No. 04-5462

In The Supreme Court of the United States

RONALD ROMPILLA,

Petitioner,

v.

JEFFREY A. BEARD, Secretary,
Pennsylvania Department of Corrections,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT[1]

I. RELIEF SHOULD BE GRANTED UNDER *SIMMONS V. SOUTH CAROLINA*, 512 U.S. 154 (1994).

Respondent does not dispute that this jury was worried Petitioner would be paroled if sentenced to life imprisonment, nor does Respondent dispute that this jury was denied the information it needed to accurately assess Petitioner's future dangerousness, *i.e.*, that Petitioner would not be paroled if sentenced to life.

– A –

Respondent fails to confront the future dangerousness argument the prosecutor actually made. *See* Pet. Br. at 4-5 (describing prosecutor's argument). Respondent's avoidance is particularly striking with respect to the prosecutor's argument that Petitioner "*learned a lesson* from" his prior convictions and "[t]hat lesson was *don't leave any witnesses*. *Don't leave anyone behind* that can testify against you. *Don't leave any eyewitnesses*. . . ." JA165-166. This is a future dangerousness argument plain and simple.[2] It is hard to imagine anyone more dangerous when

[1] All emphasis herein is supplied unless otherwise indicated. The Joint Appendix and Lodging are cited as "JA" and "L." The briefs for Petitioner, Respondent, the American Bar Association, the National Association of Criminal Defense Lawyers, the United States and the Criminal Justice Legal Foundation are cited as "Pet. Br.," "Resp. Br.," "ABA Br.," "NACDL Br.," "U.S. Br." and "CJLF Br."

[2] Respondent tries to sanitize the future dangerousness message this argument sent the jury, presenting instead only a paraphrase – that Petitioner "allowed the situation to escalate into murder, possibly in an effort to avoid apprehension and prosecution by eliminating a critical witness." Resp. Br. at 11.

released than a recidivist who "learned" the "lesson" to not "leave anyone behind that can testify" about his crimes. And the prosecutor asserted this during an argument haranguing the jury with characterizations of Petitioner as cold-blooded, merciless, brutal, "a very strong individual," a "very violent individual" and "absolutely frightening" because he repeatedly commits similar violent crimes. *See* Pet. Br. at 3-7, 22-27.

Respondent says the prosecutor "did not present any evidence" regarding parole, rehabilitation or that Petitioner committed this offense 3½ months after being released from his prior prison term. Resp. Br. at 3; *see also id*. at 14, 35-36 & n.20. Actually, the prosecutor *did* elicit and emphasize such evidence in his cross-examination of defense witnesses at the penalty phase. *See* Pet. Br. at 3-4. The prosecutor's questioning of Darlene Rompilla concerned just two issues: that Petitioner was paroled 3½ months before this offense and that her children were afraid of Petitioner when he was released on parole. JA126-127. Nearly half of the prosecutor's questioning of Nick Rompilla focused on the fact that Petitioner was released from prison 3½ months before this offense. JA131-132. About one-third of the prosecutor's questioning of Robert Rompilla focused on the lack of rehabilitation in prison and Petitioner's inability to rehabilitate himself. JA141-142. The fact that the prosecutor elicited this evidence on cross-examination made it no less a part of the prosecutor's future dangerousness message to the jury. *See Skipper v. South Carolina*, 476 U.S. 1, 9 (1986) (Powell, J., concurring

in judgment) (prosecutor sent a future dangerousness message in "the course of cross-examining petitioner").[3]

Respondent also shies from the prosecutor's actual presentation of the prior crimes evidence. *See* Resp. Br. at 2-3, 35 & n.19. The prosecutor did more than prove the existence of the prior convictions. The prosecutor put an assistant district attorney on the stand to recite the prior victim's testimony. *See* JA54-89; Pet. Br. at 3, 26. The prosecutor thus detailed the violence of the prior crimes – describing how the victim was threatened with a gun, assaulted with a knife, robbed and raped – and highlighted the victim's fear of Petitioner, including her fear that Petitioner would *return and kill her if he was not picked up*. *See* JA75 (victim was "petrified" with fear); JA77 ("I had begged him not to do it to me"); JA82 ("I felt I was gonna have a coronary"); JA83 ("I felt he was going to kill me"); JA87 (feared "he was coming back for me, and I was petrified"); JA88 ("terrified"); JA89 ("fear[ed] that he'd come back after me before they had a chance to pick him up"). The prosecutor firmly planted the future dangerousness message by presenting the evidence this way.

