If an Incompetent Criminal Defendant Shows that Counsel was Ineffective and Did Not Follow Reasonable Professional Standards, the Conviction Will be Reversed and Remanded in order to Provide Further Proceedings on his Competency: *Hummel v. Rosemeyer*

UNITED STATES CONSTITUTIONAL LAW – SIXTH AMENDMENT – JURY TRIALS FOR CRIMES, AND PROCEDURAL RIGHTS – The Third Circuit Court of Appeals held that trial counsel was ineffective for not assessing Hummel's competency to stand trial and failure to do so likely prejudiced the Defendant.

Hummel v. Rosemeyer, 564 F.3d 290 (3d Cir. 2009).

I. THE *HUMMEL v. ROSEMEYER* DECISION

In 1992, Edward V. Hummel ("Hummel") was charged, by the Commonwealth of Pennsylvania, with the murder of his wife and found guilty of first degree murder and assault.[1] On November 22, 1991, Hummel learned his wife was having an affair.[2] After she admitted her infidelities, Hummel allegedly hit her in the face and shot her in the head, which resulted in her death.[3] Hummel then went to his parents' home and told them the story.[4] He returned home, wrote a suicide letter to his children and then shot himself in the head.[5] Hummel was left a paraplegic and suffered brain damage.[6] After determining that Hummel would survive the gunshot wound, he was charged with the murder of his wife.[7] Hummel's counsel, F. Cortez Bell ("Bell"), requested continuances in order to determine if Hummel was competent to stand trial.[8] Two psychological evaluations of Hummel were conducted, one by Dr. Allan Tepper and one by Dr. Vincent Berger.[9] On August 10, 1991, Bell and the Commonwealth agreed that Hummel was competent to stand trial.[10] Bell's only contact with Hummel occurred on the day of the

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1. *Hummel v. Rosemeyer*, 564 F.3d 290, 291 (3d Cir. 2009).
2. *Hummel*, 564 F.3d at 291.
3. *Id.* The evidence was compiled with Hummel's mother's testimony. *Id.*
4. *Id.* at 292.
5. *Id.*
6. *Hummel*, 564 F.3d at 292. He was in the hospital for one month and was then transferred to a rehabilitation center where he remained for two additional months. *Id.* The Defendant was sent to a psychiatric ward until March 4, 1992 and then hospitalized again until March 9, 1992. *Id.* Following these hospitalizations the Defendant received outpatient care. *Id.*
7. *Id.* The Commonwealth of Pennsylvania brought charges against the Defendant, but set bail in order for Hummel to remain at home. *Hummel,* 564 F.3d at 292.
8. *Id.*
9. *Id.* Dr. Tepper was unable to confirm with absolute certainty that Hummel was competent to stand trial. *Id.* Dr. Berger stated Hummel was "marginally competent." *Id.*
10. *Hummel,* 564 F.3d at 292. On August 7, 1992, Bell requested a competency hearing, but did not follow through with this action. *Id.*

preliminary hearing on August 12, 1992 and during jury selection on March 6, 1992.[11]

Bell insisted that Hummel not testify during trial in order to preserve any incompetency claims that may be asserted during trial or on appeal.[12] The trial proceeded without Hummel's testimony regarding the events that occurred on November 22, 1991[13] and without Bell raising any trial arguments as to his competency.[14] After Hummel was found guilty of first degree murder and assault, Bell filed a post-trial motion for a new trial, which was denied.[15] At this time, Bell filed a direct appeal raising the issue of Hummel's competence to stand trial.[16]

Hummel's parents hired a new attorney, H. David Rothman, who filed a petition claiming ineffective assistance of counsel under the Pennsylvania Post Conviction Relief Act ("PCRA").[17] They also employed Dr. Robert Wettstein, a psychiatrist who determined that Hummel had not been competent to stand trial.[18] At the PCRA hearing, Dr. William Ryan, a prior psychiatrist who was familiar with Hummel's situation, wrote a letter to the court stating his expert belief that Hummel was not competent to stand trial.[19] Bell was subpoenaed by the court to appear as a witness.[20] The trial judge denied the PCRA petition.[21] The denial of the PCRA petition was appealed by Hummel, but the Pennsylvania Superior Court affirmed and the Pennsylvania Supreme Court denied appeal.[22] The Pennsylvania Superior Court stated that Hummel did not

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[11]. *Id.* Bell stated that Hummel's parents insisted that their son was incompetent, but he failed to raise this at trial. *Id.*

[12]. *Id.* at 293. This is inconsistent with Bell's previous determination that Hummel was competent to stand trial. *Hummel*, 564 F.3d at 292.

