NO. 21 7611

In the
Supreme Court of the United States

JOHN CHARLES EICHINGER,
Petitioner,
v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

On Petition for a Writ of *Certiorari* to the
Supreme Court of Pennsylvania

BRIEF IN OPPOSITION

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CAPITAL CASE: QUESTION PRESENTED

1. Did the Third Circuit Court of Appeals properly deny a certificate of appealability where it properly stated federal law and applied it in a reasonable manner?

COUNTERSTATEMENT OF THE CASE

Eichinger was convicted of stabbing to death three young women and a three-year-old little girl. He was sentenced to death for his crimes. There was overwhelming evidence of his guilt, including multiple confessions, a prison diary, and DNA evidence; and there was a mountain of aggravating evidence, including multiple murders, murder of a child, and killing witnesses. *See Commonwealth. v. Eichinger*, 108 A.3d 821, 851–52 (Pa. 2014) ("If ever there were a criminal deserving of the death penalty it is John Charles Eichinger. His murders of three women and a three-year-old girl were carefully planned, executed and attempts to conceal the murders were employed. …. There is overwhelming evidence of his guilt, including multiple admissions to police, incriminating journal entries detailing the murders written in Appellant's own handwriting and DNA evidence.") (quoting trial court opinion).

Eichinger's crimes were ghastly and merciless. On the morning of March 25, 2005, he left his home in Somers Point, New Jersey, and drove to the home of Heather Greaves in King of Prussia, Pennsylvania. He intended to kill Heather unless she agreed to end her relationship with her

boyfriend. He brought with him a knife that he had used to murder another young woman in 1999 and rubber gloves.

Eichinger arrived in King of Prussia at around 8:00 a.m., but he did not immediately go over to Heather's home. She lived with her father George, her sister Lisa, and her three-year-old daughter Avery Johnson. He knew that Mr. Greaves did not leave for work until 9:30 and wanted to wait until he left; he was concerned that Mr. Greaves, if present, would thwart his plan to kill Heather. To pass the time, Eichinger visited a local Acme where he used to work and chatted with old acquaintances.

When he believed Mr. Greaves had left for work, Eichinger drove over to Heather's home. He saw that Lisa's car was parked out front, however; he did not expect her to be there. He drove slowly around the block, hoping that Lisa would leave, but she did not. He decided to confront Heather anyway. He entered the house, pulled out his knife, and stabbed Heather repeatedly in the stomach. He later admitted "that he purposefully stabbed Heather in the stomach, because '[he] had heard in movies and books that it was easier to puncture organs there than through

the chest, where it is more difficult because of hitting bone.'"

Commonwealth v. Eichinger, 915 A.2d 1122, 1128 (Pa. 2007).

Three-year-old Avery saw Eichinger stabbing her mother. She had known Eichinger since she was born. After Heather screamed for Avery to call 911, Eichinger chased Avery down a hallway and slashed her neck. Avery fell to the floor. At that moment, Lisa opened the bathroom door at the end of the hallway, saw Avery, and then saw Eichinger standing over her. She tried to shut the bathroom door, but Eichinger barreled down the hallway, overpowered her, and stabbed her repeatedly in the stomach. Eichinger later confessed to police that "I had to stab Lisa, too. I couldn't go to jail." *Id.* at 1128. [1]

Eichinger walked back towards the kitchen, stabbed Avery once more, in her back, with such force that the knife blade came out her chest and pinned her to the floor. He explained to police that "'I couldn't even let the three-year old identify me. I had known her since she was born and she knew my name. She could speak my name." *Id.* at 1144-45. After

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[1] After Eichinger stabbed Lisa dozens of times, she looked at her wounds and said, "I'm dead" (N.T. 11/1/05, 249). Eichinger later wrote in his prison diary that he had to admit he was "a little amused" at the way she died (*id.*).

stabbing Avery for the second time, Eichinger returned to the kitchen, where Heather lay dying. There, he stabbed Heather in her diaphragm and slit her throat.

Eichinger took care not to leave his blood or fingerprints at the crime scene. He also ripped Lisa's shirt, making it appear that she was the primary target of the executions. A neighbor, however, saw him leave the house, and the neighbor gave that information to police.

Eventually, Eichinger confessed to killing Heather, Avery, and Lisa. He also confessed that, on July 6, 1999, he had used the same knife to kill another woman, Jennifer Still, after she spurned his romantic advances. This Court aptly described the facts surrounding that murder as follows:

> The knife used in these murders, was the same knife he used on July 6, 1999 to murder Jennifer Still. Appellant admitted to police that he killed Jennifer because she rejected him and went back to her fiancé, Kevin. Appellant described the murder:
>
> > I had the knife in my hand. I turned away from her for a second and couldn't believe she was doing that to me. She got real close to me. I thought, 'You're ripping my heart out and now you're getting close to me.' She put her hand on my shoulder. I turned around and stabbed her in the stomach.

