

Cause No: 06-CR-3624-F

EX PARTE

HANNAH RUTH OVERTON

TDCJ-IC: #01478117

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IN THE DISTRICT COURT

214TH JUDICIAL DISTRICT

NUECES CO., TX

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

Grounds One and Two-- Newly-Discovered Evidence of Actual Innocence.

1. The Court finds from the record that Dr. Alexandre Rotta testified at trial to his belief that Andrew's sodium level was elevated due to salt poisoning, and that he ruled out other possible causes, such as diabetes mellitus, diabetes insipidus, and other causes as per his testimony. (vol. 12, p. 58-62, 71-72, 75-78, 81, 96-98)

2. The Court finds from the record that Dr. Judy Melinek likewise discussed during her testimony at trial concerns about the absence of a microscopic examination of the brain that might have disclose a tumor (RR vol. 18, pp. 20, 75-76, 106), the effects of Andrew's birth mother's drug abuse (RR vol. 18, pp. 64-65), pica (RR vol. 18, 64-69), diabetes (RR vol. 18, pp. 69-74, 100, 103), available medical records (RR vol. 18, pp. 83-84, 117-19), and an underlying gastric disorder (RR vol. 18, pp. 121-24). At the writ hearing, she testified the stomach contents would have some value to explaining the events that lead to Andrew's death.

3. The Court finds that all of the new evidence provided by Dr. Melinek and Dr. Moritz mentioned in Overton's application for writ was clearly known and/or discussed at time of trial by Overton's defense team.

4. The Court finds that additional medical articles and case studies mentioned by Dr. Michael Moritz during his testimony at the writ hearing would not have been ~~as positive to the~~ testimony and evidence provided by Dr. Alexandre

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Rotta and Dr. Ray Fernandez, to the point of changing the overall outcome of the original trial.

5. The Court does not find Dr. Michael Moritz's testimony at the writ hearing adequate that additional medical articles and case studies since the time of trial amount to newly discovered evidence of Overton's actual innocence. Specifically, the Court finds that, in his deposition, Dr. Moritz admitted that child abuse was not his area of expertise. (DX #49 at 3:24:00) Accordingly, the Court does not presently find persuasive his opinion concerning the likelihood that Hannah Overton did not abusively administer the sodium in question to Andrew based on a profile and case studies that fall outside his area of expertise.

6. In addition, the Court finds credible Dr. Moritz's testimony at the writ hearing that additional medical articles and case studies do not change his underlying opinion that Hannah Overton did not intentionally poison Andrew with salt, but merely confirm that prior opinion.

7. The Court finds Dr. Moritz's opinion at the writ hearing has not changed from the time of trial to the present, even with the additional case studies.

8. The Court further finds that the Applicant has failed to show that Andrew did exhibit Prader-Willi-like syndrome symptoms, and that recent genetic research into Prader-Willi-like conditions would have revealed that Andrew Burd had such a condition, or, if he did, that this would have proven her innocent of the present crime. The Court further finds that there is no evidence in the record, other than through Hannah Overton's self-serving testimony that Andrew Burd exhibited Prader-Willi-like syndrome symptoms. Further, the Court finds that the evidence at the writ hearing given by Dr. Fernandez show that Dr. Fernandez examined Andrew's stomach and intestines, and found no evidence of an eating disorder, i.e. glue, plastics, Styrofoam, or any other non-edible substance. In addition, in Dr. Cortes's medical records in caring for Andrew, Sharon Hamil stated there was not eating disorder, which was confirmed through her trial testimony. The Court further finds that Dr. Bobel, a pediatric neurologist, states in his report after examining the child, that he found no evidence of any mental deficiencies. Dr. Bobel did note in his report that Andrew was also making progress on his speech development. The Applicant has therefore failed to provide new evidence through the submitted recent genetic research that Andrew could have had Prader-Willi-like syndrome.

