NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

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RONALD ROMPILLA,

Petitioner,

v.

MARTIN HORN, Commissioner, Pennsylvania Department of Corrections,

Respondent.

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On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

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**PETITION FOR WRIT OF CERTIORARI**


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Dated: July 23, 2004

## QUESTIONS PRESENTED IN THIS CAPITAL CASE

Questions related to the Simmons v. South Carolina, 512 U.S. 154 (1994), issue:

1. Does Simmons require a life-without-parole instruction where: the only alternative to a death sentence under state law is life without possibility of parole; the jury asks the court three questions about parole and rehabilitation during eleven hours of penalty-phase deliberations; the prosecution's evidence is that the defendant is a violent recidivist who functions poorly outside prison and who killed someone three months after being paroled from a lengthy prison term; and the prosecutor argues that the defendant is a frightening repeat offender and cold-blooded killer who learned from prior convictions that he should kill anyone who might identify him?

2. Is the state court decision denying the Simmons claim "contrary to" and/or an "unreasonable application" of clearly established Supreme Court law where the state court held that a history of violent convictions is irrelevant to the jury's assessment of future dangerousness, while ignoring the jury's questions about parole-eligibility and rehabilitation and the prosecution's actual evidence and argument?

Questions related to counsel's ineffective assistance at capital sentencing:

3. Has a defendant received effective representation at capital sentencing where counsel does not review prior conviction records counsel knows the prosecution will use in aggravation, and where those records would have provided mitigating evidence regarding the defendant's traumatic childhood and mental health impairments?

4. Has a defendant received effective representation at capital sentencing where counsel's background mitigation investigation is limited to conversations with a few family members; where the few people with whom counsel spoke indicated to counsel that they did not know much about the defendant and could not help with background mitigation; where other sources of background information, including other family members, prior conviction records, prison records, juvenile court records and school records, were available but ignored by counsel; and where the records and other family members would have provided compelling mitigating evidence about the defendant's traumatic childhood, mental retardation and psychological disturbances?

5. Does counsel's ineffectiveness warrant habeas relief under AEDPA where the state court sought to excuse counsel's failure to obtain any records about the defendant's history by saying the records contained some information that was "not entirely helpful," by saying counsel hired mental health experts (even though those experts did not do any background investigation and never saw the records), and by saying counsel spoke to some family members (even though those family members told counsel they knew little about the defendant and could not help with mitigation); and where the state court did not even try to address counsel's failure to interview other family members (who knew the defendant's mitigating history) or counsel's complete failure to investigate the aggravation that the prosecution told counsel it would use?

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# TABLE OF AUTHORITIES

Petitioner, Ronald Rompilla, prays that the Court issue its writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit, which reversed the District Court's grant of habeas corpus relief in this capital case. The Circuit panel was divided 2-1 on both issues presented herein, and the en banc Circuit denied rehearing by a 6-5 vote.[1]

## OPINIONS BELOW

The Third Circuit panel decision is Rompilla v. Horn, 355 F.3d 233 (3d Cir. 2004) ("Rompilla-4") (Appendix 4). The Circuit's denial of en banc rehearing is Rompilla v. Horn, 359 F.3d 310 (3d Cir. 2004) (en banc) ("Rompilla-5") (Appendix 5). The District Court decision is Rompilla v. Horn, 2000 WL 964750 (E.D. Pa. July 11, 2001) ("Rompilla-3") (Appendix 3). Because this is a habeas corpus action by a prisoner in state custody, Petitioner has appended the opinions of the Pennsylvania Supreme Court on direct appeal, Commonwealth v. Rompilla, 653 A.2d 626 (Pa. 1995) ("Rompilla-1") (Appendix 1), and post-conviction appeal, Commonwealth v. Rompilla, 721 A.2d 786 (Pa. 1998) ("Rompilla-2") (Appendix 2).

## STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Third Circuit denied rehearing en banc on February 25, 2004. This Court granted Petitioner an extension of time until July 24, 2004 in which to file this petition for a writ of certiorari (Appendix 6). This petition is timely filed.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall ... have the assistance of counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall ... deprive any person of life, liberty, or property, without due process of law."

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[1] All emphasis herein is supplied unless otherwise indicated. Relevant parts of the state court record were included in an Appendix filed in the Third Circuit under that Circuit's rules, and are cited herein as "A" followed by the Third Circuit Appendix page number.

28 U.S.C. § 2254(d) provides in relevant part:

> (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 the 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
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> (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.

## STATEMENT OF THE CASE

Petitioner was convicted of first-degree murder and related charges and sentenced to death by a jury in the Lehigh County, Pennsylvania, Court of Common Pleas. The Pennsylvania Supreme Court affirmed on direct appeal. Commonwealth v. Rompilla, 653 A. 2d 626 (Pa. 1995) ("Rompilla-1"). Petitioner sought state post-conviction relief under Pennsylvania's Post Conviction Relief Act ("PCRA"), which was denied. Commonwealth v. Rompilla, 721 A.2d 786 (Pa. 1998) ("Rompilla-2"). Pennsylvania Supreme Court Chief Justice Flaherty dissented, and would have granted relief from the death sentence under Simmons v. South Carolina, 512 U.S. 154 (1994).

Having exhausted state remedies, Petitioner filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania. The District Court granted habeas relief from the death sentence, finding that counsel provided ineffective assistance at capital sentencing, but denied Petitioner's other claims. Rompilla v. Horn, 2000 WL 964750 (E.D. Pa. July 11, 2001) ("Rompilla-3").

The Third Circuit panel, in a 2-1 decision, reversed the District Court and reinstated the death sentence. Rompilla v. Horn, 355 F.3d 233 (3d Cir. 2004) ("Rompilla-4"). Circuit Judge Sloviter dissented, explaining that the panel should have affirmed the District Court's finding that counsel was ineffective for failing to adequately investigate mitigating evidence. Moreover, like the dissent of Pennsylvania Supreme Court Chief Justice Flaherty, Judge Sloviter's dissent also explained that the panel should have granted relief under Simmons.

Petitioner sought en banc rehearing, which was denied by a sharply divided Circuit: five of the eleven Circuit Judges voting on the en banc rehearing request would have granted rehearing. See Rompilla v. Horn, 359 F.3d 310 (3d Cir. 2004) (en banc) ("Rompilla-5").

## ARGUMENT

### I. THIS COURT SHOULD REVIEW THE ARTIFICIAL LIMITATIONS THE THIRD CIRCUIT HAS NOW PUT ON SIMMONS V. SOUTH CAROLINA.

Of the twenty-six states with a life-without-parole alternative to death, only two, Pennsylvania and South Carolina, routinely refuse to inform sentencing juries of this fact. Shafer v. South Carolina, 532 U.S. 36, 48 n.4 (2001). This Court has reviewed Simmons v. South Carolina, 512 U.S. 154 (1994) claims in three South Carolina cases, see Simmons; Shafer; Kelly v. South Carolina, 534 U.S. 246 (2002), but has never reviewed a Simmons claim arising from Pennsylvania, which has the fourth largest death row in the United States.

Third Circuit Judge Sloviter's dissent explained that this death sentence violates Simmons and that habeas relief is appropriate under AEDPA. See Rompilla-4 (dissent) at 274, 284-94. In Simmons, this Court held: "Where the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury ... that he is parole ineligible." Id. at 178 (O'Connor, J, concurring); see also id. at 163-64 (plurality). As the Circuit dissent explained, Simmons was violated here when the trial judge refused to tell the jury that life imprisonment in Pennsylvania is without parole, "notwithstanding the jury's questions on that issue on three different occasions during its sentencing deliberations," Rompilla-4 (dissent) at 274, and notwithstanding that the jury heard the prosecution describe Petitioner as a frightening, violent recidivist who was released on parole from a prior lengthy prison term just three months before this murder, who learned from his prior convictions to kill anyone who might identify him, and who was not rehabilitated by his prior lengthy imprisonment, id. at 287-88. Pennsylvania Chief Justice Flaherty agreed, finding the jury's questions to be "a clear expression of the jury's concern about [Petitioner's] future dangerousness." Rompilla-2 at 795 (Flaherty, CJ, dissenting).

The Third Circuit majority denied relief by artificially limiting Simmons in a way that this Court has repeatedly rejected. The Circuit majority applied its restriction on Simmons despite its own recognition that its ruling is "difficult to police," and " superficial," and lets prosecutors "encourage a jury to think about future dangerousness" without allowing the jury to know that life imprisonment is without possibility of parole. Rompilla-4 at 2 66. The Circuit majority attributed its unworkable, easily manipulated limitation on Simmons to the state court, saying the state court was "reasonable" for using it, even though the state court never actually used it.

The Circuit majority has made Simmons a hollow shell in Pennsylvania. This Court should review this case and provide Pennsylvania's capital defendants the due process Simmons requires.

**A. This Death Sentence Violates Simmons**

The only alternative to a death sentence in Pennsylvania is life without possibility of parole. Petitioner's jury was never told this, even after it interrupted its sentencing deliberations and expressly asked about parole-eligibility. The only dispute is whether Petitioner's "future dangerousness [was] in issue." Simmons, 512 U.S. at 178 (O'Connor, J, concurring).

Future dangerousness was in issue here: (1) the jury repeatedly said it was concerned about parole-eligibility and rehabilitation, signaling jury contemplation of future dangerousness; (2) the prosecution's evidence was that Petitioner is a violent recidivist who functions poorly outside prison and who killed three months after being paroled from a lengthy prison term; and (3) the prosecutor argued that Petitioner is a frightening repeat offender and cold-blooded killer, and that he learned from prior convictions that he should kill anyone who might identify him. Yet the court refused to tell the jury the truth – that there is no parole from a Pennsylvania life sentence – and, instead, suggested parole is available.

