No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BEN VARNER, SUPERINTENDENT OF SCI SMITHFIELD; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,
Petitioners

v.

CLAYTON THOMAS

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

RONALD EISENBERG
Deputy District Attorney
(Counsel of Record)
THOMAS W. DOLGENOS
Chief, Federal Litigation
HELEN KANE
Assistant District Attorney
JOSHUA S. GOLDWERT
Assistant District Attorney
ARNOLD GORDON
First Asst. District Attorney
LYNNE ABRAHAM
District Attorney

Philadelphia District
Attorney's Office
Three South Penn Square
Philadelphia, PA 19107
(215) 686-5700

QUESTIONS PRESENTED

1. Where counsel's action at trial is objectively reasonable, may the conviction nonetheless be reversed on the ground that counsel's subjective thought process is found deficient?

(Answered in the affirmative by the United States Court of Appeals for the Third Circuit, in conflict with other circuits.)

2. Where a state court has clearly adjudicated the merits of an ineffective assistance of counsel claim, may a federal court avoid AEDPA deference and invoke de novo review as to any aspect of the claim that, in the federal court's view, has not adequately been addressed in the state court's legal analysis?

(Answered in the affirmative by the Untied States Court of Appeals for the Third Circuit.)

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ORDERS AND OPINIONS BELOW

The United States Court of Appeals for the Third Circuit affirmed the district court order granting a writ of habeas corpus. The court of appeals opinion was issued on November 4, 2005, and amended January 18, 2006. The opinion is reported at 428 F.3d 491 (3d Cir. 2005), and is reprinted in the Appendix at App. 6-26.

The June 1, 2004, memorandum and order of the federal district court is reprinted in the Appendix at App. 27-41. The September 29, 2003, report and recommendation of the United States magistrate judge is reprinted in the Appendix at App. 42-72. The June 11, 2003 memorandum and order of the magistrate judge, granting an evidentiary hearing, is reprinted in the Appendix at App. 73-109.

The memorandum opinion of the Pennsylvania Superior Court, affirming the denial of state post-conviction relief, was issued on December 12, 2001. The opinion is reprinted in the Appendix at App. 110-41.

STATEMENT OF JURISDICTION

This is a federal habeas corpus proceeding brought by a criminal defendant convicted of murder in state court. Petitioners seek review of the order of the United States Court of Appeals of the Third Circuit upholding the order of the district court, which granted the writ and ordered the defendant retried or released. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution, which provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

28 U.S.C. § 2254(d), which provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

STATEMENT OF THE CASE

Respondent, Clayton Thomas, entered the home of a 67-year-old man in order to rob him. When the victim tried to resist, Thomas shot him. When an eyewitness tried to flee, Thomas asked if he "wanted some too," and then shot him as well. While the first victim lay dying, Thomas went through his pockets, and then left.

Harry James, the elderly victim, ran an informal tavern, selling beer and snacks out of his house. Neighbors came by to drink and talk; children were given candy and chips. On the night of the crime, December 9, 1992, Clayton Thomas determined to rob the place. He tried to enlist the assistance of Christopher Young, a friend of his son, but Christopher – who lived on Harry's block and was a regular visitor at the house – refused. N.T. 5/25/94, 110-13, 176-78.

Later that evening, Christopher stopped by Harry's house to get some beer. Another neighbor was also there, playing chess with Harry at the table. Then Thomas showed up, with his son. While the son stayed in the vestibule, Thomas entered the living room, pulled out a gun, and ordered everyone to lie down. Harry wouldn't go along. He grabbed for Thomas. The gunman shot him in the chest. N.T. 5/25/94, 113-21, 178-80.

Meanwhile the chess player – Peter Fuller – tried to escape out the back of the house. Thomas taunted him and took aim. Fuller ducked, but the bullet hit him in the shoulder. He was not injured as seriously as Harry, who was trying to breathe as blood spurted from his chest wound. Before leaving, Thomas bent down to rifle through Harry's pockets. N.T. 5/25/94, 121-27, 180.

