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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Cherokee County
The Honorable J. Michael Baxley, Circuit Court Judge
Appellate case No. 2012-212107

JONATHAN KYLE BINNEY,

Petitioner-Respondent,

vs.

THE STATE,

Respondent-Petitioner.

REPLY TO RETURN TO [redacted] PETITION FOR WRIT OF CERTIORARI

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PETITIONER-RESPONDENT'S ADDITIONAL SUSTAINING GROUND

I. The PCR Court's order granting Petitioner a new sentencing trial should also be sustained because trial counsel provided ineffective assistance in the penalty phase when, despite knowing that Petitioner's birth mother was an alcoholic who drank heavily throughout her pregnancy, they failed to investigate, retain an appropriate expert, and present mitigating evidence that Petitioner suffers from Fetal Alcohol Spectrum Disorder?

ARGUMENT

I. The record support's the PCR judge's finding that trial counsel were not ineffective in the manner in which they investigated for and presented evidence that Binney had fetal alcohol syndrome.

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). This Court will uphold the findings of the PCR court when there is any evidence of probative value to support them, and it will reverse the decision of the PCR court only when it is controlled by an error of law. *Suber v. State*, 371 S.C. 554, 558–59, 640 S.E.2d 884, 886 (2007). Here, the State submits that the PCR judge correctly found that counsel were not ineffective in the manner in which they investigated for and presented evidence that Binney had Fetal Alcohol Syndrome (FAS), and that Binney had not established either deficient performance nor prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). *See* **App. 5496-5501**.

Counsel pursued FAS through a neurologist and a forensic psychiatrist who had treated numerous individuals suffering from FAS. Lead counsel, Mr. Pruett, was primarily responsible for the investigation and presentation of this evidence. **App. 4489-90; 4600-03; 4605-06**. Mr. Pruett testified at the PCR hearing that Binney's adoptive parents related to counsel that Binney may suffer from FAS. So, he retained several experts including Dr. Schwartz-Watts, a forensic psychiatrist, and Dr. David Bachman, a neurologist. **App. 4600-01**. [1]

In preparing for trial, Mr. Pruett informed Dr. Schwartz-Watts at the first or second

[1] Counsel consulted with Dr. McNaught and Dr. William Alexander Morton in regard to Binney's mental condition at the time of the crimes. Dr. McNaught, a psychologist, examined Binney and opined that Binney was a psychopath. **App. 4270; 4272-73; 4479-81**. Dr. Morton, an expert in psychiatric pharmacology, testified to the effects of Binney's psychotropic medications or lack thereof and nicotine on Binney's mental state on the date in question. Counsel called Dr. Morton as a witness in the sentencing phase of Binney's trial. **App. 3480-3517**.

meeting between them that FAS could be a potential issue in the case. Dr. Schwartz-Watts represented to him that she had expertise in FAS, and she specifically referred to young persons that she was treating at that time who suffered from FAS or Fetal Alcohol Effects. **App. 4489-90; 4600**-01. Dr. Schwarz-Watts also represented her expertise in the area of sexually related disorders. Pruett felt that there was going to be a good deal of information before Binney's capital sentencing jury regarding sexually deviant behavior by Binney, which would need to be explained by an expert, such as Dr. Schwartz-Watts. **App. 4601-02.**

Mr. Pruett testified that the initial report from Dr. Schwartz-Watts mentioned FAS but it was not definitive whether Binney suffered from FAS or not. As a result, counsel faxed a letter to Dr. Schwartz-Watts asking her directly whether or not she could testify that Binney suffered from FAS. The letter was faxed to Dr. Schwartz-Watts on October 29, 2002 and it was introduced into evidence at the PCR hearing as **Respondent's Exhibit 12 (App. 5239-40)**, without objection. In response to the faxed letter, Dr. Schwartz-Watts informed trial counsel that she could support a conclusion that Binney had FAS. **App. 4602-06**. Dr. Schwartz-Watts confirmed at PCR that she did pursue FAS as possible mitigation evidence and that she determined that Binney did suffer from FAS. **App. 4696-98**. As a result of her findings and representations to him, counsel presented Dr. Schwartz-Watts to testify as to her findings. **App. 4606.**

