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No. 3-16-CV-01867

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

GEORGE H. FINK, PETITIONER

VS.

SUPERINTENDENT OF SCI GREENE, RESPONDENT

On Petition for Writ of Certiorari

To The United States Court of Appeals

For The Third Circuit

PETITION FOR WRIT OF CERTIFICATE

George H. Fink Sr.

GEORGE H. FINK

PRO SE REPRESENTATION

FOR PETITIONER.

OCT. 14, 2020

QUESTIONS PRESENTED FOR REVIEW

DID NOT THE CIRCUIT COURT ERR IN AFFIRMING THE DISTRICT COURT'S DENIAL OF HABEAS CORPUS RELIEF WHERE THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FAILING TO SUPPRESS PETITIONER'S STATEMENTS TAKEN BY LAW ENFORCEMENT WHICH WERE OBTAINED IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 8 AND 9 OF THE PENNSYLVANIA CONSTITUTION?

DID NOT THE CIRCUIT COURT ERR IN AFFIRMING DISTRICT COURT'S DENIAL OF HABEAS CORPUS RELIEF WHERE TRIAL COUNSEL VIOLATED PETITIONER'S RIGHT AGAINST SELF INCRIMINATION, RIGHT TO DUE PROCESS, AND RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL CONCEDED PETITIONER'S GUILT VIA DIMINISHED CAPACITY DEFENSE, WITHOUT FIRST CONSULTING WITH THE PETITIONER?

DID NOT THE CIRCUIT COURT ERR IN AFFIRMING THE DISTRICT COURT'S DENIAL OF HABEAS CORPUS RELIEF WHERE PETITIONER'S COUNSEL WAS INEFFECTIVE FOR FAILING TO CONDUCT A PRETRIAL INVESTIGATION OF THE VICTIM'S TIME OF DEATH AND NON-EXISTENCE OF PETITIONER'S DNA ON THE VICTIM'S BODY AND THE MURDER WEAPON?

DID NOT THE CIRCUIT COURT ERR IN AFFIRMING THE DISTRICT COURT'S DENIAL OF HABEAS CORPUS RELIEF WHEN PETITIONER'S COUNSEL WAS INEFFECTIVE FOR FAILING TO ADEQUATELY ADVISE PETITIONER OF HIS RIGHT TO JURY TRIAL AND RIGHT TO TESTIFY?

DID NOT THE CIRCUIT COURT ERR IN AFFIRMING THE DISTRICT COURT'S DENIAL OF HABEAS CORPUS RELIEF WHERE PETITIONER'S COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE BIAS OF THE FACT FINDER?

PARTIES TO THE PROCEEDING

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I. CITATIONS OF OPINIONS AND ORDERS IN CASE

The report and recommendation of the United States Magistrate Judge for the Middle District of pennsylvania on Petitioner's section 2254, Petition For Writ of Habeas Corpus is unpublished and attached hereto as APPENDIX "1".

The opinion and order of the United States District Court for the Middle District of Pennsylvania adopting the United States Magistrate Judge's report and recommendation is unpublished and was filed on the 30th day of December, 2019. See APPENDIX "2".

The order and opinion of the United States Court of Appeals for the Third Circuit is unpublished and attached hereto as APPENDIX "3".

II. JURISDICTIONAL STATEMENT.

The Judgment of the United States Court of Appeals for the Third Circuit was entered on the 15th day of July, 2020. The Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

III. CONSTITUTIONAL PROVISIONS AND STATUES INVOLVED.

1. The Fifth Amendment of the United States Constitution provides:

> "No person shall be..compelled in any criminal case to be a witness against himself, deprived of life, liberty, or property without due process of law..."

2. The Sixth Amendment of the United States Constitution provides that:

> "In all criminal prosecutions, the accused shall enjoy

the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed...and to be informed of the nature and cause of the accusation...and to have the assistance of counsel for his defense."

