this false testimony, Bailey could not have argued that Bakilina was a victim as opposed to a co-conspirator.

Likewise, Solicitor Bailey allowed Lisa Watson to testify falsely regarding money stolen off of her husband's credit cards. During the penalty phase of the trial, Lisa Watson testified that she suffered losses from her husband credit cards. However, in truth, she helped steal money from these same cards. Exhibits 13, 14, 15, & 16.

Solicitor Bailey was aware of Lisa Watson's involvement by virtue of the correspondence provided to SLED agents Mears and Darnell from Western Union. Exhibits 15 & 16. He did not provide this information to Aleksey's trial counsel. He did not correct the false nature of this testimony, but instead exploited the falseness through his sole characterization of Ms. Watson as a victim.[10]

Finally, the prosecution presented false testimony from Jaime Farrell. At trial, Ms. Farrell indicated that Mr. Aleksey withdrew money from a Commerce Bank account. Tr. Transcript, 1900, l. 3-4. In fact, Ms. Farrell withdrew this money. The prosecution was aware of the truth because of Ms. Farrell's SLED statement and a letter from Vincent Caruso. Need Cite. However, the state never corrected this false testimony. Therefore, the jury was left with the impression that Ms. Farrell was victimized in the Commerce Bank scam when she was a willing co-defendant.

---

[10] Aleksey's trial counsel attempted to argue during the penalty phase that Aleksey should not be executed because of the way he treated these various women. However, this argument was limited following a sustained objection. Tr. Transcript pg. 2138.

The prejudice from these various instances of false testimony and misleading statements is highlighted by Prosecutor Bailey's portrayal of these four women as victims. To quote again from the State's closing:

> "You heard from Lisa Watson, you heard from Sara Pivero, Jaime Farrell, Teresa McCann, you heard how Bayan Aleksey used them, and abused them, took them for all he could take and left them. Bayan Aleksey spent his entire adult life, the last four or five years, according to the testimony you have heard, as a parasite on women..... He has lived off of women he has taken in. He has bled them dry. He even takes their names. He takes their money. He takes their self-respect.[11]" Trial Transcript 2109-2110.

Thus, while the State's return indicates that any inconsistencies between the trial testimony and the truth are insignificant, this argument is as misleading as the testimony presented by the government. Finally, the false presentation of Glory Vee as a person with no motive to avoid apprehension is error sufficient to grant a new trial.

CONFLICT

Aleksey's conviction is infirm because Counsel Stone labored under conflicts of interest related, alternatively, to his position as a part time prosecutor and as a contract attorney under the Attorney General's Office, handling claims covered by the Insurance Reserve Fund. These conflicts are unwaivable and require reversal *per se*. Further, these "actual" conflicts adversely effected the litigation. Finally, any alleged waivers were inadequate because of insufficient

[11] This starkly contrasts with the State's Return, "Solicitor Bailey stated that he never tried to present the women as anything other than participates in the scams." Return, pg 255, citing PCR transcript, pg 1397.

advisement or the constructive absence of counsel or the waivers were non-existent.

In its Return, the State argues that no conflict shown requires reversal. Further, it argues that no actual conflict exists or no adverse effect can be shown. Finally, the State alleges that Aleksey waived any conflict.

Prosecutors Shall Not Defend

While there is no case law in South Carolina discussing the propriety of a prosecuting attorney simultaneously serving as counsel for a criminal defendant, conflicting case law on this issue exists from foreign jurisdictions. In support of a *per se* prohibition on this conduct are decisions from the courts of Oklahoma, Vermont, Utah, Illinois, Missouri, and Tennessee. Even though some of these decisions are based upon unique conflicts or rulings premised upon supervisory powers or state law instead of constitutional concerns, all of these cases clearly indicate that a criminal defendant's right to counsel free of conflict created by affiliation with a prosecutorial sovereignty dispenses with the need for any showing of adverse effect.

A common theme of these cases is the idea that a prosecutorial sovereignty is an actual adversary to whom a duty of loyalty is owed. In State v. White, the Tennessee Supreme Court stated that "prosecutors are to keep the interests of the State as their preeminent concern."[12] 134 SW3d 469, 477 (TN 2003), referencing Berger v. US, 295 US 78, 88 (1935) Further, the court in White stated that "[p]rosecutors have taken an oath of office to uphold and apply state law in prosecutions and assist ... law enforcement officers in prosecuting alleged crime. Even if cross-examination of such personnel would not involve the disclosure of confidences and secrets

[12] See also Howerton v. State, 640 P2d 566, at 567(OK 1982)(A prosecutor's "first and foremost duty is to represent the State in criminal proceedings.")

of the state or municipality, the desire to maintain a harmonious working relationship with these law enforcement officers could adversely affect the inquiring attorney's zeal in conducting such cross-examination.[13] White, at 478, quoting Tennessee Formal Ethics Opinion, 2002-F-146.

The Missouri Supreme Court ruled similarly in the case of State v. Crockett. 419 SW2d 22 (MO 1967). There, the Missouri court wrote that the "State is not merely a nominal plaintiff" in a criminal proceeding. Crockett, at 29. Further, the Missouri court noted that a criminal case is generally prosecuted by a local prosecutor who is ultimately accountable to the chief prosecutor of the state, the Attorney General.[14] Id. The same is true for the State of South Carolina. See S.C. Code Section 1-7-320.

Other courts have emphasized the need for a bright line rule to preserve integrity in the court system. In State v. Brown, the Utah Supreme Court reversed a murder conviction based upon a conflict created when the defendant was represented at trial by a prosecuting attorney from a neighboring jurisdiction. 853 P2d 851 (1993). Instead of reaching the issue of a constitutional violation, the Utah Court found that "as a matter of public policy and pursuant to our inherent supervisory power over the courts, as well as our express power to govern the practice of law, counsel with concurrent prosecutorial obligations may not be appointed to defend indigent persons." Brown, at 856-857. Likewise, in People v. Fife, the Illinois Supreme Court agreed with the defendant that a *per se* rule dispensing with a prejudice showing was appropriate when an indigent accused was represented by a prosecuting attorney. 392 NE2d 1345 (Ill. 1979).

---

[13] But see PCR Transcript page 1134.for Stone's contrary analysis of this tension.

[14] See In re Wakefield, 177 A. 319 (1935) ("A state's attorney in this state is not merely a prosecuting officer in the county in which he is elected. He is also an officer of the state, in the general matter of the enforcement of the criminal law.")

Finally, these decisions are consistent with the logic and rule of law recently expounded by the South Carolina Supreme Court in State v. Gregory. 612 SE2d 449 (SC 2005). There, a conviction for lewd act upon a child was reversed because the defense attorney owed conflicting duties of loyalty to the criminal defendant and to a prosecuting attorney, both of whom were his clients in unrelated matters. The Supreme Court quoted the Fifth Circuit Court of Appeals for the United States saying, "a defendant may not be represented by counsel who might be tempted to dampen the ardor of his defense in order to placate his other client....This possibility is sufficient to constitute an actual conflict as a matter of law." Gregory, at 450-451, quoting Zuck v. Alabama, 588 F2d 436, at 440 (5th Cir. 1979). No showing of prejudice or adverse effect was discussed in the Gregory opinion, but instead merely recitation to *possible* effects. See Gregory, note 1. Jurisprudential consistency would be strained to disallow an attorney from simultaneous representation of a criminal accused and a prosecuting attorney but at the same time allow an attorney to simultaneously represent a criminal accused and *be* a prosecuting attorney.

Thus, Aleksey's conviction should be reversed because prosecutors should not defend the criminally accused.

Actual Conflict of Interest

Although the State argues that no actual conflict of interest existed relating to Stone's representation of Aleksey, this argument ignores South Carolina case law related to actual conflicts.

As mentioned above, in State v. Gregory, the South Carolina Supreme Court reviewed a conflict of interest scenario related to a criminal conviction. In finding an actual conflict of interest in that case, the court reviewed state law related to the test for actual conflicts of

interests. The Supreme Court stated that "[a]n actual conflict of interest exists where an attorney owes a duty to a party whose interests are adverse to the defendants." Gregory, at 450 quoting Fuller v. State, 557 SE2d 664 (SC 2001). The Court in Gregory reaffirmed the legal test, stating "an actual conflict of interest occurs:

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

Gregory, quoting Duncan v. State, 315 SE2d 809, 811 (SC 1984), citing Zuck v. Alabama, 588 F2d 436, at 439 (5th Cir. 1979).

The test in South Carolina is consistent with that found in other jurisdictions. Recently, the Georgia Supreme Court affirmed a lower court's grant of habeas relief to a capital murder defendant, citing State v. Gregory. Howerton v. Danenberg, 621 SE2d 738 (GA 2005). The Georgia Court, in Howerton, noted that an "actual conflict of interest existed because of defense counsel's concurrent representation of (the accused) and the district attorney, and given the enormity of the penalty[15], the conflict was completely impermissible." Howerton, at 740.

---

[15] Also see testimony and commentary from Prof. John Freeman. PCR, pg. 1455. Professor Freeman's testimony should be considered by the Court not as an expert witness, but instead as commentary, much the same as commentary found in writing exemplars such as law

Finally, the Tennessee Court, in White, noted that an attorney's dual role as a prosecutor and defense counsel were inherently antagonistic and created an actual conflict of interest. White, at 479.

Here, Stone owed a duty of loyalty to a party adverse to Aleksey. In the first instance, his service as a prosecutor created a duty to the State of South Carolina in criminal prosecutions. As mentioned earlier, the State is not merely a nominal party in any of these actions. Further, like many other states, a hierarchy of power exists in South Carolina such that all prosecutions, even those conducted by Stone in another circuit, are ultimately subject to oversight by the same Attorney General who oversaw the prosecution of Aleksey. See SC Code Section 1-7-100(b). ("When... the interest of the State requires it [the Attorney General] shall....[b]e present at the trial of any cause in which the State is a party or interested and, when so present, shall have the direction and management of such prosecution or suit.") Stated another way, prosecutors in South Carolina "shall perform the duty of the Attorney General." SC Code Section 1-7-320.

Also, Stone's affiliation with the Insurance Reserve Fund concurrent with his representation of Aleksey created another actual conflict of interest. This actual conflict existed regarding both Stone's IRF work in the abstract and related to specific cases Stone handled pursuant to the IRF work. Work on behalf of Aleksey was inherently antagonistic to the State, the financial beneficiary of Stone's IRF work.

Adverse Effect

---

review articles. The only difference from the commentary presented by Professor Freeman at the hearing and that reflected in a law review type article is the manner of publication, oral versus written, and that questioning by the Court and parties was available. Obviously, in a PCR action, the trial court determines both the law and facts pertaining to the specific case.

In its Return, the State argues that any litigation decisions cited by Aleksey as adverse effects of the conflicts listed above were the result of strategic decisions not related to any conflict of interest. However, these alternate explanations of trial counsel's deficiencies are themselves post-hoc explanations which stretch the bounds of credibility given the facts of this case.

As to the conflict's adverse effect on the failure to request a venue change, an objective view of the facts forces one to believe that Orangeburg County was the worst place to conduct Aleksey's trial. First, a saturation of media coverage generated incredible ill-will towards Aleksey. Exhibit 72. Further, this same coverage stirred community wide sympathy for Trooper Lingard, a public servant in the Orangeburg area. Finally, the jury venire and the petit jury overwhelmingly admitted exposure to this media coverage. Tr. Transcript pages 35-858. A last minute venue change to any county in the Fourteenth Circuit would have clearly disqualified Stone from further representation and snared the efficient administration of the proceedings.

Further, challenges to police techniques such as gun shot residue testing or the accuracy of the SLED lab would assist Aleksey, but jeopardize wholesale classes of cases handled by Stone in his prosecutorial functions. Also, challenges to the interrogation techniques of the SLED agents offered the jury an explanation for Aleksey's incriminating statements, but at the risk of offending the executive branch functions and jeopardizing the IRF interests.[16] Further,

[16]Stone also specifically refrained from assisting Aleksey with other collateral litigation related to pre-trial prison conditions, even though the ABA guidelines advise capital counsel that pursuit of such collateral challenges are required given the unique nature of capital proceedings. See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, § 1.1, Commentary, pg 4 ; In fact, Stone may have been prevented from assisting in this collateral litigation by virtue of SC Code Section 1-7-380("The several solicitors of the State shall not engage in litigation against the State or any of its departments.").

despite Stone's statements to the contrary, media reports do support Aleksey's claim of a brutality induced statement.[17]

As stated in the Brief, Stone had an interest in placating the Attorney General who controls the award of IRF contracts. However, the Attorney General has always been aligned against Aleksey. Further, specific IRF clients of Stone were involved in matters relevant to Aleksey's litigation. However, Stone was prevented by his dual roles from presenting the testimony of his IRF clients on behalf of Aleksey. Stone failed to pursue a challenge to Aleksey's incriminating statement; while a successful challenge would have increased liability for the Insurance Reserve.[18]

Finally, the failure to present witnesses such as Trooper Stack or Warden Bamberg were not based upon trial counsel's presentation of other similar evidence. In fact, these two witnesses would have offered testimony in opposition to that proposed by two state witnesses, Katherine Gallup and Vernitia Dozier. It is incredible to state that the defense was equally served by testimony from the government's witness as it would have been by presentation of its own witnesses, but Stone's divided loyalties offer the most easily acceptable explanation for these actions not taken[19].

---

[17]See Exhibit 82, Times and Democrat article dated January 6, 1998, "Man says he did not kill trooper."

[18]Stone candidly admits he failed to assist Aleksey's challenges to pre-trial detention conditions because of his conflict of interest with his IRF work. Pre-trial detention issues are fair game for debate by the jury in capital proceedings. See generally, Skipper v. South Carolina, 476 U.S. 1 (1986).

[19] See Williams v. French, 146 F3d 203, 212 (4th Cir. 1998)(Adverse effect shown if "attorney...failed to take action on behalf of one because it would adversely affect the other.")

It is worth noting that the State attempts to limit Aleksey's showing of adverse effect to those cited in the Brief, but these are merely examples of the tensions created by Stone's overwhelming affiliation with law enforcement, prosecutorial efforts and executive branch functions. One must not forget that Trooper Lingard's status as a law enforcement officer offered the only aggravating factor towards a death sentence. In this regard, the State presented high level law enforcement officers during the sentencing phase; many of the same officers Stone consults and placates in the performance of duties as both prosecutor and IRF agent. Tr. Transcript pgs. 2004-2028. In this case, these conflicts and their effects do not pass either the proverbial smell test or any legal test offered.

Ineffective Appellate Counsel on Direct Appeal

Another lapse in effective representation occurred when appellate counsel failed to raise on direct appeal the issue of trial counsel Stone's divided loyalties.

In the case at bar, Aleksey was represented on appeal by counsel different from that at trial. Appellate counsel labored under none of the conflicts from which trial counsel suffered. Instead, appellate counsel was privy to the conflict information developed in the record regarding Mr. Stone's position as a solicitor and as contract counsel for IRF claims. However, appellate counsel did not litigate this position and no strategic reason for this failure has been offered in the record.

In its Return, the State argues that appellate counsel could not raise this issue because it was not properly preserved by objection in the lower court. Further, the State argues that no prejudice has been shown. These issues are addressed seriatim below.

The State's preservation argument overlooks the danger presented when a criminal

defendant is represented by counsel laboring under a conflict of interest. Preservation of the conflict error in the lower court would have required trial counsel to object to his own representation. Because trial counsel was unlikely to recognize his own bias created by the split loyalty, it would be unfair to force a criminal defendant to rely upon the conflicted counsel to raise this error.

This danger threatened by the State's position is exacerbated when the accused is indigent. In this situation, the accused is no longer given any say in who is appointed to represent his interests, while the judicial and executive branches both have the opportunity to either approve the appointment or voice objections, respectively, through the mouthpiece of a speaker trained in the letter of the law[20]. A rule delaying un-preserved claims of conflict until post-conviction proceedings inures to the detriment of the criminal accused because the standard for relief is harder to obtain.

Further, precedent allows relaxation of the error preservation rules in situations where the trial judge explicitly ruled on the issue at hand. Case law supports this relaxed preservation requirement in some situations. In fact, in Bartles v. Livingston, the Court of Appeals stated in dicta that the "(s)tandard for determining whether an exception not raised as required in the rules clearly embraces a meritorious assignment of prejudicial error, resulting in the exception being considered by the Court of Appeals, is whether, despite the improperly framed exception, the issue sought to be raised is reasonably clear to the Court of Appeals and the adverse party." 319 S.E.2d 707 (SC Ct. App.,1984)

---

[20]It is certainly common for the prosecution to object to counsel based upon conflicts of interest. See Wheat v US, 486 US 158 (1988) and State v. White, 134 SW3d 469 (TN 2003).

Also, the Courts have announced a "Rule of Futility," applicable when objection would be futile. State v. Pace, 447 S.E.2d 186 (1994). In these scenarios, counsel's failure to object is excused when the trial judge had a fair opportunity to rule even if not preserved in the traditional sense.

In the case at bar, the trial court squarely ruled upon the conflict issue. By declaring that Mr. Aleksey agreed to Counsel Stone's representation despite the conflicts presented during the court proceedings, the trial judge necessarily ruled that any conflicts were not so serious as to be unwaivable. It is this erroneous ruling by the trial court which should have been raised by appellate counsel.

Further, because of the degree of the defect created by this conflict, the appellate counsel should have argued this issue on appeal. See generally, State v. Johnston 510 S.E.2d 423 S.C.,1999 (Appellate court may review actions of lower court in exceptional circumstances, even if waived by silence of party.) The conflict presented by Stone's representation of Aleksey was so intrinsically harmful that automatic reversal was required if appellate counsel would have raised the issue. This is because some errors are so fundamental that no prejudice need be shown. In fact, the courts have recognized that errors relating to the "right to counsel" may affect the trial of a case from "beginning to end" and that the differences in style and strategies employed by lawyers will "impact a trial in every way the presence or absence of counsel impacts a trial." US v. Gonzalez-Lopez, 399 F3d 924, at 934 (6th Cir. 2005).

Thus, Stone's service as conflict counsel was a fundamental error; this error should have been raised on direct appeal by appellate counsel; and but for the deficiency in appellate counsel's performance, the outcome of the direct appeal would have been different.

FAILURE TO RETAIN FILE

In its Return, the State admits that trial counsel failed to retain either a copy or the original of the defendant's trial counsel file in this case. However, the State argues that either estoppel prevents Aleksey from presenting this argument or that reversal of the conviction is not an appropriate remedy for this violation. Both of these arguments fail.

As to the matter of estoppel, there appears no question that Aleksey was entitled to his file. State's Return, pg. 26, note 2. Further, there is no question that statutory law required that trial counsel keep the original of this file for purposes of later review of Aleksey's trial proceedings. SC Code Section 17-27-130. However, even though the State urges that Aleksey's right to his file extinguishes trial counsel's statutory duty, these provisions are not mutually exclusive.

First, while Aleksey did vigorously request his file from trial counsel, he never asked that trial counsel disregard any statutory obligations. With overnight mailing and modern technology, no geographical remoteness explains trial counsel's failure to copy the trial file to review later claims. Because these later claims could involve either allegations concerning the effectiveness of trial counsel or other infirmities of the underlying conviction, both of which are issues in the current action, retention of a copy of the file serves to protect both the criminal defendant and trial counsel. Any ruling eviscerating this duty only undermines the protection this statute provides.

Further general rules relating to spoilation of evidence support Aleksey's claim. Federal case law clearly provides that a party has a duty to preserve what he reasonably should know is relevant to an action or is calculated to lead to the discovery of admissible evidence. Silvestri v.

General Motors Corporation, 271 F.3d 583, 591 (4th Cir. 2001) citing Kronisch v. United States, 150 F.3d 112, 126 (2d Cir.1998). This duty also extends to that period before litigation when the party knows evidence may be relevant to anticipated litigation. Id.

The application of this duty to the current situation is consistent with the ABA standards regarding death penalty cases. These standards provide that: "...all persons who.. (h)ave been members of the defense team have a continuing duty to safeguard the interests of the client....This duty includes....(m)aintaining the records of the case in a manner that will inform successor counsel of all significant developments relevant to litigation...." ABA Standards for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.13.

Finally, vacation of Aleksey's conviction is an appropriate remedy for the violation of trial counsel's duty to maintain either an original or copy of the trial file. First, the rules of equity provide that no wrong shall suffer without a remedy, especially when a statutory scheme provides no remedy at law. Key Corporate Capital, Inc. v. County of Beaufort, 602 S.E.2d 104, at 107 (SC Ct App. 2004). Here, no other remedy is available to perform this necessary function of judicial oversight. Further, the courts are granted inherent judicial power to preserve confidence that the judicial process will uncover the truth. Silvestri, at 590. Finally, while such a remedy may seem harsh, to rule otherwise would allow ineffective counsel to hide deficient performance by neglecting the duty to preserve the trial file.

TRIAL COUNSEL'S PRESENTATION OF ALEKSEY IN BAD LIGHT

Another area of ineffective assistance of counsel related to trial counsel's presentation of Aleksey in a bad light during the verdict phase of his trial. To begin, it must be noted that trial counsel believed Aleksey's trial could result in an acquittal during the verdict phase. In fact, trial

counsel specifically told the trial court that certain voir dire was not required regarding juror views of the death penalty because he believed the case would not get to the penalty phase. PCR, pg. 865.

However, in contrast with this position, trial counsel proceeded to inject prejudice against Aleksey by implying that Aleksey was a foreign national. This implication arose through trial counsel's voir dire questioning concerning whether potential jurors believed foreign nationals held the same rights as US citizens. Tr. Transcript, pgs 35-858. In fact, Aleksey is a US citizen by birth. Tr. Transcript, pg. 194. Trooper Lingard, the shooting victim, was a hometown hero. See generally, Tr. Transcript pgs. 2004-2063.

Trial counsel's poor decision concerning voir dire was compounded by the opening statement wherein Aleksey's prior bad acts were asserted as a defense to the capital murder charge. Among the first words stated by trial counsel was that the jury would not like Mr. Aleksey because of his criminal deeds. Tr. Transcript, pg 911, lines 14-24. However, the State concedes this statement and the ensuing evidence of Aleksey's bad acts would not otherwise have been admissible, pursuant to SCRE Rule 404(b). See State's Return, pg 140-141.

In retrospect, the State asserts that trial counsel took this action as part of the trial strategy to show that Aleksey was a criminal but not a violent criminal. However it remains unclear how use of this character defense is better than an assertion of Aleksey's innocence without reference to his character at all. No purpose is served by placing any evidence, even nonviolent, of Aleksey's character before the jury.

Further, character evidence not the subject of a conviction is only admissible following "clear and convincing" proof that the acts occurred. State v. Cutro, 504 SE2d 324 (SC 1998).

Thus, many of the instances in which the defense conceded in the State's characterization that Aleksey victimized the female witnesses would have been subjected to the clear and convincing analysis. Undersigned counsel propose that in these instances, clear and convincing evidence of the victimization of these women does not exists.

In its Return, the State relies upon what its references as trial counsel's reasonable strategy in conceding or admitting this bad character evidence. But case law is clear that the reasonableness of all strategy decisions must be judged with an eye to the adequacy of the investigation into the facts of the other matter. See Rompilla v. Beard, 125 S.Ct. 2456 (2005)[21], referencing Wiggins v. Smith, 539 US 510 (2003). Further, this duty to investigate applies even if the investigation only serves to mitigate the prosecution's characterization of an accused's actions. Rompilla, at 2465 ("We may reasonably assume that the jury could give more relative weight to a prior violent felony aggravator where defense counsel missed an opportunity to argue that circumstances of the prior conviction were less damning than the prosecution's characterization of the conviction would suggest.").

CONCLUSION

In light of the new information provided during the nearly five years of pursuit of Post-Conviction Relief, confidence in the validity of Aleksey's conviction and sentence are sufficiently shaken such that reversal and vacation of these judgements are required. Further, all

[21] Rompilla, at 2466, "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty." quoting 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.).

of the allegations should be considered both separately and jointly under the cumulative error doctrine. Specifically, all claims of ineffective assistance of counsel should be reviewed under the jaundiced eye created by the myriad of conflicts of interests under which trial counsel operated.[22] Therefore, based upon all matters argued and presented throughout the pursuit of Post Conviction Relief, Aleksey's Application should be granted and a new trial ordered as to both the verdict and sentence in his underlying criminal case.

Respectfully submitted,

David B. Tarr
Law Office of David B. Tarr, LLC.
1720 Main St., Suite 202
Columbia, SC 29201
(803) 238-7967

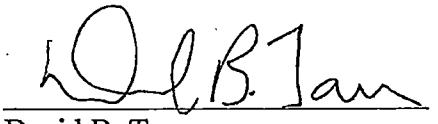
James A. Brown, Jr.
Law Offices of Jim Brown, PA
1111 Bay St., P.O. Box 592
Beaufort, SC 29901-0592
(843) 470-0003

Attorneys for Applicant
January 19, 2006

[22]Also see Frey v. State, 378 SE2d 249, at 251 (SC 1988)("While a defendant must ordinarily show that counsel's ineffective assistance resulted in actual prejudice, such a showing may be exempted where counsel's ineffectiveness is so pervasive as to render a particularized prejudice inquiry unnecessary.") internal citation omitted.

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.)	
)	
)	**CERTIFICATE OF SERVICE**
STATE OF SOUTH CAROLINA)	
)	
Defendant.)	
)	
)	

I, David B. Tarr, personally delivered a copy of the Applicant's Reply Supporting Third Amended Application for Post Conviction Relief to the office of Mr. Donald J. Zelenka, located at 1000 Assembly Street, Room 519, Columbia, SC 29211, this 19th day of January, 2006.



