

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SUMTER COUNTY
Court of Common Pleas

SC SUPREME COURT

Honorable Michael Nettles, Circuit Court Judge

CA No. 08-CP-43-00905
Appellate Case No. 2013-001968

BOBBY WAYNE STONE. *Petitioner,*

v.

STATE OF SOUTH CAROLINA *Respondent.*

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

PETITIONER’S REPLY 1

 I. Trial Counsel’s Failure to Support the Accident Theory of the Case 1

 II. Trial Counsel’s Failure to Investigate and/or Present Evidence of Stone’s Low
 Intellectual Functioning and Brian Damage 7

 III. Trial and Appellate Counsel’s Failure to Properly Object and/or Preserve Issues
 Regarding Inadmissible Victim Impact Evidence 18

CONCLUSION 19

Table of Authorities

FEDERAL CASES

<i>Booth v. Maryland</i> , 482 U.S. 496, 107 S.Ct. 2536 (1987)	18
<i>Caldwell v. Mississippi</i> , 472 U.S. 320, 105 S.Ct. 2633 (1985)	18
<i>Porter v. McCollum</i> , 558 U.S. 30, 44, 130 S.Ct. 447 (2009)	7,12,15
<i>Rompilla v. Beard</i> , 545 U.S. 374, 393, 125 S.Ct. 2456 (2005)	7,15
<i>Sears v. Upton</i> , 561 U.S. 945, 130 S.Ct. 3259 (2010)	12,15
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	7,17
<i>Tennard v. Dretke</i> , 542 U.S. 274, 287, 124 S.Ct. 2562 (2004)	15
<i>Wiggins v. Smith</i> , 539 U.S. 510, 535, 123 S.Ct. 2527 (2003)	15,19
<i>Williams v. Taylor</i> , 529 U.S. 362, 398, 120 S.Ct. 1495 (2000)	15

STATE CASES

<i>Ard v. Catoe</i> , 372 S.C. 318, 642 S.E.2d 590 (2007)	4
<i>Sapp v. State</i> , 2006-CP-08-2204 (2009)	18
<i>State v. Belcher</i> , 385 S.C. 597, 609, 685 S.E. 2d 802, 808 (2009)	6
<i>State v. Fennell</i> , 340 S.C. 266, 275, 531 S.E.2d 512, 517 (2000)	6
<i>State v. Kinard</i> , 373 S.C. 500, 503, 646 S.E. 2d, 168, 169 (Ct. App. 2007)	6
<i>State v. Tyner</i> , 273 S.C. 646, 258 S.E.2d 559 (1979)	18
<i>State v. Wise</i> , 359 S.C. 14, 596 S.E.2d 475 (2004)	18
<i>Von Dohlen v. State</i> , 360 S.C. 598, 607, 602 S.E.2d 738 (2004)	17

OTHER

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty
Cases (2003) 14

S.C. Code § 16-3-25 (c)(1) 18

PETITIONER'S REPLY

As set forth in detail in Petitioner Bobby Wayne Stones' opening brief, this case presents three issues challenging the adequacy of trial counsel's representation.¹ In this reply, Petitioner will respond to misstatements of fact or law contained in the State's December 29, 2015 submission.

I. TRIAL COUNSEL'S FAILURE TO SUPPORT THE ACCIDENT THEORY OF THE CASE.

Trial counsel's theory that Stone did not intentionally shoot Officer Kubala was consistent with: a) the evidence; b) Stone's statement to police and to trial counsel; and c) Stone's background, which contained no history of violence toward anyone, including law enforcement officers who had arrested him without incident for prior nonviolent offenses.² However, trial counsel's only method of implementing this theory was cross-examination of the State's witnesses. Counsel offered no affirmative evidence – especially expert testimony – to support their defense, even though such supporting evidence was readily available. As Respondent acknowledges, an expert witness could have testified, among other things, that:

- (1) it was indeed possible that the shooting could have occurred in the way Stone described in his statement to law enforcement;
- (2) the gun's trigger pull was 1.5 pounds, which was extremely light and unsafe under certain conditions;
- (3) the light trigger pull increased the likelihood of an unintentional discharge;

¹ Stone also argues that appellate counsel was ineffective to the extent that this Court's refusal to address a portion of the victim impact claim is attributable to appellate counsel's abandonment of the issue.

² Stone's prior record is not "extensive" as Respondent claims. On the contrary, prior to his arrest for this crime, Stone had two convictions, both for various property crimes not involving violence or any crime against persons. For the first conviction, Stone received a youthful offender sentence. Stone was sentenced to fifteen years for his second conviction, but he was paroled after serving approximately five and a half years with good behavior. App. 2919–22.

- (4) the gun could fire if rested upon three fingers the wrong way;
- (5) the evidence at the scene, including the bullet holes in the screen door, were consistent with an unintentional firing;
- (6) if the firing was intentional, the bullet holes would have been higher on the screen; and,
- (7) the discrepancy between the number of shots fired and the number of shots Stone recalled could be explained by Stone's state of intoxication and the stress of the situation.

