Or, is it Peter Santangelo?...

Did Peter Santangelo die just because he was there, just because he was there? Who are the least of these?[40] NT 12.66-12.67.

* * *

You will have to look at the testimony of the convicted thief and convicted robber, an admitted participant in this case, and you will have to ask yourselves this question: Do I dare believe him?

I would submit to you that you should ask yourselves the reverse of that question: Do you dare not to believe him? those (sic) of you who might look down your nose at a thief, and those of you – and, not getting into the Bible, because I said I wouldn't do that. If I would do that, I would only be unfair.

Let's go back to that time on Calvary and remember what was on the right and what was on the left. There you had a thief on the right of him and a their on the left of him.[41] NT 12.76-12.77

* * *

But, does it amount to a reasonable doubt? And, that's a doubt based on reason, a doubt coming of the evidence.

I would submit to you, ladies and gentlemen, that there is no doubt. And, those among you, maybe going again on a Biblical phrase, "Except that I see the prints of the nails and thrust my hand in the wound inside, I will not believe."[42]

Do we have to pass these among you? Do you have to sme-l (sic) the gunpowder within the freezer? Do you have to experience the rear of Renard Mills, or do you have to stand up and do what you know is right? NT 12.77-12.78

* * *

Let him walk out of here, because if you could find as rational members of this

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[40]Biblical reference to the book of Matthew, chapter 25, verse 40.

[41]Biblical reference to the book of Matthew, chapter 27, verse 38; as well as the book of Luke and Mark.

[42]Biblical reference to the book of John, chapter 20, verse 25.

> community that what you see exhibited before you was not an intentional, wilful, premeditated, planned killing of three people, maybe we must go back and let me declare or you be declared Thomases, doubting Thomases[43] all, for we have done everything we could do, and we being the police. NT 12.80
>
> * * *
>
> For those who are inclined for Biblical quotes, we will talk about Old Testament, Daniel, "Ralph Trent Stokes, thou weighed in the balance, and you are found wanting, wanting for what you did."[44] NT 12.83-12.84

346. Plainly King attempted to substitute the law of the Bible for the law of Pennsylvania, injecting considerations outside the death penalty statute as a basis for the jury to convict and, ultimately, to return a death sentence. This nonprobative and inherently prejudicial argument violated due process and Petitioner's right to an adjudication of guilt or innocence based solely on the *evidence* properly admitted at trial. Indeed, this argument was especially prejudicial because of the moral authority represented by the Bible.[45]

347. Mr. Stokes was not being tried in an ecclesiastical court but a criminal one. Therefore, any reference or use of the Bible by either the defense or the prosecutor was irrelevant, immaterial, and prejudicial. The trial court erred by failing to issue any corrective instruction and in permitting the escalating use of Biblical references in the case. These failures violated Petitioner's state and federal constitutional rights to due process and to conviction based

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[43]Biblical reference to the book of John, chapter 20, verse 25.

[44]Biblical reference to the book of Daniel, chapter 5, verse 27.

[45]The deliberate injection of Biblical references also violated Petitioner's right to an impartial jury. Indeed, in capital cases, one of the voir dire questions posed to jurors is whether they have religious views that would affect their ability to acquit or convict or to consider the alternative sentences mandated by law in a capital case. Deliberated injecting these considerations into any case, but particularly a capital case, is inherently improper.

on proof beyond a reasonable of all the elements of the offense, rendered solely on the evidence properly admitted in the case. The court should have at least provided the jury with a curative or cautionary instructions that the Bible was not evidence and that the jury was not to permit religious argument to influence its determinations of fact or law.

348. Counsel was ineffective for failing to object to these Biblical references.

C. Vouching.

349. The prosecutor's cloak of state authority also makes improper prosecutorial vouching for the credibility of witnesses and evidence, since such vouching places the imprimatur and prestige of his office behind the prosecution's remarks, and implies that the prosecution is in possession of knowledge that supports his evidence.

350. Here, the prosecutor repeatedly vouched for evidence and personally attacked the credibility and testimony of a defense witness who testified that a particular piece of evidence did not belong to Petitioner. During a search of Mr. Stokes's home, the police found a pair of gloves with the fingers cut off. The police seized the gloves because a pair of gloves (or glove) left at the crime scene had a finger cut off of them. Defense witness Todd Ryan Stokes testified that the gloves found during the search of the home did not belong to his brother Ralph Stokes but to his brother Troy Stokes. On cross examination, Todd explained that his brother Troy cut off the fingers of the gloves and used the gloves for shoveling snow and playing football. NT 11.27-28. The prosecutor ridiculed Todd Stokes' testimony and vouched based on his own personal experience that the gloves could not be used for playing football. In particular, the district attorney argued:

> Not that a personal reference or personal experience has anything to do with it, and it's for you to decide, I submit to you, ladies and gentlemen, *as a person who has some*

> familiarity with football as a player at college and high school level, if anyone attempted to catch a football in this glove with it hanging in the fashion in which it's hanging, it's analogous to someone trying to sell you a polyester forest, and we know polyester don't grow on trees."

