IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARC C. DRAPER	:	CIVIL ACTION
V.	:	
DAVID DIGUGLIELMO, ET AL.	:	NO. 04-5988

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE LINDA K. CARACAPPA, MAGISTRATE JUDGE:

I. INTRODUCTION

This matter is before the Court on the filing of a Petition For Writ of Habeas Corpus by Marc C. Draper ("Petitioner").

COMES NOW, Marc C. Draper pro se pursuant to §2254 of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), praying for relief improperly withheld from him during the Pennsylvania State Court proceedings. Petitioner was denied his Fifth, Sixth, and Fourteenth Amendments' rights under the United States Constitution and seeks relief in this Court from his illegal detention.

II. PROCEDURAL HISTORY

A. History of the State Court Proceedings (Trial and Direct Appeal)

Petitioner was arrested and charged with the June 11, 1984 robbery and murder of Amos Norwood.

After a preliminary hearing, Petitioner was held for trial. Prior to proceeding to trial however, Petitioner testified on behalf of the Commonwealth against his codefendant Terrance Williams, ultimately helping the Commonwealth secure a conviction of First Degree Murder and subsequent death sentence. In exchange for Petitioner's assistance, Petitioner entered into an agreement brokered by his first attorney Kenneth Dixon, the negotiations of which were held at Attorney Dixon's bed-side with Philadelphia Assistant District Attorney Andrea Foulkes, while he was being hospitalized for drug, alcohol, and depression difficulties. The conditions of the plea required Petitioner to plead guilty to Second Degree Murder, Robbery, and Criminal Conspiracy. It was said that Petitioner's testimony, in conjunction with his plea, meant he would receive a life sentence, which according to the terms of the agreement, was the service of 15 years imprisonment followed by eligibility for and release on parole. Petitioner's father was present, party to, and witnessed these negotiations between Kenneth Dixon and Assistant District Attorney Andrea Foulkes, See: Attached Exhibit A - Statement of George Draper.

Trial counsel's continued difficulty with drug and alcohol abuse caused him to miss a number of court appearances necessitating his removal from the case, See: Attached Exhibit B - Docket Entries Philadelphia Court of Common Pleas, Commonwealth v. Marc C. Draper CP#8604-3623-3628. Petitioner's family retained private counsel. New counsel was Thomas McGill, Esquire, though his associate Harry Seay, Esquire assumed primary responsibility for representing Petitioner at the upcoming guilty plea hearing. Both, attorneys Thomas McGill and Harry Seay, were aware of the prior plea negotiations between Kenneth Dixon and Assistant District Attorney Andrea Foulkes and the resulting plea conditions from those negotiations (N.T. 2/21/86 pp. 2, 15, 19). In addition, Petitioner explained to Harry Seay that the agreement required him to testify and plead guilty to charges which meant that a life sentence would be imposed and he serve 15 years in prison and be paroled, See: Attached Exhibit C - Affidavit of Marc C. Draper.

On February 21, 1986, Petitioner entered the plea. Neither trial counsel nor the trial court however, explained to Petitioner, prior to his entering the plea, that a life sentence in Pennsylvania was not a numbered sentence nor carrying with it the possibility of parole.

(First PCRA Filing)

Petitioner did not discover that he was not eligible for parole until 2001 - 15 years after entering the plea. Having been duped and Petitioner coerced into entering a plea he otherwise would not have entered, Petitioner's family immediately hired Barnaby C. Wittels, Esquire to file a petition under the Post Conviction Relief Act challenging the propriety of the guilty plea, and arguing that Petitioner was coerced into pleading guilty. Unfortunately, the PCRA petition charged Kenneth Dixon with ineffective assistance when in fact he did not represent Petitioner at the actual guilty plea hearing. The PCRA Court however, never reached the merits of Petitioner's claims, dismissing the PCRA petition as untimely filed. Petitioner filed a timely appeal to the Superior Court of Pennsylvania under NO. 2062 EDA 2001. On August 2, 2002, a panel of the Superior Court affirmed the order of the PCRA court denying relief.

