[J-77-2017][M.O. - Donohue, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 728 CAP
	:	
	:	Appeal from the Order dated 6/24/16 in
Appellee	:	the Court of Common Pleas,
	:	Philadelphia County, Criminal Division
	:	at No. CP-51-CR-0208091-2004
	:	
v.	:	
	:	
LAVAR D. BROWN,	:	
	:	
Appellant	:	
	:	SUBMITTED: September 29, 2017

DISSENTING OPINION

CHIEF JUSTICE SAYLOR **DECIDED: October 17, 2018**

I respectfully dissent, as I conclude that the PCRA court should not have limited the evidentiary hearing to a single claim. *See generally Commonwealth v. Hutchinson*, 611 Pa. 280, 363, 25 A.3d 277, 325-26 (2011) (Saylor, J., dissenting) ("[I]n line with many of my previous expressions, I believe that the appropriate way for this Court to address the intractable difficulties which have arisen in the death-penalty arena is to consistently enforce the requirement of an evidentiary hearing where material facts are in issue; to require appropriately developed factual findings and legal conclusions of the PCRA courts; and to apply consistent and fair review criteria on appeal."). I also would approve the present resentencing agreement, and I take this opportunity to write to

several penalty issues, the first of which, in my view, illustrates the unfairness in the summary dismissal of potentially colorable claims.

Organicity

In support of his claim of ineffective assistance of trial counsel in failing to adduce evidence of brain damage in the penalty phase of his capital trial, Appellant submitted an affidavit from his lead trial attorney indicating as follows:

> My trial file contained a copy of results of a 1995 psychological evaluation done of Lavar Brown by Kenneth Moberg. Moberg found a "*significant sign of organicity* on the Bender-Gestalt test." I know of no tactical or strategic reason why neuropsychological testing was not done in light of this report.

Affidavit/Declaration of Daniel A. Rendine, Esq. dated April 23, 2014, in *Commonwealth v. Brown*, CP-51-CR-0208091-2004 (C.P. Phila.) (emphasis added).

Despite this troublesome concession, the majority and the PCRA court have discerned no basis for conducting a hearing to allow for factual development of this claim. *See* Majority Opinion, *slip op.* at 29-41. In this regard, unlike counsel himself, the majority and the PCRA court attribute any failure to the defense penalty-phase expert, Allan Tepper, Psy.D. *See, e.g.*, Majority Opinion, *slip op.* at 39 ("[A]n ineffectiveness claim cannot be based upon an assertion that counsel failed to spot a 'red flag' that the [defense] mental health expert failed to spot.").

Neither the majority nor the PCRA court, however, directly indicate that competent capital lead counsel would not know what the term "organicity" -- *i.e.*, brain damage -- means in the relevant context. *See generally Commonwealth v. Sepulveda,* 618 Pa. 262, 343, 55 A.3d 1108, 1156 (2012) (Saylor, J., concurring) ("As of the time of [the a]ppellant's trial ..., it was well understood in the training readily available to capital defense attorneys that potential mental-health issues are essentially ubiquitous in

capital cases[.]"); ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES §4.1, commentary (rev. ed. 2003), *reprinted in* 31 HOFSTRA L. REV. 913 (2003). Nor would competent counsel overlook its potential significance to capital sentencing jurors. *See, e.g.*, *Hooks v. Workman*, 689 F.3d 1148, 1205 (10th Cir. 2012) ("Evidence of organic brain damage is something that we and other courts, including the Supreme Court, have found to have a powerful mitigating effect." (citations omitted)). Indeed, one can readily glean from counsel's affidavit that he both apprehends what organicity means and its potential significance in capital sentencing proceedings.[1]

To the degree that the majority opinion reflects a bright-line rule that the retention of an expert witness insulates capital defense counsel from further scrutiny in terms of the adequacy of his or her stewardship relative to mental-health mitigation, I respectfully differ with this perspective.[2] Experts are utilized by capital counsel to assist in the litigation, not to supplant counsel's obligation to orchestrate and conduct the defense.

