[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 OPINION

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

I join nearly all of the Majority's opinion, and I emphatically agree with its conclusion the trial court committed a reversible error by preventing the capital counsel of Appellant, Alfonso Sanchez, from arguing against the death penalty based on evidence already in the record from the guilt-phase trial.[1] *See* Majority Opinion at 50-58. I write separately to address whether a capital defendant can prevent the sentencing jury from considering mitigation. Regardless of whether he may waive his **personal** right to have the jury consider mitigation, a capital defendant lacks the power to prevent the jury from considering mitigation evidence already in the record. A defendant also should not be

[1] I join Part I of Justice Wecht's opinion and agree the evidence was insufficient to sustain Sanchez's conviction of conspiracy to commit second-degree murder. *See* Concurring & Dissenting Opinion at 1-8. However, I also agree with Justice Wecht that Sanchez is not entitled to vacatur of that conviction. *See id.* at 8. In all other material respects, I join the Majority's opinion regarding Sanchez's guilt-phase claims.

able to use a "mitigation waiver"[2] to prevent the jury from considering available mitigating evidence merely because he prefers death over the alternative of spending the rest of his life in prison. *See Commonwealth v. McKenna*, 383 A.2d 174, 181 (Pa. 1978) ("[T]he waiver concept was never intended as a means of allowing a criminal defendant to choose his own sentence. Especially is this so where … to do so would result in state aided suicide.").[3] For these reasons, I respectfully concur in the judgment as well as in Part III.A (except for Part III.A.i.c) and Part III.B.ii of the Majority's opinion.

I. Legal Requirements for the Imposition of the Death Penalty

Before closing arguments during the penalty phase of Sanchez's capital trial, the trial court instructed the jury that there was no mitigation evidence available:

> Under our law your verdict must be a sentence of death if you unanimously find — that is all of you, each and every one — at least one aggravating circumstance and no mitigating circumstances, or if you unanimously find one or more aggravating circumstances that outweigh any mitigating circumstances. That is the law.

---

[2] The phrase "mitigation waiver" refers to a capital defendant's waiver of his constitutional right to present mitigating evidence during the penalty phase. *Commonwealth v. Tedford (Tedford II)*, 960 A.2d 1, 45 (Pa. 2008). *See generally* Jules Epstein, *Mandatory Mitigation: An Eighth Amendment Mandate to Require Presentation of Mitigation Evidence, Even When the Sentencing Trial Defendant Wishes to Die*, 21 Temp. Pol. & Civ. Rts. L. Rev. 1 (2011) (explaining judicial and academic background of mitigation waivers, discussing related jurisprudential problems, and exploring potential solutions).

[3] While this Court later abandoned the "relaxed waiver" doctrine that evolved from *McKenna*, we did not doubt "the bedrock principles that animated *McKenna* concerning the necessity of reaching fundamental and plainly meritorious constitutional issues irrespective, even, of the litigation preferences of the parties." *Commonwealth v. Freeman*, 827 A.2d 385, 402 (Pa. 2003) (citation omitted); *see also Commonwealth v. Williams*, 141 A.3d 440, 468 n.28 (Pa. 2016) ("The Court left the *McKenna* decision intact, stating, however, that it would be the 'rare claim' that would necessitate this Court's review of a waived issue of the constitutional dimension that was 'fundamental and plainly meritorious[.]'" (internal quotation marks and citation omitted)). The Court "le[ft] the specific articulation of any future exception to the actual case or controversy in which that 'rare' claim arises." *Freeman*, 827 A.2d at 402. I believe a mitigation waiver fits the bill.

> However, it goes without saying, and I'll state of record, that **there have been no mitigating circumstances presented by the defense for you to consider**. That is their decision. It's not my decision, and I can't intrude upon that decision. It belongs to the defendant.
>
> **So there will be no mitigating circumstances offered for you to consider because none have been presented**. You will, however, consider the arguments of the Commonwealth that the aggravating circumstances to which I'll refer have already been established by your verdict and that verdict was incorporated into this proceeding.

