THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. 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

BOBBY WAYNE STONE. . . . . *Petitioner*,

v.

STATE OF SOUTH CAROLINA . . . . *Respondent.*

BRIEF OF PETITIONER

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State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) 54

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State v. Stone, 376 S.C. 32, 655 S.E.2d 487 (2007) 11,14,52

State v. Tyner, 273 S.C. 646, 659, 258 S.E.2d 559, 566 (1979) 47,51

State v. Wise, 359 S.C. 14, 27, 596 S.E.2d 475, 481 (2004) 46,47,51

Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010) 24

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OTHER

American Bar Association Guidelines For The Appointment And Performance Of Defense Counsel In Death Penalty Cases, reprinted in 31 Hofstra L.Rev. 913, 1020 (2003) . 15,25,35,43

Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) (American Psychiatric Association) at pp.41-42. 29

INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS, 36 (American Association on Intellectual and Developmental Disabilities, 11th ed. 2010) 29

NLADA Performance Guidelines for Criminal Defense Representation, Guideline 4.1(7) (Investigation) 20

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S.C. Code Ann. § 16-3-20 (C) 6,29,47,51

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QUESTIONS PRESENTED

I. WHETHER PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT-OR-INNOCENCE PHASE OF TRIAL WAS VIOLATED AS A RESULT OF:

(A) TRIAL COUNSEL'S FAILURE TO SECURE NECESSARY EXPERT ASSISTANCE TO SUPPORT THE ACCIDENT THEORY OF THE CASE; AND,

(B) TRIAL COUNSEL'S FAILURE TO OBJECT TO THE SOLICITOR'S IMPROPER STATEMENTS IN CLOSING ARGUMENT THAT PETITIONER WAS PLANNING TO KILL MORE POLICE OFFICERS AT THE TIME OF HIS ARREST?

II. WHETHER PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED DURING THE PENALTY PHASE AS A RESULT OF:

(A) TRIAL COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT EVIDENCE OF PETITIONER'S LOW INTELLECTUAL FUNCTIONING AND BRAIN DAMAGE;

(B) TRIAL COUNSEL'S FAILURE TO SUPPORT THE ACCIDENT THEORY OF THE CASE; AND,

(C) TRIAL COUNSEL'S FAILURE TO OBJECT TO INADMISSIBLE VICTIM IMPACT EVIDENCE?

III. WHETHER PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED DURING THE APPELLATE PROCEEDINGS?

IV. WHETHER PETITIONER WAS PREJUDICED AS A RESULT OF THE CUMULATIVE EFFECT OF COUNSEL'S MULTIPLE DEFICIENT ACTS AND OMISSIONS?

STATEMENT OF THE CASE

There is no dispute that Bobby Wayne Stone suffers from organic brain damage and intellectual impairment. Un-contradicted evidence offered during the PCR hearing established that every method typically used to assess brain damage and intellectual functioning indicates that Stone's brain is damaged and his cognitive abilities are unusually low.[1]

It has long been accepted that both brain damage and low intellectual functioning are inherently and powerfully mitigating factors relevant to capital sentencing proceedings. *See, e.g., Sears v. Upton*, 130 S.Ct. 3259, 3261 (2010); *Porter v. McCollum*, 558 U.S. 30, 41 (2009); *Rompilla v. Beard*, 545 U.S. 374, 392 (2005); *Tennard v. Dretke*, 542 U.S. 274, 287 (2004). Although Stone's trial counsel were aware of multiple obvious red flags pointing to the likelihood of brain damage and low intellectual functioning, trial counsel failed to take any further investigative steps, such as obtaining basic neuropsychological testing, consulting with and retaining relevant experts, or obtaining neuroimages and related analyses. As a result, trial counsel did not present any evidence of Stone's neurological impairments and low cognitive functioning to the jury that ultimately sentenced him to death.

Nevertheless, the PCR court rejected Stone's claim of ineffective assistance of counsel based on the court's perfunctory determination that trial counsel's "gathering of mitigating evidence was thorough and presented to the jury in an effective way," App. 7360 – a finding that is both unsupported by the record and contrary to basic capital jurisprudence. *See e.g., Sears*, 130 S.Ct. at 3266; *Porter*, 558 U.S. at 41; *Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000).

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[1] This evidence includes neuropsychological testing, a PET scan, a MRI scan, quantitative analysis of the neuroimages, a medical evaluation by a neurologist, academic testing scores and IQ test scores.

Further, Bobby Wayne Stone has always and consistently maintained that the shooting death of Deputy Sgt. Charles Kubala on February 26, 1996, was an accident. The accident theory was a plausible explanation – one that trial counsel readily accepted and tried to pitch to the jury. But, trial counsel offered *no evidence* to support this theory and failed to obtain available expert testimony to prove their case. Trial counsel failed again when they raised no objection to impermissible and prejudicial "victim impact" testimony that Kubala's death resulted in a loss to the Sumter community as a whole and to law enforcement in general. Finally, the State called Kubala's widow, Teresa Kubala-Hanvey, who told the jury that she attempted suicide after she learned that this Court had granted a new sentencing proceeding to Stone on direct appeal. As appellate counsel, Joey Savitz, later explained:

> I thought it was some of the worst possible testimony that I could imagine, that I certainly encountered in the time that I was at Appellate Defense. . . . I can't imagine anything more prejudicial than that or inadmissible. . . . [I]f I were on that jury, the option would only be to sentence him to death, knowing that you would probably prevent a victim's widow from killing herself and that the Supreme Court would review it to make sure that you had done the right thing. It gave the jury really only one choice to make, and that's why I thought it was so bad.

App. 4260-62. Trial counsel and/or appellate counsel mishandled the objection to Kubala-Hanvey's testimony, such that this Court later ruled on direct review that any objection to her testimony had been waived.

When presented with these grounds, among others, the PCR court denied relief by: (1) mischaracterizing Stone's claims and arguments; (2) ignoring facts, legal theories and arguments that were squarely presented for decision; and, (3) making broad, unsupported findings of law and fact. The PCR Court's findings are not supported by probative evidence, its legal conclusions are controlled by multiple errors of law, and this Court should reverse.

RELEVANT FACTS

I. THE 1997 TRIAL PROCEEDINGS.

On February 26, 1996, Bobby Stone spent the day drinking beer and target-shooting in the woods near his home. Supp. App. 695-96. Late that afternoon, he emerged from the woods into the back yard of Ruth Griffith and approached her house. Supp. App. 194-96. Stone had known Griffith for years; he had dated her niece, been a guest in her home, and done odd jobs for her. Supp. App. 751-53. Griffith's daughter, Mary Ruth McLeod, went outside and asked Stone to leave; she described Stone as holding a can of beer and "staggering," "stumbling," "wobbling," and bearing the appearance of someone who was "hyped up on something." Supp. App. 198, 265. McLeod then called 911 to report the incident. Supp. App. 203. Charles Kubala responded, checked the area, spoke with Griffith and McLeod, and left. McLeod also left. Supp. App. 203-04.

Sometime later, Stone returned and began banging on the inside door of the side porch of Griffith's house. Supp. App. 237. By this time it was dark.[2] Griffith called her neighbor, Landrow Taylor, who came to her house and called 911 from inside her home. Supp. App. 233-34. Kubala responded to the call and returned to Griffith's home. Supp. App. 240. He parked facing the diagonally opposite corner of the house from where Stone was banging on Griffith's porch door. Supp. App. 274. After he "signed down" at the house, *i.e.*, informed the dispatcher that he had

[2] *See* App. 3387-89 (taking judicial notice of U.S. Naval Observatory data on the time of sunset). At the April PCR hearing, Stone introduced testimony from an investigator, Pete Skidmore, who went to the scene on the same day the incident occurred, but in a subsequent year, and videotaped the scene at the same time the events in question took place. Skidmore testified that it was completely dark at the time of the incident at issue; the videotape confirmed his testimony. App. 4349-50.

arrived, he responded to another call from the dispatcher "10-6" ("I'm busy"). Supp. App. 323.[3] Kubala exited his vehicle and Taylor motioned him around the house before going back inside. Supp. App. 284.

Stone was still on the side porch, banging on the door and holding a pistol in his hand. Supp. App. 697, 716. Griffith and Taylor heard Kubala say "Halt," followed by gunshots. Supp. App. 275, 286. Taylor described it this way: "I heard one shot and just a split second there were three or four more. It was shooting so fast." Supp. App. 286. Kubala was shot twice, and both injuries, according to the medical examiner, were fatal. Supp. App. 309. Stone ran back into the woods.

Law enforcement officers located Stone a few hours later in the same woods, lying motionless between two logs. Supp. App. 522. Stone was placed under arrest; the arresting officers recovered the pistol lying under his body. Supp. App. 524. Stone waived his rights and agreed to talk to the police. Supp. App. 711. In his statement, he described Griffith as an "old drinking budd[y]." Supp. App. 715. He said he had gone there to speak with her, but no one opened the door. He heard a noise, turned toward the sound, and the gun went off. Supp. App. 729. He remembered pulling the trigger only once. Supp. App. 699.

Stone was charged with burglary in the first degree, murder, and possession of a weapon during the commission of a violent crime. Supp. App. 876-77. Cameron Littlejohn and James Babb represented him at trial. App. 4463. Littlejohn was primarily responsible for handling the defense case at the first phase, i.e., the facts and circumstances of the crime, and Babb was primarily responsible for developing and presenting the mitigation case. App. 4464, 4487.

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[3] It is impossible to determine whether that conversation took place inside or outside Kubala's vehicle. Supp. App. 170.

The State's theory at trial was that Stone "ambushed" Kubala. Distilled to its essence, the State contended that Stone saw or heard Kubala, laid in wait for him and killed him in cold blood in order to avoid serving a thirty-plus year prison term for the burglary that he was in the process of committing. App. 3580.[4] The defense offered a different interpretation of the evidence: Stone, grossly intoxicated, was beating on the door of Griffith's home, while holding a gun with a hair trigger that he had only obtained that day. Supp. App. 696-97. The defense maintained, consistent with Stone's statement, that Stone was unaware of Kubala's presence until he heard a man's voice "yelling" behind him in the dark, at which point he turned in the direction of the noise and reflexively discharged the gun. Supp. App. 697. Again, reduced to its core, the defense theory was that Stone "was on the porch, he heard a noise, he turned, the gun went off. . . . [H]e didn't exactly know what happened. He just took off." App. 4467. Counsel's strategy was to show that the facts and circumstances of the case were consistent with this version. App. 4487. Their plan for implementing this strategy consisted of "pointing out that it was dark, that Stone was intoxicated, [and that] the gun had a very light trigger pull." App. 4488.[5] During the guilt/innocence phase, the defense called only two witnesses, each of whom testified to Stone's relationship with Griffith.[6] Thus, trial counsel's limited cross-examination was the only method of conveying the defense's accident theory.

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[4] In summation, the State maintained that Stone heard Kubala drive up, Supp. App. 844, and also heard Kubala's "10-6" transmission. Supp. App. 845. The solicitor asserted that Kubala "was ambushed and intently (sic) shot three times," and was "a sitting duck." Supp. App. 815, 846. He used some form of the phrase "lying in wait" at least four times. Supp. App. 846, 848-49. He described Stone as "crouching there aiming at him." Supp. App. 847.

[5] In closing, Stone's counsel argued that the State's evidence had "holes" in it, that Stone was not guilty of the burglary or the murder, and asked the jury, "Did this little guy in his drunken stupor on that evening have the intention or capacity to be that evil?" Supp. App. 867.

[6] When testimony relating to startle response was proffered, the state objected that it did not rise to level of *M'Naghten*, and the court excluded the testimony. Supp. App. 778-82.

In closing argument, the solicitor repeatedly argued that Stone did not dispose of the gun prior to his arrest so that he could kill more police officers:

> [H]e went through all those woods, he could have got rid of the gun. . . . Why didn't he just get rid of the gun? . . . He didn't get rid of it because he is still – was thinking about using it. . . . He kept it till the last minute in case just maybe one or two officers came to him, we would have two unsolved murders maybe. But what he did is he kept that gun in his last second to use it again.

Supp. App. 850-53. The jury found Stone guilty of murder and the related charges.

