**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

# BRIEF FOR RESPONDENT


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## QUESTIONS PRESENTED

1. Did the state court reasonably apply *Simmons v. South Carolina*, 512 U.S. 154 (1994), in deciding petitioner's claim that the sentencing jury should have been instructed that he would not be eligible for parole if sentenced to life imprisonment?

2. Did the state court reasonably apply *Strickland v. Washington*, 466 U.S. 668 (1984), to petitioner's claim that trial counsel ineffectively investigated evidence of mitigation?

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## STATEMENT OF THE CASE

1. In the early morning hours of January 14, 1988, petitioner, Ronald Rompilla, broke into a bar in Allentown, Lehigh County, Pennsylvania, shortly after closing time, and robbed and murdered the owner, James Scanlon. Scanlon's body was found lying in a pool of blood, N.T., vol. I, 38-39, 44.[1] He had been stabbed repeatedly, at least 16 times, and his body had been set on fire. N.T., vol. IV, 13-19. Scanlon's wallet had been stolen and approximately $500-$1000 was taken from the till. N.T., vol. I, 48-54.

Rompilla had been in the bar for about an hour just prior to its 2:00 a.m. closing. During that time he went to the men's room approximately ten times. N.T., vol. II, 57, 67-68. Police investigating Scanlon's murder determined that the bar was entered after it had closed through a window in the men's room. Though Rompilla told police investigators he left the bar near or shortly after closing time because he had run out of money—he said he was down to his last two dollars—N.T., vol. III, 126, a number of witnesses testified that they had seen him with a large amount of cash after he had left the bar. N.T., vol. II, 88-89; vol. III, 73-74, 81-82. Desk clerks from a local motel, which Rompilla had checked into using a false name, reported that he had flashed a large amount of money when he had paid $121.50 in cash for two nights' lodgings. N.T., vol. II, 87-88, 93, 98.

In executing a search warrant for Rompilla's motel room, police seized his sneakers which were found to match a footprint in blood located near Scanlon's body.

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[1] "N.T." refers to the notes of testimony from guilt phase of the trial, which comprise six separate volumes. Because they are not continuously paginated, volume numbers are provided. Citations to "J.A." refer to the Joint Appendix filed in this Court.

N.T., vol. III, 38-40, 130. Blood on the sneakers matched Scanlon's rare blood type. N.T., vol. I, 132-133. Scanlon's empty wallet was found in some bushes outside of Rompilla's motel room. N.T., vol. II, 130-131; vol. III, 139-140. Rompilla's fingerprint was present on one of the two knives used to kill Scanlon. N.T., vol. I, 125-126; vol. II, 28. The jury convicted Rompilla of first degree murder, 18 Pa.C.S.A. § 2502(a), and other crimes, including robbery and burglary, 18 Pa.C.S.A. §§ 3701(a)(1)(i) and 3502(a).[2] N.T., vol. VI, 3-4.

In the penalty proceeding which followed, the Commonwealth sought to establish three aggravating circumstances which Pennsylvania law identifies: that Rompilla committed a killing while in the perpetration of a felony, 42 Pa.C.S.A. § 9711(d)(6); that the offense was committed by means of torture, 42 Pa.C.S.A. § 9711(d)(8); and that Rompilla had a significant history of felony convictions involving the use or threat of violence to the person, 42 Pa.C.S.A. § 9711(d)(9).[3] J.A. 42-43. To prove the first of those aggravating circumstances, the Commonwealth relied on the fact that, in connection with the same criminal episode as the murder, the jury had convicted Rompilla of burglary and robbery, both of which are qualifying felonies for this aggravating circumstance under Pennsylvania law. S*ee generally Commonwealth v. DeHart*, 512 Pa. 235, 516 A.2d 656 (1986). J.A. 161-162. As to the second, it presented expert testimony by a forensic pathologist to show that Rompilla had intended to inflict considerable and unnecessary pain and suffering on his victim so as to manifest exceptional cruelty and

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[2] The jury also convicted Rompilla of: two counts of theft, 18 Pa.C.S.A. § 3921(a); two counts of receiving stolen property, 18 Pa.C.S.A. § 3925(a); and one count of criminal trespass, 18 Pa.C.S.A. § 3503(a)(1)(ii). N.T., vol. VI, 4.

[3] In Pennsylvania death penalty cases, the determination of guilt and sentencing is bifurcated, and the jury alone determines the sentence to be imposed. 18 Pa.C.S.A. §§ 9711(a), (b) and (f).

depravity.[4] J.A. 91-114, 162-165. This testimony established that virtually all of the injuries Scanlon suffered—these included multiple stab wounds, a fractured nose, abrasions, lacerations and blunt force injuries—were inflicted while he was still alive and that, by their number and location, those injuries evinced an intention to cause the victim pain. *Id.*

Rompilla's prior convictions for rape, burglary and theft, which stemmed from a single criminal episode in 1974, were proffered by the Commonwealth as evidence of the last of those aggravating circumstances. The trial testimony of the victim, a female bar owner who lived above her place of business, was read to the jury. J.A. 54-90; 165-166. It showed that shortly before 2:00 a.m. on the morning of July 25, 1974, Rompilla had broken into her home while she was sleeping, demanding money at gunpoint. After ransacking the apartment and finding none, Rompilla repeatedly raped her. He used a knife to threaten, sexually assault, and slash her during the attack. *Id.* He then forced her to retrieve the bar's nightly receipts with which he fled. *Id.*

The Commonwealth did not present any evidence on the subject of the defendant's rehabilitation or lack thereof, or any evidence about the fact that the defendant had killed Scanlon three and one-half months after he had been on parole from the sentences he was serving for the 1974 convictions. J.A. 43-114. Likewise, the Commonwealth made no comment on either topic in its closing argument. J.A. 161-167.

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[4] In order to prove the "torture" aggravating circumstance, the Commonwealth must show that a specific intent by the defendant to inflict "a considerable amount of pain and suffering on a victim which is unnecessarily heinous, atrocious, or cruel manifesting exceptional depravity." *Commonwealth v. Thomas*, 522 Pa. 256, 277, 561 A.2d 699, 709 (1989); *Commonwealth v. Daniels*, 537 Pa. 464, 473, 644 A.2d 1175, 1180 (1994).

2. The defense chose to appeal to the jury for mercy and tried to capitalize on any residual doubt the jury might have about Rompilla's direct culpability for Scanlon's murder. J.A. 156-161. In the guilt phase, Rompilla had denied any involvement in Scanlon's murder. He had argued, based on forensic evidence, specifically, some fibers and hairs found on Scanlon's hands that were not similar to either his own hair or to Scanlon's, that someone else had committed the crimes. N.T., vol. V, 12-17. During its deliberations on the issue of Rompilla's guilt, the jury asked the court for instruction on the question of accomplice liability. N.T., vol. V, 160-169. The court declined to give that instruction because the prosecution had neither charged Rompilla as an accomplice, nor had argued that the jury should convict him on that basis. *Id*. Rompilla's attorneys believed that the jury's question signaled some uncertainty on its part about whether Rompilla had personally delivered the blows that killed Scanlon. Defense counsel thought that if some members of the jury believed Rompilla had been only an accomplice, they might be inclined to sentence him less harshly. J.A. 518-581; 639-644.

The defense settled on this strategy only after its efforts to identify other possible areas of mitigation had proven fruitless. J.A. 567-569. At trial, Rompilla was represented by Frederick E. Charles, the Chief Public Defender of Lehigh County, and by an Assistant Public Defender, Maria Dantos, who had been with the office for approximately two and one-half years following her graduation from law school. J.A. 465; 633-634. Based on Dantos' prior work, Charles considered her to be a very able attorney, who had gained a lot of experience in the comparatively short time she had been with his office. J.A. 657. Charles personally oversaw every aspect of Rompilla's representation and "had the final say" on all matters related to it. J.A. 467; 634-635; 657. In the ten years that he then had been practicing criminal law, Charles had defended many murder cases

and in approximately six instances had prepared to present mitigation evidence in a capital sentencing proceeding. In his capacity as the head of the county public defender's office, he had also guided the work of subordinates who were responsible for gathering and presenting evidence of mitigation in capital cases they were handling. *Id.* His prior experience in developing mitigation evidence included using qualified mental health professionals for evaluation of the defendant. J.A. 653.

Defense counsel began preparing for the penalty phase from the time they undertook Rompilla's representation and their efforts continued throughout the guilt phase of his trial. J.A. 516. Though both worked closely on all aspects of the case, Charles made all of the decisions with respect to Rompilla's defense. Under the working arrangement he had with Dantos, Charles took the lead in preparing evidence to be presented by the defense in the guilt phase. Dantos' chief responsibility was the sentencing phase, assuming one would be required. J.A. 466-467; 634-635. In line with that arrangement, Dantos was primarily responsible for contacting the persons from whom information about Rompilla would be sought, although Charles would also, from time to time, be in contact with them as well. J.A. 471-493.

