No. 09-527

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY A. BEARD, Secretary, Pennsylvania Department of Corrections, et al.,

Petitioners,

v.

BRIAN THOMAS,

Respondent.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

In this capital habeas case, Respondent (the habeas petitioner below) submitted that he received ineffective assistance of counsel at capital sentencing. Respondent proffered that counsel did no investigation for mitigating evidence. As to prejudice, Respondent proffered that he has had a major mental illness since childhood, paranoid schizophrenia, which mitigates in a capital case. Respondent supported the proffer with professional reports about his mental illness that predated the offense and trial. Respondent made a similar submission in the state courts, which denied relief without allowing a hearing.

The District Court granted relief from the death sentence. The United States Court of Appeals for the Third Circuit reversed. The Court of Appeals held that the District Court should not have granted relief but, given Respondent's proffer and the absence of a state court hearing, should have held an evidentiary hearing. The Court of Appeals remanded for a hearing.

Although Petitioners here (the Commonwealth of Pennsylvania) prevailed in the Court of Appeals, they now seek certiorari. The questions they have presented are properly restated as follows:

> Should this Court grant certiorari when the Petitioners' "Questions Presented" are not actually at issue, and where the actual certiorari argument provides little more than a party's disagreement with the Court of Appeals' fact-intensive application of settled law?

PRELIMINARY STATEMENT REGARDING CITATIONS

All emphasis herein is supplied unless otherwise indicated.

Parallel citations usually are omitted.

Transcripts in Pennsylvania are called "Notes of Testimony" and are cited herein as "NT."

Petitioners filed an Appendix containing lower court opinions and some documents, which is cited herein as "App."

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PROCEDURAL HISTORY

Mr. Thomas was convicted of first degree murder and sentenced to death in the Philadelphia Court of Common Pleas; the Pennsylvania Supreme Court affirmed, Commonwealth v. Thomas, 561 A.2d 699 (Pa. 1989) ("Thomas-1"); and state post-conviction relief was denied without allowing an evidentiary hearing, Commonwealth v. Thomas, 744 A.2d 713 (Pa. 2000) ("Thomas-2").

The United States District Court denied habeas relief with respect to the conviction, but granted relief from the death sentence. Thomas v. Beard, 388 F.Supp.2d 489 (E.D. Pa. 2005) ("Thomas-3"), partially reproduced at App. 53-119.

The Third Circuit affirmed the denial of guilt-phase relief, but *reversed* the grant of penalty-phase relief, holding that the District Court erred in granting relief without holding an evidentiary hearing. Thomas v. Horn, 570 F.3d 105 (3d Cir. 2009) ("Thomas-4"), App. 1-52. The Circuit remanded with orders that an evidentiary hearing be held.

Petitioners ("the Commonwealth") seek certiorari review of the Third Circuit's remand order. In seeking review, the Commonwealth repeatedly inaccurately asserts that the "Third Circuit *affirmed the grant of sentencing relief*." Petition at 11; see also note 7, infra (quoting Petition).

Actually, the Third Circuit *reversed* the District Court's grant of sentencing relief, and ordered an evidentiary hearing. For this reason, and other reasons described herein, this Court should deny certiorari.

COUNTERSTATEMENT OF THE CASE

A. Trial and Capital Sentencing

In August 1985, Mr. Thomas was arrested and charged with killing Linda Johnson. The offense was disturbing and bizarre. See Petition at 2 (describing offense); Thomas-4, App. 4 (same).

Two weeks after his arrest, Mr. Thomas "attempted suicide" by "slash[ing] his wrists and ... slash[ing] his neck with a razor blade." NT 1/28/86 (suppression hearing) at 183; see also id. at 184 (he "attempted suicide" and "attempted to end his life"). Mr. Thomas told a detective he tried to kill

himself "because he was charged with murder and he was placed in the company of a number of crazy people and wanted to die." Id. at 183. Mr. Thomas' suicide attempt "suggests a rather substantial degree of mental instability."[1] Yet trial counsel did not seek a mental health evaluation or investigate Mr. Thomas' mental health.

Mr. Thomas was tried in February 1986. The jury convicted on first-degree murder. Before capital sentencing, defense counsel moved for imposition of a life sentence, but counsel made no coherent argument and the court denied the motion. See NT 6.19-24. At sentencing, the Commonwealth sought three aggravating factors – "1) killing while perpetrating another felony, namely rape; 2) killing by means of torture; and 3) a significant history of violent felony convictions. See 42 Pa. Cons. Stat. § 9711(d)(6), (8), (9)." Thomas-4, App. 5. The (d)(6) and (d)(8) aggravators were based upon the guilt-phase evidence. Thomas-4, App. 5; Thomas-3, App. 56. For (d)(9), the Commonwealth presented a "1978 conviction for felonious aggravated assault and indecent assault on a three-year old, which caused injuries to the child's rectum and intestines," and a "1984 conviction for criminal trespass where Thomas unlawfully entered a neighbor's bedroom" and "climbed into bed with her while she was sleeping." Thomas-4, App. 5-6; Thomas-3, App. 56.

Defense counsel rested without presenting any mitigating evidence. NT 6.44. The jury was removed. The court asked counsel if Mr. Thomas would testify, and if it was "the defense intention to present any evidence on mitigating circumstances." NT 6.45-46. Counsel answered "no" to both questions. Id. Counsel and the court asked Mr. Thomas if he wished to testify; he said he did not. See NT 6.46-47. Counsel had not informed Mr. Thomas of who could have been presented as mitigation witnesses. Thus, when the prosecutor asked: "Mr. Thomas, do you have any witnesses that you would like to call at this time at this stage at this proceeding?" NT 6.49. Mr. Thomas said "no." Id. The court said: "You mean no, you don't have any witnesses to call?" Id. Mr. Thomas

[1] Drope v. Missouri, 420 U.S. 162, 181 (1975); see also Kaplan & Sadock, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 1739 (6th ed.) ("CTP") ("close association of suicide [attempts] with psychiatric disorder"); id. at 1749 (same).

said "Right." Id. The prosecutor offered "to stipulate to the defendant's current age and his date of birth and the fact that the defendant is a high school graduate." NT 6.50. Counsel declined the stipulation. Id.

When the time came for closing arguments, defense counsel, showing his lack of familiarity with capital sentencing procedures, asked: "Does the Commonwealth go first?" NT 6.51. The court responded: "You go first." Id.

Defense counsel gave his argument. The District Court and the Third Circuit both found that "counsel's closing was, at best, incoherent and, at worst, in the service of the prosecution's contention that the jury should select death rather than life imprisonment" and that counsel "wholly failed in his duty to present a closing argument helpful to Thomas." Thomas-4, App. 8 n.1 (quoting Thomas-3); see also Thomas-3, App. 95-98 (quoting counsel's argument). The Commonwealth did not challenge this finding in the Third Circuit, and does not challenge it here.

"The jury found the three proposed aggravating circumstances and no mitigating circumstances. Accordingly, Thomas was sentenced to death." Thomas-4, App. 6.

B. Mr. Thomas' Proffer Regarding Ineffective Assistance of Counsel at Capital Sentencing

Post-conviction, Mr. Thomas asserted that counsel was ineffective at capital sentencing because counsel: (1) failed to investigate Mr. Thomas' life history and mental health for mitigation; (2) gave an inept and harmful closing argument; and (3) failed to reasonably advise Mr. Thomas about mitigating evidence and capital sentencing. Mr. Thomas requested an evidentiary hearing.

1. Mr. Thomas proffered that counsel failed to investigate his life history and mental health. In support of that proffer, Mr. Thomas noted that at the time of sentencing there was

> no proffer from counsel identifying the investigative measures he had undertaken, or what evidence he was prepared to present. Additionally, a search of the state court file, where Thomas' court-appointed counsel and the court would have lodged certain case-related documents, yielded nothing suggesting an investigation-no request for a mitigation investigator, no request for funds for a mitigation investigation, no request for a defense mental health expert, and no subpoenas for mental health records. Had Thomas' counsel performed any investigation, we would expect either

> some mention of it in open court or some "paper trail" suggesting it in the record of proceedings. The absence of both implies that counsel did no investigating.

Thomas-4, App. 38.

Mr. Thomas also proffered compelling mitigating evidence that was available to trial counsel, upon reasonable investigation, which shows that Mr. Thomas suffered a deprived childhood in a violent, inner-city housing project; that he had a lifelong history of mental illness so severe that it required psychiatric hospitalizations; that he suffered at the time of the offense from serious mental illnesses that included paranoid schizophrenia; and that, despite his serious mental problems, he had warm and loving relationships with family members.

The documentary evidence of Mr. Thomas' mental illness begins in 1975 when, *at age sixteen*, he was committed to a psychiatric hospital for evaluation and treatment under § 406 of Pennsylvania's Mental Health and Mental Retardation Act, 50 P.S. § 4406. See Report of Psychologist Patricia Sullivan (Sept. 1975) ("Sullivan Report"), partially reproduced at App. 139-42; Report of Dana Charry, M.D. (Sept. 1975) ("Charry Report), partially reproduced at App. 147-49; Report of Dwight Ashbey, M.D. (Sept. 1975) ("Ashbey Report"), partially reproduced at App. 143-46. The law allowed such a commitment only for someone who was "*mentally disabled* and in *need of care or treatment* by reason of such *mental disability*." 50 P.S. § 4406(a).

The fact that sixteen year old Brian Thomas was found "mentally disabled and in need of care," and psychiatrically committed, shows he was suffering from serious mental problems. The expert reports created at the hospital during his commitment confirm this.

