

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Honorable Michael Nettles, Circuit Court Judge

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

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S.C. SUPREME COURT

BOBBY WAYNE STONE. *Petitioner,*

v.

STATE OF SOUTH CAROLINA *Respondent.*

**PETITION FOR REHEARING
OR, IN THE ALTERNATIVE, MOTION TO STAY
ISSUANCE OF THE REMITTITUR**

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Pursuant to Rule 221, SCACR, Petitioner Bobby Wayne Stone moves for rehearing of this Court's decision dated February 8, 2017, affirming the lower court's denial of post-conviction relief. Specifically, the Court has overlooked and/or misapprehended the following points.

I. TRIAL COUNSEL FAILED TO OFFER AVAILABLE EVIDENCE TO SUPPORT THE ACCIDENT THEORY.

This Court concluded that trial counsel was not deficient for failing to develop and present expert testimony regarding the accident theory because they chose, instead, "to elicit facts that supported the accident theory through cross examination." *Stone v. State*, ___ S.E.2d ___, 2017 WL 511077 at *15. The Court asserts that counsel elicited three pieces of testimony: (1) firearms expert Ira Parnell admitted the trigger pull on Stone's pistol was "very light" and "the play in the trigger was very slight as opposed to a gun with a heavy pull"; (2) Deputy John Prince testified that the left side of the house where the victim was found was completely dark; and, (3) "Ray MacKessy, the State's crime scene technician, testified the porch wall was boarded up in a way that made it difficult for Stone to see someone approaching the porch." *Id.* The Court's reliance on these factors is misplaced.

First, at trial, Agent Parnell did not agree with trial counsel's characterization of the trigger pull as "very light." Trial counsel twice attempted to get Parnell to admit that the trigger pull was "very light," but Parnell hedged on both occasions:

Q: Okay. And you indicated that the trigger pull on that gun was very light. And is that not another I guess function of the trigger pull being light is to keep the gun steady; isn't that right?

A: Yes, sir. Be called a characteristic. And it is a target style gun as you said and is *lighter*.

App. 674 (emphasis added). Trial counsel tried again by later asking, “[a]nd you indicated that the pull on the trigger is very light?” App. 677. Parnell responded, “[i]t’s light. Yes, sir. *It’s not extremely light*, but it’s light.”¹ App. 677-78 (emphasis added).

Second, Deputy Prince did testify that the house was dark when he arrived on the scene, App. 335, but the State also introduced testimony from a neighbor, Daniel Bethea, who claimed it was light just before the shooting. App. 184-85. In closing argument, the Solicitor dismissed any suggestion that Stone was unable to see the victim, stating, “I guess they are going to say oh, it’s so dark he couldn’t really tell if it was a deputy. Folks, you know better than that.”² App. 849.

Third, Ray MacKessy never testified that it would be “difficult for Stone to see someone approaching the porch.” *Stone*, 2017 WL 511077 at *15. MacKessy testified that two sides of the porch were boarded halfway, but he did not take any measurements of the boarded portions. App. 428-29. He acknowledged that if the victim was standing on the ground on the boarded side, the boards would be over his head. App. 429. Trial counsel later argued that Stone did not see the victim and therefore the shooting was an accident, but the Solicitor repeatedly asserted that Stone knew the victim was coming and “ambushed” him by “lying in wait.” App. 815, 846, 848. In fact,

¹ By contrast, on cross-examination during the PCR hearing, Agent Parnell readily admitted that the weapon had “what we would call a hair trigger. I mean, it’s less than two pounds of trigger pressure that’s required.” App. 4442. Parnell further acknowledged that standard-issue law enforcement pistols have substantially higher trigger pulls – eight to ten pounds – because startled officers have accidentally discharged their weapons. *Id.* He also testified that an intoxicated person’s impaired ability to use a weapon underlies zero-tolerance policies concerning alcohol use for firing ranges and officers on duty. App. 4443. None of this evidence was offered at trial.

