No. 06-2711

IN THE
SUPREME COURT OF THE UNITED STATES

FREDERIC ROSEMEYER, *et al.*,
Petitioner

v.

EDWARD V. HUMMEL,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the Third Circuit contravene the directives of, and exceed its authority under, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") when it refused to defer to the state appellate court's reasonable rejection of a habeas petitioner's claim under *Strickland v. Washington*, 466 U.S. 668 (1984)?

PARTIES TO THE PROCEEDING

The Petitioners are Frederic Rosemeyer, Superintendent of the Laurel Highlands Pennsylvania State Correctional Institution; and Thomas J. Corbett, Esquire, Attorney General for the Commonwealth of Pennsylvania. Corbett is substituted for his predecessor, D. Michael Fisher. See Fed. R. App. P. 43(c).

The Respondent is Edward Vincent Hummel, an inmate at the Laurel Highlands Pennsylvania State Correctional Institution.

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PETITION FOR WRIT OF CERTIORARI

The District Attorney of Clearfield County, Commonwealth of Pennsylvania, on behalf of Frederic Rosemeyer, Superintendent of the Laurel Highlands Pennsylvania State Correctional Institution, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Third Circuit panel's opinion is reproduced at App. 128-164. The United States District Court for the Western District of Pennsylvania's memorandum opinion denying relief is reproduced at App. 123-125; the Report and Recommendation of the District Magistrate Judge incorporated therein is reproduced at App. 81-122. The Pennsylvania court of appeal's decision denying Hummel's petition for post-conviction relief is reproduced at App. 34-80. The Pennsylvania court of appeal's opinion on direct appeal is reproduced at App. 1-5. The Pennsylvania trial court's Opinion denying Hummel's Petition for Post Conviction Relief is reproduced at App. 6-33.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit issued its order denying the State's petition for rehearing on May 27, 2009. Justice Alito extended the time period to file a petition for writ of certiorari to September 24, 2009. The

Superintendent now files this petition and invokes the Court's jurisdiction under 28 U.S.C. § 1254(1) (2003).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have assistance of counsel for his defense."

U.S.C.A. Const. Amend. 6.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides, in pertinent 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[.]

* * *

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant

shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. §§ 2254(d)(1), (e)(1).

STATEMENT OF THE CASE

On November 22, 1991, Edward V. Hummel lay in wait for his wife at their home. Earlier that day, he had learned of his wife's infidelities. When his wife entered the house, Hummel severely beat her and then shot and killed her. He then went to his parents' house and told them what he had done. He returned to his house, scribbled a note to his two teenage daughters, and shot himself in the head. As a result of his failed suicide attempt, Hummel is now a paraplegic with limited mental abilities. Following Hummel's discharge from a series of hospitals and rehabilitation facilities, he was charged with homicide and aggravated assault.

From the outset of the criminal proceedings, Hummel's competence to stand trial was at issue. Prior to the preliminary hearing, defense counsel sought and obtained multiple continuances so that appropriate psychological testing could be conducted to determine whether Hummel was competent to stand trial in light of his self-inflicted gunshot wound. The Commonwealth and defense trial counsel each retained forensic psychologists who reviewed all relevant and available medical records from the various hospitals, rehabilitation centers, and other treatment facilities in which Hummel had been institutionalized from the evening of the shooting until he was released on recognizance bail to the custody of his parents. Importantly, each expert personally met with Hummel prior to completing his evaluation. Both doctors agreed that

Hummel had a rational understanding of the charges against him and a rudimentary understanding of legal procedures. The doctors' reservations focused upon Hummel's ability to assist his counsel in his defense. Notably, neither expert opined that Hummel was legally incompetent to stand trial. In fact, while the Commonwealth's expert rendered no opinion on the issue, the defense expert stated that Hummel **was** competent if specific accommodations for his physical and mental limitations were made during trial. The defense expert specifically found that Hummel was "capable of thinking rationally in a planned and organized manner" and alternative means existed to compensate for Hummel's inability to recall details of the incident. Interestingly, the doctor noted that Hummel and his parents expressed a desire to proceed with the legal process without further delay.