Although the murder occurred directly in front of two eyewitnesses, Christopher Young and Peter Fuller, both were initially reluctant to make identifications to authorities. Christopher Young at first denied knowing the murderer at all. Some weeks later, acknowledging that the matter had been bothering him, Christopher told police what he knew, leading to the arrest of Thomas and his son. At the

preliminary hearing, though, in front of the defendants and their supporters, Christopher backed off important details, and claimed that he had given the statement because police had threatened to arrest him for the murder if he did not tell them something. N.T. 3/25/93, 54-64, 69-86.

Peter Fuller gave a description of the shooter but no name. The description turned out to match Thomas, down to the telltale pockmarked skin on his face. But later, when he viewed photos of Thomas and the son, Fuller would provide only a tentative identification. Then, at the preliminary hearing, Fuller maintained that he was not really sure if he had seen the defendants. He claimed that he had identified their photographs only because the investigating detective picked their pictures out of the array and suggested them as the perpetrators. N.T. 3/25/93, 16-27, 43-52; 9/9/03, 18-19.

Early in the proceedings, Thomas's attorney filed a blanket motion to suppress evidence. N.T. 8/27/03, 12-13. By the time of the 1994 trial, however, a year and a half after the crime, both defendants' lawyers made the decision to withdraw their motions, which went only to identification. N.T. 5/23/94, 2). (There were no confessions and no physical evidence was recovered.)

The defense strategy was made clear from the first moments of the trial, in opening statements. Thomas's attorney argued that the checkered history of the witnesses' identifications was the product not of simple unreliability, but of fabrication by the police. He asserted that police had a "grudge" against his client, and "are now imposing their will upon these witnesses. This is what is holding these people."

Defense counsel pursued these themes throughout cross-examination. He elicited testimony from Christopher Young that it was the police who suggested to him the identity of the perpetrators, that the detective "got ticked off" when Young wouldn't make an ID, that police threatened to pin the crime on him, and that he wasn't "going down for any murder." N.T. 5/25/94, 63-64, 70-71, 77-79, 92.

When Peter Fuller testified, defense counsel examined the photo array process in detail, establishing that Fuller viewed hundreds of photographs, but failed to make any kind of identification until the investigating detective retrieved two of the photos and said they were the criminals. Counsel ended the cross-examination by having the witness reiterate that, if the detective had not singled out the two pictures, Fuller would not have picked anyone. N.T. 5/25/94, 137-42, 146, 155.

Counsel then covered the same ground when the investigating detective took the stand. The detective denied any pressure or suggestive conduct, putting him in conflict with Peter Fuller's testimony. N.T. 5/25/94, 214-20, 223.

In his closing argument, counsel quickly capitalized on these points. He accused the police of a "cover-up." But for the manufactured evidence against the defendants, "the case remains unsolved and they have to go back and see who really did it." Accordingly, argued counsel, "[s]omebody has to be blamed." N.T. 5/26/94, 62-63.

Counsel capped off the cover-up charge by using it to tie together his attacks on the two eyewitnesses. Counsel pointed out that Peter Fuller had directly contradicted the detective's testimony about the suggestive conduct of the

photo array. Counsel intimated that the detective was "lying" on that point. And if he was lying about Fuller, suggested counsel, wouldn't he "lie" about Young as well? N.T. 5/26/94, 73-74. In this manner, counsel was able to use the evidence concerning Fuller's identification as a means of bolstering his challenge to Christopher Young's testimony.

In response, the prosecutor pointed out to the jury that, despite their prior reticence, both eyewitnesses had appeared at trial and positively identified Clayton Thomas as the murderer. He noted that the witnesses had been understandably frightened of retribution for snitching on a killer. He argued that random details in the witnesses' statements and testimony could not have been invented, and that the police, if they had really been trying to frame the defendants, would have created a stronger case. N.T. 5/26/94, 79-111.

In the end, the jury credited the evidence of guilt. After four days of trial, Thomas was convicted of second degree (felony) murder and related offenses. The judge imposed a life sentence, which was mandatory under state law. Thomas's son, whom the witnesses claimed they could not clearly see as he stood in the vestibule, was acquitted. App. 74, 111.

Thomas pursued a direct appeal with new counsel, but the conviction was affirmed in 1998. Thomas filed a state post-conviction petition in 1999, again receiving new counsel. In it he raised, among other claims, the assertion that trial counsel was ineffective for failing to seek suppression of Peter Fuller's identification. The petition was denied in 2000 and Thomas appealed. App. 111-12.