(Second PCRA Filing)

Petitioner filed a second petition under the Post Conviction Relief Act alleging therein that Harry Seay, Esquire was ineffective for failing to explain the consequences of the plea prior to allowing Petitioner to enter the plea. Petitioner further argued that this violation denied him the right to counsel, amounting to a fundamental miscarriage of justice, requiring that the petition be heard despite the timeliness of its filing. Petitioner also argued that Attorney Wittels, was ineffective in the first PCRA filing for failing to raise this issue. Over objection, the PCRA court dismissed the 2nd PCRA petition as untimely filed.

Petitioner filed a timely appeal to the Superior Court of Pennsylvania under NO. 661 EDA 2004. On November 23, 2004, a panel of the Superior Court affirmed the order denying PCRA relief.

B. History of the Habeas Proceedings

Petitioner filed this pro se habeas petition - his first - which was executed on or about December 17, 2004, sent by mail, and docketed in this Court at Civil Action NO. 04-CV-5998.

The case was referred to the Honorable Linda K. Caracappa, United States Magistrate Judge for Report and Recommendation. Petitioner sought and received leave of the Court to file a Memorandum of Law in Support of his babeas petition. That memorandum (the instant filing) is due in this Court on or before March 31, 2005.

III. EVIDENCE AT TRIAL

A. General Background of the Case

The Commonwealth opined that Petitioner was guilty of having involvement in the robbery and murder of Amos Norwood.

B. Evidence Connecting Petitioner to the Crime

The Commonwealth relied solely on Petitioner's admission to involvement in the crime to convict him. As discussed below however, Petitioner is actually innocent of having involvement in the crime.

C. Evidence Tending to Exonerate Petitioner

Petitioner is actually innocent. When this crime occurred, Petitioner himself was a Freshman in college with a bright future ahead of him. When he was arrested because of his association with his codefendant, - a measure used by the Commonwealth to gain leverage over Petitioner so that they could force him to testify against him - his alcohol and substance abusing attorney began plea negotiations with the Commonwealth. The plea offer was not arranged for Petitioner's benefit. Instead, it functioned as a way to minmize the work counsel would have to do to zealously defend Petitioner. To make matters worse, counsel, consumed by his addictions, had to be removed from the case. Thereafter, Petitioner's new attorney failed him likewise by his marching Petitioner to the bar of the Court and allowing him to plead guilty to certain charges without him ever once explaining to Petitioner the consequences of his plea. Petitioner is innocent and his admission and plea were the result of coercion and egregious ineffective assistance.

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IV. STANDARDS FOR DECISION UNDER THE AEDPA

The writ of habeas corpus is available to a state prisoner who "is in custody in violation of the Constitution or laws or treaties of the United States." So long as the remedies available in the state courts have been exhausted, 28 U.S.C. §2254 (b)-(c), relief may be granted where the state court's decision on the constitutional claim presented "was contrary to, or involved in, an unreasonable application of clearly established Federal law, as determined by the United States Supreme Court," 28 U.S.C. (d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings," 28 U.S.C. §2254 (d)(2).

Writing for the Court in Williams V. Taylor 529 U.S. 362 (2000), Justice Sandra Day O'Connor explained the meaning of §2254 (d)(1) as follows:

> Under the "contrary to clause," a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by the Court on a question of law, or if the state decided a case differently than this court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the the correct governing legal principle from this court's decisions but unreasonably applies that principle to the facts of the prisoners case, 529 U.S. at 412-413.

The "unreasonable application" clause encompasses either unreasonably applying the facts of the case to the correct governing legal rule, or unreasonably extending or failing to extend a legal principle from Supreme Court precedent, Moore V. Morton, 255 F.3d 95, 104, (3rd Cir. 2001). See also: Matteo V. Superintendent SCI-Albion, 171 F.3d 877 (3rd Cir. 1999), Cert denied, 528 U.S. 824 (1999).

In addition to the "contrary to" and "unreasonable application" clauses of 28 U.S.C. (d)(2), moreover, - 28 U.S.C. §2254(d)(2) permits relief to be granted where the state court's findings themselves are objectively unreasonable given the record before.

Respondent claims that the instant habeas petition is time barred and must be dismissed because it violates 28 U.S.C. §2244(d)(1)'s strict one-year time limit. Petitioner contends that Respondent is wrong. First, under 28 U.S.C. §2244(d)(1)(D) the one year limitation period for filing the habeas petition started running from the date on which the factual predicate of claim Petitioner is presenting could have been discovered through the exercise of due diligence. As discussed further herein, the basis for relief in the case involves claim that the Commonwealth fraudulently obtained a guilty plea from Petitioner by promising him that he would be paroled in 15 years if he testified on their behalf. The year of that false promise was 1986.

