[J-83A&B-2013] [MO: McCaffery, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	Nos. 567 & 568 CAP
	:	
Appellee	:	Appeal from the Judgment of Sentence
	:	entered on February 1, 2007, in the Court
	:	of Common Pleas, Criminal Division, of
v.	:	Blair County, at No. CP-07-0002273-2005
	:	
	:	
MIGUEL A. PADILLA,	:	
	:	
Appellant	:	ARGUED: April 14, 2010
	:	RESUBMITTED: September 20, 2013

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: October 31, 2013**

I join the Majority Opinion and write separately to address the penalty phase issue that divides the Court, concerning the stipulation to the in-the-perpetration-of-a-felony aggravating circumstance, 42 Pa.C.S. § 9711(d)(6). In addition, I write to note the strange fact that the Federal Community Defender's Office ("FCDO"), an outfit funded by U.S. taxpayers' dollars, entered an appearance on behalf of the sovereign government of the United Mexican States ("Mexico"), and in that capacity wrote and filed an *amicus curiae* brief in support of appellant.

I.

A.

Having been a trial lawyer for many years, I have a developed partiality to facts. The experience has proved helpful in the craft of appellate judging: many issues that

are initially presented as pristine questions of law, involving matters of great legal moment, melt away when measured by the record facts. The disputed penalty phase issue here presents just such a case.[1]

The most important fact necessary to properly understand the issue before this Court is that appellant is a Mexican national who was residing in the United States illegally at the time of these murders in August 2005. Appellant murdered three men, and received three death sentences. The facts below demonstrate that Appellant, his friend Travis Shumaker, and Shumaker's mother were denied admission to a private social club. During the course of an argument and altercation involving Shumaker and the club's owner, Alfred Mignogna, and bouncer, Frederick Rickabaugh, appellant walked to Shumaker's nearby car, retrieved a loaded handgun, returned, and fired repeatedly, killing Mr. Mignogna, Mr. Rickabaugh, and a bystander and patron of the club, Stephen Heiss. In doing so, appellant also risked the lives of other club attendees. The jury found three aggravating circumstances as to each murder, two of which are

[1] Mr. Justice Baer's Concurring and Dissenting Opinion suggests that my expression of view in this opinion is a "criticism" of Mr. Justice Saylor's Concurring and Dissenting Opinion and implies that Justice Saylor "is ignoring the facts of the case to address a legal princip[le.]" Concurring and Dissenting Opinion (Baer, J.), Slip. Op. at 1. This is not at all so. This opinion, which proceeds in several parts and along several tracks, in fact discusses the "pristine question of law," as it has been forwarded by appellant's counsel. In assessing that question, I have considered the illumination that I believe is found in the record, including what emerged post-trial, the trial court's opinion, and the response of the Commonwealth, and I explain why I believe this waived claim -- whatever may be its ultimate merit -- is properly suited for collateral attack. Moreover, I do not read Justice Saylor's Concurring and Dissenting Opinion as necessarily expressing agreement or disagreement with the specific manner in which appellant casts his claim. As I read Justice Saylor's Concurring and Dissenting Opinion, which explains why he believes that statutory penalty phase relief is warranted, his opinion is cast responsively to points made in the Majority Opinion, affirmatively in terms of Justice Saylor's own view of our precedent on salient points, and then affirmatively again in light of his view of the Commonwealth's responsibilities in light of the record and the manner in which the aggravator was actually pursued at trial.

very powerful: multiple murder, 42 Pa.C.S. § 9711(d)(11), and knowingly creating a grave risk of death to other victims, 42 Pa.C.S. § 9711(d)(7), with the third aggravator being that appellant committed the murders in the course of a felony involving the illegal possession of firearms. 42 Pa.C.S. § 9711(d)(6). Appellant had no real defense against the first two aggravators, and his counsel insisted upon stipulating to the third for a very specific reason: so that the jury would not learn appellant's status as an illegal alien. The jury also found three mitigating circumstances, two implicating the "catchall" mitigator of "any other" relevant mitigation (here, that appellant was a good father and made a positive adjustment to incarceration), 42 Pa.C.S. § 9711(e)(8), and a third relating more directly to the offenses, *i.e.*, that he was under the influence of extreme mental or emotional disturbance when he committed the three murders. 42 Pa.C.S. § 9711(e)(2). Not surprisingly in a case involving three murders, the jury unanimously found that the aggravators outweighed the mitigators as to all three murders, and thus it returned three sentences of death, as required. 42 Pa.C.S. § 9711(c)(1)(iv).

Because appellant is an illegal alien, he cannot lawfully secure a license to possess firearms in Pennsylvania. And so, when appellant went to Shumaker's vehicle and retrieved the gun, he violated the Uniform Firearms Act, 18 Pa.C.S. §§ 6101-6127. Section 6105 of the Act prohibits possession of a firearm by any person "who, being an alien, is illegally or unlawfully in the United States." 42 Pa.C.S. § 6105(a), (c). As the Majority Opinion notes, no specific grading for a Section 6105 offense is set forth in the Act. Therefore the default grading of Section 6119 applies: "Except as otherwise specifically provided, an offense under this subchapter constitutes a misdemeanor of the first degree."

But, of course, appellant was not an illegal alien who merely possessed a firearm: he also carried it and used it to murder three people. As the Commonwealth

and the trial court note, that conduct implicated Section 6106 of the Act, which provides as follows:

> (a) Offense defined.—
>
> (1) Except as provided in paragraph (2), any person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license under this chapter commits a felony of the third degree.
>
> (2) A person who is otherwise eligible to possess a valid license under this Chapter but carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license and has not committed any other criminal violation commits a misdemeanor of the first degree.

