[J-265-1999]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 211 Capital Appeal Docket
	:	
Appellee,	:	Appeal from the Orders of the
	:	Philadelphia Court of Common Pleas
	:	(Poserina, J.), Dated December 4, 1997,
v.	:	and April 13, 1998, Denying Relief Under
	:	the Post Conviction Relief Act.
	:	
CRAIG WILLIAMS,	:	
	:	
Appellant.	:	SUBMITTED: November 23, 1999
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CONCURRING OPINION

MR. JUSTICE CASTILLE **DECIDED: October 19, 2001**

For the reasons stated in my Concurring Opinion in Commonwealth v. Williams, 557 Pa. 207, 732 A.2d 1167 (1999), I agree that this appeal must be remanded to the PCRA court to prepare an opinion reflecting its independent consideration of the issues raised in the amended PCRA petition and for whatever further proceedings, if any, the PCRA court may deem necessary to accomplish that task. Following the determination that Williams requires remand, the majority goes on to address *sua sponte* issues it perceives concerning the performance of PCRA counsel in cases, such as this one, where there are "layered" claims of counsel ineffectiveness, including claims that direct appeal counsel was ineffective. The majority explains that this *dicta* is an exercise of this Court's supervisory authority over the PCRA process.

The supervisory *dicta* is no doubt motivated by this Court's recent experience with "layered" claims of ineffectiveness raised in PCRA appeals. Although Sixth Amendment claims such as these are generally cognizable under the PCRA, they are frequently stated in this Court, and in the lower courts, only in the baldest of terms. The undeveloped claims inevitably fail. As the majority notes, in this Court's recent opinion in Commonwealth v. Marrero, 561 Pa. 100, 748 A.2d 202 (2000), there was a sharp disagreement as to whether the non-development of a layered claim of ineffectiveness should result in a conclusion that the claim is either waived and unreviewable or is meritless. Compare Marrero Majority Opinion by Zappala, J. (listing layered ineffectiveness claims in statement of questions presented, while failing to argue claims in body of brief, is sufficient to avoid waiver) with Marrero Concurring Opinion by Nigro, J. (since Commonwealth v. Albrecht, 554 Pa. 31, 720 A.2d 693 (1998) made clear that relaxed waiver is inappropriate in capital PCRA appeals, and appellant's layered claims of appellate counsel ineffectiveness were supported by "absolutely no argument" in brief, claims were waived under this Court's precedents).

The majority here is equivocal with regard to Marrero, stating on the one hand that PCRA counsel must undertake to develop "each individual facet" of an ineffectiveness claim, including claims involving appellate counsel -- something counsel did not do in Marrero -- but then the majority immediately states on the other hand that this Court "would presently continue to allow a degree of latitude" with respect to what is required. The majority explains that the latitude it speaks of does not relax the substantive Sixth Amendment standard that governs actual merit review of all claims of ineffective assistance of counsel, but instead merely addresses what is required "to invoke substantive review." See Majority Slip Op. at 13 n.5.

I write separately for two reasons. First, I cannot join in the majority's approval of a "continuing degree of latitude" with respect to the development of layered ineffectiveness claims if, by that latitude, the majority means the latitude actually afforded by the Marrero

majority. The waiver in Marrero was not hypertechnical or minor and the degree of "latitude" afforded was substantial; indeed, I continue to agree with Mr. Justice Nigro's analysis in his Marrero Concurring Opinion that the Majority Opinion amounted to a resurrection of the relaxed waiver rule which this Court has made clear, in Albrecht and its progeny, has no proper role in PCRA appeals. Although the majority here cites to both Albrecht and Marrero with apparent approval, I am not convinced that the two cases can logically co-exist. Since the only occasion for this *dicta* is the need to provide guidance in such matters, I would squarely address the inescapable tension between the cases, rather than perpetuate the confusion.