3. The Statue under which Petitioner sought Habeas Corpus relief was 28 U.S.C. §2254.

IV. STATEMENT OF THE CASE.

George Fink (hereinafter "Fink") was charged with killing his ex-girlfriend, who was found dead at her home on January 21, 2006. She had been *smothered* and her cause of death was ruled a homicide by asphyxiation. According to testimony, on January 20, 2006, the day before her death, Fink had asked his aunt to give him a ride to the area where the victim lived, Hunlock Creek. Fink's aunt testified that the victim had obtained a Protection From Abuse order against him because he had threatened to kill her on several previous occasions. That same day, Fink asked his cousin for a ride, and his cousin dropped him off in Hunlock Creek. between 6:15 and 6:30 p.m.. The autopsy of the victim revealed that the victim had died 24-36 hours before she was found on January 21.

Fink was tried before the Luzerne County Court of Common Pleas Judge, Michael T. Conahan on Criminal Trespass, False Imprisonment, and Criminal Homicide.

According to detectives, Fink gave a statement to police after he was arrested on January 26, 2006, pursuant to a warrant for his failure to appear at a sentencing hearing. According to detectives, Fink was read his MIRANDA rights, but he signed a waiver, yet he still requested a lawyer. The commonwealth's version of the events allege that even though Fink requested an attorney, Fink willingly initiated a conversation with Sgt. Whitaker, without Sgt. Whitaker probing Fink, post his request for an attorney.

In the statement, Fink went to the victim's home, waited for her, grabbed her from behind, duct taped her and cut himself in front of her. Thereafter, according to the statement, the pair attempted to have sexual intercourse, but Fink could not perform sexually. The victim then began to belittle Fink and he "Blacked out."

However, Fink did meet with Dr. Richard Fischbein, who ultimately testified that Fink suffered from major depression, recurrent passive-aggressive personality disorder with borderline and histrionic features. Trial counsel moved to suppress the statement made to police, but the motion was denied.

Fink proceeded to a bench trial after waiving his right to a jury trial and was thereafter found guilty of first degree murder and related offenses. Fink was sentenced to

life in prison and received concurrent sentences for the related offenses.

Fink appealed to the Superior Court of Pennsylvania who affirmed the judgment of sentence on September 22, 2009. Fink filed Petition for Allowance which was denied.

On or about January 8, 2010, Fink filed a Petition for Post Conviction relief pursuant to the PCRA. As a result, a PCRA hearing was held on September 1, 2010. The requested relief was denied on October 6, 2010. However, after an appeal to the Superior Court, the PCRA court's order was vacated and Fink's direct appeal rights were reinstated due to appellate counsel's failure to brief the issue pertaining to the suppression issue. The appeal was filed and judgment of sentence was affirmed on July 19, 2012. Petition for allowance was filed which was denied on March 12, 2013.

Fink then filed another PCRA petition on November 8, 2013. In this Petition Fink raised six claims of trial counsel's ineffectiveness alleging that counsel failed to challenge the time of the victim's death; adequately prepare for trial; argue the lack of DNA evidence on the victim; assert the bias of the trial judge; advise defendant of his rights not to testify; and ensure that the defendant knowingly waived his right to a jury trial. The PCRA Court denied Fink's petition, finding that the claims lacked merit. The Superior Court affirmed the denial of the PCRA Court and Fink filed a petition for allowance to the Pennsylvania Supreme Court which was denied on June 15,

2016.

Thereafter, Fink filed petition for Writ of Habeas Corpus to the District Court pursuant to 28 U.S.C. §2254. After alloving Fink to exhaust his claims in the State Courts, the district Court denied Fink's Petition for Writ of Habeas Corpus on December 30, 2019. Application for Certificate of Appealability was filed and denied on July 15, 2020. Thus this present Writ of Certiorari is timely and properly before this Court.

V. EXISTENCE OF JURISDICTION BELOW.

Petitioner properly exhausted all his claims in the state court before filing the §2254 petition for writ of habeas corpus to the Middle District Court of Pennsylvania. Thereafter, a timely appeal to the United States Court of Appeals was filed.