***

> After I stabbed her the first time, she stepped back but didn't fall. Her blood splattered out at me. I lunged at her. I just kept on stabbing her.
>
> ***
>
> I slit her throat as she slid down the wall. I let her body weight cut her throat against the knife.

(Pre-Trial Hearing 9/15/05 CS-7). Appellant saved his clothes from that day, and collected articles about the murder to serve as reminders. Since using the knife to kill Jennifer in 1999, he stored it in a sheath in a cooler. Appellant told police, "I had it in the cooler with the rubber gloves and the Scream mask. Every Halloween I put the mask, gloves and knife on and handed out candy at the door." (Pre-Trial Hearing 9/15/05 CS-11).

Opinion, dated Mar. 3, 2006, at 4 (Carpenter, J.).

William McElroy, Esquire, was appointed to represent Eichinger in connection with the murders of Jennifer, Heather, Lisa, and Avery on March 30, 2005. Following Mr. McElroy's appointment, he filed an omnibus pretrial motion seeking to suppress statements, physical evidence, and an identification. He also sought to sever the murder of Jennifer from the murders of Heather, Lisa, and Avery. Following a suppression hearing, on September 16, 2005, the trial court denied Eichinger's motion; it deferred ruling on the severance claim, however.

Mr. McElroy then employed the services of an investigator, Robert Stanley. He also employed the services of a psychiatrist, Kenneth Weiss, M.D., and a psychologist, Gillian Blair, Ph.D. Both doctors evaluated Eichinger. On September 30, 2005, the trial court appointed additional counsel, Paul Bauer, Esquire.

On October 17, 2005, the trial court granted Eichinger's motion for severance that it had deferred ruling on. Jury selection started the same day. At the end of the day-long process, the parties selected a full jury panel for the Jennifer Still murder trial, and two jurors for the Heather Greaves, Lisa Greaves, and Avery Johnson murder trial (N.T. 10/17/05, 17, 95, 101). Before resuming the *voir dire* the following morning, Eichinger withdrew his severance motion; the trial court thereby vacated its earlier severance order by agreement of the parties. Eichinger then waived his right to a jury trial (N.T. 10/18/05, 3).

Later that same day, on October 18, 2005, a guilt-phase bench trial before the Honorable William R. Carpenter took place. Eichinger, offering no defense, did not contest the charges and stipulated to the evidence offered against him. He was convicted of four counts of first-degree

murder and related charges. The Commonwealth sought the death penalty for the murders of Heather, Lisa, and Avery.

Following Eichinger's convictions, Mr. McElroy filed many motions on Eichinger's behalf. He filed a motion requesting a presumption of life instruction, a motion to preclude victim impact statement, a motion requesting the life without parole instruction, a motion to preclude the killing of a witness aggravator, motion to preclude cross-examination of Eichinger; motion to preclude the use of autopsy photos; and motion to preclude the use of multiple confessions (N.T. 10/31/05, 3-16).

After Eichinger's pretrial motions were litigated, a three-day penalty hearing began on November 1, 2005. At its conclusion, the jury found at least two aggravating circumstances in the death of all three victims. The first aggravating circumstance common to all victims was that Eichinger had been convicted of another state offense for which a sentence of life imprisonment could have been imposed; specifically, the murder of Jennifer Still. The second aggravating circumstance that the jury found was that the Eichinger had been convicted of another murder that was committed before or at the time of the offense at issue; specifically, the

murders of the other two victims. The jury found a third aggravating circumstance in the murder of Lisa Greaves and Avery Johnson; specifically, that the victim was a witness to a murder and was killed to prevent her testimony in any criminal proceeding concerning the offense. All three aggravating circumstances that were found in the murder of Lisa were also found for the murder of Avery Johnson. The jury found a fourth aggravating circumstance; specifically, that Avery was a child less than twelve years old. The jury determined that each murder had one mitigating circumstance, which was that Eichinger was under the influence of extreme mental or emotional disturbance at the time of the murders.

The jury ultimately found that the aggravating circumstances outweighed the mitigating circumstance, and returned three death sentences for the murders of Heather, Lisa, and Avery. The Pennsylvania Supreme Court affirmed the judgments of sentence. *Commonwealth v. Eichinger*, 915 A.2d 1122 (Pa. 2007). The United States Supreme Court denied Eichinger's *certiorari* petition.