Petitioner did not discover the facts which support the basis for this claim until 2001. Upon his discovery, he immediately filed for relief in the state courts as required by 28 U.S.C. 2254(a)(A), giving them (state courts) the opportunity to correct the violation. This exhaustion was absolutely necessary. Petitioner litigated his action in the state appellate court and has just recently (November 23, 2004) completed a full round of appeals. The time during which Petitioner's litigation was pending warrants statutory tolling under 28 U.S.C. 2244(D)(2). The case, in its present posture before this Court, ripe for review. It is important to note that upon receiving the last order from the state court, Petitioner filed for habeas relief within weeks of the denial of relief. Thus, Petitioner has acted at all times with due diligence.

Second, your Petitioner is actually innocent of the offenses for which he is currently being detained, Dretke V. Haley, 124 S.Ct. 1847, 1849 (Recognizing the narrow exception for hearing petitions when the applicant is actually innocent of the offenses for which he is being detained).

Finally, the Third Circuit Court Appeals held in Villot V. Varner, 373 F.2d 327 (3rd Cir. 2004) "...a §2254 petitioner who claims that his counsel's ineffective assistance caused him to enter an involuntary or unknowing plea may obtain collateral relief regardless of whether he asserts or proves his innocence" Id at. 333.

V. STANDARDS FOR CLAIMS INVOLVING INEFFECTIVE ASSISTANCE OF COUNSEL

In evaluating whether counsel has been ineffective, the Court must first determine whether counsel's performance "was so deficient that it fell below an objective standard of reasonableness under prevailing professional norms," Buel V. Vaughn, 166 F.3d 163, 169 (3rd Cir. 1999), citing Strickland V. Washington, 466 U.S. 667 (1984).

In Strickland the Supreme Court explained:

> A convicted defendant's claims of ineffective assistance must identify the acts or omissions of counsel that are alleged to have been the result of reasonable professional judgement. The Court must then determine whether in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance..., Id at. 466 U.S. 690.

Secondly, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution," Strickland 466 U.S. 692. In other words, "the defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result would have been different."

A reasonable probability is a probability sufficient to undermine confidence in the outcome, Strickland 104 S.Ct. at 2053, Buel V. Vaughn, supra, 166 F.3d 169.

ARGUMENT

PETITIONER'S CONVICTION AND SENTENCE WERE OBTAINED IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS' RIGHTS TO DUE PROCESS, EFFECTIVE ASSISTANCE OF COUNSEL, AND EQUAL PROTECTION WHERE PETITIONER IS ACTUALLY INNOCENT OF THE CHARGES FOR WHICH HE IS BEING ILLEGALLY DETAINED AND TRIAL COUNSEL: (A) COERCED PETITIONER INTO PLEADING GUILTY TO SECOND DEGREE MURDER; (B) FAILED TO CONDUCT ANY PRETRIAL INVESTIGATION; AND (C) FAILED TO EXPLAIN THE CONSEQUENCES OF ENTERING THE PLEA BEFORE COERCING HIM INTO ENTERING IT.

A. COUNSEL COERCED PETITIONER INTO PLEADING GUILTY TO SECOND DEGREE MURDER, ROBBERY, AND CRIMINAL CONSPIRACY

In Myers V. Gillis, 142 F.3d 664 (3rd Cir. 1999), the Third Circuit Court of Appeals said that it was improper for defense counsel to tell the defendant that he would be eligible for parole in a case where conviction of the charges carried a life sentence.

Instantly, Petitioner's first attorney - Kenneth Dixon, Esq. - negotiated a plea agreement with the Commonwealth, the terms of which required Petitioner to testify on behalf of the Commonwealth against his codefendant and thereater, plead guilty to Second Degree Murder, Robbery, and Criminal Conspiracy.

In exchange for his cooperation and subsequent plea, Petitioner would receive a life sentence - which was communicated to both Petitioner and his family as serving 15 years followed by eligibility for and release on parole.

