[J-18-2013][M.O. – Baer, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 637 CAP
	:	
Appellee	:	Appeal from the Order entered on
	:	8/31/11 in the Court of Common Pleas,
	:	Criminal Division of Washington County
v.	:	at No. CP-63-CR-0001494-1998
	:	
	:	
MICHELLE SUE THARP,	:	
	:	
Appellant	:	SUBMITTED: March 6, 2013

CONCURRING OPINION

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

I join the majority opinion, save for its perpetuation of the notion that, in any capital case in which one or more sentencing jurors find the catch-all mitigator present, counsel cannot be deemed ineffective for failing to present additional catch-all mitigating evidence. See Majority Opinion, slip op. at 56-57 (citing Commonwealth v. Rios, 591 Pa. 583, 621-22, 920 A.2d 790, 812-13 (2007), and Commonwealth v. Marshall, 571 Pa. 289, 304-05, 812 A.2d 539, 548-49 (2002)). So far as I can tell, this approach derives from the conception that the weighing of mitigating circumstances is a mere counting exercise, a proposition which is neither supported by the death-penalty statute nor other decisions of this Court. See, e.g., Commonwealth v. Spotz, 610 Pa. 17, 99-100, 18 A.3d 244, 292-93 (2011) (crediting jury instructions admonishing that, "[i]n

deciding whether aggravated [sic] outweigh mitigating circumstances, do not simply count their number[;] [c]ompare the seriousness and importance of the aggravating with the mitigating [circumstances].").

Illustrations of the patent illogic and unfairness of the approach may be readily envisioned. For example, the rule would operate to insulate a capital penalty lawyer's stewardship from rational scrutiny where the attorney has failed to present readily available and potentially weighty evidence that his client suffers from profound intellectual disability, see generally Williams v. Taylor, 529 U.S. 362, 398, 120 S. Ct. 1495, 1515 (2000) (commenting that "the reality that [the defendant] was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability"), where the lawyer nevertheless adduced evidence, credited as mitigating by a single juror albeit given little weight, that the defendant in his early youth had effectuated a single, modest act of volunteerism.

I have previously posited that the derivation of this rule lacks a principled underpinning, see Rios, 591 Pa. at 647, 920 A.2d at 828 (Saylor, J., concurring and dissenting), and I have difficulty appreciating why majority decisions continue to apply it in a rote fashion, with no attempt to address its obvious shortcomings.

Madame Justice Todd joins this concurring opinion.