

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

JACK FOSTER OUTTEN,                    )  
  )  
                  Petitioner,            )  
  )  
                  v.                    ) Civil Action No. 98-785-SLR  
  )  
RICK KEARNEY, Warden,                )  
Sussex Correctional                    )  
Institution, and M. JANE              )  
BRADY, Attorney General,             )  
  )  
                  Respondents.        )

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Ricardo Palacio, Esquire, of Morris, James, Hitchens & Williams,  
Wilmington, Delaware, and John P. Deckers, of Wilmington,  
Delaware, attorneys for Petitioner.  
  
Loren C. Meyers, Esquire, and Thomas E. Brown, Esquire,  
Department of Justice, Wilmington, Delaware, attorneys for  
Respondents.  
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**MEMORANDUM OPINION**

Dated: March 28, 2002

Wilmington, Delaware

**ROBINSON, Chief Judge**

**I. PROCEDURAL BACKGROUND**

In 1993, petitioner Jack Foster Outten was convicted by a Delaware Superior Court jury of first degree murder and related charges. Petitioner received a sentence of death. On direct appeal, the conviction and sentence were affirmed. Outten v. State, 650 A.2d 1291 (Del. 1994).

In his application for state post-conviction relief, petitioner claimed ineffective assistance of counsel in both the guilt and penalty phases of his trial, specifically: 1) failure of trial counsel to move for severance at trial; 2) inadequate psychiatric investigation by trial counsel; 3) failure to adequately investigate the case prior to trial; 4) failure to investigate the availability of witnesses for the penalty hearing; 5) ineffectiveness in advising petitioner not to testify; and 6) failure to file a motion for new trial due to Christine Gibbons' perjury. In response, the Superior Court expanded the record by requesting responses from petitioner's trial counsel. Both the State and petitioner filed responses to trial counsel's affidavit. The Superior Court thereafter concluded that an evidentiary hearing was not warranted and denied petitioner's motion in December 1997. That decision was affirmed on appeal. Outten v. State, 720 A.2d 547 (Del. 1998).

Petitioner has applied for federal habeas relief. In connection with his habeas application, petitioner has moved for an evidentiary hearing to expand the record in the following respects: 1) claims relating to Christine Gibbons, the State's primary witness against all three defendants at trial; 2) a claim relating to trial counsel's failure to present a coherent case of mitigation at sentencing; and 3) a claim relating to petitioner's allocution at sentencing.

## **II. FACTUAL BACKGROUND<sup>1</sup>**

On January 11, 1992, Jack Outten and Nelson and Steven Shelton, along with Christine Gibbons, spent the day drinking heavily at various locations. Nelson and Steven Shelton were brothers. Outten was their cousin. Gibbons was Nelson's girlfriend. Their last stop of the day was a bar they called the "Green Door." While inside, Gibbons struck up a conversation at the bar with the victim, Wilson Mannon.

After last call at 1:00 a.m., Mannon, Outten, Gibbons, and the Sheltons left the Green Door. Nelson drove them in his car to an isolated street in Wilmington, Delaware, where the three defendants pulled Mannon from the car and beat him severely. These beatings caused Mannon's death. Over the course of the investigation and trial, Gibbons gave multiple accounts of what

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<sup>1</sup>The facts are taken from the Delaware Supreme Court's decision in Shelton v. State, 744 A.2d 465, 473-74 (Del. 2000).

occurred that night.

Gibbons initially testified that Nelson and Outten beat Mannon to death, first by punching him in the face, then by striking him in the head with a heavy object. Although Steven was at the scene and took some of the victim's money and jewelry, Gibbons testified that he went behind the car to be sick and did not participate in the beating.

After her initial testimony, Gibbons requested to retake the stand because she had lied during her previous testimony. The trial court permitted her to recant any prior testimony. Gibbons' new testimony was essentially the same, except she directly implicated Steven in the beating. This time, Gibbons testified she saw Steven kick and punch Mannon many times in the face. Gibbons further testified that Steven had told her to say he had gone off into the woods at the time of the murder. She stated that she earlier had given different versions of the story because she was confused. She explained that it would not be fair to blame just Nelson and Outten when Steven also had a part in the murder.