Appellant raised no contemporaneous objection to the felony aggravator stipulation his counsel insisted upon, thus waiving any claim respecting its propriety or content. The claim now before the Court was first raised some months after trial. Notwithstanding that the claim had been waived, the trial court, per the Honorable Hiram A. Carpenter III, diligently and carefully examined the issue -- which does not, as appellant would have it, implicate the simple circumstance of a jury accepting a stipulation to a non-existent aggravating circumstance. In other words, it is not as if the jury was erroneously told that the adult victims here were children under the age of twelve. See 42 Pa.C.S. § 9711(d)(16). Rather, the defaulted issue involves the Commonwealth's notice of aggravating circumstances, the notice's relationship to the prior criminal information, and whether that relationship could have formed the basis for dismissal of the aggravator, a challenge appellant never raised. Judge Carpenter's account of the actual defaulted issue is illuminating and explained: why the Section 6106 felony firearms provision was properly the basis for the aggravator; that proof of a

violation would entail informing the jury that appellant was an illegal alien; that appellant's counsel, as a strategic matter, wished to avoid disclosure of appellant's illegal alien status, apparently at all costs; and that it was appellant who both secured severance of the formal firearms charge for trial and insisted upon a generic stipulation to the firearms penalty aggravator, precisely so the jury would not learn that he was an illegal alien:

> [T]he Commonwealth could establish the [felony] aggravator by demonstrating that [appellant] (1) "carried a firearm in a vehicle" to the parking lot and/or "carried a firearm concealed on or about his person" the few yards from his car to the scene of the shootings at a time when [appellant] was without a "valid and lawfully issued license." Proof of this last element would involve demonstrating that [appellant] could not be a validly and lawfully licensed individual because he was an illegal alien. Thus, [appellant's] status as an illegal alien improperly in possession of a firearm was available to the Commonwealth (graded as a felony) to support the aggravator . . . .
>
> Of course, no argument was ever made to the penalty phase jury that [appellant] was an illegal alien improperly in possession of a handgun under either 18 Pa.C.S.A. 6105(c)(5) or 18 Pa.C.S.A. 6106(a)(1). Instead, Defense counsel entered into a generic stipulation that [appellant] "was guilty of a felony possession charge under the Firearms Act during the homicides." That generic stipulation satisfied the aggravator.
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> While this is not a PCRA proceeding, it is important to understand how the Defense's awareness of the Commonwealth's intention to pursue the fact that [appellant] was an illegal alien in possession of a weapon in support of the aggravator impacted the Defense. Throughout their representation, Defense counsel was concerned that [appellant's] status as an illegal alien be kept from the jury to the maximum extent possible. As early as the Omnibus Pre-trial Motions, the Defense asked this Court to sever [the formal firearms charge under Section 6105] from the information claiming possible prejudice. In response, on June 30, 2006, we authored a fourteen (14) page Opinion severing [the firearms charge] from the triple homicide trial and ordering it to be tried separately. Accordingly, the "trial" jury would never know [appellant] was an illegal alien. However, our June 30th ruling did not address the penalty phase beyond preserving [the firearms offense] re the aggravator.

> On the first day of our jury trial, penalty phase counsel . . . adopted a strategy designed to keep [appellant's] illegal alien status out of any penalty phase as well. On that date . . ., [counsel] filed a Motion with the Court requesting an Order precluding the Commonwealth from entering into evidence in the penalty phase [appellant's] illegal alien status. In support of that position, [counsel] contended in the Motion that to establish the aggravator the Commonwealth only needed to show [that appellant] had committed a felony in his possession or use of a firearm at the time of the homicide. The Defense offered a stipulation to that effect. Further, the Defense requested that the Court require the Commonwealth to accept the stipulation to avoid the inevitable prejudice which the Defense argued would result from the Commonwealth's proof of the specific felony supporting the aggravator. We never ruled on that request because the Commonwealth accepted the stipulation. Presently, because of the "error" in [the fact that the information referred only to the misdemeanor firearms offense in Section 6105, and the stipulation adverted to Section 6105 as well], the Defense questions its own action since their proffered stipulation became the "vehicle" which allowed the "improper aggravator" to be found by the penalty phase jury.

Trial Ct. Slip Op., 3/14/07, at 7-8 (emphases in original). On these facts and circumstances, I do not see how appellant can be entitled to summary penalty phase relief.

B.

The Court is divided on the issue of whether the allegedly incorrect stipulation to the course of a felony aggravating circumstance is reviewable on direct appeal notwithstanding its waiver, or if the question should be deferred for collateral review under the PCRA.[2] The Majority Opinion outlines appellant's argument, and then rejects it as a matter of law via application of Commonwealth v. Chambers, 980 A.2d 35 (Pa. 2009), without examining the views and account of the Commonwealth and the trial court in great detail. My own review of those presentations shows illuminating

[2] Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546.

additional reasons why deferral of this claim is appropriate, as against an argument that this case differs critically from Chambers and warrants a relaxation of waiver principles pursuant to this Court's statutory review power.

I begin by noting that it is difficult to imagine how a claim based upon evidence or facts that were the subject of the parties' stipulation provides the basis for an issue subject to valid direct appellate review. If a party has a problem with a stipulation, it need not, indeed it should not, stipulate; it certainly should not insist upon the stipulation, as occurred here. No objection was raised to the stipulation until months after the trial, at a point where nothing could be done about it. Assuming for the moment that the stipulation was deficient, and to appellant's detriment, his counsel obviously should have taken some action at a point where the trial court and the Commonwealth could have responded. It may be that the problem, if timely identified, could have been addressed, and the outcome would be no different (indeed, that is most likely the case here). Of course, the prosecution in a capital case bears responsibility for the aggravators it pursues. But, prosecutors make honest mistakes, no less than defense lawyers do. Furthermore, there can be complications, or confusion, or misunderstandings that do not even amount to a mistake, much less some nefarious plot by the prosecution. Many errors and pitfalls are possible in a case; ours is an adversarial trial system, with a neutral judge as arbiter, and the requirement of contemporaneous objection operates to avoid error, and to create a record to allow for meaningful appellate review. It also operates to discourage intentional building-in of error.