The mental hospital reports state that sixteen year old Brian Thomas was committed after a strange incident in which, while working in a stable, he stuck a broom handle into horses' anuses. Sullivan Report at 1; Ashbey Report at 1. "Just prior to the act, Brian had completed cleaning the stables when the horses again began to defecate. He reported someone suggested he should stick the handle of the broom ... up into the horse's anus to stop him from going. Brian apparently did this without thinking that he could seriously injure the horse(s) in this way." Sullivan Report at 1.

Before this incident Brian had a "lack of school and legal violations," Sullivan Report at 2, and had "not been a problem at home or in the community," Ashbey Report at 2.

Later records suggest, and the post-conviction mental health expert found, that Mr. Thomas suffers from schizophrenia. Signs of this disease, such as Brian's strange behavior with the horses, typically begin to manifest themselves at about this age (sixteen). See CTP at 890, 908 (psychotic symptoms of schizophrenia "usually manifest[] during late adolescence and early adulthood," with men "most likely to have the onset of symptoms between ages 15 and 25"); DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 281 (4th ed.) ("DSM-IV") (similar). As here, the "onset of schizophrenia tends to be characterized by ... idiosyncratic responses to ordinary events or circumstances," CTP at 899, and "frequently evokes responses from the affected person that are interpreted as dangerous either to the person or others." CTP at 973.

The mental hospital doctors reported that Brian showed no insight into his actions. The doctors reported that Brian "does not know why he tried it except that the horse was messing so much." Ashbey Report at 1. On psychological testing, he finished the incomplete sentence "I'd like to know" by saying "what made me do it," and finished the incomplete sentence "I can't understand" by saying "why I did it." Sullivan Report at 3. Such "[l]ack of insight is common" among those suffering from schizophrenia. DSM-IV at 279. "When he heard the horse had died he cried, said he didn't mean to do it and wanted to leave the city and join the job corps because he was teased and called crazy by his peers." Ashbey Report at 1.

Throughout his psychiatric hospitalization, Brian was found to be "guarded," "aloof," "seclusive" and "unspontaneous." Sullivan Report at 2; Charry Report. Doctors noted his "flat affect." Sullivan Report at 2; Ashbey Report at 2; Charry Report. He had "very little to say," "never offered any spontaneous verbalizations and responded to questions only in a brief way." Ashbey Report at 2; Sullivan Report at 2. His mother reported that he tries to "hold[] in his anger and frustration." Ashbey Report at 1. Doctors also noted that Brian was strangely "meticulous" and

obsessed with "neatness and order." Charry Report; Ashbey Report at 2; Sullivan Report at 2-3. Again, these symptoms are consistent with the onset of schizophrenia.[2]

Psychologist Sullivan found that sixteen year old Brian Thomas'

> constricted and inadequate emotional resources ... create considerable adjustment problems. Definite difficulties in handling aggressive and sexual impulses are noted. ... [H]is generalized constriction and lack of affective differentiation make Brian insensitive to the emotional impact of everyday life as well as blocking awareness of inner feelings. Simply worded, he lacks verbal labels and awareness of outlets for expression of emotions. Brian experiences the strength of his impulses but is unable to conceptualize few ways to handle them. An over criticalness manifesting itself in compulsivity contribute to the constriction and serve as defenses in managing these impulses. Brian has an absence of imaginal resources making even fantasy unusable as an outlet.

Sullivan Report at 2.

Psychologist Sullivan found that Brian's bizarre behavior stemmed directly from his mental problems – it was a "manifestation of problems in handling his aggressive and sexual impulses," and a "loss of control and regression to a primitive level." Sullivan Report at 2. Because of his mental infirmities, he lacked "the sense to verbally share his feelings or to quit the job" and, instead, "impulsively act[ed] out his pent up rage." Sullivan Report at 2. Because of his "pent up rage," "very shallow emotionality," "rigidity and poor judgment[,] ... Brian saw no alternative to what he did." Sullivan Report at 3.

Psychologist Sullivan noted a dysfunctional relationship between Brian and his mother. She

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[2] See CTP at 976 ("flat or blunted affect ... is common" in those suffering from schizophrenia); DSM-IV at 276 (same); CTP at 975 ("Many patients with schizophrenia tend to be monosyllabic and to answer questions as briefly as possible."); DSM-IV at 276 ("Alogia (poverty of speech) is manifested by brief, laconic, empty replies"); CTP at 974 ("Social withdrawal is a common symptom in schizophrenia."); CTP at 899 ("onset of schizophrenia tends to be characterized by increasing emotional withdrawal, [and] diminishing social engagement and social drive ... [S]ocial interaction, and emotional responsivity gradually erode"); CTP at 972-73 ("person with schizophrenia often evinces steady patterns of withdrawal, moodiness, and a disinclination to relate emotionally"); CTP at 976 ("Many patients with schizophrenia seem to be indifferent (or, at times, totally apathetic). Others with less marked emotional restriction, or blunting, show emotional shallowness."); CTP at 973 (neatness "may become an overriding preoccupation" in those suffering from schizophrenia).

observed that a "hostile-dependent mother-child relationship is quite evident," and believed Brian's "rage is no doubt a transference of an anger more appropriately directed towards his unsatisfactory relationship with both his parents." Sullivan Report at 2. His impulsive actions, however, were "done unconsciously" and without "awareness of the original anger." Sullivan Report at 3.

> His insensitivity to his environment and lack of awareness of inner feelings make it difficult for him to understand and control his aggressive and sexual impulses. He has ... in the past managed to do so but at the price of much frustration and pent up rage. ... The situation [at his stable-cleaning job] ... attacked the defenses which he had erected for dealing with these impulses. His neatness and orderliness served to keep his world in order. With the horses constantly and uncontrollably 'messing' he could no longer control himself.

Sullivan Report at 3.

The psychiatric hospital doctors also noted that Brian had learning problems. In school, he "always just managed to get passing grades and depends a great deal on his mother and older sisters to help him with his homework." Ashbey Report at 2. Brian confirmed that "he just manages to pass each year at school and asked [the doctors] that we arrange to have his school work brought to him so he wouldn't get behind." Ashbey Report at 2.

The doctors believed Brian was of average/low-average intelligence, but was functioning at a *significantly lower* intellectual level because he was mentally disturbed. See Sullivan Report at 2 ("There is no doubt that Brian functions at an intellectual level significantly below his capacity. His constricted and inadequate emotional resources contribute to this difficulty as well as create considerable adjustment problems."); id. at 3 ("Brian's inadequate and constricted emotional development contribute to his functioning intellectually at a level lower than indicated by his potential."); Ashbey Report at 2 (Brian "appeared to have borderline intelligence"; he is "a boy who has a poor self image and a great deal of difficulty with his aggression and anger. This has interfered with his intellectual functioning and leaves him with a constant feeling of discouragement and frustration, so that he is not only depressed but also extremely immature and dependent."). Since serious mental illness interferes with cognitive functions, Brian's deficient intellectual functioning

is another sign of his developing mental disease. E.g., DSM-IV at 633; CTP at 1425.

The 1975 psychiatric commitment records also contain some life history information. Brian lived with his family in an apartment in an inner-city housing project. Sullivan Report at 1. "Brian is the oldest boy in a family consisting of mother and four siblings." Ashbey Report at 1. His parents were living together when he was born, but "Brian was an unplanned child" and the "marriage ended shortly after he was born." Id. As a result, he "had no consistent relationship with his father," and his "younger siblings have a different father." Id. "His father died when Brian was ten years old." Id. Brian had "an unsatisfactory relationship with both his parents," and a "hostile-dependent mother-child relationship is quite evident." Sullivan Report at 2. Brian's mother reported that he "continued to wet the bed at night until he was thirteen." Ashbey Report at 1. She described him as "the most immature and dependent of her children." Id. At the same time, however, she also said he was "the most helpful and considerate child." Id.

Brian was able to adjust to the controlled psychiatric hospital environment. He "displayed no violent or aggressive behavior at any time during his hospitalization," Charry Report; he "followed rules and was no management problem at all," id.; he "relate[d] in a ... non-aggressive manner," Ashbey Report at 2; and his "behavior on the ward [was] uneventful," id.. Again, this is consistent with Brian's developing mental illness. Mentally ill people can adjust positively to a structured institutional environment, such as a hospital; the structure was especially helpful to Brian.

Doctors at the hospital also believed that sixteen year old Brian suffered from a personality disorder. See Charry Report; Ashbey Report at 2. Personality disorder is a serious mental disturbance that adversely affects "cognition (i.e., ways of perceiving and interpreting self, other people and events)," "affectivity (i.e., the range, intensity, lability, and appropriateness of emotional responses)," "interpersonal functioning" and "impulse control"; causes "clinically significant distress or impairment in social, occupational, or other important areas of functioning"; is "inflexible and pervasive across a broad range of personal and social situations"; and is "enduring," "of long

duration and can be traced back at least to adolescence or early childhood." DSM-IV at 633; CTP at 1425. The mental impairments associated with personality disorder frequently result in psychiatric hospitalization and self-destructive behavior. See CTP at 1426-27, 1431.

Brian was discharged from the psychiatric hospital in late September 1975. He told doctors he needed to continue to have contact with them after discharge. Sullivan Report at 3. The doctors recommended "that he be placed on probation with intensive family therapy." Charry Report; see also Ashbey Report at 2 (he should "be placed on intensive probation and ... treated along with his family"); Sullivan Report at 3 ("strongly suggested that psychiatric treatment be mandated for the Thomas family").