David B. Tarr
1720 Main St., Ste. 202
Columbia, SC 29201
(803) 238-7967

STATE OF SOUTH CAROLINA COUNTY OF ORANGEBURG BAYAN ALEKSEY, #5059 *Applicant,* v. STATE OF SOUTH CAROLINA *Respondent.*	IN THE COURT OF COMMON PLEAS CA No. 00-CP-38-628 APPLICANT'S OBJECTIONS TO THE COURT'S INTENTION TO ADOPT THE STATE'S PROPOSED ORDER

I. The Purpose of These Objections.

Applicant submits these objections pursuant to in accord with Hall v. Catoe and Simpson v. Moore[1]. Before setting forth the particulars of his disagreements with the state's proposed order, applicant advises the Court and respondent that these objections are not exhaustive, nor could they be given their limited purpose. These objections are not intended to assist the state in bringing its order up to acceptable standards, a task for which applicant is not responsible, and which he does not believe to be possible, given the pervasive errors in, and fundamental one-sidedness of, the state's order.[2]

The purpose of the objections set forth herein is to identify the most glaring instances of failing to acknowledge record evidence, failing to acknowledge relevant legal principles and theories, and failing to draw objectively defensible inferences based on the record and governing law, which appear in the state's order. Applicant submits them to underscore for the Court the unfairness and unreliability inherent in the practice of adopting one party's adversarial pleading as the order of the

[1]Hall v. Catoe, 601 SE2d 335 (SC 2004) and Simpson v. Moore, 627 SE2d 701 (SC 2006).

[2]A copy of the proposed order is being transmitted to the Clerk via a separate mailing.

Court.[3]

II. General Objections.

A. The state's order is not a product of objective, independent judicial decision-making.

The proposed order submitted by the state in this case is nothing more than the state's adversarial pleading, modified and updated in a handful of minor ways, and equipped with a signature line for the Court. This Court's announced intention to adopt that document wholesale is inconsistent with applicant's right to due process of law and fundamental fairness as guaranteed by the Fourteenth Amendment to the United States Constitution. It is also inconsistent with South Carolina law, which unequivocally requires that *courts*, not *parties*, perform the critical function of objectively assessing the evidence and law in post-conviction relief cases, and formulating even-handed conclusions based on the exercise of sound, independent discretion. *See* S.C. Code §17-27-80 (governing post-conviction relief cases generally) ("The *court* shall make specific findings of fact, and state expressly *its* conclusions of law, relating to each issue presented") (emphasis added); S.C. Code §17-27-160(D) (governing capital post-conviction relief cases) ("the *hearing judge* in writing *shall make* specific findings of fact and state expressly *the judge's* conclusions of law relating to each issue") (emphasis added).

In this case, the Court's willingness to adopt the state's proposed order *verbatim* compels the conclusion that the Court has not undertaken its own objective review of the grounds for relief, the evidence (much of which has not previously been disputed), the governing law, and applicant's

---

[3]Applicant does not waive his right to challenge any aspect of the state's order in future proceedings, whether discussed in these objections or not. Applicant further expressly incorporates by reference herein all of his previous submissions in this case.

written and oral submissions. Applicant does not reach this conclusion, or make this statement, lightly; however, the state's order is simply too uniformly one-sided, contains far too many gross errors of fact, law, and reasoning, and ignores far too much relevant evidence, for any knowledgeable observer to accept that the Court, after independently examining the issues and the record, believes the findings of fact and conclusions of law proposed by the state to be correct, or even objectively defensible.[4] The state's order resolves *every* factual and legal dispute in the state's favor, repeatedly doing so simply by proceeding as if the countervailing evidence or law offered by applicant does not exist. In a case as complicated and broadly ranging as this one, it is inconceivable that one party could be correct about *every* single point of fact and law. Yet that is precisely what the Court proposes to find by adopting the state's order. Because the Court's proposed course of action is not consistent with the state and federal law principles identified above, and because it is patently unfair, applicant objects.

While it is "common practice to allow for judges to ask a party to draft a proposed order for the sake of efficiency," Hall v. Catoe, 601 SE2d 335, at 341 (SC 2004), the Supreme Court advises against the drafting of findings of fact and conclusions of law by one party in death penalty cases. Id, ("...we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases..."). Further, South Carolina law allows a judge to request briefing and

---

[4]To give just one of many available examples, the state's order repeatedly treats the question of sentencing phase "prejudice" as if applicant had not presented probative, and frequently undisputed, evidence undermining or affirmatively disproving the majority of the factual propositions on which the prosecution's case for death was based. Instead, the state's order discusses only the evidence favoring the state's positions, and treats each item individually, dividing and rejecting them, as if the errors identified by applicant occurred in a vacuum. That analysis is inconsistent with governing law – as applicant has pointed out repeatedly in previous submissions – and cannot be characterized as an objectively fair or reasonable method of deciding a capital case.

actually provides a procedure in capital cases which is inconsistent with the proposed order being drafted by a party to the litigation. See SC Code Section 17-23-160(D)("Within thirty days from the receipt of the transcript, or if the judge requests post trial briefs, within thirty days from the receipt of the post trial briefs, the hearing judge in writing shall make specific findings of fact and state expressly the judge's conclusions of law relating to each issue.")

Because of the above cautionary restriction from the Supreme Court, this Court should rescind its plan to adopt the state's order in this case.

B. Adoption of the state's order would have lasting harmful consequences.

The adoption of an order as one-sided as that proposed by the state carries dire consequences for applicant extending far beyond the conclusion of proceedings before this Court. Appellate review of this court's disposition of applicant's case is discretionary, and even if review is granted, the South Carolina Supreme Court's examination of the denial of post-conviction relief is currently limited, in most circumstances, to application of the "any evidence" rule. *See, e.g.,* Grier v. State, 299 S.C. 321, 384 S.E.2d 722, 724 (S.C. 1989); Wray v. State, 288 S.C. 474, 343 S.E.2d 617 (1986).

Moreover, any subsequent federal habeas corpus review would, under prevailing Fourth Circuit interpretations of 28 U.S.C. §2254(d) and (e) (limiting federal courts' authority to grant habeas relief, and presuming state court findings of fact correct in all but rarest of circumstances), be all but foreclosed by this Court's adoption of the state's order, regardless of the actual merit of applicant's claims for relief. Hamstringing applicant's ability to receive a more thorough examination of his claims in this manner is neither fair nor necessary.

III. Particularized Objections.

As noted above, the particularized objections set forth below are not exhaustive. Given the nature of the state's order, which was initially prepared as an adversarial brief, then modified to include a signature line for the Court, and to change phrases like "respondent submits" to "this Court finds," applicant's identification of its errors should not be mistaken for a road map for transforming the state's order into an even-handed, legitimate judicial opinion. The problems with the state's order are so serious and widespread that mere edits or revisions are not capable of rendering it suitable for entry as the Court's order. Simply put, the state's order cannot be *fixed*; it must be *redone* from scratch. For that task to be accomplished consistently with due process and state law, this Court must abandon its plan to adopt the state's order, perform its own independent, objective review of the evidence and law, and generate its own order reflecting the results of that review. *See* C. Wright & A. Miller, Federal Practice and Procedure § 2578 (2d ed. 1995) ("All courts agree that finding the facts is an important part of the judicial function and that the judge cannot surrender this function to counsel").

The chart below sets forth the page number of the state's order, the statement, finding or conclusion at issue, and the nature of the problem applicant has identified.

Page	Statement/Finding/Conclusion	Problem(s)
17-35	Discussion designated "III[5]."	This discussion fails to address: any cumulative error analysis related to claims raised in the PCR, *see* App. Brief generally and Third Amended Application for Post Conviction Relief; any analysis regarding the conflict of interest related to Attorney Stone's contract work through the insurance reserve fund, *see* App. Brief 84-117; any legal test or analysis regarding "unwaivable conflicts," *see* App. Brief 84-117;
36	Trial counsel Stone's assertion that he was obligated to place himself on a court appointment list in a county in which he did not maintain a practice.	This assertion is not supported by the South Carolina rules regarding requirements for appointments in criminal cases in effect in January 1998. In fact, SC Code Section 16-3-26 controlled criminal appointments in capital cases in January, 1998. This statute provides counsel a mechanism to remove himself from an appointment when "he or she does not wish to provide representation in a death penalty case."
43-49	Discussion of application of Rule 608 to Counsel Stone's appointment as trial counsel.	This entire discussion is inappropriate as Rule 608 only applies to appointments arising after July, 2000. Trial counsel was appointed and this matter tried in 1998. Prior to the passage of Rule 608 in 1999, the appointment of private counsel in death penalty cases was controlled by SC Code Section 16-3-26.

[5]It appears that this portion should be designated "IV" as the proposed Order contains two portions marked "III."

46	Discussion of trial counsel Stone's belief, that he could ethically represent Aleksey, as having bearing on the constitutionality of the representation.	This discussion incorrectly ignores various legal tests applicable to conflict of interests claims when a criminal conviction is on collateral review. see App. Brief 84-117 discussing the "unwaivable"test from Schwarz and Howerton, the "presumed prejudice" test from Cronic; and the "adverse effect" test from Cuyler and Mickens.
46	The statement that Stone was required to place his name on the "criminal list."	SC Code Section 16-3-26, as in effect in January, 1998, allowed counsel to remove his name from appointment in a capital case. Further the order's statement begs the question of whether Stone's status as an assistant prosecutor bars his representation of a criminal defendant; thus, preventing him from being "eligible" for placement on the criminal list. Further, Stone's status did not bar his placement on the "civil list" as an alternative means of public service through court appointments. Finally, as mentioned above, Rule 608 was not even in effect at the time of this appointment.
56	There is no support in the record for Applicant's claim that Stone represented Trooper Lyn Stack..	However, in the PCR transcript page 792, lines 9-18, Stone unequivocally testifies that he represents Trooper Stack
50-63	Discussion fails to articulate any legal test defining an "adverse effect."	At least two distinct legal standards exist in the federal court system defining an "adverse effect" in the conflict scenario. The majority of the circuits find that an adverse effect occurs when counsel foregoes a "plausible defense" in conflict with counsel's other loyalties. The minority requires that the "plausible defense" be "reasonable." see App. Brief 86-87.

63	"Mr. Stone also performed work for the South Carolina Insurance Reserve Fund, which insures state agencies, including detention facilities and the Department of Public Safety. It is un-controverted that Mr. Stone disclosed these matters to Mr. Aleksey and to the court repeatedly; and it is undisputed that Mr. Aleksey was advised by and examined by the Court three times regarding Mr. Stone's other representations."	This statement misconstrues the fact that Mr. Aleksey was never advised regarding pitfalls inherent in these conflicts by either Stone or the Court. To the contrary, the fact that these issues were raised *three times* clearly demonstrates both counsel Stone and the trial court's acute awareness of an inherent actual conflict of interest on Stone's part. Further, the lack of advice provided to Aleksey by independent counsel regarding these conflicts creates a Cronic situation as discussed in Applicant's brief-115-117.
63	Mr. Stone's work for the Insurance Reserve Fund was disclosed to Aleksey repeatedly and he was examined by the Court three times regarding these "other representations."	The IRF work was only discussed during the February 2, 1998 hearing. In neither of the other two hearings (May 20, 1998 and August, 1998) was the IRF work discussed. In fact, Aleksey was never "examined" by the court about the IRF conflict at the February 2, 1998 hearing.
Footnote 9 on page 63	"It should be noted that Stone never served as a prosecutor in Orangeburg County."	A prosecutor represents the interests of the State of South Carolina. See SC Code Section 1-7-350.
71	Sims indicates that he spoke with Stone about the conflicts of interests.	However, during PCR testimony, pages 611-612, Sims indicates he never spoke with Aleksey about these conflicts.
Footnote 10, page 73	It is erroneous information that a venue change to Beaufort County would aggravate the conflict regarding Stone's status as a prosecutor.	A venue change to Beaufort County would have aggravated the conflict as the state has repeatedly sought to lessen an conflict in the case by reference to the fact that Stone did not prosecute in the circuit where Aleksey was tried. See footnote 9, page 63 of this same proposed Order.

Footnote 11, page 73	Brutality claims were not raised because of a lack of evidence and Aleksey's own inconsistent statements.	Stone could not raise these claims whether supported by evidence or not, because of his conflict of interest. He acknowledged that conflict during discussions held with Aleksey concerning lawsuits filed against various government agencies months before the criminal trial. PCR, page 736-737.
Footnote 12, page 74	Stone was not authorized by his criminal appointment to bring a civil suit on Aleksey's behalf.	A court appointment on a criminal matter does not preclude a civil lawsuit on that client's behalf. In fact, the ABA guidelines encourage death penalty counsel to do all necessary on behalf of a client, including filing civil suit to collaterally litigate claims. See ABA guidelines for Death Penalty Cases 2003 Introduction, Hofstra Law Review Vol 31, 913 at 923-924 and note 12 of proposed order. Here, Stone admitted his conflict prevented him from such litigation; thus, preventing Aleksey from the assistance of counsel as envisioned by the ABA guidelines. There was never a waiver of this actual conflict regarding the civil lawsuits and Stone's allegiance to certain state agencies.
Footnote 13, page 74	Aleksey did not present evidence that proper advisement would have led to a different result.	South Carolina law is clear that a per se Sixth Amendment violation occurs when there exists an "actual conflict of interest." See Thomas v. State 551 SE2d 254, 256 (2001)("Although petitioner initially waived a conflict of interest, once it became clear an actual conflict existed due to the plea bargain, counsel should have either withdrawn from representing one or both of them or acquired another waiver covering this specific conflict.") Here, no evidence exists that Aleksey waived any actual conflict which arose due to Aleksey's filing of the lawsuits against the government agencies Stone represented.

75	"This court finds that he has failed in burden of proof under Strickland to specifically assert this specification to the trial judge."	The meaning of this quoted portion of the order is unclear. However, Applicant has always asserted this contention. See Ground H of the Third Amended Application for Post Conviction Relief.
Footnote 15, page 77	The contradiction in the assertion that the confession was the product of physical coercion and a promise of a benefit.	There is nothing mutually exclusive about coercive interrogation tactics involving both offers of physical harm and preferential treatment. In fact, the US Supreme Court recognizes both types of coercive behavior in the discussion contained in Miranda v. Arizona, 384 US 436 (1966).
79	There is no showing that the confession was induced by force.	See Applicant's number 2, Aleksey's letter to Stone where Aleksey indicates that "they beat the shit out of me."
80	The order states Aleksey was never given leniency by being moved.	However, corrections officials commonly move inmates to solitary confinement as punishment. A move in the opposite direction is clearly a reward.
80	Stone did not argue inducement by promise because he believed a Miranda violation warrant was a better argument.	Stone never argued a Miranda violation to the jury. Clearly, counsel is able (and obligated under these facts) to argue the involuntary nature of the confess to the jury as a way of explaining Aleksey's confession.
82-86	Discussion about the argument regarding pre-trial publicity.	The order does not reflect the extent of the pre-trial publicity. Absent is both the number of articles disseminated about this matter and the saturation of this media into the jury's minds. See Applicant's 72 and Applicant's Memorandum, pages 55-71 (56 of 65 potential juror's questioned were exposed to this publicity including all twelve jurors who sat on the case.).

85	Order states that trial counsel did not change venue as a strategic move.	This position defies logic as the deceased was local and Aleksey was not. Coupled with the incredibly voluminous, negative, pre-trial publicity, nothing is reasonable about such a strategy.
91-92	Discussion about the failure of trial counsel to question potential jurors concerning their views concerning the death penalty.	The argument ignores any discussion of US v. Cronic, 466 US 648 (1984), the only case relied upon by Aleksey in his memorandum. (Finding 6th Amendment violation when case not subjected to any meaningful adversarial testing.)
103-110	Discussion about juror 144	The order ignores the thrust of the argument that trial counsel ignored their own judgement to "get rid of her" in preference for a lay person's opinion that this person would be a good juror. See Applicant's 61.
112-116	The proposed order references State v. Hicks for the proposition that a matter must be raised and ruled upon to be properly raised on direct review.	This order ignores the fact the conflict issues were raised, by the prosecutor, and ruled upon by the trial court. This should have been raised on direct appeal by appellate counsel. Further, trial counsel's judgement was blinded by the conflicts at issue before the court.
112-116	The proposed order discusses the conflict of interest issue.	The proposed order completely ignores the issue of the un-waivable nature of the conflict. Unwaivable conflicts have been found in both state and federal court, and by the US Supreme Court. In fact, the "prejudice" concerning an un-waivable conflict is exactly as described by CJ Rehnquist in Wheat when he states that: "(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 severe conflicts." 486 U.S. 153, 160 (1988).

125	The order discusses the prosecutor's proposed rebuttal to Applicant's proffered adaptability evidence.	However, the proposed order ignores the fact that "prison condition" testimony in any fashion is admissible. See State v. Burkhart, 640 SE2d 450 (SC 2007)
126-137	The proposed order suggests that the testimony offered at PCR from the social worker is cumulative to that provided at trial.	However, the proposed order ignores the fact that the mitigating social worker provides expert opinion through psycho-social analysis. This is in contrast to a mere recitation of facts, as provided by Ms. Aleksey.
141	The proposed order finds that trial counsel's strategy was to show that other acts were consistent with their theory that Aleksey was criminal, but non-violent.	However, this is unreasonable because no investigation was done into these other acts. Proper investigation would have shown these women were co-participants in these criminal acts, even if they were the only ones convicted at the time of Aleksey's trial. Further, this strategy is unreasonable because the "door opening" also opened the door to the shooting incident described by Luis Cruz. Trial counsel had no way of knowing that the state would not offer Mr. Cruz's testimony during the guilt phase after trial counsel unreasonably opened the door to Mr. Aleksey's "other acts."
163-164	The proposed order finds that no deficient performance existed concerning the cross-examination of Glory Vee Perez.	To the extent there is a factual finding involved in the decision that prong one of Strickland was not satisfied, an objection is raised. The information gathered by PCR counsel clearly provided substantive evidence of Glory Vee's motive to avoid apprehension as well as her identity as the driver of the automobile (items found on the driver side which belonged to her). Further, this information, at the very least, would have impeached her testimony that Aleksey was the driver and shooter. Applicant's 12-13.

169	The proposed order also finds a lack of prejudice regarding the cross-examination opportunities missed by trial counsel.	However, the paperwork involving the "mutual scam", as referenced in the order, was never presented to the jury. This alone establishes the deficiency of trial counsel in their investigation of Glory Vee. Regarding prejudice, this evidence of the "mutual scam" also defeats the state's "number one reason" offered for Aleksey's guilty. Applicant's brief 7-17.
173-174	The order discusses the "traffic tickets" and the currently still outstanding bench warrant interchangeably.	The order incorrectly confuses the "traffic tickets" involving Glory Vee with the bench warrant issued against her. As the court obviously understands, a bench warrant is independent from the underlying court proceeding from which the bench warrant arose. Trial counsel should have used the citations as a basis to request an abeyance in the proceedings to allow an investigation which would have revealed the existence of the bench warrant. Further, the prosecutor failed to seek out the bench warrant as exculpatory evidence demonstrating GV's competing motive to avoid apprehension and evidence impeaching the state's theory of Aleksey's sole "motive to avoid apprehension." Finally, and most importantly, the bench warrant (not the traffic citations) establish without any dispute that the prosecutor engaged in the provision of false information to the jury during his closing argument. (These tickets provided the prosecutor sufficient notice to seek out the Brady information and to refrain from the provision of the false argument during closing.) Applicant's brief 9-10.

187-189	The order analyzes trial counsel's cross examination of Glory Vee Perez' knowledge of Aleksey's background as a matter of sufficiency of cross examination concerning this issue.	However, PCR counsel object to the order re failure to cross re inconsistent statements about GV's knowledge of Aleksey's actions and character because the issue is not whether trial counsel could have crossed better on this issue but that there was no cross on this issue at all. Applicant's brief 13-16.
191-192	The proposed order appears to find no obligation on the part of the state to seek or provide any information about Dr. Bang to Aleksey's trial counsel.	PCR counsel object to the order to the extent that it incorrectly excuses the state's failure to seek or provide exculpatory evidence about the Dr. Bang scam considering the existence of sheets of blank checks from a doctor's office in another state coupled with the indicia of fraudulent and forged checks re a Fed Credit Union MCAS account of GV's. Applicant's brief 10-16.
192	The proposed order finds that the prosecution adequately notified counsel concerning impeachment material.	Further PCR counsel object to the order because the provision of the letter (re exculpatory evidence) does not provide the exculpatory or impeaching nature of this information. It only demonstrates an attempt to avoid collateral attack or allegations of ethical violations without the true spirit of fairness or *due* process to the trial defendant. The state has the duty to seek out this information, not trial counsel. (Although trial counsel have the duty to conduct a thorough investigation).

194	The order indicates that there are no warrants outstanding against Glory Vee.	Counsel objects to the portion of the order discussing the Summerfield Suites check. The objection is based upon the statement that there existed no warrants for GV as there was clearly a warrant related to a court matter in Hamilton Township. Further, Summerfield Suites obviously desired to be made whole for the bad checks she wrote; thus, this company and its private security were looking for her. Applicant's brief 12.
195	The order discusses Glory Vee's knowledge regarding Aleksey's background.	Also, the order incorrectly states that GV did not know about Aleksey's past when in fact she was a co-participant of his past conduct occurring during the month of December 1997. The then recent past was still Aleksey's past at the time of GV's statement to SLED and at the August, 1998 trial. Applicant's brief 14.
196-198	The order discusses the obligations of a prosecutor under the Brady line of cases.	Counsel object to the order because it misconstrues solicitor Bailey's obligation under Brady. His obligation is to seek out evidence once put on sufficient notice, as here. Further, the obligation to seek out this evidence held by the government goes further than asking the co-defendant murderer who was co-operating with the state.

213	The Order finds that trial counsel adequately cross-examined Sarah Pivero and informed the jury of her involvement in the Lexus scam.	Counsel objects to the court finding that trial counsel demonstrated Pivero's wrongdoing in the purchase of the Lexus. To the contrary, trial counsel allowed Pivero to testify, without challenge, that she was duped into purchasing the Lexus. In fact, she pled guilty to her criminal complicity in that matter. However, the jury was never informed of her conviction of this crime involving dishonesty and moral turpitude. As Aleksey's counsel sought to impeach Pivero's testimony, no reasonable strategy existed to excuse the failure to impeach her with this criminal conviction and/or specific acts involving dishonesty. Applicant's brief 31-34.
214-215	The Order characterizes missed impeachment opportunity of Pivero as harmless.	Counsel also objects to the characterization of the impeachment opportunities missed by trial counsel. First, it must be remembered that the prosecution considered Ms. Pivero's testimony regarding an otherwise uncorroborated "confession" from Mr. Aleksey as the second strongest piece of evidence in the guilt phase of the trial. Second, trial counsel was unaware of the substance of Ms. Pivero's testimony about the alleged "confession" until the trial as Ms. Pivero either failed to complete a written statement to SLED or the state failed to disclosed this crucial piece of discovery. Third, the unused impeachment material goes to the very heart of cross-examination of a witness such as Pivero; attacking her credibility and truthfulness with disclosure of prior acts of dishonesty. Therefore, the characterization of the foregone impeachment opportunity as harmless is clearly inaccurate based upon the record developed during the PCR. Applicant's brief 29-30.

225	The Order accepts statement by trial prosecutor that he didn't try to portray women witnesses as anything other than victims.	Counsel objects to the order's endorsement of the statement by the trial prosecutor that he never sought to portray the various women witnesses as victims of Aleksey, but instead as co-participants. This statement is flatly contradicted by the prosecutor's presentation during the witness examinations and during his statements made to the jury. In contrast to the proposed order, the prosecution's failure to correct the false and misleading statements about the gun purchase, bonding out of Aleksey and his departure from Batkilina's life reinforces the false depiction of Batkilina as victim instead of a co-participant. Applicant's brief 37-39.
225	The Order holds that trial prosecutor did not know about various reports of incidents of which the SLED agents were privy.	As proof of Batkilina's status as a co-participant following both the gun purchase and the bond out date, pcr counsel points to the various police reports regarding the scams perpetrated by Batkilina. These scams occurred many months after these other events. In fact, phone records demonstrate that Aleksey remained in contact with Batkilina at least until weeks before his incarceration on December 31, 1997. Counsel objects to the order's finding that the prosecution did not know about these reports or incidents of which the SLED agents. In fact, an entire US Marshall task force composed of state and federal agents was tracking Ms. Batkilina's crime spree; thus, imputing this knowledge to the very same trial prosecutor who prided himself on traveling to the Northeast to interview witnesses concerning Aleksey's background activities. Applicant's brief 37-39.

227	Order finds Batkilina's testimony did not tie date of purchase of gun to date she last saw Aleksey.	Counsel objects to the portion of the order which states Batkilina's testimony did not tie together the date of purchase of the weapon and the date of Aleksey's departure from her life. At trial, she clearly testified she both purchased the gun and last saw him in November, 1997. Trial transcript page 920.
230	Order finds state did not falsely present dat of gun purchase.	Further, counsel objects to the order's factual finding that the state did not falsely present these dates. In his closing, the state prosecutor clearly argued that Batkilina brought the gun home, Aleksey disappeared and the gun disappeared. In fact, this presentation reinforced the state theory that Aleksey preyed upon women; an issue which itself had no place in the guilt phase of the trial. Trial transcript 1763, lines 17-19.

248	Order makes finding that Ms. Watson was presented as a co-conspirator in the Western Union scam.	Counsel objects to any implied or express finding that the trial prosecutor presented Ms. Watson as a co-participant in the Western Union scam. In contrast, the prosecutor's questions clearly indicate his portrayal of her as a victim of this scam. For example, during his examination of Ms. Watson, the prosecutor refers to the money stolen from Mr. Watson by reference to what the Western Union scan "cost" her. If she was a co-participant, the question would have concerned how much she benefitted or profited from the scam against her husband's credit card. Further, the SLED investigators clearly knew of Ms. Watson's involvement in this fraud. However, the government never divulged any of the letters from West Union or the tape entitled "Lisa Watson Fraud" which was kept in the SLED agent's secret file in his barn in rural South Carolina. Now that the Order correctly notes this information should have been divulged to trial counsel, the Order is only objectionable for not clearly noting the material nature of this information towards the impeachment of Lisa Watson. Her testimony about Aleksey's theft of the car is clearly untruthful in light of her possession of the car during the Western Union fraud which followed her report of the car as stolen. While unclear why the "stolen" nature of the car had any bearing on the issues in the guilt phase, this false testimony went uncorrected by either the state or trial counsel. Considering the above, finding that the failure to disclose the Western Union evidence is not reversible defies logic.