Furthermore, I find Dr. Tepper's attestations to be relevant. In his affidavit, he stated that: it is his practice to request relevant background records prior to evaluating a defendant; defense counsel had not forwarded such records to him prior to his examination of Appellant less than two months before trial; and it was because of the

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[1] Significantly, the decisions in *Commonwealth Lesko*, 609 Pa. 128, 15 A.3d 345 (2011), and *Commonwealth v. Robinson*, 623 Pa. 345, 82 A.3d 998 (2013), upon which the majority relies, concerned indicia of potential mental-health mitigation more subtle than a specific reference to potential organicity in the cognitive sense. *See id.* at 373, 82 A.3d at 1015 (discussing a decrease in childhood IQ scores); *Lesko*, 609 Pa. at 190-91, 15 A.3d at 382 (discussing the results of discrete psychological tests that did not specifically reference organicity).

[2] From a concurring posture, I expressed a similar point of difference in *Lesko*. *See Lesko*, 609 Pa. at 249 n.1, 15 A.3d at 417 n.1 (Saylor, J., concurring).

impending trial date that "it was necessary to meet with Mr. Brown prior to receiving and reviewing the outstanding background records." Declaration/Affidavit of Dr. Allan M. Tepper, dated May 12, 2014, in *Commonwealth v. Brown,* CP-51-CR-0208091-2004 (C.P. Phila.), at ¶¶4, 6 (hereinafter "Tepper Affidavit at ___"). Dr. Tepper further explained that he is not trained as a neuropsychologist, and thus, he did not administer neuropsychological testing. *See id.* at ¶6.

According to Dr. Tepper's affidavit, counsel contacted him a single time by telephone in preparation for his penalty hearing testimony, speaking for about twenty-four minutes. *See id.* ¶12. Additionally, Dr. Tepper expressed the belief that he discussed the issue of brain damage with counsel at that time. *See id.* at ¶13.

In terms of his testimony at the penalty hearing, Dr. Tepper indicated as follows:

> During the course of my June 1, 2005 testimony, [penalty counsel] asked me to address the issue of possible underlying brain damage. At that time, I testified that a prior 1995 psychological evaluation had raised the possibility of underlying brain damage. Given the available clinical data, however, I was unable to testify with psychological certainty the nature and extent of any possible underlying brain damage, or the impact that such underlying brain damage would have had upon Mr. Brown's behavior. For this reason, I responded to the question of possible brain damage based upon the presently available clinical data and background information.

Id. at ¶14.

In light of the above factual recitations -- which the Court is obliged to take as true for purposes of reviewing the PCRA court's decision to summarily dismiss the relevant post-conviction claim -- I do not believe that the fault for failing to investigate the indicia of brain damage should be precipitously laid at the feet of Dr. Tepper. Rather, I find that material facts are in issue, such that an evidentiary hearing was required. *See* Pa.R.Crim.P. 908(2) (requiring a hearing "when the petition for post-

conviction relief or the Commonwealth's answer, if any, raises material issues of fact"). *See generally Commonwealth v. Keaton*, 615 Pa. 675, 749-50 45 A.3d 1050, 1095 (2012) (Saylor, J., concurring and dissenting) ("I continue to believe that the absence of an adequate factual foundation for consideration of capital post-conviction claims encourages unwarranted analytical shortcuts in the appellate review.").[3]

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[3] The majority repeatedly equates the prospect of a timely investigation into organicity with a rejection of Dr. Tepper's advice. *See, e.g.*, Majority Opinion, *slip op.* at 39. Nothing in the majority opinion or on this record, however, affirmatively indicates that Dr. Tepper advised counsel at a meaningful time that no investigation into organicity was required. Instead, the portrait painted by at least one of the affidavits is one of severely dilatory preparation by counsel, placing Dr. Tepper in the position of making the best of a highly unfavorable situation created by counsel's delay. *See, e.g.*, Tepper Affidavit at ¶10 (attesting that counsel provided juvenile, school, mental health, and prison records to the psychologist -- including Dr. Moberg's report -- either upon the day that Appellant's trial commenced or one day before). Of course, to the degree that there is tension among the affidavits concerning such material matters, this gives rise to the need for an evidentiary hearing. *See* Majority Opinion, *slip op.* at 25-26 (citing Pa.R.Crim.P. 909(B)(2)).

