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December 27, 2016

The Honorable Scott S. Harris
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543

RE: Charles Christopher Williams v. The State of South Carolina: 16-5909
Reply to Brief in Opposition

Dear Mr. Harris:

Enclosed, please find the original and ten (10) copies of my reply. In addition, there is one separate Certificate of Service pursuant to Rule 29.

Sincerely,

Derek J. Enderlin

cc The Honorable Daniel E. Shearouse
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No. 16-5909

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES CHRISTOPHER WILLIAMS, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA CIRCUIT COURT

PETITIONER'S BRIEF IN REPLY

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December 28, 2016

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ARGUMENT

Throughout this procedure, the State has repeatedly tried to substitute its findings for the PCR judge's non-existent findings: The State alleges that FAS is a double-edged sword which would have put the Petitioner in more danger if it was introduced, despite the fact the PCR judge never remotely addressed that argument. The State has repeatedly alleged the PCR judge found a mitigation investigator credible and presumably the attorneys not credible, despite the fact that Petitioner has repeatedly noted there is no indication of this in the record. The State has repeatedly insinuated that the Petitioner does not have FAS, despite the fact that the PCR judge's order seems to accept that he does. The State argues trial counsel could not recall any specific discussion of FAS, that they could not recall or explain why they did not further investigate FAS, that they had an awareness of the issue and reasonably chose not to further pursue it at trial. In reality, trial counsel was dumbfounded they missed it.

DOUBLE EDGED SWORD

While the PCR judge never mentioned the double-edged sword argument or anything like it, if the PCR judge did in fact believe that FAS was a reason to execute the Petitioner, rather than a reason to spare his life, that analysis is clearly at odds with this Court's most recent decisions in *Hall v. Florida,* 572 U.S. ___, 134 S.Ct. 1986 (2014) and *Atkins v Virginia*, 536 U.S. 304 (2002). The State also alleges that because of FAS the Petitioner was incapable of remorse and unable to control his aggressive, anti-social, impulses (Brief in Opposition, Page 37) although there is

no findings or testimony to the existence of these characteristics in the Petitioner. Actually, 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. Still, the state asserts this is a double-edged sword, because "a finding of FAS meant petitioner was permanently marked as brain altered". (Brief in Opposition, Page 37)

The State may be correct that the PCR judge believed the Petitioner should be executed because he was brain damaged. As the State notes in Footnote 6, individuals that are found Guilty But Mentally Ill (GBMI) are not spared the death penalty in South Carolina. *South Carolina v. Wilson*, 413 S.E.2d 19, 27 (1992) (A defendant is GBMI if because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law). Petitioner argued that a GBMI finding should bar his execution, but in *Wilson* our Supreme Court was clear that just because a defendant cannot control his actions, that does not make him in any way less culpable. They specifically rejected the notion that a death sentence would not serve a penological goal and instead found that retribution is served by the execution of one who is GBMI. If the State is correct that the PCR judge felt the Petitioner was even more deserving of death because of his lifelong and permanent brain damage, this Court should bar the death penalty in this case as cruel and unusual. Petitioner would also agree with *Amicus Curiae* that Petitioner's intellectual disability should bar him from execution, and at a

minimum this matter should be stayed pending this Court's decision in *Moore v. Texas*, (No. 15-797).

Furthermore, it was impossible for the South Carolina Supreme Court and it is impossible for this Court to determine whether or not the PCR judge believed Petitioner was GBMI, whether he had FAS, whether he was intellectually disabled, whether he had massive cognitive deficits and executive functioning problems, or whether he in fact had the mentality of a nine year old child. Without the PCR judge making adequate findings of fact, it was impossible for the South Carolina Supreme Court to have adequately determined whether trial counsels' actions were "reasonable under professional norms." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010).

SPECIFIC FINDINGS

Petitioner has never contended that this Court should create a "mandatory procedure" that state courts make findings of fact "concerning all matters deemed necessary by a criminal defendant." (Brief in Opposition, Page 2) And as Petitioner noted in the lower courts, Petitioner has never asserted that the constitution requires "a state court to expressly accept or reject each item of evidence". (*Id.*, Page 5). Nor does Petitioner claim, as the State has repeatedly alleged, that the PCR court must accept the trial counsels' admissions that they failed to consider FAS. (*Id.*). Petitioner asserts the PCR court failed to make sufficient findings of fact and that is why the State has been compelled to make up their own findings of fact. Findings concerning the attorneys' testimony is a good example. The PCR judge

never addressed trial attorneys' testimony. He never found it to lack credibility; he never dismissed it; he never described it; he never mentioned it.

Petitioner also denies that "He further complains that hearing judge did not summarize the effects of his experts testified about in his order or acknowledge in his order that the A.B.A Guidelines for Death Penalty Defense mentioned fetal alcohol syndrome in two places." *Sic.* (Brief in Opposition, Page 4) Petitioner instead complains that there is no indication the PCR judge considered any of this evidence or what professional norms he relied upon. Again, it is entirely consistent with the PCR judge's order that he believed Petitioner had horrendous cognitive deficits, severe executive control problems, the mentality of a nine year old, and an inability to control his actions, and the PCR judge believed that only made the Petitioner more worthy of execution.

