NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

EARL BERRYMAN,	:	
Petitioner,	:	
v.	:	Civil Action No. 94-3828 (DRD)
WILLIS E. MORTON,	:	O P I N I O N
Respondent.	:	

APPEARANCES:

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DEBEVOISE, Senior District Judge

Petitioner, Earl Berryman, an inmate at New Jersey State Prison, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons set forth below, the petition is granted.

I. Procedural History

On January 19, 1984, Earl Berryman, Anthony Lee Bludson and Michael Bunch were named in a seven-count Essex County, New Jersey indictment charging various offenses stemming from the alleged March 12, 1983 kidnapping, armed robbery and sexual assault of Alice Campos.

Bludson was tried twice in July 1984. His first trial ended in a hung-jury mistrial. At the conclusion of the second trial, he was acquitted of all charges. Petitioner and Michael Bunch went to trial in March 1985. The first trial ended in a mistrial just prior to summations when a juror revealed that she had discussed possibly relevant knowledge of the crime with her fellow jurors. At the conclusion of the second trial, which commenced immediately after the mistrial, petitioner and Bunch were found guilty of the most serious charges in the indictment. Petitioner was sentenced in July 1985 to an aggregate term of incarceration of 50 years with a parole ineligibility period of 25 years.

Petitioner, along with co-defendant Bunch, appealed their convictions to the Appellate Division of the Superior Court of New Jersey which, on October 4, 1987, affirmed. Further review of the conviction was apparently not sought.

Petitioner filed a Petition for Post-conviction Relief on April 25, 1991. Hearings on petitions filed by petitioner and Michael Bunch took place on November 13, 14 and 15, 1991 and the trial court denied both petitions in an oral opinion on November 22, 1991. The Appellate Division affirmed on May 21, 1993, and the Supreme Court of New Jersey denied certification on September 27, 1993.

On June 14, 1994, Michael Bunch filed a Petition for Writ of Habeas Corpus in this Court. Bunch v. Morton, Civil No. 94-3297. Petitioner followed suit thereafter and it was ordered that respondents file answers and the state court record. On December

23, 1994, upon notification of the death of Michael Bunch, his petition was dismissed.

II. Facts Developed At Trial

The trial evidence left very little doubt that Alice Campos was raped by three persons on March 12, 1983. The trial evidence leaves substantial doubt that petitioner was one of the perpetrators.

Early in the morning of March 12, 1983, after celebrating her birthday at a local club, Alice Campos and her friend, Christina DosSantos, drove home. Campos testified that she had drunk no alcohol that evening and never drank alcoholic beverages. At around 2:30 a.m., after dropping off DosSantos, Campos drove herself home. While waiting at a light, a man she later identified as Michael Bunch pulled open her car door (it was broken at the time) and forced himself into the vehicle. The man put a knife to Campos's throat and demanded that she move over and take off her stockings. The man then opened the passenger-side door for a second man (allegedly Anthony Bludson) who entered from that side. One of the men then removed $35 from her purse. The first man then drove the car to a small shopping center where a third man, later identified as petitioner, was waiting in a blue car. Next, Campos was forced into the blue car. She testified that the first man (Bunch) drove, while the second man (Bludson) sat in the back seat with her, and the third man (petitioner) sat in the passenger seat.

According to Campos, they drove for about two hours. She was told to "shut up" and lie on the floor of the back seat. They

ended their drive and parked outside of a "burned out" building. She was carried into the building, taken to one of the upper floors and raped by all three men. She testified that Bunch was the first to rape her, followed by Bludson, and finally by petitioner.

After raping Campos, the three men led her outside. They then drove her back to her car at the shopping center. She testified that they then covered her eyes with her stockings and that Bludson then walked her over to her car with a knife at her back. Finally, the three men drove away.[1]

Campos was ashamed and afraid to go to her house and, therefore, drove to DosSantos' home. She told both her friend and her friend's mother what had happened. She testified that she was crying and shaking. Two days later (March 14, 1993) she went to the police to report the rape.

There, she spoke to Irvington Detective Samuel Williams. She examined mugshots arranged alphabetically in sleeves. First she looked through the "A" sleeve. After viewing about 100-150 "A" photographs, Campos could not pick any of the rapists. After moving to the "B" sleeve she made three identifications: Berryman, Bludson and Bunch. Having made the three "B" identifications, Campos did not examine the "C" to "Z" sleeves.

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[1] In her initial statement to authorities, Campos said that she had been blindfolded with her stockings from the moment the two men got into her car at the traffic light until she was returned to her car. Her trial testimony, that the first man in her car immediately ordered her to remove her stockings, tends to corroborate this version. If this were so, she could not have identified petitioner at all since, according to her testimony, he had not entered the picture until well after she would have been blindfolded.

Detective Williams then mailed letters to the three suspects' last known addresses. On March 17, 1983 the Post Office returned the letter addressed to petitioner. The detective did nothing further because his superior (Sergeant Michael Tomich) had instructed him not to concentrate on any of the suspects because one of them, Bunch, was supposedly involved in a bank robbery/ homicide which had taken place two days after the rape.

After going to the police, Campos went to United Hospital Medical Center. Dr. Ingrid Brown examined her. She found that Campos had red scratch marks on the right side of her neck. After a full examination, the doctor discovered two vaginal tears accompanied by bleeding. The victim was also diagnosed as having both vaginal and rectal gonorrhea.

Several weeks later, after repeated requests that she sign the complaint, Campos returned to the police station. The police did not seek to arrest anyone for more than a year. After learning that the police had been searching for him, petitioner voluntarily went to the station to ascertain the reason. He was thereupon charged with first degree kidnapping, first degree robbery, first degree aggravated assault, fourth degree unlawful possession of a weapon, third degree unlawful possession of a weapon without a permit, second degree unlawful possession of a weapon, and third degree unlawful possession of a weapon. He pled not guilty. He

had a steady employment history and no prior criminal record and was released on his own recognizance.[2]

Bludson's acquittal in his second trial and the two trials of petitioner and Bunch are noted above. The trials of petitioner and Bunch commenced in March 1985.

The police investigation had consisted almost entirely of Campos' selection of the three men from the "B" sleeve of Irvington Police Department mugshots. Petitioner denied participation in the crime and testified that he did not own a car, had never driven a car and had never even met the two other men charged with the rape. Further, he had a steady employment history and no prior criminal record. As the Appellate Division stated, the guilt of all the defendants "rested almost exclusively upon the victim's out-of-court and in-court identifications."

