

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

<b>JOHN LIEBEL</b>	:	<b>CIVIL ACTION</b>
	:	
v.	:	
	:	
<b>BROOKS, ET AL.</b>	:	<b>NO. 04-4380</b>

**MEMORANDUM AND ORDER**

**Norma L. Shapiro, S.J.**

**31st January, 2006**

Petitioner John Liebel (“Liebel”), a prisoner at the State Correctional Institute at Albion, Pennsylvania, filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254. The petition was referred to Magistrate Judge Carol Sandra Moore Wells (“Judge Wells”) for a Report and Recommendation (“R & R”) under 28 U.S.C. § 636(b)(1). Judge Wells recommended that the petition be denied and dismissed without an evidentiary hearing. Presently before the court are Petitioner’s Objections to the R & R (“Objections”) and two additional grounds for relief raised by Petitioner after R&R was filed.

**I. BACKGROUND**

Liebel killed his father, George Liebel, Sr., on February 22, 1997; he was then nineteen. According to Liebel’s testimony, earlier that same day his father had fired him from the family business and ordered him to move out of his parents’ home. Liebel decided to burn the family Bible and a family portrait. His father entered the room while he still was in front of the stove,

shoved him aside, and took the items out of the fire. Liebel tackled his father from behind and choked him by applying pressure with his arm and then tying a camera strap around his father's neck. Shortly thereafter, Liebel turned himself in to the police.

The Chief Deputy Public Defender of Bucks County was assigned to represent Liebel. After consultation with a medical specialist, trial counsel believed Liebel's allegations of physical and sexual abuse by his father were not credible. He advised Liebel to plead guilty to criminal homicide, with the hope of a voluntary manslaughter verdict. After Liebel entered a plea of guilty to criminal homicide, Common Pleas Judge Weaver found him guilty of first degree murder. Liebel was sentenced to life in prison without parole; after sentencing, his motion to withdraw his plea was rejected.

#### **A. Post-sentence motion and direct appeal**

Liebel, represented by new counsel, filed a post-sentence motion requesting a new trial, because, among other things: his plea was not voluntary since he had relied on misrepresentation by trial counsel that a manslaughter verdict was likely and he had a right to withdraw the guilty plea; and trial counsel was ineffective in failing to investigate and present evidence of physical, mental and sexual abuse by George Liebel, Sr., to support a verdict of voluntary manslaughter. The trial court, dismissing the post-sentence motion after a hearing at which Liebel and trial counsel testified, found that: the colloquy and trial counsel's testimony at the post-sentence motion hearing showed Liebel had been sufficiently informed; there was "no credible testimony" Liebel's plea was involuntary; and trial counsel investigated the alleged incidents of physical and sexual abuse, met with Liebel frequently to discuss the case, and made a strategic decision to have him plead guilty because there was no certainty the trial judge would instruct a jury on

voluntary manslaughter. Com. v. Liebel, No. 2466/97 (Court of Common Pleas of Bucks County, Pennsylvania, Criminal Division filed July 10, 1998).

On appeal, the Superior Court affirmed and found particularly that there was “absolutely no support in the record for a finding of physical or sexual abuse perpetrated on Liebel by his father.” Com. v. Liebel, No. 892 Philadelphia 1998, Appeal from the Judgment of Sentence entered September 16, 1997, in the Court of Common Pleas of Bucks County, Criminal, at No. 2466/1997, at 8 (Pa. Super. Ct. March 5, 1999). Appellate counsel promised to petition for an appeal to the Supreme Court but did not.

