[J-139-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH V. PENNSYLVANIA,	:	No. 331 CAP
	:	
Appellee	:	Appeal from the Order entered in the
	:	Court of Common Pleas, Criminal
	:	Division, Philadelphia County, on 1/18/01
v.	:	denying PCRA relief at No. 2809 January
	:	term 1991
	:	
RONALD GIBSON,	:	
	:	
Appellant	:	SUBMITTED: June 26, 2002

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: July 24, 2008**

I join Mr. Justice Saylor's learned Majority Opinion, with the exception of the penalty phase claim upon which the Court remands for additional consideration. Although I concur in the result on that claim, I emphasize at the outset the following points of agreement: (1) I join the Majority's explanation why, in light of the disappointing testimony of trial counsel upon this Court's prior remand, the remaining dispositive issue is Strickland[1] prejudice; (2) I join the Majority's explanation of the inconsistency and incompleteness of the Strickland prejudice analysis conducted by the PCRA[2] judge; and (3) I join the Majority's mandate to remand the claim for development and specific findings on Strickland prejudice.

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

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

Respecting the last point, I stress my particular agreement with the directive that the PCRA court "is to develop a specific comparison of the mitigation case offered at trial with the credited evidence offered on post-conviction review," the object being an explanation of why the PCRA judge believes -- if he still does so believe following a proper, global prejudice analysis -- that there is a **reasonable probability** that the result of the penalty hearing here would have been different if only foregone and credited evidence respecting appellant's character and circumstances had been presented.

In my view, it is a close question whether the claim of Strickland prejudice warrants further hearing, as opposed to summary rejection. My joinder in the remand follows largely out of respect for the care and prudence in the Majority's explanation of the deficiencies in the PCRA court's analysis; the importance of emphasizing to the courts below their duties of precision in capital appeals; and the necessity for a dispositive order where this Court might otherwise be deadlocked in a capital case. I write separately because I have some modest points of disagreement with the Majority's analysis; it is useful to explain my reservations whether prejudice is provable here, given the type of mitigation evidence offered, arrayed against the powerful aggravating circumstance of multiple murders; and I have a different take on the proper role of recent federal habeas corpus decisions of the U.S. Supreme Court, applying Strickland, upon Pennsylvania trials conducted before those decisions were announced.

I.

Soon after re-authorizing the separate States to provide for capital punishment in the 1970s, the U.S. Supreme Court innovated what amounts to a "kitchen sink" rule concerning mitigation evidence in capital trials, and imposed that new rule upon the States. For reasons which are now primarily of academic or historical interest, Supreme Court case decisions have left us with a regime where those States that adopted capital punishment: (1) must require proof of specific aggravating circumstances to distinguish among first-

degree murderers in order to limit capital punishment to those who are "the worst of the worst," and (2) must not categorically preclude capital defendants from introducing, and factfinders from considering, any evidence in mitigation relating to the defendant's character or record (a very broad category) and the circumstances of the crime. See Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) (adopting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion)). For a thorough and illuminating description of the development of the mitigation evidence requirement imposed on the States -- what Justice Clarence Thomas has called "[t]he mitigating branch of our death penalty jurisprudence" -- see Justice Thomas's concurring opinion in Graham v. Collins, 506 U.S. 461, 479-92 (1993) (Thomas, J., concurring). The Pennsylvania General Assembly has adopted a conforming death penalty statute that follows the federal judicial command, with a series of enumerated aggravating and mitigating circumstances, including a "catchall" mitigator. 42 Pa.C.S. § 9711.

The resulting High Court-dictated penalty paradigm involves "weighing" what seem to be competing considerations, but in fact capital sentencing is twice heavily slanted in favor of a non-death verdict. First, not all first-degree murderers are eligible for the death penalty: in Pennsylvania, the Commonwealth has to prove, beyond a reasonable doubt, a specific statutory aggravator or aggravators. Second, even if the Commonwealth proves the defendant's exceptionality among his brethren of first-degree murderers, the defendant is guaranteed an opportunity for the jury -- and all it takes is one juror -- to spare him from death for reasons having to do with mitigation.[3] The High Court's decisional law in the

[3] Justice Antonin Scalia has described the two-part paradigm as follows:

> over the years since 1972 this Court has attached to the imposition of the death penalty two quite incompatible sets of commands: The sentencer's discretion to impose death must be closely confined, see Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (*per curiam*), but the