[13]. *Id.* at 293. Under Pennsylvania Law, heat of passion is a defense that could have reduced Hummel's level of culpability from murder to voluntary manslaughter. 18 PA. STAT. ANN § 2503 (West 1995). The statute in relevant part states:

> A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify the killing under Chapter 5 of this title, but his belief is unreasonable.

§ 2503.

[14]. *Hummel*, 564 F.3d at 293. During the trial, the Defendant fell asleep, shouted "tell them about the blow jobs," and was absent from the courtroom during the prosecution's closing argument and during jury instructions. *Id.*

[15]. *Id.* Bell did not have any medical evidence to confirm or deny Hummel's competency but stated Hummel cooperated at times when questioned and at other times he was unresponsive. *Id.*

[16]. *Id.* The Pennsylvania Superior Court agreed with the trial court that Hummel was competent and affirmed his conviction. *Hummel,* 564 F.3d at 294.

[17]. *Id.* Post conviction relief allows prisoners to request a court to vacate or correct a conviction sentencing. BLACK'S LAW DICTIONARY 980 (8th ed. 2004).

[18]. *Hummel,* 564 F.3d at 294-95. Dr. Wettstein examined Hummel three years after the trial occurred, but concluded that his condition would have been either the same or worse at the time of trial and as of August 1996 he was incompetent. *Id.* at 295.

[19]. *Id.* at 294. Dr. William Ryan had observed Hummel during his stay at SCI Somerset. *Id.*

[20]. *Id.* at 295. Bell testified that he believed a competency examination of Hummel was needed and agreed with Hummel's parents that he was incompetent to stand trial, but relied on the reports of the psychiatrists that Hummel was competent. *Hummel*, 564 F.3d at 295. Bell also stated he had talked to Hummel on the day of the preliminary hearing and not again until jury selection. *Id.*

[21]. *Id.* Judge Rielly was the presiding judge in the previous jury trial against Hummel. *Id.*

[22]. *Id.* The court found that Bell was not obligated to ask for a competency hearing. *Hummel*, 564 F.3d at 295. Reviewing the relevant statute, the court stated:

> Application to the court for an order directing an incompetency examination *may* be presented by an attorney for the Commonwealth, a person charged with a crime, his counsel, or the warden or other official in charge of the institution or place in which he is detained.

express how Bell's failure to request a competency hearing had any bearing on the outcome of the case.[23] Hummel subsequently filed a federal *habeas corpus* petition in the United States District Court for the Western District of Pennsylvania.[24]

After sending the petition to a Magistrate Judge, the Western District of Pennsylvania denied the petition.[25] The district court issued a certificate of appealability in order to determine whether Hummel's counsel at trial was deficient in assessing Hummel's competency to stand trial by not requesting a hearing or psychiatric evaluation.[26] Factual determinations provided by the state court are treated as correct, but Hummel could rebut these by clear and convincing evidence.[27]

Pursuant to the Sixth Amendment's guarantee of effective assistance of counsel, Hummel was required to prove that Bell's counsel was deficient and that it prejudiced his defense.[28] In order to determine whether Bell's conduct was reasonable the court must focus on his assertion that Hummel was competent on August 10, 1992, and whether it was reasonable for Bell to not request a psychiatric evaluation.[29] The American Bar Association ("ABA") standards, applicable during Hummel's trial, focused on good faith in requiring counsel to request a psychiatric evaluation when in doubt of his client's competence.[30]

Dr. Tepper, one of the psychiatrists who examined Hummel, found Hummel's I.Q. to be at a level for mental retardation and that he suffered short-term memory problems.[31] Dr. Berger's evaluations also indicated that Hummel's lack of understanding presented problems as to comprehending the details of his wife's murder and his ability to fully comprehend the trial against him.[32] Both psychiatrists were uncertain about Hummel's competency to stand trial after conducting evaluation.[33] Furthermore, Bell requested a competency hearing during the trial and

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50 PA. STAT. ANN § 7402 (c) (West 1996) (emphasis added). The superior court compared section 7402(c) with 7402(e) which requires a psychiatric evaluation of a defendant to determine competence when ordered by the court. *Hummel*, 564 F.3d at 295-296. Because the trial court did not order a competency examination, Bell did not seek a psychiatric evaluation of Hummel. *Id.* at 296.