The Pennsylvania Superior Court (the intermediate state appellate court) addressed Thomas's various contentions in a 34-page opinion in 2001. The court discussed in detail the defense police fabrication theory, noting that it was the "leitmotif" of the entire trial. App. 121-24. In light of the defense presented at trial, the court rejected the ineffectiveness/suppression claim:

> The basis for trial counsel's decision not to seek suppression of [Fuller's] identification is obvious of record from the manner in which the witness was cross-examined at trial. The witness's testimony concerning the circumstances surrounding his pre-trial identification of Appellant's photograph clearly was relevant to trial counsel's strategy of proving that the police were trying to frame Appellant for a crime he did not commit so they could close their books on the incident. Trial counsel wanted to demonstrate the overreaching behavior in which Detective Piree engaged and the lengths to which the detective was willing to go to frame Appellant. Letting the jury hear that Detective Piree essentially coerced Mr. Fuller into identifying photographs of Appellant and his co-defendant materially advanced this strategy. We have considered the entirety of Mr. Fuller's testimony and find that the equivocal nature of his pre-trial identification was well emphasized during cross-examination. Under these circumstances, we conclude that trial counsel was not ineffective for failing to seek suppression, nor was he ineffective for failing to object to testimony that supported the defense theory that the police were framing Appellant.

App. 128-29. Thomas sought discretionary review of the Superior Court's ruling in the Pennsylvania Supreme Court, but the petition was denied. App. 75.

Thomas filed a federal habeas corpus petition in 2002. The United States magistrate judge first ruled that Thomas was entitled to an evidentiary hearing. The judge determined that he would not follow the reasoning of the Pennsylvania Superior Court, because the state court had drawn conclusions from the trial record without hearing testimony from trial counsel about his thought processes on the matter. The magistrate judge believed that he could resolve the claim only on the basis of counsel's asserted rationale for his conduct. App. 97-98.

At the evidentiary hearing, trial counsel was called to the stand by Thomas's current attorney. In his testimony, counsel said nothing at all about the extensive record concerning his use of the Fuller identification evidence in support of the police fabrication theory. Instead, counsel claimed that the only reason he did not seek suppression at trial was that he had already withdrawn the motion, and he was under the mistaken impression that state law would not allow him to resurrect it. N.T. 8/27/03, 8-15.

Counsel's testimony was sufficient to secure relief for his former client. Three weeks after the hearing, the magistrate judge issued a report and recommendation concluding that, in light of counsel's "own words," there was no reasonable basis for his conduct. App. 53. The judge recommended grant of the writ.

The federal district judge accepted the recommendation in 2004. The court's opinion described the

contrary ruling of the Pennsylvania Superior Court as a "factual finding" that, in light of the federal evidentiary hearing, was not supported by the record. App. 30.

The state appealed to the United States Court of Appeals for the Third Circuit. That court affirmed the grant of the writ in 2005, and denied the state's petition for rehearing in February 2006. App. 2-3, 6-26.

REASONS FOR GRANTING THE WRIT

I. The Circuits have split in constructing "objective" and "subjective" elements of the *Strickland* test. This Court should grant *certiorari* to make clear that an attorney's subjective thought processes cannot trump an objectively reasonable rationale for his conduct.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court set the test for reviewing claims of ineffective assistance of counsel under the Sixth Amendment. The Court stated that such claims must be assessed under "an *objective* standard of reasonableness." *Id*. at 688 (emphasis supplied).

Strickland provides no special definition for "objective," leaving the word to its ordinary meaning: "emphasizing or expressing the nature of reality as it is apart from self-consciousness; treating events or phenomena as external rather than as affected by one's reflections or feelings." *Webster's New International Dictionary*, 2d ed., unabridged, at 1679; *see also Black's Law Dictionary*, 7th ed.,

at 1101 ("of, relating to, or based on externally verifiable phenomena, as opposed to an individual's perceptions, feelings, or intentions").