During 1976-77, Brian was evaluated by mental health experts from the Philadelphia Court of Common Pleas and Cornwells Heights Youth Development Center. See Report of Psychologist Eva Wojciechowski (June 1976) ("Wojciechowski Report"), partially reproduced at App. 150-51; Report of C.W. Orchinik, Ph.D. (Oct. 1976) ("Orchinik Report"), reproduced at App. 152-53; Report of Psychological Services Associate Iris Jourdan (Sept. 1977) ("Jourdan Report"), partially reproduced at App. 154-60. These evaluations show he was mentally deteriorating.

The 1976 reports show that seventeen year old Brian was reading at a *fourth grade* level, which was "lower than that of a year ago"; his "[c]omprehension and judgment ... are very limited"; he had "little insight"; he had very poor "social skills"; psychological testing showed "very poor control over aggressive impulses which may lead to explosive, impulsive behavior at any time"; and he "has uncontrollable sexual impulses." Wojciechowski Report at 1; Orchinik Report. The experts believed his prognosis was "poor," and he needed to be in an institutional setting. Orchinik Report; Wojciechowski Report at 2.

By the time of the 1977 evaluation, it was clear that Brian was severely mentally ill. He was suffering from "*serious mental disturbance*," with test results consistent with "*paranoid schizophrenia*"; he was "*psychotic*" and "*delusional*" and suffered from "*impaired thinking*,"

"*bizarre behavior*" and "*los*[*ing*] *contact*" *with reality*; and he was deteriorating:

> He was cooperative throughout the testing conscientious about doing what was asked but he seemed unemotional and somewhat stiff. There were moments when he *seemed to lose contact with what was going on around him and began talking soundlessly to himself*.
>
> * * *
>
> Brian is currently functioning in the average range of intellectual ability. ... However, the summary [IQ] scores have little or no meaning in understanding Brian because they mask his *very erratic performance*. Thus in the verbal areas he has above average ability in logical thinking while his language development, range of knowledge, and common sense are all very inadequate.
>
> * * *
>
> There were indications in the intellectual assessment of *impaired thinking* in addition to the *bizarre behavior* described above. For example, Brian answered an extremely difficult question readily but could not answer much easier ones. When asked the meaning of "Strike while the iron is hot," he said, "It's hot, don't touch it." Such quick *concrete responses* were frequently given.
>
> * * *
>
> Although Brian apparently experiences almost no conscious anxiety, *fear of people and their intentions is very high*. Testing reveals *oppressive feelings of aloneness and insecurity*.
>
> Brian's responses [on testing] are similar to those in the literature describing *paranoid schizophrenia*. However, the results of testing also indicate a capacity for prolonged conscious control of thoughts and actions. Frequently his thinking is similar to that of the model student, eager to do and know what is expected. Since controls are good, nothing is likely to show in everyday behavior. What happens in *serious mental illness* is that sometimes *unconscious tendencies slip out*. In Brian's case *this is the probable cause of the sex crimes*.
>
> Testing indicates that he is *emotionally flat* ..., without feelings of love or hate for others. Over-control is indicated by strong unconscious inhibitions.
>
> * * *
>
> Important changes have occurred in the record since Brian was last tested five months ago. Such changes are seen chiefly in a greater degree of submissiveness, introversion, inhibition and anger. Earlier testing indicated that Brian wanted to cooperate; now it reveals that he is obsessive and blocked. ... *Such change is for the worse*.
>
> * * *
>
> Another ... test result[] is a tendency to be dependent on "stick or pole" in matters referring indirectly to *sexual tension*. This wish is likely to pertain to fantasy rather than actual social relations but *may be acted out when he is delusional*.
>
> Previous testing revealed strong feelings of conscious anxiety regarding how to handle depression. There was evidence of a terrible fear of fear. Now little evidence of any conscious anxiety appears in the record. While it is generally considered a good thing for a healthy person not to feel anxious, a lack of anxiety is not a good sign in a criminal or *psychotic*. It is an indication that *he is delusional*,

> that he is expanding in order to feel secure.
>
> SUMMARY: ... Personality testing reveals *serious mental disturbance*. While Brian may seem alright most of the time *unconscious fantasies will find expression in outward behavior in spite of great efforts of control*.

Jourdan Report at 1-3. It was recommended that Brian "be maintained in a secure facility where his behavior can be closely monitored" and he could be given "psychiatric consultation." Jourdan Report at 3-4.

The Jourdan Report also contains some "background" information, including that Brian was "described by his mother as always having been extremely neat, even as an infant"; as "a child he often withdrew rather than defend himself in a conflict"; his "father died when Brian was ten"; and he suffered a head injury when he had a "fall from a truck (1970) which knocked him unconscious." Jourdan Report at 1.

All of the above-described records were created long before trial. The post-conviction proffer is that they were *not obtained or used in any way by trial counsel*.

Another court-ordered mental health evaluation was performed immediately after trial. On the day after the jury sentenced him to death, Mr. Thomas was seen (briefly) by court psychologist Lawrence Byrne, M.Ed. See Byrne Report, partially reproduced at App. 161-66. Psychologist Byrne's report, like the above-described pre-trial records, shows serious mental problems.

Psychologist Byrne noted that Mr. Thomas had a "history of alcoholic blackouts"; he was "guarded" and "tense"; he suffered from "paranoid distrust and feelings of expansiveness"; his "[f]und of information appears guarded"; his "social judgment" is "poor"; "his social perceptions and thinking have a distinctively arbitrary quality"; "his thinking reveals quite an arbitrary, personalized quality"; "there is a great deal of explosive agitation within this individual"; "He remains wholly without insight, and his defense mechanisms of massive denial are quite well-ingrained"; "There is continued indication, both clinically as well as on psychological testing, of a great deal of underlying psychopathology which is clearly focused in the sexual area, with indication of sexual identity confusion, hostility and ambivalence toward women, and indication of very

primitive, brittle, and inadequate controls"; "his long term prognosis must be considered quite poor." Byrne Report at 3-4.

Psychologist Byrne concluded that Mr. Thomas "suffer[s] from *Severe Multiple Personality Disorders*," with "Sociopathic, Reactive Paranoid, and Schizoid Traits." Byrne Report at 4. As described above, personality disorders are serious mental disturbances. Psychologist Byrne found the disorders to be "severe" in Mr. Thomas. These disorders found by Psychologist Byrne are rooted in abnormal brain structure, genetic makeup and traumatic childhood experiences. E.g., CTP at 1430 ("heavy genetic contribution to antisocial personality" disorder); id. at 1435 ("being the recipient of irrational and overwhelming parental rage may lead to" paranoid personality disorder); id. at 1435 (paranoid personality disorder may have "shared genetic and environmental and causal factors" with delusional disorder); id. at 1438 (antisocial and schizoid personality disorders "have important developmental sources – most notably, traumatic early childhoods and markedly disturbed family environments"); id. at 1442 ("risk factors for the development of antisocial personality disorder ... include childhoods marked by erratic, neglectful, harsh, and physically abusive parenting; ... poverty, an urban setting, ... [and] poorly structured early schools"); id. at 1442 ("genetic factors can be influential in the development of" antisocial personality disorder); id. at 1443 (antisocial personality rooted in "chaotic family and developmental histories"); id. at 1445 ("patients with schizoid personality disorder often have histories of grossly inadequate, cold, or neglectful early parenting"); DSM-IV at 647-48 (antisocial personality disorder rooted in genetic factors, "[c]hild abuse or neglect, unstable or erratic parenting").

Psychologist Byrne's "schizoid" and "paranoid" findings signified that Mr. Thomas suffered "a pervasive pattern of detachment from social relationships and a restricted range of expressions of emotions in interpersonal settings," and "pervasive distrust and suspiciousness of others such that their motives are interpreted as malevolent." DSM-IV at 634, 638; CTP at 1434, 1444. "Particularly in response to stress," people with these disorders "may experience ... psychotic episodes (lasting

minutes to hours)." DSM-IV at 635, 639; CTP at 1435. Those suffering from these disorders are at higher risk for other mental problems; in particular, "schizoid personality disorder may also be related to – and thus share causal sources with – schizophrenia." DSM-IV at 635, 639; CTP at 1435, 1444-45.

In addition to the above-described documentary evidence, the post-conviction proffer includes evidence from family members who describe Mr. Thomas' difficult life history and mental problems, and also provide positive information about him. See Affidavits of Sara Thomas (mother), App. 131-32; Cynthia Thomas (sister), App. 133-34; Lorenzo Thomas (brother), App. 135-35; Valerie Thomas (sister), App. 137-38; Gladys Chapman (aunt) (not in Appendix). The post-conviction proffer is that these family members were available at the time of trial and would have testified had defense counsel talked to them about Mr. Thomas' life and asked them to testify.

The family members report that Brian Thomas grew up in an inner-city housing project at a time when it was plagued by extreme violence, including frequent shootings. When he was about twelve years old, he suffered a head injury and was knocked unconscious when he fell from the back of a truck moving at thirty miles per hour. He had a long history of bizarre behavior, leading his peers to call him "crazy." He spoke with and saw people who were not there. He was out of touch with his surroundings. He had sudden, unpredictable, severe mood swings. Family members also state that, despite his mental problems, he had many positive traits, which included close, loving relationships with his family; helpfulness and acts of kindness to family members and neighbors; willingness to work hard and contribute money to his family; and encouraging his siblings to stay off drugs. Family members state that his execution would be a devastating loss to them.

Post-conviction counsel provided the above-described information, along with other information about Mr. Thomas' history and the offense, to an experienced forensic psychologist, Dr. Patricia Fleming. Dr. Fleming evaluated and tested Mr. Thomas and highlighted information that a mental health expert could have presented at sentencing, had counsel adequately investigated. See

Affidavit/Declaration of Dr. Patricia Fleming ("Fleming Aff."), App. 125-28.

