

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

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|--------------------------|---|--------------------|
| FAYE COPELAND, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| v. |) | No. 97-1123-CV-W-3 |
| |) | |
| JAMES WASHINGTON, |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

MOTION FOR EVIDENTIARY HEARING

Comes now Petitioner, Faye Copeland, by counsel, and moves this Court pursuant to Rule 7 of the Rules Governing 28 U.S.C. sec. 2254 Cases for an evidentiary hearing on her petition for writ of habeas corpus. For her motion, Petitioner states:

Mrs. Copeland is a seventy-seven-year-old great grandmother condemned to death for murders committed by her brutal husband, Ray Copeland. The central issue at her trial was whether she shared a common purpose with her husband to kill five men. Without hearing a shred of evidence that Ray Copeland physically and sexually abused his wife for nearly fifty years, and in spite of the elected prosecutor's lawful attempt to waive the death penalty, a Missouri jury sentenced Mrs. Copeland to death.

Dr. Richard Jacks, a Missouri Department of Mental Health psychiatrist, conducted a pretrial competency examination of Mrs. Copeland. He testified that he "saw no evidence" that Mrs. Copeland was a battered woman. In a recent affidavit Dr. Jacks admits that his testimony before the jury was wrong, and that if trial counsel had presented him with the exact same evidence tendered to, but ignored by, the state courts, his testimony would have been different:

I believe that I can say in all honesty that the nature and quality of the information I have recently reviewed would have dramatically altered my conclusions about battered woman syndrome, and could also be relevant to the issue of whether Mrs. Copeland suffered from a mental disease or defect impairing her mental capacity at the time of the alleged offenses.

Hearing Motion Exhibit A, Affidavit of Dr. Richard Jacks, p. 3. Dr. Jacks described the evidence as "a classic case history for battered woman syndrome." He readily acknowledged that "[i]f this information

had been available to me prior to her trial, it would not have been possible for me to testify that I observed no evidence of battered woman syndrome." Id., p. 2. The testimony of the state's own expert thus casts grave doubts upon the reliability of Mrs. Copeland's convictions and sentences of death.

Mrs. Copeland's petition for writ of habeas corpus is supported by eye-witnesses to Ray Copeland's severe abuse of petitioner, and expert testimony that this prevented her from knowing of Ray's actions or intending to participate in his murderous scheme. Dr. Jacks was the only witness in the entire state court record who raised any question about either proposition, and he has now withdrawn all of the skepticism he had expressed at trial.

Dr. Jacks' recantation of his trial testimony is clear and convincing evidence that had trial counsel, David Miller, performed competently, the result of Mrs. Copeland's trial would have been different. He now agrees with the findings of Dr. Lenore Walker, the nation's leading expert on the issue of battered woman syndrome, and Dr. Marilyn Hutchinson, a prominent local expert on battering and its effects, that Mrs. Copeland is indeed a battered woman.

Counsel for Mrs. Copeland would call the following witnesses at a hearing:

- a) Dr. Lenore Walker
- b) Dr. Richard Jacks
- c) Mr. David Miller
- d) Dr. Marilyn Hutchinson

These individuals would address the factual and legal significance of evidence of battering and its effects on Mrs. Copeland, and prove that violations of Mrs. Copeland's constitutional rights prevented such evidence from reaching the jury.

In addition to the above witnesses, counsel for Mrs. Copeland would present testimony from among the following witnesses:

- a) Helen Bohanan, Mrs. Copeland's niece;
- b) Mary Wilson Butler, Mrs. Copeland's sister;
- c) Patricia Caudill, Mrs. Copeland's sister;
- d) Everett Copeland, Mrs. Copeland's oldest son;

- e) John Copeland, Ray Copeland's nephew;
- f) John Copeland, Sr., Ray Copeland's brother;
- g) Cheryl Moore, a neighbor of the Copelands;
- h) Doris Stockwell, a neighbor of Mrs. Copeland;
- i) Sharon Trent, a friend of Wayne Copeland;
- j) Helen Willard, a co-worker of Mrs. Copeland's;

These witnesses have direct personal knowledge of Ray Copeland's violent behavior and its aftermath, and would establish Ray Copeland's unrelenting abuse of his wife and children, and provide the foundation for expert testimony that Mrs. Copeland suffered from posttraumatic stress disorder which prevented her from having a culpable mental state with respect to Ray Copeland's conduct.

