

**[J-122-2004] [M.O. - SAYLOR, J.]  
IN THE SUPREME COURT OF PENNSYLVANIA  
EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	Nos. 430 & 431 CAP
	:	
Appellee/Cross-Appellant	:	Appeal from the October 17, 2003 Order
	:	of the Court of Common Pleas of Lehigh
	:	County (McGinley, J.) denying in part and
v.	:	grating in part Appellant's petition under
	:	the Post-Conviction Relief Act
	:	
KENNETH J. WILLIAMS,	:	
	:	
Appellant/Cross-Appellee	:	SUBMITTED: November 29, 2006

**CONCURRING OPINION**

**MR. JUSTICE EAKIN**

**DECIDED: JUNE 17, 2008**

Counsel had constructive notice of appellant's mental health issues, as prior counsel's notice of intent to assert an insanity defense specifically referenced appellant's two prior psychiatric hospitalizations within seven months of his offenses. Thus relief is warranted, and I join the majority opinion. I write separately to reiterate the relevance of Commonwealth v. Romero, 938 A.2d 362 (Pa. 2007) and address the majority's characterization of Commonwealth v. Williams, 896 A.2d 523 (Pa. 2006).

In Romero, the opinion held that as Romero's trial was in 1996, well before the decisions in Williams v. Taylor, 529 U.S. 362 (2000), and Wiggins v. Smith, 539 U.S. 510 (2003), those decisions could not be the standard by which counsel's effectiveness in 1996 was measured. Romero, at 387. Counsel's conduct should be evaluated by the standards in effect at the time of trial, and if a more exacting standard is established

in future cases, it is not retroactively applied. Id. (citing Commonwealth v. Bond, 819 A.2d 33, 51 (Pa. 2002) (internal citation omitted)).

As the majority states, however, Romero was a plurality, and only three Justices supported the proposition that Williams and Wiggins did not apply to cases tried before their issuance; thus, it applies the general principles of those cases. See Majority Slip Op., at 12 n.6. The majority also notes Commonwealth v. Hughes, 865 A.2d 761, 813-14 n.56 (Pa. 2004), relied on Williams and Wiggins. However, my position remains, consistent with Romero as well as the dissenting opinion filed in Hughes, that counsel's performance regarding mitigating evidence should be critiqued according to the law existing at the time of trial, not according to later-announced standards. Hughes, at 825 (Castille, J., concurring and dissenting, joined by Eakin, J.). Any other standard would require counsel to predict changes in the law and turn representation into prognostication, not counseling.

The majority also notes Williams' approach to the admission of evidence concerning handguns is in tension with other precedent of this Court. Majority Slip Op., at 40 (citing Commonwealth v. Robinson, 721 A.2d 344, 351 (Pa. 1998)). I find this statement to be overbroad. I agree with Chief Justice Castille that the tension the majority perceives in our underlying decisional law arose after the trial in this matter, and is irrelevant to appellant's ineffectiveness claim.