C.

Obviously, there is nothing to prevent appellant from litigating his defaulted issue respecting the stipulation as a claim of ineffective assistance of counsel under the PCRA; since his own counsel demanded the stipulation, the focus obviously should be upon the conduct of counsel, which is a classic collateral issue. But, appellant's very capable appellate counsel realizes that there is nothing to be lost, and summary relief perhaps to be gained, from seeking to have the defaulted claim deemed reviewable on direct appeal via invocation of our statutory review of death sentences for passion, prejudice or arbitrariness. See 42 Pa.C.S. § 9711(h)(3). Direct review spares an appellant the need to account for his trial attorney's conduct, freezes the record at a point where necessary factual development may not have occurred, lowers the appellant's burden to prove error (if a trial court can ever be said to have "erred" when a claim has been waived), and shifts the prejudice burden to the Commonwealth. And, it is even better if the defaulted claim implicates an aggravating circumstance because the appellant can invoke -- as appellant has here -- this Court's unexplained and unsupported declaration in Commonwealth v. Williams, 650 A.2d 420, 430 (Pa. 1994), that, where an aggravator is "struck down" on appeal in a case where the jury engaged in a weighing of aggravators and mitigators, a new penalty phase is required.[3] The existence of Williams provides a powerful incentive to cast penalty phase claims a certain way; and indeed, it provides an unintended incentive for intentional error building by the defense at trial. That is not to say there in fact was error-building by the defense here; the point is that the Williams decision incentivizes it, few if any lawyers would admit to the practice, and the Court should be aware of the consequences when issuing unexplained *per se* rule pronouncements.

[3] I further discuss the difficulties with the Williams decision in Part I (E) *infra*.

To be clear, I do not criticize appellant's counsel for taking this tack: this is creative advocacy. The best appellate advocates on the criminal defense side look to burdens of proof and levels of prejudice as a way to cast their claims. It is always better to have a claim considered directly, rather than through the rubric of counsel ineffectiveness, and this is especially so where a *per se* rule like Williams appears to be available. Even where a claim can only sound in counsel ineffectiveness, this Court recently has seen a relative proliferation of claims that seek to expand definitions of structural error, for example, so as to avoid a defense burden to prove Strickland[4] actual prejudice. See, e.g., Commonwealth v. King, 57 A.3d 607 (Pa. 2012) (on collateral attack, defendant alleged that trial counsel's lack of experience amounted to constructive denial of counsel implicating structural error, and warranting presumption of prejudice); Commonwealth v. Mallory, 941 A.2d 686 (Pa. 2008) (on collateral attack, defendants alleged that ineffectiveness claim involving counsel's failure to request on-record, oral jury waiver colloquy implicated structural error, warranting presumption of prejudice).[5] And, it is always tempting for appellate courts to adopt presumptions or *per se* rules rather than to take on the harder task of individualized appellate judging.

The deferral of this defaulted claim to collateral review is consistent with, if not commanded by, this Court's precedent. Not coincidentally, all of the recent relevant precedent respecting waived issues has arisen in cases where the appeal was litigated by appellant's current lead counsel. Thus, in Chambers, *supra*, counsel unsuccessfully sought to invoke statutory death penalty review to litigate a claim properly sounding in

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[4] Strickland v. Washington, 466 U.S. 668 (1984).

[5] Not coincidentally, appellant makes just such a claim in this case, alleging that his counsel had "debilitating conflicts of interest" which warrant a conclusion that he was constructively denied counsel.

ineffectiveness on direct appeal; this Court deferred the claim to PCRA review. More recently, in Commonwealth v. May, 31 A.3d 668 (Pa. 2011), counsel invoked statutory review in an attempt to litigate numerous waived penalty phase claims including, as here, alleged misconduct by the prosecutor (involving not an aggravator in that case, but the prosecutor's closing argument), as well as claims implicating the trial court's penalty phase charge, and the fact that the defendant was shackled. Each occurrence, the defendant argued, was reviewable on appeal despite the lack of contemporaneous objection, because the events supposedly implicated our statutory review for passion, prejudice, or arbitrariness. The Court, in a unanimous opinion by Mr. Justice Eakin, rejected the effort:

> Appellant fails to acknowledge that these issues were never objected to below and presumptively fall under the rubric of ineffective assistance of counsel. "[A]s a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review." Commonwealth v. Grant, 572 Pa. 48, 813 A.2d 726, 738 (2002). In Commonwealth v. Chambers, 602 Pa. 224, 980 A.2d 35 (2009), we declined to review waived issues that derived from strategic decisions of the defendant's trial counsel under the guise of an "arbitrary factor" for the purposes of 42 Pa.C.S. § 9711(h)(3)'s statutory review. Chambers, at 58-59.
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> Although appellant acknowledges this Court's recent decision in Chambers, he baldly asserts this case is distinguishable. . . . All of appellant's claims involve instances that could have been objected to by trial counsel. For instance, the prosecutor's labeling of appellant's mitigating evidence as excuses could have been objected to immediately following the prosecutor's comments. The trial court then would have had the opportunity to sustain the objection and issue a charge. Having failed to object, appellant must now defer these issues to collateral review as ineffective assistance of counsel claims.

