[J-122-2011]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 614 CAP
	:	
Appellee	:	Appeal from the Order entered on July 23, 2010 in the Court of Common Pleas, Criminal Division of Lebanon County at
v.	:	No. CP-38-CR-0000898-1993
	:	
CAROLYN ANN KING,	:	
	:	
Appellant	:	SUBMITTED: November 29, 2011

CONCURRING OPINION

MR. JUSTICE SAYLOR **DECIDED: November 26, 2012**

I wish, unconstrained by majority authorship, to respond to the points raised by the Chief Justice in his concurring opinion.[1]

In the first instance, in terms of the legal analysis of Appellant's attempt to invoke presumed prejudice, there seems to be little if any difference between the majority opinion and the concurrence. Indeed, the only substantive legal difference which I see

[1] Special concurrences such as this are somewhat unusual but not without precedent. See, e.g., Wheeling Steel Corp. v. Glander, 337 U.S. 562, 574-76, 69 S. Ct. 1291, 1298-99 (1949) (Jackson, J., concurring specially) ("It cannot be suggested that in cases where the author is the mere instrument of the Court he must forego expression of his own convictions."); Abbate v. United States, 359 U.S. 187, 196-201, 79 S. Ct. 666, 671-74 (1959) (Brennan, J., concurring specially); Restrepo v. McElroy, 369 F.3d 627, 640-45 (2nd Cir. 2004) (Calabresi, J., concurring); Lyons v City of Xenia, 417 F.3d 565, 580-84 (6th Cir 2005) (Sutton, J., concurring); cf. In re Estate of Sayre, 443 Pa. 548, 551 n.*, 279 A.2d 51, 52 n.2 (1971) (Bell, C.J.) (expressing via footnote a Chief Justice's sentiments contrary to the majority opinion he authored).

between the expressions of the majority and the Chief Justice pertains to the hypothetical circumstance in which a defendant might prove through credited evidence (say, direct testimony from his attorney) that counsel prioritized his own financial interests above the interests of his client and, as a result, rendered deficient stewardship prejudicing the defense. The majority opinion refuses to rule out that a conflict claim might be stated in such a scenario, whereas, the concurrence seems largely to represent the Chief Justice's reaction to such reservation.

From my point of view, in considering matters touching on the funding of indigent defense services, the circumspection reflected in the majority opinion is both appropriate and necessary.[2] Certainly, I agree with several of the Chief Justice's observations – self-evidently, we should not condemn criminal defense attorneys because they may be underpaid or foster a "cynical and unsupportable view of the legal profession." Concurring Opinion, slip op. at 5 (Castille, C.J.). On the other hand, however, where serious deficiencies in the rendition of attorney services are present, we should not enforce guiding presumptions woodenly or in a way which masks actual stewardship failures. Accord Commonwealth v. Jette, ___ Pa. ___, ___, 23 A.3d 1032, 1047 (2011) (Saylor, J., concurring) (commenting that "it remains troubling that courts

[2] As noted, writing from a majority posture – and particularly given the very different sentiments maintained by respected colleagues -- I have tempered the comments considerably as compared with my independent writings. See, e.g., Commonwealth v. Hutchinson, ___ Pa. ___, ___, 25 A.3d 277, 325-26 (2011) (Saylor, J., dissenting) ("I believe that the appropriate way for this Court to address the intractable difficulties which have arisen in the death-penalty arena is to consistently enforce the requirement of an evidentiary hearing where material facts are in issue; to require appropriately developed factual findings and legal conclusions of the PCRA courts; and to apply consistent and fair review criteria on appeal."). It appears, however, that in the Chief Justice's view, such restraint is insufficient. From my own perspective, particularly given my often-repeated position that the Court and the State need to do more to remedy apparent systemic deficiencies in the arena of capital litigation, see, e.g., id., I do not see how more could reasonably be expected of me.

shape the review process based on presumptions and pronouncements that are not empirically verified, while sometimes demonstrating limited sensitivity toward other vital interests at stake in criminal justice").

Like the Chief Justice, I have no wish to condemn anyone. Indeed, I find trial counsel's circumstances in this case to be sympathetic. Having been charged by the trial judge to perform, effectively on a shoestring, a task for which she was plainly unprepared and unqualified, I have no doubt that this lawyer did what she was able to do while also managing her regular practice.[3] Nevertheless, the attorney's interest in evading close scrutiny of her performance -- and, yes, a critique for the sole and directed purpose of determining whether her client deserves a new trial – pales in comparison to Appellant's interest in the affordance of fair trial and penalty proceedings as a prerequisite to the imposition of a death sentence.

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[3] The plight of solo practitioners attempting to manage capital cases should be a subject of careful study. Significantly, one group of capital defense lawyers paid at least a living wage (i.e., certain members of the Philadelphia Defender Association) lays claim to an exceptionally high rate of success in avoiding the imposition of death sentences over the better part of the past two decades. As reflected in the attached appendix, however, the capital defense bar at large does not enjoy a similar rate of success.