#### **B. Pennsylvania Post-Conviction Relief Act**

Liebel filed a pro se Post-Conviction Relief Act (“PCRA”) motion arguing among other things: (1) ineffective assistance of trial counsel because of: (a) conflict of interest; (b) failure to investigate readily available evidence supporting his contention of abuse; (c) failure to disclose to him material facts; (d) willful destruction of readily available defense evidence; (e) failure to question witnesses about material facts (particularly Liebel’s friend Tim Bannon and his younger brother, Gregory Liebel); (f) misleading representation that pleading guilty to murder could lead to manslaughter verdict; (g) failure to object to the trial court’s contradictory explanation of the facts of the plea; and (i) failure to act reasonably in his client’s interest in advising him to plead guilty to homicide; (2) ineffective assistance by appellate counsel for failing to: (a) investigate readily available evidence; (b) call available witnesses; and (c) timely petition for an appeal to the Pennsylvania Supreme Court. Attached to the PCRA petition were witness statements and letters from a potential witnesses that Liebel believed supported his claims that his father had been prone to violence and Liebel’s trial counsel misled him to believe he had a right to

withdraw his plea and the trial judge would reach a voluntary manslaughter verdict.<sup>1</sup>

Appointed new counsel filed an amended PCRA petition based on the claims of ineffective assistance by trial and direct appellate counsel. The PCRA court, after another evidentiary hearing at which only Liebel was allowed to testify, dismissed the petition for failing to state a cognizable claim under the PCRA. The dismissal was affirmed by the Superior Court, Com. v. Liebel, No. 2359 EDA 2000, Appeal from the Judgment of Sentence entered July 21, 2000, in the Court of Common Pleas of Bucks County, Criminal, at No. 2466/1997, at 8 (Pa. Super. Ct. June 13, 2001), but the Supreme Court of Pennsylvania found ineffective assistance of counsel for failure timely to perfect an appeal was cognizable under the PCRA and remanded for a determination whether Liebel should be able to file the petition for allowance of appeal nunc pro tunc. Com. v. Liebel, 33 MAP 2002, Appeal from the Order of the Superior Court, No. 2359

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<sup>1</sup> The packet included letters or statements from: School administrator J. B. Siberski, asserting he told trial counsel he believed John Liebel's school file would be helpful to his defense but must be obtained promptly because it would otherwise be destroyed; brother George Liebel, Jr. claiming he was physically and sexually abused by his father; brother Gregory Liebel, asserting physical abuse by his father; friend Timothy Bannon, claiming George Liebel, Sr. invited him to shower with him when he was 12 or 13 and that he had once witnessed George Liebel, Sr. punching Liebel in the face; Susan Bannon, recounting an occasion when Liebel came to her "hurt and shaking"; Sharon Smeltzer, mother of a catechism student who had been physically attacked by George, Sr., his catechism instructor, in 1996; David Tyler, a Scout leader, who had to "drag" George Sr.'s hands from a young boy scout's neck when George Sr. was a scout leader; John Petras, another witness to the same incident; Judith E. LaPolla, stating George, Sr. "did not hesitate to chastise any [Boy Scouts] if they weren't behaving the way he wanted"; John LaPolla, stating that George, Sr.'s "attitude and actions toward his children" when LaPolla and others were at his home "caused [them] . . . discomfort"; Sister Agnes Frascatore, claiming trial counsel told her that if he "went before Judge Weaver, rather than a jury, there would be no way that she would find . . . Liebel guilty of first degree murder"; and three letters from appellate counsel, respectively admitting that his failure to present Sister Frascatore at the evidentiary hearing precluded him from presenting her statement to the Superior Court, promising to appeal to the Pennsylvania Supreme Court, and admitting he failed to file a Petition for Allowance of Appeal timely.

EDA 2000, entered June 13, 2001, affirming the Order of the Court of Common Pleas of Buck County entered July 21, 2000 at No. 2466/97, denying PCRA relief (Pa. June 9, 2003). On remand, Liebel was permitted to file a petition for allowance of appeal; the Supreme Court denied allocatur and denied reargument. Com. v. Liebel, 875 A.2d 1074 (Table) (Pa. 2004). Liebel's sentence was final in October 2004.