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[3] Respondent points out that at least one juror found as a mitigating circumstance the "possibility of no rehabilitation during incarceration and after release." Resp. Br. at 12 (quoting JA228); *cf*. Pet. Br. at 7 (quoting Third Circuit majority, JA1331). Respondent says this shows jurors "did not determine that the possibility that Rompilla might be rehabilitated in the future had a mitigating influence, but rather the possible lack of past rehabilitation while he was previously incarcerated and/or on parole did." Resp. Br. at 12 n.7. Respondent's statement of what the jury found only confirms that the jury received the future dangerousness message sent by the prosecutor's cross-examination of defense witnesses. After all, a man who was not rehabilitated by thirteen years of prison is unlikely to be rehabilitated by another term of imprisonment.

Future dangerousness suffused the prosecutor's evidence and argument. The jury's questions show it received the future dangerousness message the prosecutor sent.

– B –

Respondent, like the Third Circuit majority, tries to graft onto the state court decision an idiosyncratic and narrow reading of *Simmons* that would require a no-parole instruction only "where the prosecution has *expressly* appealed to the sentencing jury to impose a capital sentence *because of* the future danger the defendant presents." Resp. Br. at 28; *see also id*. at 32 (Respondent's assertion that it "was not objectively unreasonable to construe *Simmons*" in Respondent's way at the time of the Pennsylvania Supreme Court's ruling in *Rompilla*); *but see* Pet. Br. at 29-30; NACDL Br. at 9-10 (describing why Respondent's view of *Simmons* is not reasonable).

The Pennsylvania Supreme Court *did not employ* Respondent's version of *Simmons*. Instead, the Pennsylvania Supreme Court said *Simmons* requires a no-parole instruction "when the defendant's future dangerousness is *at issue*." JA284, *Commonwealth v. Rompilla*, 721 A.2d 786, 795 (Pa. 1998).[4] Because Respondent's argument is

[4] The Pennsylvania Supreme Court cited two of its prior decisions. *See* JA284, citing *Commonwealth v. May*, 710 A.2d 44, 47 (Pa. 1998) (saying no-parole instruction required when "future dangerousness is *at issue*" or "prosecutor *injects concerns* of the defendant's future dangerousness into the case"), and *Commonwealth v. Clark*, 710 A.2d 31, 36 (Pa. 1998) (saying no-parole instruction required "where the issue of the defendant's future dangerousness was *raised*" or "is *at issue*"). Neither *May* nor *Clark* adopted Respondent's narrow view of *Simmons*. Indeed, *Clark* said a *Simmons* instruction is required when *defense counsel*'s

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based on a view of *Simmons* that was not adopted 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*, 539 U.S. 510, 529-30 (2003).

The Pennsylvania Supreme Court's actual *Rompilla* decision is objectively unreasonable, *see* Pet. Br. at 26-30; NACDL Br. at 6-21, and Respondent does not really defend it. After all, the Pennsylvania Supreme Court misunderstood Petitioner's argument as being *solely* "that his future dangerousness was at issue because the Commonwealth argued the aggravating circumstance that he has a significant history of felony convictions involving the use or threat of violence," and rejected only that contention. JA284, *Rompilla*, 721 A.2d at 795.[5]

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argument raises the possibility of parole, *see Clark*, 710 A.2d at 36, which is inconsistent with Respondent's approach.