I recognize that a mere association of this type -- between better compensation and better outcomes (from a defense point of view at least) -- does not establish an actual cause-and-effect relationship, since there may be other variables at work. At the very least, however, such a stark association raises cause for close study, particularly where there is evidence that indigent defense systems are impaired. See, e.g., REPORT OF THE NATIONAL RIGHT TO COUNSEL COMMITTEE, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (Apr. 2009) (embodying the analysis of a bipartisan committee of independent experts representing all segments of the Nation's justice system identifying systemic deficiencies -- including pervasive underfunding of defense attorney services -- and recommending reform measures); id. at 31 (stating that "it is totally unrealistic to expect that effective representation will be delivered unless systems of public defense are adequately funded").

For such purpose -- and this purpose only -- I observe that trial counsel's performance in this case in no way comports with the Chief Justice's vision of attorney stewardship which is "a credit to the profession as a whole." Concurring Opinion, slip op. at 5. Counsel failed entirely to conduct what any competent attorney should recognize to be an indispensable centerpiece of a capital defense case (particularly where, as here, there is very strong evidence of guilt) – namely, a mitigation investigation. See Commonwealth v. King, No. CP-38-CR-10898-1993, slip op. at 25 (C.P. Lebanon July 23, 2010) ("[T]here was highly compelling mitigation evidence available for presentation to the jury if only counsel had conducted a sentencing phase investigation.").[4] Now, some twenty years after the fact, we can only observe the incalculable resources on the part of the Commonwealth, Appellant's multiple defense attorneys, and the courts which have been expended to reach the present state of no resolution. Presumably, there has been strain, as well, on the emotional reserves of the victim's family. Nevertheless, given trial counsel's gross dereliction, the Commonwealth must begin the penalty process anew or face the difficult decision of determining whether, at this juncture, enough is enough (such that a life sentence would be imposed).

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[4] The attorney's explanation for doing essentially nothing to prepare for the sentencing proceeding is reflected, inter alia, in the following interchange:

> Question: Is it accurate to say that your not knowing that the sentencing phase began immediately after the guilt phase was concluded, was simply a mistake in your understanding of the procedure given that it was a death penalty case?
>
> Answer: Mistake, lack of energy, you can ascribe numerous words to it.

N.T., Nov. 21, 2006, at 111.

No presumption or platitude can sweep aside this attorney's intolerably poor performance or the damage it has caused. Of greatest concern, these sorts of exceptionally costly failures, particularly as manifested across the wider body of cases, diminish the State's credibility in terms of its ability to administer capital punishment and tarnish the justice system, which is an essential component of such administration.

Attached as an appendix is a partial list of cases in which sentencing relief has been granted over the last ten years in the Pennsylvania state courts based on deficient stewardship of capital defense attorneys.[5] Notably, the list would be far longer were it to catalogue the many instances in which severe derelictions have been alleged but the defendant has been denied the opportunity to adduce supporting evidence based on other considerations, such as waiver,[6] or a finding of insufficient prejudice.[7]

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[5] I have made no attempt here to survey the decisions on federal collateral review.

[6] See, e.g., Commonwealth v. Hall, 582 Pa. 526, 551-56, 872 A.2d 1177, 1192-95 (2005) (Saylor, J., dissenting) (commenting on an instance in which waiver was invoked, in part, by a Court majority to justify a PCRA court's decision to summarily deny a claim involving trial counsel's alleged failure to conduct a mitigation investigation).

Of course, the finding of waiver in many of these instances simply reflects another manifestation of attorney dereliction. As I have previously observed in a post-conviction setting:

> [I]n these cases in which the Court is criticizing [counsel] for the inability even to frame a claim in the only established manner in which review can be obtained, we are openly confirming a patent deficiency in such counsel's stewardship. It certainly remains arguable that ineptitude of this sort and magnitude should not redound to the detriment of an indigent petitioner pursuing what is likely to be his single opportunity to secure state post-conviction appellate review of his sentence of death.

(continued…)

Furthermore, in terms of the scope of a more complete listing, in other settings I have discussed the equally troubling questions connected with the performance of capital counsel at the appellate stage. See, e.g., Commonwealth v. Johnson, 604 Pa. 176, 197-98, 985 A.2d 915, 928 (2009) (Saylor, J., concurring) (expressing "continuing concern regarding the many cases in which we are seeing a clear failure, on the part of counsel, to provide professional services necessary to secure appellate review on the merits of a capital defendant's or petitioner's claims); Commonwealth v. Ly, 605 Pa. 261, 262-56, 989 A.2d 2, 2-5 (2010) (Saylor, J., dissenting).