Ground Three- Ineffective Assistance Concerning Advice on Lesser- Included Offenses

9. The Court finds credible attorney John Gilmore's testimony at the writ hearing that he and attorney David Stith correctly advised Ms. Overton concerning the consequences of asking for a lesser-included offense, and specifically that this would not preclude her from challenging on appeal a conviction on the lesser offense. The Court further finds that the Court itself admonished Hannah Overton on the consequences of not allowing the lesser-included offenses to be added to the charge, before the charge was read to the jury. (RR vol. 17, p. 211)

10. Accordingly, the Court finds that Overton has failed to prove by a preponderance of the evidence that her trial attorneys' decision to honor her request not to ask that lesser-included offenses by submitted to the jury was deficient in any way. Specifically, the Court finds that Overton's trial attorneys' explained to her the consequences of her decision, and that nothing indicated that her decision was involuntary or unknowing or that Overton was then incompetent to make that decision, nor was that suggestion made at any point during trial.

Grounds Four and Five- Ineffective Assistance for Failure to Investigate

11. The Court finds that the Applicant failed to develop her claim that her trial attorneys were deficient for failing to seek additional testing of the victim's tissue and further investigation of the brain scan, to further investigate Andrew's birth records, and to determine whether Andrew had Prader-Willi Syndrome. The Court further finds that the Defense did test Andrew's tissue for Prader-Willi Syndrome and that the test results were negative. (DX #27)

12. The Court further finds that there is no credible evidence that would have lead the defense attorneys at the time of trial to believe further testing for Prader-Willi-like syndrome was necessary based on their trial strategy.

13. The Court further finds from the trial record that Overton's trial attorneys did develop her testimony concerning her history of caring for children. (RR vol. 17, pp. 5-7, 96-97, 106)

14. The Court finds that any deficient performance by the Defense attorneys in this regard, did not cause prejudice; specifically that there is not a probability

sufficient to undermine confidence in the outcome that, but for this complained-about deficiency, the result of the proceeding would have been different.

Grounds Six and Seven- Ineffective Assistance for Failure to Develop Evidence Concerning Causation.

15. The Court finds credible attorney David Jones' testimony at the writ hearing that he did not review Dr. Moritz's deposition testimony before recommending that it not be offered into evidence at the trial. However, the Court does not find that this decision amounted to deficient performance in light of the fact that another defense attorney, Chris Pinedo, an attorney specializing in medical malpractice cases, was also present at the deposition, and testified it was trial strategy not to use the deposition, and that there were clearly certain matters on the deposition that might have prejudiced the defense. Further, the Court finds Dr. Moritz's opinions on the deposition did not conclusively refute trial testimony by Dr. Alexandre Rotta that Andrew could have been saved had he been brought to the hospital sooner.

16. The Court finds credible the testimony at trial of Dr. Alexandre Rotta that, as a pediatric critical care specialist, he takes care of the children who are too sick to be taken care of by a nephrologist, endocrinologist or a general pediatric practitioner, and thus that he would be in a better position to assess the treatment and survivability of such a critically ill child. (RR vol. 12, p. 170; vol. 13, p. 21)

17. The Court finds that, in his deposition, Dr. Moritz admitted that a child with a sodium concentration of some 270 (some 30 points higher than the present victim) did recover. (DX #49 at 2:56:00) When asked about the window of opportunity for the parent to seek treatment for a child with salt poisoning, Dr. Moritz testified that the mortality rate was high, based on an estimate of one hour in taking the child to the hospital and some three to four hours total before diagnosing the condition, that Dr. Moritz admitted that he had never treated someone with that high a sodium level, that there was no "specific therapy," and that there are limited things available to treat this high sodium poisoning, although he did mention using dialysis as a treatment, and that there would be a 30 to 50 percent mortality rate. (DX #49 at 3:00:00-3:05:00) The Court further finds that, during the State's cross-examination, it became clear that Dr. Moritz did not review all the evidence in this case, including but not limited to Hannah Overton's children's testimony or Mr. Overton's interview regarding Hannah's discipline of Andrew. (DX #49 at 3:28:00-3:29:00) Dr. Moritz also admitted that he would feel

misled if there was a witness not provided to him who would testify that Andrew was punished by forcing him to take salt. (DX # 49 at 3:30:00-3:31:00)