Based on what had proven in the past to be most successful in locating evidence of mitigation, and what had helped to maximize available resources, defense counsel decided to first approach Rompilla himself and several close family members to learn what, if any, experiences, problems or other significant developments in his life could be further explored in more detail. J.A. 662. In Charles' experience, gathering information in this fashion had proven more efficient and productive than a general canvass. *Id.* It also allowed him to make the best use of the investigative resources which were available to him. *See id.* (at the time of Rompilla's

case, the public defender's office had two investigators and 2,000 cases).

Both Charles and Dantos, as well as their investigator, communicated repeatedly and in detail with Rompilla about the sort of evidence that would be needed to be presented on his behalf should there be a penalty phase. J.A. 493-494; 668-669 (counsel asked him what it was like for him growing up, if there was anything in his background that had happened that might be of help in the penalty phase, and if there was anything at all that might be useful). They provided him with a written description of every mitigating circumstance that Pennsylvania law recognized as a follow-up to a meeting they had with him during which they had reviewed the same information. J.A. 575-576; 657 and Com. Exh. 1. On numerous occasions, over the course of their representation of Rompilla, they spoke with him on this subject, asking him if there was anything in his past that they might be able to use. J.A. 667-671. Rompilla's response was always the same: that there was nothing in his past that might be helpful. He had had, he told them, a "normal" life. J.A. 668. In their conversations with him, Rompilla had not indicated that he was reluctant to talk about any aspect of his life. *Id.*

They queried Rompilla about possible problems with alcohol, not just for purposes of mitigation but also for the possibility of presenting a diminished capacity defense in the guilt phase of the trial. J.A. 500-502. Again, he said, this was not a subject that would lead anywhere. *Id.*; J.A. 721-722. From their discussions with him about what had occurred in the early morning hours of January 14, 1988, too, counsel had gleaned nothing that suggested a problem with alcohol. Although, over time, Rompilla gave several different versions of what occurred, in none of his accounts, did he report experiencing blackouts or any other incapacity or impairment that would have flagged a

potential problem with alcohol. J.A. 561-566. Counsel believed that they had a good relationship with their client and that he was being truthful with them. J.A. 555.[5] Counsel had had no problems communicating with Rompilla, and had detected no signs of any mental impairment or retardation. J.A.736.

Counsel's extensive efforts to learn from Rompilla's family on what might be, from the standpoint of mitigation, the best areas to focus were likewise unfruitful. Dantos repeatedly met with several family members, including siblings who were close in age to Rompilla, and his ex-wife, the mother of his son, and developed a very good rapport with them. J.A. 493-494; 498; 669-670, 729-730 (Rompilla's family was a "constant source of information" for the defense team). She reviewed in detail with them the kind of information that could be helpful for the penalty phase and stressed the importance of presenting such information. J.A. 494; 669 (Dantos asked them to describe what Rompilla's life had been like, including when he was growing up, how he interacted with the members of his family, including his parents). Based on their ongoing interaction with her, she believed that they truly cared about the defendant and wanted to aid in his defense. J.A. 729-730; 734-735. No one, however, had anything helpful to offer. *Id.* All denied the existence of any problems during Rompilla's childhood and upbringing. J.A. 669-670 (from those numerous contacts came nothing which caused them to search for more information on any subject). None of

[5] Counsel were also aware of the "denial dynamic," *i.e.*, that "[s]ometimes people who are abused deny it for reasons of mental health and psychology . . . ." J.A. 499. Dantos explained that is why "you . . . rely on other people to give you information, such as siblings, such as your psychologists or psychiatrists to conduct their interviews and ask questions in a manner that would elicit [that] sort of information." *Id.* This was one of the reasons Rompilla, as discussed later, was sent to three mental health experts. J.A. 670-671.

the family members, who had been in contact with Rompilla during the three and one-half months he was on parole, mentioned problems on his part with alcohol or anything else. J.A. 500. They all echoed what Rompilla had told them: that he had had a normal life. J.A. 494 ("although [Dantos] asked them questions, they did not tell [her] anything noteworthy about his childhood, about his family dynamics"); 734-735. Both she and Charles believed that Rompilla's family members had communicated truthfully with them. J.A. 557-558.

The defense also sought the assistance of three experienced and very well-qualified mental health experts—Paul K. Gross, M.D, a psychiatrist; Gerald Cooke, Ph.D., a clinical and forensic psychologist; and Robert Sadoff, M.D., a board-certified forensic psychiatrist whose services had been previously retained in connection with other cases. J.A. 472; 559-560.[6] He knew their work to be thorough and of very high quality and he relied on their expertise to identify any mental health problems or deficiencies about which evidence could be submitted to a sentencing jury. J.A. 671-673.

When Dantos contacted them, she "requested full examinations from all three experts." J.A. 514. These experts were, *inter alia*, "to look for brain damage. . . organic brain damage, organicity . . . ." J.A. 512. She "explained to them the purpose for [her] contacting them, and the purpose was to see if there was any issue of mental infirmity or mental insanity for the guilt phase and subsequently to possibly use in mitigation if . . . the jury came back first degree." J.A. 472.

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[6] Each of these individuals had extensive experience at the time they evaluated Rompilla. *See* J.A. 1084-1101 (Dr. Cooke's *curriculum vitae*); 1136-1159 (Dr. Sadoff's *curriculum vitae*). At the time of Rompilla's case Dr. Gross had been practicing psychiatry 13 years. J.A. 1017 (indicating that as of 1996 he had been a psychiatrist 21years).

Charles expected that, as part of their examination of Rompilla, they would obtain whatever information they required in order to evaluate Rompilla or that they would contact him if they needed something. J.A. 671-677; 705-710. He was prepared to retrieve anything they requested even if it involved going to great lengths. J.A. 672-673 (if the experts the defense retained had requested any of Rompilla's records, counsel would have taken steps to obtain them from wherever they might be located). They requested nothing from him. J.A. 676-677. These evaluations furnished nothing helpful. To the contrary, one concluded that Rompilla was a sociopath. J.A. 561.

In the wake of this, Charles and Dantos decided that the only course they could follow would be to appeal to the jury for mercy. J.A. 567-568. To this end, they presented the testimony of three of Rompilla's siblings, J.A. 128-146, his sister-in-law, J.A. 123-127, and his 14 year-old son, J.A. 147-149. Each in turn told the jury how they loved the defendant, how they had seen the good in him, and how they would maintain a relationship with him if he were sentenced to life imprisonment, and asked the jury to spare his life. *Id.* One of Rompilla's brothers offered his view that Rompilla "didn't have a chance . . . they didn't give him no rehabilitation [when he was in prison on prior charges,] which was wrong . . . ." J.A. 138.

In addition to emphasizing Rompilla's relationship with his family members, the defense's appeal urged the jury to appreciate that imposition of a death sentence would not bring the victim back. Dantos also told the jury it

> would be punishing [Rompilla] if [it gave] him life. Life is life. He will spend the rest of his life behind bars. He will not get out. Life is life. I'm not asking you to just let him walk away. I'm

> just asking you to be better than what you found him to be.

J.A. 157-158.

As planned, she played upon any residual doubt the jury might have about Rompilla's guilt saying,

> I saw you all struggling with this. I saw it [during deliberations in the guilt phase] Monday night at 10:00 o'clock when we let you go for the evening. You looked tired, you looked nervous, and you looked like you've been struggling. I know that. Well, I'm struggling too, we're all struggling with it. But if you're struggling with it, the fact that you had some doubt, should also stay in your mind now. If there was any doubt, I submit to you that there has to be some doubt. There has to be. You don't know what happened. There's got to be some doubt there. What if he dies, and they find out whose hairs those were, what then? It's too late.

*Id.*

In its turn, the Commonwealth told the jury it should impose a sentence of death, not out of vengeance but because, based on the facts of this case, it was justified under the laws of Pennsylvania. The evidence, the Commonwealth maintained, proved beyond a reasonable doubt the existence of three aggravating circumstances the state legislature had decided made a sentence of death appropriate for a defendant convicted of first degree murder. J.A. 162. The prosecutor then discussed each of the three aggravating circumstances the jury was being asked to find, and pointed to what evidence, in the Commonwealth's view, proved the existence of each. J.A. 162-166.

As part of his discussion of the "torture" aggravating circumstances, the prosecutor reviewed for the jury the many brutal injuries Rompilla inflicted on Scanlon before Scanlon expired. J.A. 162-165. Those actions, he argued, justified a conclusion that Rompilla had intended to inflict pain and suffering on his victim and should cause the jury to reject his plea for mercy. *Id.* In addressing the evidence of Rompilla's 1974 convictions for rape, burglary and theft of an Allentown bar owner, which was presented to establish that he had a history of serious felonies involving violence or the use of violence, the prosecutor remarked about how closely the 1974 crimes and those in this case resembled each other, saying that the similarities between the two were "frightening." J.A. 165-166. There was, however, one difference he noted: in this instance he allowed the situation to escalate into murder, possibly in an effort to avoid apprehension and prosecution by eliminating a critical witness. *Id.* At no time in his relatively brief argument—it takes up fewer than 9 pages of transcript—did the prosecutor assert that a death penalty should be imposed because Rompilla posed a danger to society in general or anyone in particular. J.A. 161-167.