With the case in this posture, petitioner's counsel Nicholas DePalma (i) on cross-examination of Campos failed to avail himself of prior testimony which would have cast serious doubt upon Campos' ability to identify petitioner; (ii) failed to investigate and use two witnesses who could have cast further doubt on Campos' testimony, and (iii) asked questions on cross-examination and called a witness knowing that these actions would bring to the jury's attention the fact that co-defendant Bunch was under

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[2] In its opinion on direct appeal, the Appellate Division noted: "The police [did] practically nothing to verify details of the victim's story and did not seek to arrest the men for more than a year."

investigation for homicide/bank robbery. These three actions or inactions are the subject of the instant petition.

III. State Court Review

On direct appeal, the Appellate Division affirmed the trial court's determination that defense counsel had opened the door to the admission of the homicide/bank robbery evidence. Bunch had also argued that his attorney had been ineffective in failing to call Bludson as a witness. The Court noted that any evidence as to why Bludson had not been called was outside the scope of the record, but that the issue "may be raised on a motion for post-conviction relief."

Petitioner and Bunch each filed a petition for post-conviction relief, pursuant to New Jersey Court Rule 3:22, alleging ineffective assistance of counsel at trial.[3] In his petition, petitioner argued that his trial attorney had been ineffective in failing to utilize Campos' inconsistent identification testimony from the Bludson trial, in opening the door to the homicide/bank robbery investigation concerning Michael Bunch, and in failing to call Anthony Bludson and Christina DosSantos as witnesses for the defense.

After hearing the testimony of Nicholas DePalma, the trial attorney to petitioner, and Mario Farco, the trial attorney for co-defendant Bunch, the state trial court found that petitioner's trial counsel had made reasonable investigations to determine the

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[3] Bunch raised other issues challenging his conviction, but those issues did not pertain to petitioner.

location of Anthony Bludson; that the determination not to call Christina DosSantos as a witness had been a strategic decision; that Campos' inconsistent testimony at the Bludson trial would have been insignificant and that the failure to impeach her with it had been a "strategic choice" by defense counsel; and, finally, that petitioner's counsel's actions in opening the door to the homicide/bank robbery investigation against co-defendant Bunch had been a reasonable trial strategy. The court concluded, as to each of the allegations of ineffectiveness, that even if the performance had been deficient, the deficiency did not deprive petitioner of a fair trial.[4] The appellate court affirmed, concluding that the trial court's findings were supported by the record below.

The New Jersey Supreme Court denied certification on September 27, 1993. Thus, petitioner has exhausted his remedies in the state courts as required by 28 U.S.C. § 2254(b).

III. Discussion

This proceeding follows a state trial court evidentiary hearing on the issue of effective assistance of counsel. It follows an Appellate Division affirmance of the trial court's finding that petitioner was not deprived of effective assistance of counsel.

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[4] While the trial court did not make a specific finding that petitioner's counsel's failure to call Christina DosSantos as a witness did not affect the outcome of petitioner's trial, it made that finding with regard to the same failure by Bunch's counsel. Petitioner has not argued that that particular finding would have been any different for him.

As will be developed more fully below, an ineffective assistance of counsel claim has two elements: (i) seriously deficient performance by counsel and (ii) performance so deficient that it prejudiced the defense. A determination of an ineffective assistance of counsel claim involves a mixed question of law and fact.

The underlying, historical facts about counsel's performance, when found by a state court and if fairly supported by the record, are entitled to the presumption of correctness when the state court proceedings meet the requirements of 28 U.S.C. § 2254(d). Reese v. Fulcomer, 946 F.2d 247 (3d Cir. 1991), cert. denied, 112 S.Ct. 1679, 118 L.Ed. 2d 396 (1992). The state court proceedings met those requirements in this case and (except for a few findings mentioned below which find no support in the record) none of the exceptions are applicable. Consequently, I have not granted petitioner's request for a new evidentiary hearing on the ineffectiveness of counsel issue nor have I relied on the affidavit of Thomas R. Ashley, Esq., which petitioner submitted in support of his petition.

However, the ultimate conclusion of a state court that attorney performance does or does not constitute effective assistance of counsel is not entitled to a presumption of correctness. As stated in Reese, supra:

> ... We agree that "[i]n a federal habeas corpus challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d)." Strickland v. Washington, 466 U.S. 668, 698, 104 S.Ct. 2052, 2070, 80

> L.Ed. 2d 674 (1984). Rather, it is a mixed question of law and fact. Id. We have recently adopted this standard, thereby overruling our prior case law. See Carter v. Rafferty, 826 F.2d 1299, 1306 (3d Cir. 1987) ("It is clear ... that the presumption of factual correctness [under § 2254(d)] may not be applied to mixed questions of law and fact.") (citing Miller v. Fenton, 474 U.S. 104, 106 S.Ct. 445, 88 L.Ed. 2d 405 (1985)), cert. denied, 484 U.S. 1011, 108 S.Ct. 711, 98 L.Ed. 2d 661 (1988).

At 254.

Thus, it is incumbent upon a federal court to determine whether trial counsel's representation of a defendant was so deficient as to deprive him of his Sixth Amendment right to effective assistance of counsel.

A federal court may grant a writ of habeas corpus to a prisoner jailed pursuant to a state court judgment if that judgment violates the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a). The writ of habeas corpus, however, has a limited scope. Federal courts do not sit to retry state cases *de novo*, but rather, to review for violations of federal constitutional standards. Milton v. Wainwright, 407 U.S. 371, 377 (1977). In alleging trial error, the petitioner will be granted relief only where it can be shown that such error was not harmless and resulted in the denial of protection which the United States Constitution guarantees. Id.

In this case, petitioner alleges that he was denied effective assistance of counsel, thereby violating his constitutional rights and entitling him to a new trial. Specifically, the petitioner claims deficiency in the performance of his defense counsel for (1) failing to call "critical" witnesses Christina DosSantos and

acquitted co-defendant Bludson; (2) failing to use Campos' inconsistent prior testimony in co-defendant Bludson's trial (which ended in an acquittal); and (3) finally for opening the door to harmful testimony. According to petitioner, these "active blunders ... and suicidal failures ... combined to deny petitioner effective assistance of counsel." Petitioner's Brief at 8.

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court set forth a two-step analysis for courts to use when determining whether assistance of counsel was effective, as the Sixth Amendment guarantees. Id. at 687. The standard:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made error so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

Id.

Because of the difficulties inherent in evaluating an attorney's performance in hindsight, the petitioner carries the burden to prove prejudice.

