[J-199-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 354 CAP
	:	
Appellee	:	Appeal from the Judgment of Sentence
	:	entered October 30, 1996 in the Court of
	:	Common Pleas, Criminal Division, of
v.	:	Philadelphia County at No. 866 3/3
	:	February Term 1996.
	:	
CHRISTOPHER RONEY,	:	
	:	
Appellant	:	ARGUED: December 5, 2002
	:	
	:	
	:	
	:	

CONCURRING OPINION

MR. JUSTICE CASTILLE **DECIDED: January 20, 2005**

I join the Majority Opinion with the exception of its merits discussion of appellant's novel and waived penalty phase jury instruction claim, which is premised upon Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000) and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002), cases which in tandem established a new constitutional rule of procedure affecting capital prosecutions, see Schriro v. Summerlin, 542 U.S. ___, 124 S.Ct. 2519 (2004), but which did not exist when appellant was tried and sentenced in 1996.[1] As

[1] As the Majority notes, the Apprendi rule was extended to defendants in capital cases in Ring. Ring held that the Sixth Amendment entitles capital defendants to demand that a jury, rather than a judge, find the existence of facts (such as aggravating circumstances) which permit an increase in punishment, and that those facts be found beyond a reasonable doubt. 536 U.S. at 589, 603-09. Nevertheless, appellant's Brief cites only to
(continued…)

to this issue, there is no question that the penalty phase of appellant's trial was conducted in full conformity with the then-governing law of the land. Appellant's death sentence, therefore, unquestionably was legal when the jury returned it.

The Majority recognizes that appellant did not forward an innovative Ring-type of claim at his trial, and thus, under settled retroactivity precedent, his waiver of the claim should mean that he is not entitled to the retroactive benefit of the new Ring rule on this direct appeal. Commonwealth v. Tilley, 780 A.2d 649, 652 (Pa. 2001); Commonwealth v. Cabeza, 469 A.2d 146, 148 (Pa. 1983); see also Shea v. Louisiana, 470 U.S. 51, 58 n.4, 105 S.Ct. 1065, 1069 n.4 (1985) (where new constitutional decision applies retroactively on direct appeal, it generally must be applied to cases pending on direct review at time of issuance, but "subject, of course, to established principles of waiver, harmless error, and the like").[2] In the very next breath, however, the Majority affords appellant the retroactive benefit of the new procedural rule, despite his incontrovertible waiver. The Majority reasons that Apprendi-based claims "implicate the legality" of existing sentences and, for that reason, must operate retroactively, even in instances where the U.S. Supreme Court would say they do not.

(…continued)
Apprendi and not to Ring. The Court in Summerlin held that the Ring rule was a new constitutional rule of procedure, not substance, and was not a watershed rule of criminal procedure. As such, the rule was not subject to retroactive application on habeas corpus review. 124 S.Ct. at 2523-26.

[2] The Majority apparently seeks to dilute the effect of the Cabeza/Tilley principle by characterizing it as merely "customary." The cases do not speak of, much less do they establish, mere judicial "customs." The rule reflected in Cabeza/Tilley is a salutary principle of retroactivity law. In our system of jurisprudence, trials are the main event, not mere costly and time-consuming previews or dry-runs. A party, such as appellant here, who would seek to upset a judgment premised upon a new rule of procedure may properly be asked to show that he sought, but was denied, that relief at the point where such relief may effectively have been granted.

Of course, if the U.S. Supreme Court shared the Majority's view that its new procedural rule retroactively rendered all previously-issued capital sentences subject to challenges of sentencing "illegality," it would have reached the opposite result in Summerlin and would have dictated that all state capital sentencing proceedings were subject to retroactive reevaluation under Ring -- unless we are to believe the High Court thought it was constitutionally proper for States to carry out "illegal" executions. Since the Court did not afford its new procedural rule such global retroactive effect, there is no rational way in which a pre-Ring sentence can be said to have been rendered "illegal" by Ring.

The primary flaw in the Majority's analysis rests in its erroneous assumption that appellant has raised a "constitutional" (and hence "illegal") sentencing claim, when the claim may properly be deemed a "constitutional" one only if appellant is entitled to the retroactive benefit of the new Ring procedural rule. In other words, the Majority's tautological conclusion that "constitutionality" and "sentencing legality" are implicated by this waived claim begs the predicate and controlling question of retroactivity. It is no answer to the retroactivity question to postulate: "but if the rule **was** retroactively operable here, and if the derivative claim here **did** have merit" -- two essential predicates that are missing -- "appellant **would** be posing a constitutional claim which implicated sentencing 'legality' and would therefore not be waivable."