The jury paused three times its deliberations about Rompilla's sentence to ask questions of the trial court. It first wanted to know: " 'If a life sentence is imposed, is there any possibility of the Defendant ever being paroled?' " J.A. 182-183. In reply, the court told them that it could not answer the question; that parole eligibility was not a matter before them; that they had to reach their decision based on the evidence presented and the law as detailed in its charge. *Id.*

The jury's next request was to be provided with two exhibits, the records of Rompilla's 1974 convictions, that had been admitted as evidence. The court, which had permitted no exhibits to go out with the jury, indicated it would not permit the jury to take

possession of these items, but would have any testimony about those exhibits read if they wished. The jurors explained that they were trying to learn from the exhibits if Rompilla had been released early from his prior sentence for any reason. J.A. 200-201. The court repeated its prior instruction that the circumstances of Rompilla's release from his last prison sentence were not something to be considered in reaching its verdict. They were required, the court told them, to reach a decision based on the evidence and the law as detailed in the court's charge.

The last inquiry from the jury asked: " 'was the Defendant offered any type for [*sic*] rehabilitation, either while in prison or after his release from prison?' " J.A. 216. Again, the court told the jury it could consider only the evidence presented in the sentencing hearing and the law as they had been instructed, and reiterated this when the jury foreman asked: "Could I change this question to the point that is—isn't rehabilitation available in prison?" *Id.*

The jury found all three aggravating circumstances advocated by the Commonwealth and two mitigating factors: "the son of the Defendant being present and put on the stand;" and the "possibility of no rehabilitation during incarceration and after release." J.A. 228.[7] Finding also that the aggravating circumstances outweighed the mitigating, the jury sentenced Rompilla to death. J.A. 231-232. On direct appeal, the Pennsylvania Supreme Court affirmed Rompilla's convictions and the sentences imposed. J.A. 241-257.

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[7] Petitioner's brief misstates the second mitigating circumstance found by the jury as "the possibility of rehabilitation." Br. for Pet. at 7. The jury's verdict did not determine that the possibility that Rompilla might be rehabilitated in the future had a mitigating influence, but rather that the possible lack of past rehabilitation while he was previously incarcerated and/or on parole did.

3. Rompilla first raised his claims that this Court's decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994)(plurality), required the trial judge to tell the sentencing jury that, in Pennsylvania, a term of life imprisonment carries with it no possibility of parole,[8] and that trial counsel were ineffective in representing him in the penalty phase, in an application for state collateral relief made pursuant to the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. § 9541 *et seq*. He contended that his future dangerousness had been put in issue in the penalty phase and that the trial court should have answered the jury's inquiry about parole eligibility. Consolidated Petition for PCRA Relief at 6-39. Rompilla's ineffectiveness claim faulted trial counsel for not obtaining various records, which he said contained evidence of impaired mental functioning, organic brain damage and problems with alcohol; for failing to interview two of Rompilla's sisters who could have supplied information about adverse circumstances in the family home; and for not sufficiently instructing the experts who were to evaluate Rompilla about what information about Rompilla could be presented as mitigating evidence. *Id*. at 44-70.

The state post-conviction court conducted a hearing on Rompilla's application and heard testimony from: both Charles and Dantos, who explained how they had worked to prepare for the sentencing proceeding, J.A. 464-536, 546-587, 632-651, 654-744; mental health professionals who offered opinions as to what Rompilla's records reflected, J.A. 824-1279; and members of Rompilla's family who contradicted the testimony of trial counsel about the nature of their contacts with them. J.A. 745-822. The evidence before the post-conviction court established that the experts to whom counsel had referred Rompilla for evaluation had extensive experience in that area and understood what

[8] *See* 61 P.S. § 331.21(a)(prohibiting prisoners sentenced to death or to life imprisonment from being released on parole).

types of things would be helpful to the defense in the sentencing phase. After testing and other evaluation, none of the three experts had found anything useful to the defense. *See* J.A. 1358-1369 (where the Court of Appeals summarizes the evidence before the post-conviction court).

The state post-conviction court denied both claims. J.A. 257. It determined that Rompilla was not entitled to relief under *Simmons* because, unlike that case, where the prosecutor had urged the jury to impose a death sentence to act in self-defense and to deal with someone who was a threat, the Commonwealth had not made any argument of the kind in this matter. J.A. 259-260. Further, it said that the trial judge had instructed the jury properly under state law when he told them in response to their question about parole eligibility that this was not a matter for them to ponder.[9] *Id.* There was no evidence, he noted, that they did not abide by the court's admonition. *Id.* The court also pointed out that the jury's questions about the availability of rehabilitation related to issues "raised by the *defense* witnesses during the penalty phase who complained that Mr. Rompilla had not received rehabilitation while in prison and while on parole . . . ." J.A. 260 (emphasis added).

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[9] It was well-established state law that if the court in a capital case was asked by a sentencing jury about whether a term of life imprisonment included the possibility of parole, "the reply of the court . . . 'should be, in substance, that whether the defendant might at any future time be pardoned or have his sentenced commuted is no concern of theirs and should not enter in any manner whatsoever into their consideration of the penalty to be imposed, which should be determined solely in light of the relevant facts and circumstances as then existed.' " *See*, *e.g.*, *Commonwealth v. Edwards*, 521 Pa. 134, 158, 555 A.2d 818, 830 (1989)(quoting *Commonwealth v. Johnson*, 368 Pa. 139, 148, 81 A.2d 569, 573 (1951)).

In ruling on Rompilla's ineffectiveness claim, the state post-conviction court found the testimony of Rompilla's attorneys to be credible and rejected that of his family members. J.A. 264. Applying the standard in *Strickland v. Washington*, 466 U.S. 668 (1984), the PCRA court first determined that there was arguable merit to Rompilla's contention that the jury should have been provided with relevant mitigation information, but also found "that counsel had a reasonable basis for proceeding as they did during the penalty phase." J.A. 263-264.[10]

On appeal, the Pennsylvania Supreme Court affirmed the denial of post-conviction relief. J.A. 269-287. It rejected Rompilla's contention that *Simmons* required that the jury should have been told about the defendant's ineligibility for parole if sentenced to life imprisonment when it asked for information about the possibility of parole during its deliberations. The court said that Pennsylvania law required that the jury be informed about parole ineligibility only if the defendant's future dangerousness had been put in issue by the state. J.A. 284 (citing *Commonwealth v. Clark*, 551 Pa. 258, 710 A.2d 31, 35-36 (1998)).[11]

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[10] Pennsylvania case law pertaining to ineffectiveness claims uses the same standard as *Strickland*. *See Commonwealth v. Pierce*, 515 Pa. 153, 158-161, 527 A.2d 973, 975-977 (1987). To aid review, state case law breaks down *Strickland*'s "performance" component into two steps. The court reviewing a claim must decide first whether there is arguable merit to the defendant's underlying claim about counsel's performance. If the court finds there is arguable merit to the underlying claim, then it must consider whether counsel had a reasonable strategic or tactical basis for the action or omission in dispute. *See Commonwealth v. Bomar*, 573 Pa. 426, 467 n. 19, 826 A.2d 831, 855 n. 19 (2003).

[11] In *Clark*, the court reiterated what it had said previously about *Simmons*' impact on longstanding state precedent barring consideration of the possibility of parole or other forms of early release from imprisonment by sentencing juries in capital cases. (continued…)

Because the Commonwealth had not argued Rompilla's future dangerousness, no instruction was required in this case. The state supreme court also rejected an argument that *Simmons* required an instruction because the prosecution had submitted evidence of his 1974 crimes in support of the "history of serious felonies involving violence or the threat of violence" aggravating circumstance, 42 Pa.C.S.A. § 9711(d)(9). That aggravating circumstance, the state supreme court explained, is retrospective—not prospective—in character and therefore did not require a *Simmons* instruction. J.A. 284 ("this aggravating circumstance only addresses Appellants past conduct, not his future dangerousness"). [12]

The Pennsylvania Supreme Court also concluded that trial counsel were not ineffective in their representation of Rompilla. It agreed with the post-conviction court that counsel had acted reasonably in the circumstances of this case.

4. Rompilla filed his *habeas* petition pursuant to 28 U.S.C. § 2254 ("Section 2254") on June 23, 1999. J. A. 1 (Entry 5). Included in it were his claims of counsel's

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(...continued)
*See* n. 9, *supra*. Sentencing juries were not to be furnished with information about parole unless the prosecution, in advocating for the death penalty, had put the defendant's future dangerousness at issue. *Clark*, 551 Pa. at 269, 710 A.2d at 31 (citing *Commonwealth v. Christy*, 540 Pa. 192, 656 A.2d 877 (1995)). *Accord Commonwealth v. Speight*, 544 Pa. 451, 677 A.2d 317 (1996), *cert. denied*, 519 U.S. 1119 (1997).

