[J-55-2014][M.O. – Baer, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 684 CAP
	:	
Appellee	:	Appeal from the Order entered on
	:	8/5/13 in the Court of Common Pleas,
v.	:	Criminal Division of Berks County at No.
	:	CP-06-CR-0004453-2006
CLETUS C. RIVERA,	:	
	:	
Appellant	:	SUBMITTED: May 14, 2014

DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: December 29, 2014**

For purpose of the appellate review of the summary dismissal of Appellant's PCRA petition, we are required to accept as true, inter alia, that: 1) had penalty counsel adequately investigated and prepared for Appellant's sentencing hearing, at least one additional specific mitigating circumstance -- influence of extreme mental or emotional disturbance, 42 Pa.C.S. §9711(e)(2), supported by particular mental-health diagnoses -- would have been developed on the record and put before the sentencing jury, see Appendix to Amended Petition, Volume I, at A18 (report of Neil Blumberg, M.D., attesting to satisfaction of the mitigating circumstances found at 42 Pa.C.S. §9711(e)(2) and (3)); id. at 151 (declaration of Allan M. Tepper, Psy.D., opining as to the (e)(2) mitigator)); 2) penalty counsel's pre-trial communications with and submissions of information to the defense mental-health expert, Allan M. Tepper, Psy.D., were sporadic, disorganized, and largely belated, id. at A143-151 (declaration of Dr. Tepper); 3) Dr. Tepper requested from counsel, but did not receive, multiple sets of medical

records pertaining to Appellant which were necessary to his formulation of an opinion relative to the (e)(2) mitigator, see id. at A144; and 4) penalty counsel presented a substantially incomplete and underdeveloped case of life-history mitigation to the sentencing jury, see, e.g., id. at A153-187.

Consistent with the above picture of poor stewardship on the part of Appellant's penalty counsel reflected on the face of the written submissions, at the actual penalty hearing, the attorney said only the following to the jury in his closing remarks, in terms of a substantive discussion of mitigating evidence:

> The [mitigator] we allege is age. That's undisputed. He's 24 years old. You can give what weight you want to that.
>
> . . . In an effort to [also] establish [catch-all] mitigating circumstances, . . . you heard from [Appellant's] mother, Gloria Smith. You also heard from Maribelle Rivera, his paternal aunt, and you heard from Dr. Tepper.
>
> I'm not going to bother rehashing what mom and Aunt Maribelle testified to. Suffice it to say that [the prosecutor] called it dysfunctional in the least. I'm not suggesting that a dysfunctional household requires you to grow up and kill a police officer when you are older. But you can't ignore the impact that his upbringing had on Mr. Rivera.

N.T., Aug. 13, 2008, at 132. From my point of view, it is significant that the limited information which actually was presented to the jury was in no fashion meaningfully contextualized for the jury in the advocacy addressing the jurors' individualized assessment of Appellant's moral culpability in their selection between life imprisonment and death. Cf. Williams v. Taylor, 529 U.S. 362, 415, 120 S. Ct. 1495, 1525 (2000) (O'Connor, J., concurring) ("The consequence of counsel's failure to conduct the requisite, diligent investigation into his client's troubling background and unique personal circumstances manifested itself during his generic, unapologetic closing

argument, which provided the jury with no reasons to spare petitioner's life."). See generally Penry v. Lynaugh, 492 U.S. 302, 319, 109 S. Ct. 2934, 2947 (1969) (O'Connor, J., concurring) ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." (quotation omitted)); Commonwealth v. Daniels, ___ Pa. ___, ___ n.1, ___ A.3d ___, ___ n.1, 2014 WL 5505024, at *46 n.1 (2014) (Saylor, J., concurring) (discussing the effective presentation and use of life-history mitigation in terms of the well-known impact of childhood trauma and neglect on personality, cognition, reasoning, judgment, and control of impulses). Certainly, there is no evidence on the written submissions of any strategic judgment at work to support the above sort of truncated argument, reflecting a failure, on the part of a capital defense attorney, to offer any kind of a developed case for a life sentence.