N.T., 5/3/23, at 12-13 (emphases added). The trial court then instructed the jury that certain incriminating evidence presented during the guilt phase could not be used to support an aggravating circumstance.[4] *See id.* at 14-15. The court continued:

> Ordinarily I would instruct you, as I'm required, that you would have to decide whether aggravating circumstances, if you find them, or mitigating circumstances, if they existed, were present and whether aggravating circumstances outweighed any potential mitigating circumstances. And to do that you're to consider the arguments and the evidence you heard. Now, **that does not apply now because based upon the defendant's decision there have been no mitigating circumstances for you to consider. All you have to consider are aggravating circumstances**.

Id. at 18-19 (emphasis added). Consistent with its instructions, the court determined that the portion of the verdict slip listing the mitigating circumstances to be submitted to the jury would read "NONE PRESENTED." *Id.* at 7.

Sanchez's appeal raises the question of whether those instructions and the verdict slip violated the Eighth Amendment, Pennsylvania's death penalty statute, or both. The Majority declines to reach this distinct issue based on its agreement with Sanchez "that prohibiting [his] counsel's intended argument regarding mitigation evidence already admitted in the guilt phase of [his] trial constituted a violation of the Eighth and Fourteenth

---

[4] The court instructed the jury as follows: "I'll say again, you have heard throughout the course of the guilt phase that [Sanchez] ... requested, encouraged, and solicited others to commit the crime of murder as against the surviving victim[.] And while that's in the case, I will stress again an important matter. Those issues, ... the solicitation of one or more parties to kill or murder [the surviving victim], are not in any way indicative of an aggravating circumstance, and I want you to understand that." N.T., 5/3/2023, at 14-15.

Amendments to the United States Constitution." Majority Opinion at 50; *see also id.* ("We are constrained to agree with [Sanchez]."); *id.* at 50 n.28 ("Because the resolution of this provides [Sanchez] with relief, we need not address his remaining claims."). At the same time, however, the Majority leaves open the question of "whether defendants can waive the presentation of argument in all cases." *Id.* at 58 n.32. But that question misses the point and elides that the instructions and verdict slip in Sanchez's case violated both the Eighth Amendment and Pennsylvania statutory law.

The Eighth Amendment requires "that a capital sentencing jury be allowed to consider and give effect to **all relevant** mitigating evidence." *Blystone v. Pennsylvania*, 494 U.S. 299, 305 (1990) (emphasis added). "[T]he sentencer, in all but the rarest kind of capital case, [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (footnote and emphasis omitted).[5] The Constitution

[5] Since *Lockett*, the Supreme Court has repeatedly reaffirmed that, in capital cases, "the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998); *Mills v. Maryland*, 486 U.S. 367, 375 (1988) (calling this general legal principle "well established" (citation omitted)); *Hitchcock v. Dugger*, 481 U.S. 393, 398-399 (1987) ("We think it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of *Skipper v. South Carolina*, 476 U.S. 1 (1986), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Lockett*[.]"); *Skipper*, 476 U.S. at 8 ("The exclusion by the state trial court of relevant mitigating evidence impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender."); *Eddings*, 455 U.S. at 113-114 ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." (emphasis omitted)).

Of course, States may "guid[e] the sentencer's consideration of mitigating evidence." *Johnson v. Texas*, 509 U.S. 350, 362 (1993); *see also Boyde v. California*, (continued…)

does not require that States adopt a specific set of instructions on mitigating evidence. *See Zant v. Stephens*, 462 U.S. 862, 890 (1983). Nevertheless, "the jury instructions — taken as a whole — must clearly inform the jury that they are to consider any relevant mitigating evidence." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). "Relevant mitigating evidence … is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." *Tennard v. Dretke*, 542 U.S. 274, 284 (2004) (*citing McKoy v. North Carolina*, 494 U.S. 433, 440 (1990)). Thus, evidence is mitigating "if the sentence could reasonably find that it warrants a sentence less than death." *Id.* at 285 (*citing McKoy*, 494 U.S. at 441).