**1. Questions from the jury show that future dangerousness was in issue.**

During more than eleven hours of capital sentencing deliberations, the jury asked the court several parole- and future dangerousness-related questions. As the Chief Justice of the Pennsylvania Supreme Court explained in dissenting from the state court's denial of relief,

these jury questions are "a clear expression of the jury's concern about [Petitioner's] future dangerousness." Rompilla-2 at 795 (Flaherty, CJ, dissenting). The trial judge, however, refused to address the jury's concern. Instead, as in Simmons at 165-66, this jury was "denied a straight answer about ... parole eligibility even when it was requested."

The jury's first question came after two hours of deliberations. The jury asked: "**If a life sentence is imposed, is there any possibility of the defendant ever being paroled?**" A802. Thus, these jurors plainly were concerned that Petitioner would be paroled if sentenced to life. [2] Trial counsel asked the judge to answer the jury's question truthfully, explaining to the judge: "Because of ... misconceptions, a lot of people think that if you get a life sentence, you're out in five years or three years." A801. The judge responded: "I can't stop that," A802, and refused to tell the jury the truth – that there is no parole from a Pennsylvania life sentence. Instead, the judge told the jury: "I'm sorry to say, I can't answer that question." A802-03.

After deliberating for nine hours, the jury asked more parole/danger-upon-release type questions: about "the length of the sentence" on the prior convictions; if the sentence "was commuted in any way"; and if he "got released on behavioral." A823. The judge again told the jury he could not answer the questions and the prosecutor, in the jury's presence, said: "You can't tell them." A823-24.

After deliberating for eleven hours, the jury asked if Petitioner was "offered any type of rehabilitation either while in prison or after his release from prison" and, generally, if "rehabilitation [is] available in prison." A838, A842-43. The judge replied: "I'm sorry to say, I can't answer that," and told the jurors to "rely upon your own knowledge" of the "penology system" A842-43.

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[2] See Rompilla-2 at 795 (Flaherty, CJ, dissenting); Simmons at 170 n.10 (plurality) ("It almost goes without saying that" when jury interrupts deliberations to ask "Does the imposition of a life sentence carry with it the possibility of parole?", jury does not know "life" means without possibility of parole; otherwise, "there would have been no reason for the jury to inquire"); id. at 178 (O'Connor, J, concurring) ("that the jury in this case felt compelled to ask whether parole was available shows that the jurors did not know whether or not a life-sentenced defendant will be released from prison").

After thus being frustrated in its attempts to obtain parole- and dangerousness-related information, the jury imposed the death sentence. A854. The jurors' questions plainly show that they were concerned about Petitioner's parole-eligibility and inability to be rehabilitated before being paroled – i.e., his future dangerousness.

The judge could have told the jury the truth – there is no parole from a Pennsylvania life sentence – but refused to do so. Instead, the judge's responses affirmatively suggested that parole is available. The judge's "I can't answer" responses suggested that parole was in fact available, but that the court could not tell the jury about it, or it was outside the court's control. See Simmons at 170-71 (plurality).[3] The judge's instruction that jurors should rely on their personal "knowledge" of the "penology system," A842-43, further suggested parole-eligibility, since, as this Court noted in Simmons, that "knowledge" commonly includes the misunderstanding that a life-sentenced prisoner is parole-eligible. See id. at 170 (plurality); id. at 177-78 (concurrence).

It is not surprising that this jury was concerned about parole and future dangerousness. Future dangerousness and parole were put in issue by the prosecution's evidence and penalty-phase argument.

**2. The prosecution's evidence put future dangerousness in issue.**

The jury heard evidence that Petitioner is a violent recidivist with a significant history of violent felony convictions; that he functions poorly outside prison; and that he committed this killing three months after being paroled from a lengthy prison term.

The guilt-phase evidence was that this was a "brutal murder" during which the victim was "stabbed repeatedly," "set on fire," and left "lying ... in a pool of blood." Rompilla-1 at 628-29, 634. At capital sentencing, the prosecution asserted three aggravating circumstances. Id. at 628, 634. Most significantly, the jury found the "(d)(9)" aggravating circumstance, 42 Pa.C.S. § 9711(d)(9), that Petitioner had a "significant history" of violent felony convictions.

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[3] The jury likely viewed the judge's "I can't tell you" responses as being intended to protect Petitioner by concealing his parole eligibility, just as other court rulings had protected him by concealing information from the jury. See, e.g., A774 (prosecutor introduces prior convictions and tells jury they were things "we weren't permitted to tell you in the trial"); A646-47 ("I was not permitted to tell you about that earlier").

Id. at 634. The prosecution's evidence included testimony of a victim of the prior offenses, who described Petitioner as extremely violent. Id. at 633-34; Rompilla-2 at 793-94.

The evidence of a "significant history" of violence, and of extreme violence during this offense, put Petitioner's future dangerousness "in issue." This Court has often found (and common sense dictates) that a jury hearing such evidence will believe the defendant has a propensity for violence and, thus, will be dangerous in the future.[4] Similarly, the Pennsylvania Supreme Court has recognized that the (d)(9) aggravating factor (significant history of violent felonies), which the jury found here, shows that the defendant has "pronounced recidivistic tendencies" and exhibits a "willful and persistent refusal to curb a propensity towards ... violent aggression against others," Commonwealth v. Holcomb, 498 A. 2d 833, 851 (Pa. 1985) – a dictionary-like definition of future dangerousness.[5]

In short, as this Court recently stated in a Simmons case, a "jury hearing evidence of a defendant's demonstrated propensity for violence reasonably will conclude that he presents a risk of violent behavior" in the future. Kelly, 534 U.S. at 253-54. The prosecution's evidence (and jury aggravation finding) that Petitioner is a violent recidivist certainly put future dangerousness in issue.

And this jury heard even more parole- and future dangerousness-related evidence – it heard that Petitioner was paroled from his prior convictions three months before this offense;

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4 E.g., Nichols v. United States, 511 U.S. 738, 752 (1994) (prior crimes evidence "predict[s] the likelihood of recidivism"); Heller v. Doe, 509 U.S. 312, 323 (1993) ("Previous instances of violent behavior are an important indicator of future violent tendencies."); Allen v. Illinois, 478 U.S. 364, 371 (1986) (prior crimes "predict future behavior"); Skipper v. South Carolina, 476 U.S. 1, 5 (1986) ("Consideration of a defendant's past conduct as indicative of his probable future behavior is ... inevitable."); Johnson v. Texas, 509 U.S. 350, 355-56 (1993) (future dangerousness shown by prior crimes); Jurek v. Texas, 428 U.S. 262, 272-73 (1976) (same; "In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record."); Michelson v. United States, 335 U.S. 469, 475-76 (1948) (jurors infer "propensity" for crime from prior crimes).

5 See also id. at 852 (finding of (d)(9) aggravating circumstance shows "pronouncedly recidivistic violent tendency" and "uncontrolled recidivistic tendencies to violent assaults"); Commonwealth v. Baker, 614 A.2d 663, 676 (Pa. 1992) (prior convictions evidence allows capital sentencing jury to "explore the defendant's prior behavior and dangerousness before sanctions are imposed"); Commonwealth v. Roots, 393 A.2d 364, 368 (Pa. 1978) (prior crimes have "natural tendency ... to be interpreted as indicative of the defendant's propensity to commit crime"); Commonwealth v. Billa, 555 A.2d 835, 841-42 (Pa. 1989) (same).

he does not function well on parole; there is a lack of rehabilitation services before prisoners are paroled; and his son was frightened of him when he was released on parole. Rompilla-4 (dissent) at 288; A734-57. This evidence reinforced the jury's "common sense" belief that "parole [is] a mainstay of ... sentencing regimes," Simmons at 169-70, and showed Petitioner is dangerous when released on parole.

**3. The prosecutor's argument put future dangerousness in issue.**

The prosecutor's argument to the jury also put future dangerousness at issue: the prosecutor told the jury that Petitioner is "absolutely frightening" because he commits the same type of violent crime over and over again, and because the "lesson" he learned from his prior convictions is to kill any possible witnesses to his repeated offenses.

The prosecutor first stressed the "frightening ... similarity" between the prior crimes, from which Petitioner was released on parole, and this one, committed three months after he was paroled:

> You heard testimony, that in 1974, the Defendant was convicted of the crime of Rape and Burglary, and you heard some testimony of that case ... Jo[sephine] MaCrenna, the woman that was raped, was raped pretty brutally. She was raped at knife point.... [I]sn't it frightening, the similarity between that case and this case. I mean, it is absolutely astounding. Both take place around the bar. The Defendant gets in after closing or right before closing. A knife is used. On both occasions, a knife was used. Steals money both times. Isn't it frightening the similarities in those crimes. Takes a taxi away from Jo[sephine]'s Bar, takes a taxi the night of this crime. He slashes [the prior victim] in the breast with a knife. He uses a knife on Jimmy Scanlon. It's absolutely frightening to think of the similarities in those two crimes. (A779-80)

The prosecutor's emphasis on how "frightening" Petitioner is, and on the "frightening similarities" of the crimes, drove home the idea that Petitioner is a dangerous, violent recidivist – he is "absolutely frightening" because he repeatedly commits the same type of violent crimes when released from prison.6

The prosecutor further stressed dangerousness by saying Petitioner "learned a lesson" from his prior convictions, and "[t]hat lesson was, don't leave any witnesses. Don't leave

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6 See Holcomb, 498 A.2d at 852 (prior crimes most strongly indicate "pronounced recidivist tendencies" when similar to current offense); Commonwealth v. Stanley, 401 A.2d 1166, 1174 (Pa.Super. 1979) (jury especially likely to infer recidivist tendency from prior conviction "when informed that the defendant's prior crime was the same as one of the crimes for which he is currently being tried"), aff'd, 446 A.2d 583 (Pa. 1982).

anybody behind who can testify against you. Don't leave any eye witnesses." A780. Obviously, someone who "learned [this] lesson" is dangerous when released. The prosecutor's argument made Petitioner's release on parole an "absolutely frightening" prospect. It put his future dangerousness in issue.