(continued…)

wake of this paradigm has been subjected to constant "tinkering" (Justice Harry Blackmun's famous coda)[4] or "annual improvisation" (Justice Scalia)[5] resulting in new or retooled rules -- concerning who is eligible, level of proof, how the jury is to weigh the proof, what the jury is to be told, requirements of juror unanimity versus individual juror nullification, and so on. This reality, combined with the delays and multiple levels of exacting review, has further complicated capital jurisprudence. It has even come to the point where a Pennsylvania capital murderer can secure a new penalty trial twenty-five years after conviction because a federal court panel, sitting on habeas review, feels that his trial did not conform to the teaching of a non-retroactive case innovation which did not exist at the time of his trial. See Abu-Jamal v. Horn, 520 F.3d 272 (3d Cir. 2008) (granting penalty phase relief because panel felt that 1982 sentencing proceeding did not conform to future decisions in Mills v. Maryland, 486 U.S. 367 (1988) and Boyde v. California, 494 U.S. 370 (1990), and because panel deems this Court's reading of those decisions to be "objectively unreasonable").[6]

(…continued)

> sentencer's discretion **not** to impose death (to extend mercy) must be unlimited, see Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion). These commands were invented without benefit of any textual or historical support . . . .

Callins v. Collins, 510 U.S. 1141, 1141-42 (1994) (Scalia, J., concurring).

[4] Callins, 510 U.S. at 1145 (Blackmun, J., dissenting) ("From this day forward, I no longer shall tinker with the machinery of death.")

[5] See Morgan v. Illinois, 504 U.S. 719, 751 (1992) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (adverting to "the fog of confusion that is our annually improvised Eighth Amendment, 'death is different' jurisprudence").

[6] The federal Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") adopted a series of restrictions upon federal habeas corpus review of state court convictions. Under AEDPA, a federal court cannot grant habeas relief to a state prisoner on a claim that was (continued…)

The threat of dismissive federal responses to flexible state procedural rules can lead to state legislatures and courts adopting ever-more inflexible rules. Meanwhile, in cases where the applicability and meaning of new judicial rules of substance adopted by the High Court is debatable -- and often, a lively debate is found in the fractured opinions of the U.S. Supreme Court announcing the new rule -- inevitably Pennsylvania state jurists have been deemed "objectively unreasonable" by their federal counterparts, so that death sentences may be set aside by our federal brethren. One may leave it to "academic" observers and to those committed to one or the other side of the death penalty debate whether, in the long run, the federal judicial tinkering has made capital jurisprudence more or less arbitrary than before. What is not debatable is that no sentence of death has been carried out in Pennsylvania, under the now three-decade-old federal judicial hegemony, except in the case of "volunteers," *i.e.*, defendants who have been permitted to act upon their desire not to pursue further appeals.

Of course, I recognize and welcome our duty to follow the Supremacy Clause, and I accept that this Court is bound by relevant majority expressions from the High Court, irrespective of their changeableness or the persuasiveness of their reasoning. As pertinent

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adjudicated on the merits in the state court proceedings unless the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). With respect to subsection (d)(1), the U.S. Supreme Court has held that relief may issue if the state court determination involves an "objectively unreasonable" application of clearly-established precedent from the High Court. See Wiggins v. Smith, 539 U.S. 510, 520-21 (2003).

to this appeal, I accept that the High Court has ordered that state jurors in capital cases must hear any evidence proffered in mitigation relevant to the defendant's character and background. By corollary, on collateral attack, a capital defendant can assail his prior counsel for failing to produce such evidence in mitigation. Thus, just as the jury may be required to hear whatever the defendant can muster concerning his personal history, including family background and environment, alleged substance abuse, supposed mental limitations, *etc.*, capital defense lawyers are subject to accusations of incompetence for failing to present every shred of evidence respecting that "life history" at trial. However, the jury is not required to accept such evidence as mitigating in a particular case. Eddings, 455 U.S. at 114-115 (capital sentencer may determine weight to be given relevant mitigation evidence). By the same token, in cases of collateral attack sounding in ineffective assistance of counsel for failing to produce mitigation evidence, counsel cannot automatically be deemed ineffective whenever there is a failure to present the complete psycho-biography of the defendant.

