NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, Commissioner, Pennsylvania Department of Corrections; DONALD T. VAUGHN, Superintendent of the State Correctional Institution at Graterford; JOSEPH P. MAZURKIEWICZ, Superintendent of State Correctional Institution at Rockview; THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY,
Petitioners,

v.

BRIAN THOMAS,
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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QUESTIONS PRESENTED

Brian Thomas killed a woman named Linda Johnson by forcing a crutch through her vagina and into her chest. He was convicted of first degree murder by a Philadelphia jury in 1986, and was subsequently sentenced to death after the jury was told that he had previously been convicted of trespass and an "indecent assault" on a toddler. The Third Circuit found that Thomas was prejudiced by the absence of mitigating evidence at his sentencing hearing, even though the missing evidence would have revealed to the jury, among other things, that Thomas once attacked five police horses by forcing a broomstick into their rectums (killing one of them) and that he had molested a second toddler.

1. Did Thomas demonstrate that he was prejudiced by the absence of supposedly mitigating evidence, where that evidence actually would have portrayed him as a sadistic menace, where he refused to allow any mitigation evidence, and even though none of this supposedly favorable evidence has even been subject to a hearing or cross-examination?

2. Did the Third Circuit unlawfully fail to apply the deference standard, where both the Pennsylvania Supreme Court and the state trial court rejected Thomas' ineffectiveness claim on the merits?

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The judgment and opinion of the United States Court of Appeals for the Third Circuit dated July 1, 2009, affirming the order of the district court but remanding for a hearing on the extent of counsel's investigation, is reported at 570 F.3d 105 (3d Cir.), and is reprinted in the Appendix at App. 1-52. The district court's opinion and order dated August 19, 2005, granting the petition for writ of habeas corpus with respect to Thomas' sentence but denying guilt phase relief, is reported at 388 F. Supp.2d 489, and relevant portions are reprinted in the Appendix at App. 53-119.

STATEMENT OF JURISDICTION

This is a federal habeas corpus proceeding brought by a state capital defendant. Petitioners seek review of the order of the United States Court of Appeals of the Third Circuit holding that Thomas was prejudiced by the absence of mitigating evidence and remanding for a hearing on the extent of counsel's investigation. 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

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

Brian Thomas murdered a woman named Linda Johnson in 1985. This was an extraordinarily brutal crime: Thomas shoved a crutch through the walls of Ms. Thomas' vagina and diaphragm, into her chest cavity. He used similar force to drive a blouse through the victim's rectum and intestinal wall, and into her abdomen. Thomas also beat, raped, and strangled Ms. Thomas, who was probably alive when the worst of the wounds were inflicted.

In 1986, a jury convicted Thomas of first degree murder and related charges, and the penalty phase began immediately afterwards. The

prosecution's evidence of aggravating circumstances was relatively brief – the Commonwealth incorporated its trial evidence, and demonstrated that Thomas had previously been convicted of criminal trespass and a separate "indecent assault" on a three-year-old. The details of these two crimes were only briefly described – as for the trespass, Thomas entered his neighbor's bedroom in the middle of the night, and left after she woke, recognized him, and asked him to leave; the jury was told only the age of the young victim of assault, and that the child had suffered injuries to the rectum and intestines. App. 5-6. After the prosecution finished its presentation, Thomas told the court that he would not testify and would not permit any witnesses to testify on his behalf. Nevertheless, the Commonwealth offered to stipulate to Thomas' relatively young age and the fact of his graduation from high school – both of which could be considered mitigating circumstances under Pennsylvania law – but Thomas refused again. His refusals, made repeatedly during a colloquy taking several pages of transcript, were crystal clear:

> DEFENSE COUNSEL: Mr. Thomas, you recall during the case in chief we inquired as to whether or not you wanted to testify in your own behalf. Do you recall that?
>
> DEFENDANT: Yeah, I do. Why do I answer all these questions before? We done be over that already. No, I don't want to get on the stand.

THE COURT: Well, this is a different portion.

DEFENDANT: I still don't want to get on the stand.

THE COURT: Under no conditions?

DEFENDANT: No.

* * *

THE COURT: Did you discuss it with your lawyer, Mr. Watson?

DEFENDANT: Yes.

* * *

PROSECUTOR: There is no witness in existence you would like to call, sir, at this time. Yes or no?

DEFENDANT: I said no.[1]

The jury found three aggravating circumstances: that Thomas had committed a killing during perpetration of a felony; that he had a significant history of violent felony convictions; and that the death "was committed by means of torture."[2] App. 5-6. The jury found no mitigating circumstances, and accordingly sentenced Thomas to death.

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[1] The full colloquy is set out in the Third Circuit's opinion at App. 46-48.

[2] 42 Pa. C. S. §§ 9711(d)(6), (9), and (11).

On direct appeal to the Pennsylvania Supreme Court, Thomas argued that his counsel had been ineffective because he failed to present evidence of mitigating circumstances. First, Thomas complained that his lawyer should have accepted the prosecution's proposed stipulation as to his age and education – ignoring that *Thomas* himself had instructed his lawyer to decline this agreement. As for other possible mitigating evidence, Thomas attached affidavits from his mother, brother, and two sisters, saying that he was a "good son" and attentive brother who had "close relationship[s]" with his family, had "never been violent," and who had regularly engaged in "acts of kindness" while holding steady employment. App. 131-38. Thomas himself asserted, via affidavit, that at the time of his sentencing, he did not understand that he could "present evidence concerning my character as a mitigating circumstance." App. 129. Thomas' brief did not even *mention*, however, that he had refused to allow any mitigation evidence. The Pennsylvania Supreme Court rejected the claim, noting that Thomas had "specifically declined the invitation to proceed with such evidence," and that he had consulted with counsel as he made his decision. Commonwealth v. Thomas, 561 A.2d 699, 710 (Pa. 1989).