Nevertheless, a conflict has arisen among the circuits concerning a crucial point in ineffectiveness analysis: what to do with testimony by allegedly ineffective attorneys about their perceptions, feelings, and intentions concerning the conduct under challenge. Some circuits, while recognizing that counsel's statements may help establish the context for evaluating objective reasonableness, nonetheless hold that a lawyer's explanation of his rationale – or lack of one – can never be dispositive in a *Strickland* analysis. Several circuits, however, hold that an attorney's misplaced or deficient justification for his conduct can provide a basis for ineffectiveness relief, even if other lawyers could have articulated reasonable grounds for following exactly the same course.

This case is an example of the latter view. The defendant was convicted of first degree murder. Later, he asserted that his trial attorney was ineffective for failing to seek suppression of a pre-trial identification by one of the eyewitnesses.

The state appellate court denied relief without requiring a hearing on the claim, ruling that failure to file the suppression motion was objectively reasonable, regardless of this lawyer's actual thoughts on the matter. The court observed that the witness in question testified at trial that he had been pushed by police into picking out the defendant's photo. This testimony supported the defendant's claim that he was being framed – dovetailing with evidence that the only other eyewitness (whose identification was not subject

to suppression) had also been pressured by police to testify against the defendant. App. 121-24, 128-29; *Commonwealth v. Thomas*, 792 A.2d 1288 (Pa. Super. 2001) (memorandum opinion), *appeal denied*, 805 A.2d 523 (Pa. 2002).

The Third Circuit, however, never even discussed the "frame-up" strategy revealed by the trial record and relied on by the state court. Instead the circuit focused on the evidentiary hearing that had been granted the defendant once he reached federal habeas court. At that hearing, trial counsel testified that he failed to file a suppression motion because he thought – erroneously, as it turned out – that he had missed the deadline for doing so.

The court of appeals began by stating that *Strickland* contains both "subjective and objective facets." App. 17; *Thomas v. Varner*, 428 F.3d 491, 499 n.6 (3d Cir. 2005). The court then laid out the standard it would apply:

> To overcome the Strickland presumption that, under the circumstances, a challenged action might be considered sound trial strategy, a habeas petitioner must show *either* that: (1) the suggested strategy *(even if sound)* was not *in fact* motivating counsel or, (2) that the actions could never be considered part of a sound strategy. *It is the former showing that we are presented with here*.

App. 17; 428 F.3d at 499 (emphasis supplied).

From this starting point, the result was to be expected. To be sure, the opinion includes standard boilerplate references to "objective reasonableness." App. 20; 428 F.3d at 501 & n.10. But in reality the court's analysis was

circumscribed by what in fact motivated this particular lawyer. Thus the court noted and reiterated that, as a matter of state law, trial counsel was wrong in believing he was too late to file a suppression motion. App. 19, 21; 428 F.3d at 500 n.9, 501 n.11. Accordingly, the case became straightforward: "Courts have routinely declared assistance ineffective when the record reveals that counsel failed to make a crucial objection or to present a strong defense solely because counsel was unfamiliar with clearly settled legal principles." App 20; 428 F.3d at 501 (internal quotations omitted).

"[A]bsent some informed strategy," therefore, counsel must be declared ineffective in the Third Circuit's view, App. 21; 428 F.3d at 501, without regard to whether other lawyers might have taken the same action but explained it more reasonably. Indeed the opinion goes so far as to suggest that courts should not "reward" incompetency of counsel by relying on "hypothetical strategies" to excuse what were in fact uninformed oversights. App. 17-18; 428 F.3d at 499 n.7.

The Third Circuit's lawyer-specific, subjective approach to ineffectiveness analysis is shared by at least three other courts of appeal:

D.C. Circuit

> A threshold question arises whether, on appeal, we consider the adequacy of counsel's performance in light of any possible strategies that would explain defense counsel's actions, or whether we consider only those trial strategies and tactics that counsel actually embraced as disclosed either in an affidavit, as in this case, or in testimony at a hearing….

> [W]e could conclude that our evaluation is an objective one: if counsel's action could be justified by sound trial strategy, it should not be considered deficient, even if it was not defense counsel's actual trial strategy.
>
> We are not persuaded that is the proper course…. [J]ust as we do not burden counsel's actual tactical choices with the benefit of tactics as disclosed by hindsight, … neither do we salvage them on that basis.
>
> Therefore, once the record establishes the actual tactical explanation for counsel's actions, the government is not free to invent a better-reasoned explanation of its own.

Chatmon v. United States, 801 A.2d 92, 108-09 (D.C. Cir. 2002).

