[J-84-2003]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 385 CAP
	:	
Appellee	:	Appeal from the Order of the Court of
	:	Common Pleas of Washington County,
	:	Criminal Division, entered May 23, 2003 at
v.	:	No. 555(a)(b) 1986
	:	
	:	
THOMAS J. GORBY,	:	
	:	SUBMITTED: March 27, 2003
Appellant	:	
	:	
	:	
	:	
	:	

CONCURRING OPINION

MR. CHIEF JUSTICE CAPPY **DECIDED: JUNE 20, 2006**

I join the majority opinion. Furthermore, I agree with the rule of law the majority sets forth for reviewing capital counsel's conduct when a petitioner raises a claim of ineffectiveness based on counsel's failure to investigate and/or present mental health or social history mitigating evidence, namely, that "capital counsel have an obligation to pursue all **reasonably available** avenues of developing mitigation evidence." Majority slip opinion at 27 (emphasis added).

I write separately only to clarify what I believe the proper appellate court standard of review should be in cases involving a claim of ineffectiveness based on counsel's failure to pursue all reasonably available avenues of developing mitigating evidence.

When reviewing such a claim, we repeatedly iterate the general ineffectiveness standard of review, which involves:

> a review of the PCRA court's findings to see if they are supported by the record and free from legal error. Commonwealth v. Reyes, 870 A.2d 888, 893 n.2 (Pa. 2005). Our scope of review is limited to the findings of the PCRA court and the evidence on the record of the PCRA court's hearing, viewed in the light most favorable to the prevailing party.

Commonwealth v. Collins, 888 A.2d 564, 583 n.25 (Pa. 2005). In this context, this generic standard is largely unhelpful as it fails to define an appellate court's role in deciding distinct issues with any precision. Furthermore, I do not believe our scope of review should be limited in these cases.

In Strickland v. Washington, 466 U.S. 668, 698 (1984), the Court announced that ineffectiveness "is a mixed question of law and fact. Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to deference … and although district court findings are subject to the clearly erroneous standard …, both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." While making clear that ineffectiveness questions are "mixed," this announcement in no way clarifies the appropriate standard of review. Indeed, other state courts have been struggling with this very question and reaching different results. See, e.g., Coleman v. State, 741 N.E.2d 697, 699-700 (Ind. 2000) (supporting a deferential standard of review: "We will reverse a negative judgment after a non-jury trial only if 'the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the postconviction court.'"); State v. Gill, 967 S.W.2d 540, 542 (Tex. Crim. App. 1998) (noting that court reviews Strickland standards "through the prism of an abuse of discretion standard"); but see State v. Rice, 932 P.2d 981, 1005 (Kan. 1997) (holding that the appellate standard of review of ineffectiveness claim is de novo).

When reviewing mixed questions of fact and law, the inquiry is what level of deference should be given to the determinations by the lower tribunal. And, in

Pennsylvania, there is no set appellate court standard of review for mixed questions. Warehime v. Warehime, 761 A.2d 1138, 1146 n.4 (Pa. 2000) (Saylor, J. concurring) (noting that "this Court has not articulated a universal standard of review applicable to mixed questions of law and fact").

In considering the answer to this question, at least one commentator has suggested that the standard of review for these types of questions is ultimately a policy choice by the appellate court based on the judicial actor better positioned to decide a particular issue. Randall H. Warner, All Mixed Up About Mixed Questions, 7 J. OF APP. PRAC. AND PROCESS 109, 130 (Spring 2005). In adopting one standard over another, courts have considered the need to unify precedent, reach consistent results, the right to a jury of one's peers, and the desire to see that justice is meted out even-handedly. See passim.

The concerns for consistency and ensuring that justice is even-handed are especially compelling when reviewing these unique types of ineffectiveness claims. Not only is the ultimate penalty severe, but we are also confronted with guaranteeing that the constitutional right to counsel is protected. Accordingly, I would make clear that ineffectiveness questions based on counsel's failure to pursue all reasonably available avenues of developing mitigating evidence constitute a mixed question of law and fact. We will draw our own legal conclusions as to whether counsel's conduct fell below constitutionally required standards. Thus, our standard of review is de novo in that we owe no deference to the legal conclusion reached by the PCRA court; and our scope of review is plenary. This is no way alters the principle that "the trial court is in the best position to review claims related to trial counsel's error in the first instance as that is the court that observed firsthand counsel's allegedly deficient performance." Commonwealth v. Grant, 813 A.2d 726, 737 (Pa. 2002). Indeed, I would continue to accept the factual findings and credibility determinations of the PCRA court that are supported by the record.

Applying this standard to the instant case, I agree with the result of the majority opinion.

Madame Justice Newman joins this concurring opinion.