

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RONALD ROMPILLA,	:	CIVIL ACTION
	:	
Petitioner,	:	
	:	NO. 99-737
v.	:	
	:	
MARTIN HORN, Commissioner,	:	
Pennsylvania Department of Corrections;	:	
PHILIP L. JOHNSON, Superintendent of the	:	
State Correctional Institution at Greene, and	:	
JOSEPH P. MAZURKIEWICZ,	:	
Superintendent of the State Correctional	:	
Institution at Rockview,	:	
Respondents.	:	

MEMORANDUM

BUCKWALTER, J.

July 11, 2000

On February 12, 1999, Ronald Rompilla (Petitioner) filed a Motion to Proceed *In Forma Pauperis*; For Stay of Execution; For Appointment of Federal Habeas Corpus Counsel; and for 120 days to file his habeas corpus petition.

This motion was granted and ultimately, all briefs, exhibits and records necessary to render this decision were filed no later than February 8, 2000.¹

1. The court also received a letter dated February 3, 2000 from counsel for petitioner which follows:

We are writing to address the issue discussed in the telephone conference convened by the Court on January 21, 2000. In that conference, your Honor alerted the parties that the son of the Lehigh County District Attorney who was in office at the time of Mr. Rompilla's trial is presently one of your law clerks. The Court also indicated that this clerk has not had, and will not have, any involvement with Mr. Rompilla's case. Finally, the Court requested that we discuss these circumstances with Mr. Rompilla to determine whether a recusal motion, or a similar application, would be appropriate.

(continued...)

Before proceeding with my review of this case, I awaited a decision then pending before the United States Supreme Court in Terry Williams v. Taylor, 120 S.Ct. 1495 (2000), which was decided April 18, 2000. This case will be referred to both in the Standard of Review and the Claim I discussion. In light of Williams, *supra*, I accepted additional briefing and held oral argument on July 10, 2000.

I. BACKGROUND

Petitioner, represented by court-appointed counsel, was convicted of first degree murder and related offenses, and was sentenced to death, in the Lehigh County Court of Common Pleas, No. 682/1988 (Honorable David E. Mellenberg, J.). The conviction and sentence were affirmed on direct appeal to the Pennsylvania Supreme Court. Commonwealth v. Rompilla, 539 Pa. 499, 653 A.2d 626 (1995).

While his case was still pending on direct appeal, Petitioner filed a petition for writ of habeas corpus in this court, which was dismissed without prejudice for lack of exhaustion on September 19, 1994. Rompilla v. Love, No. 94-CV-4194 (E.D. Pa.).

On December 5, 1995, Petitioner filed a petition for state post-conviction relief in the Lehigh County Court of Common Pleas. On March 28 and 29, 1996, the Court of Common Pleas (Honorable Thomas A. Wallitsch, J.) held an evidentiary hearing on Petitioner's post-

1. (...continued)

We discussed these facts with Mr. Rompilla by telephone on January 27, 2000. Based upon the telephone conference with the Court and our discussion with Mr. Rompilla, Petitioner is satisfied with the Court keeping this matter and will make no application for recusal or related relief.

NOTE: The clerk referred to has had no involvement in this opinion. Indeed, the only involvement of my other law clerk has been the securing of copies of the opinion of the court in Williams v. Taylor, *supra*. and the ABA Standards.

conviction claims. Further evidence was taken (with the consent of the parties and the court's permission) by way of depositions, which were filed with the Court. *See* Deposition of Carol Armstrong, Ph.D. (April 2, 1996) (Exhibit 3); Deposition of Barry Crown, Ph.D. (April 2, 1996) (Exhibit 4); Deposition of Paul K. Gross, M.D. (April 1, 1996) (Exhibit 5); Deposition of Gerald Cooke, Ph.D. (April 3, 1996) (Exhibit 7); Deposition of Robert Sadoff, M.D. (April 23, 1996) (Exhibit 8); Deposition of Frank M. Dattilio, M.D. (May 7, 1996) (Exhibit 9). Numerous exhibits were introduced.

On August 21, 1996, Judge Wallitsch issued an Opinion and Order denying Petitioner's claims for post-conviction relief. The Pennsylvania Supreme Court affirmed on December 10, 1998 and denied reargument on January 19, 1999. Commonwealth v. Rompilla, 554 Pa. 378, 721 A.2d 786 (1998).

Pennsylvania Governor Thomas Ridge issued a death warrant, scheduling Petitioner's execution for March 16, 1999, after which the February 12, 1999 petition referred to above was filed.

The date of petitioner's murder conviction was November 1, 1988.² The Supreme Court of Pennsylvania, in petitioner's direct appeal, wrote this about the evidence in the case:

In the early morning hours of January 14, 1988, the victim, James Scanlon, was murdered in his bar, the Cozy Corner Café, located in Allentown, Pennsylvania. At approximately 6:30 a.m. on that same morning, the victim's son discovered the body of his father lying behind the bar in a pool of blood. The victim had been stabbed repeatedly and set on fire. The victim's wallet had been stolen and approximately \$500 to \$1,000 had been stolen from the bar.

2. In all, petitioner was convicted of murder in the first degree, burglary, criminal trespass, two counts of theft and two counts of receiving stolen property.

The Commonwealth's case consisted almost entirely of circumstantial evidence as there were no eyewitnesses to this killing. Appellant was seen in the Cozy Corner Café on January 14, 1988, from approximately 1:00 a.m. to 2:00 a.m. During that time, he was observed going to the bathroom approximately ten times. A subsequent police investigation determined that the window in the men's bathroom was used as the point of entry into the bar after it had closed.

When questioned by an investigating detective from the Allentown Police Department, Appellant stated that he had been in the Cozy Corner Café on the night of the murder and left between 2:00 a.m. and 2:30 a.m. because he had no money. He stated that he had only \$2.00 to buy breakfast at a local diner. A cab driver testified that he picked up Appellant at the diner and drove him to two different hotels where Appellant was unable to rent a room. The driver then took Appellant to the George Washington Motor Lodge where he was able to rent a room. Appellant paid the cab fare of \$9.10.

Appellant rented a room for two nights at the George Washington Motor Lodge. In doing so, he paid \$121.00 in cash and flashed a large amount of cash to the desk clerks. Appellant also used a false name when he checked in.

The police secured a search warrant for Appellant's motel room and seized several items, including Appellant's sneakers. These sneakers matched a footprint in blood that was discovered near the victim's body. In addition, the blood found on the sneakers matched the victim's blood type.

The Commonwealth also presented other circumstantial evidence that linked Appellant with the robbery and murder of James Scanlon. First, Mr. Scanlon's wallet was found by a grounds keeper in the bushes, six to eight feet outside the room that Appellant had rented at the George Washington Motor Lodge. Second, Appellant's fingerprint was found on one of the two knives that was used to commit the murder. Finally, there were numerous inconsistencies between what Appellant had told police concerning his activities on January 14 and 15, 1988, and the testimony of other witnesses.

