ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Appeal from Sumter County
Michael G. Nettles, Circuit Court Judge
Appellate Case No. 2013-001968

BOBBY WAYNE STONE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

BRIEF OF RESPONDENT

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II. The PCR Court did not abuse its discretion in denying relief upon Petitioner's claims of ineffective assistance of counsel during the re-sentencing proceeding. The denial of relief upon these claims was supported by the record. 28

Petitioner asserts that trial counsel was ineffective in his sentencing proceeding in three ways. First, he contends trial counsel was ineffective in not investigating and presenting evidence of Petitioner's low intellectual functioning. Second, he argues trial counsel was ineffective in not investigating and presenting evidence to support an accident theory to the jury. Third, he asserts trial counsel was ineffective in their handling of victim impact testimony presented during the sentencing proceeding. The PCR Court denied relief upon all three claims. The denial of relief upon those claims is supported by the record. 28

A. The PCR Court properly found counsel was not ineffective during the sentencing trial in not investigating and presenting evidence of Petitioner's low intellectual functioning. The PCR Court's denial of relief is supported by the record. 29

B. The PCR Court did not abuse its discretion in denying Petitioner's claim that trial counsel was ineffective during Petitioner's re-sentencing for not supporting the alleged accident theory of Petitioner's case. 38

C. The PCR Court correctly denied relief upon the claim that trial counsel was ineffective during the sentencing trial for not objecting to victim impact evidence. The denial of relief is supported by the record. 40

III. The PCR Court correctly denied relief upon Petitioner's claim of ineffective assistance of appellate counsel. Petitioner was not prejudiced by appellate counsel's decision to not argue the admission of Ms. Kubala's testimony regarding a [suicide attempt] was irrelevant because the testimony was relevant and properly admitted. Further, any error in admitting the testimony was harmless. 54

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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,

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?

STATEMENT OF THE CASE

Petitioner, Bobby Wayne Stone ("Petitioner"), is confined in the Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC) as the result of his Sumter County conviction and death sentence for the murder of Sumter County Sheriff Deputy Charlie Kubala.

During the August 1996 term, the Sumter County Grand Jury indicted Petitioner for murder, first degree burglary, and possession of a weapon during a violent crime (96-GS-43-0698). (App. 2098-99). The state gave notice of intent to seek the death penalty, and served its Notice of Evidence in Aggravation. (App. 2097). The trial judge in the original case was the Honorable R. Markely Dennis, Jr. (App. 1-270, Supp. App. 1-1006). Petitioner was represented at the first trial by Cameron B. Littlejohn, Jr., and James H. Babb; Solicitor Wade S. Kolb prosecuted the original case for the state. Id.

On August 20, 1996, Judge Dennis granted the defense motion to draw a jury from another county due to pretrial publicity. Jury selection took place in Georgetown County on January 20 -22, 1997. (App. 272-1121). Trial began before Judge Dennis and a jury on January 23, 1997, and on January 26, 1997, Petitioner's jury convicted him of all charges. (Supp. App. 922-23).

Petitioner exercised his right to the 24-hour cooling-off period provided by S.C. Code Ann. § 16-3-20(B). The sentencing phase of his trial began on January 27, 1997. (Supp. App. 925). Judge Dennis submitted the following aggravating factors to the jury:

> (1) Murder was committed while in the commission of burglary in any degree.
>
> (2) Murder of a local law enforcement officer during or because of the performance of his official duties.

(App. 249-50, 2101).

The following mitigating factors were submitted to the jury:

> (1) The Defendant has no significant history of prior criminal convictions involving the use of violence against another person.
>
> (2) The murder was committed while the Defendant was under the influence of mental or emotional disturbance.

(App. 253-54, 2102).

On January 28, 1997, Petitioner's jury found the existence of both aggravating factors and recommended a sentence of death. (App. 265-66). Judge Dennis sentenced Petitioner to death for murder, to a consecutive thirty (30) years for first degree burglary, and to five (5) years consecutive to both of the other counts for possession of a weapon. (App. 269-70).

A timely Notice of Appeal was filed and served on January 31, 1997. Following briefing and oral argument, this Court affirmed the guilt phase result but reversed the sentencing phase and remanded for resentencing. State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002).

The Honorable Howard P. King handled the resentencing proceeding. (App. 2256-3911). Petitioner was again represented by Mr. Babb and Mr. Littlejohn; the case was prosecuted by Solicitor Kelly Jackson and Assistant Solicitor Dudley Saleeby. Id.

Jury selection began in the resentencing proceeding on February 22, 2005. (App. 2256). At the conclusion of the presentation of evidence at the sentencing hearing, Judge King submitted the following aggravating factors to the jury:

> (1) Murder was committed while in the commission of burglary in any degree.

(2) Murder of a local law enforcement officer during or because of the performance of his official duties.

(App. 3606-10, 3914). The following mitigating factors were submitted to the jury:

(1) The murder was committed while the defendant was under the influence of a mental or emotional disturbance.

(2) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

(3) The mentality of the defendant at the time of the crime.

(4) Any non-statutory mitigating circumstance.

(App. 3617-18, 3914).

On February 27, 2005, the jury found the existence of the aggravator relating to the murder of a law enforcement officer and recommended a sentence of death. (App. 3630). The judge so sentenced Petitioner. (App. 3636-37).

A timely notice of appeal was filed and served. Chief Appellate Defender Joseph L. Savitz, III, of the South Carolina Office of Appellate Defense, represented Petitioner on appeal from the resentencing. On September 6, 2007, Savitz filed a Final Brief of Appellant, in which he raised the following issue:

The trial judge committed reversible error by permitting the victim's widow to testify that she had attempted suicide when she learned - from a message left on her answering machine - that the Supreme Court had reversed Stone's death sentence and "they were going to retry this case over again," as this testimony introduced an arbitrary factor into Stone's resentencing, in violation of S.C. Code Section 16-3-25-(C)(1).

(App. 3920-36). The State, represented by Assistant Attorney General S. Creighton Waters, filed a Final Brief of Respondent. (App. 3937-68).

Following oral argument, this Court issued an opinion on December 20, 2007 affirming the death sentence. State v. Stone, 376 S.C. 32, 655 S.E.2d 487 (2007). (App.

3969-71). Petitioner subsequently filed a Petition for Rehearing on January 4, 2008. (App. 3972-75). The Petition was denied on January 23, 2008. (App. 3976-77).

Petitioner then filed on January 23, 2008 a Petition for Stay of Execution to pursue a post-conviction relief action. The State responded by letter indicating it did not object to the stay. On February 21, 2008, this Court issued an Order staying the execution to litigate the post-conviction relief action. Jim Brown and Robert E. Lominack were initially appointed to represent Petitioner. During the action and at the evidentiary hearing, Petitioner was represented by John H. Blume and Robert E. Lominack. On April 9, 2008, Petitioner filed an Application for Post-Conviction Relief. (App. 3978-83). The State served its Return, Motion to Dismiss, and Motion for Summary Judgment on May 12, 2008.

Petitioner served an Amended Application dated May 4, 2009. (App. 3984-93). The State served its Amended Return, Motion to Dismiss and Motion for Summary Judgment on June 3, 2009. Petitioner served his Second Amended Application for Post-Conviction Relief on June 26, 2009. (App. 3994-4003). Petitioner served his Third Amended Application for Post-Conviction Relief on March 22, 2012. (App. 4004-10). In that Application, Petitioner raised the following issues:

> 10(a): Applicant was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution during the guilt or innocence phase of his capital trial.
>
> 11(a): Supporting Facts: For the reasons set forth below, trial counsel's performance during the guilt or innocence phase was both unreasonable and prejudicial. See Strickland v. Washington, 466 U.S. 668 (1984).
>
> > 1) Counsel failed to object to the prosecutor's improper and prejudicial closing argument, in which the prosecutor repeatedly asserted that Applicant did not dispose of his gun prior to arrest so

that he could kill more police officers. (Trial Tr. Vol. 4, 844-47, January 27, 1998). Counsel thus failed to preserve for appeal whether the improper arguments violated the Sixth, Eighth, and Fourteenth Amendments and the corresponding provisions of the South Carolina Constitution and South Carolina law.

2) Counsels' failure to secure the assistance of appropriate crime scene and other experts prevented the defense team from adequately corroborating applicant's statement regarding the nature of the homicide and from rebutting the prosecution's theory that applicant "ambushed" and "executed" the victim.

3) Counsel failed to object to the prosecution's racially discriminatory use of its peremptory challenges. See Batson v. Kentucky, 476 U.S. 79 (1986).

4) Counsel failed to object to the presence of numerous law enforcement officers present in the courtroom throughout applicant's trial.

5) Counsel failed to object to the use of shackles on applicant These shackles were visible when applicant was in the courtroom as well as when he was being transported from the jail to the courtroom. See Deck v. Missouri, 544 U.S. 622 (2005).

10(b): Applicant was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution during the sentencing phase of his capital trial.

11(b): Supporting facts: For the reasons set forth below, trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. See Strickland v. Washington, 466 U.S. 668 (1984).

1) Counsel failed to properly object to the victim's widow's testimony and thus preserve for appeal all available grounds on which such testimony violated the Sixth, Eighth, and Fourteenth Amendments and the corresponding provisions of the South Carolina Constitution and South Carolina law. During the resentencing proceeding, the victim's widow testified that she attempted to commit suicide upon learning that the South Carolina Supreme Court had reversed Applicant's original death sentence. (R. at 1090-92). See State v. Stone, 655 S.E.2d 487, 488-89 (S.C. 2007).

2) Counsel failed to object to extensive victim impact testimony regarding the effect of the victim's death on law enforcement in Sumter County generally and on various law officers in particular. (R. at 835-41, 1095-1104.) This evidence included testimony alleging, inter alia, that the sheriffs office brings all of its law enforcement trainees to the victim's gravesite during their orientation. (R. at 840-41.) Such testimony was outside the scope of proper victim impact evidence, and counsel's failure to lodge an appropriate objection was unreasonable and prejudicial.

3) Counsel failed to present evidence during the resentencing proceedings of applicant's prior cooperation with law enforcement, including that applicant had previously provided information to law enforcement regarding certain other criminal activities.

4) Counsel failed to conduct a reasonable investigation into potentially mitigating evidence regarding applicant's impoverished childhood and the family dysfunction resulting from the essentially polygamous household in which he was raised, applicant's very low intellectual functioning, and neurological damage from exposure to dangerous neurotoxins and other chemicals as well as the maternal ingestion of alcohol during the developmental period. Counsel failed to gather relevant social history, educational and medical records which would have corroborated the mitigating evidence that was presented at applicant's trial. Counsel also failed to investigate, develop and present evidence of applicant's good character.