Dr. Fleming explains that Mr. Thomas suffers, and for years before the offense had suffered, from "a major mental illness" which meets the diagnostic criteria of "paranoid schizophrenia." Fleming Aff. "Schizophrenia is one of the most severe of the major mental illnesses. People who suffer from schizophrenia are seriously and substantially impaired in their functioning; have problems with cognition; have difficulties in thinking clearly, logically and rationally; and suffer from delusions and/or hallucinations." Fleming Aff.; see also CTP at 889 ("Schizophrenia is a disease of the brain that manifests with multiple signs and symptoms involving thought, perception, emotion, movement, and behavior. ... [T]he cumulative effect of the illness is always severe and usually long-lasting.").

In short, Mr. Thomas' post-conviction proffer is that trial counsel did no investigation whatsoever into Mr. Thomas' life history and mental health; and that reasonable investigation by trial counsel would have led to the development of significant mitigating evidence.

2. Mr. Thomas' proffer regarding counsel's ineffectiveness also includes the argument counsel made to the jury at sentencing. As both the District Court and the Third Circuit found, "counsel's closing was, at best, incoherent and, at worst, in the service of the prosecution's contention that the jury should select death rather than life imprisonment"; counsel "wholly failed in his duty to present a closing argument helpful to Thomas." Thomas-4, App. 8 n.1 (quoting Thomas-3); see also Thomas-3, App. 95-98 (quoting counsel's argument). The Commonwealth did not defend counsel's argument below and does not defend it now.

3. Mr. Thomas' proffer regarding counsel's ineffectiveness, supported by a sworn affidavit from Mr. Thomas himself, also includes counsel's failure to reasonably advise Mr. Thomas about the nature and availability of mitigating evidence. Counsel failed to inform Mr. Thomas that mitigating evidence is very broadly defined, and includes matters such as Mr. Thomas' mental problems and life history. The result was that Mr. Thomas "did not understand the nature and

purpose of mitigating evidence." Thomas-4, App. 35. Because of counsel's inadequate advice, Mr. Thomas erroneously believed that mitigating evidence encompassed *only* "evidence relating to the *circumstances of the offense*." Affidavit of Brian Thomas, App. 129. Mr. Thomas did not know he could present mitigating evidence about his mental illness and life history, or that such evidence could help him at capital sentencing.

C. The State Courts' Treatment of the Ineffective Assistance of Counsel Claim

On direct appeal, Mr. Thomas was represented by new counsel, who raised a limited ineffective assistance of counsel claim based upon Mr. Thomas' affidavit stating that he "did not understand the nature and purpose of mitigating evidence," Thomas-4, App. 35, because trial counsel led him to erroneously believe that mitigating evidence encompassed *only* "evidence relating to the *circumstances of the offense*," Affidavit of Brian Thomas, App. 129.

The Pennsylvania Supreme Court did not address the assertion actually presented by Mr. Thomas. Instead, the Pennsylvania Supreme Court mischaracterized the claim as being that "trial counsel did not advise [Mr. Thomas] that he could put on evidence of mitigating circumstances," and then denied that assertion by stating that the "record plainly belies this allegation," i.e., the record shows Mr. Thomas knew he could present mitigation. Thomas-1 at 710.

As the Third Circuit observed, Mr. Thomas never made the claim the Pennsylvania Supreme Court addressed – he never claimed he did not know he could present mitigation. Instead, Mr. Thomas "raised a completely different issue: he asserted that ... he did not understand the *nature and purpose* of mitigating evidence." Thomas-4, App. 35 (emphasis in Thomas-4). *The Pennsylvania Supreme Court did not address the issue actually raised.*

In state post-conviction, Mr. Thomas asserted that counsel was ineffective for failing to investigate mitigating evidence about Mr. Thomas' life history and mental disturbances; failing to make an adequate closing argument; and failing to advise Mr. Thomas about the nature and purpose of mitigation. Mr. Thomas requested an evidentiary hearing.

The state post-conviction trial court denied relief without allowing a hearing. It held that the "the issue of the advice given by counsel regarding [Mr. Thomas'] right to introduce mitigating circumstances" was "previously litigated" on direct appeal and therefore "not subject to additional [post-conviction] review." App. 121.[3] The state post-conviction trial court also said Mr. Thomas had not shown "prejudice." App. 122-23. This no-prejudice ruling, however, considered *only* the proffer from some of Mr. Thomas' family members that "he had some *good character traits*, so that his life has merit and that his execution would be devastating to the family." App. 122. The court *did not address or consider* any of the mental health and dysfunctional life history mitigating evidence described in § B, supra.[4]

On post-conviction appeal, the Pennsylvania Supreme Court affirmed the denial of relief, stating that Mr. Thomas' ineffectiveness claim had "previously been decided by this Court on direct appeal" – the "issue of the presentation of mitigating evidence, in all its possible manifestations, was determined by this Court's previous decision." Thomas-2 at 714 & n.3. See note 3, supra.

D. The District Court's Grant of Sentencing Relief

The District Court granted relief from the death sentence based upon the above-described ineffective assistance of counsel claim. Mr. Thomas requested an evidentiary hearing, but the District Court found "no need to hold an evidentiary hearing" because it believed "the evidence on the record is sufficient to demonstrate a Sixth Amendment violation." Thomas-3, App. 88-89 n.15.

Because the District Court granted sentencing relief on this claim, it declined to address two of Mr. Thomas' other constitutional challenges to the death sentence. See App. 8 n.3.

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[3]As this Court recently observed, this is neither a procedural bar ruling nor a merits ruling. See Cone v. Bell, 129 S.Ct. 1769 (2009) (discussed in Reasons for Denying the Writ § II, infra).

[4]The bulk of the mitigating evidence, including the evidence of Mr. Thomas' mental illness and dysfunctional life history, was first presented in the state post-conviction appeal (after undersigned counsel's office entered its appearance). Only positive character evidence was before the state post-conviction trial court. Thus, that court did not address most of the mitigation in this case. The Pennsylvania Supreme Court did not treat this as a procedural default, so there is no bar against federal review. In any event, the Commonwealth does not raise a procedural bar argument.

E. The Third Circuit's Reversal of the Grant of Sentencing Relief

The Third Circuit reversed the District Court's grant of sentencing relief. The Circuit held that the District Court erred when it granted relief without an evidentiary hearing, and remanded so the District Court can hold such a hearing.

1. Standard of review under AEDPA

The Third Circuit first determined the proper standard of review under AEDPA. Under settled law, which the Commonwealth does not challenge, the standards of 28 U.S.C. § 2254(d) apply only to claims that were "adjudicated on the merits" in state court; when "the state court has not reached the merits of a claim ..., the deferential standards provided by [§ 2254(d)] ... do not apply." Thomas-4, App. 9 (citation omitted).

The Third Circuit carefully considered the unusual way in which the state courts dealt with Mr. Thomas' arguments about counsel's ineffectiveness at capital sentencing, and found that "*no state court actually decided the claims* that formed the basis of the District Court's decision to grant Thomas habeas relief." Thomas-4, App. 35. The Circuit observed that Mr. Thomas' ineffectiveness claim includes an argument that counsel was ineffective for failing to reasonably investigate mitigating evidence of Mr. Thomas' mental illness and traumatic life history and an argument that counsel failed to professionally advise Mr. Thomas about the meaning and nature of mitigation:

> Even though Thomas raised these claims during the course of the state court proceedings, no state court actually adjudicated them on their merits. The [post-conviction trial] court and the reviewing Pennsylvania Supreme Court declined to reach the merits of each. Instead, both courts determined that the claims "have previously been decided by [the Pennsylvania Supreme Court] on direct appeal." Thomas[-2] at 714 & n.3. In reaching that conclusion, both courts were mistaken. First, the Pennsylvania Supreme Court could not have addressed Thomas' ineffective assistance [for failing to reasonably investigate mitigating evidence of Mr. Thomas' traumatic life history and mental illness] claim on direct appeal because he raised it for the first time in his PCRA petition. ... On direct appeal, the Pennsylvania Supreme Court addressed only one mitigating evidence issue: whether Thomas understood that he *could* present mitigating evidence. Thomas[-1] at 710 ("Finally, Appellant complains that his trial counsel did not advise him that *he could put on evidence* of mitigating circumstances ...." (emphasis added)). But Thomas ... raised a completely different issue: he asserted that ... he did not understand the *nature and*

> *purpose* of mitigating evidence [because counsel failed to reasonably advise him]. Therefore, no state court actually decided the claims that formed the basis of the District Court's decision to grant Thomas habeas relief.

Thomas-4, App. 34-35 (emphasis in Thomas-4).

In short, the Third Circuit found that "an examination of the opinions of the state courts shows that they misunderstood the nature of a properly exhausted claim and thus *failed to adjudicate that claim on the merits*." Thomas-4, App. 36. Because "Thomas raised the claims at issue in state court, [but] the state courts did not reach their merits," there was no state court "adjudication on the merits," and "the deferential standards of [§ 2254(d)] do not apply." Id.

2. Merits of the ineffectiveness claim

The Third Circuit applied Strickland v. Washington, 466 U.S. 668 (1984), and its progeny; held that the District Court erred when it granted relief on the current record; and remanded for an evidentiary hearing.

a. As to Strickland's "performance" prong, the Third Circuit held that the District Court erred when it found, on the current record, that trial counsel failed to reasonably investigate. The Third Circuit held that an evidentiary hearing is required on this issue.

The Circuit observed that there is some evidence already of record supporting Mr. Thomas' proffer that counsel failed to do any mitigation investigation.

