[J-108-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 313 CAP
	:	
Appellee	:	Appeal from the April 4, 2001 Order of the
	:	Court of Common Pleas of Philadelphia
	:	County, Trial Division, Criminal Section, at
v.	:	1688-92, January Term 1980, denying
	:	Defendant's Petition Under the Post
	:	Conviction Relief Act.
KEVIN HUGHES,	:	
	:	
Appellant	:	
	:	SUBMITTED: May 22, 2002
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	:	
	:	

CONCURRING AND DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: December 21, 2004**

I agree that appellant is not entitled to Post Conviction Relief Act ("PCRA")[1] relief on his pre-trial or guilt phase claims, albeit I do not agree with the Majority's non-waiver approach to two of those claims. With respect to the penalty phase, I agree that appellant is entitled to a remand on his claim that counsel was ineffective respecting mitigation evidence, but unlike the Majority, I would make clear that counsel's conduct must be evaluated according to the governing law in 1981, and not in light of later-announced standards. I am in dissent as to the scope of the penalty phase remand because I

[1] 42 Pa.C.S. § 9541 *et seq.*

respectfully disagree with the decision to remand appellant's claim of ineffective assistance of appellate counsel in failing to challenge the trial court's ruling on the Commonwealth's rebuttal evidence. Furthermore, I have other concerns respecting the proper approach to certain of appellant's penalty phase claims. I write to address these various points of divergence.

First, with respect to appellant's multi-faceted claim involving his mental competence to face trial, the Majority correctly holds that appellant's competency claim is previously litigated, and then turns to the "different issue" appellant raises concerning the standard for assessing proof respecting competency. Slip op. at 16. The Majority notes that the question of whether a defaulted claim of incompetence *qua* incompetence may be deemed waived under the PCRA has divided this Court, with no majority view emerging to date. Slip op. at 17, *citing* Commonwealth v. Santiago, 855 A.2d 682 (Pa. 2004) (plurality opinion by Cappy, C.J.). Based upon the inconclusive outcome in Santiago, the Majority avoids the question of whether appellant's distinct claim involving the standard for evaluating competency is waivable; instead, the Majority assumes that relaxed waiver applies and proceeds to evaluate the merits. I continue to believe that which I explained in my concurrence in Santiago: *i.e.*, that the PCRA does not except competency claims from its waiver provision; that this Court lacks authority to ignore the legislative waiver provision and should not invent an exception for competency claims; and that our creating a relaxed waiver exception for competency claims runs afoul of the seminal decision in Commonwealth v. Albrecht, 720 A.2d 693 (Pa. 1998), which eliminated the relaxed waiver rule on capital PCRA review precisely because that judicial rule wrongly subverted the PCRA's statutory waiver. There is no more reason to marginalize Albrecht and employ relaxed waiver to reach appellant's defaulted claim concerning the competency standard than there is to reinvigorate relaxed waiver to reach substantive claims of incompetency. Indeed, since none of the authorities cited in the Santiago plurality addressed claims

involving the **standard** for assessing competency, there is far less reason to resurrect an arbitrary judicial doctrine to void a presumptively valid statutory waiver.

By employing relaxed waiver, the Majority engages in an unnecessary consideration of the retroactive effect of the then-new federal constitutional rule emerging from Cooper v. Oklahoma, 517 U.S. 348, 116 S.Ct. 1373 (1996), which as of today provides the standard for assessing competence. See Slip op. at 17-21. Even if I could accept the Santiago proposed return to relaxed waiver for competency claims, I would not extend that doctrine to encompass defaulted claims involving the competency standard. Relaxed waiver in this instance would permit a new constitutional rule issued by the U.S. Supreme Court to operate retroactively on collateral review, even though the High Court has not required the rule to have such a super-retroactive application. Both this Court and the Supreme Court already have a settled, principled approach to rules deemed subject to retroactive application: such new rules should apply to cases still pending on direct review, but only where the defendant timely raised and preserved the claim; but they should apply if raised for the first time on collateral attack only in those truly rare instances where the U.S. Supreme Court has explicitly required that application. See Shea v. Louisiana, 470 U.S. 51, 58 n.4, 105 S.Ct. 1065, 1069 n.4 (1985) (where constitutional decision applies retroactively, it must be applied to cases pending on direct review at time of issuance, but "subject, of course, to established principles of waiver, harmless error, and the like"); Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060 (1989) (plurality opinion) (discussing limits on applying new rules to review of state trials on federal habeas corpus attack); Commonwealth v. Tilley, 780 A.2d 649, 652 (Pa. 2001) (discussing requirement that novel issue be preserved); Commonwealth v. Cabeza, 469 A.2d 146, 148 (Pa. 1983) (same).