5) Counsel failed to object to the presence of numerous law enforcement officers in the courtroom throughout the resentencing trial.

6) Counsel failed to conduct an adequate voir dire, thus allowing the erroneous and prejudicial qualification of potential jurors who were predisposed to sentence the applicant to death or were otherwise legally unqualified to serve. Counsel also failed to ask adequate questions to determine whether many jurors were (or were not) qualified to serve on a capital jury.

7) Counsel failed to secure the assistance of appropriate crime scene and other experts. The failure to secure this necessary expert assistance prevented the defense team from adequately corroborating applicant's statement regarding the nature of the homicide and from rebutting the prosecution's theory that applicant "ambushed" and "executed" the victim.

10(c): Applicant was denied the right to effective assistance of appellate counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 4 of the South Carolina Constitution during the appellate proceedings.

11(c): Supporting Facts: For the reasons set forth below, appellate counsel's performance during the sentencing phase was both unreasonable and prejudicial. See Strickland v. Washington, 466 U.S. 668 (1984).

> 1) During the resentencing proceeding, the victim's widow testified that she attempted to commit suicide upon learning that the South Carolina Supreme Court had reversed Applicant's original death sentence. (R. at 1090-92). Counsel objected, and the trial court overruled the objection. (R at 1105-06). Appellate counsel failed to properly raise this claim on direct appeal. Rather than argue the issue consistent with the objection at trial, appellate counsel based the appellate claim on a different legal argument. The South Carolina Supreme Court held that the claim as formulated by appellate counsel was not preserved for review. See State v. Stone, 655 S.E.2d 487, 488 89 (S.C. 2007).

10(d): Applicant's conviction and sentence were obtained in violation of the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution.

11(d): Supporting Facts: Several errors at trial violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Those errors include, but are not necessarily limited to, the following:

> 1) The trial court erred by refusing to approve funding for a jury selection expert in violation of Applicant's right to expert assistance. See Ake v. Oklahoma, 470 U.S. 68 (1985).
>
> 2) The presence of numerous armed officers in the courtroom during both phases of the trial violated the applicant's right to a fair trial.

10(e): Applicant's conviction and death sentence were obtained in violation of the Fifth and Sixth Amendments to the United States Constitution and South Carolina law.

11(e): Supporting Facts: The state forced applicant to wear shackles when being transported to the courtroom and also once inside the courtroom. See Deck v. Missouri, 544 U.S. 622 (2005).

(App. 4005-08). The State served its Return, Motion to Dismiss and Motion for More Definite Statement to Third Amended Application for Post-Conviction Relief on April 18, 2012. (App. 4011-74).

The evidentiary hearing was held on April 23-24, 2012 and on August 10, 2012. (App. 4075-4505). Petitioner was present and was represented by Mr. Blume and Mr. Lominack.[1] The State was represented by Senior Assistant Deputy Attorney General Donald J. Zelenka and Assistant Attorney General Alphonso Simon. After the hearing, both parties submitted post-trial briefs. (App. 7112-258).

On May 2, 2013, the PCR Court filed its Order dismissing the Application for Post-Conviction Relief. (App. 7259-90). Petitioner filed a Motion to Alter or Amend Judgment on May 10, 2013. (App. 7291-301). The State also filed a Motion to Alter or Amend Judgment on May 17, 2013. (App. 7302-05). A hearing on the motions was convened by the PCR Court on August 2, 2013. (App. 7306-38). Petitioner was present and was presented by Mr. Blume and Ms. Paavola. Id. The State was represented by Mr. Zelenka and Mr. Simon. Id. On August 14, 2013, the PCR Court filed its Amended Order, again denying the application for post-conviction relief. (App. 7339-70).

Petitioner subsequently filed a Notice of Appeal on September 17, 2013. (App. 7371-72). Petitioner filed his Petition for Writ of Certiorari. Respondent filed its Return to the Petition for Writ of Certiorari. Petitioner then filed a Reply to Petition for Writ of Certiorari. By Order filed July 23, 2015, this Court granted the Petition for Writ of

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[1] At the conclusion of the hearing on August 10, 2012, Emily Paavola, was appointed to represent Petitioner in place of Mr. Lominack during the remainder of the post-conviction relief proceedings. (App. 4501-02, 7110-11).

Certiorari for all questions except for those contained in Questions IB and IV of the Petition.

RESPONDENT'S STATEMENT OF FACTS

It is undisputed that Petitioner shot and killed Sumter County Sheriff's Deputy Charlie Kubala.

On the evening of February 26, 1996, Ruth Griffith was visited at her Sumter home by her daughter Mary Ruth McLeod. They heard knocking at the back door, and Ruth pulled the curtain back on the door and saw Petitioner. (Supp. App. 229-32, 259-60; App. 2941-42).

Ruth told her daughter that Petitioner was outside and she did not want him in her home. McLeod went outside and accosted Petitioner, telling him to go home. Petitioner initially headed towards a little shed in Griffith's backyard. After McLeod told Petitioner that was not the way home, he headed back through the woods. As Petitioner walked away, McLeod saw that he had something under the back of his jacket. She walked to the edge of the woods to make sure he was going home, and she saw Petitioner standing there, holding a shotgun across his arms, and staring back at the house. McLeod again told Petitioner he better go home, and said she was going to call the police. Petitioner's eyes were glazed; he walked a little bit off balance; and he was holding what appeared to be a beer can. (Supp. App. 232, 264-65, 279; App. 2942-46, 2969-71).

McLeod went back inside and called 911, and Sergeant Charlie Kubala responded to Ruth's house. Kubala reported arriving at the scene at 6:06 p.m. McLeod told Kubala what happened, and they walked to the edge of the woods where Petitioner had gone. Petitioner was nowhere to be seen. Sgt. Kubala told the women to call him if they had any more trouble. (Supp. App. 232-33; App. 2946-48).

Shortly after McLeod left, Ruth heard gunshots in her backyard. At 6:47 p.m., she called her neighbor Landrow Taylor, who also had heard shooting and promptly responded. Taylor called 911 close to 7:00 p.m. (Supp. App. 232-34, 281-82; App. 2948-49).[2]

Ruth and Taylor then heard someone jiggle the door handle to Ruth's car, which was parked right outside her bedroom window. They called 911 again at 7:02 p.m. As the two cowered in the living room, they heard someone banging on the rarely-used side door, which led from the washroom onto a small screened-in porch used to store wood. The light on the porch was off, and it was dark. Taylor hollered, "What are you trying to do back there?" There was a moment of silence but the beating started back. (Supp. App. 234-38, 255-56, 267-73, 283-84).

Meanwhile, Sergeant Kubala reported arriving back at the scene. Taylor went out onto the front porch and motioned to the deputy, who walked around the corner of the house. Taylor went back inside the house. The dispatcher radioed Kubala about another call, but Kubala replied that he was busy. (Supp. App. 284-86; App. 3063-65, 3085-86).

Suddenly, Taylor and Ruth heard someone shout, "Halt!," or "Hold it!," followed immediately by three or four gunshots. As Taylor ran back out onto the front porch, Deputy John Prince came pulling up in his cruiser. Taylor saw a flashlight and walkie-talkie lying on the ground, and yelled at Prince that Kubala was around the side of the house. Meanwhile, Ruth called 911 to report the officer down. (Supp. App. 240-42, 285-87; App. 3065).

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[2] Ms. Griffith was in poor health and Mr. Taylor was deceased, so their testimony from the first trial was read into the record at the resentencing proceeding.

Deputy Prince shined a flashlight, saw Kubala, and ran to his side. Kubala was laying face up and bleeding profusely from his mouth and neck. His gun lay near the fingertips of his right hand, and off the fingertips of his right hand was his walkie talkie, from which the radio transmissions were clearly audible. His flashlight lay between his body and his right arm. Deputy Prince rolled Kubala over to clear an airway, but another gunshot rang out and Prince sought cover by the corner of the house. (Supp. App. 287-90, 299-301; App. 3066-67, 3069-71).

Other officers and EMS arrived shortly thereafter. Because Prince had heard another shot, the police cleared a nearby shed and the surrounding area. EMS found the victim not breathing and without a pulse. Although he was wearing his protective vest, Sergeant Charles Kubala of the Sumter County Sheriff's Department died at the scene from one gunshot that entered his right ear, and another that entered his neck. (App. 3068, 3087-88, 3183-92).

February 26-27, 1996: Petitioner is caught and gives a statement

Officers then began to set up a perimeter to snare the assailant. SLED bloodhound and SWAT teams were called, and off-duty officers from various jurisdictions volunteered to assist. A SLED helicopter equipped with forward-looking infrared radar and an extremely powerful spotlight called "midnight sun" began searching the woods nearby Ruth's house. After searching for a while, the SLED helicopter located a subject lying prone underneath two fallen trees. The helicopter used the midnight sun to light up the spot. (App. 3107-16, 3126, 3146-47).

Police ground teams directed by the helicopter moved in on the suspect. Eventually, they neared the suspect, who lay perfectly still on his back. The officers repeatedly ordered the suspect to raise his hands, but he would not comply. Finally, one

of the agents put his foot on the suspect's chest while the other officers attempted to take control of the suspect's hands. Near the suspect's left hip was found a .22 pistol. The suspect, Petitioner, resisted being handcuffed, and officers had to carry him out of the dense woods. (App. 3116-21).

Petitioner was taken to the law enforcement center where he gave a statement. In his statement, Petitioner said that he woke up the morning of February 26 and smoked some marijuana. He went to the store and bought some beer, and met a man named David. David offered to sell Petitioner three guns, and they agreed to meet on a nearby dirt road.

According to Petitioner, David arrived at the meeting place with a .22 pistol and a .410 shotgun. The two men walked around in the woods, drinking beer and target shooting. They agreed on a price of $100 for both guns. As they walked around, Petitioner decided to stop by and say hi to Ruth, whom he described as an old drinking buddy. David stayed in the woods with the guns.

Petitioner claimed that as soon as he entered Ruth's backyard, a woman he did not know came out of the house "raising cane" at him and telling him to get off the property. Petitioner returned to the woods, and found and paid David, who left. Petitioner then walked around the woods shooting the guns and finishing off the beer. Around dark he decided to return to Ruth's.

Petitioner walked up the steps to the little screen porch, set down the shotgun, but kept the .22 in his right hand. He admitted he started beating on the inside door, which broke because he hit it too hard. Petitioner then heard a man's voice yelling outside the house, and as he turned, the gun went off. Petitioner ran into the woods. In his

statement, Petitioner claimed the gun only went off once, and he never saw the deputy or his patrol car.