Under the first prong of the Strickland test, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered trial strategy.'" Id. at 689.

Under the second prong of Strickland, prejudice is found where there is a reasonable probability that the result of the trial would have been different but for the unprofessional errors of counsel. Id. at 687; see also Frey v. Fulcomer, 974 F.2d 348, 358 (3d Cir. 1992), cert. denied, 113 S.Ct. 1368 (1993). Under this prong, petitioner must show that the prejudice involved deprived him of a fair trial which would have resulted in reliable results. Strickland, 466 U.S. at 687. In other words, a petitioner must demonstrate that trial counsel's performance foiled the appropriate use of the adversarial process.

In Kimmelman v. Morrison, 477 U.S. 365, 368-79 (1986), the Supreme Court applied the Strickland test to assess effectiveness of counsel. In Kimmelman, counsel for an accused rapist failed to request any discovery from the prosecution, and accordingly was unaware that police had seized a bedsheet from the accused's apartment, where the rape allegedly occurred, until after the accused's bench trial. Id. At that time, counsel moved to have the evidence suppressed on the ground that police had acted without a search warrant in violation of the Fourth Amendment, but the judge rejected the motion as untimely under state law. Id. at 369. Subsequent to his conviction, the defendant filed a petition for writ of habeas corpus, alleging ineffective assistance at trial. Id. at 371. The Supreme Court affirmed the Court of Appeals holding that the defendant's trial counsel was "grossly ineffective," 752 F.2d at 922, and remanded for the District Court

to decide whether, pursuant to the Strickland test, the attorney's incompetence prejudiced the defendant. 477 U.S. at 373.

A. Trial Strategy

Under Strickland, "sound trial strategy" is basically immune from appellate review. But no sound trial strategy existed in this case. Mr. Farco, Bunch's attorney, claimed at the post-conviction hearing that his theory was one based on a misidentification. State's Exh. R9 at 46. But his questioning and summation during the trial often pointed in the other direction, that is, that no rape occurred. He consistently argued that because Campos "wait[ed] over two days to tell her story to tell that she had been raped and sexually abused. If that had been ... she would have torn down the doors of the courthouse, of the police station at 6:00 or 6:30, or 7:00 on a Saturday morning, not wait two days to tell her story, her made up story." State's Exh. R22 at 112.

Switching gears, on other occasions, Farco claimed Campos was not a liar; "there was no question she'd been abused sexually"; and that it was an identification case. State's Exh. R10 at 80. The main objection to having DosSantos testify was that she was a fresh complaint witness. But if defense counsel were not denying that Campos was raped, DosSantos' testimony would not have hurt them.

Petitioner's counsel's post-trial testimony only confirms that there was no "sound trial strategy." When questioned on his theory of the case, he replied, "Theory of the case ... there was no real theory." State's Exh. R10 at 112. Again,

> Q. Is it your practice to develop a theory of your defense prior to opening to a jury in a case?

A. Not a theory of my defense, but a game plan." State's Exh. R10 at 115.

Then he claimed he had three theories: "[I]f you want to use the term theory, I had three theories, the identification was a theory, ... the investigation was theory ... and I don't know whether there was something third in there, but in my mind I think there was." State's Exh. R10 at 179. Finally, he believed that there was "no value to choosing a theory, and proceeding." State's Exh. R10 at 186.

During the trial he continued to lose credibility. He tried to discredit a disinterested doctor. During cross-examination he implied that evidence was destroyed. The prosecution quickly objected and the judge instructed the jury to disregard the question. State's Exh. R20 at 183. During the summation he stated: "The only thing is when you ask her about the investigation, she's giving you a runaround." State's Exh. R22 at 129. Then at the hearing he claimed that the "doctor was covering up." State's Exh. R10 at 181.

For counsel to rest on "strategy" necessitates the existence of one. This case lacked strategy. Instead, it was a "useless charade." United States v. Cronic, 466 U.S. 648, n.19 (1984). It is in the light of this generally muddled performance that counsel's particular failures must be examined.

Having no trial strategy, defense counsel improvised as they went along, proceeding from blunder to blunder with disastrous consequences. To determine prejudicial effect, it is necessary to

examine the totality of defense counsel's representation and its probable effect in the trial's outcome. However, preparatory to doing that, each instance of alleged ineffective assistance will be examined.

B. Failure to Use Inconsistent Identification Testimony

As the Appellate Division noted, guilt of defendants rested almost exclusively upon Campos' identification of her assailants. In these circumstances no amount of post-trial rationalization can justify petitioner's counsel's failure to utilize Campos' prior sworn testimony casting serious doubt upon her ability to identify petitioner.

In July of 1984, approximately ten months before the trial of petitioner and Michael Bunch, Anthony Lee Bludson was tried alone. His first trial ended in a hung-jury mistrial. At the conclusion of the second trial, Bludson was acquitted by a jury of all charges.

At each of the four trials in this case, Campos testified that her three alleged assailants played the following roles in her abduction:

1. Michael Bunch: the man with the knife who forced his way into her car at the traffic light.

2. Anthony Lee Bludson: the second man to get into the car at the traffic light.

3. Petitioner (Earl Berryman): the third man who waited for the other two at the supermarket parking lot.

Michael Bunch was an unusually tall man, standing approximately 6'4" tall. Petitioner is approximately 5'10" tall. Anthony Lee

Bludson, who was acquitted of all charges, was approximately 5'5" tall at the time of the offense.

At Bludson's first trial, Campos testified that the man with the knife -- supposedly the 6'4" Bunch -- was approximately 5'11" tall. At that same trial, she also testified that the second man -- allegedly the 5'4" Anthony Lee Bludson -- was approximately 5'10" and "the same size" as the man she identified as Bunch, i.e., the one with the knife. She described the third man -- allegedly petitioner -- as "shorter" than the other two. At the second Bludson trial, having failed to convince one jury of Bludson's guilt, Campos retreated from her testimony at the previous trial and was vigorously cross-examined on the issue:

Q. Well, how tall was the man with the knife?

A. I can't tell you how tall he was. I know he was the tallest, the thinner and the tallest. He wasn't that tall but he was taller than both of them, than him and the other one.

Q. The second man who got in the car, how tall was he?

A. The second man?

Q. Yes.

A. That's him.

Q. How tall was he?

A. I don't know. I don't know. I can't tell you how tall he was.

Q. Before today you have been asked how tall he was, haven't you?

A. Right.

Q. And haven't you said about 5 10?

A. Yes. I told you that, 5 8, 5 10, I am not sure if he's that height.

Q. And didn't you say that the first man was about 5 11?

A. About that.

Q. And the third man --

[interruption by the Court]

Q. And the third man, you said was about 5 4?

A. The third?

Q. Yes, the third man.

A. The third man. I don't know what I said how tall he was because I told him before and I'm telling you right now I don't know.