Pursuant to defense counsel's petition for court determination of his client's competency, the trial court held a conference to discuss Hummel's ability to stand trial. Relying on the opinions of the two medical experts, the judge found Hummel was legally competent to stand trial; in his order, the judge noted that he was aware of, and would abide by, the adaptations at trial as suggested by both medical experts. Based upon the judge's observations during trial, the judge declined to revisit his earlier determination that Hummel was competent.

Upon jury verdicts of guilty, Hummel was sentenced to life imprisonment for first degree murder and a concurrent term of five to ten years for

aggravated assault. On direct appeal, defense counsel questioned the trial court's determination that his client was competent to stand trial. The appellate court rejected this contention, affirming the conviction and sentence. On collateral appeal, newly retained defense counsel again raised the issue of Hummel's competency to stand trial, couched in terms of trial counsel's ineffectiveness. At the Post Conviction Relief Act ("PCRA") hearing, the trial judge heard testimony from several lay witnesses and a psychiatrist who had examined Mr. Hummel post-trial. That expert concluded that petitioner was presently incompetent and unable to communicate effectively with counsel. The trial court ultimately dismissed the PCRA petition. In doing so, the trial court made the following findings of fact:

- Trial counsel acknowledged that the expert reports obtained before the preliminary hearing opined that his client was competent to stand trial, but he remained ready to "re-visit" the issue of Hummel's competency if necessary.
- Trial counsel discussed with his client the criminal charges filed against him; the legal options available to him, specifically the defense of provocation; and the procedures that would follow preliminary hearing. Counsel indicated that his client acknowledged this information as it was explained to him.
- Regarding the provocation issue, trial counsel discussed Hummel's wife's

infidelity (of which Hummel had learned the day of the shooting and referred to in his note addressed to the couple's children) and the couple's financial troubles. Further, Hummel suggested questions to counsel during the preliminary hearing, and aided counsel in the jury selection process, thereby assisting in his defense. Based upon these observations, counsel believed Hummel to be competent to stand trial, contrary to reports he had received from Hummel's parents/legal guardians.

- Despite Hummel's sight deficiencies, Hummel acknowledged and responded to counsel's questions at every stage of the proceedings. Moreover, during the pathologist's trial testimony, counsel suspected Hummel knew more about circumstances surrounding the shooting than he had previously led counsel to believe. Specifically, as the District Attorney asked the pathologist to explain the source of marks on the victim's face, Hummel stated to counsel, "They will never know what caused those injuries, but I can tell you it was not the gun." When questioned further regarding his comment, however, Hummel offered no details. Finally, during the Commonwealth's closing argument, Hummel repeatedly yelled comments regarding his wife's sexual escapades, referring to an alleged

> statement she had said to him shortly before her death.

The trial court based its decision denying PCRA relief in part on testimony of other witnesses who had interaction with Hummel shortly after the incident and the trial, wherein Hummel displayed rational thought, lucidity and recall of events. The trial court considered, and ultimately rejected, the testimony of Hummel's newly acquired expert psychiatrist due to the limited time the doctor had spent with Hummel some three and one-half years following trial. Notably, certain of the new doctor's findings did not differ significantly from the previous two experts; the doctor opined that Hummel understood concepts associated with a criminal trial and was aware of the charges against him. The doctor's conclusion that Hummel was incompetent centered on Hummel's ability to collaborate with counsel in his own defense.

The Superior Court upheld the trial court decision; the Supreme Court again refused to hear the appeal. PCRA counsel filed a petition for federal habeas corpus relief, which the United States District Court for the Western District of Pennsylvania denied. The Third Circuit reversed that decision, granting habeas relief.

REASONS FOR GRANTING THE WRIT

I. Because The Pennsylvania Superior Court's Rejection Of Hummel's Ineffective Assistance Claim Was Not Contrary To Nor An

Unreasonable Application Of *Strickland*, Habeas Relief Should Not Have Been Granted.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which gives practical effect to principles of federal-state comity, permits habeas relief only where a state court's ruling is contrary to, or an unreasonable application of, extant clearly-established controlling precedent of this Court. 28 U.S.C. § 2254(d)(1). The proper construction and application of this standard for relief is of paramount importance; rigorous enforcement of AEDPA's deferential standard promotes finality and the preservation of properly-rendered state court adjudications as well as the orderly administration of criminal justice.