The jury convicted all three defendants of first degree murder and the death sentence was imposed by the court.<sup>2</sup>

### **III. STANDARD OF REVIEW**

Petitioner filed his application for federal habeas review

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<sup>2</sup>Nelson Shelton was executed on March 17, 1995.

after the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA") and, therefore, his request for an evidentiary hearing must be evaluated under the provisions of 28 U.S.C. § 2254(e), which provide that:

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that -

(A) the claim relies on -

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

It generally is recognized that

§ 2254(e)(1) does not require findings to be based on evidentiary hearings. This is the major difference between § 2254(e), part of [AEDPA], and its predecessor 28 U.S.C. § 2254(d). The former statute required deference to "a determination after a hearing on the merits of a factual issue" unless one of eight conditions was satisfied. Section 2254(e), by contrast, omits any mention of a hearing. If a state court's finding rests on thin air, the petitioner will have little difficulty satisfying the standards for relief under § 2254. But if the state court's finding is supported by the record, even though not by a "hearing on the merits of [the] factual issue," then it is presumed to be correct.

Mendiola v. Schomig, 224 F.3d 589, 592-93 (7th Cir. 2000). In order for a state court's findings to be deemed "supported by the record," the record must be based upon "probative evidence." Riley v. Taylor, 277 F.3d 261, 285 (3d Cir. 2001) (citing Rushen v. Spain, 464 U.S. 114, 121 n.6 (1983)). "Probative evidence" includes the observations and credibility determinations made by the trial judge. Indeed, the deference given a state court's findings of fact "is ordinarily based, at least in part, on the original trial court's ability to make contemporaneous assessments." Riley, 277 F.3d at 285.

Unlike § 2254(e)(1), which addresses the case where factual determinations have been made by a State court, § 2254(e)(2) addresses the situation where the petitioner has failed to develop the factual basis of a claim. The United States Supreme Court has held that "a failure to develop the factual basis of a

claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." Williams v. Taylor, 529 U.S. 420, 432 (2000). The Court reasoned as follows:

There is no doubt Congress intended AEDPA to advance these doctrines [of comity, finality, and federalism]. Federal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts. In keeping this delicate balance we have been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings. . . .

It is consistent with these principles to give effect to Congress' intent to avoid unneeded evidentiary hearings in federal habeas corpus, while recognizing the statute does not equate prisoners who exercise diligence in pursuing their claims with those who do not. Principles of exhaustion are premised upon recognition by Congress and the Court that state judiciaries have the duty and competence to vindicate rights secured by the Constitution in state criminal proceedings. . . . For state courts to have their rightful opportunity to adjudicate federal rights, the prisoner must be diligent in developing the record and presenting, if possible, all claims of constitutional error. If the prisoner fails to do so, himself or herself contributing to the absence of a full and fair adjudication in state court, § 2254(e)(2) prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the statute's other stringent requirements are met. Federal courts sitting in habeas

are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state court. Yet comity is not served by saying a prisoner "has failed to develop the factual basis of a claim" where he was unable to develop his claim in state court despite diligent efforts. In that circumstance, an evidentiary hearing is not barred by § 2254(e)(2).

Id. at 436-37.

#### **IV. DISCUSSION**

##### **A. Christine Gibbons.**

In his application for habeas relief, petitioner contends that he was afforded ineffective assistance of trial counsel because his counsel failed to investigate Christine Gibbons prior to trial in order to facilitate effective cross-examination of this critical witness. According to petitioner, such an investigation would have revealed a history of mental illness, chronic substance abuse and uncontrolled seizures aggravated by alcohol consumption. Petitioner also contends that he was denied a fair trial when the trial court improperly allowed Gibbons' testimony to go to the jury despite its unreliability.

In support of his request to expand the record in this regard, petitioner has proffered the report of David A. Ruhnke, Esquire, who has been qualified as an expert witness in the post-conviction stage of Delaware capital murder cases concerning the minimum competency of trial counsel in a capital murder case. In his report, Ruhnke opines that, because Gibbons' testimony was

the only evidence from which the State could argue that each defendant took an active role in the murder, trial counsel's failure to investigate Gibbons' background implicates the first prong of Strickland v. Washington, 466 U.S. 668, 690-91 (1984). (D.I. 57 at A-150 to A-152) Petitioner also has submitted the medical records of Gibbons and a report authored by David E. Raskin, M.D., who evaluated such records and opined that Gibbons "cannot be considered a reliable witness because her psychiatric problems seriously impact on the reliability of her testimony." (D.I. 57 at A-119) Petitioner has identified the investigative reports of Carl Kent, who interviewed Gibbons and Lori Shotwell (a witness who allegedly has knowledge of Gibbons' alcohol consumption) concerning the allegations of coercion and intoxication. (D.I. 57 at A-161 to A-171) Petitioner requests that such documents be made part of the record or, alternatively, that the authors be permitted to testify at an evidentiary hearing. Petitioner also requests permission to present the testimony of his trial counsel, Gibbons, and Shotwell.