Mr. Pruett also testified that Dr. David Bachman, a neurologist, was also retained, to look at, among other things, whether Binney suffered from FAS. Dr. Bachman ran a PET scan and some other neurological tests on Binney. At the time of PCR, counsel could not recall whether Dr. Bachman ran an MRI or not. **App. 4606**. However, Dr. Schwartz-Watts testified at the PCR hearing that an MRI was run on Binney by Dr. Bachman as well. **App. 4694**. Dr. Bachman's

report confirms that an MRI was run on Binney on September 25, 2002. **Defendant's Exhibit 14, App. 5244.** Counsel testified Dr. Bachman found no abnormalities that would be indicative of some physical or organic brain abnormality. **App. 4606-07.**[2]

Counsel had also sent Dr. Bachman some photographs of Binney when he was young. The purpose of this was Dr. Bachman was going to look at the facial features and see whether or not the early developmental stages of Binney would have been consistent with FAS. **PCR Tr. p. 661**. The letter enclosing the pictures to Dr. Bachman was sent August 13, 2002 and was admitted without objection as **Respondent's Exhibit 10 (App. 5238)**. **App. 4607; 5238**. Counsel testified that Dr. Bachman also related to him that he was going to show the photographs to a geneticist that worked at the University hospital. **App 4610.** Additionally, Dr. Bachman traveled to Lieber Correctional Facility and visited with Binney. This meeting was facilitated by trial counsel. Mr. Pruett spoke thereafter with Dr. Bachman by telephone on more than one occasion. **App. 4607**.

Mr. Pruett testified that Dr. Bachman did not ask for any additional records regarding applicant in order to make a diagnosis. Counsel also testified that Dr. Bachman was aware of the information related by Binney's birth mother to Binney's adoptive parents, that she drank alcohol during her pregnancy with Binney. **App. 4611-12**. Dr. Bachman informed counsel that he could not really add anything beneficial to Binney's case. His findings were either

[2] Counsel's testimony is supported by the report of Dr. Bachman, which indicates that the MRI scan was normal and that the PET scan was normal as well. **Defendant's Exhibit 14, App. 5244**. An EEG was also run on Binney. That study was mildly abnormal. However Dr. Bachman stated that this finding was of uncertain significance. **Defendant's Exhibit 14, App. 5244**. In summarizing his findings, Dr. Bachman stated in his report that he found no evidence of any specific neurological abnormality in Binney. **Defendant's Exhibit 14, App. 5244.**

inconclusive or they were negative as to any brain or organic brain disorder.[3] **App. 4609-10; Defendant's Exhibit 13, App. 5242.** Counsel testified that he insisted on a written report from Dr. Bachman, but that he did not receive one until after the trial. **App. 4610-11; Respondent's Exhibit 14, App. 5243-44.** Counsel testified that Dr. Bachman told him that he could not make a specific finding with respect to FAS and that counsel needed to talk with Dr. Schwartz-Watts about pursuing a FAS conclusion or obtain another expert. **App. 4610-11.** Mr. Pruett spoke with Dr. Schwartz-Watts again in this regard. He also supplied Dr. Schwartz-Watts and Dr. Bachman with all the records that he had, and they asked for no other documents that he did not provide them. **App. 4602-06; 4611-12**. Further, Dr. Schwartz-Watts told him that she could make a diagnosis that Binney suffered from FAS. **App 4605-06**. The record shows that trial counsel relied on Dr. Schwartz-Watts' and Dr. Bachman's expertise (**App. 4490**) and that trial counsel wisely chose not to call Dr. Bachman in the penalty phase because his findings were negative or inconclusive. **Respondent's Exhibit 14, App. 5243-44. App. 4609-10.**[4]

At trial, Dr. Schwartz-Watts testified in the penalty phase and opined that Binney met all of the criteria for FAS known in the medical literature at that time. Specifically, she testified that Binney had: (1) a history of heavy alcohol ingestion by the mother during pregnancy; (2) failed to thrive as a child; (3) facial dysmorphology as a child; and (4) documented developmental brain dysfunction. She also testified extensively about FAS, the characteristics, developmental

[3] Dr. Bachman related that based on the photographs alone, they did not appear to be consistent with Fetal Alcohol Syndrome, but he could not completely rule out whether Binney had FAS or not based on the childhood appearance.