Where, as here, AEDPA's standard is not given its rightful effect because, contrary to this Court's teachings, the reviewing federal court has chosen to substitute its evaluation of the factual record for that of the state court, Petitioners are adversely affected by the unjustified realignment of the state-federal relationship AEDPA ordains. Whenever relief is granted because of erroneous habeas review, the Commonwealth is burdened with the unnecessary obligation to retry cases, either in whole or in part, which unduly taxes already-strained public resources. As in this case, where the state court criminal trial took place more than a decade earlier, this burden is especially acute, because the Commonwealth's presentation of its case is hampered by the passage of time. Witnesses become unavailable and those who do testify find that their

memories have dimmed. It also means that, for no legitimate reason, the victim's surviving family members are forced to endure the anguish associated with new proceedings and/or a retrial. There is no finality, legally or practically speaking.

The Third Circuit's basis for granting habeas relief is indefensible. The court wholly failed to evaluate the state court's decision "through the lens of § 2254(d)(1)." *Price v. Vincent*, 538 U.S. 634, 639 (2003). AEDPA dictates that an application for a writ of habeas corpus shall not be granted "unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). The phrase "clearly established Federal law" "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decisions." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). A federal court "may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must be unreasonable." *Williams*, 529 U.S. at 411. Here, the Third Circuit's decision is simply wrong.

When a criminal defendant contends that the attorney was ineffective in representing him, the claim is reviewed under the familiar framework of *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* requires a court to determine two things: whether counsel's performance was professionally deficient and whether the defendant was prejudiced

by counsel's deficient performance. 466 U.S. at 687. Failure to satisfy either element requires rejection of the claim. *Id.* At 687.

A. Hummel cannot establish deficient performance.

Under a *Strickland*-based review, there is no basis for relief at all, let alone under the stringent AEDPA standard. The Pennsylvania Superior Court's rejection of Hummel's ineffectiveness claim was neither contrary to, nor an unreasonable application of, *Strickland* – to the contrary, *Strickland* instructs that

> [j]udicial scrutiny of counsel's performance must be highly deferential . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate counsel's perspective at that time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .

466 U.S. at 689-690. There is no checklist, no "one-size-fits-all" set of rules for measuring counsel's performance. There are a vast number of different approaches that professionally responsible counsel may elect to take in defending an accused. *Id.* at 689-690.

A state court reviewing counsel's performance as part of an ineffectiveness claim must follow *Strickland*'s directions about how to conduct that review, and these very directions invest the state court with a great deal of discretion. A federal habeas court reviewing a state court's decision on collateral attack must be all the more mindful of this when evaluating whether the ruling was contrary to or an unreasonable application of *Strickland*, and must take particular care not to improperly disturb the result when the state court has properly discharged its responsibilities thereunder. There must be an appreciation that a state court's exercise of discretion under *Strickland* may lead to outcomes that are valid even if the reviewing court, considering the claim *de novo*, would not have reached the same outcome. See *Knowles v. Mirzayance*, 129 S.Ct. 1411, 1420 (2009) (explaining that "doubly differential judicial review" applies to *Strickland* claims evaluated under § 2254(d)(1)). "[B]ecause the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Id.* "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

The Pennsylvania Superior Court understood and effectuated *Strickland*'s direction for evaluating attorney performance, and conducted a context-based review which found no basis for relief under either of *Strickland*'s prongs. That ruling was consistent with, not contrary to, *Strickland*. It

involved a reasonable application of *Strickland*'s holding. As a result, on habeas review, the state court decision should have been upheld.

By contrast, the Third Circuit's examination of this issue does not take into consideration that sound professional performance must be evaluated contextually; that "Monday morning quarterbacking" is not permitted; and that there is a presumption that counsel was professionally competent. Although the Third Circuit acknowledged *Strickland*, the court in fact did the very thing that this Court said in *Williams* was prohibited by AEDPA: it substituted its judgment for that of the state court.