To that end, an Eighth Amendment violation occurs if "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant [mitigation] evidence." *Boyde*, 494 U.S. at 380. The jury also must have the means to give effect to such evidence: "For it is only when

---

494 U.S. 370, 377 (1987) (concluding that "States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty'" (citation omitted)). And *Lockett* "does not require a defendant to present mitigating evidence." *Commonwealth v. Frey*, 904 A.2d 866, 874 (Pa. 2006) (emphasis and citation omitted). However, "a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all." *United States v. Tsarnaev*, 595 U.S. 302, 319 (2022) (*citing Johnson*, 509 U.S. at 361); *see also Jones v. Mississippi*, 593 U.S. 98, 116 (2021) ("Under the discretionary death penalty sentence procedure required by cases such as *Woodson* [*v. North Carolina*, 428 U.S. 280 (1976)], *Lockett*, and *Eddings*, the sentencer will necessarily consider relevant mitigating circumstances."); *Tuilaepa v. California*, 512 U.S. 967, 973 (1994) (reaffirming that the Eighth Amendment "requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant's culpability"); *McCleskey v. Kemp*, 481 U.S. 279, 303-304 (1987) ("[T]he Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence." (emphasis omitted)).

the jury is given a 'vehicle for expressing its reasoned moral response to that evidence in rendering its sentencing decision,' that we can be sure that the jury 'has treated the defendant as a uniquely individual human bein[g] and has made a reliable determination that death is the appropriate sentence.'" *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (*citing Penry v. Lynaugh*, 492 U.S. 302, 319, 328 (1989)). The legal standard requires more than a mere "possibility of such an inhibition" but less than a preponderance of the evidence. *Boyde*, 494 U.S. at 380.[6]

The United States Supreme Court's decision in *Blystone* is instructive. There, the Court considered "whether the mandatory aspect of the Pennsylvania death penalty statute renders the penalty imposed upon [the defendant] unconstitutional because it improperly limited the discretion of the jury in deciding the appropriate penalty for his crime." *Blystone*, 494 U.S. at 303. The Court affirmed, holding the Eighth Amendment was not violated since "the jury was specifically instructed to consider, as mitigating evidence, 'any other mitigating matter concerning the character or record of the

---

[6] The United States Supreme Court has not yet decided whether such errors are susceptible to harmless-error review. *See, e.g.*, *Smith v. Texas*, 550 U.S. 297, 316 (2007) (Souter, J., concurring) ("In some later case, we may be required to consider whether harmless-error review is ever appropriate in a case with error as described in *Penry*[.] We do not and need not decide that question here."). However, I would conclude that in cases where the trial court provided the jury "no vehicle to give mitigating effect to" relevant mitigating evidence, such errors cannot be deemed harmless. *Nelson v. Quarterman*, 472 F.3d 287, 307-308 (5th Cir. 2006) (*en banc*); *see also id.* at 315 (declining to apply harmless-error standard: "Given the Supreme Court's refusal to allow an appellate court to substitute its own moral judgment for a moral judgment that the jury was unable to make in a *Penry* case, we decline to do so now."); *id.* at 332 (Dennis, J., concurring) ("Under principles of law clearly established by the Supreme Court's decisions, the constitutional violation in this case was a 'structural defect' that cannot be analyzed as harmless 'trial error.' This is because the violation was not a discrete error that a reviewing court can determine from the record had no substantial and injurious effect or influence on the jury's determination of the sentence. Rather, the violation was the State's failure in this case to enable its capital sentencing jury to give full effect to [the] relevant mitigating evidence in determining the sentence.").