[4] Dr. Schwartz-Watts testified at PCR that she never communicated to trial counsel any reservations nor did she have any question about her qualifications to testify as to her findings of a FAS diagnosis. **App. 4710.**

problems, and resulting impulsive behavior. **App. pp. 3407-14.**[5] Thus, the PCR court properly concluded that counsel reasonably relied on their expert's representations and diagnosis and that counsel's performance was not deficient. *See Walton v. Angelone,* 321 F.3d 442, 466 (4th Cir. 2003); *Poyner v. Murray*, 964 F.2d 1404 (4th Cir. 1992); *Walls v. Bowersox*, 151 F.3d 827, 835 (8th Cir. 1998) (counsel has no duty to pursue neurological experts when experts consulted indicated no additional testing was required). *See also Strickland*, 466 U.S. at 689 ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way").[6]

Further, the PCR judge correctly determined that Binney could not meet *Strickland*'s prejudice prong based upon counsel's chosen strategy. To show prejudice, he was required to prove that "there is a reasonable probability that ... 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." *Strickland*, 466 U.S. at 695; *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

Dr. Natalie Novick-Brown, a psychologist called by Binnney in PCR was forced to admit, although reluctantly, that admitted that Dr. Schwartz-Watts informed the jury that Binney

[5] Additionally, Dr. Schwarz-Watts opined that Binney's attention deficit disorder was resistant to medication, and that this was consistent with individuals who suffer from FAS, as opposed to those who do not (**App. 3431**); Dr. Schwartz-Watts explained to the jury that she had reviewed Binney's school records and that Binney had undergone neuropsychological testing which documented neuro-developmental difficulties consistent with FAS (**App. 3445**); and that she could not find anything in Binney's records or history that would explain his failure to thrive except FAS. **App. 3446**. Rev. Binney also testified to Binney's developmental problems, school problems, impulsive criminal behavior as a teenager, and his inability to hold a job as an adult. Rev. Binney attributed many of Binney's lifelong problems to FAS. **App. 3522-52**.

[6] In fact, Binney's claim that Dr. Schwartz-Watts was not a qualified expert in FAS is directly contrary to his claim at his Spartanburg County PCR involving his conviction for CSC on his three month old daughter. In that action, he directly alleged that his trial attorney was ineffective for not calling Dr. Schwartz-Watts as an expert in FAS in his Spartanburg County trial for CSC. **Tr. PCR 03-CP-42-2818, pp. 4-12**. His suggestion that trial counsel in this capital case should have called an expert different than Dr. Schwartz-Watts is contradicted by his claim in his Spartanburg County PCR.

met the criteria for FAS, and that Schwartz-Watts had opined that Binney had a number of other sexually-related disorders. **App. 4243-52; 4273; 4278**. She also admitted that Binney's sentencing jury was aware that Binney's biological mother had ingested alcohol during her pregnancy with Binney; that she had attempted to abort her pregnancy by overdose of alcohol and drugs; and that the jury was aware through Dr. Schwartz-Watts' testimony of Binney's impulse control problems, attention deficit disorder, facial abnormalities as a child, and a failure to thrive or develop physically as a child. **App. 4243-52; 4278-79**. Thus, the record supports the PCR judge's finding that the FASD case presented in PCR was merely cumulative to the evidence presented at trial. *See Jones v. State*, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998) (affirming the denial of PCR finding Jones merely sought a "fancier" presentation of mitigation evidence).