2d Circuit

> [W]e conclude that [counsel] pursued an objectively reasonable course of action…. But that does not end the matter, for we must also examine counsel's decision-making processes so that if we discover, for instance, that counsel's decisions resulted from incompetence, negligence, or pure serendipity, we might reconsider any assumption that a "choice" made by counsel was strategic.

Greiner v. Wells, 417 F.3d 305, 320 (2d Cir. 2005).

7th Circuit

> The government is correct that, as a general matter, failing to pursue a particular issue is not necessarily deficient performance…. But we must consider, along with other circumstances, the reason or reasons why an attorney takes (or fails to take) a particular action.
>
> Counsel's failure [to pursue the issue on appeal] here was not the product of any such strategic decision. Counsel has freely admitted that he failed to [do so] through "inadvertence."

Kitchen v. United States, 227 F.3d 1014, 1020 (7th Cir. 2000).

In contrast, at least four circuits reject this subjective approach, asking what a reasonable attorney would have done, without regard to the actual internal thought processes of the lawyer in question.

1st Circuit

> If anything turned on counsel's precise thought process, we would remand for an evidentiary hearing, but in this case none is necessary. The Strickland test, as already noted, is an objective one; as long as counsel performed as a competent lawyer would, his or her detailed subjective reasoning is beside the point.

Cofske v. United States, 290 F.3d 437, 444 (1st Cir. 2002).

9th Circuit

> Because we use an objective standard to evaluate counsel's competence, once an attorney's conduct is shown to be objectively reasonable, it becomes unnecessary to inquire into the source of the attorney's alleged shortcomings…. Because we conclude, as the district court did, that [counsel]'s performance did not fall below the standard of objective reasonableness, it is irrelevant whether counsel used drugs.

Bonin v. Calderon, 59 F.3d 815, 838 (9th Cir. 1995).

10th Circuit

> It appears, as [the defendant] contends, that at least one of his attorneys … did not fully grasp [applicable law] and erroneously concluded that the children's hearsay statements … would be admitted under any circumstances…. We conclude, however, that a fully informed attorney could have concluded that admitting the hearsay statement was to [the defendant's] advantage and, therefore, that his attorney's performance was not objectively unreasonable.

Bullock v. Carver, 297 F.3d 1036, 1053-54 (10th Cir. 2002).

11th Circuit

> To uphold a lawyer's strategy, we need not attempt to divine the lawyer's mental processes underlying the strategy….

> If some reasonable lawyer might have not pursued a certain defense or not called a certain witness, we fail to understand why we would order a new trial on the ground that the actual lawyer had not used the defense or witness in the first trial: at the new trial, a different lawyer (even a reasonable one) might again not use the witness or defense. If two trials are identical, one should not be constitutionally inadequate and the other constitutionally adequate.

Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 2000).

The number of cases affected by this circuit conflict is unusually high, because ineffective assistance is perhaps the most frequently litigated issue in the field of criminal law. The impact is especially significant in federal habeas review of state convictions, where the subjective/objective distinction affects application of all the special rules that have been created to accommodate federalism concerns: deference, evidentiary hearings, procedural default, and exhaustion. Even aside from such procedural matters, the difference between a subjective and an objective analysis of ineffectiveness claims is often outcome-determinative.

The need for resolution by this Court, moreover, goes beyond reconciliation of conflicting cases. The divergent approaches seen here raise basic questions about the very nature of the Sixth Amendment right to effective assistance of counsel. If objective reasonableness is not the end of the matter – if the court must instead assess the wisdom of counsel's actual rationale for his actions – then the constitutional inquiry is about the representation counsel tried to deliver rather than the representation the defendant

actually received. Two co-defendants, whose counsel both fail to make a particular objection at their joint trial, may achieve different results where one lawyer gives a persuasive explanation of his conduct and the other admits that he just wasn't listening. Relief depends on the idiosyncracies of the particular attorney.

On the other hand, under an objective standard the court may indeed "speculate" about "hypothetical strategies," just as the Third Circuit noted here. 428 F.3d at 500, n.7 & 8; app. xx. But that is the very nature of reasonableness review. The "reasonable man" is not an oracle but a judicial construction; courts must infer from circumstance and experience whether the conduct in question falls within the wide range of professionally competent assistance. And, again as the Third Circuit pointed out, an objective test will tolerate the attorney who, through serendipity or sloth, stumbles onto the same strategy that a more insightful lawyer would have followed. But that is the appropriate result. The right in question is defined by assessing prevailing norms, not by grading counsel's performance.