NT 12.72.

351. The prosecutor stepped outside his proper role to summarize the case for the jury and instead participated as an expert witness informing the jury that based on his own personal experience in playing the game of football that the gloves found in the home could not be used for the sport. The prosecutor's vouching to facts based on his own life experience is inappropriate. Again, counsel ineffectively stood by, and failed to object.

D. Comments Designed to Inflame the Jury's Prejudices and Passions.

352. In addition to the biblical references, to the insistence upon the relevance of inflammatory evidence unconnected to the crime, like the sneakers soaking in cleaning solution, the prosecutor sought to play to the jury's passions. He said, for example:

> Looking at what represents three human beings who were shot in three separate locations at three separate times, in your heart of hearts, your mind of minds, as rational people, if you can look at this handiwork and not find a wilful, deliberate, premeditated intent to kill, just maybe you are living on the wrong planet, just maybe that its time to move.

NT 12.78.

E. Misconduct at Penalty Phase.

353. The prosecutor's closing argument at the penalty phase was a litany of improper argument, from start to finish. The prosecutor strayed far afield from the aggravating and mitigating factors that the Legislature has determined are relevant to the life-or-death decision, and argued for death on the basis of extraneous, irrelevant matters. Even when the prosecutor made brief excursions into the proper subject for argument – aggravating and mitigating

circumstances – he improperly disparaged and denigrated the mitigation and urged the jury to ignore the law and judge the mitigation on the basis of improper factors. This improper argument deprived Petitioner of even a minimally fair and reliable sentencing proceeding.

354. The prosecutor began his argument by suggesting to the jury that Petitioner's case for life was a case against responsibility. The prosecutor stated,

> maybe [trial counsel] subscribes to that theory which was prevalent in the '60s. "It's always somebody else's fault. Johnny can't read, but it's your fault". . . The streets are the way they are because somebody else was deprived . . . Get out of that apologetic state of mind. You owe no pardons to anyone.

NT 14.55. This argument improperly directed the jury to sentence Petitioner to death because of a discredited "theory" that allowed people to evade responsibility. The gravamen of the argument was that whatever the jury might find in the way of mitigation, it could not offset what they already had found Petitioner had done.

355. The prosecutor continued this theme throughout his closing, remarking, "This won't stop . . . until you say, 'Stop!' For years, even the Great Society, the Great Society is dead.[46] Safety on your streets is your intent." NT 14.57. These arguments were improper.

356. Moreover, the prosecutor told the jury that it should not consider mitigation because such "excuses" were merely a discredited remnant of the "dead" Great Society. The prosecutor thus told the jury that mitigation was an artifact of a "failed" liberal era -- "the great

[46]The "great society," of course, refers to the liberal social policies associated with Democratic President Lyndon Johnson. See, e.g., Random House College Dictionary at 578 (1984); Vanderveer v. Lewis, 114 Misc.2d 81, 450 N.Y.S. 709, 710 (1982) (contrasting the "'excesses' associated with 'Great Society' programs" with the new "era of Reagan[]").

society" -- and that it was no longer relevant to the jury in the new conservative age.[47] The prosecutor relegated mitigation -- which the death penalty statute and the Eighth Amendment require the jury to consider -- to the dustbin of history. This attack on the legislature's formulation of the death penalty, and on the Constitutional requirement of individualized sentencing, is not permitted.

357. After improperly telling the jury that considering mitigation would prevent them from bringing "safety to your streets," the prosecutor continued his improper argument when he turned his attention to the mitigating circumstance of age. The prosecutor told the jury that it should not consider youth to be mitigation except, perhaps, when the defendant is a "child," because:

> I submit to you when I was a child, when I was playing as a child, I acted as a child; but when I became a man, I gave up childish pursuits.

NT 14.56. This argument, too, is improper. It was improper for the prosecutor to tell the jury that age can be mitigating only if the defendant is a "child," and thus "invade the province of the Legislature" by giving a narrow (and unconstitutional) meaning to the "age" mitigating circumstance. It was doubly improper for the prosecutor to support this improper argument by relying upon the authority of the Bible, from which the prosecutor was quoting.[48] Prosecutorial arguments based on scripture are improper. They introduce matters that are irrelevant to any of

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[47]These arguments were being made in the summer of 1983, in the first term of President Ronald Reagan.

[48]The prosecutor relied upon the "authority" of I Corinthians, Chapter 13, Verse 11 (King James Version) ("When I was a child, I spake as a child, I understood as a child, I thought as a child; but when I became a man, I put away childish things."). The prosecutor neglected to tell the jury that the theme of this Chapter of First Corinthians is the importance of "charity."

the statutory aggravating factors and invite the jury to impose death based on religious beliefs and authority that have nothing to do with the statutory scheme and that cannot be rebutted or questioned by the defendant. They irreparably destroy the objectivity and impartiality. .

