

**[J-31-2013][M.O. – Baer, J.]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 594 CAP
	:	
Appellee	:	Appeal from the Judgment of Sentence
	:	entered on 4/17/09 in the Court of
	:	Common Pleas, Criminal Division of
v.	:	Bucks County at No. CP-09-CR-
	:	0006489-2008
	:	
ROBERT DIAMOND,	:	
	:	
Appellant	:	ARGUED: September 10, 2013

**CONCURRING OPINION**

**MR. JUSTICE SAYLOR**

**DECIDED: December 27, 2013**

I join the majority opinion, subject only to the reservation I expressed in Commonwealth v. Ballard, \_\_\_ Pa. \_\_\_, \_\_\_ A.3d \_\_\_, 2013 WL 6124340 (Nov. 21, 2013), namely, that a wholesale disclaimer of the ability of an appellate court to weigh the evidence adduced in a capital sentencing proceeding is inconsistent with actual practice. See id. at \_\_\_, \_\_\_ A.3d at \_\_\_, 2013 WL 6124340, at \*26-27; cf. Wiggins v. Smith, 539 U.S. 510, 535, 123 S. Ct. 2527, 2542 (2003) (explaining that, in assessing prejudice resulting from deficient performance of capital penalty counsel, the appellate court “reweigh[s] the evidence in aggravation against the totality of the mitigating evidence”).

Notably, in cases involving the imposition of the penalty of death, the General Assembly has invested this Court with the special responsibility of assuring that a capital sentence is not the result of passion, prejudice, or any other arbitrary factor. See 42 Pa.C.S. §9711(h)(3). While I agree with the admonitions offered by various Justices in previous cases cautioning that arbitrariness review should not be accorded so broadly as to obviate requirements maintained to assure a developed record and orderly and appropriate decision-making, I also do not believe it should be administered so narrowly as to preclude a deferential, weight-based assessment as to whether the sentencing jury acted within the range of its specified authority.

I acknowledge that it would be a rare instance in which a weight-based claim would prevail under such a regime. Nevertheless, it is my considered position that the statutory review for arbitrariness serves as an essential safeguard against unwarranted imposition of the severest of punishments and that it should not be circumscribed by the sort of blanket proscription which is enforced here. I also maintain the concern with the underpinnings of the per se rule, in that I believe it is derived from an understatement of the competency of appellate courts to weigh evidence adduced in a capital sentencing proceeding.