

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

CA No. 09-CP-23-0741

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SC SUPREME COURT

FREDDIE EUGENE OWENS. *Petitioner,*

v.

STATE OF SOUTH CAROLINA *Respondent.*

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Petitioner Freddie Owens moves for rehearing of this Court's order dated June 17, 2015, denying the Petition for Writ of Certiorari. Specifically, Petitioner believes this Court has overlooked and/or misapprehended the following facts and points of law:

I. THE LOWER COURT'S ORDER RELIES ON NUMEROUS FACTUAL "FINDINGS" THAT PLAINLY CONTRADICT THE ONLY AVAILABLE RECORD EVIDENCE.

Following an evidentiary hearing on Petitioner's claims for post-conviction relief, the parties completed post-hearing briefing in late October, 2011. App. 3560. Two weeks later, the PCR court announced its intention to deny relief and ordered counsel for Respondent to prepare an order of

dismissal consistent with Respondent's post-hearing brief. App. 3562. Petitioner objected to the lower court's proposal, noting that this Court does not approve of this practice, but has instead "strongly encourage[d]" judges presiding in capital post-conviction cases to "draft their own findings of fact and conclusions of law." *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). Petitioner further argued that South Carolina law unequivocally requires that *courts*, not *parties*, perform the critical function of objectively assessing the evidence and law in PCR cases, and formulating even-handed conclusions based on the exercise of sound, independent judgment. See S.C. Code § 17-27-80 (governing post-conviction relief cases generally) ("The *court* shall make specific findings of fact, and state expressly *its* conclusions of law, relating to each issue presented") (emphasis added); S.C. Code § 17-27-160(D) (governing capital post-conviction relief cases) ("the *hearing judge* in writing shall make specific findings of fact and state expressly *the judge's* conclusions of law relating to each issue") (emphasis added).

In addition, Petitioner noted that this Court's disapproval of this practice is consistent with a nationwide consensus. Verbatim adoption of a party's proposed findings is widely condemned because it represents "an abandonment of the duty and the trust that has been placed in the judge," *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 657 n.4 (1964), and leads instead to judgments that are self-evidently "not the original product of a disinterested mind." *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1284 (7th Cir. 1977); see also, *Shaw v. Martin*, 733 F.2d 304, 209 n.7 (4th Cir. 1984) ("The adoption of one party's proposed findings and conclusions is a practice with which we have expressed disapproval on a number of occasions."). Petitioner asserted that adoption of an order consistent with Respondent's post-trial brief would be particularly unfair in this case because Respondent's brief repeatedly relied on factual assertions wholly without support in

the record. Petitioner argued when such one-sided, willfully selective analysis is then adopted as the official court order denying post-conviction relief, the resulting disposition of a death-sentenced prisoner's constitutional claims is arbitrary and unfair in violation of the Eighth and Fourteenth Amendments, and incompatible with the requirements of South Carolina law. The PCR Court responded that Petitioner would have ten (10) days to raise any objections to Respondent's proposed order after its submission.

On February 16, 2012, Respondent submitted a proposed order that was two-hundred and seventy (270) pages long, virtually identical to its post-hearing brief, and riddled with errors. The PCR Court granted Petitioner's motion to strike the first proposed order as excessively long, and instructed Respondent to submit a revised order limited to seventy-five (75) pages. Nine months later, Respondent sent a substantively identical "revised proposed order"¹ attached to an email stating that Respondent also believed that the PCR court should write its own order. Petitioner joined Respondent's position and again requested that the PCR court "formulate its own findings of fact and conclusions of law, and reduce them to writing in an order of the Court's own creation." App. 3562-63. Eight days later, on December 13, 2012, the PCR court issued a thirty-one (31) page order of dismissal, drawing heavily from Respondent's submissions and containing many of Respondent's original misrepresentations of the record and erroneous findings of law and fact. App. 3567-97. As explained in greater detail below, the order of dismissal turns on factual conclusions that bear no relation to and completely lack support from the record below. The PCR Court's factual "findings" do not reflect the kind of careful, probing analysis that the law requires. *See, e.g., Brumfield v. Cain*,

¹ The revised order was reduced to approximately 112 pages through changes in formatting, spacing and font size, but was substantively identical to the original proposed order. App. 3563.

___ S. Ct. ___, 2015 WL 2473376 (June 18, 2015); *Sears v. Upton*, 130 S.Ct. 3259, 3266 (2010); *Porter v. McCollum*, 558 U.S. 30, 41 (2009), *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000).

II. TRIAL COUNSEL INEFFECTIVELY FAILED TO PRESENT READILY AVAILABLE MITIGATION EVIDENCE FROM PETITIONER'S SOCIAL HISTORY.

On the day of their appointment to represent Petitioner in his 2006 re-sentencing proceeding, trial counsel Kenneth Gibson and William Godfrey had only one fundamental task – to present as much mitigating information as possible to persuade at least one juror to vote for life. And, indeed, that is exactly what trial counsel claimed a desire to do and promised the sentencing jury it would hear.² There can be no genuine dispute that trial counsel failed at that task.