358. The prosecutor continued this improper line of argument, telling the jury: "Blessed are the merciful for they shall receive mercy. Was he merciful? How coldblooded was he? How insensitive was he?" NT 14.57 . Again, the prosecutor invoked the authority of the Bible – this time, Matthew, Chapter 5, verse 7, to urge the jury to turn away from its duty to give effect to mitigation. Here, the prosecutor's argument was doubly harmful, for it denigrated all mitigation and the mercy-giving function of the sentencing jury by telling the jury that because Petitioner had not been merciful, he should not receive mercy. But a capital sentencing scheme cannot be constitutional unless it allows the jury to show mercy and impose a life sentence. Again, invoking the Bible, the prosecutor told the jury that Petitioner was entitled only to the mercy he had shown the victims. Again, the prosecutor exceeded the bounds of proper advocacy.

359. The prosecutor continued his improper argument by telling the jury that to return a life sentence would be to "stop a foot short" and that they should "walk out of here [and] think, you acted with dispatch." NT 14.59. This, too, was improper. A jury is not stopping "a foot short" if it sentences a defendant to life without parole. Moreover, a sentencing jury is enjoined from acting "with dispatch." The jury's life-or-death decision is meant to be a reasoned, moral response the evidence presented on aggravating and mitigating circumstances.

360. The prosecutor ended his argument by returning to the improper themes with which he began. The prosecutor told the jury that it should ignore mitigation and impose the death penalty as a way of restoring an ordered society:

> do you think if you don't break the mold this time that it would go away?
>
> That the streets and the people in the streets who think that it's easier to rip off than to earn, that the old-fashioned way of a day's work for a day's pay--somewhere that got lost in the translation.
>
> Somewhere the computers failed. Somewhere education failed. Somewhere humanity failed. Notwithstanding a caring mother and father or concerned mother and father, look what he did. Just look what he did.

NT 14.64.

361. The prosecutor's argument was improper for a number of reasons. First, the prosecutor again urged the jury to ignore Pennsylvania's statutory capital sentencing scheme and the Eighth Amendment, which required that the sentencer treat Petitioner as a unique individual, and, instead, impose the death penalty without any regard for the "diverse frailties of humankind." He told the jury in effect to sentence Petitioner as a representative of all the ills of society (those who think "it's easier to rip off") rather than as a unique person, as the law demands.

362. The prosecutor then did an extraordinary thing: he told the jury to disregard "a caring mother and father." Id. Under ordinary circumstances, this would be an instruction to disregard mitigation. In Petitioner's case, it was an appeal to non-existent, extra-record evidence. As discussed infra, counsel failed to present any evidence whatsoever about Petitioner's family. Had he conducted proper investigation, he would have been able to inform the jury that Petitioner's childhood reflected anything but care and concern. The prosecutor thus invented evidence suggesting to the jury that Petitioner had come to this situation on his own, despite all the support of "computers," "education," "humanity," and "a caring mother and father." This argument is improper for all of the reasons described above, and additionally fails because it is

false. It was an improper attack on the legislature's carefully crafted structure of aggravating and mitigating circumstances, on the Constitution's requirement that the jury consider and give full effect to mitigation, and it put Petitioner in jeopardy for evidence he had no opportunity to rebut or deny.

363. A sentence of death cannot stand when it results from prosecutorial comments which may mislead the jury into imposing the sentence for irrelevant or impermissible reasons. The prosecutor led the jury far away from its proper focus on aggravating and mitigating circumstances; he urged the jury to impose death as part of a generalized war on crime and as a retaliatory message to society and to Petitioner's counsel; he injected improper, inflammatory and non-narrowing non-statutory aggravating circumstances into the jury's consideration; he turned the courtroom into an ecclesiastical forum by twice urging the jury to rely on Biblical authority; he told the jury to ignore the mitigation that should have been at the center of its concern; and he portrayed the statutory and constitutional requirements of Pennsylvania's capital sentencing scheme as the outdated relics of a discredited liberal era that should be scrapped now that the "great society is dead." The cumulative effect of the pronounced and persistent misconduct in this case was to deprive Petitioner of his fundamental right to a fair sentencing proceeding, in violation of due process and the prohibition against cruel and unusual punishments.

364. Again, trial counsel, who had had his own remark called unethical by the court, and who had made his own outrageously inappropriate, irrelevant, and ineffectual argument, allowed the prosecutor to proceed without objection, and without any attempt at curative instruction. He was grossly ineffective for his acceptance of the kind of argument that the

prosecutor was making. The trial court, too, did not correct the prosecutor's improper argument or admonish the prosecutor in any way for his grossly improper and misleading statements. The court thus gave the statements its imprimatur. Thus, the state has violated the defendant's eighth amendment rights because the court has given the state's imprimatur to those comments.