[12] One member of the court dissented because he viewed the jury's question as an expression of its concern about Rompilla's future dangerousness. J.A. 286-87. He added that it was his personal view that the meaning of a life sentence should be explained in all capital cases. *Id.* While the author of the majority opinion noted his agreement on the latter point, he also expressed his view that, under the controlling law, no instruction was required in this case. J.A. 284 n. 10.

ineffectiveness during the penalty phase and his *Simmons*-based claim that the jury should have been told that "life means life." Petition for Writ of Habeas Corpus at 3-86; 98-149.

Though it said "[i]t was a very close call in this case because trial counsel [had] performed so admirably according to [its] review of the record," J.A. 1308, the district court held that the state court's ruling was an unreasonable application of this Court's decision in *Strickland* and granted Rompilla relief. J.A. 1287-1310. The district court did not explain how, in its view, the state court's ruling could be an unreasonable application of *Strickland* when the state court's ruling was admittedly a "very close call." Instead, the district court's decision found fault with the state court's ruling for failing to discuss in depth the duty of defense counsel to investigate evidence of mitigation and standards of the American Bar Association ("ABA") on this subject. J.A. 1300-1301. It concluded from its assessment of the facts that trial counsel "were obliged to go a bit farther to fulfill their duty to investigate." J.A. 1306. The district court vacated Rompilla's death sentence and ordered that the state court either sentence him to life imprisonment or initiate a new penalty phase within 270 days. J.A. 1324.

The district court denied relief as to all of Rompilla's other claims, including his *Simmons* claim. J.A. 1309-1324. It found that "a fair reading [of the prosecutor's closing argument] leads to the conclusion that the state's reasoning for the death penalty was not based upon future dangerousness but on the despicable, savage and cowardly beating Petitioner inflicted on his victim." J.A. 1311-1312. The state court's ruling on that claim, it said, was not contrary to or an unreasonable application of the rule in *Simmons*. J.A. 1311-1312.

The Commonwealth appealed the district court's grant of habeas relief and Rompilla cross-appealed as to the denial of relief on his *Simmons* claim. The Third Circuit majority held that the district court erred in granting Rompilla relief on his ineffectiveness claim and reversed its judgment vacating Rompilla's death sentence. J.A. 1357-1375. The district court had failed to take the proper measure of Rompilla's claim under § 2254's "unreasonable application" clause. Rompilla had failed to demonstrate that the ruling of the Pennsylvania Supreme Court adjudicating the merits of his claim had applied *Strickland* in an objectively unreasonable manner to the facts of this case as determined by the post-conviction court. *Id.*

In this case, the Court of Appeals explained, "[t]he findings of the PCRA court and uncontradicted testimony at the PCRA hearing establish that trial counsel conducted an extensive examination for mitigating evidence." J.A. 1357. Counsel had established good relationships with Rompilla and his family members and had questioned all "in detailed manner" in their search for potentially helpful information. J.A. 1357-1358; *see also* J.A. 1359 (quoting testimony in the post-conviction hearing about the kinds of questions Dantos had put to Rompilla and members of his family and Charles' recollection that Dantos was "meticulous to cover points" with them). "At least some of the siblings who were interviewed must have been aware of the lurid conditions in the family home that were portrayed at the [post-conviction] hearing, but they never mentioned anything about these matters to trial counsel, despite being interviewed 'in a detailed manner.' " J.A. 1358-1359. In view of this, it was not, the Court of Appeals said, "constitutionally ineffective for trial counsel to fail to anticipate that interviewing [two other siblings] would have yielded important new information about the family home." *Id.*

> It was likewise not unreasonable for trial counsel to rely on its mental health experts to detect whether there was any basis for further pursuit of mitigating evidence relating to their client's mental condition. Trial counsel retained no fewer than three highly qualified experts. Dr. Cooke and Dr. Sadoff looked for any evidence that could be used in mitigation and found none. A battery of tests was performed but yielded no indication of mental retardation or anything else that would have been useful for mitigation. Although all three of the experts testified that the records that [post-conviction] counsel subsequently obtained would have caused them to do further investigation, none of the experts asked for records or suggested that further testing be done.

J.A. 1361-1362. The Third Circuit concluded that "[i]n view of these circumstances it was not unreasonable for the state courts to conclude that trial counsel did not fall below the constitutionally mandated level of representation by failing to search out the records at issue and by failing to provide those records to their mental health experts." *Id.* This was not a case where counsel knew of information and did not act on it, but one where counsel had proceeded responsibly to seek information but their efforts were unsuccessful. *Id.*

The Court of Appeals affirmed the district court's denial of relief on Rompilla's *Simmons* claim. J.A. 1384-1404. A critical flaw in Rompilla's claim was his interpretation of the rule announced in *Simmons*. J.A. 1385-1388. The controlling opinion, Justice O'Connor's concurrence joined by the Chief Justice and Justice Kennedy, had held that in capital sentencing proceedings where the only alternative to the death penalty under state law was life imprisonment without possibility of parole, a jury had to be instructed of the defendant's ineligibility for parole if the prosecution

expressly argued his future dangerousness as a basis for a capital sentence. *Id.* While the Court of Appeals noted that this Court's more recent decision in *Kelly v. South Carolina*, 534 U.S. 246 (2002), arguably broadened the holding in *Simmons* when it held that a defendant's future dangerousness was put in issue in ways other than express argument, *Kelly* could not be considered controlling federal law at the time of the state court's ruling in this case fourteen years earlier. J.A. 1390-1391. Because the Commonwealth had not argued to convince the jury that the death penalty should be imposed because Rompilla represented a future danger, the state court ruling's that a "life means life" charge was not required was neither contrary to nor an unreasonable application of the rule announced in *Simmons*. J.A. 1385.

Rompilla's petition for writ of certiorari was filed on July 23, 2004, and was granted on September 28, 2004.

## SUMMARY OF ARGUMENT

1. In 1998, at the time of the state court's ruling in this case, *Simmons* was the clearly established federal law governing when a sentencing jury in a capital case had to be instructed that, under the law of the jurisdiction, the defendant would not be eligible for parole if sentenced to life imprisonment. The Pennsylvania Supreme Court did not unreasonably apply *Simmons* to the facts of this case when it denied Rompilla's claim that his sentencing jury should have been instructed about his ineligibility for parole. The holding in *Simmons*, expressed in Justice O'Connor's concurring opinion, was that the defendant was entitled to such an instruction when the prosecution had argued his future dangerousness in asking the jury to impose the death penalty. In this case, the prosecution never argued that the death penalty should be imposed because he was a future danger. Rather, the prosecution sought the death penalty because, in its view, the evidence proved beyond a reasonable doubt three aggravating circumstances, all of which focused only on Rompilla's past behavior, including his actions in the course of the crime for which he was being sentenced. The prosecution's argument was limited to a discussion of those aggravators and did not address whether Rompilla would present a danger in the future. Because *Simmons* did not mention any situation other than the one presented in the case, *i.e.*, where there is an express argument by the prosecution that the death penalty should be imposed because the defendant posed a future danger, it was not unreasonable for the state court to deny Rompilla's claim because there had been no argument of his future dangerousness by the state.

Even if the state court should have understood *Simmons* to apply in situations where a defendant's future dangerousness is put in issue less directly, *e.g.*, through the presentation of evidence, its denial of relief

to Rompilla was not an unreasonable application of *Simmons*. The Commonwealth did not portray Rompilla as a future threat, either in its argument or through the evidence it presented. The overall tenor of the state's case was that because the evidence proved the existence of three aggravating circumstances specified by the Pennsylvania General Assembly a capital sentence was justified in this instance. The Court of Appeals was correct in denying Rompilla relief on his *Simmons* claims for these reasons.

2. The state court's conclusion that trial counsel were not ineffective in their investigation and presentation of mitigation evidence in the penalty phase of Rompilla's trial likewise did not involve an unreasonable application of the controlling federal law, this Court's decision in *Strickland*. The state court properly reviewed Rompilla's claim, which faulted counsel for not obtaining various records which he said would have shown problems during his childhood, brain damage and problems with alcohol, from the perspective of counsel at the time they were representing him and with the information they knew at that time.

The evidence showed that counsel were aware of their duty to investigate possible evidence of mitigation to be presented in the event a penalty phase would be required and undertook to do so from the time they began representing Rompilla. Counsel decided, as initial steps, to interview Rompilla and several family members and to have Rompilla evaluated by highly-qualified mental health professionals whose work was known by them to be of very high caliber. Rompilla's attorneys decided upon this course in order to make the most of the limited resources available to them. Based on what past experience had proven to be most productive, they sought first to learn from interviews with Rompilla and his family and the evaluations by the mental health professionals what areas might be

developed most profitably for his case in the penalty phase. Counsel placed no limitations on the interviews or evaluations. To the contrary, they indicated to Rompilla and his family that they were willing to consider anything the family had to tell them, and counsel instructed the experts to do "full" evaluations.