Petitioner denied ever firing the gun again after he ran off the porch. He also claimed he did not know what was going on even though he hid in the woods for hours surrounded by police officers with a helicopter overhead. (App. 3160-69).

Forensic evidence

Police processed the scene and collected various items of evidence confirming that Petitioner murdered Sgt. Kubala. The pistol recovered from under Petitioner at the time of his arrest was an extremely accurate target pistol which fired powerful .22 "long rifle" ammunition. The weapon was found with five rounds in its clip and a shell casing lodged in the ejection port. SLED conclusively matched this gun to two bullet fragments and one bullet taken from Sgt. Kubala's body. The .22 pistol also matched to three spent .22 cartridge cases found on the side porch as well as other casings found in the nearby woods. Kubala's 9mm service pistol, on the other hand, was found fully loaded and had not been fired. (App. 3091, 3202, 3229-32, 3279, 3285-97).

Leaning up against the wall of the side porch was a single-shot .410 shotgun, with a live shell inside and its hammer cocked back in the firing position. This shotgun was conclusively matched to a spent .410 shell casing found in the woods near Ruth's house. (App. 3202, 3212, 3280-82).

The screen door to that side porch had three holes which appeared to be from bullets. The screen around these holes not only tested positive for lead but also was microscopically consistent with holes made from bullets SLED test fired through the screen door with Petitioner's .22 pistol. Ruth had nailed a board to cover a broken window pane on the door inside the screen porch that leads into the main house itself.

After the incident, this board was knocked out and was hanging loosely from only one nail. (App. 2954-60, 3109-12, 3209-18, 3259, 3264-70).

A knife was found in Petitioner's coat pocket. Tests taken shortly after arrest indicated gunshot residue on the palm and back of Petitioner's right hand, as well as the presence of lead on Petitioner's left palm and sleeve. The victim had lead on his right palm; however, this only likely indicated handling of a weapon. The victim's shirt did not have any gunshot residue, which indicated Kubala was not hit by a close range shot. (App. 3249-52).

Character and victim impact evidence

Petitioner's extensive prior record was admitted. In 1985, Petitioner was convicted on seven indictments for breaking into a motor vehicle, larceny, housebreaking, grand larceny, housebreaking, grand larceny, breaking into a motor vehicle, petty larceny, breaking into a motor vehicle, grand larceny, breaking into a motor vehicle, grand larceny, and grand larceny. For all of these crimes he received a youthful offender sentence not to exceed six years, and Petitioner was paroled in 1985. (App. 2908-19).

In 1987, Petitioner pled guilty to two counts of second-degree burglary and two counts of grand larceny on one indictment, and second-degree burglary and grand larceny on another indictment. For those crimes, Petitioner received a total active sentence of twenty years plus five years probation. (App. 2908-19).

Petitioner was paroled in June 1993 after serving approximately five years. He faced substantial time if his parole was revoked. A witness noted that Petitioner's conditions of parole and probation precluded him from possessing firearms, using

controlled substances, drinking alcohol to excess, or otherwise violating the law. Petitioner violated all of those conditions on February 26, 1996. (App. 2919-23).

The State presented Sgt. Kubala's family members, fellow officers, and friends who universally testified that he was a young, bright, and energetic officer who devoted much time to his community, including the Explorers, the YMCA, and the Special Olympics. Kubala's mother, father, and widow described the trauma of losing Sgt. Kubala, particularly on his widow and children. Particularly moving was testimony from Captain Hobbs and Major Metts, who were close friends with Sgt. Kubala on the force and particularly affected by the loss of their comrade in the line of duty. Captain Hobbs noted that all new recruits are taken to the crime scene and Sgt. Kubala's grave to impress upon them the seriousness of the job. (App. 2900-07, 3093-100, 3309-67).

The defense's sentencing phase case

Petitioner first called social worker TeAnne Oehler, who described Petitioner's upbringing – in particular the poverty and his mother's affair with the allegedly abusive and drunk Wesley Miles. Oehler theorized this upbringing led to his poor performance and frequent troubles with the law, which began with an arrest for stealing a car. She concluded that these factors about Petitioner's upbringing affected his judgment and decision making. (App. 3391-414). On cross, Oehler admitted she believed Petitioner had anti-social personality disorder and a problem with authority figures, and admitted Petitioner's extensive history of burglary and theft. (App. 3426-30).

Petitioner's paternal aunt Bernice his sister Melinda, and his niece Linda testified about Petitioner's parents, his upbringing, and his family, and their relationship with Petitioner. (App. 3431-35, 3446-51, 3457-670.

Ruth Griffith's sister-in-law Mary Wilson testified at the first trial, and her testimony was read into the record. She stated her daughter Michelle was living with Griffith at some point in the 90s and Petitioner would visit her there. She also stated Petitioner did some work for Griffith, and some times all of them would go out to a honky tonk. Supposedly, Griffith admitted drinking beer and smoking marijuana with Petitioner. (Supp. App. 626-34). On cross, Wilson admitted it was prior to 1987 that this occurred. (Supp. App. 638). Wilson's testimony from the first trial's sentencing phase was also read into the record, during which she described Wesley Miles's drinking problem. (Supp. App. 639-41).

Psychopharmacologist Dr. Andrew Morton described the effects of Petitioner's drinking on his brain, and on his judgment and decision making. (App. 3485-509).

Former warden James Aiken stated that Petitioner would easily adapt to prison, despite his commission of some infractions. The defense asked Mr. Aiken to describe what Petitioner's life in prison would be like, at which point he stated that Petitioner would in the company of many dangerous people, and that Petitioner was relatively old and vulnerable to violent and sexually aggressive inmates. Mr. Aiken also was allowed to testify that regardless of whether Petitioner was good in prison or bad in prison, SCDC could safely contained "under the gun" for the rest of his life. (App. 3522-36).

ARGUMENT

I. The PCR Court correctly found Petitioner's trial counsel was not ineffective during the guilt phase of the trial in not securing necessary expert assistance to support the accident theory of the case. The PCR Court's denial of relief is supported by the record.

Petitioner first contends trial counsel was ineffective during the guilt phase of his trial for failing to secure experts to support an accident defense at trial. The PCR Court denied relief upon the claim, finding Petitioner failed to show that counsel was deficient or that Petitioner was prejudiced by any alleged deficiency. The PCR Court's denial of relief is supported by the record.

Standard of Review

"This court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Marlar v. State, 373 S.C. 275, 279, 644 S.E.2d 769, 771 (Ct.App.2007) (citing Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)); McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995). An appellate court must affirm the PCR court's decision when its findings are supported by any evidence of probative value. Custodio v. State, 373 S.C. 4, 9, 644 S.E.2d 36, 38 (2007); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). However, an appellate court will not affirm the decision when it is not supported by any probative evidence. Edmond v. State, 341 S.C. 340, 347, 534 S.E.2d 682, 686 (2000); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996).

It is well established that this "Court gives great deference to the PCR court's findings of fact and conclusions of law." Simpson v. Moore, 367 S.C. 587, 595, 627 S.E.2d 701, 705 (2006). It is equally well established that this "Court will sustain the PCR judge's findings regarding ineffective assistance of counsel if there is any probative

evidence to support those findings." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); Franklin v. Catoe, 346 S.C. 563, 568, 552 S.E.2d 718, 721 (2001).

To establish that counsel was ineffective, a PCR applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error(s), there is a reasonable probability that the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 694 (1984); Simpson, 367 S.C. at 595-96, 627 S.E.2d at 706. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. Id.

In order to prove deficient performance, the applicant must "show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. '" Harrington v. Richter, 562 U.S. 86, 104 (2011), quoting Strickland, 466 U.S. at 687. "The standard for judging counsel's representation is a most deferential one." Id. at 104. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Butler v. State, 286 S.C. 441, 445, 334 S.E.2d 813, 815 (1985), quoting Strickland, [466 U.S. at 690]. As the Supreme Court made clear in Strickland:

> . . . the reasonableness of counsel's actions may be determined or substantially influenced by the defendants own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigations are reasonable depends upon such information . . . [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Strickland, 466 U.S. at 691. Barnes v. Thompson, 58 F.3d 971, 978 (4th Cir. 1995); Matthews v. Evatt, 105 F.3d 907, 919-920 (4th Cir. 1997). The mere fact that trial counsel's strategy was unsuccessful does not render counsel's assistance unconstitutionally ineffective. Strickland, 466 U.S. at 689. Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995).

Next, an applicant must also establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. It is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding, because virtually every act or omission of counsel would meet that test. Id. at 693. Applicant bears the "highly demanding" and "heavy burden" in establishing actual prejudice. Williams v. Taylor, 529 U.S. 362, 394 (2000).

Discussion

The PCR Court did not abuse its discretion in denying relief upon this claim. At issue is whether trial counsel was ineffective during the guilt phase of Petitioner's first trial in not investigating and presenting expert testimony to support in the defense's presentation of an accident theory for the shooting. The PCR Court denied relief upon this claim. The denial of relief is supported by the record.

First, contrary to the underlying argument presented by Petitioner, trial counsel did properly investigate into whether an accident theory was plausible in Petitioner's case. Defense counsel did retain Donald Girndt (a former SLED agent) who had expertise in gunshots, blood splatter, and fingerprints. (App. 4367-68, 4469-70). Girndt

made the conclusion that based on the evidence in this case, it was impossible to state that the shooting was accidental or intentional. (App. 4469). All of the facts favorable to the defense were established through the testimony of agent Ira Parnell. (App. 4470).

Trial counsels' testimony established they consulted with a crime scene expert, Girndt. Counsel also made a well-reasoned, strategic determination to not call their expert as a witness at the first trial. Counsel repeatedly elicited that it was dark, and that the murder weapon was a target pistol with an extremely light trigger pull. (Supp. App. 335, 374, 673, 717, 728-29). Counsel also elicited that the victim was only 5'8" and the wooden partition of the walls of the screened porch would be over his head. (Supp. App. 429-30). Counsel argued the issue in closing. (Supp. App. 866-71). Further, based upon counsel's testimony, it appears that Mr. Girndt could not state that he had concluded that the shooting was accidental based on his review of the evidence. Thus, the PCR Court's finding that counsel was not deficient is supported by the record. See generally Ringo v. State, 120 S.W.3d 743 (Mo. 2003) (en banc) (no deficiency in investigation where counsel hired four experts; while one trial expert merely noted a high score on the PTSD scale but did not diagnose it, and a PCR expert later actually diagnosed PTSD, counsel's hiring of four experts was sufficient and reasonable investigation, making this case different from Wiggins v. Smith, 539 U.S. 510 (2003)).

