**[J-86-2003]**
**IN THE SUPREME COURT OF PENNSYLVANIA**
**EASTERN DISTRICT**

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| COMMONWEALTH OF PENNSYLVANIA, | : | No. 335 CAP |
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| | : | Appeal from the Order entered on 3/21/01 |
| | : | in the Court of Common Pleas, |
| Appellee | : | Philadelphia County, Criminal Division, at |
| v. | : | 3174-3185 October Term 1992 |
| | : | |
| | : | |
| MIGUEL RIOS, | : | |
| | : | |
| Appellant | : | SUBMITTED: April 11, 2003 |

**CONCURRING AND DISSENTING OPINION**

**MR. JUSTICE SAYLOR** **DECIDED: April 18, 2007**

I concur in the result with respect to the denial of Appellant's guilt-phase claims. As to certain penalty-phase claims, however, I would remand for a further hearing and specific findings of fact and conclusions of law from the PCRA court.

Appellant argues that his trial and appellate counsel were ineffective in failing to raise and preserve a claim that the prosecutor's exhortation in his closing remarks to the jury to "send a message to society" by returning a death sentence were inflammatory and prejudicial. See N.T., June 17, 1993, at 777-78 (reflecting the prosecutor's statement to the sentencing jury as follows: "You have, for the protection of society, to send a message to society that no, we will not tolerate this, . . . and that when you impose the death penalty, send that message, and it is up to you, the law is allowing and giving you the opportunity to use that sword in your hand and you decide what you did [sic]."). The majority rejects this claim on the basis that, although the Court has

recently held that such arguments are improper and per se prejudicial, see Commonwealth v. DeJesus, 580 Pa. 303, 860 A.2d 102 (2004), they were permitted at the time of Appellant's trial. See Majority Opinion, slip op. at 40.

In fact, however, the Court explained in DeJesus that it had not consistently approved such arguments, but instead, had "strongly admonished prosecutors to refrain from exhorting jurors to use their verdict to 'send a message' to the community or the judicial system." DeJesus, 580 Pa. at 325, 860 A.2d at 116 (citing Commonwealth v. Crawley, 514 Pa. 539, 559, 526 A.2d 334, 344 (1987)). Crawley, cited in DeJesus for the proposition that send-a-message arguments analogous to that made in the present case were actually forbidden, was the most recent decision in this line as discussed in DeJesus that was available to counsel at the time of Appellant's 1993 trial. Therefore, I cannot support the majority's reasoning on this claim. Rather, I would remand for development concerning appellate counsel's ineffectiveness per Commonwealth v. McGill, 574 Pa. 574, 832 A.2d 1014 (2003), with a directive to the PCRA court to permit a hearing concerning all layered aspects of that derivative claim.

Appellant also claims that his trial counsel unreasonably failed to investigate and present substantial life-history and mental-health mitigation evidence at the penalty phase of trial. On the life-history aspect, the majority indicates that Appellant specifically instructed trial counsel not to present additional family witnesses and threatened counsel. See Majority Opinion, slip op. at 24. The PCRA court, however, did not rest its decision on this evidence or make a credibility assessment in this regard. Moreover, there was evidence of additional discussions with Appellant, see, e.g., N.T., April 4, 2000, at 67-68; trial counsel further testified at the post-conviction hearing that he did not believe that he was impeded from presenting all of the mitigating evidence that he had available to him, see N.T., April 4, 2000, at 141-42; and counsel did secure

family witness testimony. In these circumstances, I have difficulty with the application of Commonwealth v. Sam, 535 Pa. 350, 368-69, 635 A.2d 603, 612 (1993), to foreclose examination of the stewardship of trial and appellate counsel. Rather, in such situations, I believe that a factfinder should examine the totality of the circumstances to determine whether and to what degree a capital defendant has forbidden the presentation of mitigating evidence. Particularly given the dynamic character of death-penalty litigation, when combined with the substantial pressures associated with a capital trial, I do not support reliance by an appellate court upon isolated remarks taken out of their full context, especially in the absence of relevant factual findings. Indeed, given the consequences of this sort of decision, where a defendant chooses to waive mitigation, this Court has indicated that the trial court should be involved and colloquy the defendant to confirm a knowing, voluntary, and intelligent waiver of mitigation. See Crawley, 514 Pa. at 550-51 n.1, 526 A.2d at 340 n.1.[1]

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[1] Notably, the Sam Court emphasized that such a colloquy was conducted in the case. See Sam, 535 Pa. at 368, 635 A.2d at 611. While I recognize that the Sam and Crawley decisions concerned defendants' waivers of all mitigation evidence, I see no reason why the requirement of a colloquy should not also pertain when a capital defendant, contrary to his counsel's advice and prejudicial to his interests, elects to forego a substantial aspect of a mitigation case that counsel believes may be dispositive.