Counsel diligently followed through as planned and met on numerous occasions with Rompilla and with his family members, who had indicated to counsel that they were willing and eager to help with his case. The experts to whom Rompilla was referred, who were familiar with what type of information might be helpful for the defense, conducted evaluations and testing. Counsel relied on the experts to request any material they might need for their assessment of Rompilla and were prepared to go to great lengths to obtain what they wanted. None of them, however, asked for anything, including any of Rompilla's records. Counsels' efforts to locate evidence of mitigation in this way were unsuccessful. Rompilla repeatedly told them he had a "normal" life and his relatives confirmed it. Neither Rompilla nor his relatives said anything about difficult conditions in the family home during his childhood, problems in or out of school or alcohol abuse. Counsel had had no problem communicating with Rompilla and nothing in their interaction with him had suggested that he might be mentally impaired. The experts offered nothing helpful either. One concluded that Rompilla was a sociopath.

It was only after their extensive efforts had not panned out that counsel concluded their only option was to plead for mercy and to try to take advantage of any residual doubt the jury might have signaled by its question about accomplice liability in the guilt phase. Counsel's actions did not fall below an objective standard of reasonableness. Counsel proceeded in a responsible and appropriate way in investigating as they did. Their investigation was designed to elicit

exactly the type of information that might be used in mitigation. Rompilla and his relatives could be considered to be good, first-hand sources of information that could be later fully explored and developed. Similarly, counsel could reasonably rely on experts to furnish other potentially valuable evidence that neither Rompilla nor his family members could. Given these facts, the state court did not unreasonably apply *Strickland* when it concluded that there was no basis for relief under that ruling's "performance" component. The Court of Appeals properly concluded that, under § 2254(d)(1), Rompilla was due no relief.

## ARGUMENT

Rompilla's application for a writ of habeas corpus was subject to the changes made to federal law by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). As reshaped by AEDPA, the federal habeas statute permits issuance of the writ only if a state court's decision adjudicating the merits of a claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by [this Court] . . . ." 28 U.S.C. § 2254(d)(1). *See Bell v. Cone*, 535 U.S. 685, 693 (2002)(AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law").

In a series of decisions since AEDPA's enactment, this Court has reiterated that, even if a federal court disagrees with a state court's ruling, it is not authorized to disturb that ruling unless it is contrary to the Court's controlling precedent or involves an unreasonable application of the same. *See Lockyer v. Andrade*, 538 U.S. 63, 70-71 (2003); *Price v. Vincent*, 538 U.S. 634, 638-639 (2003); *Bell, supra*, 535 U.S. at 693-694; *Williams v. Taylor*, 529 U.S. 362, 399-413 (2000). State court determinations of fact are to be presumed to be correct unless shown by clear and convincing evidence to be otherwise. § 2254(e)(1).

The Third Circuit's ruling on Rompilla's claims was informed by and strictly adhered to these principles. J.A. 1334-1335. Quite properly, it resisted engaging in any *de novo* review of those claims and viewed them as it was required to do "through the lens of § 2254(d)." *Price*, 538 U.S. 639. The conclusion it reached—that the state court's decision rejecting Rompilla's *Simmons* and ineffectiveness claims involved no unreasonable

application of this Court's jurisprudence—was correct, and therefore its denial of relief to Rompilla was entirely appropriate and should not now be disturbed.

## I. THE STATE COURT DID NOT UNREASONABLY APPLY *SIMMONS* WHEN IT RULED THAT NO "LIFE MEANS LIFE" INSTRUCTION WAS REQUIRED IN THIS CASE.

### A. *Simmons* Required Instruction About Parole Ineligibility Only If The Prosecution Argued For Imposition Of The Death Penalty Based On The Defendant's Future Dangerousness.

The threshold step in determining whether habeas relief should be granted under § 2254(d)(1) is identifying what constitutes "clearly established Federal law, as determined by the Supreme Court of the United States." *Andrade*, *supra*, 538 U.S. at 71. "Section 2254(d)(1)'s 'clearly established' phrase 'refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision.' " *Id.* (quoting *Williams*, 529 U.S. at 412).

In 1998, at the time of the Pennsylvania Supreme Court's ruling in this case, this Court's decision in *Simmons* set forth the legal principles which governed when a sentencing jury in a capital case had to be informed that, under state law, a defendant sentenced to life imprisonment would not be eligible for parole.[13] The ruling in *Simmons* represented an exception to the general principle the Court had previously recognized in its decision in C*alifornia v. Ramos,* 463 U.S. 992, 2002-1003 (1983): that what a jury is to be told (or not told)

[13] There had been no further instruction by this Court on that issue in the four years between the 1994 decision in *Simmons* and the state court's ruling in this case. In 1997, in *O'Dell v. Netherland*, 521 U.S. 151 (1997), the Court had occasion to decide if *Simmons* should be applied retroactively to cases on collateral review. *O'Dell* did not, however, modify *Simmons* in any way.

about sentencing is a matter for the individual States to determine. *Simmons*, 512 U.S. at 168; *id.* at 176-177 (O'Connor, J., concurring)(observing that "[t]he decision whether or not to inform the jury of the possibility of early release is generally left to the States").[14]

In *Simmons*, the defendant had been convicted of murdering an elderly woman and had a history of assaulting others. In the sentencing hearing, witnesses presented by both sides agreed that he posed a continuing danger to elderly women. 521 U.S. at 175-176. In his closing argument, the prosecutor told the jury to treat the defendant as a threat and to make their verdict " 'an act of self-defense.' "*Id.* The defense attempted to show in response that Simmons was capable of making a good adjustment in prison, a place where he would not have occasion to encounter the class of persons for whom he was potentially a threat, and asked to have the jury told that a sentence of life imprisonment meant he would never be eligible for parole, and hence never in a position where he might prey on elderly women. This Court ruled that the trial judge's refusal to give an instruction which specifically clarified that the defendant, if sentenced to a life term, would be ineligible for parole violated due process. *Id.* at 171.

The plurality opinion of four Justices stated "that where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." 512 U.S. at 154. The prosecution could not, the plurality opinion said, "create a false dilemma by advancing

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[14] Justice O'Connor's concurring opinion in *Simmons* also observed that the Court had "previously noted with approval . . . that '[m]any state courts have held it to be it improper for the jury to consider or be informed—through argument or instruction—of the possibility of commutation, pardon or parole.' " 512 U.S. at 176 (quoting *Ramos*, 463 U.S. at 1013 n. 13).

generalized arguments regarding the defendant's dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole." *Id.* at 171.

Justice O'Connor's concurring opinion, in which the Chief Justice and Justice Kennedy joined, however, stated a more narrow rule: "that due process requires that the defendant be allowed to [supply information about parole ineligibility] in cases in which the only available sentence to death is life imprisonment without the possibility of parole and the prosecution *argues* that the defendant will pose a threat to society in the future." *Id.* at 177 (emphasis added). Justice O'Connor's concurrence thus states the controlling rule in *Simmons*. *Marks v. United States*, 430 U.S. 188, 193 (1977) ("[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that portion taken by those Members who concurred in the judgments on the narrowest ground . . . ") (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976) (opinion of Stewart, Powell, and Stevens, J.J.)). *See O'Dell*, *supra*, 521 U.S. at 159 (referring to Justice O'Connor's concurrence as the "decisive opinion" in *Simmons*); *id.* at 169 (Stevens, J., dissenting)(describing Justice O'Connor's concurrence as having "been treated as the narrowest ground on which the decision rested"). *See also Kelly v. South Carolina*, 534 U.S. 246, 258 (2002)(Rehnquist, C.J., dissenting)(referring to Justice O'Connor's concurrence as "the prevailing opinion" in *Simmons*).

Neither the plurality opinion nor Justice O'Connor's concurrence considered any situation other than that presented by the facts in *Simmons*, *i.e.*, where the prosecution has expressly appealed to the sentencing jury to impose a capital sentence because of the future danger the defendant presents. As a result, in the wake of *Simmons* it was an open question—and when the

state court decided this case it remained an open question—whether a defendant's future dangerousness could be put in issue in other some way.

