[J-3-2025] [MO: Mundy, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 811 CAP
	:	
Appellee	:	Appeal from the Judgment of
	:	Sentence entered on May 24, 2023,
	:	in the Court of Common Pleas of
v.	:	Bucks County, Criminal Division, at
	:	No. CP-09-CR-0001136-2008.
	:	
ALFONSO SANCHEZ,	:	ARGUED: March 4, 2025
	:	
Appellant	:	

CONCURRING AND DISSENTING OPINION

JUSTICE WECHT **DECIDED: November 17, 2026**

Although I agree with much of the Majority's analysis, I differ in two critical respects. First, I am unconvinced that conspiracy to commit second-degree murder is a cognizable crime, though Sanchez' failure to challenge his conviction on that basis defeats his request for vacatur of that conviction. Second, because Sanchez expressly and unambiguously waived his right to present mitigation evidence and argument, I cannot join the Majority's decision to award a new penalty hearing. My reasoning on both of these points follows.

I. Conspiracy to Commit Second-Degree Murder

The Commonwealth presented more than sufficient evidence to prove that Sanchez entered into a criminal conspiracy. Sanchez and his cohorts, Alex Martinez and Steven Miranda, contacted Mendez Thomas under the guise of orchestrating a drug deal. Their true plan was to assault Thomas. Sanchez instructed Miranda to enter Thomas'

apartment and "be a man and prove yourself."[1] Once inside, Martinez and Thomas completed the drug deal. As soon as the deal concluded, a fight broke out between Sanchez and Thomas. Eventually, Sanchez withdrew a gun from his waistband and shot and killed Thomas and Lisa Diaz. He also shot Jessica Carmona, Diaz's sister, who survived.

Conspiracy requires proof that the defendant: "(1) entered an agreement to commit or aid in an unlawful act with another person or persons, (2) with a shared criminal intent, and (3) an overt act was done in furtherance of the conspiracy."[2] It is indisputable that Sanchez conspired with Miranda and Martinez to commit the crime of burglary.[3] But Sanchez was not convicted of conspiracy to commit burglary. He was convicted of conspiracy to commit second-degree murder. As a matter of law and logic, it appears that the latter is a crime not capable of being committed.

The Majority does not address this problem, and understandably so. Sanchez does not argue that, under the Crimes Code, it is impossible to commit the crime of conspiracy to commit second-degree murder. The Majority instead decides that Sanchez is criminally liable for second-degree murder as a natural consequence of his conspiracy to commit the burglary, in part because burglary is one of the predicate felonies for second-degree murder.[4] The Majority leans heavily upon the well-established principle

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1 Notes of Testimony ("N.T."), 4/24/2023, at 177.

2 *Commonwealth v. Chambers*, 188 A.3d 400, 410 (Pa. 2018) (quoting *Commonwealth v. Rios*, 684 A.2d 1025, 1030 (Pa. 1996)); *see* 18 Pa.C.S. § 903.

3 *See* 18 Pa.C.S. § 3502.

4 *See id.* § 2502(b) ("A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony."); § 2502(d) (defining "perpetration of a felony" as "[t]he act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping").

that participants in a criminal conspiracy generally are liable for the reasonably foreseeable illegal acts committed in furtherance of that conspiracy.[5] The Majority determines that a homicide is a "natural and probable" consequence of a conspiracy designed, in part, with the intent either to conduct a drug deal or to harm another person inside a home.[6]

The Majority's application of paradigmatic conspiracy law principles would settle the matter had Sanchez been convicted of conspiracy to commit burglary. Were that the case, when a death resulted, Sanchez would be guilty of the inchoate crime of criminal conspiracy to commit burglary and the applicable substantive homicide offense. But that is not what happened here. Sanchez was convicted of conspiracy to commit second-degree murder. That means that the Commonwealth was required to prove that the *object* of the conspiracy was second-degree murder, not that the murder was the natural and probable consequence of a conspiracy to commit a different crime. This begs the following question: Is it even possible to commit the crime of conspiracy to commit second-degree murder? Our Court has never answered this question.

