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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Honorable Michael Nettles, Circuit Court Judge

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

BOBBY WAYNE STONE.. *Petitioner*,

v.

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

REPLY TO RESPONDENT'S PETITION FOR REHEARING

On February 8, 2017, this Court issued an opinion affirming the lower court's denial of post-conviction relief in the case of Petitioner, Bobby Wayne Stone. Both parties moved for rehearing. Petitioner hereby replies to Respondent's Petition for Rehearing (hereafter, "Petition").

Respondent argues that "the State has never conceded Stone suffers from organic brain damage or intellectual impairment." Petition at 4. This is not true. Respondent has expressly and repeatedly conceded that Stone is intellectually impaired. For example, Respondent argued in its post-hearing brief that Stone's trial counsel were not deficient for failing to investigate Stone's

intellectual impairment because trial counsel did, in fact, know he was intellectually impaired. App. 7226. Respondent's brief described testimony from three PCR hearing witnesses: (1) Arlene Andrews who testified, among other things, that Stone failed the first grade (along with the fourth and sixth grades), was referred to special education, had an IQ score of 69-75 at age 14, and was determined to be "educable mentally handicapped"; (2) Dr. Merikangas's testimony that school records showed Stone was always mentally deficient and that neuropsychological testing showed a twenty-point split between his performance and verbal IQ scores, which indicated brain damage; and, (3) trial counsel, James Babb, who testified he had notes reflecting Stone's low IQ and that he believed the defense presented evidence of Stone's low intellectual functioning at some point during the trial. App. 7225-26. Contrary to Babb's belief, however, none of the evidence Respondent described in its post-trial brief was actually offered to Stone's sentencing jury. App. 3391-3430. Indeed, even respondent does not seriously contended that the evidence was actually presented at trial. Respondent's arguments have focused, instead, on its position that "counsel did conduct a reasonable investigation into Petitioner's low intellectual functioning." Brief of Respondent at 31; *see also*, App. 7226 (same). Respondent cannot now legitimately claim that it has never conceded Stone's intellectual impairment.

Likewise, petitioner's counsel argued many times (both in briefing and at oral argument) that the evidence of Stone's brain damage was undisputed and not once did respondent attempt to challenge that assertion. Petitioner's Brief at 1, 38; Petitioner's Reply at 11, 17. Nor would such a challenge be effective given that the evidence offered at the PCR hearing was uncontested. At the PCR hearing, Stone presented evidence, including: neuropsychological test results; a quantitative EEG; a report by Dr. Ruben Gur describing both structural and functional brain damage shown on both an MRI and a PET scan; a report by Dr. Fred Bookstein documenting

damage to the corpus callosum; a report by Dr. James Shine describing exposure to environmental neurotoxins; school records of Stone and his siblings; and, testimony from Dr. Merikangas describing his neurological evaluation of Stone and other findings consistent with brain damage. All of the written reports were offered without objection from respondent. Respondent did not offer a single witness (expert or otherwise) who contested this evidence. Moreover, respondent did not offer any testimony from trial counsel that they investigated evidence of brain damage and found it unpersuasive because, as trial counsel explicitly acknowledged, they failed to investigate the issue of brain damage and had no strategic reason for failing to do so. App. 4362-65. Faced with this overwhelming evidence of Stone's brain damage, respondent has consistently attempted to mischaracterize the claim as one that "trial counsel failed to investigate *the cause of Petitioner's brain damage*." Brief of Respondent at 31 (emphasis added). Having succeeded at convincing this Court to treat Stone's claim exactly as it requested, respondent is now unhappy that in doing so, the Court also acknowledged the obvious fact that respondent did not, and cannot, contest Stone's brain damage itself.

Now, for the first time in its Petition for Rehearing, respondent offers a handful of criticisms of the underlying evidence of brain damage. For example, respondent claims that Dr. Merikangas "acknowledged during cross-examination that he did not know the testing that was done by Bookstein was not generally accepted by the scientific community until around 2006." Petition at 2. This attempt to undermine the legitimacy of Dr. Bookstein's work is inaccurate. The entire exchange was as follows:

> Q: Okay. Were you aware that by Dr. Bookstein's own admission that his assessments did not become acceptable within the community until around 2006?