Petitioner's father - George Draper - was witness to part of the negotiation process when he visited Kenneth Dixon at the hospital during his hospitalization for alcohol and substance abuse, as well as depression. There, with counsel was Assistant District Attorney Andera Foulkes (hereinafter "ADA Foulkes"), discussing the particulars of Petitioner's upcoming plea, including the idea that Petitioner would enter the plea, serve 15 years, and be eligible for and released on parole. To give these negotiations the appearance of credibility, ADA Foulkes even agreed that she would write a letter to the Pennsylvania Board of Probation and Parole on Petitioner's behalf when he went up for parole. That letter, attached here as **Exhibit D**, even uses language that would give the impression that Petitioner was in fact eligible for parole. The letter specifically says "...Therefore, it is proper for you to consider the cooperation of this inmate when determining his eligibility for parole or commutation at some future date." With these inticements, Petitioner was lured and coerced into the trap of sacrificing his right to trial. The coercion here is subtle but does exist.

The conduct of counsel and ADA Foulkes, specifically her promise of the letter in support of Petitioner being paroled, knowing that in Pennsylvania conviction on the charge of Second Degree Murder carries a mandatory penalty of **LIFE WITHOUT THE POSSIBILITY OF PAROLE**, 42 Pa.C.S.A §§2502(b), 9715, was improper and done in bad faith.

Under these circumstances, there is no way that Petitioner can be said to have made a knowing and intelligent waiver of his right to proceed to trial.

The lure in **Myers V. Gillis, supra** is far worse here. Accordingly, a new trial should be awarded, or in the alternative, an evidentiary held to determine why counsel and the Commonwealth worked in collusion to deprive Petitioner his Constitutionally protected right to proceed to trial.

B. COUNSEL FAILED TO CONDUCT ANY PRETRIAL INVESTIGATION

As discussed above, Attorney Dixon had been hospitalized for alcohol and substance abuse. Unfortunately, prior to the guilty plea hearing, his continued struggle with substance abuse caused him to miss a number of critical court hearings necessistating his removal from the case. As evidenced by the docket entries from the Philadelphia Clerk of Quarter Sessions file, attached here as **Exhibit B**, counsel was routinely unreachable by the Court. One can imagine that if the judge cannot reach you, surely others cannot either. And Petitioner could not. Nor could his family. Counsel did not interview any witnesses - not even Petitioner. Counsel did not seek to formulate any type of defense or trial strategy. Instead, as argued above, counsel's only action was to try and rid himself of the responsibility and work necessary to defend Petitioner. He accomplished that by coercing him into pleading guilty. Although Petitioner was not required to put on any defense at all, viable defenses did exist. For example, Petitioner was a Freshman in college with absolutely no criminal record. Attorney Dixon could have offered character testimony on his behalf. In Pennsylvania, character testimony itself is enough to establish reasonable doubt.

Many years ago the United States Supreme Court said in Johnson V. Zerbst, 58 S.Ct. 1018 (1938) that a lawyer must be his client's zealous advocate. Obviously, if counsel is always in a poor state of health, he cannot be a zealous advocate.

Moreover, Attorney Dixon's health problems here, were not of the normal kind. He as not suffering from the wide range of health problems that are common in our society. His were of a more profound nature: alcohol and substance coupled with and/or fueled by depression. There is no way that his failure can be said to have had some strategic aim designed to effectuate Petitioner's interests. Nor were his inactions harmless. They were in fact prejudicial within the meaning of Strickland, since but for counsel's failure to prepare for trial, there is a reasonable probability that the outcome here would have been different.

Accordingly, a new trial is warranted. Or, in the alternative, an evidentiary hearing should be held to determine why counsel failed to conduct any pretrial investigation.