"The *sine qua non* of a conspiracy is the shared criminal intent."[7] "The criminal union being prosecuted cannot be based upon an agreement to complete a broad, undefined objective at some unknown point. Rather, the agreement must rest upon the mutual specific intent to carry out a particular criminal objective."[8] In other words, criminal conspiracy is a specific intent crime. Conspirators must agree upon and intend to carry

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5 Maj. Op. at 34 (citing *Commonwealth v. Wayne*, 720 A.2d 456, 463-64 (Pa. 1998)).

6 *Id.* (quoting *Commonwealth v. Fisher*, 80 A.3d 1186, 1192 (Pa. 2013)).

7 *Commonwealth v. Weston*, 749 A.2d 458, 463 (Pa. 2000) (citing *Commonwealth v. Wayne*, 720 A.2d 456, 464 (Pa. 1998); *Commonwealth v. Schomaker*, 461 A.2d 1220, 1223 (Pa. 1983)).

8 *Chambers*, 188 A.3d at 410.

out a particular crime. Second-degree murder cannot be that object. This is so because it is not a crime that can be intended or planned. Instead, second-degree murder is a consequence that ensues when a death occurs during the commission one of the statutorily delineated predicate felonies.[9] If that death was intended or planned, it would not be second-degree murder. It would be first-degree murder.[10]

The question of whether conspiracy to commit second-degree murder is a cognizable criminal offense in Pennsylvania is an open one.[11] The closest this Court has come to addressing that question was in *Commonwealth v. Fisher*,[12] where this Court considered whether a person could be convicted of conspiracy to commit third-degree murder.[13] In that case, five teenagers travelled to downtown Philadelphia to get a cellular telephone repaired. Upon learning that they would not be able to get the device fixed that day, the teens decided to "jump" the next person they saw so that the trip downtown would not have been "for nothing."[14] Spying a thirty-six-year-old man walking alone in a subway concourse, the teens attacked. The assault left the man unconscious and severely

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9 *See supra* note 4.

10 18 Pa.C.S. § 2502(a) ("A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.").

11 In *Commonwealth v. Eiland*, this Court considered whether evidence was sufficient to support Eiland's conviction for conspiracy to commit second-degree murder. 301 A.2d 651, 652 (Pa. 1973). However, *Eiland* predated the General Assembly's adoption of the murder statute, which, for the first time in Pennsylvania, categorized murder into three types, and designated felony murder as second-degree murder. Before that, second-degree murder occurred when "[o]ne who voluntarily and with malice, but without a specific intent to cause death, does an act which causes the death of a human being . . . , even though that person's death is an accidental result of such act." *Commonwealth v. Coleman*, 318 A.2d 716, 717 (Pa. 1974) (citation omitted).

12 80 A.3d at 1188.

13 18 Pa.C.S. § 2502(c) ("All other kinds of murder shall be murder of the third degree.").

14 *Fisher*, 80 A.3d at 1187 (citation omitted).

injured. He was rushed to the hospital, where he died from an asthma attack. Fisher and two other teens in the group were arrested and charged with a litany of crimes related to the attack, one of which was conspiracy to commit third-degree murder. A jury convicted Fisher of that crime, and the trial court sentenced him to ten to twenty years in prison.[15]

On appeal, Fisher argued that conspiracy to commit third-degree murder was not a cognizable offense under the Crimes Code. Fisher maintained that, because conspiracy is a specific intent crime, and because third-degree murder does not require the specific intent to kill, it is logically impossible to form an agreement to commit an unintended killing.[16] The Superior Court agreed, and it vacated Fisher's judgment of sentence. This Court subsequently reversed the Superior Court.[17]

After setting forth the law of conspiracy, this Court reviewed the somewhat vague elements of third-degree murder, a crime that is defined only as "[a]ll other kinds of murder."[18] The Court noted that third-degree murder requires proof that the defendant acted with malice, not with a specific intent to kill. The Court explained:

> [T]he absence of specific intent to kill is not an element of third[-]degree murder; rather, such crime is an intentional act, characterized by malice, that results in death, intended or not. [Fisher] and the Superior Court beg the question—in stating [that] an element of the crime of third[-]degree murder is an unintentional killing, and one cannot intend an unintentional act, they misstate the elements of third[-]degree murder. True, the intent to kill is a defined element of first[-]degree murder—this does not mean an element of third[-]degree murder is the polar opposite of intent to kill, such that the Commonwealth must prove a lack of intent to kill to convict of third[-

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15 Fisher also was convicted of third-degree murder, for which he was sentenced to twelve and one-half to twenty-five years in prison. The trial court ordered Fisher's sentence for conspiracy to commit third-degree murder to run concurrently with this prison term. *Id.*

16 *Id.* at 1190.

