

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

G. Edward Welmaker, Circuit Court Judge

Appellate Case No. 2013-001945

RECEIVED

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Charles Christopher Williams,

Appellant, **S.C. SUPREME COURT**

v.

The State of South Carolina,

Respondent.

REPLY BRIEF

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THE PCR JUDGE NEVER MADE A FINDING AS TO CREDIBILITY

The State would have this Court believe that the PCR judge found investigator Vogelsang credible and presumably, attorneys John Mauldin and Bill Nettles dishonest. Despite the State's claims on pages 16, 18, 35, 74, 75 and 78 that Vogelsang was credible and that "the Petitioner fails to recognize that the testimony of Jan Vogelsang was found to be credible and relied upon by the PCR judge" (74) the PCR judge never made a finding that Vogelsang was credible. Indeed, on page 33 of Petitioner's Brief and on page 4 of Petitioner's Reply to the State's Return, Petitioner specifically disputes the State's claim that Judge Welmaker made this finding, but still the State's brief is devoid of any citation that would point to where the PCR judge allegedly made this finding.

In fact the entire State's Brief is remarkably deficient in citations to the PCR judge's order; in a 93 page brief, the State only specifically cites the PCR judge's order on 5 pages: Pages 4-6, 74 and 82. This is not surprising due to the fact that the PCR court's order concerning FAS is 12 pages long and the State's Brief is 93 pages long. On page 74 of the State's Brief is the statement from the judge that counsel "could not identify a reason why they did not develop a mitigation strategy based on Fetal Alcohol Syndrome". On page 5 of their Brief, the State cites the following from the order, "considering all of the information it had available and in consultation with its experts, trial counsel developed a cogent strategy to present mitigation evidence – including evidence of mother's alcohol addiction – but also made a strategic decision to not present to the jury evidence of brain damage or a

diagnosis of Fetal Alcohol Syndrome (though trial counsel was unable to articulate the reasons for that strategic decision).” These two statements are the closest the PCR judge ever came to discussing the trial attorneys’ testimony.

Petitioner does not claim (as the State alleges) that the PCR court must accept the trial counsels’ admissions that they failed to consider FAS. State’s Brief p. 74. Petitioner asserts the PCR court never addressed trial counsels’ testimony. The PCR court never found it to lack credibility; he never dismissed it; he never described it; he never mentioned it. The finding that counsel made a strategic decision has no explanation in the order and no evidence to support it. Indeed, the trial attorneys’ testimony is the exact opposite.

For a complete recital of counsels’ adamant denials that they ever considered FAS see Petitioner’s Brief, pages 6-8. Typical of their testimony is the following. “Question: Okay. So I think we’ve beat this horse enough. It was just never, ever brought up, to your knowledge, of FAS?” Nettles: “Right. It wasn’t ever brought up. It wasn’t discussed. It wasn’t ruled in, it wasn’t ruled out.” App. p. 3274. Mr. Mauldin testified that after being shown PCR evidence and exhibits he was “dumbfounded” as to why a certain course of action did not occur – that a natural course would be to bring in a neurologist and tell him they had evidentiary information to suspect FAS and they needed whatever testing needed to be done to determine whether it existed. App. pp. 3367-8. “And what could possibly have lead me to not conduct some sort of follow-up is just beyond my – I don’t have an explanation for it. I just don’t know. ... I surely didn’t do it intentionally. I will

assure you, I did not do that intentionally. I think that would be horrible. App. p. 3381. “And why in the world I didn’t, with these memos being provided me, why didn’t I further take the course of action that I described to Mr. Zelenka about a neurological evaluation as to that specific issue, I just – I don’t know. I can’t explain that.” App. p. 3382.¹ This is in direct conflict with the State’s allegations that trial counsel understandably chose not to pursue this unfruitful line of investigation. State’s Brief p.80.

