

[J-156-2000]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 248 Capital Appeal Docket
	:	
Appellee	:	
	:	Appeal from the Order entered on
	:	February 12, 1991 in the Court of
v.	:	Common Pleas of Philadelphia County,
	:	Criminal Trial Division at Nos. 3222 to
	:	3231
KENNETH FORD,	:	
	:	
Appellant	:	SUBMITTED: August 17, 2000

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

MR. JUSTICE NIGRO

DECIDED: October 25, 2002

Appellant Kenneth Ford appeals from the order of the Philadelphia County Court of Common Pleas denying his petition for relief under the Post Conviction Relief Act (PCRA), 42 Pa. C.S. §§ 9541 et seq. We agree with Appellant that he is entitled to a new penalty phase hearing and therefore, we reverse.

On July 31, 1989, Celeste Sharpe and Renee Mitchell were found stabbed to death in the rear room of a candy store owned by Ms. Sharpe. Ms. Sharpe's bra had been ripped off and her skirt was pulled up above her waist. Ms. Mitchell was also found naked from the waist down, with her underwear ripped from her body. In the store, the cash register drawer was open and loose change was strewn on the floor. While the police were investigating the scene of the crime, Appellant approached the police, identified himself as Kenneth Jones, and stated that he knew who killed the two victims. Initially, he told an officer that he was in Ms. Sharpe's store and witnessed the murders. Shortly thereafter, he

changed his story and told the officer that he watched the murders from across the street. Appellant then requested that a detective accompany him down an isolated street where the two talked. At this time, Appellant appeared to become agitated about the deaths of the two victims and the detective attempted to calm him down by patting him near the waist. When the detective put his hand on Appellant, he felt a hard object. He reached under Appellant's clothing and removed a ten-inch Bowie knife from his waistband. Appellant pulled up his sweater to wipe his forehead and revealed a blood stain on his T-shirt. The detective then asked Appellant to go to the police station to further explain to the police what he saw. Appellant acquiesced and stated that he would do anything to help catch the people who killed the two women. At the police station, Appellant was handcuffed to a chair and interviewed by another detective. This detective saw blood on the zipper area of Appellant's pants and on his sweater. He asked Appellant to remove his clothing. When Appellant took off his two bloodstained shirts, he revealed a cut on his chest. Appellant also removed his pants and swim trunks, both of which had blood stains on them. After Appellant was given his Miranda warnings, he claimed to have been playing "craps" during the murders and that he had won a large amount of money doing so. He also claimed that he had received the chest abrasion during a fight with two men and that an unidentified man had given him the Bowie knife. Appellant's fingerprints, his knife and a victim's blood type subsequently linked Appellant to the killings. Appellant was arrested and charged with murder and related offenses.

Following a jury trial, Appellant was found guilty of two counts of murder of the first degree, two counts of burglary, and one count each of robbery and possession of an instrument of crime. After a sentencing hearing, the jury found two aggravating

circumstances¹ and no mitigating circumstances and accordingly, sentenced Appellant to death. On March 9, 1992, the trial court formally imposed the sentence of death on each of the two murder convictions.² On April 3, 1992, Appellant filed a direct appeal to this Court and new counsel was appointed to represent Appellant on his appeal. On November 22, 1994, this Court affirmed Appellant's judgment of sentence. See Commonwealth v. Ford, 650 A.2d 433 (Pa. 1994).

Appellant filed a pro se PCRA petition on July 23, 1996. New counsel was appointed to represent Appellant and on April 7, 1997, an Amended Petition alleging the availability of after-discovered exculpatory evidence and ineffective assistance of appellate counsel was filed. On July 9, 1997, the Commonwealth filed a motion to dismiss Appellant's Amended Petition. The following day, Appellant, represented by Mr. Lee and Billy Nolas of the Center for Legal Education, Advocacy and Defense Assistance (CLEADA), filed a Supplemental Petition and on September 8, 1997, filed a Supplemental Petition for Habeas Corpus Relief and for Statutory Post-Conviction Relief Under the Post-Conviction Relief Act. Following an evidentiary hearing, the PCRA court denied Appellant any relief. Appellant then filed the instant appeal.