When viewed in the light most favorable to the Commonwealth as verdict winner, the evidence clearly supports Appellant's conviction for first degree murder.

Petitioner now makes 11 claims which he contends merit habeas corpus relief.

II. STANDARD OF REVIEW

Before undertaking an analysis of petitioner's claim, it is appropriate to set forth the standard of review for § 2254 petitions:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of that claim --

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (West Supp. 1998).

Moreover, "a determination of a factual issue made by a State court shall be presumed correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

In accordance with Matteo v. Superintendent S.C.I. Albion, 171 F.3d 877 (3d Cir. 1999), cert. denied., 120 S.Ct. 73 (1999), this court should first review a State court decision to determine if it was contrary to Supreme Court precedent governing the claim for relief, such that a contrary outcome is required. If the initial review finds that the State court decision is not contrary to the precedent, then no habeas relief should be granted "unless the State court decision, evaluated objectively and on the merits, resulted in an outcome that cannot be reasonably justified under existing Supreme Court precedent." The court went on to say in Matteo that even if the federal habeas court disagrees with the State court decision, relief is not

appropriate. Thus, we must undertake a two-step review under the “contrary to” clause and the “unreasonable application” clause. Matteo further warns that although a reviewing court may consider “the decisions of inferior federal courts” when deciding whether the State court reasonably applied Supreme Court precedent, “federal courts may not grant habeas corpus relief based on the State court’s failure to adhere to the precedent of a lower federal court in an issue that the United States Supreme Court has not addressed.”

Finally, § 2254(d) refers to “any claim that was adjudicated on the merits in State court proceedings.” If a claim was disposed of by a State court without an explanation as to the legal or factual basis for its disposition, my view is that a habeas court may then undertake a *de novo* review.

In Williams, Justice O’Connor, delivering the opinion of the court as to Part II, summed up the above, as follows:

In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner’s application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied -- the state-court adjudication resulted in a decision that (1) “was contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States,” or (2) “involved an unreasonable application of ... clearly established Federal law, as determined by the Supreme Court of the United States.” Under the “contrary to” clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the “unreasonable application” clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.

I will now discuss each claim in order.

CLAIM I. TRIAL COUNSEL WERE INEFFECTIVE AT THE CAPITAL SENTENCING PHASE FOR FAILING TO INVESTIGATE, DEVELOP AND PRESENT SIGNIFICANT MITIGATING EVIDENCE RELATED TO PETITIONER'S TRAUMATIC CHILDHOOD, ALCOHOLISM, MENTAL RETARDATION, COGNITIVE IMPAIRMENT AND ORGANIC BRAIN DAMAGE.

For purposes of analyzing Claim I, it is important to know just exactly what evidence trial counsel did produce at the sentencing hearing. The record reveals that Petitioner's counsel called five witnesses on his behalf at that hearing: Darlene Rompilla, his sister-in-law; Nicholas Rompilla, Junior, an older brother; Robert Rompilla, a younger brother; Sandy Whitby, a sister; and Aaron Rompilla, a son who was 14 at that time. The total examination of those witnesses is encompassed in about 26 pages of Notes of Testimony, Volume VII. Not one witness discussed Petitioner's traumatic childhood, his alcoholism, mental retardation, cognitive impairment or organic brain disorder. What they did say were, "He was a good family member"; "We never had a problem"; "I don't think my brother did it"; "Have mercy on him"; "I was close to him, he loved my family, he just didn't have a chance"; "They didn't give him no rehabilitation"; "Why can't he get help like all the rest of the people get help"; "I love him very much" (crying); "I've never seen the bad side of my brother, never"; "He just loves us like we love him."

The testimony was apparently presented to engender sympathy for the Petitioner. From the record, it appears that it may have been uncomfortable for all involved. A person identified on the record as Ms. Hass says (referring to the jury, apparently), "They said they need a break. They said that they can't take no more of this right now." At side bar, the court said, "They wanted a break" to which trial counsel replied, "Me too."

The recitation above is to explain the nature of the sentencing hearing. It seemed to be designed primarily as an emotional appeal to the jury to show mercy to Petitioner -- he wasn't as bad as he seemed and his family loved him. On its face at least, the hearing seems unreasonably brief and lacking in real substance considering the nature of the proceedings.

Indeed, in an opinion written after a PCRA hearing, the Honorable Thomas A. Wallitsch, Judge of the Court of Common Pleas of Lehigh County, presiding over that hearing in place of his late colleague, The Honorable David E. Mellenberg, the trial judge, found that the Petitioner was entitled to have relevant information of mental infirmity presented to a jury. In applying Pennsylvania law, Commonwealth v. Buehl, 450 Pa. 493, 658 A.2d 771 (1995), he nevertheless found that counsel had a reasonable basis for proceeding as they did. In affirming Judge Wallitsch, the Supreme Court of Pennsylvania stated as follows:

“It [the PCRA court] explained that trial counsel employed two recognized experts in the field of psychiatry and psychology who administered tests, evaluated Appellant, and reported that there was nothing that could be used as mitigation evidence. Rather, the experts told counsel that Appellant was a sociopath. Counsel also obtained an evaluation by another psychiatrist who after evaluating Appellant, found nothing that would be beneficial in the penalty phase. Although counsel did not obtain the records identified above [records that Petitioner maintains would have aided the mental health experts, including school records reflecting a low IQ, a hospital record reflecting a fever at age two, and Department of Corrections records reflecting low achievement test scores and alcohol abuse], the PCRA court found them not entirely helpful to Appellant and further found that counsel gave the experts whatever information they requested.

With respect to Appellant's siblings' testimony about his childhood, the PCRA court accepted trial counsel's testimony that when they questioned Appellant and his family before trial, they did not reveal the information that they now claim should have been told to the jury. The court rejected the siblings' testimony to the contrary. The court also stated that Appellant made contradictory statements to counsel during his representation and that counsel was reasonable in believing that their only avenue was to ask the jury to have mercy on him.

We agree with the PCRA court that trial counsel was effective with respect to their investigation and presentation of mitigation evidence. In addition to concluding that counsel acted reasonably, we further find that Appellant's claim lacks arguable merit. As recognized by the PCRA court, trial counsel employed three experts to evaluate Appellant. N.T., 3/28/96 at 68-69, 120-21. Based upon their testing, the experts found nothing helpful to Appellant's case and diagnosed him as a sociopath. *Id.* at 122-23. The fact that Appellant now has found two experts who conclude that he has brain damage does not negate the fact that trial counsel investigated Appellant's cognitive abilities with other experts. In addition, we agree with the PCRA court that under the facts of this case, counsel reasonably relied upon their discussions with Appellant and upon their experts to determine the records needed to evaluate his mental health and other potential mitigating circumstances. *See* N.T., 3/29/96 at 27-28, 33, 38-39. Thus, Appellant's claim that trial counsel failed to investigate his mental health is without arguable merit.