17 *Id.* at 1187, 1196.

18 18 Pa.C.S. § 2502(c).

>]degree murder. The Commonwealth has no such obligation; evidence of intent to kill is simply irrelevant to third degree murder. The elements of third[-]degree murder absolutely include an intentional *act*, but not an act defined by the statute as intentional murder. The act sufficient for third[-]degree is still a purposeful one, committed with malice, which results in death—clearly one can conspire to such an intentional act.[19]

Then-Justice (now Chief Justice) Todd dissented. She explained that, in order to form a valid conspiracy, its members must share the specific intent of promoting or facilitating a particular crime, [20] which, in that case, was third-degree murder. Each conspirator must have agreed that one of them would engage in conduct that constitutes the crime of third-degree murder. However, because third-degree murder does not require a specific intent to kill, Justice Todd explained, the Commonwealth was required to prove that Fisher and his co-conspirators "intended to commit an unintentional killing, a logical impossibility."[21] In her view, holding otherwise, as the *Fisher* majority did, ignored the "crucial distinction between an intentional *act* and an intentional *result*."[22] Justice Todd opined that one cannot conspire to commit a crime that "results from an unintended consequence."[23]

Fisher does not resolve the quandary presented here. The *Fisher* Court did not reject the premise that one cannot conspire to commit an unintentional act. Rather, the Court rejected the defendant's premise as logically flawed because the act required for third-degree murder is not an unintentional one.[24] Second-degree murder is markedly

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19 *Fisher*, 80 A.3d at 1191 (emphasis in original).

20 *Id.* at 1197 (Todd, J., dissenting). Then-Justice (later Chief Justice) Saylor joined the dissent.

21 *Id.* at 1198 (Todd, J., dissenting).

22 *Id.* at 1199 (Todd, J., dissenting) (emphasis in original).

23 *Id.*

24 *Id.* at 1194-95.

different. As noted, the death that results in a second-degree murder conviction is not an intended one. It cannot be. If it was intended, it could not support a second-degree murder charge. It would support a first-degree murder charge. Because first-degree murder requires specific intent to kill, and because third-degree murder (at least according to the *Fisher* majority) requires an intentional act committed with malice, those crimes both can be the object of a criminal conspiracy. Conspirators can agree to commit that intended killing or that intended act. But one cannot conspire to commit an unintentional act, which is what second-degree murder concerns: an unintended death that results from perpetration of certain felonies.

On at least two occasions, the Superior Court has acknowledged that it likely is not possible to commit the crime of conspiracy to commit second-degree murder. In *Commonwealth v. Mitchell*, that court observed that:

> [t]he Crimes Code does not expressly set forth that one can be found guilty of second-degree murder as a conspirator. Other jurisdictions have determined that one cannot conspire to commit felony murder. *Evanchyk v. Stewart*, 340 A.3d, 933, 939-40 (9th Cir. 2003) (holding that, under Arizona law, one cannot conspire to commit felony murder); *see also Evanchyk v. Stewart*, 47 P.3d 1114, 1119 (Ariz. 2002); *State v. Wilson*, 43 P.3d 851, 853-54 (Kan. 2002) (opining that Kansas does not recognize the crime of conspiracy to commit felony murder because conspiracy requires a specific intent). This Court has also repeatedly noted that one cannot attempt to commit felony murder because an attempt is a specific intent crime, as is conspiracy. *Commonwealth v. Spells*, 612 A.2d 458, 460 n.5 (Pa. Super. 1992); *Commonwealth v. Griffin*, 456 A.2d 171, 177 (Pa. Super. 1983). We note, however, that our Supreme Court has concluded that one can conspire to commit third-degree murder, which does not require proof of a specific intent to kill. [*Fisher*, 80 A.3d at 1191].[25]

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[25] 135 A.3d 1097, 1101 n.2 (Pa. Super. 2016); *see also Commonwealth v. Rivera*, 238 A.3d 482, 490 n.4 (Pa. Super. 2020) (quoting *Mitchell* but declining to address directly whether a person can conspire to commit second-degree murder because the appellant did not raise or preserve such a claim).