### **C. Federal habeas petition**

Liebel, pro se, initially filed a federal habeas petition on September 16, 2004. On November 5, 2004, he filed an amended petition raising identical claims. This new petition was treated as part of the same action. Whether or not the date of filing would "relate back" to the initial filing, Liebel's petition was timely filed.

Liebel argues three grounds for relief:

Ground One: his guilty plea was involuntary because: (a) trial counsel threatened to abandon him if he did not plead guilty; (b) Liebel was misled to believe he had a right to withdraw his plea within ten days; and (c) Liebel believed that a homicide plea did not rule out a manslaughter conviction.

Ground Two: Trial counsel was ineffective because he:

(a) failed to challenge witnesses, reveal perjury and present a psychiatric witness;  
and

(b) failed adequately to investigate known and available witnesses to support his allegations of abuse.

Ground Three: During the direct appeal proceedings, he was denied the right to appeal by the Pennsylvania Superior Court.

Judge Wells recommended the petition be denied without a hearing because: (1) Liebel failed to exhaust Grounds 2(a) and 3, and they are procedurally defaulted; (2) Grounds 1 and 2(b) are meritless.

Liebel then filed: (1) an Objection and Response to the Magistrate Judge's Report and Recommendation ("Objections"); (2) a Motion to Drop the Unexhausted Claim ("Ground III"); and (3) a Motion for Leave to Amend his habeas petition to add two claims. This court granted the motions. The added claims are:

Ground Four—conflict of interest of trial counsel;

Ground Five—ineffective assistance of post-sentence motion counsel, because of his failure to argue decedent's abuse and trial counsel's misleading advice.

## **II. DISCUSSION**

### **a. Liebel's Objections to the R&R**

Objections 1 and 2: The Magistrate Judge Failed to Address Petitioner's Claims of Trial Counsel's Actual Conflict of Interest and Ineffective Assistance of Direct Appeal Counsel for Failing to Investigate and Present Witnesses.

Liebel objects that the R&R failed to address his claims that: trial counsel's performance was negatively affected by a conflict of interest ; and his counsel on direct appeal was ineffective because he failed to investigate and present witnesses of his father's abuse and of ineffectiveness by trial counsel. These claims were not raised in the habeas petition submitted to the Magistrate Judge; Liebel first moved to add them in a Motion to Amend filed after the R&R was issued. Judge Wells had no obligation to address claims not made in the petition. These objections are

overruled.

Objection 3: The Magistrate Judge Failed to Include All the Claims Considered by the PCRA Court.

Liebel argues the Magistrate Judge erred in failing to review all the claims considered by the state PCRA court, particularly the claim of trial counsel's conflict of interest. The conflict of interest claim was not before Judge Wells although it is now part of the petition as amended.

This objection is overruled.

Objection 4. The Magistrate Judge Failed to Expand the Record.

During the course of his federal habeas proceedings, Liebel submitted twenty-three exhibits; he argues that the R&R fails to take them into account. Exhibits 1 through 17 were appended to the Motion for Expansion of the Record filed after the issuance of the R&R. Exhibits 18 and 19 were submitted with Petitioner's Motion for an Evidentiary Hearing and Motion for Discovery; four additional documents (Exhibits 20-23) were the product of that discovery and are reproduced in his Objections.

Exhibits 1-17 are statements and letters submitted with the PCRA petition; they were part of the state record reviewed by Judge Wells. Exhibit 18 is a transcript of someone else's plea colloquy given to Liebel by his trial counsel; it was not transmitted with the state court record, but Liebel's receipt of it was never in doubt. He read the relevant parts of the colloquy into the record; even if Judge Wells did not formally place the entire transcript in the record, she adequately reviewed Liebel's claim that the transcript misled him into entering a guilty plea.

Exhibits 19-23 are documents relating to his mother's sale of Liebel's motorcycle and car after his arrest and relate to the conflict of interest claim. Judge Wells properly considered the record as it was before her. This court has considered all additional exhibits in reviewing the entire record. This objection is overruled.

Objection 5. The Magistrate Judge Failed to Address the Motion for Evidentiary Hearing.