With respect to the mitigation evidence brought forth by Appellant's siblings, the PCRA court accepted as credible trial counsels' testimony that when they spoke to the family before trial, none of the family members revealed abuse or other circumstances that could be used as mitigation evidence. *See* N.T., 3/28/96 at 46-51, 109, 118-19, 133, 143; N.T., 3/29/96 at 111. Thus, Appellant's claim that trial counsel failed to investigate his family background also lacks arguable merit.

Related to this claim, Appellant next argues that because trial counsel failed to investigate his background, he received inadequate evaluations by mental health professionals in violation of his constitutional rights. Having found above that trial counsel did not fail to investigate, this claim similarly has no merit.

In testimony at the PCRA hearing, Maria Dantos, Esquire, who handled the sentencing hearing (penalty phase), testified that she graduated from law school in 1985, was then employed by the Lehigh County Office of the Public Defender and undertook representation of Petitioner (together with Chief Public Defender Frederick Charles) sometime after his arrest in January of 1988. She described her role as handling the penalty phase including making the arguments and presenting witnesses. Attorney Charles, as her supervisor, was involved in all of the decisions and the discussions on how to proceed. This was Ms. Dantos' first capital case, and first homicide trial. She contacted three mental health professionals; Drs. Cooke, Sadoff and

Gross prior to the trial to initially see if there was any issue of mental infirmity or mental insanity for the guilt phase and, mental infirmity for the penalty phase if the jury returned a first degree verdict. Apparently, she did not get Petitioner's school records and those records were never furnished to the three doctors aforesaid. The school records revealed, among other things, that Petitioner was in special education class and that his I.Q. was below the mentally retarded range at certain ages. The medical records of Petitioner were not obtained by trial counsel either. Those records revealed that at age 2, Petitioner was admitted to the hospital with a 105° fever and diarrhea. Finally, the Department of Corrections records, discussed at page 18, were not obtained by counsel.

Ms. Dantos did talk to family members, but nothing exceptional was presented to her about alcoholism within the family. Also, it was never indicated that there was any sort of abuse within the family. Ms. Dantos did agree that if someone were an alcoholic, that might be potentially mitigating value.

Chief Public Defender Frederick E. Charles was also examined at great length at the PCRA hearing before Judge Wallitsch. My examination of his testimony leads me to conclude that he was a veteran attorney with significant criminal trial experience as a defense lawyer at the time of Petitioner's trial; that he was knowledgeable with regard to the law and savvy with regard to trial techniques and strategy. While not dispositive of the ineffectiveness issue, a letter sent by Sandra Whitby to Maria Dantos shows the impression the representation of Mr. Charles and Ms. Dantos made upon someone close to the case.

“Dear Maria. It is the next day, and the pain and word “death” is still alive in my mind, but I had to take the time and write and tell Fred and you what superb [sic] human beings you both are. You fought and felt everything our family did, and when we cried you cried along with us. You left a feeling in me I can't

explain, and I want to thank you both for caring and for being there with us all the way. I'm sure I speak for all my family.

I only hope that some day, as Fred promised, the word "death" can be erased from the sentence so we can live in peace that Ron will be there to write, visit and talk with. If he should die, a part of us will, too, cause in our hearts we feel he is innocent, and nothing will change that.

Maria, I know at this point you want to put this matter aside and get on with your work, but I hope you don't give up on Ron, cause he called me and said you woke up feelings in him, and he trusts you with all his heart. We both know that was hard for him to say.

I can't say it enough that Fred and you are both wonderful, caring people. Thank you again for everything, and please, please help us, and don't forget us.

Love, Sandra Whitby."

The following excerpt from the lengthy testimony of Mr. Charles puts into perspective what was done on behalf of Petitioner compared to what Petitioner claims should have been done:

Q. Okay. That's fine. Just so I fully understand -- getting back to the penalty phase, just so I understand your position, you investigate based upon what your client tells you?

A. No, that's not my position. Okay. I know how you want to simplify this. But -- and so I don't know if I can answer you in the terms of your question. But I'll try. We investigate the evidence that we have, the evidence that's given in a preliminary hearing. We look at the probable cause affidavit. We look at the examination that we took in this case from the preliminary hearing. We looked at the evidence that came forth during the suppression hearing. We looked at the evidence that --

Q. I'm talking about the penalty phase.

A. But whatever came, we -- you know, you don't -- we don't sit and separate it. It's an investigation. The penalty phase is something that we keep an eye on. But I have to tell you in this case you had a very, very objecting client. Whenever we tried to talk penalty phase and death penalty with him, he was resistant to that.

Q. Let's discuss that.

A. Sure.

Q. Let's discuss that. What I thought you said just before was that you sit down with your client and you say, "Tell me how your schooling was," and your client would say, "I did okay in school." We're talking hypothetically. All right? If you have a client who is reluctant to discuss how his schooling was because he doesn't really want to talk about the penalty phase, do you, as counsel, have a duty to go further than just talking to your client about it?

A. It depends.

Q. Depends on what?

A. It depends on what evidence you have in the case. It depends on what he's told you.

Q. You --

A. Let me finish, Mr. Wiseman. He didn't tell us, "I'm not willing to talk to you about my schooling. I'm reluctant to talk about my this." He said there was nothing wrong. "Is there anything that happened? What was it like growing up? Is there anything you can tell us that could help us? And he said, "No, there was nothing wrong." He was very, very, very smooth about it. It wasn't that he was reluctant to talk about anything. He said, "Your conversations about the possibility of the death penalty bore me." He said, "I have home box in my room that I can watch, and I'm bored being here listening to it, and I'm going to go watch home box," and he walked out. That's why, when we tried to go through the death penalty phase with him and he left, we wrote it in that letter. And I said, "Since you won't hear it when we sit there, it bores you, I want you to at least read it." His reluctance wasn't an overall reluctance where he said, "I don't want to talk about my childhood, because it's too painful." There was no indicator from anything he told us that would send us searching for elementary school records, high school records, any kind of records. He said everything was fine. He had a normal childhood. There was nothing there. And so no, we didn't go beyond that. And my professional opinion is that, given what Ron Rompilla told us during the numerous discussions we had with him and the countless discussions that John Whispell, our deceased investigator, had with him and was over to see him constantly, there was nothing that came across our table that would make us go looking for his elementary school records, his home life records or anything. And if he knew of anything or his family knew of anything, they never told us. And I know most certainly that we asked, and I know Miss Dantos asked.