VI. REASONS FOR GRANTING THE WRIT.

1. Third Circuit Court erred affirming the district Court's denial of Petitioner's due process and 5th Amendment rights against self incrimination because the state of Pennsylvania clearly violated Petitioner's rights, in direct conflict with this Court's decision in **MIRANDA** and **REED V. FARLEY**, infra. The record reveals that after Petitioner requested to have counsel present for the interview, the troopers still told Petitioner that it was better for Petitioner to "get his side of the story out". Without this illegally obtained evidence, there is no proof that Petitioner committed this crime beyond a reasonable doubt.

2. The Third Circuit Court erred affirming the District Court's denial of Petitioner's ineffective assistance of counsel claims because its decision is in direct conflict with this Court's decision in STRICKLAND V. WASHINGTON, infra. Counsel did not inform Petitioner that counsel would be conceding admission to the murder of the victim; Counsel failed to challenge the time of the victim's death; failed to assert the lack of DNA evidence on the victim; failed to

advise Petitioner of his right to not testify; and failed to challenge the bias of the trial judge who was the fact finder in Petitioner's bench trial. If not for counsel's ineffectiveness there is a likelihood that the outcome of the proceeding would have been different.

3. The Third Circuit Court erred in affirming the district court's denial of petitioner's 2254 petition without conducting an evidentiary hearing to resolve factual disputes, which, if true, warrants habeas relief and the record did not "conclusively show" that he could not establish facts warranting relief under section 2254, which entitled Petitioner to a hearing.

4. Petitioner respectfully urges that all aspects of the Circuit Court's decision are erroneous and at a variance with this Court's decisions as explained in the argument below.

VII. ARGUMENTS AMPLIFYING REASONS FOR WRIT.

1. DID NOT THE CIRCUIT COURT ERR IN AFFIRMING THE DISTRICT COURT'S DENIAL OF HABEAS CORPUS RELIEF WHERE THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FAILING TO SUPPRESS PETITIONER'S STATEMENTS TAKEN BY LAW ENFORCEMENT WHICH WERE OBTAINED IN VIOLATION OF PETITIONER'S RIGHT UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTIONS 8 AND 9 OF THE PENNSYLVANIA CONSTITUTION?

The U.S. Supreme Court, in MIRANDA V. ARIZONA, 384 U.S. 436 (1996), provided a set of guidelines by which an individual's right against self-incrimination under the Fifth Amendment is to be safeguarded. Whenever a person is in custody and "subjected to either express questioning or its functional equivalent, i.e. interrogation," MIRANDA warnings are required. COMMONWEALTH V. DEWAR, 674 A.2d 714, 717 (Pa. Super. 1996). Such questioning or interrogation "occurs where the police should know that <u>their words or actions are reasonably likely to elicit an incriminating response from the suspect</u>". COMMONWEALTH V. GWYNN, 723 A.2d 143, 149 (Pa. 1999) (citing COMMONWEALTH V. HUGHES, 639 A.2d 763, 771 (Pa. 1994)).

As expressed by the Pennsylvania Supreme Court in COMMONWEALTH V. PITTS, 740 A.2d 726, 730 (Pa. Super. 1999), determining whether a suspect is in custody does not require that the police make a formal arrest, nor that the police intend to make an arrest.

When a defendant is in custody, he is entitled to

MIRANDA Warnings. See COMMONWEALTH V. MARABEL, 283 A.2d 285 (Pa. 1971). A determination of whether a defendant validly waived his MIRANDA Rights depends on a two prong analysis: (1) Was the waiver voluntary, in the sense that Defendant's choice was not the end result of governmental pressure; and (2) Was the waiver knowing and intelligent? COMMONWEALTH V. BROWN, 583 A.2d 905, 810-11 (Pa. Super. 1990) Cert. Denied, 502 U.S. 946 112 S.Ct. 391, 116 L.Ed.2d 341 (1991).

"Only if the totality of circumstances surrounding the interrogation reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that MIRANDA Rights have been waived." COMMONWEALTH V. CEPHAS, 522 A.2d 63, 65-66 (Pa. Super. 1987) appeal denied, 516 Pa. 616, 531 A.2d 1118 (Pa. 1987), cert. denied, 484 U.S. 981, 108 S.Ct. 495, 98 L.Ed.2d 494 (1987).