First, Mr. Thomas provided a declaration from an aunt "that states that no attorney or investigator asked her about Thomas' life and mental health while he was on trial." Thomas-4, App. 37. This is "evidence directly pointing to a failure to investigate." Id.

Second, when counsel declined to present any evidence at sentencing, he did not make any "proffer ... identifying the investigative measures he had undertaken, or what evidence he was prepared to present." Thomas-4, App. 38. Counsel's failure to make such a proffer is consistent with Mr. Thomas' allegation that counsel had not investigated and had nothing prepared. Compare Wiggins v. Smith, 539 U.S. 510, 515-16 (2003) ("Before closing arguments, [counsel] made a

proffer to the court, outside the presence of the jury," which "detailed the mitigation case counsel would have presented"; counsel's failure to "proffer any evidence of petitioner's life history or family background" supported defendant's allegation that counsel had not reasonably investigated those areas); Schriro v. Landrigan, 127 S.Ct. 1933, 1937 (2007) (counsel made extensive proffer of mitigation evidence he had prepared and would have presented if allowed).

Third, "the state court file, where Thomas' court-appointed counsel and the court would have lodged certain case-related documents, yielded nothing suggesting an investigation – no request for a mitigation investigator, no request for funds for a mitigation investigation, no request for a defense mental health expert, and no subpoenas for mental health records." Thomas-4, App. 38. Again, this is consistent with Mr. Thomas' proffer that counsel failed to investigate – had "counsel performed any investigation, we would expect either some mention of it in open court or some 'paper trail' suggesting it in the record of proceedings. The absence of both implies that counsel did no investigating." Id.

While the evidence already of record is *consistent with* and *supports* Mr. Thomas' proffer that counsel failed to investigate, the Third Circuit concluded that the current record is too "sparse" to *prove* lack of investigation. Thomas-4, App. 37:

> [F]rom this record, we cannot simply jump to the conclusion that Thomas' counsel was deficient. Counsel's performance enjoys a presumption of effectiveness, and we must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." [Strickland] at 689-90. ... This means that based on the present record, we cannot affirm the District Court's conclusion that Thomas' counsel was deficient at sentencing.
>
> We by no means go so far as to deny Thomas the possibility of relief. ... [W]e believe that any resolution of Thomas' Strickland claims here is premature without the benefit of an evidentiary hearing. Accordingly, we will remand the case for a hearing concerning the extent, if any, of Thomas' counsel's pre-sentencing investigative efforts to obtain mitigating evidence.

Thomas-4, App. 38-39; see also id., App. 52 ("[W]e disagree with the District Court that Thomas' sentence should be vacated. Although the absence of any evidence of a pre-sentencing investigation in this case seems to suggest that none occurred, it is simply not sufficient to overcome the

presumption of effectiveness that we are bound to apply. As a result, we ... remand the case for an evidentiary hearing concerning the extent, if any, of Thomas' counsel's pre-sentencing investigative efforts to obtain mitigating evidence.").

Thus, the Third Circuit concluded, an evidentiary hearing is required in order to determine the actual scope of trial counsel's investigation.

b. As to Strickland's "prejudice" prong, the Circuit began its discussion by stating: "*without a fully developed record*, we cannot foreclose the possibility that Thomas will be able to show prejudice – a reasonable probability that, but for counsel's deficiency, one juror would have voted to impose a sentence of life imprisonment." Thomas-4, App. 41. This speaks to an *evidentiary hearing*, after which both performance *and* prejudice will be assessed on a "fully developed record." Other parts of the Third Circuit's opinion, however, highlighted by the Commonwealth, suggest that the Circuit believed a finding of prejudice is appropriate. E.g., Petition at 26-31.

The Commonwealth's arguments in its certiorari petition, regarding the need for a hearing on prejudice, are quite ironic given the way in which the Commonwealth raised its hearing-on-prejudice assertion in the Third Circuit. In the Circuit, the Commonwealth's sole reference to a possible need for a prejudice hearing is in a *footnote on the last page of its 130 page brief*. See Second-Step Brief for Appellees/Cross-Appellants Martin Horn, et al., at 130 n.28 ("Further, Thomas's proposed mitigation witnesses have never testified in court under oath and been subject to cross-examination, so their testimony would be likewise required before granting the writ."). Under Third Circuit precedent, the Commonwealth may have waived its argument for a hearing on prejudice by confining it to a passing reference in a footnote. John Wyeth & Brother Ltd. v. CIGNA Int'l Corp., 119 F.3d 1070, 1076 n.6 (3d Cir.1997) ("arguments raised in passing (such as, in a footnote), but not squarely argued, are considered waived").

In any event, the precise meaning of the Circuit's ruling on prejudice, and the question of

whether the Commonwealth waived any argument for a hearing on prejudice, will be addressed by the District Court on remand.

The Third Circuit expressly addressed and rejected the other main arguments made by the Commonwealth about "prejudice."

First, the Circuit rejected the Commonwealth's argument that Mr. Thomas was not prejudiced because his mental health records contain some negative information. The Circuit recognized that the records documenting Mr. Thomas' lifelong history of mental impairments contain some negative descriptions of him, just as the evidence introduced at trial and capital sentencing did. See Thomas-4, App. 50-51. The Circuit observed, however, that Mr. Thomas' lifelong history of mental illness is of substantial mitigating importance precisely because his "mental health history acts as a common thread that ties all of this evidence together" – it "explain[s] Thomas' horrific actions in way that lower[s] his culpability" by showing that they were the actions of a severely mentally ill child who became a severely mentally ill man, "and thereby diminishe[s] the justification for imposing the death penalty." Id., App. 51.

Because Mr. Thomas' history of mental illness mitigates both the capital crime and Mr. Thomas' entire history, the Circuit concluded that "there exists a reasonable probability that effective counsel would have chosen to present evidence of Thomas' mental health history, and that its presentation would have convinced at least one juror to sentence Thomas to life imprisonment." Thomas-4, App. 52.

Second, the Circuit rejected the Commonwealth's argument that "no prejudice could have resulted because Thomas would not have let his counsel present any mitigating evidence." Thomas-4, App. 42. The Commonwealth asserted that its argument was supported by Schriro v. Landrigan, 550 U.S. 465 (2007), and Taylor v. Horn, 504 F.3d 416 (3d Cir. 2007), which applied Landrigan to deny relief in another Pennsylvania capital case, but the Circuit disagreed. The Circuit explained at length why Landrigan and Taylor do not control here:

In Landrigan, the Supreme Court confronted ... "a situation in which a client interferes with counsel's efforts to present mitigating evidence to a sentencing court." There, the petitioner's counsel informed the trial court that he had advised the petitioner "very strongly" that the petitioner should present mitigating evidence. The trial court questioned the petitioner, and the petitioner confirmed that he instructed his counsel not to present mitigating evidence and that he understood the consequences. When the petitioner's counsel was proffering, at the court's request, the mitigating evidence he intended to present, the petitioner interrupted multiple times to explain away the mitigating characteristics of the evidence, and also to reaffirm that he did not want the evidence presented in court. Finally, at the end of the sentencing hearing, the petitioner stated that "I think if you want to give me the death penalty, just bring it right on. I'm ready for it." Applying AEDPA's deferential standard of review, the Supreme Court determined that the state appellate court reasonably concluded that the petitioner had refused to allow the presentation of mitigating evidence, and this refusal prevented any showing of prejudice.

In Taylor, the petitioner wrote a confession letter to the police, which stated that "I want the maximum sentence." At the petitioner's guilty plea hearing, the petitioner agreed with his counsel's statement that he had instructed counsel not to contact any witnesses or to call any medical personnel who had spoken to him, and that he understood that "the likely result will be imposition of the death penalty." At sentencing, the petitioner informed the court that he declined to present any mitigating evidence. The court then sentenced the petitioner to death. In the subsequent state post-conviction relief proceedings, the state court conducted an evidentiary hearing, denied the petitioner's request for relief, and found that the petitioner had discussed the possibility of presenting testimony of mitigating circumstances with his counsel, that the petitioner rejected the idea of doing so, and that the petitioner personally called potential witnesses to tell them not to attend his sentencing. The state appellate court affirmed these findings and the court's holding.

Applying AEDPA's deferential standard of review, we determined in Taylor that the state post-conviction court's factual and legal conclusions were reasonable. Comparing the petitioner to the one in Landrigan, we agreed with the petitioner that "he was not belligerent and obstructive in court like the defendant in Landrigan ..., but the record shows that his determination not to present mitigating evidence was just as strong." As a result, "whatever counsel could have uncovered, [the petitioner] would not have permitted any witnesses to testify, and was therefore not prejudiced by any inadequacy in counsel's investigation or decision not to present mitigation evidence."

* * *

[B]oth Landrigan and Taylor differ significantly from the present case. As an initial matter, AEDPA deference pursuant to Section 2254(d) constrained federal review in both Landrigan and Taylor. It does not apply here. ...