Q. Asked what?

A. "What can you tell me about Ron? What was it like for him? What was his life like? What was it like growing up? What was his relationship? What kind of a brother was he? What kind of a brother-in-law was he? What do you know?" Their response was they hardly know him. I mean one said, "He was in a reformatory. He's been away the whole time. We didn't know him

that well.” Things of that nature. But I remember her specifically going one by one and talking to him. “Is there anything you can tell me? Tell me about yourself. Tell me about your background.” She was, you know, meticulous to cover points. And she had a way of doing that, because she was legitimately concerned. And I thought it was disarming. They engaged in numerous what I considered to be cordial conversations. Some of the times I felt like I was in the way even being in the room, and I’d go get coffee. And she would sit down, and so would John Whispell. John Whispell was like a buddy with them, and they would go over and talk. “Tell me about yourself.” We undertook to try and determine from him and his family whatever information we could. Nothing came across to us that made us do what you’re asking about.

Q. All right. Are you aware of the dynamics that exist among people who are subject to child abuse, that they don’t readily like to talk about those kinds of things? Is that something that you --

A. Sure.

Q. -- see in your experience?

A. Sure.

Q. So you go to an adult -- well, let’s say -- well, you go to an adult who may have had an abusive childhood, and you say, “How was your childhood?” and the person says it was fine. Would you agree that, given your awareness of the abuse dynamics, that maybe it would be more prudent to go beyond the client and beyond those who may have abused the client to look for other indications of abuse?

A. It may in a vacuum. But, my goodness, you have -- with 2,000 defendants you have over 50 percent that tell you, “Yes, I’ve been beaten. I’ve been raped. I’ve been molested.” I mean, what’s the difference? It’s hard to determine when someone says, “No, I had a great childhood. I had no problems,” the difference between that and being in denial. I mean we talked to him more than once, and we believed that there was nothing outstanding. His family didn’t tell us anything. I mean maybe the family would say, “Hey, you know don’t believe him, because he was one heck of an abused kid.” That never was volunteered. It was never told during any of the times that we talked to them. You know, even if Ron denied it, I mean, somebody in the family would have known it. His wife would have known it. Somebody would know it to tell us. And I don’t think that it’s looking back and I really think it’s classic. I don’t want to say that. You’re looking back at it in a vacuum. Because when he says, “No, there’s nothing there,” you know, what’s the difference between the truth, there was nothing there, and classic denial. I’m not an expert. That’s why I send them to an expert.

Q. All right.

A. And I figure that Dr. Cooke or Dr. Sadoff or Dr. Gross, who do this for a living, might be able to say, “There’s something in the way he denied this that shows it’s classic denial syndrome, and we ought to explore it a little bit.” So I get him away from me making that call. I’m a lawyer. I’m not a psychiatrist or a psychologist. And so I get him to a pro, and then I get on with the business of preparing the rest of my case. And that’s what we did with Ron Rompilla’s case.

Petitioner argues now that this investigation did not fulfill counsel’s obligation to conduct a thorough investigation of Petitioner’s background. More specifically, trial counsel for Petitioner, his present counsel argue, should have obtained his school, medical, court and prison records as part of their investigation. The school records would have shown he was in special education and mentally retarded or borderline mentally retarded; the medical records would have revealed his early hospitalization at age 2; and the prison records would have shown scores on other tests, as well as other background information. There is reason to believe, from my reading of the depositions of Drs. Cooke, Sadoff and Gross, that information from those records may have been important in their respective diagnoses.

At the beginning of this analysis, I said that the penalty hearing appeared to be unreasonably short and lacking in substantive evidence.. The explanation of trial counsels’ conduct is two-fold, it seems to me. First and foremost, Petitioner himself was not forthcoming; he just was of virtually no help in the penalty stage (*see* testimony of Attorney Charles at pp.10-13 of this opinion). Second, despite the lack of cooperation of the Petitioner and his family members’ failure to reveal anything about his life other than he was a good guy, trial counsel had three doctors examine Petitioner. None of these experts were able to offer any mitigating factors and one even concluded the Petitioner was a sociopath; hardly something counsel could use.

My review of the record reveals that trial counsel were intelligent, diligent and devoted to their task of representing Petitioner. But, did trial counsel comply with their obligation to conduct a thorough investigation? We know that they did not develop and present any mitigating evidence about Petitioner's childhood, alcoholism, mental retardation or possible organic brain damage.

Certainly, with regard to the first two, Petitioner himself and his relatives simply did not supply counsel with any meaningful information prior to the penalty hearing. As to the mental retardation and organic brain damage, counsels' response is that the three experts never requested this information and therefore they never sought it. Judge Wallitsch concluded in this regard that, "Given the fact that three health care professionals, all of whom were experienced forensic experts, had provided opinions to defense counsel, and none of them asked for more information, it was hardly unreasonable or ineffective for defense counsel to have relied upon their opinions." (Opinion of Thomas A. Wallitsch, J., p. 8).

In affirming Judge Wallitsch, the Supreme Court of Pennsylvania stated, "We agree with the PCRA court that trial counsel was effective with respect to their investigation and presentation of mitigation evidence. . . . In addition, we agree with the PCRA court that under the facts of this case, counsel reasonably relied upon their discussions with Appellant (Petitioner) and upon their experts to determine the records needed to evaluate the mental health and other potential mitigating circumstances." The Pennsylvania Supreme Court concluded that trial counsel did not fail to investigate.

What is missing from the court opinions in this case is at least two matters of concern. First, there is no in depth analysis of what the duty to investigate consists of in a case of

this nature; and second, there is a lack of discussion of alcoholism as pertaining to the Petitioner.³

A discussion of the duty to investigate should include reference to the ABA Standards for Criminal Justice. These standards were cited in Williams v. Taylor, *supra*. Writing for the majority on the particular issue of ineffective assistance of counsel, Justice Stevens said, referring to certain conduct of defense counsel:

Whether or not those omissions were sufficiently prejudicial to have affected the outcome of the sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background. *See* 1 ABA Standards for Criminal Justice 4-4.1, commentary p. 4.55 (2d ed. 1980).

The ABA Standards for Criminal Justice 4-4.1, Duty to Investigate, and commentary 4.55 (2d ed. 1980) provides as follows:

Standard 4-4.1. Duty to investigate

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

The commentary to the above standard includes the following:

3. The overall analysis of this Claim I involves clearly established federal law, namely Strickland v. Washington, *infra*. Justice Kennedy explained that rules of law may be sufficiently clear for habeas purposes even if it is a generalized standard. He said:

"If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent." Wright v. West, 505 U.S. 277, 308-309, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992) (opinion concurring in judgment).

The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant. Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. Investigation is essential to fulfillment of these functions.

As early as Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052 (1984), the Supreme Court referred to ABA guidelines when it said:

Prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides.

Clearly in the Williams case, *supra*, that duty was breached. In Williams, evidence not presented at the sentencing hearing included:

- (1) documents prepared in connection with Williams' commitment when he was 11 years old that dramatically described mistreatment, abuse and neglect during his early childhood;
- (2) testimony that he was "borderline mentally retarded"; and
- (3) had suffered repeated head injuries and might have mental impairments organic in nature.