365. These errors violated Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Pennsylvania Constitution.

F. Conclusion.

Defense ineffectiveness in failing to object to any of these comments, and the court's failure to intervene and stop them, left the jury free to be swayed by the prosecutor's improprieties. These errors, combined with all of the prosecutor's misdeeds, violated Petitioner's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Claim XVI. PETITIONER'S DEATH SENTENCE MUST BE VACATED BECAUSE THE ARBITRARY "PROPORTIONALITY REVIEW" PERFORMED BY THE PENNSYLVANIA SUPREME COURT VIOLATED HIS RIGHT TO DUE PROCESS AND DENIED HIM THE MEANINGFUL APPELLATE REVIEW OF DEATH PENALTY CASES CONSTITUTIONALLY MANDATED BY THE EIGHTH AMENDMENT.

366. Petitioner's sentencing jury found two aggravating circumstances and no mitigating circumstances. On direct appeal, the Supreme Court of Pennsylvania found that the trial court "err[ed] in the manner in which it charged the jury as to [aggravating circumstance (d)(7)(grave risk of death to others)]" Stokes – I , at 713. As such, the jury's finding of (d)(7) was stricken. The remaining aggravating circumstance was (d)(6)(the defendant committed a killing while in the perpetration of a felony), as to each information charged. Then, in

compliance with its duty to perform statutory proportionality review, the Court found that Petitioner's sentence of death was neither excessive nor disproportional "...when compared to the sentences imposed in similar cases." Id at 715.

367. In reaching its conclusion regarding proportionality review, the Court relied a database maintained by the Administrative Office of Pennsylvania Courts (AOPC) in order to have and utilize a basis for comparing "similar cases." The AOPC database, however, is fundamentally flawed and inaccurate; as a consequence, the Court's conclusion rested upon unreliable and faulty information and Petitioner's sentence cannot stand. Petitioner's death sentence must be vacated because the Pennsylvania Supreme Court failed to provide him the meaningful proportionality review statutorily mandated by 42 Pa.C.S. 9711(h)(3)(iii), in violation of his federal constitutional rights to due process and to meaningful appellate review of capital cases.

368. The Pennsylvania Supreme Court has explained statutory proportionality review requires an independent evaluation of all cases of murder of the first degree convictions which were prosecuted or could have been prosecuted since the reinstatement of the death penalty in 1978. In order to facilitate this review that Court ordered the President Judge of each county to supply to the AOPC information pertaining to each such conviction and imposed a continuing obligation on the President Judges to update the AOPC with data pertaining to future cases. This information included the facts and circumstances of the crimes, the aggravating and mitigating circumstances arguably presented by the evidence, the gender and race of the defendant and the victim, and other information pertaining to the conduct and prosecution of the case. The data was then compiled and monitored by the AOPC to insure that the body of similar cases is

complete.

369. Thus, the Pennsylvania Supreme Court had established two important criteria for determining comparison cases for the purposes of comparative proportionality review. First, the determination of "similar cases" must involve a factual comparison of the full range of aggravating and mitigating features of the defendant and the offense. Second, the cases against which a given death sentence is compared for proportionality must include the entire universe of Pennsylvania death-eligible cases, first-degree murder convictions that have resulted in life sentences as well as those resulting in death sentences.

370. By statutorily mandating proportionality review, Pennsylvania created a federal liberty interest in the performance of a rational proportionality review. In this case, Petitioner had a constitutionally protected interest in having the Pennsylvania Supreme Court review his case to determine that his death sentence was neither "excessive [n]or disproportionate to the penalty in imposed in similar cases." 42 Pa.C.S.9711(h)(3)(iii). Providing him a proportionality review that failed to meet the legitimate expectation that the Court can and will review all "similar cases" and that the Court can and will consider the mitigating information concerning the character and record of the defendant arbitrarily violates his due process rights.

371. Testimony in the matter of Commonwealth v. Terry, No. 1563-79, (Mtgy C.P.), from AOPC legal counsel, Zygmont Pines, and Professor Eugene Ericksen, shows that the database compiled by the AOPC and the raw data upon which it is based, cannot do what the Pennsylvania Supreme Court has requested be done by the AOPC with regard to proportionality

review. The views of these two witness are summarized here:[49]

> It is not possible to conduct a meaningful proportionality review under a statute such as Pennsylvania's, which conditions the sentencing of life or death upon what combination of aggravating and mitigating circumstances are found, if the data collection instrument does not collect, and the database cannot report, the mitigating circumstances found. (NT 2/21/96, 241-42.
>
> The data collection instrument used by the AOPC to encode the information actually contained in the proportionality review database does not collect information on mitigating circumstances found. Moreover, Zygmont Pines, admitted that the AOPC could not provide the Pennsylvania Supreme Court with information on mitigation found in capital cases and that the AOPC could not provide any comparison of capital cases based upon mitigation actually found by the capital sentencer. (NT 2/21/96, 185-86).
>
> Instead of collecting and recording "mitigating circumstances found," the AOPC database collects and records "mitigating circumstances presented." (NT 2/21/96, 186).
>
> In Dr. Ericksen's uncontested expert opinion, there is nothing in the AOPC database that "could meaningfully substitute for [the] missing information" on mitigation found. (NT 2/21/96, 240). Based upon his previous review of the database, "there was no [statistical] relationship between the number of mitigating circumstances presented and the likelihood of a death sentence," and any proportionality review based upon a comparison of "mitigation presented" would be "statistically irrelevant." (NT 2/21/96, 241-42).
>
> Even if "mitigation presented" had any statistical relevance, Mr. Pines acknowledged that the AOPC database provides no meaningful basis to do "any kind of qualitative review" (NT 2/21/96, 198). The AOPC cannot ascertain the strength of mitigating evidence presented in a case (id.), nor does anything in the database permit the AOPC to identify, select out, or compare between specific types of mitigating evidence presented under 42 Pa.C.S. § 9711(e)(8). (NT 2/21/96, 243-49).
>
> Consequently, the AOPC could not provide to the Supreme Court in this case any set of comparison cases based upon specific mitigating information, so that the Court could conduct any meaningful comparison of these cases or to permit the Court to conduct any qualitative analysis of whether the death penalty was disproportionate in a particular case.