Next, in 1992, Thomas filed a petition for state collateral review. Through appointed counsel, he argued that trial counsel should have explained to him the "nature and purpose" of mitigation evidence,

and that without this advice Thomas' waiver of mitigation evidence was invalid. He also argued that his lawyer should have investigated family background mitigation. App. 120-21. But the factual proffer remained the same as on direct appeal – the affidavits from Thomas, his mother, and his siblings. Not surprisingly, the PCRA Court held that the sufficiency of counsel's representation with respect to this same evidence had already been litigated on direct appeal. App. 121-22. The court also found, in the alternative, that the mitigation evidence was weak and "could not possibly have made a difference." App. 123.

On collateral appeal, as one of his 23 claims of error, Thomas once again presented the same affidavits and claimed that his lawyer should have presented this evidence as mitigation. For the first time, now some 15 years after his trial, Thomas also made a series of mental health arguments: he argued that he was *not mentally competent* to waive his right to present mitigating evidence, and he also insisted that his lawyer should have presented evidence of his mental illness as mitigation. To prove these points, Thomas attached a series of psychological records developed in connection with several earlier convictions. He also attached the unsworn statement of a psychologist, Patricia Fleming, who concluded from her review of these

same records that Thomas had been diagnosed as a paranoid schizophrenic. App.127. This was not true.[3]

The consistent theme of the medical records was that Thomas was dangerous and not subject to rehabilitation. E.g., App. 153 (Thomas "has uncontrollable sexual impulses toward females and has also sexual aggressivity and cruelty towards animals;" he "is a serious threat in the community and needs to be placed in a correctional institution of maximum security" to neutralize his "anti-social and sadistic potentials"); App. 160 (Thomas "is a dangerous criminal [who] should not be returned to the community"); App. 150-51 (Thomas "has little empathy for others [and] little understanding of his social and moral responsibility").

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[3] Ms. Fleming was apparently referring to one 1977 report, in which the examiner explained that some of Thomas' test responses were "similar to those in the literature describing paranoid schizophrenia." App. 157. That was not a *diagnosis*, however, and this same examiner goes on to describe Thomas' ability to mostly control his thoughts and actions. Id. None of the other reports come close to a "paranoid schizophrenia" diagnosis, and indeed they repeatedly describe Thomas as competent, angry, defensive, with poor insight; that he displayed "no evidence of psychotic behavior or thought disorder," App. 147, and "[t]here are no psychological factors which would interfere with the sentencing process," App. 166.

Even worse for Thomas, these reports concerned prior crimes, two of which the jury had known nothing about. And these were not garden-variety burglaries or juvenile delinquency – they were brutal and grotesque acts. It turns out that Thomas "abused five police horses by inserting the handle of a broom into their rectums. Two of the horses were seriously injured with one dying ... Indications were that the dead horse had had the broomstick jammed 3'10" into its body." App. 139. Thomas had also molested *another* infant girl, in addition to the three-year-old boy the jury had been told about (who had also suffered injuries to his rectum and intestines as Thomas attacked him). App. 151. No wonder the medical professionals believed, and repeatedly concluded in these supposedly "mitigating" records, that Thomas was a sexual predator, without remorse, a danger to the community, and without significant hope of rehabilitation.

The state supreme court affirmed the denial of collateral review, explaining that the rationale of its previous decision – that Thomas had refused to allow mitigating evidence on his behalf – foreclosed these new variations on the argument that defense counsel should have presented such evidence. Commonwealth v. Thomas, 744 A.2d 713, 714 n.3 (Pa. 2000).

As is common in Philadelphia death penalty cases, things have gone very differently in federal court. Thomas filed a *Petition for Writ of Habeas*

Corpus and argued his lawyer had been ineffective for failing to develop and present mitigating evidence. He relied on the same family member affidavits, his own statement, the opinion of Ms. Fleming, and the various mental health reports prepared in connection with his earlier convictions and state supervision. The district court first held that the Pennsylvania Supreme Court's rejection of this claim – based on Thomas' refusal to allow mitigation evidence – was a merits decision. App. 73-74. Nevertheless, the court did not mention the deference standard in its long discussion of this claim, and analyzed the claim *de novo*, as if no state court had reviewed the evidence or decided the ineffectiveness issue. App. 76-108. The district court also thought there was no need for a hearing or cross-examination of Thomas' witnesses. App. 88-89 n.15. The court presumed that counsel had done no meaningful investigation of mitigation, because there was "no evidence" one way or the other. The court also (very briefly) summarized the mental health records and concluded that they contained "repeated diagnoses of paranoid schizophrenia and an inability to control aggressive impulses." App. 81. (In fact, *no* expert had diagnosed Thomas as a paranoid schizophrenic.)[4] Finally, the court uncritically

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[4] The court seems to have been confused about the language in one report, describing Thomas as afflicted with "Multiple Personality Disorders." App. 165. The court apparently took this to mean that Thomas had a schizophrenic, "Three Faces of Eve"-style split identity,

(continued ...)

accepted the statements of Thomas and his family that they had been ready and willing to testify about his "acts of kindness toward others and the close relationship he enjoyed with his family members," and that Thomas would have allowed them to do so. App. 82. The district court concluded that it was "reasonably probable" that the jury would not have imposed the death sentence if such evidence had been presented. App. 92-93.

As for the potentially devastating impact of Thomas' prior crimes and his repeated portrayal as a

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but this expert was merely summarizing the several "personality disorders" evident in Thomas' anger, aggression, lack of remorse or insight, his "hostility and ambivalence toward women," and his unsuitability for further treatment. There is no reference to delusions, non-alcoholic blackouts, or other symptoms of multiple personalities. Indeed, elsewhere in the same report, the examiner states there is "no indication of a formal thought disorder." App. 164.

The district court's confusion was no doubt triggered by the defense expert, Ms. Fleming, who in her affidavit misleadingly announced that Thomas had earlier been diagnosed with "severe multiple personality disorder" – leaving out the final "s," thereby transforming the phrase into a jarring and extreme diagnosis, the stuff of films. App. 127. This was, at best, a sloppy and fundamental mis-reporting of what the document actually said.