Appellant raises numerous issues in his brief to this Court. The Commonwealth argues, however, that many of Appellant's claims have either been waived or previously litigated. We agree.

¹ The two aggravating circumstances were that the murders occurred during the commission of another felony and were committed by means of torture.

² Appellant was also sentenced to two concurrent sentences of 104 to 240 months imprisonment on the two burglary convictions, a consecutive sentence of ten to twenty years imprisonment on the robbery conviction, and a consecutive sentence of one to five years imprisonment on the possession of an instrument of crime conviction.

To be eligible for relief under the PCRA, a petitioner must establish that his allegations have not been previously litigated or waived. See 42 Pa. C.S. § 9543(a)(3). An issue is deemed finally litigated for purposes of the PCRA if the “highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue.” 42 Pa. C.S. § 9544(a)(2). If the allegations of error have not been previously litigated, a petitioner must also demonstrate that those allegations have not been waived. An allegation is deemed waived “if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding.” 42 Pa. C.S. § 9544(b).

Here, Appellant claims that the prosecutor engaged in misconduct by: stating during closing arguments that if the walls and the floor could talk, they would tell the jury that Appellant committed the crime; withholding Commonwealth witness Dennis Sims Africa’s identity until the day before he testified; and attempting to amend the aggravating circumstances during trial. He also claims that District Attorney Lynne Abraham’s prosecution of his PCRA case, when she had been the trial judge who presided over his trial, violated his due process rights and that there was insufficient evidence to support his burglary convictions. These claims were all raised and disposed of on Appellant’s direct appeal to this Court, see Commonwealth v. Ford, 650 A.2d 433, 436-442 (Pa. 1994), and have therefore been previously litigated for purposes of the PCRA.³ Accordingly, these claims are not reviewable. See 42 Pa. C.S. § 9543(a)(3).

³ Appellant’s attempt to frame these previously litigated issues as claims of prior counsel’s ineffectiveness does not make these claims cognizable under the PCRA. This Court has held that a petitioner cannot obtain post-conviction review of claims previously litigated on appeal by alleging ineffective assistance of prior counsel and presenting new theories of relief to support previously litigated claims. See Commonwealth v. Porter, 728 A.2d, 890, 896 (Pa. 1999); see also Commonwealth v. Albrecht, 720 A.2d 693, 703 (Pa. 1998) (issue remains previously litigated within meaning of PCRA despite appellant’s assertion that counsel’s ineffectiveness caused claim to fail on direct appeal).

Appellant also raises a number of claims of trial court and constitutional error and claims of prosecutorial misconduct that have been waived. Specifically, Appellant contends that the prosecutor engaged in misconduct by: soliciting highly prejudicial comments from Commonwealth witness Daisy Fisher; attempting to deceive the jury as to whether Commonwealth witness Paulette Riddick had an arrangement with the prosecution; improperly alluding to Appellant's criminal record by soliciting testimony that brought out the fact that Appellant's fingerprints were already on file with the police prior to his arrest for the murders; improperly vouching for the credibility of one of the detectives who worked on the case ; telling the jury that there was additional evidence that the Commonwealth had not brought forth; and knowingly presenting perjured testimony to the jury. He also claims that the perjury of Commonwealth witness Dennis Sims Africa constitutes after-discovered evidence that entitles him to relief; that his right to confront witnesses was violated by the trial court's restrictions on cross-examination; that his conviction and death sentence were the products of racial discrimination; that the trial court's instructions on mitigating evidence were unconstitutional; that his rights were violated by Mr. Justice Castille's failure to recuse himself from hearing Appellant's direct appeal to this Court; that the trial court erred in failing to advise the jury regarding the meaning of a life sentence under Simmons v. South Carolina, 412 U.S. 154 (1994); that the trial court's instructions on impeachment and the specific intent necessary for first-degree murder were misleading; that the trial court erred in allowing various witnesses to speculate about a sexual assault when the forensic evidence did not support such speculation; that his due process rights were violated when the Commonwealth was allowed to have unqualified experts testify concerning sexual assault; that the trial court erred in permitting the medical examiner's testimony that the victims were defending against a sexual assault when there was no scientific basis for this testimony; that the trial court erred when it death qualified every member of the jury, but failed to life qualify them; that the execution of an innocent man would violate the

constitution; and that the trial court's burglary instruction was flawed and thus constituted an unconstitutional ex post facto broadening of the burglary statute. Appellant could have raised each of these claims of trial error in his direct appeal to this Court but failed to do so. Accordingly, these claims are waived under the PCRA and therefore, can offer Appellant no basis for relief.⁴