Further, the record supports the PCR judge's finding that Novick-Brown's testimony that Binney's behavior on the date of the murder was consistent with FAS is not credible. *See Goins v. State*, 397 S.C. 568, 573-74, 726 S.E.2d 1, 3-4 (2012) ("The PCR court's findings on matters of credibility are given great deference by this Court"). She testified that approximately 50% of persons diagnosed with any fetal alcohol syndrome condition exhibit sexually inappropriate behavior that can range from inappropriate remarks, a brief inappropriate touch, up to sexual assault behavior. **App. 4237**. However, she did not attempt to relate Binney's sexual assault of his three month old daughter or his thoughts of raping Judy Southern to FAS and she never opined that those were the result of FAS.[7]

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[7] Dr. Bookstein briefly mentions in his report that individuals with FASD often have special difficulties with inappropriate sexual behaviors. However, Bookstein did not opine that Binney sexually assaulted his three month old daughter or considered raping Mrs. Southern as a result of FASD. Bookstein also admitted that he did not know anything about the facts of this case. The record contains other examples of her lack of credibility: for example, in her affidavit, Novick-Brown listed as a neurological abnormality that Binney had a nervous twitching of his neck

At PCR, Novick-Brown was likewise impeached by the credible facts and evidence in this case, including Binney's own admissions. **App. 4289-4302**. The PCR judge correctly found that Binney's actions on the day before and the day of the murder show that they were planned, methodical, and not the result of FAS.[8] Further, her attempt to relate Binney's overall plan to impulsiveness was cumulative to Schwartz-Watts' trial testimony. More importantly, Schwartz-Watts testified at the PCR hearing that she remained firm in her original conclusion that Binney entered the victim's home as a result of his sexual sadism.

She also testified at PCR that there was no medical study showing that sexual sadism is linked to FAS. She further testified that the studies cited in Novick-Brown's affidavit were unreliable,[9] and that Schwartz-Watts would need to see more studies before she would accept a theory that fetal alcohol exposure is a separate risk factor for sexual paraphilias. **App. 4698-4711**. Dr. Schwartz-Watts is a nationally recognized expert on sexual deviant behaviors and disorders, and the Court found that her testimony is credible on this issue. Thus, Binney has failed to show deficient performance or resulting prejudice in failing to call Novick-Brown at trial. *See Strickland*, 466 U.S. at 695.

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when a teenager However, she failed to inform the court in the same affidavit that this twitching was resolved after Binney visited a chiropractor and received massage therapy. **App. 4259-62**. She also related in her affidavit as a neurological abnormality that Binney's mother had a hard time getting Binney's attention when he was a teenager because he would stare off into space. However, she admitted on cross-examination that it would not be unusual for a seventeen year old to stare or for his mother to be unable to get his attention, and she tied the importance of this staring to the twitching of the neck, which she later admitted was resolved by a chiropractor. **App. 4258-59**.

[8] The PCR court discusses these facts in accurate detail in his original Order. **App. pp. 5456-61**. Respondent incorporates that "Statement Of Facts In the Underlying Case" by reference.

[9] One citation was not a scientific study. Rather, it merely relied on Novick-Brown's other citation. Schwartz-Watts testified that she conducted an extensive search and could not find any studies that replicated what the study in the other citation found.

Likewise, the PCR court correctly found neither deficient performance nor prejudice to Binney from the failure of counsel "to identify or call Dr. Fredrick Bookstein, a statistician, at trial in 2003." **App. 5498**. *See also* **App. 5498-5500**. As discussed, counsel had a neurologist review Binney's MRI and PET Scans who determined that the results of these tests were normal. The neurologist also reviewed Binney's childhood photographs and could not determine he had FAS. Further, counsel utilized Dr. Schwartz-Watts. Her findings, discussed above, were premised on the same diagnostic criteria Dr. Bookstein's findings support, and she opined that Applicant had FAS.