18. The Court finds credible Chris Pinedo's testimony that he made the decision not to introduce the testimony or the deposition of Dr. Moritz due to trial strategy. The Court further finds and agrees with Mr. Pinedo's testimony he was not ineffective as trial counsel based upon this choice. Mr. Pinedo, when presented with the aforementioned possibility that Dr. Moritz's testimony might open the door to evidence and testimony harmful to the defense that was otherwise excluded at trial, cannot be said to be ineffective in choosing to exclude Dr. Moritz's testimony from trial, especially when the excluded evidence concerned child abuse. Further, Dr. Moritz never treated the patient, nor was provided with all the evidence available at the time of trial and was therefore not in a position to effectively refute either Dr. Rotta's testimony regarding Andrew Burd's survivability or Dr. Fernandez's testimony regarding cause and manner of death.

19. Accordingly, the Court finds Overton has failed to prove by a preponderance of the evidence that her trial attorneys' performance was deficient in failing to offer Dr. Moritz's deposition at trial. Further, the Court finds that any deficient performance in this regard did not cause prejudice, and specifically that there is not a probability sufficient to undermine confidence in the outcome that, but for this complained-about deficiency, the result of the proceeding would have been different.

20. The Court further finds that the Applicant failed to develop her claim that her trial attorneys failed to adequately cross-examine Dr. Rotta at trial concerning causation and Andrew's survivability.

Grounds Eight and Nine- *Brady* Claim Regarding the State's Failure to Disclose Information Known by Dr. Cortes.

21. The Court finds credible the testimony of Dr. Edgar Cortes at the writ hearing that he was not employed by the District Attorney's office or any other State agency and was not an agent of the State or of the prosecution for purposes of a duty to reveal exculpatory information to the defense.

22. The Court finds credible the testimony of Anna Jimenez, that she initially told Dr. Cortes he could not talk to the defense attorneys, but immediately recanted and allowed him to talk to the defense attorneys, which by Dr. Cortes's testimony at the writ hearing he did do so for a short amount of time, and that she did not abruptly end the interview with Dr. Cortes and the defense attorneys in

question. Further the Court finds Dr. Cortes was a subpoenaed witness and available to both the prosecution and defense.

23. The Court finds the testimony of Dr. Edgar Cortes not credible at the writ hearing concerning his opinion that Hannah Overton's state of mind was based on facts that were available in the medical records and known to the defense. The Court further finds his testimony credible that his opinion on Hannah Overton's state of mind was not based on personal knowledge of any other facts concerning Hannah Overton or Andrew Burd or their relationship with one another.

24. The Court finds from the record of trial and the hearing on the motion for new trial that Applicant's present claim concerning the State's failure to disclose the opinions held by Dr. Cortes was fully developed in the written motion for new trial and at the hearing on that motion, and that this complaint was raised and rejected both by the trial court and by the intermediate appellate court in connection with the appeal.

25. The Court finds credible the testimony of attorney John Gilmore at the hearing on motion for new trial that Dr. Cortes was the first expert witness on Overton's April 2007 disclosure of experts and that he knew Dr. Cortes participated in Andrew's care on the day he was poisoned (RR vol. 22, pp. 96-97), and that after talking to Dr. Cortes at trial, the defense did not want him to testify. (RR vol. 22, p. 105) The Court further finds the testimony of attorney Sandra Eastwood at the hearing on motion for new trial reasonable that she did not recall Dr. Cortes ever expressing his opinion that Overton did not intentionally kill Andrew. (RR vol. 22, p. 181)

26. Accordingly, the Court finds that Applicant has failed to prove by a preponderance of the evidence that the prosecutors failed to disclose material evidence to the defense concerning Dr. Cortes's opinions.

Grounds Ten and Eleven- *Brady* Claim Regarding the State's Failure to Disclose the Gastric Contents and Other Medical Records

27. The Court finds Credible the testimony of attorney Chris Pinedo at the writ hearing that he did receive a test result, labeled as DX 57, showing that the victim's gastric content from an unknown location tested at a level of 48 millimoles.

28. Accordingly, the Court finds that the low 48 sodium test result actually mentioned in Overton's application for writ was clearly known to the defense at the time of trial, and that Applicant has failed to prove by a preponderance of the evidence that the prosecutor or any agent of the State failed to disclose this evidence to the defense.