It is one thing to overlook a procedural waiver where the foregone claim involves settled law, but quite another to do so to allow a new rule of law to impeach the fairness of a trial and a judgment that has become final, and properly so, under the law in existence

when the trial occurred. In this regard, it is notable that, for purposes of federal habeas corpus review of state convictions, the U.S. Supreme Court has held that the fact that this Court employed relaxed waiver to reach a claim arising under Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860 (1988), which was not preserved when the case was tried pre-Mills, did not absolve the Third Circuit from having to determine whether Mills should properly be deemed retroactively applicable. See Horn v. Banks, 122 S.Ct. 2147 (2002) (*per curiam*). In a later appeal in the Banks case, the High Court reversed the Third Circuit a second time, holding that Mills was a new procedural rule; that it was not subject to retroactive application on collateral attack; and thus it could not be employed to overturn a Pennsylvania conviction which was secured before Mills was decided. See Beard v. Banks, ___ U.S. ___, 124 S.Ct. 2504 (2004). I think this Court should employ a similar approach: a new rule of federal constitutional law should be deemed retroactively applicable on PCRA review only in instances where the U.S. Supreme Court would require that result. This case does not pose such an instance.

On the merits, even if I were willing arguably to agree that this waived claim was not waived, I do not follow the Majority's analysis in its entirety. Taking the Santiago plurality's relaxed waiver approach to its logical conclusion in this extension/application, we are now supposed to treat appellant's claim as if it was not waivable, and therefore, he is entitled to pursue it here as if this was effectively a continuation of his direct appeal. Under direct review retroactivity principles, appellant would generally be entitled to the benefit of the new rule in Cooper if he had anticipated it and asked for it, even if the rule had not been embraced at the time he was tried. It is hard to grasp why the Majority ultimately denies appellant any benefit of Cooper if we are indulging the pretense that he did not waive his right to pursue the new rule on direct review. In other words, the ultimate holding that follows upon the Majority's retroactivity analysis appears to be that appellant waived his supposedly non-waivable Cooper claim. It would be better simply to apply the statute

according to its actual language and rational structure; recognize that the competency standard claim is waivable and was in fact waived here; decline to convert appellant's claim of counsel ineffectiveness into the underlying waived claim; and dispose of the ineffectiveness claim -- which is cognizable and not waived -- on the merits by applying settled law which holds that counsel cannot be deemed ineffective for failing to predict the change in the law represented by Cooper. See, e.g., Commonwealth v. (Aaron) Jones, 811 A.2d 994, 1005 (Pa. 2002); Commonwealth v. Rollins, 738 A.2d 435, 451 (Pa. 1999).

Second, of necessity I must disagree with the Majority's decision to nullify the PCRA's waiver provision to reach the merits of appellant's claim premised upon Riggins v. Nevada, 504 U.S. 127, 112 S.Ct. 1810 (1992) -- another decision which did not exist until years after appellant's trial and direct appeal had concluded. In addition to assuming that Riggins claims are not waivable, the Majority assumes that Riggins is subject to super-retroactive application on PCRA review. Slip op. at 24. Again, the U.S. Supreme Court has had little difficulty in concluding that new rules generally should not apply when they are defaulted on direct review and invoked for the first time upon collateral attack. See generally Shea v. Louisiana, supra. In my view, the likelihood that the High Court would ever issue the extraordinary holding that the Riggins rule must be deemed to apply retroactively not only to preserved claims on direct appeal, but also to waived claims raised for the first time upon state collateral attack falls squarely on the "none" end of the "slim and none" continuum. With the Supreme Court not yet having issued such a remarkable ruling, this defaulted claim, like the defaulted Cooper claim, should be treated as the ineffective assistance of counsel claim that it actually is. I would then hold that counsel cannot be

deemed ineffective for failing to predict the decision in Riggins. (Aaron) Jones, supra; Rollins, supra.[2]