257	Once again, Order adopts trial prosecutor's statement that women were never presented as victims, but as co-conspirators.	Again, pcr counsel object to the proposed order's endorsement of the trial prosecutor's statement that he only presented the former girlfriends as co-participants in Aleksey's prior bad acts. In fact, these women, Farrell included, were portrayed as victims. The prosecutor clearly urged the jury to consider Aleksey's victimization of these women when determining the appropriate penalty. Trial counsel objected to this argument in favor of a sentence of execution based upon the treatment of the girlfriends, but this objection was overruled. See trial transcript, generally.
259	Order characterizes Jamie Ferrel's claim regarding who withdrew the money as not a false statement.	There is no question that the state's argument about Farrell being a victim of the commerce bank scam is a false statement. Further, the state can not claim ignorance regarding this information when it chose to present Farrell's testimony concerning this crime and her arrest as evidence of Aleksey's character. The only relevance of this evidence to the penalty phase is to demonstrate Aleksey's character. The state urged that this evidence demonstrated his character of victimizing women. This contradicts the pcr testimony of the trial prosecutor that this information portrayed Farrell as a co-participant. Finally, her false trial testimony regarding Aleksey's withdrawal of the money went uncorrected despite Farrell's SLED statement to the contrary. Applicant's brief 47.

IV. Conclusion.

WHEREFORE, for all of the foregoing reasons, this Court should abandon its intention to adopt the state's proposed order, perform its own independent, objective review of the evidence and law, and generate its own order reflecting the results of that review.

Respectfully submitted,

DAVID TARR
Elmwood Avenue
Columbia, SC
(803) 238-7967

JAMES A. BROWN, JR.
Law Offices of Jim Brown, P.A.
1111 Bay St., P.O. Box 592
Beaufort, SC 29901-0592
(843) 470-0003

BY: _____
ATTORNEY FOR APPLICANT

July 30, 2008.

STATE OF SOUTH CAROLINA COUNTY OF ORANGEBURG BAYAN ALEKSEY, #5059 *Applicant,* v. STATE OF SOUTH CAROLINA *Respondent.*	IN THE COURT OF COMMON PLEAS CA No. 00-CP-38-628 APPLICANT'S OBJECTIONS TO THE COURT'S INTENTION TO ADOPT THE STATE'S PROPOSED ORDER

I, James A. Brown, Jr., hereby certify that I have served upon the attorney for the respondent one (1) copy of Applicant's Objections to the Court's Intention to Adopt the State's Proposed Order, with supporting exhibits, in the above-captioned case by depositing a copy of same in the United States Mail, first class, postage pre-paid, addressed as follows:

Donald Zelenka, Esq.
Assistant Deputy Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

This the 30 day of July 2008, in Columbia, South Carolina.

JAMES A. BROWN, JR

STATE OF SOUTH CAROLINA COUNTY OF ORANGEBURG **BAYAN ALEKSEY**, #5059 *Applicant,* v. **STATE OF SOUTH CAROLINA** *Respondent.*	IN THE COURT OF COMMON PLEAS CA No. 00-CP-38-628 **MOTION TO CLARIFY THE STATE'S POSITION REGARDING A PROSECUTOR'S ELIGIBILITY FOR APPOINTMENT IN LIGHT OF CONFLICTS OF INTEREST**

THIS MOTION IS BROUGHT BEFORE THIS COURT, on behalf of Applicant by his attorneys, to require the State of South Carolina to clarify its position regarding a state prosecutor's eligibility for appointment as counsel for a capital defendant in light of conflicts of interests. Supporting this motion are pertinent attachments. Applicant requests a court hearing to resolve these issues on the record.

South Carolina Appellate Court Rule 608 and the Case at Bar

The Court should require that the State of South Carolina clarify certain testimony regarding the application of South Carolina Appellate Court Rule 608 to the appointment of counsel Stone as Aleksey's trial counsel in 1998. Alternatively, the Court should strike all testimony relating to the requirement of counsel Stone to place his name on an appointment list for death penalty cases during the year 1998. Finally, all references to an appointment list or SCACR Rule 608 should be removed from any Order regarding the judgement in this matter and all rulings regarding conflicts of interests should be reconsidered by the Court in light of the correction of the State's position.[1]

---

[1]The Applicant does not intend for this Motion to waive any objections filed regarding the State's proposed Order. These objections were filed by mailing on July 3, 2008. Further, as

To begin, in testimony provided to this Court, in the State's Post-Hearing Memorandum in Opposition to Application for Post-Conviction Relief, and in the State's proposed Order Denying Post-Conviction Relief, reference is made to trial counsel Stone's obligation 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." State's Post-Hearing Memorandum, page 35, referencing PCR transcript page 985. However, South Carolina Appellate Court Rule 608 was not enacted until March 4, 1999 (more than six months after Aleksey's trial). Further, this rule did not apply until July 1, 2000. In fact, only the death penalty statute itself, SC Code Section 16-3-26 (1997 version), applied to the appointment of counsel in death penalty proceedings during the year 1998. Further, this statute provided a mechanism for counsel to remove themselves from appointment in a death penalty matter.

In contrast, during testimony provided during the PCR merits hearing, trial counsel Stone testified regarding his appointment in this death penalty matter that "....what I did on that was simply look at the court *rules* which told me as far as being appointed, put myself on the appointment list and there was clearly the prohibition from me taking cases inside the Fourteenth Circuit and a requirement on the other end of that to put my name on the list for conflicts outside of the circuit in which I practiced." PCR, page 985, lines 1-8. Later, Stone stated: "[m]y experience was probably more with the court *rules* that I think, and I still think, require me actually to put myself on conflict lists outside of the places in which I have a conflict. And I may be reading that *rule* wrong, but that is at least my impression of it and when I studied that particular issue, that's the way I understood it." PCR, 1130, l. 19-25. (emphasis added).

---

indicated in the Applicant's objections, all argument, motions and positions are incorporated by reference into that written set of objections.

In a similar vein, opposing PCR counsel Asst. Deputy Attorney General Zelenka questioned Applicant's witness Professor John P. Freeman regarding counsel Stone's "...requirement as a matter of law to make himself available for appointment in criminal cases...." PCR, 1467, l. 10-12. This questioning by counsel Zelenka of Professor Freeman concerning the application of Rule 608 to Stone's appointment is evidenced by several pages in the transcript. PCR, 1467-1470. In fact, counsel Zelenka asked Professor Freeman whether: "...there's no doubt that he [Stone] would be required to subject himself to appointment." PCR, 1468, l. 12-13.

Likewise, the State relies upon inaccurate references to SCACR Rule 608 in its Post-Hearing Memorandum in Opposition to Post-Conviction Relief (hereinafter MO). During the argument concerning Stone's conflict between his loyalties as defense counsel for Aleksey and his service as a state prosecutor, the State references the "requirement that he put his name on the list for conflicts outside of his circuit." State's MO, p. 35. This memorandum continued to assert that "Rule 608 required non-full time prosecutors to make themselves available for appointment in criminal cases." State's MO, p. 43. In fact, the State specifically asserted that "Stone was appointed to represent Aleksey pursuant to Stone's compliance with Rule 608, SCACR." MO, p. 45. The State's memo also urged that Stone's alleged obligation under Rule 608 colored his ability to discern the ethical prohibitions found in ethics opinions barring a prosecutor from representing criminal defendants in any courts. State's MO, p. 48 and PCR, 1465, l. 11-22 referencing SC Bar Ethics Opinion 77-2, 82-26 and ABA Formal Opinion 142 and 262.

The State's proposed Order adopted the erroneous application of this Rule wholesale. First, there is reliance upon Rule 608 appointment during discussion of Professor Freeman's testimony. State's proposed Order, p. 43. Again, the State's proposed Order indicated that

"...Stone was appointed to represent Aleksey pursuant to Stone's compliance with Rule 608, SCACR....Stone was not exempt from appointment , as a matter of statutory law, based upon his assignment." State's proposed Order, p. 45. Later, the Order stated that "...he [Stone] was aware he was not exempt from court appointments under Rule 608 and he was required to place his name on the appointment list..." State's proposed Order, p. 46, citing PCR, pages 985, 1131-1132.

Because Rule 608 was not enacted for more than a year after Stone's appointment and did not take effect until nearly two years after Aleksey's trial, this testimony and these assertions are clearly wrong and patently false. In fact, SC Code Section 16-3-26 (1997 version), which governed appointment of defense counsel in capital proceedings in 1998, provided a mechanism for the relief of counsel from these appointments. Specifically, this section of law stated: "[i]n the event the court appointed counsel notifies the chief administrative judge in writing that he or she does not wish to provide representation in a death penalty case the chief administrative judge shall advise the Office of Indigent Defense which shall forward a name or names to the chief administrative judge for consideration." SC Code Section 16-3-26 (G).

The Dichotomy Regarding Eligibility for Appointment

Nearly as troubling as the reliance upon SCACR Rule 608, referenced above, is the state's position that Stone's conflict in Aleksey did not bar Stone's eligibility for appointment. This position is particularly troubling in light of the position taken by both the state's prosecutors at both the circuit and municipal levels regarding guardian ad litem appointments. Finally, the State's handling of a conflict scenario in the Fourteenth Judicial Circuit is contrary to the State's position taken in the PCR in the case at bar.

As referenced above, the State contends in this matter that Stone was not only eligible for

appointment to represent Mr. Aleksey, but was required to do so. However, regarding eligibility for appointment as a guardian ad litem (GAL), the 16 Circuit prosecutors in South Carolina unanimously assert that a "tremendous and very real potential for conflicts of interests in violation of the South Carolina Rules of Professional Conduct" would arise if prosecutors where required to accept GAL appointments. Letter from the Solicitor's Association of South Carolina, dated January 15, 2008, attachment 1. This sentiment is echoed at the summary court level by the Municipal Attorney Association who announce that "...appointments in cases representing parties against law enforcement is an apparent conflict of interest." Letter from the Municipal Attorney Association of South Carolina to the SC Bar House of Delegates, dated January 17, 2008, attachment 2.

It defies logic to believe that conflicts arising in the class of cases covered by a GAL appointment disable a state or municipal prosecutor from eligibility for appointment due to conflict of interest concerns but a criminal defendant, charged with the capital murder of a state highway patrol trooper, is subject to representation by similarly situated counsel. Aggravating this doublespeak is the fact that this contrary position regarding the disabling nature of GAL appointments is asserted by both the First Circuit Solicitor who is still listed as counsel for the State in the case at bar and the Fourteenth Circuit Solicitor, who served as Aleksey's trial counsel while suffering from the identical conflict. Undersigned counsel is unable to reconcile these contrary positions and ask that the Attorney General expressly do so or withdraw and modify the State's position in the case at bar.[2]

---

[2]Undersigned counsel understands that the State of South Carolina may just take these contrary positions as a matter of convenience or self-interest. While estoppel or claim preclusion generally bars such flip-flopping by a litigant, due process certainly limits the State, as ministers of fairness, from doing so. See generally, US v. Brady, 710 FSupp 290 (Dist. of Colorado 1989)(Violation of due process for the state to hold an individual to a standard contrary to

The Juan Salvador Solis Matter and Recusal Based Upon Conflict of Interest

Finally, the Court should consider the situation regarding conflict of interests in the prosecution and defense of Juan Salvador Solis.[3] In January 1998, Juan Salvador Solis was arrested for Obtaining Property under False Pretenses. This arrest concerned Juan Salvador Solis' actions in Beaufort County, South Carolina.

Tom Johnson, an attorney in Jasper County, represents Mr. Juan Salvador Solis in a civil matter pending in Jasper County. Mr. Johnson also serves as a part-time prosecutor in Jasper County. According to news accounts, Mr. Johnson could not serve as Mr. Salvador Solis' attorney in the criminal matter pending in Beaufort County because his service as a part-time prosecutor in Jasper County created a "conflict of interest." See *Is Boyfriend in Quints Case only 16?*, Beaufort Gazette, January 31, 2008.

Further, the Fourteenth Circuit Solicitor, Duffie Stone recused his entire office from the prosecution of Mr. Salvador Solis, citing a "conflict of interest." Initially, Stone declined to comment regarding this conflict of interest. See *Solicitor Hands Quints Case Off to Attorney General*, Beaufort Gazette, February 22, 2008. However, he later stated this recusal was made to "avoid even the appearance of impropriety." See *Solicitor Explains Conflict in Quintuplets Fraud Case, Beaufort Gazette*, February 23, 2008.

Like the contradictory positions taken regarding the GAL appointments, the contrary positions taken by the State of South Carolina, through Solicitor Stone's actions, in the Salvador Solis case and the State's position minimizing any conflict issues concerning the representation

---

position provided by a different state actor.)

[3]See articles from the Beaufort Gazette dated January 31, 2008, February 22, 2008, February 23, 2008 and June 28, 2008, attachments 3.

of Aleksey in a death penalty matter concerning the death of a state highway patrol trooper defy logic and common sense.

Conclusion

Because there is an obligation placed upon all counsel to ensure that only truthful testimony is placed before the court, the undersigned counsel request that this Court reconvene the witnesses and the parties to correct any incorrect information provided to the court by the testimony, in the briefs and that the Court reassess its rulings which rely expressly or implicitly upon this testimony.

Respectfully submitted,

DAVID TARR
1313 Elmwood Drive, Suite H.
Columbia, SC 29201
(803) 238-7967

JAMES A. BROWN, JR.
Law Offices of Jim Brown, P.A.
1111 Bay St., P.O. Box 592
Beaufort, SC 29901-0592
(843) 470-0003

BY: _____
ATTORNEY FOR APPLICANT

July 8th, 2008.

Solicitors' Association of South Carolina

Post Office Box 11251
Columbia, South Carolina 29211-1251

David M. Pascoe, Jr.
First Judicial Circuit

Barbara R. Morgan
Second Judicial Circuit

C. Kelly Jackson
Third Judicial Circuit

Jay E. Hodge, Jr.
Fourth Judicial Circuit

W. Barney Giese
Fifth Judicial Circuit

Douglas A. Barfield, Jr.
Sixth Judicial Circuit

Harold W. Gowdy, III
Seventh Judicial Circuit

Jerry W. Peace
Eighth Judicial Circuit

Scarlett A. Wilson
Ninth Judicial Circuit

Christina T. Adams
Tenth Judicial Circuit

Donald V. Myers
Eleventh Judicial Circuit

E.L. Clements, III
Twelfth Judicial Circuit

Robert M. Ariail
Thirteenth Judicial Circuit

Isaac McDuffie Stone, III
Fourteenth Judicial Circuit

J. Gregory Hembree
Fifteenth Judicial Circuit

Kevin S. Brackett
Sixteenth Judicial Circuit

MEMORANDUM

TO: Members of the South Carolina Bar House of Delegates

FROM: Jay E. Hodge, Jr.
President, Solicitors' Association of South Carolina

RE: Proposed Amendments to Rule 608

DATE: January 15, 2008

On behalf of the Sixteen Judicial Circuit Solicitors, I am writing to voice our strong opposition to the proposed amendments to Rule 608 that, *inter alia*, removes the exemption for government attorneys.

We oppose the removal of the exemption for government attorneys for the following reasons.

- **Conflicts of Interest.** There is a tremendous and very real potential for conflicts of interests in violation of the South Carolina Rules of Professional Conduct through the appointment of government attorneys. For example, the cases in which guardians *ad litem* (GALs) are appointed are generally family court cases, and a large number, but not all, of those cases involve DSS/allegations of abuse or neglect. The potential conflict arises in those cases due to the possibility that the government attorney may be employed by an agency that will be simultaneously or subsequently prosecuting, defending or presiding over a related criminal matter.
- **Violation of State Ethics Act and/or Personnel Policies.** While private practitioners have the ability to use the resources of their law firms when handling appointed cases, government attorneys do not. It would be a violation of Section 8-13-700 and/or individual agency personnel policies in most instances for government attorneys to use any agency resources (time, telephones, computers, printers, copiers, office space for meetings, etc.).
- **Civil Liability.** Government attorneys do not maintain their own malpractice insurance. And, as of today's date, the Bar has not received a binding, definite answer from its insurance company as to whether the Bar's *Pro Bono* Program provides coverage for attorneys appointed under Rule 608 either (1) to serve as GALs or attorneys (and who accept the fees offered by law through OID), or (2) to serve as GALs regardless of

whether they accept fees. Moreover, even if the appointed attorneys are covered, it is not clear if the amount of coverage provided meets the maximum recoverable amount under either state or federal law. No rule requiring government attorneys to accept court appointments should even be considered without the inclusion of language providing that government attorneys cannot be appointed under until such time as the Legislature provides coverage for any civi. claim that may be filed (above and beyond what the Bar's malpractice policy covers).

- **Lack of Operating and Trust Accounts.** Government attorneys also do not have professional operating accounts and trust accounts from which they can draw to cover expenses associated with handling an appointed case or through which they can process any payments received from the Office of Indigent Defense (OID). OID does not always pay promptly or pay the entire amount that has been requested or ordered (in fact, according to a telephone conversation with OID staff today, government lawyers who must go to a Kinko's ™ to use a computer or print a document may not be completely reimbursed for those expenses). Most government attorneys are not going to be able to outlay money for expenses (including investigators, court transcripts, copies, etc.) and wait to be reimbursed without it affecting their ability to pay their owr personal bills. Moreover, in cases where not all expenses are covered, it is questionable whether the average government attorney – who is not incorporated – will be able to deduct un-reimbursed expenses as business or charitable expenses.

Please understand that I and the other Solicitors, as well as the attorneys on our staffs, believe very strongly in the obligation to serve the public. However, under the Rules of Professional Conduct (Rule 6.1), the representation of individuals is not the only way in which an attorney's *pro bono* obligation may be satisfied. Under the Rules, the obligation may be satisfied by involvement in bar activities aimed at either educating the Bar (to improve the system and administration of justice) or the public. That would include involvement in the work of the committees and sections of the State and other Bars, serving on the faculty of CLE programs, writing education materials, serving as screeners for legal clinics, and working with school children (on any of the number of projects the Bar has developed through the years – mock trial coaching and judging, participating in programs improving literacy, etc.). These are the avenues, in addition to community activities, that government attorneys have historically taken to satisfy their *pro bono* obligation.

The Sixteen Judicial Circuit Solicitors ask that the House of Delegates vote against the proposed amendments to Rule 608. We thank you for your attention and consideration, and we ask that you contact us if you have any questions or need further information.

4865

City of Aiken

Post Office Box 1177
Aiken, S.C. 29802

Aiken All-America City 1997

January 17, 2008

SC Bar House of Delegates
C/O SC Bar
PO Box 608
Columbia, SC 29201

Re: Proposed Rule 608 Amendments Regarding
Full-Time Government Municipal Lawyer Appointments to Litigants

Fellow Bar Members:

The Municipal Association of South Carolina's Municipal Attorneys Association has been provided with a copy of proposed changes to Rule 608, SCACR.

We were dismayed to read that the exemption for local government attorneys who work full-time is proposed to be removed. Our initial dismay has given way to grave concerns about the implications of this proposed revision. We are also unclear, from the draft rationale in support of these changes, as to whether full-time local government attorneys were contacted before this revision was included as a proposed rule change.

First, the proposal before you purports to convert a public asset – public lawyers' time and advice – to private use, in direct contravention of federal, state, and local laws. Taxpayers will not have any say in this reappropriation of public property if it is done by a mere rules change.

Second, our local government insurers have flatly stated our proposed appointed case work will not be covered by our general liability, or any other, policy of insurance.

Third, many of our full-time local government attorneys are also prosecutors in municipal or other courts. We note that you have retained the exemptions for circuit solicitors and their deputies. Since many city court attorneys work so closely with these circuit solicitors as well as law enforcement officers, appointments in cases representing parties against law enforcement is an apparent conflict of interest. Furthermore, defendants in Municipal Court prosecutions will be visiting their city attorney-prosecutors as appointed clients if the change is approved.

Fourth, many municipal attorneys handle document requests and U.S.C. Section 1984 – based lawsuits filed against law enforcement and other city officials. Appointment of attorneys for these clients puts municipal attorneys into a severely untenable position with the folks with whom they usually work every day.

RLP
#1

Fifth, as many Delegates can appreciate, the practice of public law is already – in and of itself – an increasingly demanding public service.

Sixth, our full-time public service work as government attorneys, does not lend itself to our being able to afford to rent additional office space or carve out hours from already limited personal time to meet with appointed clients and attend hearings, pay thousands of dollars out of personal funds for legal malpractice liability insurance for four clients a year, or to focus the attention needed for, or demanded by, these appointed clients.

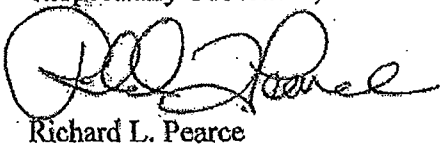
Seventh, full-time government lawyers cannot simply "seek inactive status" as your packet cover memo suggests. We must remain active members in order to competently represent our public and elected officials with a myriad of legal issues in a host of different settings including trials as well as prosecuting defendants in Municipal and Common Pleas courtrooms.

Local government lawyers already have, and continue to have, much to contribute to the legal system in South Carolina within their existing full-time responsibilities. For the reasons mentioned here, and the plain fact that we are simply not equipped – as full-time government attorneys – to handle this proposed reappropriation of public assets, we simply ask to be allowed to continue our mandated work without the peril of being pulled away from it for these proposed appointments.

Our plate is full, please do not shatter it.

We respectfully request that the exemption under Rule 608 for full-time public attorneys remain intact.

Respectfully Submitted,

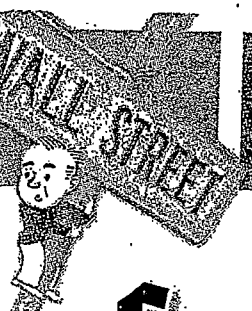


Richard L. Pearce
President, Municipal Attorneys Association,
City Solicitor and Staff Attorney
City of Aiken, South Carolina

cc: SC Bar Board of Governors
Robert Wells, SC Bar Executive Director
Charmy Medlin, SC Bar Membership Services Director
Howard Duvall, MASC Executive Director
Municipal Attorneys Association of South Carolina

HIGH: 61
LOW: 39
Weather, 8B

FED SLASHES RATES AMID RECESSION FEARS 5B



McCORMICK GUILTY IN WIFE'S MURDER 2A

The Beaufort Gazett

THURSDAY, January 31, 2008 | beaufortgazette.com | Established in 1897 25 cents

IS BOYFRIEND IN QUINTS CASE ONLY 16?

Lawyer says medical records list age as 16, not 22 or 24 as suspect stated

By JEREMY HSIEH
jhsieh@beaufortgazette.com
843-986-5548

The boyfriend of the woman who police say lied about being pregnant with quintuplets in order to solicit donations may be six years younger than he told authorities — making him a minor — his lawyer in an unrelated civil case said Wednesday.

Police arrested the couple, Juan Salvador Solis and Nancy Cantu, both of 45 Youmans Drive on Lady's Island, on Monday and charged them with obtaining property under false pretenses.

Tom Johnson's Hardeeville law firm has been representing Solis since 2006, when, Johnson claims, a defective nail gun misfired, blinding Solis in one eye. They are suing the makers of the nail gun. Medical documents the firm is using in the case say Solis was born in April 1991, making him 16, Johnson said.

"We've got the same rumor," said Beaufort County Sheriff P.J. Tanner. "We haven't been able to confirm anything. We're basically going by what they're telling us" as the investigation continues.

Before the arrests, Solis said he was 24. Beaufort County Detention Center logs identify him as 22. Both Solis and Cantu are being held on $25,000 bond in the detention center and investigators are trying to determine the total value of goods and money the couple received, which affects the prison time they face, if convicted.

Police think the couple received at least $1,000 in goods, which carries a

Please see QUINTS on 7A

Cantu

DONATE TO THE COUPLE

Call the Beaufo dispatch center 524-2777 or inv Jeff Purdy of th fort County She Office at 843-4

4867

County staff reconsidering

Fast food to go

4 88¢

FED SLASHES RATES AMID RECESSION FEARS 5B

McCORMICK GUILTY IN WIFE'S MURDER 2A

The Beaufort Gazette

THURSDAY, January 31, 2008 | beaufortgazette.com | Established in 1897 25 cents

OYFRIEND IN QUINTS CASE ONLY 16?

says medical records list age as 16, not 22 or 24 as suspect stated

H
uzette.com

f the woman who po-
being pregnant with
der to solicit dona-
ears younger than he
making him a minor
unrelated civil case

the couple, Juan Salvador Solis and Nancy Cantu, both of 45 Youmans Drive on Lady's Island, on Monday and charged them with obtaining property under false pretenses.

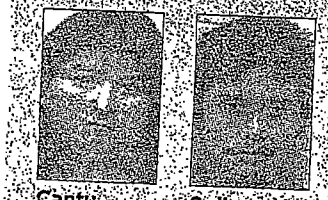
Tom Johnson's Hardeeville law firm has been representing Solis since 2006, when, Johnson claims, a defective nail gun misfired, blinding Solis in one eye. They are suing the makers of the nail gun. Medical documents the firm is using in the case say Solis was born in April 1991, making him 16, Johnson said.

"We've got the same rumor," said Beaufort County Sheriff P.J. Tanner. "We haven't been able to confirm anything. We're basically going by what they're telling us" as the investigation continues.

Before the arrests, Solis said he was 24. Beaufort County Detention Center logs identify him as 22. Both Solis and Cantu are being held on $25,000 bond in the detention center and investigators are trying to determine the total value of goods and money the couple received, which affects the prison time they face, if convicted.