It also bears mention that counsel's presentation of life-history mitigation at the penalty phase of Appellant's trial was exceptionally truncated; indeed it spans just two pages of the transcript. See N.T., June 17, 1993, at 764-65. In terms of life history, the jurors heard only that Appellant was born in Puerto Rico, that he was ten years old when he came to the United States, and that his mother committed suicide by setting herself on fire. See id. By comparison, the post-conviction case included, inter alia, evidence that Appellant was abandoned at an early age by his father; witnessed several suicide attempts by his mother prior to her eventual self-immolation; was disfavored and abused by relatives when he came to the United States; was ultimately barred from his father's household around the age of twelve or thirteen; became addicted to heroin during this time period; and engaged in bizarre behaviors and suffered from delusions (continued . . .)

In reviewing claims of deficient stewardship associated with the presentation of mitigating evidence, an evaluation of the adequacy of counsel's underlying investigation is a threshold inquiry. See, e.g., Commonwealth v. Malloy, 579 Pa. 425, 454, 856 A.2d 767, 784 (2004). This is so because strategic judgments made by counsel are assessed in light of the reasonableness of the investigation performed. See id. at 460, 856 A.2d at 788 (citing Wiggins v. Smith, 539 U.S. 510, 528, 123 S. Ct. 2527, 2539 (2003)). See generally Williams v. Taylor, 529 U.S. 362, 364, 120 S. Ct. 1495, 1498 (2000) (explaining that capital counsel have the "obligation to conduct a thorough investigation"). Additionally, the United States Supreme Court has admonished: "In assessing the reasonableness of an attorney's investigation . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Wiggins, 539 U.S. at 527, 123 S. Ct. at 2538.

Here, concerning the mental-health aspect of Appellant's claim, trial counsel possessed various records indicating that Appellant had, on multiple occasions, been diagnosed as suffering from a major mental health condition, namely, paranoid schizophrenia, and apparently had been treated with anti-psychotic medication by the government while in prison. Despite this information, however, counsel did not consult a mental health professional in connection with the penalty defense and, at the post-

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from an early age. A fair amount of this information was contained in pre-sentence reports available to counsel. See 1984 Pre-Sentence Investigation Report ("After his mother's departure, the family structure dissolved" and Appellant was a "product of a broken home and subsequent [to the] reported suicide of his mother, he appeared to have been reared without the benefit of adequate discipline, guidance, love and supervision."). The United States Supreme Court has repeatedly recognized the potential value of this sort of evidence in terms of mitigation in a capital case. See, e.g., Wiggins, 539 U.S. at 535, 123 S. Ct. at 2542 (citing cases).

conviction stage, was unable to articulate a strategic or tactical reason for having failed to do so. See N.T., April 4, 2000, at 112-13, 117, 152-53.

The majority displaces any review of counsel's investigation by relying upon the entry of a stipulation that counsel secured in the penalty phase of trial that Appellant suffered from a "schizophrenic reaction" ten years before his offenses. See Majority Opinion, slip op. at 25. The majority reasons that counsel's decision to proceed solely on the stipulation cannot have represented deficient stewardship, as "the Commonwealth had reliable evidence that Appellant was not mentally ill, was fully capable of presenting [sic] the criminality of his acts, and was not under extreme mental or emotional stress at the time of the crime." Id. at 26. This reasoning is faulty, in the first instance, as the source of the information referenced by the majority was Dr. John S. O'Brien, who did not examine Appellant until seven years after his trial. See N.T., July 25, 2000, at 9-10. Counsel thus could not have relied upon a report that did not yet exist to forego an investigation into his client's mental health condition. Additionally, it would seem to me to be an untenable practice to rely upon an adverse party's expert witness to omit an investigation, particularly in light of the information contained in Appellant's records.[2]

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[2] Finally, the reasoning is also not wholly accurate, because the purport of Dr. O'Brien's post-conviction testimony was not that Appellant was entirely free from mental illness; rather, it was that Appellant did not suffer from paranoid schizophrenia or a psychiatric condition. Dr. O'Brien did, however, render a mental-health diagnosis of alcohol and mixed substance abuse by history, which is recognized under the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV"). See N.T., July 25, 2000, at 92. Further, he indicated that he did not have enough information concerning whether Appellant suffered from any condition under the DSM's Axis II categorization. See N.T., July 25, 2000, at 90 ("I think that he has a variety of problems, but that does not render an Axis II, because I don't feel I have enough information."); id. ("I'm not concluding he doesn't suffer from other problems . . .."). Various aspects of Dr. O'Brien's testimony also highlighted the potential value of (continued . . .)