Brief of Respondent 24.

At the PCR hearing, Wayne Hill – a homicide reconstruction and firearms expert – testified to all of the above conclusions. App. 4271–4301. He had previously testified forty-one times as an expert in this area, including six times in South Carolina. App. 4265–66. Hill's other important conclusions were that the trigger only had to move five one-hundredths of an inch before it discharged (App. 4275), and “the average shooter, even a non-practiced shooter, can fire six rounds per second with a semiautomatic pistol” like the one involved in this case. App. 4283. Hill also described studies, even with trained law enforcement officers, where the officers could not accurately recall the number of times they fired a weapon.³ App. 4297–98. Finally, Hill concluded, based on his review of the records and the physical evidence, including examination of the weapon and the crime scene, that there was no evidence contradicting Stone's story that he unintentionally fired the weapon. App. 4296, 4301.

³ Respondent errs in its claim that “the PCR Court was well within its province in finding that it was beyond the expertise of a firearms examiner to testify as to the effects of alcohol on human behavior.” Brief of Respondent 23. Mr. Hill described his personal experience being around intoxicated firearms users, his work on policies for law enforcement, and his involvement with the NRA and knowledge of its alcohol policies. He testified regarding the effects of alcohol without objection from Respondent. App. 4284–88. Moreover, Respondent's own witness at the PCR hearing, Ira Parnell, concurred with Hill on this same issue without objection. App. 4443.

The PCR Court – echoing Respondent’s post-trial brief – found that trial counsel were not ineffective because they consulted with “Donald Girndt (a former SLED agent) who had expertise in gunshots, blood splatter, and fingerprints,” and decided not to call him to testify because he could not state conclusively that the shooting was accidental.⁴ App. 7348. First, it is by no means clear that Girndt had the appropriate experience and knowledge needed for this case, and even less clear whether trial counsel asked Girndt to make all of the necessary inquiries. There was no relevant blood splatter or fingerprint evidence to be evaluated. Regarding the gunshot evidence, trial counsel testified that Girndt was someone he would typically use in a firearms case to “reconstruct the events or explain . . . the mechanism of the weapon involved,” but then admitted that the defense team did not consider doing a re-enactment of the shooting itself. App. 4468–70. Trial counsel stated that they considered calling Girndt to testify about “the trigger pull and – other aspects of the – of the weapon that was used, but if I remember, I think that came out through Ira Parnell, who was the SLED expert I believe.” App. 4470.

Furthermore, the fact that Girndt could not “say definitely this was an accident,” App. 4469, was not a reason not to call him (or another more appropriately qualified expert like Wayne Hill). Trial counsel was not required to conclusively prove accident – rather the State bore the burden of proving Stone acted with malice aforethought – and expert testimony detailing that Stone’s accident claim was plausible and consistent with the known evidence would have

⁴ Respondent also claims that trial counsel made a strategic decision “that in light of the fact [that] the points to which [Girndt] would testify could be brought out through cross-examination and argument, it was not worth the risk of having him possibly testify adverse to the accident theory.” Brief of Respondent 26. Trial counsel’s testimony does not support this claim. Rather, trial counsel testified that “it wasn’t a cut and dried thing. It wasn’t we could put [Girndt] up and he’s say definitely this was an accident.” App. 4469. Trial counsel explained that they did not call Girndt to testify “for that very reason.” *Id.* Respondent has simply invented a strategic decision that Respondent prefers over the one trial counsel actually offered. Moreover, the PCR Court’s order does not contain any such finding.

significantly strengthened the defense theory. Trial counsel acknowledged that the two competing theories of the case essentially came down to a battle between which story the jury would believe. Counsel explained, “I mean the State had a theory that it was ambush, but I don’t know of any evidence they had that it was an ambush.” App. 4486. Despite that knowledge, trial counsel offered no evidence to support their theory of the case.

In that regard, Stone’s case is very similar to *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007), and Respondent’s efforts to distinguish the two are without merit. In *Ard*, as here, trial counsel’s single defense theory was that the shooting was accidental. In *Ard*, as here, trial counsel chose to implement that strategy by relying solely on Ard’s own statements and cross-examination of the State’s witnesses. In affirming the PCR court’s grant of a new trial in *Ard*, this Court found that “trial counsel should have further investigated and more thoroughly challenged the gunshot residue evidence” when that evidence was “crucial” to the defense. *Id.* at 332, 642 S.E.2d at 597-98. Expert evidence supporting the defense’s accident theory was equally crucial in Stone’s case. If the jury had heard expert testimony like that presented at the PCR hearing, combined with a closing argument that connected the known facts to the defense theory, there is a reasonable probability that the jury’s answer to the “ambush v. accident” question would have been different.