In summary, I share in the Chief Justice's praise and gratitude for pro bono attorneys and attorneys who are able to undertake representation of indigent capital defendants without compromising their practices. Nevertheless, I am unable to agree with the suggestion that the presumption of effectiveness by and large reflects the actual state of capital defense representation in Pennsylvania. I would submit that, in fact, we have seen more than enough instances of deficient stewardship to raise very serious questions concerning the presumption's accuracy. It is my considered position,

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(…continued)
Commonwealth v. Gwynn, 596 Pa. 398, 421 n.2, 943 A.2d 940, 954 n.2 (2008) (Saylor, J., dissenting).

[7] See, e.g., Commonwealth v. Romero, 595 Pa. 275, 312-20, 938 A.2d 362, 384-89 (2007) (plurality, in part) (rejecting an ineffectiveness claim in the circumstances involving a highly limited penalty investigation); Commonwealth v. Brown, 582 Pa. 461, 481, 872 A.2d 1139, 1150-51 (2005) (sustaining summary dismissal of an ineffectiveness claim, despite the trial attorney's attestation that he "was shocked by the jury's guilt-phase verdict and . . . had not done any preparation for the penalty phase of the case").

Parenthetically, my own perspective in each of these cases is reflected in my dissents. See Romero, 595 Pa. at 335-39, 938 A.2d at 398-400 (Saylor, J., dissenting); Brown, 582 Pa. at 516-26, 872 A.2d at 1171-77 (Saylor, J., dissenting).

like that of many others, that a contributing factor may be the pervasive underfunding of indigent defense. See, e.g., supra note 5 (citing REPORT OF THE NATIONAL RIGHT TO COUNSEL COMMITTEE, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (Apr. 2009)). Against such a background, I do not believe that courts can justly foreclose defendants from asserting that inadequate compensation has impacted their counsel's performance.

As a postscript, very recently, this Court exercised its extraordinary jurisdiction to consider a petition challenging Philadelphia's compensation system for counsel representing indigent capital defendants. This Court appointed a special master, who reported his findings that such system is "grossly inadequate," "completely inconsistent with how competent trial lawyers work," "punishes counsel for handling these cases correctly," and "unacceptably increases the risk of ineffective assistance of counsel in individual cases." Report and Recommendations in Commonwealth v. McGarrell, 77 EM 2011, CP-51-CR-0014623-2009 (C.P. Phila. Feb. 21, 2012). While this Court has not yet formally reviewed these findings, they certainly are in tension with the aspirational notions fostered by the Chief Justice's concurrence, as applied in the capital arena, particularly since Philadelphia is far and away the largest contributor to Pennsylvania's death row.

Appendix

Sampling of Capital Cases in which Relief Has Been Granted in the Pennsylvania State Courts

- Commonwealth v. King, ___ Pa. ___, ___ A.3d ___ (2012) (reflecting the Commonwealth's decision to discontinue the appeal from the award of a new penalty hearing, directed on a PCRA court's finding of a failure to investigate and present mitigation evidence)

- Commonwealth v. Keaton, ___ Pa. ___, 45 A.3d 1050, 1091-93 (2012) (new penalty award affirmed, where trial counsel maintained a "myopic focus only on the guilt phase"; failed to obtain life-history and mental-health records or otherwise conduct an adequate mitigation investigation; and ignored the advice of a mental-health expert he had engaged that further mental-health testing was implicated)

- Commonwealth v. Walker, ___ Pa. ___, 36 A.3d 1, 5 (2011) (reflecting an unappealed new penalty hearing award based on ineffectiveness of trial counsel)

- Commonwealth v. Smith, 609 Pa. 605, 621, 17 A.3d 873, 882 (2011) (stipulated penalty relief based on deficient attorney stewardship)

- Commonwealth v. Martin, 607 Pa. 165, 207-08, 5 A.3d 177, 202-03 (2010) (new penalty award affirmed where the counsel's deficient investigation "was the result of lack of attention," and his failure to present mental-health mitigation was "unreasonable as a matter of law")

- Commonwealth v. Smith, 606 Pa. 127, 178, 995 A.2d 1143, 1173 (2010) ("Counsel cannot meet his obligation by relying on 'only rudimentary knowledge of [the defendant's] history from a narrow set of sources,' which is exactly what [the defendant's attorney] did[;] [t]his is the type of case . . . where 'potentially powerful mitigating evidence . . . would have been apparent from documents any reasonable attorney would have obtained'" (citations omitted))

- Commonwealth v. Williams, 602 Pa. 360, 371, 980 A.2d 510, 517 (2009) (reflecting the Commonwealth's eventual concession, some twenty years post-trial, that a new penalty hearing was warranted)