31 A.3d at 675-76 (footnotes omitted). Here, as in May, appellant's trial counsel could have objected to the stipulation – or more to the point, he could have declined to

demand that the Commonwealth agree to stipulate. Also, to the underlying point, which is simply assumed by the claim as posed here, counsel could have challenged the propriety of the aggravator, notwithstanding that appellant's conduct obviously implicated the Section 6106 felony. Presumably, any such timely argument along those lines would be premised upon a position that there was something in the law and the facts of this case to prevent the Commonwealth from moving on that felony aggravator (I will further address this point in Part I(D), *infra*). Whether there was a strategy leading to the non-action, and what would have happened if counsel had acted (including the question of whether the aggravator was proper in the first place, and whether the ultimate outcome would still have been a stipulation, so that the jury would not learn that appellant is an illegal alien), depends upon factual development. This circumstance does not, however, make for a ready appellate issue, much less a *per se* grant of a new penalty phase.[6]

[6] Justice Baer's Concurring and Dissenting Opinion takes issue with the analysis of the trial court and the Commonwealth that I have outlined concerning the Section 6106 felony, arguing that the facts at trial – a trial where Section 6106 was not specifically at issue – do not prove the offense since it was not shown at that level that appellant carried the firearm either in the vehicle or concealed on his person. (Notably, appellant has not argued this in response to the Commonwealth and the trial judge, preferring instead his "pristine question of law"). At the same time, however, Justice Baer recognizes the obvious fact that, put to proving the felony – for example, by a timely objection or challenge to the aggravator – the Commonwealth may well have produced more specific evidence addressing the elements of that crime. Justice Baer then states that "it is wholly improper to assume or infer the existence of the felony to justify the aggravating circumstance." Concurring and Dissenting Opinion (Baer, J.), at 3. Respectfully, it is difficult to see how this argument weighs against deferral of the claim, which is my primary point. The fact remains that the aggravator was supported by stipulation; the stipulation was entered into upon insistence by the defense; no objection was raised to the aggravator or the stipulation; and a proper and accurate disposition of the waived claim, in my view, is better left to collateral attack.

Appellant also relies heavily on Commonwealth v. Boczkowski, 846 A.2d 75 (Pa. 2004), but that case is materially distinguishable. In Boczkowski, the jury found one aggravating circumstance -- that the appellant had been convicted of another murder, 42 Pa.C.S. § 9711(d)(11), which occurred in North Carolina -- and one mitigating circumstance -- evidence respecting the appellant's character, falling within the catchall mitigator. 42 Pa.C.S. § 9711(e)(8). The jury determined that the single aggravator outweighed the single mitigator, and thus returned a sentence of death. 42 Pa.C.S. § 9711(c)(1)(iv). The appellant had moved to quash the aggravating circumstance pre-trial, on grounds that the death eligibility circumstance had been secured only by the Commonwealth's violation of a pre-trial court order staying his extradition to North Carolina for trial on the prior murder until the Pennsylvania murder trial had concluded. On appeal, the appellant argued that the Commonwealth had no authority to contravene the order; that its conduct in transferring him to North Carolina created the single aggravating circumstance that made him death penalty eligible; that the Commonwealth should not benefit from its violation of a court order; and that quashal of the aggravating circumstance and vacatur of the death sentence it produced were appropriate. In response, the Commonwealth did not dispute that its action led to the creation of the aggravating circumstance, but argued that it was not deliberately seeking to create that aggravating circumstance; that it acted in good faith; that the aggravator existed when the matter ultimately was ready for trial; and that absent a showing of "purposeful abuse" by prosecution authorities, the aggravator should not be set aside. In resolving the merits of this preserved claim in favor of the appellant, the Boczkowski Court looked to the statutory review standard, and concluded that "this sentence of death cannot stand under Section 9711(h)(3)(i)'s proscription against sentences that are the product of passion, prejudice or any other arbitrary factor." 846 A.2d at 100-01.

Thus, the penalty phase claim at issue in Boczkowski was preserved at trial, and statutory review was not invoked to relax or eliminate issue preservation principles (and to secure a more favorable level and standard of review), or to avoid having to litigate a defaulted claim through the guise of ineffective assistance of counsel and a fully developed factual record. Rather, this Court adverted to the statutory review factors only to assess the merits of the preserved issue. To be on all fours with Boczkowski, the record here would have to show that the trial court, over objection, permitted the Commonwealth to pursue an aggravating circumstance that never actually existed, or that was not properly in the case to begin with. The record here shows no such thing; thus, in my view, the Majority Opinion's application of the Chambers line of decisions is appropriate.[7]

D.

This is not to say that the facial aspect of the claim as cast on appeal is not problematic. It is. But, this is where the Commonwealth's brief and the trial court's

[7] The recent proliferation of cases where capital defendants seek to invoke statutory review of the penalty as a means to revive claims that were defaulted below raises a broader question. This particular review requirement dates to 1978, soon after the reinstitution of capital punishment in America, at a time when states were left to guess at what sort of review systems might be deemed constitutional in the wake of the effective suspension of capital punishment resulting from Furman v. Georgia, 408 U.S. 238 (1972). The decisional law issuing from the U.S. Supreme Court since that time has imposed a series of requirements that address the fractured Furman Court's concerns with unbridled and arbitrary sentencing power being reposed in a capital sentencer. Appellate court review for supposed "passion, prejudice and arbitrariness" in death penalty cases proceeding according to these more recent extensive Eighth Amendment guidelines has little logical place; the General Assembly may want to consider whether it has any proper current role. I will explain my concerns in this regard in greater depth in a more appropriate case.

opinion provide some illumination, which makes the case for deferral to PCRA review stronger.