² Charles Kubala arrived at Ruth Griffith’s house at 7:07 p.m. on February 26, 1996. App. 159. At Stone’s resentencing proceeding, the trial court took judicial notice of U.S. Naval Observatory data on the time of sunset. App. 3387-89. However, no such evidence was offered at Stone’s first trial during which his guilt or innocence of the crime was actually at issue. Moreover, at the PCR hearing, Stone introduced testimony from an investigator, Pete Skidmore, who went to the scene on the same day, but in a subsequent year, and videotaped the scene at the same times as the events in question. Skidmore testified that it was completely dark at the time of the incident, and the videotape confirmed his testimony. App. 4349-50.

the Solicitor claimed that Stone used the boarded portions of the porch as cover to facilitate his “ambush”:

He lied in wait there behind that little thing where the deputy unfortunately couldn't see him and unfortunately the deputy when he'd come there earlier had gone to the actual back door, not that little screen side porch. . . . Charlie came around there, headed to that back door and just for an instant glanced over and saw Stone crouching there aiming at him and said hold it there or halt like the people inside think they heard. . . . [I]t was Bobby Stone's first thought to shoot. Bobby Stone lying in wait. Bobby Stone saying huh-uh, that officer ain't taking me to jail. Bobby Stone thinking it's me or him and I ain't going to jail. It's what happened.

App. 846-49.

Further, the Solicitor argued, the shooting could not have been an accident because the gun was fired more than one time. On this point, the State invoked the fact that it had offered testimony from an expert with twenty-five years of experience:

But what you have got here is clear expert testimony that the gun fired three, at least three, and it could have been four shots as you understand because there were – had to be fired because the shell casings were ejected from the gun and are still on the porch; okay?

. . . He shot at least three times and it has to be intentional. Has to be an intentional act, ladies and gentlemen. Mr. – the expert witness – our twenty-five year ballistics expert test fired that gun.

. . . They are saying well, [he] got startled and then something happened and the trigger went off one time? No. This is why the evidence is so clear. You have to hear it, that scientific evidence and the expert testimony. Mr. Parnell said absolutely no way that could have happened. That gun is semiautomatic, not an automatic.

App. 840-41.

Trial counsel offered no expert testimony to persuade the jury that Stone's account of an accidental shooting was both plausible and consistent with the known evidence. The three minor points counsel attempted to elicit on cross-examination did not produce an effective

counterargument to the State's ambush theory, particularly with no expert testimony to support them and tie them together with other available facts and argument. As the PCR evidence demonstrates, expert testimony was available to support the accident theory, including an explanation about how the gun could be fired unintentionally multiple times. Trial counsel's failure to offer this evidence rendered the defense case much weaker than it could, and should, have been.

II. THE COURT'S OPINION MISCHARACTERIZES THE PCR RECORD.

This Court incorrectly concluded that "[t]he only facts PCR counsel argues trial counsel should have presented regarding the accident theory – but did not present – related to the trajectory of the bullets." *Stone*, 2017 WL 511077 at *15. Wayne Hill testified to the following facts, none of which were presented at trial:

- The weapon involved in this incident required only 1.5 pounds of pressure to fire. App. 4274.
- A single-action trigger requires only 5/100th of an inch of movement to fire. App. 4275.
- The average shooter, even a non-practiced shooter, can fire six rounds per second with a semiautomatic pistol like the one at issue in this case. App. 4283.
- A person can fire a weapon multiple times unintentionally. App. 4287.
- If held by the trigger, the weight of the gun itself is sufficient to fire the weapon. App. 4279. The centrifugal force from wheeling, or turning suddenly, with your finger on the trigger could discharge this weapon. App. 4298
- The fact that Stone was intoxicated increased the risk of an unintentional firing (and multiple unintentional firings). App. 4285-88.

- The location of the bullet holes in the middle of the screen door is more consistent with Stone shooting from the waistline than aiming intentionally from shoulder height. App. 4294-96.

The Court also asserted that Hill claimed the bullets traveled on an “upward” trajectory from Stone’s waist. The Court concluded, “[w]e find it difficult to imagine *three* accidental shots fired from the hip upward to the height of another man’s head.” *Stone*, 2017 WL 511077 at *15 (emphasis in original). Mr. Hill did not testify that the bullets traveled at an upward angle from Stone’s waist. Everyone agrees that Stone was standing on an elevated porch approximately three feet off the ground when the shots were fired. There was no testimony at the PCR hearing that the bullets traveled on an upward trajectory.

