

# **Bench Memorandum**

## **Constitutional Law Debate #2**

### **Ineffective Assistance of Counsel and the Sixth Amendment**

#### **Summary of the Fact Pattern**

In Setonia, on December 23 2012, Charles Thomas approached three college freshman, and after forcing them to tie each other up, executed them. Charles Thomas was convicted of three homicides and faced the death penalty.

Annie Advocate graduated law school and after passing the bar took on a large caseload as an associate at a major law firm. Annie was assigned the Charles Thomas sentencing proceeding as a *pro bono* case for a non-profit. Annie was told by her supervisor that the firm has represented Mr. Thomas in the past and that helpful information could be found about his abusive childhood in the court's records. Charles Thomas had three prior convictions for robbery from 10 years earlier, but he had been law-abiding since.

Mr. Thomas suffers from schizophrenia and is occasionally unable to afford his medication. Annie Advocate was able to interview his doctor and learn about his condition. The doctor stated that in the past he had helped Mr. Thomas obtain his medication when he needed it and was unable to obtain it. Mr. Thomas was having a psychotic episode during his offense.

Annie was working other cases during this time and was forced to reschedule meetings and push back gathering information several times. She was able to interview her client three weeks after receiving the case and less than two weeks before the sentencing hearing. Annie called the numbers provided by Mr. Thomas to interview family members. She received a call back from his wife, two days before the sentencing hearing. Annie was unable to meet with her only witness, Thomas's wife, until the day of the sentencing. Annie decided to not call Mr. Thomas's doctor to present evidence of his schizophrenia, and persuaded her client not to testify. In mitigation Annie examined Mrs. Thomas for 15 minutes, revealing that she loved him, that it would crush the family to see him die, that the family was having economic troubles, and that he normally stayed out of trouble. After deliberating for two hours the jury returned and sentenced Charles to death for the three murders.

Petitioner attorneys represent Mr. Thomas. Petitioners will argue that Annie Advocate's conduct during the sentencing hearing fell below the standard required and that her unprofessional conduct prejudiced the outcome of Mr. Thomas' sentencing proceeding.

Respondents are attorneys for the State of Setonia, and will argue that Annie Advocate's conduct during the sentencing hearing was objectively reasonable and that no prejudice resulted from any error.

#### **Outline of Written and Oral Arguments**

The following is a possible outline of NJ LEEP student debaters' arguments. There may be other iterations of strong argument outlines, but such logical flow should cover all the

aspects of the *Strickland* test discussed below.

- I. Was Annie Advocate's conduct below the objective standard of reasonableness?
  - A. Was Annie Advocate qualified to take the case to begin with?
    1. She was fresh out of law school
    2. No experience in capital cases or mitigation cases
  - B. Were Annie's choices based on reasoned strategy?
    1. Avoiding prior convictions?
    2. Choosing to not bring up the doctor and her clients medical condition?
  - C. What could Annie Advocate have done differently?
    1. Communicated better with the trial attorney?
    2. Reviewed the court files in a timely fashion?

**II. Did Annie Advocate's conduct prejudice the outcome of the case?**

- A. Were the mitigating factors available enough to undermine the outcome of the case if presented?
  1. How do schizophrenia and a possible mental episode effect culpability?
  2. How should the aggravating factors be weighed in this case?
    - i. Made the victims tie each other up
    - ii. Shot each twice in the head
  3. What weight should be given to a troubled upbringing?
  4. What weight should be given to the economic stress being experience by Mr. Thomas and his family?

**III. Public Policy**

(These are examples of the kinds of arguments discussed in class. Other arguments can be appropriate if they focus on the policy concerns of the Sixth Amendment)

1. What kind of counsel does the Sixth Amendment guarantee?
2. What is the role of the attorney in a capital case?
3. Why must Petitioners prove both parts of the *Strickland* test in order to show that counsel was ineffective under the Sixth Amendment?

## Cases and Materials For Debate Competition

The following are summaries of the three case excerpts provided.

### **I. *Strickland v. Washington*, 466 U.S. 668 (1984)**

Defendant in the underlying case sought relief under the Sixth Amendment after receiving three death sentences. Counsel did not introduce character witnesses or present psychiatric evaluation and instead relied on the trial judge's statement that owning up to the crime was admirable. The Defendant received a death sentence.

The Supreme Court determined the two-part test for ineffective assistance of counsel in this case.

1. Trial Counsel's performance was deficient
  - Fell below an objective standard of reasonableness
2. Counsel's deficient performance prejudiced the defense
  - The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

**Petitioners:** Petitioners will try to distinguish the facts of this case from our case and explain how Annie's choices were not as strategic as the counsel in *Strickland*. Petitioners may also argue that the value, or underlying strategy of a choice, is not what is weighed. Rather, courts weigh the presence of strategic choices as compared to inattention or neglect.