Q. Weren't the first and second men about the same size, about 5 10, 5 11?

A. The first man --

[lengthy objection by the State which is overruled by the Court]

Q. Were not the first man with the knife and the second man who got in the car, weren't they about the same height, about 5 10, 5 11?

A. The both of them that got in the car first?

Q. Yes. The two men that got in the car first?

A. No. The other one was a little bit taller than him. Not much but he was the tallest, like I said.

Q. Well, do you recall we had a hearing back on July 17th and you were in a courtroom like this and we had a hearing?

A. Yes.

Q. Do you recall being asked "was he taller or shorter than the man with the knife?" Do you remember being asked that question?

A. Yes.

Q. And do you remember answering "I think the same size."

A. No, I never said that -- I said he was the tallest, the other one maybe I said the same size but I never said he was -- I remember what I said.

Q. And the third man was much shorter than those two, is that right?

A. The third guy?

Q. Yes.

A. Yes.

Q. And do you remember at that hearing you testified when you said how tall he was?

A. Yes.

Q. And I think you said 6 feet?

A. I told you about 6 feet about. I don't know.

Q. And stand up, Mr. Bludson. How tall did you say -- I asked you how tall Mr. Bludson was?

THE COURT: You mean as she views him standing now?

MR. FLORCZAK: Yes.

A. I told you I don't know but I said -- I remember I said about 5 9 , 5 10.

Q. Well, looking at him now, how tall do you think he is?

Q. 5 7. I don't know. I don't know.

These descriptions differ radically from the actual physical attributes of the three men whom Campos accused, both in absolute and comparative terms. Bunch, the supposed "man with the knife," is in fact nearly a foot taller than the alleged second man, Bludson. Moreover, not only are Bludson and Bunch strikingly dissimilar in height; but also, petitioner, far from being the shortest of the three, is between Bunch and Bludson in height. All

this casts serious doubt upon the conclusion that the three man Campos described at Bludson's first trial were the three men selected by her from the "B" sleeve of the Irvington Police Department mug book.

Yet, petitioner's counsel undertook no cross-examination on these prior descriptions. Thus the victim's prior, sworn, inconsistent identification testimony was never presented to or considered by the jury which convicted petitioner. Counsel for Mr. Bludson, on the other hand, had vigorously cross-examined Campos with her previous testimony at the second trial, which resulted in the witness demonstrating uncertainty about her ability to describe her attackers, even to the point of denying her prior sworn testimony.

Petitioner's counsel sought to justify this failure at the post-trial hearing. He had concluded that the discrepancy in height was a "minor one" because "[t]here were a lot of major and substantial discrepancies in her story." State's Exh. R10 at 150-5 to 13. This explanation simply does not wash. Petitioner's counsel had in his hands material for a devastating cross-examination of Campos on the critical issue in the case. Because of his failure to confront her with her prior sworn testimony, the jury did not learn that she had previously described the height of her attackers under oath, that she had previously recanted prior testimony given under oath and that her prior descriptions were very different from her testimony at the Bunch/Berryman trial.

The purpose of defense counsel is "to make the adversarial process work." Strickland v. Washington, 466 U.S. at 690; competent counsel "provide[s] a guiding hand ... that the defendant needs." U.S. v. Cronic, 466 U.S. at 458. Both of these principles are enshrined in cross-examination and both ensure that a trial is fair. Therefore, cross-examination not only protects a defendant's Sixth Amendment right to confront the witnesses against him, but also guarantee that both sides of the story will be presented to the jury. When an attorney fails to cross-examine the State's only witness effectively, the jury's ability to evaluate the testimony is impaired.

The Appellate Division's characterization of Campos' recital as "somewhat contradictory testimony concerning the height of her assailants during the several trials," Appellate Division at 13, seriously understates the situation. During the Bludson trial, presiding Judge Edwin Stern ruled as follows on the State's objection that cross-examination concerning height was irrelevant:

> It is not irrelevant because the description [Campos] could give, and to the description she gave, if any, she relates to the identification and the photos that were shown to her and the relationship between -- or the comparison between the person identified and the description given. I take it that identification is the critical issue in the case, if not the issue in the case, and under the circumstances, what she said and the description she gave is highly relevant and probative.

State's Exh. R15 at 53.

At certain times during the trial, petitioner's counsel's strategy appeared to be to challenge the occurrence of a rape - a dubious strategy in light of what everyone knew the evidence would

be. "Among the factors relevant to deciding whether particular strategic choices are reasonable ... [is] the inconsistency of unpursued and pursued lines of defense, and the potential for prejudice from taking an unpursued line of defense." Strickland v. Washington, 466 U.S. at 681. However, theories available to counsel (no rape occurred and misidentification) are not mutually exclusive. An identification defense (the kind that worked in the Bludson trial) could never have proven "more harmful than helpful." Id. A reasonable jury could have believed that: her story was a fabrication, and therefore she misidentified petitioner and Bunch as assailants; or a jury could find her story as authentic, but that she identified the wrong men.

Judge Ronco found that petitioner's counsel had conducted a rigorous cross-examination. But he cross-examined Campos primarily about inconsistencies regarding an extremely tenuous fabrication defense. He inquired about Campos' Grand Jury testimony where she claimed to have gone to her mother's house immediately after the rape instead of DosSantos. She denied that she said that. Also, he inquired about her police statement where she stated that her stockings had been tied around her face promptly after the first two men forced their way into her car. She denied that she said that.

There is no reasonable explanation why Campos' inconsistent identification testimony was not also pursued. Petitioner's counsel claims that it would have bolstered the issue of an actual rape. But the doctor already bolstered the account of the rape

with her testimony about the vaginal injuries and the gonorrhea which Campos claimed never to have had before.

There is no way in which the failure to confront Campos with her prior inconsistent identification testimony can be justified as sound trial strategy or a reasonable strategic choice. It was an error of law for the state courts to have so held.

C. Opening the Door to the Homicide and Robbery

It will be recalled that petitioner had no criminal record. He had a steady employment history. At trial, he testified that he had never even met the two men accused with him. The only evidence which the state produced to contradict this testimony was Campos' identification testimony.