The Court also found that trial counsel made a reasonable strategic decision not to call Don Girndt because he could not say that the shooting was accidental. The Court further stated that Stone’s argument was not that trial counsel should have called Girndt to testify, but instead that they “should have found another expert – one who would testify the shooting was an accident.” *Stone*, 2017 WL 511077 at *16. This has never been Stone’s argument. As Petitioner explained in his opening brief,

Stone did not argue that trial counsel should have called an expert witness to decisively claim the shooting was an accident. Rather, he argued that trial counsel was ineffective for failing to ‘reasonably investigate, implement and support their chosen trial strategy.’ App. 7125. Trial counsel chose to argue an accident theory at trial, but did nothing to implement this strategy other than cross-examination of the State’s witnesses. Trial counsel was not required to conclusively prove accident, and expert testimony that the evidence was consistent with Stone’s version of the events would have significantly strengthened the defense theory.

Brief of Petitioner at p.23; *see also* Petitioner’s Reply Brief at 3 (arguing the fact that Grindt could not say definitely this was an accident was not a valid reason not to call him or another expert).

Finally, the Court suggested that trial counsel would not have wanted to call an expert witness like Wayne Hill because, at the PCR hearing, “Hill admitted it would take three separate trigger pulls to fire the semi-automatic pistol three times.” *Stone*, 2017 WL 511077 at *16. This is not a valid strategic reason for failing to offer expert testimony like that presented at the PCR hearing, nor is it one claimed by trial counsel or endorsed by the PCR court. There was no dispute that the firing of three bullets required three pulls of the trigger. Agent Parnell testified to this fact in the State’s case-in-chief, and there was nothing trial counsel could have done to prevent that information from coming to the jury’s attention. There was, therefore, no downside (and tremendous upside) to calling a defense expert who could further explain how extremely easy it was for those three trigger pulls to occur, how even the weight of the gun itself could cause the gun to fire, how a person who was startled, particularly an intoxicated person, could fire the gun unintentionally multiple times, and how the physical evidence was not inconsistent with an accidental firing. Moreover, there is no evidence in the PCR record to support this alleged strategic decision. This Court’s own “*post hoc* rationalization” is not an appropriate basis on which to deny relief. *Wiggins v. Smith*, 539 U.S. 510, 526, 123 S. Ct. 2527, 2538 (2003).

III. IF THE COURT DENIES REHEARING, IT SHOULD STAY THE REMITTITUR UNTIL STONE’S PETITION FOR A WRIT OF CERTIORARI IS RESOLVED.

For the reasons set forth above, Petitioner believes this Court should grant rehearing and reverse. However, should this Court deny Stone’s petition for rehearing, he hereby moves this Court to stay its issuance of the remittitur while he seeks review from the United States Supreme Court. All of the issues raised in Stone’s case before this Court present important federal questions that warrant review by the United States Supreme Court. Once this Court issues the remittitur, an execution date will be set and the statute of limitations for federal habeas corpus will begin running. Stone will be forced to begin his federal habeas proceedings to obtain a stay of execution,

resulting in the litigation of his federal claims in two separate forums simultaneously. To avoid concurrent litigation and conserve judicial time and resources, this Court should instead wait to issue the remittitur until after Stone's petition for certiorari is resolved.

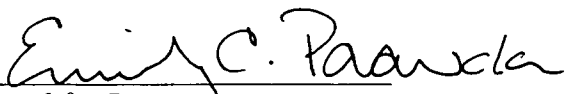
CONCLUSION.

Petitioner moves this Court to grant rehearing and reverse. In the alternative, he petitions this Court for an order staying issuance of the remittitur pending the filing and disposition of a petition for writ of certiorari in the United States Supreme Court.

Respectfully submitted,

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February 22, 2017

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Honorable Michael Nettles, Circuit Court Judge

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

Bobby Wayne Stone, Petitioner,

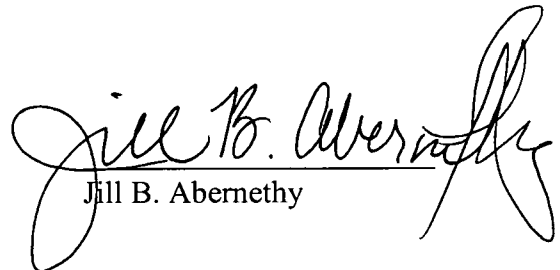
v.

State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Petitioner's Petition for Rehearing or, in the Alternative, Motion to Stay Issuance of the Remittitur was served by first class United States mail, postage prepaid, this 22nd day of February, 2017, upon the following:

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Jill B. Abernethy