As noted by the PCR Court, without an eye-witness or video, it is impossible for a firearms expert to re-create all the events of the night of the shooting. There are so many variables such as: the posture and position of Stone; the posture and position of the victim; and, the position of the weapon. Additionally, it was beyond the scope of the expertise of a firearms examiner to testify as to the volition of Petitioner. No expert can

render an opinion as to the intent of the defendant. With or without expert testimony, it is ultimately a question of fact for the jury. Also, the PCR Court was well within its province in finding it was beyond the expertise of a firearms examiner to testify as to the effects of alcohol on human behavior. If Hill would have testified at trial, the very same factual issues would have been submitted to the jury.

Petitioner also failed to show that he was prejudiced. There is no reasonable probability a jury would have accepted Petitioner's version of events, even with a crime scene expert and other experts, when Petitioner asserted in his statement: 1) that he unintentionally only fired once, when in fact there were three casings on the porch, two bullets in the victim, and three holes in the screened porch; 2) that he did not know he shot a deputy and did not know what was going on for the four hours he was at large, even though he spent that time hiding under a log in a thick brush. (Supp. App. 666, 699-700).

The PCR Court was also correct in finding the legitimate factual disputes were established by the State's witness, agent Ira Parnell. SLED agent Ira Parnell did testify at trial and stated the trigger pull was fairly light. (Supp. App. 674-75, 677-78). Second, one would have to pull the trigger three times to discharge three bullets. (Supp. App. 679).

As noted by the PCR Court, at the evidentiary hearing, Petitioner did present the testimony of Wayne Hill, who was qualified as an expert in homicide events reconstruction and firearms. (App. 4263-319). Mr. Hill did testify that he reviewed prior trial transcripts (including Petitioner's testimony, Agent Parnell's testimony, and other law enforcement officers' testimony regarding their actions at the scene), crime lab

reports, crime scene photographs, autopsy photographs, and autopsy reports. (App. 4272). Hill also testified that he went to the shooting scene. Id. Hill indicated that he also examined the weapon used in the shooting. (App. 4273).

Hill did make a number of conclusions. First, he opined the shooting could have occurred in the way outlined by Petitioner in his statement to law enforcement. (App. 4296-97). Second, the trigger pull was 1.5 pounds which he deemed to be unsafe under certain conditions. (App. 4274-76, 4, 4277-78). Third, a light trigger pull increased the likelihood of an unintentional discharge. (App. 4278). Fourth, the gun could fire if rested upon three fingers the wrong way. (App. 4279). Fifth, the patterns in the screen door were consistent with an unintentional firing of the gun. (App. 4294-95). Sixth, if the firing were intentional, the bullet holes would have been higher on the screen. (App. 4295-96). Seventh, the discrepancy between the number of shots fired and the number of shots recalled could be explained by Stones' state of intoxication. (App. 4297-98).

Hill also made the following inculpatory conclusions. First, it was within the realm of possibility that Stone intentionally aimed and fired the gun. (App. 4316). Second, it would take three trigger pulls to discharge three bullets from the weapon. (App. 4314).

Moreover, the PCR Court correctly found Petitioner was not entitled to a jury charge on involuntary manslaughter or accident anyway. Involuntary manslaughter is the killing of another without malice and unintentionally while engaged in either 1) an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or 2) a lawful act with reckless disregard for the safety of others. State v. Cabrera-Pena, 361 S.C. 372, 381, 605 S.E.2d 522, 526 (2004); State v. Tucker, 324 S.C.

155, 478 S.E.2d 260 (1996). Petitioner, a felon on probation and not entitled to have a weapon, admitted he was banging on the side door of a house from which he had already been sent away once, while holding a loaded pistol in his hand. Such conduct hardly can meet either test for involuntary manslaughter as it involves a felon with no good reason to be in possession of a weapon, such that the possession is the proximate cause of the homicide. See Cabrera-Pena, supra (finding the appellant was not entitled to an involuntary manslaughter charge because his conduct in arming himself with a deadly weapon and waiting to confront the victim was not a lawful activity and, his conduct, in turn, created the volatile circumstances that led to the victim's death); State v. Smith, 391 S.C. 408, 414, 706 S.E.2d 12, 15–16 (2011) (holding the trial court properly refused to charge the jury on involuntary manslaughter where there was no evidence to indicate that the appellant lawfully armed himself in self-defense given that the appellant engaged in a drug deal, while armed with a loaded gun, knowing the victim owed him money from a previous drug transaction). It also involves trespass after notice and burglary.

Similarly, Petitioner could not show he was entitled to an accident charge because such a charge would have required Petitioner to both have been acting lawfully, and showing that he used due care in the handling of the weapon. State v. Burriss. 334 S.C. 256, 513 S.E.2d 104 (1999). Not only was Petitioner acting unlawfully, his invasion of an enclosed porch and banging on the back door with a loaded pistol in one's hand cannot be considered due care. Since Petitioner was not entitled to either an involuntary manslaughter or accident charge under any view of the evidence, then counsel could not have been deficient nor Petitioner prejudiced from the failure to get an expert to support his statement.

Contrary to Petitioner's assertions, this case is not similar to the one presented in Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007). In Ard, this Court found the PCR Court had properly found trial counsel was ineffective in not retaining an independent expert to assess gunshot residue evidence. Id. at 331-32, 642 S.E.2d at 596-97. The expert hired was a former supervisor of the SLED agent who testified for the State, and had reviewed the gunshot residue evidence while he was still employed at SLED. Id. The PCR Court and this Court found that the expert was not independent because of his involvement in the case prior to leaving SLED. Unlike the expert in Ard, the expert retained by trial counsel in this case did not have any prior involvement in investigating Petitioner's case while employed at SLED. There was no evidence presented at the evidentiary hearing establishing that Girndt had any prior involvement in the case before he was hired by trial counsel. There was also no testimony or evidence presented to show that his investigation and advice to counsel was not independently done. As already noted, counsel made a reasoned decision not to present Girndt as a witness; counsel determined that in light of the fact the points to which he would testify could be brought out through cross-examination and argument, it was not worth the risk of having him possibly testify adverse to the accident theory.

Further, Petitioner's reliance upon Jackson v. Conway, 765 F.Supp.2d 192 (W.D.N.Y.2011) is misplaced. In Jackson, the United States District Court found that a defendant in a sexual assault case received ineffective assistance of counsel when counsel did not present testimony from a medical expert to challenge to point out deficiencies in the victim's medical records and explain the difference between an "abrasion" and an "irritation," to support the argument that counsel made to the jury. 765 F.Supp.2d 192 at

263-64. Ultimately, this determination by the District Court was reversed on appeal. Jackson v. Conway, 763 F.3d 115, 153-54 (2d Cir. 2014) cert. denied sub nom. Jackson v. Artus, 135 S. Ct. 1560, 191 L. Ed. 2d 648 (2015). The Second Circuit noted that it was not a case where counsel had not investigated the matter before trial as counsel had consulted with a registered nurse. Id. at 154. Further, in light of defense counsel's expectations of the State's case, it was not unreasonable for trial counsel to not present a medical expert.[3] Id.

Altogether, the denial of relief by the PCR Court upon this claim was reasonable and supported by the record. Trial counsel was not deficient. They did investigate the circumstances of the shooting and considered presenting their expert, and they made a strategic decision not to present his testimony. That decision was reasonable under the circumstances. Further, as properly found by the PCR Court, Petitioner failed to establish he was prejudiced. Since Petitioner has failed to establish the PCR Court abused its discretion in denying relief upon this claim, the PCR Court's Order should be affirmed.

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[3] Similarly, Elmore v. Ozmint, 661 F.3d 783 (4th Cir. 2011) is distinguishable from Petitioner's case. Unlike the situation relied upon by Petitioner in Elmore, defense counsel here did consult with an expert and investigate the circumstances of the shooting to consider what to present regarding accident. As noted by trial counsel's testimony, they made a decision not to present their expert in light of the limitations upon his proposed testimony.

II. The PCR Court did not abuse its discretion in denying relief upon Petitioner's claims of ineffective assistance of counsel during the re-sentencing proceeding. The denial of relief upon these claims was supported by the record.

Petitioner asserts that trial counsel was ineffective in his sentencing proceeding in three ways. First, he contends trial counsel was ineffective in not investigating and presenting evidence of Petitioner's low intellectual functioning. Second, he argues trial counsel was ineffective in not investigating and presenting evidence to support an accident theory to the jury. Third, he asserts trial counsel was ineffective in their handling of victim impact testimony presented during the sentencing proceeding. The PCR Court denied relief upon all three claims. The denial of relief upon those claims is supported by the record.

Standard of Review

In order to prove deficient performance, the applicant must "show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. '" Richter, 562 U.S. at 104, quoting Strickland, 466 U.S. at 687. "The standard for judging counsel's representation is a most deferential one." Id. at --, 131 S.Ct. at 788. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Butler, 286 S.C. at 445, 334 S.E.2d at 815, quoting Strickland, [466 U.S. at 690]. The mere fact that trial counsel's strategy was unsuccessful does not render counsel's assistance unconstitutionally ineffective. Strickland, 466 U.S. at 689. Bell v. Evatt, 72 F.3d at 429.

In order to prove "prejudice" in regard to sentencing phase error, an applicant must show "there is a reasonable probability that, absent [counsel's] errors, the sentence - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998). Further, prejudice is evaluated by consideration of the trial evidence of mitigation, along with the PCR evidence, compared to the aggravating circumstance evidence. Wong v. Belmontes, 558 U.S.15, 130 S.Ct 383 (2009). "The likelihood of a different result must be substantial, not just conceivable." Richter, 562 U.S. at 112, citing Strickland, 466 U.S. at 693.

"[W]hile in some instances 'even an isolated error' can support an ineffective assistance claim if it is 'sufficiently egregious and prejudicial,' Murray v. Carrier, 477 U.S. 478, 496, 106 S.Ct 2639 (1986), it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." Richter, 562 U.S. at 111, 131 S.Ct. at 791.

A. The PCR Court properly found counsel was not ineffective during the sentencing trial in not investigating and presenting evidence of Petitioner's low intellectual functioning. The PCR Court's denial of relief is supported by the record.