Not only was it wrong for the court of appeals to re-evaluate counsel's performance and to use that re-evaluation as the basis for granting relief, but the manner in which it did so cannot be reconciled with the type of scrutiny *Strickland* prescribes. In finding it unreasonable that trial counsel did not press for a psychiatric examination or a competency hearing, the panel virtually ignores the "reasonable investigation" that counsel did undertake in delving into his client's competence to stand trial and gives no measure of deference to counsel's reasonable reliance upon the opinions of the two pre-trial medical experts. Trial counsel ***did*** inquire into his client's competency; in fact, it was he who initiated medical review of his client's mental capacity and it was he who petitioned the court for a determination on the issue. Given the initial "indicia of his client's incompetence," trial counsel explored facts concerning his client's mental capacity; he raised the

issue with the trial court, retained an expert to examine his client, and obtained and reviewed reports from his expert as well as from the expert for the Commonwealth. Those reports, however, did not opine that his client was legally incompetent to stand trial.[1] The panel essentially disagrees with the conclusion drawn from the pre-trial expert reports; while the reports may not have been "ringing endorsements" of Defendant's mental abilities, the fact remains that they did not conclude that Defendant was incompetent to stand trial. Irrespective of *Strickland's* recognition of limitations on unfettered investigation, the panel deemed it incumbent upon trial counsel to disregard these reports in search of additional expert testimony. Yet, it is absurd to insist that trial counsel ignore two reports wherein the doctors opined that Defendant was legally competent to stand trial and petition the court for a competency hearing or another mental examination. Rejecting the contention that trial counsel was required to invoke these statutory procedures, the district magistrate stated in his Report and Recommendation:

> [Appellate counsel] argues that [trial] counsel . . . had an "absolute need" to invoke the procedures of the Mental Health Procedures Act. This is not the law of Pennsylvania, however, as both the trial court and the

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[1] In his PCRA testimony, defense trial counsel said that if the reports of the psychologists were negative, the plan was to have his client examined by a psychiatrist, but as a result of the reports indicating competency, he proceeded no further: it was his intention to revisit the issue of competency at any point the issue arose, before trial or during the course of the trial.

> Pennsylvania Superior Court have explained. . . . Because [trial counsel] believed his client to be competent, as an officer of the Court he did not consider it his duty to file a motion to hold a competency hearing merely on the chance that [the trial judge] would find his client incompetent to stand trial. Despite the position of some to the contrary, it is not part of the constitutional obligation of defense counsel to file every available motion, especially ones for which counsel believes there is no sufficient factual basis.

Like all attorneys, Hummel's trial counsel had a duty to make reasonable investigations into the facts and circumstances of the case, but that duty is not unlimited. Counsel may draw a line when they have good reason to think further investigation is unwarranted. *Rompilla v. Beard*, 545 U.S. 374, 382 (2005). In light of the two expert reports that opined Hummel was competent to stand trial, trial counsel was not ineffective for failure to investigate further. The reports provided no medical basis that Hummel was incompetent to stand trial, and aside from his client's parents' insistence, trial counsel had no reason to further inquire into the issue. Thus, counsel made a "reasonable decision" not to press for yet another examination or a competency hearing.

Moreover, counsel's personal observations led him to reasonably believe his client was legally competent to stand trial. Throughout the proceedings, counsel was able to discuss strategy with Hummel. Trial counsel proffered testimony directly contradicting Hummel's post-trial expert's

concern that Hummel was unable to assist in his own defense. Trial counsel stated that Hummel did participate in his own defense, suggesting questions to put to witnesses and the jury venire. Also, *with the assistance of his client*, trial counsel was able to present a cogent defense (provocation) based on evidence of the victim's sexual infidelity and Hummel's outrage upon learning of his wife's extra-marital affair, along with extreme financial duress caused by her extravagant spending habits, designed to mitigate the charge to involuntary manslaughter or even possibly to achieve acquittal altogether. Hummel's incomplete memory of events preceding the murder does not establish incompetence; the test for competency only requires a memory sufficient to permit Hummel to rationally consult with counsel and to reasonably understand the charges and the proceedings against him. If anything, the record affirmatively shows that this threshold was met. Thus, trial counsel was under no obligation to further investigate or again raise his client's competence and his performance was not deficient for failing to do so. The reviewing state court's decision, which rejected Hummel's claim for ineffective assistance of counsel on this record, was not an "objectively unreasonable" application of *Strickland.*

