[J-140-2001]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 315 CAP
	:	
Appellee	:	
	:	Appeal from the Order of the Court of
	:	Common Pleas of Lehigh County, Criminal
v.	:	Division, entered on 9/15/00 at No.
	:	1827/1995 denying PCRA petition
	:	
EDWIN RIOS ROMERO,	:	
	:	
Appellant	:	SUBMITTED: August 2, 2001

CONCURRING AND DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: December 28, 2007**

I concur in the result as to Appellant's guilt-phase claims and respectfully dissent as to penalty.

My principal difference on the penalty claims relates to Appellant's claim of ineffective assistance of counsel concerning counsel's investigation of mitigating evidence. A plurality of Justices concludes that Appellant may not rely upon Williams v. Taylor, 529 U.S. 362, 396, 120 S. Ct. 1495, 1515 (2000), Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527 (2003), Commonwealth v. Gorby, 589 Pa. 364, 909 A.2d 775 (2006), or Commonwealth v. Jones, 590 Pa. 202, 912 A.2d 268 (2006), as support for his argument that counsel was required to investigate evidence of childhood abuse, family dysfunction and neglect, and mental health and intellectual deficits. See Lead Opinion, slip. op. at 35. The plurality rationale is that those cases had not been decided

at the time of Appellant's trial in 1996, and "[p]rior to Williams and its progeny, case law regarding what is required of counsel during the penalty phase was not as exacting as today." Id.

Such perspective, however, was rejected in Commonwealth v. Hughes, 581 Pa. 274, 865 A.2d 761 (2004). There, this Court applied Wiggins and Williams to counsel's conduct in connection with a trial that occurred in 1981. See id. at 361-62 n.56, 865 A.2d at 813-14 n.56. In response to a dissenting opinion crafted along the same lines as the majority's present reasoning, the Hughes majority explained that Wiggins and Williams were also issued in the context of collateral review, occurring many years after trial, and therefore, those decisions did not represent innovations in prevailing federal constitutional law. See id. Furthermore, we explained that well before the appellant's trial the ability to present information respecting a defendant's background, character, and the circumstances of the offense was considered a constitutional constituent to a valid capital sentencing scheme, see id. (citing Lockett v. Ohio, 438 U.S. 586, 602-05, 98 S. Ct. 2954, 2964-65 (1978)), and the significance of counsel's role in evaluating this information had been recognized as essential. See id. (citing Gardner v. Florida, 430 U.S. 349, 360, 97 S. Ct. 1197, 1206 (1977)). Certainly, the Hughes Court reasoned, it could not be reasonably maintained that counsel could fulfill his obligation by conducting little or no investigation into an available area of mitigation, particularly when such omission may be of critical consequence to the penalty imposed. Id. Indeed, Hughes explained, the very standards relied upon in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), as guideposts in assessing counsel's performance at trial occurring in 1976, in Williams regarding a trial conducted in 1986, and in Wiggins involving a trial conducted in 1989, provided that:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues

> leading to facts relevant to the merits of the case and the penalty in the event of conviction.

Hughes, 581 Pa. at 361-62 n.56, 865 A.2d at 813-14 n.56 (quoting ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1 (2d ed. 1980) (The Defense Function; Investigation and Preparation)). As important, the Court continued, the commentary following this standard explains that:

> The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant. Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. Investigation is essential to fulfillment of these functions.

Id. (quoting ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1, cmt). Hughes also noted that the ABA standards quoted above were in place since 1971. See id. As such, we stated that the prevailing federal constitutional standards as articulated in Williams and Wiggins pertaining "to counsel's duty to investigate as part of his penalty phase preparation [do] not constitute a retroactive application of a new standard." Id.; accord Hamblin, 354 F.3d 482, 487 (6th Cir. 2003) (explaining that "[t]he Court in Wiggins clearly holds ... that it is not making 'new law' on the ineffective assistance of counsel either in Wiggins or in the earlier case on which it relied for its standards, Williams v. Taylor").[1]

[1] On this point, I also do not agree with the plurality that the older line of Pennsylvania decisions was as consistent in approving limited investigations as the majority implies. See, e.g., Commonwealth v. Smith, 544 Pa. 219, 675 A.2d 1221 (1996) (plurality) (awarding a new penalty hearing where trial counsel neither pursued nor presented any evidence of the defendant's mental state); id. at 246, 675 A.2d at 1234 (Newman, J., (continued . . .)

