SUPERIOR COURT, STATE OF ARIZONA, In and for the County of Cochise

STATE OF ARIZONA, Plaintiff, vs. KYLE DAVID SHARP, Defendant.	February 10, 2009 Case No. CR9500271 DECISION AND ORDER	FILED 2009 FEB 10 AM 10: 01 DENISE I. LUNDIN CLERK OF SUPERIOR COURT SV BY _____ DEPUTY
HONORABLE WALLACE R. HOGGATT **DIVISION THREE**		By: Glendalynn Cobb (02/10/09) Judicial Administrative Assistant

The court has considered Defendant's Bench Memo Re: Attorney Error and Prejudice Per Se as supplemented November 24, 2008, the State's Response as supplemented on December 08, 2008, and Defendant's Reply, filed January 02, 2009.[1] Because these filings ask the Court to determine attorney error and prejudice *per se* – and to grant Rule 32 relief accordingly – it is appropriate to treat Defendant's bench memorandum as a motion, and it will be ruled on accordingly.

I. STATEMENT OF THE CASE

Defendant Kyle David Sharp assaulted, sodomized, and murdered Judith A. Coughlin during the early morning of July 01, 1995, as described in the Arizona Supreme Court's decision in *State v. Sharp*, 193 Ariz. 414, 418-419, ¶¶ 2-10, 973 P.2d 1171, 1175-1176 (1999). Defendant had his initial appearance before the Willcox Justice Court on the same date, and two days later the justice court appointed the Cochise County Legal Defender to represent the Defendant. In July 1995, no specific qualifications existed for counsel representing defendants in capital cases. Rule 6.8, Arizona Rules of Criminal Procedure, did not exist at that time.

The Legal Defender's Office, acting through James G. White, the Legal Defender, and Margaret L. McCartney, Deputy Legal Defender, represented Defendant in this case through the filing of the notice of appeal, and at least for some time afterwards.

Defendant was tried before a jury in June and July, 1996, and convicted by the jury of kidnapping, sexual assault, and first degree murder (both premeditated murder and felony murder).

[1] The defendant's Exhibits to his Reply were filed with the court on January 6, 2009. Accordingly, as a purely procedural matter, it is hereby ORDERED that the Order of November 07, 2008, setting a December 15, 2008, under advisement date for the defendant's present motion is CONTINUED to January 07, 2009, the first business day after the filing of the Exhibits.

The mitigation/aggravation hearing was held in March, 1997, after being continued at least twice. Defendant was sentenced to death for the murder and to prison for the other charges on April 07, 1997. The Arizona Supreme Court affirmed Defendant's convictions and sentences. *State v. Sharp, supra.* This case is before the court on Defendant's first petition for post-conviction relief, although the court is not now called upon to make findings of fact and render conclusions of law on all matters at issue following the lengthy evidentiary hearings conducted in this case. This court is now required to determine whether Defendant received ineffective assistance as a matter of law and whether Defendant suffered prejudice *per se*.

II. DISCUSSION

A. Qualifications of Counsel.

On October 22, 1996, the Supreme Court of Arizona entered an order adopting, on an emergency basis, Rule 6.8, Arizona Rules of Criminal Procedure, effective November 01, 1996. The order remained in effect on an emergency basis until it was made permanent by order of the Supreme Court of June 25, 1997. Both the emergency order, with the text of Rule 6.8 attached, and the permanent order, with the text of the rule attached, were sent to a long list of officials and interested persons, including the presiding judge of each county and to the Cochise County Legal Defender, Mr. White.

The version of Rule 6.8 which went into effect on an emergency basis on November 01, 1996, and was made permanent thereafter, prescribed certain standards for appointment of counsel in capital cases. The rule during the pertinent time did not list any special standards for *trial* counsel – such standards were added after sentencing in this case – but did prescribe the following general qualifications for *all* counsel in capital cases.

> **a. general** To be eligible for appointment in a capital case an attorney
>
> (1) Shall have been a member in good standing of the State Bar of Arizona for at least five years immediately preceding the appointment;
>
> (2) Shall have practiced in the area of state criminal litigation for three years immediately preceding the appointment; and
>
> (3) Shall have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

At no time after Rule 6.8 went into effect on an emergency basis – and specifically at no time before or during the sentencing proceeding – did trial counsel raise the issue of whether they were qualified to serve as counsel with the trial court, by motion or otherwise, nor did the trial court raise the issue on its own.