There is also no evidence supporting the PCR Court’s conclusion that “[a]ll of the facts favorable to the defense were established [at trial] through the testimony of agent Ira Parnell.” App. 7348. First, by the PCR Court’s own admission, Parnell’s testimony at trial was merely that: (1) “[t]he trigger pull was fairly light”; and, (2) “[o]ne would have to pull the trigger three times to discharge three bullets.” App. 7347.⁵ In fact, the entirety of Parnell’s direct testimony was

⁵ Parnell was offered at trial as an expert for the State in “firearm tool mark identification.” Supp. App. 648. Although this field has since been discredited by many courts and the FBI, the area of

focused on his conclusion (about which there was never any dispute) that the fired bullets and shell casings recovered from the scene of the shooting were fired from the .22, semiautomatic weapon found lying under Stone's body upon his arrest. Supp. App. 647–72. On cross-examination, Parnell admitted that the weapon was a “target pistol” with a weighted barrel, which he acknowledged “could be” designed to make it shoot more accurately. Supp. App. 672–73. When trial counsel asked Parnell whether the trigger pull on the gun was “very light,” Parnell responded, “it is a target style gun as you said and is lighter.” Supp. App. 674. Trial counsel later pressed again, asking if “the pull on the trigger is very light?” Parnell answered, “It's light. Yes, sir. It's not extremely light, but it's light.”⁶ Supp. App. 677–78. There was no other testimony at trial which would have explained for the jury the kind of relevant facts and conclusions to which Mr. Hill testified in post-conviction, and which support and significantly strengthen the accident theory.

Finally, the PCR Court concluded that Stone was not prejudiced because he would not have been “entitled to a jury charge on involuntary manslaughter or accident anyway.” App. 7348. This conclusion ignores the fact that a properly supported accident theory could have been used to argue that Stone lacked the requisite intent to commit murder. Regardless of what other instructions may have been proper, it was the State's burden to prove, beyond a reasonable doubt, every element of

“firearm tool mark identification” basically involves the microscopic comparison of markings on fired bullets and/or cartridges to determine whether a fired projectile “matches” a specific weapon.

⁶ By contrast, when Parnell was called as a witness at the PCR hearing, he described the gun as having “a hair trigger,” and stated that standard-issue law enforcement pistols have substantially higher trigger pulls, of approximately 8 to 12 pounds, specifically to avoid inadvertent discharge. App. 4442. Further, Parnell acknowledged instances when officers have been startled into accidentally discharging their weapons and stated that law enforcement has a zero tolerance policy for drinking alcohol because it impairs an officer's ability to safely handle a weapon. App. 4442–43.

the crime charged. *See State v. Kinard*, 373 S.C. 500, 503, 646 S.E.2d 168, 169 (Ct. App. 2007) (“each and every element of murder must be proven beyond a reasonable doubt . . .”). Thus, the State was required to prove that Stone acted with malice. *See State v. Fennell*, 340 S.C. 266, 275, 531 S.E.2d 512, 517 (2000) (stating the required mental state for murder is malice aforethought). As this Court has noted, “malice includes the absence of justification, excuse and mitigation.” *State v. Belcher*, 385 S.C. 597, 609, 685 S.E.2d 802, 808 (2009). If trial counsel had offered available expert testimony to support the accident theory, there is a reasonable probability that the outcome of the trial would have been different because at least one juror could have believed that Stone did not commit the shooting with a “wicked[.]” heart, or one that was “fatally bent on mischief.” *Id.* at 609, n.5; 685 S.E.2d at 808 n.5 (internal quotations omitted).

But, perhaps even more important was the evidence’s relevance to the jury’s determination of the appropriate punishment as it was far more mitigating than the State’s alleged “ambush” theory of the crime. The PCR Court offered only a conclusory bullet point list of unexplained “findings” regarding this claim. With regard to the penalty-phase application of this claim, the PCR court’s disposition reads, in full:

Based upon the trial transcript and the PCR transcript, I find that:

1. Trial counsel hired an expert, Donald Girnt, but elected not to call him.
2. Trial counsel made a well-reasoned strategic decision not to call this witness.
3. Trial counsel were not ineffective in their investigation of this case. They were not ineffective in their decision not to hire additional experts.
4. Applicant also failed to show that he was prejudiced.
5. Applicant failed to show that the result of the resentencing would have been any different had additional experts been

hired or, if they had elected to call Donald Girndt as a witness.

Therefore, this claim is denied and dismissed.

App. 7364. The prejudice inquiry under *Strickland v. Washington*, 466 U.S. 668 (1984), is not whether Stone can show “that the result of the resentencing would have been any different had additional experts been hired.” App. 7364. Rather, the question is whether the unrepresented mitigating evidence, “taken as a whole, might well have influenced the jury’s appraisal of [Stone’s] culpability.” *Rompilla v. Beard*, 545 U.S. 374, 393, 125 S.Ct. 2456, 2469 (2005) (internal quotations omitted). As the United States Supreme Court explained in *Porter v. McCollum*,

[w]e do not require a defendant to show ‘that counsel’s deficient conduct more likely than not altered the outcome’ of his penalty proceeding, but rather that he establish ‘a probability sufficient to undermine confidence in [that] outcome.’