Trial counsel's belief that his client was legally competent was entirely reasonable. After inquiry into his client's competency, trial counsel was satisfied that the legal standards for competency were met in this case; counsel had no reason to doubt Hummel's ability to understand the

proceedings, to communicate with counsel, or to assist in defending the charges brought against him. Consistent with the legal standard for competency, counsel's interaction with Hummel, paired with the experts' reports concluding that Hummel was competent, were sufficient for counsel to reasonably forego a competency hearing. In sum, Hummel's ineffective assistance of counsel claim fails on the first prong of *Strickland* because, considering all the facts, counsel's decision not to pursue a competency hearing, nor to have his client further evaluated, nor to raise the issue yet again with the trial court, was objectively reasonable.

The Third Circuit erroneously accepted Hummel's mischaracterization of the language in the pre-trial order as trial counsel's "stipulation" to his client's competency to stand trial. Despite the unfortunate phrasing of the order, the PCRA opinion makes clear that the court based its determination solely on the opinions within the experts' reports, and thus supports the contention that trial counsel agreed to nothing more than the content of the reports.

> The record is clear that Petitioner was extensively examined by two (2) psychologists (one employed by the Commonwealth and the other by Defendant). ***Both psychologists agreed and concluded that the Petitioner was competent to stand trial.*** After a meeting with the District Attorney and Trial Counsel, this ***Court ruled that based on the findings of both psychologists, the Petitioner was competent to stand trial.***

> Furthermore, this Court observed the Defendant during trial and did not observe any dramatic change in his appearance or behavior throughout the proceedings. Therefore, ***based on the findings of the two (2) psychologists and its own observations during the proceedings, Petitioner's claim that he [was] incompetent is without merit*** and is hereby denied.

The portrayal of counsel's "agreement" as a "stipulation" is illogical. As the magistrate observed, it would have been unnecessary for the trial court to consider the proffered expert reports had counsel stipulated to his client's competency. And, if trial counsel had "waived" the issue (which under state law he could never do), he would hardly have been prepared to "re-visit" the issue if and when the need arose. It is more likely that, faced with two expert opinions that his client was legally competent to stand trial, counsel agreed that further inquiry at that time into the competency issue was not necessary. In sum, counsel did not stipulate to his client's competency; that decision remained within the full and exclusive purview of the trial judge.

In reviewing the adequacy of counsel's performance, the Third Circuit invoked the ABA Guidelines, beginning its analysis with the proposition that "[a]s soon as practicable the lawyer should seek to determine all relevant facts known to the accused." ABA Standards for Criminal Justice, Standard 4-3.2(a) (1991). This inquiry is irrelevant to the issue; what Hummel knew or could recall regarding the incident is not germane to the

question of his competency to stand trial. The Commonwealth is aware of no authority that mandates recall of the event of which one is accused as a precursor to a determination that one is competent to stand trial; on the contrary, the standard is relatively low – is the accused (1) generally aware of the criminal charges and proceedings against him and (2) able to consult with his attorney regarding his defense to those charges. All but ignored in the court's analysis, trial counsel did discharge his professional duty to protect the accused by promptly obtaining psychiatric examination of the accused when the need appeared. See ABA Standards for Criminal Justice, Standard 4-3.6 (1991). Moreover, this Court has emphasized that the guidelines are just that – guidelines to determine what is reasonable. *Strickland,* 466 U.S. at 688; *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). Yet, the Third Circuit's decision elevates the guidelines to the status of constitutional requirements.

