[J-49-2003]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 347 CAP
	:	
Appellee	:	
	:	Appeal from the Order entered on 6/26/01
	:	in the Court of Common Pleas, Criminal
v.	:	Division, Philadelphia County, dismissing
	:	PCRA relief at No. 1037 1/1 December
	:	Term 1993
ANTHONY WASHINGTON,	:	
	:	
Appellant	:	SUBMITTED: January 23, 2003

DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: July 18, 2007**

I depart from the majority on several points.

First, although the majority deems Claim IA (pertaining to the Teagle affidavit) waived based upon a technical defect in Appellant's supplemental PCRA pleading, the PCRA court's pre-dismissal notice did not identify this defect as a basis for dismissal.[1] Indeed, the court's notice of its intent to dismiss consisted of a form document with an 'X' marked on the line entitled, "The issues raised in the PCRA Petition filed by your

[1] At Appellant's trial, the identity of the shooter was a contested issue. Consistent with the Commonwealth's position that Appellant was the shooter, Teagle admitted to being present at the scene, but denied being the shooter. Teagle was ultimately convicted of second-degree murder and sentenced to life imprisonment, and Appellant was convicted of first-degree murder and sentenced to death. Teagle now claims that he, and not Appellant, was the shooter, and that he falsely testified otherwise in order to avoid the death penalty. See Affidavit/Declaration of Derrick Teagle, at 1 ¶2.

attorney are without merit." In my view, this did not constitute adequate pre-dismissal notice so as to provide a realistic opportunity for Appellant to amend his petition to come into conformance with the applicable rules. See Pa.R.Crim.P. 909(b)(2).[2] It is also notable that the pre-dismissal notice is dated February 5, 2001, whereas the supplemental pleading which contained the Teagle affidavit was filed three weeks later. Additionally, although, in its opinion, the PCRA court acknowledges the filing of the supplemental petition, see PCRA Court op. at 2, it makes no mention of any of the affidavits filed with the supplement -- including the Teagle affidavit -- and its only reference to after-discovered evidence pertains to police records made at the time of the underlying offenses. See id. at 14. Thus, it is unclear whether the PCRA court treated the supplement as an amendment to the original petition or in some other manner. For these reasons, rather than disposing of this claim on the grounds

[2] See, e.g., Commonwealth v. D'Amato, 579 Pa. 490, 522 n.19, 856 A.2d 806, 825 n.19 (2004) ("The PCRA court did note that all of the purported after discovered evidence was 'improperly presented in the form of a Response, rather than an amendment.' However, this technical defect cannot be controlling here because the pre-dismissal notice did not identify it as a basis for the denial of relief, and hence, Appellant was not afforded an opportunity to cure it." (citation omitted)); Commonwealth v. Santiago, 579 Pa. 46, 70 n.14, 855 A.2d 682, 696 n.14 (2004) (observing that a remand to the PCRA court may be necessary absent adequate pre-dismissal notice); Commonwealth v. Rush, 576 Pa. 3, 14-15, 838 A.2d 651, 658 (2003) (explaining that this Court's criminal procedural rules require PCRA courts to provide a capital defendant with specific pre-dismissal notice of its reasons for dismissal so that the defendant has a reasonable opportunity to amend defects in the petition); Commonwealth v. Brown, 574 Pa. 231, 233, 830 A.2d 536, 537 (2003) (per curiam) (vacating and remanding to the PCRA court, in part, due to inadequate pre-dismissal notice, the sufficiency of which is an "essential predicate for appellate review of the post-conviction proceedings by this Court"); Commonwealth v. Wharton, 571 Pa. 85, 107, 811 A.2d 978, 991 (2002) (Saylor, J., concurring) (highlighting the salutary effect of the rule requiring adequate pre-disissal notice in terms of timely exposing ineffective assistance of PCRA counsel in the framing of post-conviction claims, thereby "providing some reasonable assurance that the single opportunity for review left available to a post-conviction petitioner in the courts of this Commonwealth may be a meaningful one").

articulated by the majority, I would remand with instructions to clarify whether the supplemental pleading was treated as an amendment to the timely PCRA petition, and if so, to provide notice with sufficient specificity to allow counsel to cure any technical deficiencies. If such cure is effected, then, of course, it is the obligation of the PCRA court, in the first instance, to evaluate the credibility of the Teagle evidence and its significance within the context of the trial record as a whole. See D'Amato, 579 Pa. at 522-23, 856 A.2d at 825-26; Commonwealth v. Williams, 557 Pa. 207, 233, 732 A.2d 1167, 1181 (1999).

I also have reservations concerning the majority's handling of Claim IB, concerning Martha Harrington's recantation affidavit. The majority notes that Appellant first argues that trial counsel was ineffective for not uncovering Ms. Harrington's alleged deception; it then proceeds to reject his second theory -- that the affidavit constitutes after-discovered evidence -- on the sole basis that, by arguing ineffectiveness, Appellant has already effectively conceded that Ms. Harrington's truthful testimony would have been discovered by the exercise of reasonable diligence. See Majority Opinion, slip op. at 12. It is relevant, however, that Appellant frames his ineffectiveness and after-discovered evidence theories in the alternative, see Brief for Appellant at 25 ("Alternatively, Ms. Harrington's admissions constitute newly discovered evidence . . .."), a widely accepted litigation technique. These claims should therefore be considered separately. See generally Prewitt v. United States Postal Service, 662 F.2d 292, 310 n.25 (5th Cir. 1981) (recognizing the acceptability of raising two mutually inconsistent legal theories in the alternative); Pershing Park Villas Homeowners Ass'n v. United Pacific Ins. Co., 219 F.3d 895, 905 (9th Cir. 2000) (same); Shearson Lehman Bros. v. Brady, 738 F. Supp. 1490, 1494 (D. Mass. 1991) (same); United States v. Melendez, 70 Fed. R. Evid. Serv. 237, 2006 WL 1379624 *11 (S.D.N.Y. 2006) ("[A] fallback argument

or argument in the alternative does not require a concession, and could be presented, lawfully and without logical contradiction, while simultaneously pressing an argument for complete acquittal.").