Moving to the merits of the Commonwealth's argument, we cannot conclude that Thomas would have interfered with the presentation of all mitigating evidence. Thomas' colloquy at sentencing focused narrowly on whether he wanted to take the stand himself[.] ... [T]he sentencing court did ask Thomas to confirm that "it's your

> decision not to ... present any evidence." Yet we cannot ignore that this question was part of a compound question that also asked Thomas to reaffirm that "it's your decision not to take the stand," and the remainder of the questions in the colloquy only concerned Thomas' desire to testify on his own behalf. Accordingly, Thomas' terse answer to this inquiry does not display an intent to interfere with the presentation of mitigating evidence that is strong enough to preclude a showing of prejudice. ... [T]he only thing that Thomas clearly disclaimed at his colloquy was a desire to testify on his own behalf.
>
> The followup questions asked by the [trial prosecutor] fare even worse. At most, Thomas' responses indicate that he had no witnesses to call at his sentencing[and] ... provide[] no support for the Commonwealth's argument that Thomas would have prevented the presentation of all mitigating evidence.
>
> Nor does Thomas' refusal to stipulate to his age and education tip the scales in the Commonwealth's favor. ... While Thomas' refusal to stipulate is consistent with the Commonwealth's position, it is equally consistent with other scenarios that the record supports. Indeed, Thomas has claimed that he did not understand the nature and purpose of mitigating evidence. Thomas' failure to stipulate could be viewed as a symptom of this fundamental misunderstanding, and not as an affirmative declaration against the presentation of all mitigating evidence.
>
> In sum, this case bears no resemblance to Landrigan and Taylor. Thomas never indicated that he would interfere with or otherwise prevent the presentation of all mitigating evidence, regardless of its nature. At sentencing, Thomas' colloquy focused on two very specific questions: 1) whether he desired to testify on his own behalf; and 2) whether he had any other witnesses to call. That he answered "no" to both does not mean that, had effective counsel prepared mental health evidence, he would have also declined its presentation. Therefore, we cannot conclude that Thomas' conduct at sentencing eliminated all possibility that counsel's performance caused him prejudice.

Thomas-4, App. 43-50 (citations omitted).

In discussing Landrigan, the Circuit emphasized that it did not reach the question reserved in Landrigan of whether a waiver of mitigation must be "informed and knowing," 550 U.S. at 479:

> In assessing Thomas' ability to show prejudice under Strickland, the only question we answer here is whether Thomas would have waived his right to present mitigating evidence had he been represented by effective counsel. As a result, we offer no opinion on whether a waiver of the right to present mitigating evidence must be "informed and knowing." See Landrigan, 550 U.S. at 479 ....

Thomas-4, App. 50 n.9.

c. The Circuit also observed that the Commonwealth made no effort to argue that trial counsel's closing argument was acceptable under Sixth Amendment standards:

> The District Court also determined that counsel's "incoherent" closing argument at sentencing exacerbated the prejudice caused by counsel's other deficient performances. Thomas III, 388 F.Supp.2d at 511-513. Although we agree with the District Court that "counsel's closing was, at best, incoherent and, at worst, in the service of the prosecution's contention that the jury should select death rather than life imprisonment" and that "[c]ounsel wholly failed in his duty to present a closing argument helpful to Thomas," id. at 513, it does not appear that the Commonwealth has raised this issue in its cross-appeal. Therefore, we will not address counsel's closing argument in our review.

Thomas-4, App. 7-8 n.2. Thus, trial counsel's harmful closing argument will enter into the District Court's "prejudice" calculus on remand, after the District Court conducts the evidentiary hearing ordered by the Third Circuit.

d. Finally, the Circuit observed that, "[i]n light of [the District Court's] decision to vacate Thomas' sentence on the basis of Thomas' Strickland claim, the District Court *dismissed, without prejudice*, two of Thomas' other claims" for relief from his death sentence. Thomas-4, App. 8 n.3. Thus, those two sentencing phase claims also are before the District Court on remand, and will be addressed if Mr. Thomas does not prevail, after the hearing, on his ineffectiveness claim.[5]

REASONS FOR DENYING THE WRIT

The Commonwealth does not dispute the Third Circuit's holding that counsel's performance was deficient under Strickland, if Mr. Thomas' proffer is true, because counsel failed to investigate for mitigation. The Commonwealth does not dispute the Third Circuit's holding that an evidentiary hearing is appropriate on the scope of counsel's investigation. The Commonwealth does not dispute the Third Circuit's finding that counsel's closing argument at capital sentencing was "at best, incoherent and, at worst, in the service of the prosecution's contention that the jury should select death." Thomas-4, App. 7-8 n.2.

All of the Commonwealth's arguments concern Strickland's prejudice prong. The Commonwealth's arguments are not appropriate for certiorari review because of the interlocutory

[5]The Commonwealth agreed that a remand is required on those two claims. See Second-Step Brief for Appellees/Cross-Appellants Martin Horn, et al., at 76 n.20 (3d Cir.).

nature of the Third Circuit's judgment, which remanded for an evidentiary hearing; because the issues for which the Commonwealth seeks review are not actually presented in this case; and because the issues for which the Commonwealth seeks review concern the Third Circuit's application of settled law to the facts of this case.

I. THIS COURT SHOULD DENY CERTIORARI BECAUSE OF THE INTERLOCUTORY NATURE OF THE THIRD CIRCUIT'S JUDGMENT, WHICH REMANDED FOR AN EVIDENTIARY HEARING

The Third Circuit did *not* grant relief, nor did it order the District Court to grant relief. Instead, it remanded to the District Court for an evidentiary hearing on Mr. Thomas' claim that counsel was ineffective at capital sentencing and, if necessary, for consideration of two other sentencing claims that the District Court did not previously address. Under these circumstances, where the judgment is interlocutory in nature, this Court generally does not grant certiorari.[6] There is no reason to deviate from that general rule here. Certiorari should be denied.

The Commonwealth, perhaps because it recognizes that certiorari generally is denied under these circumstances, repeatedly asserts (in fact, it emphasizes) that the Third Circuit *granted relief* without requiring a hearing.[7] The Commonwealth's assertions are utterly inaccurate, as set forth in

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[6] E.g., VMI v. United States, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari) (denying certiorari where Court of Appeals remanded for further proceedings in District Court; "We generally await final judgment in the lower courts before exercising our certiorari jurisdiction." (citing authorities)); Brotherhood of Locomotive Firemen v. Bangor & Aroostook R. Co., 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied.").

[7] E.g., Petition at i ("The Third Circuit found that Thomas was prejudiced by the absence of mitigating evidence ... *even though none of this supposedly favorable evidence has even been subject to a hearing or cross-examination*") (emphasis in Petition); Petition at ii ("I. The Court of Appeals improperly granted relief on a claim of ineffectiveness."); Petition at ii ("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."); Petition at 11 ("The Third Circuit affirmed the grant of sentencing relief."); Petition at 13 ("The Third Circuit here granted relief to Thomas"); Petition at 14 ("The Court of Appeals even accepted Thomas' evidentiary proffers ... without so much as a hearing."); Petition at 15 ("**The Court of Appeals improperly granted relief on a claim of ineffectiveness**.") (emphasis in Petition); Petition at 15 ("The Third Circuit held that

the Counterstatement of the Case § E, supra.

In the Commonwealth's only nod toward acknowledging that the Circuit actually remanded for an evidentiary hearing, the Commonwealth says the outcome of a hearing "is something of a foregone conclusion, because [trial counsel] has been dead for years, and the Third Circuit has held that the lack of evidence amounts to *proof* that counsel did *no* investigation." Petition at 14 (emphasis in Petition); see also id. at 12 (same). The Commonwealth's assertions are again flat out inaccurate.

First, the Commonwealth is simply wrong when it claims trial counsel is dead. He is very much alive. Had the Commonwealth not sought certiorari, he likely would have testified at the hearing by now.

Second, the Third Circuit did *not* hold that "lack of evidence amounts to *proof* that counsel did *no* investigation," as the Commonwealth claims. Instead, the Circuit simply observed that – because counsel was court-appointed and dependent upon the court for funds – one would expect the state court file to contain at least some hint of counsel's investigation, if counsel did investigate, such as requests by counsel "for a mitigation investigator" or "for funds for a mitigation investigation" or "for a defense mental health expert," or "subpoenas for mental health records." Thomas-4, App. 38. The state court file contains none of these things, and the Third Circuit reasonably observed that this absence of any "paper trail" is *evidence supporting* Mr. Thomas'

Thomas' trial lawyer was ineffective because he did not develop and present family background and 'mental health' evidence as mitigation."); Petition at 16 ("The Court of Appeals held that the absence of this evidence *prejudiced* Thomas.") (emphasis in Petition); Petition at 26 ("***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.***") (emphasis in Petition); Petition at 26 ("the Third Circuit uncritically accepted all of Thomas' factual proffers at face value – without a hearing [and] without cross-examination"); Petition at 26-27 n.8 (Third Circuit erred because "there can be no relief without a hearing"); Petition at 31 (Third Circuit erred because "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."); Petition at 33-34 n.10 (Third Circuit erred in making a "decision to grant relief by assuming the truth of Thomas' proffers").

proffer that counsel did not investigate. E.g., Fed. R. Ev. 803, Note to Paragraph 7 ("Failure of a record to mention a matter which would ordinarily be mentioned is satisfactory evidence of its nonexistence."). The Circuit did not hold that the absence of any "paper trail" *proves* lack of investigation; had it so held there would have been no reason to remand for a hearing. Rather, it held a hearing is appropriate in these circumstances given Mr. Thomas' proffer.

In any event, the Commonwealth's speculation about what it fears may happen at the hearing is not grounds for this Court to exercise its certiorari jurisdiction.

As to prejudice, the Commonwealth may have waived any argument for a hearing on prejudice by raising it only in a footnote on the last page of its Circuit brief. See Counterstatement of the Case § E. The precise scope of the hearing ordered by the Third Circuit, and the related issue of the Commonwealth's waiver, are matters for the District Court on remand, not for certiorari.[8]

II. THIS COURT SHOULD DENY CERTIORARI BECAUSE THIS CASE DOES NOT ACTUALLY PRESENT THE § 2254(d) QUESTION POSED BY PETITIONERS

The Commonwealth seeks review of the following "Question Presented": "Did the Third Circuit unlawfully fail to apply the deference standard [i.e., § 2254(d)], where both the Pennsylvania Supreme Court and the state trial court rejected Thomas' ineffectiveness claim on the merits?" Petition at i. This case does not actually present this question because, as the Third Circuit explained, *neither the Pennsylvania Supreme Court nor the state trial court addressed Mr. Thomas' actual ineffectiveness claim on the merits*.