THE STATE’S HEAVY RELIANCE ON VOGELSANG’S TESTIMONY DESPITE
THE FACT THE PCR JUDGE RARELY MENTIONED HER

But even if the PCR judge believed Vogelsang did repeatedly discuss FAS with the trial attorneys as is suggested by the State’s brief, it would suggest that Vogelsang repeatedly told the attorneys to specifically investigate FAS and yet they failed to do so. In fact the State’s Brief has heading after heading listing Vogelsang’s actions: p. 17 – *What Vogelsang learned in 2004 and 2005 and presented to Counsel and the Experts*; p. 20 – *Vogelsang and Dr. Evans*; p. 21 – *Vogelsang and Dr. Richards*; p. 22 – *Vogelsang and Dr. Hammock*; p. 23 – *Vogelsang and Alcohol Effects*. In fact the State spends almost as much time discussing Vogelsang (pp. 17-27), as Judge Welmaker spent on FAS, (App. pp. 4202-4214).

In its brief, the State includes the following factors that suggest Vogelsang

¹ In contrast, the State reports Mr. Mauldin’s testimony as, “that his normal course would be to have retained a neurologist for a MRI on the FAS issue, but could not explain the delay from September 2003 until January 2005 for the MRI.” State’s Brief p.34.

repeatedly told the attorneys they need to investigate FAS: p. 20 - Vogelsang said FAS remained a risk factor and was never eliminated. p. 23 - Vogelsang said it was important information and one of the most important factors. p. 24 - Vogelsang said she sought to highlight FAS. p. 26 - Vogelsang said she was focused on showing the symptoms of FAS in her reporting. However, all of this is absent in the PCR judge's order.

While Jan Vogelsang may have said she was not surprised FAS was not submitted, she could not and did not testify as to what trial counsels' strategic decisions were. App. p. 3247. Furthermore, trial counsel never conceded or indicated that they simply "could not recall any specific discussion about FAS". State's Brief p. 77. They adamantly denied it.

The State repeatedly states that trial experts had the information about the mother drinking during pregnancy.² This ignores, just like the PCR court's order, that the neurologist was hired on the eve of trial to do a quick MRI³, but more importantly, it ignores the affidavit of the neurologist that he never had the information that mother drank during pregnancy, and would have advised counsel to seek an expert in FAS if he had this information; furthermore, the neurologist wanted additional psychological testing done, which had already been done but that was not presented to him, and when he was shown that testing by PCR counsel, he

² In their Brief, the State repeats that the mother's drinking during pregnancy was provided to the experts, (Brief p. 4, 16, 17, 18, 25) but in only one instance (page 16) admits that the neurologist was not provided this information.

³ This is in direct contrast to the State's position that "Nor was the expert team appointed too late to provide meaningful benefit to the case." Brief p. 15.

found the petitioner had serious brain damage issues. App. p. 4851 - 4852.⁴

This is in direct contradiction to the State's assertion that "[f]ailure to micro-manage the mental health and medical testing performed by the experts is different in kind from failing to provide those experts with information needed to conduct their evaluations, which would constitute deficient performance." State's Brief p.16. It was also clear the experts were not communicating with each other. App. p. 3219, L. 8. Counsel is not only responsible to manage the experts and provide them with appropriate information, counsel is specifically advised by the ABA guidelines to investigate FAS, which is something trial counsel testified they never did.

The State also claims, "Petitioner's numerous references to the ABA guidelines speaks to the lack of prejudice." State's Brief p. 14, FN 6. The Petitioner only mentioned the ABA guidelines three times. These references were extremely brief, the first noting a list of things the PCR judge did not consider, the second noting the attorneys failed to do what the Guidelines demand, and the third noting that the damaging effects of FAS have been known for decades, evidenced by the fact that it is even mentioned in the ABA guidelines. Petitioner's Brief pp. 13,35,36. First, this Court has also found the ABA guidelines useful. *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008); *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007) (Referring to the ABA standards as longstanding norms). But more importantly, the PCR judge not only ignored the Guidelines, he failed to discuss prevailing standards

⁴ On page 32 of their brief, the State writes, "When the MRI was done, the report noted some minor neurological, and recommend going to a psychologist, which had been done earlier with Dr. Evans." [sic] As noted in the neurologist's affidavit, the point is not that the testing had been done, it is that the neurologist requested it and was never given it.

at all.