Third, I respectfully disagree with the Majority's disposition of appellant's claim of ineffective assistance of counsel premised upon the trial court's penalty phase ruling that the Commonwealth could rebut defense mitigation evidence with evidence concerning a knifepoint sexual assault appellant committed on a minor female when he was a juvenile, an assault which resulted in a consent decree disposition. Slip op. at 42-50. The Majority finds arguable merit in the claim that counsel should have challenged the trial court's rebuttal ruling on direct appeal. The Majority reasons that a consent decree is not the equivalent of a prior conviction or juvenile delinquency adjudication for purposes of rebutting the defense invocation of the lack of significant history of prior criminal convictions mitigating circumstance, see 42 Pa.C.S. § 9711(e)(1); and thus, the trial court erred in ruling that the facts underlying the consent decree would be admissible to rebut that mitigating circumstance. In so holding, the Majority rejects the PCRA court's view that this Court's reasoning in Commonwealth v. Stokes, 615 A.2d 704, 714 (Pa. 1992), which upheld the admission of rebuttal evidence of juvenile delinquency adjudications in a similar circumstance, would also support the admission of evidence concerning a juvenile crime which resulted in a consent decree. Slip op. at 44-45. The Majority remands this claim for a hearing on reasonable basis and prejudice. Id. at 50.

[2] There is no harm to the PCRA petitioner in holding waived claims of this ilk to be waived. In the event that the U.S. Supreme Court, or this Court, were to hold that a new constitutional rule is so fundamental as to warrant super-retroactive application on collateral attack, the PCRA specifically deems such claims to be cognizable as exceptions to the PCRA time-bar. See 42 Pa.C.S. § 9545(b)((1)(iii). The High Court has never held that Riggins is such a watershed rule.

The difficulty with the Majority's approach is that it pays no heed to the governing law requiring that counsel is presumed to be effective and that we assess counsel's conduct in light of the Strickland[3] requirement of contemporary assessment, *i.e.*, that we evaluate counsel's conduct according to the law in existence at the time counsel had to act.[4] The requirement that counsel's conduct be viewed in light of contemporaneously-governing law is central to any rational assessment of a claim of ineffectiveness.

> "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S.Ct. 2052. This is so because it is "all too tempting" for a defendant to second-guess counsel, and "all too easy" for a court to deem a particular act or omission unreasonable merely because counsel's overall strategy did not achieve the result his client desired. Id. See also Lockhart [v. Fretwell], 506 U.S. [364,] 372, 113 S.Ct. 838 [(1993)] (Strickland Court adopted "the rule of contemporary assessment" because it recognized that "from the perspective of hindsight there is a natural tendency to speculate as to whether a different trial strategy might have been more successful"); Waters v. Thomas, 46 F.3d 1506, 1514 (11th Cir. 1995) ("nothing is clearer than hindsight--except perhaps the rule that we will not judge trial counsel's performance through hindsight").

Commonwealth v. Bond, 819 A.2d 33, 51 (Pa. 2002). Accord Commonwealth v. Duffey, 855 A.2d 764, 778-79 (Pa. 2004) (Castille, J., joined by Eakin, J., concurring and dissenting). "Deeming counsel to be ineffective for failing to forward an objection based upon a principle of law that was not then-governing is the very essence of the sort of perverse second-guessing which is not permitted under Strickland and its progeny." Duffey, 855 A.2d at 779 (Castille, J., concurring and dissenting). Another way of stating

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[3] Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

[4] I note that, in disposing of other claims on this collateral appeal, the Majority does recognize the principle of contemporary assessment. See, e.g., Slip op. at 68-70, 73.

this bedrock principle is that collateral attack is simply not the place for courts to innovate new holdings concerning trial issues, since counsel cannot be faulted for failing to predict those new rulings.

There was no controlling interpretive decisional law when this case was tried in 1981, or when counsel filed his direct appeal brief in 1987, which suggested that the trial court's rebuttal ruling was erroneous. Indeed, this collateral appeal would be the very case that would establish the novel substantive proposition that would serve as the basis for determining counsel to have been incompetent seventeen years ago. It may be that direct appeal counsel could have puzzled out the theory that the Majority has accepted, for the first time, today. But, since counsel cannot be blamed for failing to predict a decision that was still seventeen years down the appellate pike, I do not believe that counsel can be faulted for failing to pursue this claim, as opposed to the claims he actually did pursue, on direct appeal.