I. Applicability of Rule 6.8 to this Case.

The State contends that Rule 6.8 has no application to this case because counsel were appointed to represent Defendant in July 1995, before Rule 6.8 went into effect. The State is correct that Rule 6.8 was not in existence in July 1995. The rule was not in existence at all until several months after the conclusion of the jury trial. The State, however, fails to take into account the nature of the sentencing proceedings in March and April 1997.

Under both the superseded capital sentencing scheme in existence in 1997[2] and the one currently in force, a defendant who is charged with first degree murder (and who faces the possibility of the death penalty) receives one trial in two phases: a guilt phase and a penalty phase. *State v. Ring*, 204 Ariz. 534, 554, 65 P.3d 915, 935, ¶50 and fn. 19 (2003). Although the penalty phase in 1997 was part of the trial, by law it had the status of a separate proceeding within that trial.

> When a defendant is found guilty of or pleads guilty to first degree murder... the judge who presided at the trial or before whom the guilty plea was entered... shall conduct a separate sentencing hearing to determine the existence or nonexistence of the [aggravating and mitigating] circumstances...for the purpose of determining sentence to be imposed. The hearing shall be conducted before the court alone. The court alone shall make all factual determinations required by this section or the Constitution of the United States or this state.

A.R.S. §13-703(B) [superseded following *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)].

The right to counsel applies to each of the two separate phases of the trial. *State v. Ring, supra*, 204 Ariz. at 554, 65 P.3d at 935, ¶50. The original Committee Comment to Rule 6.8 notes, "The purpose of this rule is to establish standards for appointment of counsel for indigent defendant in *all stages of capital*

[2] Arizona's former death penalty process, in which the judge and not the jury was the trier of fact, was determined to be unconstitutional in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

litigation." [Emphasis added.] The sentencing phase – legally a separate proceeding – was surely one of the phases to which the Committee referred.

Rule 6.8 was added in its original form as an emergency measure, effective November 01, 1996. Although the Supreme Court stated in its Order of October 22, 1996, that the reason for the emergency was the need to comply with time limits set in A.R.S. §13-4041(C) to determine qualified post-conviction relief counsel, the rule itself is not limited to post-conviction relief counsel. Rule 6.8 (a) applies to all counsel covering any stage of any capital case. The Supreme Court could have promulgated on an emergency basis only subsection (c), dealing with post-conviction relief and appellate counsel, had it chosen to do so. The fact that the Supreme Court approved, as part of the emergency order, subsection (a) as well as subsection (c) supports a conclusion that the Supreme Court intended Rule 6.8(a) to apply to any stage of any capital case that had not occurred as of November 01, 1996. In the case of Kyle David Sharp, the sentencing phase had not occurred as of November 01, 1996. Rule 6.8(a) therefore applied to the sentencing proceeding that began in March 1997 and concluded in April 1997.

2. By Whom Capital Representation Eligibility Is Determined.

Rule 6.8 does not expressly say who is to determine a lawyer's eligibility to represent a capital defendant, and in particular the rule does not specify to whom a prospective capital counsel "[s]hall have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases," as stated in Rule 6.8(a)(3). Rule 6.8 must be read in conjunction with Rule 6.5, however, and Rule 6.5 clearly places the duty of appointing counsel on the court. As of November 01, 1996, the present case was pending in the Superior Court of Arizona, Cochise County, Division One, and the trial judge in this case had the authority to determine the qualifications of counsel to handle the sentencing phase of the trial. Indeed, because the trial judge was the only person with authority to make such a determination, he had the obligation to do so. This obligation existed whether the court was asked or (as in this case) not asked, to make a determination of counsel's qualifications to serve in a capital case. Further, defense counsel, as officers

of the court charged with the duty to provide competent representation,[3] had the obligation to satisfy the trial court that they were qualified to represent Defendant under Rule 6.8(a) or to seek the appointment of counsel who were qualified. Neither obligation was satisfied in the case. The trial court did not inquire of counsel whether they were authorized under the newly-enacted rule to represent a defendant facing the possibility of a death sentence, and counsel did not ask the court to make a determination of the presence or absence of their qualifications to represent the defendant.

3. Trial Defense Counsel's Lack of Qualifications Under Rule 6.8(a).

Under the version of Rule 6.8 that was in effect during the capital sentencing proceeding in this case, were James White and Margaret Macartney qualified to represent Kyle David Sharp?

In his present motion, Defendant does not appear to contend that trial defense counsel failed to meet the standards set out in Rule 6.8(a)(1) or (2).[4] *See* Defendant's Supplement to Bench Memo: Attorney Error and Prejudice Per Se Is Established, filed November 24, 2008, at 7. Rather, Defendant contends that trial defense counsel violated Rule 6.8(a)(3), in that they did not demonstrate "the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases." Defendant argues that not only did not trial counsel demonstrate the necessary proficiency and commitment, but that they would not have been able to demonstrate such qualities even had they attempted to do so, because they failed to meet the qualifications of the relevant ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, specifically Guidelines 4.1 (dealing with a mitigation specialist), 5.1(B) (dealing with counsel's qualifications), and 8.1(B) (dealing with required training).