Trial counsel in the Williams case failed to ascertain the social service records regarding number (1) above because he erroneously believed that the state law didn't permit it. Counsel also "failed to introduce available evidence that Williams was 'borderline mentally retarded' and did not advance beyond sixth grade in school." Williams at p. 30. The court said

It is undisputed that Williams had a right -- indeed, a constitutionally protected right -- to provide the jury with mitigating evidence that his trial counsel either failed to discover or failed to offer, *id.* at p. 29.

Was Petitioner denied that right in this case because counsel was ineffective in performing their duty to investigate?

I am not sure why counsel did not seek out school or prison records in this case. It appears that they thought they could rely on the experts to determine Petitioner's general mental ability or capacity. Also bothersome is the apparent ignoring of Dr. Gross' advice (Exhibit 6 to Petition for Writ of Habeas Corpus) at the end of his letter:

The possibility does remain, however, that Mr. Rompilla while under the influence of alcohol, can become prone to violent behavior, although he himself strongly denies this. My recommendation is that this area should be further evaluated before any definite conclusions are drawn.

While acknowledging some potential mitigating value in one's being an alcoholic (N.T. 3/28/96, p. 54), counsel did nothing to further explore it. Petitioner was, however, sent to Drs. Cooke and Sadoff. Counsel was also aware that Petitioner had spent quite a lot of time in jail (about 14 years prior to being released, three months before his arrest on this charge) (N.T. 3/28/96, pp. 47, 48), but never sought prison records, some of which would have alerted counsel to possible mitigating evidence.

For example, Exhibit 12 of Petitioner's Exhibits to Petition for Habeas Corpus, in an Initial Classification Summary dated March 3, 1976 identifies alcohol as a past or present problem area. This summary was prepared by the Bureau of Corrections, Commonwealth of Pennsylvania in connection with Petitioner's incarceration for rape. In Petitioner's Legal History Prior to Present Confinement and Offense Pattern, alcohol is also checked.

In a Program Planning and Expectations dated March 11, 1976 concerning his initial classification, under Other Programs, the following appears:

Because of his abuse of alcohol, regular participation in the Alcoholic Anonymous program is strongly recommended.

The counselor's evaluation in that same report concludes:

This 28 year old married non-veteran was the 6th of nine children reared in the slum environment of Allentown, Pa. vicinity. He early came to attention of juvenile authorities, quit school at 16, started a series of incarcerations in and out Penna. often of assaultive nature and commonly related to over-indulgence in alcoholic beverages.

A summary prepared November 27, 1964 in connection with charges against

Petitioner as a juvenile revealed the following family background:

HOME AND FAMILY: In 1945 the City Health Department of Allentown, Pennsylvania became interested in this family then residing at 203 Green Street, Allentown, Pennsylvania. Following this, the Probation Office was alerted of neglected children. At this time, Miss Hahner of the Catholic Children's Bureau was interested in the family group and pleaded with the Probation Office that the family be given an opportunity to correct its home condition.

September 6, 1945 the mother was picked up by the police in a drunken condition at which time the Probation Office was obliged to enter into the home and family; the children were placed in a hospital and the home of relatives at that time; at this time the husband and father of this family was in the United States Army.

June 27, 1946 the children were returned to the mother where they resided in a basement apartment at 11 No. Fourth Street, Allentown; upon the husband's return home, upon discharge from the U.S. Army, things improved slightly.

Over a period of years the mother was missing from home frequently for a period of one or several weeks at a time; reports came to the Probation Office that she would be picked up by some man and would leave town with him during that period. Always upon return home the husband took her back into the house even though he complained about her absence; there was never any prosecution for her desertion of the family for her moral episodes. She has been reported over a period of years to be frequently under the influence of alcoholic beverages, with the result that the children have always been poorly kept and on the filthy side which was also the condition of the home at all times.

PROBATION OFFICER'S NOTE: Ronald comes from the Notorious Rompilla Family which has been known to the Lehigh County Courts on many occasions. The parents appeared to be cooperative but their past record indicates failure of handling their off-spring.

This court is aware that Petitioner was born on April 14, 1948. Nevertheless, this information would have certainly been of assistance to trial counsel, had they known it, in evaluating Petitioner's background.

Once again, an answer from Mr. Charles puts in perspective the dilemma of public defenders, at least in 1988, when this case was tried:

Q. Let me ask my question. What -- leaving aside your resource question, do you have any reason why you wouldn't investigate whether your client was raised as a homeless child?

A. I would investigate by asking my client, "How was your childhood? Were there any problems that you suffered? Any kind of abuse? Tell me something about -- is there anything you can tell me from your youth till now that can help us? Tell me, is there anything that sticks out? Don't think whether it's important or not. You just tell us, and then we'll determine whether or not we can use it." Investigate it that way. Would I send somebody to the person's elementary school to talk to the teacher to see if they remember him from 25 years or 40 years before? No. I didn't have those resources in the office. So I would do an investigation. But again, "investigate" is a subjective term. Investigate given what your resources are in light of the office. I had two investigators and 2,000 cases. And I'm sure you know the difficulties with budgeting caseloads and having to get investigations done given the resource you have. I will talk to the client, talk to the family, and see if anything developed from there. If something did, we would then amplify on it and develop it. If it didn't, we would go from there. There's a certain point in time when you have two or three thousand cases in a year that you have to deal with some of the things your client tells you and give that some full faith and credit and rely on it.

Acknowledging the difficulties of a public defender as explained by Mr. Charles, it seems to me on balance that they were obliged to go a bit farther to fulfill their duty to investigate. It is true, as the U.S. Supreme Court acknowledged in Williams that a lot of information they would discover would not be helpful to their client. It is also true that Strickland reminds us:

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. *Engle v. Isaac*, 456 U.S. 107, 133-134 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

In this case, however, there were pretty obvious signs, at least superficially from what counsel knew of Petitioner's criminal past, including his rape conviction, that Petitioner may have had a drinking problem, may have had a poor school record, and probably had a difficult childhood. More investigation into those areas would have uncovered information that at least counsel should have considered relative to mitigation, *i.e.*, his possible alcoholic problem, his family past, his borderline mental retardation. Obviously, we cannot consider the question of sound trial strategy when counsel did not have the information before it upon which to strategically decide how it should or should not be used.

It is a very close call in this case because trial counsel performed so admirably according to my review of the record. But, I think they had reason to know of Petitioner's past and should not have relied on defendant alone or his family to reveal the true nature of his background. Case law referred to in Petitioner's brief support his argument that in a capital case, courts have recognized a particular duty of counsel to thoroughly investigate defendant's background for any possible mitigating circumstances.

Even if counsel did not pass muster with regard to the first prong of the Strickland test in that their representation fell below an objective standard of reasonableness in regard to their duty to investigate Petitioner's background in preparation for the penalty phase, Petitioner must still show prejudice. To establish this, he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052 (1984).