THE STATE'S INSINUATIONS THAT PETITIONER DOES NOT HAVE FAS IS COMPLETELY CONTRARY TO THE EVIDENCE AND THE JUDGE'S ORDER

The state claims that the Petitioner's FAS case is "the new mitigation case of Partial Fetal Alcohol Syndrome Disorder (PFASD) presented in 2005 as FAS ..."
State's Brief p.8. As Petitioner noted in his Reply to the State's Return, Petitioner does not know what this means. Petitioner is technically diagnosed with PFAS, but experts and the manuals often use the generic terms FAS or FASD to encompass all the definitions. The State also alleges, "Petitioner claims that Judge Welmaker failed to recognize that diagnostic criteria for FAS had been accepted prior to 2005" State's Brief p. 8. Petitioner again does not know what the State is referring to. The PCR judge never disputed that Petitioner suffers from FAS. Regardless, the diagnosis is the same now as it would have been in 2005, as can be seen by the Institute of Medicine manual⁵ (a copy of the manual was mailed to the Supreme Court for ease of reference) and the Centers for Disease Control (CDC) FAS guidelines⁶. Petitioner actually meets all the criteria described in the CDC publication, except small palpebral features, which is only one of the three facial dysmorphia noted. App. pp. 3638-43, 4573. Furthermore, these dysmorphia are formed in a narrow window of 6-8 weeks during the gestational period and are

⁵ Institute of Medicine: Fetal Alcohol Syndrome: Diagnosis, Epidemiology, Prevention, and Treatment. Stratton K, Howe C, Battaglia F (editors). National Academy Press. (Referred to in the Reply as IOM). Plaintiff's Exhibit 31; App.p. 4899. The Manual is a publication authorized and funded by the United States Congress. App. p. 4900.

⁶ *Fetal Alcohol Syndrome: Guidelines for Referral and Diagnosis* (CDC). July of 2004. App. p. 4548. For a more complete history of FAS, please see the Brief at page 9-23.

known to disappear into adulthood. IOM manual, p. 75, App. p. 4903. Finally, as noted in the IOM, the designation of “partial” is in no way meant to mean less severe and sometimes can put an individual at much higher risk for adverse life course outcomes due to it not being recognized and the individual’s ability to mask his cognitive deficits. App. p. 3707.

The State also repeatedly states the experts “opine”, when in fact they are testifying to known published standards including some of the ones just mentioned above. There are many examples, but specifically on page 49 of the State’s Brief, the State writes, “Dr. Connor opined that according to the CDC Guidelines, they need to see at least 3 domains that are in deficit.” These are the clear standards as set out by the CDC in their manual. App. p. 4551. The State also repeatedly stated Dr. Adler “opined”, for example whether all 3 elements of FAS needed to be present, that people with PFAS needed supervision, and that PFAS can be more serious than FAS. State’s Brief pp. 53, 58, 64. These are all in the IOM. App.pp. 4903-4906.

The State repeatedly refers to the “conflicting evidence about mother drinking” and notes this is “a condition precedent to FAS.” State’s Brief p. 82. The State also writes, “As Dr. Adler stated, he did not know if mother drank during pregnancy. App.p. 3742.” Dr. Adler’s actual response was, “No. I don’t know for a fact with a hundred percent certainty, I do not know. However, in this line of work, one has to use reasonable medical certainty, taking the totality of the information available and making a reasonable medical decision. That’s – I mean, I don’t have – I was asked the other day if I had video; right? Do I have blood test contemp-

oraneously of the mother? I don't have those things." Dr. Adler also testified the CDC manual reports mothers are often reluctant to admit it and that it is appropriate to have other sources confirm it despite the mother's denials. App. p. 3628-3629. Furthermore, he testified that in 2004 the team had enough evidence from other sources to confirm it and it was absolutely confirmed. App. p. 3629-3630. Finally, it was admitted by the state's expert witness at trial and is replete in the record.⁷ And even if it is not confirmed, there is an actual diagnosis of FAS without confirmation. IOM manual, p. 76. Plaintiff's Exhibit 31. App. p. 4904.