Police think the couple received at least $1,000 in goods, which carries a

Please see QUINTS on 7A



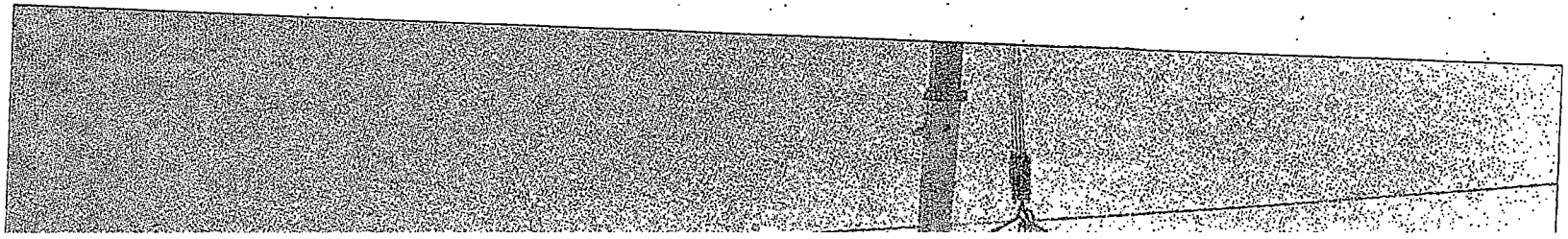
Cantu Solis

DONATE TO THE COUPLE?

Call the Beaufort County dispatch center at 843-524-2777 or investigator Jeff Purdy of the Beaufort County Sheriff's Office at 843-470-3483.

staff
ering
mplex

Fast food to go



QUINTS

Continued from 1A

maximum sentence of five years. If that figure exceeds $5,000, they face up to 10 years, Tanner said.

But if Solis is a minor, he could be sent to a juvenile detention facility in Columbia and his case could fall under the jurisdiction of the Department of Juvenile Justice.

In the meantime, if either Solis or Cantu is able to come up with the bond money before their Feb. 22 court date, they will not be released, pending questioning by U.S. Immigration and Customs Enforcement.

In a Jan. 11 interview, Cantu said in Spanish she was in the country legally, though Solis was not.

Johnson's firm cannot represent Solis in his criminal case because Johnson is a part-time solicitor in Jasper County, a conflict of interest, but he offered the unverified information because he "felt there was a critical part of the story being left out — if a 15- or 16-year-old child is being manipulated" by an older woman.

Cantu's stated age also has varied. Before her arrest, she said she was 36. In Beaufort County EMS reports documenting the four 911 calls she made from Dec. 11 to Jan. 6, her age is listed as 25 in three cases and 37 in the other.

In late December, Cantu called the Spanish-language Radio Sol, based in Bluffton, crying and claiming she was 19, going hungry, had no money or car and was expecting quintuplets, station director Esperanza Ebersole said Wednesday.

Also Wednesday, Tanner said several agencies could file civil suits against the couple to seek restitution for various agencies, such as Beaufort Memorial Hospital and Beaufort County EMS, if the criminal case doesn't address repayment for those entities.

"There's accou
he said, referri
spent investigati
preparing for qu
It seems unlil
come in the fo
Cantu and Solis
any income or pr
There are alt
though.
"There's a lot
streets of Beaufo
to be picked up,"

A tall order for zookeepers

JON SUPER | The Associated Press

A 10-day-old Rothschild giraffe named Margaret licks her keeper, Tim Rowlands, at Chester Zoo, Chester, England, on Wednesday. The 5-foot, 75-pound giraffe was born two weeks early and having difficulty suckling, so keepers have been hand-rearing her.

COMPLEX

Continued from 1A

a list of projects approved Monday by the County Council.

Other emergency services offices — including a Beaufort County Emergency Management building, an auxiliary solicitor's office and an EMS station — would either occupy existing structures or be built as needed, Tanner said. Those buildings and offices now are part of the government complex on Ribaut Road.

"It potentially could be a one-stop shop," Tanner said. "What we need is the County Council to look at this as a positive opportunity to expand our services. It would take

center is pr
about 400 t
Last yea
passed thro
of Tuesday,
ter housed
said. The ce
ity is 255 bed
The bulk
about 290, a
Foot said.
housed in th
than two yea
Center staf
to house mor
in the center's
cells while the
inmates, Foot
"We're havi
internally ho
sometimes," h
frustrating be
to make

JINTS

nued from 1A

ıum sentence of five years. igure exceeds $5,000, they face) years, Tanner said.

Solis is a minor, he could be a juvenile detention facility in ɔia and his case could fall under sdiction of the Department of e Justice.

e meantime, if either Solis or Cantu is able to come up with the bond money before their Feb. 22 court date, they will not be released, pending questioning by U.S. Immigration and Customs Enforcement.

In a Jan. 11 interview, Cantu said in Spanish she was in the country legally, though Solis was not.

Johnson's firm cannot represent Solis in his criminal case because Johnson is a part-time solicitor in Jasper County, a conflict of interest, but he offered the unverified information because he "felt there was a critical part of the story being left out — if a 15- or 16-year-old child is being manipulated" by an older woman.

Cantu's stated age also has varied: Before her arrest, she said she was 36. In Beaufort County EMS reports documenting the four 911 calls she made from Dec. 11 to Jan. 6, her age is listed as 25 in three cases and 37 in the other.

In late December, Cantu called the Spanish-language Radio Sol, based in Bluffton, crying and claiming she was 19, going hungry, had no money or car and was expecting quintuplets, station director Esperanza Ebersole said Wednesday.

Also Wednesday, Tanner said several agencies could file civil suits against the couple to seek restitution for various agencies, such as Beaufort Memorial Hospital and Beaufort County EMS, if the criminal case doesn't address repayment for those entities.

"There's accountability issues here," he said, referring to the man-hours spent investigating the false claim and preparing for quintuplets.

It seems unlikely restitution will come in the form of money, since Cantu and Solis said they do not have any income or property.

There are alternatives to cash, though.

"There's a lot of trash along the streets of Beaufort County that needs to be picked up," Tanner said.

ll order for zookeepers

JON SUPER | The Associated Press

A 10-day-old Rothschild giraffe named Margaret licks her keeper, Tim Rowlands, at Chester Zoo, Chester, England, on Wednesday. The 5-foot, 75-pound giraffe was born two weeks early and having difficulty suckling, so keepers have been hand-rearing her.

COMPLEX

Continued from 1A

a list of projects approved Monday by the County Council.

Other emergency services offices — including a Beaufort County Emergency Management building, an auxiliary solicitor's office and an EMS station — would either occupy existing structures or be built as needed, Tanner said. Those buildings and offices now are part of the government complex on Ribaut Road.

"It potentially could be a one-stop shop," Tanner said. "What we need is the County Council to look at this as a positive opportunity to expand our services. It would take care of our needs for the next

center is predicted to rise by about 400 this year, he said.

Last year, 7,166 inmates passed through the center. As of Tuesday, the detention center housed 360 inmates, Foot said. The center's rated capacity is 255 beds, he said.

The bulk of those inmates, about 290, are awaiting trial, Foot said. Some have been housed in the center for more than two years.

Center staff has been forced to house more than 40 inmates in the center's gym and holding cells while they juggle problem inmates, Foot said.

"We're having to rearrange internally how we do things, sometimes," he said. "It's very frustrating because we have to make sure those people

4871

bg beaufortgazette.com

Solicitor hands quints case off to attorney general

Published Fri, Feb 22, 2008 12:00 AM
By JEREMY HSIEH
jhsieh@beaufortgazette.com
843-986-5548

Citing a conflict of interest, the state's local prosecutor is handing the quintuplets fraud case off to the South Carolina attorney general's office.

Mark Plowden, spokesman for the attorney general's office, said his office received the case Thursday and that it will be reviewed "to determine what, if any, prosecutorial action is warranted," a process that he expects to take weeks.

Solicitor Duffie Stone of the 14th Judicial Circuit could not be reached for comment. Heather Strickland, a spokeswoman for the solicitor's office, said she cannot elaborate on the conflict of interest for legal and ethical reasons. Plowden said he doesn't know the nature of conflict and that his office typically doesn't delve into them.

The case, which is under investigation, involves Erika Nieves-Abrigo, aka Nancy Cantu, and Juan Salvador Solis, both of 45 Youmans Drive on Lady's Island. In December, they claimed to be pregnant with quintuplets and investigators believe they received more than $1,000 in cash and material donations as their story spread.

A voluntary ultrasound the Beaufort County Sheriff's Office arranged proved Nieves-Abrigo was not pregnant at all, leading to their arrest Jan. 28. They are charged with obtaining goods under false pretenses and are being held in the Beaufort County Detention Center.

Investigators said last week that Nieves-Abrigo is also wanted in Florida, where she is accused of unlawfully collecting welfare benefits worth $2,375 from 1999 to 2000. She was ineligible because she was simultaneously collecting welfare benefits from Georgia.

Nieves-Abrigo and Solis are due to appear in court today for a pre-trial roll call.

bg beaufortgazette.com
The Beaufort Gazette

Solicitor explains conflict in quintuplets fraud case

Published Sat, Feb 23, 2008 12:00 AM
Staff reports

The solicitor's office in the 14th Judicial Circuit won't prosecute the quintuplets fraud case because one of its part-time employees is representing one of the defendants in an unrelated civil case, Solicitor Duffie Stone said.

"Everything appears to be unrelated, but to avoid even the appearance of impropriety, I've asked the attorney general's office to come in and prosecute the case," Stone said.

The case, which is under investigation, involves Erika Nieves-Abrigo, aka Nancy Cantu, and Juan Salvador Solis, both of 45 Youmans Drive on Lady's Island. In December, they claimed to be pregnant with quintuplets and investigators believe they received more than $1,000 in cash and material donations as their story spread.

A voluntary ultrasound the Beaufort County Sheriff's Office arranged proved Nieves-Abrigo was not pregnant at all, leading to their arrest Jan. 28. They are charged with obtaining goods under false pretenses and are being held in the Beaufort County Detention Center.

The part-time solicitor, Tom Johnson, has a law firm in Hardeeville that has represented Solis since 2006, when a defective nail gun misfired and blinded Solis in one eye, Johnson said. They are suing the makers of the nail gun.

After the arrest, Johnson spoke up about inconsistencies with Solis' age. Johnson said medical documents state that Solis is 16, but detention center and court records list him as 22.

4873

bg beaufortgazette.com
The Beaufort Gazette

Five months in, little action in quints case

Published Sat, Jun 28, 2008 12:00 AM
By JEREMY HSIEH
jhsieh@beaufortgazette.com
843-986-5548

Saturday marked the fifth month in lockup for the Lady's Island couple that claimed to be pregnant with quintuplets to allegedly scam the community out of more than $1,000 in money and goods.

The well-publicized criminal case appeared open-and-shut -- investigators with the Beaufort County Sheriff's Office got the "mother" in the scheme, Erika Nieves-Abrigo, aka Nancy Cantu, to have an ultrasound in January, revealing she was not pregnant at all -- but the South Carolina Attorney General's office won't even confirm it will prosecute.

In February, spokesman Mark Plowden said the case was "under review to determine, what, if any, prosecutorial action is warranted," a position he reiterated Thursday.

The couple claimed to be pregnant with quintuplets in December and received gifts and donations as their story spread, according to police.

Plowden said verifying the age of Juan Salvador Solis, the "father" in the case has been a key holdup. The parties were in court for two weeks this month because Solis' side wants him treated as a minor and his case moved to family court.

"Problem is, you can't move someone who is potentially an adult into a youth prison without knowing that as a fact," Plowden said. "Where we are now, we have now approached the Mexican government in an attempt to determine what his true age is."

Before his arrest, Solis said he was 24. Beaufort County Detention Center logs put his age at 22 at the time of his arrest. Hardeeville lawyer Tom Johnson, whose firm is representing Solis in an unrelated personal injury case, said medical documents the firm is using say he was born in April 1991, making him 16 when he was arrested.

Plowden said "twists and turns" like this make it tough to pin an expected timeline to cases.

"Just because a case is here, you can't turn around and prosecute next week. You've got to make sure defendants are properly charged before we get to court," he said. "We have never, and will never, guess how quickly a case will move."

The federal Immigration and Customs Enforcement agency was also tapped in the case to determine Solis and Nieves-Abrigo's immigration status, though their involvement usually comes after local charges are adjudicated, officials have said.

In a Jan. 11 interview, Nieves-Abrigo said in Spanish she was in the country legally, though Solis was

not.

Solis and Nieves-Abrigo, both of 45 Youmans Drive, are charged with obtaining goods under false pretenses and face up to five years in prison if convicted. Immigration officials' involvement in the case bars the couple from getting out on bond.

Nieves-Abrigo is also wanted in Florida, where she is accused of unlawfully collecting welfare benefits worth $2,375 from 1999 to 2000. She was ineligible because she was simultaneously collecting welfare benefits from Georgia.

Criminal prosecution duties in Beaufort, Jasper and Hampton counties ordinarily fall to the office of Duffie Stone, solicitor for the 14th Judicial Circuit, though Stone handed the case off to the attorney general's office in February because of a potential conflict of interest stemming from Solis' personal injury case; his lawyer in that case is a part-time solicitor.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF DORCHESTER) 2001-CP-38-0628

BAYAN ALEKSEY,

PLAINTIFF,

VS.

STATE OF SOUTH CAROLINA,

DEFENDANT.

TRANSCRIPT OF RECORD

JANUARY 29, 2009
ST. GEORGE, SOUTH CAROLINA

B E F O R E:

THE HONORABLE DIANE S. GOODSTEIN, JUDGE

A P P E A R A N C E S:

DAVID TARR, ESQ.
JIM BROWN, ESQ.
ATTORNEYS FOR THE PLAINTIFF

DONALD ZELENKA, ESQ.
ATTORNEY FOR THE DEFENDANT

BONNIE H. KELLY
CIRCUIT COURT REPORTER

I N D E X

WITNESS/DESCRIPTION	PAGE NO.
EX PARTE HEARING	6 - 59
DECISION BY THE COURT	59
CERTIFICATE PAGE	61

E X H I B I T S

NO.	DESCRIPTION	I.D.	EVID

NO EXHIBITS INTRODUCED

THE COURT: All right. Thank you all for being here today. And please let the record reflect that Mr. Aleksey is here with his lawyers, Mr. Brown and Mr. Tarr. And Mr. Don Zelenka's here on behalf of the -- of the Attorney General and on behalf of the State. So, thank you all for being here today.

(To Mr. Aleksey) And how are you doing today?

MR. ALEKSEY: Fine, Your Honor.

THE COURT: You're doing okay, Mr. Aleksey? Thank you.

MR. TARR: Your Honor, could I make one request before we start?

THE COURT: Say again?

MR. TARR: May I make a request before we start?

THE COURT: Sure.

MR. TARR: Mr. Aleksey was wondering if he could have his hands free during the hearing.

THE COURT: No. He doesn't need his hands free.

Now, what I wanted to do, and I had received some correspondence from Mr. Aleksey that I -- I believed needed to be addressed on the record. And because he sent it to me, of course, I circulated it as I believe is appropriate, and -- because obviously matters that come to the Court are not privileged documents. And so, I circulated them. And in that there are some questions that I need -- to be

addressed.

And what -- the way that I think it is appropriate to proceed -- I think what I want to do is -- I think what I want -- the way that I want to proceed is that I want to -- because I -- my discussions with Mr. Aleksey may involve attorney/client privileged information, I think it's probably appropriate that I have an in camera -- in camera? Is that -- it's actually ex parte on the record. It's ex parte on the record, if you will -- discussion with him and his lawyers.

And -- and there's some other -- and after that, as best as I can and as much as I can, I certainly will report back when we reconvene with everyone. And then if I need to go further at that point, we'll do it at that point. But I think that's probably appropriate.

What I'm going to ask now to occur is that if you are not involved with security from SCDC or from my courthouse or my court reporter or my law clerk, I'm going to ask you all to -- or my bailiff, I'm going to ask you all to be so kind as to give us the courtroom.

MR. ZELENKA: Where should I go?

THE COURT: I'd come on back here in chambers.

MR. ZELENKA: Back here?

THE COURT: Yeah. Because the phone's there in case you wanted to -- you got some calls you need to make, Mr.

Zelenka. Please feel free.

MR. ZELENKA: Thank you.

THE COURT: You know, make them on this side of the Atlantic, though.

MR. ZELENKA: Pardon me?

THE COURT: Make your phone calls on this side of the Atlantic.

(All exit the courtroom except as required by the Court.)

(Ex Parte Hearing)

THE COURT: All right. Now, here's what -- here's what we're going to do. I'm just going to ask everyone, if you'd be so kind, as to just tell me your names. That way we can have the record be replete with who is in the courtroom.

We're going to start with Mr. Taylor. George Taylor; Andrew Platte.

MR. SEARFOSS: Marvin Searfoss.

MR. NORTH: Joey North.

MR. ROBERTS: Matthew Roberts.

MS. MOORE: Martha Moore.

MR. BROWN: Jim Brown.

MS. PERRY: Sgt. Joyce Perry.

MR. MORVEY: Ted Morvey.

THE COURT: Now, what I'm going to ask of all of you -- and I'm going to order so there's no question about it --

this is a -- this is an ex parte hearing. I may be hearing things that involve the attorney/client privilege. So, the communications that occur within this hearing, you cannot discuss them with anyone at any point in time. You are here for security purposes only, and you must not discuss these matters and you are now under court order not to.

Also present is our court reporter, Ms. Bonnie Kelly. And I am here, Mr. Tarr is here, and of course, Mr. Brown is here as well with Mr. Aleksey, of course.

So now, Mr. Aleksey, I have a letter that I received from you. It's dated August 5, 2008. And the matters that I thought we needed to talk about were the -- it says (as read) "Attorney issues and problems." And -- and then "attorney issues and problems."

I sent this letter, of course, to counsel, and -- because -- well, when I received it, my concern was to hear you in regards to what you have put down here. And obviously to tell you my -- the issue that I would concern myself is only if you believe that any of these matters that you have raised have in any way negatively impacted on your representation. And if so, how. And any evidence that you have with regards to that. You understand?

MR. ALEKSEY: Yes, ma'am.

THE COURT: All right. And Mr. Aleksey, do you solemnly swear or affirm that the testimony that you will

give will be the truth and the whole truth?

MR. ALEKSEY: Yes, ma'am.

THE COURT: Thank you, sir. All right. I'm listening to you.

MR. ALEKSEY: Well, Your Honor, my concerns are that when I asked Mr. Tarr to do certain things and he doesn't do them, that concerns me.

THE COURT: Okay.

MR. ALEKSEY: I asked him -- you know, I give him information and I ask him to look -- get certain records from some police departments and agencies outside the state. Mr. Tarr would come down, say he would do it. The next thing I find out, he didn't do anything I asked. Okay.

THE COURT: All right.

MR. ALEKSEY: And I would just like to give an example, if I may. A few years back I wrote a letter to Judge Maria Sypek of the Mercer County Superior Court in New Jersey to try to get records on my co-defendant, my ex-girlfriend, Glory -- Gloryvee Perez Blackwell. I sent the letter and then I didn't hear nothing like in about three weeks.

So, I called Judge Sypek's chambers, and the secretary there and the law clerk was very helpful. They said they got the letter; they said that Judge Sypek wants to help in

every which way she can. But she needs -- the judge needs a call from your lead attorney just to discuss and confirm a couple of things, and they would send the records.

I told Mr. Tarr this. I said, Mr. Tarr, can you please call -- and I wrote the judge up there. They're willing to help us. All they want is a phone call from you.

Well, I didn't hear nothing for about a month. So, I decided to call back. And when I called back Judge Sypek's chambers, the secretary tells me, "Well, Mr. Aleksey, I'm sorry, but your lead attorney never called. And it's nothing we -- we can really do unless we get a phone call from your lead attorney."

Right there I'm upset about that, because you know, I'm trying my best to help Mr. Tarr and Mr. Brown the best I can. And then that's -- that's just one of many examples, you know, that I -- I can give.

I call ---

THE COURT: When -- when did this happen?

MR. ALEKSEY: In -- over the years, Your Honor. I mean this ---

THE COURT: When did the -- when did this particular matter happen with Judge Sypek?

MR. ALEKSEY: 2004/2005.

THE COURT: Uh-huh. Okay.

MR. ALEKSEY: Okay.

THE COURT: Uh-huh.

MR. ALEKSEY: Then another example, I asked Mr. Tarr, you know, if he can get records, again, police records, from outside the state that my trial attorneys never got. And Mr. Tarr would say, "Okay. I'm going to do it. I'm gonna make the phone calls, send the letters."

I would give him all the information. Next thing I know, nothing was ever done.

THE COURT: Uh-huh. And what records specifically, as you may recall?

MR. ALEKSEY: Well, I'm talking like Pennsylvania, the lower South Hampton Police Department, Doylestown Police Department in Bucks County.

THE COURT: Okay. And police records for ...

MR. ALEKSEY: On certain witnesses and people that testified in the -- you know, in the trial.

THE COURT: Uh-huh.

MR. ALEKSEY: Things that we had never gotten.

THE COURT: And did you ask this of Mr. Tarr and Mr. Brown or just Mr. Tarr?

MR. ALEKSEY: I asked Mr. Tarr.

THE COURT: Okay. You did not ask Mr. Brown to do these things?

MR. ALEKSEY: Later on I did.

THE COURT: Okay.

MR. ALEKSEY: Later on I did.

THE COURT: Would you reiterate -- for example, would you then, if -- if you didn't have satisfaction with Mr. Tarr, would you then ask Mr. Brown, I'm trying to get in touch with Judge Sypek. I've asked Mr. Tarr can you do this for me.

MR. ALEKSEY: Yeah.

THE COURT: Okay.

MR. ALEKSEY: I -- I spoke to Mr. Brown about it.

THE COURT: Okay.

MR. ALEKSEY: And you know, Mr. Brown's position was -- you know, and I understand what he was -- what I'm about to say.

THE COURT: Uh-huh.

MR. ALEKSEY: He said, "Mr. Aleksey, I'm not your only lawyer. You have two lawyers. I cannot do everything. I have other clients."

And I understand that. And I should call David -- I mean, Mr. Tarr, and speak to him about it and try to get him to do a lot of things that I'm asking, because he can't do it by himself.

THE COURT: So, are you telling me that you would then ask Mr. Brown to do things for you, and he would not do those things for you?

MR. ALEKSEY: No, no. I asked Mr. Brown, you know, he was really busy. He had cases, he had trials going on. And he did send a letter to the Lower South Hampton Police Department --

THE COURT: Uh-huh. Okay.

MR. ALEKSEY: -- along with a subpoena, you know, as a courtesy, to try to get the records. And never the less, they never responded.

THE COURT: Okay.

MR. ALEKSEY: And like I say, Your Honor, that's, you know, one of many.

THE COURT: Yes. I have to have them all, though, Mr. Aleksey.

MR. ALEKSEY: I know, I know, I know.

THE COURT: You know. Okay.

MR. ALEKSEY: As far as like -- okay. Now, I -- now, my understanding is -- is that PCR is a civil matter. And Mr. Tarr and Mr. Brown have no out-of-state subpoena power whatsoever, without -- no court order power, nothing that can make somebody from another state produce records because it's a civil matter.

I -- I contacted and I wrote several attorneys in New Jersey, Pennsylvania, asking for their help, and you know, write a letter explaining my situation, if they could help me. And I would end up calling them eventually, you know,

to see if they got my letter and if they could help me.

And again it comes down to where, "Mr. Aleksey, who is your lead attorney and who -- you know, that's on the case? We need to speak to him. We need a letter from him requesting assistance."

And they were willing to help, and they wasn't gonna charge -- charge anything. They were gonna help pro bono for me.

THE COURT: Can you give me the names of these folks?

MR. ALEKSEY: Yeah. Helen Marino in Philadelphia, Pennsylvania; Michael Wiseman, attorney in Philadelphia, Pennsylvania; Dale Jones in Trenton, New Jersey.

THE COURT: Okay.

MR. ALEKSEY: John Callahan, who represents the New Rochelle Police Department in New York. That's all I can see right now here in front of me.

THE COURT: Okay.

MR. ALEKSEY: And I mean, my -- my -- my real concern, Your Honor, you know, I'm not -- you know, I don't dislike Mr. Tarr. I'm not saying he did a bad job or nothing. My -- my -- my concern is that if you're gonna -- if I ask you to do something and you say you're gonna do it, just please do it. Don't lie to me, say you're gonna do it, and you don't.

THE COURT: Okay. Anything -- other specifics that

you want to let me hear about?

MR. ALEKSEY: As far as Mr. -- Mr. Tarr working on the case, you know, I had concerns when Mr. Brown had told me, you know, that he couldn't -- Mr. Tarr would say he would come -- come down to Mr. Brown's office to work on the case, and Mr. Tarr wouldn't show up. And at one time, Mr. Brown did get upset. You know, he couldn't work the way he was working, because he wasn't getting help. And he couldn't do everything by himself.

So, you know, one day I call Mr. Brown, and Mr. Brown tells me, "Mr. Aleksey, I can't work like this. I'm sending a letter to Judge Goodstein to withdraw from your case, because I need help. I cannot do this by myself."

And I go into a panic mood. And I believe I wrote you two handwritten letters real quick, to where I asked you if you could please give an extension and have a hearing so I could speak to you about this.

That concerned me. You know, if I have, you know, Mr. Brown telling me that, you know, I need help, I can't do things by myself, you know, that concerns me.

Another thing I did when it came to that situation, you know, I talked to Mr. -- I called Mr. Dudek at Appellate Defense, because I had no one else to call, and asked him his advice. Mr. Dudek at Appellate Defense said he would call Mr. Brown and talk to Mr. Brown, you know, to

see what was going on and so forth.

Eventually, you know, I try to work things out again. You know, Mr. Brown was there as a mediator between me and Mr. Tarr, you know, to try to work things out. You know, Mr. Brown would say, you know, "Mr. Aleksey, try to work it out with Mr. Tarr."

And I'd try. I tried and tried and tried. Okay. But then it ends up going to where when I try to work it out, it just happens again. So, it just keeps repeating itself.

THE COURT: Okay. And was there one period of time that you felt like this was more pronounced than at other periods of time?

MR. ALEKSEY: Well, it was -- I mean, it's hard to say, Your Honor, because this is --

THE COURT: Uh-huh.

MR. ALEKSEY: -- this is in all -- over the years.

THE COURT: Okay.

MR. ALEKSEY: You know, I -- when I could -- when I wrote to -- wrote you the letter, it wasn't a specific list, it was just things that were happening as we -- as things were going along.