I also respectfully disagree with the Majority's implicit assumption that all "constitutional" claims affecting sentencing necessarily implicate the "legality" of a sentence. In support of this far-reaching assumption of non-waiver, the Majority cites to a footnote in Commonwealth v. Aponte, 855 A.2d 800, 802 n.1 (Pa. 2004). The footnote simply noted **competing** authority in this Court on the question of whether Apprendi-based constitutional challenges to sentences implicate sentencing legality, and therefore are non-waivable, ultimately electing to reach the underlying merits issue without purporting to resolve that procedural conflict. Mr. Justice Saylor had earlier noted his concerns with this

Court's uncertain precedent concerning the illegal sentence doctrine and waiver in his dissent to the *per curiam* order in Commonwealth v. Wynn, 786 A.2d 202 (Pa. 2001) (Wynn was discussed by the majority in Aponte); and, in a separate concurring opinion in Aponte, Justice Saylor accurately noted that Aponte did not "undertake to resolve" his concerns. 855 A.2d at 816 (Saylor, J., concurring).

I also wrote separately in Aponte, addressing the uncertainty and complexity in Pennsylvania law concerning the illegal sentence doctrine. Id. at 812-16 (Castille, J., concurring). I noted that the doctrine should not be deemed monolithic and should account for all relevant and countervailing considerations:

> [A] claim that a sentence is "illegal" may be offered for a variety of reasons: to negate an abject waiver on direct appeal, as here; to secure substantive appellate review of a preserved claim in light of statutory restrictions, as in [Commonwealth v. Bradley, 834 A.2d 1127 (Pa. 2003)]; as a basis for creating a form of extraordinary jurisdiction *nunc pro tunc*, see Fajohn v. Commonwealth, 692 A.2d 1067 (Pa. 1997); and, I would expect, both to defeat limitations upon the retroactive application of new procedural rules and to secure belated collateral review of a sentence in the face of the statutory restrictions imposed by the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541 *et seq.* Should this Court's construction of the term "illegal sentence" be so broad as to permit a party such as appellant to seek to innovate a new constitutional rule of procedure, where normative principles of issue preservation and retroactivity ordinarily would prevent such an innovation? Should that construction apply only to those seeking the benefit of an existing law or interpretation which calls into question the lawfulness of their sentences (as in the case of the appellant in Wynn who sought application of the Butler [Commonwealth v. Butler, 760 A.2d 384 (Pa. 2000),]) decision, as opposed to one seeking to make that very law? Should the definition of what is an "illegal" sentence for purposes of avoiding a judicial issue preservation doctrine factor in the reality that the Court would essentially be permitting the defendant to mount a preemptive collateral attack, and thereby to avoid satisfying statutory limitations upon collateral attack as well as salutary limitations upon the retroactive effect of new constitutional rulings? Merely labeling a sentence as "illegal" hardly justifies defeating all other laws which exist to ensure a rational and fair system of review.

* * * *

> Logically, the question of when a sentencing claim should be deemed to be of such fundamental importance as to defeat existing procedural defaults should depend upon a balance of the specific nature of the claim forwarded and the specific statute, rule or judicial default doctrine which would be negated by judicial consideration of the claim. I would flatly reject the blanket notion that if a sentencing claim is deemed to implicate "legality," it necessarily suspends all countervailing considerations. I would reserve that sort of status to those few sentencing claims which fall within the traditional realm of what may be called the "illegal": *i.e.*, those which challenge sentences exceeding the very jurisdiction or power of the sentencing court ….

855 A.2d at 815.

In coming to terms with the far-reaching implications of the Majority's summary relaxed waiver holding today, it is important to recognize that the sole reason the Aponte court assumed that Aponte's Apprendi claim implicated the legality of his sentence was not specific to Apprendi, but rather, involved the broader assumption that all constitutional sentencing claims are non-waivable. The Majority's non-nuanced application of the assumed holding in Aponte has created the following relaxed waiver rule: "constitutional" challenges to sentences automatically implicate sentencing legality and therefore cannot be waived, even if the challenge is premised upon a new rule of non-retroactive effect. Since the only rulings of the U.S. Supreme Court which bind this Court are those involving constitutional issues, apparently every new such decision in the sentencing arena will now be given global retroactive effect by this Court, even in the face of specific rulings from the High Court that no such effect is appropriate or required. Every concluded sentencing proceeding in Pennsylvania is now vulnerable to reinterpretation based upon every new and non-retroactive constitutional rule issuing from the High Court.

It bears noting that the Majority's relaxed waiver holding respecting constitutional sentencing claims in this case is squarely inconsistent with other, very-recent precedent from this Court. Thus, in Commonwealth v. Cox, ___ A.2d ___ (Pa. 2004), 2004 WL

2964418, this Court held that a claim sounding under Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860 (1988), which was unpreserved at trial or on direct appeal, "is deemed waived" for purposes of the PCRA. ___ A.2d at ___, 2004 WL 2964418, at *15. Mills established a new procedural rule governing the sentencing phase of capital cases (specifically, the non-unanimity requirement in the jury's weighing of mitigating circumstances). If today's Majority is correct that constitutional claims affecting sentencing "implicate the legality of th[e] sentence [and] … cannot be waived," slip op. at 13 n.33, then Cox's holding that a Mills claim is waivable cannot stand close scrutiny. Although Cox was a PCRA appeal, and this is a direct appeal, that distinction cannot harmonize the cases. The same assumed "illegality" that defeats direct appeal waiver presumably would defeat PCRA waiver: facially "illegal" sentences do not become "legal" with the mere passage of time.