The appellant in Marrero claimed that his direct appeal counsel was ineffective for failing to claim that trial counsel was ineffective for failing to, *inter alia*, (1) inquire into the appellant's competence and (2) investigate and present mitigation witnesses. The Concurring Opinion in Marrero would not have discussed the merits of these two layered ineffectiveness claims because the attack on trial counsel's stewardship was waived, since new counsel obviously could have challenged trial counsel's stewardship on direct appeal, while the attack on appellate counsel's stewardship was not properly layered and developed. In point of fact, the appellate counsel claims **were not developed at all**. They were merely listed in the statement of questions presented, while the appellant presented absolutely no supporting argument in the body of the brief, instead arguing only his distinct, underlying constitutional claims of trial counsel ineffectiveness. 561 Pa. at 104-06, 748 A.2d at 204-05.

The Marrero majority responded to the Concurring Opinion only in a footnote, and addressed only the allegation that the ineffectiveness claims were not properly "layered." The majority opined that the appellant's allegation that direct appeal counsel was ineffective in his statement of questions was sufficient to "properly 'layer'" his claims. The majority did not address the fact that the appellate counsel ineffectiveness claims were not

at all **developed**. The "proper layering" in the statement of questions alone was viewed as sufficient to render the non-argued claims reviewable on the merits. Certainly, that is the interpretation of the Marrero majority opinion offered by Mr. Justice Zappala, its author, in his Concurring Opinion in this case. See Concurring Opinion, Zappala, J., slip op. at 1 (Marrero was never intended as a guide for developing ineffectiveness claims, "but merely expressed our view that the boilerplate assertion of all prior counsels' ineffectiveness was sufficient to overcome waiver").

The brief majority opinion in Marrero, which cited no cases, then held that the layered claims failed on the merits because the appellant's refusal to cooperate with his trial counsel or to assist in his defense precluded trial counsel from pursuing these claims. 561 Pa. at 104, 748 A.2d at 204. The majority never specifically discussed appellate counsel's stewardship. Presumably implicit in its holding was a recognition of the settled rule that counsel -- including appellate counsel -- can never be deemed ineffective for failing to pursue a meritless claim. Commonwealth Peterkin, 538 Pa. 455, 469, 649 A.2d 121, 128 (1994), cert. denied, Peterkin v. Pennsylvania, 515 U.S. 1137, 115 S.Ct. 2569 (1995) ("Appellant's claim [of trial counsel ineffectiveness at the penalty phase] is meritless and appellate counsel cannot be deemed ineffective for failing to raise a meritless claim"); Commonwealth v. Tarver, 491 Pa. 253, 255, 420 A.2d 438, 438 (1980) ("It is well-settled that counsel may not be deemed ineffective for failing to raise a meritless claim").

In my view, reaching the merits of a completely undeveloped, non-argued claim such as the "boilerplate" claims of appellate counsel ineffectiveness identified, but never actually argued in Marrero, does not merely afford "latitude" to a capital defendant, but is a resurrection of relaxed waiver. The requirement that parties actually argue and develop the distinct legal claims they merely identify is not a "hypertechnicality": it is an indispensable necessity for effective appellate review. The Rules of Appellate Procedure direct that a party must not only include its issues on appeal in the Statement of Questions

Involved, Pa.R.A.P. 2111, 2116, but must also provide an argument as to each question, which should include a discussion and citation of pertinent authorities. Pa.R.A.P. 2119. The reasons for such a bedrock requirement are self-evident. This Court is neither obliged, nor even particularly equipped, to develop an argument for a party. To do so places the Court in the conflicting roles of advocate and neutral arbiter. The Court is left to guess at the actual complaint that is intended by the party. The practice of fashioning arguments for a party is also unfair to the would-be responding party, which will only learn upon receipt of the Opinion that the Court perceived the argument, and thus will have been deprived of an opportunity to respond. The result is a decision on the issue without the benefit of helpful advocacy from either side. This is not a model for sound decision-making.

Furthermore, as a general matter, making and then rejecting the argument for a capital defendant does him no favor since actual litigation of a complaint, rather than a holding of waiver, precludes future litigation of the issue under the PCRA **under any theory**. See, e.g., Williams, 557 Pa. at 238, 732 A.2d at 1183. In addition, the practice may be unfair to future litigants, who may identify stronger arguments on the issue than those the Court perceived on its own, but who will be bound by the precedent previously established without the benefit of adversarial presentations.