[5] Petitioner's argument involves much more than the mere presentation of the prior crimes aggravating factor. There was the prosecutor's evidence about the extreme violence of this crime and the prior crimes and about the similarities between this crime and the prior crimes; the way the prosecutor presented the prior crimes evidence (reading the victim's testimony about Petitioner's violence and the victim's fear); the prosecutor's elicitation of evidence that Petitioner was paroled from his prior convictions, that he killed shortly after being paroled, that parolees are released without rehabilitation and that Petitioner could not rehabilitate himself; the prosecutor's argument that Petitioner is cold-blooded, merciless, brutal, strong and violent; the prosecutor's argument that Petitioner is "absolutely frightening" because he repeatedly commits similar violent crimes; the prosecutor's argument that Petitioner "learned a lesson from" his prior convictions and "[t]hat lesson was don't leave any witnesses. Don't leave anyone behind that can testify against you. Don't leave any eyewitnesses"; the jury's repeated questions about parole eligibility and rehabilitation; and the judge's responses suggesting parole might be available but the jury

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Respondent says *Weeks v. Angelone*, 528 U.S. 225 (2000) shows that 28 U.S.C. § 2254(d) review "should not examine the state court's reasoning" or consider "the rationale [the state court] used." Resp. Br. at 31 & n.17. But *Weeks* involved a *silent* state court denial of relief – it was not a case where the state court articulated its "reasoning" or "rationale." *See Weeks v. Commonwealth*, 450 S.E.2d 379, 383, 390 (Va. 1994). In that silent denial setting, this Court provided *de novo* review to the claim at issue, *found it meritless*, *see* 528 U.S. at 227-37, and only then concluded that "it follows *a fortiori* that the adjudication of the [state court denying relief] neither was 'contrary to,' nor involved an 'unreasonable application of,' any of our decisions," *id*. at 237.

Weeks does not suggest that when the state court says what its rationale is the federal court should nevertheless ignore the state court's rationale and substitute a new rationale that the state court did not employ. This Court's decisions address the actual rationale of the state court when the state court gives one. *See Wiggins*, 539 U.S. at 529-30; *Williams v. Taylor*, 529 U.S. 362, 391-98, 413-16 (2000); Pet. Br. at 28-29; NACDL Br. at 7-9 (citing cases).

II. RELIEF SHOULD BE GRANTED BECAUSE OF COUNSEL'S FAILURE TO REASONABLY INVESTIGATE FOR CAPITAL SENTENCING.

Respondent does not dispute that Petitioner has a tragic life history of childhood mistreatment and trauma, mental retardation, brain damage, alcoholism and serious

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should not know about it. The state court ignored all of this. *See* Pet. Br. at 3-7, 22-27.

mental and emotional disturbances. It is undisputed that counsel wanted to present such mitigating evidence. It is undisputed that this jury heard *nothing* about this mitigating evidence. It is undisputed that the mitigating evidence was available and, indeed, *easy to get* at the time of trial – from prior convictions court records, school records, juvenile records and prison records. It is undisputed that counsel did not try to get a single piece of paper about Petitioner's life history.

The question then is whether a reasonable capital defense lawyer would have obtained Petitioner's records, *i.e.*, whether trial counsel's life history mitigation investigation – which consisted only of conversations with Petitioner and some family members who counsel knew *were not good sources of background information* – was the thorough investigation required by the Sixth Amendment in a capital case. It was not.[6]

– A –

As Respondent acknowledges, this Court regards the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) ("1989 ABA Guidelines") as a "polestar" for evaluating counsel's investigation. Resp. Br. at 46 n.23; *see Wiggins*, 539 U.S. at 524. Respondent, however, urges this Court to view the 1989 ABA Guidelines as irrelevant

[6] Respondent does not try to defend the state court's ruling that counsel did not have to seek any records because the records supposedly are "not entirely helpful." JA272, *Rompilla*, 721 A.2d at 790. *See* Pet. Br. at 38-39 (discussing why this ruling is contrary to and an unreasonable application of clearly established law, and factually unreasonable, under 28 U.S.C. § 2254(d)(1) & (2)).

because they were published a few months after Petitioner's trial. *See* Resp. Br. at 40-41 n.21, 46 n.23. But the contours of a reasonable investigation did not materially change between 1988 and 1989 – the 1989 ABA Guidelines "articulated" existing standards for what effective capital defense lawyers were doing at the time of Petitioner's trial. *Wiggins*, 539 U.S. at 524.[7]