For my part, since the issue here is necessarily one of retroactivity, I would apply controlling retroactivity principles, rather than torture the definition of an "illegal sentence" so as to allow non-retroactive, new procedural rules to operate retroactively to eviscerate judgments which were unquestionably valid when rendered. Criminal trials should be evaluated according to the law as it existed at the time they were tried, unless the defendant anticipated and requested a new procedural rule which was embraced before his conviction became final, or the new rule is of such watershed dimension that it has been deemed retroactively applicable to prior cases irrespective of doctrines of waiver, previous litigation etc. The difficulties this Court has had in coming to grips with the meaning of its "illegal sentence" doctrine should not change the fact that the U.S. Supreme Court, which devised the new rule at issue, has not deemed it of such watershed importance as to implicate the very "legality" of all existing death sentences. The practical meaning of the Court's non-retroactivity decision in Summerlin is that death verdicts which were returned before the new rule in Ring were not -- not even arguably -- rendered "illegal." I would defer to the High Court's judgment concerning the nature and proper scope of its new rule.

It is becoming increasingly apparent in cases like this one that the Siren's song of relaxed waiver still finds tempted and willing ears on this Court. Our *ad hoc*, issue by issue, return to the doctrine -- in a footnote no less in this case -- will create as much havoc as did the former rule. It is particularly ill-advised to reestablish the doctrine in a case such as this, where it allows for a concluded and proper trial to be evaluated by a new rule which did not exist and did not govern at the time of the trial. Although the ultimate result in this case causes no immediate harm, since Pennsylvania's capital sentencing scheme obviously comports with Ring, the very approach itself is flawed and may well work arbitrary havoc when the next new rule is at issue.

I recognize that the discretionary relaxed waiver doctrine is available in this direct capital appeal, since the briefs were filed before this Court issued its decision in Commonwealth v. Freeman, 827 A.2d 385 (Pa. 2003), which prospectively abrogated the relaxed waiver rule previously available on direct capital appeals. Notably, however, the Majority does not reach the waived claim on the basis of the former capital case relaxed waiver rule; instead, it inexplicably devises a new relaxed waiver rule specific to constitutional claims implicating sentencing "legality." I do not think that the former relaxed waiver doctrine can properly be invoked where, as here, it would operate to permit a new and non-retroactive decision to operate retroactively in a case where no contemporaneous objection was raised at trial. This Court has emphasized that the relaxed waiver doctrine should only be applied in appropriate circumstances. See, e.g., Commonwealth v. Watkins, 843 A.2d 1203, 1214 (Pa. 2003) (collecting cases); Freeman, 827 A.2d at 400-01, 406, 407 (same). Accord Commonwealth v. Malloy, 856 A.2d 767, 778-79 (Pa. 2004). In addition, Freeman discussed the absurdity inherent in employing relaxed waiver when doing so would avoid bedrock questions of the retroactive application of new constitutional rules in cases where the defendant did not anticipate the rule later adopted. 827 A.2d at 395-96.

It is one thing to overlook a waiver where the foregone claim involves settled law, but quite another to employ the doctrine to allow an entirely new rule of law to operate to impeach the fairness of a trial that was properly conducted under the law then in existence. As I have noted above, unless a new procedural rule is the sort of watershed rule of criminal procedure which the U.S. Supreme Court has held is entitled to "full" retroactive effect, the presumption should remain that retroactive application is available only where the defendant preserved the specific argument and his case is still pending on direct appeal. In this regard, it is notable that, for purposes of federal habeas corpus review of state convictions, the U.S. Supreme Court has held that the fact that this Court employed relaxed waiver to reach a claim belatedly raised under Mills v. Maryland, supra, which was not preserved when the case was tried pre-Mills, did not absolve the Third Circuit from having to determine whether that federal rule should properly be deemed retroactively applicable. See Horn v. Banks, 122 S.Ct. 2147 (2002) (*per curiam*). In a later appeal in the Banks case, the High Court reversed the Third Circuit a second time, holding that Mills was a new procedural rule; that it was not subject to retroactive application; and thus it could not be employed to overturn a Pennsylvania conviction which was secured before Mills was decided. See Beard v. Banks, ___ U.S. ___, 124 S.Ct. 2504 (2004). In construing relaxed waiver, I think this Court should employ a similar approach: a new procedural rule of federal constitutional law should be deemed retroactively applicable only in instances where the U.S. Supreme Court would require it to so operate. Since this case does not pose such an instance, this Court should not reach the merits of appellant's belated Ring claim.