It is thus not surprising that it is settled as a general proposition that undeveloped claims are deemed waived and unreviewable on appeal. See, e.g., Commonwealth v. Jackson, 494 Pa. 457, 459 n.1, 431 A.2d 944, 945 n.1 (1981) (where ineffectiveness claim was listed in statement of questions, but not addressed in argument section of brief, claim was waived; waiver is warranted because "Appellant has failed to guide this Court as to the facts or applicable law"). See also Marrero, 561 Pa. at 105-06, 748 A.2d at 204-05 (Nigro, J., Concurring) (same); Williams, 557 Pa. at 223, 732 A.2d at 1175 (recognizing "unavailability of relief based upon undeveloped claims for which insufficient arguments are presented on appeal"); Commonwealth v. LaCava, 542 Pa. 160, 176 n.9, 666 A.2d 221,

229 n. 9 (1995) (claim mentioned in statement of questions in direct capital appeal, but not mentioned again or developed in argument section of brief is waived); Commonwealth v. Ragan, 538 Pa. 2, 37, 645 A.2d 811, 828 (1994) (boilerplate allegation provides no basis for relief).

Application of this settled proposition of appellate jurisprudence has been complicated in capital cases, however, by the existence of this Court's relaxed waiver rule. This Court has invoked the relaxed waiver rule to reach claims on direct capital appeals that were inadequately developed and otherwise would not have been reviewable under this Court's procedural practices. See, e.g., Commonwealth v. Mason, 559 Pa. 500, 518 n.9, 741 A.2d 708, 718 n.9 (1999) (although appellant failed to adequately develop argument, citing no case law or other legal support for his bald assertion, Court addressed the otherwise waived argument under relaxed waiver rule applicable on capital case direct appeals); Commonwealth v. Spotz, 552 Pa. 499, 510 n.5, 716 A.2d 580, 585 n.5 (1998) (same).[1] But, as the majority recognizes, this Court has recently made clear that the

[1] It should be noted that the relaxed waiver rule is not absolute. Relaxed waiver encompasses only "significant" issues that were "technically" waived, and that could be resolved on the basis of the record generated. E.g., Commonwealth v. Billa, 521 Pa. 168, 181, 555 A.2d 835, 842 (1989). This Court has declined to apply the rule in many instances, often involving situations where the failure to raise a claim below might have fallen within the realm of defense trial strategy, or when the absence of a contemporaneous objection made it difficult to resolve the issue on the limited record presented. See, e.g., Commonwealth v. Gribble, 550 Pa. 62, 79-80, 703 A.2d 426, 434-35 (1997) (suppression issue waived where defendant withdrew pre-trial motion to suppress, thereby depriving Commonwealth of opportunity to meet burden of proving that evidence was lawfully seized); Commonwealth v. Wallace, 522 Pa. 297, 309, 561 A.2d 719, 725 (1989) (claim that court erred in failing to issue cautionary instruction waived where court offered to give charge and counsel failed to "take a stand" on issue and failed to object when cautionary charge was not forthcoming); Commonwealth v. Peterkin, 511 Pa. at 310-11, 513 A.2d at 378 (claim that two prospective jurors were improperly excluded for cause waived where trial defense counsel indicated he had no objection to challenges for cause); Commonwealth v. Szuchon, 506 Pa. 228, 254-55, 484 A.2d 1365, 1379-80 (1984) (claim that prospective jurors were improperly excluded waived where counsel's decision not to (continued…)

relaxed waiver rule has no place in the PCRA setting. See, e.g., Commonwealth v. Kemp, 562 Pa. 154, 169, 753 A.2d 1278, 1285 (2000); Commonwealth v. Albrecht, 554 Pa. at 44, 720 A.2d at 700.