Liebel argues that no final order was issued on his Motion for Evidentiary Hearing. The motion was initially denied without prejudice by Judge Wells; the R&R recommends dismissal without an evidentiary hearing. The motion was adequately addressed; this objection is overruled.

Objection 6. The Magistrate Judge Erred in Rejecting the Claim That Trial Counsel Failed to Challenge Witnesses for Bias, Perjury, and to Provide a Psychiatric Witness As Unexhausted.

The Magistrate Judge recommended dismissal of this claim as unexhausted and procedurally defaulted. Liebel contends he raised this ground on direct appeal and the PCRA by complaining of his trial counsel's failure to investigate and present available third-party witnesses to support his claim his father was not the gentle family man his mother described during the degree of guilt hearing.

A claim is exhausted if the petitioner has fairly presented its "substance" to the highest court of the state. Landano v. Rafferty, 897 F.2d 661, 673 (3d Cir. 1990). "Obviously there are instances in which 'the ultimate question for disposition' . . . will be the same despite variations



in legal theory or factual allegations urged in its support..” Picard v. Connor, 404 U.S. 270, 277 (1971) (internal citation omitted).

A generous reading of Liebel’s pro se habeas petition shows he presented the substance of this claim to the state courts when he contended throughout his direct appeal process that trial counsel failed to investigate and present witnesses to support the theory of abuse by his father. The court will consider this claim on the merits.

To establish counsel was constitutionally ineffective, a petitioner must show: 1) trial counsel's performance fell well below an objective standard of effectiveness; and 2) a reasonable probability the result of the trial would have been different with effective counsel. Strickland v. Washington, 466 U.S. 668, 687 (1984). The test for "standard of effectiveness" is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686. Counsel is permitted to exercise discretion whether to make questionable claims. See Parrish v. Fulcomer, 150 F.3d 326, 328 (3d Cir.1999) (counsel not ineffective for failing to raise a meritless claim).

An error by counsel, even if professionally unreasonable, does not require setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Strickland, 466 U.S. at 696. A different outcome must be not merely possible, but probable. McNeil v. Cuyler, 782 F.2d 443, 451 (3d Cir.1986). If petitioner's argument fails either criteria of the Strickland test, the entire claim fails. "There is no reason for a court deciding an ineffective assistance claim to . . . address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697.

The Pennsylvania standard for ineffective assistance is similar to the federal. Counsel is

ineffective only if counsel's conduct: 1) had no "rational, strategic or tactical basis"; and 2) "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S.A. §§ 9543(a). The Pennsylvania standard is not contrary to or an unreasonable application of Strickland. See Werts v. Vaughn, 228 F.3d 178, 204 (3d Cir. 2000).

The state courts found that Liebel's trial counsel investigated his claims of physical and sexual abuse and engaged a psychiatric expert to examine him, but concluded, partly because of the expert's opinion, that Liebel was not truthful about the sexual abuse allegations. As a result, he made a reasonable decision not to present any witnesses to establish this claim. See Com. v. Liebel, No. 892 Philadelphia 1998, Appeal from the Judgment of Sentence entered September 16, 1997, in the Court of Common Pleas of Bucks County, Criminal, No. 24676/1997, at 8 (Pa. Super. Ct. March 5, 1999).

Liebel argues that trial counsel's decision not to aggressively counter the prosecution's evidence on the victim's character was unreasonable because it was based on an incomplete investigation; the witnesses Liebel named, would have corroborated his story. See Strickland, 466 U.S. at 690-91 (counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary); United States v. Gray, 878 F.2d 702, 711-12 (3rd Cir.1989) ("counsel can hardly be said to have made a strategic choice ... when s/he has not yet obtained the facts on which such a decision could be made"; under such circumstances, counsel's behavior is "not colorably based on tactical considerations but merely upon a lack of diligence.")