For similar Strickland-based reasons, I respectfully disagree with the Majority's finding, in relation to a separate point respecting the same rebuttal evidence claim, that counsel should have challenged the ruling on direct appeal because, according to the Majority, as a matter of law the prior juvenile assault/consent decree was inadmissible for the separate purpose of rebutting defense evidence produced under the "catch-all" mitigating circumstance set forth in 42 Pa.C.S. § 9711(e)(8). Slip op. at 47. The Majority holds that rebuttal evidence under the catch-all mitigator cannot concern aspects of character other than the specific aspects invoked by the defendant's mitigation evidence. But, once again, the Majority's holding on the scope of rebuttal is an innovative one which ignores the requirement of contemporary assessment. The question of the proper scope of rebuttal evidence under the catchall mitigator apparently was an open question in 1981 and in 1987, and to the extent it is a less than open question today, that is so only because what law there is on the subject is contrary to the Majority's view.

This Court has recognized that the Section (e)(8) mitigator effectuates the U.S. Supreme Court's requirement that: "in capital cases, the sentencer [may] not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Skipper v. South Carolina, 476 U.S. 1, 4, 106 S.Ct. 1669 (1986) (citations omitted; emphasis original). See Commonwealth v. Bomar, 826 A.2d 831, 851-52 (Pa. 2003); Commonwealth v. Harris, 817 A.2d 1033, 1053-54 (Pa. 2002). The "character" evidence approved under Section (e)(8) has not been confined to the sort of classic character evidence deemed admissible at trial -- *i.e.*, it is not limited to evidence of one's reputation in the community for pertinent character traits. See generally Commonwealth v. Fulton, 830 A.2d 567 (Pa. 2003) (Opinion Announcing Judgment of Court by Castille, J.) (discussing admissibility of character evidence); Pa.R.E. 404(a)(1). The fact that appellant's mother may have abandoned him, for example, says nothing at all of his community reputation for any particular character trait. Instead, Section (e)(8) permits evidence, under the rubric of character, which is much broader and necessarily more vague. That evidence typically encompasses matters such as childhood abuse, substance abuse, mental impairments, prison adjustment, religious conversion, individual good deeds, family relations, life achievements and disappointments, *etc*. The Section thereby permits evidence which allows a fuller and more personal portrait of the defendant to appear so that the **jury** may assess his "character" for purposes of determining whether the character/record/circumstances mitigator exists. The point of pursuing the mitigator is to convince the jury that, for purposes of penalty, this particular cold-blooded murderer is at least slightly less blameworthy than other cold-blooded murderers. Since truth is still relevant at the penalty phase, the Commonwealth is not obliged to sit idly by if false, skewed or one-sided "character" information is presented under the Section (e)(8) mitigator. Instead, it may rebut the evidence.

Although the Section (e)(8) catchall mitigator has been construed to permit a wide variety of defense evidence, it leads at best to a finding of a single statutory mitigator -- *i.e.*, that the character and record of the convicted defendant, or the circumstances of his offense, should be deemed mitigating. Thus, the defendant cannot argue that each particular bit of evidence he would introduce pursuant to the Section warrants a finding of a separate statutory mitigator. Given the very broad and flexible nature of this Section, it is certainly a plausible reading of its plain language to conclude that evidence of "good" Section (e)(8) character opens the door to rebuttal evidence of "bad" Section (e)(8) character.

Even if the Court is of a mind to adopt a contrary reading, that new interpretation cannot properly form any basis for retroactively faulting counsel. This is particularly so because the Majority's narrow construction of the Section (e)(8) character evidence mitigator is inconsistent with authority from this Court on the question. In Commonwealth v. Rice, 795 A.2d 340 (Pa. 2002) (plurality opinion by Newman, J.), cert. denied, 538 U.S. 926, 123 S.Ct. 1571 (2003), the appellant claimed that the trial court erred in holding that if he introduced penalty phase evidence of his "kindness in sharing a civil settlement award with his family" under the catchall mitigator, the Commonwealth could rebut with evidence of appellant's "involvement in several stabbings while in prison." The appellant there argued that the court's erroneous rebuttal evidence ruling led him not to present his available mitigation evidence. In a plurality opinion, Madame Justice Newman, joined by this Justice and Mr. Justice Eakin, summarily rejected the claim as follows:

> During the Commonwealth's case-in-chief at the penalty phase, Appellant moved *in limine* to prevent the Commonwealth from presenting evidence of Appellant's misconduct. The Commonwealth did not attempt to introduce this evidence during its case-in-chief and planned to present these facts only in rebuttal if Appellant presented testimony of his kind and generous character. … **The trial court ruled that if Appellant offered evidence of his good character during his case-in-chief, then the Commonwealth would be**

> **allowed to offer evidence of Appellant's bad character during its rebuttal. … We conclude that the trial court did not abuse its discretion with this ruling.** Because Appellant elected not to introduce evidence of his good character, the Commonwealth did not present evidence of his prison misconduct. Consequently, because the trial court did not abuse its discretion and Appellant deliberately chose not to present evidence of his good character, we hold that Appellant is not entitled to relief.

795 A.2d at 355 (emphasis supplied) (record citations omitted). Evidence that the appellant in Rice was involved with prison stabbings did not contradict the proffered defense evidence that he had generously shared a civil settlement with his family. The plurality's view was that generic good character evidence opened the door to generic bad character evidence. Rice is in unavoidable tension with today's Majority's approach and holding. If appellate counsel in this case was incompetent in misperceiving the contours of Section (e)(8) in the 1980's, then this Court in Rice was no less incompetent two years ago.

Although Justice Newman's opinion in Rice did not command a majority, it is notable that **none** of the full complement of Justices participating in the case took issue with the plurality's disposition of this particular claim, and the Court denied penalty phase relief by a vote of 5-2. Certainly, no Justice suggested that rebuttal character evidence at the penalty phase was limited to evidence which actually rebutted the specific factual assertions proffered by the defendant concerning his character.[5]

I continue to adhere to Justice Newman's analysis in Rice. However, since the constitutional test for counsel ineffectiveness requires assessment by standards in

[5] Three separate responsive opinions were filed in Rice: a concurrence by Mr. Justice Nigro, and separate concurring and dissenting opinions by then-Chief Justice Zappala and Mr. Justice (now Mr. Chief Justice) Cappy. Each of these opinions was confined to a separate issue concerning the jury instructions on victim impact testimony. Mr. Justice Saylor concurred in the result without opinion. Notably, Justice Nigro's concurrence stated that he "agree[d] with the Opinion Announcing the Judgment that none of the claims of error raised by Appellant warrant relief." 795 A.2d at 363 (Nigro, J., concurring).

existence at the time counsel was required to make litigation decisions, it is not necessary to choose between the opposing views expressed in the Rice plurality in 2002 and in today's Majority Opinion. What matters is that this Court cannot deem appellate counsel incompetent for failing to forward an argument in 1987 that found no support in existing case law and which was summarily rejected -- without dispute or dissenting comment -- by this Court less than three years ago. I would not hold counsel to a higher standard than that which should apply to the Court itself. Accordingly, I would not remand this sub-claim to the PCRA court because, under the law in existence at the time counsel had to act, the notion that counsel was ineffective on appeal lacks even arguable merit.

I also note my respectful disagreement with the Majority's unnecessary suggestion, in remanding this claim, that "there does not appear to be a reason for counsel's failure to pursue the [rebuttal evidence] issue on direct appeal." Slip op. at 53. I disagree with this observation not only because an objective rational basis for counsel's decision is indeed obvious given the state of the law at the relevant time, but also because the approach it suggests does not account for the governing considerations applicable when a claim sounds in ineffective assistance of counsel on appeal. I have described those considerations as follows:

> To prove [appellate counsel] ineffective under the Sixth Amendment, PCRA counsel would have had to prove not only the underlying merit of each waived claim …but satisfy the entire Strickland standard. Smith v. Robbins, 528 U.S. 259, 289, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (petitioner "must satisfy both prongs of the Strickland test in order to prevail on his claim of ineffective assistance of appellate counsel"); Smith v. Murray, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986). Moreover, … even identifying an issue of "arguable" merit does not prove that appellate counsel acted unreasonably, or that prejudice ensued. This is so because, as the U.S. Supreme Court has recognized, appellate counsel is not constitutionally obliged to raise every conceivable claim for relief. Counsel may forego even arguably meritorious issues in favor of claims which, in the exercise of counsel's objectively reasonable professional judgment, offered a greater prospect of securing relief. Jones v. Barnes, 463 U.S. 745, 750-54, 103 S.Ct.