[23]. *Id.* A hearing is a necessary requirement needed in order to address the issue of competence. *Id.* Judge Brosky, the dissenting judge for the superior court found that the use of "may" in section 7402(c) focused on who was authorized to petition the court for a hearing. *Id.* at 296 (Brosky, J., dissenting) (quoting *Commonwealth v. Hummel*, No. 1169 WDA 1999, slip. op. at 17-18 (Pa. Super. Sept. 28, 2001)).

[24]. *Hummel*, 564 F.3d at 296. The denial of appeal by the Pennsylvania Supreme Court exhausted all of Hummel's state remedies so he filed in district court. *Id.*

[25]. *Id.* The Magistrate Judge looked at the Antiterrorism and Effective Death Penalty Act 28 U.S.C. § 2254 ("AEDPA") and determined the court must accept the state court's decision in regards to Hummel's competency. *Id.*

[26]. *Id.* at 297. A review of the District Court's decision is de novo and the AEDPA, allows the granting of a writ of *habeas corpus* on a claim adjudicated on the merits only if the decision is contrary to Federal law or the law was misapplied. *Hummel*, 564 F.3d at 297.

[27]. *Id.*

[28]. *Id.* (quoting *Strickland*, 466 U.S. at 687). "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

[29]. *Hummel,* 564 F.3d at 298. Reasonableness is based on "the facts of the particular case at the time the questioned conduct occurred." *Id.*

[30]. *Id.*

[31]. *Id.* at 299. Dr. Tepper's evaluation indicated that Hummel may not have any memories or understanding of the events that took place on November 22, 1991, when he murdered his wife. *Id.*

[32]. *Hummel,* 564 F.3d at 299.

[33]. *Id.* at 300. The evaluations, at minimum, should have signaled to Bell that additional examination be conducted, especially because he had never met Hummel before determining he was competent to stand trial. *Id.*

then dismissed it without cause.[34] Because Bell never spoke to Hummel about the events that occurred on the night of the murder, he violated Criminal Justice Standards.[35] Bell's testimony at the PCRA hearing also indicated that he should have requested additional competency testing of Hummel.[36] The court was not at liberty to discuss whether the trial court would have issued and held a competency hearing, but the court was not faced with this determination, as Bell stated that Hummel was competent to stand trial.[37]

Under the two-part test set forth in *Strickland v. Washington*, the defendant must prove that counsel's performance fell below an objective standard of reasonableness and that the error prejudiced the defendant.[38] The state court's determination that Bell provided effective assistance of counsel was an unreasonable application[39] and does not bound the Third Circuit Court of Appeals here.[40] The third circuit concluded that Bell was deficient because he never met Hummel, did not meet with him between the preliminary hearing and jury selection, failed to advise the trial court of Hummel's parents' advice that he was incompetent, and found the defendant competent after reviewing psychological evaluations to the contrary.[41]

The court then discussed whether Bell's failure to request a competency hearing prejudiced Hummel.[42] Hummel had the burden of proving that the trial court would have found him incompetent to stand trial.[43] Based on the psychiatric evaluations, Bell's actions were unreasonable, but under the PCRA, Hummel had to show that he was prejudiced as a result of Bell's omissions or actions.[44] This court was faced with whether Bell's ineffectiveness of counsel led the state court to determine that Hummel was competent and if so, whether Hummel was prejudiced as a result.[45] In compiling Dr. Wettstein's findings with Dr. Berger and Dr. Tepper's recommendations, the third circuit found Hummel was incompetent to stand trial.[46] Under the AEDPA, when a state court's decision is contrary to United State Supreme Court

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[34]. *Id.* at 301. The August 10, 1992, court order stated that the Commonwealth and Bell both agreed Hummel was competent to stand trial. *Id.*

[35]. *Hummel*, 564 F.3d at 300. The standard requires a lawyer to meet with a client in order to learn his or her client's version of the events that took place. *Id.*

[36]. *Id.* at 301. Bell stated he believed Hummel was aware of what was happening in the court room, but may have lacked knowledge of the events that took place involving the death of his wife due to the reports from the psych evaluations. *Id.*

[37]. *Id.* at 302.

[38]. *Strickland*, 466 U.S. at 694.

[39]. *Id.* at 694.

[40]. *Id.* at 304.

[41]. *Hummel*, 564 F.3d at 302.