For its part, the State does not argue that trial counsel were qualified under Rule 6.8(a)(3). Rather, the State argues, first, that the rule could not apply to this case because if went into effect after the conclusion of the jury trial; second, that the ABA Guidelines should not be incorporated into Rule 6.8 because they are just that: nonbinding guidelines; third, that any Rule 6.8 violation should not result in relief for

[3] ER 1.1, Rules of Professional Conduct, Rule 42, Rules of the Supreme Court.

[4] Subsection (a)(1) requires that counsel have been a member in good standing for at least five (5) years before the appointment, and subsection (a)(2) requires that counsel have practiced in state criminal litigation for at least three (3) years before the appointment.

Defendant because ineffectiveness of counsel must still be determined according to *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); and, fourth, that prejudice *per se* cannot apply here.

The State's first point has been considered and rejection in section (A)(1) above, and the question of prejudice will be considered in section B below. The issue of the ABA Guidelines is discussed here.

This court acknowledges that a deviation from the ABA Guidelines does not necessarily result in a finding of ineffective assistance. The 2006 Comment to Rule 6.8 says as much. For example, a lawyer who attends a training program that is deficient in some of the subject areas required by Guideline 8.1(B) is not thereby rendered automatically ineffective. Also, as shown by *State v. Nordstrom*, 200 Ariz. 229, 256, 25 P.3d 717, 744, ¶ 92 (2001), a failure to appoint second counsel in a death penalty appeal, as suggested but not mandated by the original Committee Comment to Rule 6.8 (and by ABA and National Legal Aid and Defender Association guidelines) was not error.

But the ABA Guidelines include within them restatements of certain principles constituting prevailing professional norms – which, if violated, will result in the satisfaction of the first component of the test for ineffectiveness set forth in *Strickland*.[5] The requirements that defense counsel be "skill[ed] in the investigation, preparation, and presentation of mitigation evidence" under Guideline 5.1(B)(2)(g) and that the defense team include a mitigation specialist under Guideline 4.1(A)(1) are indeed prevailing professional norms.[6] A defendant charged with first-degree murder who faces the prospect of a death sentence is entitled to a mitigation specialist – and, necessarily, to be defended by someone who knows how to secure and to work with a mitigation specialist. The State argues with great ability that *State v. Bocharski*, 200 Ariz. 50, 22 P.3d 43 (2001) (*Bocharski I*), has no bearing on the present case, but this court must reject the State's effort. In *Bocharski I*, the Arizona Supreme Court "reversed [the defendant's] death sentence, concluding that [he] received inadequate funding for a mitigation investigation." That is the description of the Court's ruling by the Court itself, writing seven years later in *State v. Bocharski*, 537 Ariz. Adv. Rep. 23, ¶ 1 (2008) (*Bocharski II*).

[5] Under *Strickland*, a claim of ineffective assistance of counsel has two components, each of which must be shown: "First, the defendant must show that counsel's performance was deficient....Second, the defendant must show that the deficient performance prejudiced the defense." 466 U.S. at 687.

[6] It is immaterial whether such principles became prevailing professional norms because they are part of the Guidelines, or whether they were included in the Guidelines because they were already prevailing professional norms.

As the defendant argues in the present case, if it is error to provide inadequate funding for a mitigation specialist, it is an even worse error not to have a mitigation specialist on the job at all. [Defendant's Supplement to Bench Memo: Attorney Error & Prejudice Per Se Is Established, at 20.] The State contends, however, that there is more to the story:

> [L]ack of funding was only part of the equation in the ... decision to reverse in *Bocharski [I]* – the court also strongly relied on Bocharski's express request to waive further mitigation investigation and proceed immediately to sentencing, despite "vigorous opposition" by counsel. *Bocharski [I]*, 200 Ariz. at 60, ¶ 54, 22 P.3d at 53. Bocharski "essentially gave up" in frustration due to the court's funding system and his concerns about conditions at the Yavapai County jail [where he was being held]. *Id.* at 62, ¶¶ 58, 60, 22 P.3d at 55. Expressing concern whether Bocharski was competent to make such a decision, the Arizona Supreme Court reversed, finding that "funding problems interfered with the fair and orderly administration of justice." *Id.* at 62, ¶ 62, 22 P.3d at 55. The court also expressed concern that the trial court managed to produce an 'instantaneous special verdict' immediately after he denied counsels' pleas to continue the mitigation hearing, a process that left the court "with an uneasy feeling and very little to independently reweigh." *Id.* at 61, ¶ 55, 22 P.3d at 54....[7]