defendant, or the circumstances of his offense.'" *Id.* at 308. The jury also was instructed to consider any mitigating evidence presented during the guilt phase. *See id.* at 306 n.4. For that reason, ever since *Blystone*, the standard practice under Pennsylvania's death penalty scheme has been to instruct jurors that, "[i]n deciding whether aggravating or mitigating circumstances exist and whether aggravating outweigh mitigating circumstances, [they] **should consider** the evidence" that they "heard **during the earlier trial to the extent that it bears upon the issues now** before [them]." Pa. Suggested Standard Criminal Jury Instructions § 15.2502F (emphases added).[7]

Importantly, the defendant in *Blystone* waived his right to present mitigating evidence during the penalty phase of his capital trial. *See Blystone*, 494 U.S. at 307 n.4. Notwithstanding the mitigation waiver, the Supreme Court held no Eighth Amendment violation occurred since the jury was instructed to consider any evidence presented at either phase of the trial. *See id.* Thus, although *Blystone* did not consider whether a defendant may waive the presentation of mitigation evidence, it established the federal constitutional benchmark for cases involving mitigation waivers under Pennsylvania's death penalty scheme.[8] In fact, even before *Blystone*, this Court admonished trial courts to strictly adhere to the **mandatory** language of the death penalty statute:

---

[7] *See also, e.g.*, *Commonwealth v. Marinelli*, 810 A.2d 1257, 1270 (Pa. 2002) ("The parties did not present any substantial additional testimony during the penalty phase, so the court instructed the jury to refer to the evidence presented during the guilt phase when making its determination concerning aggravating and mitigating circumstances."); *Commonwealth v. Tilley*, 595 A.2d 575, 585 (Pa. 1991) (rejecting defendant's "meritless" challenge to instruction that purportedly limited the jury's consideration of mitigation to only evidence presented during the penalty phase, because the instruction provided: "All the evidence from both sides, including the evidence you heard earlier during the trial in chief as to aggravating or mitigating circumstances is important and proper for you to consider." (emphasis and citation omitted)).

[8] *Cf. Commonwealth v. Hitcho*, 123 A.3d 731, 757 (Pa. 2015) (reiterating *Blystone* "specifically held that Pennsylvania's death penalty statute satisfies" the constitutional (continued…)

> Our death sentencing procedures were carefully designed by the legislature to channel the discretion of the jury and prevent arbitrary or capricious imposition of the death penalty. Our trial courts are directed to follow the language of the statute and interpretive decisions of this Court, and thereby avoid the problems created by ill-conceived deviations from that language.

Commonwealth v. Billa, 555 A.2d 835, 845 (Pa. 1989); *see also* 42 Pa.C.S. § 9711(c)(1)(ii) ("[T]he court **shall** instruct the jury on … [t]he mitigating circumstances specified … as to which there is some evidence." (emphasis added)); *Oberneder v. Link Computer Corp.*, 696 A.2d 148, 150 (Pa. 1997) ("By definition, 'shall' is mandatory." (citation omitted)).[9]

"requirement of individualized sentencing by permitting capital juries 'to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime'" (*citing Blystone*, 494 U.S. at 304-305)); *Commonwealth v. Williams*, 615 A.2d 716, 723 (Pa. 1992) (rejecting defendant's challenge to jury charge on mitigating evidence because instructions matched instructions approved in *Blystone*).