The Commonwealth relates that it provided notice to appellant that the third aggravator was that appellant "committed the killing while in the perpetration of a felony." The Commonwealth then notes that appellant's current claim is premised upon the fact that the earlier criminal information -- not the notice of aggravators -- charged him with violating the Section 6105(c)(5) "person not to possess/use a firearm -- illegal alien" misdemeanor. The Commonwealth next correctly identifies the factual predicate of appellant's claim as alleging that the information's citation to the (c)(5) misdemeanor limited the Commonwealth to pursuit only of that firearms offense, and since that offense is a misdemeanor, the perpetration-of-a-felony aggravator ceased to exist. Leaving aside the merits of such a claim for the moment, that is certainly an argument appellant's trial counsel could have made, instead of demanding the stipulation. The Commonwealth's core position on appeal, and the trial court's analysis, dispute that necessary predicate.

In the Commonwealth's view, it "is not limited, in this instance, to the charge set forth in the information to establish the aggravator." Rather, the key question is whether the aggravator that the Commonwealth identified to appellant in fact existed: "did [appellant] commit the killing while in the perpetration of a felony." The Commonwealth says the answer is yes, because appellant's conduct implicated not only the Section 6105(c)(5) misdemeanor listed in the information, but also implicated Sections 6106(a)(1) and 6109(e)(1)(x). The Commonwealth then explains:

> Both of the aforesaid sections prohibited [appellant] from carrying or possessing a firearm. Even if Section 6105(c)(5) is not a felony, . . . Section 6106(a)(1) clearly is a felony. Therefore, although not charged in the information, [a]ppellant, being an illegal alien, committed a felony in violation of the Firearms Act. (See 18 Pa.C.S.A. Section 6109(e)(x) as the

> same applies to Section 6106(a)(1) of the Act). The fact that the action of [appellant] constituted a felony is the aggravator that the Commonwealth noticed in this matter. Thus, the aggravator that the Commonwealth noticed, did exist.

Commonwealth's Brief at 38. The Commonwealth then adds that appellant stipulated that he committed the killings while in the perpetration of a felony involving the illegal use of a firearm, and this was all that the jury was told.

The Commonwealth goes on to note that, if appellant's actions in fact comprised a violation of Section 6106(a)(1), which was a felony – and, the Commonwealth says, his actions did – then the jury's finding of the aggravator was supported by the stipulation. Moreover, the stipulation was "factually and legally accurate," according to the Commonwealth, even if the stipulation wrongly cited Section 6105(c)(5):

> The fact that the stipulation cited Section 6105(c)(5) of the Firearms Act does not negate the Commonwealth's argument . . . . The citing of a statutory number to the jury would have meant nothing to them since the entire statute was not read to them for definition. The jury was also not told of the specific facts that gave rise to the felonious conduct of the [a]ppellant (that he was not permitted to have the firearm because he was an illegal alien). They were simply given a stipulation that the killing was in the perpetration of a felony regarding the Firearms Act. Once again, that stipulation was consistent with Section 6106(a)(1) which is, in fact, a felony. Therefore, the inclusion of a numerical cite of the subsection of the Firearms Act referred to in the stipulation can be no more than harmless error, if any.
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> Thus, the Commonwealth noticed the aggravator of "Defendant committed the killing while in the perpetration of a felony". The evidence before the jury was the stipulation that [appellant] committed the killing while in the perpetration of a felony involving the illegal possession of a firearm. A review of the verdict slip unequivocally evidences the fact that is exactly what the jury found.
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> Further there is no requirement that a defendant be charged with either of the aforesaid sections of the Firearms Act in order for the aforesaid aggravator to exist. The Commonwealth was not required to

> specifically charge [appellant] with Section 6106(a)(1) for said aggravator to be legitimately placed before the jury.

Id. at 38-39.

The lower court likewise approached the substantive core of the defaulted issue as one implicating notice of the aggravator. The court found that the felony aggravator was properly supported by the facts, that the issue was essentially one of notice of the aggravator, that the notice was sufficient notwithstanding that the criminal information referenced the misdemeanor offense, and that appellant had good reason to stipulate, even if counsel did not realize that the felony involved Section 6106(a)(1): both the felony and the aggravator turned on the fact that appellant was an illegal alien, and counsel's trial strategy included a determination not to have that status revealed to the jury. The court explained that Pennsylvania Rule of Criminal Procedure 802 requires the Commonwealth in a capital case to file, and provide to the defense, a notice of the aggravating circumstances it intends to pursue at sentencing. The notice is generally required "at or before the time of arraignment." Here, the court noted, "Rule 802 was followed to the letter."

> Notice was provided to the Defense at arraignment of the aggravator at issue as well as two other aggravators the Commonwealth intended to submit to the penalty phase jury. The language used by the Commonwealth in providing notice quoted the required statutory language as to each aggravator exactly. There is no possibility of confusion on the part of the Defense that it was the Commonwealth's intention to pursue as one of their aggravating circumstance that [appellant] committed the killing in the perpetration of a felony.
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> Once that inescapable conclusion is reached, it becomes clear that the Defense Motion is not founded on a violation of the existing Rules. Instead, the Defense asks the Court to expand the Rules and impose on the Commonwealth the additional duty to notice the Defendant as to the specific felony the Commonwealth intends to demonstrate in the information. While we can agree the information has some importance on

> the notice issue, neither Rule 802 nor case law support that position. In fact, the law regarding notice is much more relaxed.

Trial Ct. Slip Op., 3/14/07, at 4 (emphasis in original). After discussing decisional law from this Court concerning proper notice of aggravating circumstances,[8] Judge Carpenter carefully explained why he did not believe there was a legitimate notice issue that appellant's counsel could have raised:

> First, the Commonwealth in the Notice of Aggravating Circumstances noticed the aggravator it intended to prove in the exact language of the statute. Second, based on [the criminal information,] the Defense knew that the Commonwealth intended to demonstrate that the particular felony supporting the aggravator was based on [appellant's] status as an illegal alien not to possess a handgun during the murders. While this additional notice was not required, it was clearly provided. The only thing not apparent was that [appellant's] status would be shown to the jury not under 18 Pa.C.S.A. 6105(c)(5) as charged but rather under 18 Pa.C.S.A. 6106(a)(1) and (2) . . . .