#### **1. Trial Court Error**

Petitioner did not raise any claims relating to Christine Gibbons in his post-conviction proceedings. He argues, nevertheless, that he has exhausted his State remedies with respect to these claims because his co-defendant, Steven Shelton, presented to the Delaware Supreme Court allegations that Gibbons

was testifying under duress and was intoxicated at trial. The record demonstrates that, although the trial court did not conduct an evidentiary hearing as to these allegations during Shelton's post-conviction proceedings, the factual underpinnings to these claims were adequately explored during the trial itself.

More specifically, the trial court offered defense counsel an opportunity to question Gibbons outside the presence of the jury about the circumstances of her return and recantation. Gibbons never indicated during her testimony that the State had threatened or coerced her recantation, or otherwise engaged in prosecutorial misconduct. (D.I. 57 at A-2 to A-23) Likewise, the trial court had the opportunity to observe Gibbons' demeanor during the course of the trial, as did defense counsel and the defendants. There is no indication of record that anyone detected any change in her demeanor suggestive of alcohol or drug consumption.

The court concludes that the factual basis of this claim was adequately developed in the State court proceedings; therefore, petitioner is not entitled to an evidentiary hearing pursuant to § 2254(e)(2). The court further concludes that petitioner, at this stage of the proceedings, has failed to present clear and convincing evidence to rebut the presumption of correctness as to the State court's factual determinations in this regard, as such determinations are supported by the record.

## **2. Ineffective assistance of counsel.**

The record indicates that, in his amended motion for post-conviction relief, petitioner claimed ineffective assistance of counsel based on counsel's "failure to adequately investigate the case prior to trial." Outten v. State, 720 A.2d at 550. The trial court expanded the record in order to consider the motion by posing twelve questions to trial counsel and allowing both the State and petitioner to respond to trial counsel's averments. None of the twelve questions, however, was directed to the issue of trial counsel's pretrial investigation efforts. (D.I. 57 at A-81 to A-88) Petitioner requested an evidentiary hearing on his allegations of ineffective assistance of counsel, which request was denied. Given this record, the court concludes that there has not been a failure on petitioner's part to develop the factual basis of his claim, pursuant to the reasoning of Williams v. Taylor, 529 U.S. at 432. The court further concludes that there is an inadequate factual basis upon which to review petitioner's claim. Therefore, an evidentiary hearing in this regard is justified in light of the significance of the testimony of Christine Gibbons to the State's case against petitioner.

### **B. Mitigation Case.**

Petitioner claims that trial counsel rendered constitutionally ineffective assistance by his failure to present a coherent case of mitigation at sentencing. The issue of trial

counsel's conduct at sentencing was explored during the post-conviction proceedings. Specifically, six of the twelve questions posed to trial counsel by the trial court were directed to counsel's conduct during the penalty phase of the trial. (D.I. 57 at A-81 to A-88) Both the Superior Court and the Delaware Supreme Court examined this issue with great care. Consistent with the reasoning of Mendiola v. Schomig, 224 F.3d at 592-93, the court concludes that the factual basis of this claim was adequately developed in the State court proceedings; therefore, petitioner is not entitled to an evidentiary hearing pursuant to § 2254(e)(2).<sup>3</sup> The court further concludes that petitioner, at this stage of the proceedings, has failed to present clear and convincing evidence to rebut the presumption of correctness under § 2254(e)(1) as to the State court's factual determinations in this regard, as such determinations are supported by the record.

**C. Allocution.**

Petitioner claims that trial counsel rendered constitutionally ineffective assistance by failing to object to the State's criticism of petitioner's alleged lack of remorse during allocution. The court concludes that this claim does not present any factual issues subject to review under § 2254(e). As

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<sup>3</sup>The court acknowledges in this regard that the State has agreed to supplement the record with the expert report of a mitigation specialist, Lori James-Monroe.

explained by the Eleventh Circuit in Provenzano v. Singletary,  
148 F.3d 1327 (11th Cir. 1998):

[T]he reasonableness of a strategic choice is a question of law to be decided by the court, not a matter subject to a factual inquiry and evidentiary proof. Accordingly, it would not matter if a petitioner could assemble affidavits from a dozen attorneys swearing that the strategy used at his trial was unreasonable. The question is not one to be decided by plebiscite, by affidavits, by deposition, or by live testimony. It is a question of law to be decided by the [courts].

Id. at 1332. There are no disputed facts relating to this issue, just the legal determination of whether trial counsel's failure to lodge an objection fell below prevailing professional norms. Therefore, petitioner's request to expand the record in this regard is denied.

#### **V. CONCLUSION**

For the reasons stated, petitioner Outten's motion for an evidentiary hearing is granted in part and denied in part. The motion is granted with respect to his claim that trial counsel rendered constitutionally ineffective assistance by failing to investigate Christine Gibbons' background prior to trial. The motion is denied in all other respects.

An order shall issue.