Appellant does, however, raise two claims of ineffective assistance of counsel at his penalty phase that are properly developed in accordance with the standard governing such claims. Consequently, these claims are reviewable.⁵

⁴ At some point during the arguments relating to each of these waived claims of straight trial error, Appellant tacks on a bald sentence that trial and appellate counsel were ineffective for failing to raise and/or properly litigate the underlying claims of error. Then, at the end of the discussion section of his brief, Appellant adds a one paragraph summation that each of these "ineffectiveness claims" were of arguable merit, that counsels' failures had no reasonable strategic bases, and that the errors all established prejudice. This Court has previously held that a petitioner can avoid a finding of waiver under the PCRA by making a proper claim of ineffective assistance of counsel at his first available opportunity to do so. Commonwealth v. Wallace, 724 A.2d 916, 921 (Pa. 1999). However, an undeveloped argument such as the one presented by Appellant, which fails to meaningfully apply the standard governing the review of ineffectiveness claims at any point, simply does not satisfy Appellant's burden of establishing that he is entitled to any relief. See Commonwealth v. Bracey, 787 A.2d 344, 350 n4 (Pa. 2001). We could not, however, reach this same conclusion had Appellant framed the instant claims as ones of ineffectiveness, applied and discussed the tripartite ineffectiveness standard at least as it related to trial counsel's performance, and provided a properly-layered assertion that prior counsel were ineffective for failing to raise trial counsel's ineffectiveness. Only then, contrary to what Justice Newman suggests in her concurring opinion, would these claims warrant merit review under this Court's precedent. See id. at 351-57 (reviewing numerous claims where appellant addressed each prong of the ineffectiveness standard as it related to trial counsel and at least included a properly-layered assertion that all prior counsel were ineffective for failing to raise trial counsel's ineffectiveness); Commonwealth v. Williams, 782 A.2d 517, 525-26 (Pa. 2001) (addressing level of advocacy required regarding appellate counsel's ineffectiveness once properly-developed claim of trial counsel's ineffectiveness has been made); Commonwealth v. Marrero, 748 A.2d 202 (Pa. 2000).

⁵ As noted above, a petitioner can avoid a finding of waiver under the PCRA by making a proper claim of ineffective assistance of counsel at his first available opportunity to do so. Commonwealth v. Wallace, 724 A.2d at 921. Here, the PCRA petition marked the first opportunity Appellant had to challenge appellate counsel's failure to assert claims of trial counsel's (continued...)

Appellant essentially argues that trial counsel was ineffective for failing to investigate and present sufficient evidence of mitigation, including evidence of Appellant's history of abuse and his mental illness and dysfunction, at the penalty phase pursuant to 42 Pa. C.S. § 9711(e),⁶ and that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness in this regard. We agree.

(...continued)

ineffectiveness and therefore, Appellant's properly-layered claims of prior counsel's ineffectiveness are not waived.

⁶ Section 9711(e) of the Death Penalty Statute permits the introduction of the following mitigating evidence at the penalty phase:

- (1) The defendant has no significant history of prior criminal convictions.
- (2) The defendant was under the influence of extreme mental or emotional disturbance.
- (3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.
- (4) The age of the defendant at the time of the crime.
- (5) The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under 18 Pa.C.S. § 309 (relating to duress), or acted under the substantial domination of another person.
- (6) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts.
- (7) The defendant's participation in the homicidal act was relatively minor.
- (8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

42 Pa.C.S. § 9711(e).

To prevail on an ineffectiveness claim under the PCRA, Appellant must demonstrate (1) that the underlying claim is of arguable merit; (2) that counsel's course of conduct was without a reasonable basis designed to effectuate his client's interest; and (3) that he was prejudiced by counsel's ineffectiveness, i.e., that there is a reasonable probability that but for the act or omission in question the outcome of the proceeding would have been different. See Commonwealth v. Kimball, 724 A.2d 326, 333 (Pa. 1999).