Yet inexplicably petitioner's counsel conducted his cross-examination of Detective Williams in such a manner as to elicit testimony that co-defendant Bunch was under investigation for bank robbery/homicide. Further, petitioner's counsel called as a defense witness a detective who elaborated upon the robbery/homicide investigation. It would have been bad enough if defense counsel had committed these blunders at the first of petitioner's two trials. However, he repeated the same catastrophic course of action at the second trial, ensuring that the jury would be exposed to this highly prejudicial and totally irrelevant information.

At the first trial, Detective Williams testified about (1) the taking of a statement from the victim concerning the offense; and (2) the circumstances of the selection of the Bunch, Berryman and

Bludson mugshots. Beyond that, Detective Williams did literally nothing other than send letters to the last known address of each of the men identified asking each to come to police headquarters to discuss an allegation that had been made against them. State's Exh. R17 at 132-18 to 23. For the purpose of attacking the police investigation and with no idea where the questions would lead, the detective was cross-examined at the first trial by counsel to both petitioner and Bunch concerning the detective's reasons for not pursuing the investigation further. The following occurred during petitioner's counsel's cross-examination of Detective Williams:

> Q. Is there any reason why you didn't [try to locate the three individuals]?
>
> A. One of the suspects in the matter was being investigated by the sergeant of our bureau relative to other acts and he asked me to lay off it relative to that.
>
> Q. How about the other two suspects?
>
> A. By all three of them being connected you can't lean on two and not lean on the third one.

State's Exh. R17 at 155-11 to 17.

Petitioner's counsel thus brought to the jury's attention the fact that at least one of the three men accused by the victim was the suspect in another investigation. Petitioner's co-counsel asked:

> Q. Now, is it your custom or was it your assignment that when someone comes in charging a crime of this nature or this seriousness: rape, kidnapping, threats, and so forth, that you just sent letters and do nothing else?
>
> A. As stated earlier, I was asked to lay off because my sergeant had one of the guys connected to an investigation he was doing relative to something else which he deemed was more important at that time.

State's Exh. R17 at 185-13 to 21.

As might be expected, on re-direct the prosecutor pursued the issue and inquired of Detective Williams just what it was that was being investigated. The detective responded that Bunch was suspected of involvement in a bank robbery/homicide. State's Exh. R17 at 188-21 to 189-1. This answer led to a courtroom outburst from Bunch followed by a mistrial motion from both defense counsel. The trial court denied the mistrial motions, ruling that counsel had opened the door by asking why there had been so little follow up by the police. State's Exh. R17 at 189-2 to 193-10. On the resumption of re-direct, the prosecutor elicited the following reiteration of why it was that so little follow-up had taken place:

> Because at the time Mr. Bunch here was alleged to have been involved in a bank robbery/homicide which occurred on Mill Road in our town where the bank teller was shot and killed.

Apparently to rebut minor inconsistencies in statements by Campos [State's Exh. R10 at 169-17 to 170-4], petitioner's counsel called the sergeant in question, Michael Tomich, as a defense witness. As a result, Tomich was able to confirm that he had in fact told Detective Williams to "lay off." State's Exh. R18 at 37-16 to 19. The prosecutor, cross-examining this defense witness, was permitted to elicit that the particular robbery/homicide was the subject of a joint investigation by the Irvington Police Department, the Essex County Prosecutor's Office and the Federal Bureau of Investigation. State's Exh. R18 at 65-12 to 15; 66-10 to 13. Tomich testified further that three men were alleged to have committed the murder and that Bunch's brother, Barry, had been charged with and convicted of the crimes. State's Exh. R18 at 67-3

to 18. Tomich offered the following reasons for wanting Bunch "on the street":

> I had informants on the street on this job and the name Bunch came up in that investigation the Saturday evening after the bank holdup and homicide. I had two informants on the street and wanted to give them time to work.

State's Exh. R18 at 67-25 to 68-4.

Defense counsel again moved for a mistrial arguing that the introduction of the evidence (from his own witness) regarding Bunch's suspected involvement in the bank robbery/homicide was prejudicial. The trial court denied the motions and reiterated its view that both defense counsel had opened the door to the introduction of this evidence when they cross-examined Detective Williams in an effort to highlight the supposed failures of the police investigation and implied that the investigation had stalled because Williams had not believed the victim. State's Exh. R19 at 8-13 to 10-23.

It seems clear that counsel could legitimately and safely have developed through Williams the fact that he had gathered no scientific evidence whatsoever to corroborate the identification. Indeed, counsel did this at length. See, e.g. State's Exh. R17 at 143-12 to 144-12. However, counsel miscalculated when they sought to suggest that Detective Williams did not believe Campos as evidenced by the delay in pursuing any further investigation.

Disastrous as the responses to the questions at the first trial were, they might have been considered to have been one of those misadventures which affect even the ablest of trial counsel from time to time. However, in this case, defense counsel were

given a second chance. The first trial ended in a mistrial, and the case was tried a second time.

In the second trial, defense counsel again pursued the same disastrous tactic with the same disastrous result. Thus, when Detective Williams again appeared as a witness, petitioner's counsel again asked why he had done nothing to pursue the investigation once the letter addressed to petitioner had been returned by the post office. State's Exh. R21 at 25-5 to 26-1. Counsel also attempted to elicit on cross-examination that the detective was "skeptical of the circumstances that [the victim] was telling [him]." Although an objection to that question was sustained, defense counsel continued by asking the officer whether he had "any personal attitude as to what [the victim] was telling [him]." State's Exh. R21 at 46-12 to 47-19. Counsel for defendant Bunch also pursued this line, asking specifically whether the detective ever, for example, went out to the address listed for Bunch to see if he really resided there. State's Exh. R21 at 80-15 to 81-2.

Again, the prosecutor argued that defense counsel had opened the door to the reasons the detective had not pursued the investigation. The trial court, in a careful response, agreed, but ruled that the detective could only testify that the reason there had been no further investigation was the existence of another, unspecified, investigation concerning Michael Bunch which was unrelated to the sexual assault charge. The trial court specifically warned the prosecutor and the detective not to bring out the

fact that the other investigation involved a murder. State's Exh. R21 at 99-25 to 101-15. Detective Williams then testified in accordance with the limitations placed on him by the trial judge. State's Exh. R21 at 105-2 to 24.

Oblivious of the protection which the trial court had given them, defense counsel blundered on, pursuing a line of re-cross examination that implied that it was incredible that the detective would "lay off" the investigation because it involved such serious charges as rape, abduction and kidnapping. State's Exh. R21 at 119-9 to 122-19. The prosecutor sought, and received, the court's permission to bring out the entire circumstances since, from the trial court's perspective, the re-cross examination of the detective had been designed to create the impression that it was incredible that the detective would not pursue the investigation in light of the serious crimes at issue. Thus, the trial court permitted the State to introduce into evidence the fact that the other investigation involved even more serious crimes, namely a bank robbery and homicide. State's Exh. R21 at 125-16 to 127-25.

