[J-54-2000]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 180 CAP
	:	
Appellee	:	
	:	Appeal from the Order entered on
	:	February 28, 1997, in the Court of
v.	:	Common Pleas of Allegheny County,
	:	Criminal Division at CC8504383 & CC
	:	8504687
SALVADOR CARLOS SANTIAGO,	:	
	:	
Appellant	:	SUBMITTED: February 7, 2000

CONCURRING OPINION

MR. JUSTICE SAYLOR **DECIDED: August 17, 2004**

I concur in the result and write to make the following observations.

First, I am able to join the lead opinion's affirmation of the PCRA court's retrospective competency assessment because Appellant has not demonstrated that the trial court improperly failed to make a determination of his competency in the course of the proceedings on his second trial. Although certainly there was information before the trial court implicating substantial mental infirmity on Appellant's part (schizophrenia), thus bringing competency into question, Appellant had been deemed competent upon hearing during the course of his first trial; Appellant did not seek a competency hearing in his second trial; and there appears to be no indicia of record demonstrating that the judge presiding at the second trial should have discerned a change in Appellant's mental condition. In these circumstances, I agree with the lead that the burden of proof was properly placed upon Appellant in the post-conviction proceedings concerning the

retrospective competency assessment. Nevertheless, I would also note that in circumstances in which there was in fact an unjustified failure on the part of the trial court to make a contemporaneous determination of competency, a substantial argument can be made that the burden in connection with a retrospective competency assessment is more appropriately allocated to the government. See James v. Singletary, 957 F.2d 1562, 1571 (11th Cir. 1992) (citing Pate v. Robinson, 383 U.S. 375, 86 S. Ct. 836 (1966)). I would therefore phrase the guiding standards to leave open this possibility.

Second, I disagree with the lead opinion's categorical statement to the effect that "[d]eclining to pursue a defense which has proven unsuccessful at an earlier trial is eminently reasonable." Opinion Announcing the Judgment of the Court, slip op. at 14. In my view, the reasonableness of such an approach depends integrally on the quality of the defense measured against that of available alternatives.

Finally, I view as a closer question, than does the lead, the issue of whether Appellant was entitled to a hearing concerning his allegations of ineffectiveness of penalty-phase counsel in failing to present life-history mitigation evidence. In this regard, I read the United States Supreme Court's recent decision in Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527 (2003), as underscoring the potential import of life-history mitigation in capital sentencing determinations. See, e.g., id. at ___, 123 S. Ct. at 2542. On review of the affidavits submitted with Appellant's post-conviction petition, however, I ultimately agree with the PCRA court's apparent determination that Appellant failed to make a sufficient proffer of specific, life-history-type mitigation that, if believed, would undermine confidence in the jurors' weighing of aggravating versus mitigating

circumstances in their selection determinations or, more generally, the reliability of the judgment of sentence.[1]

[1] In terms of detail, the affidavits submitted by professionals offered little more than the same types of generalized references to Appellant's life history as were alluded to in the expert testimony presented at the penalty phase of trial. Moreover, no fact-witness affidavits were tendered with the post-conviction submission to develop the asserted neglect and abuse (principally, the fact affiants attested to unusual behaviors on the part of Appellant which reflected his mental illness, which, as the lead opinion notes, was developed as of record in the penalty phase). It is also noteworthy that the allusions that were made at the penalty phase to life-history mitigation had mixed implications, since a defense expert held the view that Appellant had, at least at one point, sought to rely on his background manipulatively. See N.T., Sept. 8, 1992, at 332-33.