On direct appeal, this Court affirmed Stone's conviction but reversed the death sentence based on the trial court's erroneous instruction concerning voluntary intoxication and its refusal to instruct the jury on the statutory mitigating circumstances set forth in S.C. Code Ann. § 16-3-20(C)(b)(6)&(7). *State v. Stone*, 350 S.C. 442, 567 S.E.2d 244 (2002).

II. THE 2005 RESENTENCING PROCEEDINGS.

A. THE STATE'S CASE FOR DEATH.

The State's case at the 2005 resentencing proceeding was substantially similar to its original trial presentation in 1997.[7] The State repeated its "ambush" theory of the case, arguing that Stone laid in wait for Kubala and then "ambushed him like a coward and dropped him dead right here." App. 3574; *see also,* App. 3573-74 (arguing Stone was "sitting in the crow's nest. He's got a birds-eye view. . . . [H]e knew the deputy was there and Charlie Kubala was coming [around] the side of the house. Bobby Wayne knows he's there.").

The State also offered evidence of Stone's prior criminal record, which consisted of two prior convictions.[8] Neither prior charge involved an act of violence or a crime against persons.

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[7] Stone was again represented by Littlejohn and Babb.

[8] Stone was convicted of breaking into a motor vehicle and house breaking in 1985. App. 2919-20. He was nineteen years old at the time and was sentenced to a youthful offender sentence not to exceed six years. App. 2920. In 1987, Stone was convicted of burglary and grand larceny and

Nevertheless, the State characterized Stone as "a career criminal" and argued that he made a calculated decision to kill Kubala because he did not want to go back to jail:

> If [Stone] gets caught right here, he's got thirty hanging over his head, and he stands to get more for the burglary he's doing. He chose to kill. I submit to you he was facing the rest of his natural life this time with thirty plus, whatever you got for the burglary, at the age [of] thirty-one, I submit he was going to stay in there for life anyhow. He knew it, and there wasn't one way out. . . . It was Sgt. Charlie Kubala in the line of duty, and he wasn't going with him. He wasn't going back to jail. He didn't want to go back to jail. He had the choice and he chose not to do it, and he killed him like a coward. Shot him straight on and [Kubala] doesn't know it's coming.

App. 3579-80.

Finally, the State offered seven victim impact witnesses. Former Sheriff Thomas Mims, Captain Gene Edward Hobbs and Major Gary Metts talked about Kubala's career with the Sheriff's department and the impact his death had on each of them personally, on the Sheriff's department generally, and on the community as a whole. Specifically, Mims described how he heard about Kubala's death and tearfully told the jury of his personal difficulty with breaking the news to Kubala's family:

> [T]his is the first time something like this has ever happened, and as a supervisor of a group of men or women, this is the worst thing that could ever happen to you is to have one of your, your personnel under your supervision, your responsibility, under your charge to come to, to be killed. The thoughts that ran through my . . . excuse me. Thank you. I'll be all right, I hope. Thoughts ran through my mind how was I going to . . . what was I going to tell his wife Teresa. How was I going to, what was I going to tell his daddy and his momma, how would I deal with that. His daddy, Fred Kubala, made it easy for me. Before I could say anything, his words to me were he knew that Charlie died doing what he knew his son loved to do,

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sentenced to fifteen years and a five-year suspended sentence, respectively. App. 2921. He was paroled approximately five and a half years later on June 9, 1993, and remained on parole at the time of Kubala's death. App. 2922.

> what he had chosen to do, the profession that he had dedicated himself to.

App. 2905-06. Mims explained that, as a supervisor in law enforcement, he would always carry the memory of Kubala's death with him. App. 2906 ("What do you say as a supervisor of a group of men and one that [has] lost his life in the line of duty. That's basically what I did, and you know, the memory is still there. It will never go away."). Finally, Mims testified that, like any member of law enforcement, Charlie Kubala was willing to die in the line of duty:

> [E]very officer that has raised his hand and taken that oath to serve and protect the citizens of this county or any other county or even the United States of America know that's a possibility, but yet they're willing to do it. Sgt. Kubla was willing to do it, and he did it with, with a great honor, a high degree of professionalism, and he was held in high regard by those he worked with, and I certainly hold him in high regard.

App. 2906-07.

Captain Hobbs reiterated many of the themes from Mims' testimony. He stated that "[t]here's probably not going to be anybody closer in law enforcement than Charlie Kubala in my life," and "I loved him like a brother." App. 3094-95. Hobbs explained that Kubala took a cut in pay after a brief break to return to work in law enforcement because he had "a sense of helping people that's important." App. 3096. Hobbs described in detail how he "did literally the hardest thing I've ever done in my life, and I told [Kubala's wife] that Charlie Kubala was dead." App. 3098. Then, Hobbs explained that Kubala's death had a significant impact on the training and the operation of the Sumter County Sheriff's Department. He stated that there was a "department-wide" sentiment that "we were never going to allow this to happen again." App. 3099. One of the major changes the department made is that all new trainees now visit the scene of Kubala's death during orientation where they hear about "what happened and what led up to it." App. 3099-3100.

Next, the trainees are taken to Kubala's grave site in Sumter and are told about "the consequences of this job." App. 3100. Hobbs testified that all trainees are told:

> [I]f you're in this job for the wrong reasons, if your heart's not right, if you're not able to give that sacrifice, then maybe you should think about another job. Understand this is real. And that's, that's a training that we do for every trainee since that happened.

Id.

Similarly, Gary Metts described Kubala's career in law enforcement and talked about his own personal feelings surrounding Kubala's death. He described serving as a pallbearer during Kubala's funeral and helping Kubala's wife, Teresa, get his uniform ready because she wanted to bury him in his police uniform. App. 3357-63. Metts stated that he had another best friend who also passed away and Charlie was his second best friend, so "I'm not too good on having best friends anymore." App. 3363. He testified that he keeps the beeper Kubala wore on the night of his death attached to the visor in his car. App. 3363-64 ("[I] [a]lways said I was going to throw it away, but I've never been able to."). Metts explained that Kubala had taken on a significant volunteer role in the Explorer Program, which was "a program designed for young kids . . . and it's a way that we can kind of show the community a little bit about what we do in law enforcement, and especially kids who are interested in that field." App. 3358-59. Metts told the jury that after Kubala's death, however, the Explorer Group "collapsed." App. 3364. He also described Kubala's volunteer activities with the Special Olympics and how, right before his death, Kubala volunteered to "spend[] nights and days" working overtime to improve a law enforcement policy book. App. 3364-66.

Metts testified that Kubala "was very involved in every aspect of the sheriff's department on and off duty." App. 3366. He described how the Sheriff's Department honored Kubala posthumously by dedicating the policy book to him, retiring his badge number, and starting the

Charles Kubala golf tournament. Metts stated, "If you live in Sumter, you've heard about the Charlie Kubala golf tournament. It's one of the biggest golf tournaments in Sumter, and we've got a lot of hard-working people putting a lot of effort in it." App. 3365. The golf tournament raises money for children whose parents have died while serving in law enforcement. *Id.* ("That's what it's intended to do, and if somebody is offed, mother or father should fall in the line of duty, it will help their children go to school."). Metts noted that Kubala's son, Little Charlie, was able to go to college because of the money raised by the tournament. Metts concluded his testimony by describing how he took several members of Kubala's family, including Little Charlie, to see the scene of the crime, saying:

> Little Charlie looked up at me. He asked me if his daddy was brave.
> I told him he was the bravest man I've ever known.

App. 3367.[9]

Four members of Kubala's family also gave victim impact testimony. His mother, father and brother briefly described Kubala's life history and the impact of his death on their family. Teresa Kubala-Hanvey remarried five years after Kubala's death. She testified that in 2003, she received a message on her answering machine informing her that "they were going to retry this

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[9] In closing argument, the State asserted that law enforcement officials would have been justified in killing Stone upon his arrest. Solicitor Jackson stated:

> When they found Bobby Wayne Stone sitting on the edge of that field, getting close to his house and the Boy's Club, they could have killed him. They could have riddled him with bullets, and nobody would have said anything different. They could have given him the death penalty just like he killed Sgt. Charlie Kubala. Some say they should have. Save us all the time and effort of being here and putting twelve people to the trouble of making the decision for them.

App. 3563-64.

case over again, that the Supreme Court had overturned it." App. 3353. As a result, she decided that she "couldn't take it any more" and attempted suicide. App. 3353-54. She stated that she was taken to the ICU and stayed in the hospital for three days "which was an eye-opener." App. 3355. Littlejohn objected to Kubala-Hanvey's testimony regarding her suicide attempt, but the trial court overruled the objection.[10] App. 3354, 3368-70. Defense counsel did not object to any other aspect of the State's victim impact presentation.

B. TRIAL COUNSEL'S ARGUMENT FOR LIFE.

To counter the State's case for death, defense counsel argued that Bobby Stone was simply a "foolish drunk" who did not intend to shoot Kubala. App. 3595; *see also,* App. 3593 ("this was a reaction and not [a] planned calculated thing"). TeAnne Oehler, a clinical social worker, testified that Stone's family was poor, with a history of alcoholism on both sides, and that Stone developed

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[10] Appellate counsel, Joseph L. Savitz III, raised this issue on direct appeal arguing that Kubala-Hanvey's testimony regarding her suicide attempt impermissibly injected an arbitrary factor into the jury's decision making. *State v. Stone*, 376 S.C. 32, 655 S.E.2d 487 (2007). However, this Court determined that this argument was not preserved for review because it was not raised at trial and thus was not ruled on by the trial court:

> Appellant alleges that his argument on appeal is simply an augmentation of his objection at trial, but a thoughtful examination reveals that this is not so. Primarily, Appellant's objection at trial was based on relevance, and that issue has been abandoned here. Second, whether the suicide attempt by the victim's spouse minimized the jury's sense of responsibility (by suggesting that the jury's ultimate decision would be subject to review by a higher court) or maximized the jury's sense of responsibility (by implying that imposing a life sentence might lead the victim's widow to attempt suicide again), these considerations are wholly independent of the relevance argument presented below. If a pitch was never thrown at trial, we cannot review whether the trial court made the proper call.

Id. at 489. Moreover, this Court held that appellate counsel had "abandon[ed]" the issue of relevance that trial counsel actually raised at trial, and thus refused to address that argument as well. *Id.* at 488.

poor coping skills for dealing with life. App. 3396-97. She explained that Stone's mother was separated from his biological father and engaged in a polygamous-like affair with another man, Wesley Miles, who lived next door with his own wife and children. App. 3397. Miles also had an alcohol problem and was physically abusive. Oehler testified that, on one occasion when Stone was about eight or nine years old, Miles beat Stone so badly that he was taken to the emergency room. App. 3398. Oehler explained that the Stone family was afraid of Miles and that he attempted to make sexually harassing moves toward Stone's sisters. App. 3399-3402.

Oehler briefly noted that Stone had some problems in school and that he dropped out in the tenth grade. She summarized Stone's school history as follows:

> He didn't have too much difficulty in school until about sixth grade, and at that point, it became very evident through his academic records. He was in resource class, but he didn't have the ability, according to these school records, to pay attention, to concentrate, to focus on information and to be able to internalize that to move forward with a plan.

App. 3407. Oehler explained that Stone's family lacked structure and good academic role models. App. 3403, 3407-08. Finally, she noted that Stone "appeared to have been very accident prone during his growing up years" and that "[h]e had a very difficult time with dates and with sequence of when things happened or the years that they happened." App. 3411*; see also,* App. 3412 ("he was very poor on his sequence of events"). She testified that a radiator once fell on Stone's head when he was working as a mechanic. Oehler testified:

> There seemed to be a significant history of these accidents happening to him during the years. I wondered because of the radiator falling on his head or some of the injuries that he had when he was younger if there was any history of head injury, but I did not see any medical documentation that stated that.

App. 3411-12.

On cross-examination, Oehler admitted that she did not interview any of Stone's teachers. App. 3418-19. She did not speak to any medical doctors, employers, or anyone who had done a psychological examination of Stone. App. 3419-20. She did not interview Wesley Miles.[11] Oehler further testified that Stone had no history indicating any kind of serious mental illness, neurosis or mental retardation. App. 3425-26. Specifically, Oehler stated, "I examined both the academic record through the school districts that he attended, as well as the evaluation that was conducted at the State Hospital, and there's no documentation of mental retardation." App. 3426.