[42]. *Id.* at 303. The defendant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quoting *Strickland*, 466 U.S. at 694).

[43]. *Id.* at 303. Competency requires that "a defendant [has] sufficient ability at the pertinent time to consult with his lawyers with a reasonable degree of rational understanding, and [has] a rational as well as factual understanding of the proceedings against him." *Id.* (quoting *Commonwealth v. Kennedy*, 305 A.2d 890, 892 (1973)).

[44]. *Hummel*, 564 F.3d at 303.

[45]. *Id.* Decisions overturned under AEDPA must be contrary to "clearly established United States Supreme Court precedent." *Id.*

[46]. *Id.* at 303. Dr. Wettstein stated Hummel would need to have further discussions with Bell in order to understand the proceedings in front of him due to his short term memory. *Id.* The psychologists also stated that the trial would frequently need to be interrupted in order to "arouse" the Defendant and to keep him aware of what was going on in the court room. *Hummel*, 564 F.3d at 303.

precedent, it will not be followed.[47] The Superior Court of Pennsylvania applied a clear and convincing standard stating Hummel had failed to show that Bell's ineffective assistance of counsel was prejudicial.[48]

The third circuit court held that the Superior Court's failure to correctly apply the reasonable probability standard was contrary to United States Supreme Court law and not afforded deference.[49] The court found that Hummel's counsel was ineffective, as he agreed that Hummel was competent to stand trial, and that there was a reasonable probability that Hummel was prejudiced by counsel's ineffectiveness.[50] Because of the failure of the Superior Court to apply the correct standard, the District Court erred in denying Hummel's request for a writ of *habeas corpus*.[51] The court reversed the denial of the *habeas corpus* petition and remanded the decision to the District Court ordering it to remand the case to the Pennsylvania state court to vacate the conviction.[52]

II. THE HISTORY BEHIND THE *HUMMEL V. ROSEMEYER* DECISION

The Sixth Amendment provides the right to counsel to all defendants faced with criminal proceedings.[53] The right to counsel has been defined over the past forty years to include the right to *effective* assistance of counsel in all criminal proceedings.[54] The federal courts have provided a two-prong test to follow when dealing with whether counsel is effective.[55]

In 1932, Justice Sutherland delivered a memorable opinion in *Powell v. Alabama* where two black youths were charged with the crime of rape committed upon two white females.[56] The case established that defendants had a right to counsel whether they could afford it or not in all federal capital cases where the death penalty was allowed.[57] The Court looked at the common law dating back to the enactment of the U.S. Constitution and the history that has evolved over the importance of the assistance of counsel.[58] The Court reversed the convictions, ultimately finding that the defendants were entitled to their right of counsel because it was a fundamental right under the U.S. Constitution.[59]

Six years later in *Johnson v. Zerbst*, two United States Marines were convicted of possessing counterfeit money.[60] Both defendants were represented during preliminary hearings,

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47. *Id.* at 304. "If a state court misapplies a rule and contradicts the governing law, the decision will be contrary to the precedent set." *Id.* at 304 (quoting *Strickland*, 466 U.S. at 668).

48. *Id.* at 305.

49. *Id.* The reasonable probability standard requires a defendant to show that "the result of the proceeding would have been different." *Hummel*, 564 F.3d at 304.

50. *Id.*

51. *Id.*

52. *Id.* at 305. The Pennsylvania state court has the option to retry Hummel's competency should they feel the need to do so. *Id.*

53. U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

54. Annotation, *Modern status of rule as to test in federal court of effective representation by counsel,* 26 A.L.R. FED. 218 (1976).

55. *Strickland*, 466 U.S. at 668.

56. *Powell v. Alabama*, 287 U.S. 45, 49 (1932).

57. *Powell*, 287 U.S. at 65.

58. *Id.* at 60-61.

59. *Id.* at 73. Every trial judge must appoint counsel when an indigent defendant requests counsel or they will be denied their due process rights under the Constitution. *Id.* at 69.