It is quite possible, if not probable, that Sanchez was convicted of a crime that is not cognizable logically or under our Crimes Code. Someday, this Court will have to decide the matter. Today is not that day. Nonetheless, I cannot join the Majority's resolution of this issue, because I do not agree that the evidence sufficed to convict Sanchez of conspiracy to commit second-degree murder. There appears to be sufficient evidence to prove only that he conspired to commit the crime of burglary. However, since Sanchez does not challenge the cognizability of the crime for which he actually was convicted, I cannot support vacatur of that conviction. Thus, I concur in the result reached by the Majority on this issue.

II. Waiver of Mitigation

The Majority concludes that Sanchez waived his right to have the jury consider any mitigation evidence during the penalty phase of his capital trial.[26] However, the Majority deems Sanchez' waiver to be limited, applying only to the presentation of new mitigation evidence. The Majority discerns no basis in the record to conclude that Sanchez also waived the ability of counsel to argue the mitigation factors that became available to the jury once the guilt-phase record was incorporated into the penalty phase. My review of the record demonstrates that Sanchez made a complete and total waiver of his right to argue mitigation to the jury in any capacity.

The Majority notes correctly that both the Commonwealth and the defense can waive the opportunity to present new evidence at a death penalty hearing.[27] The Majority then suggests that such a waiver does not preclude the jury from considering aggravating circumstances and mitigating factors, as required by Pennsylvania's death penalty

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[26] Maj. Op. at 47-48, 51.

[27] *Id.* at 53.

statute,[28] because the jury always can consider the evidence in the guilt phase record. This conclusion rests upon the incorrect assumption that the guilt phase record is incorporated automatically and as a matter of law in every case. The guilt phase record is not made available to the jury "by default."[29] The Commonwealth must move for its incorporation. The defendant has the opportunity to object, or to request that only parts of the record be considered by the jury.[30] And, while the actual incorporation is a "purely procedural matter,"[31] the trial court still must grant the motion and then instruct the jury accordingly. Incorporation does not happen automatically (or by default) on its own.

Regardless of how a guilt phase record is incorporated into the penalty phase, there is no dispute that it occurred in this case. For the first time in our extensive death penalty jurisprudence, today's Majority holds that a death penalty defendant must execute two separate waivers. He must waive the right to present new evidence, and he must waive the right to have the jury consider the guilt phase evidence.[32] To support this view,

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[28] *See* 42 Pa.C.S. § 9711.

[29] Maj. Op. at 53.

[30] It is not difficult to conceive of situations in which the guilt-phase record includes matters that are irrelevant or prejudicial to the penalty phase determination based upon the particular aggravating circumstances pursued by the Commonwealth.

[31] *Commonwealth v. Albrecht*, 511 A.2d 764, 777 (Pa. 1986).

[32] The Majority asserts that the latter waiver is not concerned with evidence submitted to the jury for consideration as mitigation, but instead pertains to a capital defendant's right to have his attorney argue for a lesser sentence. *See* Maj. Op. at 55 n.29. Even when framed as argument-based, Sanchez' waiver is still valid and enforceable. As defendant, Sanchez has the right to control his defense. Sanchez' attorney cannot argue defenses or pursue strategies against Sanchez' wishes. *See McCoy v. Louisiana*, 584 U.S. 414, 417 (2018) (explaining that "[t]he Sixth Amendment guarantees a defendant the right to choose the objective of his defense and to insist that his counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty"); *Florida v. Nixon*, 543 U.S. 175, 178-89 (2004) (stating that, "certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made (continued…)

the Majority invokes a number of well-established principles. For instance, the Majority notes that a trial court is required to "permit" counsel to make closing arguments against a death sentence,[33] that such arguments can be based upon the evidence presented at trial and during the penalty phase,[34] and that a sentencing jury may not be precluded from considering all "constitutionally relevant mitigating evidence."[35] Each of these guarantees is essential, and each is fundamental to the fairness of the death penalty process. And, each of them can be waived.