Three weeks later, the Federal Community Defender Office ("FCDO") filed a motion in the United States District Court for the Eastern

District of Pennsylvania seeking its appointment as federal habeas counsel in this case. Once appointed, the FCDO ultimately sought and obtained a stay of the federal habeas proceeding.

At about the same time that the FCDO launched a federal habeas proceeding, Eichinger filed a *pro se* post-conviction petition in state court under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541 *et seq*. In the *pro se* petition, Eichinger asserted that he was represented by the FCDO, which ended up filing an amended petition on his behalf two years later in November 2009. The amended petition raised twenty-three claims of error, and many more additional sub-issues. The FCDO's primary allegation was that Eichinger was "mentally and cognitively impaired," and that prior counsel were ineffective for failing to properly investigate and utilize such alleged impairments (*Amended PCRA Petition* ¶17).

The Commonwealth answered and moved to dismiss the petition in April 2010. The trial court held oral argument on the pleadings. At argument, the Commonwealth did not oppose granting Eichinger evidentiary hearings on eleven of his claims, but sought dismissal of the rest. The trial court agreed.

The trial court held 22 days of PCRA hearings. The FCDO presented the testimony of prior counsel, Eichinger, five mental health experts, and fourteen other witnesses. The Commonwealth presented two mental health experts in rebuttal. After a final oral argument, the trial court dismissed Eichinger's petition. The Pennsylvania Supreme Court affirmed the denial of PCRA relief. *Commonwealth v. Eichinger*, 108 A.3d 821 (Pa. 2014).

The FCDO filed an amended federal habeas petition on Eichinger's behalf. The Honorable John R. Padova of the United States District Court of the Eastern District of Pennsylvania, after briefing and oral argument, dismissed the petition without a hearing and denied a certificate of appealability. *Eichinger v. Wetzel*, 2019 WL 248977 (E.D.Pa. 2019). The Third Circuit Court of Appeals denied Eichinger's request for a certificate of appealability.

This petition for writ of *certiorari* followed.

REASONS FOR DENYING THE WRIT

Eichinger contends that trial counsel were ineffective advising him to stipulate to the evidence against him. The Third Circuit, however, properly concluded that no reasonable jurist would conclude that this claim entitles Eichinger to habeas relief. The state court decisions rejecting it were—at the very least—reasonable applications of *Strickland v. Washington*, 467 U.S. 1277 (1984).

The strategy of trial counsel in advising Eichinger to stipulate to the evidence was well-within "the wide range of professional assistance." *Strickland*, 467 U.S. at 689. Before the stipulated trial, Mr. McElroy and Mr. Bauer reviewed discovery from the prosecution, spoke repeatedly with Eichinger, talked to his family and friends, interviewed potential witnesses, requested and obtained client background forms from several members of his family, and subpoenaed and reviewed medical, school, counseling, and employment records (N.T. 2/8/11, 43-44). Based on this investigation,

both counsel found no viable mental health or other defenses for the guilt-phase of trial for any of the four murders (N.T. 10/25/11, 6-10).[2]

They instead negotiated an agreement with the Commonwealth. They wanted to preserve Eichinger's appellate rights for his suppression issues. But they also wanted to pursue a penalty-phase defense that Eichinger had accepted responsibility for his crimes and that he was remorseful. If he tried to make that argument after stipulating to the evidence, however, the prosecutor would have been free to argue that Eichinger had failed to accept responsibility because he did not plead guilty. After discussing this with Eichinger, counsel therefore negotiated an agreement with the prosecutor; if Eichinger stipulated to the evidence for all four murders, including the murder of Jennifer, the prosecutor would agree not to argue that Eichinger's failure to plead guilty conflicted with his assertion that he accepted responsibility. As counsel explained to Eichinger, he reasonably believed that, based on the overwhelming evidence of guilt, there was no real possibility of even an acquittal on any of the four murder charges, and that Eichinger would be better served by

[2] Mr. Bauer testified that Eichinger admitted to him that he killed Jennifer and never suggested that he did not kill Heather, Lisa, and Avery (N.T. 6/17/11, 58-59, 61-62; N.T. 7/21/11, 99-100).

accepting a negotiated agreement that preserved his appellate rights (stipulated trial) and yet did not detract from his defense that he had accepted responsibility (prosecutor agreed not to argue absence of guilty plea showed lack of remorse). That advice and strategic decision was well-within "the wide range of reasonable professional conduct." *Strickland*, 467 U.S. at 689 ("a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance").