60. *Johnson v. Zerbst*, 304 U.S. 458, 460 (1938).

but they were unable to employ individual counsel for trial.[61] The men had little education, were without funds, and resided far from their homes at the time of trial.[62] During the *habeas corpus* proceeding, petitioner Johnson did not request trial judge to appoint counsel, but the District Attorney was asked to appoint counsel if defendants were charged with a capital crime.[63] The defendants were tried, convicted and sentenced all in one day on January 25, 1935.[64] On May 15, 1935, the petitioners filed applications for appeal, but were denied because they were too late.[65] The petitioners appealed their case to the United States Supreme Court alleging they had been denied their right to counsel.[66] The Court expressed the importance of the right to counsel and extended the review under a writ of *habeas corpus*.[67] The Court reversed and remanded to the District Court to determine whether petitioners can establish by a preponderance of the evidence that they did not waive their right to counsel.[68]

In 1963's *Gideon v. Wainwright*, the Supreme Court was faced with the issue of whether a right to counsel was applicable to the state courts.[69] Gideon, who was charged with robbery, argued he was denied his Sixth Amendment right to counsel after the trial court refused to appoint counsel.[70] The Court found that the Due Process Clause requires appointment of counsel in all criminal prosecutions.[71] The Florida Supreme Court held that an indigent defendant charged with a felony did not violate the Due Process Clause of the Fourteenth Amendment.[72] The Court's analysis focused on *Powell v. Alabama*, and how through the Fourteenth Amendment fundamental rights of liberty and justice in civil and political institutions, such as the right of counsel, are imposed upon the states.[73] The Court determined that the right of counsel was a fundamental right safeguarded by the Sixth Amendment in all criminal prosecutions and not just for capital crimes.[74]

In *Scott v. Illinois,* the defendant argued that his Sixth Amendment rights had been violated because counsel had not been appointed after he was convicted of shoplifting and fined fifty dollars.[75] The defendant argued that under *Argersinger v. Hamlin*, he was entitled to

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61. *Johnson,* 304 U.S. at 460.
62. *Id.*
63. *Id.*
64. *Id.* at 462.
65. *Id.* At this time in the law the time for filing a motion for new trial and for taking an appeal was three and five days. *Johnson*, 304 U.S. at 462.
66. *Id.* The District Court stated that it was "unfortunate" that the petitioners had been unable to get a new trial due to the lateness of their applications. *Id.* at 465.
67. *Id.* at 467. "To deprive a citizen of his only effective remedy would not only be contrary to the rudimentary demands of justice but destructive of a constitutional guaranty specifically designed to prevent injustice." *Id.*
68. *Johnson*, 304 U.S. at 467. "Where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of *habeas corpus*, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of counsel." *Id.* at 468-69.
69. *Gideon v. Wainwright*, 372 U.S. 335, 338 (1963).
70. *Gideon*, 372 U.S. at 338.
71. *Id.* at 349.
72. *Id.* at 339.
73. *Id.* at 341.
74. *Id.* at 343. "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Gideon*, 372 U.S. at 344-45.
75. Scott v. Illinois, 440 U.S. 367, 368 (1979).

counsel.[76] The Supreme Court of Illinois rejected this argument and held that *Argersinger* would not be extended to cases where a defendant was charged with a statutory imprisonment in which imprisonment may be authorized, but not actually imposed upon the defendant.[77] The Supreme Court again expressed the notion that the right to counsel is a fundamental right that comes from the Federal Constitution.[78] Chief Justice Rehnquist in a plurality opinion concluded that the Sixth and Fourteenth Amendments only require that an indigent individual shall not be imprisoned unless the state has afforded him the right to assistance of appointed counsel.[79]

Effective assistance of competent counsel is safeguarded by the Constitution and therefore should be afforded to defendants.[80] The Supreme Court in *McMann v. Richardson* touched on the subject of ineffective assistance of counsel, holding that three state prisoners, who upon the advice of counsel had entered pleas of guilty, were not entitled to hearing on *habeas corpus* alleging their confessions were coerced and improperly obtained.[81] One aspect the Court addressed was whether the defendants were incompetently advised by counsel when giving their guilty pleas.[82] The Court left the decision to the trial courts to determine whether one has been given effective assistance of competent counsel.[83] The defendants' guilty pleas were upheld because they failed to establish that their counsels were reasonably competent attorneys and that the advice was not within the range of competence demanded of attorneys in criminal cases.[84]

In the seminal case of *Strickland v. Washington*, the Court established a two-part test to determine whether counsel has been ineffective.[85] The Court emphasized the crucial role counsel plays in the adversarial process.[86] This role is significant because the skill and knowledge counsel possesses is necessary to assist the defendant.[87] The applicable two-prong test set forth by the United States Supreme Court requires the defendant to show that counsel's performance was deficient, and that the deficient performance prejudiced the defense, thereby depriving the defendant of a fair trial.[88] Following *Strickland* the reasonableness standard of

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[76]. *Scott*, 440 U.S. at 368. In *Argersinger*, the Court announced the rule that "no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel." *Argersinger v. Hamlin*, 404 U.S. 25, 40 (1972).