Id. at 6. The court then explained why it believed the Section 6106 offense was supported by the facts: I have quoted that analysis at the outset of this opinion.

It would be one thing if trial counsel had insisted upon a stipulation to an aggravator that the Commonwealth could never prove, such as that the adult victims

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[8] The trial court cited the unanimous decision in Commonwealth v. Edwards, 903 A.2d 1139 (Pa. 2006), a case which relied upon Commonwealth v. Carson, 741 A.2d 686 (Pa. 1999), *cert. denied*, 530 U.S. 1216 (2000). In Edwards, the notice claim was premised upon the fact that the Commonwealth did not cite the appropriate subsection of the death penalty statute governing the multiple murder aggravating circumstance. In rejecting the claim, the Edwards Court noted that the purpose of Rule 802 is merely to provide the defense with sufficient time and information to prepare for the sentencing proceeding. The Court noted that our decisions "reveal a central theme: where the defendant has constructive notice of the aggravators due to the crimes charged, we have found no prejudice resulting from the Commonwealth's failure to provide timely or accurate notice." 903 A.2d at 1161.

here were children. But, it is another thing entirely where, as here, the Commonwealth actually asserted timely that it could, in fact, prove the aggravator, and what is at issue is a belated claim on appeal built upon questionable assumptions about the effect that a charging document, and a citation error, has upon the Commonwealth's ability to notice, and prove, statutory aggravators. Appellant's trial-level counsel could have raised a notice objection, or a claim that the criminal information somehow trumps Rule 802; he likely would have lost. And then, in all likelihood, faced with the certain knowledge that the Commonwealth could prove the Section 6106 felony by showing that appellant was an illegal alien, counsel would have demanded the same stipulation, so that the jury would not learn his client's status as an illegal alien. It is not clear that there is a meritorious issue properly of record here, defaulted below but resurrected on appeal because the penalty phase proceeding was supposedly infected by arbitrariness in the form of an illegitimate aggravator. Any claim must focus upon the decisions and actions of counsel, and should be pursued under the PCRA.

Facts are inconvenient to some claims. The facts here show that a summary award of penalty phase relief to this triple murderer would represent the height, or rather the depths, of arbitrariness.

E.

Speaking of arbitrariness, since the case here for the *per se* award of the windfall of a new penalty phase is premised solely upon this Court's decision in Commonwealth v. Williams, 650 A.2d 420 (Pa. 1994), I will address some concerns with that decision. Appellant accurately cites Williams for the proposition that, where an aggravator is "struck down" on appeal in a case where the jury engaged in a weighing of aggravators

and mitigators, a new penalty phase is required. Here is the entirety of the relevant discussion in Williams:

> Since the sentencing jury improperly heard evidence on aggravating circumstance 9, their finding with regards to that aggravating circumstance is insupportable and a new sentencing hearing will have to be conducted. Where we strike down an aggravating circumstance and other aggravating circumstances are present along with a finding of a mitigating circumstance, we are not in a position to determine whether the lack of the aggravating circumstance struck down would have changed the jury's determination and, pursuant to 42 Pa.C.S. § 9711(h)(4), we are required to vacate the penalty of death and remand for a new sentencing hearing.

Id. at 430. Williams cited no authority for the significant legal proposition that prejudice cannot be assessed in this circumstance, or the derivative assumption that varying factual paradigms can make no difference. The only authority cited, 42 Pa.C.S. § 9711(h)(4), is a procedural provision, directing that, "[i]f the Supreme Court determines that the death penalty must be vacated because none of the aggravating circumstances are supported by sufficient evidence, then it shall remand for the imposition of a life imprisonment sentence. If the Supreme Court determines that the death penalty must be vacated for any other reason, it shall remand for a new sentencing hearing pursuant to subsections (a) through (g)." The "any other reason" determined by the Williams Court was the naked proposition that, "we are not in a position to determine whether the lack of the aggravating circumstance struck down would have changed the jury's determination."

Williams is problematic, setting forth a holding unsupported by constitutional or statutory authority, and doing so with not so much as a syllable of legal reasoning. The holding is both dubious and counterintuitive. Imagine a mass murderer (one who murders more people than appellant did in this case) with, say, one additional relatively

minor aggravator, such as the in-the-perpetration-of-a-felony aggravator here, and a single mitigator. If the felony aggravator were to be "struck down" on appeal, are we really to accept that it is impossible to assess prejudice? Williams's unexplained proposition is particularly dubious given the subsequent experience of Pennsylvania courts in determining penalty phase prejudice, primarily in cases posing claims of counsel ineffectiveness. See, e.g., Commonwealth v. Gibson, 19 A.3d 512 (Pa. 2011); Commonwealth v. Lesko, 15 A.3d 345 (Pa. 2011). That task requires assessment of whether there is a reasonable probability that the outcome of the proceeding would have been different, which is little different from assessing "whether the lack of the aggravating circumstance struck down would have changed the jury's determination" – the determination the Williams Court assumed was impossible. Courts assess penalty phase prejudice all the time.