Three of Stone's relatives – a sister, his aunt and a niece – testified that their family struggled with difficult circumstances but that Stone was generally a good person and they loved him. App. 3431-67. Dr. William Alexander Morton described the effects of alcohol on the brain and estimated that Stone's blood alcohol level was somewhere between .18 and .71 at the time of the crime. App. 3502. Dr. Morton noted that the effects of alcohol are exacerbated when a person drinks on an empty stomach, as Stone did prior to Kubala's death. App. 3505. Finally, Jim Aiken testified that, according to prison records, Stone was not involved in systematic or predator violence and had positively adjusted to prison conditions.[12] App. 3532. Trial counsel did not offer any evidence that Bobby Stone suffers from low intellectual functioning, brain damage or any other cognitive impairments.

[11] Oehler also admitted that she had no documentation or other records verifying physical abuse or that Miles sexually abused the Stone children. App. 3421-22. Oehler also claimed that Stone witnessed the drowning death of one of his relatives at a young age, but she likewise had no death certificate or other documentation to confirm that event. App. 3424.

[12] Trial counsel also attempted to offer an affidavit from Ruth Griffith, whose prior testimony from the 1997 trial was read into the record over defense counsel's objection, indicating that Griffith did not want Stone to be sentenced to death. The trial court excluded Griffith's affidavit. App. 3378-85.

The State alleged two statutory aggravating circumstances for the jury's consideration: (1) the murder was committed while in the commission of a burglary; and, (2) the murder was of a local law enforcement officer during or because of the performance of his official duties. App. 3606-07. Over defense counsel's objection, the jury was not charged that the State had to prove "knowledge on the part of the defendant that the person who was murdered was a law enforcement officer." App. 3371-72. The jury returned with a sentence of death, finding that the law enforcement aggravator was present but rejecting the State's contention that the murder occurred during the commission of a burglary. App. 3630.

III. POST-TRIAL PROCEEDINGS.

Chief Appellate Defender Joseph Savitz represented Stone on direct appeal. Savitz raised a single issue – whether Kubala-Hanvey's testimony regarding her suicide attempt impermissibly injected an arbitrary factor into the jury's deliberations. This Court ruled that trial counsel had not preserved this argument for review and affirmed Stone's death sentence on December 20, 2007. *State v. Stone*, 376 S.C. 32, 655 S.E.2d 487 (2007). Stone timely filed an application for post-conviction relief, and subsequently amended the application on two occasions prior to the evidentiary hearing. The PCR court held hearings on April 23-25, 2012, in Sumter, South Carolina, and on August 10, 2012, in Florence, South Carolina. The PCR court issued an order of dismissal on May 2, 2013; following oral arguments on Stone's timely Motion to Alter or Amend, the court issued a final Amended Order on August 14, 2013.

ARGUMENT

I. TRIAL COUNSEL WAS INEFFECTIVE DURING THE GUILT-OR-INNOCENCE PHASE.

A. TRIAL COUNSEL FAILED TO SUPPORT THE ACCIDENT THEORY OF THE CASE.

1. Relevant Legal Principles.

The Sixth Amendment guarantees that every criminal defendant receives the effective assistance of counsel in establishing his defense. *Strickland v. Washington,* 466 U.S. 668, 685 (1984). A defendant must ordinarily make two showings in order to prevail on an ineffective assistance claim. First, the defendant must show that counsel's performance was deficient – in other words, that counsel's performance fell below an objective standard of reasonableness. *Id.* at 687-88. "[A]t a minimum, counsel has the duty to . . . make an independent investigation of the facts and circumstances of the case." *Ard v. Catoe*, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) (quoting *Troedel v. Wainwright*, 667 F. Supp. 1456, 1461 (S.D. Fla. 1986), *aff'd*, 828 F.2d 670 (11th Cir. 1987)). The Supreme Court has recognized that "'[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence.'" *Hinton v. Alabama*, 134 S. Ct. 1081, 1088 (2014) (quoting *Harrington v. Richter*, 131 S.Ct. 770, 788 (2011)). "With the assistance of appropriate experts, counsel should [] aggressively re-examine all of the government's forensic evidence, and conduct appropriate analyses of all other available forensic evidence." *Ard*, 372 S.C. at 330, 642 S.E.2d at 597 (quoting *American Bar Association Guidelines For The Appointment And Performance Of Defense Counsel In Death Penalty Cases, reprinted in* 31 Hofstra L.Rev. 913, 1020 (2003) [hereinafter ABA Guidelines]). Performance is deficient when counsel fails to sufficiently challenge the state's forensic evidence. *Id.* (finding that "trial counsel should have further

investigated and more thoroughly challenged the gunshot residue evidence" when that evidence was "crucial" to the defense).

Second, the defendant must demonstrate a "reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694; *Ard,* 372 S.C. at 331. In a guilt-or-innocence phase challenge to the underlying conviction, the question before the court is whether, absent the errors, and considering the totality of the evidence, there is a reasonable probability that the jury would have had a reasonable doubt about the defendant's guilt. *Strickland* 466 U.S. at 695; *Ard* 372 S.C. at 331.

2. Expert testimony was available to support the accident theory.

At the post-conviction relief hearing, Stone called Wayne Hill, an experienced homicide reconstruction expert. In forming his opinions, Hill reviewed the trial testimony, witness statements, reports, photos, and other documentation, and examined the gun and other physical evidence. Hill testified that the weapon had an extremely light (1.5-pound) trigger pull, (App. 4274), which, in his opinion, created the distinct possibility of an accidental discharge in anything other than a target shooting setting. App. 4277-78. Hill also testified that the distance the trigger would have to move before firing was approximately 5/100 of an inch. He described the effort required to fire the gun as "minimal."[13] App. 4275. Given these two factors alone, Hill testified: "if you have too light a trigger, it's going to [fire]. And we've got historic cases of police officers who said, 'I didn't intend to shoot the guy.' . . . And when you add in [that the trigger] only has to go five-hundredths of an inch, . . . if you're not paying attention, you could set it off before you

[13] As demonstrated at the PCR hearing, the trigger pull is so light that, if held by the trigger, the weight of the gun itself is sufficient to fire the weapon. App. 4279.

intended to. If somebody come[s] up behind you and startle[s] you, you could set it off."[14] App. 4275-79. Hill also noted that swinging the gun up – as Stone described happening when he turned towards the sound, would add centrifugal force to the likelihood of discharge, because "you're pushing the gun against your finger." App. 4298-99.

Hill also testified that it was possible to unintentionally fire the weapon in this case more than once. He discussed a scenario in which the first accidental discharge could startle an individual into pressing the trigger accidently a second time. This is especially true given the extraordinarily light trigger pull and short distance the trigger must move to fire the semiautomatic weapon, which automatically reloads and is ready to fire again immediately.[15] App. 4282.

Hill also explained how the evidence supported Stone's account that he shot from waist-level, not from his shoulder as would be expected if he aimed and fired. Stone's height, his location on the raised porch, the height and the path of Kubala's wounds, the height of the bullet holes in the screen door, and the fact that Griffith and Taylor reported that Stone was beating on the door until Kubala said "halt" are all consistent with shooting "from the hip" or unintentional shooting, and -- in combination -- are inconsistent with aiming and shooting from the shoulder which would require the bullets to travel through the screen door in a sharp downward angle, most likely into the ground. App. 4294-96, 4317-18.

Finally, Hill testified that the fact that Stone was intoxicated also increased the risk of unintentionally firing the weapon. App. 4285-86. An intoxicated person is unable to focus simultaneously on two different things, e.g., controlling body movement while responding to cues

[14] Hill testified that, when startled, even trained law enforcement officers, commonly discharge their weapons unintentionally. App. 4286-87.

[15] Hill testified that the average shooter, even a non-practiced shooter, can fire six rounds per second with a semiautomatic pistol. App. 4283.

from the environment. App. 4285. Alcohol also tends to deaden sensations, including the sensation of the finger on the trigger. *Id.* Hill explained that a person, especially an impaired person, can fire multiple shots accidentally.[16] App. 4287-88.

In sum, Hill's testimony was that the totality of the known evidence is consistent with Stone's statement that he did not intend to kill Kubala. App. 4296.

A second expert, Dr. James Merikangas, a board certified neurologist and psychiatrist, testified regarding Stone's mental impairments. He noted that Stone had an increased startle response, App. 4113, and described "[h]is jumpiness, his anxiety, his impulse control, his attention." App. 4115. He opined that Stone was "suffering from a disorder of the ability to control impulses with increased startle. In other words, if someone had come up behind him in the dark, he would react not with deliberation and planning but just in a reflex way."[17] App. 4117.

Hill also opined that it is not surprising that Stone later did not remember firing the weapon more than once, especially given his brain damage and intoxication. App. 4297. When people feel threatened, the fight or flight reflex kicks in, and they "tunnel focus" on the threat. App. 4297-98. Studies have shown that even trained law enforcement officers often cannot correctly

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[16] At the PCR hearing, SLED Agent Ira Parnell testified on direct and confirmed on cross-examination that firing more than one round unintentionally was possible. App. 4441. On cross-examination he also acknowledged that the gun had "what we would call a hair trigger." App. 4442. He agreed that standard-issue law enforcement pistols have substantially higher trigger pulls – eight to ten pounds in New York City – 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.

[17] Wayne Hill testified that based on standard police training procedures, Sgt. Kubala would have come around the side of the house with his flashlight off, so as not to make a target of himself "until [he was. . .] tactically ready" and then use the light to startle Stone, temporarily blinding him to gain tactical advantage. App. 4312-13.

remember the number of shots fired under a sense of threat. App. 4297. The perception of being threatened "just changes your perspective." App. 4298.

3. Trial counsel's performance was deficient.

Counsel had a "duty to advocate the defendant's cause" and to "bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland,* 466 U.S. at 688. In this case, fulfilling that basic obligation required trial counsel to marshal and adequately present reasonably available evidence supporting Stone's claim that he did not intentionally shoot Kubala.

It is important at the outset to note that Stone does not take issue with trial counsel's basic strategy. It was a plausible defense (in fact it was the only plausible defense), it was advocated by their client, and it was consistent with the evidence and Stone's statements to law enforcement: Stone did not know Kubala had been to the house earlier that day or that the police had been summoned while he was beating on the door of Griffith's porch; it was dark; there is no proof that Stone saw or heard Kubala arrive at Griffith's home or knew the officer was there until Kubala shouted "halt." Stone was also very intoxicated and holding a gun with a light trigger pull. An unintentional killing was also consistent with Stone's background; he had absolutely no history of violence toward anyone, including the law enforcement officers who had arrested him without incident for prior nonviolent offenses.

Trial counsel's selection of the correct theory of the case, however, is only a necessary condition, not a sufficient one, to providing the effective assistance of counsel. The appropriate strategy must also be reasonably implemented. *See* NLADA Performance Guidelines for Criminal Defense Representation, Guideline 4.3 (Theory of the Case) ("During investigation and trial preparation, counsel should develop and continually reassess a theory of the case."). This, in turn

requires a constitutionally adequate investigation, and in a case such as this one, counsel is obligated secure necessary expert assistance. *See* NLADA Performance Guidelines for Criminal Defense Representation, Guideline 4.1(7) (Investigation) ("Counsel should secure the assistance of experts where it is necessary or appropriate to: (A) the preparation of the defense; (B) adequate understanding of the prosecution's case; (C) rebut the prosecution's case."). In this case, trial counsel's failure to support Stone's statement that he did not intend to kill Kubala was objectively unreasonable.