There are also more pragmatic implications to the distinction between a subjective and an objective benchmark. If courts may consider only the rationale in the mind of the specific trial lawyer in the case, then the attorney's motivations in characterizing that rationale may skew the review process in a particular direction. Perhaps, out of professional ego, the lawyer will dress up his conduct as best he can. More often, a committed defense lawyer will regret his trial losses and will feel greater allegiance to his former client than to the prosecutor seeking to sustain the sentence. As a result it is not uncommon for defense lawyers to concede their own ineffectiveness, thereby voiding the

conviction they could not avoid at trial. And there is little disincentive to doing so. Counsel almost never suffer professional discipline after a finding of ineffectiveness.[1] To the contrary – they often receive kudos from the courts for their "candor."[2]

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[1] *See, e.g., Florida Bar v. Sandstrom*, 609 So. 2d 583, 584 n.1 (Fla. 1992) ("We note that most cases of ineffective assistance of counsel do not rise to the level of a disciplinary violation"); *In re Lewis*, 445 N.E.2d 987, 989 (Ind. 1983) ("the fact that post-conviction relief was granted is not controlling…. Our finding of misconduct must be predicated on independent grounds…. We cannot find … that Respondent's conduct … is in violation of the Code of Professional Responsibility").

[2] *See, e.g., Wanatee v. Ault*, 39 F. Supp. 2d 1164, 1172 (N.D. Iowa 1999) ("In both the *habeas corpus* proceedings and the state-court post-conviction relief proceedings that preceded them, trial counsel stated that he did not believe his representation of Wanatee had been effective in this respect. The court admires trial counsel's honesty and conscientiousness in making such a self-evaluation"); *United States v. Harris*, 1993 U.S. App. LEXIS 23096, at *6 (9th Cir. 1993) (unpublished) ("in a notable instance of candor, counsel himself admits, and submits a declaration in support thereof, that the omission of the Vargas issue amounted to ineffective assistance in violation of Strickland"); *James v. Commissioner of Corrections*, 2001 Conn. Super. LEXIS 1877, at 4-5 (Conn. Super 2001) ("During testimony at the habeas trial defense counsel at the criminal trial gave as her reason for not raising it on the record that she simply forgot to raise it…. The Court admires the candor of the defense

(continued ...)

Of course, even when ineffectiveness is judged objectively, counsel's testimony may be relevant – either 1) to establish the facts on which he acted, *see, e.g., Strickland*, 466 U.S. at 691 ("inquiry into counsel's conversations with the defendant may be critical"), or 2) to suggest objective bases for such conduct that might not otherwise have been discerned merely from reading the record. Counsel's statements about the nature of his own reasoning process, however, can never limit or overcome consideration of objectively reasonable rationales, whether or not they are actually identified by counsel. At least not as *Strickland* is understood in some of the courts of appeal.

In fairness, some of the confusion in applying *Strickland* may have arisen from *Strickland* itself – specifically its language about the "presumption" – the "strong presumption" – of professional competence. 466 U.S. at 688-89. These references to a presumption of effectiveness are certainly meaningful as an exhortation that ineffectiveness claims must be judged against the wide range of reasonable professional assistance, under the

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attorney…. [H]er failure to object on the record … was below the standard of competence"); *Commonwealth v. Napper*, 385 A.2d 521 (Pa. Super 1978) ("At a [post-conviction] hearing, appellant's trial counsel all but admitted that he had been ineffective in failing to advise appellant fully on the advisability of accepting a plea bargain. Under the circumstances of this case, we agree with counsel; and while we regret his ineffectiveness, we commend his candor").

circumstances as they existed at the time, without the blinding light of hindsight. But as an actual legal framework for deciding Sixth Amendment claims, the language of presumptions may have proven less useful.

Thus, for those courts hewing to an objective view of ineffective assistance analysis, the notion of presumption does little to advance the inquiry. The conduct either falls within the wide range of reasonableness, or it does not. Once it is determined that some reasonable lawyer would have taken the action in question, then effective assistance is not just presumed – it is established.