Petitioner cited the 1989 ABA Guidelines in support of two points. First, that counsel were derelict in failing to review the prior convictions records that the prosecutor said he would be using for aggravating evidence. *See* Pet. Br. at 35 & n.20; *see also* ABA Br. at 16-18. Surely, these lawyers should have conducted an "investigation into the prosecution's case" in order to make the proceedings "a

[7] *See Hamblin v. Mitchell*, 354 F.3d 482, 487 (6th Cir. 2003) ("Although the instant case was tried before the 1989 ABA edition of the standards was published, the standards merely represent a codification of longstanding, common-sense principles of representation understood by diligent, competent counsel in death penalty cases."); *American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 920 (2003) (1989 ABA Guidelines were "designed to express existing practice norms and constitutional requirements") (quotation marks omitted); ABA Br. at 6 n.7 (1989 ABA Guidelines "reflect prevailing norms in the profession that have existed since the early 1980s"); *id*. at 8 ("Because they reflect professional norms that prevailed in the 1980s, the [1989 ABA Guidelines] are an appropriate benchmark against which counsel's conduct should be judged in this case."); *id*. at 10 n.9 (citing "[a]rticles and attorney handbooks" pre-dating Petitioner's trial that emphasized importance of "reviewing a defendant's prior conviction records, prison records, juvenile court records, school records, and records relating to childhood abuse and substance abuse"); Brief for American Bar Association as *Amicus Curiae* in *Wiggins v. Smith*, No. 02-311, 2003 WL 252551, *4 ("The standard of care set forth in the [1989 ABA] Guidelines resulted from the ABA's study of what reasonably performing lawyers *were* doing and what ineffectively performing lawyers *were not* doing.").

reliable adversarial testing process." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) (citations omitted).

Second, Petitioner cited the 1989 ABA Guidelines because they indicate that effective capital counsel routinely seek records as part of investigating the defendant's background for mitigating evidence. *See* Pet. Br. at 31; *see also* ABA Br. at 12-16; Resp. Br. at 40-41 n.21 (acknowledging that 1989 ABA Guidelines contemplate "collection of a defendant's records" as necessary for a reasonable investigation). Surely, these lawyers should have obtained records about Petitioner's life history as part of a mitigation investigation.

– B –

Respondent urges the Court to rely upon the ABA Standards for Criminal Justice (2d ed. 1980) ("1980 ABA Standards"), instead of the 1989 ABA Guidelines. *See* Resp. Br. at 40-42. But those 1980 ABA Standards themselves highlight that a reasonable capital defense lawyer in this case *would have obtained the records* about Petitioner's life history.

In *Williams v. Taylor*, 529 U.S. 362 (2000), this Court observed that those 1980 ABA Standards require "a *thorough investigation* of the defendant's background" for mitigation. *Williams*, 529 U.S. at 396 (citing 1980 ABA Standard 4-4.1, commentary, at 4-55). Based upon this duty of "thorough investigation," the *Williams* Court found counsel ineffective for failing to obtain the defendant's *juvenile records*. *Id.*, 529 U.S. at 395-96. Here, as in *Williams*, counsel were ineffective because they did not

conduct the "thorough investigation" that the 1980 ABA Standards themselves discuss.[8]

The 1980 ABA Standards say counsel's investigation should "explore all avenues leading to . . . information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like," *id*., 4-4.1 & commentary, and the defendant's records are an obvious "avenue" where that information can be found. In Respondent's words, "review of a defendant's records can be of great assistance in locating" mitigation. Resp. Br. at 42.

School, juvenile, prior conviction, prison and medical records are the basic stuff of any effective capital defense lawyer's investigation. But even assuming it might be reasonable in some case for a capital defense lawyer to not seek records about the client's life, counsel were not reasonable here given what they knew, the types of records available and the ease with which the records could have been obtained.