As a separate matter, I would also specifically disapprove the prosecutor's remarks concerning the burden of proof in capital sentencing, see Majority Opinion, slip op. at 36, because I do not believe that they accurately reflect the Commonwealth's and the defendant's respective burdens.[3]

Finally, I would expressly require a hearing concerning the derivative ineffectiveness claim relating to trial counsel's failure to develop mental-health and life-history mitigation at trial. As to the mental-health aspect, the majority faults Dr. Barabash's report because she "does not state that she has any knowledge of Appellant's mental health at the time of the offense." Majority Opinion, slip op. at 41. The entire report, however, is obviously a forensic one derived from Appellant's life history before his capital crime, culminating in the conclusion that the various mental impairments described "constitute an extreme mental and emotional disturbance" and

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[3] For one thing, contrary to the prosecutor's representation, it simply is not true that the defendant has any burden of proof unless the Commonwealth first establishes at least one aggravating circumstance beyond a reasonable doubt. Additionally, the prosecutor misstated the jury's task by indicating that it must find the mitigating circumstances to "outweigh the aggravating circumstances" to impose a life sentence. To the contrary, if even one juror deems the mitigating and aggravating factors to be in equipoise, the sentence must be life. See 42 Pa.C.S. §9711(c)(iv).

Along these lines, I am also more troubled than the majority by the prosecution's argument to the jurors that they should find no mitigation, and hence impose the death penalty, in order to "make [their] job easier." See Majority Opinion, slip op. at 37. The jury must, of course, follow the law in determining whether to sentence a defendant to death, independent of considerations such as whether ignoring mitigating evidence might be an "easier" way to complete its task. I would require the PCRA court in the first instance to assess the effect of these improper statements in disposing of Appellant's layered ineffectiveness claim.

"substantially impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Psychological Evaluation, at 5. Particularly as the only relevance of these conclusions would be to the mitigating circumstances concerning a defendant's mental condition and/or state at the time of a capital offense, I do not see how the report can be fairly read as speaking to anything other than just that. Further, as highlighted in the amended PCRA petition, it appears that certain records that may have been reasonably available to trial counsel indicated of Appellant that:

> There is ego impairment in terms of concreteness of thinking, excessive suspiciousness, and an inability to relate well to other people. I am diagnosing him with a Mixed Character Disorder with Schizoid elements and a history of drug abuse.

Mental Health Evaluation dated Oct. 30, 1990, at 2; see Amended Petition at 50. Given its potential significance in a capital case,[4] this seems to me to be enough to put counsel on inquiry notice concerning potential mental health mitigation evidence that would warrant a mental health examination. Further, I do not believe that it is the defendant's burden in every case to present an affidavit from his trial counsel discussing his performance to merit an evidentiary hearing, as, quite obviously, where counsel has not performed adequately, he may not be willing to cooperate. Finally, I disagree with

[4] As I have previously noted, there is fairly widespread consensus that the sort of mental-health and explanatory-type life-history mitigation evidence presently proffered by Appellant can serve as effective mitigation. See generally Wiggins v. Smith, 539 U.S. 510, 534-35, 123 S. Ct. 2527, 2542 (2003); Williams v. Taylor, 529 U.S. 362, 396, 120 S. Ct. 1495, 1514-15 (2000); Allen v. Woodford, 366 F.3d 823, 850-51 (9th Cir. 2004) ("Defense counsel's use of mitigation evidence to complete, deepen, or contextualize the picture of the defendant presented by the prosecution can be crucial[.]"); People v. Coleman, 660 N.E.2d 919, 934 (Ill. 1995) ("We acknowledge the critical importance of a defendant's background and mental health to the sentencing decision.").

the majority that an absence of self-reporting on the part of a criminal defendant of mental health deficiencies should obviate an investigation that is otherwise called for by information of which counsel should be aware. See Majority Opinion, slip op. at 42. Capital counsel has the obligation to pursue all reasonably available avenues of developing mitigation evidence. Commonwealth v. Gorby, 587 Pa. 417, 443, 909 A.2d 775, 790 (2006) (citing Wiggins v. Smith, 539 U.S. 510, 521, 123 S. Ct. 2527, 2535 (2003); Williams v. Taylor, 529 U.S. 362, 396, 120 S. Ct. 1495, 1515 (2000)).

As to the life-history aspect, the weighing decision in a capital case by definition involves matters of degree, see Commonwealth v. Brown, 538 Pa. 410, 429, 648 A.2d 1177, 1186 (1994), and although life-history mitigation was introduced at Appellant's sentencing hearing, his post-conviction proffer contains a good deal more information. Particularly in light of the fact that the mental-health proffer expressly relates the life-history mitigation to specific mitigating factors, I believe that the post-conviction court should have entertained this evidence as well and made the requisite factual findings and legal conclusions concerning its impact. Although the PCRA court repeatedly stated that these proofs would not have changed the outcome of the trial, its findings in this regard are in the context of an undeveloped record and are set forth in a conclusory fashion with little or no supporting analysis. See Commonwealth v. Washington, Nos. 1037-1055 (PCRA), slip op. at 13 & n.7, 16 (C.P. Phila., Oct. 24, 2001).

Madame Justice Baldwin joins this dissenting opinion.