C. COUNSEL FAILED TO EXPLAIN TO PETITIONER THE CONSEQUENCES OF ENTERING THE PLEA BEFORE COERCING HIM INTO ENTERING IT.

Because Attorney Dixon had to be removed from the case, Petitioner's family was forced to secure new counsel. The family hired Thomas McGill, Esquire to represent Petitioner at the guilty plea hearing; however, his associate, Harry Seay, Esquire, assumed primary responsibility of the case. Both Attorneys McGill and Seay were made aware of the prior negotiations between Attorney Dixon and ADA Foulkes, as well as the specific conditions of the plea, (N.T. 2/21/86 pp.2, 15, 19). In fact, Petitioner personally made Attorney Seay aware of the specified conditions of the plea. In particular, Petitioner explained that he was required to testify for the Commonwealth, and plead guilty to Second Degree Murder and other offenses. In exchange, Petitioner would receive a life sentence, which was 15 years followed by release on parole. Despite these conditions clashing with existing law in Pennsylvania regarding mandatory penalties, neither Attorneys McGill nor Seay ever addressed the improper representations of Attorney Dixon concerning Petitioner receiving 15 years for his plea. Nor did either attorney correct Petitioner's mistaken impression that a life sentence had parole eligibility after some period of time. Most importantly, Attorney Seay did not, at any time, explain the full consequences of Petitioner's plea <u>before</u> allowing him to enter it. That is, that his plea would result in his receiving a sentence of LIFE <u>without the possibility of parole</u>.

With parole eligibility not being an available option for a person convicted of Second Degree Murder, either through plea or trial, failure by Attorney Seay to explain the consequences of Petitioner's plea, prior to his entering it, was ineffective assistance of the most blantant kind.

Courts in this and other circuits have held that failure to communicate an offer and/or failure by counsel to advise a defendant of the possible consequences of accepting or rejecting an offer is ineffective assitance, United States V. Rodriquez, 929 F.2d 747 (1st Cir. 1991) (Failure by defense counsel to inform a defendant of a plea offer can constitute ineffective assitance of counsel on grounds of incompetence alone); United States ex rel Caruso V. Zelinsky, 515 F.Supp. 676 (1981) affirmed, 689 F.2d 435 (3rd Cir. 1982) (Failure to inform the client of the offer, rejecting the offer without informing the client, or failing to inform the client of the possible consequences of accepting or rejecting an offer all amount to ineffective assistance); Beckman V. Wainwright, 639 F.2d 262 (5th Cir. 1991) (Where the issue is whether to advise the client to plead or not, the attorney has the duty to advise the client of the available options and possible consequences, and failure to do so constitutes ineffective assistance of counsel).

Although Attorney Seay did not participate in the initial plea negotiations, he still had the responsibility of ensuring Petitioner was fully aware of the possible consequences of his plea.

What is perhaps worse about the ineffective assistance here is the fact of Petitioner's telling counsel what the terms of the plea were. Clearly when Petitioner explained the terms of the plea as he understood them, counsel could and should have corrected him then - before allowing him to plead. Instead, counsel remained silent. He did not protect Petitioner from advice that was illegitimate and legally unsound. Had Petitioner known that pleading guilty to Second Degree Murder meant receiving a sentence of natural LIFE without the possibility of parole, he never would have plead guilty and would have exercised his right to a jury trial. This is not a case where a person receives a harsher sentence than what was anticipated and thereafter has second thoughts. Here, the sole reasoning behind acceptance of the plea was the idea that Petitioner would be released on parole after serving 15 years. To Petitoner's severe prejudice, Attorney Seay did not explain to him that being released on parole was impossible under the present circumstances.

All prior counsel here were ineffective amounting to a constructive denial of counsel at a particularly critical stage. The above violations here establish a bona fide miscarriage of justice, since it is absolutely impossible for a proceeding to be fundamentally fair without the effective assistance of counsel at a point when both State and Federal Constitutions guarantee such protection.

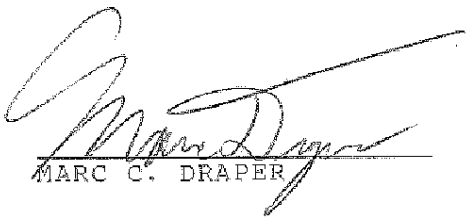
It is important to note here that the trial court is equally culpable in this attack on Petitioner's rights. The Court should have informed Petitioner that a LIFE sentence meant natural LIFE without the possibility of parole. No where in the Court's extensive and lengthy colloquy does it ever explain this basic fact. Under Pennsylvania Law, a trial court's failure to fully colloquize a defendant concerning the possible range of sentences to which he is pleading guilty amounts to manifest injustice, since no civilized society could accept a guilty plea following a defective colloquy, Comonwealth V. Persinger, 532 Pa. 317, 615 A.2d 1305 (1992).

Thus, under the above authorities, Petitioner is entitled to a new trial, or in the alternative, an evidentiary hearing to determine why counsel failed to advise him that the his plea and subsequent sentence had the attending consequence of his never being paroled - ever.