In assessing Strickland prejudice, the first point worthy of note is that there is nothing facially surprising or arbitrary about the death sentences imposed in this case. Appellant distinguished himself even among first-degree murderers. Appellant is responsible for the first-degree murder of two victims, including an off-duty police officer who sought to come to the assistance of the patrons and employees in the Philadelphia bar that appellant and his confederate entered with handguns on Christmas Eve in 1990, with robbery on their minds. In addition to killing two Christmas Eve celebrants in cold blood, appellant risked death or serious injury to other bar employees and patrons as he and his confederate fired shots into the crowded bar that night. None of the sociological or historical concerns that led the U.S. Supreme Court to its micromanagement of State death penalty jurisprudence is implicated here.

In a case where a verdict of death is returned, at least three levels of complete review will follow, and trial counsel, in that review, is almost always faulted for failing to present additional or different mitigation evidence. But the test for Strickland prejudice requires the defendant to prove actual prejudice, a "reasonable probability" that, but for counsel's lapse, the result of the penalty proceeding would have been different. Where the defendant is responsible for multiple murders and where he risked even greater carnage, he should have great difficulty in securing Strickland relief premised upon foregone, supplemental mitigation evidence. As noted in my responsive opinion in Commonwealth v. Zook, 887 A.2d 1218 (Pa. 2005):

> . . . I think that it is unrealistic in the extreme ever to discount the difficult uphill battle any capital defense lawyer faces where, as here, one of the aggravating circumstances involves the fact that his client elected to commit multiple first-degree murders. This is a mark of distinction that seems different in kind from other statutory aggravators. Thus, if the foregone additional mitigation evidence in this case were mere catchall "I had a bad childhood" evidence, I doubt that this Court could find that appellant sustained his burden to prove prejudice.[FN2]
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> FN2. See Commonwealth v. Moore, 580 Pa. 279, 860 A.2d 88, 99 (2004) (noting that evidence of traumatic childhood "may or may not be perceived as mitigating (one juror might see this as reason for sympathy; another might see it as assuring [the defendant] his violence permanently ingrained in him").

Id. at 1236 (Castille, J., concurring).

In this case, if the only additional mitigation evidence were that cited by the PCRA judge in his most recent analysis, I would deny relief now. As the Majority notes, the jury was apprised of evidence along the lines of this "life history" information at the penalty hearing. Moreover, assuming a reasonable jury with any moral center, it is highly improbable to believe that additional evidence of appellant's childhood circumstances and

voluntary drug and alcohol abuse would have made a difference in the face of the substantial aggravating factors. Cf. Schriro v. Landrigan, ___ U.S. ___, 127 S. Ct. 1933, 1943-44 (2007). But, as the Majority notes, appellant's proffer was broader and was not permitted to be developed, including opinions from defense mental health experts trying to fashion a mental health mitigation argument from appellant's personal circumstances. From the proffers -- which track the generic mental health defense pleadings we find in most capital cases -- I do not believe this evidence is particularly strong and of course it may be rebutted by the Commonwealth. However, given that counsel conducted no investigation, I agree that the PCRA court was obliged to allow for its development, and the better course here is to remand with a directive for that court to do so and to engage in a comprehensive Strickland prejudice analysis.[7]

II.

Next, I turn to the question of the applicability and role of federal habeas corpus decisions from the U.S. Supreme Court, applying Strickland, which were decided after the actions of counsel here that form the basis for the Strickland claim. The Majority accurately notes that there has been some division on this Court concerning the effect of such decisions. Majority Slip Op. at 14-15 & n.8. The division concerns Williams v. Taylor, 529

[7] Like Justice Eakin, I cannot join in footnote 11 of the Majority Opinion, which suggests there is some "empirical support" for the "notion" that mental health mitigation theories and evidence may sway capital jurors favorably. I think that is impossible to say. Moreover, given the stakes in the death penalty debate, and the consequent blurring of "academics" and "advocates," I do not know which purported "empirical studies" are trustworthy or accurate. Generally, there is no peer-review vetting of law review articles, and many articles obviously are slanted to forward the views and biases of the authors, or with an eye toward advancing a particular claim. This Court has seen its share of sham "empirical" claims. Moreover, I believe there is at least equal force to the points made in Justice Eakin's dissent. Most people with difficult childhoods, and even with residual mental health issues arising from those circumstances, do not become multiple murderers. It is just as easy to imagine a jury being insulted by the argument that such factors should operate in some way to diminish crimes such as these.

U.S. 362 (2000) and Wiggins v. Smith, 539 U.S. 510 (2003). A more recent decision, involving federal habeas review of a Pennsylvania state conviction presenting a claim of counsel ineffectiveness respecting mitigation evidence, is Rompilla v. Beard, 545 U.S. 374 (2005). In Rompilla, the Court, by 5-4 decision reversing a Third Circuit ruling authored by then-Judge, now Associate Justice Samuel A. Alito, Jr., held that this Court's handling of the Strickland claim was "objectively unreasonable."

