

**IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA, : No. 77 EM 2011

Respondent

v.

SHIRVIN McGARRELL,

Petitioner

COMMONWEALTH OF PENNSYLVANIA, : 78 EM 2011

Respondent

v.

DARRYL YOUNG,

Petitioner

COMMONWEALTH OF PENNSYLVANIA, : 79 EM 2011

Respondent

v.

HERMAN BURTON,

Petitioner

DISSENTING STATEMENT

MR. JUSTICE McCAFFERY

I join Justice Saylor's dissenting statement and write separately to explain why, in my view, the continued oversight of this Court is necessary with respect to the reform measures undertaken to remedy Philadelphia's heretofore chronic underfunding for legal services for indigent capital defendants, and particularly to express my disagreement with the "flat fee" manner in which attorneys representing indigent capital defendants continue to be remunerated. Although the five-fold increase in the flat fee paid to guilt phase and penalty phase counsel under the new remuneration template for the FJD has resulted in greater numbers of qualified attorneys being on the appointment list, in my view, the majority fails to heed Judge Benjamin Lerner's clear and substantial preference for an hourly rate.¹

As Judge Lerner noted in his Recommendation and Report, although the "average" Philadelphia capital case requires one hundred twenty-five (125) attorney work hours, the potential complexities that may arise in litigating a capital case frequently require enlarging the number of hours counsel must devote to any given case above that of an "average" case, and thus, a one-size-fits-all flat fee is less than ideal. In my view, an hourly rate as suggested by Judge Lerner would be a fairer method of remuneration, and would have the added benefit of providing a greater measure of accountability because there would be an itemized bill from counsel for hours worked and tasks performed. Such itemization is more amenable to review and verification than a simple presentation of the request for issuance of the flat fee "earned" for an

¹ Judge Lerner, the former Chief Defender for Philadelphia who later served as the calendar judge for all homicide prosecutions in Philadelphia, was the jurist presiding over Petitioners' cases at the time the initial petition in this matter was filed. We appointed this able jurist as Special Master in these proceedings because we believed the benefits of his input would be immeasurable. In his Recommendation and Report issued February 21, 2012, Judge Lerner suggested his strong preference that appointed capital counsel be remunerated at an hourly rate of \$90.00.

appointment, plus trial day per diems. I would defer to Judge Lerner's wisdom on this point, and set an hourly rate.

Moreover, although the reforms instituted thus far have had the salutary intended effect of improving somewhat the system for providing legal services to indigent capital defendants, the work is certainly not done; thus, I disagree with the majority's determination that the oversight of this Court is no longer required. It is not as if Judge Lerner's Updated Report and Recommendations, issued July 10, 2013, showed that all the problems flowing from the capital defense crisis in Philadelphia have been finally and permanently rectified, or even that the trajectory of the program reforms going forward is certain. To the contrary, Judge Lerner warned, in his conclusions, that "the improvements ... are not self-sustaining, and they do not indicate that we can rest on our laurels." Report, 7/10/13 at 9. Indeed, Judge Lerner noted that while the capital appointment list, which stands now at thirty-three (33) qualified attorneys is sufficient, it is "far from ideal," and he pointed out the constant need to increase the number of qualified attorneys on the list due to normal career changes, the aging process and other attrition factors. Id. at 9 -10. Judge Lerner also expressed his view that under either an hourly rate or flat-fee system, it is likely that a fee increase will soon be required in order to continue to provide an incentive for qualified attorneys to accept capital appointments.

Finally, I would note that Philadelphia is a big city with historically high annual homicide rates requiring a correspondingly large, fair and efficient capital justice system. While the changes instituted thus far have promoted better management of the capital dockets, in my view, the continued oversight of this Court is necessary simply due to the number of murders in Philadelphia, the size of the system designed to adjudicate those crimes, and the chronic underfunding that has debilitated the system to date. The

system may at some time become fixed and self-sustaining. In my view, that time has not yet arrived. Accordingly, I respectfully dissent, and would not summarily dismiss the petition or discontinue the oversight of this Court.

Madame Justice Todd joins.