[J-32-2007]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	Nos. 454, 455, 462 CAP
	:	
Appellee	:	Appeal from the decisions dated January
	:	5, 2004 and June 21, 2004 of the Court of
	:	Common Pleas, Philadelphia County,
v.	:	Criminal Division at No. 0208-0840 1/1.
	:	
	:	
WILLIE COOPER,	:	
	:	ARGUED: April 17, 2007
Appellant	:	
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	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
Appellant	:	
	:	
	:	
v.	:	
	:	
	:	
WILLIE COOPER,	:	
	:	
Appellee	:	

CONCURRING OPINION

MR. JUSTICE CASTILLE **DECIDED: December 28, 2007**

I join the Majority Opinion. I write separately to the two points I address below.

First, I reiterate the view I expressed recently in my Concurring Opinion in Commonwealth v. Rega, 933 A.2d 997, 1032 (Pa. 2007) (Castille, J., concurring, joined by Saylor, J.) that, absent waiver of PCRA rights, defendants generally should not be

permitted to expand post-verdict motions and direct appeal to encompass collateral claims. See also id. at 1029 (Cappy, C.J., concurring) (sharing my concerns in this area).

Second, with respect to the trial judge's basis for granting penalty-phase relief, I agree that mitigation counsel's invitation to the jury to substitute the Bible for the Sentencing Code was improper and lacked a reasonable basis. The very purpose of such an improper invitation is to prejudice the opposition by introducing an irrelevancy as if it were a proper penalty argument.[1] Such attempts to circumvent the statutorily mandated sentencing scheme should be disapproved in the strongest terms. Nevertheless, the fact that the attempt here was pitifully botched does not prove that, had the argument not been made, the jury probably would not have returned the death penalty. In my judgment, it is a very close question whether any actual prejudice arose from counsel's improper invitation. The Majority concludes that "it is inconceivable to suggest that the statement had no effect on the jury" because, upon deliberation, the jurors immediately requested that the trial judge provide them with a Bible. Majority Slip Op. at 13. The trial judge, however, just as promptly denied the request, telling the jurors that doing so would be "inappropriate" and reminding them that they must "decide the penalty based on the facts as you find them, and the law as I gave it to you." Notes of Testimony, 10/3/03, at 3. Moreover, the jury in this case found no mitigating circumstances and a single aggravating circumstance (that appellant committed the killing while in the perpetration of a felony), and the botched improper argument had nothing to do with that aggravating circumstance.[2] Counsel's

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[1] It is beyond cavil that, had it been offered by the Commonwealth, such an argument would constitute prosecutorial misconduct. Trial judges should not permit the defense any more latitude with respect to such references to extra-statutory sources of law in a capital case.

[2] As the victim was only three and one-half months pregnant at the time of her death, the Commonwealth did not present her pregnancy as an aggravating circumstance. See 42 (continued…)

improper "eye for an eye" biblical reference was irrelevant and, being irrelevant, it is hard to see specific prejudice.

Nevertheless, the prejudice assessment was made by the trial judge and therefore deserves a certain degree of deference. That fact, together with the supervisory concern I have articulated above, lead me to join in the Majority's affirmance of the grant of a new penalty hearing.

(…continued)
Pa.C.S. § 9711(d)(17) ("At the time of the killing the victim was in her third trimester of pregnancy or the defendant had knowledge of the victim's pregnancy.").