The court must view and assess the totality of the circumstances surrounding Defendant and the interrogation, including, as applicable, defendant's mental age, IQ, mental disease, limited education and general condition, as well as the duration and means of the interrogation, the conditions attendant to the detention, the attitude of the interrogator, and any and all other factors that could drain a person's ability to withstand suggestion and coercion. COMMONWEALTH V. NESTER, 709 A.2d 879, 882 (Pa. 1998).

In Petitioner's case, the record reflects that the Defendant, prior to being engaged by the Pennsylvania State

Police(PSP), was hospitalized under section 302 of the Mental Health Act at Geisinger Medical Center since January 21, 2006. Though the defendant was release from this section 302 commitment on January 26, 2006, without medication, he was still expressing thoughts of suicidal ideation. (Suppression Hearing p. 32).

Immediately upon picking up the defendant for a bench warrant on an unrelated case and for failing to appear at his sentencing hearing, PSP read Petitioner his MIRANDA Rights and had him sign a waiver, on the same day he was released from the mental health institution, January 26, 2006. Petitioner and PSP didn't arrive at the barracks until one hour after initially picking Petitioner up, between 11;30-11;40 am. (Suppression Hearing p. 8).

Petitioner was handcuffed and placed in an interview room, constantly in the presence of at least two troopers with the door closed at all times. These troopers began interrogating Petitioner approximately one-half hour after arriving at the barracks or at 12;15 pm. (Suppression Hearing pp. 9 & 11).

One hour after the initial interrogation began, the troopers finally disclosed to Petitioner that they wished to speak with him about the death of Charlene DeWitt. (Suppression Hearing pp. 10 & 36). Petitioner denied involvement in the death of Ms. DeWitt. (Suppression Hearing p. 11).

Because the Petitioner did not give the answers the

troopers were looking for, after three hours of interrogation, Trooper Prula left the room and was replaced by Corporal Hannon. (Suppression Hearing, P. 12, 35). Again, however, the petitioner denied his involvement. (Suppression hearing, p. 12). Corporal Hannon interviewed the petitioner for approximately two hours without success.

Knowing that Petitioner was familiar with Sgt. Whittaker, after 5 hours of interrogation by other troopers, Sgt. Whittaker was brought in to engage the defendant in interrogation at approximately 5:00 PM. (Suppression Hearing, p. 12, 37). Petitioner knew Sgt. Whittaker for approximately 15 years and the troopers believed that Sgt. Whittaker would get Petitioner to open up. (Suppression Hearing p. 38). Sgt. Whittaker continued to interrogate Petitioner and confronted him with facts of the case. (Suppression Hearing, p. 13).

Petitioner reflected that he did not remember anything and the investigators advised him if he did not tell them his story, the evidence would tell the story for him. (Suppression Hearing, p. 14). At this point, after 2.5 hours of interrogation by Sgt. Whittaker, the defendant, a mentally ill man, just released from Mehntal Health hospitalization, indicated that he believed he needed a lawyer. (Suppression Hearing, p. 15, 38, 47). Troopers claimed they stopped asking questions and terminated the interview process after that. (Suppression hearing, p.15). However, the troopers did not allow Fink to contact a

lawyer, claiming that Fink hadn't specifically requested to use the phone. (Suppression Hearing p. 38). Although the questioning allegedly stopped, Fink was never left alone nor provided access to counsel. Instead, Fink was intentionally left in the room along with Sgt. Whitaker, who the troopers knew Fink viewed favorably. (Suppression Hearing pp. 44 & 15).

Ultimately, the troopers, once again, before leaving the room, advised Fink that this was his way to get his side of the story out. (Suppression Hearing p. 39). And again, that if Fink did not tell his side of the story, the evidence would speak for him. (Suppression Hearing p. 40).

All of the above mentioned took place while awaiting transportation to the Luzerne County prison on a PFA violation and bench warrant. (Suppress Hearing p. 47). Then, Fink indicated that he would provide a statement. Although Fink requested an attorney, the interrogation continued to occur "where the police should know that their words or actions are reasonably likely to elicit an incriminating response from the suspect." Commonwealth v. Gwynn, 723 A.2d 143, 149 (Pa. 1999). Thereafter, Fink gave an oral statement to Sgt. Whitaker and agreed to give a written statement as well. (Suppression Hearing p. 50).