Mrs. Copeland's mental state was the central issue at her trial. No evidence whatsoever placed her at the scene of any homicide, either as an active participant or as a passive observer. Evidence that Mrs. Copeland was severely battered by her husband was relevant to the issues of whether she had knowledge of Ray Copeland's homicidal activities, whether she performed any act for the purpose of causing the death of another human being, and whether she deliberated upon any conduct which caused the death of another human being. Dr. Hutchinson and Dr. Walker testified that decades of domestic violence committed against Mrs. Copeland caused her to remain ignorant of Ray Copeland's activities, and rendered her incapable of forming the state of mind necessary to be guilty as an accomplice to first degree murder.

Mrs. Copeland has alleged several factually-based claims that her convictions and sentences were obtained in violation of her constitutional rights, including:

- a) Mrs. Copeland's due process rights were violated by exclusion of evidence from the guilt stage of her trial that she suffered from battered woman syndrome (Claim No. 1);
- b) The performance of Mrs. Copeland's trial attorney fell below an objective standard of competence when he failed to conduct a reasonable investigation which would have produced evidence that Ray Copeland beat Mrs. Copeland sadistically throughout their marriage, as a result of which she suffered from posttraumatic stress disorder. (Claim No. 5);

c) The evidence as a whole fails to establish beyond a reasonable doubt Mrs.

Copeland's knowing or deliberate participation in the offense of homicide (Claim No. 7).

Other claims in Mrs. Copeland's petition for writ of habeas corpus are capable of resolution on the law and on the facts in the state court record.

An evidentiary hearing is authorized and necessary because the state courts' findings are not adequate to resolve the issues now properly before this Court. Although the witnesses listed in paragraph 5 above testified in the state postconviction hearing, the state court made no finding with respect to their credibility. Ignoring the unrefuted testimony of Dr. Walker that Mrs. Copeland suffers from a mental disease, posttraumatic stress disorder, the court rejected her testimony as legally irrelevant in reliance on a state statute pertaining to battered woman syndrome. Furthermore, the state courts refused to hear the testimony of the witnesses listed in paragraph 6 above, and completely ignored their properly submitted, detailed affidavits.

SUGGESTIONS IN SUPPORT OF MOTION FOR EVIDENTIARY HEARING

Where a state court fails to make findings of fact which adequately resolve the constitutional claims that are properly before it, the federal court's duty to adjudicate the claim includes the power to hear evidence. Townsend v. Sain, 372 U.S. 293, 312 (1963). Although the circumstances under which a federal court *must* grant a hearing have been limited, "the district courts. . .still possess the discretion. . .to hold hearings even where they are not mandatory." Keeney v. Tamayo-Reyes, 504 U.S. 1, 23 (1992)(O'Connor, J., dissenting); accord, Jamison v. Lockhart, 975 F.2d at 1381. Under the circumstances of this case - where the state court fact-finding is contradictory and incomplete, the state court's ruling on mixed questions were not supported by the record as a whole, and petitioner sought and was denied an opportunity to present testimony in state court, a hearing is indeed necessary. Townsend v. Sain, supra.