THE COURT: Uh-huh. All right. Any -- you know, I want to -- I want to hear from you on all the specifics that you can tell me. So --

MR. ALEKSEY: I could -- for example, "Court TV"

tapes. I asked Mr. Tarr, you know, if he could obtain the "Court TV" tapes of my trial, you know, to consider or to possibly look at in my case, to see if he could get a better understanding of what happened actually in my trial. Because there's a lot of things in the transcript that you can't see. Like you know, people's emotions, things that were happening in the courtroom, the witnesses, and stuff like that. Okay.

Mr. Tarr said that, "No. Judge Goodstein's not going to pay for the tapes, because the tapes are like $10,000."

I mean, there's like 40 to 50 tapes, and "Court TV" wanted like 10 grand for it. And Mr. Tarr said, "Well, Judge Goodstein's not going to approve any kind of money like that."

And I'm saying to myself, I'm saying, well, how -- how can you say what Judge Goodstein's going to say if you don't ask her?

You know, and it's -- like I say, Your Honor, if I list on a paper so many things -- and I tried to work it out.

We recently had a meeting at the institution. I talked to Mr. Tarr. And I'm willing -- I'm willing to put all this aside and work with him, and try to work things out with him. But on the other hand, I worry, because I hope he doesn't have bad -- bad feelings, ill feelings

towards me.

You know, I don't -- I hope he doesn't, you know, be more -- be upset with me and not tell me. I mean, if we can't -- if you're upset with me, tell me. If you don't -- if we can't work things out, tell me you can't work things out. And I'm willing to work it out with him, Your Honor.

And I'm -- I mean, like I said, I'm not trying to be vindictive or anything like that. I just have concerns. Okay.

One of the -- one of the other things that I was also talking about is medical at the Department of Corrections. I spoke to Mr. Tarr and Mr. Brown about this. And -- and as -- as you say, I wrote you a letter. You know, I brought to Mr. Tarr's attention also, as lead attorney, I said, you know, the SCDC medical director is denying me medical treatment because I'm on death row.

I have several doctors at the institution that have told me that you're -- the reason why I'm not going to get medical treatment or anything like that is because I'm on death row, going to be executed, so what's the point of going through the trouble and spending money. And I brought that to Mr. Tarr's attention, and asked him to deal with that.

But then other things came up ---

THE COURT: Now, what doctors told you that you're not

going to receive medical treatment?

MR. ALEKSEY: Dr. Walter Smith, Dr. Schribnick, Dr. Judson, the health care administrator Joe Powell.

THE COURT: I thought you said they weren't letting you see doctors? And you saw these doctors?

MR. ALEKSEY: No, I saw them.

THE COURT: Oh, okay.

MR. ALEKSEY: I saw -- I saw the doctors.

THE COURT: Uh-huh.

MR. ALEKSEY: And they told me this.

THE COURT: Okay.

MR. ALEKSEY: I mean, they said, "Mr. Aleksey, we're here to tell you to discourage you; it's coming from the top down."

THE COURT: Uh-huh.

MR. ALEKSEY: "And I'm going to tell you, we're not going to provide you medical treatment, because you're on death row, going to be executed, so what's the point?"

THE COURT: And medical treatment for what conditions?

MR. ALEKSEY: Vidiligo.

THE COURT: Okay. Okay.

MR. ALEKSEY: And you know, I spoke to Mr. Tarr about it; asked him if he can address the situation. And he said he would, and I never hear nothing about it again until I keep on and on and on. And again, I tell Mr. Brown, too,

and Mr. Brown tries to help.

Now, recently, you know, there's two doctors, Dr. Babb and Dr. -- Dr. Blake, they're willing to help me. They said, "Mr. Aleksey, we're willing to help you. But the medical directors don't want to pay for it or go through the trouble because you're on death row."

And I don't think that's fair. I don't think that's right that you're going to deny me medical treatment because I'm on death row.

THE COURT: Uh-huh.

MR. ALEKSEY: And that's something I asked -- you know, as I wrote to you.

THE COURT: And did you grieve that? I mean, have you -- I mean, there are other procedures. I know you have these two ---

MR. ALEKSEY: Uh-huh.

THE COURT: --- lawyers for your capital PCRs. But that doesn't mean that whatever legal issues you think you may have, that they are charged with pursuing that. They are your lawyers for your capital PCR.

And there are grievance proceedings and whatnot through the South Carolina Department of Corrections. Have you availed yourself of those kinds of procedures?

MR. ALEKSEY: Yes, I did, Your Honor.

THE COURT: Okay.

MR. ALEKSEY: I did.

THE COURT: Okay.

MR. ALEKSEY: And when that all failed --

THE COURT: Uh-huh.

MR. ALEKSEY: -- I went to -- I came to Mr. Tarr and Mr. Brown, and you know, let them know what was going on.

THE COURT: Yeah.

MR. ALEKSEY: And I felt -- you know, when I was told that, Your Honor, that you know, I'm not going to get the medical treatment because I'm on death row --

THE COURT: Uh-huh.

MR. ALEKSEY: -- and going to be executed and what's the point, I felt that was a valid concern.

THE COURT: Well, let me ask you this question: When were you diagnosed with vidiligo?

MR. ALEKSEY: During, like, 2002 -- 2000 -- well, 2001/2001.

THE COURT: Okay. And tell me how that affects -- how does that affect you?

MR. ALEKSEY: Well, I don't -- I don't go outside. You know, it's just -- you know, it's just a -- it's a self-conscious thing.

THE COURT: Okay. Okay. All right. Any other medical issues, because you've got that as a separate place in here. Any other medical issues?

MR. ALEKSEY: I'm sorry I've been bouncing ---

THE COURT: Huh?

MR. ALEKSEY: I'm sorry I've been bouncing all over the place.

THE COURT: Well, I'm just trying -- I'm trying to get it all.

MR. ALEKSEY: I'm sorry. Like I say, Your Honor, it's a lot of things. Again it goes back to a lot -- a lot of things in the record, Your Honor. I mean, it's getting documents and certain things we haven't gotten.

THE COURT: Like what? What documents?

MR. ALEKSEY: Okay. The Lower South Hampton Police Department; the Upper -- Upper South Hampton Township Police Department in Bucks County, Pennsylvania; the Bucks County Sheriff's Department in Bucks County, Pennsylvania; the Philadelphia Police Department in Pennsylvania, Detective Cathy Crawford --

THE COURT: And what records are -- are those specifically that you -- you feel as though you need?

MR. ALEKSEY: Pertaining to witnesses that testified in my case --

THE COURT: Okay. And what witnesses?

MR. ALEKSEY: -- my trial.

THE COURT: Yeah. What witnesses for which documents?

MR. ALEKSEY: Well, it's a -- okay. The ones in

Philadelphia, this is all combined. This is, you know, Sarah Provera, Elena Batkilina. That's in Pennsylvania.

THE COURT: Okay.

MR. ALEKSEY: New Jersey is Gloryvee Perez. That's that one there.

THE COURT: Okay.

MR. ALEKSEY: Then New Rochelle Police Department, the Clarkstown Police Department in New York. That's dealing with Teresa McCann, Jamie Ferrell. Also, you can say with Elena Batkilina and Sarah Provera also. You know, kind of trickled on.

Dean Wykes, the New Jersey District Attorney's Office. That's dealing with Sarah Provera, Teresa McCann.

And Judge Timothy Savage of the United States District Court in Pennsylvania. That's dealing with also the Federal records with Cathy Crawford, because she's also a Federal Agent and a detective for the Philadelphia Police Department.

And I mentioned the "Court TV" tapes, also, Your Honor.

THE COURT: You did. You did.

MR. ALEKSEY: Sarah Provera's in Bucks County, Pennsylvania, her probation records that we never got at trial.

THE COURT: All right.

MR. ALEKSEY: And also, something I was concerned about is the gunshot residue test that was done in the case here. It's missing from the Clerk of Court's in Orangeburg. They can't find it.

And I think that's it, Your Honor.

THE COURT: Okay. Okay. Thank you. Thank you, Mr. Aleksey.

Okay. Mr. Tarr.

MR. TARR: Yes, Your Honor.

THE COURT: Mr. Aleksey has -- has raised a number of different issues. And he says that he had asked you to do certain things specifically; to call Judge Sypek, for example. Do -- do you have any memory of that?

MR. TARR: Yes, Your Honor. And I believe I called once or twice. And I don't know -- like I said, he said 2004 or 2005. It's a long time ago, and I -- I can't tell you if I ever spoke -- I think I may have spoke to a law clerk or something. But --

THE COURT: Okay.

MR. TARR: -- one of these things is we've been on this case for eight years. And the last hearing we had was in 2003.

THE COURT: Yes, sir.

MR. TARR: Anytime after that point when Mr. Aleksey would come to me and ask me to get things for him, I would

speak with Mr. Brown about, and we'd come to a decision together, generally, that we'd either already covered that or even if we were able to find something out in the case, the record may be considered closed and we'd have two weeks of full hearings.

We have been on two investigative trips to the northeast. We had found, as Your Honor knows, lots and lots and lots of stuff to help support his claims. So, that's kind of where we were in 2004, 2005, 2006, even up until this present day.

You know, we -- we -- a lot of the things he's looking for, we either already have or have something similar. And that even if there -- there were some documents that were helpful, would we even be able to use them.

And we have no subpoena power. We did everything we could back when we were investigating the case, and were able to get a lot of things even without it. A lot of people just gave it to us. And we even got a lawyer to help us get some stuff, you know, in New Jersey. A New Jersey lawyer got some documents that we wanted.

THE COURT: When you consider what -- what he has been telling me, did you consider his request and why the request; and then determine whether or not, based on your judgement, it was an appropriate action to take?

MR. TARR: Yes, Your Honor. And I -- and I apologize

to Mr. Aleksey if there was any miscommunication. I mean, if I led him to believe that I was going to do something, I -- I -- my recollection is that whenever I talked to him without Mr. Brown, I would say, "Well, I'll talk to Mr. Brown about it, and then we'll -- we may do this, you know."

And you know, I just feel like I'm being held accountable for things that neither one of us decided that we should do.

I mean -- and I know there are -- you know, he has a lot easier time getting in touch with Mr. Brown, so he can talk to him almost daily. And so -- I mean, there are a lot of things -- factors that go into this.

But I did consider every request he made, and I never failed to do something that I didn't consult with Mr. Brown about and decide together as counsel that we should not do this.

THE COURT: I -- I'm with you. Thank you. Thank you.

And -- and Mr. Brown, let me ask you this question --

MR. BROWN: Yes, ma'am.

THE COURT: -- is that -- did -- tell me about that. Tell me about how you all would -- first of all, I guess I would ask this question: Did you typically meet with Mr. Aleksey together or separately, or some of all of it?

MR. BROWN: Both. And -- and ---

THE COURT: Yeah. And that's typical ---

MR. BROWN: This is the first capital PCR I've been on. Since then I've served on I'll say three. There's a fourth one that I was on briefly.

And there's no doubt that -- because there's a little bit of -- a lot of gray in between what's going on here.

There's no doubt that Mr. Tarr and I have met with Mr. Aleksey probably more than I've met with any of my other clients in capital PCRs.

Now, I say that and I've also been on the case longer. So, I've not taken and done some kind of ratio breakdown. So, I don't know.

We do take his calls. We've got a policy, Bayan and I do, that he calls and he knows that we answer, you know. It's usually because I'm available and able to do it. If we don't answer the call, it's usually because I'm not available; either not in the office or not able to take the call. But we have a pretty open policy about taking his collect calls.

And I know over the years -- and Your Honor's reimbursed some of the expenses through Indigent Defense. And they've gone up into the hundreds, maybe $500 one time -- collect call. And -- and now we do it a little differently, because SCDC -- they're willing to let me make a phone call to him. And that way it's just a long

distance phone call.

THE COURT: Uh-huh. Sure.

MR. BROWN: And it's a little -- a little better that way. I know there have been a lot of phone calls that we've made. There have been times that I've met with Mr. Aleksey.

THE COURT: (Coughs) Excuse me.

MR. BROWN: One thing I try to do is when I go drive up to Leiber -- because all my clients I represent on capital PCRs I usually try to visit more than one at the same time, because the drive's sometimes as long as the visit is.

And to kind of get to some of the specifics, to be fair to Mr. Aleksey, there are -- there are some things -- and this puts me in a difficult situation.

There was a period of time when Mr. Tarr did not have an office that was conducive to working. And I say that as -- there's nothing -- I'm not trying to create a division between me and Mr. Tarr, because Mr. Tarr -- every time something's been due, he has worked with me on it. There's no doubt. None of it has been a solo effort.

And I say that, because again, I'm trying to tell you there's a lot of gray in between. And I think what you've got coming out here is an emotional description of -- of a view of the last few years, which may be skewed by some

other things. And I want to hit some specifics.

We have had difficulties getting some records. And there were efforts I know I've made to get records. There was efforts that we jointly made to get records, Mr. Tarr and I. One of the most frustrating examples deals with Ms. Crawford, Cathy -- or Detective Cathy Crawford.

My understanding is she worked at the Philadelphia Police Department and she's on a Fugitive Task Force. There are some records that we know about, because they're referenced in another police report, which has actually been entered into evidence.

And in that report it says "see fugitive task -- Federal Fugitive Task Force file." And it gives the name, "Cathy Crawford," and a phone number.

And so, we've even talked to her. I've spoken to her. And it's very frustrating, I know, to -- to Mr. Aleksey and frustrating to us, because she's says things like, "Great. Those records are with the U.S. Marshall's Task Force, and I'm not giving you a thing." I think she references Mr. Aleksey as a "cop killer," and that she would never help a cop killer. And that she doesn't care what happens, she's not going to give us one bit of information in that case.

We've sent a subpoena -- actually, I think it was Mr. Tarr that actually sent the subpoena to I think the office of the Attorney General at the time, John Ashcroft. And

that's my understanding of the procedure to get the federal government documents pursuant to a State court proceed -- procedure. And it has to go through the U.S. Attorney General. And we got no response, which you know, the lawyers, that's par, that they don't really respond to subpoenas that are issued by a State court.

And that's -- I mean, you know, arguably was a valid subpoena, because the U.S. Attorney General touches the State of South Carolina in some way, even though that subpoena may have been mailed, I believe, to -- to Mr. Ashcroft's office in Washington, D.C.

But arguably, we would have had that -- again, we sent a subpoena to the Philadelphia Police Department. There's no response.

Some agencies give us the records. Some of them, when we went up north, we didn't even have to subpoena: "We want some records. What does it take?" "Hold on one second." Gives us the records.

Some of them asked for subpoenas and then we actually had the fortune of having a law firm in New Jersey that would make some requests for us as well that were fruitful, but I think that had to do with that law firm's relationship with the local district attorney's office. Because that's actually where the records eventually came from is the D.A.'s office and not the police department,

which was -- just worked as well for us.

THE COURT: Sure.

MR. BROWN: There is a lot of frustration over some of the records. And I've got to say this, there's two sides to it.

Mr. Aleksey wants all the records and some of its for a very good reason, which may not even be for -- pertinent to this PCR. Which is: If I win and go back for another trial and these witnesses come back, these records would be important to have.

And we know that we've already lost some records, because there are records that have been destroyed over the course of time, before we were ever able to get a hold of them. I can't tell you exactly the examples, but some of them had like a 3-year retention period or 5-year retention period.

And some of these records, even though he was tried in '98 and we got on the case in '01, the records may go to '96. And so, you know, by whatever, spring of '02, more than five years has elapsed, and they purged the system. And I think his fear has to do with some of that.

Some of the records, as Mr. Tarr says, is correct. We feel like may not be necessary here, and some of the reasons may be that they're cumulative. And what I mean by that is they may be records that -- that Mr. Aleksey

believes would impeach -- could have been used as impeachment evidence or other type of evidence against these witnesses testifying against him.

THE COURT: Uh-huh.

MR. BROWN: And we may have already impeached in -- well -- and so, a lot of its got to do with this kind of balancing in between on the one hand, we have very little ability to pry the records -- I mean, you got to remember these are the agencies that we don't -- and we've entered a hundred-some exhibits.

THE COURT: Yes.

MR. BROWN: Many of them police reports.

THE COURT: Yes.

MR. BROWN: And a lot of these we've heard: Lower and Upper South Hampton Township. Mr. Tarr and I know that. We know those records are -- and want them very badly. These are -- police departments that are not playing ball with us.

And -- and I say that because -- I -- I cannot say that every time that there's been some effort made by Mr. Aleksey, because he's very industrious, which is an admirable trait for a client. I mean, boy, it helps an attorney to have a client that's -- that can really -- that help you get records.

But you know, he will say there's so-and-so needs to

be talked to, etc. Sometimes this is after extensive efforts to get these same records. Whether they be fruitful, it still comes back to whether it's going to help or be cumulative or -- or any of that. And that's even besides whether the record's been closed or whether this matter's been briefed, etc. So, there's a lot more that goes on that's got a lot different layers to it.

Now, on the other hand, to be fair to Mr. Aleksey, there have been times when I got phone calls saying he couldn't reach Mr. Tarr, or I've gotten phone calls saying that he and Mr. Tarr had been at odds on some issues. And it's been difficult for me, because -- there are a number of things: One, he's my co-counsel. Two, he's the lead counsel on this case.

One example -- I don't know if this was what he was referring to, but there was a point in time that I had written Your Honor requesting that another lawyer be assigned to the case. And I'm going to ballpark it was in December of 2004, somewhere in that range.

And -- and John Delgado at -- at one time volunteered to come on the case. There was nothing that was done. He didn't come in -- Mr. Delgado didn't come in in any way to try to pry Mr. Tarr off the case.

But I had sent a letter, and I think it -- that request more or less was denied. And it -- it was put

forth to Your Honor, and I don't know where in the spectrum -- I know the day of that, but I don't know when he alluded to these things, if that's what he was talking about.

And again, you know, Mr. Tarr and I've known each other longer that Mr. Aleksey and I have known each other. And I say that because we worked in and out of the same offices. We never actually worked in the same office.

He came to the Richland County Public Defender Office. He was a law clerk there. He -- and I was a law clerk there, and he left; became a lawyer.

And then I worked as a lawyer for the Richland County Public Defender Office. And then I left and he came in.

So, we were kind of moving in the same circles. Just not exactly at the same time. So, we've known each other personally and professionally for some time. And so, there's also a different respect.

But I do have to say there was a period of time when my office was the office, and Mr. Tarr did not have what I would refer to as a "traditional office" where the work could be shared, where ---

THE COURT: What period of time are we talking about?

MR. BROWN: It's been a number of years, because the objections that we filed were done in Mr. Tarr's office in court. And those are the ones that were submitted in June.

And that's why what's been put in here, you know, is -

- is kind of a -- I can't tell you whether -- some of the stuff I have no personal knowledge of at all. So, I'll leave it at that.

Some of the stuff may have some ring of truth to it. But it's hard to say that this is a static situation, the -- what was written in this letter. Because this has been a dynamic.

And I know, being a solo practitioner -- I had an associate attorney for about 10 months. But being a solo practitioner for the most of my eight years in private practice, that -- and it is hard. And there are times when things change.

I've been through -- I went through a period of time where -- over about a 10-month period, I had three different paralegals. I had one for a long period of time, and I've had one now for over a year. But there was a period of time when a lady -- one left, and one came in for four months and she left. And it's really hard.

And you know, when things like that happen, it's hard to -- it's hard to go see Mr. Aleksey. Hard to take phone calls because of the other dynamics. I've tried to train somebody. If I leave the office and I got somebody there who doesn't even know what they're doing, and -- and I say that partly because I don't know all Mr. Tarr's situation.

But I know that he had some transition, too. And --

and I say that because to be fair to Mr. Aleksey, there was a transitional period. And -- and the file for the most part has sat in my office, which is fine with me. Although, at some point in time, I don't know, maybe Indigent Defense needs to rent my room, because his file is voluminous. And -- and I say that tongue in cheek, because it's an honor to represent him.

But one thing, the medical condition ---

THE COURT: I want to stop you right there, though.

MR. BROWN: Yes, ma'am.

THE COURT: Now, how long were you without an office, Mr. Tarr?

MR. TARR: Your Honor, it was about a three-month period. I'd moved to Beaufort County with my wife. We were going through a kind of on again/off again, and we thought the change in geography would be helpful; moved down there.

I was -- actually, while I was down there, I applied to work at the Public Defender's Office there; didn't get the job. And was still maintaining the cases that I had left from Columbia. And I was using an office in Mr. Brown's office as -- what is his conference room, as an office while I was down there.

THE COURT: Okay. So, we're talking about a three-month period.

MR. TARR: Yeah. Three months out of eight years --

THE COURT: Okay. Okay.

MR. TARR: -- out of my entire 14 years as a lawyer.

Then I decided I'm going back to Columbia; went right back with the same office that I had. Stayed there for, I guess, two more years.

THE COURT: Let me ask -- let me ask this question -- let me ask this question of you, Mr. Brown. And the question is this: Do you believe that the performance of counsel provided Mr. Aleksey suffered as a result of any of these things?

MR. BROWN: Over all, I'm -- I'm going to say no, and I'm going to tell you why.

THE COURT: Okay.

MR. BROWN: There have been times when we would have been able to be more productive if -- you know, if I had 10 paralegals and Mr. Tarr did and our offices were side-by-side, things would have sure run smoother and faster.

Your Honor's been very understanding about our time line of turning in briefs. And so, honestly, I cannot say that we haven't had enough time to do any of the briefing at any of the steps. And in -- partly because you've given us a briefing schedule that has been almost carte blanche of what we needed.

THE COURT: And that has been my memory too, because

as you all would say, "We are working. But I am a sole practitioner. I need a little more time."

I -- I don't remember at any point in time when I said, "No, no, no, no. I gotta have it." And -- and I think that probably has been a help.

MR. BROWN: And now, that's not to say that there wasn't a day at some point in time when Mr. Aleksey called, and there wasn't frustration, and maybe very honest frustration expressed about the fact that Mr. Tarr and I could not get together or weren't seeing -- and let me tell you, it may not just be a day. It may have been a month, because you know, that's the way my life is.

In fact, unless you missed some of the news articles, I've got an appointed trial that I've got to do coming up where I may or may not be getting paid for another client. And that's going to consume me and I've even told Mr. Aleksey, before he came out here, that until the trial ends the week of February 23rd, I know what I'm working on. Whether I will plead or that's -- that's what I prefer to do or not ---

THE COURT: That's been your life for the last several years, which is a good thing for a lawyer.

MR. BROWN: It's not bad at all. And -- and you know, especially when Mr. Tarr is solo, you know, it sometimes may be that I'm involved in briefing a Federal -- because

I'm on the CJ Panel, Fourth Circuit -- if I brief something there and Mr. Tarr may have a trial, too. And -- and then there's no doubt Mr. Aleksey may not be able to reach anybody.

And -- and you know, that's something that's a little different than any of my other clients. Because I've got other clients that will go a period of time where there is very little communication. And if I go see them, you know, we'll talk about how their cousin's dirt track car or racing's going, or something like that. And it's not very much about what's moving on their case.

Mr. Aleksey's not that way at all. And -- and I do have to tell you Mr. Aleksey's developed a relationship. My wife's worked in my office during periods of time. She -- at my office, she'd be on maternity leave and she'd be answering the phones for awhile. And so, she got to know him then.

And she took some time off a few years ago, and -- and so -- and my paralegals all know Mr. Aleksey. And so, he calls, and as he calls, we talk. He invariably calls on the holidays. He calls, you know, to wish -- wish Merry Christmas and -- and -- and very -- very sincere is his mother. We got to know each other. I've even visited her home in New York and things of that nature.

So, the relationship's a little more involved, and so

if a period of a month goes by and I don't talk to him, that's -- there's no doubt that's a -- that's extreme. That would be almost an alarm.

On the other hand, I've got clients that we had their hearings and we're doing some briefings or whatever. You know, I can go see them, and you know, their concerns may be whether or not they can, you know, have -- have salt in their diet at the Department of Corrections, or things like that, which may be valid, but it's not really the same level.

And Mr. Aleksey is very involved. And -- and you know, there's one thing that -- that -- that I've got to give him in all fairness he wanted us to do, and I'd love to go -- to have been able to do. But on the other hand, as a lawyer, I don't know that it would have made much difference.

And I'll give you this example: The co-defendant, in his case in Orangeburg here that's at issue --

THE COURT: Uh-huh.

MR. BROWN: -- she at some point lived in Miami and was charged with perjury in the last couple of years. Certainly that's of interest if he gets a new trial, because her being charged with perjury and her being a witness back in his trial before, if there was a new trial, that would certainly have a nice potential for use as a

defense tool.

And he -- at some point there was a trial that was going to be set up. And he wanted us to travel to Miami for that trial. And of course, I've been to Miami. It's nice; I'd like to go to Miami.

But frankly, I don't know that there's anything there that would bear on this hearing. Although I think it's very pertinent and I think that the passing of time and the destruction of those records that could occur would hurt his efforts down the road or could. And there's no doubt about that.

And if we had unlimited resources, there's no question that -- I think sitting there and seeing the trial and meeting all those people would be invaluable. There's -- you know, there's an endless amount of work that could be done with this potential.

Now, I know that's one of the things with Mr. Tarr and I both, whether we had visited Mr. Aleksey separately or together, that we did agree that that was not something we were going to present a request to Your Honor for. Because I couldn't in good faith voice a way that it would become relevant.

I mean, unless she somehow or other recanted -- you know, *sua sponte* recanted her trial testimony from Orangeburg down in -- in Miami, which is just not likely.

And there's no question when we -- and I talked -- I talked to the person who was the victim of the perjury, because it involved a family court proceeding where there was allegedly perjurious testimony given that -- in a family court matter she had against her I assume now ex-husband.

MR. TARR: Your Honor --

MR. BROWN: And he is a police officer.

THE COURT: Okay.

MR. BROWN: And so, it had -- you know, very interesting because, of course, this is a police officer saying this lady perjured and there was actual charges brought. And in other words the police officer was a victim and some perjury committed in family court. And we were very interested.

I talked to the law enforcement officer. In fact, Mr. Zelenka was contacted by this police officer, and Mr. Zelenka called me and says you need to talk to this guy. And I say that, because I think he recognized that the guy had been misdirected to Mr. Zelenka, and should be talking to me.