**B. The State Court Decision Was "Contrary to" and an "Unreasonable Application of" Clearly Established Law.**

These reasons why future dangerousness was at issue were provided by Petitioner to the Pennsylvania Supreme Court. That Court ignored virtually all of them. Instead, it focused only on the question of whether the (d)(9) (significant-history-of-violent-felonies) aggravating circumstance, by itself, necessarily raises future dangerousness. It denied relief on the ground that (d)(9) supposedly "only addresses [Petitioner's] past conduct, not his future dangerousness." Rompilla-2 at 795. This state court decision is "contrary to" and an "unreasonable application of" clearly established Supreme Court law, requiring habeas relief under 28 U.S.C. § 2254(d)(1).

**1. Contrary to clearly established law:**

The state court's holding – that a history of violence is supposedly irrelevant to the jury's assessment of future dangerousness – is contrary to clearly established law. This Court's precedents show that jurors view past conduct as predictive of future behavior and, in particular, view a history of violence as predictive of future violence. See note 4, supra (citing cases). [7] The fact that Petitioner's history of violence is relevant to the (d)(9) aggravating factor does not negate its additional relevance to future dangerousness. Evidence may be, and often is, relevant to more than one issue, and it is clearly established law that juries view past conduct as predictive of future behavior, even when that past conduct is also

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7 The cases cited above in note 4 qualify as "clearly established law" for the Simmons claim because they pre-date the state court's 1998 decision (Rompilla-2) on the Simmons claim. See Williams v. Taylor, 529 U.S. 362, 412 (2000) ("clearly established law" found in "this Court's decisions as of the time of the relevant state-court decision"). Moreover, the note 4 cases were also decided before 1995, when Petitioner's conviction became final on direct appeal. Thus, application of these cases does not implicate Teague v. Lane, 489 U.S. 288 (1989). See Penry v. Lynaugh, 492 U.S. 302, 314-15 (1989) (under Teague, habeas petitioner is "entitled to the benefit of those decisions" pre-dating the conclusion of his direct appeal).

relevant to other matters. [8] In short, as this Court has reiterated in a Simmons case: "Evidence of future dangerousness ... is evidence with a tendency to prove dangerousness in the future; its relevance to that point does not disappear merely because it might support other inferences." Kelly, 534 U.S. at 254. The state court's holding that "past conduct" is irrelevant to future dangerousness is contrary to this Court's clearly established law.

**2. Unreasonable application of clearly established law:**

The state court decision is also an "unreasonable application" of clearly established law, for three separate reasons.

**a.** The state court's false distinction between evidence that is probative of past conduct and evidence that is probative of future behavior is "objectively unreasonable." Williams, 529 U.S. at 409. As noted earlier, this Court has repeatedly found evidence of past conduct probative of future behavior. The Pennsylvania Court itself has recognized that a jury finding the (d)(9) (significant-history-of-violent-felonies) aggravator, which the jury found here, brands the defendant as having a "propensity [for] violent aggression" and "uncontrolled recidivistic tendencies to violent assaults." Holcomb, 498 A.2d at 851-52. The Pennsylvania Supreme Court has also recognized that prior crimes evidence is used by capital sentencing juries to "explore the defendant's prior behavior and dangerousness." Baker, 614 A.2d at 676. And all courts recognize that juries view prior crimes evidence as showing a propensity for later crime, even when the prior crimes evidence is also relevant to other issues – that is why courts require limiting instructions when such evidence is admitted for some

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8 Nichols, 511 U.S. at 752 (prior crimes evidence "reflect[s] the seriousness of his prior criminal conduct" and "predict[s] the likelihood of recidivism"); Johnson, 509 U.S. at 369 ("forward-looking perspective of the future dangerousness inquiry" is "not independent of an assessment of personal culpability," and same evidence may be relevant to both inquiries); Skipper, 476 U.S. at 6-7 (state erred in trying to make "distinction between use of evidence of past good conduct to prove good character and use of the same evidence to establish future good conduct"); see also McCormick on Evidence at 259 (5th ed.) ("An item of evidence may be logically relevant in several aspects, leading to different inferences or bearing upon different issues.").

non-propensity purpose.[9] It was objectively unreasonable for the state court to assume that this jury would not consider Petitioner's history of violence as showing his future dangerousness.

**b.** Assuming, arguendo, that it was reasonable for the state court to hold that presentation of the (d)(9) (significant-history-of-violent-felonies) aggravating circumstance did not in-and-of-itself put future dangerousness at issue, the state court decision is still unreasonable, because it ignored most of the factors that actually made future dangerousness at issue in this case. There was far more here than mere presentation of the (d)(9) aggravating circumstance. There was, inter alia:

> * the jury's questions about Petitioner's parole-eligibility; the unavailability of rehabilitation in prison; and his lack of rehabilitation;
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> * the trial judge's evasive and misleading responses to the jury's questions;
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> * the extreme violence of this offense and the prior crimes;
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> * the way in which the prior crimes evidence was presented – through the prior victim's testimony about Petitioner's violence;
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> * the evidence that Petitioner was not rehabilitated by a lengthy prison term;
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> * the evidence that Petitioner killed within months after being paroled from the previous lengthy prison term;
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> * the prosecutor's argument that Petitioner is a frightening recidivist who "learned a lesson" from his prior convictions that he should kill anyone who might identify him;

The state court decision simply ignored all of this, and addressed only the bare fact that the (d)(9) aggravating circumstance was presented. Accordingly, the state court decision unreasonably applied Simmons. See Williams, 529 U.S. at 397-98 (state court decision "unreasonable insofar as it failed to evaluate the totality of" relevant facts, as shown by its "fail[ure] to even mention" them).

**c.** Even if the state court had applied the correct law, which it did not, and even if the state court had considered all the relevant facts, which it did not, the state court's conclusion

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[9] E.g., Billa, 555 A.2d at 841 (other crimes evidence must be accompanied by limiting instructions to protect against jury's natural tendency to treat it as proof of propensity for crime); Huddleston v. United States, 485 U.S. 681, 691-92 (1988) (same); United States v. Morley, 199 F.3d 129, 133 (3d Cir. 1999) (same). No limiting instruction was given here.

that future dangerousness was not at issue would still be objectively unreasonable, given the above-described prosecutorial evidence and arguments, and the jury's repeated questions. On this record, it is abundantly clear that this jury was concerned about Petitioner's parole eligibility and future dangerousness, and it is objectively unreasonable to hold otherwise.

**C. The Third Circuit Majority Gravely Erred.**

Because the state court did not provide the due process rights required by Simmons, the federal habeas courts had a duty to fulfil their "vital role in protecting constitutional rights." Slack v. McDaniel, 529 U.S. 473, 483 (2000). The Third Circuit majority failed to do so; its errors, outlined below, are serious; its approach allows the gutting of Simmons in Pennsylvania and demands this Court's review.

**1.** One error in the Third Circuit majority's analysis is strikingly similar to an error committed by the Fifth Circuit in Tennard v. Dretke, 124 S.Ct. 2562 (2004), which resulted in this Court reversing the Fifth Circuit's judgment.

The Third Circuit majority believed that Simmons "may be read ... narrowly" to require a no-parole instruction only when the prosecutor explicitly says that the defendant is a future threat; the Circuit majority then deemed the state court decision "reasonable" for supposedly adopting this narrow view of Simmons. See Rompilla-4 at 264-67.

But that is not what the state court actually did in this case. Instead, the state court held that Simmons applies when future dangerousness is "at issue," but that future dangerousness is not put "at issue" by presentation of the (d)(9) aggravating circumstance, because (d)(9) supposedly addresses only "past conduct." Rompilla-2 at 795. That is the actual state court decision in this case.

The Third Circuit majority here did what the Fifth Circuit did in Tennard, 124 S.Ct. at 2569: "Rather than examining the ... [state] court decision," the Third Circuit majority "invoked its own restrictive gloss on" Simmons, a "restrictive gloss" that was not actually applied by the state court. Because the Circuit majority's miserly restriction on Simmons was not actually relied upon by the state court, it "has no bearing on whether the [state court] decision reflected an objectively unreasonable application" of clearly established law.

Wiggins v. Smith, 123 S.Ct. 2527, 2539 (2003).10 The actual state court decision is contrary to and an unreasonable application of clearly established law, for the reasons described earlier.

**2.** Relief is appropriate under § 2254(d)(1) even if it is inaccurately assumed, for the sake of argument, that the state court did apply the Circuit majority's "restrictive gloss" on Simmons, because the Circuit majority's narrowing of Simmons is an unreasonable application of Simmons.

The Circuit majority admitted that its distinction between cases where the prosecutor explicitly argues future dangerousness and cases where "future dangerousness is inferred by the jury from the evidence that is brought to its attention" is " difficult to police and arguably superficial," and allows prosecutors to evade Simmons by " encourag[ing] a jury to think about future dangerousness without expressly referring to that concept." Rompilla-4 at 266. It is unreasonable to see Simmons as adopting such a difficult, superficial, easily manipulated rule. "Determining constitutional claims on the basis of such formal distinctions, which can be manipulated largely at the will of the government ..., is an enterprise that [this Court] ha[s] consistently eschewed." Board of Cty. Com'rs v. Umbehr, 518 U.S. 668, 679 (1996).

Nothing in Simmons or this Court's applications of Simmons suggests that Simmons adopted the Third Circuit majority's formalistic and easily evaded rule.

Justice O'Connor's controlling Simmons opinion says a no-parole instruction is required when "the State puts the defendant's future dangerousness in issue." Id. at 178. The Simmons opinions do not say that only an explicit prosecutorial argument can put future dangerousness "in issue." Instead, Justice O'Connor, like the plurality, found future

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10 Accord Allen v. Lee, 366 F.3d 319, 343 n.3 (4th Cir. 2004) ("Having found that the analysis employed by the state court was unreasonable, we could not properly deny relief under § 2254(d) on the basis that the result of the state court proceeding was not unreasonable. Such a conclusion would necessarily be premised on reasoning that was not relied on by the state court. Reasoning that the state court could have – but did not – employ must be evaluated de novo, without applying the deferential standard prescribed by § 2254(d)(1). See Wiggins, 123 S.Ct. at 2540. The Wiggins Court explained that § 2254 deference to a state court finding is simply not possible in these circumstances because 'the State court made no such finding.' Id."); cf. Harris v. Reed, 489 U.S. 255, 262, 265 n.12 (1989) (comity requires federal habeas court to defer to state court procedural rule only if state court actually relied on rule as basis for denying relief).

dangerousness in issue based on the state's evidence that the defendant "[wa]s a vicious predator who would pose a continuing threat to the community," id. at 176; the prosecutor's arguments (which were not explicit), id. at 176; and the jury's questions about parole-eligibility, id. at 177-78. This is just like Petitioner's case. The Third Circuit majority's limitation on Simmons is not supported by the Simmons opinions.