To compound the prejudice which had been created, petitioner's counsel once again called Tomich as a defense witness and elicited from him the following: (1) the investigation of Bunch was still considered open; (2) the investigation had already yielded the successful prosecution of Bunch's brother, but two other suspects remained at large; (3) Bunch had not been charged in the case only because Tomich felt that he did not have enough evidence; and (4) that from Tomich's perspective, Bunch would always be considered "a

prime suspect" in the bank robbery/homicide. State's Exh. R22 at 7-6 to 53-8.

Both petitioner and Bunch asserted on appeal from their convictions that the trial court had erred in admitting this testimony. The Appellate Division rejected this contention, noting that defense counsel's line of questioning invited the prejudicial testimony of which they complained.

> Defendant's main argument on appeal is that the judge erred in admitting evidence that Bunch had been a murder suspect. We disagree. The trial judge admitted the evidence in measured steps. At first he limited the State's witnesses to a general explanation that they delayed arresting defendants because Bunch was a suspect in another investigation. When defense counsel insinuated through further questioning that the investigation of no other crime could have been more important than the present crimes, the judge permitted the witnesses to disclose that the other crime was murder. When defense counsel then insinuated through their questioning that the other investigation was a sham, the judge permitted the witnesses to testify that, as a result of the other investigation, Bunch's brother was indicted for murder.
>
> We reject defendants' argument that this evidence was inadmissible under Evid. R. 55. The evidence was not admitted to prove either defendant was a bad person and therefore had committed the crimes with which he was charged in the present indictment. *The evidence was admitted to counter an inference defense counsel deliberately raised that the police did not arrest defendants sooner because they did not believe the victim's story. By the inferences they sought to raise, defendants themselves widened the scope of relevancy to accommodate the challenged evidence.*

State's Exh. R13 at 113-14 (Emphasis added).

At the post-trial hearing, petitioner's counsel attempted to justify the unjustifiable, but his explanation hardly had the ring of conviction. His explanation of his cross-examination of Detective Williams was that "it was some inadvertence and some

intentional. I can't say it was either/or in that situation." State's Exh. R10 at 170-24 to 25. He later elaborated on this statement.

> A. No, not that the information would come out at this moment because I felt that I really didn't open the door this time.
>
> Do you understand what I am saying? I tried to hedge so the "door" didn't get opened. But once it was open I had to take counter motions to protect Mr. Berryman and that's why he was segregated from Mr. Bunch.
>
> Q. That's exactly what I was trying to get out, you did not intentionally open the door?
>
> A. No, but I played with it, lets put it that way.
>
> Q. You were taking a tremendous risk?
>
> A. Right.

State's Exh. R10 at 174-9 to 22.

The trial court concluded that petitioner's counsel made a tactical decision to open the door to the bank robbery/homicide in order to nullify the good effect the victim had on the jury by showing the lack of a police investigation. The Appellate Division concurred in this judgment.

In the face of the record in this case, that determination cannot be sustained. As petitioner's counsel himself testified this disastrous testimony was the result of "some inadvertence." At the first trial, he could observe the terrible consequences which would result from his line of questioning. At the second trial, the trial judge sought to protect him from a repetition of the errors of the first trial. All to no avail. Petitioner's

counsel proceeded relentlessly to elicit the irrelevant testimony that was so damaging to his client.

Ironically, at the Bludson trial Detective Williams gave a different reason for "laying off" the rape investigation, a reason less sinister than a bank robbery/homicide investigation. He testified as follows:

Q. Did you make an arrest in this case, Detective?

A. No, I did not?

Q. And why didn't you make an arrest?

A. Well, when there's a positive I.D., such as this one, all the matters are forwarded to the Grand Jury for determination on their part.

Q. Did you go to the defendant's house and attempt to arrest him?

A. No, I did not.

Q. Why didn't you do that, Detective Williams?

A. Because I hadn't heard from the Grand Jury.

State's Exh. R15 at 78.

This transcript was readily available to petitioner's counsel, and a cursory reading would have revealed Williams' previous explanation. But even after inviting the highly prejudicial evidence, petitioner's counsel did not seek to impeach William's with his own prior testimony.

However deferentially one may evaluate petitioner's counsel's performance with respect to the Williams-Tomich testimony, it must rank as a striking instance of ineffective assistance of counsel.

D. Failure to Investigate Potential Defense Witness

There were two persons whose testimony might well have assisted petitioner to discredit Campos' all-important identification testimony -- Christina DosSantos and Anthony Bludson.

DosSantos was Campos' girlfriend who was with Campos immediately before and immediately after the rape. In her testimony at the state post-conviction hearing, she contradicted Campos' version of events in several respects. She testified that the two women were alone together and not, as testified by Campos, at a birthday party for Campos attended by some 15 to 20 other people. State's Exh. R11 at 7-12 to 21. She also contradicted Campos' testimony that she had had nothing alcoholic to drink on that night. State's Exh. R11 at 7-5 to 8. DosSantos also said that Campos refused to call the police despite urging by Campos' mother and sister. State's Exh. R11 at 10-23 to 11-2. DosSantos was certain that she had never been interviewed by anyone on behalf of the defense. State's Exh. R11 at 12-8 to 20.

One would have thought that defense counsel would at least have interviewed DosSantos. However, petitioner's counsel testified that his investigation had consisted of unsuccessfully attempting to subpoena DosSantos during the course of the trial. State's Exh. R11 at 121-15 to 20. He had never spoken to her himself, nor had he sent an investigator to locate her. While he had some recollection that there may have been an investigation conducted by previous counsel, the document he recalled was "consistent to the victim's testimony." State's Exh. R11 at 123-11

to 25. Thus, he made his "strategic choice" whether to call DosSantos without having assembled the information necessary to make such a choice. A tactical decision must be preceded by a thorough investigation and consideration of all "plausible options." Strickland v. Washington, 466 U.S. at 690-91.

There was ample information available to petitioner's counsel to suggest that Bludson was an important defense witness. Because of the glaring discrepancies in the physical descriptions given by Campos at the two Bludson trials, Bludson's mere appearance at petitioner's trial was important.