[9] It is true that, even in capital cases, this Court's "policy" is "to give our trial courts latitude and discretion in phrasing instructions." *Commonwealth v. Eichinger*, 915 A.2d 1122, 1138 (Pa. 2007). For example, we have opined that Pennsylvania Suggested Standard Criminal Jury Instruction 15.2502F is "not binding and do[es] not alter the discretion afforded trial courts in crafting jury instructions[.]" *Commonwealth v. Eichinger*, 108 A.3d 821, 845 (Pa. 2014) (citation omitted). However, that "policy" stands in tension with the death penalty statute's mandatory language. *Cf. Sackett v. Nationwide Mut. Ins. Co.*, 919 A.2d 194, 201 (Pa. 2007) ("A policy objective … may be considered only '[w]hen the words of the statute are not explicit." (*citing* 1 Pa.C.S. § 1921(c)). Of course, "[a] deviation from the language of the statutory instruction or a technical inaccuracy in the jury instruction which nevertheless adequately, accurately and clearly expresses the law to the jury will not invalidate a sentence of death." *Commonwealth v. Frey*, 475 A.2d 700, 704 (Pa. 1984) (citation omitted), *abrogated on other grounds by Freeman*, 827 A.2d 385; *see also, e.g.*, *Commonwealth v. D'Amato*, 856 A.2d 806, 819 (Pa. 2004) (rejecting defendant's reliance on *Billa* in challenge to instruction defining "preponderance of the evidence," since "*Billa* does not stand for the proposition that trial courts have no leeway in describing the meaning of such terms, or that they must follow the standard jury instructions to the letter"). But courts do not have free reign to ignore the mandates of the death penalty statute. *See Billa*, 555 A.2d at 845; *cf. Commonwealth v. H.D.*, 247 A.3d 1062, 1064 & n.1 (Pa. 2021) (noting "[c]ourts generally are not wed … to the suggested instructions[,]" but "a court would be bound by language included in the suggested instructions that is made mandatory by a precedential judicial decision" (citation omitted)). Courts obviously cannot issue instructions containing legal errors. *See Commonwealth v. Drummond*, 285 (continued…)

In my view, a trial court's instructions and verdict slip violate the Eighth Amendment if they categorically bar a capital sentencing jury from considering and giving effect to relevant mitigating evidence presented during the guilt phase. Since "[e]vidence concerning the catchall mitigator tends to be subjective," it is difficult to conclude, as a matter of law, that a guilt-phase record contains no mitigating evidence whatsoever. *Commonwealth v. Ballard*, 80 A.3d 380, 411 (Pa. 2013). Moreover, as the United States Supreme Court noted, mitigating evidence is not limited to the categories listed in the 42 Pa.C.S. § 9711(e). *See Blystone*, 494 U.S. at 305 & n.2 ("The Pennsylvania Supreme Court has construed [Section] 9711(e) to allow consideration of **any** relevant mitigating evidence, even that falling outside the catchall provision of subsection (e)(8)." (emphasis in original) (*citing Commonwealth v. Holcomb*, 498 A.2d 833, 856 n.26 (Pa. 1985) (plurality opinion); *and Commonwealth v. Fahy*, 516 A.2d 689, 698 (Pa. 1986))).

Similarly, Pennsylvania statutory law requires the jury to consider mitigating evidence before sentencing a person to death. *See* 42 Pa.C.S. § 9711(a)(2), (c)(1)(ii)-(iii), (e). "[A]lthough one is admonished to listen attentively to what a statute says[,] one must also listen attentively to what it does not say." *Commonwealth v. Giulian*, 141 A.3d 1262, 1268 (Pa. 2016) (second alteration in original; citation omitted). This Court cannot "rewrite a statute in order to supply terms which are not present therein[.]" *In re Nov. 3, 2020 Gen. Election*, 240 A.3d 591, 611 (Pa. 2020).

The death penalty statute provides that the evidence to be considered by the jury during the sentencing phase "shall include matters relating to any of the … mitigating circumstances specified in subsection[] … (e)[.]" 42 Pa.C.S. § 9711(a)(2). It also states that "mitigating circumstances must be proved by the defendant by a preponderance of

---

A.3d 625, 634 (Pa. 2022) ("A trial court may use such language as it chooses, so long as the law is clearly, adequately, and accurately presented to the jury for its consideration." (citation and internal quotation marks omitted)).