The precedents upon which Simmons relied also show that the Third Circuit majority unreasonably narrowed Simmons. The holding of Simmons is based on two decisions, Skipper v. South Carolina, 476 U.S. 1 (1986) and Gardner v. Florida, 430 U.S. 349 (1977), which found due process violated when an accused is sentenced to death "on the basis of information which he had no opportunity to deny or explain." Gardner, 430 U.S. at 362; Skipper, 476 U.S. at 5 n.1. See Simmons at 161, 164-65, 171 (plurality); id. at 175-76 (concurrence). In Gardner, the relevant "information" was evidence (a pre-sentence report) – it did not involve prosecutorial arguments at all. Id., 430 U.S. at 351. In Skipper, the relevant "information" was both "evidence and argument." Id., 476 U.S. at 9 (Powell, J, concurring).

Thus, the precedents upon which Simmons relied considered both prosecutorial arguments and evidence, and one of those precedents did not involve prosecutorial arguments at all. The Third Circuit majority's restrictive gloss on Simmons, which ignores the evidence and considers only the prosecutor's argument, is utterly inconsistent with Simmons' precedential basis.

This Court's applications of Simmons confirm that the Third Circuit majority was way off the mark. This Court has repeatedly reaffirmed that Simmons requires a no-parole instruction when future dangerousness is "in issue," and has never restricted Simmons to cases where the prosecutor explicitly argues future dangerousness. [11] And this Court has twice repeated what is clear from Simmons itself: to determine if future dangerousness was at

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[11] See Ramdass v. Angelone, 530 U.S. 156, 165 (2000) (plurality) (no-parole instruction required when future dangerousness is "at issue"); id. at 178-79 (O'Connor, J, concurring) ("In Simmons ..., a majority of the Court held that '[w]here the State puts the defendant's future dangerousness in issue," a no-parole instruction is required."); Shafer, 532 U.S. at 39 (Simmons requires no-parole instruction when "a capital defendant's future dangerousness is at issue."); id. at 46, 49, 51 (same); Kelly, 534 U.S. at 248 ("reiterat[ing] the holding of Simmons" that no-parole instruction required "when a capital defendant's future dangerousness is at issue").

issue, the reviewing court should ask "whether [the defendant's] future dangerousness was a logical inference from the evidence, or was injected into the case through the State's closing argument." Kelly, 534 U.S. at 252 (citations and quotation marks omitted); accord Shafer, 532 U.S. at 46, 54. The Third Circuit majority's approach is, at least, an unreasonable application of Simmons.

**3.** Habeas relief is appropriate here even under the Third Circuit majority's narrow view of Simmons, because this prosecutor did argue future dangerousness. As stated above, this prosecutor told this jury that Petitioner is "absolutely frightening" because he is a violent recidivist who repeats the same type of violent crimes every time he is released from prison and who learned from his prior convictions that he should kill anyone who might be a witness to his crimes. This is a future dangerousness argument that is at least as explicit as that made by the Simmons prosecutor.[12]

The Circuit majority tried to avoid the obvious import of this prosecutor's argument by citing its "context," saying it was made in "response" to defense counsel's mitigation argument. Rompilla-4 at 271. The majority's "context" argument, however, is the position taken by the dissent in Simmons, which also complained that, when "[r]ead in context," the prosecutor's argument "was not made ... in the course of an argument about future dangerousness, but was a response to petitioner's mitigating evidence." Id. at 181-82 (Scalia, J, dissenting). Thus, Simmons rejected the Circuit majority's "context" argument.

The Circuit majority also tried to minimize the prosecutor's argument by claiming that when the prosecutor called Petitioner's violence "absolutely frightening," he really meant "astounding"; and when the prosecutor said Petitioner learned the "lesson" to kill any possible witnesses, he really meant something other than future dangerousness. Rompilla-4 at 271-72. This speculation about what the prosecutor "really" meant "is sheer conjecture." Rompilla-4 (dissent) at 292.

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[12] See Simmons at 176 (O'Connor, J. concurring) ("The prosecutor argued that the jury's role was to decide 'what to do with [petitioner] now that he is in our midst,' and told the jury: 'Your verdict should be a response of society to someone who is a threat. Your verdict will be an act of self-defense.'" (citations omitted)); id. at 181-82 (Scalia, J, dissenting) (quoting argument).

It "is plain from Simmons ... that the reasons for the prosecutor's statements are not dispositive of whether they put future dangerousness at issue." Rompilla-4 (dissent) at 292. In Simmons, as in other contexts, the constitutional significance of the prosecutor's presentation "depends ... on the reasonable understanding of the [jury], not merely the intent of the [prosecutor]." Rompilla-4 (dissent) at 292; see Brady v. Maryland, 373 U.S. 83, 87 (1963) (due process assesses fairness of proceeding, not intent of prosecutor). Whatever the prosecutor's intent, he sent a clear message to the jury – Petitioner is dangerous because he is a violent recidivist who will kill again if released on parole.

**4.** In addition to imposing an unreasonable "restrictive gloss" on Simmons, the Circuit majority also failed to take into account the full body of "clearly established law" that is relevant to this claim under § 2254(d)(1). As stated above, the state court decision is contrary to and/or an unreasonable application of the "clearly established law" cited in note 4, supra, that jurors view past conduct as predictive of future behavior. The Circuit majority, however, declined to evaluate the state court decision against this "clearly established law" because the cases cited in note 4 are "not ... Simmons case[s]." Rompilla-4 at 269-70 & n.21. [13] But the "clearly established law" relevant to a particular constitutional claim is not limited to decisions on the exact same claim. [14] Instead, "clearly established law" encompasses "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." Lockyer v. Andrade, 538 U.S. 63, 71 (2003). Here, one clearly established "governing legal principle" is that jurors view past conduct as predictive of future behavior. The majority erred when it slighted this clearly established law.

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13 The Third Circuit majority mentioned only Skipper. See Rompilla-4 at 269-70. All of the note 4 cases, however, were cited in Petitioner's Third Circuit briefs.

14 For example, suppose a death-sentenced prisoner asserted a claim, under Strickland v. Washington, 466 U.S. 668 (1984), that his lawyer was ineffective at capital sentencing for failing to present mitigating evidence of mental retardation and childhood abuse, and the state court denied the claim by holding that mental retardation and childhood abuse are not mitigating. Such a state court decision would be contrary to the clearly established law of Penry v. Lynaugh, 492 U.S. 302, 322 (1989) (mental retardation and childhood abuse are mitigating), even though Penry is not a Strickland case, and even if the state court recognized Strickland as controlling authority for ineffective assistance of counsel claims.

**5.** The Circuit majority also erred when it declined to use later precedent from this Court that requires relief on this claim; instead, the Circuit majority erected a per se ban on consideration of any Supreme Court case that post-dates the state court decision.[15]

As the Circuit dissent shows, this Court's decision in Kelly v. South Carolina 534 U.S. 246 (2002) is materially indistinguishable from this case and plainly shows that relief is appropriate under Simmons. See Rompilla-4 (dissent) at 286-91. The Circuit majority did not dispute that Kelly requires relief. Instead, the Circuit majority said "Kelly cannot aid Rompilla" because Kelly post-dates the state court decision on the Simmons claim. Rompilla-4 at 267. The Circuit majority erred when it erected a per se bar against consideration of any Supreme Court opinion that post-dates the state court decision. This Court's cases show that Kelly applies, as Circuit Judge Sloviter explained in her dissent, see Rompilla-4 (dissent) at 291, and as outlined below.

This Court directly rejected the Circuit majority's approach in Wiggins v. Smith, 123 S.Ct. 2527 (2003). In Wiggins, the state argued that Williams v. Taylor, 529 U.S. 362 (2000) could not aid the defendant because Williams post-dated the Wiggins state court decision – i.e., the state in Wiggins took the position taken by the Circuit majority here. This Court, however, rejected that argument, holding that Williams controlled because Williams was just an "application of" Strickland v. Washington, 466 U.S. 668 (1984), and Strickland was "clearly established" at the time of the Wiggins state court decision. Wiggins, 123 S.Ct. at 2535-36.

For the same reason, Kelly applies here. Just as Williams was an "application of" Strickland, Kelly was an "application of" Simmons. Indeed, Kelly expressly states that it is "within the four corners of Simmons," and "need[ed] go no further than Simmons in our discussion." Kelly, 534 U.S. at 254 & n. 4. Thus, Kelly applies here, and shows that the Rompilla state court decision was unreasonable, just as Williams showed that the Wiggins state court decision was unreasonable.

## II. THIS COURT SHOULD REVIEW THE ISSUES ARISING FROM COUNSEL'S FAILURE TO REASONABLY INVESTIGATE FOR CAPITAL SENTENCING.

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15 Petitioner is entitled to habeas relief even without the benefit of any Supreme Court precedent that post-dates the state court decision, for the reasons stated above.

The Third Circuit was sharply divided on this claim. The panel split 2-1 and the en banc Circuit split 6-5. Prior to this, the District Court had granted relief on this claim.

The Third Circuit dissenters found this a case of "shocking ineffective assistance of counsel," where counsel's "grossly inadequate investigation" resulted in their failure to present compelling mitigating evidence of, inter alia, Mr. Rompilla's "abusive [childhood] background, his dysfunctional [childhood] family situation, his low IQ [in the mentally retarded range], his meager reading and understanding ability, ... [his] brain dysfunction," and his mental and emotional disturbances. Rompilla-4 (dissent) at 273-75, 284; Rompilla-5 (dissent) at 310.