558 U.S. 30, 44, 130 S.Ct. 447, 455–56 (2009) (quoting *Strickland*, 466 U.S. at 693–94) (second alteration in original). For the reasons discussed above, the PCR Court’s perfunctory conclusions are not supported by any evidence in the record, nor are they based on a correct application of the relevant law. *See also*, Petitioner’s Brief 15–23, 42.

II. TRIAL COUNSEL’S FAILURE TO INVESTIGATE AND/OR PRESENT EVIDENCE OF STONE’S LOW INTELLECTUAL FUNCTIONING AND BRAIN DAMAGE.

In regard to Stone’s claim that his trial counsel were ineffective for failing to investigate and/or present evidence of his low intellectual functioning and brain damage at the penalty phase of his capital proceeding, the PCR Court concluded, in full:

Based upon the view of the trial transcripts and the testimony of James Babb and Te Anne Oehler, I find that:

1. The issue of low intellectual functioning was investigated and presented to the jury.
2. Defense counsel had access to Applicant’s school records.

3. Defense [sic] was aware of the low IQ, and the fact that Applicant's IQ dropped between the ages of 11 and 14.
4. Defense [sic] was aware that Applicant was diagnosed with a learning disability in the area of verbal expression and language comprehension.

Applicant fails in meeting its burden with regard to showing that counsel's investigation was not reasonable. Further Applicant has failed to show that he was prejudiced. As a result, this claim for relief is denied and dismissed.

App. 7360–61.

These skeletal assertions are largely irrelevant and/or not supported by any evidence in the record. Stone agrees that trial counsel had access to information regarding his low intellectual functioning, but that does not make trial counsel's actions reasonable, nor does it render their penalty phase presentation constitutionally adequate. There is absolutely no evidence in the trial record to support the PCR Court's conclusion that the jury at Stone's resentencing proceeding was told of his low intellectual functioning.⁷ In fact, Ms. Oehler erroneously testified that Stone "didn't have too much difficulty in school until about sixth grade" and incorrectly stated that his academic record included no suggestion of possible mental retardation. App. 3407, 3426. Stone's sentencing jury was not informed that he was repeatedly evaluated in school and found to have an IQ score as low as 69–75, which is in the mental retardation range, that he was determined by the school system to be educably mentally handicapped (i.e., mentally retarded) or that his academic achievement scores consistently indicated low intellectual functioning. The jurors were likewise

⁷ Respondent points to some evidence offered at Stone's first trial, including Ms. Oehler's brief testimony in that proceeding that Stone did not have a high IQ and that his IQ dropped between the ages of 11 and 14. Brief of Respondent 30; *see* App. 142–43 (Ms. Oehler's testimony in 1997). This evidence was *not* offered before the resentencing jury that ultimately sentenced Stone to death. App. 3391–3429.

never informed that Stone failed the first, fourth, and sixth grades, or that he repeatedly and consistently tested below grade level in all academic areas.

Trial counsel had no strategic reason for failing to present the fullest possible mitigating account of Stone's life history, including his cognitive impairments and brain damage. Specifically, Cameron Littlejohn repeatedly claimed that he could not recall details about trial preparations because of his "bad memory," (App. 4470, 4475, 4476) but, in any event, it was Jim Babb's primary responsibility to prepare the penalty phase presentation. App. 4487. Babb testified regarding this issue as follows:

Q: All right. So Mr. Simon met with you last week, right?

A: Last week or week before.

...

Q: And I met with you as well, right?

A: That's correct.

Q: And I showed you the psychological reports from Mr. Stone's school records, right?

A: I remember seeing a record. I believe it had grades on it, and it also had his – at least in one or more instances, the results of IQ tests.

Q: And did you feel that that was the first time that you had actually reviewed those records and seen the IQ scores?

A: To my recollection, yes. Now, I was aware that Mr. Stone's IQ had been diagnosed as below normal. But that's the first instances I recall actually looking at the records.

...

Q: And if Ms. [Oehler's] file does not have that school record in it, is it possible and in fact probable that that was because it came to your office and for whatever reason it just didn't find its way to Ms. [Oehler] or you didn't give it to her?

- A: That's a possibility.
- Q: You said a moment ago that you were aware that his IQ was lower than normal, correct?
- A: Correct.
- Q: And you were also aware that he had suffered several head injuries, correct?
- A: Correct.
- Q: And yet there does not appear to have been a neuropsychological evaluation conducted. And I take it that you did not seek funding for or hire a neuropsychological expert to conduct an evaluation?
- A: We did not request funding for any brain scans, no, sir.
- Q: Or a neuro-
- A: Or a neuropsych evaluation, no, sir.
- Q: And, of course, Ms. [Oehler] is a social worker, right?
- A: That's correct.
- Q: And so she can't administer any psychological testing of any kind, right?
- A: I wouldn't think so. I wouldn't expect her to, wouldn't ask her to, and wouldn't rely on it.
- ...
- Q: And I take it, but I want to ask you, did you have any strategic reason after learning of his low IQ score and his head injuries for not hiring a neuropsych evaluation?
- A: No, sir.
- Q: And you'd agree with me that if a capital defendant does suffer from brain damage, especially significant brain damage, that would be mitigating, right?