The State claims this could have removed the persuasive power of the FAS assessment and "Simply put, Petitioner's current attempt to shoehorn Williams with all the potential traits and deficits of people who suffer from PFASD or FAS in light of the entire record of Williams actual functioning in this crime to a reasonable probability would not have resulted in a new verdict." State's Brief p. 79. The State had ample opportunity to have their own experts testify if they felt we were "shoehorning" Williams into a diagnosis. The medical testimony at PCR was uncontradicted that petitioner suffered from FAS, but most importantly, reading the PCR judge's order, it seems clear that the PCR judge believed the petitioner has FAS; the PCR judge made no indication he felt the petitioner did not suffer from FAS. App. p. 4203-4208.

The State also claims, "A naked emotional appeal for mercy (based upon a purported diagnosis of fetal alcohol syndrome or fetal alcohol effects – a diagnosis

⁷ App. pp. 1877, 1978, 2179, 2180, 2182, 2214, 2236, 2237, 2252, 2262, 2331, 2336. The mother admitted heavy drinking during pregnancy at the PCR. App. p. 3412.

not then independently recognized by the DSM-IV-TR in 2005) combined with an admission the petitioner was constitutionally incapable of experiencing remorse would not reasonably have resulted in a different verdict at the punishment phase of petitioner's capital murder trial." State's Brief p. 86. Evidence of brain damage caused by prenatal ingestion of alcohol is not a "naked emotional appeal to mercy". It is the type of evidence the United States Supreme Court and the ABA has found significant mitigating evidence. *Sears v. Upton*, 130 S.Ct. 3259, 3261 (2010); see also Brief pp. 39-41. And the fact that FAS is still not in the DSM does not mean it does not exist; furthermore, pre-natal alcohol exposure and its negative effect is mentioned in the DSM-IV TR. App.p.3707. Furthermore, the cognitive deficits and resulting complications that the PCR judge never mentioned, are just like the cognitive deficits mentioned in *Hall v. Florida*, ___ U.S. ___, No. 12-10882 (May 27, 2014).

One of the reasons the evidence of FAS is so compelling is the extensive research it has received as can be seen by the 317 page appendix submitted before trial (Plaintiff's Exhibit 23, App. p. 4531), as well as the 200 page diagnostic manual published in 1996 by the Institute of Medicine, as well as the 2004 Center for Disease and Control's guidelines on FAS (See Footnote 2 and 3). Finally, Petitioner is unable to find the purported "admission th[at] petitioner was constitutionally incapable of experiencing remorse."

The State also repeatedly notes both the 2004 and 2011 MRI reports were normal. State's Brief p. 66. Dr. Adler testified that Dr. Bookstein's research (who

Mr. Zelenka had referenced earlier) showed the vast majority of neuroradiologists will not discern significant thinning of the corpus callosum in an MRI. App. p. 3790.⁸ Dr. Adler testified that both MRIs showed thinning of the corpus callosum as well as something wrong with the cingulate gyrus. App. p. 3656-3657. Part of the problem was the 2004 MRI noted "Autism spectrum disorder suspected, which has nothing to do with the corpus callosum."⁹ When the 2011 MRI report was requested, it specifically noted FAS, and the radiologist noted "mild thinning of the corpus callosum." So it was not surprising that in 2005 when the radiologist was asked to look for Autism, they did not see thinning of the corpus callosum, but in 2011 when they were asked to look for FAS, they did. App. p. 3791-3792. He also clarified that the average neurologist is looking for profound abnormalities, like tumors or abscesses, and without them they look at it as a normal brain. App. p. 3797.

The State continues and writes that Dr. Adler "went to MUSC to try to get the 2011 report changed concerning the thinning of the corpus callosum, but they refused to change the report which declared it to be a normal MRI. State's Brief p. 66-67. Dr. Adler's more complete testimony was that he had examined the petitioner the day before and decided because he was there, he would go to MUSC because a reasonable physician asks to see the study with the radiologist. App. p.

⁸ The CDC manual and other research shows FAS often causes abnormalities in the corpus callosum. App. p. 3648. That is the largest and most important part of the brain white matter; it connects the left and right sides. App. p. 3651. Mr. Mauldin's psychologist, Dr. Evans, even noted that there were problems with these connections, "as if no corpus callosum". App. p. 3651.