On appeal, Petitioner contends trial counsel was ineffective in not fully investigating and presenting evidence of Petitioner's low intellectual functioning and brain damage. In the Application, Petitioner raised this claim as follows:

> 4) Counsel failed to conduct a reasonable investigation into potentially mitigating evidence regarding applicant's impoverished childhood and the family dysfunction resulting from the essentially polygamous household in which he was raised, applicant's very low intellectual functioning, and neurological damage from exposure to dangerous neurotoxins and other chemicals as well as the maternal ingestion of alcohol during the developmental period. Counsel failed to gather relevant social history,

> educational and medical records which would have corroborated the mitigating evidence that was presented at applicant's trial. Counsel also failed to investigate, develop and present evidence of applicant's good character.

(App. 4006). The PCR Court denied relief, finding counsel was not deficient in their investigation, and Petitioner failed to establish he was prejudiced. The PCR Court's denial of relief is supported by the record.

The PCR Court addressed this issue in two separate claims. In the first, the PCR Court found that Petitioner failed to show that the issue of low intellectual functioning was not investigated and presented to the jury. The PCR Court found that the issue was investigated and presented to the jury. Further, the PCR Court found that defense counsel had access to Petitioner's school records, counsel was aware of Petitioner's low IQ and the fact that his IQ dropped between the ages of 11 and 14. The PCR Court also found that defense counsel was aware that Petitioner was diagnosed with a learning disability in the area of verbal expression and language comprehension. (App. 7360-61).

These findings are supported by the record. While Mr. Babb indicated that he did not recall reviewing school records and psychological reports for trial, (App. 4363), Te Anne Oehler's testimony from the first trial indicated that trial counsel did have access to such records. In the sentencing phase of the first trial, Oehler testified that Petitioner's school records indicated that he did not have a high IQ. (App. 142). She noted that she found it significant that Petitioner's IQ slowly dropped between the ages of 11 and 14. (App. 142-43). She also indicated that Petitioner was diagnosed with a learning disability in the area of verbal expression and language comprehension. (App. 163).

Also, Mr. Babb acknowledged that he had notes reflecting that Petitioner had a low IQ, and he recalled knowing that Petitioner had a lower than average IQ. (App.

4362, 4397, 7107). Babb also indicated that he believed that the defense presented evidence of Petitioner's intellectual functioning and falling IQ at some point during the trial. (App. 4392-93). Altogether, it appears that counsel did conduct a reasonable investigation into Petitioner's low intellectual functioning. Thus, the PCR Court's finding that the investigation is reasonable is supported by the record.

In regards to Petitioner's claim that trial counsel failed to investigate the cause of Petitioner's brain damage, the PCR Court found that Petitioner failed to establish counsel was ineffective in assessing the alleged different causes of brain damage asserted by Petitioner at the hearing. The PCR Court found that trial counsel hired mitigating experts who investigated Petitioner's background in a thorough manner. The experts did not report to trial counsel anything concerning exposure to contamination in and around Turkey Creek. Petitioner never informed mitigation experts as to any concerns about Turkey Creek. (App. 7361-62).

Those findings are supported by the record. Mr. Babb testified that he did not recall obtaining any records from DHEC or the EPA regarding contamination around Turkey Creek. (App. 4361). He noted that the defense hired two mitigation specialists leading into the second trial. (App. 4389-90). He further testified that they relied upon those specialists to go out and find mitigation evidence and information in preparation for trial. (App. 4390). Babb indicated that he never received any information that indicated Petitioner would have played in Turkey Creek as a child. (App. 4391). Similarly, Mr. Littlejohn testified that they relied upon their mitigation experts to assist in the finding information and evidence to be presented at the resentencing trial. (App. 4482). Mr.

Littlejohn further stated that he did not remember anything about Petitioner spending any time in Turkey Creek. (App. 4482-83).

The PCR Court further found that the testimony of Dr. Merikangas, who had opined that Petitioner suffered brain damage and that based on the report from Dr. Shine, that brain damage was at least partially caused by neurotoxins contained in Turkey Creek, was not credible. (App. 7361-62). In light of the PCR Court's credibility determination regarding Dr. Merikangas' testimony, Respondent submits Petitioner cannot show the denial of relief upon this claim as it relates to investigating and presenting evidence of brain damage caused by neurotoxins in Turkey Creek was unreasonable. As noted by the PCR Court, there was not sufficient testimony to support an allegation that Petitioner had significant exposure to Turkey Creek. Further, there was little to no testimony establishing when and where Petitioner was exposed to Turkey Creek, and, as noted by the PCR Court, it would be impossible to know the levels of toxicity of the water at the location where Petitioner may have been exposed at any particular time and place. The records submitted regarding testing done by the EPA and DHEC during various times reflect as much insofar as they indicate that different parts of Turkey Creek contained different levels of pollution, and the levels of pollution changed over time.

Altogether, the PCR Court correctly found that Petitioner had not shown that counsel was ineffective in not investigating Turkey Creek as a possible cause of neurological damage. Petitioner failed to show that counsel was deficient. First, as noted by counsel's testimony, Petitioner never informed anyone on the defense team that he spent time in Turkey Creek. He never advised counsel that he spent time in Turkey Creek as a child, and counsel indicated that they were not informed by either their

mitigation investigators or their social worker that Petitioner spent time in Turkey Creek. Counsel cannot be found deficient when Petitioner did not provide them with the information that would have led to this further investigation. See Collins v. Francis, 728 F.2d 1322 (11th Cir. 1984) (counsel was not ineffective for failing to investigate witnesses about whom defendant did not tell him); Primeaux v. Leapley, 502 N.W.2d 265, 268 (S.D. 1993) ("Where [defendant] did not give information to counsel, counsel could neither investigate it or pass it on to the expert."). Furthermore, the fact that the mitigation investigators and social worker did not uncover that Petitioner spent time in Turkey Creek further support a finding that counsel was not deficient. Counsel is allowed to rely upon the expertise of the experts they hired to assist in developing the mitigation case. See Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992) (counsel entitled to rely on experts, and the fact that the testifying expert did not identify "every possible malady or argument" is not a basis for relief). Ringo v. State, 120 S.W.3d 743 (Mo. 2003) (en banc) (no deficiency in investigation where counsel hired four experts; while one trial expert merely noted a high score on the PTSD scale but did not diagnose it, and a PCR expert later actually diagnosed PTSD, counsel's hiring of four experts was sufficient and reasonable investigation, making this case different from Wiggins); See, e.g. Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995) (to impose a duty on the attorney to gather background information for an expert independent of any request from that expert would defeat the whole purpose of hiring the expert, as understanding what information is needed is an integral part of the expert's skill, and requiring an attorney to review the trustworthiness of the expert's conclusions would make the expert superfluous). Byram v. Ozmint, 339 F.3d 203 (4th Cir. 2003) (where counsel hired a

psychologist, psychiatrist, social worker, and investigator for mitigation, and prepared extensively, investigation was reasonable despite claim counsel failed to present evidence of background, fetal alcohol syndrome, and brain damage; moreover, case was different from Wiggins on the prejudice prong in that here the jury did hear testimony about the background, and this was not a case where the jury was "completely in the dark as to the defendant's alleged mental problems).

Similarly, the PCR Court addressed separately the claim that counsel was ineffective in not investigating and presenting evidence Petitioner suffered neurological damage as a result of his mother ingesting alcohol while she was pregnant. The PCR Court found that there was no credible evidence the mother drank alcohol. To the contrary, the PCR Court found that the overwhelming evidence was that she abstained from the use of alcohol.

Those findings were supported by the record. At the evidentiary hearing, Mr. Babb testified that the defense team for the first trial included at least three investigators: Tommy Davis, Leslie Sapp, and Scott Parker. (App. 4369-70). At no point in time did he recall there being any evidence found by his investigators for the first trial that indicated Petitioner's mother drank while she was pregnant with Petitioner. (App. 4387). Similarly, Babb indicated that he never received any information from any member of Petitioner's family or from any other source during the investigation that indicated Petitioner's mother drank alcohol while she was pregnant with Petitioner. (App. 4389). To the contrary, trial counsel had records that indicated Petitioner's mother was intolerant of drinking in her household. (App. 4399, 7108-09). Mr. Littlejohn also indicated that he

did not recall ever coming across information that Petitioner's mother drank alcohol while she was pregnant with Petitioner. (App. 4483).

Petitioner did not present credible evidence that Petitioner's mother drank alcohol while she was pregnant with him. Arlene Andrews, Petitioner's social worker at the PCR evidentiary hearing, testified that Petitioner had alcoholics on both sides of his family. (App. 4209). She further indicated that Petitioner was the "child of alcoholics." (App. 4241, l 17). On cross-examination, however, Andrews testified that she found no information from Te Anne Oehler's notes that indicated Petitioner's mother drank alcohol. (App. 4243). Andrews could not recall whether she reviewed information that Petitioner's mother was intolerant of her husband's drinking. (App. 4244). Andrews did recall that on the reports from her tuberculosis hospitalization, Petitioner's mother did indicate she did not use alcohol. (App. 4244). Andrews also noted that there was nothing in her diagnoses while at the sanatorium to indicate she was suffering from an alcohol-related problem. (App. 4244). Andrews further testified that Petitioner told her that his mother did not drink alcohol. (App. 4249). Ultimately, Andrews conceded that when she indicated Petitioner was the son of alcoholic parents, she was referring to Petitioner's father, Bobby Ozine Stone, and Eugene Miles. (App. 4250). Further, Andrews admitted that she did not know if Petitioner's mother was an alcoholic. (App. 4250).

Also, as found by the PCR Court, Dr. Merikangas' conclusion that Petitioner's mother drank alcohol was questionable. Dr. Merikangas admitted that he had no direct information that Petitioner's mother was drinking alcohol at the time Petitioner was born. (App. 4124-25). Instead, he relied upon affidavits (from whom he did not specify) and

the fact that she was treated with Librium while at the sanatorium for tuberculosis. (App. 4125). Merikangas noted that "Librium is chlordiazepoxide, which is a minor tranquilizer. It's used for the treatment for anxiety, and it is specifically used when treating alcohol withdrawal to prevent delirium tremens and other consequences of withdrawing from alcohol." (App. 4149, ll 8-13). In light of that testimony, the PCR Court's determination that Dr. Merikangas' findings were not credible is supported by the record.

In light of the PCR Court's findings regarding counsel's investigation into Petitioner's low intellectual functioning and causes for Petitioner's alleged brain damage, Respondent submits Petitioner has not shown the PCR Court erred in denying relief upon this claim. Trial counsel put together a highly qualified defense team. Trial counsel carefully investigated the social, educational, familial, and mental health background of the Petitioner. Trial counsel developed a cogent mitigation defense, offered an array of compelling evidence, and presented the poignant testimony of a number of lay and expert witnesses. After a reasonable investigation, counsel had no basis for arguing that Petitioner suffered brain damage as a result of environmental toxins or due to fetal alcohol syndrome or fetal alcohol spectrum disorder.

