

**IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA, : No. 77 EM 2011

Respondent

v.

SHIRVIN MCGARRELL,

Petitioner

COMMONWEALTH OF PENNSYLVANIA, : 78 EM 2011

v.

DARRYL YOUNG,

Petitioner

COMMONWEALTH OF PENNSYLVANIA, : 79 EM 2011

Respondent

v.

HERMAN BURTON,

Petitioner

DISSENTING STATEMENT

MR. JUSTICE SAYLOR

During my tenure on the Court I have been dismayed by the deficient performance of defense counsel in numerous Pennsylvania death-penalty cases.

Recently, I collected some observations in my special concurrence in Commonwealth v. King, 57 A.3d 607, 633-38 (Pa. 2012) (Saylor, J., concurring specially), including a sampling of instances of substandard lawyering and remarks about the present litigation, which I incorporate by reference here.

Significantly, Pennsylvania has long been on notice that leaders of national, state, and local bar associations do not believe that capital litigation is being conducted fairly and evenhandedly in the Commonwealth, not the least because of the ad hoc fashion by which indigent defense services are funded from the local government level.¹ Such concerns are consistent with vast compilations of literature containing evidence of long-standing, chronic underfunding of public defense systems in the United States. See generally Nat'l Right to Counsel Comm., Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel, CONST. PROJECT 2-3 (2009).² Nevertheless, this Court seems unable to attend to the apparent systemic difficulties in individual capital cases considered on appeal, as, doctrinally, the adjudicatory focus is

¹ See, e.g., ABA, Evaluating Fairness and Accuracy In State Death Penalty Systems: The Pennsylvania Death Penalty Assessment Report iii (Oct. 2007) ("The Pennsylvania Death Penalty Assessment Team has identified a number of areas in which Pennsylvania's death penalty system falters in affording each capital defendant fair and accurate procedures," including in the failure to protect against poor defense lawyering[.]").

² Petitioners also cite evidence suggesting there is large disparity in terms of disposition results obtained on behalf of homicide defendants whose legal interests are advanced by the salaried attorneys of the Defender Association of Philadelphia and those represented by court-appointed lawyers subject to modified flat-fee arrangements. See James M. Anderson & Paul Heaton, How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes, 122 YALE L.J. 154, 159-60 (2012). Notably, the statistically better outcomes are attained by the Defender Association, which, in capital litigation, adheres to the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. Reprinted in 31 HOFSTRA L. REV. 913 (2003).

on the facts at hand relative to an array of widely disparate claims of deficient stewardship.

Thus, the present litigation offers an essential opportunity for this Court to address a systemic challenge amidst much evidence that Pennsylvania's capital punishment regime is in disrepair. See King, 57 A.3d 607, 633-38 (Saylor, J., concurring specially). While the local government in Philadelphia has undertaken to implement some modest reform measures relative to legal-services funding in the death-penalty arena, Petitioners reasonably question the adequacy of such changes, while pointing to other jurisdictions in which the courts have assumed a more active role. See, e.g., State v. Young, 172 P.3d 138, 140 (N.M. 2007) (collecting cases from courts exercising "inherent authority to ensure that indigent defendants receive constitutionally adequate assistance of counsel.").

In summary, I believe that Petitioners' challenge to the funding of legal services for indigent capital defendants in the First Judicial District presents an opportune vehicle for deeper, developed review and explication by this Court about fundamental fairness in the highest-stakes criminal prosecutions. Ideally, the Court's further consideration might also serve as a springboard to a collaborative conversation among the judicial, legislative, and executive branches to institutionalize statewide remedies and facilitate ongoing improvements.³

³ The importance of legislative involvement cannot be overstated. State-level funding for indigent defense services -- presently lacking in Pennsylvania and only one other state in the nation -- is at the core of nearly every reform recommendation. See, e.g., Nat'l Right to Counsel Comm., Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel, CONST. PROJECT 11-12, 54. While certainly, governments are currently operating under financial pressures, the Legislature has made the decision to authorize capital punishment in the Commonwealth. Accordingly, it and subordinate instrumentalities must ensure adequate funding to meet all attendant constitutional mandates, including the requirement for the Commonwealth to provide effective attorney stewardship for indigent defendants.

In light of the above, I am unable to support either the majority's decision to dismiss the petition summarily or its pronouncement that "the continued oversight of this Court is no longer required."

Madame Justice Todd and Mr. Justice McCaffery join this dissenting statement.