During Appellant's penalty phase in the instant case, trial counsel presented virtually no evidence of mitigating circumstances. Although counsel called Appellant's sister, Valerie Monroe, to testify during the penalty phase, he did so without preparing her as a witness. Once on the stand, Ms. Monroe stated little more than "if you all would give my brother a life long sentence it would change his mind about the errors that he made in his life and for him to do much better." N.T., 2/11/1991, at 2653. The only other mitigation evidence offered by counsel at the penalty phase was evidence regarding Appellant's low I.Q. and evidence that Appellant's educational achievement is approximately at the second to third grade level.

At the PCRA hearing, trial counsel testified that the only mitigation evidence he reviewed prior to the penalty phase was a report prepared by Dr. Melvin Heller, a psychiatrist, regarding Appellant's competency to stand trial. Although the report ultimately concluded that Appellant was competent, it also clearly revealed that Appellant had a troubled childhood and learning problems.⁷ Despite the information contained in Dr.

⁷ Dr Heller's report stated:

Without psychosis. [Appellant] presents with a background history of troubled childhood in a one-parent impoverished home, followed by the sudden, traumatic loss of his mother in a vehicular accident when he was approximately 12, and unhappy placement in a foster home in which he states that he was abused by alcoholic foster parents. This was coupled with a long standing learning disorder requiring special classes and his development is marked by socioeconomic, cultural
(continued...)

Heller's report, trial counsel made no attempt to obtain any records of Appellant's prior medical hospitalizations, any mental health records or any high school records. He did not solicit information concerning Appellant's life history from Appellant or his family members, nor did trial counsel have a mental health professional evaluate Appellant regarding the potential applicability of mitigating evidence.

Given these circumstances, the PCRA court found, and we agree, that Appellant's claim has arguable merit. It is clear that although trial counsel was reasonably made aware that Appellant had a history of abuse, mental illness and dysfunction, he failed to pursue or develop any of this mitigating evidence. See Commonwealth v. Smith, 675 A.2d 1221, 1234 (Pa. 1996) ("where counsel is informed that his client has suffered some mental problems that may provide evidence of mitigation in the penalty phase, counsel is ineffective if he fails to pursue such evidence").

We also agree with the PCRA court that trial counsel had no reasonable basis for failing to present this mitigating evidence. At the PCRA hearing, trial counsel testified that his failure to investigate Appellant's life history, school records, medical records or mental health records was not a strategic decision. N.T., 2/23/98, at 42-44. Trial counsel also testified that his failure to have Appellant evaluated by a mental health professional was not a strategic decision. Id. at 45. When questioned about his preparation of mitigating evidence, trial counsel stated:

[Mitigation investigation] is a blind spot in my practice. It is a blind spot that exists even today. I do not do what should be done for mitigation. I still have

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and emotional deprivation. This has resulted in Depressive Personality Disorder DPD manifested by poor self image, repeated episodes of self defeating behavior, and underlying feelings of inadequacy.

Heller Report at 3.

constant arguments with my partner to go out there and get mitigation evidence, and I'm getting better, and I am working on it now, because she is forcing me to, but I didn't have her when this case was tried, and I simply did not look for it. I was too enamored with the results that I could get from shooting from the hip to believe that I had to do any more searching than what I thought I could do standing before a jury, and that's why I honestly dropped the ball.

N.T., 3/13/1998, at 59.