"dangerous criminal" in the supposedly mitigating mental health records, the district court brushed these concerns off in a footnote. The court explained that the jury *already* knew Thomas had committed terrible crimes, so one more case of infant molestation, along with the grotesque animal cruelty with a broomstick, would "likely" not have changed anything. App. 92 n.16.

The Third Circuit affirmed the grant of sentencing relief. The panel first held that the state supreme court had disposed of the claim on procedural grounds, rather than on the merits; the claim was not defaulted, however, because the Pennsylvania Supreme Court's discretionary practice of relaxing waiver rules in capital cases supposedly rendered *all* procedural bars inadequate. App. 18 n.4. As for the decision of the lower state court on collateral review, which had clearly rejected the claim on its merits, the Court of Appeals held that this did not count as an "adjudication on the merits" within the meaning of the habeas statute, so no deference was due. App. 10-18. On the merits, the panel held that Thomas' explicit refusal to allow mitigating evidence was essentially involuntary, because he had not been fully informed about the "nature" of mitigation. As for the Commonwealth's argument that the supposedly "mitigating" evidence contained devastating information about Thomas' prior crimes, his stone-cold lack of remorse, his uncontrollable aggression, and his lack of rehabilitative prospects, the panel simply concluded that even with this evidence the death penalty was

not a "*fait accompli*" and that one juror might well have been convinced that the "mental health history acts as a common thread" which might transform this evidence from aggravating to mitigating. App. 51.

Finally, the panel agreed with the district court that the lack of evidence regarding defense counsel's investigation suggested that none had taken place. Indeed, the panel even concluded that "Thomas' failure to discover evidence of an investigation is itself a sign that none occurred;" in other words, the defense can meet its burden of proof by failing to produce evidence that contradicts its own argument. App. 37. Nevertheless, the court remanded for a hearing on this limited issue – what, if anything, the defense lawyer did to investigate mitigation. Given that this trial took place about 25 years ago, the lawyer is now dead, and Thomas' failure to disprove his own claim has been converted to evidence *supporting* his allegations, it is hard to see how this hearing will go well for the prosecution.

REASONS FOR GRANTING THE WRIT

Over the past decade, the Third Circuit has routinely granted relief in Pennsylvania death penalty cases – the only three prisoners to be executed post-Furman have been volunteers, and even that has not happened since 1999. In the process, the Third Circuit has overlooked almost every procedural bar, second-guessed counsel, and engaged in wide-ranging *de novo* review of never-presented claims.[5]

This case, however, goes even farther. The Third Circuit here granted relief to Thomas – who committed a truly grotesque crime – because his

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[5] Just since the beginning of last year, the Third Circuit has granted relief in the following other Pennsylvania death penalty cases: Simmons v. Beard, 2009 WL 2902251 (3d Cir. 2009) (granting new trial); Kindler v. Horn, 542 F.3d 70 (3d Cir. 2008) (new penalty phase), cert. granted *sub nom* Beard v. Kindler, 129 S. Ct. 2381 (2009); Bond v. Beard, 539 F.3d 256 (3d Cir. 2008) (new penalty phase), cert. denied, __ S. Ct. __, 2009 WL 959455 (Oct. 5, 2009); Abu-Jamal v. Horn, 520 F.3d 272 (3d Cir. 2008) (new penalty phase), cert. filed, No. 08-652 (Nov. 14, 2008) (still pending); Holland v. Horn, 519 F.3d 107 (3d Cir.) (new penalty phase), cert. denied, 129 S. Ct. 571 (2008). In two other cases, the Third Circuit did not grant the writ outright, but remanded for further proceedings. Lewis v. Horn, 2009 WL 2914433 (3d Cir. 2009); Fahy v. Horn, 516 F.3d 169 (3d Cir. 2008).

counsel supposedly should have presented "mitigating" evidence at the penalty phase. But that evidence was not merely weak, it was *horrifying* and would have painted Thomas in the worst possible light. What is more, Thomas actually *refused* to allow his counsel to present mitigating evidence; and even though the state courts rejected this claim *twice* on the merits, the Third Circuit declined to apply the deference standard. The Court of Appeals even accepted Thomas' evidentiary proffers – affidavits by his siblings, mother, and one defense expert called "palpably biased" in a different case by a different court – without so much as a hearing. The only remaining issue – how much investigation did defense counsel undertake before he forewent mitigation? – is something of a foregone conclusion, because this lawyer has been dead for years, and the Third Circuit has held that the lack of evidence amounts to *proof* that counsel did *no* investigation.

This Court should grant *certiorari* not only because each of these errors is fundamental and important, but because, taken together, they reveal an improper eagerness to overturn a settled state court judgment.

I. The Court of Appeals improperly granted relief on a claim of ineffectiveness.

A. Thomas was not prejudiced by the absence of supposedly "mitigating" evidence that contained devastating information about his grotesque criminal history.

The Third Circuit held that Thomas' trial lawyer was ineffective because he did not develop and present family background and "mental health" evidence as mitigation. But this evidence would have revealed some very awful things about Thomas that the jury did not know: He once assaulted several horses (and killed at least one of them) by forcing a broom handle up their rectums; and he once molested a *different* infant girl, *in addition* to the other child the jury already knew about. The mental health records on which Thomas builds his claim not only discuss these crimes, but they are not even remotely mitigating taken at face value – they are filled with devastating language. To take just a few examples: "[Thomas] is a sexual deviate with sadistic tendencies. He has uncontrollable sexual impulses towards females and has also sexual aggressivity and cruelty towards animals;" or, "his lack of sensitivity or shame or guilt make for a poor prognosis with or without treatment;" or, "[he] is a dangerous criminal [and] should not be permitted to return to the community." App. 152-53, 160.

The Court of Appeals held that the absence of this evidence *prejudiced* Thomas. This is a basic error. Any competent defense lawyer would have avoided such devastating evidence at all costs – what Thomas did to Linda Johnson was revoltingly similar to what he did to those horses, as was what he did to the three-year-old boy, and there can be no mitigating explanation for molesting an infant girl. Virtually every mental health professional to examine Thomas concluded that he was an unrepentant, aggressive, sadistic menace. None of these experts (except, unsurprisingly, the one expert hired by the defense years after trial) actually found Thomas to be a paranoid schizophrenic, despite the Third Circuit's assumption to the contrary. To risk an understatement, these are all points favoring the prosecution.