Following their appointment, Gibson and Godfrey waited over five months before even introducing themselves to Petitioner. They conducted no mitigation investigation of their own, but relied, instead, on a dysfunctional defense team assembled less than two months before trial. This hastily assembled team included two investigators - one of whom was unable to carry out her duties because of personal problems - who did not even meet Petitioner until five weeks before trial. App. 2056, 2315. Trial counsel relied entirely on Marjorie Hammock to be the primary vehicle through which they intended to convey Petitioner's life history, App. 2001, 2068-69, 2074-75, despite the

² Trial counsel told the jurors in opening statements that they would hear “evidence of the violence that [petitioner] has lived through his entire life. And you will come to know him as a person, basically from the time he was a young boy up to where he is now.” App. 1094. Trial counsel claimed this evidence would be detailed, and would explain “where [petitioner] came from and everything that he went through.” App. 1097. In their PCR testimony, trial counsel reiterated that their strategy was to present as complete a picture as possible of petitioner's life history in great detail. App. 2061 (“I think everybody on that team knew that I really wanted to beat to death the idea that [petitioner] had a very miserable family life which had a major impact upon him and his violence. I wanted to use that as much as I could.”); App. 2005 (“We did not make any kind of strategic decision to not present the full and complete picture of [petitioner's] background.”).

fact that trial counsel and other team members observed: (1) "she loses items given to her"; (2) there was reason to doubt whether she was "truly on board and ready to go"; (3) she had a bad attitude regarding trial preparations; (4) she was "moving slowly"; and, (5) team members were "not all that enthusiastic about Marjorie's level of preparation and interest." App. 2340-42.

Kenneth Gibson took responsibility for preparing Hammock's testimony only days before jury selection began. App. 1998-99. Prior to that, he knew nothing of the extensive mitigating evidence available from Petitioner's life history, and he remained ignorant of virtually all of the relevant details regarding that life history even after his acceptance of this responsibility. App. 2002. Gibson relied on Hammock to tell him what she thought was important. App. 2003. Throughout his representation of Petitioner, Gibson *never* read any of Petitioner's social history records, he did not interview any mitigation witnesses, and he spent a total of five hours with Petitioner discussing non-mitigation topics. App. 1997, 2002. Neither Gibson nor Godfrey ever asked petitioner about his experiences in the Department of Juvenile Justice ("DJJ"), nor did they ever ask Petitioner if he had ever been sexually abused. App. 2065.

Specifically, Ken Gibson testified about trial counsel's investigation and trial preparations as follows:

Q: [P]rior to the time you agreed to handle these two [mitigation] witnesses [Ms. Hammock and Dr. Brawley] which occurred around mid-to-late October, I guess?

A: Yeah.

Q: Had you been focusing on the subjects that they were going to testify about or were you sort of generally aware of them because of your overall involvement in the case?

- A: I was more focused on the guilt issues.
- Q: Okay. Now, had you personally reviewed any of the - Mr. Owens' social history or institutional records that were in the case file?
- A: I had reviewed the transcripts from the previous trial. So whatever is included in those previous trials, that is what I have gone over.
- Q: Had you personally interviewed any members of Mr. Owens' family?
- A: No.
- Q: Or acquaintances?
- A: No.
- Q: All right.
- A: Never did. And did not throughout the trial other than the ones that we were planning on calling.³
- Q: If additional information had been available that could have been used to present a fuller picture of Mr. Owens' background, would you have used it?
- A: Yes.
- Q: If it had been possible for you to present a fuller picture

³ Trial counsel called the following five witnesses: (1) Marjorie Hammock, who was the primary intended vehicle for conveying petitioner's life history; (2) Fain Maag, who was petitioner's elementary school teacher for one year; (3) Dr. Tora Brawley, a neuropsychologist who testified that the scope of her work was "very limited," that she was asked only "to look at his brain function," and that her findings were "not significant." App. 1482, 1484; (4) Dr. Thomas Cobb, a prison psychiatrist who had met with petitioner on "two or three" occasions for approximately 15 minutes each and claimed that petitioner's prison behavior had improved, although he had not reviewed any of petitioner's prison records; and, (5) Dr. Watts, who testified about why petitioner was first sent to DJJ, that his behavior there was "horrible," and that he was treated briefly for depression in DJJ but was shortly thereafter transferred to an adult facility where he asked for psychiatric help, but received none.

of Mr. Owens' experiences in the Department of Juvenile Justice and the effects that had on him, would you have used that information?

A: Yes.

Q: To the extent that something less than a full account of Mr. Owens' background from his earliest days to his time at DJJ did not come out at trial, was that because you or the defense team as a whole had made a strategic decision not to present what was available?

A: We did not make any kind of strategic decision to not present the full and complete picture of his background.

App. 2002-2005. Bill Godfrey similarly testified that he never spoke to Petitioner about his experiences in DJJ, App. 2065; he wanted to present a complete picture of Petitioner's life history in great detail, App. 2061, 2074; he would have wanted to present any additional information about Petitioner's background, but he was not aware of any such information, App. 2076; and, he did not have any information about Petitioner's personal experiences at DJJ apart from what was recorded in his DJJ records. App. 2076-77.