> 3308, 77 L.Ed.2d 987 (1983); see also Robbins, 528 U.S. at 288, 120 S.Ct. 746 ("[A]ppellate counsel ... need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal."). "Generally, only when ignored issues are clearly stronger than those presented will the presumption of effective assistance of counsel be overcome." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986) (quoted with approval in Robbins, 528 U.S. at 259, 120 S.Ct. 746).
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> The High Court has explicitly recognized that appellate counsel is **not** constitutionally obliged to raise any and all nonfrivolous claims; to the contrary, the Court has, on repeated occasions, emphasized that vigorous, effective appellate advocacy requires the exercise of reasonable selectivity in deciding upon which claims to pursue. Robbins, 528 U.S. at 288, 120 S.Ct. 746; Barnes, 463 U.S. at 750-54, 103 S.Ct. 3308. This process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy. Smith, 477 U.S. at 536, 106 S.Ct. 2661 (quoting Barnes, 463 U.S. at 751-52, 103 S.Ct. 3308. See also Buehl v. Vaughn, 166 F.3d 163, 174 (3d Cir. 1999) ("One element of effective appellate strategy is the exercise of reasonable selectivity in deciding which arguments to raise."). Barnes emphasized that "[t]here can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." 463 U.S. at 752, 103 S.Ct. 3308.

Commonwealth v. (Gilbert) Jones, 815 A.2d 598, 613, 614 (Pa. 2002) (Opinion Announcing Judgment of Court by Castille, J., joined by Eakin, J.).

Fourth, with respect to appellant's claim that his counsel was ineffective on direct appeal for not seeking leave to file a supplemental brief to raise a complaint based upon the U.S. Supreme Court's decision in Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860 (1988), the Majority assumes strictly for purposes of disposition that review on direct appeal could have been secured by such a filing and by invoking relaxed waiver in the hopes of overcoming the fact that the claim was defaulted at trial. Slip op. at 75-76. I have no objection to assuming certain points in order to facilitate a disposition, particularly given the typically prolix filings with which this Court is burdened upon capital PCRA review. But,

since this Court is likely to encounter this new type of assault upon direct appeal counsel in capital cases with increasing frequency, I believe there are two points worth making about such claims. First, even laying aside the procedural hurdle that the direct appeal in this case was already briefed and submitted when Mills was decided, it is pure speculation whether the Court would have entertained a particular defaulted claim based upon new constitutional authority under the discretionary relaxed waiver doctrine. Indeed, this Court has held that counsel cannot be deemed ineffective on appeal for failing to seek the retroactive benefit of a new constitutional rule that was announced while the appeal was pending, where the claim was not preserved below. Commonwealth v. (Aaron) Jones, 811 A.2d at 1005.

Second, there is a fundamental substantive issue that would have to be resolved in the defendant's favor before relief could be granted upon a claim that direct appeal counsel was ineffective in failing to invoke relaxed waiver to seek the benefit of a new federal constitutional rule which was not in existence at the time of trial, and the benefit of which was not sought below. Specifically, there is a strong argument to be made that such an ineffectiveness claim should be governed by the heightened prejudice standard set forth in Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838 (1993), rather than the prejudice standard governing more typical Strickland claims. The Lockhart rule is somewhat obscure, and to understand properly its relationship to Strickland, it is best simply to reproduce the High Court's most recent description of the doctrine:

> It is true that while the Strickland test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims, there are situations in which the overriding focus on fundamental fairness may affect the analysis. Thus, on the one hand, as Strickland itself explained, there are a few situations in which prejudice may be presumed. … And, on the other hand, there are also situations in which it would be unjust to characterize the likelihood of a different outcome as legitimate "prejudice." Even if a defendant's false testimony might have persuaded the jury to acquit him, it is not fundamentally unfair to conclude that he was not prejudiced by counsel's

interference with his intended perjury. Nix v. Whiteside, 475 U.S. 157, 175-176, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986).