And I think, you know, in all fairness -- and we called. And it was very interesting. And we've gotten -- he's gotten -- and Mr. Aleksey's gotten a plethora of documents about those proceedings which could all at some

point be very fruitful.

Now, most of it has to do with actions that have occurred after his trial, which makes it difficult for me to figure out how those would go to claims related to his trial.

THE COURT: I understand

MR. BROWN: Because there's not like after-discovered evidence about something beforehand ---

THE COURT: Yeah. Now, I interrupted you, and you wanted to say something about his medical condition.

MR. BROWN: I wanted to go to the medical, because the medical -- the medical actually, I think, bears more on this than even Mr. Aleksey knows.

I talked to Dr. Babb, and Dr. Babb came in and talked with Mr. Aleksey. Mr. Aleksey wanted me to talk to Dr. Babb, and very coincidentally and conveniently, he and I were being buzzed through at the same time where I knew -- recognized his name on his lab coat or doctor's coat.

And so, I asked him if he'd come in and tell me what was going on with Mr. Aleksey there. And so, we had a talk about his medical condition. And there's no question, he says I'm willing to do whatever.

And at some point I talked to a fellow named "Campbell." And bear with me, because his name is referenced and I want to get his first name. But it's

Russell Campbell. And I talked to Mr. Campbell.

Well, Mr. Campbell was the medical director for the Department of Corrections. Mr. Campbell was very clear to me that it would probably be easier to move mountains than to get medical treatment. And I didn't feel like the reasons given were very sincere.

And some of the reasons went along this line: The -- one of the possible treatments is a cream, and the cream has -- and I -- make sure -- I may not have this right, but like a steroid in it or something of that nature, or some type of substance that could at some point be dried out and smoke or something like that; which Mr. Aleksey -- and this is clear from the transcripts of his trial -- has never -- he doesn't drink or use drugs.

All the girls came up -- all the women who came and testified for the State about bad character evidence for the State against him, they were all very clear when asked by law enforcement or asked at the trial: He didn't drink; doesn't use drugs.

And so, I found that very ludicrous, especially since it's a cream that could have been a -- I'm assuming they weren't going to give him a tube of cream to take back to his cell. And it could be administered like -- I'm sure they don't give -- the other drugs aren't being administered back to go to the cell. And I didn't find

that very genuine.

And the rest of it had to do with how -- because one of the things requires exposure to some special lamps. And some of the stuff could be done, but it had to be done in a doctor's office. And so, there were ways and his mother could -- that the medicine would have to picked up, and nobody would go pick it up, and it would have to be brought in by a pharmacy that would deliver.

And Mrs. Aleksey, his mother, and Bayan are very good about trying to solve all the problems. And Mr. Campbell was very good about making sure that didn't happen.

And I tell you that, because I read a newspaper article where he's at least not actively working, because he's been indicted. They allege some fraud. And ---

THE COURT: Who? Who?

MR. BROWN: Mr. Campbell.

THE COURT: Oh, Mr. Campbell. Not Bayan, but Campbell.

MR. BROWN: I say that because, you know, I understand that he was not a doctor. And I raised concerns to him that I could not believe that the medical policy was going to trump the doctor's advice. And the gist of his response to me was, "Well then, sue me over it." Which was my advice and since we're keeping this privileged, my advice to Mr. Aleksey was let's file a 1983 suit.

Which gets to a different question about me being able to do it, because I actually have done some civil rights litigation. And it isn't easy, and the prospect of it being fruitful and paying for -- fruitful to the client and paying to the attorney, those are stars that are hard to align.

THE COURT: All right. In other words ---

MR. BROWN: And I can't submit a bill to you for doing his 1983 ---

THE COURT: That's right.

MR. BROWN: --- litigation. And he had another concern when there is a lawsuit and -- and they file the court filings, if they're done in form of pauper, that they'll actually leverage his account, which would include his ability to get anything from the canteen.

THE COURT: Uh-huh.

MR. BROWN: These are real concerns for ---

THE COURT: Uh-huh. Sure.

MR. BROWN: --- somebody that is there -- there normalcy in life.

THE COURT: But you gave him advice. In other words --

MR. BROWN: I -- I did.

THE COURT: You gave him advice and I gather you said this is -- this is -- these are the options that are

available to you. It really is outside the capital PCR; however, you can file a grievance, you can file a 1983; there are things you can do.

MR. BROWN: And -- and I'm going to be honest, I'm not even satisfied with where he is. And here's the reason I mention it to you, because -- and -- and I understand that. I'm not satisfied with where he is with getting his treatment, you know.

Don't get me wrong, I haven't volunteered my time to do a lawsuit for free with -- with maybe no hope of getting attorney's fees at the end of the case. I mean, if I went through and filed a lawsuit and they gave him the medicine and mooted the lawsuit, and I get no attorney's fees.

So -- so, I've been there before. I've filed one of them. Not -- not to an inmate, but to a 1983 case, where it mooted that kind of entity.

And -- and I say that because one of the things that the doctors have been clear about is that there is a -- and it's -- and it may not -- have no actual physiological bearing, but there can be a psychological affect to his skin condition.

And one thing -- I can say this as nice as I can, Mr. Aleksey's complexion has changed, and I think it's something that's bothering him. And -- and I know that that's had a cloud on his mental state, because I think

it's left him feeling depressed related to that. And -- and I've seen it. I know because -- and I think Mr. Tarr would attest to this.

You know, he will file a complaint with us or -- that's too technical. But he'll complain about the police reports and about his medical condition. And he'll complain about something else and his medical condition. And they do seem to always have the medical condition component.

He can't go outside which cannot be healthy, and the reason he can't go outside is exposure to sun exacerbates the skin de-pigmentation.

THE COURT: Uh-huh. Uh-huh.

MR. BROWN: Because it shows the ---

THE COURT: Uh-huh.

MR. BROWN: --- de-pigmented areas more.

THE COURT: Uh-huh.

MR. BROWN: And not being close to sunlight cannot be a positive thing. But then I think sunlight provides among -- and I'm not a doctor. I'm just pontificating. There's a, you know, Vitamin D benefit --

THE COURT: Okay.

MR. BROWN: -- being exposed to the sunlight. He doesn't go out in the sun. And you know -- and I think it's had a cyclical affect where some of the things that --

that he's been very reasonable about over the years, he may not have been as reasonable about, because he can't just get a tube of cream.

THE COURT: Okay.

MR. BROWN: And he's got two lawyers who can't get him a tube of cream and a doctor that can't get him a tube of cream and a mother who's willing to pay for it.

And so, I think that you have to take it all together. Because I think when he's got frustration over that it -- whether it's David won't take his phone call and I tell him we don't want the records or vice versa or whatever it is, then there's frustration with us too.

And it has to be taken from the dynamic where he's -- he's on death row, his -- his mother's never been to visit because of a myriad of issues, not because she doesn't love him. And I -- I don't want to go into all of that.

THE COURT: Uh-huh.

MR. BROWN: I think it's because she doesn't want to come down here and see him in this condition.

And -- and I say all that so we -- we have become the center of ---

THE COURT: Whoa. I'm sorry. Okay. Go ahead.

MR. BROWN: And -- and long story short, I think some of these things that have been alleged in the letter, Your Honor, I never saw the letter. Mr. Aleksey can tell you

that. I never saw the letter. He mailed me the letter -- letter.

THE COURT: Right.

MR. BROWN: He didn't consult me about writing the letter. To give you some perspective on it, he -- he wrote a letter asking to withdraw his -- his PCR, waive all his appeals. And I had just met with him before that happened.

There was a little crisis regarding his -- he had a job working in the canteen. And he really valued that job. He lost that job. That's kind of his own little issue there. And I know he and I -- I spoke with David Tatarsky, the general ---

THE COURT: Right.

MR. BROWN: --- counsel for the Department of Corrections. And I think Mr. Aleksey would tell you that he was satisfied with the way that -- that issue resolved. He hasn't had the job at the canteen restored.

That was during the first letters that went -- wishing away the appeal. He told me he wanted to withdraw it. In fact, he told me he wanted to withdraw his waiver the day I visited with him, before I'd even been informed that he'd waived it. In other words, he says, "Gosh, Jim. You're going to be mad at me. I waived all my appeals, but I don't want to do that."

So, I got a phone call from -- I want to say somebody

at the Supreme Court. And they said, What's going on? And I said, Oh, he doesn't want to do that. And they said give me something in writing. So, I did.

Well, then almost immediately thereafter -- and -- and again I have to put it in a little perspective, my understanding of the proceeding June 12th, he reasserts our request to waive. Within a week or so we submitted our objections and a motion. And -- and I say that because that had been a product of a -- of a -- work over a long period of time and there had been a lot going on in both of our lives. And I say that because even when I did this, you know, in -- in 2008, spring 2008, I was a solo practitioner running for political office. Which -- there's just been a lot going on that tugs at the time.

And that letter came before we even did that filing. And so, you know, we know we were working, although it may have been in -- kind of stilted. And I know that that caused him concern.

THE COURT: I got it.

MR. BROWN: And -- and -- and you got to realize ---

THE COURT: I ---

MR. BROWN: --- he also sits -- and Mr. Aleksey running a canteen, he -- man, he had his hand on the pulse of death row. And he knew when other people were going to a hearing, and other people were coming up -- and some

people's cases go in fast. And -- and his is not of that dynamic.

And for whatever reason -- and -- and you know, we don't -- I don't do just capital work. I may do mostly criminal defense work, but I do it in Federal Court, I do it in magistrate court.

THE COURT: Right.

MR. BROWN: The schedules never work out. When one court's out, the other one's in.

THE COURT: Sure. Sure.

MR. BROWN: And so, that -- I think overall it's not a black and white of what you've been presented. And I think Mr. Aleksey has some true concerns. I'm not just keeping -- counting them. I cannot tell you the number of times that -- and I don't mean this because there were. I cannot tell you -- give you an accounting of the times that he called me and I took his call, versus the times he called David and David took his call; or didn't take his call. I do know sometimes he would call me and say David won't take my call. Or David, I got mad at him and hung up the phone.

And there was one of those in June that -- that almost directly corresponds to this letter, which was written -- his letter was written June 9th. I can tell you the date, because he called me and I was on a baseball field with my kids.

My -- my youngest son was being asked to play in a travel tournament, and -- which was -- he was 7 at the time. It was kind of unusual. We were on the field and I talked to -- I think I talked to the two of them within five minutes, and they were both not happy with each other. And that is -- and that was right at the very beginning of June, which is almost exactly when that letter --

THE COURT: Okay.

MR. BROWN: And -- and I know that they had had some issues ---

THE COURT: Let me -- let me ask you this question, Mr. Brown: Do you believe that -- and -- and you have said that you believe that some of the concerns that Mr. Aleksey had were legitimate concerns, that a lot of it has to do with just normal life progression over a case that has been there for -- for some time. Do you believe that any of the issues that you are aware of in this case, with or without -- with Mr. Tarr/without Mr. Tarr, but including the issues raised regarding Mr. Tarr, have in any way compromised the -- the work that you and Mr. Tarr have been able to do?

MR. BROWN: No, ma'am. And I'm going to say I think the work that has been presented -- the integrity's there in the work. And -- and I say that because with all due respect, I think we've presented an overwhelming case in his behalf for relief. And again, I say that as an

advocate and just honestly, you know, besides just being an advocate, but with just sheer honesty on that.

And -- and ---

THE COURT: Undoubtedly, there was obviously an extraordinary amount of time, energy, effort, and detail that was in this case. No question.

MR. BROWN: And -- and if you'll ---

THE COURT: Okay.

MR. BROWN: --- the dates when things have been submitted ---

THE COURT: Uh-huh.

MR. BROWN: --- there -- there a year or more apart. And when he doesn't see that -- a product, because we don't take rough drafts to him. I mean, he doesn't get bits and pieces. There was a period of time when we had worked on the objections --

THE COURT: Yes.

MR. BROWN: -- and my computer crashed --

THE COURT: Yes.

MR. BROWN: -- in February about a year ago.

THE COURT: Yeah.

MR. BROWN: And we lost a lot. We lost about -- and there's so months we hadn't done anything, but it happened to be that I -- we'd done some work that month that we lost, that put us back. And -- and you gotta remember ---

THE COURT: I do.

MR. BROWN: --- even if it's just two days, the ability of David and I to work together in different cities for two days devoted on the case, it's significant. And so, you know, we put in 18 hours on something and then we lost it. And that was certainly -- certainly we -- we back up very regularly, but it was just -- it slipped through the cracks on that between the back up and the computer crashing.

THE COURT: Got it.

MR. BROWN: And that was one that set us back a little bit more, because we didn't want it to be until June. And I say all that because I think that we have been able to give you everything. I'd love to see Cathy Crawford's Fugitive Task Force report. I want to see it, but I can't get it. And I don't know how to tell you to get it. Because if I did, I would have asked you for it.

And you know, the -- the only thing left would have been to file an ancillary proceeding in every other state up and down the eastern seaboard and associate counsel.

And you know, we -- we have done -- and -- and I told Mr. Aleksey this. You know, most of this stuff deals with the same witnesses that we've gotten information on. There is one -- one witness that we know, and then there's -- that we know we haven't gotten the truth about some things.

And we just are scratching trying to get it. It's not one of the major ones. I still can't tell you exactly how it -- to break that open.

And I say that because we have presented to you what we could get, and what we think ---

THE COURT: Got it.

MR. BROWN: --- is -- is an effective presentation.

THE COURT: I -- I got it. Got it.

MR. BROWN: And -- and I think -- and again, I know there's been frustration with Mr. Tarr. You know, one of the things -- and I -- I'll tell you this, which makes very little difference, I don't know. Mr. Aleksey's talking about making me lead counsel, which you know, to me that makes little difference.

You know, we've talked about other things that would be possible. And I'll throw one out there, and -- and of course, I don't want to get too far down. But you know, if -- if the ability to have somebody review our briefings, not with a posture of going backwards, but as far as providing some kind of expert counsel on -- because we're not done even if -- if someone -- assigned to us today, the proceedings not done. And there's a Rule 59 that would have to be filed, and -- and Mr. Tarr and I have never been this far in a capital PCR, either one of us.

THE COURT: I understand.

MR. BROWN: And so, you know, certainly there are people out there, Center for Capital Litigation and other places, that could give us a consult. And maybe that would make Mr. Aleksey feel better about our efforts. And I say that because they're not going to do it volunteer -- you know, the days of volunteering just doesn't, I don't think, happen in this era, you know. And that would be something that would be short of getting another lawyer, but provide some other eyes to look at it.

And again -- and I don't mean going back to get this stuff, because quite frankly, our efforts to get this -- we're still trying to get it. And -- and I say that because I don't know what we'll do if we get it, you know. File another PCR if the "magic report" comes down from some police department or whatever it would be. Because we have tried to document some efforts.

There's no doubt that there are probably more reports on here that we've requested. We have requested some. I know Mr. Aleksey's been very fruitful. I know there are probably some phone calls we haven't made.

I talked to a lawyer from New York at one time, and she had told Mr. Aleksey she wanted to help. I talked to her and -- and --

THE COURT: I got it, Mr. Brown. I got it.

MR. BROWN: -- and the gist of the conversation was --

THE COURT: I got it.

MR. BROWN: -- tell me what I can do to help.

THE COURT: Yes.

MR. BROWN: But she didn't really know much more about how to help than -- you know, and I'm here to help.

And you know, I've done that with other lawyers, you know, tell me what I can do.

THE COURT: Yeah. Sure. I got it.

MR. BROWN: But there's not much you can do.

THE COURT: Got it. I got it. I got it. Very well.

Mr. Aleksey, anything you want to add?

MR. ALEKSEY: Your Honor, I just want to say, you know, I'm not trying to -- to make Mr. Tarr and Mr. Brown go against each other. I'm not trying to do that. I was concerned.

THE COURT: Uh-huh.

MR. ALEKSEY: There are things out there that I feel that should be found and be brought up -- brought to your attention.

THE COURT: Okay.

MR. ALEKSEY: My understanding is this: If I don't bring it out now before Your Honor, I can never bring it out again. That's my concern.

THE COURT: Thank you so much. Thank you all. Very well. Okay.

MR. TARR: May I say one quick thing, Your Honor?

THE COURT: All right, Mr. Tarr.

MR. TARR: I just want to let you -- I mean, I figure the Court would want to know Mr. Aleksey said that he's willing to work with me. I'm willing to work with him.

THE COURT: He 's -- and he was clear with that.

MR. TARR: We -- I mean, he said he was willing. I'm just letting the Court know I'm willing. I don't have any hard feelings against him. I'm willing to do -- work just as hard as I have with -- with no conflict of interest.

THE COURT: Thank you.

MR. TARR: I'm -- I'm not harboring any ill will, and as an officer of the Court I will tell you that I'll do whatever I need to do, if it's your court -- if the Court wishes that I stay on.

THE COURT: I do. I do. I would tell you that. I do.

MR. ALEKSEY: Can I ---

THE COURT: I do, Mr. Tarr. Thank you.

MR. ALEKSEY: Can I just add one thing, Your Honor. I just wanted to say as far as dropping my appeals, it was a lot of frustration. And over the years, I did write you and I know you wrote me back. And so -- and I wanted to see you. I mean, I dropped my appeals so I could see you and talk to you, because it was so -- so long going, and I

felt, you know, if I -- if I drop my appeals, it will secure a hearing so I can talk to you. That -- that was my belief. And ---

THE COURT: Okay.

MR. ALEKSEY: --- I apologize for that.

THE COURT: Okay. Thank you. Thank you. Great.

All right. Thank you all so much. And obviously, it was very important for me to have this hearing today. And I'm going to just respond to that, and -- and we'll just proceed on at that point. Thank you so much.

MR. ALEKSEY: Thank you.

(Ex parte hearing ends.)

THE COURT: Let us -- can you find other lawyers? Can you find Mr. Zelenka? I need him, and yeah, Ms. Wofford.

(All parties return to the courtroom.)

THE COURT: Thank you, Mr. Zelenka. All right. First of all, thank everyone for being here today. I think that the -- that the hearing was hopefully helpful. And Mr. Tarr will continue to represent Mr. Aleksey.

And we will simply continue. I -- I think that was good that they had an opportunity on the record to have -- to have some interchange. I think that was very positive and very helpful for me; very helpful for me as well.

And at this point, I think that I have all the submittals, and was actually -- when this matter happened,

I was certainly doing my study and my work, which I will certainly continue to do. I know it has been an awfully long time for everyone, particularly for the victim's family. But I think that you all can -- my work is -- is concluding. My law clerk and I have been working pretty diligently on it. We certainly needed to have this hearing, and delighted that we've had that occur today.

But I think we will -- I think I will be in a position to render an order in the very near future. So, thank you all so much. This has been very helpful. Thank you. Thank you, thank you.

All right. That's going to conclude this hearing, and then we're going to go find some other lawyers. Thank you.

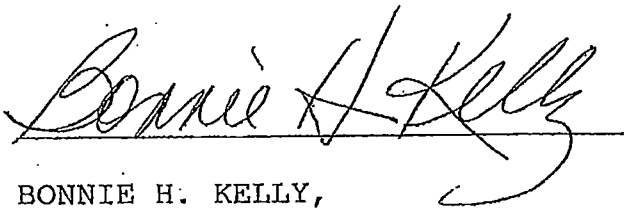
(To Mr. Aleksey) You take care now.

-- END OF TRANSCRIPT OF RECORD --

CERTIFICATE

I, THE UNDERSIGNED BONNIE H. KELLY, OFFICIAL COURT REPORTER FOR THE FIRST JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR DORCHESTER COUNTY, SOUTH CAROLINA, ON THE 29TH DAY OF JANUARY, 2009.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO.



BONNIE H. KELLY,

COURT REPORTER

COLUMBIA, SOUTH CAROLINA

NOVEMBER 27, 2010

Law Office of David B. Tarr, L.L.C.
1313 Elmwood Ave., Suite A
Columbia, South Carolina 29201
Telephone 803-238-7967
Fax 803-771-0553
www.davidtarrlaw.com

April 1, 2009

2009 APR 1 A 11:00

The Honorable Diane S. Goodstein
P.O. Box 234
St. George, SC 29477

RE: Aleksey v. the State of South Carolina

Case #: 2001-CP-38-0628

Dear Judge Goodstein,

On behalf of my client Bayan Aleksey, and after consultation with my co-counsel Jim Brown, I am writing to you today to make a formal objection to the State's proposed revisions to its proposed order. On Friday March 27, 2009, Mr. Brown and I were copied on an email sent to the Court by Don Zelenka. This email consisted of attachments of the State's proposed order in this case, as well as proposed revisions to the Order relating to Duffie Stone's testimony and an analysis of Rule 608 as it applies the conflict issue raised by the applicant in this case.

We object to these revisions citing the case of Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70 (2006). In Riddle, the Supreme Court reiterates the state's obligation to correct false testimony when it becomes aware that testimony presented in court is incorrect. The Court, in Riddle, stated "The failure to correct false evidence is as reprehensible as its presentation." Riddle at 48. As counsel for Mr. Aleksey, we read this case to mean

that both the state and counsel for the applicant are under a duty to correct inaccurate testimony when apparent.

It is our contention that the inaccuracies in Mr. Stone's testimony cannot be corrected through the proposed revisions. Merely ignoring testimony or trying to explain it away is not an adequate way to resolve the problem. The applicant has a right to know why Mr. Stone received an appointment in this case, when Rule 608 was not in existence at that time, and it is our information and belief that there was no appointment list in Orangeburg County in February of 1998. These discrepancies can only be corrected by re-calling Mr. Stone to testify for the limited purpose of clarifying his testimony as it relates to his appointment in this case.

Thank you for your time and assistance in this matter and we look forward to hearing from you soon.

Sincerely,

David B. Tarr

Cc: Jim Brown, Esquire
P.O. Box 592
Beaufort, SC 29901

Donald Zelenka
S.C. Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

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

Law Offices of Jim Brown

From : "Don Zelenka" <AGDZELENKA@scag.gov>
To : "Diane S. Law Clerk (Andrew Platte) Goodstein" <DGoodsteinLC@sccourts.org>
Cc : "jimbrownlaw@hargray.com" <jimbrownlaw@hargray.com>, "dbtarr1@yahoo.com" <dbtarr1@yahoo.com>
Date : Fri, Mar-27-2009 4:29 PM
Subject : Re: Aleksey v State of S.C., 2001-CP-38-628 - Proposed Order and Rule 608 Recommended Revisions

I am attaching three copies of the original proposed order sent April 2007 without change. The original was done in Wordperfect and I have (attempted) to convert it to a pdf and Word document.

As had been discussed in an earlier conference call, my analysis concerning the conflict of interest issue with Duffie Stone is partially incorrect because Rule 608 did not come into effect until March 4, 1999 effective to appointments after July 1, 2000 and Mr. Stone's appointment was done prior to that in 1997. Becxause of this error on my part in my memorandum and proposed order, I would recommend the following changes.

REVISION ONE

Therefore, revisions in the section at pages 43- may be appropriate.Particularly, at the top pf page 45 it reads "Defense counsel Stone was appointed to represent ALejsey pusuant to Stone's compliance with Rule 608, SCACR." I would recommend a change such as: defense counsel Stone was appointed to represent Aleksey in compliance with S.C. Code Ann. section 16-3-26. In an analogous setting, SCACR Rule 608, effective in July 2000 would have similarly authorized his appointment ..."

REVISION TWO

On page 46, paragraph 2, sentence 3, I would revise the following sentence which currently reads "Importantly, because of his part-time prosecutor status, he was aware he was not exempt from court appointment under Rule 608 and the required to place his name on the appointment list. PCR 985, 1131-32."

I would recommend that it be revised as follows:"Importantly, because of his part-time prosecutor status, he was aware he was not exempt from court appointment and was required to be considered for appointment in criminal cases . PCR 985, 1131-32."

I did not do these revisions in any of the proposed orders I have attached, however, similar changes should be made. Another reference to Rule 608 is made on page 36 paragraph 1, but that directly relates to testimony rather than analysis, although there was no specific reference in Duffie Stone's testimony at PCR 1131-32 to Rule 608, thus the i.e when it referred to his present belief also.

If you have any questions, please advise me.

Sincerely,

Donald J. Zelenka
Assistant Deputy Attorney General
South Carolina Attorney General's Office
P.O. Box 11549

Columbia, South Carolina 29211
803-734-3601
803-734-4035(FAX)
agdzelenka@scag.gov
>>> "Goodstein, Diane S. Law Clerk (Andrew Platte)" <DGoodsteinLC@sccourts.org> 3/26/2009 4:36 PM >>>

Mr. Zelenka,

Would it be possible to get an electronic copy (word document) of the state's proposed order in this case?
Thank you,

Andrew S. Platte

Law Clerk

The Honorable Diane S. Goodstein

Post Office Box 234

St. George, South Carolina 29477

843-832-0332

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	CA No. 00-CP-38-628
	)	
BAYAN ALEKSEY, #5059	)	
Applicant,	)	**SUPPLEMENT TO MOTION TO CLARIFY THE STATE'S POSITION REGARDING A PROSECUTOR'S ELIGIBILITY FOR APPOINTMENT IN LIGHT OF CONFLICTS OF INTEREST**
v.	)	
	)	
STATE OF SOUTH CAROLINA	)	
Respondent.	)	

FILED
RECORD
CLARK
COURT
ORG. SC
DEC 9 P 12:59

THIS SUPPLEMENT TO A MOTION IS BROUGHT BEFORE THIS COURT, on behalf of Applicant by his attorneys, to further illustrate the need for the Court to clarify certain testimony regarding the appointment of trial counsel Stone to represent Mr. Aleksey's interest in the defense of the allegations of capital murder. This supplemental information has just been provided to PCR counsel for Mr. Aleksey and provides further demonstration of the need to supplement the record with correct testimony regarding the nature of trial counsel's appointment to Mr. Aleksey's defense in 1998.