The Majority decides that Sanchez waived only the right to present new evidence, but not the right to have the jury consider the guilt phase evidence and counsel's argument concerning the relevance and importance of that evidence to the aggravating circumstance versus mitigating factor calculus. This, the Majority asserts, is because Sanchez was never explicitly asked whether he wanted to waive that particular aspect of the process. While it is true that this specific question was never posed to Sanchez as such, the record is abundantly clear that Sanchez knowingly, voluntarily, and intelligently waived his right to mitigation in all of its forms.

Through on-the-record colloquies conducted by both the trial court and Sanchez' penalty-phase counsel, Sanchez was apprised of "the nature of the penalty proceeding, his right to present mitigation evidence, the aggravating circumstances the

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for the defendant by a surrogate"). Assuming, *arguendo*, that the right at issue is the right to present argument, it was within Sanchez' prerogative to waive that right. Sanchez' intent was knowing and it was clear. He wanted the jury to hear no mitigation. The record is devoid of any indication (or even the slightest suggestion) that Sanchez understood his waiver to be anything but full and complete, regardless of whether the mitigation came in the form of evidence or argument.

[33] Maj. Op. at 53 (quoting 42 Pa.C.S. § 9711(a)(3)).

[34] *Id.* at 55 (quoting *Commonwealth v. Travaglia*, 546 A.2d 288, 298 (Pa. 1983)).

[35] *Id.* (quoting *Buchanon v. Angelone*, 522 U.S. 269, 276 (1998)).

Commonwealth was to pursue, and the differing burdens of proof."[36] Fully informed of the consequences of his decision, Sanchez never wavered from his desire to give up his right to present mitigation evidence. Sanchez repeatedly insisted that, were his attorney to present or argue any such evidence to the jury, he would take the witness stand, rebut that mitigation evidence, and encourage the jury to sentence him to death.[37] Under these circumstances, and given that he does not challenge the adequacy of the colloquies, Sanchez' waiver was knowing, intelligent, and voluntary.

The waiver was binding and all-encompassing. Sanchez cannot now avoid the consequences of his decision by arguing that the trial court erred when it denied his attorney's request to argue mitigating circumstances that might have arisen from the guilt phase evidence, all of which had been incorporated into the penalty phase. Sanchez was unequivocal and emphatic that he did not want his attorney to present *any* mitigation evidence. His waiver was not limited to new mitigation evidence that his attorney could have introduced for the first time during the penalty phase. Sanchez was asked by his attorney during an on-the-record colloquy to confirm that he did "not wish [counsel] to go forward in presenting any evidence of mitigation."[38] Sachez responded affirmatively. In the very next question, counsel asked Sanchez whether he understood that "the jury [was] not going to hear *any* mitigating evidence" on Sanchez' behalf. Sanchez again answered affirmatively. The questions were not ambiguous. Nor were the answers. Sanchez was clear, as he had been throughout the entirety of the proceedings, that he did not want the jury to consider *any* mitigation evidence. There is nothing in the record to suggest that Sanchez did not understand the breadth of the choice he was making. Nor is there any

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36 *Commonwealth v. Tedford*, 960 A.2d 1, 45 (Pa. 2008).

37 *See* N.T., 5/2/2023, at 89-95.

38 *Id.* at 110-114.

evidence to suggest that he would have made a different choice had he been asked specifically about mitigation evidence that may have been included within the guilt phase record. To the contrary, Sanchez never wavered. He never equivocated. At each and every turn, Sanchez was insistent that he wanted the jury to consider no mitigation, regardless of its source. That was his right. He now is bound to the consequences of that clear, unequivocal choice.

Because the record establishes that Sanchez knowingly, voluntarily, and intelligently waived the right to have the jury consider any mitigation evidence, regardless of whether it was new evidence or evidence that was part of the guilt phase record, I would affirm the judgment of sentence. Therefore, I respectfully dissent as to the Majority's decision to award Sanchez a new penalty hearing.[39]

Justice Donohue joins Part I of this concurring and dissenting opinion.

[39] For the reasons stated, I join the Majority's opinion in all respects, save for Part III(A)(i)(c), with which I concur only in the result, and Parts III(B)(ii) and IV, with which I respectfully dissent.