Maybe there is some potential juror, somewhere, who would have heard this evidence and concluded that it made Thomas more sympathetic. But that cannot be the correct standard, because it is always true. Indeed, if there is any case in which the absence of supposedly "mitigating" evidence did *not* prejudice the defendant, this is it.

This Court has long recognized that the omission of "mitigating" evidence is not prejudicial where there is a strong risk of backfire. Indeed, in Strickland itself, counsel's failure to introduce mitigation evidence was justified, in large part, by the danger that such evidence would have opened the door to the defendant's criminal history. Strickland

v. Washington, 466 U.S. 668, 699-700 (1984). The defendant there did not even have a particularly serious "rap sheet" - apparently he "had engaged in a course of stealing." Id. at 674. But even a relatively minor risk is important and, as this Court has repeatedly emphasized, lawful prejudice analysis *must* take sober account of such dangers. See Schriro v. Landrigan, 127 S. Ct. 1933, 1944 (2007) (no prejudice from omission of mitigating evidence where Landrigan failed to show remorse and "flaunted" his menacing behavior); Bell v. Cone, 535 U.S. 685, 700-01 (2002) (proposed witnesses "might elicit information about respondent's criminal history," specifically prior robbery convictions, so counsel's decision to avoid such testimony was reasonable); Burger v. Kemp 483 U.S. 776, 792 (1987) (no prejudice from omission of mitigation witnesses who "might well have referred ...[to defendant's] encounters with law enforcement authorities," such as juvenile probation, "at least one petty offense" and drug abuse); Darden v. Wainwright, 477 U.S. 168, 185-86 (1986) (counsel's omission of mitigating evidence not prejudicial, where it would have "opened the door" to Darden's criminal history, including assault).

Just as important, in cases where this Court *has* granted relief on mitigation/ineffectiveness claims, there has been no significant danger of backfire. The Court has been careful to emphasize that point: In Wiggins v. Smith, 539 U.S. 510, 537 (2003), this Court explained that there was nothing "counterproductive" about the mitigation evidence, because Wiggins had no criminal history and no

history of violent behavior at all. In Rompilla v. Beard, 545 U.S. 374, 378, 383 (2005), and Williams v. Taylor, 529 U.S. 362, 368-69 (2000), the potential backfire problem was extremely limited, because the prosecution had *already* described the most prejudicial parts of the defendant's criminal history and argued at length to the jury that these details helped justify the death penalty. Williams, 529 U.S. at 368-69; Rompilla, 545 U.S. at 378, 383. That was not true here. At sentencing, Thomas' prosecutor introduced evidence that Thomas had once been convicted of trespass, and once convicted of child molestation. The jury was not told much about the details of either crime, and the jury knew *nothing* about his attacking a *different* infant, or the horse incident. And the awful foreshadowing apparent from those prior crimes goes far beyond anything in Williams or Rompilla. Nor did the "mental health" records in those other cases contain anything close to the insistent negative language that Thomas' records contained – phrases like "dangerous criminal" and "sadistic" – which would have confirmed the jury's worst fears.

The Third Circuit's two-paragraph discussion of prejudice did not properly weigh these risks, or apply the proper standard. The panel simply brushed aside the possibility that this evidence might have been damaging to Thomas, saying, "We are not convinced that the death penalty is a *fait accompli* even if evidence of Thomas' mental health history were available at sentencing." App. 51. As a statement of the governing standard, this is

completely backwards. First, the *government* need not prove the result would have been the same – on the contrary, the *defendant* "must affirmatively prove prejudice." Strickland, 466 U.S. at 693. Second, Strickland prejudice speaks in terms of probabilities, rather than a "*fait accompli*." No one – most especially the government – has to show that no other verdict was possible.

The Court of Appeals went on to conclude that "a single juror may well have believed" that "Thomas's mental health history acts as a common thread that ties all of this evidence together." App. 51. But the Strickland prejudice standard does not hinge on whether the court can imagine one juror who "may well" have been convinced. The prejudice requirement is stronger than that: "the defendant must show that [the errors of counsel] actually had an adverse effect on the defense." Strickland, 466 U.S. at 693. That means a reasonable *probability* that the evidence, *taken as a whole*, would have led to a different result. Wiggins, 539 U.S. at 534.

Indeed, Strickland itself *rejected* the might-have-influenced-the-outcome standard, because "[v]irtually every act or omission of counsel would meet that test." 466 U.S. at 693. Instead, the defendant must show that a different outcome was "reasonably probable." Id. At 695. This is an objective inquiry, independent of any "unusual propensities toward harshness or leniency," 466 U.S. at 695 – in other words, an unusually sympathetic juror is *not* the standard by which prejudice is

measured. Instead, the touchstone of the inquiry is whether the trial was rendered fundamentally unfair; the mere possibility of a different outcome or a juror who "may" have sympathized with Thomas, is not enough.

Further, a lawful prejudice inquiry must be based on a reweighing of *all* the evidence, rather than a narrow assessment of the strength of mitigation. Strickland, 466 U.S. at 695-96. But the Third Circuit did not reweigh or stand in the shoes of the jury. Instead, the panel treated the question as if it were a sufficiency issue: there must only be *some* evidence that might be accepted by *someone* as mitigating. That goes far beyond anything this Court has said in Strickland or succeeding cases.