In light of this testimony, it is clear that trial counsel had no reasonable basis for failing to investigate and present mitigation concerning Appellant's history of abuse, mental illness and dysfunction. See Kimball, 724 A.2d at 333. ⁸

Finally, we must determine whether Appellant was prejudiced by trial counsel's failure to present mitigating evidence. To show prejudice in the penalty phase of a death penalty case, an appellant must show the reasonable probability that, absent trial counsel's failure to present mitigating evidence, he would have been able to prove at least one mitigating circumstance by a preponderance of the evidence and that at least one jury member would have concluded that the mitigating circumstance(s) outweighed the aggravating circumstance(s).⁹

⁸ Appellant's trial counsel testified that, prior to trial, he spoke with the prosecutor who indicated that he would provide trial counsel with Appellant's mental health reports from the parole department, which, according to the prosecutor, contained evidence that Appellant was explosive. Based on this conversation and without actually reviewing the parole board files, trial counsel declined the prosecutor's offer and decided not to introduce any psychiatric records during the penalty phase given his concern that the reports might have opened the door to the admission of Appellant's prior record. Trial counsel eventually did review the parole board records, but not until the lunch recess just before he was to present Appellant's evidence of mitigation. Thus, although counsel did offer a reason for not presenting Appellant's psychiatric records, this decision was based on very limited information and without actually reviewing the supporting documents. Counsel never explained his failure to pursue or present other evidence of mitigation and indeed, admitted that if he "would have done the job right, and had all of this [mitigation] evidence, [he] certainly would have presented it all [including the psychiatric records]." N.T., 2/23/98, at 54.

⁹ 42 Pa. C.S. § 9711(c) provides, in pertinent part:

(continued...)

In the instant case, the PCRA court summarized the evidence of mitigation put forth by Appellant during the PCRA hearing as follows:

[Appellant] was the middle of five (5) children who shared the same alcoholic mother but four (4) different fathers. His mother would leave the house for days at a time leaving the children to fend for themselves, to scrounge or steal food. Oftentimes after drinking, [Appellant's] mother beat him with an extension cord, threw him against a wall, punched and kicked him. Once a naked [Appellant] was tied to a bed with rope and his mother beat him with an ironing cord. One day when [Appellant] was six (6) or seven (7) years old he ran away after being warned his mother was coming up the stairs to give him a beating. When the police returned [Appellant] to his mother, she threatened to kill him and placed him in foster care. While he was eleven (11) and in an abusive foster care home, [Appellant's] mother was killed in a car accident; at the age of twelve (12) he ran away and went to live with his maternal grandparents. After a short time, [Appellant's] grandmother started the same abusive behavior, beating him with a cord and her fists. When [Appellant's] Uncle Cornell tried to sexually assault one of [Appellant's] sisters, [Appellant] intervened and received a savage beating. On three occasions, [Appellant] jumped from a third story window to escape another beating by Uncle Cornell who was intoxicated and who had

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(c) Instructions to jury.--

(1) Before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters:

(iii) aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances must be proved by the defendant by a preponderance of the evidence.

(iv) the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

threatened to carve his initials in [Appellant's] face. During his teen years, [Appellant] often lived on the street, sleeping in cars.

From his formative years, [Appellant] had also been repeatedly sexually abused although the physical abuse and neglect were, from a psychiatric point of view, deemed more extreme and clinically significant. From his teenage years, [Appellant] also suffered from recurrent major depression with psychotic features including psychotic experiences, paranoia and auditory hallucinations. [Appellant] also suffers from rejection sensitivity, schizophrenia, brain impairments including mental retardation, learning disabilities and post traumatic stress, which, according to Dr. Julie Beth Kessel, a defense psychiatrist, makes him a "grossly impaired person."

According to Dr. Kessel [Appellant] showed signs of dementia early in life as he lived as a homeless street person. These factors coupled with his other extreme deficits leads to a conclusion that [Appellant] is "badly damaged." There is a long history of psychiatric treatment and high dosages of medication with several suicide attempts and impaired reality, including hearing voices and alcohol dependence. It was Dr. Kessel's conclusion that at the time of these savage murders, [Appellant] suffered (1) "from an extreme emotional disturbance," (2) "from a substantially impaired capacity to appreciate the criminality of his conduct" and (3) "from a substantially impaired capacity to conform his conduct to the requirements of law."

Commonwealth v. Ford, Nos. 3222 to 3231, slip op. at 15-17 (C. P. Phil. Oct. 30, 1998).