A. The Pennsylvania Supreme Court did not address the merits of this ineffectiveness claim. See Counterstatement of the Case § C (describing Pennsylvania Supreme Court rulings).

On direct appeal the Pennsylvania Supreme Court addressed an argument Mr. Thomas never

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[8]The Commonwealth attacks Dr. Fleming, one of the mental health practitioners who saw Mr. Thomas through the years. See Petition at 30-31. The Commonwealth did not attack Dr. Fleming's credibility in the Third Circuit. Dr. Fleming is a psychologist who conducted a post-conviction evaluation of Mr. Thomas. She restated what other doctors have stated over many years, in reports that predate the offense – i.e., Mr. Thomas is seriously mentally ill. See Counterstatement of the Case § B. The Commonwealth's attack on Dr. Fleming does not help its cause here.

actually made – that "counsel did not advise him that he could put on evidence of mitigating circumstances." Thomas-1 at 710. The Court did not address the *actual* direct appeal assertion that counsel led Mr. Thomas to believe mitigation was limited to "evidence relating to the circumstances of the offense." Thomas-4, App. 33-34. Nor did the Court address Mr. Thomas' claims that counsel failed to reasonably investigate mitigating evidence of Mr. Thomas' traumatic life history and mental illness and that counsel made a harmful closing argument, because neither of those issues was raised on direct appeal. Thus, the Pennsylvania Supreme Court on direct appeal plainly did *not* "adjudicate on the merits" the ineffectiveness issues raised in the federal habeas proceedings.

On post-conviction appeal, when Mr. Thomas raised all aspects of his ineffectiveness claim, the Pennsylvania Supreme Court denied relief by stating that the claim had "previously been decided by this Court on direct appeal." Thomas-2 at 714 & n.3.

In two recent decisions, this Court described the effects this type of state court ruling has on federal habeas review. See Cone v. Bell, 129 S.Ct. 1769 (2009); Wellons v. Hall, — S.Ct. —, 2010 WL 154825 (Jan. 19, 2010). The Third Circuit treated the Pennsylvania Supreme Court's ruling in *exactly the way this Court held it should be treated*. See Thomas-4, App. 33-36.

First, this Court held that "[w]hen a state court declines to review the merits of a petitioner's claim on the ground that it has done so already," as the Pennsylvania Supreme Court did on post-conviction appeal here, "it creates *no bar to federal habeas review*." Cone at 1781 (citing Ylst v. Nunnemaker, 501 U.S. 797, 804 n.3 (1991)); Wellons at *1 (quoting Cone). Thus, Mr. Thomas' ineffectiveness claim is not procedurally barred.

The Third Circuit recognized this, applied the same rule, and held that there was no bar to federal merits review of Mr. Thomas' ineffectiveness claim.

Second, this Court held that if the claim presented post-conviction *differs* from the earlier claim that the state court previously had addressed, then the state court's post-conviction ruling "did not reach the merits of [the post-conviction] claim" and, thus, "federal habeas review is not subject

to the deferential standard that applies under AEDPA to 'any claim that was adjudicated on the merits in State court proceedings.' 28 U.S.C. § 2254(d). Instead, the claim is reviewed *de novo*." Cone at 1784.

The Third Circuit applied exactly the same rule to Mr. Thomas' ineffectiveness claim. The Third Circuit observed that Mr. Thomas' ineffectiveness claim, presented to the Pennsylvania Supreme Court on post-conviction appeal, is quite distinct from the issue the Pennsylvania Supreme Court addressed on direct appeal; thus, the Pennsylvania Supreme Court "did not reach the merits of [the post-conviction] claim" and "federal habeas review is not subject to the deferential standard" of § 2254(d), but, instead, "the claim is reviewed *de novo*." Cone at 1784.

Because the Third Circuit applied the same rules that this Court recently held should be applied, there plainly is no reason to grant certiorari review.[9]

B. In the body of the Petition, the Commonwealth asks the Court to review a § 2254(d) question that is quite different from its "Question Presented" – it asks the Court to decide if "the merits decision of a lower [state] court" should be reviewed under § 2254(d) "where the decision was later affirmed by operation of a procedural rule that the federal court considers inadequate." Petition at 34-35; see generally id. at 11, 32-39.

This issue is not properly before the Court because "it is not 'fairly included' in the questions presented under this Court's Rule 14.1(a)." Wood v. Allen, — S.Ct. —, 2010 WL 173369, *8 (Jan. 20, 2009) (§ 2254(d) argument made in body of certiorari petition not properly before the court when not "fairly included in the *questions presented* for our review") (emphasis in Wood).

In any event, the issue the Commonwealth asks this Court to review is not even present in this case. As set forth in the Counterstatement of the Case § C, the lower state court did not render a "merits decision" on Mr. Thomas' actual ineffectiveness claim, as the Commonwealth claims. And

[9]The ruling of the lower state post-conviction court does not change the analysis because that court, too, failed to address the merits of Mr. Thomas' actual ineffectiveness claim. See Counterstatement of the Case § C (describing lower court ruling).

even if it erroneously is assumed that the lower state court's ruling was on the merits of the actual claim, the Third Circuit did *not* treat the Pennsylvania Supreme Court's ruling as an "inadequate" procedural bar ruling – instead, the Circuit treated the Pennsylvania Supreme Court's ruling in the way this Court held it should be treated in Cone and Wellons, as *not being a bar ruling at all*.

The Commonwealth grossly misrepresents the Third Circuit's opinion when it claims the Circuit "found that [the Pennsylvania Supreme Court's post-conviction ruling] was a *procedural* ruling, and it was inadequate to boot." Petition at 33 (emphasis in Petition) (citing Thomas-4, App. 18-19 n.4); see also Petition at 11, 32-36, 39 (same argument, citing Thomas-4, App. 10-18 & n.4).

The parts of the Third Circuit opinion cited by the Commonwealth *have nothing to do with Mr. Thomas's ineffectiveness claim*. Instead, that part of the Third Circuit's opinion discusses the procedural and § 2254(d) status of *three other claims*, for which the Pennsylvania Supreme Court *actually did* apply a procedural bar rule on post-conviction appeal.[10] It is for those *other* claims, *not Mr. Thomas' ineffectiveness claim*, that the Third Circuit applied the default and § 2254(d) analysis on which the Commonwealth seeks this Court's review. Since the Third Circuit *denied relief* on those other claims, nothing about the Third Circuit's treatment of those other claims could be before this Court even if the Commonwealth had put it in its "Questions Presented."

[10]See Thomas-4, App. 10 ("We will first address the three claims before us on Thomas' appeal: 1) the trial court's 'reasonable doubt' instruction to the jury was unconstitutional; 2) the Commonwealth's closing argument at sentencing was unconstitutional, and Thomas' counsel was ineffective for not objecting to it; and 3) Thomas' counsel was ineffective for failing to life qualify the jury. ... Here, the [lower state post-conviction] court ruled on the merits of two of Thomas' claims – his [prosecutorial] closing argument and life-qualification claims – but did not address the third – his objection to the reasonable doubt instruction. On appeal, the Pennsylvania Supreme Court dismissed all three claims as waived because they were not raised in Thomas' amended [post-conviction] petition. See Thomas[-2] at 715 n.4.").

III. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE PETITION PROVIDES ONLY A PARTY'S DISAGREEMENT WITH THE COURT OF APPEALS' APPLICATIONS OF PROPERLY STATED RULES OF LAW

In light of the above, the Commonwealth's real quarrel with the Third Circuit is that the Circuit concluded Mr. Thomas' proffer on prejudice is a valid proffer, while the Commonwealth disagrees. Certiorari "is rarely granted when the asserted error consists of ... the misapplication of a properly stated rule of law." Supreme Court Rule 10. Certiorari should be denied here because the Third Circuit applied "properly stated rule[s] of law" to the facts of this case.

A. The Commonwealth combs the Third Circuit's opinion for isolated sound bites which it says suggest the Circuit did not "apply the proper standard" for prejudice. Petition at 18; see generally id. at 11-12, 18-22. But the Circuit repeatedly stated and applied the proper reasonable-probability-of-a-different-result standard.[11] The Commonwealth's attempt to create an issue, where none actually exists, is unavailing. Cf. Woodford v. Visciotti, 537 U.S. 19, 23-24 (2002) (where court's "opinion painstakingly describes the Strickland ['reasonable probability'] standard," its "occasional shorthand reference to that standard by use of" other phrases "may perhaps be imprecise, but if so it can no more be considered a repudiation of the standard than can this Court's own occasional indulgence in the same imprecision").

B. The Commonwealth complains that the Third Circuit gave a "two-paragraph discussion of prejudice." Petition at 18. But the Circuit actually devoted *eleven* paragraphs to the

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[11] E.g., Thomas-4, App. 30 ("To demonstrate prejudice, Thomas 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'") (quoting Strickland); App. 32 ("Thomas has demonstrated prejudice if 'there is a reasonable probability that, but for counsel's unprofessional errors ...' one juror [would have] voted to impose a sentence of life imprisonment rather than the death penalty.") (quoting Strickland); App. 41 ("a reasonable probability that, but for counsel's deficiency, one juror would have voted to impose a sentence of life imprisonment"); App. 42 ("a reasonable probability that this evidence would have persuaded at least one juror to impose life imprisonment rather than the death penalty"); App. 52 ("a reasonable probability that effective counsel would have chosen to present evidence of Thomas' mental health history, and that its presentation would have convinced at least one juror to sentence Thomas to life imprisonment").