Here, Appellant's trial counsel repeatedly acknowledged on the post-conviction record that the case for mitigation that he offered at the penalty phase of trial was meager. See, e.g., N.T., May 31, 2000, at 651 (reflecting counsel's explanation, "Well, we didn't have much, you know, and that was the -- that was the problem, and so we just, you know, went with what we had[.]"); id. at 701 ("as you can see from the record, we didn't have a lot of ammunition to fire, you know, in the death penalty phase, so you just got to go with, you know, the fundamentals of basics [sic]"). Nevertheless, as the lead opinion recognizes, counsel did not attempt to contact most family members, did not obtain various life-history records, and did not seek out the advice of a mental health professional. Further, he acknowledged that he had no strategic or tactical reason for failing to do so. When counsel did contact a family member, he did not think to ask about Appellant's life history. See id. at 624.

The plurality discounts these facts based on counsel's testimony as to his impression that Appellant did not want to involve his family and believed that they had no useful information, although it acknowledges that Appellant never forbade counsel from contacting family members. See Lead Opinion, slip op. at 33-34. Again, however, counsel was faced with a situation in which the Commonwealth would likely establish strong aggravation, and he was in possession of very little effective mitigation evidence. In such a circumstance, I do not agree that counsel can reasonably limit his investigation based on non-binding impressions and preferences. Cf. Commonwealth v. Malloy, 579 Pa. 425, 459, 856 A.2d 767, 788 (2004) ("The onus is not upon a criminal

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(. . . continued)
concurring) ("[T]his Court repeatedly has found that the failure of defense counsel to adequately prepare, particularly in a capital case, is simply an abdication of the minimum performance required. We have specifically held that a failure to investigate witnesses and/or records, that may have established a defense or mitigating circumstance, constitutes ineffective assistance of counsel.").

defendant to identify what types of evidence may be relevant and require development and pursuit. Counsel's duty is to discover such evidence through his own efforts[.]").

The PCRA court found as a fact, and it was undisputed at the post-conviction hearing, that Appellant is borderline mentally retarded. As the majority notes in passing, the educational records that trial counsel should have obtained confirm Appellant's poor performance in school. See Lead Opinion, slip op. at 36. I have difficulty accepting the notion that capital counsel presented with a client who he should have known had performed very poorly in school, and who is undisputedly borderline mentally retarded, will lack cause to investigate his client's intellectual functioning as a mitigating factor. In this regard, I would note that in Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242 (2002), the United States Supreme Court determined that, because of their disabilities in areas of reasoning, judgment, and control of their impulses, mentally retarded persons do not act with the level of moral culpability that characterizes the most serious adult criminal offenders. See id. at 306, 122 S. Ct. at 2244. While I agree with the majority that Appellant does not fall within the category of persons as to whom there is a per se rule that they cannot be executed, it seems clear to me that an argument to the jurors that Appellant's moral culpability should be assessed in light of his substantially limited intellectual functioning would have been more potent than the mitigation case that was presented at trial. Accord Williams, 529 U.S. at 398, 120 S. Ct. at 1515 (commenting that "the reality that [the defendant] was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability."). In terms of the prevailing standard governing prejudice, I believe that "there is a reasonable probability that at least one juror would have struck a different balance," Wiggins, 539 U.S. at 537, 123 S.Ct. at 2543, in the face of such evidence and argument.

With regard to appellate counsel's performance, he testified that it was his impression that he could only raise trial error and not collateral matters, and therefore, he did not conduct an extra-record investigation. See N.T., May 31, 2000, at 714-16. However, the law as of the time of Appellant's direct appeal required direct-appeal counsel to investigate and litigate extra-record claims on pain of waiver. See Commonwealth v. Grant, 572 Pa. 48, 66, 813 A.2d 726, 737 (2002) (explaining that, under the rule pertaining at the time of Appellant's trial, appellate counsel had the "burden of raising any extra-record claims that may exist by interviewing the client, family members, and any other people who may shed light on claims that could have been pursued before or during sentencing"). Thus, appellate counsel's stewardship was also clearly deficient.

Madame Justice Baldwin joins this concurring and dissenting opinion.