The majority opinion in Marrero never employed the phrase "relaxed waiver" nor did it cite to, or purport to overrule or limit, Albrecht and its progeny. Nevertheless, it is difficult to see how the majority could reach the merits of the boilerplate layered Sixth Amendment claims presented without, in fact, "relaxing" the requirement that legal claims be adequately articulated to the Court. I cannot agree with any suggestion in the present majority opinion that this Court should employ this type of "latitude" in assessing layered claims of ineffectiveness. I certainly cannot agree with the suggestion in Justice Zappala's concurrence that boilerplate statements in the statement of questions presented, but undeveloped in the brief itself, make for reviewable constitutional claims. Consistently with

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(…continued)
raise claim or attempt to rehabilitate jurors must be viewed as tactical and where that decision resulted in record that made it difficult to resolve claim). Furthermore, this Court has expressly warned that the doctrine is not to be used, and abused, as a litigation tool:

> This Court does not countenance trial counsel intentionally sitting by silently at trial only later to complain of trial errors on appeal after an unfavorable verdict. That a matter is a death penalty in no way relieves trial counsel of the duty to raise appropriate contemporaneous objections at trial to allow the trial court to cure any alleged error as well as preserve issues for appellate review.

Commonwealth v. Gibson, 547 Pa. 71, 88-89 n.17, 688 A.2d 1152,1161 n.17 (1997). See also Commonwealth v. O'Donnell, 559 Pa. 320, 331, 740 A.2d 198, 204 (1999) (relaxed waiver "was never meant to serve as an invitation to appellate counsel to appear before the Court carte blanche and expect that we will resolve a litany of newly developed challenges not raised or objected to before the lower court"). Whether an otherwise waived claim would be reviewed on the merits depends upon the nature of the particular claim at issue, the waiver at issue, and the record.

Albrecht, this Court should make clear that a failure to assert and argue a claim results in its waiver.

The actual scope of the majority's promised continuing latitude is impossible to assess since its observations are *dicta* and, thus, there is no judgment by which to measure the actual effect of the would-be rule. It may be that the majority does not intend to go so far as Marrero went. In this regard, I would note that I have no quarrel with this Court's affording a degree of latitude in reviewing the pleadings in capital cases, or in **all** appellate cases for that matter. Unlike questions of waiver arising from the terms of the PCRA, or the substantive standard governing ineffectiveness claims, which this Court has no power to relax, questions involving waivers arising from appellate jurisprudential concerns, such as our rules and precedents governing the sufficiency of arguments for purposes of appellate review, are properly for this Court to decide. In no case, however, capital or otherwise, would I agree that an utter failure even to mention, much less develop, a distinct constitutional claim in the body of the brief, as occurred in Marrero, is adequate to warrant review on the merits.

My second reason for writing separately is to address the actual Sixth Amendment standards that govern substantive review of layered claims of ineffectiveness, and particularly claims that previous appellate counsel was ineffective. I address this point because these standards are too often simply ignored by subsequent counsel in favor of boilerplate "layerings" of ineffectiveness. Acquaintance with the relevant substantive standards is essential if PCRA petitioners hope to have any prospect of actually prevailing on the merits of such claims, as opposed to their relying upon relaxed waiver to have the undeveloped claims reviewed but, inevitably, rejected.

This case is a convenient vehicle to discuss the substantive contours of claims of appellate counsel ineffectiveness. Appellant was represented on direct appeal by new counsel, Norris E. Gelman, Esquire, an experienced capital appellate lawyer. Mr. Gelman

raised nine claims of trial counsel ineffectiveness, involving both the guilt and the penalty phases of trial. See Commonwealth v. Williams, 532 Pa. 265, 615 A.2d 716 (1992). Because appellant was represented by new counsel on appeal, any additional claim of trial counsel ineffectiveness, as well as any preserved claim of trial court error, was also available to appellant on that appeal. Accordingly, under the express terms of the PCRA, any claim of trial court error or trial counsel ineffectiveness not raised on that appeal is now waived and not cognizable. See 42 Pa.C.S. §§ 9543(a)(3), 9544(b); Albrecht, 554 Pa. at 45, 720 A.2d at 700 ("very terms" of PCRA "exclude[] waived issues from the class of cognizable PCRA claims"). As the majority notes, the counseled appellant here submitted an amended PCRA petition, which raised numerous additional claims of trial counsel ineffectiveness. However, in only two instances did the amended petition even aver that direct appeal counsel was ineffective for failing to raise the claim of trial counsel ineffectiveness.