As a matter of law -- since all three of these decisions were rendered upon federal habeas corpus review of state court convictions under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") -- and as a matter of fact -- because the Court said so all three times -- these cases did not purport to establish any new federal constitutional rule or standard, but merely **applied** the existing rule of Strickland v. Washington, through the deferential filter of AEDPA.[8] This Court noted the role of such decisions soon after Williams was decided:

> Williams does not alter the legal standard governing appellant's ineffectiveness claim; as the U.S. Supreme Court emphasized in Williams, it is still the Strickland test that governs the evaluation of counsel's penalty-phase preparation and performance. Indeed, if Williams had set forth a new or modified Strickland standard, appellant would not be entitled to its benefit since counsel in this case were acting long before Williams was decided. Appellant himself implicitly recognizes this fact, as he states elsewhere that Williams "did not break any new ground in describing the obligations of counsel in a capital case." Reply Brief of Appellant, 3. Accordingly, Williams is relevant to our inquiry in the limited sense that it represents an example of

[8] The Strickland Court was not so constrained, as that case was decided long before AEDPA's deferential standard was adopted. The Court is no longer free to innovate new constitutional rules upon collateral review.

Of course, even under AEDPA, a federal court may consider an element of a Strickland claim *de novo* if the state court wrongly failed to reach the merits, or if it did not address an element. See, e.g., Rompilla, 545 U.S. at 390 (engaging in *de novo* assessment of Strickland prejudice because state courts did not reach that element given their conclusion that counsel's performance was not deficient).

> the U.S. Supreme Court's application of its settled Strickland test in factual circumstances which, according to appellant, are materially indistinguishable from the facts presented here.

Commonwealth v. Bond, 819 A.2d 33, 42 (Pa. 2002).

Bond accurately describes the role of habeas cases from the High Court which consider Strickland claims under AEDPA. Such cases cannot break new "Strickland" ground, and cannot impose new standards upon counsel. Indeed, in AEDPA cases, the Court does not even render a pure Strickland-application holding; it renders an AEDPA holding, which is not the same thing. The question before the Court under AEDPA is the **reasonableness** of the state court's Strickland analysis, and not the performance of counsel in some absolute sense. E.g., Rompilla, 545 U.S. at 380 ("Rompilla's entitlement to federal habeas relief turns on showing that the state court's resolution of his claim of ineffective assistance of counsel under Strickland v. Washington, supra, 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States'") (citing 28 U.S.C. § 2254(d)(1)). Thus, a federal court is obliged to reject a Strickland claim that it might deem meritorious on direct review, if the court realizes that the state court decision, though not to its personal liking, was objectively reasonable. See Wiggins, 539 U.S. at 520-21 ("In order for a federal court to find a state court's application of our precedent to be 'unreasonable,' the state court's decision must have been more than incorrect or erroneous. The state court's application must have been 'objectively unreasonable.'") (citation omitted).

To be sure, a court faced with materially identical facts to a decision of the High Court involving an "application" of Strickland under AEDPA would be hard-pressed not to follow the High Court's outcome; but the legal "standards" governing review of counsel's performance in such cases still derive only from Strickland (and any other relevant, clearly-

established precedent of the U.S. Supreme Court in existence at the time counsel acted). In addition to being commanded by salutary restrictions upon federal habeas corpus review, this limitation comports with Strickland's focus upon contemporaneous assessment, and its admonition to avoid condemning counsel via hindsight.

The U.S. Supreme Court realizes this elemental fact. The Court in Williams made clear that "the merits of [the defendant's] claim are squarely governed by our holding in Strickland," which set forth a test that requires a "case-by-case examination." 529 U.S. at 390, 391. Indeed, if there had **not** been a clearly-established rule whose application was at stake, there would have been no basis for federal collateral review at all. Id. at 390. Citing AEDPA, the Williams Court made clear that the narrow question it decided was whether the state court resolution of the Strickland claim "was either 'contrary to, or involved an unreasonable application of,' that established law." Id. at 391.