Petitioner maintains trial counsel was ineffective in not discovering and presenting evidence that Petitioner suffers from brain damage, but he fails to acknowledge that counsel did not have a sufficient basis to pursue such an investigation. The documentation from Ruben Gur and Fred Bookstein relied upon by Petitioner reflect that they were looking for damage consistent with fetal alcohol syndrome or fetal alcohol spectrum disorder, or possible toxin exposure. (See App. 4515, 4517-19, 4527-29). As

already noted, it was not unreasonable for trial counsel to not seek similar studies as there was not evidence warranting investigation into whether Petitioner suffered from exposure to toxins or fetal alcohol spectrum disorder. There was also no indication that counsel was advised by the experts they retained that further investigation was warranted.

Petitioner also cannot show that he was prejudiced. Trial counsel presented a well-reasoned mitigation defense, and presenting the additional information that Petitioner asserts now should have been presented would have "merely resulted in a 'fancier' mitigation case, having no effect on the outcome of the trial." Jones, 332 S.C. 329, 504 S.E.2d 822 (trial counsel not ineffective for failing to thoroughly investigate and present mitigating evidence regarding defendant's metal impairments, including organic brain damage, where trial counsel focused its mitigation on the mental conditions of the defendant); Simpson, 367 S.C. 587, 627 S.E.2d 701. Furthermore, Petitioner did not show that the result at trial would have been different. See, e.g. Zack v. State, 753 So. 2d 9 (Fla. 2000) (affirming death sentence where jury weighed aggravating circumstances against mitigating circumstances, including evidence and diagnosis of FAS) aff'd Zack v. State, 911 So. 2d 1190 (Fla. 2005); State v. Locklear, 349 N.C. 118, 134, 505 S.E.2d 277, 286 (1998) (affirming sentence of death in capital case where defendant's evidence during the sentencing phase included evidence that defendant suffered from Fetal Alcohol Syndrome); State v. Timmendequas, 168 N.J. 20, 33, 773 A.2d 18, 25 (2001) (affirming death sentence where jury found aggravating circumstances outweighed mitigating circumstances, including jury's finding that defendant was born to a mother who was emotionally unfit and unable to meet his physical and emotional needs and caused him to suffer from fetal alcohol effect due to her drinking throughout her pregnancy); People v.

Roybal, 19 Cal. 4th 481, 522, 966 P.2d 521 (1998) (jury instructed to consider fetal alcohol syndrome as a mitigating factor after expert testimony that defendant had organic brain damage as a result of the FAS; defendant sentenced to death); Brown v. State, 659 N.E.2d 671, 675 (Ind. Ct. App. 1995) (affirming trial court sentence in murder case where the court concluded that the aggravating circumstances outweighed the mitigating circumstances, which included evidence of fetal alcohol syndrome); Davies v. State, 758 N.E.2d 981, 988 (Ind. Ct. App. 2001) (affirming sentence where the trial court weighed aggravating and mitigating circumstances, including fetal alcohol syndrome).

Altogether, the PCR Court's denial of relief was reasonable and supported by the record. This claim for relief should therefore be denied and dismissed.

B. The PCR Court did not abuse its discretion in denying Petitioner's claim that trial counsel was ineffective during Petitioner's re-sentencing for not supporting the alleged accident theory of Petitioner's case.

Petitioner next contends the PCR Court erred in denying relief upon his claim that trial counsel was ineffective during the sentencing trial for not presenting evidence to support an accident theory in Petitioner's case. The PCR Court's denial of relief upon this claim is supported by the record.

At the PCR evidentiary hearing, trial counsel did note that they hired an expert, Donald Girndt, but elected not to call him. (App. 4380). Trial counsel made a well-reasoned strategic decision not to call this witness. Littlejohn noted that the same issues in presenting expert testimony in the first trial existed in the second trial.

> Well, I'd have to just say the same thing I say to when that issue was brought up as to the first trial that we consulted with an expert. We didn't feel like there was anything that we could prove or disprove as to what Bobby's position or what his attitude was or whether he was lying in wait or whether the gun went off accidently. There just wasn't a whole lot that

> the expert could have helped us with. And I might add -- I mean the State had a theory that it was an ambush, but I don't know of any evidence they had that it was an ambush.

(App. 4485, l 19 – 4486, l 3).

The PCR Court's finding that trial counsel were not ineffective in their investigation of this case. They were not ineffective in their decision not to hire additional experts. Trial counsel's testimony establishes they consulted with a crime scene expert. Counsel also made a well-reasoned, strategic determination to not call their expert as a witness at the first trial. Here, counsel were not deficient in addressing this issue through examination, and there was no constitutional need for the crime scene and other experts. It was established through testimony that the shooting occurred when it was dark, and that the murder weapon was a target pistol with an extremely light trigger pull. (App. 2964, 3298-99, 3301, 3601). Dr. Sexton had testified that the victim was only 5'8". (App. 3185). Much of what defense counsel had to elicit regarding the dimensions of the screened in porch in the first trial were presented by the State during resentencing. (App. 3213-18). Counsel argued the issue in closing. (App. 3589-95). Further, based upon counsel's testimony, it appears that Mr. Girndt could not state that he had concluded that the shooting was accidental based off of his review of the evidence. Respondent submits the PCR Court's determination that that counsel could not be found deficient for not presenting their expert at trial when the defense team's expert reached different conclusions from the expert presented at the PCR evidentiary hearing was reasonable.

The PCR Court was reasonable in finding that Petitioner failed to show he was prejudiced. There is no reasonable probability a jury would have accepted Petitioner's

version of events, even with a crime scene expert and other experts, when Petitioner asserted in his statement: (1) that he unintentionally only fired once, when in fact there were three casings on the porch, two bullets in the victim, and three holes in the screened porch, and (2) that he did not know he shot a deputy and did not know what was going on for the four hours he was at large, even though he spent that time hiding under a log in a thick brush. In light of that, Petitioner had not shown that the result at his resentencing trial would have been different had counsel presented their crime scene expert.

C. The PCR Court correctly denied relief upon the claim that trial counsel was ineffective during the sentencing trial for not objecting to victim impact evidence. The denial of relief is supported by the record.

Petitioner asserts trial counsel was ineffective during the sentencing trial because counsel did not object to victim impact evidence presented by the State. Specifically, Petitioner asserts counsel should have objected to the testimony of the victim's widow regarding a suicide attempt after hearing that Petitioner's first death sentence was overturned as improper victim impact testimony. Second, Petitioner contends trial counsel should have objected to the testimony of Captain Hobbs and Major Metts as improper victim impact testimony. As found by the PCR Court, the challenged evidence in the present case was admissible as a matter of law; thus, counsel could not have been deficient nor Petitioner prejudiced by counsel not objecting to the testimony.

i. The testimony from the victim's widow was admissible victim impact testimony.

The PCR Court's denial of relief as it related to the testimony of Teresa Kubala is supported by the record. At resentencing, widow Teresa Kubala did describe her relationship with the victim, the pain of finding out about his death, and the difficulties of

moving on in her life without the victim. (App. 3334-50). She did specifically note the counseling and help she needed to even start dating again, as she thinks of Sgt. Kubala every day and felt like she was cheating on the man she had married at age 19. (App. 3352-53).

Near the end of her testimony, the solicitor asked if there was "anything significant" in her life she would like to tell the jury. (App. 3353). She stated that after she and her new husband returned from a family trip to celebrate their first anniversary, she found a message on her machine that "they were going to retry this case over again, that the supreme court had overturned it." (App. 3353). She went on to state that her new husband had gotten hurt working at UPS and was dealing with trying to get workers compensation, and they were trying to make two house payments until they could sell one. (App. 3353-54). She said UPS would not take her husband back, so he lost his job and had to find another, "and everything just blew up." (App. 3354).

The defense did approach for an off the record conference, after which the solicitor asked Teresa to state what happened as a result of "the things you went through with Charlie and the things after." (App. 3354). Teresa then described taking a bottle of Tylenol PMs before her husband woke, but then having second thoughts and telling him what she had done. (App. 3354-55). She then described going to the hospital for treatment and then spending three days in a ward, which led her to realize she did not have as many problems as she thought. (App. 3355). At this point the solicitor stopped the questioning and moved on. (App. 3355).

After the State rested, the defense placed its objection on the record. (App. 3368-69). The defense argued the causation factor for the suicide was not the crime but

because the legal proceeding was about to occur again, and asserted that the time that had passed from the original crime and this resentencing proceeding "lessens the direct effect that she would otherwise be allowed to testify about." (App. 3369). Thus, the defense contended the suicide attempt was extremely prejudicial. (App. 3369). The trial court responded that objection was timely, but Teresa's testimony was at least partially related to Sgt. Kubala's murder, even though that was not the only thing she mentioned. (App. 3369-70).

Petitioner did raise an issue related to this event on direct appeal, but the South Carolina Supreme Court found it was not preserved. The Supreme Court noted that counsel at trial argued the issue as one of causation – that the suicide attempt was related more to financial difficulties rather than the victim's murder – but on appeal Petitioner was asserting that the reference to direct review invited the jury to speculate on the finality of their decision, and the reference to suicide invited the jury to speculate on the effect of their decision on the widow's health. On direct appeal, the Court found the latter issues were distinct from that raised at trial and not preserved.

The PCR Court properly found that trial counsel was not deficient because the evidence was admissible, relevant, and not unduly prejudicial. Victim impact evidence is admissible in the sentencing phase to demonstrate the "uniqueness" of the victim and the specific harm committed by the defendant. State v. Rocheville, 310 S.C. 20, 27, 425 S.E.2d 32, 36 (1993). In Payne v. Tennessee, 501 U.S. 808 (1991), the United States Supreme Court held that victim impact evidence is relevant for a jury to meaningfully assess the defendant's moral culpability and blameworthiness and is only inadmissible where it is so unduly prejudicial that it renders the trial fundamentally unfair. See State v.

Hughey, 339 S.C. 439, 457, 529 S.E.2d 721,730 - 731 (2000) (setting forth the above discussion).

Victim impact evidence is not just to provide a glimpse of the victim's life, but also to show the impact of the victim's death on those left behind. See Hughey, supra (noting the admissibility of testimony that the survivors would miss the victim's cooking and mothering, and citing: "State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1997) (admitting testimony from victim's mother concerning the impact of her son's death); Riddle v. State, 314 S.C. 1, 443 S.E.2d 557 (1994) (admitting testimony of victim's stepdaughter concerning the victim's standing in the community, the victim's grandchildren, and the impact the crime had on her); State v. Rocheville, 310 S.C. 20, 425 S.E.2d 32 (1993) (admitting testimony of victim's parents who testified about their families' reliance on their son's dreams and aspirations)"). See also State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997) ("victim impact evidence which was introduced showed the specific harm committed by appellant in murdering the victim").