Counsel's actual, stated basis for his strategic decision was to avoid negative references in various records, for example, to Appellant having "social judgment [that] is impaired and self centered." See, e.g., N.T., April 3, 2000, at 55. Again, however, the proper threshold focus in assessing this claim is on the adequacy of counsel's investigation supporting this strategic decision. See, e.g., Malloy, 579 Pa. at 454, 856 A.2d at 784. In this regard, in the post-conviction proceedings, counsel was unable to explain how it was that he could consider the relative merits of presenting a developed case of mental-health mitigation without consulting a mental health professional, particularly where counsel seemed to possess at best a rudimentary understanding of the mental health information that he had in his possession.[3] Capital counsel should be well aware that mental health disorders may provide context for impulsivity and/or impaired judgment. See American Bar Association, ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.3(F) (explaining that capital counsel should consider presenting "[e]xpert witnesses to provide medical, psychological, sociological or other explanations for the offense(s) for which the client is being sentenced"); id., Commentary (indicating that "[t]he assistance of one or more

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mental-health evidence in terms of providing context. See, e.g., id. at 103 (reflecting Dr. O'Brien's explanation that neglect and abandonment is "[o]ftentimes connected with development of his behavior and problems with the law").

[3] Counsel testified that he did not believe that he knew what a schizophrenic reaction was, other than it was some type of a psychiatric problem, "probably having something to do with some type of split or bipolar personality." N.T., April 3, 2000, at 51. Further, despite that the reference to a ten-year-old "schizophrenic reaction" was the sole source of evidence concerning mental-health mitigation, counsel testified that he did not consider it important that the jury be advised as to what the reference meant. See id. at 59-60.

experts (e.g. social worker, psychologist, psychiatrist, investigator, etc.) may be determinative as to outcome" of a capital sentencing proceeding).[4]

The majority also indicates that, since the jury found both mitigators advanced by Appellant, i.e., those pertaining under Sections 9711(e)(2) and (e)(8) of the Judicial Code, 42 Pa.C.S. §§9711(e)(2), (e)(8), trial counsel's failure to offer any additional evidence concerning those mitigators could not be prejudicial. See Majority Opinion, slip op. at 26 (citing Commonwealth v. Marshall, 571 Pa. 289, 812 A.2d 539 (2002), for the proposition that "appellant fails to establish prejudice in connection with an ineffectiveness claim based on counsel's failure to investigate and present additional evidence in support of a finding of a mitigating circumstance when that mitigating circumstance was already found to exist without the benefit of the additional evidence."). I have factual and conceptual differences with this reasoning, however. First, it is not at all clear to me that any member of the sentencing jury in this case found the mitigating circumstance at Section 9711(e)(2) that "[t]he defendant was under the influence of extreme mental or emotional disturbance" at the time of his capital crime. The verdict slip reflects that the jurors recorded the following:

> The mitigating circumstance(s) found by one or more of us (is) (are):
>
> (1) Loss of Mother
> (2) Mental Illness
> (3) Plea of Children
> (4) Plea of Brother

[4] The 1989 ABA guidelines were available at the time of Appellant's trial and have been recognized by the United States Supreme Court to be appropriate "guides to determining what is reasonable" in capital litigation. Wiggins, 539 U.S. at 524, 123 S. Ct. at 2537 (citation omitted).

Particularly given the cryptic character of the stipulation concerning Appellant's "schizophrenic reaction," and the remoteness of the finding from the time of Appellant's offenses, it seems more likely to me that the specification of "mental illness" among catch-all-type mitigating factors reflected a comment on Appellant's background and character pursuant to the Section 9711(e)(8) mitigator and not a finding that he was, at the time of his offenses, "under the influence of extreme mental or emotional disturbance" pursuant to Section 9711(e)(2). Indeed, there was no evidence offered on the record, or argument made by counsel, that would define a "schizophrenic reaction," support a conclusion that such a reaction was an extreme mental or emotional disturbance, or concretely relate such reaction to the time of Appellant's offenses ten years later.[5]

Additionally, the majority's statement that "the jury" found one or more mitigators is misleading. As previously noted, consistent with established capital sentencing

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[5] Trial counsel's entire argument to the jury concerning the mitigator was as follows:

> The other mitigating circumstance is the mental capacity of the defendant. You will hear the law again as to that. Do not listen to me.
>
> You will hear from Judge Riber [sic], who will talk about the law. You also heard about the schizophrenic tendencies that he has. That is also something that will show that that specific circumstance outweighs any aggravating circumstances in this case.