29. The Court finds that additional items mentioned at the hearing, including the supplemental report indicating the location at which the vomitus was collected, photographs showing an experiment conducted with the vomitus and other items, and the existence of the vomitus itself, were not provided to the defense upon the initial request. The Court further finds that the vomitus was known to the defense prior to trial as per the testimony of Dr. Fernandez at his deposition. Further, the Court finds the lower 48 test was available and excluded from evidence at the defense's request. The Court further finds that Attorney Brad Condit, one of the defense attorneys, testified that the bag containing the vomitus was made available to him, but he chose not to open the bag to inspect the contents.

30. The Court finds credible the testimony of attorney Cynthia Orr at the writ hearing that she conducted discovery for Overton on the present writ of habeas corpus and was allowed to look through the entire file maintained by the Nueces County District Attorney's Office during the time in which Anna Jimenez was the appointed District Attorney for Nueces County (from March to November 2010), which occurred before Overton's present Application was filed in March 2011. The Court further finds that at some point during this process of discovery Orr discovered the basis for her present *Brady* claims, including the supplemental police report indicating the location at which the vomitus was collected, photographs showing an experiment conducted with the vomitus and other items, and the existence of the vomitus itself.

31. The Court finds that Sandra Eastwood was the lead prosecutor at trial and that she has a limited memory of the trial and discovery in the present case.

32. The Court finds reasonable Sandra Eastwood's testimony at the writ hearing that it was her practice to provide discovery to the defense of all potentially exculpatory evidence, and that she would have recognized the low sodium test results on the vomitus in question as potentially exculpatory and provided it to the defense, along with the vomitus itself and any photographs regarding the testing of such vomitus.

33. The Court finds credible Anna Jimenez's testimony that she was not personally involved in the distribution of discovery to the defense attorneys in this case. The Court finds the testimony of both Chris Pinedo and David Jones that they were aware of the low 48 results prior to trial, contained in defense exhibit 57.

34. The Court finds from the pre-trial deposition of Dr. Fernandez, labeled as DX 13, that attorney David Jones, who questioned Dr. Fernandez and was employed both as an attorney for Hannah Overton in the present criminal prosecution and for the Overtons in the related civil matter concerning the custody of their children, was aware that the gastric content represented by DX 57 was vomitus.

35. The Court finds from the trial record that attorney Sandra Eastwood specifically questioned Dr. Alexandre Rotta at trial, without objection or comment from the defense, concerning the reason for a low amount of sodium in the vomit collected at the Urgent Care Center. (RR vol. 12, pp. 50-51) Dr. Rotta then explained that the sodium could have quickly passed from the stomach into the intestines and that gastric juices in the stomach could have watered down the amount of sodium in the vomit. (RR vol. 12, pp. 51-52) Accordingly, the Court finds that the defense was at least aware of the origin of the low sodium gastric contents existed by the time that the State presented its evidence at trial, and that the defense could have countered this evidence with their own experts; however, they chose not to do so because of trial strategy as set out in sections 15-20 of these findings.

36. The Court finds credible D.J. Rivera's testimony at the writ hearing that he collected from the Driscoll Urgent Care Center a Bemis containing Andrew's vomitus, which he then took to the Medical Examiner's Office and that he signed for this item in connection with the chain of custody normally maintained by the Corpus Christi Police Department.

37. The Court finds credible Arnold Arias' testimony that one of Hannah Overton's defense attorneys, Brad Condit, as well as Mr. Overton's defense attorney Lisa Harris, were present at the police department with prosecutor Sandra Eastwood to view a number of items of evidence, and that the outer bag containing the vomitus in question was opened and a photograph thereof was taken. Specifically, the Court finds credible the testimony of Arnold Arias that Brad Condit and Lisa Harris, in the presence of Sandra Eastwood, were on two occasions shown the bag containing the Bemis canister.

38. The Court finds credible attorney Brad Condit's testimony at the writ hearing that he does not have a good memory concerning the meeting at the Corpus Christi Police Department at which he viewed certain items of evidence prior to trial in the Overton case.