⁹ The State writes, "[Dr. Adler] further admitted that the 2005 MRI report indicated it was done to evaluate for congenital anomaly versus focal injury. App. p. 5036." Page 5036 is the actual MRI report, which clearly indicates, "Autism. Evaluate for congenital anomaly versus focal injury." And, "Autism spectrum disorder suspected." See App. p. 3791 for the actual testimony.

3774. That his neuroradiologist in Seattle opined there was moderate thinning of the corpus callosum. App. p. 3659. That when he went to MUSC he reviewed the study with a Dr. Harrington who offered to measure the corpus callosum, and Dr. Harrington agreed it was more than mild thinning. App. p. 3774. It was thinned more than fifty percent. App. p. 3659. They tried to contact the original reviewer to clarify whether it was mild or moderate thinning. App. p. 3788. That Doctor never got in contact with Dr. Adler. App. p. 3795. Mr. Zelenka's follow up was, "[Y]ou went down to MUSC and sought to get the 2011 report changed with respect to the thinning issue on the corpus callosum. And the – as far as you know, they've been unable or unwilling to change the report; correct?" App. p. 3799. Finally, Petitioner would still meet the definition of PFAS even if there was no visible damage to the corpus callosum. App. p. 3798. Again, if the State wanted to dispute the fact that Petitioner has FAS, they should have presented their own experts or made a Rule 59 motion to the judge clarifying his order.

THE PCR JUDGE NEVER FOUND THAT FAS WAS A DOUBLE EDGED SWORD

And while the State would like to posit that FAS is a double edged sword, the United States Supreme Court and multiple jurisdictions are in direct contradiction to this opinion. Petitioner's Brief p. 39-41. But more importantly, the PCR court never indicated that this was in any way why he felt the petitioner was not prejudiced. He relied on *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998) and *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006) for the proposition that FAS was a fancier mitigation package. This is discussed on page 39 of petitioner's Brief,

but the most significant point is that in *Jones*, the PCR team attempted to put in additional evidence of organic brain damage. In Williams' case, the trial attorneys never put in evidence of organic brain damage and Petitioner's massive cognitive deficits, similar to mental retardation. App. p. 3446.

Furthermore the State is inaccurate in citing Dr. Brown's testimony as evidence that an FAS diagnosis would reinforce the risk of future dangerousness. State's Brief p. 85-86. Dr. Brown clearly testified that people with FAS that are in a structured environment such as prison, have relatively stable behavior, and in fact they are more likely to be victims. App. p. 3852. More importantly, any potential mitigation evidence can be harmful in some ways and if this argument is accepted the failure to present mitigation would never be prejudicial.

The State also takes issue with Dr. Brown's opinion that the petitioner was easily suggestible and changed his story under the skilled questioning of Dr. Pam Crawford. Dr. Brown's testimony about Williams' suggestibility was based on the Gudjonsson test that is known and used by forensic psychologists; Gudjonsson was a former police officer from Iceland that became a psychologist and spent his life's research on suggestibility in the criminal context. App. p. 3893. The test showed Williams was highly susceptible to suggestion and the results explain why he dramatically changed his statements given to officers and the negotiator - that he was not planning on killing the victim or that he was not sure he was going to kill the victim beforehand. App. p. 3895. This changed with Crawford asking the leading question, "So last night you decided to kill her?" and Williams responding,

“Yeah.” Another example of this manipulation is Crawford wanting Williams to make sure he was intent on killing the victim because that will be helpful to the negotiators to let them know they did not say the wrong thing to set him off. App. p. 2913. Regardless, the PCR judge did not find this testimony lacked credibility. There was no evidence to suggest the Gudjohnson test is not the standard in the industry.