- Commonwealth v. Beasley, 600 Pa. 458, 462-63, 967 A.2d 376, 379 (2009) (reflecting a remand where trial counsel attested that he was not aware that he could adduce life-history and mental-health information in penalty proceedings and that he conducted no investigation along such lines)

• Commonwealth v. Johnson, 600 Pa. 329, 342, 966 A.2d 523, 531 (2009) (reflecting a PCRA court's determination that a trial attorney "completely abrogated his duty to [the defendant]," in a matter remanded for a determination of prejudice)

• Commonwealth v. Collins, 598 Pa. 397, 408, 957 A.2d 237, 243 (2008) (unappealed award of new penalty hearing)

• Commonwealth v. Sattazahn, 597 Pa. 648, 664, 952 A.2d 640, 649 (2008) (new penalty hearing awarded where, as recounted by the PCRA court, trial counsel "failed to adequately investigate substantial mitigating factors, even though the record was replete with 'red flags' of brain damage that indicated the need for neuropsychological evaluations," and "did not conduct a thorough investigation of his client's background" (citation omitted))

• Commonwealth v. Williams, 597 Pa. 109, 127, 950 A.2d 294, 305 (2008) (new penalty award affirmed, where "the omission from consideration by the sentencing jurors of the diagnosis of Axis I major mental-health disorders and recent psychiatric hospitalizations occurred . . . in the absence of a sufficient investigation and without strategic or tactical justification")

• Commonwealth v. Cooper, 596 Pa. 119, 145, 941 A.2d 655, 671 (2007) (Castille, J., concurring) (new penalty hearing due where, in the words of a concurring Justice, trial counsel "pitifully botched" his own misguided attempt to introduce an irrelevancy)

• Commonwealth v. Gorby, 589 Pa. 364, 390-91, 909 A.2d 775, 791 (2006) (denial of new penalty hearing overturned, where trial counsel failed to explore well-travelled avenues of mitigation investigation, presented a "remarkably weak" penalty defense, and failed even to secure a jury instruction by which jurors could give effect to the only category of mitigation evidence which he did present)

• Commonwealth v. Sneed, 587 Pa. 318, 345, 899 A.2d 1067, 1083 (2006) (new penalty award sustained where counsel "failed to conduct even a cursory investigation into [the defendant's] background")

• Commonwealth v. May, 587 Pa. 184, 213, 898 A.2d 559, 576 (2006) (OAJC) (denial of new penalty hearing overturned, where trial counsel failed to adequately address unreasonable trial-court refusal to admit relevant mitigation)

• Commonwealth v. Collins, 585 Pa. 45, 75-76, 888 A.2d 564, 582 (2005) (new penalty hearing award sustained where trial counsel failed to obtain life-history records or otherwise conduct a reasonable investigation)

- Commonwealth v. Zook, 585 Pa. 11, 38, 887 A.2d 1218, 1235 (2005) (new penalty hearing required where inadequate penalty presentation "simply was a result of inattention to the mitigating evidence that was known, or should have been known, to counsel")

- Commonwealth v. Jones, 583 Pa. 130, 135, 876 A.2d 380, 384 (2005) (reflecting an unchallenged award of penalty relief where "trial counsel failed to investigate and develop mitigating evidence")

- Commonwealth v. Gribble, 580 Pa. 647, 684, 863 A.2d 455, 477 (2004) (reflecting vacation of a PCRA court's summary award of a new penalty hearing and remand; however, new penalty proceeding awarded following a hearing as recounted in Brief for Appellee in Commonwealth v. Gribble, No. 1042 EDA 2009, 2010 WL 4338675 (June 21, 2010), at *8).

- Commonwealth v. Malloy, 579 Pa. 425, 456, 856 A.2d 767, 786 (2004) (new penalty hearing awarded where "[i]t is apparent from this record that counsel undertook little or no affirmative effort aimed at the penalty phase of trial")

- Commonwealth v. Harris, 578 Pa. 377, 383 n.6 , 852 A.2d 1168, 1171 n.6 (2004) (new penalty hearing awarded by a PCRA court based on deficient stewardship, which the Commonwealth did not appeal)

- Commonwealth v. Brooks, 576 Pa. 332, 337 839 A.2d 245, 249 (2003) (new trial awarded, where the defense attorney "never once met with [his client] before his trial on capital charges")

- Commonwealth v. Chambers, 570 Pa. 3, 22, 807 A.2d 872, 883 (2002) (new penalty hearing where trial counsel unreasonably failed to object to confusing jury instruction concerning mitigating circumstances)

- Commonwealth v. O'Donnell, 559 Pa. 320, 347 n.13, 740 A.2d 198, 214 n.13 (2002) (new penalty hearing granted on other grounds; however, the majority expressed "serious doubts regarding counsel's effectiveness," where the attorney "presented virtually no evidence of [the defendant's] upbringing or background" and "did not call a single witness on [the defendant's] behalf")