As the Court will recall, trial counsel Stone was called to testify at the PCR merits hearing in the above captioned matter. In testimony provided to this Court, in the State's Post-Hearing Memorandum in Opposition to Application for Post-Conviction Relief, and in the State's proposed Order Denying Post-Conviction Relief, reference was made to trial counsel Stone's obligation 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." State's Post-Hearing Memorandum, page 35, referencing PCR transcript page 985. Trial counsel Stone also testified regarding his appointment in this death penalty matter that "....what I did on that was simply look at the court *rules* which told me as far as being appointed, put myself on the appointment list and there was

clearly the prohibition from me taking cases inside the Fourteenth Circuit and a requirement on the other end of that to put my name on the list for conflicts outside of the circuit in which I practiced." PCR, page 985, lines 1-8. Later, Stone stated: "[m]y experience was probably more with the court *rules* that I think, and I still think, require me actually to put myself on conflict lists outside of the places in which I have a conflict. And I may be reading that *rule* wrong, but that is at least my impression of it and when I studied that particular issue, that's the way I understood it." PCR, 1130, l. 19-25. (emphasis added).

However, it is now conceded that South Carolina Appellate Court Rule 608 was not enacted until March 4, 1999 (more than six months after Aleksey's trial). Further, this rule did not apply until July 1, 2000. In fact, only the death penalty statute itself, SC Code Section 16-3-26 (1997 version), applied to the appointment of counsel in death penalty proceedings during the year 1998. This statute actually provided a mechanism for counsel to remove themselves from appointment in a death penalty matter.

Now it appears that counsel Stone was never on any appointment list in Orangeburg County. In fact, he did not receive this appointment related to any "list", but instead received this appointment directly from a circuit judge upon recommendation by the then Chief Deputy of the Office of the Solicitor of the First Judicial Circuit. Thus, the very same office which prosecuted Mr. Aleksey is the office which chose his trial counsel.

There is little doubt as to the veracity of the information concerning this appointment of counsel Stone as this stems from an affidavit of former Chief Administrative Judge of the First Judicial Circuit and current Circuit Court Judge, Judge James C. Williams. See attached Affidavit of James C. Williams. As noted in the affidavit, Judge Williams was the then Chief Deputy for the Office of the Solicitor, the very same office prosecuting Mr. Aleksey.

Instead of Stone being conscripted into the representation of Mr. Aleksey, it appears that Stone's representation of Aleksey was more akin to that of a volunteer. This new information changes the complexion of the conflict issues. Testimony concerning the appointment should be required to clarify the record for purposes of judgement at the trial level and on appeal.

Therefore, counsel request that the court convene a hearing to provide accurate and truthful testimony regarding the appointment of counsel Stone.

Respectfully submitted,

DAVID TARR
1313 Elmwood Drive, Suite H.
Columbia, SC 29201
(803) 238-7967

JAMES A. BROWN, JR.
Law Offices of Jim Brown, P.A.
1111 Bay St., P.O. Box 592
Beaufort, SC 29901-0592
(843) 470-0003

BY: _____
ATTORNEY FOR APPLICANT

May 19, 2009.

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding this 19th day of May, 2009.

_____

STATE OF SOUTH CAROLINA COUNTY OF ORANGEBURG **BAYAN ALEKSEY**, #5059 *Applicant,* v. **STATE OF SOUTH CAROLINA** *Respondent.*	IN THE COURT OF COMMON PLEAS CA No. 08-CP-38-628 01 **MOTION TO CLARIFY THE STATE'S POSITION REGARDING A PROSECUTOR'S ELIGIBILITY FOR APPOINTMENT IN LIGHT OF CONFLICTS OF INTEREST**

2008 JUL 14 A 11:19
RECORD
CLERK OF COURT
ORANGEBURG, SC

THIS MOTION IS BROUGHT BEFORE THIS COURT, on behalf of Applicant by his attorneys, to require the State of South Carolina to clarify its position regarding a state prosecutor's eligibility for appointment as counsel for a capital defendant in light of conflicts of interests. Supporting this motion are pertinent attachments. Applicant requests a court hearing to resolve these issues on the record.

South Carolina Appellate Court Rule 608 and the Case at Bar

The Court should require that the State of South Carolina clarify certain testimony regarding the application of South Carolina Appellate Court Rule 608 to the appointment of counsel Stone as Aleksey's trial counsel in 1998. Alternatively, the Court should strike all testimony relating to the requirement of counsel Stone to place his name on an appointment list for death penalty cases during the year 1998. Finally, all references to an appointment list or SCACR Rule 608 should be removed from any Order regarding the judgement in this matter and all rulings regarding conflicts of interests should be reconsidered by the Court in light of the correction of the State's position.[1]

---

[1]The Applicant does not intend for this Motion to waive any objections filed regarding the State's proposed Order. These objections were filed by mailing on July 3, 2008. Further, as

To begin, in testimony provided to this Court, in the State's Post-Hearing Memorandum in Opposition to Application for Post-Conviction Relief, and in the State's proposed Order Denying Post-Conviction Relief, reference is made to trial counsel Stone's obligation 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." State's Post-Hearing Memorandum, page 35, referencing PCR transcript page 985. However, South Carolina Appellate Court Rule 608 was not enacted until March 4, 1999 (more than six months after Aleksey's trial). Further, this rule did not apply until July 1, 2000. In fact, only the death penalty statute itself, SC Code Section 16-3-26 (1997 version), applied to the appointment of counsel in death penalty proceedings during the year 1998. Further, this statute provided a mechanism for counsel to remove themselves from appointment in a death penalty matter.

In contrast, during testimony provided during the PCR merits hearing, trial counsel Stone testified regarding his appointment in this death penalty matter that "....what I did on that was simply look at the court *rules* which told me as far as being appointed, put myself on the appointment list and there was clearly the prohibition from me taking cases inside the Fourteenth Circuit and a requirement on the other end of that to put my name on the list for conflicts outside of the circuit in which I practiced." PCR, page 985, lines 1-8. Later, Stone stated: "[m]y experience was probably more with the court *rules* that I think, and I still think, require me actually to put myself on conflict lists outside of the places in which I have a conflict. And I may be reading that *rule* wrong, but that is at least my impression of it and when I studied that particular issue, that's the way I understood it." PCR, 1130, l. 19-25. (emphasis added).

---

indicated in the Applicant's objections, all argument, motions and positions are incorporated by reference into that written set of objections.

In a similar vein, opposing PCR counsel Asst. Deputy Attorney General Zelenka questioned Applicant's witness Professor John P. Freeman regarding counsel Stone's "...requirement as a matter of law to make himself available for appointment in criminal cases...." PCR, 1467, l. 10-12. This questioning by counsel Zelenka of Professor Freeman concerning the application of Rule 608 to Stone's appointment is evidenced by several pages in the transcript. PCR, 1467-1470. In fact, counsel Zelenka asked Professor Freeman whether: "...there's no doubt that he [Stone] would be required to subject himself to appointment." PCR, 1468, l. 12-13.

Likewise, the State relies upon inaccurate references to SCACR Rule 608 in its Post-Hearing Memorandum in Opposition to Post-Conviction Relief (hereinafter MO). During the argument concerning Stone's conflict between his loyalties as defense counsel for Aleksey and his service as a state prosecutor, the State references the "requirement that he put his name on the list for conflicts outside of his circuit." State's MO, p. 35. This memorandum continued to assert that "Rule 608 required non-full time prosecutors to make themselves available for appointment in criminal cases." State's MO, p. 43. In fact, the State specifically asserted that "Stone was appointed to represent Aleksey pursuant to Stone's compliance with Rule 608, SCACR." MO, p. 45. The State's memo also urged that Stone's alleged obligation under Rule 608 colored his ability to discern the ethical prohibitions found in ethics opinions barring a prosecutor from representing criminal defendants in any courts. State's MO, p. 48 and PCR, 1465, l. 11-22 referencing SC Bar Ethics Opinion 77-2, 82-26 and ABA Formal Opinion 142 and 262.

The State's proposed Order adopted the erroneous application of this Rule wholesale. First, there is reliance upon Rule 608 appointment during discussion of Professor Freeman's testimony. State's proposed Order, p. 43. Again, the State's proposed Order indicated that

"...Stone was appointed to represent Aleksey pursuant to Stone's compliance with Rule 608, SCACR....Stone was not exempt from appointment , as a matter of statutory law, based upon his assignment." State's proposed Order, p. 45. Later, the Order stated that "...he [Stone] was aware he was not exempt from court appointments under Rule 608 and he was required to place his name on the appointment list..." State's proposed Order, p. 46, citing PCR, pages 985, 1131-1132.

Because Rule 608 was not enacted for more than a year after Stone's appointment and did not take effect until nearly two years after Aleksey's trial, this testimony and these assertions are clearly wrong and patently false. In fact, SC Code Section 16-3-26 (1997 version), which governed appointment of defense counsel in capital proceedings in 1998, provided a mechanism for the relief of counsel from these appointments. Specifically, this section of law stated: "[i]n the event the court appointed counsel notifies the chief administrative judge in writing that he or she does not wish to provide representation in a death penalty case the chief administrative judge shall advise the Office of Indigent Defense which shall forward a name or names to the chief administrative judge for consideration." SC Code Section 16-3-26 (G).

The Dichotomy Regarding Eligibility for Appointment

Nearly as troubling as the reliance upon SCACR Rule 608, referenced above, is the state's position that Stone's conflict in Aleksey did not bar Stone's eligibility for appointment. This position is particularly troubling in light of the position taken by both the state's prosecutors at both the circuit and municipal levels regarding guardian ad litem appointments. Finally, the State's handling of a conflict scenario in the Fourteenth Judicial Circuit is contrary to the State's position taken in the PCR in the case at bar.

As referenced above, the State contends in this matter that Stone was not only eligible for

appointment to represent Mr. Aleksey, but was required to do so. However, regarding eligibility for appointment as a guardian ad litem (GAL), the 16 Circuit prosecutors in South Carolina unanimously assert that a "tremendous and very real potential for conflicts of interests in violation of the South Carolina Rules of Professional Conduct" would arise if prosecutors where required to accept GAL appointments. Letter from the Solicitor's Association of South Carolina, dated January 15, 2008, attachment 1. This sentiment is echoed at the summary court level by the Municipal Attorney Association who announce that "...appointments in cases representing parties against law enforcement is an apparent conflict of interest." Letter from the Municipal Attorney Association of South Carolina to the SC Bar House of Delegates, dated January 17, 2008, attachment 2.

It defies logic to believe that conflicts arising in the class of cases covered by a GAL appointment disable a state or municipal prosecutor from eligibility for appointment due to conflict of interest concerns but a criminal defendant, charged with the capital murder of a state highway patrol trooper, is subject to representation by similarly situated counsel. Aggravating this doublespeak is the fact that this contrary position regarding the disabling nature of GAL appointments is asserted by both the First Circuit Solicitor who is still listed as counsel for the State in the case at bar and the Fourteenth Circuit Solicitor, who served as Aleksey's trial counsel while suffering from the identical conflict. Undersigned counsel is unable to reconcile these contrary positions and ask that the Attorney General expressly do so or withdraw and modify the State's position in the case at bar.[2]

---

[2]Undersigned counsel understands that the State of South Carolina may just take these contrary positions as a matter of convenience or self-interest. While estoppel or claim preclusion generally bars such flip-flopping by a litigant, due process certainly limits the State, as ministers of fairness, from doing so. See generally, US v. Brady, 710 FSupp 290 (Dist. of Colorado 1989)(Violation of due process for the state to hold an individual to a standard contrary to

The Juan Salvador Solis Matter and Recusal Based Upon Conflict of Interest

Finally, the Court should consider the situation regarding conflict of interests in the prosecution and defense of Juan Salvador Solis.[3] In January 1998, Juan Salvador Solis was arrested for Obtaining Property under False Pretenses. This arrest concerned Juan Salvador Solis' actions in Beaufort County, South Carolina.

Tom Johnson, an attorney in Jasper County, represents Mr. Juan Salvador Solis in a civil matter pending in Jasper County. Mr. Johnson also serves as a part-time prosecutor in Jasper County. According to news accounts, Mr. Johnson could not serve as Mr. Salvador Solis' attorney in the criminal matter pending in Beaufort County because his service as a part-time prosecutor in Jasper County created a "conflict of interest." See *Is Boyfriend in Quints Case only 16?*, Beaufort Gazette, January 31, 2008.

Further, the Fourteenth Circuit Solicitor, Duffie Stone recused his entire office from the prosecution of Mr. Salvador Solis, citing a "conflict of interest." Initially, Stone declined to comment regarding this conflict of interest. See *Solicitor Hands Quints Case Off to Attorney General*, Beaufort Gazette, February 22, 2008. However, he later stated this recusal was made to "avoid even the appearance of impropriety." See *Solicitor Explains Conflict in Quintuplets Fraud Case, Beaufort Gazette*, February 23, 2008.

Like the contradictory positions taken regarding the GAL appointments, the contrary positions taken by the State of South Carolina, through Solicitor Stone's actions, in the Salvador Solis case and the State's position minimizing any conflict issues concerning the representation

---

position provided by a different state actor.)

[3]See articles from the Beaufort Gazette dated January 31, 2008, February 22, 2008, February 23, 2008 and June 28, 2008, attachments 3.

of Aleksey in a death penalty matter concerning the death of a state highway patrol trooper defy logic and common sense.

Conclusion

Because there is an obligation placed upon all counsel to ensure that only truthful testimony is placed before the court, the undersigned counsel request that this Court reconvene the witnesses and the parties to correct any incorrect information provided to the court by the testimony, in the briefs and that the Court reassess its rulings which rely expressly or implicitly upon this testimony.

Respectfully submitted,

DAVID TARR
1313 Elmwood Drive, Suite H.
Columbia, SC 29201
(803) 238-7967

JAMES A. BROWN, JR.
Law Offices of Jim Brown, P.A.
1111 Bay St., P.O. Box 592
Beaufort, SC 29901-0592
(843) 470-0003

BY: _____
ATTORNEY FOR APPLICANT

July 8th, 2008.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	CA No. 00-CP-38-628
	)	
BAYAN ALEKSEY, #5059	)	
Applicant,	)	
	)	
v.	)	CERTIFICATE OF SERVICE
	)	
STATE OF SOUTH CAROLINA	)	
Respondent.	)	
	)	

FILED FOR RECORD
LISA M. HILL
CLERK OF COURT
ORANGEBURG, SC
2008 JUL 10 A 11:19

I, James A. Brown, Jr., hereby certify that I have served upon the attorney for the respondent one (1) copy of Applicant's Motion to Clarify the State's Position Regarding a Prosecutor's Eligibility for Appointment in Light of Conflicts of Interest, with supporting attachments, in the above-captioned case by depositing a copy of same in the United States Mail, first class, postage pre-paid, addressed as follows:

Donald Zelenka, Esq.
Assistant Deputy Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

This the 8th day of July 2008, in Beaufort, South Carolina.

JAMES A. BROWN, JR

ATTACHMENT ONE

Solicitors' Association of South Carolina

Post Office Box 11251
Columbia, South Carolina 29211-1251

FILED FOR RECORD
LISA W. MIZELL
CLERK OF COURT
ORANGEBURG, SC
2008 JUL 10 A 11: 19

David M. Pascoe, Jr.
First Judicial Circuit

Barbara R. Morgan
Second Judicial Circuit

C. Kelly Jackson
Third Judicial Circuit

Jay E. Hodge, Jr.
Fourth Judicial Circuit

W. Barney Giese
Fifth Judicial Circuit

Douglas A. Barfield, Jr.
Sixth Judicial Circuit

Harold W. Gowdy, III
Seventh Judicial Circuit

Jerry W. Peace
Eighth Judicial Circuit

Scarlett A. Wilson
Ninth Judicial Circuit

Christina T. Adams
Tenth Judicial Circuit

Donald V. Myers
Eleventh Judicial Circuit

E.L. Clements, III
Twelfth Judicial Circuit

Robert M. Ariail
Thirteenth Judicial Circuit

Isaac McDuffie Stone, III
Fourteenth Judicial Circuit

J. Gregory Hembree
Fifteenth Judicial Circuit

Kevin S. Brackett
Sixteenth Judicial Circuit

MEMORANDUM

TO: Members of the South Carolina Bar House of Delegates

FROM: Jay E. Hodge, Jr.
President, Solicitors' Association of South Carolina

RE: Proposed Amendments to Rule 608

DATE: January 15, 2008

On behalf of the Sixteen Judicial Circuit Solicitors, I am writing to voice our strong opposition to the proposed amendments to Rule 608 that, *inter alia*, removes the exemption for government attorneys.

We oppose the removal of the exemption for government attorneys for the following reasons.

- **Conflicts of Interest.** There is a tremendous and very real potential for conflicts of interests in violation of the South Carolina Rules of Professional Conduct through the appointment of government attorneys. For example, the cases in which guardians *ad litem* (GALs) are appointed are generally family court cases, and a large number, but not all, of those cases involve DSS/allegations of abuse or neglect. The potential conflict arises in those cases due to the possibility that the government attorney may be employed by an agency that will be simultaneously or subsequently prosecuting, defending or presiding over a related criminal matter.
- **Violation of State Ethics Act and/or Personnel Policies.** While private practitioners have the ability to use the resources of their law firms when handling appointed cases, government attorneys do not. It would be a violation of Section 8-13-700 and/or individual agency personnel policies in most instances for government attorneys to use any agency resources (time, telephones, computers, printers, copiers, office space for meetings, etc.).
- **Civil Liability.** Government attorneys do not maintain their own malpractice insurance. And, as of today's date, the Bar has not received a binding, definite answer from its insurance company as to whether the Bar's *Pro Bono* Program provides coverage for attorneys appointed under Rule 608 either (1) to serve as GALs or attorneys (and who accept the fees offered by law through OID), or (2) to serve as GALs regardless of

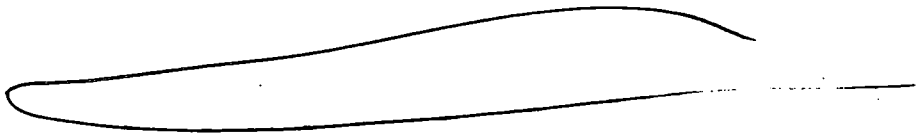
whether they accept fees. Moreover, even if the appointed attorneys are covered, it is not clear if the amount of coverage provided meets the maximum recoverable amount under either state or federal law. No rule requiring government attorneys to accept court appointments should even be considered without the inclusion of language providing that government attorneys cannot be appointed under until such time as the Legislature provides coverage for any civi. claim that may be filed (above and beyond what the Bar's malpractice policy covers).

- **Lack of Operating and Trust Accounts.** Government attorneys also do not have professional operating accounts and trust accounts from which they can draw to cover expenses associated with handling an appointed case or through which they can process any payments received from the Office of Indigent Defense (OID). OID does not always pay promptly or pay the entire amount that has been requested or ordered (in fact, according to a telephone conversation with OID staff today, government lawyers who must go to a Kinko's ™ to use a computer or print a document may not be completely reimbursed for those expenses). Most government attorneys are not going to be able to outlay money for expenses (including investigators, court transcripts, copies, etc.) and wait to be reimbursed without it affecting their ability to pay their owr personal bills. Moreover, in cases where not all expenses are covered, it is questionable whether the average government attorney – who is not incorporated – will be able to deduct un-reimbursed expenses as business or charitable expenses.

Please understand that I and the other Solicitors, as well as the attorneys on our staffs, believe very strongly in the obligation to serve the public. However, under the Rules of Professional Conduct (Rule 6.1), the representation of individuals is not the only way in which an attorney's *pro bono* obligation may be satisfied. Under the Rules, the obligation may be satisfied by involvement in bar activities aimed at either educating the Bar (to improve the system and administration of justice) or the public. That would include involvement in the work of the committees and sections of the State and other Bars, serving on the faculty of CLE programs, writing education materials, serving as screeners for legal clinics, and working with school children (on any of the number of projects the Bar has developed through the years – mock trial coaching and judging, participating in programs improving literacy, etc.). These are the avenues, in addition to community activities, that government attorneys have historically taken to satisfy their *pro bono* obligation.

The Sixteen Judicial Circuit Solicitors ask that the House of Delegates vote against the proposed amendments to Rule 608. We thank you for your attention and consideration, and we ask that you contact us if you have any questions or need further information.

ATTACHMENT TWO



4955-

City of Aiken

Post Office Box 1177
Aiken, S.C. 29802

Aiken All-America City 1997

January 17, 2008

SC Bar House of Delegates
C/O SC Bar
PO Box 608
Columbia, SC 29201

2008 JUL 10 A 11:20
FILED FOR RECORD
LISA W. MIZELL
CLERK OF COURT
ORANGEBURG, SC

Re: Proposed Rule 608 Amendments Regarding
Full-Time Government Municipal Lawyer Appointments to Litigants

Fellow Bar Members:

The Municipal Association of South Carolina's Municipal Attorneys Association has been provided with a copy of proposed changes to Rule 608, SCACR.

We were dismayed to read that the exemption for local government attorneys who work full-time is proposed to be removed. Our initial dismay has given way to grave concerns about the implications of this proposed revision. We are also unclear, from the draft rationale in support of these changes, as to whether full-time local government attorneys were contacted before this revision was included as a proposed rule change.

First, the proposal before you purports to convert a public asset – public lawyers' time and advice – to private use, in direct contravention of federal, state, and local laws. Taxpayers will not have any say in this reappropriation of public property if it is done by a mere rules change.

Second, our local government insurers have flatly stated our proposed appointed case work will not be covered by our general liability, or any other, policy of insurance.

Third, many of our full-time local government attorneys are also prosecutors in municipal or other courts. We note that you have retained the exemptions for circuit solicitors and their deputies. Since many city court attorneys work so closely with these circuit solicitors as well as law enforcement officers, appointments in cases representing parties against law enforcement is an apparent conflict of interest. Furthermore, defendants in Municipal Court prosecutions will be visiting their city attorney-prosecutors as appointed clients if the change is approved.

Fourth, many municipal attorneys handle document requests and U.S.C. Section 1984 – based lawsuits filed against law enforcement and other city officials. Appointment of attorneys for these clients puts municipal attorneys into a severely untenable position with the folks with whom they usually work every day.

RLP
#1

Fifth, as many Delegates can appreciate, the practice of public law is already – in and of itself – an increasingly demanding public service.

Sixth, our full-time public service work as government attorneys, does not lend itself to our being able to afford to rent additional office space or carve out hours from already limited personal time to meet with appointed clients and attend hearings, pay thousands of dollars out of personal funds for legal malpractice liability insurance for four clients a year, or to focus the attention needed for, or demanded by, these appointed clients.

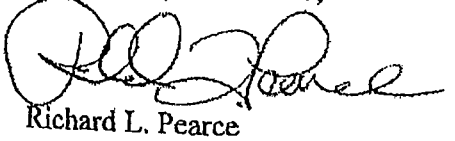
Seventh, full-time government lawyers cannot simply "seek inactive status" as your packet cover memo suggests. We must remain active members in order to competently represent our public and elected officials with a myriad of legal issues in a host of different settings including trials as well as prosecuting defendants in Municipal and Common Pleas courtrooms.

Local government lawyers already have, and continue to have, much to contribute to the legal system in South Carolina within their existing full-time responsibilities. For the reasons mentioned here, and the plain fact that we are simply not equipped – as full-time government attorneys – to handle this proposed reappropriation of public assets, we simply ask to be allowed to continue our mandated work without the peril of being pulled away from it for these proposed appointments.

Our plate is full, please do not shatter it.

We respectfully request that the exemption under Rule 608 for full-time public attorneys remain intact.

Respectfully Submitted,



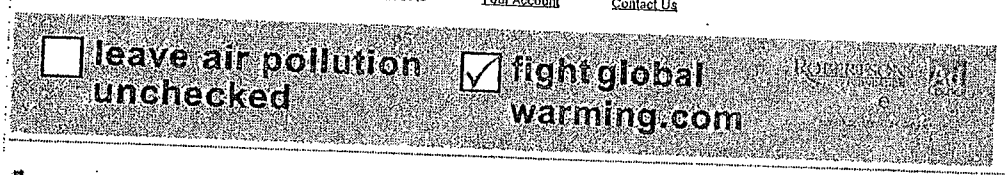
Richard L. Pearce
President, Municipal Attorneys Association,
City Solicitor and Staff Attorney
City of Aiken, South Carolina

cc: SC Bar Board of Governors
Robert Wells, SC Bar Executive Director
Charmy Medlin, SC Bar Membership Services Director
Howard Duvall, MASC Executive Director
Municipal Attorneys Association of South Carolina

ATTACHMENT THREE

Subscribe - Home Delivery | Place a Classified Ad | Your Account | Contact Us

July 8, 2008 - Beaufort, South Carolina



Is boyfriend in quints case only 16?

Lawyer says medical records list age as 16, not 22 or 24 as suspect stated

Published Thu, Jan 31, 2008

By JEREMY HSIEH
jhsieh@beaufortgazette.com
843-986-5548

Add Comment

The boyfriend of the woman who police say lied about being pregnant with quintuplets in order to solicit donations may be six years younger than he told authorities – making him a minor – his lawyer in an unrelated civil case said Wednesday.

Police arrested the couple, Juan Salvador Solis and Nancy Cantu, both of 45 Youmans Drive on Lady's Island, on Monday and charged them with obtaining property under false pretenses.

Tom Johnson's Hardeeville law firm has been representing Solis since 2006, when, Johnson claims, a defective nail gun misfired, blinding Solis in one eye. They are suing the makers of the nail gun. Medical documents the firm is using in the case say Solis was born in April 1991, making him 16, Johnson said. "We've got the same rumor," said Beaufort County Sheriff P.J. Tanner. "We haven't been able to confirm anything. We're basically going by what they're telling us" as the investigation continues.

Before the arrests, Solis said he was 24. Beaufort County Detention Center logs identify him as 22. Both Solis and Cantu are being held on $25,000 bond in the detention center and investigators are trying to determine the total value of goods and money the couple received, which affects the prison time they face, if convicted.

Police think the couple received at least $1,000 in goods, which carries a maximum sentence of five years.

If that figure exceeds $5,000, they face up to 10 years, Tanner said.

But if Solis is a minor, he could be sent to a juvenile detention facility in Columbia and his case could fall under the jurisdiction of the Department of Juvenile Justice.