A: Absolutely.

Q: And that would be something if you learned, you would want to make sure you presented to the jury, right?

A: Yes.

App. 4362–65. Babb later explained to counsel for Respondent that he actually thought Ms. Oehler *did* testify to Mr. Stone’s low IQ at one point. App. 4392. That Ms. Oehler, in fact, did not testify to this evidence, but instead asserted incorrectly that Stone “didn’t have too much trouble in school,” simply speaks to trial counsel’s inattention and lack of adequate preparation, rather than a reasoned strategic decision. Babb’s response to Respondent’s cross-examination highlights this point:

Q: Altogether, you presented – did you try to present everything you could find that would help Mr. Stone in mitigation?

A: Well, let me answer it this way. I certainly didn’t come across something I thought would be helpful and then decide not to use it in terms of mitigation.

App. 4393. Trial counsel’s failure to present evidence of Stone’s low intellectual functioning and brain damage was deficient and prejudicial.

Regarding the brain damage component of this claim, Respondent does not (and cannot) dispute that Stone’s brain is damaged. At the PCR hearing, Stone presented evidence of brain damage, which included:

- The results of neuropsychological testing conducted by Dr. Jim Evans showing brain damage, including extremely low functioning in the left frontal lobe. Dr. Evans also ordered a Quantitative EEG, which likewise revealed damage to the frontal, left temporal, parietal and central areas of the brain.
- A report by Dr. Ruben Gur, admitted without objection from Respondent, describing both structural and functional brain damage, as revealed by Dr. Gur’s visual and quantitative analysis of an MRI and a PET scan of Stone’s brain.

- A report by Dr. Fred Bookstein, also admitted with Respondent’s consent, documenting damage to Stone’s corpus callosum – an area of the brain that regulates executive functions such as impulse control, judgment, moral reasoning and assessing the intentions of others.
- Stone’s school and medical records containing psychological evaluations, academic testing scores, and a history of head injury – which are all consistent with low intellectual functioning and brain dysfunction.
- Testimony from Dr. James Merikangas noting that a physical, neurological evaluation of Stone revealed a number of findings consistent with brain damage.

Thus, every measure typically used to assess brain damage indicates that Stone suffers from significant neurological damage. Faced with this evidence, Respondent attempts to re-characterize Stone’s claim as a claim that his “trial counsel failed to investigate the *cause* of [his] brain damage.”⁸ Brief of Respondent 31 (emphasis added). That is not and has never been Stone’s claim.

The PCR Court committed this same error by breaking this claim up into separate parts aimed at addressing the issue of causation. At the PCR hearing, after establishing the fact of his brain damage, Stone offered evidence that fetal alcohol exposure, environmental neurotoxins, some combination of the two, or some other cause (e.g., head injuries) could all have contributed to his brain damage. The PCR Court refused to engage with any of the actual underlying evidence of brain damage, but instead simply divided this issue into parts based on potential causation theories and then offered yet another set of conclusory bullet-point lists to dispose of each part. First, the PCR Court asserted Stone was claiming “trial counsel was ineffective for not

⁸ The cause or etiology of Stone’s brain damage does not matter. The Supreme Court of the United States has noted as much. *See, e.g., Sears v. Upton*, 561 U.S. 945, 949, 130 S.Ct. 3259, 3262 (2010) (“*Regardless of the cause of his brain damage*, [Sears’] scores on at least two standardized assessment tests placed him at or below the first percentile in several categories of cognitive function”) (emphasis added); *Porter v. McCollum*, 588 U.S. 30, 42, 130 S.Ct. 447, 45455 (2009) (“[T]he Constitution requires that the sentencer in capital cases must be permitted to consider *any relevant mitigating factor*.”) (internal quotation omitted) (emphasis added).

investigating evidence of applicant suffering neurological damage *from exposure to dangerous neurotoxins and other chemicals.*” App. 7361 (emphasis added). The PCR Court then listed the following findings:

1. Defense counsel hired mitigating experts who investigated Applicant’s background in a thorough manner.
2. Defense experts did not report to trial counsel anything concerning exposure to contamination in and around Turkey Creek.
3. Applicant never informed mitigation experts as to any concerns about Turkey Creek.
4. Applicant relied upon the expert testimony of Dr. Merikangas who has an impressive educational background; however, this court does not find his testimony persuasive. Although he presented his uncontradicted expert opinion this court does not believe his opinion is supported by the facts and, therefore, not credible. The facts are lacking in that:
 - a. There was insufficient testimony to support the allegation that Applicant had significant exposure to Turkey Creek;
 - b. There was insufficient evidence as to when and where Applicant was exposed to Turkey Creek; and,
 - c. It is impossible to know the levels of toxicity of the water at the particular time and place that Applicant was exposed to Turkey Creek.