Trial counsel's method of implementing the defense theory of the case was. cross-examination of the State's witnesses. Counsel presented no affirmative evidence, especially expert testimony, to support their primary contention, although, as the PCR hearing testimony established, supporting evidence was reasonably available. Wayne Hill, whose testimony was described above in detail, or another similar expert could have powerfully bolstered Stone's consistent contention that, startled by Kubala shouting "halt," he turned towards the sound and the gun went off. Hill concluded, after considering the totality of the known evidence, that the evidence was more consistent with Stone's statement that the gun accidently discharged than it was with the State's ambush theory. In sum, trial counsel's failure to secure necessary expert assistance rendered the defense case much weaker than it could – and should – have been.[18]

In *Ard*, this Court held that trial counsel's failure to retain an independent expert was unreasonable and prejudicial. Ard was convicted of murder and sentenced to death for shooting his pregnant girlfriend. Like Stone, Ard maintained that the shooting was accidental. A state's

[18] As discussed in the next section of this brief, trial counsel's failure to adequately assess Stone's cognitive impairments, is also relevant to this claim. Stone's low I.Q. and brain damage affect areas in his brain that are well-known to relate to the interpretation of danger signals, executive functioning, planning and flexibility, and thus are relevant to Stone's mental state at the time of the offense.

expert testified regarding the results of gunshot residue testing on the defendant's hands, while the defense failed to secure an independent expert to review and challenge this testimony. Another similarity between Stone's case and *Ard*, is that trial counsel staked their case that the killing was unintentional: i) on Ard's consistent statements that he did not intend to kill his girlfriend; and, ii) through cross-examination of the prosecution's witnesses. *See Ard*, 372 S.C. 318, 642 S.E.2d 590 In affirming the PCR court's grant of a new trial, 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 598;[19] *see also People v. Baines*, 399 Ill. App. 3d 881, 896, 927 N.E.2d 158, 170 (2010) ("[I]t defies reason to believe that defense counsel would intentionally fail to bring out the very essence of the defense theory in the clearest possible manner."). Expert evidence supporting the defense theory that Stone did not intentionally kill Kubala was just as, if not more, "crucial" to the defense in this case as the gunshot residue testimony was to the defense in *Ard*. Therefore, trial counsel's performance was similarly deficient, and thus unreasonable, under *Strickland.*

4. Trial counsel's deficient performance was prejudicial.

The jury in this case had, for all practical purposes, only one issue to resolve: did Stone intentionally kill Kubala, or did he, in his intoxicated state, turn towards the sound of Kubala's voice and accidently fire the shots that took Kubala's life. The Court charged the jury that they could not convict Stone if there was "another reasonable explanation" for the facts other than that Stone was guilty of malicious murder. Supp. App. 884. As discussed above, there *was* another

[19] At his retrial, Ard's defense team did secure and present expert testimony on this issue. The jury rejected the murder charge, instead finding Ard guilty only of the lesser-included offense of involuntary manslaughter. *See SC Man Walks Free After Serving 11 Years on Death Row*, WYFF4.com, August 1, 2012, available at http://www.wyff4.com/news/columbia-statewide-news/SC-man-walks-free-after-serving-11-years-on-death-row/15912514.

reasonable explanation – that the shooting was reflexive and unintentional. Unfortunately, trial counsel failed to develop and present evidence which would have persuaded the jury that Stone's account of what happened was plausible and consistent with the known evidence.

Not surprisingly, courts have consistently held that failing to secure a defense expert to corroborate the defendant's version of events is prejudicial. *See, e.g., People v. Hull,* 898 N.Y.S.2d 284, 71 A.D.3d 1336 (2010) (finding counsel's failure to call an expert gunsmith regarding the possibility of accidental discharge of a firearm unreasonable and prejudicial because the "testimony would have been directly pertinent to defendant's primary defense, and would not have been duplicative [and where there was no evidence of] 'strategic or other legitimate explanation' for the failure to call a firearms expert"); *Elmore v. Ozmint*, 661 F.3d 783, 853 (4th Cir. 2011) (granting habeas corpus relief in part because "[t]he defense team conducted no independent analyses of the State's forensic evidence"); *Jackson v. Conway,* 765 F. Supp. 2d 192, 264 (W.D.N.Y. 2011) (finding prejudice when "defense counsel needed [an] expert's testimony to . . . effectively make his arguments.").

Had Stone's jury heard testimony similar to that presented at the PCR hearing regarding the crime scene, unsafe trigger pull[20] and the ease with which the gun Stone had in his hand could be accidentally fired, the significance of the height of the bullet holes in the screen door and the angle of the bullet paths entering Kubala's body, and Stone's significant cognitive impairments, combined with a closing argument that connected the known facts to the defense theory, there is a

[20] Although at trial SLED examiners minimized the lightness of the trigger pull, Stone's trigger pull was approximately one and one-half pounds, less than half of the pressure of the trigger pull in *Ard*, which the South Carolina Supreme Court described as requiring "*only* three to three and one quarter pounds of pressure." *Ard,* 372 S.C. at 324 n.5, 642 S.E.2d at 593 n.5 (emphasis added). Furthermore, at the PCR hearing, the same SLED examiner conceded on cross-examination that the weapon had a "hair trigger." App. 4442.

reasonable probability that the jury's answer to the "ambush v. accident" question would have been different. For these reasons, counsel's failure to reasonably investigate, implement and support their chosen trial strategy was prejudicial.

5. The PCR Court erred in denying this claim.

The PCR Court concluded that any expert testimony offered in PCR was cumulative to the trial evidence because "all of the facts favorable to the defense were established through the testimony of [SLED] agent Ira Parnell." App. 7348. This finding is not supported by the record. *See* Supp. App. 647-81, App. 3276-3301, 4263-4318.

The PCR Court further erred in denying this claim on the basis that a crime scene expert could not conclusively testify that the shooting was accidental. App. 7348. This conclusion turns on a mischaracterization of Stone's claim. Stone did not argue that trial counsel should have called an expert witness to decisively claim that 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.[21]

[21] The PCR court also found that, even if trial counsel's performance was deficient, Stone was not prejudiced because he "was not entitled to a jury charge on involuntary manslaughter or accident." App. 7348. However, even if this is true, an accident theory was also relevant to the sentencing phase and the jury's acceptance of such a theory would have been far more mitigating than the State's alleged "ambush" theory of the crime. *See* Section II.C., *infra*.

B. TRIAL COUNSEL FAILED TO OBJECT TO THE STATE'S IMPROPER AND PREJUDICIAL CLOSING ARGUMENT.

1. Counsel's performance was deficient and prejudicial.

Arguments must be confined to evidence in the record and reasonable inferences that may be drawn from it. *State v. Huggins*, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997); *Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010). A solicitor "may argue that the evidence gives rise to an inference, but the suggested inference must be reasonably drawn from the facts in evidence." *United States v. Talley,* 135 F.3d 291, 298 (4th Cir. 1998). This is "a fundamental rule, known to every lawyer." *Id.*

Testimony described Stone as essentially inert and nonresponsive when officers discovered and approached him. The gun was under his left shoulder as he lay motionless for at least twenty minutes; he made no effort to retrieve it. Nevertheless, the solicitor told the jury that Stone's intent was to ambush and kill more officers. Although there was no evidence to support his assertions, the solicitor argued that Stone: (a) had "already killed one police officer, what's keeping him from killing another?"; (b) was "thinking about using [the gun]"; (c) "kept it till the last minute in case just maybe one or two officers came to him, we would have [had] two unsolved murders maybe"; and, (d) "kept that gun in his last second to use it again." Supp. App. 850-53. These inferences were not reasonably drawn from the facts in evidence, as the law requires. Trial counsel failed to object.

As to prejudice, the concept of ambush can have only negative connotations. Its use is calculated to inflame the jury's outrage. This Court has found both deficient performance and prejudice when the solicitor argues without evidentiary support. For example, in *Mincey v. State*, the Court determined that trial counsel was ineffective for failing to object to the solicitor's comments in closing, when "[t]here was, in fact, *no* evidence that [Petitioner] intimidated any of

the witnesses." 314 S.C. 355, 358, 444 S.E.2d 510, 512 (1994). In *Huggins*, the defendant was denied a fair trial because the solicitor argued that the defendant wanted the victim dead, knew how to do it, and had offered to pay to have it done. This was "fundamentally unfair" and, when "there was no evidence in the record that she had done so, was highly prejudicial." *Huggins* 325 S.C. at 108, 481 S.E.2d at 116. Likewise, here, trial counsel's failure to object was ineffective assistance.

2. The PCR Court erred in denying this claim.

The PCR court concluded that trial counsel made a valid, strategic decision not to object to this argument because trial counsel did not believe that the trial judge would sustain his objection. App. 7345. This is not a correct application of *Strickland.* Trial counsel has an obligation to preserve every potential error for appellate review, regardless of whether counsel actually believes that a particular trial judge will rule correctly. *See, e.g., Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002) ("[C]ounsel cannot assert trial strategy as a defense for failure to object to comments which constitute an error of law and are inherently prejudicial."); *Jolly v. State*, 314 S.C. 17, 19, 443 S.E.2d 566, 568 (1994) (finding trial counsel ineffective for failing to object where trial counsel claimed he did not object because the trial judge previously had admitted the same testimony); ABA Guidelines 10.8, commentary ("One of the most fundamental duties of an attorney defending a capital case is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review.").

II. TRIAL COUNSEL WAS INEFFECTIVE DURING THE PENALTY PHASE.

A. RELEVANT LEGAL PRINCIPLES.

Penalty phase claims of ineffective assistance of counsel are also reviewed under the two-prong test established by *Strickland*, 466 U.S. at 687. A PCR applicant must show that: (1) trial counsel's performance was deficient; and, (2) the deficiency resulted in prejudice.

First, whether an attorney's performance was deficient is determined by a standard of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. In capital cases, the professional norms require counsel to conduct a thorough investigation into "*all reasonably available* mitigating evidence" spanning the entirety of the defendant's life and background. *Wiggins*, 539 U.S. at 524 (emphasis in original); *Porter*, 558 U.S. at 39. The United States Supreme Court has repeatedly and consistently emphasized that trial counsel must be particularly diligent to investigate evidence of mental impairments such as brain damage or low intellectual functioning because of its powerful mitigating effect.[22] Numerous lower courts have

[22] *See, e.g., Sears*, 130 S.Ct. 3259, 3261 (2010) (holding evidence of frontal lobe damage was "significant mitigating evidence a constitutionally adequate investigation would have uncovered"); *Porter*, 558 U.S. at 41 (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*, 539 U.S. at 535); *Rompilla*, 545 U.S. at 392 (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 (2004) (holding evidence of impaired intellectual functioning is inherently mitigating in the penalty phase of a capital case); *Wiggins*, 539 U.S. at 535 (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*, 529 U.S. at 398 (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 premediation").

likewise recognized that low intellectual functioning and brain damage are inherently and uniquely mitigating.[23]

Moreover, trial counsel must not "ignore[] pertinent avenues for investigation of which he should have been aware." *Porter*, 558 U.S. at 40. Where trial counsel fail to conduct a thorough mitigation investigation, they necessarily lack the information required to make reasonable strategic judgments concerning the selection and presentation of evidence, and deference to decisions made under such conditions is inappropriate. *See e.g., Sears*, 130 S.Ct. at 3265 ("We rejected any suggestion that a decision to focus on one potentially reasonable trial strategy . . . can be justified by a tactical decision when counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background.").

To establish prejudice, a PCR applicant "'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

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[23] *See, e.g., Hooks v. Workman*, 689 F.3d 1148, 1205 (10th Cir. 2012) ("Evidence of [petitioner's] educational handicaps was surely relevant to the jury's appraisal. It was readily available and should have been part of [the] mitigation case."); *id.* ("the involuntary physical alteration of brain structures, with its attendant effects on behavior, tends to diminish moral culpability, altering the causal relationship between impulse and action."); *Wilson v. Sirmons*, 536 F.3d 1064, 1094 (10th Cir. 2008) (stating mental conditions "associated with abnormalities of the brain" are "likely to [be] regarded by a jury as more mitigating than generalized personality disorders."); *Bryan v. Mullin*, 335 F.3d 1207, 1244 (10th Cir. 2008) (Henry, J., concurring in part and dissenting in part) ("[Counsel's] performance left the jury no reason even to consider as a possibility that [the defendant] might not be morally culpable enough, as a result of his involuntarily adduced organic brain disorder, for the death penalty."); *Blystone v. Horn*, 664 F.3d 397, 406 (3rd Cir. 2011) (trial counsel's deficient performance was prejudicial where counsel failed to investigate and present evidence that petitioner suffers "from serious untreated brain damage and psychiatric disorders, all of which were aggravated by a history of poly-substance abuse."); *Haliym v. Mitchell*, 492 F.3d 680, 718 (6th Cir. 2007) (prejudice found where trial counsel failed to present evidence that, among other things, petitioner suffered a serious brain injury and functional brain impairment, which caused problems with impulsivity, judgment and problem solving); *Caro v. Woodford*, 280 F.3d 1247, 1258 (9th Cir. 2002) ("By explaining that [defendant's] behavior was physically compelled, not premeditated, or even due to a lack of emotional control, his moral culpability would have been reduced.").

different.'" *Porter*, 558 U.S. at 38-39 (quoting *Strickland*, 466 U.S. at 694). To assess that probability, this Court must consider "'the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the [PCR hearing]' – and 'reweig[h] it against the evidence in aggravation.'" *Id.* at 41 (quoting *Williams*, 529 U.S. at 397-98). The test is not whether Stone would have received a life sentence absent trial counsel's deficient performance. As the Supreme Court recently reiterated in *Porter*:

> [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.