Finally, trial counsel cannot be faulted for failing to pursue Hummel's claim of incompetence. A defendant is presumed competent; he must prove otherwise by a preponderance of the evidence.[2] 50 P.S. § 7402(d), § 7403(a). Under prevailing state and federal law, if one is "substantially unable to understand the nature or object of the proceedings against him or to participate and assist in his

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[2] In the interim between Mr. Hummel's trial and appellate review, the Pennsylvania standard was changed from "clear and convincing evidence" to comply with *Cooper v. Oklahoma*, 517 U.S. 348 (1996).

defense" then he is deemed incompetent to stand trial. 50 P.S. § 7402(a); see *Commonwealth v. Kennedy*, 305 A.2d 890 (Pa. 1973) (citing *Dusky v. United States*, 362 U.S. 402 (1960)). Hummel's asserted incompetence is based on his alleged inability to meaningfully participate and assist in his defense given his alleged limited ability to communicate effectively with counsel.[3] In rejecting Hummel's claim that he was incompetent at the time of trial, the PCRA court opined as follows [emphasis added]:

> Petitioner also alleged that Trial Counsel was ineffective due to his alleged failure to request that the Court make inquiries of Petitioner as to his competency before and during his trial. . . . First, the record shows that Petitioner's Preliminary Hearing was continued five (5) times, at the request of the Petitioner, in order that appropriate psychological testing could take place. In regards to the overall proceedings, ***Trial Counsel testified that he never felt that he had a communication problem with Petitioner.*** As a matter of fact, ***Trial Counsel stated that Petitioner would acknowledge the comments that counsel made to him and aided counsel with certain tactics during the overall proceedings.*** Moreover, this Court, itself, could have revisited the issue of Petitioner's competency by its observations of him during

[3] The record reflects that all three medical experts substantially agreed that Mr. Hummel was able to understand the nature or object of the proceedings against him.

> trial. However, as stated before, there was no dramatic change in Petitioner's appearance or conduct.

Significantly, neither pre-trial expert report opined that Hummel was incompetent to stand trial; consequently, there was no medical evidence to rebut the presumption of competency at the time of trial. The trial court judge, sitting in review of Hummel's PCRA, permissibly rejected conflicting expert testimony and accepted the earlier medical opinions, in again determining that Hummel was competent at the time of trial. The trial judge's observation of Hummel for any indication of incompetence during trial, corroborated rather than contradicted his finding of competency. Simply, Hummel has not and can not meet his burden of demonstrating, even under a "preponderance of the evidence" standard, that he was not competent to stand trial. Lastly, it is significant that none of the parties empowered under the statute to question Hummel's competence to stand trial sought to do so. No one, not the district attorney, the trial judge, the warden, or any of the myriad of healthcare providers attending Hummel, ever felt the need to request that he undergo a competency exam. Implementing the undisputed review standards that afford substantial deference to the findings of the state trial court, there was no ineffective assistance of counsel in presentation of the issue of competency and no abuse of discretion connected with the determination that Hummel was competent to stand trial. The record, specifically the pre-trial expert medical reports and the PCRA testimony of counsel and others, along

with the trial judge's personal observations of Hummel, as stated in the judge's opinion, amply supports the trial court's finding of competency.

B. Hummel cannot establish prejudice.

Even assuming without deciding that trial counsel's performance was constitutionally deficient, Hummel cannot show prejudice – that is, he cannot establish "a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694, i.e., the trial court would not have determined that Hummel was competent to stand trial. Nor can Hummel show that it was objectively unreasonable for the Pennsylvania Superior Court to reach that conclusion.

The Third Circuit summarily asserts that there was a "reasonable probability" that but for trial counsel's alleged ineffectiveness, Hummel would have been found incompetent to stand trial, based in large part on the undue credence they give the PCRA testimony of Hummel's medical expert hired post-trial.[4] Frankly, the court is mistaken; there is

[4] The panel suggests that they are not bound to accept the state court's finding that Hummel was not prejudiced because the basis for the decision was contrary to clearly established United States Supreme Court precedent, in that the appellate court evaluated the claim against a too stringent standard that Hummel did not definitively show that an examination, if ordered, would have established that he was incompetent by clear and convincing evidence. As discussed above, under the appropriately relaxed standard, the outcome would have remained the same and hence the fact remains that Hummel still cannot establish the requisite prejudice.