[77]. *Scott*, 440 U.S. at 369. On Certiorari the Defendant argued that the Court in *Argersinger* left open the argument of whether this type of charge would warrant the right to counsel. *Id.*

[78]. *Id.* at 370.

[79]. *Id.* at 374. In *State v. Kelly*, the Florida Supreme Court did not follow this proposition but held that "[a] defendant who is charged with a misdemeanor punishable by possible imprisonment is entitled to counsel unless the judge timely issues a written order guaranteeing that the defendant will never be incarcerated as a result of the conviction." 999 So.2d 1029, 1053 n.20 (2008).

[80]. *E.g., McMann v. Richardson,* 397 U.S. 759, 771 (1970); *Reece v. Georgia*, 350 U.S. 85, 90 (1955); *Glasser v. United States*, 315 U.S. 60, 69-70 (1942).

[81]. *McMann*, 397 U.S. at 759.

[82]. *Id.* at 768-69.

[83]. *Id.* at 771. The court pointed out that "judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." *Id.*

[84]. *Id.* at 771.

[85]. *Strickland,* 466 U.S. 668.

[86]. *Id.* at 685. Because of the importance of counsel, a criminal defendant must be appointed counsel if he cannot obtain one. *Id.*

[87]. *Id.*

[88]. *Id.* at 686. Because the earlier cases that found ineffective assistance of counsel existed did not establish or elaborate on the constitutional requirement of effective assistance this Court has taken upon that task. *Id.*

effective counsel was followed in *Weekley v. Jones*.[89]

In *Weekley,* the United States Court of Appeals for the Eighth Circuit held that the defendant did not receive ineffective assistance of counsel when his trial counsel failed to pursue an insanity defense.[90] The defendant, like *Hummel*, allegedly shot and killed his wife and shot himself, but survived.[91] The eighth circuit faced the issue of whether counsel was ineffective for not pursuing an insanity defense and for not asserting defendant was incompetent.[92] The court applied the *Strickland* two-part test and focused on whether counsel committed an error by giving a plea of not guilty rather than using a "not guilty by reason of insanity" defense.[93] The district court found that counsel was ineffective because there was evidence to indicate that the defendant had some sort of mental defect.[94] The court stated that defense counsel's trial strategy was focused on avoiding an indeterminate sentence, but it was irresponsible to do so.[95] The court of appeals noted that the defendant had admitted on the record that he understood his pleading options and it was not until after the sentence was given that he asserted ineffective assistance of counsel.[96] The court of appeals did not rule on the issue of whether there was error by defense counsel, but instead stated that even if there was error, the standard of prejudice from *Strickland* had not been met.[97] If counsel would have pursued a defense of not guilty by reason of insanity, the outcome would have been the same.[98]

In *Commonwealth v. Pierce*, the Pennsylvania Superior Court adopted its own three-pronged test for ineffective assistance of counsel and also focused on the *Strickland* test.[99] This three-pronged test requires a court to assess whether the mistake of defense counsel is of arguable merit and if it is, the court must then assess whether defense counsel had a reasonable, strategic, or tactical reason to effectuate the client's best interests that explains the error.[100] Prior to *Strickland*, under Article I, section 9 of the Pennsylvania Constitution, a defendant did not have to prove prejudice.[101] The court discussed previous decisions that required a prejudice requirement,[102] and ultimately, adopted the *Strickland* prejudice requirement.[103] In determining whether an error prejudices a client, the Pennsylvania Supreme Court used a harmless error standard.[104]

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89. 56 F.3d 889 (8th Cir. 1995). Counsel is ineffective for failure to show medical evidence that the defendant suffered from schizophrenia, mental retardation and brain damage. *Id.*

90. *Weekley*, 76 F.3d 1459, 1464 (1996).

91. *Id.* at 1460.

92. *Id.* at 1461.

93. *Id.*

94. *Weekley*, 76 F.3d at 1461. The two psychiatrists employed by the defendant established that the defendant suffered from paranoid schizophrenia. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* The court gave several factors showing no prejudice to the defendant. *Weekley*, 76 F.3d at 1462-64. The most persuasive argument against prejudice came straight from the trial transcript which showed that the defendant had been planning to kill his wife. *Id.* at 1464.