[State's Response to Petitioner's Supplement to Bench Memo Re Attorney Error and Prejudice Per Se, at 11-12.] The flaw in the State's argument is this: inadequate funding for a mitigation specialist was not merely one of several isolated problems affecting Mr. Bocharski's death sentence. Rather, it was the problem that caused all other problems. The defendant's frustrations with the proceedings would not have resulted in a remand for resentencing had he received an adequate mitigation investigation.[8] The hurried nature of the sentencing at an impromptu hearing was the result of the lack of funding for a proper mitigation investigation, which caused the defendant's *pro se* request to the trial judge to terminate further efforts.

Although *Bocharski I* did not state, in so many words, that a capital defendant is entitled to a mitigation specialist, it is hard to escape the conclusion that the Supreme Court decided exactly that. The Court

[7] The quoted material is relevant to the question of whether a mitigation investigation, and a mitigation specialist to do that investigation, are required in a capital case, and thus are relevant to the first prong of *Strickland v. Washington, supra.* At the end of the quoted paragraph, in language omitted here, the State also adds a prejudice argument, which addresses the second prong: "Rather than find prejudice per se, the *Bocharski* court stated that, "[t]he unique facts of each case will determine what is 'reasonably necessary' for an indigent to adequately present a defense." *Id.* (citing A.R.S. § 13-4013(B).)" The issue of prejudice will be discussed in section B below.

[8] It is immaterial, as a legal matter, whether any particular defendant had a subjective feeling of frustration about sentencing or other proceedings. What is important is *why* the defendant may have felt frustrated about the proceedings. If reversible legal error was committed, then the defendant is entitled to relief – whether the defendant felt frustrated or not.

discussed the problem of adequate funding for the mitigation specialist with reference to *Lockett v. Ohio*, 438 U.S. 586, 601-604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), which held that a defendant facing the death penalty has the right, guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution, to present mitigating evidence. *Bocharski I*, 200 at 60, 22 P.3d at 53, ¶ 50. If the Arizona Supreme Court did not believe that Mr. Bocharski was legally entitled to a mitigation specialist, then why would it cite *Lockett*? Indeed, why would it remand for resentencing at all?[9] And, if there were no legal right to a mitigation investigation, why would *Bocharski II* have described the Court's ruling in *Bocharski I* as it did? This court can only conclude that the Supreme Court would not have done any of these things unless it had determined that a capital defendant is entitled to an adequately-funded mitigation investigation conducted by someone trained to do such work.

Bocharski I was not an ineffective assistance of counsel case, and presumably for that reason it did not cite *Williams v. Taylor*, 529 U.S. 362, 395-396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The present petition indeed alleges ineffective assistance of counsel, and *Williams* is controlling here. In *Williams*, the United States Supreme Court found Mr. Williams' claim of ineffective assistance of counsel meritorious under *Strickland*, because trial counsel had not "fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background. See 1 ABA Standards for Criminal Justice 4.4.1, commentary, p. 4-55 (2d ed. 1980)." 529 U.S. at 396. *See also Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Not only is a mitigation investigation required *by law*, as we know from *Bocharski I*, but it is required *under the Constitution* for adequate defense in a capital case, as we learn from *Williams*.

Kyle Sharp did not have a mitigation specialist at the relevant time he was entitled to one – that is, at the separate sentencing proceeding in 1997. He did not have anyone, with any job title, who did the work of a mitigation specialist, and there has never been the suggestion of a valid reason to explain why he did not

[9] Criminal defendants don't get their convictions or sentences reversed because of a denial of some resource they aren't legally entitled to – no matter what the resulting level of personal frustration might be. Suppose that Mr. Bocharski had been denied the services of a phrenologist, or an astrologer; his case would not have been remanded for resentencing because of such a denial or any consequences of that denial.

have a mitigation specialist.[10] The defendant did not have counsel who knew of his right to have a mitigation specialist or who acted upon that knowledge.[11] His defense counsel were not qualified to represent him in 1997 because they failed to satisfy Rule 6.8(a)(3): they never "demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases," nor did they attempt to make such a demonstration. There could be no valid reason for counsel's failure to bring the issue of their own qualifications to the attention of the court. By failing to employ a mitigation specialist and to undertake any meaningful mitigation investigation,[12] defense counsel demonstrated their lack of the necessary proficiency. The first component of *Strickland* has been satisfied, as a matter of law.