App. 7361–62. Second, the PCR Court alleged that Stone separately claimed trial counsel was ineffective for not investigating “evidence that [he] suffered neurological damage *that resulted from his mother ingesting alcohol while she was pregnant.*” App. 7362 (emphasis added). The PCR Court then concluded:

1. There was no credible evidence that Applicant’s mother drinks alcohol. The overwhelming evidence is that she abstained from the use of alcohol.

2. More specifically there is no evidence that Applicant's mother drank alcohol while she was pregnant with Stone.
3. The methodology employed by Dr. Merikangas is questionable. The conclusions reached by Dr. Merikangas were not supported by the facts and, therefore, are not believable.

Therefore, the relief requested is denied and dismissed.

App. 7362–63.

The PCR Court's order, and Respondent's attempt to defend it, ignores the fact that Stone's trial counsel had a duty to investigate the possibility of brain damage in general, *regardless of its potential etiology*.⁹ That is particularly true where trial counsel knew, or should have known, of multiple "red flags" pointing to the likelihood of brain damage, including: (1) information from Stone's school records documenting his repeated academic failures, impaired intellectual functioning, poor test scores and other indicators of brain damage; (2) the school records of Stone's siblings likewise indicating academic failure and intellectual deficits; (3) Stone's medical records documenting a history of head injury; and, (4) Stone's social history including evidence of family chaos, violence and trauma and Stone's difficulty with remembering dates and sequencing of events.¹⁰ Despite these multiple, obvious indicators of brain damage and cognitive impairment,

⁹ See, e.g., ABA Guidelines for the Appointment and Performance of Defense Council in Death Penalty Cases (2003) [hereafter "ABA Guidelines"], Commentary to Guideline 10.7 ("[c]ounsel's duty to investigate and present mitigating evidence is now well established" and includes an obligation to investigate, among other things: (1) "Medical history, [i]ncluding . . . **neurological damage**"; (2) "Family and social history, [i]ncluding . . . **cognitive impairments**"; and, (3) "Education history, [i]ncluding . . . special education, **cognitive limitations** and learning disabilities."); see also, *id.* (instructing counsel to carefully collect and review social history records because they "can contain a wealth of mitigating evidence, documenting or providing clues to childhood abuse, retardation, **brain damage**, and/or mental illness") (emphasis added).

¹⁰ Respondent is, therefore, incorrect in its assertion that trial counsel did not have a sufficient basis to pursue an investigation into the possibility of brain damage. Brief of Respondent 36.

trial counsel failed to do any of the following basic investigative tasks: (1) seek basic neuropsychological testing; (2) consult with experts on organic brain damage and low intellectual functioning; (3) obtain neuroimaging, such as an MRI or PET scan, and related analyses; or, (4) have Stone evaluated by a neurologist or other appropriate medical expert. Accordingly, trial counsel did not conduct a “reasonable investigation,” as Respondent claims. Brief of Respondent 36. As a result of these errors, trial counsel presented *no evidence* of Stone’s low intellectual functioning and brain damage at trial. This failure was clearly prejudicial.¹¹

The PCR Court completely ignored the majority of the evidence Stone offered in support of this claim. For example, Stone did not rely on the testimony of Dr. Merikangas to address the issue of his exposure to environmental neurotoxins, as the PCR Court’s Order suggests. App. 7361. On the contrary, Stone admitted without objection an affidavit and written report from Dr. James Shine, an expert in environmental pollution from the Harvard School of Public Health in which Dr. Shine described his review of 6,346 pages of EPA and DHEC collected documents related to environmental pollution in and around Turkey Creek, in the area where Stone grew up

¹¹ See, e.g., *Sears*, 561 U.S. at 945 130 S.Ct. at 3261 (holding evidence of frontal lobe damage was “significant mitigat[ing] evidence [that] a constitutionally adequate investigation would have uncovered”); *Porter*, 558 U.S. at 41, 130 S.Ct. at 454 (finding evidence of brain damage and cognitive deficits in reading, writing and memory were part of “the ‘kind of troubled history we have declared relevant to assessing a defendant’s moral culpability.’”) (quoting *Wiggins v. Smith*, 539 U.S. 510, 535, 123 S.Ct. 2527, 2542 (2003)); *Rompilla v. Beard*, 545 U.S. 374, 392, 125 S.Ct. 2456, 2469 (2005) (holding trial counsel was ineffective for failing to discover and present evidence of organic brain damage and significant impairments in several cognitive functions); *Tennard v. Dretke*, 542 U.S. 274, 287, 124 S.Ct. 2562, 2572 (2004) (holding evidence of impaired intellectual functioning is inherently mitigating in the penalty phase of a capital case); *Wiggins*, 539 U.S. at 535, 123 S.Ct. at 2542 (stating that a competent attorney, aware of the defendant’s history of diminished mental capacities, among other things, would have introduced it in the capital sentencing proceeding); *Williams v. Taylor*, 529 U.S. 362, 398, 120 S.Ct. 1495, 1515–16 (2000) (holding evidence of Williams’ borderline mental retardation “might well have influenced the jury’s appraisal of his moral culpability” and could have suggested that “his violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation”).

