[J-33-2013] [MO: Baer, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 658 CAP
	:	
Appellee	:	Appeal from the Judgment of Sentence entered on 7/21/2009 in the Court of Common Pleas Criminal Division of Montgomery County at No. CP-46-CR-0005181-2005 (Post-sentence motions denied on 4/12/2012)
	:	
v.	:	
	:	
	:	
HAROLD MURRAY, IV,	:	
	:	
Appellant	:	
	:	ARGUED: May 7, 2013
	:	

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: December 27, 2013**

I join Mr. Justice Baer's thoughtful and comprehensive Majority Opinion in this capital direct appeal, with the exception of Part III A, as to which I concur in the result. This is a different case, to be sure; the Majority's discussion of the inexplicable error here is accurate; and the expression of deep concern is fully warranted and shared by myself. In terms of the ground for relief, however, I am not comfortable with adverting to general propositions in other capital cases from the U.S. Supreme Court addressing other unrelated specific problems, except to the extent they may provide general guidance. Premising the grant of relief upon such decisional law amounts to stating that High Court constitutional authority is either directly governing, or by logical extension, all reasonable jurists agree it would or should be governing.

This is not a case like some others passed upon by the High Court, where an authorized procedure of a state was employed and found to be unconstitutional. (Put another way, appellant does not point to any authority that says a state cannot authorize the death penalty for the first-degree murder of an unborn child). The underlying error here, rather, is one of Pennsylvania law. To eliminate the prospect of the death penalty for the murder of the unborn child, all the prosecutor had to do was read the plain language of the governing statute, 18 Pa.C.S. § 1102(a)(2), and all appellant's counsel had to do, once the prosecutor erred, was cite to the statute.

That error, if uncorrected, could give rise to a derivative constitutional claim, or claims, to be sure. But, at its essence, it was an error of state law, correctable through normal procedures. The correction did not occur here in advance of the trial due to a perfect storm of one-time ineffectiveness by otherwise capable counsel on both sides, and by a fine judge. The specific error was then corrected upon responsible post-trial motion of the prosecutor. What remains is a question of prejudice from the acknowledged error. As an analytical matter, and to avoid unnecessary resort to broader and vaguer constitutional precepts, I view the question to be one governed, in the first instance, by harmless error principles.

When federal constitutional error is at issue in a direct appeal in a criminal case, the measure for prejudice is the harmless error rule deriving from Chapman v. California, 386 U.S. 18, 21, 87 S.Ct. 824, 826-27 (1967) (federal constitutional error cannot be found harmless unless appellate court is convinced beyond reasonable doubt that error was harmless; burden is on prosecution). In our seminal decision in Commonwealth v. Story, 383 A.2d 155 (Pa. 1978), however, this Court made clear that the same beyond a reasonable doubt measure should govern errors of state law, regardless of whether the error is of constitutional or non-constitutional magnitude. The

Court went to some length to explain why the stringent measure should apply. See id. at 162-64.

The Commonwealth here does not specifically advert to the harmless error rule, much less does it argue the issue along the lines of the guidance in the Story opinion. Notably, however, in defending the denial of relief from the remaining death sentence, the Commonwealth does not argue that appellant waived the claim, or that the claim should be deferred to collateral review. Instead, its essential position is that there was error to be sure, but that the prejudice suffered by appellant was fully remedied by the belated vacatur of the death sentence for the murder of the unborn child.

In my judgment, given the inevitable spillover prejudice resulting from the Commonwealth's improperly being permitted to pursue a death sentence for the murder of the unborn child, the Commonwealth has not borne its burden of proving harmless error beyond a reasonable doubt. Indeed, given the standard, I do not even view the question as close. I come to this conclusion for many of the same reasons postulated by the Majority. My central difference is that I would squarely place the ground for decision upon the absence of harmless error, which is the usual manner by which we measure prejudice on direct appeal when an error is found or conceded. For the same reason, I see no need to resort to the Court's statutory review for passion, prejudice and arbitrariness under 42 Pa.C.S. § 9711(h)(3)(i).