The dissenters sharply criticized the majority's ruling. They said the majority "seriously err[ed]"; they denounced the majority ruling as "astonishing" and "inexplicable in light of" controlling Sixth Amendment Supreme Court precedents; they lamented that the "majority opinion in this case infuses our jurisprudence with [a] degraded standard" for effective assistance of counsel, and improperly excuses "inept" and "shabby lawyering." Rompilla-4 (dissent) at 274, 282-83; Rompilla-5 (dissent) at 311-12.

This Court should afford review and address the Third Circuit majority's errors.

**A. Counsel Failed to Reasonably Investigate for Capital Sentencing.**

The Sixth Amendment right to effective assistance of counsel is violated when counsel's performance is deficient, i.e., falls below "an objective standard of reasonableness"; and the defendant is prejudiced, i.e., confidence is undermined in the outcome of the original proceeding. Wiggins v. Smith, 123 S.Ct. 2527, 2535 (2003); Strickland, 466 U.S. at 694.

Here, the existence of prejudice is clear, and has never been disputed by any of the state and federal judges who considered this claim. Trial counsel, neither of whom had ever prepared for or conducted a capital sentencing proceeding and one of whom was just 2½ years out of law school, presented paltry mitigation: twenty transcript pages of testimony from some family members who were asked whether they loved Mr. Rompilla; whether he was nice and helped around the house in the three months between his release on parole and this crime; and whether they wanted mercy and believed he was innocent. Rompilla-4 (dissent) at 276-77, 282; A733-59.

Post-conviction proceedings, in contrast, disclosed significant mitigating evidence that trial counsel could have introduced.

Post-conviction counsel obtained Mr. Rompilla's school records, prior conviction records, prison records and juvenile court records. These records show that he suffered a very traumatic childhood. His parents were severe alcoholics. His childhood home was extremely dysfunctional and marred by fear, neglect, instability and poverty. The children were abandoned by the parents for weeks at a time. Conditions in the home were so awful that the family was "notorious" in the county and the children had to be removed from the home and placed in hospitals and foster care. Rompilla-4 at 240; id. (dissent) at 273-74, 278-79, 281-82, 284; A1005, A2277-2366.

These records also document Mr. Rompilla's lifelong history of intellectual, mental and emotional impairments. The records show that his IQ was repeatedly found to be in the mentally retarded range. He was in special education classes until he left school in 9th grade. Throughout his life, he never advanced functionally beyond the 3rd grade level. Psychological tests in the records show serious abnormalities on scales measuring schizophrenia, paranoia, neurosis and obsessive/compulsive problems. The records describe a lifelong history of debilitating alcoholism. Rompilla-4 at 240; id. (dissent) at 273-74, 278-79, 281-82, 284; A1005, A2277-2366.

These records were readily available at the time of the capital trial. They could have been easily obtained by trial counsel. The prior conviction records were available in the clerk's office in the same courthouse where the capital trial was held; the prison records were contained in the prior conviction court file; the school records were available in the public school building, across the street from the courthouse; the juvenile court records were maintained nearby. Trial counsel, however, did not seek or obtain these records, or any other records about Mr. Rompilla. Rompilla-4 (dissent) at 273-74, 277, 281-82; A1075, A1077, A1087-89, A1107-09, A1197, A1297, A1307, A1335, A1351-52. The jury never heard any of the mitigation the records disclose.

Post-conviction counsel also presented testimony from three of Petitioner's siblings, sisters Randi Rompilla, A1407-48, and Barbara Harris, A1479-98, and brother Nick

Rompilla, A1449-78, who corroborated and elaborated on the information in the records. The siblings' testified:

> Rompilla's parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla's mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at least one occasion his mother stabbed his father. He was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled. He had an isolated background, and was not allowed to visit other children or to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags.

Rompilla-4 (dissent) at 279 (citations to record omitted).

This family testimony was available, but not presented, at the time of capital sentencing. Trial counsel never spoke to either of these sisters (Randi, Barbara), even though both were reasonably available to trial counsel (both lived locally, one attended the trial). If counsel had interviewed them and asked them about Mr. Rompilla's background, they would have provided the same information to trial counsel and the capital sentencing jury that they

provided at the post-conviction hearing. Rompilla-4 (dissent) at 274, 279-80; A1422-23, A1436-37, A1489-90.[16]

Post-conviction counsel also submitted mental health mitigation evaluations of Mr. Rompilla. Post-conviction counsel gave the above-described background information, none of which was obtained by trial counsel, to the post-conviction experts (Drs. Carol Armstrong and Barry Crown) and asked them to evaluate Mr. Rompilla in light of this history. The doctors testified that this background information contain numerous "red flags" indicative of organic brain damage, mental retardation and extreme mental/emotional disturbances, and clearly showed the need for psychological and neuropsychological testing, which they performed. Based on the background information and their testing, they found that Mr. Rompilla suffers from organic brain damage, mental retardation, serious psychological impairments and alcoholism. They found that his mental, emotional, intellectual and cognitive impairments are severe, date back to childhood, and were likely caused by fetal alcohol exposure, head injuries and childhood trauma. They found that, at the time of the offense, he was suffering from extreme mental and emotional disturbances, and had a substantially impaired capacity to appreciate criminality of conduct or conform to the law, both statutory mitigating factors in Pennsylvania. They testified that all of their findings

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16 Trial counsel did speak to the brother, Nick, who briefly testified at capital sentencing. At the post-conviction hearing, Nick testified that trial counsel had asked him only about his relationship with Mr. Rompilla during the three months they lived together between the time Mr. Rompilla was paroled and this offense. The state court, however, declined to credit that part of Nick's testimony. See Rompilla-4 (dissent) at 279. Trial counsel, however, did not claim to have spoken to Randi or Barbara at all. Assuming that Nick's post-conviction testimony was not available to trial counsel, the state court still did not question the veracity or availability of the two sisters, who would have provided the above-described information to trial counsel and the sentencing jury if trial counsel had interviewed them. See id. at 280.

could have been developed and presented at the time of the original capital sentencing proceeding. Rompilla-4 at 244; id. (dissent) at 279-80; A1558-1780.[17]

The capital sentencing jury never heard any of the mitigating evidence, presented post-conviction, concerning childhood trauma, organic brain damage, mental retardation, mental and emotional disturbances, and alcoholism. "Had the jury been able to place [this evidence] on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance," thus showing prejudice. Wiggins, 123 S.Ct. at 2543.

Trial counsel testified at the post-conviction hearing that they did not withhold any of this evidence for tactical or strategic reasons. Counsel testified that they would have presented it if they had been aware of it. E.g., Rompilla-4 (dissent) at 279; A1074-75, A1078-83, A1091-92, A1096, A1101, A1110-13, A1156-62, A1198.

This leaves the only real issue here: did counsel's investigation satisfy the Sixth Amendment? The Third Circuit dissenters found it did not even come close – counsel's investigation was "grossly inadequate," making this a case of "inept," "shabby lawyering"

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17 Post-conviction counsel also presented a report prepared by the Chief Psychiatrist at the state prison where Mr. Rompilla is incarcerated on death row. The report, A2377-79, states that Mr. Rompilla is of "borderline intelligence"; his mother was a heavy drinker; he "dropped out of school after 9th grade and started drinking heavily that summer"; he "has a very significant alcohol problem which includes frequent blackouts"; "whenever he gets out of prison he drinks very heavily and has frequent blackouts"; and the times of this offense and prior offenses were "during these blackouts." Based on these findings, the prison's Chief Psychiatrist recommended that the death sentence be commuted to life imprisonment.

The Commonwealth retained a post-conviction "rebuttal" psychologist, Dr. Frank Dattilio. Dr. Dattilio's testimony was remarkable: it supported Mr. Rompilla's case. Dr. Dattilio testified that Mr. Rompilla's records and history were replete with "red flags" indicating organic brain damage, mental retardation and a traumatic childhood, and had mitigating significance. See A1911-2014.

The mental health experts who were contacted by trial counsel (Drs. Sadoff, Gross and Cooke) also testified at the post-conviction hearing. They testified that trial counsel did not give them any records or other background information about Mr. Rompilla. They testified that the background information, which they saw for the first time at the post-conviction hearing, provides significant mitigation and contains numerous "red flags" for organic brain damage, mental retardation and psychological impairments. They testified that if trial counsel had provided the background information to them they would have done the same type of psychological and neuropsychological testing done by the post-conviction doctors, rather than the brief "screening" tests that one of them (Dr. Cooke) administered at the time of trial. Rompilla-4 at 242; id. (dissent) at 281-82; A1518-47, A1795-1821, A1839-72.

and "shocking ineffective assistance of counsel." Rompilla-4 (dissent) at 273-74; Rompilla-5 (dissent) at 311-12. As outlined below, the Circuit dissenters are right. The Circuit majority's denial of relief is "inexplicable in light of" this Court's controlling precedent, Rompilla-4 (dissent) at 274, and is based upon a "degraded standard" that is inconsistent with the Sixth Amendment, Rompilla-5 (dissent) at 312. This Court should consider this case and address the Third Circuit majority's "degraded standard."