**Respondents:** Respondents will argue that the conduct of the attorney in *Strickland* is similar to the conduct of Annie Advocate. The choice to not conduct a psychiatric evaluation or present character evidence is similar to the mitigation choices made by Annie Advocate.

### **II. *Rhoades v. Arave*, 2007 WL 1550441, United States District Court for the District of Idaho (2007)**

The defendant went on a killing spree over a three-week period. After receiving two life sentences the defendant pleaded guilty to a third murder. The attorney admitted that he did not consider looking into the mental health of the defendant because it "did not occur to him."

The court held that the assistance provided was deficient but that there was no prejudice. The mitigation evidence that was introduced described an alcoholic father, frequent arguing between his parents, poverty, and substance abuse. Despite the unprofessional errors by counsel the court found that there was no evidence of the "excruciating" life history required to overturn the sentence and there is "no reasonable probability" that the verdict would have been different with the additional evidence presented.

**Petitioners:** Petitioners will focus on the length of time spent on the mitigation investigation, 20 to 25 hours total, and the weight of the aggravating factors. They will

want to draw an analogy to the first part of the *Strickland* test but not the second part.

**Respondents:** Respondent's will use this case to stress the need to satisfy both parts of the test. Even if counsel's conduct is deficient it does not mean that it is ineffective under the Sixth Amendment. Rhodes emphasizes the need for sufficient mitigation evidence to have possibly presented.

### **III. *Rompilla v. Beard*, 545 U.S. 374 (2005)**

In the underlying case the defendant was convicted of stabbing and burning his victim. After being found guilty, counsel's mitigation evidence consisted solely of his 14 year old son's testimony that he would visit him in prison. The jury sentenced Rompilla to death. Mitigation evidence was uncovered detailing Rompilla's abusive childhood being locked in a cage filled with excrement and physically abused by his father.

The Court held that the counsel provided was ineffective under the Sixth Amendment and reversed the sentence of death. The State was ordered to retry the case or stipulate to a life sentence.

**Petitioners:** Petitioners will draw a comparison between the mitigating factors in *Rompilla* and in our case. Petitioners will argue that the aggravating factors in *Rompilla* are similarly heinous and the defendant was subject to a difficult upbringing that would alter his view of life.

**Respondents:** Respondents will want to make a strong distinction between this case and our case. Respondents will argue that the mitigating circumstances in this case are distinct from ours by their explicit and disturbing nature.

## **Issues of Note**

### **I. No actual innocence claims**

Students have been instructed to not argue actual innocence. Mr. Thomas' guilt in the underlying crime is not in question.

### **II. Use of Fact Pattern**

Students should be encouraged to make creative arguments about the factual nuances of the case, but not to argue that any facts not in the materials exist. Thus, students can interpret factual vagaries, but not add facts.

### Questions for the Petitioner

1. What are the elements of Ineffective assistance of counsel under *Strickland*? Why does this case meet the standard?
2. Is the standard described in *Strickland* detailed enough to be meaningfully applied? Or is it so vague as to be useless?
3. Do you think that Annie Advocate intentionally did a deficient job representing Mr. Thomas? Does it matter if she was intentional or merely negligent?
4. Simply stated, why do you think we should overturn the decision of the lower court?
5. Isn't it possible for Annie Advocate's choices to be seen as a strategic way of dealing with the limited time and support she had going into the sentencing hearing? Would that be allowed under *Strickland*?
6. Explain the facts of *Rompilla v. Beard* and how they relate to your case? Do you believe the aggravating and mitigating circumstances to be similar?
7. Explain the facts of *Rhoades v. Arave* and how they relate to your case? Do you believe the mitigating circumstances to be distinguishable?

### Questions for the Respondent

1. What are the elements of Ineffective assistance of counsel under *Strickland*? Why doesn't this case meet the standard?
2. Is the standard described in *Strickland* detailed enough to be meaningfully applied? Or is it so vague as to be useless?
3. Do you think that Annie Advocate intentionally did a deficient job representing Mr. Thomas? Does it matter if she was intentional or merely negligent?
4. Doesn't it seem fundamentally unfair to sentence a man to death who is undoubtedly mentally ill and unable to obtain his medication?
5. Was it objectively reasonable for Ms. Advocate to wait so long to access the files? To communicate with his old lawyer? To try to meet his wife?
6. Explain the facts of *Rompilla v. Beard* and how they relate to your case? Do you believe the aggravating and mitigating circumstances to be distinguishable?
7. Explain the facts of *Rhoades v. Arave* and how they relate to your case? Do you believe the mitigating circumstances to be similar?