[J-81A&B-2012] [MO: Baer, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 612 & 624 CAP
	:	
Appellant/Cross-Appellee	:	Appeal from the Order entered on May 28,
	:	2010, in the Court of Common Pleas of
	:	Philadelphia County, Criminal Division, at
v.	:	No. CP-51-CR-0410911-1994
	:	
	:	
JOSEPH ELLIOTT,	:	
	:	
Appellee/Cross-Appellant	:	SUBMITTED: June 20, 2012

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: November 21, 2013**

I join the Majority Opinion. I write separately only because I continue to believe that the analysis set forth in Commonwealth v. Brooks, 839 A.2d 245 (Pa. 2003) conflated two distinct lines of Sixth Amendment analysis, and the PCRA court's erroneous ruling in this case (on a waived claim, no less) shows the mischief the lack of clarity in Brooks can cause.

In Brooks, a majority of the Court concluded that trial counsel's failure to meet with a capital murder defendant prior to trial amounted to ineffectiveness under the three-prong Strickland/Pierce[1] test. The majority reached that conclusion without identifying an instance of actually deficient and prejudicial performance at trial, *i.e.*,

[1] The three-prong ineffectiveness test set forth in Commonwealth v. Pierce, 527 A.2d 973, 974 (Pa. 1987), implements the performance and prejudice standard of Strickland v. Washington, 466 U.S. 668 (1984).

other claims, additional information, or evidence that counsel could have discovered but for his failure to meet with Brooks prior to trial that would have changed the outcome of the proceedings. This fact formed the basis for my concurring opinion in Brooks. I noted that the Brooks majority had established a bright-line rule that failure to meet with a client face-to-face established ineffectiveness *per se*. I further pointed out that the majority's reliance upon a *per se* conclusion to find Strickland/Pierce prejudice in fact was inconsistent with that standard, which requires an assessment of actual prejudice. I further argued that the majority's analysis of prejudice was more in line with the U.S. Supreme Court's decision in U.S. v. Cronic, 466 U.S. 648 (1984).[2]

I continue to believe that the actual analysis of the majority in Brooks is defensible as a Sixth Amendment matter only as an application of Cronic and not under Strickland; I continue to believe that the *per se* rule announced there was overbroad because the majority failed to come to terms with Cronic; and this case shows why better precision is required. The PCRA court read Brooks as entitling appellee to relief based on the sole fact that counsel did not have a face-to-face meeting with him prior to his trial in this case. But, the facts here show why Brooks should not be read in such an erroneous fashion. First, although counsel may not have met with appellee in person to discuss his upcoming trial for murder in this matter, counsel was well-acquainted with appellee. Counsel had just finished representing appellee in a rape trial one month prior to the trial here. Thus, he knew appellee, he had an opportunity to build a relationship with appellee, he knew appellee's demeanor, and he was familiar with

[2] In Cronic, the High Court concluded that there might be "circumstances of" a certain "magnitude" that required a court to forego an individual inquiry into counsel's performance because the defendant had been denied counsel entirely or during a critical stage of the proceedings.

much of the "prior bad acts" evidence that the Commonwealth would use against appellee in the murder trial. Second, and relatedly, unlike the defendant in Brooks, appellee was not forced to represent himself because of a destruction in the attorney-client relationship arising from a failure of a lawyer to meet his client face-to-face prior to representing him. Counsel here had a reason not to meet with appellee, whom he knew from representing him in the very recent past. Notably, as explained by the Majority, appellee has not pointed to any action or inaction of counsel, arising from the failure to meet with him, or anything which would have changed the outcome of the proceedings.

The point is that not all failure to meet cases are alike, and not all have the same effect upon trial. This case presents a routine (albeit waived) ineffectiveness claim, and warrants treatment as any other ineffectiveness claim under Strickland, requiring the demonstration of actual prejudice. Brooks should be expressly confined to its facts and construed as an application of U.S. v. Cronic, supra.