Id. at 44 (quoting *Strickland*, 466 U.S. at 693-94). The question is whether "the undiscovered [mitigation] evidence, taken as a whole, might well have influenced the jury's appraisal of [a defendant's] culpability." *Rompilla*, 545 U.S. at 393. Prejudice is established if "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537.

B. TRIAL COUNSEL FAILED TO INVESTIGATE AND PRESENT EVIDENCE OF STONE'S LOW INTELLECTUAL FUNCTIONING AND BRAIN DAMAGE.

1. Trial counsel was aware of numerous facts indicating brain damage and other cognitive impairments.

Prior to trial, Littlejohn and Babb possessed a variety of information pointing to Stone's low intellectual functioning and organic brain damage. First, trial counsel obtained Stone's school records, which contained numerous references to academic failure, impaired intellectual functioning and potential brain damage. Stone failed the first, fourth, and sixth grades. Supp. App. 1007-48. He dropped out of school at age seventeen, having completed only the ninth grade. *Id.*

Stone was first referred for a psychological evaluation in 1975 by his third grade teacher. *Id.* His elementary teachers consistently reported that he tired easily and had frequent inattention and undue restlessness. *Id.* Stone obtained a full-scale IQ score of 86 on the Wechsler Intelligence Scale for Children ("WISC"). The school examiner noted that Stone exhibited weaknesses in "visual perception, visual memory and alertness to details, and in rote and immediate memory." Supp. App. 1007. The examiner further observed "[w]ide variance in scores indicate deficits in sequencing and spacial abilities at the performance level," and that "his eyes did not seem to work together properly." *Id.* Stone was placed in the Learning Disabled Resource Program.

Over the next few years, Stone's test scores steadily declined. He was evaluated again in 1976 during his second attempt at the fourth grade. His IQ was measured at 78. Supp. App. 1009. Test results indicated "very low psychological functioning" and "major problems in visual-motor coordination and integration." Supp. App. 1009-11. The examiner observed that "Bobby is functioning overall in the borderline range of intelligence, with substantial deficits in the performance area." Supp. App. 1010. Academic achievement tests revealed that Stone was functioning at a second grade level in reading and math. *Id.* Three years later, Stone's IQ score had declined further to a full-scale range of 69-75. Supp. App. 1012. Tests indicated that his adaptive functioning skills were "generally below the normal range."[24] *Id.* Although he was fourteen years old and in the seventh grade, Stone was performing academically at only a fourth grade level in reading and at approximately the third grade level in math and spelling. These scores

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[24] A diagnosis of intellectual disability [formerly called "mental retardation"] requires an IQ score of 75 or less combined with significant deficits in adaptive functioning skills prior to the age of eighteen. *See* Hall v. Florida, 134 S. Ct. 1986, 1995 (2014); S.C. Code Ann. § 16-3-20(C)(b)(10); INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS, 36 (American Association on Intellectual and Developmental Disabilities, 11th ed. 2010); Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) (American Psychiatric Association) at pp.41-42.

placed him in the bottom 1st to 4th percentile among his peers. *Id.* The school examiner determined that Stone's classification should be downgraded from Learning Disabled to Educably Mentally Handicapped ("EMH"). Supp. App. 1013. The following chart summarizes the relevant test results from Stone's school records:

Date/Age	**School/ Grade**	**IQ Test/ Results**	**Other Tests/Results**			
2/18/1975 (Age 9)	Lemira Elementary (3rd Grade)	WISC = 86				
10/12/1976 (Age 11)	Lemira Elementary (4th Grade, second attempt)	WISC-R = 78	**Peabody Picture Vocabulary Test** Low average psychological functioning	**Bender-Gestalt** Results indicate low average psychological functioning	**WRAT** Reading – 2.5 grade level Math – 2.5 grade level	**Draw-A-Man** Very low psychological functioning
11/1/1979 (Age 14)	Bates Middle (7th Grade)	WISC-R = 69-75	**Peabody Picture Vocabulary Test** Slow learner range of functioning	**Bender** Score was below the 5th percentile, at a quality level expected of an average 8-5 year old.	**WRAT** Reading – 4.2 grade Spelling – 2.9 grade Math – 3.6 grade	**AAMD** Indicated adaptive functioning generally below the normal range.

Second, trial counsel also collected the school records of Stone's siblings, Jerry Stone and Tammy Stone, which likewise indicated academic and intellectual deficits. Stone's younger brother, Jerry, failed the first, second, seventh and eighth grades. Supp. App. 1051-53. His IQ

was tested four times during the course of his school history, resulting in full-scale IQ scores ranging from 66 to 78. Supp. App. 1052. Jerry was deemed Educably Mentally Handicapped in the fourth grade and remained in the Resource Program until he received a special education certificate after completing high school at age twenty. Supp. App. 1051. Stone's younger sister, Tammy, failed the first grade and was determined to be Educably Mentally Handicapped that same year. Supp. App. 1053. Her IQ scores range from 65 to 75. *Id.* She remained in the Resource Program for the duration of her school history. Tammy failed the tenth grade three times. After her fourth attempt at the tenth grade, Tammy was given a certificate of high school completion.[25] *Id.*

Third, trial counsel possessed medical records for Bobby Stone, which showed that he was treated at the emergency room on numerous occasions. For example, when he was thirteen years old, Stone was treated at the hospital because he fell and injured his ribcage. At age fourteen, he experienced another fall during which he cut his right foot. The following year, he appeared in the ER complaining of pains in his left chest and broken ribs. Stone fell again at age sixteen, resulting in a fractured foot. Later that same year, Stone "fell about eight feet and ha[d] pain in his chest and back." At age twenty-seven, Stone was in a motor vehicle accident resulting in back pain. The following year, he was working on a car when the motor fell about a foot onto his head. Stone reported that a bolt went into his right ear. Emergency room staff noted abrasions, blood coming from the ear canal, cranial swelling and tenderness.

[25] Trial counsel did not collect school records related to Stone's older sister, Melinda Stone. App. 4495. Melinda's school records indicate that she was also classified as Educably Mentally Handicapped by at least the sixth grade. App. 6456-6474, Supp. App. 1053. Academic achievement testing in the sixth grade demonstrated that Melinda was performing at a second grade level in verbal skills and at a third grade level in math. *Id.* Melinda dropped out of school shortly after beginning the tenth grade. *Id.*

Fourth, TeAnne Oehler noted that Stone had difficulty concentrating and was unable to remember dates and sequencing. App. 3406, 3411. She also collected information from family members to the effect that Stone sustained a serious head injury at approximately age six, but no medical records were located regarding that event. Oehler pointed out that Stone's life-long tendency toward falls and accidents also suggested the possibility of head injury. App. 3411-12. Finally, Oehler noted a general pattern of chaos, violence and trauma throughout Stone's social history.

2. Trial counsel failed to investigate further.

Despite these multiple obvious indicators of brain damage and cognitive impairment, trial counsel failed to: (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; (4) have Stone evaluated by a neurologist or other appropriate medical expert; and, (5) investigate the potential causes of Stone's brain damage. All of these investigative tools were available to trial counsel at the time of their trial preparations, and – as demonstrated by the evidence presented at the PCR hearing – any one of these steps would have led to a wealth of powerful mitigating evidence.

As part of the post-conviction investigation, Stone was seen by Dr. James Evans, a licensed clinical psychologist, for a neuropsychological evaluation. Dr. Evans administered a standard battery of tests, which indicated that Stone suffers from brain damage. Specifically, Evans' findings included significant problems with word finding, abstract reasoning, impulsive responding and poor tactual memory. These areas of difficulty are associated with damage to the frontal lobe, left temporal, parietal and central areas of the brain. Stone had major difficulty with additional neuropsychological testing designed to measure left frontal lobe functioning, scoring

four standard deviations below average for his age group (below the first percentile). Results from a Quantitative EEG (QEEG) evaluation, which is used to measure and quantify electrical activity within the brain, were consistent with the neuropsychological test findings and likewise pointed to damage of the frontal, left temporal, parietal and central areas of Stone's brain.

Dr. Ruben Gur is a neuropsychologist and tenured professor at the University of Pennsylvania in the departments of Psychiatry, Neurology and Radiology. Dr. Gur issued a report explaining that quantitative analysis of an MRI (magnetic resonance imaging) and a PET (positron emission tomography) scan revealed damage to Stone's brain in both its structure and function. App. 4515. The MRI showed that Stone's frontal lobe "is reduced in size to a clinically significant extent." App. 4514. A variety of other areas of Stone's brain are "abnormally small" as well. *Id.* By contrast, Stone's ventricles (the fluid filled spaces in the brain) are "extremely large." *Id.* Dr. Gur explained that "[w]hen brain tissue dies, the volume formerly occupied by cells is replaced by cerebrospinal fluid. Large ventricles are therefore an indicator of overall brain atrophy (death of cells) or dystrophy (failure of brain tissue to develop)." *Id.* The structural abnormalities observed in Stone's brain are known to "interfere with executive functions such as abstraction and mental flexibility, planning, moral judgment, emotional regulation, [and] impulse control." App. 4515.

The PET study revealed that certain areas of Stone's brain associated with executive functioning (including the corpus callosum) suffer from severely decreased metabolic activity. App. 4514-15. However, other areas are functioning in a hyper-aroused state. Dr. Gur explained that this specific damage "would lead to severe emotional dysregulation." App. 4516. In other words, Stone's brain "will misinterpret danger signals" and "issue false alarms." *Id.* Moreover, when faced with these "false alarms," the areas of Stone's brain that regulate behavior are called upon to respond when they are "already at a hyper-activated state." *Id.* As a result,

> [t]he situation is analogous to a car with weak brakes that are already engaged when it begins to race. When Stone's amygdala becomes activated, his frontal lobe is unlikely to be capable of exercising control as a normal one would, because his frontal lobe is not only damaged but his cortex is operating at full capacity in its hyper-vigilant state. The frontal lobe is unable to do its job and act as the brakes on the primitive emotional impulses emanating from the amygdala when the limbic system reaches its activated stage.

Id. Thus, Dr. Gur concluded:

> The resulting behavior of someone with such brain damage could be disorganized, erratic and failing to adjust to situational demands. Notably, such individuals do respond well to structured environments, where the complexity of the surroundings and need for decision-making is reduced.

Id.

In addition to Dr. Gur, Dr. Fred Bookstein also analyzed Stone's MRI results and likewise found that Stone's brain is damaged. Dr. Bookstein is a Professor of Statistics at the University of Washington with particular expertise in damage to the corpus callosum associated with fetal alcohol spectrum disorder. He concluded that Stone's corpus callosum is abnormal in its shape, thickness and position within the brain. App. 4522-26. "The corpus callosum is the bundle of nerve fibers that connects the two halves of the cortex across the middle of the brain." App. 4521. Regarding his analysis of Stone's corpus callosum, Dr. Bookstein concluded: "it is fair to say that with high likelihood something went wrong with this brain's development, in this region, early in the embryonic period." App. 4527. Dr. Bookstein explained that damage to the corpus callosum produces deficits in executive functioning, such as difficulties in impulse control, poor judgment, impaired moral reasoning and difficulty assessing the intentions of others. App. 4528-29.