Rompilla argues that the mere presentation of evidence of a defendant's criminal history necessarily puts his future dangerousness in issue, and that the Court's decision had made this clear by 1998, but this is incorrect. He points to a series of cases, including this Court's decision in *Kelly*, *supra*, which he says "reiterated [that] a 'jury hearing evidence of a defendant's demonstrated propensity for violence reasonably will conclude he presents a risk of violent behavior' in the future." Br. for Pet. 22-23 and n. 10. *Kelly* post-dates the ruling by the state court, and therefore cannot be considered part of the legal landscape of "clearly established Federal law" which is relevant for analyzing Rompilla's claim under § 2254(d)(1). The other cases he cites as illustration of the principle which *Kelly* "reiterated," in fact, do not support his position. None of the cases supplies controlling legal precedent on the issue of whether proof of a defendant's criminal history, by itself, served to put a defendant's future dangerousness in issue.[15]

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[15] The issue before the Court in *Nichols v. United States*, 511 U.S. 738, 752 (1994), involved the federal sentencing guidelines and the fragments Rompilla has taken from Justice Souter's concurring opinion were part of a discussion of how certain evidence should be treated in calculating the defendant's sentence. In *Heller v. Doe*, 509 U.S. 312, 333 (1993), the statements were made in conjunction with a discussion of the relevancy of evidence for purposes of a civil commitment matter. In both *Johnson v. Texas*, 509 U.S. 350, 355-356 (1993) and *Jurek v. Texas*, 428 U.S. 262, 272-272 (1976), the defendant's future dangerousness was in issue and evidence of past crimes was submitted in each as proof of the same. The Court's discussion of that evidence was in that context and did not generalize about the nature of criminal convictions. In *Michelson v. United States*, 335 U.S. 469, 475-476 (1948), the court's discussion of criminal history information involved whether such evidence could be admitted in order to prove a defendant had committed a (continued…)

Contrary to what Rompilla says, at the time of the state court's decision, whether a defendant's future dangerousness could be put in issue by implication or by means less direct than express argument was a question unanswered by this Court's cases. Not only did this Court's jurisprudence at the time not make it clear if evidence of a defendant's criminal history could put a defendant's future dangerousness in issue, but also it did not address the separate question of whether the submission of such evidence necessarily and always has that effect.

When the Pennsylvania Supreme Court decided this case, the governing rule was that a jury must be instructed on parole ineligibility only if the prosecution in a capital case *argues* that a death sentence should be imposed because of the defendant's future dangerousness. Eighteen months before the state court rendered its decision, this Court in *O'Dell* had described *Simmons*' holding in just that way. *See* 521 U.S. at 153 (*Simmons* "requires that a capital defendant be permitted to inform his sentencing jury that he is parole ineligible if the prosecution *argues* that he presents a future danger . . . ")(emphasis added). Thus, for purposes of the review to be conducted under § 2254(d)(1) in this case, that was the "clearly established Federal law."

### B. The State Court's Decision Did Not Unreasonably Apply *Simmons*.

The Pennsylvania Supreme Court's ruling on Rompilla's claim that he was entitled to have the jury told that he would be ineligible for parole if he were sentenced to life imprisonment does not involve an

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(...continued)
particular crime, *i.e.*, whether from his past crimes a jury might conclude the defendant had a propensity to commit the offense for which he was being tried. The court only addressed evidence of past criminal behavior in that very limited fashion.

unreasonable application of the rule in *Simmons*.[16] "Under § 2254(d)(1)'s 'unreasonable application' clause, . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Williams*, *supra*, 529 U.S. at 411. Instead, the state court's application must be objectively unreasonable. *Id.* at 409. *Andrade*, 538 U.S. at 75-76 (citing *Bell*, 535 U.S. at 699; *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002)). This can occur if a state court decision correctly identifies the proper controlling precedent but unreasonably applies it to the facts of a particular case. *Williams*, 529 U.S. at 407. It is the reasonableness of the state court's judgment that matters, not the rationale it used. *See*, *e.g.*, *Weeks v. Angelone*, 528 U.S. 225 (2000).[17]

In reviewing Rompilla's claim that the jury should have been instructed about parole ineligibility, the state court correctly identified *Simmons* as the law which governed Rompilla's claim and referenced its own rulings which had effected the change in Pennsylvania law mandated by *Simmons*. J.A. 284 (citing C*lark*, *supra*, 551 Pa. at 269-270, 710 A.2d at 36). Its

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[16] Though the second question presented in Rompilla's brief involving *Simmons* encompasses § 2254(d)(1)'s "contrary to" clause, *see* Br. for Pet. i, he has abandoned this point by not arguing it. *See id.* at 26-30; *Hegeman Farms Corp. v. Baldwin*, 293 U.S. 163, 168 (1934).

[17] In *Weeks*, the court held that the state court's ruling denying the defendant's claim involving jury instructions in the penalty phase of his trial was neither "contrary to" nor an "unreasonable application of" its decisions and denied relief under § 2254(d)(1). The court did not examine the state court's reasoning but reviewed the controlling precedent contained in its decisions and concluded, based on its discussion, that no habeas relief was justified. 528 U.S. at 231-237. The state court opinion in fact provided no rationale for its conclusion that the claim lacked merit. *Weeks v. Commonwealth*, 248 Va. 460, 465-467, 450 S.E. 2d 379, 388-390 (1994).

application of what was then the clearly established precedent of this Court to the facts of this case was not unreasonable, and therefore does not support granting the writ, for two reasons.

1. It was not objectively unreasonable, before this Court's ruling in *Kelly*, to construe *Simmons* as only applying to cases where the prosecution expressly argues future dangerousness. In light of *Simmons*' specific holding, and the questions it left unanswered, it was not unreasonable for the state court to conclude that, absent overt argument of the defendant's future dangerousness by the prosecution, no instruction about a lifer's prospects for parole needed to be given.

Certainly, *Simmons* established no rule requiring that a sentencing jury must be provided with parole-related information if it requests it. To the contrary, *Simmons* reaffirmed the settled principle that this is a matter typically left to the judgment of the States, 512 U.S. at 168, 176-177, to which the rule announced in *Simmons* was an acknowledged exception. Nor did *Simmons* hold that an inquiry by the jury about parole eligibility must be treated as though the defendant's future dangerousness has been placed in issue. Nor did *Simmons* hold that evidence of a defendant's past criminal record, by itself, places a defendant's future dangerousness in issue and requires that a jury be instructed on parole eligibility.

Indeed, *Simmons* offered no guidance on any situation other than the one which was directly before the Court—where the prosecution has expressly argued future dangerousness—and it was therefore unclear, in the wake of *Simmons*, if some less direct means could suffice to put a defendant's future dangerousness in issue, necessitating a suitable jury instruction about parole. It was not until the decision in *Kelly* that the Court held that when determining whether a "life means life" instruction must be given, a court must

consider more than whether the state has affirmatively asked the jury to take the prospect of the defendant's future dangerousness into account in arriving at his sentence. *Kelly*, 534 U.S. at 261 (Rehnquist, C.J., dissenting)(discussing how *Kelly* had changed the way in which *Simmons* claims are to be scrutinized, specifically, that "the test [for determining if a jury is to be informed about parole ineligibility] is no longer whether the State argues future dangerousness to society; the test is now whether evidence was introduced at trial that raises an 'implication' of future dangerousness to society").

Rompilla was entitled to relief under § 2254(d)(1) only if it was clear at the time of the state court's decision that a defendant's future dangerousness could be put in issue by something short of express argument at the time. It was not. The 5-4 decision of this Court in *Kelly*, shows that the rule in *Simmons* could be reasonably understood to mean different things. *See id.* and at 263 (Thomas, J., dissenting)(describing *Simmons* as having provided "an imprecise standard").[18]

For a court in 1998, given the ambiguity that existed, it was entirely reasonable to conclude, as the state court did here, that if a prosecutor had not actively argued a capital defendant's future dangerousness to the jury, the usual rules of its

[18] We are not arguing that *Kelly* was wrongly decided but rather that the views expressed in dissent illustrate that there could have been reasonable disagreement about what precisely *Simmons* had held. *See Beard v. Banks*, No. 02-1603 (U.S, Jun. 24, 2004), slip op. 8, (where in analyzing whether its decision in *Mills v. Maryland*, 486 U.S. 367 (1988), was a "new rule" for purposes of *Teague v. Lane*, 489 U.S. 288 (1989), the Court viewed the dissent by four Justices to have demonstrated that reasonable jurists could have disagreed about the holding of an earlier ruling). In *Kelly*, this Court had no occasion to address whether the state court's ruling was an unreasonable application of the controlling precedent of this Court because review in this Court followed the petitioner's direct appeal in the state court.

jurisdiction about providing a jury with parole-related information applied. Pennsylvania law generally did not allow juries to be given information about parole. *See* n. 9, *supra*. Because the prosecution did not argue Rompilla's future dangerousness as justification for imposing the death penalty, the state court's conclusion that no relief was appropriate under the rule of *Simmons* was objectively reasonable.

2. Even if it could have been understood in 1998 that the rule in *Simmons* was not limited to situations in which the prosecution had argued future dangerousness—that the state court should have evaluated the trial record in the way *Kelly* did—the state court's opinion does not reflect any unreasonable application of federal law. On the facts of this case, even under the scrutiny that *Kelly* requires, it is clear that the Commonwealth did not put Rompilla's future dangerousness in issue in the penalty phase, either by argument, the evidence it introduced, or the combination of both.

The Commonwealth asked the jury to sentence Rompilla to death because—and only because—the evidence had proved beyond a reasonable doubt three of the things that the Pennsylvania legislature had decided caused a murder to come within the narrow category of cases in which a death penalty is appropriate. J.A. 161-162. None of those three aggravators spoke to the defendant's future behavior, but focused instead solely on his *past* actions: his commission of felonies concurrent to the murder; his infliction of unnecessary pain and suffering on his victim as he was killing him; and his prior criminal episode in which he had, in very similar fashion, broken the law. The Commonwealth's arguments were strictly limited to what Rompilla had done in the past as the basis for imposition of sentence, not anything he might do in the future. J.A. 162-167.