Counsel knew Petitioner had problems in school and left school in ninth grade. *See* Pet. Br. at 13, 34. Thus, the need to "explore all avenues leading to . . . information" about Petitioner's "education," 1980 ABA Standard 4-4.1 & commentary, was especially apparent. These lawyers made no effort to get school records – the most obvious documentation of Petitioner's educational history. Nor did they try

[8] *See also Wiggins*, 539 U.S. at 516, 522, 524-25 (citing 1980 ABA Standards and 1989 ABA Guidelines and finding counsel ineffective for failing to develop a social history from "*social services, medical, and school records*, as well as interviews with petitioner and numerous family members").

to get juvenile and prior conviction records, which in Pennsylvania contain information about educational background. *See* Pet. Br. at 33-34 (citing Pennsylvania cases).

Counsel knew Petitioner had a juvenile and adult criminal history. Pennsylvania lawyers know that prior conviction and juvenile records contain "information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like," 1980 ABA Standard 4-4.1 & commentary, because Pennsylvania law *requires* those records to contain such information, *see* Pet. Br. at 33-34 (citing Pennsylvania cases). These lawyers made no effort to get Petitioner's prior convictions and juvenile records.

Counsel knew Petitioner had spent much of his life in juvenile detention and prison. *See* Pet. Br. at 8. Effective defense lawyers know that the defendant's ability to adjust to imprisonment can be mitigating, *see* Pet. Br. at 35, and therefore review prison and juvenile records as part of "explor[ing] all avenues" relating to mitigation, 1980 ABA Standard 4-4.1, especially when, as in this case, the jury will learn that the defendant has spent many years in prison. These lawyers made no effort to get prison or juvenile records.

Counsel knew, from police reports provided by the prosecutor before trial, that a condition of Petitioner's parole was that he not drink alcohol and that witnesses described Petitioner as incoherent and passing out from drinking around the time of the offense. *See* Pet. Br. at 34. Effective counsel would have reviewed the court and prison records from Petitioner's prior convictions to "explore all avenues" relating to alcohol problems, 1980 ABA

Standard 4-4.1, especially since abstaining from alcohol was made a condition of Petitioner's parole. These lawyers made no effort to get such records.

Pennsylvania capital defense lawyers know the prosecution can introduce as aggravating evidence the *facts and circumstances* of prior convictions and juvenile adjudications, as reflected in the *prior case court files*. *See* Pet. Br. at 9-10, 35-36 & n.21. While effective lawyers seek information "in the possession of the prosecution and law enforcement authorities," 1980 ABA Standard 4-4.1 & commentary, these lawyers made no effort to review Petitioner's juvenile or prior convictions court records. Their inaction is profound because the prosecutor *told them* he would be using Petitioner's prior convictions court file as part of his aggravating evidence. *See* Pet. Br. at 9.

Counsel's failure to "explore all avenues," 1980 ABA Standard 4-4.1, by obtaining records is also profound because they knew that the few "avenues" they did "explore" for background information – Petitioner and some family members – were poor sources of information about Petitioner's history. *See* Pet. Br. at 7-8, 32-33, 40. Under these circumstances, "a thorough investigation of [Petitioner's] background," *Williams*, 529 U.S. at 396 (citing 1980 ABA Standard 4-4.1, commentary, at 4-55), plainly required counsel to seek other "avenues" for information.

Finally, counsel's failure to obtain any records is remarkable because of how easily available the records were – much information was available just a short walk

from the capital case courtroom itself. *See* Pet. Br. at 14, 32.[9]

– C –

Respondent says counsel hired mental health experts, *see* Resp. Br. at 7 n.5, 8-9, 13-14, 19, 22-24, 40, 43-45, 47, to conduct "full evaluations," *id*. at 8, 23, 40, 44, and assumed "the experts had done their job," *id*. at 45. But the purported "full evaluations" counsel requested were for opinions about Petitioner's *mental state at the time of the offense* – counsel *did not ask the experts to gather or consider life history mitigation information*. *See* Pet. Br. at 15-16 & n.3, 39-40 (citing JA474, JA476); Resp. Br. at 8 (quoting JA472). As in *Wiggins*, "counsel's decision to hire [mental health experts] sheds no light on the extent of [counsel's] investigation into petitioner's social background." *Id*., 539 U.S. at 532; *see also Williams*, 529 U.S. at 368-69 (counsel ineffective for failing to "thoroughly investigate" defendant's background by, *inter alia*, obtaining juvenile records, in case where defendant was evaluated by defense psychiatrist and two other mental health experts); Pet. Br. at 29-40.[10]