A: That would not surprise me, but I was not aware of his statements.

Q: Okay. Why would that [not] surprise you?

A: Because medical progress is always ahead of general acceptance, and not very many people have the computer skills available to them.

Q: Okay. So in 2005, when this case was tried in February of 2005, this wouldn't have been the norm?

A: I'm not sure what you mean by the norm.

Q: Generally accepted medical practice in the state of South Carolina.

A: I can't answer that.

App. 4136-37. Clearly, Dr. Merikangas testified that he was not aware of any such statements by Dr. Bookstein, and he stated "I can't answer that" when asked by respondent to comment on when Dr. Bookstein's assessments became "the norm." App. 4137. In any event, there is no evidence that Dr. Bookstein has "admitted his work was not accepted until 2006." Petition at 2, n.1. Respondent points to an article, without citation, which is not part of the record. However, Dr. Bookstein's report in this case, available at App. 4519-4529, states that Dr. Bookstein's work was published in three peer-reviewed scientific articles in 2001 and 2002. App. 4519.

Next, respondent argues 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." Petition at 3. Respondent relies on a series of cases, which it has never previously cited, and which were all decided years to nearly a decade after Stone's resentencing proceeding. The overwhelming majority of these cases appear to turn on competing expert testimony, whereas the evidence in Stone's case was uncontested. Moreover, Dr. Gur's report in Stone's case did not rely

solely on "volumetric structural analysis," but instead contained his opinions based on his own visual analysis of the neuroimages as well as a quantitative analysis of both structural and functional brain damage.

Finally, respondent claims "[t]he PCR Court's decision reflects it did not believe Petitioner established he has brain damage and significant intellectual impairment." Petition at 2. This is not true, either. As respondent itself acknowledges in the preceding sentence, the PCR Court made no findings at all regarding whether Petitioner has brain damage. *Id.* Rather, the PCR Court simply divided this issue into separate parts based on potential causation theories and then offered a conclusory bullet-point list to dispose of each part. *See* App. 7361-62 (regarding evidence of "neurological damage from exposure to dangerous neurotoxins and other chemicals"); 7362-63 (regarding evidence of "neurological damage from maternal ingestion of alcohol during the developmental period."). The PCR Court never even discussed the evidence from Drs. Gur, Evans, Bookstein and Shine. Whatever findings the PCR court intended by its statements about Dr. Merikangas's methodology (in a section describing the PCR court's belief that there was no evidence that petitioner's mother drank alcohol), they are not a finding that petitioner failed to establish brain damage and low cognitive functioning. Both the PCR court and respondent itself approached these claims with the same understanding recognized by this Court – "that Stone does in fact suffer from organic brain damage and significant intellectual impairment." *Stone v. State*, ___ S.E.2d ____, 2017 WL 511077 at *21. This Court should deny respondent's petition for rehearing.

Respectfully submitted,

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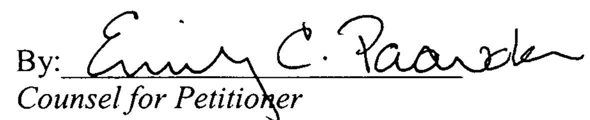
By: 
Counsel for Petitioner

March 2, 2017

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State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Petitioner's Reply to Respondent's Petition for Rehearing as served by first class United States mail, postage prepaid, this 2nd day of March, 2017, upon the following:

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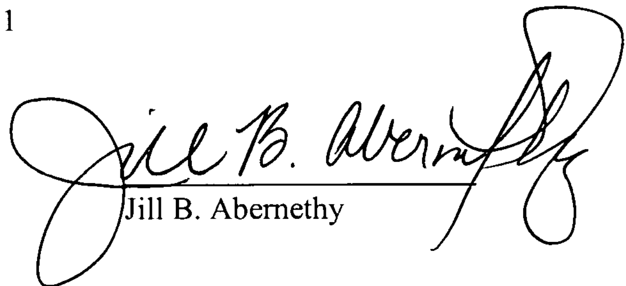

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