The State also claims that Dr. Brown admitted that the intent to kill did not occur as an irresistible impulse and cites App. p. 3914. State’s Brief pp. 72, 78-79. That is not the question the State asked. The State asked Dr. Brown, “And that intent to kill her did not occur as a result of an irresistible impulse that happened at ten o’clock on that day; did it?” The murder happened at almost noon. Dr. Brown’s testimony was that because of the petitioner’s deficits, and also because of the struggle, that he could not control himself. Petitioner’s counsel specifically asked, “At that moment could he control himself?” App. p. 3901. Dr. Brown admitted the petitioner had controlled himself at other times in his life. Just because petitioner did not randomly run red lights or run naked down the street, does not mean he was always in control. Whether he could control himself at other times or at 10:00 AM is not the appropriate question.¹⁰

¹⁰ State’s Brief p.70. In a footnote, the State disagrees with Dr. Brown’s testimony that petitioner’s hiding in the closet was illogical and instead determines, “if the desire was only to kill the victim and torture her by delaying committing the act, but to survive, the best action would be to drop the weapon and hide knowing that SWAT was there.” The PCR judge certainly made no finding in this regard. But it is clear from the testimony, that Dr. Brown was saying it made no sense to hide in the store. That if Williams plan was to not get caught, he certainly had never created a sophisticated plan to get away with the murder. Despite what the State says, if Mr. Williams was trying to survive at that point in time, with hundreds of SWAT officers surrounding the building, the best thing for him to do would be put his hands up in the air and stay in plain view. It would certainly not be part

The State also claims Dr. Brown testified people with FAS cannot make long term plans. State's Brief p.79. The State also claims Dr. Brown "thought the fact of making lists is evidence of executive function impairment". State's Brief p. 69. That is not what she said. She testified people with FAS made plans, but the plans were faulty. App. p. 3820. As evidence she noted Williams writing down the note to "get cigarettes" during the hostage standoff. The State also claims Dr. Brown ignored overwhelming evidence of planning and premeditation and instead merely relied on testing that showed Petitioner was "suggestibile". State's Brief pp. 80-81. This not only ignores Dr. Brown's testimony, it also ignores Dr. Halleck's testimony about the impropriety of Dr. Crawford's testimony. More importantly, the testimony that Williams was unable to conform his actions because of FAS was not contradicted; at best the testimony of the trial forensic expert, Dr. Halleck, was extremely similar; that Williams was having a terrible time conforming his actions. App. p. 2318.

ADDITIONAL MATTERS

And despite the State's assertion, without reference to the transcript, that "the psychiatrist [Dr. Halleck] would be appropriate in making [a FAS] determination" State's Brief, p. 77, the PCR testimony was that a medical doctor has to make the actual diagnosis, but that the process involved a multi-disciplined team working in connection with knowledge of FAS. App. p. 3447. There is no testimony that Dr. Halleck or anyone else on the team had any expertise in FAS or that he could make such a diagnosis.

of anyone's sophisticated plan to think, "I'll kill her and then go hide in the closet."

On page 42 of their brief, the State failed to include the expert's use of the phrase, "per se" at the end of the following statement: The neuropsychological assessment was not designed to measure damage to the brain. State's Brief p. 54. The State notes that Dr. Adler did not see the records on a 2003 hospital visit caused by petitioner's attempt at suicide, a 2011 MRI report, and the petitioner's birth records. Petitioner's counsel provided the 2003 records to Dr. Adler on re-direct and Dr. Adler reviewed those records at that time and did not change his opinion; he also reviewed the report and discussed it. App. p. 3786. He verified that no birth records could be found despite assiduous efforts. App. p. 3737. The State also writes, "[Petitioner] claimed to have bought the shotgun the year before." State's Brief p.81. This was undisputed at trial. Petitioner bought the shotgun before he ever met the victim. App.p.1766.

THE PCR JUDGE FAILED TO REWEIGH THE EVIDENCE

Finally, while the State notes the PCR judge has to reweigh evidence in aggravation against the totality of evidence in mitigation, State's Brief p. 12, the PCR judge never specifically made a finding or ruling that was what he did. Instead, despite all the evidence to the contrary, he found trial counsel made a strategic decision not to present FAS, without ever addressing counsels' denials to that effect or their testimony that they would have wanted this testimony in front of the jury. He then found the PCR case would have simply resulted in a fancier mitigation case without ever acknowledging or discussing the fact that FAS and organic brain damage are uniquely mitigating evidence. More importantly, the new

experts gave uncontradicted opinions that petitioner had severe cognitive deficits, impulse control problems and could not conform his actions to the law.