CONCLUSION

For the reasons cited herein, Petitioner humbly requests this Court to grant habeas relief.

March 25, 2005



MARC C. DRAPER

EXHIBIT - A: AFFIDAVIT OF GEORGE DRAPER

IN THE COMMONWEALTH OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : CP NO. 8406-3623-3628

v. :

MARC C. DRAPER :

AFFIDAVIT OF GEORGE DRAPER

I, GEORGE DRAPER, being duly sworn according to law, hereby depose and state the following to the best of my knowledge, information, and belief:

1. That I was born on January 18, 1933.

2. That I reside at 4 Wissahickon Lane, Philadelphia, Pennsylvania.

3. That Marc's attorney, Kenneth Dixon, Esq., was hospitalized for substance abuse and depression.

4. That I visited Kenneth Dixon at the hospital during one of his stays.

5. That while there, on at least one occasion also visiting Kenneth Dixon was Assistant District Attorney Andrea Foulkes.

6. That I was party and witness to discussions about Marc's case during the visit with Kenneth Dixon and Assistant District Attorney Andrea Foulkes.

7. That both Kenneth Dixon and Assistant District Attorney Andrea Foulkes explained that Marc would plead guilty to 2nd Degree Murder and be paroled after serving 15 years.

8. That I had to retain private counsel for Marc's guilty plea hearing. That new counsel was Thomas McGill.

9. That Thomas McGill's associate Harry Seay took over the case.

10. That I informed both Thomas McGill and Harry Seay about the plea arrangement set up by Kenneth Dixon. That I informed them about the specific terms of the agreement.

11. That at no time did Thomas McGill or Harry Seay tell me that Marc would not be eligible for parole based on the charge he was pleading guilty to.

GEORGE DRAPER

10/17/03

Notarial Seal
Christopher Merton, Notary Public
City Of Philadelphia, Philadelphia County
My Commission Expires Oct 26, 2005

EXHIBIT - B: DOCKET ENTRIES/COMMONWEALTH V. DRAPER

1	DATE	TYPE	COURTRO.	COURT STENO.	2 DATE	TYP.	COURTROOM	COURT STE
	9-19-85	Status	432	V. Yates	SEP. 26 1985		602	M Conte
COURT CLERK	JUDGE	ADA	COUNSEL	COURT CLERK	JUDGE	ADA	COUNSEL	
L. Bradford	Donnelly	A. Foulkes	K. Dixon	L Johnson	Savitt	A Foulkes		
CONTIN. CODE	CONT. TO JUDGE	CONT. TO ROOM	ON (Date)	CONTIN. CODE	CONT. TO JUDGE	CONT. TO ROOM	ON (Date)	
		602	9-30-85			602	9-30	
DEFENSE		PROSECUTION		DEFENSE		PROSECUTION		
☐ Ready	☑ Not Ready	☑ Ready	☐ Not Ready	☐ Ready	☐ Not Ready	☐ Ready	☐ Not Ready	

Defense attorney (Kenneth Dixon) Did not appear.

Cannot be located - moved from his previous location and left no forwarding address) or phone nos.
C 9-30-85 - Rm 602 - LPD. -
By the Court
CUSTODY - 84-10805-HSBC -

Defense Attorney (Kenneth Dixon) failed to appear.

Continued 9-30-85, Rm. for Status.
By the Court

	DATE	TYPE	COURTROOM	COURT STENO.	DATE	TYPE	COURTROOM	COURT STEN
	SEP. 30 1985		602	M. Canterino	1-30-86	Status/Hrg.	602	M. Conte
COURT CLERK	JUDGE	ADA	COUNSEL	COURT CLERK	JUDGE	ADA	COUNSEL	
L Dumas	Savitt	Foulkes	Thomas McGill	R Jordan	R. Savitt	A. Foulkes	H. Cha	
CONTIN. CODE	CONT. TO JUDGE	CONT. TO ROOM	ON (Date)	CONTIN. CODE	CONT. TO JUDGE	CONT. TO ROOM	ON (Date)	
					R. Savitt	602	2-19-	
DEFENSE		PROSECUTION		DEFENSE		PROSECUTION		
☐ Ready	☐ Not Ready	☐ Ready	☐ Not Ready	☐ Ready	☑ Not Ready	☐ Ready	☐ Not Ready	

Attorney Thomas McGill, just retained.
Case to be postponed until the conclusion of Co-Def's (Terrance Williams) Case.
Rule 1100 extended to January 30, 1986.