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[9] Respondent and its Amici thus err when they say Petitioner would require a "scorched earth," "no-stone-unturned" search for the "full spectrum" of all possible records. *See* Resp. Br. at 42; U.S. Br. at 23 n.6; CJLF Br. at 4, 14, 18. To "explore [these] avenues" of investigation in Petitioner's case, 1980 ABA Standard 4-4.1, counsel just had to stroll down main roads, not search obscure alleys.

[10] Respondent's post-conviction expert, Dr. Dattilio, explained that the trial experts' evaluations were unreliable even as to mental state at the time of the offense, because counsel did not give the trial experts any background information about Petitioner; background information, like that in the records, is essential to a reliable forensic mental health

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– D –

Respondent emphasizes that counsel spoke to some family members. *See* Resp. Br. at 5-8, 18, 39-40, 42-44, 46. Respondent acknowledges that counsel "knew [Petitioner's] relatives were poor sources of information about him," but claims this "is true only for the period during Rompilla's adult life when he was imprisoned for his 1974 crimes and for some time when he was in juvenile detention." Resp. Br. at 43.

Counsel, however, testified that this was not "the type of family that would provide you information when asked," JA557, for *several reasons*: because Petitioner had been incarcerated for much of his life, including as a juvenile, JA495, JA557-558, JA669; because family members believed Petitioner was innocent and were not interested in identifying mitigation, JA494; and because "of their own whatever was going on with them," JA558. Thus, counsel knew the family members they spoke to were not a good source of information about any part of Petitioner's life.

Respondent concedes that counsel "were aware of the 'denial dynamic,' *i.e.*, that 'sometimes people who are abused deny it.' " Resp. Br. at 7 n.5 (quoting JA499, attorney Dantos); *see also* JA670 (attorney Charles: "It's hard to determine when someone says, 'No, I had a great childhood. I had no problems,' the difference between that

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evaluation. *See* JA1248-1249, JA1258-1261, JA1264 (Dr. Dattilio); *see also* JA353-355 (habeas petition, detailing Dr. Dattilio's testimony); JA382-386 (habeas petition, further describing importance of background information to a reliable evaluation). The trial experts themselves made it clear in their post-conviction testimony that counsel's failure to provide background information adversely affected their evaluations. *See* Pet. Br. at 16-17.

[being true] and being in denial."); Pet. Br. at 8-9. Counsel had no reason to believe the siblings they spoke to – raised in the same home as Petitioner – would be any more forthcoming than Petitioner.[11] As Respondent's post-conviction expert (Dr. Dattilio) testified, when one child is abused it is likely that other children in the family are too. JA1262-1263.[12]

Finally, even under Respondent's view that the family was a poor source of information "only" for the period when Petitioner was in prison and juvenile detention, *i.e.*,

[11] Moreover, at least one of the siblings counsel spoke to, Nick Rompilla, is *mentally retarded*, *see* Pet. Br. at 13, as is Petitioner, *see* Pet. Br. at 11, 13. Mentally retarded people are poor historians. *See* Pet. Br. at 8.

[12] The post-conviction evidence confirms this was the case here. Petitioner *and his siblings* experienced severe neglect, deprivation, physical abuse and mental abuse in the violent home of alcoholic parents – *e.g.*, "*[a]ll of the children* lived in terror. . . . His father locked Rompilla *and his brother Richard* in a small wire mesh dog pen that was filthy and excrement filled. . . . They had no indoor plumbing in the house, . . . and the children were not given clothes and attended school in rags"; Petitioner "*and his brothers* eventually developed serious drinking problems." JA1415-1416, *Rompilla v. Horn*, 355 F.3d 233, 279 (3d Cir. 2004) (Sloviter, J., dissenting) (describing family post-conviction testimony; citations omitted); *see also* JA300-310 (habeas petition, detailing family post-conviction testimony).