In the meantime, if either Solis or Cantu is able to come up with the bond money before their Feb. 22 court date, they will not be released, pending questioning by U.S. Immigration and Customs Enforcement.

In a Jan. 11 interview, Cantu said in Spanish she was in the country legally, though Solis was not.

Johnson's firm cannot represent Solis in his criminal case because Johnson is a part-time solicitor in Jasper County, a conflict of interest, but he offered the unverified information because he "felt there was a critical part of the story being left out – if a 15- or 16-year-old child is being manipulated" by an older woman.

Cantu's stated age also has varied. Before her arrest, she said she was 36. In Beaufort County EMS reports documenting the four 911 calls she made from Dec. 11 to Jan. 6, her age is listed as 25 in three cases and 37 in the other.

In late December, Cantu called the Spanish-language Radio Sol, based in Bluffton, crying and claiming she was 19, going hungry, had no money or car and was expecting quintuplets, station director Esperanza Ebersole said Wednesday.

Also Wednesday, Tanner said several agencies could file civil suits against the couple to seek restitution for various agencies, such as Beaufort Memorial Hospital and Beaufort County EMS, if the criminal case doesn't address repayment for those entities.

"There's accountability issues here," he said, referring to the man-hours spent investigating the false claim and preparing for quintuplets.

It seems unlikely restitution will come in the form of money, since Cantu and Solis said they do not have any income or property.

There are alternatives to cash, though.

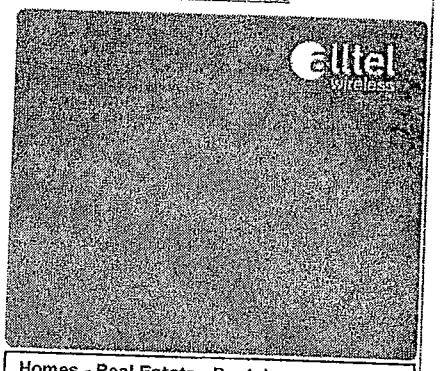
"There's a lot of trash along the streets of Beaufort County that needs to be picked up," Tanner said.

Most Popular | Most Emailed | Most Talked About

Authorities investigate three area shootings
Habersham expansion approved with conditions
Firefighters become 'Special Friends' to area autistic girl
Marines release name of corporal killed in motorcycle wreck
High-speed chase leads to arrest
New Beaufort businesses to keep us well-fed and looking good
Area schools adjusting for high fuel costs
Marine killed in motorcycle accident
Son of former lawmaker arrested while on bail
Sheriff to address Lady's Island group

Need help?

Search... Local News, Ads, Business Directory
Web Search powered by YAHOO! SEARCH
Search BeaufortGazette.com Archives



Homes - Real Estate - Rentals
Sponsor: Lowcountry Real Estate

Featured Property
17 Broadview Drive
Lowcountry Real Estate

Hot Properties
- Waterfront Estate Sale! Cottage on St. H...
- Beautiful 1 ac. MH lot avail. $39,900. W...
- Near MCAS. Remodeled, Brick, 4BR/2.5BA....
- $29,900 SOUTH CAROLINA'S BEST DEAL! LAKE...

Hot Rentals
- Beautiful Restaurant Site. Restored 1914...
- Bus. office 80 Lady's Island Dr. $250/mo...
- 2Br Waterfor Place condo for lease. Imma...
- Executive Homes Newpoint, Pinckney Retre...

Jobs - Careers - Employment
Sponsor:

Cars - Trucks - SUVs
Sponsor:

Great Restaurants

Looking for a new job?

- Need to reach The Gazette? Try our Directory.
- Web site problems? See our site help page.
- Questions about home delivery? See our customer service page.

See Today's Mortgage Rates
Calculate Your New Mortgage Payment. See Rates- No Credit Check
LowerMyBills.com

Refinance $300,000 for Only
$300,000 Mortgage for only $965/month. Save $1,000's - No
HomeLoanHelpLine

Refinance and Save $1,000S
$150,000 Mortgage for $483/month. Compare up to 4 free quotes.
pickamortgage.com

Ads by Yahoo!

bg beaufortgazette.com

Solicitor hands quints case off to attorney general

Published Fri, Feb 22, 2008 12:00 AM
By JEREMY HSIEH
jhsieh@beaufortgazette.com
843-986-5548

Citing a conflict of interest, the state's local prosecutor is handing the quintuplets fraud case off to the South Carolina attorney general's office.

Mark Plowden, spokesman for the attorney general's office, said his office received the case Thursday and that it will be reviewed "to determine what, if any, prosecutorial action is warranted," a process that he expects to take weeks.

Solicitor Duffie Stone of the 14th Judicial Circuit could not be reached for comment. Heather Strickland, a spokeswoman for the solicitor's office, said she cannot elaborate on the conflict of interest for legal and ethical reasons. Plowden said he doesn't know the nature of conflict and that his office typically doesn't delve into them.

The case, which is under investigation, involves Erika Nieves-Abrigo, aka Nancy Cantu, and Juan Salvador Solis, both of 45 Youmans Drive on Lady's Island. In December, they claimed to be pregnant with quintuplets and investigators believe they received more than $1,000 in cash and material donations as their story spread.

A voluntary ultrasound the Beaufort County Sheriff's Office arranged proved Nieves-Abrigo was not pregnant at all, leading to their arrest Jan. 28. They are charged with obtaining goods under false pretenses and are being held in the Beaufort County Detention Center.

Investigators said last week that Nieves-Abrigo is also wanted in Florida, where she is accused of unlawfully collecting welfare benefits worth $2,375 from 1999 to 2000. She was ineligible because she was simultaneously collecting welfare benefits from Georgia.

Nieves-Abrigo and Solis are due to appear in court today for a pre-trial roll call.

bg beaufortgazette.com

Solicitor explains conflict in quintuplets fraud case

Published Sat, Feb 23, 2008 12:00 AM
Staff reports

The solicitor's office in the 14th Judicial Circuit won't prosecute the quintuplets fraud case because one of its part-time employees is representing one of the defendants in an unrelated civil case, Solicitor Duffie Stone said.

"Everything appears to be unrelated, but to avoid even the appearance of impropriety, I've asked the attorney general's office to come in and prosecute the case," Stone said.

The case, which is under investigation, involves Erika Nieves-Abrigo, aka Nancy Cantu, and Juan Salvador Solis, both of 45 Youmans Drive on Lady's Island. In December, they claimed to be pregnant with quintuplets and investigators believe they received more than $1,000 in cash and material donations as their story spread.

A voluntary ultrasound the Beaufort County Sheriff's Office arranged proved Nieves-Abrigo was not pregnant at all, leading to their arrest Jan. 28. They are charged with obtaining goods under false pretenses and are being held in the Beaufort County Detention Center.

The part-time solicitor, Tom Johnson, has a law firm in Hardeeville that has represented Solis since 2006, when a defective nail gun misfired and blinded Solis in one eye, Johnson said. They are suing the makers of the nail gun.

After the arrest, Johnson spoke up about inconsistencies with Solis' age. Johnson said medical documents state that Solis is 16, but detention center and court records list him as 22.

bg beaufortgazette.com

Five months in, little action in quints case

Published Sat, Jun 28, 2008 12:00 AM
By JEREMY HSIEH
jhsieh@beaufortgazette.com
843-986-5548

Saturday marked the fifth month in lockup for the Lady's Island couple that claimed to be pregnant with quintuplets to allegedly scam the community out of more than $1,000 in money and goods.

The well-publicized criminal case appeared open-and-shut -- investigators with the Beaufort County Sheriff's Office got the "mother" in the scheme, Erika Nieves-Abrigo, aka Nancy Cantu, to have an ultrasound in January, revealing she was not pregnant at all -- but the South Carolina Attorney General's office won't even confirm it will prosecute.

In February, spokesman Mark Plowden said the case was "under review to determine, what, if any, prosecutorial action is warranted," a position he reiterated Thursday.

The couple claimed to be pregnant with quintuplets in December and received gifts and donations as their story spread, according to police.

Plowden said verifying the age of Juan Salvador Solis, the "father" in the case has been a key holdup. The parties were in court for two weeks this month because Solis' side wants him treated as a minor and his case moved to family court.

"Problem is, you can't move someone who is potentially an adult into a youth prison without knowing that as a fact," Plowden said. "Where we are now, we have now approached the Mexican government in an attempt to determine what his true age is."

Before his arrest, Solis said he was 24. Beaufort County Detention Center logs put his age at 22 at the time of his arrest. Hardeeville lawyer Tom Johnson, whose firm is representing Solis in an unrelated personal injury case, said medical documents the firm is using say he was born in April 1991, making him 16 when he was arrested.

Plowden said "twists and turns" like this make it tough to pin an expected timeline to cases.

"Just because a case is here, you can't turn around and prosecute next week. You've got to make sure defendants are properly charged before we get to court," he said. "We have never, and will never, guess how quickly a case will move."

The federal Immigration and Customs Enforcement agency was also tapped in the case to determine Solis and Nieves-Abrigo's immigration status, though their involvement usually comes after local charges are adjudicated, officials have said.

In a Jan. 11 interview, Nieves-Abrigo said in Spanish she was in the country legally, though Solis was

not.

Solis and Nieves-Abrigo, both of 45 Youmans Drive, are charged with obtaining goods under false pretenses and face up to five years in prison if convicted. Immigration officials' involvement in the case bars the couple from getting out on bond.

Nieves-Abrigo is also wanted in Florida, where she is accused of unlawfully collecting welfare benefits worth $2,375 from 1999 to 2000. She was ineligible because she was simultaneously collecting welfare benefits from Georgia.

Criminal prosecution duties in Beaufort, Jasper and Hampton counties ordinarily fall to the office of Duffie Stone, solicitor for the 14th Judicial Circuit, though Stone handed the case off to the attorney general's office in February because of a potential conflict of interest stemming from Solis' personal injury case; his lawyer in that case is a part-time solicitor.

STATE OF SOUTH CAROLINA COUNTY OF ORANGEBURG	)	IN THE COURT OF COMMON PLEAS OF THE FIRST JUDICIAL CIRCUIT
BAYAN ALEKSEY, #5059 Applicant, vs. STATE OF SOUTH CAROLINA, Respondent.	)	Case No. 2001-CP-38-628 ORDER DENYING APPLICATION FOR POST-CONVICTION RELIEF

This matter comes before this Court by an application for state post conviction 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. After receipt of Memorandum of Law from each party, this Court indicated its intention to dismiss the application and requested Respondent' Counsel to submit a proposed order consistent with the Court's letter of October 12, 2006. For reasons not clear to the Court, nether Counsel received the letter until March 1, 2007. This Order follows:

FILED FOR RECORD
WINNIFA B. CLARK
CLERK OF COURT
ORANGEBURG, S.C.
2007 FEB -5 A 8:32

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. Mr. Aleksey was arrested on January 1, 1998. At the January 1998 term of the Court of General Sessions for Orangeburg

ATTEST: TRUE COPY
Winnifa B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

County, Mr. 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. R. 1804.

The sentencing phase began on August 31, 1998. R. 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.

R. 2156:12-16; 2146:20-22. 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.

R. 2161:25 - 2162:13. The jury was also instructed that "you may consider any other mitigating circumstance which is supported by the evidence in this case." R. 2162:14-22. 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. R. 2171-72. The jury was polled on its verdict. R. 2172-74. Counsel made a motion for a new trial and sentencing. R. 2179-80. Judge Cottingham denied the motion. R. 2180. The judge then sentenced Mr. Aleksey to death. R. 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 Ms. Perez Blackwell 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, 532 U.S.1027, 121 S.Ct. 1974, 149 L.Ed.2d 766 (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, Mr. 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 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 (Ms. Perez Blackwell is referred to as Gloryvee, Gloryvee Perez, and Gloryvee Perez Blackwell during the trial and PCR hearing, she will be referred hereafter as Ms. Perez Blackwell) and her two children to exit from the passenger side of the vehicle. While Ms. Perez 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 reported stolen.

On January 2nd, appellant gave two statements to officers from the State Law Enforcement Division (SLED). In the first, he claimed Ms. Perez 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. Ms. Perez 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. Ms. Perez 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, 535 U.S. 162, 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 Mr. 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,

535 U.S. 162, 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 Mr. 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, 535 U.S. 162, 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 conflicts 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 Mr. 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 Mr. Aleksey possessed information which would cause a jurors provided [sic] 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 SLED 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, 529 U.S. 362, 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 [sic] 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 Blackwell. Counsel failed to impeach witness with evidence of her motive to commit crime of which Applicant was charged. Counsel failed to prove Perez Blackwell's character through character evidence involving specific instances or relevant dishonest conduct.

(5) Trial Counsel failed to properly cross examine and impeach state's witness Sara 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 agent Mears about Applicant's allegations of coercion during police

interrogation. Counsel failed to question Mears about certain evidence belonging to Gloryvee Perez Blackwell found in car that was evidence of her recent criminal activity and gave her motive to shoot Sergeant Lingard. Counsel failed to cross examine agent Mears about the missing SLED statement of Sara 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 Mr. 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 Blackwell. Such an investigation would have uncovered a substantial amount of evidence that Ms. Perez Blackwell 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, 529 U.S. 362 (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 Sara 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 Blackwell's 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.

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, 360 U.S. 264, 79 S.Ct. 1173, (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. 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, 919-20 (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).

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. Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (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 378. 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. 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 382-83. 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 378-79. 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 381-82, 398-99. 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 383-84. The Rompilla Court rejected the argument that trial Counsel sufficiently investigated Rompilla's prior convictions by reviewing his rap sheet. Id. at 385 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 undoubtedly investigated further and uncovered the voluminous mitigating evidence not introduced at trial. Id. at 390-91. 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 387-89.

In addition to a burden of showing "deficient" performance, Counsel must also prove "prejudice" under the Sixth Amendment. In Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004), 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 539 U.S. at 536, 123 S.Ct. at 2543; 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 v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003), 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

[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.").

> 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. In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence."

Wiggins, 539 U.S. at 534. This Court concludes that Mr. Aleksey is unable to satisfy this burden of proof from his allegations.

B. Discussion of Specific 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. [Applicant's Memo., p. 50-55].

Failure to Retain Original Files by Trial Counsel

In his initial allegation, Mr. 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. 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 Mr. 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 Mr. 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 Mr. Aleksey and did not maintain a copy. PCR R. 68. He stated that Mr. Aleksey wanted his entire file. He recalled that he spoke with Mr. Stone about it, after he received a call from someone in the grievance office of the Bar who said to give Mr. Aleksey the file. PCR R. 69. Mr. Sims stated that while he had a file during the representation, Mr. Stone's file was the central file. PCR R. 618. Simms stated that there was an attorney grievance filed by Mr. Aleksey limited to Mr. Aleksey receiving his file. PCR R. 660. Simms stated again that information he received from the grievance committee gave Simms the impression that he had no other choice but to turn his original file over to Mr. Aleksey. PCR R. 661. This was done in February 1999 before any post conviction proceedings had begun. PCR R. 661.

Counsel Duffie Stone testified that he had copies of some matters, that he retained, but none of the original file except for correspondence he received from Mr. Aleksey after the file was turned over to the applicant. Counsel stated that a copy of his computer time records were retained. On February 22, 1999, he stated he sent the original file to Mr. Aleksey. PCR R. 827. As Mr. Stone stated in his letter to Mr. 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 R. 829.

Mr. Stone stated that in February 1999, he was unaware of the statute that required capital trial Counsel to maintain the original file; he remained unaware until he received a copy of the application for post conviction relief. PCR R. 829-830. Mr. Stone stated that he retained some work product, but not the discovery materials. Mr. Stone stated that he was unaware of the statute when Mr. Aleksey asked for the file, but still did not want to give it to him because he thought it was a bad idea. PCR R. 831. Mr. Stone noted that the January 28, 1999 letter he received from Mr. Aleksey demanded "the original, not a photocopy." Id. Since Mr. Stone felt it would have been a delay in turning the file over to Mr. Aleksey, after receipt of the disciplinary council correspondence, "I decided to move as quickly as humanly possible." Mr. Stone stated that he felt that he needed to hold the file until someone was appointed to represent Mr. Aleksey on appeal and then would turn the file over to them. PCR R. 1140. Mr. Stone was concerned about sending a file into the prison based upon his desire to preserve the attorney-client

privileged matters and also concerned about how much of the material Mr. Aleksey could keep or whether some of the file would be seized. PCR R. 1141.

Mr. Stone felt that when Mr. Aleksey grieved him over the file, he should turn it over to him on Feb. 19, 1999. PCR R. 1144. At that time Mr. Aleksey's appeal was still pending. Counsel Stone, prior to the release contacted Professor Adams at the U.S.C. Law School about Mr. Stone's ethical concern about turning over the file, and Professor Adams advised Mr. Stone to give up the file. There was no discussion about Section 17-27-130. PCR R. 1144. Mr. Stone stated that there was no place, like Kinko's Copy Center or other quick copying place in Beaufort nor was there someone he was willing to turn the file over to make copies. Mr. Stone felt that retaining a copy of his billing records and some of the other materials would be sufficient to refresh his memory about the case.

Mr. Stone stated he had discussions with Mr. Sims, but did not recall specifics. PCR R. 1146. Mr. Stone stated that when he received the grievance his first thought was to get rid of the file which is what he did. PCR R. 1146.

On redirect, Mr. Stone acknowledged that there was never any official order from the grievance committee mandating him to turn over the file, but based on his communications he felt directed to do so. PCR R. 1230.

Analysis

The Applicant makes various constitutional claims and implies that the state statute provides the remedy of a new trial if trial Counsel does not maintain their original file. There is nothing in the statute which creates such an occurrence.

It is undisputed that the appeal was still pending at the time of the January 1999 request by Mr. Aleksey for his original file. It is also undisputed that Mr. Aleksey received the entire original files of both Mr. Sims and Mr. Stone based on his insistence (e.g. complaints to grievance committee). Now, Mr. Aleksey asserts because he personally received the original file from his Counsel, he is entitled to a new trial because his actions may have impaired his ability to prove his PCR case (apparently Mr. Aleksey commingled his original files with independently received documents and materials from his own Freedom of Information Act (F.O.I.A.) requests).

Mr. Aleksey cannot gain a new trial where his own intentional conduct created the alleged technical violations. The hindrance and difficulty he complains of in presenting his case was caused when he demanded that Counsel not comply with the statute by demanding his original files. Further, his own actions in commingling the materials cannot be deemed to work to his benefit.

In conclusion, this Court must deny the Applicant's request for relief. It is clear from all the evidence presented that the reason trial Counsel did not retain a copy of the Applicant's file was because of the Applicant's persistence that he be given the file and Counsel's reasoned response to a grievance filed to obtain the file. Further, trial Counsel only released the file to Mr. Aleksey after they consulted with ethics experts on the issue. Furthermore, even assuming ineffective assistance of Counsel, Mr. Aleksey has failed to show prejudice. Mr. Aleksey has his file. As a result, the Court denies Applicant's request for relief as it pertains to Ground A.

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, 535 U.S. 162, 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's Memo., 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, 566-67 (Okla. 1982), where 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, Mr. 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. For the reasons set forth below, this Court is constrained to deny the requested relief.

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, 446 U.S. at 348). An actual conflict of interest means "a conflict that affected Counsel's performance - as opposed to a mere theoretical division of loyalties." Mickens, 535 U.S. at 163. 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." Mikens 535 U.S. at 175. 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 176.

In Longworth v. Ozmint, 302 F.Supp.2d 535 (D.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," Mickens, 535 U.S. at 174 (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 Mr. Stone's potential conflict. Particularly, Solicitor Bailey advised the Court that there may be a conflict based upon Mr. Stone's part-time Solicitor position and asked for the court to make inquiry.

Mr. 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 [Mr. 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. [Mr. Aleksey] Yes.

Feb. 2, 1998 TR. 5-7, App. Ex. 70, PCR R. 737-39.

Subsequently on May 20, 1998 [mislabeled in some of the trial transcript as 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 Mr. 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.

R. 2192; see also PCR R. 740-43.

At the pretrial hearing on August 24, 1998, Solicitor Bailey again wanted to make the record clear that Mr. Stone was a part-time assistant solicitor in a different circuit and that Mr. Aleksey had been made aware of it and continued to desire to waive it. R. 180-81.

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.

R. 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 Mr. Aleksey.

a. Duffie Stone

Mr. Stone testified that at the time he represented Mr. Aleksey, he was a part-time prosecutor in the Fourteenth Circuit, exclusively in Beaufort. PCR R. 718-19. He stated this allowed him to have a private practice. He stated that throughout his practice, he never had any

dealings with Sergeant Lingard, the victim, although he had dealings with a number of troopers. PCR R. 723. He stated he began as a part-time prosecutor in 1997. PCR R. 724-25.

Mr. Stone declared that a large bulk of his private practice had been civil litigation assigned from the Insurance Reserve Fund. PCR R. 725-27. He stated that he had represented state employees, including the Department of Corrections and highway patrolmen. PCR R. 729.

Mr. Stone recalled speaking with Mr. Aleksey concerning his other employment on February 2, 1998. He recalled telling Mr. 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 R. 730-31. Mr. Stone explained to him he had never represented Sergeant Lingard and never met him, to his knowledge. PCR R. 731.

Mr. Stone noted at a later time, Mr. Aleksey attempted to file some lawsuits and Mr. Stone advised him he could not help him on those because he worked with the I.R.F. PCR R. 732, 734-35.

Mr. 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 R. 744, R. 180-82. Mr. Stone stated that he specifically brought up the Insurance Reserve Fund at that time. PCR R. 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 R. 747-49.

It was developed that Mr. 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 R. 753-54.

Inquiry was made of Mr. Stone concerning the South Carolina Bar Ethics Advisory Opinion 77-2 and the A.B.A. Ethics Opinions 142 and 262. PCR R. 980-83. Mr. 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 R. 984. Mr. 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 R. 985.

On cross-examination, Mr. Stone stated that he had specific communication with Mr. Aleksey about explaining to him what his role as a solicitor was as well as explaining the Insurance Reserve Fund. PCR R. 1129. Mr. 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. Mr. 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 R. 1130-31.

Mr. Stone stated at the time of his 1997 representation of Mr. Aleksey, he stated that he felt that court rules required him to put himself on conflict [appointment] list outside of places where he had a conflict. PCR R. 1131-32.

Mr. Stone stated that in 1997 he did not feel that he could not adequately represent Mr. Aleksey based upon his part-time status in the Fourteenth Circuit. PCR R. 1131. He stated that nothing occurred during the Mr. Aleksey representation that caused him to think or hold back on cross-examination or the development of evidence based upon in other role with the Fourteenth Circuit. PCR R. 1132:12-19.

Considering SCACR Rule 407, 1.7(b)(1) on whether he believed that the representation would be adversely affected,[2] Mr. Stone stated , in hindsight, that his assessment of his Mr. 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 R. 1133.

Mr. 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 R. 1133-34. He declared that the ongoing representation did not impact his ability to defend Mr. Aleksey. PCR R. 1134. To the contrary, Mr. Stone suggested that he had developed a knowledge of police procedures which probably would have worked to Mr. Aleksey's advantage. PCR R. 1134. Mr. Stone reiterated that he had discussed with Mr. Aleksey the fact of his representation of the state and county entities at the time of the trial. PCR R. 1134-35.

Mr. Stone stated that Mr. Aleksey never sought, after the initial consultation, to have him removed and consistently consented to the representation. PCR R. 1135.

Mr. Stone stated that his work on Mr. Aleksey occurred at his Beaufort office and no material went to the Fourteenth Circuit. PCR R. 1135.

Mr. Stone stated his work with Orangeburg County did not impact his representation of Mr. Aleksey concerning the escape charge against his client. PCR R. 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 R. 1136. He said he or Mr. Sims went to Willie Bamberg, the Director of the Detention Center to find out why Mr. Aleksey was charge with escape after looking at the

[2] Rule 1.7(b)(1): "The lawyer reasonably believes that the representation will be adversely affected."

window and determine that either he could not have gotten through the window, or if so the fences. PCR R. 1136-37.

Mr. Stone stated that Mr. Aleksey had told him, at some point, that the police had coerced a confession which would be an obvious defense to that evidence. However, Mr. 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 R. 1137-38.

Mr. 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. Mr. Stone recalled using a board during his cross-examination of the officers, outlining the time from and demeanor leading to the crying. PCR R. 1138. Further, he recalled using the confession form given Mr. 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 Mr. Aleksey's first statement. The obvious point needed to be presented at trial in cross-examination and was done. PCR R. 1139.

Mr. Stone stated he also made a F.O.I.A. request to get every case the agents had handled to determine how many resulted in confessions and used that on cross-examination. PCR R. 1139. "But there was nothing in that that made me feel uneasy about cross-examining them." PCR R. 1139-40. Mr. 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 R. 1140.

Mr. Stone did not know if co-Counsel Sims ever discussed the conflict issue with Mr. Aleksey outside of his presence. PCR R. 1146. Mr. Stone reiterated that after he had disclosed to Mr. 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 Mr. Aleksey never indicated he wanted him removed and in fact like the idea. PCR R. 1147.

Concerning the Jackson v. Denno issue, Mr. Stone stated that his client advised him that the confession was "coerced" or "pressured" but did not mention to him (or in the WIS interview) that he was beaten. PCR R. 1147. He stated he never received a vivid description of the coercion. PCR R. 1147. In his notes of March 23, Mr. Stone suggested nothing was new except allegations of beating the confession out of him. PCR R. 1147-48. Mr. Stone stated he noted then that Mr. Aleksey had not told WIS-TV about any beating and his response was only that he was under pressure; Mr. Stone did not recall him saying "they beat the confession out of him."

Mr. Stone stated he spoke with Mr. Aleksey a number of times concerning the confession and what caused him to give it. He told him he was coerced or pressured, but there was not any physical abuse.

Mr. Stone stated that they discussed with Mr. Aleksey testifying at the Jackson v. Denno hearing and they decided he would not. PCR R. 1149. Mr. Stone noted they were successful, nevertheless in keeping out a statement Mr. Aleksey made while in custody at the hospital concerning a Russian mob hit.

Mr. Stone stated that his role as 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 R. 1150.