Bookstein's deposition, with exhibits, is found at **App. 5263-5449**. He is not a radiologist, neurologist, nor neuro-radiologist. He is not licensed to review an MRI, issue an MRI report, or diagnose an individual with FAS. Thus, the PCR court correctly determined that his testimony about what he saw reviewing an MRI film is not credible. *See Goins*, 397 S.C. at 573-74, 726 S.E.2d at 3-4 ("The PCR court's findings on matters of credibility are given great deference by this Court"). Further, Dr. Bookstein measured the corpus callosum of a 3-D image of Binney's brain that had been generated by a computer program Dr. Bookstein wrote that used MRT films from MUSC, and compared it to measurements of a Seattle study group. However, Dr. Bookstein was admittedly engaging in "frontier research science at the time of [Binney's] trial." **App. 5499**.

As discussed by the PCR court,

> During Dr. Bookstein's deposition, Respondent impeached him about a paper that he wrote in 2005 complaining that the medical community would not accept or recognize his pioneering work or research. [**App. 5328-92; Respondent's Deposition Exhibit 2, App. 5439-49**]. Dr. Bookstein admitted that he wrote this paper, and he admitted that his scientific research attempting to demonstrate fetal alcohol damage to the center of the brain-the corpus collosurn-through 3-D MRI study and measurement, was not accepted by the fetal alcohol and psychiatric

> communities until 2005 and after, long after Applicant's trial. [**App. 5328-92; Respondent's Deposition Exhibit 2, App. 5439-49**]. He also admitted that, after many diverse rejections of his work, he was only able to get the work published in 2002 in a journal about brain anatomy, not a journal about alcohol damage ([**App. pp. 5368-70**]); that this particular work was not replicated until after 2005, at another university ([**App. 5370**]); and that, prior to 2005, no one was accepting his research team's work except neuro-imaging researchers, not fetal alcohol researchers or psychiatric researchers. [**App. 5383-84**]. He likewise admitted he moved into the field of neuro-imaging research to get his work published and read. [**App. 5384**].
>
> Further, he did not begin testifying in FAS cases until 2004, because the Center for Disease Control did not publish the standardized criteria for diagnosis of FAS until 2004. He also admitted fetalalcoholexperts.com, of which Dr. Novick-Brown is a member, stated in its own publication that it did not begin the systematic forensic diagnosis of FAS until 2007 and that diagnosis of FAS prior to 2004 was "hit or miss." His methodology employed in this case was not yet accepted, even by other fetal alcohol research groups. Thus, Applicant has not proven deficient performance or resulting prejudice in failing to call Dr. Bookstein or similar expert as a witness. *Strickland, Id.*

App. 5499-5500.[10]

Respondent submits that this was a correct application of *Strickland.* Counsel had no duty to contact other experts when he thought those consulted were well qualified and counsel has no duty to ensure the trustworthiness of an expert's conclusions. *Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998); *Walton,* 321 F.3d at 466. Further, South Carolina decisions are clear that an attorney is not required to "be clairvoyant or anticipate changes in the law which were not in existence at the time of trial." *Gilmore v. State*, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994). *See also Cartrette v. State*, 323 S.C. 15, 448 S.E.2d 553 (1994); *Thornes v. State*, 310 S.C. 306, 426 S.E.2d 764 (1993). The same is true for failing to anticipate that an area of expertise that is only in its infancy will later become accepted by some court, somewhere in the United States because the question on collateral review is not whether counsel could have found

[10] Binney's case was tried in 2003.