A. THIS COURT MAY HEAR EVIDENCE WHICH MRS. COPELAND TENDERED TO THE STATE COURT

Mrs. Copeland took every reasonable action possible to present the testimony of the above witnesses to the state court--by either presenting their live testimony, or unsuccessfully requesting an

opportunity to present their testimony and submitting their detailed, sworn affidavits. Federal courts have uniformly held that where a petitioner has attempted to develop the record in state court, but is precluded from doing so, the recent revisions to the habeas corpus statute do not restrict her right to a hearing in this Court:

Because we find the Respondent's assertion that the petitioner failed to develop the factual record in the state court to be erroneous, we need not decide whether the new statutory provisions concerning when a district court can hold such an evidentiary hearing added to ' 2254 by the Antiterrorism and Effective Death Penalty Act of 1996, signed into law on April 24, 1996, apply to this case. See 28 U.S.C. ' 2254(e)(2) (as amended) ("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 . . .").

Wilkins v. Bowersox, 145 F.3d 1006, 1016 n.6 (8th Cir. 1998). Similarly, Mrs. Copeland's diligent attempts to prove her case in state court cannot by any stretch of the imagination be considered a failure to develop the factual basis of her claim in state court proceedings. See Jones v. Wood, 114 F.3d 1002, 1113 (9th Cir. 1997) (Where state courts "denied [petitioner] an opportunity to present evidence by failing to hold an evidentiary hearing," the AEDPA "does not preclude a federal hearing on otherwise exhausted claims.") Accord, Love v. Morton, 112 F.3d 131 (3rd Cir. 1997); Burris v. Parke, 116 F.3d 256, 258-59 (7th Cir. 1997).

B. THIS COURT MAY HEAR EVIDENCE ON ISSUES WHICH WERE NOT RESOLVED BY THE STATE COURTS.

Although the central issue surrounding Mrs. Copeland's guilt or innocence of a capital crime involves Ray Copeland's violence directed at her and her children, the state courts never resolved the underlying questions--whether Ray Copeland did in fact beat his wife into submission on a regular basis, and whether that fact prevented Mrs. Copeland from having a culpable mental state with respect to Ray's fraudulent and murderous schemes. Where a petitioner squarely presents the factual and legal basis of a claim to the state court which fails to resolve the underlying factual issue, ' 2254(e)(2) allows the federal court to hear evidence and resolve the claim. The absence of any finding with respect to evidence presented by petitioner entitles her to a *de novo* consideration of that evidence in this Court:

[C]ommon sense dictates that the first exception to the presumption of correctness under ' 2254(d) -- that the "merits of the factual dispute

were not resolved in the state court hearing" -- would continue under the new statute. Here, this Court decides questions of law and decides factual issues not resolved by the state courts even though the evidence had been developed there. The end result thus is the same, regardless of which statute applies.

Wilkins v. Bowersox, 933 F. Supp. 1496, 1506 (W.D.Mo. 1996), aff'd, 145 F.3d 1006 (8th Cir. 1998).

In response to Mrs. Copeland's claim that trial counsel was ineffective for failing to investigate and present evidence that Mrs. Copeland was beaten by her husband, the state court found that trial counsel "did, during the trial, present substantial testimony from family members that Ray Copeland dominated movant and was abusive." 29.15 Legal File, Vol. XI, p. 2101. The court cited pages in the trial transcript setting forth testimony that Ray Copeland was verbally abusive. There was no testimony in the trial record that Ray Copeland had ever struck his wife. Thus, the state court's "finding" ignores the question of physical abuse. Further, in addressing the issue of domestic violence, the Court referred only to the testimony of the family members who testified at both the postconviction hearing and the trial, and questioned their credibility, observing that "it was not until after the trial that they all got together and 'remembered' this material. . . This Court can only wonder whether the death of Ray Copeland played any part in their ability to remember." Id.

While Mrs. Copeland's present counsel agree that many of those witnesses were petrified of Ray Copeland even while he was in prison, this finding does not resolve the fact issues raised by the witnesses listed in paragraph 6, above, none of whom were interviewed by trial counsel, and none of whom testified at trial. A reasonable investigation into the defense of battered woman syndrome would extend to close relatives, friends, co-workers and neighbors outside the abuser's immediate sphere of influence. Likewise, the finding that trial counsel "offered the testimony which was available to him at that time," id., fails to resolve the question of whether trial counsel conducted a reasonable investigation. The postconviction court denied petitioner's request to present the live testimony of these witnesses, and although it granted leave to file their depositions, the court simply pretended like that testimony simply wasn't there.