Respondent suggests the state court rejected the family members' post-conviction testimony, *see* Resp. Br. at 15 (citing JA264), but the state court's ruling was quite narrow. The judge disbelieved only part of Nick Rompilla's testimony – *i.e.*, that trial counsel had asked Nick only about his relationship with Petitioner during the time they lived together just before this offense. The judge did *not* find that Nick misrepresented the nature of the childhood home; nor did the judge question the veracity of sisters Barbara Harris and Randi Rompilla, who were able to describe the dysfunctional home but were *never interviewed* by counsel. *See* Pet. Br. at 14-15; JA1416-1417.

much of his life, counsel should have obtained Petitioner's prison and juvenile records, which covered that period.

– E –

Respondent says it was reasonable for counsel to rely on Petitioner for information. *See* Resp. Br. at 6-7. But counsel testified that they knew Petitioner was not reliable;[13] they knew that people with traumatic childhoods often deny it, *see* JA499, JA670; and they knew Petitioner had an "unrealistic" view of the guilt-phase trial, JA582-583, so that "[w]henever [counsel] tried to talk penalty phase and death penalty with him, he was resistant to that," JA667.[14] A reasonable lawyer would not rely on Petitioner for information.[15]

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[13] *See*, *e.g.*, JA556 (Petitioner gave counsel "some information that we checked out . . . and it turned out not to be truthful"); JA583 ("There were things he told us that proved to be inaccurate."); JA663 ("He told us stories. . . . We went and checked them and found, one by one, the stories to be just absolute fabrications."); JA272, *Rompilla*, 721 A.2d at 385 (state court found Petitioner "made contradictory statements to counsel").

[14] The post-conviction evidence also highlights that Petitioner is a poor historian because of his traumatic childhood and cognitive impairments. *See* Pet. Br. at 8-9.

[15] *See also* 1980 ABA Standard 4-3.2, commentary at 4-33 (defendant often reluctant to reveal background information to counsel); 1980 ABA Standard 4-4.1 ("The duty to investigate exists regardless of the accused's admissions or statements to the lawyer constituting guilt or the accused's stated desire to plead guilty."); *id*., commentary ("The lawyer . . . has a substantial and important role to perform in raising mitigating factors. . . . This cannot effectively be done . . . on the strength of statements made to the lawyer by the defendant."); 1989 ABA Guideline 11.4.1(C) ("The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered.").

– F –

Respondent says counsel's failure to seek any records was a reasonable use of "limited resources." *See* Resp. Br. at 5, 22, 39-40, 45-47.[16] The state court did not rely on this rationale, which "therefore has no bearing on whether the [state court's] decision reflected an objectively unreasonable application" of clearly established law. *Wiggins*, 539 U.S. at 529-30. In any event, it would have taken virtually no "resources" to get Petitioner's school, juvenile, prior convictions and prison records, which were easily available. *See* Pet. Br. at 14, 32. The records here are exactly what effective capital defense lawyers routinely obtain. But Petitioner's lawyers did not get a single scrap of paper about his life history.

CONCLUSION

The jurors got the future dangerousness message the prosecutor sent, and then were denied the information they needed to accurately assess Petitioner's future dangerousness. The jurors did not get any mitigating evidence about Petitioner's tragic life and diminished functioning, and thus were denied the information they needed to accurately assess Petitioner's moral culpability.

[16] Respondent's "limited resources" rationale comes from a comment in the testimony of attorney Charles. Respondent says Mr. Charles had experience, especially in dealing with mental health experts. *See* Resp. Br. at 4-5, 39-40. But Mr. Charles delegated primary responsibility for capital sentencing to Ms. Dantos, 2½ years out of law school, and it was Ms. Dantos who had almost all the contact with Petitioner and family members, and had the only contact with the mental health experts. *See* Pet. Br. at 2-3 n.2.

Either error demonstrates that this death sentence is not constitutionally reliable and that habeas relief is appropriate.

Respectfully submitted,

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