as a child. App. 4506–07. Dr. Shine reported that Stone’s family homes all had well-water, and Stone “regularly played and swam in Turkey Creek and in a ditch that drains into the creek.” App. 4506. Dr. Shine focused his investigation on the time period during Stone’s exposure to pollutants in Turkey Creek, and concluded that Turkey Creek was highly contaminated with industrial waste chemicals, including heavy metals such as lead, copper and zinc, pesticides, wastewater from the shellac vat at Southern Coatings and similar industrial companies, print and dye discharge chemicals from Santee Print Works, and raw sewage. App. 4508–10. Dr. Shine noted that “[i]t is well known that childhood exposure to toxicants can result in long-term cognitive deficits (and other outcomes) later in life.” App. 4510.

Both the PCR Court and Respondent err in their attempt to blame Stone or other defense experts for trial counsel’s failure to investigate the possibility of Stone’s exposure to environmental neurotoxins. App. 7361; Brief of Respondent 31 (“The experts did not report to trial counsel anything concerning exposure to contamination in and around Turkey Creek. Petitioner never informed mitigation experts as to any concerns about Turkey Creek.”). Neither Stone himself, nor any of the experts trial counsel retained, are experts on issues of environmental toxin exposure. Even trial counsel rebuffed Respondent’s efforts to pin this failure on Stone:

Q: Okay and to kind of follow up on that, at any point in time did anyone tell you anything about Mr. Stone swimming in Turkey Creek?

A: About him what?

Q: Swimming in Turkey Creek.

A: Mr. Simon, I don’t – I don’t remember. There was something about him chasing some chickens, but I don’t remember Turkey Creek.

Q: Okay and so that was something that even Mr. Stone never told you anything about, correct?

A: No. I mean he wouldn't – That wouldn't have been something I would have asked him, okay? So I mean I really had no reason to discuss that with him.

App. 4482–83.

Similarly, the PCR Court ignored the uncontested evidence of brain damage offered by Stone in post-conviction, and instead treated the claim as if it rested solely on the testimony of Dr. Merikangas. As noted previously, Stone also offered evidence (all documenting brain damage, and all without objection from Respondent) of neuropsychological test results, a quantitative EEG, a report from Dr. Ruben Gur providing visual and quantitative analyses of an MRI and PET scan, a report from Dr. Fred Bookstein describing damage to Stone's corpus callosum, and a complete set of Stone's school records containing numerous psychological evaluations. App. 4511–29; 4105–4107; 4226–3230. Thus, whatever specific findings the PCR Court intended by its conclusory statements that “[t]he methodology employed by Dr. Merikangas is questionable,” and “[t]he conclusions reached by Dr. Merikangas were not supported by facts and, therefore, are not believable,” App. 7362, they do not support the PCR Court's rejection of this claim, and there is no evidence in the record to support a conclusion that Stone did not demonstrate that he suffers from low intellectual functioning and brain damage – uncontested facts that were never told to his sentencing jury. A full account of Stone's low intellectual functioning, brain damage, and its effects would have dramatically altered the sentencing profile, creating a reasonable probability that at least one juror would have struck a different balance and returned with a different sentence. *See e.g., Strickland*, 466 U.S. at 699–700, 104 S.Ct. at 2071; *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004).

III. TRIAL AND APPELLATE COUNSEL'S FAILURE TO PROPERLY OBJECT AND/OR PRESERVE ISSUES REGARDING INADMISSIBLE VICTIM IMPACT EVIDENCE.

Stone's trial and appellate counsel were ineffective in failing to object and/or properly preserve claims related to inadmissible victim impact evidence, including: (1) the victim's widow's testimony that she attempted suicide upon learning that this Court had reversed Stone's original death sentence; and, (2) testimony from law enforcement officers that the victim's death negatively affected the community at large and the law enforcement community, including new recruits who are routinely taken to the scene of the crime and to the victim's grave site as part of their training. The PCR Court rejected this claim based on its findings that all of the evidence was admissible. App. 7354–55.