Nevertheless, a disturbing number of Circuits have interpreted Strickland's "reasonably probable" language as the Third Circuit did here, that is, to mean that prejudice is established if one can imagine a juror who would agree with the defense. See, e.g., Belmontes v. Ayers, 529 F.3d 834, 876 (9th Cir. 2008) (capital defendant prejudiced by omission of mitigating evidence that would have revealed his role in prior murder; "the humanizing evidence ... might well have persuaded at least one juror to vote for life in prison whether he had committed one murder or two"), petition for cert. filed, No. 08-1263 (filed March 30, 2009) (still pending); Correll v. Ryan, 539 F.3d 938, 951-55 (9th Cir. 2008), and id. at 963-64 (O'Scainnlain, J., dissenting) (holding, over sharp dissent, that defendant was prejudiced by

absence of mitigating evidence that would have opened the door to damaging information, including prior rape), cert. denied, 129 S. Ct. 903 (2009); Harries v. Bell, 417 F.3d 631, 641-42 (6th Cir. 2005) (evidence of defendant's troubled background might have convinced "one juror" to change sentencing decision, even if prosecution could have introduced details of his criminal history in response).

The source of the problem may be over-interpretation of this Court's language in Wiggins that, for sentencing ineffectiveness claims, one juror is all it takes to change the outcome. 539 U.S. at 537. That is true, of course, but that is no license to speculate about whether a particularly sympathetic juror might have been convinced by this narrow slice of evidence. If there is any meaning to the standard at all, it must not revolve around a hypothetical *outlier* juror, but a *reasonable* juror, and not an especially lenient or credulous one. There must also be a reasonable *probability* (not just a possibility) that the new evidence would have changed this juror's vote, based on *all* the evidence.

It is time to reaffirm the significance of the "prejudice" component of Strickland. Only a small class of attorney omissions, or even acknowledged failures, are so fundamentally trial-changing as to undermine the fairness of the proceedings. Given the atrocity of Thomas' crime, the devastating information contained in the mental health records, and the weakness of the evidence of mental illness, there is no "reasonable probability" of a different

outcome here. A competent lawyer could reasonably choose *not* to open this particular door; the absence of this evidence did not render the trial unfair.

B. Thomas' trial counsel was not ineffective for failing to overcome his client's refusal to allow mitigating evidence.

Another flaw in Thomas' ineffectiveness claim is that he *refused* to allow his lawyer to put on *any* mitigating evidence. He even refused the prosecution's offer to stipulate to his age and educational background. The state supreme court held that this refusal precluded relief. That seems like a reasonable decision, and indeed, this Court recently rejected a similar claim. Schriro, 127 S. Ct. 1933. In that case, just as here, the defendant refused to allow mitigation evidence to be presented on his behalf; in that case, just as here, the state courts found that this refusal defeated any claim that the case in mitigation wasn't good enough. This Court held that the Arizona state court was reasonable both legally and factually. 127 S. Ct. at 1941-42, citing 28 U.S.C. § 2254(d)(1) and (2).

The Third Circuit, however, evaded Schriro and refused to apply the deference standard. First, the panel insisted that the state supreme court did not address the right claim. True, on direct appeal the state court concluded that Thomas refused to present mitigating evidence, that he "specifically declined the invitation to proceed with such evidence" after an on-the-record colloquy and after

consulting with his lawyer, and that this plain refusal prevented him from blaming his counsel for failure to present this evidence. 561 A.2d at 710. But according to the Third Circuit, the state supreme court had not identified or decided Thomas' *real* claim on direct appeal: that his refusal was not "knowing and voluntary" because he did not understand the *purpose* of mitigating evidence. App. 35.

But, for one thing, that was *not* Thomas' claim on direct appeal. In fact, at that point in the litigation, Thomas did not even *mention* his refusal to allow mitigating evidence, let alone argue that this refusal was not "knowing and voluntary."[6] The *Commonwealth* raised the issue of Thomas' refusal, not the defense, and the Pennsylvania Supreme Court agreed that this refusal, rather than any mistakes by counsel, explained the absence of such

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[6] The only question Thomas presented in his direct appeal brief to the Pennsylvania Supreme Court that was related to mitigation evidence was: "Should the Sentence of Death be Vacated Because Trial Counsel Was Ineffective for Failure to Present Any Evidence Whatever in Mitigation of the Sentence of Death, Although Such Evidence was Readily Available Because the Commonwealth Proffered a Stipulation and Because Witnesses Were Prepared to Testify?" *Brief for Appellant Brian Thomas (Direct Appeal)*, No.106 EDA 1986, at ix (1988). Thomas did not refer *at all* to his refusal to permit mitigation evidence.

evidence.[7] Thus, just as in Schriro, this claim was not properly presented to the state courts in the first place.

More importantly, the claim that was supposedly missed by the state supreme court could not justify collateral relief. This Court noted in Schriro that "we have never imposed an 'informed and knowing' requirement upon a defendant's decision not to introduce evidence," 127 S. Ct at 1942, and there is no "specific colloquy" required, either, id. at 1943. As a result, this claim would have required making new law; counsel can hardly have been ineffective for not anticipating a non-existing "advice" requirement. On the contrary, as long as

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[7] This was not the thrust of Thomas' claim on collateral appeal, either. App. 60. There, Thomas argued at length that he was *mentally incompetent* and thus was not capable of refusing to present mitigation evidence, which should have prompted the trial court to order an evaluation *sua sponte*. Thomas also argued that counsel should have *investigated* psychological mitigation (and therefore would also have realized, despite appearances to the contrary, that his client was incompetent). If Thomas was incompetent to participate in his own defense, it would not have made any difference to advise him differently. At any rate, Thomas obviously knew that "mitigation" evidence could include information not directly related to the crime – for example, his age and education, to which the government offered to stipulate before Thomas flatly refused.

the defendant was adamant and coherent, counsel was not required to ignore him. *Compare* Knowles v. Mirzayance, 129 S. Ct. 1411, 1421 (2009) ("Competence does not require an attorney to browbeat a reluctant witness into testifying").

Having decided that no deference was due, the panel engaged in *de novo* review of the claim, and once again placed all of the burden of proof on the prosecution. The court found that "we cannot conclude that Thomas' conduct at sentencing eliminated all possibility that counsel's performance caused him prejudice." App. 49-50. In other words, even though Thomas *seemed* to rule out any mitigating evidence, if one reads between the lines, he *might* have allowed such evidence if different questions had been asked, or maybe he would have stopped objecting if counsel had simply ignored him and barreled ahead. Actually, there is no evidence (apart from Thomas' self-serving affidavit, created years later, and never even subject to cross-examination) that he would have allowed *any* mitigating evidence, but the mere possibility is apparently enough.