Finally, Dr. James Merikangas, a medical doctor with board certifications in both Neurology and Psychiatry, testified at the PCR hearing that Stone has organic brain damage. Merikangas testified that Stone's brain damage was evident on every available measure, including:

(1) testing conducted by the school system when Stone was a child; (2) Dr. Evans' neuropsychological testing; (3) the MRI and PET scans and related analyses by Dr. Gur and Dr. Bookstein; and, (4) Dr. Merikangas' own physical, neurological evaluation. App. 4101-4112. Dr. Merikangas also testified that Stone has a number of psychiatric symptoms consistent with long-term effects of the trauma Stone experienced as a child, including violence and terror perpetrated by Wesley Eugene Miles.[26] App. 4100. Research indicates that early childhood trauma can adversely affect brain development. App. 4114.

3. Trial counsel's performance was deficient.

Trial counsel's failure to adequately investigate and present evidence that Stone suffers from impaired intellectual functioning and organic brain damage was objectively unreasonable under prevailing professional norms for capital sentencing proceedings in 2005.[27] *See, e.g., Porter*,

[26] Miles and his family lived next door to the Stone family. Miles, a violent alcoholic, had a long-term, essentially polygamous relationship with Stone's mother from Stone's early years until his mother's death.

[27] The American Bar Association Guidelines for the Appointment and Performance of Defense Council in Death Penalty Cases (2003) have been cited with approval and repeatedly referenced as relevant guidelines by the Supreme Court of the United States, *see, e.g., Rompilla*, 545 U.S. at 387; *Wiggins*, 539 U.S. at 524; *Williams*, 529 U.S. at 396, and by this Court, *see Council v. State*, 380 S.C. 159, 172-73, 670 S.E.2d 356, 363 (2008); *Ard*, 372 S.C. at 332, 642 S.E.2d at 597. Guideline 10.7(A) provides that "[c]ounsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." The commentary to Guideline 10.7 explains that "[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 (including . . . neurological damage)"; (2) "Family and social history (including . . . cognitive impairments)"; and, (3) "Education history (including . . . special education . . . cognitive limitations and learning disabilities)." Moreover, the commentary instructs that records, in particular, "can contain a wealth of mitigating evidence, documenting or providing clues to childhood abuse, retardation, brain damage, and/or mental illness." Similarly, Guidelines 10.11(A) and (F) instruct that "counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty" and that counsel should carefully consider presenting expert testimony "to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s)."

558 U.S. at 39; *Wiggins*, 539 U.S. at 524-27; *Williams*, 529 U.S. at 396; *Council*, 380 S.C. at 170, 172-75, 670 S.E.2d at 361, 363-64; *Von Dohlen v. State*, 360 S.C. 598, 607-08, 602 S.E.2d 738, 742-43 (2004). Trial counsel possessed information and documents containing multiple "red flags" pointing to a need for further investigation. *See, e.g., Sears,* 130 S.Ct. at 3263 ("Sears' history is replete with multiple head trauma, substance abuse and traumatic experiences of the type expected to lead to [brain damage and cognitive] impairments."); *Hooks v. Workman*, 689 F.3d 1148 1205 (10th Cir. 2012) (holding trial counsel was ineffective for failing to investigate further even though defendant's history of head injury was a "clear marker[] for organic brain damage"); *Simmons v. State*, 105 So.3d 475, 509 (Fla. 2012) (finding deficient performance where trial counsel failed to investigate brain damage and stating "[b]ecause trial counsel were aware of the low IQ, special education, Simmons' limited oral, reading, and writing abilities, and his serious alcohol abuse, it appears they did not perform an adequate mitigation investigation into possible mental mitigation based on those circumstances").

Nevertheless, Littlejohn and Babb failed to take any further investigative steps. *See, e.g., Porter*, 558 U.S. at 40 (trial counsel "ignored pertinent avenues for investigation of which he should have been aware"); *Wiggins*, 539 U.S. at 524 (counsel were deficient because they "abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources"); *Council*, 380 S.C. at 173, 670 S.E.2d at 363 ("Even the limited information obtained should have put counsel on notice that [defendant's] background, with additional investigation, could potentially yield powerful mitigating evidence."). As a result, trial counsel's investigation and trial preparations were constitutionally inadequate.

Moreover, trial counsel failed to present even the mitigating evidence that they did have in their possession. *See, e.g., Williams*, 529 U.S. at 393 ("it is undisputed that Williams had a right – indeed, a constitutionally protected right – to provide the jury with the mitigating evidence that his trial counsel either failed to discover *or failed to offer.*") (emphasis added); *Council*, 380 S.C. at 172, 670 S.E.2d at 363 ("We believe it was unreasonable for trial counsel not to further investigate [defendant's] background and present even the minimal mitigating evidence that was obtained."). Stone's school records alone reveal that he consistently struggled with academic failure, very low psychological functioning, problems with visual-motor coordination, and deficits in adaptive functioning skills, among other things. Trial counsel relied on TeAnne Oehler to present Stone's social history, but failed to provide her with a complete copy of Stone's school records. App. 4362-63. Oehler incorrectly testified at trial that Stone "didn't have too much difficulty in school until about sixth grade," and that his academic record included no suggestion of possible mental retardation. App. 3407, 3426. Thus, not only did trial counsel fail to conduct an adequate investigation, but they further failed to adequately prepare Oehler's testimony, preventing the jury from hearing an accurate account of Stone's academic difficulties and intellectual impairments. *See, e.g., Von Dohlen*, 360 S.C. at 608, 602 S.E.2d at 743 (trial counsel's performance was deficient where they failed to provide their expert with "crucial medical records" preventing the expert from "conveying an accurate diagnosis and explanation of Petitioner's mental condition to the sentencing jury"); *Hooks*, 689 F.3d at 1204 (finding trial counsel "totally failed to prepare his witness, thus strongly diminishing the potential mitigating impact of the testimony").

Trial counsel had no strategic reason for their failure to thoroughly investigate and present all evidence of Stone's cognitive and neurological dysfunction. App. 4364. Both attorneys

admitted at that PCR hearing that they had no strategic reason for failing to present the fullest possible mitigating account of Stone's impairments. App. 4364-65, 4487. Even if trial counsel had not admitted that they had no strategic reason for their failure, any alleged strategic decision would be objectively unreasonable given that trial counsel's investigation was inadequate and incomplete. *See, e.g., Council*, 380 S.C. at 175, 670 S.E.2d at 364 (internal quotations omitted) ("This Court has recognized that strategic choices made by counsel after an incomplete investigation are reasonable only to the extent that reasonable professional judgment supports the limitations on the investigation"); *see also, Wiggins*, 539 U.S. at 523 (same).

4. Trial counsel's deficient performance was prejudicial.

Trial counsel's failures resulted in prejudice. In *Simmons*, the Florida Supreme Court found prejudice where trial counsel failed to investigate and present evidence that a PET scan showed damage to Simmons' brain. 105 So.2d at 504. Simmons' post-conviction experts testified that his brain damage "impaired his ability to learn and function socially, and to control himself and not be impulsive." *Id.* at 505. The State challenged this claim with its own expert witness, who testified that Simmons' PET scan was not abnormal in any way. *Id.* at 506. Nevertheless, the Florida Supreme Court held:

> [e]ven though the State presented expert testimony that Simmons' brain was not abnormal, the effect of Dr. Wood's testimony as possible mitigation cannot be completely discounted. As the United States Supreme Court noted in somewhat similar circumstances, 'While the State's experts identified perceived problems with the tests that Dr. Dee used and the conclusions that he drew from them, it was not reasonable to discount entirely the effect that his testimony might have had on the jury or the sentencing judge.'

Id. (quoting *Porter*, 558 U.S. at 43-44).

Here, unlike *Simmons*, Respondent did not even attempt to dispute Stone's evidence of brain damage and low intellectual functioning. Respondent was well aware that these issues were

the main focus of Stone's penalty-phase PCR claims. Stone provided Respondent with expert reports and affidavits on these issues in advance of the PCR hearing, including written reports from Dr. Rubin Gur, Dr. James Shine and Dr. Fred Bookstein. Respondent presented no contrary testimony or other evidence on these issues.

Moreover, the inherent mitigating effect of brain damage and/or low intellectual functioning is evident from numerous capital cases in which courts have found prejudice even where the aggravating evidence was especially strong. For example, George Porter was convicted of killing two victims – his former girlfriend, Evelyn Williams, and her new boyfriend. *Porter*, 558 U.S. at 30. Porter had threatened to kill Williams three months before he ultimately broke into her house and shot her. Porter also "drove past [Williams'] house each of the two days prior to the shooting" and visited her house on the night before the murder, prompting Williams to call the police. *Id.* at 31. The sentencing jury found four aggravating factors: (1) the killing of more than one person; (2) burglary; (3) the murder was committed in a cold, calculated and premediated manner; and, (4) the murder was especially heinous, atrocious, or cruel. *Id.* at 32. And yet, the United States Supreme Court held that trial counsel's failure to investigate and present mitigating evidence, including evidence that Porter suffered from "[a] brain abnormality, difficulty reading and writing, and limited schooling," resulted in prejudice. *Id.* at 41. The Court further held that it was unreasonable for the state court to "discount to irrelevance" certain items of mitigating evidence simply because their introduction would have opened the door to negative information, such as the fact that Porter went AWOL on more than one occasion while serving in the military. *Id.* at 43; *see also Sears*, 130 S.Ct. at 3264 (finding prejudice where trial counsel failed to present

evidence of low intellectual functioning and brain damage and stating that "the fact that along with this new mitigation evidence there was also some adverse evidence is unsurprising.").[28]

By contrast, the State's penalty-phase case against Stone was not particularly aggravated. The jury found only a single aggravating factor – the killing of a law enforcement officer – and under circumstances that did not even require jurors to find that Stone was aware of this fact. The State introduced evidence that Stone had two prior convictions, one as a youthful offender and one as an adult. Neither conviction involved any act of violence on the part of Stone. Stone's prison history likewise did not include any suggestion of violence and largely indicated that Stone was an adaptable, compliant prison inmate.

In the absence of significant aggravating evidence, the State simply argued that jurors should impose a death sentence because Stone made an affirmative "choice" to "ambush" Charlie Kubala. Evidence of Stone's impaired intellectual functioning and brain damage would have

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[28] Likewise, courts have found prejudice where trial counsel failed to present similar evidence in many other more highly aggravated cases. *See, e.g., Rompilla*, 545 U.S. at 393 (trial counsel's failure to offer evidence of organic brain damage resulted in prejudice where Rompilla repeatedly stabbed his victim and then set him on fire and where Rompilla had a significant history of prior violence); *Wiggins*, 539 U.S. at 536 (prejudice resulted from trial counsel's failure to offer extensive mitigating evidence, including Wiggins' limited intellectual capacities, where Wiggins robbed an elderly woman, ransacked her apartment and drowned her in a bathtub); *Williams*, 529 U.S. at 398 (prejudice resulted from trial counsel's failure to offer, *inter alia*, evidence that Williams had an IQ in the borderline mentally retarded range, suffered repeated head injuries, and might have mental impairments organic in nature where Williams killed a man with a mattock (i.e., a type of pickaxe) simply for his refusal to lend Williams "a couple of dollars" and subsequently committed two separate violent assaults on elderly victims, leaving one woman in "a vegetative state"); *Council*, 380 S.C. at 176, 670 S.E.2d at 365 (prejudice established where trial counsel failed to offer evidence of borderline IQ, frontal lobe brain dysfunction, mental illness, repeated school failures and childhood head injuries even though the State offered "overwhelming evidence" of guilt, the jury found six aggravating factors, and Council's crime was "violent and brutal"); *Hooks*, 689 F.3d at 1207 (prejudice established where Hooks raped his victim, shaved her head and then beat her to death in front of their one-year-old daughter); *Simmons*, 105 So. 3d at 506-07 (prejudice found where Simmons kidnapped his victim from her workplace, raped her, beat her to death, fracturing her skull, and then left her naked body in a wooded area commonly used for illegal dumping).

significantly undermined this theme. Stone did not "choose" to begin his life with a damaged brain and cognitive impairments. Further, Dr. Gur's description of Stone's brain as one likely to "misinterpret danger signals" and as operating under stressful conditions like "a car with weak brakes that are already engaged when it begins to race" would have given jurors an alternative, and much more mitigating, explanation for the events of the crime. These points would have likewise supported trial counsel's accident theory of the case, making it more plausible that Stone reacted impulsively and out of a startled state of mind.