**1. Counsel's complete failure to investigate aggravation.**

A critically important duty of capital counsel is to investigate what the prosecution may introduce as aggravation. Wiggins, 123 S.Ct. at 2537 (counsel should seek "all reasonably available ... evidence to rebut any aggravating evidence that may be introduced" (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 11.4.1(C) (1989))). [18] Here, trial counsel completely failed to investigate the Commonwealth's aggravating evidence. If counsel had reasonably investigated the aggravation, they would have obtained the records that contain the significant mitigation outlined above.[19]

The Commonwealth disclosed pre-trial that it would present aggravation that Petitioner had a "significant history of felony convictions involving the use or threat of violence to the person." 42 Pa. C.S. § 9711(d)(9). Counsel knew pre-trial that the Commonwealth would pursue the (d)(9) aggravating circumstance and would introduce

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18 See also ABA Guideline 11.8.5(A) (counsel should investigate at "earliest possible time" areas that may relate to aggravation); ABA Guideline 11.8.3(A) ("Counsel should seek information ... to rebut the prosecution's sentencing case."); Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. Rev. 299, 337 (1983) ("counsel must investigate ... any evidence of other crimes or circumstances in the defendant's background which the prosecution may be permitted to introduce in aggravation"); Starr v. Lockhart, 23 F.3d 1280, 1285 (8th Cir. 1994) ("basic concerns" of capital counsel "are to neutralize the aggravating circumstances ... and to present mitigating evidence"; counsel ineffective for failing to challenge invalid aggravators); Lewis v. Lane, 832 F.2d 1446, 1453-58 (7th Cir. 1987) (capital counsel ineffective for failing to investigate defendant's criminal record where it was used to establish aggravator); Esslinger v. Davis, 44 F.3d 1515, 1529-30 (11th Cir. 1994) (non-capital counsel ineffective for failing to investigate defendant's criminal record where it was used to enhance sentence).

19 Independent of the duty to investigate aggravation, effective counsel would have obtained these records as part of a reasonable background investigation for mitigation. See infra.

Petitioner's prior (burglary/rape) convictions as evidence for (d)(9). Under Pennsylvania law, the Commonwealth was entitled to introduce, as evidence for (d)(9), more than the mere existence of the prior convictions. It also could introduce their "facts and circumstances" as reflected in the prior convictions court record. Commonwealth v. Beasley, 479 A.2d 460, 465 (Pa. 1984); Commonwealth v. Holcomb, 498 A.2d 833, 851 n.18 (1985). The Commonwealth told counsel pre-trial it would introduce evidence from the prior convictions court file to show the "facts and circumstances" of the priors. A633-34, A640, A1278.

The prior convictions court file was a public record, available to trial counsel in the clerk's office in the same courthouse where the capital trial was held. Given counsel's knowledge that the Commonwealth would introduce information from the prior convictions court file as part of its (d)(9) evidence, counsel had a duty to, at least, inspect that file as part of investigating the aggravation. Shockingly, however, counsel failed to take this rudimentary investigatory step – counsel never even looked at the prior convictions court file. A626, A629, A633-34, A638-41, A1278. When the Commonwealth introduced materials from that file at capital sentencing, as it had told counsel it would, counsel admitted they had never bothered to look at the file before trial. The prosecutor replied, aptly: "it's a public record, ... you could have ... looked at it just like I did." A629.

If counsel had done a rudimentary investigation of the prior convictions used to establish the (d)(9) aggravating circumstance – by reading the prior convictions court file – counsel would have found significant mitigating evidence.

The prior convictions court file contains prison records created in connection with those convictions. A1005, A1253. These court/prison records include "achievement test" scores showing that Mr. Rompilla, as an adult, had not progressed beyond 3rd grade level in spelling and arithmetic, with abilities below 97% of the population. These records also include results from the Minnesota Multi-Phasic Personality Inventory ("MMPI"), a psychological test, which was administered to Mr. Rompilla when he entered prison for the prior convictions. The test results show serious abnormalities on the schizophrenia, paranoia, neurosis and obsessive/ compulsive scales. These records state that Mr. Rompilla is an

alcoholic and needed "counseling pertaining to his longstanding abuse of alcohol." These records also note that he was "raised in [a] slum environment."

Thus, basic investigation of the aggravation would have uncovered substantial mitigation regarding Mr. Rompilla's learning/cognitive problems, psychological impairments, alcoholism and deprived childhood. Trial counsel, however, never took this first step and, as a result, were ignorant of this mitigating evidence. The jury never heard it. The doctors never received it. Counsel never used it to develop a penalty-phase defense.

Moreover, if counsel had taken the elementary investigatory step of looking at their client's prior case file, they would have been led to other records that also contain compelling mitigation. The court/prison records refer to Mr. Rompilla's juvenile court records as containing additional relevant information. Given the mitigation contained in the court/prison records, "any reasonably competent attorney would have realized that pursuing these leads was necessary," Wiggins, 123 S.Ct. at 2537, and would have obtained the juvenile court records.[20]

The juvenile court records, A2297-2304, contain significant mitigating evidence about Mr. Rompilla's traumatic childhood and mental retardation. They contain a report from the Allentown School District, dated November 20, 1964, when Mr. Rompilla was sixteen years old, stating that his IQ is in the mentally retarded range (sixty-nine) and that he "is easily influenced by others into different events, no matter if it is bad or good." The file also contains a juvenile court "summary," dated November 27, 1964, which describes some of the dysfunctional conditions in the home, including "neglected children"; parental alcoholism; reports that the "mother was picked up by the police in a drunken condition"; removal of the children from the home by the city health department, which placed them in "in a hospital" and foster case; parental abandonment "for a period of one or several weeks at a time"; and reports "that the children have always been poorly kept and on the filthy side which was also

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[20] Even if the juvenile court records had not been explicitly referenced in the prior convictions court file, effective counsel would have been concerned that the Commonwealth would introduce prior juvenile adjudications in support of the (d)(9) aggravating circumstance, as Pennsylvania law allows, see Baker, 614 A.2d at 676, and would therefore have investigated the juvenile court history as part of a reasonable investigation of evidence the Commonwealth might introduce in aggravation.

the condition of the home at all times." The "summary" notes that, as a result of this dysfunctional home situation, the family was "notorious" in the county.

Mr. Rompilla's juvenile court file also states that additional information about the family is contained in the juvenile court records of his brother, Nick Rompilla. Again, given the information in this file, effective counsel "would have realized that pursuing these leads was necessary," Wiggins, 123 S.Ct. at 2537, and would have obtained Nick's juvenile records. Those records, A2305-66, confirm that Mr. Rompilla's childhood home was deeply dysfunctional. A report dated April 6, 1957, when Mr. Rompilla was nine years old, states: "I regret to say that the home conditions in this [Rompilla] family group have not changed. The mother still is neglecting her children with filth and lack of supervision existing at all times." A "summary," dated October 7, 1957, reiterates that the children were "neglected"; the mother had been "picked up by the police in a drunken condition"; "the mother was frequently missing from the home for weeks at a time"; "[t]he children at all times have been poorly kept, always on the filthy side"; "the house always showed signs of neglect"; because of neglect and parental drunkenness the children were removed from the home. A May 13, 1960 "Classification Summary" notes the "father-son relationships were weak"; the mother was an "alcoholic" who was "often off with other men" and away from "home [for] weeks at a time"; there were "poor home conditions"; it was "an unstable home situation"; there was "[n]eglect of children"; and the "children were always dirty." Trial counsel did not get the records and the jury never heard this mitigation.

As stated, Mr. Rompilla's juvenile court records contain a report from his school that his IQ is in the mentally retarded range. Effective counsel would have "pursu[ed] th[is] lead," Wiggins, by obtaining school records. Similarly, an effective lawyer seeing the very low achievement test scores in the court/prison file also would have realized that school records should be obtained.

The school records, A2277-98, show that Mr. Rompilla's IQ was repeatedly found to be in the mentally retarded range. At age six, his IQ score was in the 60's; at age eleven, his "verbal," "performance" and "full-scale" IQ scores were 61, 75 and 64; at age thirteen, they were 69, 75 and 69. Achievement test results in the school records show that his abilities

never advanced above 3rd grade level (which is consistent with the very low achievement test scores in the court/prison records). The school records show he was placed in special education classes, where he remained until he left school in 9th grade. The records state that school officials could get "no cooperation" from his parents in trying to deal with his problems. Trial counsel did not get the records and the jury never heard this mitigating evidence.

In sum, effective counsel would have investigated the aggravation evidence by, at least, reviewing the prior convictions court file from whence that evidence came. Effective counsel then would have followed the obvious leads created by the first step in an adequate investigation, and would have obtained the rest of the above-described records. Effective counsel thus would have had compelling documentary evidence showing childhood trauma in the dysfunctional home of alcoholic parents, mental retardation, serious learning problems, mental and emotional disturbances, and a lifelong struggle with alcoholism. These lawyers, however, did not take even the first, rudimentary step toward investigating the prior convictions that were used in aggravation. The jury never heard any of the compelling mitigation that an adequate investigation would have revealed.

**2. Counsel's "grossly inadequate" background mitigation investigation.**

Effective capital counsel "conduct a thorough investigation of the defendant's background" for "all reasonably available mitigating evidence," including "all reasonably available" evidence about his "educational history," "family and social history" and "adult and juvenile correctional experience." Wiggins, 123 S.Ct. at 2535, 2537 (quoting Williams, 529 U.S. at 396, and ABA Guidelines 11.4.1, 11.8.6 (emphasis altered)). Here, trial counsel did not perform the thorough background investigation required by the Sixth Amendment – their background investigation was "grossly inadequate." Rompilla-4 (dissent) at 274.

A "comparison of counsel's actions in this case with those of counsel in Wiggins ... is instructive" and shows that these lawyers were ineffective. Rompilla-4 (dissent) at 277.

In Wiggins, counsel investigated the defendant's background by obtaining a Pre-Sentence Investigation ("PSI") report, which included a brief account of the defendant's "personal history," and "track[ing] down" social service records about the defendant. Id.,

123 S.Ct. at 2536. This Court found this background investigation inadequate because it gave counsel only a "rudimentary knowledge of [the defendant's] history from a narrow set of sources." Id. at 2537. This Court held that effective counsel would have reached beyond the "narrow set of sources" upon which they relied, and would have gathered and developed much more background information, such as that described in a "social history report" prepared for post-conviction, which used "social services, medical, and school records, as well as interviews with [the defendant] and numerous family members" to "chronicle[] [the defendant's] bleak life history." Id. at 2532-33.

Trial counsel's background investigation here was "no more thorough, perhaps less, than th[at] found inadequate ... in Wiggins." Rompilla-4 (dissent) at 282. Mr. Rompilla's lawyers did not even come close to developing the type of social history information that Wiggins found would have been developed by effective counsel. Instead, their entire investigation of Mr. Rompilla's background consisted of talks with a few family members. Counsel thus relied on a remarkably "narrow set of sources," Wiggins, especially given that several other sources – the above-described records and other family members – were readily available.