Counsel reasonably decided that contesting the overwhelming evidence at trial would serve no purpose, and that it was in his client's best interest to instead focus on the penalty phase and argue that his client had attempted to avoid further inflicting pain and hardship on the families of the victims, and he discussed this strategic decision with Eichinger, who assented to their chosen course of action. *See Florida v. Nixon*, 543 U.S. 175, 192 (2004) (holding that counsel was not ineffective for conceding client's guilt at trial and "attempting to impress jury with his candor and his unwillingness to engage in a 'useless charade'") (quoting *United States v. Cronic*, 466 U.S. 648, 657 (1984)). Finally, the evidence against Eichinger was overwhelming, so his stipulation did not prejudice him; that is, even

counsel had adopted the FCDO's "go for broke" mentality (which it advocates for only after other more measured, nuanced approaches have failed), there is no reasonable probability Eichinger would have insisted on going to trial.

For the prejudice prong, Eichinger presumably relies on his own self-serving testimony at the PCRA hearings that he would have insisted on a contested trial. The trial court, however, found that his testimony was "not worthy of belief" (N.T. 4/4/12, 56). That is not surprising. He stabbed to death a young woman and a three-year-old child he had known since she was born to avoid getting caught; to him, lying to law enforcement or a judge is small change. Indeed, he has several convictions for false swearing and lied at the suppression hearing (he testified there that he had confessed to a detective when questioned at Acme because Acme policy was to give someone with a gun what they wanted). At the PCRA hearing, he also admitted to sending Mr. McElroy a letter before trial with five versions of his involvement with the 2005 murders; he noted that he was the only one who knew which one was true (N.T. 12/2/11, 119-120). He snickered when questioned about those letters at the PCRA hearing (*id.* at

120). Eichinger has demonstrated that he lies when it suits him. The trial court's credibility determination is thus supported by the record and binding here. Eichinger's claim that he would have insisted on going to trial but for the advice of his trial attorneys is thus nothing but counter-intuitive conjecture.

And even if Eichinger's claim were not subject to the deferential AEDPA standard, he still could not show that a reasonable jurist would find the District Court's dismissal of his habeas claim to be debatable on the merits. But that is not the question. The question instead is whether a reasonable jurist would find that the state court decision was such an "extreme malfunction in the state criminal justice system" that the claim prevails despite the doubly deferential standard of review for ineffectiveness claims under the AEDPA. *See Harrington v. Richter*, 131 S.Ct. 770, 786 (2011) (explaining that the deferential habeas standard stops short of imposing a complete bar on the relitigation of claims already denied in state court, allowing relief only where there are "extreme malfunctions in the state criminal justice systems") (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring)); *Williams v. Beard*, 637 F.3d 195, 233

(3d Cir. 2011) ("Overcoming this hurdle is no simple undertaking; as the Supreme Court has recently stressed, the 'standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so."). This claim fails to surmount these formidable obstacles.

Eichinger nevertheless argues that this Court should grant *certiorari* for the following reason:

> The ruling below "depart[s] from the accepted and usual course of judicial proceedings," U.S. Sup. Ct. R. 10(a), because it defies binding precedent under which Eichinger's claim depends on "not the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance."

Petition for Writ of Certiorari at 8-9 (quoting *Lafler v. Cooper*, 566 U.S. 156, 169 (2012)).

But Eichinger ignores that the District Court correctly stated this same standard before applying it to his claim:

> In the context of challenging the advice trial counsel gave a defendant during the plea-bargaining stage, "the question is not the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance." *Lafler*,

> 566 U.S. at 169 ("The fact that respondent is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney's deficient performance during plea bargaining."). Thus, any issue regarding the voluntariness of Eichinger's waiver of rights is independent of this claim regarding trial counsels' ineffectiveness. *See Frye*, 566 U.S. at 141 (noting that Supreme Court has "rejected the argument ... that a knowing and voluntary plea supersedes errors by defense counsel"); *Lafler*, 566 U.S. at 173 ("An inquiry into whether the rejection of a plea is knowing and voluntary, however, is not the correct means by which to address a claim of ineffective assistance of counsel."); *cf. Menna v. New York*, 423 U.S. 61, 62 n.2 (1975) (counseled guilty pleas do not "inevitably 'waive' all antecedent constitutional violations").

Eichinger, 2019 WL 248977, at *11.

So petitioner is left with an argument that the federal courts misapplied a properly stated rule of law. That is rarely grounds for *certiorari*. *See* Rule 10 of the Supreme Court Rules ("A petition for a writ of certiorari is rarely granted when the asserted error consists of … the misapplication of a properly stated rule of law."). Indeed, petitioner is seeking mere (alleged) error correcting in a unique, fact-intensive case.

CONCLUSION

WHEREFORE, the Commonwealth respectfully requests that this Court deny the petition for writ of *certiorari*.

RESPECTFULLY SUBMITTED:

/s/Robert M. Falin

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