Petitioner also claims that one of the few findings the PCR judge made, that counsel made a strategic decision not to present FAS, has no explanation in the order and no evidence to support it. Just as Justice Hearn remarked at oral arguments, that finding is "troubling" and, "it's really clear from reading [the trial attorneys'] testimony, that they just missed fetal alcohol syndrome. They didn't make a strategic decision not to present evidence on it."[1] [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judments support the limitations on investigation." *Hinton v. Alabama*, 571 U.S. ____, 134 S.Ct. 1081 (2014).

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1 Video Portal, Oral Arguments of South Carolina Supreme Court, (March 22, 2016: Minute 19:20 and again at 20:18), http://media.sccourts.org/videos/2013-001945.mp4

As part of the State's double-edged sword argument, the state refers to where the PCR judge "showed cases where evidence of FAS had been admitted and a death verdict still occurred." (Brief in Opposition, Page 35, Footnote 20):

> In the state court, Petitioner took issue with the PCR Court's survey which showed cases where evidence of FAS had been admitted and a death verdict still occurred. Brief of Petitioner p.41. [sic] App.p. 4212-13. This analysis was plainly a review to the [*sic*] Dr. Adler's testimony where he stated that same 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. App.p. 3718. 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 the testimony of Dr. Adler that his testimony resulted 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 and it is unfathomable why he would need to have a "specific reaction" to Dr. Adler's testimony, instead of simply reweighing the evidence in aggravation and mitigation. 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*, 561 U.S. 945 (2010). But instead he just listed cases where FAS was presented and death still

resulted.

As Petitioner noted in the lower court, there is no "underlying assertion by Petitioner that the mere presentation of FAS" would automatically require a new trial. 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.

REMANDING FOR SPECIFIC FINDINGS

The State claims the Petitioner did not ask the South Carolina Supreme Court to remand the case to the state PCR court to make further specific findings of fact in violation of S.C. Code Section 17-27-80. (State's Brief in Opposition, page 2). While it is true the Petitioner focused on the fact that there was no evidence supporting the PCR judge's conclusion that trial counsel made a strategic decision not to present FAS, the petitioner did in fact also ask the South Carolina Supreme Court, in the alternative, to remand the case for specific findings of fact, "as noted below". (Petitioner's Reply Brief, page 17). Then there is a discussion following on pages 20 and 21 of the Reply Brief regarding the non-existing findings and the rules of procedure and cases that detail and cite S.C. Code Section 17-27-80 and the procedures to follow when a PCR judge fails to set forth the findings as required by that statute. In fact Petitioner cited the same case, *Pruitt v. South Carolina*, 423 S.E.2d 127 (1992), that the State cites in support of their position. (Petitioner's Reply Brief, Page 21).

THE FAILURE TO MANAGE TRIAL EXPERTS

The State repeatedly alleges that trial experts had the information about the mother drinking during pregnancy, but in only one place acknowledges that the neurologist (Dr. Griesemer) did not have this information. (Brief in Opposition, Page 15). 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." (Brief in Opposition, Page 14). 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. More importantly, this clearly ignores, as did the PCR judge's order, the fact that one of the trial experts (Dr. Jim Evans) told the team information did not seem to pass from side to side in Williams' brain, "as tho no corpus callosum" [2], and the trial attorneys did not know what a corpus collosum was. Even if trial counsel is not required to share with their neurologist that their client's mother drank during pregnancy, along with other important testing showing dysfunction in the client's brain, professional norms demand trial counsel at a minimum ask their expert, "What is a corpus callosum?".

The State notes that Dr. Griesemer reported the MRI showed a normal brain. (Brief in Opposition, Page 10). The PCR experts explained that the MRI actually

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2 In the petition, the undersigned mistakenly stated that this information came from the neurologist. (Cert Petition, Page 9). Actually, Dr. Evans is a neuropsychologist.

showed the corpus callosum thinned by as much as fifty percent. They also discussed research explaining why this is often missed in FAS patients. App. p. 3790. Especially when the MRI is for "Autism spectrum disorder suspected", which has nothing to do with the corpus callosum. App. p. 3791. More importantly, the PCR judge never discussed any of this.

THE PCR JUDGE NEVER FOUND THE MITIGATION INVESTIGATOR CREDIBLE

The State has consistently alleged that the "testimony of Jan Vogelsang was found to be credible and relied upon by the PCR judge to show that counsel's investigation was reasonable and preparation was not constitutionally deficient." (State's Brief in opposition, page 27; See also pages, 15, 28). For the first time in these proceedings the State has acknowledged, that the PCR judge did not "expressly" make a finding of credibility regarding the mitigation investigator. (Brief in Opposition, Page 5). Petitioner has repeatedly disagreed that the PCR judge made this finding, but if the PCR judge did find the investigator credible, and the two attorneys and neurologist not credible, it was incumbent upon him to expressly make that finding.