To be sure, the Commonwealth discussed the particularly horrible way Rompilla had killed Scanlon in addressing the "torture" aggravator and presented evidence of one past criminal episode in support of the "significant history" aggravating circumstance.[19] That evidence was necessary proof for each. In his closing argument the prosecutor did not stray from only discussing that evidence against that framework. He did not address in any way what the evidence portended for the future, nor did he ask the jury to factor any perceptions they might have about Rompilla's future behavior into their decision. *Id.*

At no time did the Commonwealth remark in any way about the future or do anything to imply that Rompilla presented a future danger. For example, there was no argument by the Commonwealth that Rompilla should be sentenced to death because he was incapable of rehabilitation. To the contrary, the topic of rehabilitation was raised solely *by Rompilla*, whose witness offered his views that Rompilla had not received any rehabilitation, as a mitigating circumstance. J.A. 138. The prosecution never mentioned the subject in its presentation of evidence in its case in the penalty phase or in closing argument and only made brief reference to the topic on cross-examination in follow-up questions to statements by the defendant's witnesses.[20] J.A. 141-142.

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[19] The state court determined that the prosecution's presentation of the evidence of Rompilla's prior criminal case had been accomplished in a way that minimized any inflammatory impact. J.A. 281-282.

[20] Similarly, the prosecution did not mention parole in its presentation of evidence or argument in the penalty phase. Again, that was first brought up only by defenses witnesses as well, J.A. 124, and only one question on cross-examination referenced it to focus the witness on a particular point in time. J.A. 127. It was also not part of the Commonwealth's penalty phase case to elicit, or (continued…)

The record of the penalty phase of Rompilla's trial stands in stark contrast both to those in *Simmons* and *Kelly* and to the description of the proceeding that Rompilla has carefully crafted in his brief by using words and phrases selectively snipped from the record, and mischaracterizations, to fit his theme that the Commonwealth was out to "send a message" about Rompilla's future dangerousness to the jury. Br. for Pet. 30.

No one offered opinions that Rompilla posed a continuing danger to others. *Simmons*, 512 U.S. at 157 ("witnesses for both the defense and the prosecution agreed that the petitioner posed a continuing danger to elderly women"); *Kelly*, 534 U.S. at 250 ("[t]he prosecutor told the jurors that '[Kelly] doesn't have any mental illness. He's intelligent . . . He's quick-witted. Doesn't that make somebody a little more dangerous —' " and also said " 'murderers will be murderers' "). The Commonwealth never asked the jury to "act in self-defense" when it imposed its sentence, *Simmons*, 512 U.S. at 157, or emphasized the jury's physical proximity to someone who had engaged in a heinous act. *Kelly*, 534 U.S. at 248 ("prosecutor began [his opening statement in the penalty phase] by telling jurors that 'I hope you never in your lives again have to experience what you are experiencing right now. Being some thirty feet away from such a person. Murderer.' ")

No one told the jury about any involvement by Rompilla in jailhouse violence, escape attempts or plots

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(…continued)
to emphasize information that the defendant had been on parole for only three and one-half months when he committed the crimes in this case. On cross-examination, in an effort to impeach the testimony of Rompilla's witnesses who had said that they were in contact with him when he was on parole, the prosecution asked about the length of time they had been in touch with him. The witnesses acknowledged that it had been for three and one-half months. J.A. 123-131.

to take hostages. *Id.* at 248-249 (prosecutor presented testimony "that while in prison Kelly made a knife (or shank) and had taken part in an escape attempt, even to the point of planning to draw a female guard into his cell where he would hold her hostage"). No one tagged him with grisly epithets. *Id.* at 249-250 (in closing argument, "the prosecutor spoke of Kelly as 'the butcher of Batesburg,' 'Bloody Billy,' and 'Billy the Kid").

On this very different record, it was reasonable for the state court to conclude that, by its narrowly-focused case in the penalty phase, the Commonwealth had not, even indirectly, put Rompilla's future dangerousness into issue and that there was therefore no requirement to instruct the jury about parole ineligibility. The state court's ruling therefore affords no basis for relief under the "unreasonable application" clause of § 2554(d)(1).

## II. THE STATE COURT REASONABLY APPLIED *STRICKLAND* WHEN IT REJECTED ROMPILLA'S CLAIM THAT TRIAL COUNSELS' REPRESENTATION IN THE PENALTY PHASE WAS INEFFECTIVE.

The state court correctly identified this Court's decision in *Strickland* as the "clearly established Federal law" which governed Rompilla's claim challenging trial counsels' representation of him in the penalty phase. *Strickland* prescribes a two-step test to evaluate whether an attorney's representation of a criminal defendant satisfies the Sixth Amendment. Under *Strickland*'s "performance" prong, a court must determine if "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 at 688. Under its "prejudice" prong, the court must assess if "counsel's deficient performance prejudiced the defendant," that is, whether "there is a reasonable probability that, but for counsel's unprofessional errors,

the result of the proceeding would have been different." *Id.* at 694. A reviewing court may deny relief upon determining that either one of the prongs has not been met. *Id.* at 697. The state court did not address the "prejudice" element but denied Rompilla's claim after determining that he had failed to meet *Strickland*'s "performance" component. J.A. 270-273. The state court's holding—that counsels' performance did not fall below "an objective standard of reasonableness"—reasonably applied the rule in *Strickland* to the facts of this case.

*Strickland* made it clear that "[j]udicial scrutiny of counsel's performance must be highly deferential," and that every effort [had to] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. The reviewing court must also "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Id.* There are, this Court said, "countless ways to provide effective assistance in any given case." *Id.* Hence, there is no "checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688.

In taking the measure of counsel's professional performance, a reviewing court may look to "[p]revailing norms of practice as reflected in the American Bar Association standards and the like" as "guides to determining what is reasonable," but stressed that "they are *only* guides." *Id.* (emphasis added). "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel of the range of

legitimate decisions how best to represent a criminal defendant." *Id.*

The state court's review of Rompilla's claim that counsel did not properly investigate evidence of mitigation was conducted from the proper temporal perspective. Also, as *Strickland* instructs, the court reconstructed the circumstances that existed at the time counsel were involved in representing Rompilla. It took care, too, to guard against having its evaluation skewed by the benefit of hindsight and to orient its review from Charles' and Dantos' perspective. J.A. 271-273.

1. Indisputably, both attorneys were aware that they were obliged to search for evidence of mitigation to be presented in the event a penalty phase would take place and undertook to do so from the time they began to represent Rompilla. J.A. 657-660 (acknowledging the importance of mitigation evidence, that the duty to investigate for mitigation evidence is equal to duty to investigate for the guilt phase, and agreeing that an attorney "should use [his] maximum resources to investigate . . . a capital offense and anything else that would help his client"); 516 (preparation for guilt phase continued "all throughout," including during the trial's guilt phase). Counsel did not make a decision to limit their investigation to only certain types of information but instead kept the subject matter of their investigation open-ended. Charles made it a practice to routinely begin investigating by first asking his client wide-reaching questions such as:

> 'How was your childhood? Were there any problems that you suffered? Any kind of abuse? Tell me, is there anything that sticks out? Don't think whether it's important or not. You just tell us something about – is there anything you can tell me from your youth till now that can help us? Don't think whether it's

> important or not. Just tell us, and then we'll determine whether or not we can use it.'

J.A. 662. Dantos also cast a wide net. In meeting with his family members she, too, posed questions designed to allow them to bring any topic they might think would be valuable. J.A. 669 (Dantos asked them " 'What can you tell me about Ron? What was it like for him? What was his life like? What was it like growing up? What was his relationship? What kind of brother was he? What kind of brother-in-law was he? What do you know?' ") Their experts were told to do "full" evaluations. J.A. 514.

In beginning the task of identifying and gathering potentially relevant evidence of mitigation, counsel chose to take a two-pronged approach: to interview Rompilla and several close family members, and to have him evaluated by experienced mental health professionals. Counsel envisioned those efforts as a first step, not the whole of their investigation. They believed that these sources would highlight for them areas that could be further explored and developed. As they explained to the state post-conviction court, in proceeding as they did, they were attempting to make the most of the investigative resources they had at their disposal. J.A. 662-673.

In pursing this investigation plan, counsel's professional performance did not fall below an objective standard of reasonableness. The ABA's standards *circa* 1988, when counsel were engaged in Rompilla's representation, for example, offered little specific guidance with respect to counsel's duty to investigate.[21]

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[21] In February of 1989, the ABA issued guidelines for the performance of counsel in capital cases which supplied more detail in terms of recommending what should be done in an investigation of possible evidence of mitigation, including the collection of a (continued...)

In its entirety, ABA Standard 4-4.1 ("Duty to Investigate") provided that:

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

ABA *Standards for Criminal Justice* § 4-4.1 (2d ed. 1980). The relevant part of the commentary which follows that standard, adds that

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

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(...continued)
defendant's records. *See Guidelines for the Appointment of Counsel and Performance of Defense Counsel in Death Penalty Cases* (1989). Because those guidelines post-date counsel's representation in this case by a few months, they cannot fairly serve as an objective standard against which their performance can be measured as they were not the "prevailing norms," *Strickland*, 466 U.S. at 688-689, at the time of counsel's representation.