no reasonable likelihood that this testimony would have dictated a different decision by the trial judge. Notably, the judge who presided over trial also sat in judgment of the collateral PCRA challenge; after hearing extensively from Hummel's newly hired expert, the judge's opinion remained steadfast – Hummel was competent to stand trial. The trial court judge permissibly rejected the newly obtained (conflicting) expert testimony and accepted the earlier medical opinions, the lay witnesses' and trial counsel's testimony, and his own observations of Hummel in again determining that he was legally competent at the time of trial. Accordingly, as the judge was unpersuaded by additional evidence from the PCRA hearing, it follows that he would have been equally unwavering in his initial opinion that Hummel was competent to stand trial. Hence, the reasonable probability is that even had trial counsel pressed for a competency hearing immediately prior to or at the time of trial wherein the trial judge would have heard the additional expert testimony, the outcome would have remained the same, i.e., the trial court would have found Hummel legally competent to stand trial. Consequently, Hummel did not and can not demonstrate that, but for trial counsel's alleged deficient performance, a different outcome was reasonably probable; therefore, he did not and cannot demonstrate prejudice and his claim of ineffective assistance of counsel must fail.

In addition, the panel asserts that in view of the ambivalent reports from the two psychologists who examined Hummel pre-trial, it was "probable" that the trial court would have directed further inquiry

into Hummel's mental state had trial counsel invoked statutory procedures to explore Hummel's questionable competency. But it was precisely these "ambivalent" reports upon which the trial court concluded that Hummel was competent. In rejecting Hummel's PCRA claims, the trial court opined as follows:

> The record is clear that Petitioner was extensively examined by two (2) psychologists (one employed by the Commonwealth and the other by Defendant). Both psychologists agreed and concluded that the Petitioner was competent to stand trial. After a meeting with the District Attorney and Trial Counsel, this Court ruled that based on the findings of both psychologists, the Petitioner was competent to stand trial.
>
> Clearfield County Court of Common Pleas Opinion on Post-Conviction Relief Act Petition dated, June 24, 1999, Appendix 21

Moreover, under those same statutory procedures, the trial court is permitted to *sua sponte* order a competency examination of defendant, even without a hearing. Although empowered to do so, the trial judge was not compelled to convene a hearing or order an additional examination, based on his continual observations of Hummel as well as the medical reports. As the trial court did not avail itself of the statutory means to revisit its initial determination that Hummel was competent, it is equally unlikely that it would have done so upon suggestion of defense counsel. Thus, Hummel

cannot show a reasonable probability that had trial counsel applied for a competency hearing, the trial judge would have exercised his discretion and ordered further psychiatric testing or granted a hearing.

Second, Hummel failed to demonstrate that such a hearing or a psychiatric evaluation would have established, by a preponderance of the evidence, that he was incompetent to stand trial. The trial court is not bound by the testimony of an expert to the exclusion of all other evidence supporting a contrary opinion; a trial court may resolve conflicts in testimony of expert witnesses, accepting one opinion over another where the record adequately supports it. The trial judge had the benefit of two reports from doctors, whose expertise and foundation for their opinions was never questioned, supporting the trial judge's personal observation that Hummel was competent to stand trial. Hummel's post-trial expert based his opinion that Hummel was incompetent to stand trial on his perception that Hummel was unable to assist counsel in his defense, a fact directly refuted by trial counsel. Hence, the trial court did not err in rejecting his testimony and crediting other expert testimony. Although the trial court was not obligated to rule as it did, Hummel has not shown that the factual rulings were unreasonable. This being the case, the state court cannot be said to have engaged in an unreasonable application of the *Strickland* standard.

In contravention of the principles underlying the AEDPA, the Third Circuit impermissibly and inappropriately substituted its judgment for that of

the Pennsylvania state courts. The court failed to give the requisite deference to the state court's factual determinations and erroneously concluded that the state court's decisions involved an objectively unreasonable application of clearly established legal principles under U.S. Supreme Court precedent. When the proper inquiry is taken and the appropriate deference is given to the factual findings of the Pennsylvania post-conviction courts, it is clear that trial counsel's performance was constitutionally adequate. The Pennsylvania appellate court's opinion cited state case law setting forth the correct federal standard for evaluating ineffective assistance claims and correctly concluded that counsel's performance was not ineffective. The state court's decision to deny relief under *Strickland* was neither contrary to nor an unreasonable application of controlling precedent. Accordingly, this Court should grant review to correct the Third Circuit's approach to reviewing Hummel's Sixth Amendment claims.

CONCLUSION

For the above reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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