39. The Court finds credible Dr. Ray Fernandez's testimony at the writ hearing that it would be speculative to infer anything concerning the time or manner of sodium ingestion from the sodium content of Andrew's vomitus.

40. The Court is not persuaded by Dr. Melinek's testimony at the writ hearing that her present knowledge that Andrew's vomitus tested low for sodium would have changed her opinion in the case concerning Overton's responsibility for his death, in light of Dr. Fernandez's later testimony that it would be speculative to infer anything concerning the time or manner of sodium ingestion from the sodium content of the vomitus, and in light of the lack of expert evidence concerning absorption rates. The Court is not persuaded by Dr. Melinek's testimony concerning the low 48 test as she had this information prior to her testimony at trial as set out in her testimony at the writ hearing. (RR vol. 3, 96-97)

41. The Court is not persuaded by Dr. Moritz's testimony at the writ hearing that his present knowledge that Andrew's vomitus tested low for sodium would have any impact on his opinion concerning Overton's responsibility for Andrew's death, in light of Dr. Fernandez's later testimony that it would be speculative to infer anything concerning time or manner of sodium ingestion from the sodium content of the vomitus, and in light of the lack of expert evidence concerning absorption rates.

42. The Court further finds that the Applicant failed to develop her claims that the prosecution failed to disclose other medical records, including the hospital brain scan, birth records, early development records, and evidence of some genetic disorder.

Grounds Twelve and Thirteen- Ineffective Assistance for Failure to Investigate Gastric Contents.

43. The Court finds that the Applicant did develop her claim that her trial attorneys failed adequately to investigate the gastric contents evidence in the present case.

44. The Court finds that any deficient performance in this regard did not cause prejudice, and specifically that there is not a probability sufficient to

undermine confidence in the outcome that, but for this complained-about deficiency, the result of the proceeding would have been different, in light of Dr. Fernandez's later testimony that it would be speculative to infer anything concerning the time or manner of sodium ingestion from the sodium content in the vomitus, and in light of the lack of expert evidence concerning absorption rates.

Grounds Fourteen and Fifteen- Ineffective Assistance for Failure to Make a Confrontation Clause Objection

45. The Court finds from the record of trial that Overton's trial attorneys successfully prevented Dr. Fernandez from testifying concerning the sodium content (RR vol. 15, pp. 23-64), but that other witnesses not affiliated with the Medical Examiner's Office or law enforcement did testify to Andrew Burd's high sodium levels, based on testing done while he was still alive and being treated as a patient. (Respiratory Therapist Farah Verjee- RR vol. 10, p. 11; Dr. Alexandre Rotta- RR vol. 11, pp. 92-95)

46. Accordingly, the Court finds that Overton has failed to prove by a preponderance of the evidence that her trial attorneys' performance was deficient in failing to make a Confrontation Clause objection at trial to the results of sodium testing from the hospital doctors and other non-Medical Examiner Office affiliated experts.

All Claims of Ineffective Assistance.

47. The Court finds that, with regard to each of the claims individually, and as a whole, Overton has failed to prove by a preponderance of the evidence that her trial attorneys' performance was deficient.

Grounds Sixteen to Forty-One.

48. The Court finds that there are no controverted fact issues concerning these grounds, which present only legal issues for the Honorable Texas Court of Criminal Appeals to determine.

Conclusions of Law

Grounds One and Two- Newly-Discovered Evidence of Actual Innocence.

1. The Court concludes that all of the supposedly newly-discovered evidence actually mentioned in Overton's application for writ was clearly known and discussed at the time of trial.

2. The Court concludes the additional unpled complaints that Applicant raised at the hearing on her writ were allowed in the interest of justice. Further, the Court concludes that Overton's unpled complaints concerning additional medical articles and case studies did not amount to newly-discovered evidence of actual innocence.

Ground Three-Ineffective Assistance Concerning Advice on Lessor-Included Offenses.

3. The Court concludes that Overton's trial attorneys did not render ineffective assistance of counsel by allowing her to reject the submission of lesser included offenses.