The PCR Judge relied on *Jones* for the proposition that the PCR case was a fancier mitigation case. Williams case is far more like *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Rompilla v. Beard*, 545 U.S. 374, (2005), and in our own state, *Von Dohlen v. State*: "strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgment support the limitations on investigation.... A decision not to investigate thus must be directly assessed for reasonableness in all the circumstances." *Von Dohlen v. State*, 360 S.C. 598, 306, 602 S.E.2d 738 (2004) (Quoting *Wiggins* and *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). First, there simply is no evidence of a strategic decision. But more importantly, there is no evidence supporting the fact that the attorneys were reasonable in failing to continue to research Williams' organic brain damage or the effects of the mother's drinking. There is no evidence either attorney asked any of the experts why the mother's drinking during pregnancy was important or how it could cause organic brain damage. Furthermore, there is specific evidence from the neurologist hired on the eve of trial, that if the attorneys had provided him with this information he would have specifically told them to rule out FAS. There is uncontradicted expert testimony that Petitioner suffers massive cognitive deficits recognized as uniquely mitigating which the trial attorneys clearly failed to investigate. This matter should be remanded at a minimum for a new sentencing. In the alternative, is should be remanded for specific findings of fact as noted below.

THE STATE'S FAILURE TO HEED THE JUDGE'S WARNINGS THAT HE WOULD NOT GRANT ANOTHER EXTENSION TO FILE POST HEARING MEMORANDA AS WELL AS THE STATE'S FAILURE TO HEED THE JUDGE'S WARNING THAT ALL POST TRIAL MOTIONS HAD TO BE MADE ON TIME.

In footnote 4, the State asserts:

Importantly, the Petitioner ignores that at the conclusion of the PCR hearing, Judge Welmaker indicated at the conclusion of the hearing after closing arguments that he would give findings of fact after to the parties after reviewing the hearing transcript prior to the submission of findings of fact. [sic] App.p. 4014-4015. The State had been similar arguments [sic] about findings and conclusions in its closing statement to Judge Welmaker at the conclusion of the hearing on February 6, 2013 which are presented in the earlier Return and the Brief of Respondent. See App.p. 3976-3997, 4008-4010. See also App. 5075 – June 9, 2013 email noting the State's request for fact-finding on particular issues. When the judge's law clerk submitted his proposed order for comment on July 17, 2013, counsel for Respondent responded that it use the order to address its final post-hearing memorandum thinking at that time it would address the finding of fact that Judge Welmaker suggested he would make for the parties at the February 2013 hearing and requested in the June 9, 2013 email. [sic] App.p. 5079.

[Italics and bold in original]. State's Brief p. 7. Petitioner is not completely sure what the State is saying in the above footnote, but if he is implying that it was Judge Welmaker's fault for not supplying additional findings of fact or for not waiting until the State could "use the order to address its final post-hearing memorandum", Judge Welmaker could not have been more clear about his timetable and the necessity for responding promptly. The judge clearly indicated he was unlikely to grant another extension for memorandum after June 10, 2013. The judge's July 17, 2013 email that the State references, clearly stated Judge Welmaker wanted to finalize the order *before* the beginning of August.

Furthermore, the email anticipated that Judge Welmaker would file the final order “early next week”, and finally that “any motions should be promptly made pursuant to the relevant rules of court. I [the law clerk] do not expect the Judge to be amenable to any extensions.” App. p. 5073-5078.

Furthermore, the State originally objected to potential delay in the case and specifically requested that the case proceed efficiently. App. p. 5058-5059. They even indicated to Judge Welmaker that the Supreme Court had made these cases the highest priority and specifically asked that the matter “be set within a reasonable time as is the intent of the statute 17-27-160 with that expectation that it be set within 180 days of that first, uh, time.” App. p. 5064-5066. And the judge originally scheduled the case for July 16, 2012. App. p. 5070. The State should not be allowed to complain to this Court that the PCR judge failed to wait on their post trial memorandum when the State was the one who was initially asking the judge to speed the matter along.