In Wiggins, Justice O'Connor, the author of Strickland, wrote for a seven-Justice majority and stressed the same essential point. AEDPA, she explained, limited federal habeas review of state convictions "to the law as it was 'clearly established' by our precedents at the time of the state court's decision." Wiggins, 539 U.S. at 520. In discussing Williams, the Wiggins Court further stressed that that decision was "illustrative of the proper application of these [*i.e.*, the Strickland] standards" and that "we . . . made no new law in resolving Williams' ineffectiveness claims." Id. at 522. The Court also stressed that its review of the Strickland claim, as a Strickland claim, was "circumscribed" by the review paradigm established by AEDPA. Id. at 520. Notably, in resolving the mitigation/ineffectiveness claim before it, the Wiggins Court went on to speak of "the professional standards that prevailed in Maryland in 1989" (Wiggins was tried and convicted in Maryland in 1989), along with other "well-defined norms" of **that** time. Id. at 524.

The 5-4 decision in Rompilla is to similar effect. Justice Souter's Majority Opinion recognized that Strickland -- not Wiggins, not Williams -- was the clearly established law at issue; acknowledged that review of the Strickland claim was circumscribed by the AEDPA standard; and stressed Strickland's recognition that, in evaluating counsel's conduct, "hindsight is discounted by pegging inadequacy to 'counsel's perspective at the time' investigative decisions are made." 545 U.S. at 380-81 (citing Strickland, 466 U.S. at 689). The Opinion made repeated references back to the benchmark of viewing counsel's decisions from their perspective at the time of trial preparation. Five Justices thought that this Court's resolution of the Strickland claim was "objectively unreasonable;" four thought it was reasonable; and so, a new penalty hearing was ordered.

When today's Majority says that the "legal standards articulated" in Williams and Wiggins "apply" to cases involving trials pre-dating those decisions, respectfully, I do not believe the statement is strictly accurate. Such a statement is accurate only to the extent those "legal standards" precisely parrot what was already said in Strickland or some other governing authority (the norms in Pennsylvania, as it were) extant at the time counsel acted. Strickland certainly applies, but Williams and Wiggins only "apply" to the extent they are redundant of Strickland -- or, again as a practical matter, to the extent the material circumstances are indistinguishable from one of the High Court's "application" decisions. Thus, for example, Rompilla does not establish a general rule that counsel in a capital case must always seek the case file relating to the defendant's prior convictions. Rather, it was the entirety of the circumstances that led the court to conclude that counsel's performance was deficient. Generally speaking, then, these AEDPA decisions applying Strickland

"apply" to concluded cases only to the extent that they do not really matter at all except as "ditto" citations.[9]

It is not accidental that the decisions in Williams, Wiggins, and Rompilla involve much fuller factual discussions than are usually found in High Court decisions. Such an approach is an inevitable byproduct of the limited review that was at issue under AEDPA. For our purposes, it is enough to note that the factual circumstances here are not remotely identical to those presented in any of the three cases, and we are not at liberty to extrapolate an extension of Strickland to condemn counsel retroactively. I agree with the Majority that counsel's confession on remand to a **non-investigation**, for no good reason, fails the Strickland performance standard -- because it does not comply with Strickland, not because it does not comply with some other or later case "standard." And I agree that the remaining, controlling question is prejudice.[10]

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[9] Of course, even though "inapplicable," the later cases could be deemed significant in some amorphous sense, *i.e.*, as revealing what ever-shifting High Court majorities construe Strickland to mean. But such speculation does not advance the concrete tasks this Court faces.

[10] I realize that Strickland and later cases refer to American Bar Association-promulgated standards as "guides" for evaluating the reasonableness of attorney performance respecting mitigation investigations. See Rompilla, 545 U.S. at 387 (quoting Wiggins, 539 U.S. at 524 (quoting Strickland, 466 U.S. at 688)). However, I would be wary of going too far with such observations, absent evaluation and adoption of such commands by those in authority in Pennsylvania, or an express command along those lines from the High Court. Moreover, the Court has recognized that applicability of the standards may be subject to dispute. See Rompilla, 545 U.S. at 387 ("[T]he Commonwealth has come up with no reason to think the quoted standard impertinent here."). Of course, the ABA does much good work to advance the cause of justice. In recent years, however, the ABA has chosen to be a very active voice, almost invariably on the defense side, in criminal and particularly capital matters. Its activism in this regard has been pronounced enough to lead many prosecutors away from the organization. Notwithstanding the good work and dedication of the ABA generally, and its prestige, in this instance at least, I would keep in mind that its suggestions are those of a private organization, not answerable to the people's voice or (continued…)

Mr. Justice McCaffery joins this opinion.

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purse, offering one view, which does not necessarily account for the views of all with front-line experience in these matters.