But when a defendant refuses to allow his lawyer to present mitigation evidence, his later claim that he *didn't really mean it* should be received with skepticism. Further, the *prisoner* has the burden that he likely would have allowed mitigation – it is not the prosecution's burden to "eliminate all possibility" of prejudice. Thomas' refusal to allow

mitigation evidence was rather clear, and as a result the Third Circuit should not have granted relief.

The Third Circuit's conclusion that this case "bears no resemblance to Schriro" is thus another remarkable overstatement. Of *course* it "bears resemblance" to Schriro. The Third Circuit was not free to deny deference to the state court's decision, and the panel was also wrong to conclude that counsel was professionally obligated to override Thomas' belligerent refusal to allow mitigation evidence.

C. The Court of Appeals incorrectly granted relief based on the self-serving statements of Thomas' family members and a hired expert, without even a hearing or cross-examination.

As a necessary step in concluding that Thomas' counsel should have presented the "mitigating" evidence he now relies upon, the Third Circuit uncritically accepted all of Thomas' factual proffers at face value – without a hearing, without cross-examination, and without much explanation. But the credibility of these witnesses is subject to serious question.[8] It is a fundamental point: the

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[8] As the Commonwealth argued below, Thomas is not entitled to an evidentiary hearing in federal court, for two obvious reasons – he was not diligent in developing the state court record, and the state court's resolution of

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decision to overturn a presumptively valid state court judgment on the basis of factual assertions recited in pieces of paper presented by defense lawyers is unjustifiable – period.

Prisoners who believe that their convictions or sentences were obtained "in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2254(a), must prove – not simply allege or offer to prove – that they are entitled to the extraordinary relief they seek under the standards prescribed by statute and the Supreme Court's decisions. See, e.g., Adams v. United States ex rel. McCann, 317 U.S. 269, 281 (1942) ("If the result of the [state court] adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential injustice be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a

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the claim was reasonable given the record before it. See 28 U.S.C. § 2254(d)(1), (e)(2); see also Schriro, 127 S. Ct. at 1940 (no federal hearing available where state court findings were reasonable). After all, Thomas did not present the "mental health" records for *years*.

But if the AEDPA deference standard does not apply, if the claim is not defeated by the present record, and if a hearing is not barred by Thomas' lack of diligence, there can be no relief without a hearing – these proffers cannot simply be accepted as true without any adversarial testing.

matter of speculation but as demonstrable reality"). While 28 U.S.C. § 2246 allows district courts to receive affidavits, this was not meant as a wholesale substitution for the rules of evidence. Indeed, the advisory committee notes to the relevant habeas rule recognize that it will seldom, if ever, be possible to determine from the face of an affidavit whether the affiant is credible or the facts attested are true. See 28 U.S.C. *foll.* § 2254, R.7 advisory committee note. That same commentary explains that the rule was adopted to make it easier to *deny* habeas corpus petitions without a hearing, rather than to *grant* them; the concern was that under then-existing law, district courts felt compelled to hold costly, burdensome, and unnecessary hearings, even when it appeared clear that the applicant was *not* entitled to relief, because of nonmaterial (and easily filled) gaps in the record. See id.

This Court has recognized in the habeas context that lawyer-created affidavits and defense reports should be met with skepticism rather than credulity. See Herrera v. Collins, 506 U.S. 390, 417 (1993) ("motions based solely upon affidavits are disfavored because the affiants' statements are obtained without the benefit of cross-examination and an opportunity to make credibility determinations," especially where the affidavits are presented years after trial). Nevertheless, the Third Circuit has now several times accepted such statements, untested and not subject to cross-examination, as proof in capital habeas proceedings. See Kindler, 542 F.3d at 84-85 (counsel ineffective for

not presenting mitigation evidence contained in affidavits of family, friends, and two defense-hired mental health experts; no hearing held); Outten v. Kearney, 464 F.3d 401, 409-10 (3d Cir. 2006) (granting ineffectiveness claim without hearing based on report of defense mitigation expert which was based on her interpetation of family affidavits and various state records); Jacobs v. Horn, 395 F.3d 92 (3d Cir.) (granting relief on claim that counsel should have presented mental health evidence to establish diminished capacity at the *guilt* phase of capital murder case, without evidentiary hearing), cert. denied, 546 U.S. 962 (2005). See also Libberton v. Ryan, 2009 WL 3152389, *21-*24 (9th Cir., Oct. 2, 2009) (granting penalty phase relief largely on basis of untested affidavits.)

There may be some extraordinary case where the defendant's proffered evidence is undisputed or so inherently trustworthy that a hearing is unnecessary.[9] But there is nothing reliable about

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[9] Part of the problem may be the perception that if counsel is shown not to have done much of an investigation, the strength of the missed evidence does not matter. But that kind of thinking upends the Strickland standard. Counsel's omissions must be *prejudicial*, and that means the absence of this evidence rendered the trial unfair. To meet that standard, the missing evidence must be credible and persuasive, and these qualities cannot simply be assumed or accepted

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Thomas' evidence. His mother and siblings, who testified to his being "thoughtful and kind," obviously have a bias here; it is also hard to square their stories with Thomas' violent criminal history, and with the medical records that portray him as dangerous and sadistic. Their affidavits were plainly prepared by Thomas's counsel – the format and language are similar, and they were all signed the same day. Thus, it is impossible to know what these witnesses would actually *say*, let alone whether their credibility could withstand cross-examination.