Without evidence of Stone's brain damage and intellectual impairments, trial counsel's mitigation presentation was weak. The solicitor pointed out that it was not "unusual" to grow up poor and under difficult conditions in Florence County. The solicitor noted that he himself had grown up in that area, and many jurors were likely to be familiar with that part of the State and may have found Stone's background, as it was presented at trial, unremarkable in many respects. Thus, evidence of brain damage and impaired cognitive abilities would have not only weakened the State's case for death, but also significantly strengthened the mitigation case. Finally, unlike the circumstances in *Sears* and *Porter*, there was no significant disadvantage to presenting evidence of Stone's brain damage and low intellectual functioning.

In sum, trial counsel had nothing to lose and everything to gain by investigating and presenting the kind of mitigating evidence Stone offered at the PCR hearing. A full account of Stone's brain damage, cognitive impairments and their effects would have dramatically altered "the sentencing profile." *Strickland*, 466 U.S. at 699-700. Faced with the mitigating evidence that could have been presented at trial on Stone's behalf, "there is a reasonable probability [that] at least one juror would have struck a different balance and returned with a different sentence." *Von Dohlen*, 360 S.C. at 607, 602 S.E.2d at 743 (2004); *see also, e.g., Porter*, 558 U.S. at 42 ("Had the

judge and jury been able to place Porter's life history 'on the mitigating side of the scale,' and appropriately reduced the ballast on the aggravating side of the scale, there is clearly a reasonable probability that the advisory jury – and the sentencing judge – 'would have struck a different balance,' and it is unreasonable to conclude otherwise.") (citing *Wiggins*, 539 U.S. at 537).

5. The PCR Court erred in denying this claim.

In rejecting this claim, the PCR court relied on several erroneous legal conclusions and unsupported findings of fact. First, there is no support in the record for the PCR court's finding that Stone's low intellectual functioning was thoroughly investigated and presented to the sentencing jury at trial. App. 7360. On the contrary, Ms. TeAnne Oehler erroneously testified at trial that Stone "didn't have too much difficulty in school until about sixth grade" and 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. App. 7137-7142.

Moreover, the PCR court failed to even address the majority of Stone's evidence and unreasonably focused instead on whether Stone could conclusively prove the cause of his brain damage. At the PCR hearing, Stone offered a variety of evidence that fetal alcohol exposure, environmental neurotoxins, some combination of the two, or some other, unknown cause, could all have contributed to his brain damage. Regardless of the likely cause, however, the critical, undisputed fact is that Stone's brain is damaged. The Supreme Court of the United States has noted as much. *See, e.g., Sears*, 130 S.Ct. at 3262 ("*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*, 558 U.S. at 42 ("[T]he Constitution requires that 'the sentencer in capital cases must be permitted to consider any relevant mitigating factor.'") (internal quotation omitted).

Stone's trial counsel had a duty to investigate the possibility of brain damage in general[29] and, particularly here, where they knew, or should have known about multiple "red flags" pointing to the likelihood of brain damage.[30] Trial counsel presented no evidence of Stone's low intellectual functioning and brain damage at trial. This error was clearly prejudicial.[31]

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[29] *See, e.g.*, ABA Guidelines 10.7, commentary ("[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, including . . . **neurological damage**"; (2) "Family and social history, including . . . **cognitive impairments**"; and, (3) "Education history, including . . . 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).

[30] *See, e.g., Sears,* 130 S.Ct. at 3263 ("Sears' history is replete with multiple head trauma, substance abuse and traumatic experiences of the type expected to lead to [brain damage and cognitive] impairments."); *Hooks*, 689 F.3d at 1205 (holding trial counsel was ineffective for failing to investigate further even though defendant's history of head injury was a "clear marker[] for organic brain damage"); *Simmons*, 105 So.3d at 509, 2012 WL 4936109 at *25 (Fla. 2012) (finding deficient performance where trial counsel failed to investigate brain damage and stating "[b]ecause trial counsel were aware of the low IQ, special education, Simmons' limited oral, reading, and writing abilities, and his serious alcohol abuse, it appears they did not perform an adequate mitigation investigation into possible mental mitigation based on those circumstances").

[31] *See, e.g., Sears*, 130 S.Ct. at 3261 (2010) (holding evidence of frontal lobe damage was "significant mitigating evidence a constitutionally adequate investigation would have uncovered"); *Porter*, 558 U.S. at 41 (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*, 539 U.S. at 535); *Rompilla*, 545 U.S. at 392 (holding trial counsel was ineffective for failing to discover and present evidence of organic brain damage and significant impairments in several cognitive functions); *Tennard*, 542 U.S. at 287 (holding evidence of impaired intellectual functioning is inherently mitigating in the penalty phase of a capital case); *Wiggins*, 539 U.S. at 535 (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*, 529 U.S. at 398 (holding evidence

C. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO SUPPORT THE ACCIDENT THEORY OF THE CASE.

Trial counsel's failure to properly support their accident theory was ineffective assistance in the penalty phase, as well as in the guilt-or-innocence phase. Trial counsel presented essentially the same case in 2005 as they had in the 1997 trial that resulted in a death sentence. Their presentation did not include meaningful support for the accident theory, despite the fact that expert testimony was readily available. This failure was especially prejudicial in sentencing because, although the jury is limited in the first phase to whether the elements have been established, in the sentencing phase the jury retains much more discretion and can give life for "any reason or no reason at all." *See, e.g., State v. McClure*, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000) ("We note the evaluation of the consequences of an error in the sentencing phase of a capital case are more difficult because of the discretion that is given to the sentencing jury. A capital jury can recommend a life sentence for any reason or no reason at all."); *see also*, *Caldwell v. Mississippi*, 472 U.S. 320 341 (1985) (When a reviewing court "cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires."). The PCR court erred in denying this claim and applied the wrong prejudice inquiry by requiring Stone to conclusively prove that the result of the resentencing would have been different had additional experts testified at trial. App. 7364.

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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 premediation").

D. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO PROPERLY OBJECT TO INADMISSIBLE VICTIM IMPACT EVIDENCE.

1. Relevant legal principles.

Changing its historical position on the inadmissibility of victim impact evidence, the United States Supreme Court ruled in 1991 the Eighth Amendment "erects no *per se* bar" to relevant evidence about the victim in a capital sentencing proceeding. *Payne v. Tennessee,* 501 U.S. 808, 817 (1991). The state may present "a quick glimpse of the life [taken]" *Id.* at 822 (quoting *Mills v. Maryland*, 486 U.S. 367, 397 (1988)). Both Chief Justice Rehnquist, writing for the majority, and Justice O'Connor, concurring, stressed the protection offered by the Due Process Clause of the Fourteenth Amendment in the event that a witness's testimony is "unduly prejudicial." *Id.* at 825; *id.* at 831 (Connor, J., concurring). *Payne* involved the brutal and repeated stabbing of a mother and her two small children, one of whom survived. During sentencing, the children's grandmother, in response to a sole question by the solicitor, briefly explained that the surviving child cried for his mother and baby sister and did not understand their absence. In finding that the testimony was not unduly prejudicial, Justice O'Connor opined that "this brief statement did not inflame [the jury's] passions more than did the facts of the crime." *Id.* at 832.

South Carolina allows victim impact evidence for the purpose of demonstrating the "uniqueness" of the victim and the "specific harm committed by the defendant." *State v. Hughey,* 339 S.C. 439, 457, 529 S.E.2d 721, 730 (2000), *overruled on other grounds by Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009). South Carolina law also relies on the courts to limit the scope of the evidence, barring evidence if it is "so unduly prejudicial that it renders the trial fundamentally unfair and violates due process under the Fourteenth Amendment." *Von Dohlen,* 360 S.C. at 612, 602 S.E.2d at 745.

The Court in *Payne* specifically declined to overturn the holding in *Booth* that the Eighth Amendment bars victims' family members from characterizing or opining about the crime, the defendant, or the appropriate sentence. *Payne*, 501 U.S. at 830 n.2. This Court reasoned that this is because such testimony goes to the ultimate issue – whether the appropriate sentence is life or death, which is a question properly reserved for the jury. *State v. Wise*, 359 S.C. 14, 27, 596 S.E.2d 475, 481 (2004).

2. Kubala-Hanvey's testimony was inadmissible and unduly prejudicial.

In *Sapp v. State,* 2006-CP-08-2204 (2009), the lower court granted post-conviction relief because impermissible victim impact evidence was offered at trial, including a letter from the widow of another law enforcement officer detailing the burden on her of attending repeated parole hearings. The PCR court found that this evidence was highly prejudicial and portrayed the consequences of a non-death sentence as "an additional victimization of the murder victim's family." *Id.*

Here, the victim's widow testified to a suicide attempt she made years after the crime in the context of other unrelated difficulties. Her suicide attempt was triggered by this Court's reversal of Stone's death sentence and the state's decision to re-try the case. It was fundamentally unfair to link her decision to the crime. This Court has defined prejudicial evidence as evidence that creates a "tendency to suggest a decision on a improper basis, commonly, though not necessarily, an emotional one." *State v. Martucci*, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (2008) (discussing photographs). A suicide attempt is on its face highly emotional. It was, in essence, a form of emotional blackmail for the jury, the subtext being that a decision for life may be unbearable for Kubala-Hanvey, causing her to attempt suicide again. This constituted an arbitrary

basis for a sentencing determination. It went far beyond the facts of the crime and the "quick glimpse" allowed by *Payne*, and unquestionably inflamed the passions of the jury.

In addition, Kubala-Hanvey's testimony impermissibly portrayed the consequences of a potential life sentence as "additional victimization," an argument that is irrelevant, unduly prejudicial, and an arbitrary basis for a sentencing determination. *See Sapp*. Her testimony was also a clear and impermissible statement of her opinion on the appropriate sentence. If the sentence reversal triggered a suicide attempt, the jury could have no doubt of her opinion that the prior death sentence was appropriate. The state was not entitled to elicit this opinion from the witness. *See, e.g.*, *Wise*, 359 S.C. at 27, 596 S.E.2d at 481.

Finally, Kubala-Hanvey's testimony improperly injected appellate review into the jury's deliberations. The law recognizes a capital defendant's right to a sentencing proceeding that is free from "the influence of passion, prejudice, or any other arbitrary factor. S.C. Code Ann. § 16-3-25 (C)(1) (2003). The United States Supreme Court has held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. *Caldwell*, 472 U.S. at 328-29. Under South Carolina law, comments about the appellate review process require reversal because they "imply to the [jury] that its responsibility for determining the fate of the defendant is lessened" by suggesting that it may "pass the responsibility for a death sentence on to a higher court." *State v. Tyner*, 273 S.C. 646, 659, 258 S.E.2d 559, 566 (1979). Kubala-Hanvey's references to the court's reversal injected the issue of appellate review into the proceedings, reminding the jury that their decision is not final. The issue was brought close to home for the jury by the mention of review and reversal, not only as some remote possibility but as a recently accomplished fact in the instant case.

3. Testimony by law enforcement officers exceeded the scope of permissible victim-impact evidence and was unduly prejudicial and fundamentally unfair.

Because of the danger of prejudice, courts have carefully limited the scope of allowable victim impact evidence. For example, in *United States v. Fields,* 516 F.3d 923, 947-48 (10th Cir. 2008), the Tenth Circuit cautioned that "[i]ncluding the community in the victim-impact inquiry is fraught with complication. It would involve not just the incremental extension from family to friends (and even co-workers), but a radical change in perspective: replacing a close-in focus on persons closely or immediately connected to the victim with a wide view encompassing generalized notions of social value and loss." Similarly, the Louisiana Supreme Court has concluded:

> introduction of detailed descriptions of the good qualities of the victim or particularized narrations of the emotional, psychological and economic sufferings of the victim's survivors, which go beyond the purpose of showing the victim's individual identity and verifying the existence of survivors reasonably expected to grieve and suffer because of the murder, treads dangerously on the possibility of reversal because of the influence of arbitrary factors on the jury's sentencing decision.

State v. Bernard, 608 So.2d 966, 972 (La. 1992).