Thus, the record clearly shows that Fink only waived his Rights in relation to the Bench Warrantfor failing to appear at his sentencing hearing. When questioned about the murder of Ms. DeWitt, Fink clearly requested counsel and the troopers'

words and actions kept the interrogation ongoing, notwithstanding Fink's request for an attorney. Any statement obtained after that is tainted evidence and any judgment based solely on the tainted evidence is void. There is no untainted evidence that would suggest that Fink murdered Ms. DeWitt.

This Court has made a decision in Arizona v. Roberson, 485 U.S. 675 (1988) that held a Miranda violation occurred where the police held Roberson after he requested an attorney. Three days later, still in custody, Roberson was interrogated about another crime, but the officers were unaware of Roberson having already requested an attorney, they reinformed him of his rights, which he waived and they obtained a statement incriminating Roberson in the initial crime.

Petitioner would posit that he has even more of a Miranda violation than that in Roberson.

Under the reasoning employed in Roberson, this Court has explained that an individual who is in custody and has expressed his desire to only deal with police with assistance of counsel of counsel shall not be the subject of further investigation, unless he initiates the discussion with authorities himself or states likewise. Id. Roberson, at 682.

The above cases show the importance relative to the request for counsel. Based upon the above, it is submitted that once the defendant expressed his inability to deal with interrogation without the assistance of counsel and his desire for assistance

of counsel. At that point, the troopers and Sgt. Whitaker should have discontinued all communication with the defendant and acknownledged the defendant's desire to exercise his rights to counsel and toremain silent. However, they did not. Rather, the troopers continued to engage Fink in a manner intended to illegally obtain a statement.

2. DID NOT THE CIRCUIT COURT ERR IN AFFIRMING DISTRICT COURT'S DENIAL OF HABEAS CORPUS RELIEF WHERE TRIAL COUNSEL VIOLATED PETITIONER'S RIGHT AGAINST SELF INCRIMINATION, RIGHT TO DUE PROCESS, AND RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL CONCEDED PETITIONER'S GUILT VIA DIMINISHED CAPACITY DEFENSE, WITHOUT FIRST CONSULTING WITH THE PETITIONER?

In Petitioner's case, he has consistently maintained his innocence. Although Fink gave an illegally obtained statement that he was in the victim's house on the day of her death. Fink has consistently maintained that the victim was living when he exited her home.

"The extremely limited defense of diminished capacity...is only available to defendants who admit criminal culpability, but contest the degree of culpability based upon an inability to form the specific intent to kill." COMMONWEALTH V. HUTCHINSON, 611 Pa. 280, 25 A.3d 277 (PA 2011).

Only a criminal defendant has the authority to concede criminal liability and authorize counsel to present a defense of diminished capacity. COMMONWEALTH V. WEISS, 622 Pa. 663, 81 A.3d 767 (Pa. 2013), citing HUTCHINSON, 25 A.3d at 313.

Simply put, Fink has never admitted to actually killing the victim. The mere facts that Fink was in the vicinity of the victim on the day she died is not evidence of Fink's guilt. The mere fact that Fink's DNA was on a knife, when

the victim had no cuts nor killed by a knife; that is not evidence of Fink's guilt. Additionally, the victim is Fink's ex-girlfriend, and any DNA found in her house belonging to Fink is not surprising.

With that being said, for Fink's trial counsel to take it upon himself to forego his client's due process and presumption of innocence rights, without Fink's knowledge and permission, is a clear violation of the United States' and Pennsylvania's Constitutions. Furthermore, counsel's actions are in violation of STRICKLAND V. WASHINGTON, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). It is ineffective assistance of counsel for the attorney to present an diminished capacity defense, even if it was the only defense. See COMMONWEALTH V. WEAVER, 500 Pa. 439, 457 A.2d 505, 506-07 (Pa. 1983)(holding that even if diminished capacity was only viable defense, trial counsel would be deemed ineffective for presenting this defense without the consent of defendant).