Trial counsel's decision not to present a history of abuse may have been based on an

insufficiently tested disbelief in his client's version of the facts, but his assistance was not ineffective because there was no "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." See Strickland, 466 U.S. at 687.

Liebel did not deny intentionally killing his father, so the most favorable verdict he could obtain was voluntary manslaughter under one of two theories: sudden intense passion caused by serious provocation, or incomplete self-defense (a subjective, erroneous belief that his life was in danger). See Com. v. Laich, 777 A.2d 1057, 1061 (Pa. 2001) ("the difference between first-degree murder and voluntary manslaughter is whether the actor committed the killings under a sudden and intense passion resulting from serious provocation"); Com. v. Shephard, 648 A.2d 563, 569 (Pa. Super. 1994) ("[a]n imperfect self-defense . . . is more in the nature of perception based upon faulty analysis of the circumstances, or state of mind arising from a pattern or history of interaction, which would lead to a reaction based on fear of one's safety arising out of previous abuse.")

Liebel's testimony could not support a finding of serious provocation by his father; his act of burning the family Bible and photograph was a provocation to which his father responded only by pulling them out of the fire and turning away. Liebel also failed to establish that he feared for his life. Even had all of Liebel's proposed witnesses been found and had all their testimony been admissible, the most they could have established is that seven to ten years before his killing, George Liebel, Sr. took showers with his sons and asked another boy to shower with him; he sexually abused George Liebel, Jr. and routinely beat his sons when they were growing up; and became enraged at a child under his care and had to be physically restrained on two occasions. Liebel made no explicit allegation of sexual abuse except one vague allusion to an

incident that might have been a dream; he did not allege that his father had been violent toward him in the recent past. He also never claimed that the knowledge of the two incidents of violence affected his state of mind when he killed his father. He testified, “the fact that [his father] beat up on someone . . . didn’t mean anything” to him. N.T. 7/21/2000 at 68. Counsel knew of his allegations and had an expert consider them before he decided they were not credible. There is no reasonable probability that a court or jury would have found Liebel had a subjective fear for his life even had all those witnesses testified.<sup>2</sup> Because the testimony would probably not have changed the outcome, there was no constitutionally ineffective assistance of counsel. This objection is sustained on the exhaustion issue but overruled on the merits.

Objection 7: The Magistrate Judge Erred in Rejecting Liebel’s Claims of Involuntary and

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<sup>2</sup> The court could find no precedent in the Third Circuit where ineffective assistance of counsel was alleged because of failure to present evidence of abuse with respect to the determination of guilt. Cases mostly regard failure to present mitigating evidence at sentencing. In Wiggins v. Smith, 539 U.S. 510 (2003), the Supreme Court found that counsel had been ineffective in failing to investigate and present mitigating evidence at sentencing, where petitioner had been subjected to “severe physical and sexual abuse suffered at the hands of his mother and while in the care of a series of foster parents.” Id. at 533, 535. See also Rompilla v. Beard, 125 S.Ct. 2456 (2005) (defense counsel's failure at sentencing phase of capital murder trial to examine file on defendant's prior conviction for rape and assault was prejudicial ineffective assistance of counsel; in the file was evidence potential mitigating factors, including the records of defendant's imprisonment on the earlier conviction, including statement by corrections counselor outlining defendant's upbringing in a slum environment, disclosing test results that the defense's mental health experts would have viewed as pointing to schizophrenia and other disorders, and test scores showing a third grade level of cognition after nine years of schooling); Jermyn v. Horn, 266 F.3d 257 (3d Cir. 2001) (in capital case, counsel's failure to conduct an adequate investigation into circumstances surrounding defendant's childhood, during which he was severely abused by his father, and present such evidence in mitigation during penalty phase of capital murder trial, was prejudicial) . Here there was no question of mitigating factors at sentencing; once the court found Liebel guilty of first degree murder life imprisonment was mandatory under Pennsylvania law.

Unlawfully Induced Guilty Plea and That Trial Counsel Threatened to Abandon Him If He Did Not Plead Guilty.