an expert but whether counsel would have found one at the time. See Robinson v. State; 308 S.C. 74, 417 S.E.2d 88 (1992) (finding counsel not ineffective for failing to use a defense that would not receive acceptance until several years after the trial). *Cf. Earhart v. Johnson*, 132 F.3d 1062, 1067-68 (5th Cir. 1998) (failure to engage a ballistics expert was not incompetence where there was no showing that there was an expert available who would make a difference in the trial); *Affinito v. Hendricks*, 366 F.3d 252 (3rd Cir. 2004) (generally, the selection of a particular expert is a matter of strategy and tactics where there is no showing that the expert selected is unqualified.); *United States v. Davis*, 406 F.3d 505 (8th Cir. 2005) (not ineffectiveness to hire analytical chemist rather than metallurgist where the expert used made a similar challenge to the prosecution case and where the material later relied upon by the habeas metallurgist was unavailable at the time of petitioner's trial). In this regard, Respondent notes that a Westlaw search of Dr. Bookstein only returned three opinions in which he gave testimony concerning his testing of the corpus callosum. Each of these cases was decided in 2009 or later, and two of these cases are actually just published and unpublished copies of the same case.[11]

The State submits that the record likewise supports the PCR court's finding that counsel were not ineffective in failing to uncover medical records and school records of Binney and medical records of his birth mother that he alleges could have substantiated his claim of FAS. *See* **App. pp. 5500-01**. First, Binney submitted voluminous medical records of his mother, Ms. Dove, that have no relation whatsoever to the issue of whether Binney had FAS. **App. 4252-53.**[12]

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[11] *See State v. Cooper*, 979 A.2d 792 (N.J.Super.A.D. 2009) (publishing part of the opinion); *State v. Cooper*, 2009 WL 2778035 (N.J.Super.A.D. Sep 03, 2009); *People v. Scaroni*, 2012 WL 3538884 (Cal.App. 2 Dist. Aug 17, 2012) (NO. B230340) (unpublished/noncitable), review denied (Oct 24, 2012).

[12] Many of these records deal with Ms. Dove being treated for post-traumatic stress disorder as a result of being raped when she was in her mid-twenties, long after Binney was born and adopted, and long after she had any contact with Binney. The records indicate that Ms. Dove was raped by a Sergeant while she was in the military, and that

In fact, Dr. Novick-Brown admitted that only three or four sheets of paper in the seven or eight inch stack of records of Ms. Dove deal with her drinking as a minor. **App. 4253**. All of these records are reports of drinking made after the fact. Binney introduced records where Ms. Dove admitted she started drinking when she was fourteen or fifteen years old. However, the records also indicate that her drinking increased significantly in her late teens or early twenties and after she had enlisted in the Army, which was after Binney's birth. She continued to abuse alcohol and drugs over her lifetime. These records do not prove that she abused alcohol or even drank alcohol during her pregnancy with Binney. **Respondent's Exhibits 1 & 2, App. 5210-19.**

Binney's social worker admitted there are no medical records of Ms. Dove contemporaneous with her pregnancy with Binney, *i.e.* neo-natal or gynecological records because those records could not be located by collateral counsel. Binney's social worker also admitted there are no birth records regarding Binney that were located. **App. 4123**. Further, there are no contemporaneous medical records of any suicide attempt by Ms. Dove when she was a teenager. Instead, Binney offered at his PCR hearing psychiatric records of Ms. Dove that were made either twenty-five years or twenty years after his birth. In the first records, she apparently self-reported to her treating psychiatrist/physician that she attempted suicide or attempted self-harm in 1973 by taking valium and one bottle of gin. It appears from another entry nearby on this same record this incident occurred in the eighth (8th) month of 1973. However, in the same records, from 1999, she related that she had no children, and she did not relate her suicide attempt in 1973 to discovering that she was pregnant.

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when she reported the rape, the Sergeant committed suicide. Other records indicate that Ms. Dove was treated for migraine headaches. Still other records indicate she was treated for slipping and falling and hurting her back. **PCR App. 4252-53**.

Binney's social worker also testified there were a series of records in 1994, twenty years after Binney was born, in which Ms. Dove self-reported to a treating psychiatrist/physician that she made a suicide attempt at age 16 by an overdose of pills after learning she was pregnant. However, Binney's social worker admitted these records reflected that Binney's mother was treated and released for the suicide attempt. She conceded these records do not even indicate Binney's mother was kept overnight in the hospital. She also admitted that these records do not indicate how many pills Ms. Dove took. **App. 4125, ll. 1-21**. Moreover, Binney's social worker admitted that these records, the 1994 records, do not indicate that Ms. Dove was using alcohol at the time of her suicide attempt, only pills. **App. 4125-26**.

