

[J-172-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 465 CAP
	:	
Appellee	:	Appeal from the Order entered on
	:	10/14/04 in the Court of Common Pleas,
	:	Criminal Division of Philadelphia County
v.	:	denying PCRA relief at No. 86-11-2556-
	:	2661 1/1
	:	
CAM LY,	:	
	:	
Appellant	:	SUBMITTED: October 16, 2006

CONCURRING AND DISSENTING OPINION

MR. JUSTICE SAYLOR

DECIDED: October 1, 2009

I concur in the result as to guilt-phase relief and respectfully dissent as to penalty, as I would remand for further proceedings.

In the post-conviction hearings, trial counsel testified that he conducted effectively no pre-trial penalty-phase investigation and, indeed, did not so much as ask Appellant about his background. See N.T., April 4, 2000, at 312, 315, 377.¹ It is undisputed that, prior to the penalty hearing, counsel also did not even attempt to learn what aggravating circumstances the Commonwealth intended to pursue. The majority

¹ The PCRA court did not reject counsel's testimony on credibility grounds, but rather, held that trial counsel pursued a reasonable strategy at trial. Such conclusion is unsustainable, however, in the absence of an assessment of the adequacy of the underlying penalty investigation. See Wiggins v. Smith, 539 U.S. 510, 527, 123 S. Ct. 2527, 2538 (2003) (explaining that "a reviewing court must consider the reasonableness of the investigation said to support that strategy").

finds the obviously disturbing claim arising out of counsel's lack of preparation to be waived, since it was not properly layered under Commonwealth v. McGill, 574 Pa. 574, 832 A.2d 1014 (2003). My position on this matter is reflected in the following statement from my dissenting opinion in Commonwealth v. Gwynn, 596 Pa. 398, 943 A.2d 940 (2008):

I . . . have favored the allowance of some time for McGill to become institutionalized among the capital bar, as we certainly have not seen immediate, consistent, or even ordinary compliance. However, my personal tolerance expired in November 2006, with the issuance of [Commonwealth v. Marinelli, 589 Pa. 682, 910 A.2d 672 (2006),] in which I indicated that I would no longer maintain a minority position supporting temporary leeway for briefs failing to meet McGill's specific requirements. See Marinelli, 589 Pa. at 714-15, 910 A.2d at 691 (Saylor, J., concurring).^[fn] In this regard, however, the present matter was submitted well before Marinelli was rendered. Accordingly, I have reviewed [the a]ppellant's claims regarding appellate counsel's stewardship and remain of the belief that a remand for further proceedings is warranted.

[fn] It should be noted, however, that in these cases in which the Court is criticizing capital post-conviction counsel for the inability even to frame a claim in the only established manner in which review can be obtained, we are openly confirming a patent deficiency in such counsel's stewardship. It certainly remains arguable that ineptitude of this sort and magnitude should not redound to the detriment of an indigent petitioner pursuing what is likely to be his single opportunity to secure state post-conviction appellate review of his sentence of death.

Id. at 421, 943 A.2d at 954 (Saylor, J., concurring and dissenting).

Since Appellant's briefs also were filed prior to Marinelli, I would extend similar latitude here.