Once again, the PCR court misconstrued Stone's claims. Stone argued that Kubala-Hanvey's testimony regarding her suicide attempt was improper because it: (a) served as the functional equivalent of her personal opinion about the crime, the defendant, or the appropriate sentence, in violation of *Booth v. Maryland*, 482 U.S. 496, 508–09, 107 S.Ct. 2536 (1987); (b) improperly went to the ultimate issue, which must be reserved for the jury; *see State v. Wise*, 359 S.C. 14, 27, 596 S.E.2d 475, 481 (2004); (c) inflamed the passions of the jury and injected an arbitrary factor in violation of S.C. Code § 16-3-25(C)(1); (d) served as emotional blackmail and impermissibly portrayed the consequences of a potential life sentence as “additional victimization of the murder victim's family,” *Sapp v. State*, 2006-CP-08-2204 (2009); (e) injected issues of appellate review into the jury's deliberations; *see, e.g., Caldwell v. Mississippi*, 472 U.S. 320, 328–29, 105 S.Ct. 2633, 2639 (1985); *State v. Tyner*, 273 S.C. 646, 659, 258 S.E.2d 559, 566 (1979); and, (f) was so unduly prejudicial that it rendered the trial fundamentally unfair in violation of due process under the Fourteenth Amendment. App. 7294–95. The PCR court refused to address these arguments and, instead, simply concluded that trial counsel was not ineffective because “suicides

are generally admissible victim impact evidence.” App. 7354. However, there is no legal basis to support this conclusion. Neither the United States Supreme Court nor any court in South Carolina has ever held that suicides or suicide attempts are relevant, admissible victim impact evidence.

Moreover, there is no evidence to support the PCR Court’s conclusion that trial counsel asserted a valid strategic reason for not objecting to evidence presented by Captain Hobbs. The PCR Court relied on Cameron Littlejohn’s PCR testimony stating:

I considered objecting to a lot of this, but Judge King was being very liberal in what he was allowing in from the standpoint of victim’s testimony. I mean I felt if he allowed in what [the victim’s widow] said about her reaction to the appeal that he was probably going to allow this in.

App. 4479. As Stone has already noted, however, trial counsel’s asserted “strategic thinking” here is a classic example of impermissible “*post hoc* rationalization.” *Wiggins v. Smith*, 539 U.S. 510, 526–27, 123 S.Ct. 2527, 2538 (2003). Captain Hobbs served as the State’s tenth witness and testified at the sentencing proceeding on the morning of February 23, 2005. App. 3081. The victim’s widow did not testify until the following day, when she served as the State’s twenty-second, and nearly final, witness. App. 3333. Stone brought this error to the PCR court’s attention in his Motion to Alter or Amend the Judgment, App. 7296, and the PCR court held a hearing at which Respondent likewise noted that there was “some concern” about the PCR court’s reliance on this testimony, given “the timing of when the witnesses testified.” App. 7324. It is disingenuous for Respondent to now assert that “counsel expressed a valid strategic reason for not objecting to the testimony.” Brief of Respondent 49–50.

CONCLUSION

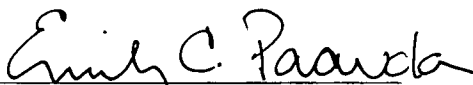
This was not “an extremely aggravated” case for death, as Respondent claims. Brief of Respondent 47. Stone had no prior history of violence toward anyone. His prison history was and

continues to be void of any suggestion of violence and largely indicates that he is an adaptable, compliant inmate. Stone had a compelling story of accident, which trial counsel unreasonably failed to support. The jury found only a single aggravating factor – the killing of a law enforcement officer – and did so under circumstances that did not even require jurors to find that Stone was aware of this fact.¹² App. 3609. The jury did not hear any evidence of Stone’s low intellectual functioning and extensive brain damage, but instead heard testimony from the victim’s widow that essentially she might kill herself if the jury did not impose another death sentence. Trial counsel attempted to object to this testimony, but failed to do so in a manner that would have preserved the issue for this Court’s review. Trial counsel’s errors worked together to deprive Stone of his constitutional right to the effective assistance of counsel at both the guilt-or-innocence and the penalty phases of trial. The PCR Court’s decision is riddled with multiple errors of law and numerous, conclusory factual statements that are not supported by the record below. This Court should reverse and grant Stone a new trial.

Respectfully submitted,

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By: 
Counsel for Petitioner

January 19, 2016

¹² Trial counsel specifically requested, as a matter of “Due Process,” that the trial court instruct the jury that they were required to find that Stone knew the victim was a law enforcement officer before the jury could conclude that the State proved this aggravating circumstance beyond a reasonable doubt. App. 3625. The trial court denied this request.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

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JAN 21 2016

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

SC SUPREME COURT

Honorable Michael Nettles, Circuit Court Judge

Case No. 08-CP-43-00905
Appellate Case No. 2013-001968

Bobby Wayne Stone, Petitioner,

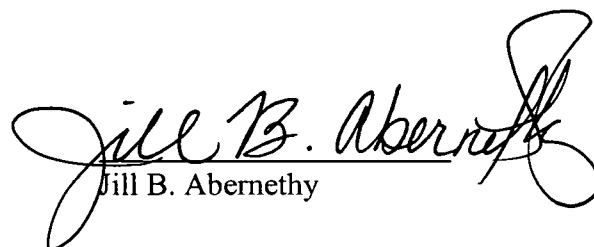
v.

State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Petitioner's Reply Brief was served by first class United States mail, postage prepaid, this 19th day of January, 2016, upon the following:

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