The penalty phase of a first degree murder trial, it seems to me, is in many respects the same as a sentencing hearing in a non-capital case except the jury is for all practical purposes doing the sentencing in a capital case. To the extent the sentencing authority (whether judge or jury) does not have essential background information, the sentencing may be influenced one way or another. In this case, what the sentencing authority (the jury) lacked was the background history involving Petitioner's mental capacity and possible alcoholism. It also lacked information about his possible abusive childhood, although counsel was somewhat misled in this regard. The lack of information about these items is sufficient to undermine the confidence in a decision which was made in the absence of arguably important mitigation evidence.

Because I believe the correct governing legal principle (*i.e.*, Strickland) was clearly established but unreasonably applied, Petitioner is entitled to relief on this claim.

CLAIM II. PETITIONER IS ENTITLED TO RELIEF FROM HIS CONVICTION AND DEATH SENTENCE BECAUSE OF THE TRIAL COURT'S IMPROPER INSTRUCTION ON ACCOMPLICE LIABILITY.

Sometime after the jury began its deliberations, it forwarded the following question

to the trial court:

If defendant was an accomplice to the charge of Criminal Homicide, can he be charged with Murder in the First Degree?

Defense counsel, Mr. Charles, properly objected to the giving of the charge because accomplice liability was never part of the case and defendant therefore was neither alerted to address it through cross examination or otherwise. The trial court felt the jury was entitled to an answer and thus gave an answer including an incomplete charge on accomplice liability. He began his charge with this:

Well, preliminarily, let me say this. If you recall, the Court, in it's Charge, at no time referred to any theory of accomplice in this case. It is not the Commonwealth's theory in this case that the Defendant was an accomplice.

and concluded with this:

I can only say this to you, that you should determine this case based on the Charge of the Court as it had given you originally. There was no evidence in this case with regard to the question as posed but a simple clear answer to the question is yes, you could be charged with, and you could be convicted of Murder in the First Degree if, indeed, you're an accomplice, but it requires other proof or findings on your part that were not a part of this case nor were they made a part of this case.

As previously stated, I agree with Petitioner that the accomplice instruction was incomplete, but it did not, as Petitioner suggests, prevent the jury from considering and giving effect to exculpatory and mitigation evidence. Moreover, the incompleteness of the charge was cured by the admonition that it did not apply. Petitioner's argument that there was evidence of an accomplice is not supported by a careful reading of the record. His reference to the forensic evidence at p. 37 footnote 18 of his reply brief do not support an accomplice theory because:

(1) Consistent with the location of the murder being a public bar, finding lots of hair and fibers not being identified as Petitioners is not unusual (Vol. I, 11/25/88 N.T.,

p. 111);

(2) Moreover, while Petitioner's blood was not found at the scene, the only blood that was found there was the victim's, nobody else's; *id.*, p. 146; and

(3) The finding of other shoe impressions at a crime scene other than the alleged defendant's is normal (Vol. III, 11/28/88 N.T., p. 50).

CLAIM III. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY THAT "LIFE IMPRISONMENT" MEANS LIFE WITHOUT POSSIBILITY OF PAROLE, EVEN AFTER THE JURY REPEATEDLY ASKED ABOUT PAROLE ELIGIBILITY; AND THE TRIAL COURT'S PROVISION, INSTEAD, OF INACCURATE AND MISLEADING INFORMATION, VIOLATED PETITIONER'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

This claim evolves around the following occurrence. Shortly after the jury had retired to consider the penalty, it requested the court to answer this question: If a life sentence is imposed, is there any possibility of the defendant ever being paroled? The court's response follows:

I'm sorry to say, I can't answer that question. That's not before you as such. The only matter that you can consider in the Sentencing Hearing is the evidence that was brought out in the course of the Hearing and the Law with respect to the Court's Charge. That's the only consideration you have, I'm sorry to say. I -- if there were other alternatives that you should consider, we would have outlined them in the Charge, all right. Are there any other questions?

Petitioner argues that under Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187 (1994), where the state secured the death sentence, at least in part, based upon defendant's future dangerousness, failing to instruct the jury that under South Carolina law, life imprisonment meant no possibility of parole, denied defendant due process.

The prosecutor's summation in this case covers 16 pages of the notes of testimony and a fair reading of it leads to the conclusion that the state's reasoning for the death penalty was not based upon future dangerousness but on the despicable, savage and cowardly beating the Petitioner inflicted upon his victim. This is a close issue, however, but the Supreme Court of Pennsylvania's decision in the PCRA case was not an unreasonable application of federal law.

CLAIM IV. PETITIONER IS ENTITLED TO RELIEF FROM HIS DEATH SENTENCE BECAUSE THE (d)(8) AGGRAVATING CIRCUMSTANCE WAS UNCONSTITUTIONALLY OBTAINED.

Petitioner in this claim asserts that the following instruction on torture was unconstitutionally vague:

The second aggravated circumstance advanced by the Commonwealth was that the a -- the offense was committed by means of torture. The word "torture" is generally understood as the infliction of a considerable amount of pain and suffering on a victim which is unnecessarily heinous, atrocious or cruel, manifesting exceptional depravity. There must of necessity be more than a mere intent to kill to be an aggravating circumstance, the law requires an intent to cause pain and suffering in addition to the intent to kill. There must be an indication that the killing is not -- the killer is not satisfied with the killing alone.

Petitioner relies on Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853 (1988) which the Supreme Court of Pennsylvania reasoned was not applicable to this case. The court wrote:

Appellant appears to concede that the trial court gave an instruction defining torture that comports with *Pursell* and its progeny. Nonetheless, Appellant argues that the definition employed by the court is unconstitutionally vague under *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). *Maynard*, however, found vague an aggravating circumstance in the Oklahoma death penalty statute that provided that the murder was "especially heinous, atrocious, or cruel." 486 U.S. at 363-64, 108 S.Ct. 1853. The Court explained that these words alone did not guide the jury as almost every murder could be characterized

as especially heinous, atrocious, or cruel. *Id. Maynard* did not involve an aggravating circumstance that an offense was committed by means of torture. In addition, the Court in *Maynard* agreed that a limiting instruction that the aggravating circumstance at issue required torture would be constitutionally acceptable. *Id.* at 364-6, 108 S.Ct. 1853. Thus, *Maynard* does not preclude defining torture as the infliction of pain that is unnecessarily heinous, atrocious or cruel, with the intent to cause pain and suffering in addition to the intent to kill. Appellant's claim is without merit.

I agree.

CLAIM V. PETITIONER IS ENTITLED TO RELIEF FROM HIS DEATH SENTENCE BECAUSE THE (d)(9) "SIGNIFICANT HISTORY" OF FELONY CONVICTIONS AGGRAVATING CIRCUMSTANCE IS UNCONSTITUTIONALLY VAGUE; THE JURY INSTRUCTIONS DID NOT CURE THIS VAGUENESS; AND THE JURY INSTRUCTIONS, TO THE EXTENT THEY PROVIDED GUIDANCE AT ALL, DIRECTED A FINDING OF THIS AGGRAVATING CIRCUMSTANCE.

