

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Sumter County
Michael G. Nettles, Circuit Court Judge
Appellate Case No. 2013-001968
Opinion No. 27701

RECEIVED
FEB 23 2017
S.C. SUPREME COURT

BOBBY WAYNE STONE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RESPONDENT'S PETITION FOR REHEARING

Comes now Respondent, above named, by and through the Office of the South Carolina Attorney General, and pursuant to Rule 221(a), SCACR, hereby requests this Court to rehear a portion of its opinion in this matter. Respondent would show this Court the following:

In this Court's Opinion, this Court states "[a]t the PCR trial, Stone's counsel proved through expert testimony Stone suffers from brain damage and significant intellectual impairment." Stone v. State, Op. No. 27701 (S.C. Sup. Ct. filed February 8, 2017) (Shearouse Adv. Sh. No. 6 at 32). Further, this Court begins its analysis by recognizing Petitioner suffers from organic brain damage and significant intellectual impairment. Respondent requests this Court reconsider these findings. Respondent respectfully submits this Court overlooks the PCR Court's decision not to find Petitioner

suffers from brain damage and significant intellectual impairment in the PCR action in making this assessment. Contrary to this Court's Opinion, Petitioner did not prove he suffers from brain damage and significant intellectual impairment in the PCR evidentiary hearing. The PCR Court never found Petitioner suffers from brain damage and significant intellectual impairment. Instead, the PCR Court made no findings regarding whether Petitioner has brain damage and significant intellectual impairment, even after such a request was made by Petitioner. (See App. 7292).

The PCR Court's decision reflects it did not believe Petitioner established he has brain damage and significant intellectual impairment. The PCR Court found the testimony of Dr. Merikangas was not persuasive. (App. 7361). Further, the PCR Court found that "[a]lthough he presented his uncontradicted expert opinion this court does not believe his opinion is supported by the facts and, therefore, not credible." (App. 7361). The PCR Court also found the methodology employed by Dr. Merikangas was questionable, and his conclusions were "not believable." (App. 7361-62).

These findings by the PCR Court are supported by the record. Merikangas testified that he relied upon a report presented by Dr. Fred Bookstein. (App. 4102-03). However, as Merikangas later acknowledged during cross-examination, he did not know the testing that was done by Bookstein was not generally accepted by the scientific community until around 2006.¹ (App. 4137-38). Further, Merikangas testified that he relied upon a report that was issued by Dr. Reuben Gur in which Gur concluded that Petitioner's ventricles were too large and his frontal lobes were too small. Respondent

¹ Bookstein acknowledged as much in an article titled "My Unexpected Journey in Applied Biomathematics," published in the journal Biological Theory in 2006.

would note that the reliability of Dr. Gur's methodology in volumetric structural analysis as a means of diagnosing dysfunction has been found unreliable in other cases. United States v. Lisa M. Montgomery, PACER available, C/A 05-6002-01-CR-SJ-GAF, Motion of the United States, Document 273 at pp. 1-2 (referencing September 5, 2007 notice from the Court of the Court's intention to exclude the testimony); see Smith v. State, 170 So.3d 745 (2015)(finding testimony and evidence did not support finding of Dr. Gur and another expert); Foster v. State, 132 So.3d 40 (Fla. 2013)(noting Gur's claim was directly contradicted by the credible testimony of another expert who testified Gur's methodology is not accurate or valid and the algorithm on which it is based was created with insufficient data; there were no publications or articles on this methodology since 1990; and another expert's testimony that Gur's methodology is not frequently used by neurologists and not generally accepted in the field of neuropsychology); Steven Bixby v. State, Order of Dismissal, 2011-CP-01-110, filed January 13, 2015, the Honorable Knox McMahon, Circuit Court Judge (finding no prejudice from failure to call Dr. Gur as mitigation witness as his methodology was questionable based on testimony of doctors presented at PCR hearing); Kamell Delshawn Evans v. State, Order of Dismissal, 2006-CP-23-7719, issued February 24, 2011, the Honorable Garrison Hill, Circuit Court Judge (finding counsel was not deficient in failing to call Dr. Gur for similar reasons); United States v. Duncan, 2013 WL12057465 (D. Idaho 2013)(Slip Copy)(finding Gur's conclusions questionable given his formula or algorithm did not take into account all of the testing of the defendant, including a great number of tests where the defendant scored well); United States v. Montgomery, 635 F.3d 1074 (8th Cir. 2011)(upholding exclusion of Dr. Gur's testimony regarding MRI findings, and diagnosis, and finding failure to