Appellant cites no case since Williams, and my research has revealed none, which has stepped into the void and provided any developed reasoning in support of the bald proposition stated by Williams. The only other case appellant cites, Commonwealth v. Wesley, 753 A.2d 204, 213-14 (Pa. 2000), quotes Williams *verbatim*. The U.S. Supreme Court sees no difficulty with assessments of prejudice in the penalty phase under Strickland. See, e.g., Smith v. Spisak, 558 U.S. 139 (2010). Appellant does not claim that the High Court, in direct review capital cases, requires that any error on the aggravation side be deemed *per se* prejudicial. In point of fact, the High Court made clear in decisional law predating Williams that there is nothing in the federal Constitution (including the Sixth Amendment and the Eighth Amendment) to prohibit a court from weighing prejudice after striking down one of multiple aggravating circumstances found by the jury, in a case where the jury weighed aggravators and mitigators: Clemons v. Mississippi, 494 U.S. 738, 739 (1990) ("[N]othing in appellate

weighing or reweighing of the aggravating and mitigating circumstances is at odds with contemporary standards of fairness or . . . inherently unreliable and likely to result in arbitrary imposition of the death sentence.").[9]

Significant legal holdings rendered without a shred of support or explanation are problematic. See Commonwealth v. Marconi, 64 A.3d 1036, 1041-42 & nn.5 & 7 (Pa. 2013) (noting difficulties with precedent lacking developed reasoning); accord Commonwealth v. Russo, 934 A.2d 1199, 1208 n.11 (Pa. 2007) (construing constitutional claim, and noting that decisions of such matters are more secure when supported by relevant searching inquiry). Also, "'[j]udicial opinions are frequently drafted in haste, with imperfect foresight, and without due regard for the possibility that words or phrases or sentences may be taken out of context and treated as doctrines.'" City of Scranton v. Firefighters Local Union No. 60, of Int'l Ass'n of Fire Fighters, 29 A.3d 773, 787 (Pa. 2011) (quoting Maloney v. Valley Med. Facilities, Inc., 984 A.2d 478, 490 (Pa. 2009) (quoting N.W. Nat'l Ins. Co. v. Maggio, 976 F.2d 320, 323 (7th Cir. 1992))). Absent some demonstration that the *per se* approach in Williams is required or appropriate under some relevant principle of law, I would limit the case to its facts and not perpetuate the error.

[9] In Clemons, the High Court describes that in a "weighing state," an appellate court, if properly authorized by state law: (1) may re-weigh the remaining aggravating factors and any mitigating factors on its own without remanding for such re-weighing by a jury, (2) may not rely on automatic rules of affirmance, as that reliance is invalid under Lockett v. Ohio, 438 U.S. 586 (1978) (*i.e.*, the court must actually re-weigh the factors and cannot rely on the mere presence of any "valid and undisturbed" aggravating factor as the basis for affirming the death sentence), and (3) if the court lacks authority to re-weigh under state law, the court may at least conduct a harmless error analysis. 494 U.S. at 744-54.

Furthermore, the notion that Williams must apply to all cases ignores the bedrock jurisprudential rule that cases must be read against their facts. In that case, unlike here, the defendant did not murder three people and risk killing others; he killed a single victim. The jury found that three aggravators (killing in the perpetration of a felony, torture, and significant history of felony convictions[10]) outweighed a single mitigator (the catchall[11]), and returned a sentence of death. On appeal in Williams, a divided Court struck down the perpetration-of-a-felony aggravator because of a notice issue, and then summarily concluded it could not assess prejudice and awarded a new penalty hearing. Even indulging the dubious assumption that it is impossible to assess prejudice under those circumstances – and I am not saying there was no prejudice, I am saying that prejudice can be assessed – there should be no such difficulty here. In the context of assessing Strickland prejudice, both this Court and the U.S. Supreme Court have stressed the importance of powerful aggravators. See Smith v. Spisak, *supra*; Gibson, *supra*; Lesko, *supra*. It is difficult to imagine a more powerful aggravator than that the defendant committed multiple murders. See Commonwealth v. Sepulveda, 55 A.3d 1108, 1131 (Pa. 2012); Lesko, 15 A.3d at 384-85. Accord Smith v. Spisak. In my view, there is nothing to prevent a merits-based assessment of prejudice in this case, even if there had been error, which there was not.

- **II** -

Here, shortly after appellant's incarceration, Mexico, through its consulate in Philadelphia, attempted to intervene on his behalf including, at least initially, by making an effort to secure counsel for him. On October 12, 2005, however, Mexico filed a

[10] 42 Pa.C.S. § 9711(d)(6), (d)(8), and (d)(9), respectively.

[11] 42 Pa.C.S. § 9711(e)(8).

motion with the trial court requesting appointment of taxpayer-financed counsel for appellant. Thereafter, appellant was represented by the county public defender and the trial court rebuffed efforts by Mexico to further involve itself in this criminal case except by and through appellant's counsel of record. A representative from the Mexican consulate was permitted, however, to attend status conferences and also was present at appellant's trial. Appellant now argues that an alleged discord between his appointed counsel and the Mexican government (after his country of origin had declined to secure counsel for him) contributed to his appointed counsel becoming unconstitutionally conflicted and also to violations of the Vienna Convention. The Majority Opinion rejects these claims.

On appeal, Mexico filed an *amicus curiae* brief on appellant's behalf on June 15, 2009. Strangely, Mexico's brief was authored and signed by Robert Brett Dunham, Esquire, identifying himself as counsel with the Capital Habeas Corpus Unit of the FCDO. The *amicus* brief requests that we grant the relief sought by appellant in this appeal from his convictions and death sentences.[12]

Of course, this Court welcomes the views of Mexico on behalf of Miguel Padilla, its citizen illegally in the United States of America. But, until this case, I did not realize that our federal government, which is the primary funding source for the FCDO, approves of that organization providing lawyering services for foreign governments in state litigation cases involving capital defendants. It would be a remarkable thing indeed if Congressionally-authorized financing of federal criminal defense services for the indigent also encompassed representation of the interests of non-indigent foreign

[12] The name of Professor Sandra L. Babcock of the Center for International Human Rights at Northwestern Law School appears below Attorney Dunham's name on the brief, though Ms. Babcock did not sign it.

sovereign nations, who in turn seek to advance the interests of their citizens illegally in this nation who have been convicted of capital murder in state courts.