N.T., June 17, 1993, at 781. Counsel's entire penalty-phase argument covers only four pages of transcript and consists predominately of generic comments about the seriousness of the case, the nature of the death penalty, and disadvantages associated with life in prison. See id. at 778-82. His discussion of mitigating circumstances is on a single page and, in terms of specifics, in addition to the above, encompasses only an indication that Appellant's daughters and brother loved him. See id. at 780.

procedure, the verdict slip reflects only a notation that "one or more" jurors found the noted mitigators. This is significant because, if there was additional, strong evidence of a particular mitigator, there may be a reasonable possibility that such evidence would have persuaded additional jurors, and only one of twelve jurors need be persuaded to avoid a death verdict. See 42 Pa.C.S. §9711(c)(1)(iv). Further, the selection aspect of capital sentencing entails an individualized weighing process in which, obviously, the strength of the evidence is highly relevant. See Commonwealth v. Hughes, 581 Pa. 274, 363, 865 A.2d 761, 815 (2004) ("[T]he penalty 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)). See generally Commonwealth v. Trivigno, 561 Pa. 232, 257-58, 750 A.2d 243, 256-57 (2000) (Saylor, J., concurring) (describing a capital sentencing body's separate eligibility and selection decisions). Finally, some categories of mitigators, such as life history, are very broad and can subsume many different types of life circumstances that can serve as effective mitigation. I therefore have difficulty with a broad-based application of the principle from Marshall that a finding of some evidence of mitigation in a mitigation category, particularly the catch-all circumstance, forecloses all possible claims that counsel unreasonably failed to investigate and present additional evidence of that general type.

Notably, Marshall couched this principle as an encapsulation of a narrow footnote in Commonwealth v. Scott, 561 Pa. 617, 752 A.2d 871 (2000), which, in substance, states only that the failure to adduce vague, supplemental evidence of drug abuse treatment was non-prejudicial. See id. at 627-28 n.7, 752 A.2d at 877 n.7. I fully support the notion that a failure on the part of trial counsel to adduce redundant evidence concerning a found mitigator will not satisfy a post-conviction petitioner's burden to prove prejudice. I have difficulty, however, with transporting this logic to bar

claims that are based on substantial differences between the weight or type of the evidence that was presented at trial and that which is presented at the post-conviction stage. See Commonwealth v. Brown, 544 Pa. 406, 425, 676 A.2d 1178, 1187 (1996) (allowing for the possibility of post-conviction relief "if it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued" (citation omitted)).[6] Thus, I would not extend Marshall's characterization of Scott to evidence that may add substantial weight to the impact of a mitigating circumstance category, but rather, would limit it to situations in which evidence substantially overlaps.[7]

Appellant presented a developed case of life-history and mental-health mitigation at the post-conviction stage, including testimony that such evidence was reasonably available at the time of Appellant's trial. See, e.g., N.T., November 23, 1999, at 3-259 (testimony of Lawson F. Bernstein, Jr.); N.T., February 1, 2000, at 6-126 (Ruth Latterner, PhD). The PCRA court discounted the post-conviction life-history evidence in light of the minimal evidence that was presented at trial and credited a strategic decision by trial counsel to limit mental-health mitigation evidence without making any assessment of the underlying investigation. As I find such approach to be inconsistent

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[6] It is obviously necessary in undertaking such assessment to guard against the distorting effects of hindsight. See Commonwealth v. Howard, 553 Pa. 266, 274, 719 A.2d 233, 237 (1998). At the same time, however, where it can be demonstrated that an alternative not chosen offered a potential for success substantially greater than the course actually pursued, a finding that a given strategy lacked a reasonable basis may be warranted. See id.

[7] I find the majority's decision particularly troubling to the extent that it can be read as suggesting that a finding of any catch-all mitigating circumstance by at least one juror will foreclose a challenge based upon a capital attorney's failure to investigate and present other reasonably available catch-all-type evidence of a different character. Measured against their facts, neither Scott nor Marshall supports such a proposition.

with prevailing standards in the capital arena, I would vacate the court's decision concerning penalty only and remand for an adequate assessment and to conform the record to McGill.[8] Further, I would recognize that the PCRA court's perspective concerning the relative weight of the testimony of Appellant's and the Commonwealth's post-conviction experts, respectively, concerning whether Appellant suffers from paranoid schizophrenia and/or cognitive impairment is relevant to the essential inquiry concerning prejudice. However, I would also instruct the court that the dispositive consideration as concerns prejudice is whether there is a reasonable probability that Appellant's entire mitigation case proffered on post-conviction review (to the extent that it is not rejected on credibility grounds) may have made a difference to at least one or the twelve jurors in their selection (weighing) decision. See Wiggins, 539 U.S. at 536-37, 123 S. Ct. at 2543; Malloy, 579 A.2d at 462, 856 A.2d at 789.

Madame Justice Baldwin joins this concurring and dissenting opinion.

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[8] In light of the calculated nature of Appellant's crimes and his criminal history, I recognize that this was a particularly difficult case for the defense at the penalty phase of trial. Nevertheless, I believe that the judicial review in this case should fairly reflect an acknowledgment that trial counsel's penalty-phase presentation was very weak, and that there was considerable information available that would have presented a better case of mitigation. Concerning the weight of the latter, I would leave the assessment to the PCRA court in the first instance, upon correction of the deficiencies noted above.