There is no on the record colloquy (pursuant to Pa.R.Crim.P. 590) of Fink waiving his constitutional rights and the burden to establish that Fink knowingly and voluntarily effectively plead guilty rests solely upon the commonwealth. See COMMONWEALTH V. DAVIS, 457 Pa. 194, 198-99, 322 A.2d 103, 106 (Pa. 1974).

Instead, Petitioner has continued to maintain his innocence through every stage of his case and at no point plead guilty to the charges. See Notes of Testimony 20,

25-26. Thus, Petitioner is wrongfully convicted of the crimes charged and counsel violated Fink's rights, also provided Fink ineffective assistance of counsel by presenting the diminished capacity defense without Fink's permission.

3. DID NOT THE CIRCUIT COURT ERR IN AFFIRMING THE DISTRICT COURT'S DENIAL OF HABEAS CORPUS RELIEF WHERE PETITIONER'S COUNSEL WAS INEFFECTIVE FOR FAILING TO CONDUCT A PRETRIAL INVESTIGATION OF THE VICTIM'S TIME OF DEATH AND NON-EXISTENCE OF PETITIONER'S DNA ON THE VICTIM'S BODY AND THE MURDER WEAPON?

In Petitioner's case, the victim was smothered with a pillow as determined to be her cause of death. The time which Petitioner spent at the victim's house that day, Petitioner had cut his own hand with a knife, as he warned the victim that he would kill himself (N.T. p.16). However, Petitioner's DNA did not match the DNA on the pillow, nor the
DNA under the victim's finger nails.

Counsel's ineffectiveness lies in his failure to investigate pretrial, and thereafter present the lack of DNA evidence (where it matters) to the fact finder. This information being removed from the fact finder's determination of guilt undermined confidence in the outcome.

The Pennsylvania Supreme Court held in, IN THE INTEREST OF: J.B. APPEAL OF: JB, 647 Pa. 339, 189 A.3d 390 (2018) "It must be remembered that guilt must be proved and not conjectured. The reasonable inference of guilt must be based on facts and conditions proved; it cannot rest solely on suspicion or surmise. These do not take the place of testimony." Citing COMMONWEALTH V. DUBOISE, 269 Pa. 169, 112

A. 461, 463 (Pa. 1921).

"Notably, this principle was applied by our Court in the case of COMMONWEALTH V. WOONG KNEE NEW, 354 Pa. 188, 47 A.2d 450 (Pa. 1946), to reverse a murder conviction when all of the circumstantial evidence of record presented at trial, which our Court accepted as true, did not establish the defendant's guilt beyond a reasonable doubt, but, rather, was in 'equipoise' on this question. That is to say, the trial evidence equally supported two reasonable but diametrically opposed ultimate inferences: one that the defendant committed the murder, and the second that he did not commit the murder.

"In WONG KNEE NEW, the victim, a proprietor of a laundromat in Chester County, was found dead on Sunday, June 24, 1943, lying in a pool of blood on the floor in his apartment, having been bludgeoned to death with a hammer. The apartment had been ransacked and money that the victim had stored therein was missing. The apartment bore gruesome testament to the viciousness of the crime, as there was extensive blood spatter evidence throughout. A brown hat with a red feather in the band and a human hair inside was discovered on his bed, and a half empty bottle of beer was observed sitting on the kitchen table. The defendant, who was an acquaintance of the victim, and who visited him fairly regularly, was being detained in New York on immigration violation. He became a suspect in the murder and was questioned extensively by detectives. During the

interrogation, according to the detectives, the defendant, who was of limited fluency in the english language, admitted to being with the victim on Sunday morning until 4:00 a.m. and drinking beer in his apartment; however, when the detectives inquired further about his interactions with the victim, he terminated the interview, claiming illness. While in custody, the defendant, who had quit his job in a shipyard earlier in the week, was found in possession of over $1,200 dollars, after he denied having any money on his person.