Presumably, the FCDO was never appointed by a federal court to perform this "*amicus*" service for Mexico in support of a convicted murderer. Even assuming that the FCDO has a sufficient private budget to undertake expeditionary tasks, such as this, and further assuming that the Administrative Office of Federal Courts approves of such extracurricular activities by block-grant-funded federal defender organizations, there is a question of whether the briefing activity here in fact was supported exclusively with non-federal taxpayer money. In this regard, I note that Attorney Dunham withdrew his appearance on behalf of Mexico by *praecipe* filed on October 12, 2011; that same day, Marc Bookman, Esquire, of the Atlantic Center for Capital Representation, entered his appearance, "substituting" for Attorney Dunham as counsel of record for Mexico. The timing and substitution may be significant. On October 3, 2011, this Court entered an Order in Commonwealth v. Spotz, 576 CAP, directing the FCDO to file a Verified Statement which, among other things, was to identify all Pennsylvania state capital cases in which the FCDO was currently involved, how the FCDO's involvement came about, and if the involvement did not involve a court appointment, under what authority the FCDO undertook to appear. That Verified Statement was filed with this Court on October 13, 2011, the day after Attorney Dunham withdrew his appearance in this appeal. Given the withdrawal, the FCDO's Verified Statement does not list this case as one in which it was involved.

The federal statutes governing defender services do not authorize federally-financed lawyers to appear in state court capital cases at all, unless they have specifically been appointed to do so by a federal *habeas corpus* court. Even then, the power to employ federal tax dollars to support state court litigation is limited to matters

subsequent or ancillary to the actual pursuit of a federal *habeas corpus* petition -- matters such as requests for clemency once federal *habeas* relief has been denied. See 18 U.S.C. § 3006A(a)(2)(B) (authorizing federal court to appoint counsel to represent indigent state or federal prisoners in federal *habeas corpus* matters); id. § 3006A(c) (where counsel is appointed to represent indigent federal *habeas* petitioner, appointment continues through appeal, and includes "ancillary matters appropriate to" the federal *habeas* proceeding); id. § 3599(a)(2) (authorizing appointment of counsel to indigent state defendants seeking to vacate or set aside death sentence via federal *habeas* review). See also Harbison v. Bell, 556 U.S. 180, 188-90 & n.7 (2009) (Section 3599 authorizes federally appointed *habeas* counsel to represent prisoner in subsequent state clemency proceedings; stressing that legislation does not authorize pursuit of litigation in state court in advance of federal *habeas* proceedings).

I am unaware of any Congressional authorization for taxpayer-financed federal defenders to appear in state capital direct appeals to represent the political interests of a foreign nation relating to that nation's citizens convicted of capital murder. It is possible that the Administrative Office inexplicably signed off on the activity and that the FCDO ensured that not a penny of federal funds was deployed to support such activity here. On the other hand, Attorney Dunham presumably is paid a full-time salary and is afforded generous benefits. Perhaps Attorney Dunham worked strictly on weekends from home or on vacation in preparing Mexico's brief; did not avail himself of federally-financed FCDO support staff, computer equipment, or research resources; and used private or Mexican funds to print, bind, deliver and serve his work product on behalf of a foreign nation. But, even if that were the case, and some mechanism were in place to avoid such abuses by the FCDO, that would still not answer the question of whether an

organization whose primary function involves federally financed representation of capital defendants in federal court should make these sorts of forays into state courts.

The problem is more acute because the FCDO refuses to be candid about its manner of deploying federal resources in state court, as evidenced by, *inter alia*, the federal removal actions it has filed in response to modest inquiries into the propriety of its activities in representing state prisoners in capital PCRA matters. See, e.g., In re Commonwealth's Request for Relief Against or Directed to Defender Ass'n of Philadelphia, 2013 WL 4458885, 1 n.2 (M.D. Pa. 2013) (memorandum by Caputo, J.) (noting"[a]t least six other similarly situated proceedings have been removed to federal court."). Leaving aside the merit of the FCDO's claim in those actions that they are somehow acting as "federal officers" when they appear in state court, without the authority of a federal court order, to provide representation to state court defendants who have no right to federally-financed representation, to my knowledge, there is nothing that **precludes** them from being candid when they appear in state court. In a world of increasing budget crunches, and indeed of sequestrations, surely federal taxpayers in Pennsylvania are entitled to know whether the FCDO has inappropriately diverted federal funds to finance extensive state court activities over the years, all in advance of federal *habeas* review. Even if the FCDO declines to be candid, presumably there is some federal authority – Congress, after all, controls the purse strings – that can secure answers for the public.

In any event, what is certain is that these sorts of extracurricular (indeed extra-national) activities by the FCDO cause delay in other state capital matters where the FCDO has involved itself. For example, Attorney Dunham cited his *amicus* endeavor on behalf of Mexico in this case as a reason to secure a briefing extension in the Spotz case (motion filed June 2, 2009). The FCDO's conduct here corroborates this Court's

grounded concerns with the FCDO's broad agenda in Pennsylvania capital cases, and the propriety of its activity. See Commonwealth v. Porter, 35 A.3d 4, 22-24 (Pa. 2012); Commonwealth v. Birdsong, 24 A.3d 319, 353-54 (Pa. 2011) (Castille, C.J., concurring) (discussing Commonwealth v. Spotz, 18 A.3d 244, 329-49 (Pa. 2011) (Castille, C.J., concurring, joined by McCaffery, J.)).

Mr. Justice Eakin joins this opinion.