The State notes that Petitioner takes issue with the PCR judge’s survey of cases where FAS was presented and a death sentence occurred. On page 82 of the State’s Brief, the State concluded:

This analysis was plainly a review to the [*sic*] Dr. Adler’s testimony where he stated that some kind of information that he had presented in William’s case had been presented in another penalty phase case and still resulted in a life sentence. As the PCR court found that assessment on prejudice needed to be viewed from the entire record in this particular case, not the mere fact that a similar diagnosis may have been presented in a different case with different aggravation and other mitigation. Plainly, Judge Welmaker was rejecting the underlying assertion by Petitioner that the mere presentation of FAS automatically would require a new trial or satisfy the prejudice prong.

Plainly, this portion of the Order was a collateral portion of the reasonable assessment and reaction to a suggestion that the presentation of FAS would always result in a life sentence (or acquittal or GBMI verdict).

In contrast to what the State writes, the PCR judge introduced his survey as follows: "This Court also notes that a survey of jury verdicts in sister jurisdictions shows that defendants are often sentenced to death in spite of evidence offered in mitigation that the defendant had fetal alcohol syndrome or organic brain damage." App. p. 4213. He never mentions Dr. Adler. He never found "that assessment on prejudice needed to be viewed from the entire record in this particular case... ." That is what he should have done; *Sears v. Upton*, 130 S.Ct. 3259 (2010). But instead he just listed cases where FAS was presented and death still resulted.

There is no "underlying assertion by Petitioner that the mere presentation of FAS" would automatically require a new trial. The Petitioner asserts the PCR judge never considered Petitioner's massive cognitive deficits similar to mental retardation, his childlike mentality, any of the trial attorneys' admissions that they would have liked to have had this evidence before the jury, the divided jury and a host of other compelling factors. Despite what the State says, there is no evidence the PCR judge weighed any of these factors and instead he improperly relied on the fact that other people had received a death sentence with FAS. Petitioner made no suggestion that FAS would always result in a life sentence and Petitioner has never even mentioned acquittal in this case. Saying this was "plainly" a reaction to that non-existent suggestion, is a culmination of the non-existent findings attributed to

the PCR judge; factors the State could have raised under South Carolina Rule of Civil Procedure 52 or 59. *Marlar v. State*, 375 S.C. 407, 653 S.E.2d 266 (2007):

We take this opportunity to reiterate our admonition that "[c]ounsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it. Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCP, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by 17-27-80 and Rule 52(a), SCRCP." *Pruitt v. State*, 310 S.C. at 256, 423 S.E.2d at 128.

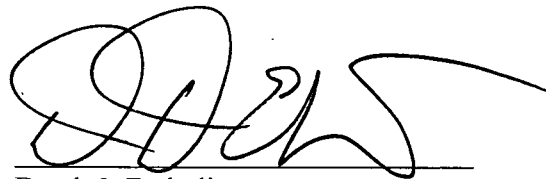
Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992):

We recognize the immense task imposed on the Assistant Attorneys General representing the State in these actions, the pressure on judges to hear and decide numerous cases in one term, and the burdens placed on lawyers appointed to represent PCR applicants. However, failing to address the merits of issues which have been fairly raised in these actions does nothing to alleviate these problems but rather exacerbates them. We are confident that in the future all those involved in post-conviction matters will do everything in their power to ensure that remands such as the one we order today will no longer be necessary.

CONCLUSION

For the reasons stated, Petitioner asks this Court to vacate the conviction, or in the alternative, to remand for a new sentencing.

Respectfully submitted,
February 4, 2016



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THE STATE OF SOUTH CAROLINA

In The Supreme Court

RECEIVED

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

FEB 09 2016

G. Edward Welmaker, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2013-001945

Charles Christopher Williams,

Appellant,

v.

The State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served a copy of the Reply Brief of Petitioner on the State of South Carolina, by depositing a copy of it in the United States Mail, postage pre-paid, to his attorney of record, Donald J. Zelenka, at the Attorney General's Office, at POB 11549, Columbia, SC 29211-1549, on this day.

February 5, 2016



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