[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
	:
	: SUBMITTED: March 6, 2013
MICHELLE SUE THARP,	:
	:
Appellant	:

CONCURRING OPINION

MR. JUSTICE EAKIN **DECIDED: September 24, 2014**

I join the concurring opinions of Chief Justice Castille and Justice Saylor. The rationale of Commonwealth v. Marshall, 812 A.2d 539 (Pa. 2002), and Commonwealth v. Rios, 920 A.2d 790 (Pa. 2007), can only apply if the jury found the mitigating factors presented outweighed the aggravating factors — additional mitigation evidence would amount to surplusage and would not have altered the result. If, however, the jury found the mitigation evidence presented did not outweigh the aggravating factors, counsel could be deemed ineffective for not presenting additional, available mitigation evidence, if such evidence is substantial enough to create a reasonable probability one juror may have voted against the imposition of death. Under this qualitative approach, which has now been adopted by a majority of this Court, see Concurring Slip Op., at 3 (Castille, C.J.), it is necessary to view the mitigation evidence not presented and determine if it could be substantial enough to tip the scale in the defendant's favor.

Here, given the significant unpresented mitigation evidence readily available to appellant's trial counsel, see Majority Slip Op., at 44-45, the scale could indeed tip. We cannot discount a potential ineffectiveness claim merely because the jury found the catch-all mitigator present. Since Rios, I have come to agree with Justice Saylor that the death penalty statute does not support merely evaluating the catch-all mitigation evidence quantitatively on collateral review. Prejudice may be found when there is a substantial difference between the nature or quality of evidence presented at trial and the evidence which the PCRA record shows was available but not investigated or presented, even if it is categorized as part of the same "factor." See Rios, at 828 (Saylor, J., concurring and dissenting) ("I fully support the notion that a failure on the part of trial counsel to adduce redundant evidence concerning a found mitigator will not satisfy [the] burden to prove prejudice. I have difficulty … with transporting this logic to bar claims that are based on substantial differences between the weight or type of the evidence that was presented at trial and that which is presented at the post-conviction stage." (citation omitted)); see also Commonwealth v. Scott, 752 A.2d 871, 877 n.7 (Pa. 2000) (opining defendant not prejudiced where counsel did not introduce drug-treatment records but presented testimony of forensic psychologist and defendant's father regarding defendant's past drug treatment).