The jury instruction involving this claim follows:

And the third aggravating circumstance appointed to, by the Commonwealth, is that the Defendant has a significance history of felony convictions involving the use or threat of violence to the person. And in this regard, a significant history of prior criminal convictions involving the use or threat of violence to the person means one -- more than one prior conviction. In other words, at least two prior convictions before that can become an aggravating circumstance.

Petitioner's claim of unconstitutionally vague must be viewed, as Petitioner agrees, by the standard, "did the adjudication by the state court result in a decision that involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States?" The thrust of Petitioner's argument is that in finding that the aggravating factor in question, namely; "The defendant has a significant history of felony convictions involving the use or threat of violence to the person", was not unconstitutionally vague, the Supreme Court of Pennsylvania relied on a U.S. Supreme Court case which dealt with

a mitigating factor. See Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960 (1976). Petitioner is correct that Proffitt dealt with a mitigating factor. Specifically, Petitioner in Proffitt argued that neither a judge or jury was capable of determining whether he had a “significant history of prior criminal activity.”

In answering this and similar objections, the Supreme Court said

While these questions and decisions may be hard, they require no more line drawing than is commonly required of a fact finder in a lawsuit. For example, juries have traditionally evaluated the validity of defenses such as insanity or reduced capacity, both of which involve the same considerations as some of the above-mentioned mitigating circumstances. While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authority’s discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court’s sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed. *Id.* at 257-58.

Again, I do not find an unreasonable application of the law on the vagueness issue.

More problematical is the actual charge of the court. While I have found that it was reasonable to conclude that the phrase “significant history” was not unconstitutionally vague and thus, there was in effect no vagueness for the jury instruction to cure, the charge of the court quoted above, when read alone, might support Petitioner’s third argument in this claim. But I think that the entire charge makes it clear that the court is not in any way directing a finding on this issue. The charge makes the burden of proof on issues of aggravation quite clear.

CLAIM VI. PETITIONER IS ENTITLED TO RELIEF FROM HIS DEATH SENTENCE BECAUSE OF IMPROPER PROSECUTORIAL ARGUMENT AT THE PENALTY PHASE.

As mentioned in Lesko v. Lehman, 925 F.2d 1527 (3d Cir. 1991), Justice Sutherland's oft-quoted phrase about the role of a United States Attorney is a good starting point for review of Claim VI. Justice Sutherland said

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done . . . He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935).

In reviewing the 16-page closing of the prosecutor in this case, I find that it borders on but does not transgress the line which separates fair play from foul. Nevertheless, I am puzzled as to why prosecuting attorneys do not limit their closing argument to the framework of a capital case within the Pennsylvania statutory scheme of aggravating and mitigating factors. Without passion, but with cool, calm objectivity, a prosecutor in a case like the one now before the court can simply stress how clearly the Commonwealth has proven the aggravating factors and why any mitigating factors are far outweighed by the aggravating ones. The point can be made, the argument delivered, without resort to personal feelings or reference to inflammatory matters not within the record of the case.

Petitioner states on p. 54 of his reply brief that the Pennsylvania Supreme Court noted that it provides less searching review of the prosecutor's capital sentencing phase arguments. I did not find any such notation but in fact found the court's opinion to have

thoroughly covered, with discussion, the alleged inappropriate remarks of counsel. Remarks of the prosecutor such as, “its not easy for me to argue for the death penalty” (a personal and unnecessary remark); “if you don’t do it in this case, when are you going to do it? This is the most appropriate case for the death penalty and that’s all I’m asking for....” do not unfairly vouch for the propriety of the death sentence. The statement of the prosecutor to the effect that the jury should not show any mercy to Petitioner because, “did Petitioner show any mercy to the victim”, does not entitle Petitioner to relief. *See Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 597 (1991). The prosecutors delved into areas not necessarily supported by the record, i.e., the Petitioner killed the victim so that there would be no witness and speculation on the impact on the victim’s family. As I stated earlier, counsel should stick to the record in closing argument. But, even viewing the closing in its entirety, I believe the Pennsylvania Supreme Court’s finding of no prejudice is a reasonable application of the law.

CLAIM VII. PETITIONER IS ENTITLED TO RELIEF FROM HIS DEATH SENTENCE BECAUSE THE TRIAL COURT IMPROPERLY ALLOWED THE PROSECUTOR TO READ TO THE JURY THE INFLAMMATORY AND PREJUDICIAL TESTIMONY OF THE VICTIM OF A PRIOR RAPE AND COUNSEL WERE INEFFECTIVE FOR FAILING TO CITE CONTROLLING AUTHORITY THAT WOULD HAVE PREVENTED THE INTRODUCTION OF THE INFLAMMATORY AND PREJUDICIAL EVIDENCE.

The second part of this claim is not correct. Indeed, trial counsel attempted to stipulate that burglary was inherently a violent crime in order to prevent a reading of the record, but the prosecutor insisted upon it and the trial judge permitted it. Petitioner argues that trial counsel should have been aware of and cited to the trial court the case of Commonwealth v. Rolan, 520 Pa. 1, 549 A.2d 553 (1988) decided October 18, 1988, roughly two weeks before his trial. The Rolan case declared that burglary was a violent crime. It did not go on to say that

therefore, the prosecutor could not reveal to a jury the underlying facts of the crime during the penalty phase. It was not improper to permit the reading of the testimony of the victim. Defense counsel appropriately argued strenuously against its use.

CLAIM VIII. THE SEATING OF THE JUROR WHO VISITED THE SCENE OF THE CRIME TEN TIMES, INCLUDING, DURING THE TRIAL PROCEEDINGS, WHO KNEW THE VICTIM OF THE OFFENSE AND THE VICTIM'S SON, WHO KNEW AN EMPLOYEE OF THE PROSECUTOR'S OFFICE AND WHO EXPRESSED SUBSTANTIAL DOUBTS REGARDING THE PRESUMPTION OF INNOCENCE; AND TRIAL COUNSEL'S FAILURE TO CHALLENGE THIS JUROR FOR CAUSE, VIOLATED PETITIONER'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The claim as worded is somewhat of a distortion of the examination of the juror in question. It also doesn't mention the fact that this particular juror apparently got a ticket from a police officer and was found guilty. The police officer was from the Allentown Police Department, the same department of which the detective prosecuting the case belonged.

Moreover, the following exchange took place during voir dire:

Q. Okay. Now the judge told you this is going to last about two weeks starting tomorrow, probably. Say that you're in the end of the second week, you've been here for a long time, you've been deliberating and you are in the minority in your view. Okay? Your one view differs from the eleven others. Would you change your opinion simply because of the pressure from the other jurors on the lateness of the hour or would you hold firm to your beliefs?