The records themselves bear this out. *See* **Respondent's Exhibit 3, App. 5220-25**. In one of the records from 1994, Ms. Dove self-reports that she was treated and released from the hospital the same day as this suicide attempt. **App. 5220-25**. In this same record, she self-reports that the suicide attempt was made with pills, and there is no mention of alcohol being involved. **App. 5220-25**. In two other records from 1994 and 1995, she does not mention this suicide attempt. **Defendant's Exhibit 1 & 2, App. 5210-19**. Rather, she mentions a suicide attempt in 1993, when she took an overdose of pills with a half-pint of alcohol. **Defendant's Exhibit 1, App. 5210-13**.

The PCR court properly found that these records do not prove that Binney's mother was abusing alcohol while she was pregnant with him because they were not made contemporaneous with her pregnancy with Binney but twenty-five years and twenty years after the fact, and, because the records are conflicting because alcohol is mentioned in only one of the two self-

reports, and in fact, not mentioned at all in the earliest of the two self-reports.[13] Novick-Brown admitted on cross-examination that Ms. Dove's medical records do not indicate that she drank alcohol while she was pregnant with Binney. **App. 4253-54.** Rather, the best evidence that Ms. Dove ingested alcohol or drugs while she was pregnant with Binney were the statements that Ms. Dove made to Binney's adoptive mother before her death, which were before Binney's capital sentencing jury, and a statement a witness supposedly made to Dr. Novick-Brown the night before Dr. Novick-Brown testified at the PCR hearing[14] and after she heard the social worker testify that the Dove's admissions were the best evidence. **App. 4253; 4257.**

With regard to Binney's school records and other records, the record demonstrates counsel did a thorough and reasonable mitigation investigation under *Wiggins* and *Strickland*, and the substance of Binney's school and life history were testified to through the testimony of Binney's adoptive father, Rev. Binney, and Dr. Schwartz-Watts. Binney has not proven that trial counsel was deficient or that he was prejudiced by any alleged deficiency in this regard. *Strickland.* Dr. Novick-Brown testified that Binney's school records showed deficiencies in mathematics consistent with a finding of Fetal Alcohol Syndrome. However, Binney's school records show deficiencies in other areas unrelated to mathematics that undercuts Novick-

[13] Also, the records indicate Binney's mother was treated and released without being kept overnight, indicating the attempt may not have been serious. There are no records contemporaneous with his mother's pregnancy about her pregnancy, delivery, or suicide attempt. Moreover, the records that were offered are similar to and cumulative to the self-report of Binney's biological mother to his adopted mother shortly before trial, which was before the jury.

[14] The record shows this witness submitted an affidavit to the Court consideration in this PCR hearing. The affidavit was filled out and executed several weeks before the PCR hearing. Nowhere in that affidavit does this witness relate that he witnessed applicant's mother drinking while she was pregnant with applicant. **App. 4254-55.** Thus, the expert's credibility was impeached.

Brown's credibility regarding the significance of the school records. **Plaintiff's Exhibit 15, PCR App. 4762-73.**[15]

These particular records contradict Doctor Novick-Brown's testimony, and are more consistent with the testimony of Reverend Binney at trial that Binney struggled academically in elementary school and continued to struggle academically as he progressed through school. **App. 3526-28**. As the PCR court correctly found (**App. 5501**),