Judge Wells considered Liebel's claims of an involuntary guilty plea and found the record fairly supported the Superior Court's determination of a knowing, voluntary, and intelligently entered guilty plea. Liebel objects that Judge Wells made this determination without considering trial counsel's conflict of interest or the exhibits. The conflict of interest claim was not before Judge Wells. Of the additional evidence, only Exhibit 14, the declaration of Sister Frascatore, is related to this claim. Sister Frascatore, Liebel's spiritual advisor while he was detained awaiting the degree of guilt hearing, states that Liebel's trial counsel "advised [her] that if John Liebel went before Judge Weaver, rather than [sic] a jury, there would be no way that she would find John Liebel guilty of first degree murder." Even if this testimony were admissible, she did not state that counsel promised Liebel a particular verdict or contradict Liebel's statements under oath at his plea colloquy that he understood the significance of his plea and had not been induced to plead by any promises or threats. Liebel's claim remains unsupported by evidence; this objection is overruled.

Objection 8: The Magistrate Judge Erred in Reviewing the Claim That Trial Counsel Misled Petitioner to Believe He Had the Right to Withdraw His Guilty Plea Within Ten Days.

Liebel's habeas petition argues that trial counsel misled him to believe he could withdraw his plea as of right within ten days. After Liebel was found guilty of first degree murder, but before sentencing, he moved, pro se, to withdraw his plea. The court denied his

motion, but appointed new counsel to re-file the motion after sentencing. The trial court again denied the motion.

Liebel claims that while preparing him for his guilty plea, trial counsel gave him Exhibit 18, the plea colloquy transcript from another case where the judge told that defendant he could move to withdraw his plea within ten days “for whatever reasons you may have.” See Ex. 18; N.T. 1/28/98 at 57. Liebel concluded he could withdraw his plea as of right within ten days without any reason. When questioned on this misunderstanding at the post-sentence motion hearing, Liebel stated a fellow inmate told him he had withdrawn his guilty plea three days after entering it, “no questions asked.” N.T. 1/28/1998 at 27, and because the transcript confirmed what he had been told, he did not ask counsel about it. Id. 34-35. The court found that there was “no credible testimony” that Liebel’s plea was involuntary; the Superior Court affirmed. Com. v. Liebel, No. 892 Philadelphia 1998, Appeal from the Judgment of Sentence entered September 16, 1997, in the Court of Common Pleas of Bucks County, Criminal, at No. 2466/1997, at 8 (Pa. Super. Ct. March 5, 1999).

Liebel objects to the Magistrate Judge’s finding that, “[b]y Petitioner’s own admission, in open court, counsel played no part in misleading him to believe that he could withdraw his plea.” R&R at 17-18.<sup>3</sup> He argues that it is contradicted by her statement that Liebel, “testified that he had reviewed a copy of the colloquy from an unrelated guilty plea/degree of guilt hearing in a murder case that counsel gave him in preparation for his plea and degree of guilt hearings.” R&R at 15.

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<sup>3</sup> Liebel also insists that this claim was exhausted. Since Judge Wells considered the claim on the merits, there is no need to decide this.

Counsel may not have anticipated Liebel's alleged misinterpretation of the transcript, but Liebel admitted the transcript "reinforced what I learned through the inmate and seemed to downplay the significance of it all and, if I did not get the verdict I liked, I could withdraw the plea and start over again," N.T. 1/28/1998 at 34:25-35:4, so he and counsel did not discuss the issue at all. There is no contradiction in the R&R. This objection is without merit.

Objections 9 and 10: The Magistrate Judge Applied the Wrong Standard of Review in Rejecting the Claim That Trial Counsel Misled Petitioner To Believe Entering a Plea to Homicide Supported Manslaughter Defense; The Magistrate Judge Erroneously Recommended Dismissal of His Claim.