Responding to the Commonwealth's own concerns along the above lines, the majority notes that nothing in Dr. Tepper's affidavit "include[s] any contention that the timing of his receipt of Dr. Moberg's report had any substantive effect on his testimony." Majority Opinion, *slip op.* at 30 n.12. To me, this observation is relatively beside the point, since the critical concern is the impact of the assertedly late preparation on the defense investigation, for example, in terms of whether the defense should have consulted a neuropsychologist during the pretrial preparation phase. *Cf.*, *Wiggins v. Smith,* 539 U.S. 510, 522–23, 123 S.Ct. 2527, 2536 (2003) ("[W]e focus on whether *the investigation* supporting counsel's decision not to introduce mitigating evidence of [the petitioner's] background *was itself reasonable.*" (emphasis adjusted)).

Finally, in discussing the principles applicable to the *summary review* stage of post-conviction litigation, the majority appears to recognize that judicial consideration of a motion to dismiss is not a fact-finding exercise. *See* Majority Opinion, *slip op.* at 25-26 (explaining that the summary-review process entails consideration of evidentiary proffers to determine whether the petitioner has raised a material issue of fact); *accord Weaver v. Lancaster Newspapers, Inc.*, 592 Pa. 458, 465, 926 A.2d 899, 902-03 (2007) (explaining that "the issue as to whether there are no genuine issues as to any material fact presents a question of law[.]"). Nevertheless, the majority proceeds to treat one (continued…)

This brings me to the joint application to remand for resentencing to life imprisonment without parole. Over the past few decades, this Court has been presented with a great deal of evidence that the capital punishment regime in Pennsylvania is severely broken, including in a plethora of cases in which defense counsel have been shown to have been patently ineffective. *See, e.g.*, *Commonwealth v. King*, 618 Pa. 405, 453-57, 57 A.3d 607, 636-38 (2012) (Saylor, J., concurring specially) (cataloguing a sampling of capital cases in which relief has been granted in Pennsylvania state courts).[4] Notably, in 2011, the Court exercised its extraordinary jurisdiction to consider a petition challenging Philadelphia's compensation system for counsel representing indigent capital defendants, under which the present capital case was tried. In this litigation, an appointed special master reported his findings that such system "is grossly inadequate," "completely inconsistent with how competent trial lawyers work," "punishes counsel for handling these cases correctly," and "unacceptably increases the risk of ineffective assistance of counsel in individual cases." Report and Recommendations in *Commonwealth v. McGarrell*, 77 EM 2011, CP-51-CR-0014623-2009 (C.P. Phila. Feb. 21, 2012), at 2, 17.

(…continued)
discrete passage from one of the multiple, *untested* evidentiary proffers as "evidence of record" supporting a fact-finding judgment by the PCRA court. *Id.* at 32 n.13. From my point of view, this approach is precisely the sort of "analytical shortcut" with which I have expressed deep concern over the years. *Keaton*, 615 Pa. at 749-50, 45 A.3d at 1095 (Saylor, J., concurring and dissenting).

[4] As emphasized in a 2018 Report of the Task Force and Advisory Committee to the Joint State Government Commission on Capital Punishment in Pennsylvania, "[d]uring the last 56 years, the Commonwealth executed three condemnees even though it has had a death penalty for approximately 50 of those years." JOINT STATE GOVERNMENT COMMISSION, CAPITAL PUNISHMENT IN PENNSYLVANIA: THE REPORT OF THE TASK FORCE AND ADVISORY COMMITTEE 1 (June 2018).