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[49]A copy of the testimony of Mr. Pines and Professor Ericksen is included in *Petitioner's Appendix*, and was proffered to the state trial and appellate court. Dr. Ericksen is a professor of sociology and statistics at Temple University. He is experienced in the design and evaluation of survey instruments and databases and has worked as a consultant to the United States Department of Commerce with regard to the 1990 census. He has testified as an expert in statistics and survey designs before courts and legislative bodies (NT 2/20/96, 232-237).

Even if one attempted to do merely a quantitative comparison of mitigating evidence, flaws in the data collection process systemically undercount mitigation in cases in which evidence of multiple types of constitutionally recognized mitigating circumstances had been presented under 42 Pa.C.S. § 9711(e)(8). Neither a statistician nor the court would be able to identify from the database which cases were subject to such undercounting, and so a comparison of cases based upon the numerical figures provided in the portion of the database reporting "mitigation presented" under (e)(8) would not be meaningful. (NT 2/21/96, 250).

Additionally, the database does not indicate if or when aggravating evidence has been double-counted in a particular case and served as the basis for multiple aggravating circumstances found. (NT 2/21/96, 202-03).

Pa. R. Crim. P. 358(a), provides that when a jury is unable to reach a verdict during the sentencing stage of a capital trial, it does not complete a verdict slip and does not specify the aggravating and mitigating circumstances found. Consequently, relevant information on aggravating circumstances found is not recorded, and an entire class of cases in which the outcome was "life" is unavailable for meaningful comparison. The proportion of factually comparable death cases available for comparison in the database is artificially higher as a result. Moreover, this produces a corresponding skewing towards death of any proportionality review based upon a comparison from which these cases are omitted. (NT 2/21/96, 189-92, 251-53).

In guilty plea cases resulting in a sentence of life, no sentencing hearing is held and no aggravating or mitigating circumstances are presented. The AOPC makes no effort to find out what mitigation the defense could have presented, and this information is unavailable in the database. As with hung jury cases, this removes an entire class of "life" cases from the proportionality review, artificially increasing the proportion of death sentences available for comparison purposes, and skewing the resulting proportionality review towards death. (NT 2/21/96, 227-28, 254).

These data collection errors are exacerbated by data entry errors that undermine the reliability of the proportionality database. For example, Dr. Ericksen testified that the database contains "a large number of cases [124] where the death penalty was not sought, but there were aggravating circumstances found and/or mitigating circumstances presented." (NT 2/21/96, 250-51, 261). The database contains cases in which aggravating circumstances were found and no mitigators and a life sentence was imposed. (NT 2/21/96, 261). As of June 1994, the database contained 77 entries purportedly from cases in which no aggravation was presented, yet a death verdict was returned. The database also contained 19 entries purportedly from cases in which no evidence of aggravation was ever presented and yet the verdict was death. (NT 2/21/96, 208-09, 220-21). Every one of these outcomes is a statutory impossibility.

Dr. Ericksen testified that the presence of these many obvious and important errors in the

> database ("to me, it could very well be the tip of the iceberg") undermined his confidence as a statistician in the accuracy of the rest of the database. At a minimum, he said, these errors "make your [proportionality] review uncertain." (NT 2/21/96, 259-62). Even assuming that these are the only errors, approximately 220 major errors in a database of approximately 3,000 entries represents a known-error rate in excess of 7.3%.
>
> Given this combination of case-specific, data collection, and data entry problems with the AOPC database, it was Dr. Ericksen's conclusion that "based on the information provided in the database, the Supreme Court could not conduct a meaningful proportionality review if they relied upon this data base." (NT 2/21/96, 262).[50]

372. Neither did Petitioner have notice or the opportunity to meaningfully participate in what amounted to appellate fact finding. That is to say that the Court had to 1) determine what the Court would regard as a "similar case" and 2) whether the sentence in this case was disproportionate. Thus, the Court's proportionality review in this case was based on facts which Petitioner had no opportunity to deny or explain, in violation of the Fourteenth Amendment.