The PCRA makes clear that otherwise cognizable claims, if waived, are unavailable for review. See 42 Pa.C.S. §§ 9543(a), 9544(b). Recognizing the statutory waiver, PCRA petitioners such as appellant here routinely take waived claims and argue them under the rubric of ineffective assistance of counsel, alleging however many "layers" of ineffectiveness as are necessary to convert the claim into a cognizable one. But I believe it is absolutely essential to recognize that the underlying and unreviewable (because waived) claim is distinct from the reviewable ineffectiveness (or layered ineffectiveness) version of the claim. Moreover, each claim of counsel ineffectiveness, no matter what "layer" of representation is at issue, itself poses a distinct, substantive constitutional question -- assuming, of course, that there was a constitutional right to counsel at the layer of representation at issue. See Commonwealth ex rel. Washington v. Maroney, 427 Pa. 599, 604, 235 A.2d 349, 352 (1967) (ineffectiveness review involves "an examination of

counsel's stewardship **of the now challenged proceedings** in light of the available alternatives") (emphasis added).

An ineffective assistance of counsel claim is, in essence, a claim of constitutional malpractice, *i.e.*, a claim that counsel was so incompetent as to have effectively deprived the defendant of his or her Sixth Amendment right to counsel. See Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984) (defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and that defendant was prejudiced by the deficient performance).[2] It is the very constitutional dimension of the claim that no doubt led the General Assembly to include it as one of the enumerated, cognizable claims under the PCRA. In light of the waiver provisions of the PCRA, ineffectiveness claims are the most common claims raised in PCRA petitions.

An allegation of ineffectiveness is a serious matter not only because of the crucial importance of the constitutional right to counsel in the criminal justice system, but also because the very allegation is a grave one to level at an attorney. The underlying non-cognizable claim, which often is not itself even of constitutional dimension (for example, many evidentiary claims or claims regarding jury instructions), is relevant **only** as it bears upon the Sixth Amendment analysis. See Kimmelman v. Morrison, 477 U.S. 365, 382, 106 S.Ct. 2574, 2586-87 (1986) (constitutional ineffectiveness standard under Strickland v. Washington "differs significantly from the elements of proof applicable to" Fourth

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[2] In Commonwealth v. Pierce, 515 Pa. 153, 527 A.2d 973 (1987), this Court recognized that Strickland's two-part performance and prejudice test was the same test for ineffectiveness as under our Constitution. We have come to characterize the coextensive test as a tripartite one, by dividing the performance element into two distinct parts, i.e., arguable merit and lack of reasonable basis.

Amendment claim; thus, while meritorious Fourth Amendment issue is essential to Sixth Amendment claim of ineffectiveness arising from failure to pursue Fourth Amendment issue, meritorious Fourth Amendment claim alone does not prove ineffectiveness; Strickland "gross incompetence" test must be met to prevail on Sixth Amendment claim); Commonwealth v. Green, 551 Pa. 88, 92 n.4, 709 A.2d 382, 383, n.4 (1998) (analysis of abandoned claim "is undertaken solely for the purpose of resolving questions of ineffective representation"), quoting Commonwealth v. Hubbard, 472 Pa. 259, 278, 372 A.2d 687, 696 (1977); Senk v. Zimmerman, 886 F.2d 611, 614 (3d Cir. 1989), *cert. denied*, 493 U.S. 1035, 110 S.Ct. 756 (1990) (ineffectiveness claims are concerned with defense attorney's performance; underlying issue is only "indirectly implicate[d]").