For those courts employing a subjective ineffectiveness analysis, in contrast, presumptions do too much. These courts appear to apply the presumption language more literally: if there is a general presumption that lawyers are effective, but the presumption is not conclusive as a matter of law in all cases, then there must be a way to rebut that presumption factually in individual cases. What better manner of testing whether the presumption is true in a particular case than by determining what the attorney in that case was really thinking? The problem with this approach is that it effectively reverses the *Strickland* "presumption," by narrowing the wide range of reasonable competence down to the actual thoughts within that one attorney's mind. Subjective displaces objective.

In light of the disparities among the courts of appeal in adjudicating ineffective assistance claims, and because such claims have come to occupy so much space in review of both state and federal criminal judgments, this Court should grant certiorari to clarify its *Strickland* test.

II. This Court's decisions in *Weeks v. Angelone* and *Wiggins v. Smith* have led to confusion concerning the nature of "deference" on habeas review. The Court should grant *certiorari* to make clear that review under § 2254(d) of the habeas act is of the state court's ruling, not its reasoning.

In *Weeks v. Angelone*, 528 U.S. 225, 237 (2000), this Court held that, if a state court rejects a claim on the merits – without discussing any aspect of the reasoning in support of its ruling – the ruling is still entitled to deferential review under § 2254(d).

In *Wiggins v. Smith*, 539 U.S. 510, 534 (2003), this Court stated that, where a state court rejects an ineffective counsel claim on the merits – without discussing the prejudice aspect of the ineffectiveness claim – the prejudice aspect is thereby subject to de novo review.

The interplay of these two decisions has raised a critical question in the application of the deference standard: does de novo review apply as to any issue or argument that was not addressed by the state court? What happens when the state court was not completely silent as to its reasoning, but does not discuss a point of law or fact that the federal habeas court believes is necessary for resolution of the claim?

This is a threshold issue in almost every habeas case; yet *Wiggins* provides a poor basis for resolving it. In *Wiggins*, the state court determined that counsel had a reasonable basis for his actions, and therefore – as this Court

itself has directed – the court had no need to decide the prejudice prong.[3] When the case reached this Court, the briefs argued the merits of the prejudice issue, but did not consider whether it should carry a separate standard of review. Nor was there any such consideration at oral argument. Interest about the standard of review arose for the first time only in this Court's opinion, where discussion of the point consisted of a one-sentence declaration, without citation to *Weeks*, to the statutory provision in question, or to any other authority of any kind. *Wiggins*, 539 U.S. at 534. So lower courts were left without guidance on the deference "partial silence" problem.

This case is an example of the unhappy result. The Third Circuit not only distinguished between the two prongs of the *Strickland* test, but further purported to subdivide the first prong for purposes of determining the applicable standard of review. Thus the court stated that "[o]ur review of whether counsel's conduct was objectively unreasonable is de novo, as the Pennsylvania courts never reached this issue, having denied the claim on strategy grounds." App. 21; 428 F.3d at 501. It is unclear what the court meant by "objective unreasonableness" as distinct from "strategy grounds," but it is clear that the court perceived both notions to relate to *Strickland*'s first component – as opposed to prejudice, the second component, which the court addressed later in a separate section of its opinion. App. 23; 428 F.3d at 502

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[3] *Strickland*, 466 U.S. at 697 ("there is no reason for a court deciding an ineffective assistance claim … even to address both components of the inquiry if the defendant makes an insufficient showing on one").

("As with objective reasonableness, we review prejudice de novo, as it is a legal issue never considered in the Pennsylvania court proceedings"). The Third Circuit never considered, however, whether the deference standard is appropriately extended or withheld on a point-by-point basis, to parts and subparts of claims rather than to claims as a whole. Indeed, the totality of the court's § 2254(d) analysis consisted of the two sentences quoted here.