In *Sapp*, *supra*, the state's evidence included a law enforcement magazine containing, among other things, various tributes to the victim and other fallen officers, lists of officers killed in the line of duty, and a poem about the victim that "focuses on [the victim's] young son's loss of a father." *Sapp order at 43-45.* Viewing the evidence in the context of the "substantial" victim impact evidence already admitted, the court found the evidence "excessive." *Id. at 45.* The court described the poem, which detailed the process of telling the son that his father had been killed, as "playing more towards sympathy than showing the true man." *Id. at 46.* The court, noting the Tenth Circuit's concerns about allowing a "wide view," also pointed out that the Supreme Court

has not broadened the scope of *Payne* to include co-workers and the community. *Id. (*citing *Fields,* 516 F.3d at 947). The court found the evidence impermissible because "it was focused not on the impact on the victim's family but rather the impact on the community as a whole." *Id. at 46.* The "invocation of the community's loss" is impermissible. *Id. at 47.*

Here, as part of the State's case for death, Sumter County Sheriff's Department Major Gary Metts not only testified to the impact on himself personally as Kubala's friend and co-worker, but went well beyond, to include the effect of Kubala's death on the department and the community at large. He described a golf tournament that was established in Kubala's honor, explaining its size, purpose, and importance to the community. Further, he detailed the "collapse," after Kubala's death, of the Explorer Group, a Sheriff's Department program targeting children, for which Kubala volunteered.

Sumter Sheriff's Captain Gene Edward Hobbs likewise testified to his close relationship with Kubala and his wife. He described going to Kubala's house to tell Kubala-Hanvey about the shooting. He then described how, since Kubala's death, the Sheriff's Department takes all new recruits to visit the scene of the crime, and then to the victim's grave site, telling the story of Kubala's death to each new recruit. This evidence was impermissible. Sheriff's Department trainees are not proper victims in the case. They did not know Kubala and were not directly affected by his death. And yet, the image implanted in jurors' minds from this testimony would have been emotionally powerful. The jury was left to imagine a group of fresh new deputies, hearing the story of Kubala's death from one who had loved him and worked with him, followed by an impassioned speech about the dangers they will face and the need to search their hearts about their desire to become law enforcement officers. This is far more than the "quick glimpse" into the character of the victim and the direct impact of his death anticipated by the *Payne* Court.

Because the evidence was unduly prejudicial and fundamentally unfair, trial counsel should have objected.

4. Trial counsel's failure to properly object and preserve all available arguments regarding the victim impact evidence was deficient and prejudicial.

Performance is deficient when it falls below prevailing professional norms and is not the result of reasonable professional judgment. *Strickland*, 466 U.S. at 688, 690. Based on the fact that trial counsel objected, it is clear that they intended to keep out the widow's testimony about her suicide attempt. They objected on one possible basis but failed, however, to object on any of three additional, distinct, available legal bases. At the PCR hearing, trial counsel testified that they had no strategic reason for failing to do so. App. 4488-89. Given the highly prejudicial nature of the evidence, this was a significant failure and constitutes deficient performance. In addition, trial counsel's failure to object to the irrelevant and inflammatory evidence regarding the Sheriff's Department orientation for new recruits was also deficient performance. *See Sapp,* 2006-CP-08-2204 at 47 (finding that evidence of 43 other state trooper deaths was impermissible because it "placed the burden of all South Carolina trooper deaths on applicant").

Trial counsel's failure to properly preserve these issues for appellate review resulted in prejudice because, had the issues been preserved, there is a reasonable probability that this Court would have found at least one of the claims meritorious and reversed his sentence. *See, e.g., Sapp,* 2006-CP-08-2204 (finding counsel ineffective for failing to object to the admission of victim impact evidence that was both beyond the scope and prejudicial); *Fields,* 516 F.3d at 947 (finding general community impact evidence to be outside the scope of proper victim impact evidence).

5. The PCR Court erred in denying this claim.

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 (1987); (b) improperly went to the ultimate issue, which must be reserved for the jury; *see Wise*, 359 S.C. at 27, 596 S.E.2d at 481; (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*, 2006-CP-08-2204; (e) injected issues of appellate review into the jury's deliberations; *see, e.g., Caldwell*, 472 U.S. at 328-29; *Tyner*, 273 S.C. at 659; and, (f) was so unduly prejudicial that it rendered the trial fundamentally unfair in violation of due process under the Fourteenth Amendment. The PCR court refused to address these arguments and, instead, simply concluded that the testimony was proper 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.

Further, the PCR court erroneously relied on trial counsel's claim that he considered objecting to victim impact testimony presented by Captain Hobbs, but ultimately decided against it because "Judge King was being very liberal. . . . I mean I felt if he allowed in what Ms. Kubala said about her reaction to the appeal that he was probably going to allow this in." App. 7356. Trial counsel's asserted "strategic thinking" here is a classic example of impermissible "*post hoc* rationalization." *Wiggins*, 539 U.S. at 526-27. Captain Hobbs served as the State's tenth witness

and testified at the sentencing proceeding on the morning of February 23, 2005. App. 3081. Kubala-Hanvey did not testify until the following day, when she served as the State's twenty-second, and nearly final, witness. App. 3333.

Trial counsel's claim that he did not want to be perceived by the jury as "jumping up and objecting to everything" is likewise not credible. Trial counsel could have easily filed a motion *in limine*, as he did for other issues, to address objectionable material outside of the jury's presence. *See* 2005 ROA p.31; *see also*, *Dawkins v. State*, 346 S.C. 151, 157, 551 S.E.2d 260, 263 (2001) (holding "the PCR court erred by finding counsel had valid strategy reasons for not objecting. . . . Counsel's failure to object because he did not want to confuse or upset the jury does not constitute sound trial strategy. To eliminate the possibility of confusing or upsetting the jury, counsel could have sought a determination . . . out of the hearing of the jury as he had previously done."); *Gallman v. State*, 307 S.C. 273, 276, 414 S.E.2d 780, 782 (1992) (holding counsel's claim that "objections would give the jury the idea that something was being hidden" was not a valid strategic decision).

III. APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE DURING THE APPELLATE PROCEEDINGS.

On direct appeal, Stone's appellate counsel attempted to raise the issue of prejudice from Kubala-Hanvey's testimony, but failed to do so on the basis on which trial counsel objected. *Stone*, 376 S.C. at 36, 655 S.E.2d at 489 ("[Appellate counsel's arguments] are wholly independent of the relevance argument presented below.") As a result, the claim was deemed waived. Thus, trial counsel's failure to properly articulate the objection, combined with appellate counsel's misstep, rendered this Court unable to correct the error, despite its magnitude. At the post-conviction hearing, appellate counsel acknowledged that he had no strategic reason for abandoning the claim, App. 4257, and opined that it was "some of the worst possible testimony that I could imagine, that

I certainly encountered in the time that I was at Appellate Defense." App. 4260-61. Had trial and/or appellate counsel properly preserved this issue, there is a reasonable likelihood that this Court would have found reversible error. *See Southerland v. State*, 337 S.C. 610, 615-16, 524 S.E.2d 833, 836 (1999) (finding both deficient performance and prejudice when appellate counsel abandoned a meritorious jury instruction claim); *Patrick v. State,* 349 S.C. 203, 562 S.E.2d 609 (2002) (non-capital) (finding appellate counsel ineffective for failing to adequately assert a claim of prosecutorial retaliation); *Simpkins v. State*, 303 S.C. 364, 401 S.E.2d 142 (1991) (non-capital) (finding appellate counsel ineffective for abandoning an insufficiency claim). To the extent that this Court's refusal to address this claim previously is attributable to appellate counsel's abandonment of the issue, appellate counsel's performance was deficient and prejudicial. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Southerland*, 337 S.C. at 615, 524 S.E.2d at 836.

IV. STONE WAS PREJUDICED AS A RESULT OF THE CUMULATIVE EFFECT OF TRIAL COUNSEL'S MULTIPLE DEFICIENT ACTS AND OMISSIONS.

Both the United States Supreme Court and this Court have unequivocally held that it is the *cumulative* impact of constitutional error which must be considered when determining whether a prisoner has established prejudice, not merely whether each individual error, viewed in isolation, is sufficient to warrant relief. *See, e.g., Sears*, 130 S. Ct. at 3266 (a court applying the *Strickland* standard must "consider the totality of the available mitigating evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding – and reweig[h] it against the evidence in aggravation." (citing *Porter*, 558 U.S. at 41 (emphasis added)); *Williams*, 529 U.S. at 397 (in assessing prejudice flowing from deficient performance, reviewing court must consider "the totality of the mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceedings. . ."); *Strickland*, 466 U.S. at 695 ("In making this [prejudice] determination, a court hearing an ineffectiveness claim must consider the *totality* of the evidence before the judge

or jury") (emphasis added); *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (citations omitted) ("cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial"), *abrogated on other ground by In re Robert R.*, 340 S.C. 242, 531 S.E.2d 301 (2001).[32] That is, when determining whether its confidence in the outcome of Stone's trial and re-sentencing is undermined, this Court must consider the simultaneous, cumulative impact of trial counsel's failure to adequately challenge the prosecution's case for death, as well as counsel's failure to affirmatively make their own case for life.

Stone was entitled under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, as well as the corresponding sections of the South Carolina Constitution, to a fair trial, sentencing, and direct appeal, and the effective assistance of counsel at all three stages. Instead, at trial, his attorneys failed to support the sole available defense theory and failed to object

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[32]*See also, e.g.*, *Gersten v. Senkowski*, 426 F.3d 588, 611 (2d Cir. 2005) ("In evaluating prejudice, we look to the cumulative effect of all of counsel's unprofessional errors."); *Lindstadt v. Keane*, 239 F.3d 191 (2nd Cir. 2001) (habeas relief granted in non-capital case where petitioner was prejudiced by the "cumulative effect of four errors" committed by trial counsel); *Combs v. Coyle*, 205 F.3d 269 (6th Cir. 2000) (noting, in the course of granting relief, cumulative prejudice resulting from counsel's numerous errors at petitioner's capital trial); *Washington v. Smith*, 219 F.3d 620 (7th Cir. 2000) (affirming grant of habeas relief where cumulative prejudice resulting from trial counsel's deficient performance denied petitioner a fair trial); *Harris ex rel. Ramseyer v. Wood*, 64 F.3d 1432 (9th Cir. 1995) (habeas corpus relief granted in capital case due to cumulative impact of trial counsel's errors); *Jackson v. Conway*, 765 F. Supp. 2d 192, 266 (W.D.N.Y. 2011) ("When assessing the amount of prejudice that accrued to the petitioner, courts 'look to the cumulative effect of all of counsel's unprofessional errors."). *Cf. Cargle v. Mullin*, 317 F.3d 1196, 1212 (10th Cir. 2003) ("We conclude that prejudice may be cumulated amoung different kinds of constitutional error, such as ineffective assistance of counsel and prosecutorial misconduct. We further conclude that prejudice may be cumulated amoung such claims when those claims have been rejected individually for failure to satisfy a prejudice component incorporated in the substantive standard governing their constitutional assessment.").

to an unfounded closing argument by the solicitor. At sentencing, trial counsel failed to investigate and present compelling evidence of intellectual dysfunction and brain damage, failed to properly object to impermissible victim impact evidence, and again failed to support the accident theory of the case. On direct appeal, Stone's attorney abandoned a strong, meritorious claim. If, instead: (a) the jury had been able to place Stone's brain damage and low intellectual functioning on the mitigating side of the scale; (b) trial counsel had appropriately supported the accident theory of the case; and, (c) trial counsel had appropriately reduced the ballast on the aggravating side of the scale and objected to inadmissible and prejudicial victim impact evidence, there is clearly a reasonable probability that the outcome of Stone's trial could have been different.

CONCLUSION

For all of the reasons discussed above, Stone is entitled to post-conviction relief. This Court should reverse the lower court's decision, and grant Stone a new trial.

Respectfully submitted,

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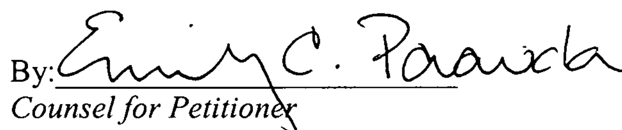
By: 
Counsel for Petitioner

September 22, 2015

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 Brief of Petitioner was served by first class United States mail, postage prepaid, this 22nd day of September, 2015, upon the following:

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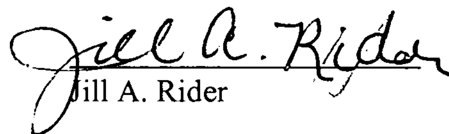

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