[J-83A&B-2013]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	Nos. 567 & 568 CAP
	:	
Appellee	:	Appeal from the Judgment of Sentence
	:	entered on 2/1/07 in the Court of Common
	:	Pleas, Criminal Division of Blair County at
v.	:	No. CP-07-CR-0002273-2005 (Post
	:	Sentence Motions denied on 3/19/08)
	:	
MIGUEL A. PADILLA,	:	
	:	ARGUED: April 14, 2010
Appellant	:	RESUBMITTED: September 20, 2013

CONCURRING AND DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: October 31, 2013**

I concur in the result as to the denial of guilt-phase relief but do not support affirmance of the penalty verdict.

It is a matter of record that an arbitrary factor was interjected directly into the weighing process performed by Appellant's capital sentencing jury. In this regard, as the majority opinion aptly discusses, the stipulation serving as the basis for the in-perpetration-of-a-felony aggravator was self-provingly erroneous. See Majority Opinion, slip op. at 52-53 (explaining that the sole predicate offense advanced by the Commonwealth to prove the in-perpetration-of-a-felony aggravator simply was not a felony). Moreover, under the capital sentencing regime, this Court is tasked with undertaking an independent review of death penalty verdicts for arbitrariness. See 42 Pa.C.S. §9711(h)(3)(i).

The majority relies on Commonwealth v. Chambers, 602 Pa. 224, 980 A.2d 35 (2009), as a basis for withholding statutory arbitrariness review concerning the improper aggravator. See Majority Opinion, slip op. at 55-56. In my view, however, Chambers is distinguishable, since it does not involve the injection by the Commonwealth of an indisputably flawed aggravator directly into the weighing determination undergirding a death verdict. See Chambers, 602 Pa. at 259-65, 980 A.2d at 55-59. Instead, I believe this case bears closer resemblance to a decision cited by Appellant, Commonwealth v. Boczkowski, 577 Pa. 421, 846 A.2d 75 (2004), where the Court recognized the unacceptable arbitrariness in a sentencing jury's consideration of an improper aggravator and awarded relief consistent with Section 9711(h)(3). See id. at 465-67 & n.25, 846 A.2d at & 101-02 & n.25.

Thus, while Chambers reflects the Court's practice to defer to post-conviction review the wider array of claims interwoven with deficient stewardship, the Legislature has required us to independently review death penalty verdicts for arbitrariness, see 42 Pa.C.S. §9711(h)(3), and I do not regard the deferral practice as entirely supplanting such statutory review responsibility.

I also do not agree with the majority that a "sufficiency" analysis tied to a legally erroneous stipulation, see Majority Opinion, slip op. at 54, can serve to shore up an improper aggravator when assessing the present validity of the weighing process.[1] Finally, I am not persuaded by the Commonwealth's argument that the ordinary

[1] The application of a sufficiency analysis resting upon the face of the stipulation is confusing in the first instance, since stipulations in the nature of judicial admissions are not evidence in and of themselves, but, rather, serve to dispense with the need for formal proof of facts. See Bartholomew v. State Ethics Comm'n, 795 A.2d 1073, 1078 (Pa. Cmwlth. 2002). In any event, I cannot agree with the majority that a stipulation which is legally erroneous on its face "constituted sufficient support for the jury's finding of [the] aggravating factor 9711(d)(6)." Majority Opinion, slip op. at 54.

consequence attending its advancement of an improper aggravator should not ensue here, based on what it might have put before the sentencing jury, had it realized its mistake at an earlier time. In this regard, I simply do not believe the capital sentencing process is amenable to such revisionism. Accord Boczkowski, 577 Pa. at 466, 846 A.2d at 102 (rejecting "after-the-fact-explanations" in an analogous context). [2]

In summary, although there certainly are grounds for questioning whether deficient stewardship on the part of Appellant's counsel may have accompanied the unfortunate circumstances at hand, the Commonwealth should be held, at the very least, to be the master of its own claims of aggravation in pursuing the death penalty. Here, it bears responsibility for the advancement of a self-provingly erroneous aggravator. I believe this forecloses the finding, necessary to affirmance, that the death verdict is not the product of an arbitrary factor. Accord Commonwealth v. Williams, 539 Pa. 61, 80-81, 650 A.2d 420, 430 (2000) ("[W]e are not in a position to determine whether the lack of the aggravating circumstance struck down would have changed the jury's determination, and, pursuant to 42 Pa.C.S. §9711(h)(4), we are required to vacate the penalty of death and remand for a new sentencing hearing.").

Madame Justice Todd joins this concurring and dissenting opinion.

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[2] It bears mention that the in-perpetration-of-a-felony aggravating circumstance has been profoundly broadened from its original formulation centered on six specific felonies (robbery, rape, deviate intercourse by force or threat of force, arson, burglary, and kidnapping). See generally Commonwealth v. Robinson, 583 Pa. 358, 392-99, 877 A.2d 433, 453-58 (2005) (Saylor, J., dissenting) (discussing the widening of the Section 9711(d)(6) aggravator). At the very least, the Commonwealth should be held to a standard of advancing an actual felony within the now expansive range of available ones.