99. *Pierce*, 498 A.2d at 425.

100. *Id.*

101. *Id.*

102. *Id.* (quoting *Commonwealth v. Garvin*, 485 A.2d 36, 39 (1984)).

103. *Id.* at 426.

104. *Commonwealth v. Davis*, 305 A.2d 715, 719-20 (1973). An error is found harmless "where the properly admitted evidence of guilt is so overwhelming and the prejudicial effect of the error is so significant by comparison that it is clear beyond a reasonable doubt that the error could not have contributed to the verdict."

Under the guidelines of *Strickland,* there are two types of prejudice in ineffective assistance of counsel claims: actual and structural prejudice.[105] Structural prejudice exists when counsel is faced with conflicts of interest.[106] In *Commonwealth v. Mallory*, the Pennsylvania Supreme Court discussed *per se* prejudice as set forth in *U.S. v. Cronic*.[107] Pennsylvania uses the actual prejudice standard as well.[108] This standard was set by the United States Supreme Court in *Florida v. Nixon*, where the Court held that the defendant must establish actual prejudice when claiming that counsel was ineffective for conceding guilt during a capital trial.[109] In *Commonwealth v. Johnson*, the Supreme Court of Pennsylvania found that where issues are of this nature, a court can never find structural prejudice, but rather must find actual prejudice.[110] Structural prejudice was found where defense counsel represented all defendants and only met them on the day of trial because such a limited meeting could not lead to adequate representation.[111]

III. AN ANALYSIS OF THE *HUMMEL V. ROSEMEYER* DECISION

Trial courts have a duty to conduct inquiries throughout the proceedings when questions arise as to a defendant's competence to stand trial.[112] In *Hummel*, both the judge and defense counsel had reason to question the defendant's competence. At one point he yelled obscenities during the trial,[113] and at another stage was absent from the courtroom.[114] Although it may be hard to determine the level of one's competency due to the lack of a medical background, there were numerous instances during Hummel's case that should have alerted members of the courtroom that he may not understand the proceedings. Additionally, Hummel was unresponsive and had to be awoken throughout the proceedings indicating his lack of competence.[115]

A *habeas* proceeding was necessary in order for Hummel to attempt to vacate or overturn his conviction based on ineffective assistance of counsel. The *Strickland* two-part test on its face looks like an easily applicable test, but after looking deeper is very lenient toward allowing errors to stand.[116] The first part of the test, based on a reasonable standard, requires the defendant to prove that counsel was deficient. Is the standard simply a reasonably prudent person standard or is it a reasonable attorney in the same situation standard. The Court fails to give any guidelines as to what is reasonable in this situation. Justice Marshall, in his dissenting

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Davis, 305 A.2d at 719. Where reasonably minded jurors would find the defendant not guilty an error will not be harmless. *Id.* at 721.

105. *Strickland,* 466 U.S. 668. Under *Strickland,* in order to find prejudice one must show "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Pierce*, 498 A.2d at 424 (quoting *Id.* at 687).

106. *Mickens v. Taylor*, 535 U.S. 162, 171 (2002).

107. Commonwealth v. Mallory, 941 A.2d 686, 700-01 (2008). The Pennsylvania Supreme Court has used this type of presumption "where counsel's constitutional error has caused a total failure in the relevant proceeding." *Commonwealth v. Halley*, 870 A.2d 795, 801 (2005).

108. *Commonwealth v. Cousin*, 888 A.2d 710, 719 (2005).

109. Florida v. Nixon, 543 U.S. 175, 189-91 (2004).

110. Commonwealth v. Johnson, 966 A.2d 523, 540-41 (2009).

111. *Powell v. Alabama*, 287 U.S. 45.

112. *Drope v. Missouri*, 420 U.S. 162, 181-82 (1975).

113. *Hummel v. Rosemeyer*, 564 F.3d at 293 .

114. *Id.*

115. *Id.*

116. *Strickland,* 466 U.S. at 677-78.

opinion in *Strickland,* goes further and asks whether an objective standard is based on locale.[117]

Justice Marshall points out that in criminal cases uniform standards could be applied to every criminal attorney.[118] Criminal cases are very similar when looking at the criminal process as a whole. Uniform standards could be applied during preliminary hearings, formal court arraignments (allowing for discovery), the plea bargaining stages, and during the pre-trial motions (such as suppressing evidence). The defendant must plead guilty or not guilty at trial, and the attorney may file preemptory challenges, challenge the evidence presented or move for a directed verdict. After the verdict is filed and if the defendant is found guilty, the representing attorney must then file post-sentence motions, direct appeals, PCRA proceedings or Federal *Habeas Corpus*. The stages of the criminal process are pretty uniform, allowing the United States Supreme Court or state courts, on independent grounds, to file procedures for attorneys to follow. In *Hummel*, the lack of counsel attentiveness to the defendant's competence was so apparent reasonableness was not really at issue. The attorney failed to meet with his own client until right before trial,[119] which clearly indicates lack of persistence and professionalism on behalf of the attorney.