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 its brief, the State includes two pages of Vogelsang's testimony

never mentioned by the PCR judge. The State indicates she had extensive discussions with trial counsel regarding the red flags of FAS. (Brief in Opposition, Pages 15-17). 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, Vogelsang testified she was not an expert in FAS, and regardless, she could not explain why the trial attorneys never asked their neurologist about FAS or at a minimum asked Dr. Jim Evans what he meant by their client not having a corpus callosum.

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

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 ..." (Brief in Opposition, Page 8, 31). As Petitioner has repeatedly noted in prior filings in the lower court, 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 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 Institue of Medicine manual and the CDC guidelines. (See Petition, Page 8, Footnote 7).

The State continues to discount the FAS diagnosis by repeatedly refering to the "conflicting evidence about the mother drinking", and also writes, "As Dr. Adler stated, he did not know if mother drank during pregnancy. App.p. 3742." (Brief in Opposition, Page 34; See also, Page 24, Footnote 15). Dr. Adler's actual response

was, that he did not know with a hundred percent certainty, but that the standard was a reasonable medical certainy. He then gave the example that he did not have a video tape or contemporaneous blood tests, but that in 2004 the team had enough evidence from other sources to confirm the mother's drinking and it was absolutely confirmed. App. p. 3629-3630. And despite the State's assertion that it is "a condition precedent to FAS", even if drinking is not confirmed, the Institue of Medicine has an actual diagnosis of FAS without confirmation. 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." (Brief in Opposition, Page 31). 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, 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 not then independently recognized by the DSM-IV-TR in 2005) combined with an admission the petitioner was constitutionally incapable of experiencing remorse[3]

3 Petitioner is unable to find the purported "admission th[at] 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." (Brief in Opposition, Page 37). Evidence of brain damage caused by prenatal ingestion of alcohol is not a "naked emotional appeal to mercy". It is the type of evidence this Court and the ABA has found significant mitigating evidence. *Sears v. Upton*, 130 S.Ct. 3259, 3261 (2010). And as *Amicus Curiae* note, Petitioner would be viewed as intellectually disabled under the DSM V, because proof of an IQ below 70 is no longer required.

IRRESISTIBLE IMPULSE

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. (Brief in Opposition, Page 32). As noted before in the lower court, the State was inaccurate in its description of Dr. Brown's testimony. 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 immediately preceding the shooting, that Petitioner could not control himself. Petitioner's counsel specifically asked Dr. Brown, "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.

The State also claims Dr. Brown testified people with FAS cannot make long

term plans. (Brief in Opposition, Page 32). 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 that a sophisticated plan would not end in hiding in a closet in a grocery store surrounded by police, SWAT and a helicopter; nor would a sophisticated plan list "get cigarettes" or include running out of gas at the front of the store. App. p. 3882-3889. The State also claims Dr. Brown ignored overwhelming evidence of planning and premeditation and instead merely relied on testing that showed Petitioner was "suggestibile". (Brief in Opposition, Page 33). The Gudjohnson test was one of eleven assessments given to Petitioner, and one of nine that he failed. Dr. Brown relied on all of those massive deficits. 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. Most importantly, these are again the State's "findings"; the PCR judge never addressed these issues.[4]

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, the PCR judge never

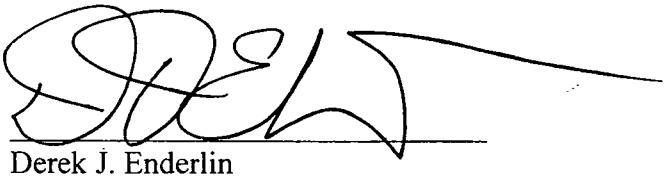
4 In addition, the State in its Brief and in the lower court, without reference to the transcript, alleges that "the psychiatrist [Dr. Halleck] would be appropriate in making [a FAS] determination" (Brief in Opposition, Page 29), the PCR testimony was that the actual diagnosis must be made by a medical doctor, 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. Furthermore, the State also writes without citation to the record; "[Petitioner] claimed to have bought the shotgun the year before." (Brief in Opposition, Page 34). As noted in the lower court, this was undisputed at trial. Petitioner bought the shotgun before he ever met the victim. App.p.1766.

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, that the new experts gave uncontradicted opinions that petitioner had severe cognitive deficits, impulse control problems and could not conform his actions to the law; and the PCR judge failed to weigh those factors against the one aggravator, kidnapping. The PCR judge failed to assess the probability of a different outcome by considering the trial and PCR mitigation and reweighing it against the evidence in aggravation. *Porter v. McCollum,* 558 U.S. 30 (2009).

CONCLUSION

For the reasons stated, Petitioner asks this Court to grant the writ of certiorari, or in the alternative, to remand for additional findings

Respectfully submitted,
December 28, 2016



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