the evidence." 42 Pa.C.S. § 9711(c)(1)(iii). But it does not say the defendant is the only possible source of mitigating evidence.[10] Nor does it say the defendant may prevent the jury from considering and giving mitigating effect to evidence presented during the guilt phase. Rather, the sentencer must find the existence of any mitigating circumstance supported by a preponderance of the evidence. *See Commonwealth v. Rizzuto*, 777 A.2d 1069, 1089 (Pa. 2001) ("[T]he jury is required to find the existence of any mitigating circumstances that have been proven by a preponderance of the evidence." (citation omitted)), *abrogated on other grounds by Freeman*, 827 A.2d 385. So, the trial court must give instructions on any mitigating circumstances "as to which there is some evidence." 42 Pa.C.S. § 9711(c)(1) ("[T]he court **shall instruct** the jury on … [t]he circumstances specified in subsection (e) as to which there is some evidence." (emphasis added)). Thus, trial courts do not have *carte blanche* to deviate from the statutorily mandated instructions.

Simply put, the statute does not grant the defendant any right to choose the death penalty and waive the statutory requirement that the sentencer determine whether he deserves death based on a weighing of the aggravating circumstances and mitigating circumstances as to which the record contains "some evidence." 42 Pa.C.S. § 9711(c)(1). *Cf. State v. Schroeder*, 941 N.W.2d 445, 471 (Neb. 2020) ("Due to this statutory scheme, a defendant cannot 'choose' the death penalty."); *State v. Koedatich*, 548 A.2d 939, 994-995 (N.J. 1988) (holding, after reviewing the language of the New Jersey death penalty statute, that a defendant cannot "prevent[] the presentation of mitigating evidence[,]"

---

[10] *Cf. Commonwealth v. Small*, 980 A.2d 549, 557 n.1 (Pa. 2009) (noting that, even though the defendant "instructed his attorney not to present any evidence[,]" "the jury, *sua sponte*, found two circumstances they found to be mitigating" (citation omitted)); *Commonwealth v. Morales*, 701 A.2d 516, 527 & n.28 (Pa. 1997) (noting that, despite defendant's mitigation waiver, "the jury was presented with evidence that would have allowed it to consider [his] age as a mitigating circumstance" because the testimony of two Commonwealth witnesses during the penalty hearing established that he was 22 years old at the time of the murder).

because mitigation waivers frustrate the state supreme court's "constitutional and statutory duty to review every judgment of death" and "determine if the imposition of the death penalty was appropriate"). It is the duty of the jury, not the defendant, to determine whether a mitigating factor exists and how much weight to give that factor.[11]

The statute is unambiguous. But to the extent one may interpret it as ambiguous, reading the death penalty statute to allow a defendant to prevent a capital sentencing jury from considering mitigating evidence presented during the guilt phase would raise constitutional concerns by inviting arbitrariness into the selection process.[12] *See Lenhard v. Wolff*, 444 U.S. 807, 815 (1979) (Marshall, J., dissenting from *per curiam* denial of stay of execution) (labeling a "defendant's decision to acquiesce in his own death" as "an entirely arbitrary factor" that should not bar appellate review of a capital sentence).[13]

---

[11] *See Commonwealth v. Walter*, 966 A.2d 560, 568 (Pa. 2009) ("The law is clear that the task of determining the existence of mitigating factors is for the jury **alone**." (emphasis added) (*citing Commonwealth v. Treiber*, 874 A.2d 26, 30-31 (Pa. 2005))); *Fahy*, 516 A.2d at 698 ("[I]t is **exclusively** a jury question whether any mitigating factor is to be given determinative weight when balanced with other mitigating and aggravating circumstances in the case." (emphasis added)); *see also* Majority Opinion at 53.

[12] "The 'canon of constitutional avoidance' provides that when a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *See MCI WorldCom, Inc. v. Pa. Pub. Util. Comm'n*, 844 A.2d 1239, 1249 (Pa. 2004) (citations omitted). This canon allows courts to adopt a plausible alternative interpretation even if it is not "the most natural interpretation" of the statute. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 563 (2012).