Commonwealth's prejudice arguments, and a twelfth paragraph to the harmful effect of counsel's closing comments, which the Commonwealth did not challenge. See Thomas-4, App. 7-8 n.2, 42-52. In any event, purported brevity of a lower court ruling is not grounds for granting certiorari.

C. The Commonwealth argues that the Third Circuit misapplied Schriro v. Landrigan, 550 U.S. 465 (2007), to this case. Petition at 11, 22-26. The Third Circuit carefully considered the Commonwealth's Landrigan arguments, addressed them at length, and found them wanting on this record. See Counterstatement of the Case § E. The Third Circuit has shown it understands Landrigan, here and in Taylor v. Horn, 504 F.3d 416 (3d Cir. 2007), where the it applied Landrigan to *deny relief* in a capital case. The Commonwealth's disagreement with the Third Circuit's application of settled law to the facts is not grounds for certiorari review.

One aspect of the Commonwealth's Landrigan argument may deserve a further, final comment. The Commonwealth suggests the Third Circuit imposed an "informed and knowing" requirement on the failure to present mitigating evidence. Petition at 11, 24. But the Circuit *expressly explained that it did no such thing*. See Thomas-4, App. 50 n.9 (quoted in Counterstatement of the Case § E). Again, the Commonwealth seeks review of an issue that is absent from this case.

D. The Commonwealth says the Third Circuit erred in assessing prejudice because some of the records documenting Mr. Thomas' history of mental illness contain negative information. E.g., Petition at 11-12, 15-18. The Third Circuit applied settled law, carefully considered the Commonwealth's arguments about this fact-intensive issue, and rejected those arguments. The Commonwealth's disagreement with the outcome is not grounds for certiorari review.

Moreover, the Commonwealth seriously understates the strength of the mitigating evidence in this case, and ignores the mitigating light the evidence sheds on the offense and on Mr. Thomas' entire history, including the prior bad acts that established aggravation in this case and that are mentioned in some of the mental health records.

The proffer of mitigating evidence in this case is very substantial. Mr. Thomas suffers from paranoid schizophrenia and several severe personality disorders. These serious mental disturbances are not his fault, they are rooted in abnormal brain structure and traumatic childhood experiences. The symptoms of these mental illnesses include delusions, hallucinations, lack of contact with reality, irrational thinking and bizarre behavior. These mental disturbances disrupt and distort Mr. Thomas' self-perception, his perceptions of others and his perceptions of the world around him. They wreak havoc on his ability to control, modulate and understand his emotions, his impulses and his actions. They produce psychotic breaks with reality.

Moreover, Mr. Thomas' *entire life* has been miserably distorted by his mental illness. From an early age, he was different from other children. His strange behavior, which included seeing and speaking to people who were not there, lack of contact with his surroundings, social isolation and severe mood swings, led his peers to make fun of him and call him "crazy." He also had serious learning problems, struggled with his schoolwork and barely managed to pass.

Despite his impoverished childhood in a violent inner-city housing project, he was not a disciplinary problem until he was sixteen years old. At age sixteen, however, his mental illness overwhelmed him. He suffered a breakdown, he was found mentally disabled, and he was committed to a psychiatric hospital, after a bizarre incident in which he put a broom handle into horses' anuses. Hospital evaluators found he lacked insight or understanding as to why he did it. They found he had struggled for years to build inner defenses against his mental illness, but those defenses broke down and he lost control over his actions. They found he was very remorseful, and could not understand why it happened.

These professionals found that Brian's mental illness substantially interfered with his capacity for intellectual and emotional functioning. They found he lacked understanding or insight into his mental illness. When he was discharged from the hospital, Brian asked for ongoing help, and the doctors found that he (and his family) needed intensive, ongoing psychiatric treatment, which

he never received.

Both the timing (age 16) and manifestations of this first mental breakdown are consistent with the onset of his schizophrenia. During the years after this first breakdown, his mental illness became even more severe.

By the time he was eighteen, in 1977, mental health professionals found that he suffered from "*serious mental disturbance*" consistent with "*paranoid schizophrenia*"; he was "psychotic"; he was "delusional"; he suffered from "impaired thinking"; he was suspicious and fearful; his behavior and thoughts were "erratic" and "bizarre"; he was "los[ing] contact with what was going on around him"; he had "little insight" into his illness; his "[c]omprehension and judgment ... are very limited"; he had very poor "social skills"; he was emotionally "obsessive and blocked"; and, despite his "great efforts of control" and "eager[ness] to do and know what is expected" of him, his psychosis sometimes overwhelms him and causes him to commit sex crimes. The doctors found his mental illness was severe and getting worse, and believed he should be *confined "in a secure facility* where his behavior can be closely monitored" and he needed psychiatric treatment.

In short, Brian Thomas' life is an example of the "human tragedies of seriously disturbed children," Parham v. J.R., 442 U.S. 584, 599 (1979), who become seriously disturbed adults. This is substantial mitigation.[12]

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[12]The Commonwealth suggests Mr. Thomas' mental illness is aggravating, rather than mitigating, because it makes him "dangerous." E.g., Petition at 7, 8, 10-11, 15, 18. The Commonwealth is wrong. First, "future dangerousness is *not an aggravating circumstance* under Pennsylvania's death penalty statute, and therefore is *not a valid factor* to be considered by the jury." Commonwealth v. Marrero, 687 A.2d 1102, 1108 n.19 (Pa. 1996). In evaluating prejudice under Strickland, courts cannot assume the sentence is imposed by a "lawless decisionmaker" who would treat dangerousness as aggravating. Id., 466 U.S. at 695. Second, the only alternative to a death sentence in Pennsylvania is life without the possibility of parole. Thus, Mr. Thomas poses no danger to society if sentenced to life. Third, Mr. Thomas' records show he functions appropriately in the type of structured, controlled environment to which he would be confined if sentenced to life. Thus, he poses no danger in prison, either. Finally, the Commonwealth's suggestion that mental illness should be treated as aggravating raises serious constitutional concerns, as this Court recognized in Zant v. Stephens, 462 U.S. 862, 885 (1983) ("constitutionally impermissible" to "attach[] the 'aggravating' label to ... conduct that actually should militate in favor of a lesser penalty, such as

Moreover, Mr. Thomas' lifelong history of mental illness also provides a mitigating explanation for the *aggravating* evidence and for other negative information.

The disturbing facts of this offense likely increased the weight the jury gave to the offense-related aggravating circumstances – (d)(6) (rape) and (d)(8) (torture). Jurors who understood Mr. Thomas' mental illness would give less weight to this offense-related aggravation because they would see the disturbing facts of the offense as symptomatic of Mr. Thomas' *severe mental problems*, rather than evidence that he is the inhumane, evil person portrayed by the prosecutor. E.g., Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (noting "belief, long held by this society, that defendants who commit criminal acts that are attributable to ... emotional and mental problems, may be less culpable than defendants who have no such excuse").

For similar reasons, Mr. Thomas' history of mental illness undermines the weight of the (d)(9) aggravating circumstance – "significant history of felony convictions" – which was based on a "1978 conviction for felonious aggravated assault and indecent assault on a three-year old" and a "1984 conviction for criminal trespass where Thomas unlawfully entered a neighbor's bedroom." Thomas-4, App. 5-6; Thomas-3, App. 56. Mr. Thomas' history sheds mitigating light on these prior offenses, because it shows they were committed by a severely mentally disturbed person.

Mr. Thomas' history of serious mental illness also explains negative information in the records in a mitigating way. In particular, the records show that the bizarre incident with the horses and both assaults on children, which the Commonwealth particularly emphasizes, occurred when Mr. Thomas was a teenager, at the same time when he was being committed for psychiatric treatment and when the mental health professionals who observed him found that he suffered from "*serious mental disturbance*" consistent with "paranoid schizophrenia"; that he was "psychotic," "delusional" and "los[ing] contact with what was going on around him"; and that he was making "great efforts of control" but was overwhelmed by his illness.

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perhaps the defendant's mental illness").

Courts long have recognized that a defendant's mental illness can "totally change the evidentiary picture" at capital sentencing because it "not only can act in mitigation, it also could significantly *weaken the aggravating factors*." Middleton v. Dugger, 849 F.2d 491, 495 (11th Cir. 1988) (quoting Huckaby v. State, 343 So.2d 29 (Fla.1977)). The Third Circuit found that Mr. Thomas' mental illness does precisely that – his "mental health history acts as a common thread" that explain his actions at the time of the offense and in the past "in way that lower[s] his culpability" by showing that they were the actions of a severely mentally ill child who became a severely mentally ill man. Thomas-4, App. 51.

This Court recently reached a similar conclusion in Porter v. McCollum, 130 S.Ct. 447 (2009). In Porter, the state courts held Porter was not prejudiced by counsel's failure to present mitigating evidence in Porter's military records because those records contained negative information – that he "went AWOL on more than one occasion." Id. at 455. This Court found the state court's no-prejudice ruling "unreasonable" because the "evidence that he was AWOL is consistent with [the post-conviction] theory of mitigation" that his combat experiences caused him serious "mental and emotional" distress. Id. Porter's mental disturbances cast a mitigating light on the negative information in his records, just as Mr. Thomas' mental disturbances cast a mitigating light on the negative information in his records.

There is no reason to grant certiorari here.

CONCLUSION

For the reasons stated, certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David Wycoff, certify that on this 8th day of February, 2010, I have caused the foregoing brief to be served by FIRST CLASS MAIL on the following person:

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