Another recent case shows the same divide-and-conquer approach to determining the standard of review under § 2254(d). In *Stevens v. Horn*, 2006 U.S. App. LEXIS 17043 (3d Cir. 2006) (unpublished), the claim under review was that trial counsel was ineffective for not presenting a diminished capacity defense to negate specific intent to kill. The state supreme court had explicitly resolved this claim on prejudice grounds, concluding that the evidence of specific intent was overwhelming and would not have been affected by the newly proffered testimony on diminished capacity. *Commonwealth v. Stevens*, 739 A.2d 507, 515-16 (Pa. 1999). On federal habeas review, the district court also addressed an alternative argument against prejudice – that the proffered testimony did not properly relate to diminished capacity at all. The Third Circuit held that only the former, but not the latter, theory was subject to deferential review: "In its analysis of the *Strickland* prejudice prong, the Pennsylvania Supreme Court did not rely on this thinking. *See Stevens*, 739 A.2d at 515-16. Accordingly, there is no issue of legal deference as to this." 2006 U.S. App. LEXIS at *11 n.5. Apparently, federal courts must now engage in hairsplitting to tease out each individual strand of the state court's

"thinking" in order to know the correct standard from which to begin their review.[4]

Yet it is far from self-evident why a state court ruling with no stated reasoning, as in *Weeks*, is entitled to more deference than a state court ruling with extensive reasoning, as in the two examples above. Section 2254(d) was enacted precisely to require greater respect for state court judgments from federal courts. Congress could hardly have imagined that comity would be advanced by inviting federal courts to go hunting for "holes" in the thought processes of state judges who diligently explain their decisions.

The more natural reading of the statute has been articulated by then-Judge Alito.

> For purposes of the habeas statute, a failure to decide affects the standard of review; a failure to discuss (either at all or to the satisfaction of the habeas petitioner or the federal court) is irrelevant….
>
> [I]f an examination of a state court opinion reveals that the state court did not decide a federal claim on the merits, the deferential standards of

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[4] *See, e.g.*, *Allen v. Lee*, 366 F.3d 319, 343 n.3 (4th Cir.) (en banc) (Gregory, J., concurring in the judgment in part) (relying on *Wiggins* for proposition that habeas courts may apply deference only as to reasons specifically articulated by state court); *Federal Habeas Corpus Practice and Procedure*, Hertz & Liebman, 5th ed., § 32.2. at 1569 (deference inapplicable if state court decision did not discuss all "dimensions" of federal constitutional analysis).

> review set out in § 2254(d)(1) do not apply…. But if the state court decided the claim, the § 2254(d)(1) standards govern – regardless of the length, comprehensiveness, or quality of the state court's discussion.

Rompilla v. Beard, 355 F.3d 233, 247-48 (3d Cir. 2004), *rev'd on other grounds*, 545 U.S 374 (2005).

A contrary view not only undermines comity; it also risks reducing the deference standard to near-meaninglessness. Virtually any disagreement with a state court's reasoning can readily be rephrased as a failure to adjudicate. If a state court erred by relying on an overruled federal precedent, for example, then it failed to discuss the overruling precedent. If the state court erred by emphasizing irrelevant testimony, then it failed to address the more relevant evidence. Such errors may well make the state court ruling unreasonable under § 2254(d). But they should not subject it to de novo review.

In the end, the scope of the deference standard must be defined according to the express terms of the statute. Section 2254(d) provides for deferential review when a "*claim*" was adjudicated on the merits in state court. The object of the adjudication that gives rise to deference is a *claim* – not an element, an argument, a proposition, a prong, or any other constituent of a claim. Accordingly, a federal court may not withhold deference based on perceived deficiencies in the state court's analysis, because the claim has been adjudicated on its merits whether or not the federal court agrees with every step in the decision-making process.

The new standard of review established in § 2254(d) was a cornerstone of the 1995 habeas reform legislation. It is appropriate to resolve the tension in this Court's decisions concerning proper application of the provision.

CONCLUSION

For the reasons set forth above, petitioners respectfully request that this Court grant the petition for writ of *certiorari*.

Respectfully submitted,

RONALD EISENBERG
Deputy District Attorney
(Counsel of Record)
THOMAS W. DOLGENOS
Chief, Federal Litigation
HELEN KANE
Assistant District Attorney
JOSHUA S. GOLDWERT
Assistant District Attorney
ARNOLD H. GORDON
First Asst. District Attorney
LYNNE ABRAHAM
District Attorney

Philadelphia District Attorney's Office
Three South Penn Square
Philadelphia, PA 19107
(215) 686-5700