[13] *See also* Linda Carter, *Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death*, 55 Tenn. L. Rev. 95, 111 (1987) ("Where society's interest in the reliability of the decision making process in death penalty cases is manifested in an individualized determination based on aggravating and mitigating circumstances, a waiver of one part of this structure invalidates the delicately balanced protection for safeguarding against arbitrary imposition of the death penalty."); Anthony J. Casey, *Maintaining the Integrity of Death: An Argument for Restricting a Defendant's Right to Volunteer for Execution at Certain Stages in Capital Proceedings*, 30 Am. J. Crim. L. 75, 96-97 (2002) ("[T]he refusal (continued…)

Allowing mitigation waivers to bar the jury's consideration of mitigating evidence contained in the record raises serious doubts as to compliance with the core holding of *Furman v. Georgia*,[14] *i.e.*, the death penalty cannot be imposed based on an arbitrary factor. *See Gregg v. Georgia*, 428 U.S. 153, 188-189, 195, 199, 206 (1976) (Opinion of Stewart, Powell, and Stevens, JJ.); *see also Hamblen v. State*, 527 So.2d 800, 808 (Fla. 1988) (Barkett, J., dissenting) ("Without a presentation of mitigating evidence, we cannot be assured that the death penalty will not be imposed in an arbitrary and capricious manner, since the very facts necessary to that determination will be missing from the record. The state's responsibility in this regard cannot be handed over to the accused merely because he wishes to see himself executed.").

Allowing the defendant to choose whether the jury may be instructed on mitigating evidence presented during the guilt phase also leads to an "absurd" or "unreasonable" result. *See* 1 Pa.C.S. § 1922(1). From a penological perspective, the death penalty is justifiable only on deterrence and retribution grounds. *See Kennedy v. Louisiana*, 554 U.S. 407, 441 (2008) ("*Gregg* instructs that capital punishment is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes." (citations omitted)). Crucially, "the State's interest in retribution is diluted in the volunteer context.[15]

---

to present mitigating evidence reduces the assurances that the sentence was appropriate for the case. It is well established that a defendant must be allowed to present mitigating evidence to ensure that the death penalty is applied in a non-arbitrary way. Arbitrariness is no less troublesome when the defendant herself bars the presentation of mitigating evidence than when that presentation is prohibited by an act of the state." (footnotes omitted)).

[14] 408 U.S. 238 (1972).

[15] "'Volunteer' is the term generally used for a death-row inmate who waives his appeals in the academic literature as well as in the capital defense community." John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency,* 103 Mich. L. Rev. 939, 940 n.5 (continued…)

To the extent that execution is sought only because the inmate considers it less painful than life imprisonment, the State's interests in retribution are probably better served by requiring life imprisonment." G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness, and Propriety of Third Party Intervention*, 74 J. Crim. L. & Criminology 860, 904 (1983). A mitigation waiver also "calls into question who is actually making the determination of whether the defendant is death-worthy[,]" since such a waiver "enables the defendant to choose an extreme and irreversible sentence that lacks any meaningful assessment by the delegated sentencing body responsible for making the determination of whether the punishment is proportional or deserved." Adam L. Dulberg, Note, State v. Robert: *Why Mitigation Waivers During Capital Sentencing Undermine Fundamental Justifications of Punishment*, 51 Am. Crim. L. Rev. 483, 505 (2014). As for deterrence, allowing the defendant to essentially choose the death penalty would have no positive marginal deterrent effect on first-degree murder. *See id.* at 512 ("[T]he existence of a capital sentencing scheme allowing defendants to essentially choose execution by