"The defendant was arrested and charged with first-degree murder. At trial, the Commonwealth introduced a panoply of circumstantial evidence to establish that the defendant had murdered the victim: the defendant's alleged statements to detectives admitting that he was with the victim until 4:00 a.m. Sunday morning and that he left for New York later that morning at 10:30 a.m., which was characterized by the prosecution as flight, and, thus was evidence of his consciousness of guilt; testimony of witnesses who claimed to have seen the defendant in Chester County on the night of the murder; testimony from the coroner who approximated the time of the victim's death at between 2:30 and 4:30 a.m. based on the progress of rigor mortis in the victim's body; testimony that on the Saturday evening preceding the murder, a witness saw the defendant wearing a brown hat that looked like the one found in the victim's bedroom, which the Commonwealth theorized was left

behind by the defendant in haste to flee the apartment after committing the crime; the fact that there was no evidence of forced entry into the apartment, suggesting that the killer was a person, like the defendant, known to the victim so that the victim let him into the apartment voluntarily; the victim was known to carry large sums of money, and the defendant was, at the time of his arrest, found with a substantial sum of money, even though witnesses testified that they had never seen the defendant carrying large amounts of cash on his person before, and he did not earn substantial pay in his employment.

"The defendant, through cross-examination and the testimony of his own witnesses, presented the following evidence to the jury: the coroner's admission under cross examination that he could not fix the exact time of death, given the varying speeds with which rigor mortis progresses that are dependent on the age and physical condition of the body; testimony that the murder weapon, the hammer, was examined by the FBI and no fingerprints or other physical evidence were found on the hammer to establish that the defendant had used it to commit the murder; the fact that the defendant's fingerprints were not found on the half-empty beer bottle; expert testimony that the hair found in the brown hat was the victim's and other testimony showing that, on the few occasions defendant was observed wearing a brown hat, it did not have a red feather in the band; testimony of three witnesses that defendant was in New

York on the night of the murder gambling with them; the testimony of the defendant in which he denied giving the statements which the detectives testified that they gave, claiming he did not understand their questions and that they physically coerced him; evidence that the was preparing for deportation during the week of the murder and had shipped his clothes to New York the preceding Thursday before the murder, and had actually left Chester County the following friday morning at 1:00 a.m.; testimony that some of the money in his possession was from his savings which he had withdrawn form his bank earlier in the week, as he feared he would be deported; and bank records showing withdrawals of money, albeit not the entire amount he was found with. The jury, after hearing all of this evidence, returned a verdict of guilty of the charge of first-degree murder.

"The Pennsylvania Supreme Court reversed the defendant's conviction on the grounds that the evidence was insufficient for a jury to have been convinced beyond a reasonable doubt that the defendant murdered the victim. Specifically, our Court examined all of the above-discussed evidence, highlighted its contradictory nature, and found that it, at most, supported two equal but fundamentally inconsistent inferences on this question." IN THE INTEREST OF: J.B., at
189 A.3d 411.

The base rule from IN THE INTEREST OF J.B. is that, "when two equally reasonable and mutually inconsistent

inferences can be drawn from the same set of circumstances, a [finder of fact] must not be permitted to guess which inference it will adopt, especially when one of the two guesses may result in depriving a defendant of his life or his liberty." Id. at 647 Pa. 375.

Therefore, Petitioner Fink's counsel was ineffective for failing to present the evidence to show a mutually inconsistent inference that could be drawn. Trial counsel failed to present any DNA experts at trial to show how, with the cuts to Fink's hand, it would have been impossible for Fink to have committed the murder and not transfer his DNA to the murder weapon or the victim's body. Trial Counsel also failed to consult any DNA experts pretrial, thereby depriving himself of critical knowledge necessary to the formulation of a defense. See SANDERS V. RYDER, 183 Fed. Appx. 666 (9th Cir. 2006).

"It is especially important for counsel to seek the advice of an expert when he has no knowledge or expertise about the field." See SHOWERS V. BEARD, 635 F.3d 625 (3rd Cir. 2011).

Counsel has a duty to conduct a thorough investigation of his client's case in order to understand Hey facts of the case. "To make a reasoned judgment about whether evidence is worth presenting, one must know what it says." Id. citing COUCH V. BOOKER, 632 F.3d 241, 246 (6th Cir. 2011).