Counsel's reliance on this "narrow set of sources" was particularly unreasonable because counsel knew that the few people to whom they spoke were poor sources of background information – those people told counsel that they did not know much about Mr. Rompilla. Rompilla-4 (dissent) at 281. As trial counsel testified at the post-conviction hearing:

> The "overwhelming response from the family was that they didn't really feel as though they knew him all that well since he had spent the majority of his adult years and some of his childhood years in custody. ... [T]here wasn't a lot that they knew." A1094;
>
> Family members to whom counsel spoke had "limited knowledge of" Mr. Rompilla. A1098
>
> "Q. Were they the type of family that would provide you information when asked?
> A. No. As I said earlier, it seemed pretty clear that they didn't feel as though they knew Ron very well, because there was a distance as a result of his being incarcerated and as a result of their own whatever was going on with them." A1165-66.

> The family told counsel " 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.'" A1303.

Moreover, counsel also knew that the few people to whom they spoke avoided discussing topics that might mitigate because they believed Mr. Rompilla was innocent – they "were coming from the position that Ronald was innocent. And, therefore, they weren't looking for reasons for why he might have done this. " A1093; see also A1180-81 ("Q. Did they ever waiver on the fact that they thought he was innocent? A. No. Q. So it's fair to say that no one ever tried to offer you an excuse as to why he might have done it? A. No.").21

Counsel thus relied upon an extraordinarily "narrow set of sources" and counsel knew they were obtaining, at best, no more than a "rudimentary knowledge," Wiggins, of Mr. Rompilla's background, because the few people on whom counsel relied told counsel that they knew little about Mr. Rompilla's history and were not interested in topics that might mitigate. Under these circumstances, "[c]ounsel certainly had reason to inquire further." Rompilla-4 (dissent) at 281. Effective counsel would have expanded their investigation beyond this "narrow set of sources" and would have sought something more than a

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21 Counsel testified that Mr. Rompilla, like the family members counsel spoke to, was not a good source of information. E.g., A1128, A1164, A1195, A1294-95, A1300. There are several likely reasons why Mr. Rompilla and the few family members counsel spoke to were unable to provide useful background information. The experts at the post-conviction hearing, including the Commonwealth's "rebuttal" expert, Dr. Dattilio, testified that Mr. Rompilla's brain damage, low intelligence, cognitive impairments, communication problems and memory deficits make him a very poor historian; moreover, he is the victim of childhood trauma, which is difficult for even an unimpaired person to discuss. E.g., A1517 (Dr. Gross); A1988, A1998-2001, A2005 (Dr. Dattilio); A1722 (Dr. Armstrong); A1637 (Dr. Crown). Similarly, the dysfunctional family situation made it difficult for other family members to discuss Mr. Rompilla's childhood. A2000-01, A2005 (Dattilio); A1517 (Gross). These problems were exacerbated by the fact that trial counsel who spoke to the family, Ms. Dantos, asked only "general questions" – e.g., was there "anything important or noteworthy about his family, upbringing?" – rather than specific questions about abuse, neglect, poverty, etc. A1073, A1096-97, A1156-58. The experts testified in post-conviction that such general questions are often inadequate when questioning people, like Mr. Rompilla and his family, who have suffered childhood trauma. A2000-01, A2005 (Dr. Dattilio); A1517 (Dr. Gross). In the end, however, the reason why trial counsel's "narrow set of sources" was unable to help is largely irrelevant. The point is that counsel knew this "narrow set of sources" did not know much about Mr. Rompilla's background and would not be likely to aid in developing mitigation.

"rudimentary knowledge" of Mr. Rompilla's background. And there are two obvious, readily available sources to which effective counsel would have turned: other family members and records about Mr. Rompilla.

Given the lack of background information obtained from the few family members to whom counsel spoke, counsel "certainly had reason to inquire further as to the availability of other family members ... who did know more about Rompilla's youth." Rompilla-4 (dissent) at 281. As discussed above, other family members (sisters Randi and Barbara) were available to counsel, and would have provided significant background information, but counsel never contacted or spoke to them to determine what they knew about Mr. Rompilla's background. Counsel ineffectively failed to go beyond their unproductive, "narrow set of sources" by interviewing other family members. Wiggins; see also Williams, 529 U.S. at 415-16 (counsel deficient where they presented testimony from mother and two friends but failed to interview and present other 'friends, neighbors and family").

Even more striking than counsel's failure to interview other family members is their complete failure to seek or obtain any records about Mr. Rompilla. The ABA Guidelines, which articulate "reasonable" professional "standards for capital defense work," Wiggins, 123 S.Ct. at 2536-37, explain that one of the first things capital counsel should do as part of a mitigation investigation is seek "all reasonably available" records about the defendant, including records about "educational history," "adult [criminal] record," "correctional experience" and "juvenile [criminal] record," ABA Guideline 11.4.1 (cited in Wiggins, 123 S. Ct. at 2537) – precisely the records that were obtained by post-conviction counsel here. See also Williams, 529 U.S. at 395-96 (counsel ineffective for failing to obtain defendant's juvenile records).

As stated above, these records were "reasonably available" to counsel – school records were across the street from the courthouse; adult criminal records were in the courthouse; prison records were in the criminal record court files (or could easily have been obtained from the prison); juvenile records were referenced in the court/prison records and available nearby. Counsel, however, did not seek or obtain any of these readily available records, or any other

records about Mr. Rompilla. Counsel's mitigation investigation fell below reasonable professional norms.

The ABA Guidelines say capital counsel should always seek the type of records that trial counsel failed to seek here (school, juvenile, prior conviction, prison) as part of a reasonable mitigation investigation. And there are several features of this case that make counsel's failure to seek or obtain these (or any other) records particularly "shocking," Rompilla-4 (dissent) at 273, and highlight counsel's ineffectiveness.

First, as stated above, counsel knew the few people they spoke to were not good sources of information, making it particularly obvious that counsel needed to seek other sources.

Second, as stated above, counsel knew the Commonwealth would introduce evidence from the prior convictions court file as aggravation. Under these circumstances, effective counsel would have investigated the prior convictions by, at least, reviewing the court file that the Commonwealth planned to introduce, and would have done so even if there was no duty to investigate mitigation.[22]

Third, counsel knew the capital sentencing jury would learn that Mr. Rompilla spent fourteen years in prison before this offense.[23] It was well-established at the time of this trial that "evidence bearing on the defendant's ability to adjust to prison life" can be mitigating. Skipper v. South Carolina, 476 U. S. 1, 6 (1986). Under these circumstances, effective counsel would have obtained and reviewed the prison records as a possible source of this mitigating evidence.

Fourth, counsel knew that Mr. Rompilla left school in 9th grade and that this suggested "problems in school." A1314-15. Under these circumstances, effective counsel would have obtained and reviewed the school records.

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22 For similar reasons, effective counsel would have reviewed the juvenile court file, even if there was no duty to investigate mitigation. See note 20, supra.

23 As stated above, the sentencing jury learned that Mr. Rompilla committed this offense three months after being released on parole from fourteen years imprisonment for the prior convictions that were used to establish the (d)(9) aggravating circumstance.

Fifth, counsel knew, from police reports provided in pre-trial discovery, A2367-76, that Mr. Rompilla was drinking so heavily around the time of the offense that he was described as being incoherent and passing out, showing that his alcoholism needed to be investigated. The available records about Mr. Rompilla's background were an obvious source of information about the development and history of his alcoholism, and effective counsel would have obtained them.

The "narrow set of sources" counsel used did not give counsel any information about any of these matters, yet counsel never sought other, readily available sources. Effective counsel would have gone beyond this narrow set of unhelpful sources by getting easily obtainable records about Mr. Rompilla. Those records had significant mitigation.

**B. Habeas Relief is Appropriate Under AEDPA.**

Habeas relief is appropriate under AEDPA. The state court did not rule on Strickland's "prejudice" prong. See Rompilla-2 at 789 n.3. Thus, habeas "review is not circumscribed by a state court conclusion with respect to prejudice," i.e., prejudice is reviewed de novo. Wiggins, 123 S.Ct. at 2542. No court has ever doubted the existence of prejudice here, which is established by the compelling mitigating evidence presented in the post-conviction proceedings.

The only issue here is the adequacy vel non of counsel's investigation. As stated above, counsel's investigation was deficient in two ways: (1) counsel completely failed to investigate the aggravating evidence; and (2) counsel did not conduct the thorough investigation for background mitigation that the Sixth Amendment requires. A ruling for Mr. Rompilla on either issue requires habeas relief. Relief is appropriate on both.

**1.** The state court did not address counsel's complete failure to investigate the aggravation, despite the fact that Mr. Rompilla squarely presented the argument in state court, see Commonwealth v. Rompilla, No. 152 CAP, Initial Brief of Appellant at 67-69 (Pa. June 3, 1997); id., Reply Brief of Appellant at 3 (Pa. Aug. 8, 1997). Thus, habeas review of this

aspect of counsel's deficient performance "is not circumscribed by a state court conclusion," Wiggins at 2542, and relief is appropriate for the reasons stated above[24]

**2.** With respect to the mitigation investigation, the state court tried to excuse counsel's failure to seek or obtain any records because: (a) the records supposedly are "not entirely helpful"; (b) counsel hired mental health experts; (c) counsel spoke to Mr. Rompilla and a few family members. Rompilla-2 at 790. These attempts to excuse counsel's "grossly inadequate investigation," Rompilla-4 (dissent) at 274, are unreasonable.[25]

**a.** The Pennsylvania Supreme Court believed it could excuse counsel's failure to seek or obtain any records because "the [post-conviction hearing] court found [the records] not entirely helpful." Rompilla-2 at 790. We explain below that this "finding" is absurd. But even assuming the records are "not entirely helpful," this is an unreasonable application of Strickland because it uses the contents of records never seen by counsel to justify counsel's failure to get them. The state court thus engaged in a paradigmatic improper use of hindsight to justify counsel's investigative failure. E.g., Strickland, 466 U.S. at 689 (reviewing court must avoid "distorting effects of hindsight," and must "evaluate [counsel's] conduct from counsel's perspective at the time"); Kimmelman v. Morrison, 477 U.S. 365, 386-87 (1986) (same).