This Court never completed a substantive review of the special master's findings since, over the dissents of Justice Todd, former Justice McCaffery, and myself, a majority of the Court dismissed the petition after the First Judicial District's Administrative Governing Board implemented a five-fold increase in the fees to be paid to defense counsel in capital cases on a prospective basis. For the sake of perspective, I reproduce my dissenting statement lodged against such dismissal in its entirety:

> During my tenure on the Court I have been dismayed by the deficient performance of defense counsel in numerous Pennsylvania death-penalty cases. Recently, I collected some observations in my special concurrence in *Commonwealth v. King,* 618 Pa. 405, 57 A.3d 607, 633–38 (2012) (Saylor, J., concurring specially), including a sampling of instances of substandard lawyering and remarks about the present litigation, which I incorporate by reference here.
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> Significantly, Pennsylvania has long been on notice that leaders of national, state, and local bar associations do not believe that capital litigation is being conducted fairly and evenhandedly in the Commonwealth, not the least because of the *ad hoc* fashion by which indigent defense services are funded from the local government level.[1] Such concerns are consistent with vast compilations of literature containing evidence of long-standing, chronic underfunding of public defense systems in the United States. *See generally* Nat'l Right to Counsel Comm., *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel,* CONST. PROJECT 2–3 (2009).[2] Nevertheless, this Court seems unable to attend to the apparent systemic difficulties in individual capital cases considered on appeal, as, doctrinally, the adjudicatory focus is on the facts at hand relative to an array of widely disparate claims of deficient stewardship.
>
> Thus, the present litigation offers an essential opportunity for this Court to address a systemic challenge amidst much evidence that Pennsylvania's capital punishment regime is in disrepair. *See King,* 57 A.3d 607, 633–38 (Saylor, J., concurring specially). While the local government in

Philadelphia has undertaken to implement some modest reform measures relative to legal-services funding in the death-penalty arena, Petitioners reasonably question the adequacy of such changes, while pointing to other jurisdictions in which the courts have assumed a more active role. *See, e.g., State v. Young,* 143 N.M. 1, 172 P.3d 138, 140 (2007) (collecting cases from courts exercising "inherent authority to ensure that indigent defendants receive constitutionally adequate assistance of counsel.").

In summary, I believe that Petitioners' challenge to the funding of legal services for indigent capital defendants in the First Judicial District presents an opportune vehicle for deeper, developed review and explication by this Court about fundamental fairness in the highest-stakes criminal prosecutions. Ideally, the Court's further consideration might also serve as a springboard to a collaborative conversation among the judicial, legislative, and executive branches to institutionalize statewide remedies and facilitate ongoing improvements.[3]

In light of the above, I am unable to support either the majority's decision to dismiss the petition summarily or its pronouncement that "the continued oversight of this Court is no longer required."

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[1] *See, e.g.,* ABA, *Evaluating Fairness and Accuracy In State Death Penalty Systems: The Pennsylvania Death Penalty Assessment Report* iii (Oct. 2007) ("The Pennsylvania Death Penalty Assessment Team has identified a number of areas in which Pennsylvania's death penalty system falters in affording each capital defendant fair and accurate procedures," including in the failure to protect against poor defense lawyering[.]").

[2] Petitioners also cite evidence suggesting there is large disparity in terms of disposition results obtained on behalf of homicide defendants whose legal interests are advanced by the salaried attorneys of the Defender Association of Philadelphia and those represented by court-appointed lawyers subject to modified flat-fee arrangements. *See*

James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes,* 122 YALE L.J. 154, 159–60 (2012). Notably, the statistically better outcomes are attained by the Defender Association, which, in capital litigation, adheres to the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. *Reprinted in* 31 HOFSTRA L.REV. 913 (2003).