B. Prejudice.

A defendant who asserts ineffective assistance of counsel is normally obligated to show prejudice by reason of counsel's deficient performance, under *Strickland*'s second component. 466 U.S. at 687. In the present case, the defendant asserts that he was denied "his fundamental right to the basic resources mandated to effectuate his right to counsel and due process [which caused] . . . a structural defect in the proceedings, infected the integrity of the proceedings, and is prejudicial per se." [Defendant's Reply to State's Response, at 2.] The State disputes the defendant's prejudice *per se* analysis, stating that he "misapprehends the narrow scope of prejudice per se," and that the defendant must affirmatively prove prejudice under *Strickland*. [State's Response to Petitioner's Supplement to Bench Memo Re Attorney Error and Prejudice Per Se, at 6.]

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[10] There is a possible *invalid* reason: the expense involved in employing a mitigation specialist.

[11] This court heard evidence in this case from Natman Schaye, a criminal defense lawyer experienced in capital litigation, who testified that he personally talked to Mr. White in the early stages of this case about the need to obtain a mitigation specialist. However, the present motion must be decided on as a matter of law, and the court will not now make any factual findings about what Mr. White did or did not understand based on that conversation nor about any possible reasons for Mr. White's (and co-counsel's) failure to employ a mitigation specialist. For present purposes, it is sufficient to say that the defendant did not have counsel who understood the defendant's right to have a mitigation specialist and who were ready, willing, and able to act on whatever understanding they did have.

[12] In arguing the issue of prejudice, the State contends that the defendant indeed had the resources to present mitigation evidence. State's Response to Petitioner's Supplement to Bench Memo Re Attorney Error and Prejudice Per Se, at 12. Although the court will not make specific findings at this time (*see* fn. 11 above), the Arizona Supreme Court was unimpressed with such purported mitigation, and so is this court. This court has already determined that the State is precluded from arguing that defense counsel corroborated the defendant's self-reported claims of substantial mitigation at the sentencing hearing. *See* Decision and Order of December 03, 2008. In the direct appeal in this case, the State contended – and the Arizona Supreme Court agreed – that the purported mitigation was self-reported and uncorroborated, and was therefore entitled to little or no weight.

In most cases, a defendant who has received substandard legal representation must affirmatively show prejudice, but occasionally "circumstances [exist] that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified," and prejudice must be presumed. *United States v. Cronic*, 466 U.S. 648, 658, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Such circumstances "are very rare," *Vance v. Lehman*, 64 F.3d 119, 122 (3d Cir. 1995), and are not present here. Therefore, the court must make specific findings of fact concerning the existence of nonexistence of prejudice as required by the second component of *Strickland*.

III. ORDER

It is hereby ORDERED that the defendant's current motion is GRANTED IN PART and DENIED IN PART:

A. Defense counsel at the sentencing phase of the trial proceedings fell below prevailing professional norms, and their performance was deficient, as a matter of law.

B. This court cannot, and therefore does not, determine that the defendant suffered prejudice *per se*, and the court must make specific findings of fact and conclusions of law after counsel have had an opportunity to submit proposed findings and conclusions.

It is further ORDERED that each side shall submit proposed findings of fact and conclusions of law concerning the prejudice component of *Strickland* no later than Tuesday, March 10, 2009; each side may have until and including Tuesday, March 31, 2009, within which to file a response to the other side's proposed findings and conclusions; each side may have until and including Tuesday, April 14, 2009, within which to file a reply thereto. Each party's proposed findings and conclusions, response, and reply shall together constitute sufficient written argument, and so no additional written argument shall be filed except by motion of a party and order of the court.

It is further ORDERED that each party's proposed findings and conclusions shall be stated clearly and concisely in numbered paragraphs suitable for this court's use in preparing the specific findings and express conclusions of law required by Rule 32.8(d), Ariz. R. Crim. P.

It is further ORDERED that this matter shall be taken under advisement on Wednesday, April 15, 2009, the first business day after the final filings allowed above.

It is further ORDERED that copies of each filing shall be delivered directly to the court's chambers on or before its due date. The court prefers email (addressed to both whoggatt@courts.az.gov and gcobb@courts.az.gov), but facsimiles and hand-delivered copies are also acceptable. The court's FAX number is 520-432-8548, and the physical address of the courthouse, for hand-delivery, is 100 Quality Hill, Division Three, Bisbee, Arizona.

DATED this 10th day of February, 2009.

WALLACE R. HOGGATT
JUDGE OF THE SUPERIOR COURT

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