

proved the forcible medication of a death row inmate who does not pose a risk to himself or others.

Of note, after Mr. Sam's PCRA hearing, the Delaware Supreme Court defined competence for pursuing postconviction relief as having the ability to "understand the process and goals of PCRA proceedings and. . .to assist in that process to the extent required given the specific legal and factual issues which remain to be litigated" (quoted in *Commonwealth v. Zook*, 887 A.2d 1218 (Pa. 2005), pp 1224–5).

## Ineffective Counsel

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### **Defense Counsel in Capital Cases Must Attempt to Discover All Mitigating Evidence, Including Mental Impairment, Even Though the Defendant Rejects Such a Defense**

In *Gray v. Branker*, 529 F.3d 220 (4th Cir. 2008), the United States Fourth Circuit Court of Appeals held that counsel was ineffective for failing to investigate and develop evidence that their client, a capital murder defendant, had significant mental illness.

#### *Facts of the Case*

William Robert Gray, Jr., was convicted of first-degree murder and sentenced to death in North Carolina for the murder of his wife. In February 1992, Mrs. Gray told her husband that she was divorcing him after 22 years of marriage. During contentious divorce proceedings, Mr. Gray was awarded temporary custody of the former couple's two children and was allowed to stay in the family home. As the case progressed, Mr. Gray displayed worsening signs of emotional instability. His friends described him as not having a "grasp of what was going on" and as "not in his right mind." His behavior worsened to the point that he interrogated his wife's gynecologist, his marital counselor refused to work with him, and his initial divorce attorney withdrew from the case citing "irreconcilable differences." Divorce proceedings were continuing when, on November 24, 1992,

Mr. Gray assaulted Mrs. Gray in the street when she dropped off the children at his house. A witness who observed the assault said that Mrs. Gray pleaded with him (the witness) not to leave the scene. There was a gunshot, Mr. Gray fled, and Mrs. Gray was left in the street with a bullet wound to the head, as well as wounds from a stun gun and from apparently being beaten with the butt of a pistol. She died in the hospital.

That day, Mr. Gray was arrested and charged with first-degree murder. He formally asked his divorce attorney, Bob Worthington, to represent him in this trial. Mr. Worthington had no previous experience with capital murder trials.

During his detainment, Mr. Gray's mental state deteriorated. He was placed on suicide watch. At the jailer's suggestion, Mr. Gray was committed for evaluation at Dorothea Dix Hospital. Patricio Lara, MD, completed an evaluation of Mr. Gray but emphasized that the information provided to him about Gray's "condition before the incident in question [was] quite limited." Dr. Lara reported that stress on Mr. Gray "may have contributed to regression in behavior and reduction in impulse control." He ultimately found Mr. Gray competent to stand trial and diagnosed adjustment disorder with mixed disturbance of emotions and conduct. He commented that Mr. Gray was guarded during the evaluation and suggested ongoing psychiatric counseling with pharmacologic intervention as a possibility. He further stated that, should other information become available, he would be able to expand his opinion. Mr. Gray was returned to Lenoir County Jail where he had "anxiety attacks" and a "fainting spell" and was housed in the juvenile wing because of his "physical and mental condition." Mr. Worthington chose to focus, not on Mr. Gray's continuing mental deterioration, but on the alibi he had proffered to the police during his arrest. For his part, Mr. Gray resisted the investigation of (and presentation of) mental health evidence.

During the trial, the state presented evidence that Mr. Gray had previously psychologically and physically abused Mrs. Gray, that he had related a false alibi when arrested, and that the blunt force injury to her face was consistent with a blow from the butt of a handgun. The defense presented no mental health evidence. The jury convicted Mr. Gray of first-degree murder. At the sentencing phase, no mental health evidence (expert or lay) was presented. Mr. Gray was sentenced to death.

Mr. Gray appealed to the Supreme Court of North Carolina who affirmed his conviction and sentence. The United States Supreme Court denied *certiorari*. Mr. Gray then filed a motion for appropriate relief (MAR) alleging claims of ineffective counsel. Although Mr. Gray allowed mental health testimony at this phase, the MAR court denied relief. The Supreme Court of North Carolina denied *certiorari*, and Mr. Gray filed a writ of *habeas corpus* in United States District Court. The state asked for summary judgment, which the court granted on statute of limitations grounds under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA; 28 U.S.C. § 2244(d)(1)(A)). He then appealed to the U.S. Fourth Circuit Court of Appeals on grounds that his counsel rendered ineffective assistance by failing to investigate and develop, for sentencing purposes, evidence that Mr. Gray had a mental illness. The Fourth Circuit granted *habeas* relief.

#### *Ruling and Reasoning*

The Fourth Circuit's majority opinion relied heavily on the U.S. Supreme Court's opinion in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Court formulated a test for ineffective assistance claims in capital murder cases. To prevail, a petitioner must establish that his counsel's performance was deficient and that the deficiency prejudiced his defense. Mr. Gray contended that he had been denied his Sixth Amendment right to counsel, as his attorneys did not pursue mitigating evidence about his mental state at the time of the offense. Deficient performance requires failure to perform "reasonably" under "prevailing professional norms." In establishing deficiency, the appellate court must also be "highly deferential" to counsel and must emphasize the "facts of the particular case" as viewed "from counsel's perspective at the time." Once a deficiency (prong 1 above) is established, it must be shown to have had a "reasonable" probability of altering the outcome (prong 2).

In their application of *Strickland*, the Fourth Circuit focused primarily on the mental health evidence. It stated that an "objectively reasonable application of *Strickland* principles compels the conclusion that Gray's lawyers were prejudicially ineffective in their failure to investigate and develop, for sentencing purposes, evidence of Gray's impaired mental condition" (*Gray*, p 228). Despite Mr. Gray's refusal to cooperate in the development of said evidence, the

court averred that, in a capital case, a defense attorney must make reasonable efforts to "discover *all reasonably available* mitigating evidence" (*Wiggins v. Smith*, 539 U.S. 510, (2003) p 524). The defense's failure to investigate Mr. Gray's mental health fell short of "reasonable professional judgment." The court noted that a reasonable lawyer "would not count on his client's self assessment of his mental health, especially in a capital case" (*Gray*, p 231). It expounded that "there was an independent duty to investigate." It conducted a *de novo* evaluation of the evidence and determined that there was "reasonable probability that at least one juror would have struck a different balance." The court continued that it was not establishing a need to "always include presentation of expert evidence" (*Wiggins*, p 537). The Fourth Circuit ruled the North Carolina MAR court unreasonably applied the standards outlined by the Supreme Court in *Strickland*. Further, an objective application of the principles outlined by *Strickland* demonstrate that Mr. Gray's counsel was prejudicially ineffective in failing to investigate, for sentencing purposes, evidence of Mr. Gray's mental illness.

#### *Discussion*

For mental health professionals working in capital cases, this case highlights the import of collecting all available mental health records and any other evidence (from family and friends) that might reveal the relative mental health of a capital defendant. The Fourth Circuit emphasized that, in some capital cases, mental health evidence may be the most important mitigating "counterweight" to aggravating factors presented by the prosecution. If not thoroughly developed, the defendant may be denied due process. This is true even if the defendant denies that there is anything wrong with him.

## **Not Guilty by Reason of Somnambulism**

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