373. For the reasons described above, the proportionality review actually provided to Petitioner by the Pennsylvania Supreme Court arbitrarily denied him the proportionality review mandated under Pennsylvania law and denied his right to due process of law under the Fourteenth Amendment to the U.S. Constitution and Article I, Section 9 of the Pennsylvania Constitution.

CLAIM XVII. PETITIONER'S DEATH SENTENCE MUST BE OVERTURNED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY THAT ITS LIFE-SENTENCING OPTION WAS STATUTORILY DEFINED AS LIFE WITHOUT POSSIBILITY OF PAROLE.

374. Under Pennsylvania law, a defendant convicted of first degree murder must be sentenced either to death or to life imprisonment, and such a sentence is statutorily defined as life without possibility of parole.

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[50]Copies of the transcript of this testimony is included in *Petitioner's Appendix*.

375. Petitioner's death sentence must be vacated because the jury that sentenced him to death was not instructed regarding Pennsylvania life without parole sentencing regimen. The trial court's failure to accurately instruct the jury of Petitioner's statutory ineligibility for parole violated the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution; and United States human rights treaty obligations, customary international law, and peremptory international human rights norms, as binding on the Commonwealth of Pennsylvania through Article VI of the United States Constitution.

376. Petitioner presents below multiple grounds for relief arising out of the failure to provide a life without parole instruction, each of which provides an independent basis for overturning the death sentence imposed in this case. These include that:

> the trial court's failure to provide a life without possibility of parole instruction after the issue of parole and future dangerousness had been injected into this case violated due process;
>
> the trial court's failure to provide a life without possibility of parole instruction violated due process, whether or not the issue of future dangerousness had been injected into the case because
>
> > there is a reasonable probability that the resulting death sentence was imposed by a sentencer acting under a material misapprehension of law or fact relating to the sentencing decision;
> >
> > the absence of the instruction violated Petitioner's life and liberty interest in a jury sentence based upon the statute to which he was entitled under state law;
> > it resulted in a death sentence on the basis of information concerning parole eligibility that Petitioner had no opportunity to deny or explain;
>
> the trial court's failure to provide a life without possibility of parole instruction violated the Eighth Amendment because
>
> > it presented the jury with a false choice of sentencing options, denied Petitioner the heightened procedural safeguards required in capital cases, and produced an arbitrary and capricious sentence in violation of the

Eighth Amendment's requirement of truth in capital sentencing;

it prevented the jury from considering relevant mitigating evidence that Petitioner did not pose a significant future danger to society;

it prevented the jury from considering and giving full effect to other relevant mitigating evidence that was present in this case;

the absence of the instruction offends the evolving standards of decency that underlie the Eighth Amendment;

the absence of a life without parole instruction resulted in a capital sentencing hearing in front of a jury uncommonly willing to condemn Petitioner to die, in violation of his Sixth Amendment right to an impartial jury; and

the absence of a life without parole instruction violated Pennsylvania's and the United States' obligations and international human rights treaties, customary international law, and peremptory norms of international human rights law.

the absence of a life without parole instruction also violated the Eighth Amendment's prohibition on cruel and unusual punishment inasmuch as 26 of 28 states that have life without parole for homicide instruct capital jurors that life means life; thus this instruction is required because of the evolving standards of decency.

377. In addition, trial counsel was ineffective for failing to request a life without parole instruction and to object to the trial court's failure to independently provide a sentencing instruction that the jury's life sentencing option was statutorily defined as life without possibility of parole.

378. The Commonwealth violated its due process obligation to disclose information that was exculpatory at sentencing when it failed to produce to the defense evidence that no person who has been capitally prosecuted and later was convicted or pled guilty to first degree murder under Pennsylvania's death penalty statute has ever become eligible for parole. Alternatively, trial counsel was ineffective in failing to investigate and present this evidence in

support of the defense's argument that by the jury's guilt-phase verdict, Petitioner would spend the rest of his life in prison.

379. All of these issues are of arguable merit, and trial counsel's failure to present them was constitutionally deficient and prejudicial. Counsel also was ineffective in failing to raise these issues on their merits on direct appeal, which under the relaxed waiver rule would have permitted their consideration for the first time at that stage of Petitioner's case.[51] Counsel's ineffectiveness violated the Sixth and Fourteenth Amendments; Article I, Section 9 of the Pennsylvania Constitution; and United States human rights treaty obligations, customary international law, and peremptory international human rights norms, as binding on the Commonwealth of Pennsylvania through Article VI of the United States Constitution.

CLAIM XVIII. THE TRIAL COURT'S PENALTY PHASE INSTRUCTION ON THE "AGE" MITIGATING CIRCUMSTANCE VIOLATED THE EIGHTH AMENDMENT. COUNSEL WERE INEFFECTIVE FOR FAILING TO OBJECT OR RAISE THIS CLAIM ON DIRECT APPEAL.