Liebek argues, first, that the R&R should not have limited its review to the state direct appeal process, but should have considered the PCRA process; there should be no deference to the state court's findings because Liebel was not allowed to present the testimony of his spiritual advisor, Sister Frascatore, and her declaration is sufficient to sustain his ineffective assistance claim.

Liebel's original theory seems to have been that his plea of criminal homicide irreparably damaged him because it was incompatible with a manslaughter verdict. See "Unreasonable Strategy" memorandum submitted with Liebel's 9/16/2004 habeas petition. The colloquy transcript contradicts Liebel's contention that he was misled into entering a guilty plea. The judge explained that the plea was sufficient for the offense of third degree murder, and that: (1) the government would have to prove additional elements for a conviction of first or second degree murder, or (2) Liebel could attempt to prove "by a preponderance of the evidence" that

the offense was manslaughter rather than murder. N.T.9/15/1997, I:11-13.

In his Objections, Liebel contends that trial counsel promised him a manslaughter verdict. On the basis of his answers under oath at the plea colloquy and trial counsel's testimony at the post-sentence motions hearing, the state courts determined Liebel's plea was knowing and voluntary and not based on any improper promises or threats. That determination was reviewed by Judge Wells and found fairly based on the record. Sister Frascatore's proffered testimony about what trial counsel told her is not probative or admissible. These objections are without merit.

Objections 11 and 12: The Magistrate Judge Applied the Wrong Standard of Review to the Claim of Ineffective Assistance of Trial Counsel for Failure to Investigate and Present Witnesses to Support Allegations of Abuse," the Magistrate Judge Erroneously Recommended Dismissal of This Claim for Lack of Evidence.

Liebel argues: (a) the Magistrate Judge erred in giving deference to the state courts decision under 28 U.S.C. § 2254(d)(2), because the claim was not the subject of a "full and fair hearing." The PCRA court did not allow him to present witnesses who could have testified to George Liebel, Sr.'s violent behavior toward children; (b) even under § 2254(d)(2), the state courts determination that trial counsel was not ineffective was unreasonable, because trial counsel failed to articulate any reason for not asking Liebel's childhood friend about the alleged sexual abuse; and (c) new evidence submitted with Petitioner's Motion for Expansion of the Record supports his claim.

It is not clear whether the Magistrate Judge deferred to the factual finding by the Superior



Court, on direct appeal, that, “there is absolutely no support in the record for a finding of physical or sexual abuse perpetrated on [Liebel] by his father,” Com. v. Liebel, 892 Philadelphia 1998 (Pa. Super. Ct. Mar.5, 1999), to the Superior Court’s factual determination that counsel had reasonably investigated Liebel’s claims, or to the legal determination that counsel’s representation was not ineffective because he had made a reasonable strategic decision. Even without deference, and taking into consideration the letters and statements from witnesses that Liebel was not allowed to present during his PCRA hearing, the claims of ineffective assistance of counsel for failure to investigate and present witnesses to support allegations of parental abuse fail because there is no reasonable probability that the outcome would have been different even if all the witnesses had been heard. See Strickland, 466 U.S. at 696; discussion of Objection 6, supra. These objections are overruled.

#### **b. Liebel’s Two New Claims**

After the R&R was filed, Liebel was allowed to amend his habeas petition to add two grounds for relief: trial counsel’s conflict of interest and ineffective assistance of post-sentence motion counsel for failure to investigate or present witnesses.

Both of these claims were first raised in Liebel’s pro se PCRA motion; the amended PCRA motion filed by new appointed counsel reiterated the claim of ineffective assistance of appellate counsel, but did not raise the issue of trial counsel’s conflict of interest. The PCRA court refused to allow Liebel to present any witnesses other than himself to support his claims and dismissed the petition. Subsequent appeals centered on the court’s decision not to allow the

witnesses.<sup>4</sup> It is doubtful whether both of these claims have been exhausted; but assuming they have been, they fail on the merits.

If a petitioner claims ineffective assistance of trial counsel based on a conflict of interest, the court presumes prejudice “only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance.” Strickland, 466 U.S. at 692.