A claim of ineffective assistance does not lose its distinct constitutional nature merely because the stewardship of direct appeal counsel is at issue. The United States Supreme Court -- the final word on matters affecting the Sixth Amendment -- has specifically recognized that appellate counsel may be deemed ineffective only if the defendant can actually **prove** ineffectiveness under the Strickland standard. See Smith v. Robbins, 528 U.S. 259, 289, 120 S.Ct. 746, 766 (2000) (petitioner "must satisfy both prongs of the Strickland test in order to prevail on his claim of ineffective assistance of appellate counsel"). Claims involving appellate counsel ineffectiveness, moreover, necessarily involve concerns unique to appellate practice. No appellate counsel is constitutionally obliged to raise any and all possible claims on appeal. Arguably meritorious claims may be omitted in favor of claims which, in appellate counsel's judgment, offer a greater prospect of securing relief. See Jones v. Barnes, 463 U.S. 745, 750-54, 103 S.Ct. 3308, 3312-14 (1983). "[A]ppellate counsel . . . need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." Robbins, supra, at 288, 120 S.Ct. at 765. "This process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to

prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." Smith v. Murray, 477 U.S. 527, 536, 106 S.Ct. 2661, 2667 (1986), quoting Jones, 463 U.S. at 751-52, 103 S.Ct. at 3312-13. See also Buehl v. Vaughn, 166 F.3d 163, 174 (3d Cir. 1999) ("One element of effective appellate strategy is the exercise of reasonable selectivity in deciding which arguments to raise.").

By being reasonably selective, counsel ensures that better claims are not diluted in a brief indiscriminately raising every possible claim. See Jones, supra at 752, 103 S.Ct. at 3313 ("Legal contentions, like the currency, depreciate through over-issue."), quoting, Jackson, Advocacy Before the Supreme Court, 25 Temple L.Q. 115, 119 (1951); see also Commonwealth v. Ellis, 534 Pa. 176, 183, 626 A.2d 1137, 1140-41 (1993) ("'Appellate advocacy is measured by effectiveness, not loquaciousness.'"), quoting R. Aldisert, The Appellate Bar: Professional Competence and Professional Responsibility -- A View From the Jaundiced Eye of One Appellate Judge, 11 Cap. U. L. Rev. 445, 458 (1982). An effective appellate advocate takes seriously the implication of Justice Jackson's admonition in a related context: "He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search." Brown v. Allen, 344 U.S. 443, 537, 73 S.Ct. 397, 425 (1953) (Jackson, J., concurring in result). In sum, although it is "possible to bring a Strickland claim based on [appellate] counsel's failure to raise a particular claim, . . . it is difficult to demonstrate that counsel was incompetent." Robbins, 528 U.S. at 288, 120 S.Ct. at 765.

In light of what is necessary to prevail upon a claim of appellate counsel ineffectiveness, PCRA counsel's task is clear. Counsel should be prepared not only to identify a waived issue of apparent merit, but also to explain why the claim appellate counsel is faulted for failing to raise was, at the time appellate counsel was acting, clearly stronger than the claims counsel actually raised, such that counsel was constitutionally obliged to perceive and raise it. See Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)

("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome"), quoted with approval in Robbins, supra.

Mr. Justice Zappala's Concurring Opinion disputes whether a petitioner needs to show that the foregone claim is stronger than the ones pursued on appeal in order to demonstrate appellate counsel ineffectiveness. Justice Zappala argues that the jurisprudence of this Court is otherwise, citing Commonwealth v. Townsell, 474 Pa. 563, 379 A.2d 98 (1977) and Commonwealth v. Yocham, 483 Pa. 478, 397 A.2d 766 (1979). Both of those cases pre-date Strickland and Commonwealth v. Pierce, which recognized that the test for ineffective assistance is the same under the Pennsylvania Constitution as under Strickland. As the discussion above demonstrates, the U.S. Supreme Court has explicitly stated that when a defendant claims that appellate counsel was ineffective for failing to raise a particular claim, the first part of the Strickland test requires a showing that the issue not raised was "clearly stronger than the issues that counsel did present." Robbins, 528 U.S. at 288, 120 S.Ct. at 766. To the extent that Townsell and Yocham suggest a different, *per se* test, they are simply no longer good law. It would be perilous indeed for petitioners to rely on such cases without attending to the binding developments in the law since they were decided.[3]

[3] I offer no opinion on the majority's additional *dicta* concerning the PCRA court's obligations under the Rules of Criminal Procedure, since there is no issue before us in that regard.