A. I would stick to my belief.

Q. Okay. Are you sure about that?

A. I don't think time would have anything to do with it.

Q. Okay. Good. Because I'm sure that you realize this is a serious case. We want your mind focused on the evidence, okay, and not on the lateness of the hour or other pressures. So can I have your word that you'll hold firm?

A. Yes ma'am.

The entire examination of this particular juror appearing at pages 220 to 247, Notes of Jury Voir Dire 10/24/88, makes it clear that the concerns raised in this claim are exaggerated. It appeared that he had been in the bar owned by the victim about 10 times over the last eight years (N.T. 222). About one week before his voir dire examination, he stopped in the bar for a six pack. He hadn't sat down and had a drink in the bar since about three years before the homicide (N.T. 225). He barely knew the owner, had no relationship with him other than to say hi (N.T. 226), and didn't think he ever met the owner's son except maybe one time (N.T. 226). He also said he knew an Emil Cantro (apparently an Assistant D.A.). The juror said, "I don't know who he is, I just met him one time" (N.T. 231). This juror did express a lack of understanding of the presumption of innocence initially, but his examination makes it clear that he understood it and could apply it after it was explained to him (N.T. 241-246). This claim is without merit.

CLAIM IX. PETITIONER'S DEATH SENTENCE SHOULD BE VACATED BECAUSE THE ARBITRARY "PROPORTIONALITY REVIEW" PERFORMED BY THE PENNSYLVANIA SUPREME COURT VIOLATED HIS EIGHTH AMENDMENT AND FOURTEENTH AMENDMENT RIGHTS.

The Petitioner points to no federal case law in support of this argument. As pointed out by the Supreme Court of Pennsylvania in Commonwealth v. Gribble, 550 Pa. 62, 703 A.2d 426 (1997), the United States Supreme Court has held that the Eighth Amendment as applied to the states through the Fourteenth Amendment does not require that a state death penalty statute contain proportionality review. The state court's decision in Gribble was not an unreasonable application of Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871 (1984). Referring to Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct.

2690 (1976); Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, the court in Pulley said,

“...Examination of our 1976 cases makes clear that they do not establish proportionality review as a constitutional requirement.” Pulley at 44-45, 876.

CLAIM X. PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS CLAIM THAT THE PROSECUTION VIOLATED HIS DUE PROCESS BY INTRODUCING FALSE AND MISLEADING EVIDENCE.

This claim, according to counsel for Petitioner, is described in the Petition itself in numbers 503-511.

What Petitioner is arguing is that the knife the Allentown police located broken in two in a snow bank outside the bar, had a brown handle according to testimony at the preliminary hearing. At the trial itself, the knife recovered at the scene had a black handle, according to testimony. Thus, Petitioner concludes that the knife identified at the trial was not the same one that was found in the snow bank.

The Notes of Testimony reveal that more than one knife was found at the scene and the identity of one of them as a black-handled knife found in the snow bank is acknowledged by the victim's son as one of the knives used at the bar (N.T. 10/25/88, p. 45). Another knife found at the scene was described by the victim's son as having “like a burned-orange type color” handle (N.T. 10/25/88, p. 57). Since the fingerprints of Petitioner were found on evidence that was not recovered at the scene (the black-handled knife), false evidence has been introduced, Petitioner argues. This is totally unsupported by a reading of the Notes of Testimony and appears to be based entirely on paragraphs 507 through 510 which follow:

507. In addition to the above-described fingerprint evidence, the FBI had extensive involvement in the investigation and prosecution of this case. Recent revelations of

possible malfeasance and incompetence in the FBI labs raise the possibility that other false and misleading evidence was introduced at Petitioner's trial.

508. Over fifty items of evidence, including fibers, blood, hair, potential weapons (e.g., glass bottles, knives) broken glass, floor tile, sneakers, photographs, fingerprints, and clothing, were submitted to the FBI for analysis. (Copies of April 4, 1988 and May 5, 1988 reports from the FBI to Allentown's Chief of Police, listing evidence submitted for analysis in this case, are appended as combined Exhibit 19).

509. In addition to the lab work done in this case, five FBI agents testified for the prosecution. Paul A. Bennett, employed in the FBI's Laboratory Division, testified as to analysis of fibers found on some of the evidence gathered in this case. NT 10/25/88 at 96, 106-11. Robert R.J. Grispino, employed as a Supervisory Special Agent conducting forensic serology for the FBI, testified as to the origins and types of various blood samples that had been submitted to the FBI. *Id.* at 119, 124-36. As described above, Leonard P. Dreibelbis testified as an FBI fingerprint specialist and indicated that one of Mr. Rompilla's prints matched a latent print found on the alleged murder weapon. NT 10/26/88 at 6, 19-28. Richard Crum, a special agent employed in the Firearms and Tool Mark Identification Unit of the FBI laboratory, testified as to the origins of different pieces of knife that was purportedly the murder weapon. *Id.* at 152, 155-57. Gary Kanaskie, a special agent assigned to the Document Unit of the FBI lab with additional specific duties regarding shoe and tire print analysis, testified regarding the origins of various impressions left at the crime scene. NT 10/27/88 at 28-29, 32-50.

510. Given the FBI's pivotal role in the investigation and prosecution of this case, the integrity of the FBI's lab work and agent testimony is obviously a matter of great importance. There has been recent public disclosure of far-ranging allegations made by high level employees of the FBI that agents employed in the Bureau's Laboratory Division have routinely, and over a period of years, engaged in a multitude of corrupt practices. These allegations assert that FBI laboratory agents have falsified lab results and reports to meet the needs of prosecuting agencies; have suppressed exculpatory lab results, and have engaged in sub-standard laboratory practices effecting the substantive outcome of their work.

Such broad sweeping allegations form no grounds for an evidentiary hearing much less relief from conviction.

CLAIM XI. PETITIONER IS ENTITLED TO RELIEF BECAUSE OF CUMULATIVE PREJUDICIAL EFFECTS OF ERRORS IN THIS CASE.

This case in terms of having a fair if not perfect trial is almost error free. Only in the sentencing phase does the concept of a fair hearing come up somewhat short.

III. CONCLUSION

None of Petitioner's claims entitle him to relief from the jury's verdict of guilty of murder in the first degree. None of his claims make a substantial showing of the denial of any constitutional right with regard to the guilt determining phase of his trial. Those claims are:

- (1) Improper instruction of accomplice liability (Claim II);
- (2) Improper seating of a juror (Claim VIII);
- (3) Introduction of false and misleading evidence (Claim X); and
- (4) Cumulative effect of errors (Claim XI).

With regard to Claim III, the court believes that Petitioner has made a substantial showing relative to the trial court's failure to instruct the jury that life imprisonment means life without the possibility of parole, and therefore would grant a certificate of appealability with regard to that claim only. Claim III, together with Claims I, IV, V, VI, VII and IX deal with defects in the sentencing procedure. The relief hereafter granted may make the granting of a certificate of appealability as to Claim III superfluous.