Along these lines, undoubtedly a surviving member's suicide attempt or suicidal feelings due to the murder of the loved one is a relevant and admissible part of victim impact evidence in a sentencing phase. See U.S. v. McVeigh, 153 F.3d 1166 (10th Cir. 1998) (evidence concerning impact of federal building bombing on families of victims, such as fear and hatred suffered by victims' children and suicidal feelings of surviving spouse, was admissible during capital trial's penalty phase); Moreno v. State, 38 S.W.2d 774 (Tex. Ct. App. 2001) (testimony from victim's grandmother about the suicide of his uncle following the murder was admissible as showing the psychological impact of the crime, and citing other cases admitting psychological effects on survivors following

commission of a crime). Indeed, other decisions show that suicidal feelings or depression are often admitted without question in presentencing reports for the judge in the non-capital context. See, e.g. People v. Stidham, 533 N.E.2d 957 (Ill. Ct. App. 1989) (presentence report contained father's observations of his son's depression, loss of sleep and weight, suicidal statements and attempt, and psychiatric hospitalization).

The trial court was correct in ruling in this case that Teresa's testimony about the event sufficiently tied it in with Petitioner's crime. First, like most issues people deal with in life, there are often multiple and interrelated factors at work, and simply because other problems leaked into Teresa's heartbreak from this crime did not give Petitioner the windfall of making the event inadmissible, since at a minimum it was at least in part based on the chronic loss she faced from losing her first husband. State v. Gill, 167 S.W.3d 184, 196 (Mo. 2005) ("It is not necessary that every piece of victim impact evidence relate to the direct impact of the victim's death on the witness.").

Second, part of losing the loved one is not just losing his or her company; it also encompasses losing the help, comfort, and aid that the murdered family member provided to the daily life of a household. Cf., e.g. State v. Rocheville, 310 S.C. 20, 425 S.E.2d 32 (1993) (admitting testimony of victim's parents who testified about their families' reliance on their son's dreams and aspirations). Having one's personal and financial life thrown into complete turmoil may not be as important as losing the loved one itself, but it is still an important and relevant impact of the crime on the survivors. Teresa had just finished testifying as to how she thought of Sgt. Kubala every day and how she needed counseling to even begin considering a new relationship. Obviously it would be very hard to nurture a new relationship when, as Teresa testified, her mind goes every day to the man to

whom she was married at age 19, and for whom she bore two children. Her life had changed greatly in the negative due to Petitioner's crime, and none of the present demons she mentioned – new husband, the new husband's job situation, the difficulty of two house payments, and feelings she was "cheating on" Sgt. Kubala with her new relationship – would have existed had Petitioner not taken the victim's life. The fact that Teresa's life had changed in many respects was a consequence of the crime, and thus was admissible victim impact.

Moreover, when one reads Teresa's testimony in its entirety, it is clear that while the reversal might have been a trigger point, it was the daily anguish of living without Sgt. Kubala that was ultimately part of Teresa's fateful decision – not the mere possibility of resentencing in a vacuum. For example, she had testified that she moved away from Sumter to stop going to the victim's gravesite every day, which was negatively affected her children. (App. 3352-53). Given that this sentencing phase was tried so far removed from the original crime, it was relevant for the State to show that this murder had a continuing impact on the survivors that had not eased with the passage of time. Altogether, the trial judge was correct that the evidence was sufficiently tied to the impact of this crime on the survivors for it to be admissible.

To the extent Petitioner argues that trial counsel should have preserved an objection contending that the mention of supreme court review lessened the jury's sense of responsibility for sentencing, State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979) and Caldwell v. Mississippi, 472 U.S. 320 (1985), the PCR Court correctly found his claim was without merit. This was simply not a Caldwell issue, where there was extensive argument that the responsibility for determining the appropriateness of the sentence

rested with someone other than the jurors. Caldwell, 472 U.S. 320. Likewise, in Tyner there was an extensive explanation of everyone from the trial judge to the United States Supreme Court who would "determine whether your recommendation was right or not." Tyner, 273 S.C. at 659, 258 S.E.2d at 566. No such argument was made in the present case; there was merely a matter-of-fact mention of a retrial that was a necessary predicate fact to otherwise admissible victim impact evidence of the suicide attempt. There was no harping on this predicate fact, and no implication that the jury was not completely responsible for sentencing. The trial court expressly charged them that they were completely responsible for the "final decision," and unlike those cases, no one told them different. (App. 2882).

To the extent Petitioner asserts trial counsel should have argued that the mention of prior reversal impermissibly maximized the jury's sense of responsibility inasmuch as it implied a life sentence would trigger another attempt, his claim is also without merit. Such an argument would present a logical problem in that Petitioner asserts in the same sentence that the mention of the reversal both minimized and maximized the jury's responsibility. Regardless, there was no argument along those lines, simply a brief matter-of-fact mention of a predicate fact. Indeed, as noted before, suicides are generally admissible victim impact evidence, and any suicide attempt might carry the inference that any sort of subsequent victory for the defense might trigger another attempt. The same could be said for other psychological problems suffered by a survivor, but that concern does not mean the defendant gets to escape having the jury learn about the actual impact of what he has done on those who have suffered.

Neither of Petitioner's concerns was sufficient to mandate reversal given the circumstances of this case. As such, counsel was not deficient nor Petitioner prejudiced by the failure to preserve the issue in this regard. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial).

Finally, there was no error under Strickland. Petitioner committed an extremely aggravated crime in ambushing a police officer, and he has an extensive criminal history – including an then-active parole that provided ample evidence of motive. The victim impact evidence was especially moving without regard to Teresa's testimony as to the suicide attempt, from the close friends of Sgt. Kubala's responding to the scene, or helping with the family after the crime, to the discussion of one officer taking Sgt. Kubala's young son to the scene to explain to him why his brave daddy was gone. As repeatedly noted before, the mention of reversal was made briefly and matter-of-factly and then no further mention was made again in either argument or testimony. Under these circumstances, these two lines of text in this more than 700-page sentencing hearing could not have been prejudicial. See, e.g. Havard v. State, 928 So.2d 771, 792 -793 (Miss. 2006) (Payne recognizes it is unlikely a brief statement in victim impact testimony could inflame the jury beyond the facts of the case so as to make the proceeding fundamentally unfair); State v. Young, 196 S.W.3d 85, 111 (Tenn. 2006) (no prejudice from improper victim impact testimony where trial court instructed jury how to consider the evidence, and the prosecution did not rely on or stress the offending testimony in

closing argument). See also State v. Gill, 167 S.W.3d 184, 196 (Mo. 2005) (defendant did not show that the emotion displayed by the witnesses was unduly prejudicial).

Any error did not affect this sentencing result. It simply cannot be said that there is a reasonable probability that, absent this one little brief exchange in one witness's testimony, that "the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Jones, 332 S.C. at 333, 504 S.E.2d at 823-24 (citing Strickland).

ii. The PCR Court's denial of relief upon Petitioner's claim that the testimony of Captain Hobbs and Major Metts constituted improper victim impact evidence is supported by the record.

Petitioner also contends the testimony of Captain Hobbs and Major Metts, both of the Sumter County Sheriff's Office, was improper victim impact testimony.

What Occurred At Trial

Captain Hobbs testified that he and Deputy Kubala started in law enforcement at the same time. (App. 3094). As a result of their closeness in beginning their law enforcement careers, they became close friends. (App. 3094-95). Hobbs testified that he loved Kubala like a brother, and the two and their families were close. (App. 3095). Hobbs noted they stayed in contact after Kubala left law enforcement to pursue another job. (App. 3095). Hobbs also described Kubala returning to duty at the Sheriff's Office a few years later, including how they lobbied to work together again once Kubala became a sergeant. (App. 3096). Hobbs also testified about how he was the one who told Kubala's wife that he was killed on the night of the shooting. (App. 3097-98). Hobbs also testified about the impact Kubala's murder had on the Sheriff's office. He noted that

during orientation, new trainees are taken to the scene of the shooting, and they are informed about the case. (App. 3099). The trainees are then taken to Kubala's grave site, and they are advised that if they are not able to give that sacrifice, then it may not be the right job for them. (App. 3099-100).

Major Metts testified that he met Deputy Kubala as both volunteered with the Explorer program. (App. 3358-59). Metts stated that Kubala was like his brother, and Kubala was his best friend. (App. 3359). Metts testified about the night of the shooting, and how he responded to the news. (App. 3360-61). He discussed how he and others, like Hobbs, tried to help his widow in the weeks after the shooting. (App. 3362). Metts indicated that she asked him to serve as a pallbearer in Kubala's funeral, and she further requested that he get his police uniform ready for the burial. (App. 3362-63). Metts went on to describe how Kubala's death impacted him personally, and how he was unable to maintain the Explorer program because of the memories he had of working with Kubala on the program. (App. 3363-64). Metts also discussed a golf tournament that was started in Kubala's memory, and described visiting the scene of the murder with Kubala's widow and children. (App. 3365-67).

Testimony at the PCR Evidentiary Hearing

At the PCR evidentiary hearing, Mr. Littlejohn testified that he considered objecting to some the testimony presented by Captain Hobbs, and he ultimately decided against it.

> I considered objecting to a lot of this, but Judge King was being very liberal in what he was allowing in from the standpoint of victim's testimony. I mean I felt if he allowed in what Ms. Kubala said about her reaction to the appeal that he was probably going to allow this in. I didn't want to be perceived by the jury as — as jumping up and objecting to everything like I was trying to hide something.

> So yes, I did consider it. I didn't consider my chances of winning that objection very well — to be very good and I mean there's a lot of leeway that the courts have allowed in — in this kind of testimony. So I considered it; I didn't object to it obviously.

(App. 4479, l 18 – 4480, l 5). Similarly, Littlejohn testified that he made a similar strategic decision in not objecting to portions of Major Metts' testimony.

> Well, like I said earlier and I reviewed this yesterday, I considered objecting to a lot of this, but I did not feel that the objection would be sustained. I didn't want to be perceived as - as trying to hide things and, you know, a lot of this is contemporaneously with that happened and, you know, I just think Judge King would have - would have let it in.

(App. 4480, ll 16-21).

