[J-18-2013] [MO: Baer, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	: No. 637 CAP
	:
Appellee	: Appeal from the Order entered on
	: 08/31/2011 in the Court of Common Pleas,
	: Criminal Division of Washington County at
v.	: No. CP-63-CR-0001494-1998
	:
	:
MICHELLE SUE THARP,	:
	:
Appellant	: SUBMITTED: March 6, 2013

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: September 24, 2014**

I join Mr. Justice Baer's Opinion, with a single caveat concerning the point addressed by Mr. Justice Saylor in his Concurring Opinion.

Consistently with our precedent, Justice Baer's lead Opinion[1] expresses the view that because the jury found the catchall mitigator at 42 Pa.C.S. § 9711(e)(8), in response to evidence of appellant's character and the circumstances of the offense, no prejudice can be shown from counsel's failure to present alleged additional catchall evidence of appellant's personal history -- both past and ongoing -- as a victim of neglect, abandonment, abuse, and even violence. Majority Slip. Op. at 56-57.

Renewing the position that Justice Saylor set forth at greater length in his concurring and dissenting opinion in Commonwealth v. Rios, 920 A.2d 790 (Pa. 2007), Justice Saylor argues that the lead opinion's approach, which is grounded in the Court

[1] Given the four Justices in concurrence, as to this one point, Justice Baer's opinion represents a minority view; as to all other points, it is a majority expression.

majority's decision in Rios and the unanimous opinion in Commonwealth v. Marshall, 812 A.2d 539 (Pa. 2002), is both illogical and unfair. Justice Saylor notes that the assessment of aggravating and mitigating circumstances is qualitative, and the categorical approach approved in Rios is not prescribed by the death penalty statute nor any of our other case precedent. Justice Saylor explains that the Rios approach can too easily erode penalty phase review into a mechanical process divorced from the jury's serious and weighty work of weighing aggravators and mitigators in the capital case context. Taken too far, Justice Saylor aptly notes, an instance of truly ineffective assistance of counsel could be improperly excused.

Justice Baer responds that Justice Saylor's concerns, while reasonable, are not before us with the requisite level of advocacy by the parties to warrant revisiting Marshall and Rios. I joined the Court majority in both Rios and Marshall, and agree generally that it is not the policy of this Court to reconsider our precedent on a *sua sponte* basis. Nevertheless, instances may arise when to do so can be appropriate and beneficial to advancing the law. See Commonwealth v. Mitchell, 902 A.2d 430, 474-75 (Pa. 2006) (Castille, J., concurring and dissenting) (citations omitted) ("One also does not have to search very far to find cases where this Court has *sua sponte* reconsidered and overruled prior precedent, including very recent precedent. In many of these very cases, moreover, statutory interpretation was involved and we acted despite the absence of intervening corrective action by the Pennsylvania General Assembly. There are a myriad of other circumstances where individual Justices have taken it upon themselves to suggest a need for a closer look at precedent, and particularly in capital case jurisprudence. The indisputable point, as I see it, is that there is no absolute jurisprudential bar against what I propose; indeed, there is ample precedent in favor of it. Moreover, as I have noted in another context, since the affected party [may be reluctant]

to be so bold as to squarely ask for reconsideration of apparently-controlling precedent, it oftentimes falls upon this Court, or individual Justices, to notice the issue.").

I believe this case presents just such a circumstance and that, upon further reflection, Justice Saylor is correct that the evaluation must be qualitative, particularly when the catchall mitigator is at issue. If specific additional evidence relevant to the catchall mitigator is not presented to a penalty phase jury, but is ultimately shown to have been available, material, and weighty, to the point where there is a reasonable probability that one juror may well have decided against imposition of the death penalty, see Commonwealth v. Malloy, 856 A.2d 767, 789 (Pa. 2004), counsel was ineffective. As an aside, I would merely note that a reorientation toward qualitative assessments in death penalty cases may require reconsideration of other precedents where the Court has adopted categorical approaches, and especially in cases where the *per se* rule so adopted is unsupported by a reasoned analysis. See, e.g., Commonwealth v. Padilla, 80 A.3d 1238, 1286-88 (Pa. 2013) (Castille, C.J., concurring, joined by Eakin, J.) (criticizing Commonwealth v. Williams, 650 A.2d 420 (Pa. 1994), where Court, without supported reasoning, declared that when an aggravating circumstance is struck down in a case where the jury found multiple aggravators and at least one mitigator, Court cannot assess prejudice and award of new penalty hearing is required).

Justice Baer's now-minority view respecting this single point of law is ultimately of no consequence since the Court grants relief upon a related, but legally distinct, penalty phase claim. Since four Justices in concurrence agree with a qualitative approach to claims resting upon additional evidence supporting a found-mitigator, however – a position which overrules Marshall and Rios -- I believe there is some benefit in exploring this now-majority viewpoint in operation. A qualitative approach here begins with what the jury did have before it from the penalty phase: the stipulation that appellant had no

prior criminal record and incorporation of the guilt phase evidence, which included appellant's testimony in her own defense that she had been a victim of physical and emotional abuse at the hands of her own parents, step-parents, and boyfriends, including the fathers of her children, who gave her no support in raising their children. See Majority Slip Op. at 5. At the PCRA hearing, though, appellant asserted that counsel could have: (1) called numerous family members to corroborate her testimony; (2) obtained her school records, which showed consistently below-average intelligence and performance; (3) obtained her father's criminal records, which included various DUI and drug dealing offenses; (4) corroborated appellant's testimony of domestic abuse by her boyfriends by obtaining and presenting police records available for such incidents; and (5) presented testimony of prison guards of appellant's exemplary behavior while incarcerated. Id. at 44-45.

Had appellant not taken the stand in her own defense during the guilt phase and testified as to the history of abuse and neglect she suffered at the hands of her own family and boyfriends, there is little doubt that her catchall mitigator "bundle" would have been much thinner, by any accounting. But appellant did testify as to these complicated misfortunes in her life; and although testimony by family members or presentation of records would have been corroborative, and perhaps bolstered the credibility of appellant's testimony in this regard, it would nevertheless have been cumulative of her own story in her own words, rather than factually distinctive with regard to the catchall mitigator. According to this qualitative rather than quantitative approach, I do not discount the possibility that one or more jurors may have given the catchall mitigator more weight, or that more jurors may have found the catchall mitigator (if the jury was less than unanimous in this regard). But this is not to say that an enhanced finding of the catchall mitigator would have altered the outcome, and ultimately I would conclude that there is

not a reasonable probability that presentation of appellant's additional catchall mitigation evidence would have led at least one original juror to have voted against imposing the death penalty.

Justice Eakin joins this concurring opinion.