> Had Applicant's or his mother's records been introduced, this Court finds there has been no showing that the result of the sentencing proceeding would have been different. Id. The record does not support a finding that FAS caused Applicant to murder Judy Southern or to sexually assault his own daughter. Dr. Schwartz-Watts testified at trial and at PCR that Applicant was motivated by sexual sadism when he burglarized Mrs. Southern's home. This Court finds that Dr. Schwartz-Watts' testimony is credible on the point that there is no relation between sexual sadism and FAS. Her testimony on what motivated Applicant with regard to this crime is consistent with the evidence in this case. Applicant admitted he considered raping Judy Southern when entering her home. He admitted he did not enter the home until after he knew a man and a woman lived there. Also, he admitted he had fantasized about raping his brother-in-law's wife and then killing his brother-in-law. Dr. Schwartz-Watts opined that he raped his daughter because of n different sexual paraphilia, pedophilia. This diagnosis is supported by the credible facts and evidence in this case.FN23 Therefore, the Court concludes that Applicant has not proven deficient performance or prejudice in **Ground 11(b)(3)** with regard to FAS issues.

App. p. 5501.

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[15] While Binney had difficulties in mathematics, Binney's school records also show that: in the 1986/1987 school year, he made a D- in Social Studies, a D- in English, an F in science, and a D- in Bible. See **Cornerstone Christian Academy School Records**. In the eighth(8th) grade, 3rd quarter, he made a D+ in English, an F in Bible, an F in Science, and an F is History. See **Zanesville Christian School Records**. In 1988, while he had negative scores in mathematics on the California Achievement Tests, he also had negative scores in political science and sociology. In 1988, Binney also made failing grades in other subjects besides mathematics. According to the records from Conerstone Christian Academy in North Carolina, he had failing grades in English, Geography, and what appears to be General Science. See **Cornerstone Christian Academy Records**. In his final semester at Rose Park Baptist Academy, Binney made a D- in social studies, a D- in English, an F in Science, a D- in Bible, and an A in Physical Education. See **Rose Park Baptist Academy Records**. A diagnositic evaluation and report of progress from October 26, 1988 shows that he was deficient in mathematics but also showed that he was in the 5th percentile in written composition and in the 9th percentile in reference skills. See Dublin Christian Academy Records. In 1990, Binney also failed U.S. History and Literature and Themes and made a D in Bible and a D- in Physical Science. See **Victory Family Ministries School Records**. In 1991-1992, his Math for Today grade was 78 while his English and Biology grades were apparently incompletes (I). See **Freedom Academy Record**.

Finally, Binney makes reference in footnote 10, **Return, p. 11**, to counsel's failure to employ an investigator, such as a social worker or mitigation specialist to assist them in their investigation for and presentation of mitigating evidence, an allegation that he has not preserved for this Court's review. He also complains of counsel's failure to present other family members in mitigation. The State submits that both claims lack merit for the reasons set forth in the Order on **App. 5486-95**, and that he cannot show either deficient performance or resulting prejudice for the reasons stated therein.

CONCLUSION

For all of the foregoing reasons, the State submits that this Court should deny certiorari as to Binney's additional sustaining ground.

Respectfully submitted,

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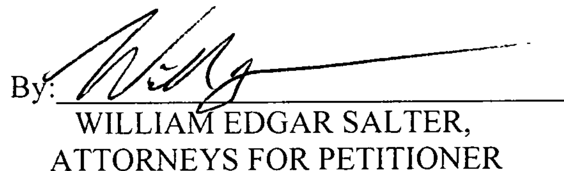
By: 

WILLIAM EDGAR SALTER,
ATTORNEYS FOR PETITIONER

April 17, 2013
WES, III

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Cherokee County
The Honorable J. Michael Baxley, Circuit Court Judge
Appellate case No. 2012-212107

JONATHAN KYLE BINNEY,

Petitioner-Respondent,

vs.

THE STATE,

Respondent-Petitioner.

CERTIFICATE OF SERVICE

The undersigned certifies that on the 17th day of April, 2013, he served the Respondent-Petitioner's Reply to Return to State's Petition for Writ of Certiorari on counsel for the Petitioner-Respondent by depositing two copies of same in the United States mail, first class, postage prepaid, and addressed as follows:

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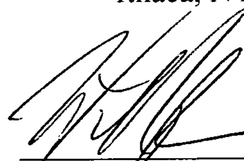

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