Discussion

Clearly, counsel expressed a valid strategic reason for not objecting to the testimony. First, counsel did not want to appear as if he was hiding something from the jury. Second, counsel reasoned that the objection likely would have been overruled by Judge King. In light of counsels' reasoning in not objecting to the disputed victim impact testimony, Petitioner failed to show that counsel was ineffective in not raising an objection. See generally Devier v. Zant, 3 F.3d 1445, 1454 (11th Cir. 1993) ("The decision not to object was based on a reasonable strategic choice. The fact that such a stratagem, viewed from hindsight, may have been imprudent does not . . . provide the basis for a claim of ineffective assistance of counsel."); Strickland, 466 U.S. at 689 (reasonable trial strategy is not a basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision cannot be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial).

Counsels' determination that his objection likely would have been overruled was well founded. The testimony Petitioner challenges was admissible. First, as to the specific officers, they were not merely coworkers, but friends who ate together, spend off duty time together with each other and their families, and did community projects together. Moreover, the loss of the victim affected the way they perceived and went about their jobs. This evidence involved their specific personal relationships with the victim and was undoubtedly admissible.

As noted by the PCR Court, the greater issue to Petitioner was apparently the admissibility of the lasting effect of the killing on the Sumter County law enforcement community in general. However, this larger effect on the community is admissible as well. As noted in Payne:

> [Defendant] Payne echoes the concern voiced in Booth's [Booth v. Maryland, 482 US. 496, 107 S.Ct. 2529, 96 LEd.2d 440] case that the admission of victim impact evidence permits a jury to find that defendants whose victims are assets to their community are more deserving of punishment that those whose victims are perceived to be less worthy, (citation omitted). As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind-for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but the murderer of a reprobate does not. It is designed to show instead each victim's "uniqueness as an individual human being," whatever the jury might think the loss resulting to the community might be.

Payne, 501 U.S. at 823-824 (emphasis added) (quoted in Humphries v. State, 351 S.C 362, 570 S.E.2d 160 (2002)). Other passages in Payne support the idea that evidence on the crime's impact of the larger community is admissible:

> In Justice O'Connor's concurrence, she explains her view that "[a] State may decide that the jury before determining whether a convicted murderer should receive the death penalty, should know the full extent of the harm caused by the crime, including its impact on the victim's family and community." Payne, 501 U.S. at 829, 111 S.Ct. 2597 (O'Connor J.,

> concurring) (emphasis added). Although obviously relevant to the Government's argument, this of course is not part of the holding of Payne, but rather dicta from the concurrence. Second, the Payne majority opinion cites a statement of Justice White from the dissenting opinion of Booth v. Maryland, one of the cases that Payne overruled: "'The State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.'" Payne, 501 U.S. at 826, 111 S.Ct. 2597 (quoting Booth, 482 U.S. at 517, 107 S.G. 2529 (White J., dissenting) (citation in original omitted) (emphasis added)).

United States v. Wilson, 493 F. Supp. 2d 364 (E.D.N.Y. 2006)..

Further, a number of courts have upheld admission of the effect of a law enforcement officer's murder on the law enforcement community. See United States v. Battle, 173 F.3d 1373 (11th Cir. 1999) (permissible to show how murder of corrections officer emboldened inmates and made the prison more dangerous, but how a death sentence would send a message to those emboldened inmates); United States v. Wilson, 493 F. Supp. 2d 364 (E.D.N.Y. 2006) (permissible to show murder of undercover officer had chilling effect on other undercover officers); People v. Brown, 93 P.3d 244 (Cal 2004) (permissible to show officer was a good police officer and to admit testimony brother saluted his grave because officer gave life for the community); United States v. Whitten, 610 F.3d 168, 189 (2d Cir. 2010)(noting that no prohibition of testimony regarding generalized community harm as victim impact evidence is generally recognized); State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) (finding admission of law enforcement officer's funeral was proper victim impact evidence demonstrating the general loss suffered by society); United States v. Lawrence, 735 F.3d 385, 406 (6th Cir. 2013)(holding that testimony of fellow police officer who was friend of victim police officer was properly admitted under Payne). Altogether, Petitioner failed

to show that counsel was deficient in not objecting to the victim impact testimony presented at trial.

Altogether, Petitioner failed to establish counsel was ineffective in not objecting to the victim impact testimony presented through Ms. Kubala, Captain Hobbs and Major Metts. This claim for relief was properly denied and dismissed.

III. The PCR Court correctly denied relief upon Petitioner's claim of ineffective assistance of appellate counsel. Petitioner was not prejudiced by appellate counsel's decision to not argue the admission of Ms. Kubala's testimony regarding a [suicide attempt] was irrelevant because the testimony was relevant and properly admitted. Further, any error in admitting the testimony was harmless.

Petitioner contends the PCR Court erred in denying relief upon his claim of ineffective assistance of appellate counsel. In that claim, Petitioner asserted that appellate counsel should have argued the testimony of Ms. Kubala was not relevant, as was argued by trial counsel. The PCR Court properly denied relief upon this claim. Petitioner failed to establish he was prejudiced by any error of appellate counsel.

Standard of Review

A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). A PCR applicant has the burden of proving appellate counsel's performance was deficient. Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). Appellate counsel is not required to raise every non-frivolous issue that is presented by the record, Tisdale v. State, 357 S.C. 474, 594 S.E.2d 166 (2004), as "[t]here can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." Jones v. Barnes, 463 U.S. 745, 752 (1983). Rather, appellate counsel has a professional duty to choose among potential issues according to their merit. Id.

To obtain relief a PCR applicant must show that appellate counsel's performance was (1) deficient; and (2) prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 615-16, 524 S.E.2d 833, 836 (1999). In other words, the applicant is required to demonstrate "that his counsel was objectively unreasonable in failing" to identify and argue present significant and obvious issues on appeal, and "a reasonable

probability that, but for his counsel's unreasonable failure ..., he would have prevailed on his appeal." Smith v. Robbins, 528 U.S. 259, 285 (2000) (citation omitted). Although recognizing that "[n]otwithstanding Barnes, it is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim" on direct appeal, the Supreme Court has recently reiterated that "it [will be] difficult to demonstrate that counsel was incompetent." Robbins, 528 U.S. at 288. "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" Id. (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). See also Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir.2000) (en banc).

What Occurred Below

On appeal after the sentencing trial, appellate counsel raised a single issue. (App. 3920-36). Specifically, he asserted the trial judge committed reversible error by permitting the victim's widow to testify that she had attempted suicide when she learned from a message left on her answering machine that the Supreme Court had reversed Stone's death sentence and "they were going to retry this case over again", as this testimony introduced an arbitrary factor into Stone's resentencing, in violation of S.C. Code Section 16-3-25(C)(l). Id. In affirming Petitioner's conviction on appeal, the South Carolina Supreme Court found the issue raised in the appeal was not preserved for appellant review.

> Appellant's argument is not preserved for review. At trial, Appellant objected as the victim's widow began to describe her suicide attempt. The record reveals that Appellant based his objection on causation grounds, arguing that the testimony implied that the cause of the suicide attempt was not the victim's murder, but the financial pressures the victim's widow was experiencing and the fact that Appellant would have another sentencing proceeding. In allowing the testimony, the trial court held that the victim's widow had attributed the facts relayed in the testimony to her

relationship with the victim, and that the testimony was, therefore, relevant and admissible.

Appellant's argument before this Court goes along quite different lines. Appellant now argues that the victim's widow's testimony improperly invited the jury to speculate about the finality of its decision on the appropriate punishment and improperly invited the jury to consider how its decision might impact the victim's widow's future health. Thus, while Appellant's argument below focused on what caused the victim's widow to attempt suicide-meaning, what caused the testimony to be relevant-Appellant's argument on appeal abandons the issue of relevance and addresses only the effect this testimony may have had on the jury. Because Appellant did not argue these grounds in support of his objection at trial, Appellant's argument is not preserved for review See State v. Dunbar, 356 S.G 138, 142, 587 S.E. 2d 6912, 693 (2003) (providing that in order for an issue to be preserved for appellant review, it must have been raised to and mled upon 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.

State v. Stone, 376 S.C. 32, 35-36, 655 S.E.2d 487, 488-89 (2007).

Based upon the trial transcript, PCR transcript, and this Court's opinion in the direct appeal, the PCR Court determined that Petitioner failed to show that appellate counsel was ineffective because he did not show that he was prejudiced. Specifically, the PCR Court found that Petitioner would not have prevailed on appeal if he had raised the issue raised by counsel at trial. The testimony in question was admissible during the sentencing phase to demonstrate the uniqueness of the victims and the specific harm committed by Petitioner.

Discussion

The PCR Court's determination that appellate counsel was not ineffective is supported by the record. As found by the PCR Court, the testimony to which trial counsel objected was admissible. It was relevant as victim impact testimony.

As discussed above in response to the allegation that trial counsel was ineffective in handling the objection regarding victim impact testimony from the victim's widow, (see pages 42-45), the testimony regarding the suicide attempt was properly admitted at trial. It was relevant victim impact testimony.

Even if the trial court erred in admitting this testimony, any such error was harmless. It did not have a substantial and injurious effector or influence in determining the jury's recommended death sentence. The testimony regarding the suicide attempt was not referenced by the solicitor at any other point in time during the resentencing trial, nor was it referenced by any other witness. It also was not referenced by any other witness presented at the sentencing hearing. Altogether, the testimony at issue was very limited, and Petitioner cannot show that the result at trial would have been different had the testimony not been presented. Cf. State v. Johnson, 306 S.C. 119, 126, 410 S.E.2d 547, 552 (1991). Since any error in admitting the testimony would have been harmless, Petitioner would not have been entitled to relief in his direct appeal had appellate counsel raised the claim in the same manner it was raised at trial. The PCR Court's denial of relief is supported by the record. This claim should be denied and dismissed.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court affirm the PCR Court's Order of Dismissal. Respondent further requests any other relief this Court deems appropriate.

Respectfully submitted,

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December 29, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Sumter County
The Honorable Michael G. Nettles, Circuit Court Judge
Appellate Case No. 2013-001968

BOBBY WAYNE STONE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PROOF OF SERVICE

I, Alphonso Simon, Jr., of counsel for the Respondent, certify that I have served two (2) copies of the within Brief of Respondent via U.S. mail to his attorneys of record, Emily C. Paavola, Esq., Death Penalty Resource and Defense Center, 900 Elmwood Avenue, Ste. #200, Columbia, South Carolina 29201, and to John H. Blume, III, Esq., Blume Norris & Franklin-Best LLC, 900 Elmwood Avenue, Ste. #200, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 29th day of December, 2015.

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