By the Court

Defense attorney unavailable for 2nd. trial Deposition today. Rule 1100 waived until 3-3-86.

By the Court

COMMONWEALTH VS.

RULE 1100 EXPIRATION DATE

INFORMATION NO.

RECORD CONTROL NO.

NAME, A/K/A, ADDRESS, ZIP CODE

Marc Draper

YEAR, TERM & NO.
84 Indict

POLICE PHOTO NO.
62928

THIS CASE INVOLVES NOS.
3423 TO 3428

6-288 (Rev. 8/76)

1

EXHIBIT - C: AFFIDAVIT OF MARC C. DRAPER

IN THE COMMONWEALTH OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : CP NO. 8406-3623-3628

v. :

MARC C. DRAPER :

AFFIDAVIT OF MARC C. DRAPER

I, MARC C. DRAPER, being duly sworn according to law, hereby depose and state the following to the best of knowledge, information, and belief:

1. That on February 21, 1986, I pled guilty to Second Degree Murder, Robbery, and Criminal Conspiracy.

2. That prior to pleading guilty, my attorney, Kenneth Dixon, Esq., told my family and myself that my guilty plea to Second Degree Murder meant that I would receive a LIFE sentence, only serving fifteen (15) years, at which time I would be eligible for and released on parole.

3. That Kenneth Dixon, Esq. failed to appear at a number of pre-trial hearings and could not be located by myself or the Court.

4. That my family secured private counsel to represent me at the guilty plea hearing. New counsel was Thomas McGill, Esq.

5. That Thomas McGill's associate Harry Seay, Esq. assumed primary responsibility for representing and handling my case.

6. That Harry Seay, Esq. was aware of the negotiated plea to Second Degree Murder, and also knew that I was told by Kenneth Dixon, Esq. that the LIFE sentence meant the service of fifteen (15) years and release on parole.

7. That counsel, Harry Seay, Esq., never, at any time prior to, during, or after my guilty plea, inform me that a LIFE sentence did not mean the service of fifteen (15) years, or that there is no parole eligibility for persons sentenced to LIFE.

8. That the Court never explained in its colloquy that a LIFE sentence meant actually serving Life without the possibility of parole.

9. That the Court's failure to explain that a LIFE sentence does not have parole eligibility in its colloquy aided in my mistaken impression that a LIFE sentence – as represented by Kenneth Dixon, Esq. – was the service of fifteen (15) years at which time I would be eligible for and released on parole.

10. That Assistant District Attorney Andrea Foulkes's representation and promise to provide a letter in support of my release once eligible for parole aided in my mistaken impression that a LIFE sentence meant serving fifteen (15) years and being released on parole.

11. That but for Kenneth Dixon's improper and inaccurate advice relating to LIFE sentences having parole eligibility, I would not have pled guilty.

12. That had Thomas McGill and Harry Seay explained to me the full consequences of my plea, i.e. that I would not be eligible for parole and released from custody after serving fifteen (15) years, I would not have pled guilty.

13. That had the Court explained in its colloquy that a LIFE sentence meant Life without the possibility of parole, I would not have pled guilty.

14. That had Assistant District Attorney Foulkes not represented that she would send a letter in support of my release when I became eligible for parole, I would not have pled guilty.

15. That PCRA counsel Barnaby C. Wittels, Esq. was aware of the above facts but failed to present this claim to the Court.

MARC C. DRAPER

Sworn and Subscribed To Me
This 9th day of Oct, 2003

NOTARIAL SEAL
WILLIAM D. CONRAD, Notary Public
Skippack Twp., Montgomery County
My Commission Expires 5/26/2007

EXHIBIT - D: LETTER TO PENNSYLVANIA BOARD OF PROBATON AND PAROLE FROM ASSISTANT DISTRICT ATTORNEY ANDREA G. FOULKES

DISTRICT ATTORNEY'S OFFICE
1421 ARCH STREET
PHILADELPHIA, PENNSYLVANIA 19102

RONALD D. CASTILLE
DISTRICT ATTORNEY

June 23, 1988

Pa. Board of Probation and Parole
P.O. Box 1661
3010 N. Front Street
Harrisburg, Pennsylvania 17120

Re: Inmate Marc Draper

To Whom It May Concern:

At the request of the family of the above-named inmate, I am submitting the following information to them with instructions to forward it to you if and when this prisoner becomes eligible for parole or commutation of sentence.