In a series of capital cases, I have pointed out a pattern of gross underrepresentation we have seen in the Pennsylvania death-penalty cases. See, e.g., Commonwealth v. King, 618 Pa. 405, 448-57, 57 A.3d 607, 633-38 (2012) (Saylor, J., concurring specially); Commonwealth v. Sepulveda, 618 Pa. 262, 339, 55 A.3d 1108, 1154 (2012) (Saylor, J., concurring) ("I maintain grave concerns with the quality of the stewardship we have seen in a number of the capital post-conviction cases, including the present one."). The impressions created by the post-conviction submissions and upon a review of the penalty-hearing transcript are consistent with this pattern. See Commonwealth v. Hughes, 581 Pa. 274, 363, 865 A.2d 761, 815 (2004) ("[T]he penalty-phase determination [in a capital case] is a qualitative one, in which the weight and detail of a particular presentation is likely to impact upon the deliberative process."

(citation omitted)). Moreover, I have otherwise noted the inconsistent fashion in which some post-conviction courts afford evidentiary hearing and others decide cases summarily. See, e.g., Commonwealth v. Roney, ___ Pa. ___, ___ & n.4, 79 A.3d 595, 648 & n.4 (2013) (Saylor, J., dissenting) (citing Commonwealth v. Simpson, 620 Pa. 60, 115, 66 A.3d 253, 286 (2013) (Saylor, J., dissenting) ("I dissent in favor of requiring reasonable compliance, in our post-conviction courts, with the rules and principles which are supposed to govern their review.")).[1]

I incorporate such comments here by reference in further support of my position that, in various material respects, Appellant's petition should be addressed on a developed evidentiary record, consistent with applicable protocols and fundamental fairness. See Pa.R.Crim.P. 909(B).[2] I also believe that it is important to bear in mind

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[1] See also Commonwealth v. Fears, ___ Pa. ___, ___, 86 A.3d 795, 829 (2014) (Saylor, J., dissenting) ("[T]he matter should be addressed on a developed post-conviction record, with [the a]ppellant being afforded the single post-conviction hearing to which he is entitled."); Commonwealth v. Sneed, 616 Pa. 1, 38, 45 A.3d 1096, 1118 (2012) (Saylor, J., dissenting) ("Given the extent of the patent ineffectiveness we have seen in a fair number of these cases, including this one relative to the penalty phase at least, I maintain that such claims should be decided on a reasonably developed record." (citation omitted)); Commonwealth v. Keaton, 615 Pa. 675, 750-51, 45 A.3d 1050, 1095 (2012) (Saylor, J., concurring and dissenting) ("I continue to believe that the absence of an adequate factual foundation for consideration of capital post-conviction claims encourages unwarranted analytical shortcuts in the appellate review."); Commonwealth v. Brown, 582 Pa. 461, 524, 872 A.2d 1139, 1176 (2005) (Saylor, J., dissenting) ("It remains my position that, in circumstances (such as here) in which affidavits, declarations, or similar evidentiary proffers are presented to a PCRA court which, if believed, would bring the reliability of the death verdict into legitimate question, a post-conviction hearing and associated fact-finding are required."); Commonwealth v. Hall, 582 Pa. 526, 551-56, 872 A.2d 1177, 1192-95 (2005) (Saylor, J., dissenting).

[2] I also reiterate, however, that I continue support judicious control, by our common pleas courts, of such hearings. See Commonwealth v. Birdsong, 611 Pa. 203, 269, 24 A.3d 319, 358 (2011) (Saylor, J., dissenting) (explaining that "[a]ppropriate time limitations may be set on presentations; irrelevant matters certainly may be excluded; reasonable interjections may be warranted; and the presumption in favor of the validity (…continued)

that the prejudice assessment in a capital case is to be made in terms of whether there is a reasonable probability that Appellant's entire mitigation presentation on post-conviction review (to the extent that aspects would not be rejected on credibility grounds on a developed evidentiary record) may have made a difference to at least one of twelve jurors in his or her individualized weighing of aggravating versus mitigating circumstances. See Wiggins v. Smith, 539 U.S. 510, 537, 123 S. Ct. 2527, 2543 (2003); Commonwealth v. Malloy, 579 Pa. 425, 462, 856 A.2d 767, 789 (2004); cf. Porter v. McCollum, 558 U.S. 30, 44, 130 S. Ct. 447, 455-56 (2009) (per curiam) ("We do not require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.'" (citation omitted; alteration in original)). Previously, I have spoken to the circumspection which should attend such an inquiry, particularly given the degree of deficient stewardship we have seen in many of these cases in Pennsylvania. See Commonwealth v. Koehler, 614 Pa. 159, 227-28, 36 A.3d 121, 162 (2012) (Saylor, J., concurring).

(continued…)
of a judgment of sentence is to be enforced"). My objection is to the obviation of such hearings where they are warranted on the face of the written submissions.