Campos had identified Bludson as one of her assailants. She similarly testified that Bludson was the second man into the car and that he was the same height as the first man, supposedly Bunch. In reality, there is nearly a 12" discrepancy in height between the two men. Bunch, an unusually tall man at 6'4", could not in any manner be confused with Bludson, an unusually short man at 5'5". By producing Bludson in court in connection with the previous testimony, defense counsel would have called into question the entire identification made by the witness and would have supported the "wrong man" theory-of-the-case.

The state court found that defense counsel had attempted to locate Bludson by contacting his criminal trial attorney, who said he did not know where Bludson was. State's Exh. R30 at 42-15 to 20. However, the Bludson trial, which as noted above, resulted in an acquittal, had ended eight months earlier. Bludson's trial counsel had no reason to remain in contact with him and apparently

petitioner's counsel failed to look further for Mr. Bludson. This hardly constitutes the "informed and reasonable strategy" decision, but rather a failure to adequately investigate and prepare for trial. See Lewis v. Mazurkiewicz, 915 F.2d 106, 113 (3d Cir. 1990).

E. Prejudice

The second prong of the Strickland test is that there be "a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland v. Washington, 466 U.S. at 687. Prejudice is found where there is a reasonable probability that the result of the trial would have been different but for the unprofessional errors of counsel. Id. at 687.

If ever there were a case where prejudice in this sense has been established, it is the present case.

It starts with a petitioner with an impeccable background. He had no criminal record and had a history of steady employment. He reported voluntarily to the Irvington Police when he heard that they sought him.

Petitioner testified at his trial. Campos, the rape victim, testified that the third man waited in the supermarket parking lot in a blue car, into which Campos was ordered to enter. Petitioner (allegedly the third man) testified without contradiction that he did not own a car and had never driven a car. He testified that he had never even met the other two accused persons. The only evidence which tied him to the crime was Campos' selection of all

three defendants from the "B" sleeve of the Irvington Police Department's mugshot collection (an interesting alphabetical coincidence) and Campos' in-court identification two years after the event.

The first trial of co-defendant Bludson ended in a hung jury. Bludson was acquitted of all charges at his second trial. Bludson's attorney proceeded on a single theory of mistaken identify and aggressively challenged the identification by confronting Campos with her previous inconsistent identification testimony.

In these circumstances, it is highly probable that but for petitioner's attorney's egregious errors, the verdict as to petitioner would have been "not guilty."

The identification testimony was all important. Petitioner's counsel had readily available the tools to mount a devastating attack on that testimony. He had Campos' contradictory testimony from the two earlier Bludson trials. He could have produced Bludson himself whose mere size alone would have thrown doubt on Campos' identification. Petitioner's counsel failed to avail himself of these important pieces of evidence.

The closing arguments in the trial of the case illustrate the irreparable prejudice which had been caused by defense counsel's opening the door to, and then actively pursuing, the Bunch bank robbery/homicide investigation and by defense counsel's failure to cross-examine Campos on her prior inconsistent identification testimony.

Bunch's attorney alluded to various circumstances which might cast doubt upon Campos' statement that she had been raped. His main thrust was upon the critical issue of identification.

Bunch's case presented several unavoidable problems with which his counsel had to deal. He had a prior criminal record which his attorney sought to minimize; he had fled during the course of the proceedings on the rape indictment, conduct which his counsel sought to explain.

However, the bank robbery/homicide evidence was a subject which Bunch's counsel should not have been required to discuss in closing argument. But there it was. During the trial, Bunch's and petitioner's counsel having opened the subject, Bunch's counsel pursued it on Bunch's direct examination. Bunch was asked by his counsel whether he had ever talked with anyone about the bank robbery/homicide. Bunch denied such a conversation. On rebuttal the prosecutor produced the detective investigating the bank robbery/homicide to show that he had interrogated Bunch about it and that Bunch was lying when he denied discussing the investigation.

In his closing argument Bunch's counsel felt compelled to go into that dangerous area:

> Then we have this other situation and the Judge warned you and told you and charged you that it has nothing to do with the situation we are facing today. The situation where he was investigated for a kidnap, for some other situations, murder and something else.
>
> I asked him on the stand were you, did you talk to anyone? Were you ever asked anything about this before? And he said: No.

> Then he took the stand again. The Prosecutor came with rebuttal testimony that he had been -- he had been interviewed about the situation and I asked him: Why did you say that you weren't? And he said that he was told to keep quiet. It is up to you to weigh it out.

(State's Exh. R22 at 115, 116).

Petitioner's counsel's argument was long and disjointed. It reflected the confusion about the nature of the defense which marked his performance throughout the trial.

At times petitioner's counsel argued that the rape never occurred and that Campos' testimony about the incident was false.

> It is an appalling, demeaning, brutalizing crime for any victim that suffers through it and if that is so and if that is believed by each and every one of you jurors, why was it not believed by Alice Campos?
>
> Why did she wait until March 14 to go into police headquarters? She gives you explanations by saying that she thought that the police headquarters was closed or she thought that she had to go in on a Monday rather than on a weekend to report the crimes. It is absurd. It was an absurd reason why this girl Alice Campos should not have gone to police headquarters sooner.
>
> This was somebody -- there were three people that perpetrated a demeaning, demoralizing crime on her which is appalling to society and she waits until Monday to go to report that crime.

(State's Exh. R22 at 121).

> What do we have to convict these individuals? We have a girl that comes in two days later and says I was raped, which we can't even prove through the Prosecution there was a rape. He is going to get up here, Ladies and Gentlemen, and obviously he is going to show you this diagram that was drawn by the doctor who examined her, a nice diagram.
>
> It shows you her vagina. We don't disagree with it but how do we know she was raped? How do we know she didn't consent to the sexual affair?

(State's Exh. R22 at 127, 128).

> You have got to also look at the demeanor of the witnesses on the witness stand, the doctor who examined her and if you look at her demeanor, she was trying to be protective of this witness Ms. Campos through the way she was answering her questions.
>
> Was she believable? Was she credible? She should be. She is a medical doctor. The only thing is when you start asking her about investigations she is giving you a runaround.

(State's Exh. R22 at 129).

> No rape victim waits two days to go to the hospital after an alleged rape. Then conveniently you hear the detectives from Irvington again say: We have many instances where the rape victim does not come in for a couple of days, a couple of weeks. You heard the doctor tell you the same thing.

(State's Exh. R.22 at 152).

Interspersed between these arguments that the rape never occurred was argument conceding that Campos was not lying about the rape but contending that there was a failure of identification. Petitioner's counsel was handicapped when making this argument because he had not confronted Campos with her prior inconsistent identification testimony.