Marc Draper was the co-defendant of Terrance Williams and, with Williams, conspired and acted to abduct, rob and beat to death 56 year old Amos Norwood, inside the Ivy Hill cemetery in the Mt. Airy section of Philadelphia. After tying the victim with his own clothes and beating him with car tools, the co-defendants took his money, credit cards and car, obtained more money and jewelry with the stolen goods in Atlantic City and Philadelphia. Their spree was ended when credit card calls were traced by police to a third man who assisted the killers in obtaining these credit card benefits.

Mr. Draper was arrested in his home and Williams fled the jurisdiction upon issuance of warrants. On the day of his arrest, Mr. Draper completely and thoroughly confessed his participation in this hideous crime without any promises or benefits offered to him. In addition, he volunteered additional information about his co-defendant's ~~responsibility~~ for the murder of 53 year old Herbert Hamilton in West Philadelphia six months earlier, which led to the arrest of Williams on that previously unsolved case. Draper offered to cooperate fully with the investigations and to testify truthfully in the prosecution of Williams in both homicide cases, resulting in Williams' conviction in the earlier killing of murder in the third degree (William's defense was that the killing was provoked by homosexual advances of the victim), and a verdict of murder in the first degree with the penalty of

RR-34

Re: Inmate Marc Draper

death by the jury in the Norwood case. In addition, Draper agreed to plead guilty to murder in the second degree, knowing that it brought a mandatory life sentence, without any promise of leniency or early release.

Although the heinous nature of the underlying crime cannot be minimized in any way, Mr. Draper has attempted to compensate significantly for his role in this matter. While it is true that he has benefitted by avoiding the death penalty for himself, I was well aware that during the pendency of prosecutions against Williams, Mr. Draper was visited regularly in Holmesburg prison by Williams himself, at the gates of Draper's protective custody area, and by friends of Williams inside Draper's cell. Thus, Mr. Draper's security in prison was never certain, yet he continued without complaint in his cooperation with authorities to see that justice was served in all matters in which he had information or connection.

I never had any reason to doubt Mr. Draper's veracity and he never declined to answer the most difficult questions about his own culpability. Williams sent Mr. Draper letters in prison with alternative stories to feed the authorities and the court about their criminal activities. Mr. Draper passed that correspondence on to his father, a Philadelphia police officer, with instructions to give them to the prosecutor in preparation for trial. Those letters, in addition to his oral testimony, established a compelling case against Williams who had a frightening history for violent crimes.

Therefore, it is proper for you to consider the cooperation of this inmate when determining his eligibility for parole or commutation at some future date. That I provide you with the particulars of Mr. Draper's cooperation was the only benefit or promise conveyed to him in exchange for his complete truthful cooperation. I hope this information will be useful in your evaluations.

Yours very truly,

Andrea G. Foulkes

ANDREA G. FOULKES
Assistant District Attorney
Homicide Unit

/mp

bcc: Mr. George Draper

RR-35

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARC C. DRAPER	:	CIVIL ACTION
V.	:	
DAVID DIGUGLIELMO	:	NO. 04-5988

CERTIFICATE OF SERVICE

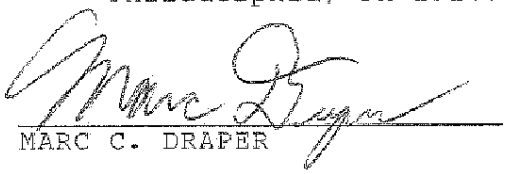
I hereby certify that I am on this 28th day of March 2005 serving a copy of the foregoing document upon the parties listed below in the manner indicated.

I also certify that this document was given to prison officials March 28, 2005 for forwarding to the Clerk of the District Court. I certify under the penalty of perjury that the foregoing is true and correct, 28 U.S.C. §1746

Service by U.S. mail addressed as follows

(1) Susan A. Affronti, ADA
Office of the District Attorney
1421 Arch Street
Philadelphia, PA 19107

(2) Thomas W. Dolgenos, Chief Federal Litigation
Office of the District Attorney
1421 Arch Street
Philadelphia, PA 19107



MARC C. DRAPER