> the offense itself. Investigation is essential to fulfillment of these functions.

ABA *Standards for Criminal Justice* § 4-4.1 cmt. (2d ed. 1980)

Neither the standard itself nor its commentary identified any one path to be followed by counsel. Neither said that, in any instance, let alone every instance, an attorney had to obtain a defendant's records as part of his or her investigation. While it is true that review of a defendant's records can be of great assistance in locating the types of information described in the commentary, it is not the only means by which that information can be located. Certainly nothing in the ABA standards that may be used in this case as a gauge of prevailing norms suggested that counsel could not, or should not, take an alternative route to the same place.

Counsel's plan in this case, while not calling for collection of the full spectrum of Rompilla's records in its initial step, was nevertheless aimed at mining exactly the sort of information the ABA standards counseled. Rompilla and his siblings, who were on either side of him in the family birth order, were logical sources of first hand knowledge about his upbringing and his life experiences. His family members were informed of the importance of the information they were providing to counsel and were eager to help. J.A. 493-494; 669-670; 729-730. Counsel could reasonably expect that in speaking to them they would be alerted to any problems in the family's home, any physical or mental problems Rompilla experienced, any difficulties Rompilla had had in or out of school, and any watershed developments during his childhood and teenage years. Rompilla's sister-in-law, who had some contact with him when he was incarcerated and who had given him a home when he was on parole, J.A. 123, as well as his ex-wife, with whom he had lived as an

adult and with whom he shared a son, likewise could offer information and insight about his adult years. All of these individuals, too, were likely to know positive information about Rompilla that could be presented to the jury.

In disparaging counsels' efforts, Rompilla says that they knew his relatives were poor sources of information about him because his relatives had had only limited contact with him. Br. for Pet. 9. That is misleading: it 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.[22] They did not lead counsel to believe they would not know conditions in the family home when Rompilla lived in it or his experiences and any problems during that time. J.A. 493-496 (family members had very limited knowledge of Rompilla while he was in prison). But as the Court of Appeals pointed out, it was certainly reasonable for counsel to expect that these relatives—especially Rompilla's siblings—would be knowledgeable sources about other aspects of Rompilla's life, especially the childhood events on which he now places such emphasis. J.A. 1358-1359 They were, after all, members of the same family and bracketed him by their ages. J.A. 128, 134, 144 (brother Nicholas was six years older; brother Robert, 9 years younger; sister Sandra, one year older). After several of Rompilla's siblings had all told counsel the same thing he had—that there was nothing helpful in Rompilla's childhood or family life—it was not unreasonable to forego interviews with his other two sisters.

The panoply of mental health experts to whom counsel also turned were well versed in evaluating criminal defendants and in identifying mitigating

[22] Those who were in contact with him during the time reported nothing significant.

information. These were persons who, as the result of their expertise, might be able to supply material for mitigation that the family could not. They included courtroom veterans who had testified in many state and federal cases before participating in this matter and were well aware of what sort of evidence would be helpful for the defense. *See* J.A. 1365-1369 and n. 12 (where the Court of Appeals pointed out that the evidence presented to the state post-conviction court showed that the experts understood what was expected of them and catalogued some of the cases in which Drs. Sadoff and Cooke had testified previously). Counsel placed no restrictions on the manner in which they were to evaluate Rompilla or the subjects they could cover with him. Counsel was ready to obtain whatever information, including any of Rompilla's records that they may have wanted, no matter how burdensome that task may have been. None of the experts gave any indication to counsel that they were unable to perform the full evaluations that had been requested. J.A. 1363-1364.

It was therefore not unreasonable for the state court to reject Rompilla's claim that counsel should have instructed them in more detail about what to look for in the course of their evaluations of Rompilla, or his claim that counsel's performance was deficient for failing to obtain and provide Rompilla's records to them. Given their obvious expertise and experience, counsel could reasonably rely on them to seek whatever information or records were required in order to conduct their respective evaluations. Thus, as conceived, counsel's investigative plan was eminently reasonable and did not fall below an objective standard of reasonableness.

2. In execution as well, counsels' performance reflected diligence and extensive effort. They met repeatedly with Rompilla and his family members and questioned them in a detailed manner designed to elicit relevant information. Counsel also consulted with the

experts that the defense had retained and was prepared to aid them in any way the experts might require. Counsel's communications with their experts disclosed what, to any reasonable person, would appear to be suitable professional action by those experts, *e.g.*, that they had conducted various tests to ascertain deficiencies or problems in Rompilla's mental and cognitive faculties. In other words, they reasonably believed that the experts had done their job. When the extensive interviews and multiple professional evaluations produced nothing significant in terms of possible evidence of mitigation, it was entirely reasonable, as the Court of Appeals observed, J.A. 173-175, for counsel to conclude that they would have to take another approach in the penalty phase.

The defense settled on the strategy they did only after they had exhausted these avenues. There was no tactical decision not to investigate, *cf*. *Strickland*, 466 U.S. at 673-674, nor any decision to treat investigation of possible mitigation evidence as subordinate to efforts to pursue a different strategy in the penalty case. *Cf. Wiggins v. Smith*, 539 U.S. 510, 515-516 (2003). At no time did counsel representing Rompilla choose not to take advantage of available resources. *See id*. at 524 (counsel chose not to commission social history report despite available funds for the same). To the contrary, they conceived the plan they did deliberately to *maximize* the resources available to them. In trying to make the most of what counsel had available to them, counsel performed in the best interests of their client.

These practical realities, as the Third Circuit found, had to be included in the recreation of their perspective for purposes of the evaluation that *Strickland* mandated. J.A. 1364-1365. In faulting counsel for not obtaining records and other material, Rompilla is conducting a critique in hindsight, working backwards from subsequently-obtained materials to show how "easily" they could have been obtained. This improperly

re-shapes the review of counsel's performance that *Strickland* specifies. Counsel's decisions must be evaluated based on what was known to counsel at the time they acted, not from "[h]indsight [which] is, of course 20/20." *Barker v. Wingo*, 407 U.S. 514, 555 n. 39 (1972).

Counsel's performance in this case differs from that in *Wiggins* in other important ways. In *Wiggins*, even given the comparatively limited scope of the investigation into evidence of mitigation, there were signposts pointing to areas which should have been explored "by any reasonably competent attorney . . . ." *See* 539 U.S. at 523 (noting that in a pre-sentence investigation report that counsel had received Wiggins had said that his childhood had been "disgusting"). Counsel's efforts in *Wiggins*, this Court said, had "uncovered no evidence in their investigation to suggest that . . . further investigation would have been fruitless."[23] *Id.* at 525. For the lawyers here, in contrast, there were only dead ends.[24] Rompilla told Charles and Dantos that his childhood and been "normal," and five of the six family members they spoke to—the sixth was his son, who obviously had no

[23] Approximately eight months before Wiggins' trial, the ABA issued its first set of Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, which provided guidance on investigating and presenting the defense's case in the penalty phase. *See* n. 21, *supra*. In reviewing the performance of Wiggins' attorneys, this Court looked to those guidelines as the polestar for professional conduct at the time of their representation. 539 U.S. at 524. Those standards could not be used to measure the performance of the defense attorneys in this case because they were promulgated three months *after* Rompilla's trial.

[24] Rompilla contends that a statement in the correspondence from one of the experts alluded to his problems with alcohol and should have served as a "red flag." As the Third Circuit's opinion points out, the statement did not actually identify this as a problem area but noted that additional evaluation might be warranted. J.A. 1372-1373. After receiving the correspondence, *id.*, counsel had Rompilla evaluated by the two other experts.

knowledge on this score—all confirmed it. The evaluation of several mental health experts had not shown otherwise. The Court of Appeals aptly summarized the critical differences between *Wiggins* and this case this way:

> In short, the attorneys in *Wiggins* did little to investigate their client's background although they possessed information that should have prompted them to do so. Rompilla's attorneys conducted a much greater investigation, but their interviews with their client and his family provided a reasonable basis for concluding that additional investigation would not have represented a wise allocation of limited resources. In our view, *Wiggins* is critically different from the present case.

J.A. 1372.

In view of these marked differences, the state court's decision appreciated this and adhered to this Court's instruction. The state court reasonably applied the *Strickland* rule in this case.

The district court failed to appreciate this and improperly substituted its view of the record for that of the state court. A federal habeas court, however, is not entitled to grant the writ simply because it believes the state court has incorrectly or erroneously resolved an issue. *Williams*, 529 U.S. at 410 ("an *unreasonable* application of federal law is different from an *incorrect* application of federal law"). The Court of Appeals' ruling re-focused the scrutiny properly and conducted a thorough evaluation of the record from the perspective that § 2254(d)(1) requires. Its conclusion that the state court's decision did not unreasonably apply *Strickland* is sound and warrants no correction by this Court.

## CONCLUSION

The Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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