380. Trial counsel presented Petitioner's age of 19 at the time of the offense as a mitigating circumstance. Accordingly, the trial court instructed the jury on this circumstance:

> There is very little law covering what is meant by the age of the defendant as defined to be a mitigating circumstance under pertinent legislation.
>
> We revert to the provisions of the Statutory Construction Act which says that words used in a Statute shall be given their common, ordinary, everyday meaning, and I think you should, in defining what is meant by age of the defendant at the time of the commission of the offense, think of these kinds of questions in your mind.
>
> Was the defendant of such an age as to exercise his own discretion or independent judgment? Did the defendant have enough maturity as the average person to make proper decisions for himself.

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[51]Because trial and appellate counsel were the same, counsel was not required on appeal to raise the issue of his own ineffectiveness at trial.

> Think about matters of common knowledge. You can vote at eighteen. You can drive a car at sixteen years of age. You can drink at twenty-one.
>
> Was the defendant of such an age as to be able to make a proper decision for himself?
>
> In sum, ask yourselves in effect the question: Was the defendant of such an age, wisdom, and maturity to be able to make a decision in matters of importance to himself.

(NT 14.88-89).

381. This instruction eviscerated the Eighth Amendment meaning of the mitigating circumstance of youth. The court's focus on deliberation, "proper decision making," and such measures of society's gross judgments regarding age (e.g. driving age, voting age, etc.), misstated the seminal point of capital mitigation: that the jury must make an individualized capital sentencing determination.

382. Trial, post-verdict and appellate counsel were ineffective for failing to object or raise this claim on direct appeal.

CLAIM XIX. PETITIONER IS ENTITLED TO RELIEF FROM HIS SENTENCE OF DEATH BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS INDICATED THAT THE JURY UNANIMOUSLY HAD TO FIND ANY MITIGATING CIRCUMSTANCE BEFORE IT COULD GIVE EFFECT TO THAT CIRCUMSTANCE IN ITS SENTENCING DECISION.

383. In a capital case, the sentencer may not be precluded from considering and giving full effect to any mitigating aspect of the defendant's character or record, or the circumstances of the offense. This clear and fundamental principle of Eighth Amendment jurisprudence was violated at Mr. Stokes' trial. The trial court failed to advise the jury that any juror who individually found a mitigating circumstance could weigh that circumstance against the aggravating circumstances unanimously found, even if there was not unanimity as to the existence of that mitigating circumstance. Instead, the penalty phase jury instructions led the jury to believe incorrectly that it had to be unanimous in finding any mitigating circumstance before it

could give effect to that mitigating circumstance in its sentencing determination.[52] The jury instructions thus created a barrier to the sentencer's consideration of all mitigating evidence and violated Petitioner's Eighth and Fourteenth Amendment rights.

384. Throughout the trial, the court's instructions repeatedly informed the jury that it had to be unanimous in its finding of a mitigating circumstance before it could give it effect in its sentencing decision. At all times, the judge spoke to the jury as a single, collective body, i.e. "you." In its opening charge at the penalty phase, the trial court told the jury:

> You will recall that at our last session of court you found the defendant guilty of three separate Counts of murder in the first degree, that there was a jury poll at the request of the defense Counsel.
>
> The jury poll established that the verdicts were unanimous and voluntary on your parts. Your verdicts were thereafter recorded.
>
> We are now going to hold a sentencing hearing during which Counsel may present additional evidence and arguments to you, and you will thereafter, following my instructions in areas pertinent to your penalty deliberations, decide whether the defendant is to be sentenced to death or life imprisonment.
>
> There will be three separate verdicts or decisions to be reached by you. You will make the determination concerning the punishments, whether it be life imprisonment or death, on each of the separate verdicts you found guilty of murder in the first degree on each of the separate criminal Informations covering the killings of each of the three victims in this case … .
>
> Whether you sentence the defendant to death or to life imprisonment as separate and distinct single individual verdicts on each of the criminal Informations in this case will be dependent upon what if any aggravating or mitigating circumstances you find are present in this case. …

---

[52]Pennsylvania Standard Criminal Jury Instruction 15.2502H(2) attempts to cure any problem in the instructions on aggravating and mitigating circumstances by specifically instructing the jury that "each of you is free to regard a particular mitigating circumstance as present despite what other jurors may believe." No such instruction, or similar instruction, was provided to the jury in the present case.

> Although I will give you detailed instructions later in this hearing, I would tell you now that aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt.
>
> You recall my definition of "beyond a reasonable doubt" during my final jury instructions, and that same definition governs at this point.
>
> Mitigating circumstances must be proved by the defendant by a preponderance of the evidence, and I'll define that for you at a later point in these instructions.