In light of these facts, the PCRA court found that trial counsel's failure to present this evidence deprived the trier of fact of mitigating evidence and that there was a reasonable possibility that the jury would have found at least one statutory mitigating circumstance by a preponderance of the evidence. The PCRA court, however, went on to conclude that there was no reasonable probability that the outcome of the penalty phase deliberations would have differed. The PCRA court noted that although Appellant's mitigating evidence was extensive, it was "severely compromised by the quality of defendant's prior bad acts and the effective cross-examination of [Appellant's] experts." See id. at 18. In support of this conclusion, the PCRA court pointed to the Commonwealth's rebuttal evidence that Appellant had previously been convicted of the sexual assault of a twelve year-old boy, that he had been a gang member in his youth, and that he had threatened to kill his grandparents and set their house on fire. In addition, the court noted that the

Commonwealth would have presented psychiatric evaluations of Appellant concluding that he had an anti-social personality disorder and that he was aggressive, explosive, and impulsive. The PCRA court also noted that the Commonwealth would have presented the opinion of a clinical psychologist that Appellant does not suffer from organic brain damage and that he is not learning disabled.

Although this rebuttal evidence is substantial, we simply cannot agree with the PCRA court's conclusion that trial counsel's admitted failure to pursue and present mitigating evidence did not prejudice Appellant. It is the duty of the jury to consider all evidence - evidence of aggravating circumstances, evidence of mitigating circumstances as well as rebuttal evidence - in deciding whether or not a defendant should receive the sentence of death. Yet, the jury in the instant case was, in effect, given no meaningful evidence of mitigation to consider in their weighing process even though, as the PCRA court noted, extensive evidence was available. Even without such evidence, however, the record shows that the jury was deadlocked at one point during their penalty phase deliberations. Given these circumstances, we cannot agree that there is no reasonable probability that the outcome of the penalty phase deliberations would have been different had counsel presented evidence of mitigation, including evidence of Appellant's history of abuse, mental illness and dysfunction. We therefore agree with Appellant that trial counsel was ineffective for failing to present such evidence and that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness in this regard. Accordingly, we reverse the order of the PCRA court denying relief and remand the matter to the trial court for a new sentencing hearing.¹⁰

¹⁰ We note that Appellant raises another properly-layered claim of ineffectiveness, wherein he argues that previous counsel was ineffective for failing to assert trial counsel's ineffectiveness for failing to submit any proof in support of Appellant's claim that the court crier improperly interfered with jury deliberations. Specifically, Appellant claims that after four hours of deliberations, the jury foreman told the crier that the jury was deadlocked. Appellant then claims that, without notifying the (continued...)

Madame Justice Newman files a concurring opinion in which Mr. Justice Saylor joins.

Mr. Justice Saylor files a concurring opinion.

Mr. Justice Cappy concurs in the result.

Mr. Justice Castille files a dissenting opinion.

Mr. Justice Eakin files a dissenting opinion.

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trial judge of what had transpired, the court crier told the foreman that the jury had not deliberated long enough and that they should resume deliberations. Appellant raised this claim at post-verdict motions and was ordered by the trial court to offer proof of these allegations. Trial counsel, however, never offered such proof. Given Appellant's failure to offer proof supporting his claim, this Court found on direct appeal that Appellant had waived the claim. Commonwealth v. Ford, 650 A.2d 433, 440 (Pa. 1994). We went on, however, to state that:

[i]f the claim had not been waived and assuming the substance of appellant's claim is true, then such communication by a court crier would be viewed as error that is not harmless. It is highly improper for a court crier to fail to inform the trial judge of a deadlock and, thereafter, to usurp the function of the judge by directing the jury to continue its deliberations after being informed that it is deadlocked. The danger that arises by bypassing the trial judge is that the verdict could be the product of judicial coercion.

Id.

Appellant has now provided affidavits from four members of his penalty phase jury which support his claim. Although the Commonwealth argues that this issue has been previously litigated, Appellant notes that this Court never actually reached the merits of the issue in the direct appeal. Without deciding whether the issue was actually previously litigated or not, we merely reassert, now that Appellant has provided evidence in support of his claim, this Court's conclusion that reversible error occurs when a court crier independently tells the jury to resume penalty phase deliberations.