Further, Mrs. Copeland's claim of ineffective assistance of counsel was cynically misconstrued by the state court, which found that "movant asserts, essentially, that counsel was ineffective for not

using the 'right' psychologist, and suggests Dr. Lenore Walker should have been called." *Id.* at 2099. The court then "resolved" the issue as though choice of expert was the sole basis of the claim. In reality, the issue was not Dr. Hutchinson's performance, but the failure of trial counsel to conduct a reasonable investigation into his client's mental state. Mrs. Copeland alleged in state court that "Judge Conley clearly erred in rejecting Faye's claim" that "Miller was ineffective for inadequately presenting the basis for admitting Dr. Hutchinson's testimony." (Resp. Exh. E at 41). If the postconviction court had allowed Dr. Hutchinson to testify, she would have explained that she relied upon trial counsel to perform the background investigation necessary to corroborate Mrs. Copeland's psychological profile as a victim of domestic violence. She also would have testified that Miller instructed her *not* to make a diagnose of mental disease or defect--an instruction that prevented her testimony from reaching the jury. The identity of the expert is irrelevant to petitioner's claim of ineffective assistance of counsel, but that is the only factual element of the state court's ruling on the subject.

Mrs. Copeland's case is similar to a recent decision finding trial counsel ineffective in spite of a state court finding, unsupported by record, that trial counsel had presented mitigating evidence to the jury. The court observed,

In light of this record, we must agree with the petitioner, as he so vigorously argues, that there was no evidence presented at the guilt or penalty phases of the trial concerning the petitioner's childhood abuse. In the absence of such evidence, we cannot accept the state court's factual findings. Since we cannot accept those findings, we must grant the writ under the applicable federal law.

Jermyn v. Horn, ___ F.Supp. ___, 1998 W.L. 754567, *14 (M.D.Pa. October 27, 1998). The same is true here; the state court findings are inadequate to resolve the issues that are properly before this Court.

Of course, this Court has the discretion to apply alternative fact-finding techniques, such as expanding the record with affidavits, granting discovery, and ordering depositions, to limit the duration and scope of a hearing and to preserve judicial resources, see, e.g., Blackledge v. Alison, 431 U.S. 63 80 (1977), and to grant the writ on that basis. There is ample evidence in the record to support a ruling that Mrs. Copeland suffered extreme abuse at the hands of her husband, Ray Copeland, and that this evidence warrants a new trial. However, the denial of Mrs. Copeland's factually detailed and petition

without a hearing, in reliance on the inadequate state findings, would almost certainly be an abuse of discretion. Townsend v. Sain, 372 U.S. 293 (1963); Medina v. Barnes, 71 F.3d 363 (10th Cir. 1995); Anderson v. United States, 443 F.2d 1226 (10th Cir. 1971). Petitioner therefore respectfully suggests that a hearing is warranted.

CONCLUSION

Mrs. Copeland has raised other claims in his petition which are not referred to in this pleading because, even they are compelling on the merits, they are legal issues which can be adequately resolved on the basis of the state court record and existing law without an evidentiary hearing in this Court. However, an evidentiary hearing on the claims referred to herein is essential to a fair and reliable resolution of the constitutionality of Mrs. Copeland's conviction and sentence.

WHEREFORE, Petitioner, Faye Copeland, prays:

That she be accorded an evidentiary hearing on the allegations of her petition;

That she be allowed a period of sixty (60) days which shall commence after the completion of the hearing in which to brief issues of law and fact;

That after a full and fair hearing, Mrs. Copeland be discharged from her unconstitutional conviction and sentence of death;

That Mrs. Copeland be allowed other and further relief as may seem just, equitable and proper under the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed
to:

Mr. Steve Hawke
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on this ____ day of February, 1999.

Attorney for Petitioner