> Ladies and Gentlemen, she is not lieing. The defense isn't alleging that she is lieing to you. All we are telling you, Ladies and Gentlemen, is she didn't make a credibile identification. What identification did she make? She went into police headquarters and she told Detective Williams: Three black males. That is all she told during the entire course of anything that she told any of the investigators, anybody from the Prosecutor's Office or any of the investigators from the Prosecutor's Office. Never did she give a height. Never did she give a weight. Never did she give a description.

(State's Exh. R22 at 125, 126).

> Did you see anything which is relating to the incident she told you about except her verbal testimony and these two mugshots for which she gave no description at all and then another wierd (sic) situation or an

absurdity of the case that she looks at mugshots for half an hour to 45 minutes, looks throught "A" to "B" and picks out "B". Nobody in "C" through "Z" was involved or probably that she should have looked at.

(State's Exh. R22 at 130).

The catastrophic evidence about the Bunch bank robbery/ homicide investigation presented a major problem for petitioner's counsel. His first gambit was to urge that the evidence was inflammatory and should never have been brought into the case. (A thought which should have occurred to him before the second trial even began).

> Then you have Investigator Tomich now with the Prosecutor's Office who was then a detective saying that my case load was too heavy. You know, I tried but we are involved in this bank robbery homicide which was brought into this case which should have never been brought in this case.
>
> You are told to bring your common sense to this Courtroom from outside and that is what I am going to ask you to do. This was prejudicial. It was inflamatory and it should have never been in this case, Ladies and Gentlemen.
>
> THE COURT: Mr. DePalma, we had motions on that and I ruled on it and I permitted that testimony to go in and the reasons were stated by the court.
>
> I am going to ask the Jury to disregard that comment by you. Members of the Jury, disregard that comment by Mr. DePalma stating that it was prejudicial and never should have been in the case.
>
> We argued on that, Mr. DePalma, and I ruled and I permitted it.

(State's Exh. R22 at 123, 124).

Having been rebuffed by the judge, petitioner's counsel continued to comment upon the bank robbery/homicide investigation and in the process managed to tie his client to Bunch and the

investigation, a link which was totally unsupportable in the record.

> Ladies and Gentlemen, we were told by Investigator Tomich, Detective Williams was told to lay off of this investigation but if you listen to Andrew Winkler who is also a member of the Prosecutor's Office, he interviewed Mr. Bunch on April 7, 1983 and the complaint against Mr. Bunch and Mr. Berryman was signed April 21, 1983.

(State's Exh. R22 at 124).

To compound the prejudice, petitioner's counsel at the end of his rambling summation returned to the subject he knew to be inflammatory and appeared to be defending Bunch on the bank robbery/homicide charges.

> Detective Williams a juvenile detective, the first rape investigation he ever had what did he do? He blew the whole thing. He didn't do one thing which was credible enough to present to you because he was told by his superior Sergeant Tomich to lay off but then we come back to April 7, 1983 where the laying off stopped and all of a sudden Mr. Bunch is in.
>
> You have got to put all of it aside. The Judge is going to give you charges to put those things aside, all that homicide and that murder and that bank robbery is just to affect credibility, to affect credibility. You heard me ask these detectives point blank: Was it a fruitless investigation? Well, Detective Tomich says: I don't consider it to be a fruitless investigation. He is still a suspect. A suspect in what?
>
> They didn't have any evidence to indict him. They didn't have any evidence to bring him to trial and this is the same circumstance as in this case. They didn't have the evidence to indict really and they don't have evidence to convict him.

(State's Exh. R22 at 155, 156).

In his closing argument the prosecutor picked up on all the errors petitioner's counsel had committed and used them to great effect.

The prosecutor noted that petitioner's counsel could not make up his mind whether Campos was raped.

> Now, they are talking about the young woman, whether or not she was raped. I can't understand what they are talking about because in one breath the defense says she was not raped. She is lieing and then in the other breath they are saying this was a horrible thing. She was raped. So what are they talking about when they give you an opening statement and they say as Mr. DePalma said: Well, maybe she is telling the truth. The only issue here is identification.

(State's Exh. R22 at 160).

The prosecutor recognized and told the jury that "[t]he crucial issue in this case is identification" (State's Exh. R22 at 161), something which seems to have escaped defense counsel.

The Prosecutor made good use in his summation of the Bunch bank robbery/homicide investigation.

He dwelt upon Detective Winkler's testimony about the investigation and his testimony that Bunch had lied when he stated that he had never been questioned about the bank robbery/homicide (State's Exh. R22 at 177-179). He emphasized Bunch's four prior convictions when arguing the strength of his credibility as against that of Campos. He noted his flight. Having hammered away at Bunch, the prosecutor plunged the stiletto which petitioner's counsel had handed to him. He linked petitioner to Bunch:

> You ask yourselves. Bunch is guilty and you ask yourselves how could Alice Campos be so right about Bunch and so wrong about Berryman? It is impossible. Both of them are guilty.

(State's Exh. R22 at 180).

Thus knowing the dangers involved, petitioner's counsel opened the door to the extensive irrelevant and prejudicial testimony

about the Bunch bank robbery/homicide investigation. Worse still, through his trial "strategy" and closing argument, he enmeshed petitioner in Bunch's multiple crimes and alleged crimes. Except for the Campos identification testimony, there was no evidence that petitioner had ever so much as heard of Bunch. Yet his counsel's course of action permitted the prosecutor to close to the jury with the rhetorical question: "how could Alice Campos be so right about Bunch and so wrong about Berryman?"

Petitioner's counsel invited and was responsible for the introduction of the devastatingly prejudicial testimony about the investigation of co-defendant Bunch for bank robbery/homicide. That evidence should never have been brought into this case even against Bunch. In multiple ways, both during the presentation of evidence and in the closing argument, petitioner's counsel entangled petitioner in that investigation even though it had nothing to do with petitioner. No jury instruction could insulate petitioner from the prejudice which this evidence occasioned.

It is unlikely that, by itself, the failure to interview DosSantos and call her as a witness would have had a fatal prejudicial effect. This failure, however, illustrates the overall manner in which petitioner's counsel's representation of petitioner was defective. The other two deficiencies, both individually and in combination, were fatal to a fair trial.

Conclusion

For the reasons set forth above, the petition for a writ of habeas corpus will be granted. Respondents will be ordered to release petitioner unless within 180 days he is given a new trial with competent trial counsel.

DICKINSON R. DEBEVOISE, U.S.S.D.J.

DATED: June 29, 1995.