Petitioner was prejudiced by his counsel's actions because counsel, unprepared for trial, decided from his own

accord to forego Fink's presumption of innocence and presented a defense of diminished capacity, completely against Fink's wishes and in contradiction of the presentation of the facts of Fink's DNA not being on the murder weapon, nor the victim. Petitioner is requesting reversal of his conviction in the form of a new trial.

4. DID NOT THE CIRCUIT COURT ERR IN AFFIRMING THE DISTRICT COURT'S DENIAL OF HABEAS CORPUS RELIEF WHEN PETITIONER'S COUNSEL WAS INEFFECTIVE FOR FAILING TO ADEQUATELY ADVISE PETITIONER OF HIS RIGHT TO JURY TRIAL AND RIGHT TO TESTIFY.

Petitioner has a right to testify at trial. For counsel to not inform him of this right pretrial, is inclusive of ineffectiveness due to its unreasonableness and the pursuing prejudice. This claim must be taken into account with the fact that Petitioner's counsel also threw away Petitioner's presumption of innocence by presenting the diminished capacity defense.

Essentially, counsel took the reigns of Petitioner's case at trial and made his own choices as regards Pink's guilt or innocence. Counsel never ensured that Petitioner's waiver of his right to testify and his right to a jury trial was knowing, voluntary, and intelligent. To the contrary, counsel advised petitioner to forego these rights without highlighting the significance of them.

"If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be 'diametrically different', 'opposite in character of nature', and 'mutually opposed to our clearly established precedent because we held in Strickland that the prisoner need only demonstrate a 'reasonable probability that...the result of the proceeding

would have been different.'" WILLIAMS V. TAYLOR, 529 U.S. 362, 406, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

LINSTADT V. KEANE, 239 F.3d 191, 199 (2nd Cir. 2001) describes the Strickland standard as follows:

"We need not decide whether one or another or less than all of these four errors would suffice, because Strickland directs us to look at the 'totality of the evidence before the judge or jury' keeping in mind that 'some errors have a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture...' Id. at 695-96, 104 S.Ct. 2051."

Thus this claim of ineffectiveness must be viewed along with the totality of the facts and counsel's other errors.

5. DID NOT THE CIRCUIT COURT ERR IN AFFIRMING THE DISTRICT COURT'S DENIAL OF HABEAS CORPUS RELIEF WHERE PETITIONER'S COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE BIAS OF THE FACT FINDER?

Fink's judge who stood over his bench trial was under investigation at the time of Fink's trial. At the PCRA hearing, Fink's counsel testified that he was totally unaware of any investigation or any wrong doing of the judge. (PCRA Hearing 26-4, at 83). Petitioner's trial counsel should have known that there had been a complaint filed with the Judicial Conduct Board against the trial judge.

The PCRA court concluded that the Pennsylvania Law Weekly he attached to his PCRA petition from 2009 outlining the Judge's misconduct was information that counsel could not have known. What Petitioner raises is that his counsel should have known. Pretrial investigation is essential to preparation for trial.Counsel's lack of investigation was unreasonable and resulted in Fink being prejudiced; Fink had to stand a bench trial under a biased and proven misconductive judge.

This claim of ineffective must be viewed in light of the totality of the facts and evidence presented at trial.

LINSTADT V. KEANE, 239 F.3d 191, 199 (2nd Cir. 2001) describes the Strickland standard as follows:

"We need not decide whether one or another or less than all of these four errors would suffice, because Strickland

directs us to look at the 'totality of the evidence before the judge or jury' keeping in mind that 'some errors have a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture...' Id. at 695-96, 104 S.Ct. 2051."

VIII. CONCLUSION

Thus counsel was ineffective. For all of the foregoing reasons, Petitioner shall be entitled to a new trial. The level of fairness fell drastically below the standard of justice in our American courts. Furthermore, the violation of Petitioner's 5th Amendment rights require Petitioner's conviction to be vacated.

WHEREFORE, Petitioner respectfully requests this Court to issue a writ of certiorari.

RESPECTFULLY SUBMITTED BY:

George H. Fink Sr.

GEORGE FINK, PRO SE

OCT. 14, 2020