Despite their opening statement promise to present a detailed account of Petitioner's life history – one that would allow the sentencing jury to “come to know him as a person,” App. 1095, 1.6, – trial counsel ultimately presented nothing more than a handful of naked facts stated in a conclusory manner. Trial counsel's entire presentation of Petitioner's background amounts to approximately eight pages of the trial transcript. And yet, there was indeed a rich, compelling and detailed mitigation story waiting to be told on Petitioner's behalf. The Petition for Writ of Certiorari sets forth a detailed narrative describing the physical abuse, sexual abuse, neglect, violence and trauma that Petitioner experienced over the course of his life and the multiple, negative impacts that

history had on his development. See Petition for Writ of Certiorari at pp.24-48. All of this information was available to trial counsel at the time of trial. That trial counsel failed to present this story, and instead offered only a meager handful of vague, naked facts without detail, simply speaks to their inattention, rather than any reasoned strategic judgment. See *Weik v. State*, No. 2007-060700, 2014 WL 3610954, at *21 (S.C. July 23, 2014) (citing *Wood v. Allen*, 558 U.S. 290, 304 (2010), and *Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003)).⁴

Faced with this post-conviction evidence, the PCR Court denied relief by simply adopting Respondent's fabricated factual findings. For example, the PCR Court found that trial counsel made a series of strategic decisions not to present any further details regarding Petitioner's life history because they felt it would not be in his best interest. App. 3589, 3591-92. The record below flatly contradicts such a conclusion; trial counsel testified at the PCR hearing that their intended strategy was to present the fullest possible picture of Petitioner's life history and they had no strategic reason for omitting any available details of that history. App. 2002-2005; 2061; 2074; 2076. The PCR Court further concluded "any topics that [Hammock] failed to cover were addressed by the other mitigation witnesses." App. 3590. Very simply, there is no support for this assertion. At the PCR

⁴ The facts in *Weik* are notably similar to petitioner's case. In *Weik*, this Court found trial counsel ineffective for failing "to present readily available evidence concerning Weik's chaotic upbringing and dysfunctional family." *Id.* at 2. The Court noted that trial counsel presented only "limited and general" testimony regarding Weik's childhood and "offered no detail or insight" into Weik's true history of an abusive and dysfunctional childhood, "saturated with violence." *Id.* at 2, 23. The Court further noted that trial counsel failed to hire a mitigation investigator until a mere eleven weeks before trial, resulting in the "scant" social history presentation at trial. *Id.* at 4, 23. This Court rejected respondent's argument that the abundant social history evidence available to trial counsel would have merely provided a "fancier" mitigation case, insufficient to show prejudice. *Id.* at 18. Instead, the Court held that a complete and accurate presentation of Weik's social history established "a reasonable probability that at least one juror would have struck a different balance." *Id.* at 19 (quoting *Wiggins*, 539 U.S. at 537).

hearing, through witnesses and exhibits, Petitioner offered extensive mitigating evidence that was never presented at trial, as well as expert testimony explaining the results of the lifelong trauma and abuse he experienced as a child. This evidence was not presented at trial by Hammock or any other witness.

Similarly, the PCR Court concluded that even if trial counsel's performance was deficient, Petitioner suffered no prejudice because "[t]rial counsel presented a cogent mitigation case" at trial. App. 3951. That declaration not only lacks support in the record, it also lacks anything approaching the legally dispositive power attributed to it by the PCR Court's order. *Sears*, 130 S.Ct. at 3266 ("We certainly have never held that counsel's effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. To the contrary, we have consistently explained that the *Strickland* inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below.") (emphasis in original); *see also Williams*, 529 U.S. at 397-98; *Porter*, 558 U.S. at 39-41.

CONCLUSION


In sum, Petitioner's trial counsel failed to investigate and present available mitigating evidence from Petitioner's entire life history, and they specifically and expressly disclaimed any strategic reason for these omissions in sworn testimony at the PCR hearing. Petitioner suffered prejudice because there is a reasonable probability that a full and complete presentation of his life and background, if placed on the mitigating side of the sentencing scale, would have caused at least one juror to strike a different balance and vote for a life sentence. The PCR Court's decision rejecting this claim is not the product of a reasoned, independent, probing and fact-specific analysis.

Instead, it is simply the result of the lower court's uncritical adoption of a set of unsupported factual propositions set forth in Respondent's adversarial brief. Consequently, the PCR Court's decision unreasonably rests on factual findings that are clearly contradicted by the only relevant evidence available in the record. This Court should grant *certiorari* and reverse.

Respectfully submitted,

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June 30, 2015

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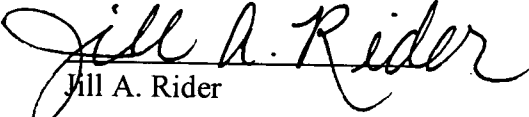
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Certificate of Service

The undersigned hereby certifies that a copy of the Petitioner's Petition for Rehearing was served by first class United States mail, postage prepaid, this 30th day of June, 2015, upon the following:

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