[J-070-99]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA ,	:	0228 Capital Appeal Docket
	:	
Appellee	:	Appeal from the Judgment of Sentence
	:	entered on October 1, 1996 in the Court of
	:	Common Pleas, Philadelphia County,
v.	:	Criminal Division at No. 0086 January
	:	Term, 1996
	:	
PHILIP TRIVIGNO,	:	
	:	
Appellant	:	ARGUED: April 27, 1999

CONCURRING OPINION

MR. JUSTICE SAYLOR **DECIDED: March 24, 2000**

Although I concur with the majority's disposition, I respectfully differ with the analysis concerning the propriety of arguing Appellant's future dangerousness to the jury during the penalty phase. The majority concludes, based upon a passage from the United States Supreme Court decision in Simmons v. South Carolina, 512 U.S. 154, 114 S. Ct. 2187 (1994), that once a jury determines that a defendant is eligible for the death penalty, it is free to consider a myriad of factors, including future dangerousness, in deciding whether the imposition of the death penalty is appropriate.

The Court in Simmons, however, was elaborating on the constitutional limitations placed upon the capital sentencing process and, in particular, those resulting from the

Eighth Amendment. These limitations require the courts to view the capital sentencing scheme as entailing two separate and distinct decisions, namely, eligibility and selection. See Tuilaepa v. California, 512 U.S. 967, 971, 114 S. Ct. 2630, 2634 (1994). In the eligibility determination, the statutory scheme must narrow the class of persons for whom the death penalty applies and justify the imposition of such penalty as compared to others found guilty of murder. See Lowenfield v. Phelps, 484 U.S. 231, 244, 108 S. Ct. 546, 554 (1988). One means of narrowing the class is by prescribing aggravating circumstances that must exist before the death penalty can be imposed, which serves to appropriately channel the sentencer's discretion. See Blystone v. Pennsylvania, 494 U.S. 299, 306-07, 110 S. Ct. 1078, 1083 (1990). The selection decision is implicated when the sentencer decides whether a defendant who is eligible for the death penalty should in fact receive that sentence. See Tuilaepa, 512 U.S. at 972, 114 S. Ct. at 2635. It is in this respect that the passage from Simmons has relevance -- as the Eighth Amendment does not impose a constitutional limitation upon the discretion of the sentencing authority in the selection stage, a variety of factors may be considered. See id. at 979-80, 114 S. Ct. at 2639.

Nevertheless, the admission of evidence in the penalty phase of a capital case is governed, in the first instance, by the applicable state statute. The South Carolina death penalty statute at issue in Simmons required the jury to first decide eligibility by reference to whether one or more statutorily prescribed aggravating circumstances existed. Where an aggravator was present (and thus eligibility established), the jury made the selection determination, in the course of which it was expressly permitted to consider "additional evidence in extenuation, mitigation, or aggravation of the punishment." See S.C. Code Ann. §16-3-20(B). Thus, as the Court in Simmons explained, South Carolina's "evidence in aggravation is not limited to statutory aggravating circumstances." Simmons, 512 U.S. at 162, 114 S.Ct. at 2193.

In Pennsylvania, by contrast, the legislature has not elected to generally expand the range of aggravating factors relevant to selection over and above the aggravating criteria considered in determining eligibility.[1] Under the Pennsylvania sentencing scheme (as in South Carolina), the jury first determines eligibility by deciding if one or more of a specific range of aggravating circumstances has been satisfactorily established. See 42 Pa.C.S. §9711(c); Blystone, 494 U.S. at 306-07, 110 S. Ct. at 1083. However, unlike South Carolina's scheme, a Pennsylvania jury then makes the selection decision by balancing precisely the same statutorily prescribed aggravators against any mitigating circumstances which they may find to exist. See 42 Pa.C.S. §9711(c).[2] Since the constitutionally required narrowing (eligibility) process and the subsequent selection process are confined to the same criteria (on the aggravating side of the equation), there is no basis for consideration of non-statutory aggravators such as a defendant's future dangerousness.

Indeed, this Court has expressly held that, under our present statutory scheme, evidence must relate to a specific aggravating or mitigating circumstance. See Fisher, 545 Pa. at 266, 681 A.2d at 146. Moreover, the Court has stated, albeit in dicta, that because future dangerousness is not an aggravating circumstance under Pennsylvania's death

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[1] The death penalty statute has recently been amended to provide that evidence concerning the victim and the impact the death had upon the victim's family may also be presented during the sentencing hearing, even though such evidence is not among the statutory aggravating circumstances listed in Section 9711(d). See 42 Pa.C.S. §9711(a)(2). The constitutionality of this provision is presently pending before this Court in Commonwealth v. Means, 54 E.D. Appeal Dkt. 1997.

[2] Although Section 9711(a) of the Sentencing Code, 42 Pa.C.S. §9711(a)(2), states that "evidence may be presented as to any other matter that the court deems relevant and admissible on the question of the sentence to be imposed," this language was intended to allow the Commonwealth the latitude to respond to mitigating evidence introduced by the defendant under the "catchall" provision in Section 9711(e)(8). See Commonwealth v. Fisher, 545 Pa. 233, 268, 681 A.2d 130, 147 (1996).

penalty statute, it is not a valid factor to be considered by the jury. See Commonwealth v. Marrero, 546 Pa. 596, 610 n.19, 687 A.2d 1102, 1108-09 n.19 (1996).

In my view, therefore, the interjection of future dangerousness into our capital sentencing scheme, without statutory authorization or without the matter having been placed in issue by the defense, constitutes error.

Mr. Justice Zappala and Mr. Justice Cappy join this concurring opinion.