Similarly, in Lockhart we concluded that, given the overriding interest in fundamental fairness, the likelihood of a different outcome attributable to an incorrect interpretation of the law should be regarded as a potential "windfall" to the defendant rather than the legitimate "prejudice" contemplated by our opinion in Strickland The death sentence that Arkansas had imposed on Bobby Ray Fretwell was based on an aggravating circumstance (murder committed for pecuniary gain) that duplicated an element of the underlying felony (murder in the course of a robbery). Shortly before the trial, the United States Court of Appeals for the Eighth Circuit had held that such "double counting" was impermissible, see Collins v. Lockhart, 754 F.2d 258, 265 (1985), but Fretwell's lawyer (presumably because he was unaware of the Collins decision) failed to object to the use of the pecuniary gain aggravator. Before Fretwell's claim for federal habeas corpus relief reached this Court, the Collins case was overruled. Accordingly, even though the Arkansas trial judge probably would have sustained a timely objection to the double counting, it had become clear that the State had a right to rely on the disputed aggravating circumstance. Because the ineffectiveness of Fretwell's counsel had not deprived him of any substantive or procedural right to which the law entitled him, we held that his claim did not satisfy the "prejudice" component of the Strickland test.

Cases such as Nix v. Whiteside, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986), and Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993), do not justify a departure from a straightforward application of Strickland when the ineffectiveness of counsel *does* deprive the defendant of a substantive or procedural right to which the law entitles him. In the instant case, it is undisputed that Williams had a right--indeed, a constitutionally protected right--to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer.

Williams v. Taylor, 529 U.S. 362, 391-93, 120 S.Ct. 1495, 1512-13 (2000) (citations and footnotes omitted); accord Lockhart, 506 U.S. at 372, 113 S.Ct. at 844 (prejudice component of Strickland test "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. … Unreliability or unfairness does not result if the ineffectiveness of counsel does

not deprive the defendant of any substantive or procedural right to which the law entitles him.") (citations omitted).

As the Majority notes, the Supreme Court has held that Mills established a new constitutional rule, which is not entitled to retroactive operation upon collateral attack. Beard v. Banks, ___ U.S. ___, 124 S.Ct. 2504 (2004). Appellant's trial in this case, which pre-dated Mills, unquestionably was conducted in conformity with governing pre-Mills law: he was deprived of no substantive or procedural trial right to which the law entitled him. Moreover, since Mills does not apply retroactively to those who failed to preserve a Mills claim for direct review, appellant was not entitled to its benefit on appeal once he had failed to preserve an objection below. In such a circumstance, it would be an arbitrary windfall to allow the doctrines of relaxed waiver -- a doctrine since abrogated by this Court, see Commonwealth v. Freeman, 827 A.2d 385 (Pa. 2003), no less than the Collins rule at issue in Lockhart was eventually overturned -- and ineffective assistance of counsel to permit appellant to upset a final verdict which was fundamentally fair when rendered.[6]

Finally, with respect to appellant's claim of ineffective assistance of counsel concerning mitigation evidence, although I agree that this issue should be remanded, I must reiterate my concern with the Majority's reliance upon authority which did not exist at the time of this trial in 1981, which is the only relevant time for purposes of evaluating counsel's conduct in this regard. Indeed, the seminal decision in Strickland -- a case which likewise involved alleged ineffective assistance at the penalty phase -- did not yet exist at the time of trial. The Majority does not cite to a **single** case which was in existence at the time of appellant's trial, and yet it states the governing law with a certitude that misleadingly

[6] It might be a different circumstance if the defendant could point to an identically situated appellant, whose direct appeal counsel in fact secured the benefit of the new rule by invoking relaxed waiver, resulting in an award of appellate relief. Such is not the case here.

suggests that the principles it discusses are timeless, and were settled in 1981. I believe that it is at least debatable whether guidance provided by the High Court in a decision so recent as Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003), for example, may properly be invoked to second-guess the decisions counsel was required to make in 1981, even before Strickland was decided. Accordingly, I would make clear, where the Majority does not, that upon remand appellant will have the burden of proving that counsel's performance with respect to evidence of mitigation was deficient and prejudicial according to the law in existence in 1981, and not according to standards which were only announced much later on.

Mr. Justice Eakin joins this concurring and dissenting opinion.