[3] The importance of legislative involvement cannot be overstated. State-level funding for indigent defense services—presently lacking in Pennsylvania and only one other state in the nation—is at the core of nearly every reform recommendation. *See, e.g.,* Nat'l Right to Counsel Comm., *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel,* CONST. PROJECT 11–12, 54. While certainly, governments are currently operating under financial pressures, the Legislature has made the decision to authorize capital punishment in the Commonwealth. Accordingly, it and subordinate instrumentalities must ensure adequate funding to meet all attendant constitutional mandates, including the requirement for the Commonwealth to provide effective attorney stewardship for indigent defendants.

Commonwealth v. McGarrell, 624 Pa. 625, 626–28, 87 A.3d 809, 810-11 (2014) (Saylor, J., dissenting).

In light of the accumulated and accumulating evidence, I have questioned how it is that the Court can maintain the presumption of effective representation, at least in its present forceful permutation, in the face of so much evidence of the systemic obstacles. *See, e.g.*, *King*, 618 Pa. at 452, 57 A.3d at 636 (Saylor, J., concurring specially); *cf. Commonwealth v. Jette*, 611 Pa. 166, 191, 23 A.3d 1032, 1047 (2011) (Saylor, J., concurring) (commenting, in a non-capital case, that "it remains troubling that courts shape the review process based on presumptions and pronouncements that are not empirically verified, while sometimes demonstrating limited sensitivity toward other vital interests at stake in criminal justice."). This is particularly true, in light of the disturbing --

and yet unreviewed -- findings of the special master, relative to indigent capital defendants represented by private counsel in Philadelphia, such as Appellant, prior to the implementation of modest, untested reforms in 2014. *Cf. Commonwealth v. Roney*, 622 Pa. 1, 90, 79 A.3d 595, 648 (2013) (Saylor, J., dissenting) (observing that the special master's findings "suggest against sanctioning the use of summary dismissals skirting governing law and procedural protections at the post-conviction stage").

In the present case, the District of Attorney of Philadelphia represents that a committee from his office has carefully reviewed the matter as to whether it remains appropriate to defend the imposition of the death penalty on the existing record. *See* Brief for the Commonwealth at 8. In light of this consideration, to which I would afford substantial deference, as well as the nature of the claim asserted, the supporting attestations, and the landscape of apparent underfunding in which counsel operated, I would proceed to grant the joint motion for resentencing.

To the degree that the majority relies on past precedent as foreclosing such approval, I observe that the Supreme Court of the United States has recognized that "execution is the most irremediable and unfathomable of penalties; . . . death is different." *Ford v. Wainwright*, 477 U.S. 399, 411, 106 S. Ct. 2595, 2602 (1986).[5] Particularly in light of the notice provided by the special master, it is not appropriate, in my view, for this Court to enforce capital punishment when the official prosecuting authority in Philadelphia tenders a good faith and colorable representation that it simply

[5] In terms of the absence of any provision in the Post Conviction Relief Act for approval by this Court of resentencing, I note that the Court has otherwise recognized that the internally inconsistent goals and mechanisms specified in the PCRA should give way to a fuller panapoly of remedies being made available under the enactment. *See Commonwealth v. Lantzy*, 558 Pa. 214, 222-25 & n.4, 736 A.2d 564, 569-70 & n.4 (1999).

is not appropriate. I also observe that some consideration is due to the vast expenditure of resources that must be dedicated to the ongoing pursuit of a death sentence through the state and federal litigation process. In this regard, it is not unrealistic to suggest that the present thirteen-year-old case is at least another decade away from approaching a final resolution. As such, I find it untenable that the District Attorney must be tasked with expending the substantial time and resources involved in the protracted defense of a death sentence which he agrees is unsustainable on post-conviction review.[6]