The state court's hindsight approach is directly refuted by Williams, where counsel was ineffective for failing to obtain juvenile records, and where those records actually contained harmful information. This Court explained: "Of course, not all of the

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[24] Habeas relief is also appropriate if the failure-to-investigate-aggravation issue is reviewed under § 2254(d), since nothing in the state court decision suggests any reasonable basis for counsel to completely fail to investigate the source of the aggravating evidence.

[25] "It is impossible to determine" from the state court opinion "the extent to which the [Pennsylvania] Supreme Court's error[s] with respect to" each of these three areas "affected its ultimate finding that" counsel were effective. Williams, 529 U.S. at 414. Accordingly, the state court decision is unreasonableness if any one of these three excuses given by the state court is unreasonable. Id. Moreover, the state court did not address at all counsel's failure to interview the two sisters who would have provided significant background mitigation about Mr. Rompilla's traumatic childhood and the development of his mental problems and alcoholism, see Rompilla-4 (dissent) at 280, and habeas relief is appropriate on that ground even apart from counsel's failure to obtain any records. Nevertheless, we outline the unreasonableness of all three of the state court's excuses for counsel's failure to seek records.

[unpresented] evidence [in records] was favorable to Williams. ... But ... failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision" because counsel did not adequately investigate and did not know what the records contained. Id., 529 U.S. at 396; accord Wiggins, 123 S.Ct. at 2535. The state court's use of the records' purported contents to justify counsel's failure is an unreasonable application of Strickland.

Moreover, as a factual matter, the Pennsylvania Supreme Court's "not entirely helpful" assertion is absurd. It is based on the post-conviction hearing court's statement that the "records were not entirely helpful" because, "[w]hile they reveal a low IQ, low IQ can simply be part of the bell curve." A2029. It is silly to say this makes the records unhelpful. Any IQ score is "part of the bell curve." The low IQ scores of mentally retarded people, like Mr. Rompilla, are at the low end of the "bell curve." The state court's "not entirely helpful" ruling is thus " based on an unreasonable determination of the facts," requiring relief under section 2254(d)(2).

**b.** The state court believed that hiring mental health experts absolved counsel of the duty to investigate Petitioner's background. This, too, is unreasonable. In Wiggins, when the state "emphasized counsel's retention of a psychologist," this Court rejoined that "counsel's decision to hire a psychologist sheds no light on the extent of their investigation into petitioner's social background." Id. at 2541. Whether counsel hires experts or not, counsel has an "obligation to conduct a thorough investigation of the defendant's background." Id. at 2535 (quoting Williams).

Even if counsel could abdicate their background investigation duty to mental health experts, counsel here could not reasonably rely on the experts for such an investigation because counsel did not ask the experts to seek or expound upon background mitigation. Instead, counsel asked only for expert opinions about Mr. Rompilla's mental state at the time of the offense. A1067-71 (trial counsel testimony); Rompilla-4 (dissent) at 28126 And, even

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26
One expert did not even know counsel wanted a mitigation mental state evaluation; he believed counsel was interested only in possible guilt-phase mental defenses. A1545 (Dr. Gross).

if counsel had asked the experts to do a background investigation, the experts would have had a very "narrow set of sources," Wiggins – no records about Mr. Rompilla's history, no family interviews, and so on. Finally, hiring mental health experts would not under any circumstances have relieved counsel of the duty to investigate the prior convictions used in aggravation. Thus, if it is falsely assumed that counsel asked the experts to do a background investigation and falsely assumed that they did one, it still did not meet Sixth Amendment standards.

**c.** The Pennsylvania Supreme Court tried to excuse counsel's failure to seek or obtain any records because counsel spoke to a few family members. This is an unreasonable application of Strickland for the reasons stated in Wiggins, by the Circuit dissenters, and above. Counsel's reliance on this remarkably narrow set of sources, who told counsel they knew little about Mr. Rompilla's background, does not even come close to meeting the Sixth Amendment requirement that counsel investigate thoroughly for all reasonably available background mitigation.

### C. The Third Circuit Majority Gravely Erred.

When examined in light of this Court's controlling precedents, Williams and Wiggins, the Third Circuit majority's ruling is "astonishing" and "inexplicable." Rompilla-4 (dissent) at 274, 282. In light of Williams, the District Court had granted relief. In light of Williams and Wiggins, several Third Circuit Judges were appalled by the Circuit majority's ruling.

Under Williams and Wiggins, this is an easy case. Counsel did not even come close to the "thorough investigation of the defendant's background" for "all reasonably available mitigating evidence" that this Court requires. Unlike the Circuit majority, the Circuit dissenters actually evaluated this claim under Williams and Wiggins, and found that counsel "fail[ed] to conduct even the most rudimentary investigation into Rompilla's background." Rompilla-5 (dissent) at 312. Applying Williams and Wiggins, the dissenters found this is a case of "grossly inadequate investigation" and "shocking ineffective assistance of counsel." Rompilla-4 (dissent) at 273-74.

The Circuit majority, however, did not discuss Williams' Sixth Amendment analysis at all (it cited Williams only for its general interpretation of §2254(d)). See Rompilla-4 at

240, 246, 250. The Circuit majority treated Wiggins as an afterthought relegated to the end of its opinion, Rompilla-4 at 256, and hinged its ruling instead on lower court decisions which pre-date both Williams and Wiggins and do not apply the Sixth Amendment analysis required by Williams and Wiggins.[27]

The Circuit majority not only treated Wiggins as an afterthought, it also ignored the core of its teaching. According to the Circuit majority, Wiggins found counsel ineffective solely because they failed "to follow the leads" they found in records they obtained. Rompilla-4 at 257. But failure-to-follow-leads is only one of the reasons this Court found Wiggins' lawyers deficient.

The Wiggins Court first stressed, at some length, that "well-defined norms" for capital counsel, as "articulated by" the ABA Guidelines and other professional standards, require capital counsel to conduct a "thorough investigation of the defendant's background" for "all reasonably available mitigating evidence." Id., 123 S.Ct. at 2535-37 (citations omitted; emphasis original). Applying these Sixth Amendment norms, this Court found counsel's investigation inadequate because it gave counsel only a "rudimentary knowledge of [Wiggins'] history from a narrow set of sources." Id. at 2537. None of this had anything to do with counsel failing to "follow leads" in records they already had. After holding that counsel's investigation was deficient because it was not "thorough" and did not seek "all reasonably available mitigating evidence," Wiggins then went on to further hold that the "scope of their investigation was also unreasonable in light of what counsel actually

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27 The decisions relied on by the Circuit majority highlight the "degraded" approach decried by the dissenters. For example, the majority cited Rogers v. Zant, 13 F.3d 384, 387 (11th Cir. 1994), which explicitly held that "thorough investigation" is not required in capital cases, a holding directly contrary to Williams and Wiggins; Waters v. Thomas, 46 F.3d 1506 (11th Cir. 1995), where "[u]nder the majority's analysis, defense counsel need have no trial strategy, need not find out how witnesses will testify before putting them on the stand, and need not know about the value of mitigating evidence," id. at 1529 (dissent); and Kokoraleis v. Gilmore, 131 F.3d 692, 697 (7th Cir. 1998), where the defendant confessed to being "a serial killer who ... eats his victims after fetishistic ... ceremonies," yet the court deemed it reasonable for counsel to not investigate mental health mitigation because the defendant "appeared normal" to counsel.

discovered in the . .. records" they obtained, because effective counsel would have followed up on leads contained in those records. Id. at 2537.28

Thus, Wiggins held that capital counsel must both: (1) thoroughly investigate for all reasonably available mitigation; and (2) follow up on leads contained in information they obtain. The Circuit majority ignored the first requirement and treated Wiggins as if it held only the second. The Circuit majority thereby stripped Wiggins of most of its force. As Circuit Judge Sloviter said in dissent, the Circuit majority's narrow view of Wiggins is "nothing short of astonishing" and "entirely misses the point" of this Court's decision. Rompilla-4 (dissent) at 282.

The Circuit majority also paid no heed to the ABA Guidelines, mentioning them only in a footnote, and belittling their importance. Rompilla-4 at 259 n.14. This cavalier treatment of the ABA Guidelines cannot be squared with Williams and Wiggins. See, e.g., Wiggins, 123 S.Ct. at 2536-37 (ABA Guidelines are "norms" and "standards to which we long have referred as 'guides to determining what is reasonable'" under the Sixth Amendment (citing Strickland; Williams)); see also Hamblin v. Mitchell, 354 F.3d 482, 486 (6th Cir. 2003) (in light of Wiggins, ABA Guidelines "provide the guiding rules and standards to be used in defining the 'prevailing professional norms' in ineffective assistance cases").

Finally, and inexplicably, the Circuit majority did not even discuss counsel's complete failure to investigate aggravation, even though that argument was squarely presented by Mr. Rompilla. There was no reasonable basis whatsoever for counsel to fail to investigate the prior convictions that were used to establish an aggravating circumstance. Had they done so, they would have found the significant mitigation described herein. Neither the Third Circuit nor the state courts have ever even suggested any reason why this argument is not meritorious.

## CONCLUSION

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See also id. at 2541-42 ("Counsel's investigation into Wiggins' background did not reflect reasonable professional judgment. Their decision to end their investigation when they did was neither consistent with the professional standards that prevailed in 1989, nor reasonable in light of the evidence counsel uncovered in the social services records – evidence that would have led a reasonably competent attorney to investigate further.").

This Court should issue its writ of certiorari and review the decision of the Third Circuit.

Respectfully submitted,

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Dated: July 23, 2004

CERTIFICATE OF SERVICE

I, BILLY H. NOLAS, Esq., certify that on this 23rd day of July, 2004, I have caused the foregoing petition and its appendix to be served by FIRST CLASS MAIL on the following person:

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_____
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