As for Thomas' mental health expert, Patricia Fleming: the Eleventh Circuit once found this same witness to be "palpably biased" in a different capital case. Tompkins v. Moore, 193 F.3d 1327, 1339 (11th Cir. 1999), cert. denied, 531 U.S. 861 (2000). The court in Moore described at length Ms. Fleming's lopsided psychological opinion – "[s]he accepted everything Tompkins told her as the gospel ... [she was] unwilling[] to concede that the kidnappings and rapes Tompkins admitted committing at knife point are violent crimes ... She described him as a 'perpetual victim.'" Id. In addition, Ms. Fleming "mischaracterized" evidence to support her opinions, and even opined that Tompkins' young victim might not even be dead, despite the "overwhelming evidence" which included identification of the

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through the untested assertions of defense counsel and biased witnesses.

victim's "skeletal remains." Id. at 1338. The Eleventh Circuit went so far as to conclude, "There is no real possibility that a jury would have been swayed by anything she said." Id. at 1339.

If the Eleventh Circuit can reject Ms. Fleming's opinion as "palpably biased" and even insufficient to change the mind of *any* reasonable juror, it should go without saying that the Third Circuit was wrong to assume the *truth* of her unsworn statement.

To be clear: there should not be a hearing in this case, because Thomas' claim should be denied on the papers. The record simply does not suggest the need to go further, and much of Thomas' evidence would be barred because he failed to timely develop the record in the state courts. But *if* the federal courts believe there is potential merit here, and *if* an evidentiary hearing is not barred, there can be no finding of counsel's ineffectiveness without a hearing. The next step would be for the defense to actually present its witnesses, and for the prosecution to test the "mitigation" evidence. Settled state court judgments should not be overturned without these basic steps. The point is important and worthy of this Court's attention.

II. The Third Circuit failed to apply the deference standard, even though both the state supreme court, and the state trial court on collateral review, rejected this ineffectiveness claim on the merits.

The deferential habeas standard applies to "any claim that that was adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). Thomas' ineffectiveness/mitigation claim was rejected on the merits *both* by the state supreme court, and by the trial court. The decision of the Pennsylvania Supreme Court is due deference; but if (as the Third Circuit held) this was somehow an invalid *procedural* holding, then the decision of the trial court is due deference because it, too, was an "adjudication on the merits" by any reasonable definition of that term.

Because the deference standard is so critical to the current habeas statute, this Court should grant *certiorari* and affirm the importance of deferring to state court merits decisions.

A. The Pennsylvania Supreme Court's rejection of Thomas' ineffectiveness claim is due deference.

The Pennsylvania Supreme Court first rejected Thomas' ineffectiveness/mitigation claim on direct appeal more than twenty years ago, and concluded that Thomas' adamant refusal to allow any mitigating evidence to be presented on his behalf foreclosed relief. On collateral

appeal, when Thomas raised the claim again – this time accompanied by his "mental health" evidence – the Court explained that it had already rejected the core of the claim; that is, Thomas' refusal to put on a mitigation case prevents him from blaming his lawyer for not presenting mitigating evidence, "mental health" evidence included. 744 A.2d at 714 n.3.

The Third Circuit found that this second decision was a *procedural* ruling, and it was inadequate to boot. App. 18-19 n.4. While that "inadequacy" holding was incorrect,[10] its premise – that this was purely a

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[10] This is yet another application of the Third Circuit's oft-repeated (and still disturbing) holding that there was *no such thing as an adequate procedural rule* in Pennsylvania death penalty cases pending in the mid-1990s. The reasoning goes something like this: the Pennsylvania Supreme Court reserved the right to "relax" the rules of waiver in death penalty cases in the interest of justice. According to the Third Circuit, that means that the application of every state rule was uncertain; such uncertainty, in turn, rendered every rule inadequate, resulting in *de novo* review in federal court of every claim barred by a state procedural rule. This remarkably broad and defendant-friendly definition of "inadequacy" is at issue in another case from the Third Circuit presently before this Court. See Kindler, No. 08-992 (oral argument scheduled for Nov. 2, 2009). Even if Kindler were to resolve and correct the Third Circuit's unlawful approach to state procedural bars, however, that would not solve the problem here. That would still leave in place the Third Circuit's incorrect merits

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procedural rule – was also wrong. As this Court has recently held, when a state court rejects a claim "after concluding that it had been previously determined," that is a decision on the merits. See Cone v. Bell, 129 S. Ct. 1769, 1780 (2009); see also Commonwealth v. Gribble, 863 A.2d 455, 462 (Pa. 2004) (explaining operation of Pennsylvania's "previous litigation" rule; when core of claim already rejected on the merits, new peripheral allegations cannot overcome previous decision). Thus, deference was due.

B. Decisions of lower state courts qualify as "adjudications" under 28 U.S.C. § 2254(d).

On its face, the language of § 2254(d) applies to decisions by *all* state courts – trial courts as well as appellate tribunals – and this Court has previously assumed that deference would be due to decisions by state trial judges.[11] The Third Circuit held below, however, that the merits decision of a lower court is *not* an "adjudication," at least not where the decision was later

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analysis, its decision to grant relief by assuming the truth of Thomas' proffers, its misidentification of a state court decision on the merits as a procedural bar, and its decision to strip the state trial court's decision of the deference it was due as an "adjudication on the merits."

[11] Wiggins, 539 U.S. at 534 (applying *de novo* review where "*neither* of the state courts below reached this prong of the Strickland analysis") (emphasis added).

affirmed by operation of a procedural rule that the federal court considers inadequate. This decision has deepened a split of the circuits on the issue.[12]

The statute's phrasing, "adjudication on the merits," is neither difficult to interpret or mysterious in operation. Its primary function is to require a *merits* rather than a *procedural* holding as a prerequisite to deference. See, e.g., Lambert v. Blodgett, 393 F.3d 943, 969 (9th Cir. 2004) ("we conclude that the force of the phrase 'adjudicated on the merits' lies in the words 'on the merits'"), cert. denied, 546 U.S. 963 (2005); Miller v. Johnson, 200 F.3d 274, 281 & n.4 (5th Cir. 2000) ("adjudication on the merits" is "a term of art that refers to whether a court's disposition of the case was substantive, rather than procedural"), cert. denied, 531 U.S. 849 (2000); Green v. Johnson, 116 F.3d 1115, 1121 (5th Cir. 1997) (phrase is "term of art" describing the court's decision – substantive vs. procedural – rather than the *quality* of the disposition). But the Third Circuit here