Mitigation as an Excuse

Regarding Part VII(c), *see* Majority Opinion, *slip op.* at 84-86, I agree with those jurisdictions that would disapprove the reflexive portrayal by prosecutors of mitigating evidence as being in the nature of "an excuse." *See, e.g.*, *Brooks v. State*, 762 So. 2d 879, 904 (Fla. 2000) (finding that a prosecutor's repeated characterization of mitigating circumstances as "excuses" was "clearly an improper denigration of the case offered by [the defendants] in mitigation."); *accord Commonwealth v. Spotz*, 610 Pa. 17, 199-200, 18 A.3d 244, 353 (2011) (Saylor, J., concurring). Jurors charged with capital sentencing are not in a position of excusing murder; rather, they must make a reasoned, moral choice of the appropriate punishment as between a sentence of life imprisonment and a death sentence. *Accord Penry v. Lynaugh,* 492 U.S. 302, 319, 109 S. Ct. 2934, 2947 (1989). Prosecutors who encourage jurors to accept superficial shortcuts to forego consideration of bona fide mitigating evidence of a type designated by the Legislature

[6] I also note that Justices of the Supreme Court of the United States have discussed the substantial collateral consequences of the excessive delays in securing executions, including the decades-long maintenance of prisoners on death row in conditions that may produce "numerous deleterious harms." *Glossip v. Gross*, ___ U.S. ___, ___, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., dissenting).

as mitigating do a disservice to the fair and evenhanded administration of the death penalty.

Future Dangerousness

Finally, I note that, in Part X of its opinion, the majority misstates the applicable federal constitutional law concerning the necessity of a life-means-life instruction when a prosecutor injects future dangerousness into capital sentencing proceedings. *Compare* Majority Opinion, *slip op.* at 94-96 (asserting that prior violent felonies have no bearing on a defendant's future dangerousness, based on decisions of this Court relative to trials that preceded *Kelly v. South Carolina*, 534 U.S. 246, 122 S. Ct. 726 (2002)), *with Kelly*, 534 U.S. at 253, 122 S. Ct at 731 ("A jury hearing evidence of a defendant's demonstrated propensity for violence reasonably will conclude that he presents a risk of violent behavior" in the future).[7]

Contrary to the majority's portrayal, *see* Majority Opinion, *slip op.* at 95 n.24, I do not mean to suggest that *Kelly* establishes a *per se* rule that the admission of *any* act of prior violence requires a *Simmons* instruction. *But cf. Kelly*, 534 U.S. at 260, 122 S. Ct. at 735 (Rehnquist, J., dissenting) (asserting that the majority decision in *Kelly* necessitates a *Simmons* charge in every case in which there has been a brutal murder,

[7] In defending its position, the majority does not reference a single decision of this Court that concerns a capital sentencing proceeding that post-dates *Kelly*. This is significant, given this Court's repeated holding that *Kelly* is not to be retroactively applied in post-conviction challenges to the stewardship of capital counsel. *See, e.g.*, *Commonwealth v. Spotz*, 610 Pa. 17, 116, 18 A.3d 244, 302 (2011). I recognize that there are a few decisions in which majorities of this Court have expressed a substantively narrow view of *Kelly*. *See, e.g.*, *id.* at 116, 18 A.3d at 302-03. Given, however, that such decisions emanated from trials in which *Kelly* was inapplicable in the first instance, I believe that those expressions are *dicta*, *see, e.g.*, *id.* at 200, 18 A.3d at 353 (Saylor, J., concurring), and the issue of *Kelly*'s substantive impact has thus remained a live one until the present time.

since it requires the instruction not only when the state argues that the defendant will be dangerous in the future, but also on account of the admission of evidence "from which a jury might infer future dangerousness"). What I do mean to convey is that *Kelly* clearly conflicts with the opposing bright-line rule advanced by the majority -- deriving from the decisions of this Court arising out of pre-*Kelly* trials -- that a prosecutor's allusions to a capital defendant's prior violent acts cannot implicate future dangerousness.

Justice Todd joins this dissenting opinion.