Liebel’s claim of conflict of interest is based on: (1) a statement by a school administrator (Ex. 12) that he was told by a defense investigator that trial counsel had decided to abandon the abuse defense in favor of one that was better for defendant’s family; and (2) his contention that trial counsel favored his mother’s unauthorized sale of his motorcycle and car after his imprisonment. Liebel has submitted: (a) a letter from trial counsel, stating, “[a]s we discussed, it is my understanding that this vehicle has been sold on your behalf, in good faith, and the proceeds have been placed in one of your bank accounts” (Ex. 19); and (b) a series of letters Liebel wrote to his girlfriend from jail in which he expressed anger at his mother’s intention to sell his property (Exs. 20-23). Even if admissible, these provide no basis for finding that trial counsel represented anyone other than Liebel; the claim of trial counsel’s conflict of interest

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<sup>4</sup> According to the Superior Court’s opinion, two issues were raised on appeal of the denial of the PCRA petition:

Did the lower court err in refusing to permit Appellant to call witnesses to testify at the PCRA hearing of July 21, 2000, thereafter to deny Appellant’s petition for PCRA?

Was it error for the lower court to deny Appellant’s petition for PCRA relief wherein he requested leave to file for allowance of appeal to the Supreme Court of Pennsylvania nunc pro tunc?

Com. v. Liebel, No. 2359 EDA 2000, Appeal from the Judgment of Sentence entered July 21, 2000, in the Court of Common Pleas of Bucks County, Criminal, at No. 2466/1997, at 8 (Pa. Super. Ct. June 13, 2001).

fails.

Liebel argues that post-sentence motion counsel was ineffective because he: (1) made the same prejudicial error as trial counsel by not investigating and presenting witnesses of abuse; and (2) failed to support Liebel's claim that he was misled into pleading guilty by presenting the testimony of Sister Agnes Frascatore. This claim is a restatement of Liebel's claims that he would not have been found guilty of first degree murder if allowed to present evidence of parental abuse and he was misled into pleading guilty to homicide. See discussion of Objections 6, 7, 11, and 12, supra. It fails because there is no reasonable probability that the outcome would have been different had this witness been offered.

### **III. CONCLUSION**

The R&R of the Magistrate Judge will be approved and adopted except for her finding of partial lack of exhaustion. Liebel's Petition for a Writ of Habeas Corpus, as amended, will be denied. Liebel's objections 1 through 5 and 7 through 12 to the Report and Recommendation are overruled. Liebel's Objection 6 to the R&R's finding of lack of exhaustion is sustained in part, but the claim is denied on the merits.

There is no probable cause to issue a certificate of appealability. An appropriate Order follows.

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

<b>JOHN LIEBEL</b>	:	<b>CIVIL ACTION</b>
	:	
v.	:	
	:	
<b>BROOKS, ET AL.</b>	:	<b>NO. 04-4380</b>

**ORDER**

AND NOW, this 31st day of January, 2006, upon consideration of the Petition for Writ of Habeas Corpus (Paper # 6), Magistrate Judge Wells' Report and Recommendation issued on July 29, 2005 (Paper # 15), Petitioner's pro se objections filed on August 12, 2005 (Paper # 16), and additional Exhibits 1-23, it is **ORDERED** that:

1. The Report and Recommendation (Paper # 15) is **APPROVED AND ADOPTED** in part.
2. Petitioner's Objections 1-5 and 7-12 to Magistrate Judge Wells' Report and Recommendation are **OVERRULED**.
3. Petitioner's Objection 6 to Magistrate Judge Well's Report and Recommendation is **SUSTAINED** in part. There was no lack of exhaustion but the claim fails on the merits.
3. Petitioner's Petition for Writ of Habeas Corpus (Paper # 1) is **DENIED**.
4. There is no probable cause to issue a certificate of appealability.

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/s/ Norma L. Shapiro

S.J.