The second part of the test requires counsel's performance to have so prejudiced the defendant that the outcome of the proceedings would have been different.[120] Again, however, the types of trial errors that necessitate the reversal of a conviction are less easy to define. The defendant bears the burden of proving that he was prejudiced from the ineffective assistance of counsel after the fact. In *Hummel*, Bell's failure to assist was evident, but in other cases there may be no record of ineffective assistance of counsel. Because the defendant bears the burden of proof by a reasonable probability, he has to focus on what the attorney should have done or failed to do, which is a daunting task. If the standard was lessened and the defendant could prove there was evidence of prejudice, a new trial should be granted.

Another issue with the *Strickland* test is an abundance of litigation. After filing a petition for *habeas corpus*, the court either grants or denies the writ to go forward with the proceedings. The petitioner will allege denial of his or her constitutional rights, allowing for different issues preserved at the state court level to be addressed. Ineffective assistance of counsel is easy to assert at the initial stages, although the court may later find counsel was ultimately not ineffective. The Commonwealth of Pennsylvania has been faced with ineffective assistance claims over a wide array of issues.[121]

The three-part test established by the Pennsylvania Supreme Court is stricter than *Strickland.* The first prong requires that the error be one of arguable merit. If a defendant claims that the trial attorney should have objected to a hearsay statement by a witness, the court must determine whether it was hearsay. But if the court determines there was no hearsay, then there is no arguable merit and the ineffective assistance of counsel claim fails. When the arguable merit standard is met, the defendant must then argue that the error was not made for a strategic or tactical reason. If counsel argues the reason for not objecting to hearsay of a witness was a trial tactic and he succeeds, the claim again will fail. Only when the defendant is able to meet both of

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117. *Id.* at 708 (Marshall, J., dissenting).
118. *Id.*
119. *Hummel v. Rosemeyer*, 564 F.3d at 292.
120. *Strickland*, 466 U.S. at 686.
121. *See Commonwealth v. Brooks*, 839 A.2d 245, 250 (2003) (finding ineffective assistance of counsel where defendant's counsel met defendant on the day of trial). *See also Commonwealth v. Reed*, 971 A.2d 1216, 1227 (2009) (holding that counsel's deficient brief on direct appeal was not structural prejudice, but defendant must prove actual prejudice under *Strickland*).

these prongs he must then proceed to the strict standard of prejudice set by the *Strickland* court.

One way to avoid the problems in *Strickland* and in Pennsylvania is to use a lower standard than the "but for" test such as the totality of the circumstances. The prejudice prong is easily met where no counsel is provided and where a conflict of interest arises; it is hard to meet otherwise. By implementing the "but for" test, the court is apt to find no prejudice in a majority of circumstances. Assuming the lawyer made an error and it was not made for some reasonable, strategic, or tactical reason, one still must prove prejudice. A defendant is entitled to a fair trial, not a perfect one, and if the lawyer's error did not so prejudice the case that one must doubt the integrity of the outcome, relief must be denied although the lawyer made a mistake. Prejudice will be more easily met by allowing the court to focus on the totality of the circumstances. The court will be able to look at all of the proceedings as a whole against the defendant to decide whether prejudice has occurred. In *Commonwealth v. Gardner*, the Supreme Court of Pennsylvania, applying a totality of the circumstances approach looked at oral pleas, written pleas, and off-the-record communications between the defendant and his counsel, but did not find ineffective assistance of counsel. Likewise, in *Commonwealth v. Flanagan*, the Pennsylvania Supreme Court used the totality of the circumstances test and found that counsel was ineffective.[122] Under the totality of the circumstances test, counsel may be deemed either ineffective or effective. However, the court is more likely to find no prejudice when employing the *Strickland* prejudice standard because the standard is very high and difficult to meet.

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[122]. Commonwealth v. Flanagan, 854 A.2d 489, 504 (2004).