Ground Four and Five- Ineffective Assistance for Failure to Investigate.

4. The Court concludes that Overton's trial attorneys did not render ineffective assistance of counsel by failing to do additional investigation or testing.

Grounds Six and Seven- Ineffective Assistance for Failure to Develop Evidence Concerning Causation.

5. The Court concludes that Overton's trial attorneys trial strategy did not render ineffective assistance of counsel by failing to offer Dr. Moritz's deposition at trial or by failing to adequately cross-examine Dr. Rotta at trial concerning causation and survivability of Andrew Burd.

Grounds Eight and Nine- *Brady* Claim Regarding the State's Failure to Disclose Information Known by Dr. Cortez.

6. The Court concludes that Dr. Cortes was available at all times before and during the trial, as he was listed as a witness, and that Overton's complaint that Dr. Cortes's opinions were withheld are without merit. This is the same complaint that has been raised and rejected both on motion for new trial and on appeal.

Grounds Ten and Eleven- *Brady* Claim Regarding the State's Failure to Disclose the Gastric Contents and Other Medical Records.

7. The Court concludes that the low 48 sodium test result as shown in DX 57 actually mentioned in Overton's application for writ was clearly known to the defense at the time of trial, and thus could not be a *Brady* attack.

8. The Court concludes that the additional unpled complaints that Applicant attempted to raise at the hearing on her writ, which was allowed in the interest of justice, are not persuasive to the trier of the facts of the writ hearing because they failed to prove the evidence supporting the unpled claims amounted to exculpatory evidence. In addition, the Court concludes that the writ attorneys were clearly aware of these potential complaints before the present application was filed.

9. Alternatively, the Court concludes that Overton's unpled complaints that the State failed to disclose a police report showing the source of the vomitus, photographs of a test involving the vomitus, and the vomitus itself are without merit because the Defense had knowledge of the vomitus and were allowed to examine and photograph the physical evidence at the police station, and at least one defense attorney was present to photograph the contents of the bag labeled homicide.

10. The Court further concludes that Overton's complaint that the State failed to disclose other medical records, including the hospital brain scan, birth records, early development records, and evidence of some genetic disorder is without merit because they were all provided to the Defense in a timely manner.

Grounds Twelve and Thirteen- Ineffective Assistance for Failure to Investigate Gastric Contents.

11. The Court concludes that any deficiency by Overton's attorneys did not prejudice Overton's defense to the extent that, but for the supposed deficiency, Overton would not have been found guilty of capital murder.

Grounds Fourteen and Fifteen- Ineffective Assistance for Failure to Make a Confrontation Clause Objection.

12. The Court concludes that Overton's trial attorneys did not render ineffective assistance of counsel by failing to raise a Confrontation Clause objection to the results of sodium testing that was done at the hospitals where

Andrew Burd was treated as a patient, because any such objection lacked merit as it was not settled law at the time of trial.

All Claims of Ineffective Assistance.

13. The Court concludes that Overton's trial attorneys did not render ineffective assistance of counsel with regard to grounds three, four, six, seven, fourteen and fifteen of the claims alleged in the present Application. The Court further concludes any deficiencies found in grounds twelve and thirteen, whether considered individually or collectively, did not prejudice Overton's defense to the extent that, but for the supposed deficiencies, Overton would not have been found guilty of capital murder.

Grounds Sixteen to Forty-One.

14. The Court concludes there are no controversial facts issues concerning these grounds, and further concludes that these are legal issues for the Honorable Court of Criminal Appeals to determine.



JUDGE PRESIDING

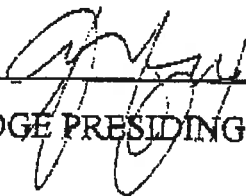
May 31, 2012

DATE

RECOMMENDATION

Based on the above findings of fact and conclusions of law of grounds 1-15, this Court could only recommend denying relief requested. However, grounds 16-41 are matters of law that only the Honorable Court of Criminal Appeals can rule on, and therefore this Court does not have the legal authority to make a recommendation on those grounds.

SIGNED AND ENTERED on this the 31st day of May, 2012.



JUDGE PRESIDING