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[12] *Compare* Liegakos v. Cooke, 106 F.3d 1381, 1385 (7th Cir. 1997) (state trial court decision, later affirmed on procedural grounds, does not count as "adjudication on the merits"), *with* Hirschfield v. Payne, 420 F.3d 922, 928-29 (9th Cir. 2005) (applying deference to decision of trial court not addressed on appeal). See also DeBerry v. Portuondo, 403 F.3d 57, 68 (2d Cir.) ("[i]t is not clear whether an adjudication on the merits by a trial court, which is neither explicitly [affirmed or rejected on appeal], is sufficient to trigger AEDPA review"), cert. denied, 546 U.S. 884 (2005).

focused on the other part of the phrase, and found that even if a state court *says* it is resolving a particular federal claim, this is not an *adjudication* unless the decision *also* has "preclusive effect." App. 14. According to the panel, the lower state court's rejection of Thomas' ineffectiveness claim was not "preclusive" because the state supreme court affirmed on a different, and supposedly invalid, procedural ground, and so, for purposes of AEDPA deference, the trial court decision does not exist. Id.

There are several problems with this logic. First, the statute neither says nor implies that preclusiveness is a prerequisite to deference. On the contrary, an "adjudication" is simply a judicial resolution of a claim.[13] More than that seems a stretch. After all, requiring the federal courts to measure the *res judicata* effects of a state court decision would often require exploration of intricate state rules governing *what* state courts are governed by *which* previous decisions; this level of involvement with state rules would be at odds with the purpose of AEDPA,

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[13] Black's Law Dictionary, which the Court of Appeals cited in its discussion of this point, defines an "adjudication" as "the process of judicially deciding a case" *or* a "judgment," which in turn simply means "a decree and any order from which an appeal lies" *or* a "final determination of the rights and obligations of the parties in a case." *Black's Law Dictionary* 7th ed. (West 1999). Thus the plain meaning of the term generally does *not* include *res judicata* effect.

and its overall design to allow the state courts to work with *less* federal interference, rather than more. One would expect the habeas statute or its legislative history to contain some sort of guideline or explanation of such a requirement, or even a hint somewhere that such an inquiry is necessary, but there is none.

More obviously, even if there is a *res judicata* requirement, the trial court's decision in this case was "preclusive" in every meaningful sense. If the parties were back in state court, the issue of mitigation ineffectiveness could not be relitigated: under Pennsylvania law, "a court involved in later phases of a litigated matter should not reopen questions decided by another judge of the same court or by a higher court in earlier phases." Melley v. Pioneer Bank,N.A., 834 A.2d 1191 (Pa. Super. 2003), citing Riccio v. American Republic Ins. Co., 550 Pa. 254 (1997). For example, "law of the case" applies when a defendant is granted a new trial (by a federal appeals court), and it precludes the defendant from thereafter relitigating issues raised and decided the first time around. Commonwealth v. McCandless, 880 A.2d 1262 (Pa. Super. 2005.) That is exactly the situation here. The decision may not be *precedential* with respect to other cases, and it may not bind the state supreme court, but that is often true – for example, most decisions of the intermediate state appellate court are unpublished, and even published ones do not constrain the Pennsylvania Supreme Court. That does not mean these decisions do not count as "adjudications," or else AEDPA's reach would be very limited indeed.

As support for its implicit preclusiveness requirement, the Third Circuit relied primarily on language from a Second Circuit case, Sellan v. Kuhlman, 261 F.3d 303, 311 (2d Cir. 2001) (defining "adjudicate," in part, as "to settle finally [] the rights and duties of the parties"). But Sellan had nothing to do with this issue – the Second Circuit there only decided that deference is due to an unexplained state court decision. There was no need to distinguish between lower and appellate state decisions, or between state court decisions with preclusive effect and those without. The few other authorities cited are similarly unhelpful and do not remotely require preclusiveness as a prerequisite to AEDPA deference. None of the cases cited as adopting Sellan's language addressed the issue of whether a lower court decision counts as an "adjudication."[14]

Even more remarkably, the panel did not cite *any* Pennsylvania law to establish that *this* lower court decision was not "preclusive." The Court of Appeals cited several federal cases and national treatises, none of which involve Pennsylvania law or actually address the issue

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[14] Teti v. Bender, 507 F.3d 50, 56-57 (1st Cir. 2007) (state court decisions on the merits, as opposed to procedural rulings, are due deference), cert. denied, 128 S. Ct. 1719 (2008); Lambert v. Blodgett, 393 F.3d 943, 969 (9th Cir. 2004) (same), cert. denied, 546 U.S. 963 (2005); Muth v. Frank, 412 F.3d 808, 815 (7th Cir.) (same), cert. denied, 546 U.S. 988 (2005); Schoenberger v. Russell, 290 F.3d 831, 840 (6th Cir. 2002) (Keith, J., concurring) (same).

presented here. App.14-15. In fact, whatever these sources might say, under Pennsylvania law the PCRA trial court's rejection of Thomas' ineffectiveness claim "finally resolved" the issue as between these parties.

The question of whether a lower state court decision counts as an "adjudication on the merits" is relatively common – indeed, this issue comes up more often as federal courts reject state appellate decisions applying procedural bars as "inadequate" (as the Third Circuit did here). In order to ensure that these lower state court decisions receive the deference they are due, this Court should grant *certiorari* and review the question.

CONCLUSION

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

Respectfully submitted,

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 05-9006 & 05-9008

BRIAN THOMAS,

Appellant in No. 05-9006

v.

MARTIN HORN, Commissioner, Pennsylvania Department of Corrections; DONALD T. VAUGHN, Superintendent of the State Correctional Institution at Graterford; JOSEPH P. MAZURKIEWICZ, Superintendent of the State Correctional Institution at Rockview; THE DISTRICT ATTORNEY OF PHILADELPHIA COUNTY

Appellants in No. 05-9008

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
District Court No. 00-cv-803
District Judge: The Honorable Louis H. Pollak