NT 14.41-43. A reasonable juror would determine from this instruction that a mitigating circumstance must be unanimously found before the jury could give it effect. The first "you" in this instruction is the entity that "found the defendant guilty" -- i.e., the unanimous jury. The second "you" is the entity that "decide[s] whether the defendant is to be sentenced to death or life imprisonment" -- i.e., the same unanimous jury. The jury could only reasonably conclude that the third "you" -- the entity that "find[s]" "aggravating or mitigating circumstances" is also the unanimous jury. Indeed, the only way the jury could reach the constitutionally acceptable interpretation of this charge is if it concluded that: (1) the first "you" meant the unanimous jury; the second "you" meant the unanimous jury; and (3) the third "you" meant the unanimous jury with respect to aggravating circumstances, but meant each individual juror with respect to mitigating circumstances -- even though the third "you" "find[s]" "aggravating or mitigating circumstances." It is extraordinarily unlikely that the jury would or could arrive at the constitutionally required interpretation of the instruction.

385. The trial court's constitutionally infirm instructions continued in its closing penalty phase charge:

> Members of the jury, you must now decide whether the defendant is to be sentenced to death or life imprisonment.
>
> The sentences that you determine will be three in number, one sentence, one

verdict, on each of the three separate Criminal Informations in this case.

It will depend upon your findings concerning aggravating and mitigating circumstances.

The Crimes Code – now more literally the Judicial Code – provides that the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstance, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigation, mitigating circumstance.

The verdict must be life imprisonment in all other instances and cases.

NT 14-85. Later, in explaining the differing burdens of proof, the court said:

The Commonwealth has the burden of proving aggravating circumstances beyond a reasonable doubt.

The same definition of the term "beyond a reasonable doubt" that I delivered to you in my final instructions holds in this case, and I won't repeat that. Apply the same definition.

The defendant has the burden of proving mitigating circumstances, but by a lesser burden of proof, which is called a preponderance of the evidence. That's a lesser burden of proof than beyond a reasonable doubt.

Simply stated, a preponderance of the evidence exists where one side is more believable that the other side, or a preponderance of the evidence in definition furnished by legal scholars seems to be proof which leads **the jury to find** that the existence of the contested fact is more probable than its nonexistence.

NT 14.91-92. In recapitulating for the jury, the court stated:

Any decision by the jury is binding upon the trial Judge thereafter. Remember again that your verdict must be unanimous. It can't be reached by any majority vote or by any percentage verdict proceedings. It must be the verdict of each and everyone of you.

Remember that your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstances, or if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances.

NT 14.93.

386. Again, throughout this final charge, the jury was given absolutely no reason to believe that there is any distinction between the entity that sentences, the entity that "finds" aggravating circumstances and the entity that "finds" mitigating circumstances. In fact, in these closing instructions, the jury was repeatedly that the jury must find that the existence of the mitigating circumstance. In the context of explaining the burden of proof for mitigating circumstances, the judge told the jury that a "a preponderance of the evidence in definition furnished by legal scholars seems to be proof which leads **the jury to find** that the existence of the contested fact is more probable than its nonexistence."

387. Moreover, the pronoun "you" is used interchangeably with the word "jury," and these words are used without distinction to refer to all of the factfinding functions. To reach the constitutionally required interpretation of the instruction, the jury would have to irrationally decide that "you" or "jury" referred to the unanimous jury with respect to the sentencing decision and the "finding" of aggravating circumstances, but referred to each juror individually with respect to the "finding" of mitigating circumstances. And it would have to reach this conclusion despite the fact that the instruction treats aggravating circumstances and mitigating circumstances identically -- as facts that exist only if unanimously found by the jury.

388. In addition, the penalty phase verdict sheets submitted to the jury expressly required unanimous jury findings regarding mitigation. Only one sheet was provided to the jury and there is no place on it for individual jurors to record any mitigation that they individually found. Instead, the only place for the jury to record mitigation found is on page three, which arguably requires that only mitigation that was unanimously found be recorded.

389. The trial court's instruction that a mitigating circumstance must be found

unanimously before it could be given effect improperly restricted the jury's consideration of mitigating evidence and thereby violated Petitioner's rights under the Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Pennsylvania Constitution.

REQUEST FOR RELIEF

Based upon all of the above, and the exhibits presented with this *Petition*, Petitioner respectfully requests that this Court grant the following relief:

A. That the Court entertain and grant such motions as Petitioner may file regarding discovery;

B. That Petitioner be afforded an opportunity to submit a *Memorandum of Law* in conformity with Local Rule 9.4;

C. That Respondents be compelled to respond to the *Petition* and *Memorandum of Law*;

D. That Petitioner be afforded evidentiary hearings as to every disputed material fact;

E. That upon conclusion of these proceedings, the Court grant the Writ and order that Petitioner either be released from his custody or resentenced to life imprisonment, or else retried (as to either guilt, penalty or both) within a reasonable time period to be set by the Court.

Respectfully Submitted,

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Dated: Philadelphia, Pennsylvania
June 7, 2004

Certificate of Service

I, Michael Wiseman, hereby certify that on this 7th day of June, 2004 I caused a copy of the foregoing to be served on the following person by first class United States Mail, postage prepaid:

Thomas W. Dolgenos, Esq.
Chief, Federal Litigation
District Attorney's Office
1421 Arch Street
Philadelphia, PA 19102

_____
Michael Wiseman