admit PET testimony was harmless); see also Commonwealth v. Ballard, 622 Pa. 177, 80 A.3d 380 (2013)(holding prosecution properly cross-examined Dr. Gur on the exclusion of his testimony in Montgomery, his repeated testimony for criminal defendants in capital cases, his failure to deliver a report to the state, and his personal opposition to the death penalty, because this properly impeached his testimony and qualifications and tended to show bias on his part).

Merikangas' testimony was further undermined by the fact that his determinations were not consistent with generally accepted practices within his fields. For example, Merikangas testified that he would not use the definition of mental retardation outlined in the DSM-IV, even though its definition is generally accepted as proper definition. (See App. 4139). It was reasonable for the PCR Court to question whether other aspects of his testimony regarding his diagnosis of Petitioner were based upon some different set of diagnostic criteria not generally accepted within his fields. In light of the PCR Court's decision to not find Petitioner has brain damage and significant intellectual impairment, Respondent submits this Court should reconsider its determination that Petitioner proved he has brain damage and significant intellectual impairment. Further, in light of the credibility determinations made by the PCR Court, Respondent submits this Court should reconsider its findings that the affidavits and reports of Gur and Bookstein, along with the testimony of Merikangas about brain damage, were powerful mitigating evidence.

Furthermore, the State has never conceded Stone suffers from organic brain damage or intellectual impairment. First, Respondent would note that Petitioner's statement of the case was not binding upon Respondent pursuant to Rules 208(b)(2) and 243(j), SCACR. Respondent clearly expressed its dissatisfaction with the statement of

the case presented by Petitioner by drafting its own statement of the case, consistent with the requirements of Rule 208(B)(1)(c) and 208(b)(2), SCACR. Further, Respondent has never conceded, either in the PCR trial or on appeal, that Petitioner suffers from organic brain damage. Respondent has always maintained that Petitioner has not shown there was organic brain damage, and the testimony and evidence relied upon by Petitioner to establish the existence of organic brain damage was not credible. Respondent would also note that its argument in the brief and at oral argument maintained that the PCR Court did not err in denying relief upon the allegations that trial counsel was ineffective in not investigating the existence of low intellectual functioning. At no point in either the brief or in the oral argument did Respondent concede that Petitioner suffers from organic brain damage, and none of the statements made in the brief or at oral argument were inconsistent with Respondent's position that Petitioner did not establish he suffers from organic brain damage.

Wherefore, premises considered, for the reasons stated in this petition, Respondent respectfully requests this Court to reconsider its findings regarding whether Petitioner suffers from brain damage and significant intellectual impairment. In light of the PCR Court's credibility determinations and decision not to find the existence of brain damage, Respondent further requests this Court to reconsider its findings regarding the strength of the mitigating evidence presented at the PCR evidentiary hearing regarding brain damage.

Respectfully Submitted,

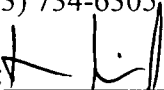
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February 23, 2017.

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PROOF OF SERVICE

I, Alphonso Simon, Jr., of counsel for the Respondent, certify that I have served two (2) copies of the within Respondent's Petition for Rehearing via U.S. mail to his attorneys of record, Emily C. Paavola, Esq., Justice 360, 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 23rd day of February, 2017.



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