[J-121-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 400 CAP
	:	
Appellee	:	
	:	Appeal from the Order entered on
	:	12/26/02 in the Court of Common Pleas of
v.	:	Philadelphia County, Criminal Division,
	:	dismissing PCRA relief at Nos. 1841-1848
	:	May term 1994
SAMUEL CARSON,	:	
	:	
Appellant	:	SUBMITTED: May 5, 2004

CONCURRING AND DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: December 27, 2006**

I join the majority in remanding for a post-conviction evidentiary hearing concerning the sufficiency of trial counsel's stewardship connected with the presentation of mitigation circumstances in the penalty phase of Appellant's trial, but I would broaden this remand to include at least some ineffectiveness claims arising from the guilt phase of trial. Notably, Appellant's post-conviction evidentiary proffer includes a declaration from his trial counsel indicating that counsel failed to attempt to locate a material witness and to pursue available avenues for impeachment of the testimony of critical Commonwealth witnesses. In his declaration, counsel further indicates that he had no strategic or tactical reasons for such failures. In light of such a proffer, it is my position that it is appropriate for the PCRA court, in the first instance, to hear the relevant

testimony and issue appropriate findings of fact and conclusions of law on a developed record.

The majority proceeds, without the benefit of evidence concerning the extra-record claims, to evaluate the cold trial record and to offer various conclusions concerning the potential impact of better performance by trial counsel. For example, with regard to the potential impeachment of one Commonwealth witness, the majority indicates "[e]stablishing that Mr. Burton was involved in other illegal activities would not ineluctably alter the jury's opinion of him, much less lead to a different verdict." Majority Opinion, slip op. at 36. It is not a post-conviction petitioner's burden, however, to establish conclusions ineluctably (or inescapably). According to the United States Supreme Court, whose decisions this Court follows in the ineffectiveness arena:

> Although a defendant need not establish that the attorney's deficient performance more likely than not altered the outcome in order to establish prejudice under Strickland [v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)], a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S., at 694, 104 S.Ct. at 2068. According to Strickland, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." Ibid. The Strickland Court noted that the "benchmark" of an ineffective-assistance claim is the fairness of the adversary proceeding . . ..

Nix v. Whiteside, 475 U.S. 157, 175, 106 S. Ct. 988, 998 (1986).

Pursuant to this standard, I maintain my perspective that these cases involving allegations of serious constitutional violations with supporting evidentiary proffers should be assessed on a developed evidentiary record. Accord Commonwealth v. Bryant , 579 Pa. 119, 164, 855 A.2d 726, 752 (2004) (Saylor, J., dissenting) ("My position is that the Court would give better effect to the values of regularity and fairness that are essential to the judicial function by requiring closer and more consistent adherence to the

procedures that have been designed to ensure the reliability of criminal convictions, particularly in the capital arena, where the need for reliability is at its greatest."). Further, relative to these fact-sensitive inquiries, I believe that a fact-finder (here, the PCRA court) should determine which, if any, of the instances of asserted ineffectiveness are true in light of the post-conviction evidence before the collective impact of any deficient stewardship upon the fairness of the trial proceedings can be reasonably evaluated.

I also differ with the majority opinion to the degree that it suggests that counsel cannot be deemed ineffective for failing to advance arguments merely because supporting theories have not yet been accepted by any controlling tribunal, see Majority Opinion, slip op. at 49, 56. In this regard, I maintain the perspective that competent counsel should pursue reasonably available theories that are likely to vindicate client interests, regardless of whether those theories have been definitively accepted by the courts. Cf. Commonwealth v. Hughes, 581 Pa. 274, 334-35 n.40, 865 A.2d 761, 797-98 n.40 (2004) ("We decline to accept . . . the proposition that an ineffectiveness challenge based on counsel's failure to pursue vindication of generally prevailing precepts in the capital sentencing context is necessarily foreclosed solely because the Court had not at the time announced that those salient prevailing and generally applicable principles should apply in capital sentencing determinations."). However, to the degree that the theories have no merit, or are not readily available, I agree with the majority that counsel should not be faulted.