---

(2005) (citations omitted). This is not an uncommon phenomenon. *See* Richard J. Bonnie, *The Dignity of the Condemned*, 74 Va. L. Rev. 1363, 1380 (1988) (noting that "a significant proportion of defendants charged with capital murder express a preference for a death sentence at some point during the course of interactions with their attorneys"). Nationally, from 1976 to 2005, 12% percent of the executed "had waived their appeals and permitted the death sentence to be carried out." Blume, *supra*, at 940. Death volunteerism may also occur "at sentencing in two ways: (1) he can refuse to present mitigating evidence, or (2) he can take the stand and plead for execution." Ross E. Eisenberg, *The Lawyer's Duty When the Defendant Seeks Death*, 14 Cap. Def. J. 55, 62 (2001); *see also* Blume, *supra*, at 940 n.5 ("There are other individuals on death row who have precluded their trial counsel from presenting any evidence or argument at the sentencing phase of their capital trials." (citation omitted)). Notably, since *Furman*, Pennsylvania has executed only three people — and all three used tactics to expedite their executions. *See* Joint State Govt. Comm'n, Capital Punishment in Pennsylvania; The Report of the Task Force and Advisory Committee 153 (2018) ("[T]he Commonwealth has executed only three condemnees during the last 56 years, and all three had psychiatric problems and relinquished their appeals[.]" (footnote omitted)).

refusing to put on the mitigation presentation may actually cause individuals to commit more, not fewer, murders that meet statutorily defined aggravating factors."). In short, there is no constitutional, statutory, or common-law norm that supports affording a defendant the right to choose the death penalty. *Cf. Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) ("The history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it.").

Accordingly, I conclude that, even in cases where the defense did not present any mitigating evidence during the penalty phase, it is still the jury's right and duty to balance aggravating and mitigating factors to determine whether a sentence of death is justified. An instruction that inhibits the jurors' weighing of those factors in any way contradicts the death penalty statute's mandate that "the court **shall** instruct the jury on" any mitigating circumstance as to which the record contains "**some** evidence." 42 Pa.C.S. § 9711(c)(1)(ii) (emphases added). The "record" evidence of mitigation includes the evidence admitted during the guilt phase. *See Commonwealth v. Albrecht*, 511 A.2d 764, 776-777 (Pa. 1986) (rejecting defendant's "frivolous" claim that his "trial counsel was ineffective in failing to object, at the penalty stage, to the incorporation of the trial record[,]" since "the incorporation of this evidence into the penalty stage was purely a procedural matter carried out pursuant to 42 Pa.C.S. § 9711"); *see also* Majority Opinion at 50-53. Due to the expansive reach of the catchall mitigator, the jury is entitled to the statutory instructions even if a defendant refuses to present evidence during the penalty trial. *See Blystone*, 494 U.S. at 305 & n.2, 306 n.4. If the jury is instructed that there is no mitigating evidence, despite the guilt-phase record containing relevant mitigating evidence, the defendant's sentence should be vacated for violating the Eighth Amendment and Pennsylvania's statutory requirement that the guilt-phase evidence be incorporated into

the penalty phase and that the jury be instructed to consider all mitigating evidence as to which the record contains "some evidence." 42 Pa.C.S. § 9711(c)(1)(ii).

II. Defendants Have No Right to Choose Their Sentence

It is beyond question that convicts have no right to a sentence of their choosing. An important corollary to this principle is that those convicted of capital murder have no right to choose between life in prison and the death penalty. *See McKenna*, 383 A.2d at 181; *see also Hammett v. Texas*, 448 U.S. 725, 732 (1990) (Marshall, J., dissenting) ("The defendant has no right to 'state-administered suicide." (citation omitted)); Welsh S. White, *Defendants Who Elect Execution*, 48 U. Pitt. L. Rev. 853, 863 (1987) ("Clearly, an individual who has not been convicted of a criminal offense has no right to demand that he be executed by the state. Moreover, even a criminal defendant who has been convicted of a capital offense has no right to dictate to the government which of the two authorized penalties, death or life imprisonment, should be imposed."). Nor does he have the right to waive the Eighth Amendment's absolute ban on "cruel and unusual punishment." U.S. Const. amend. VIII; *see also Lenhard*, 444 U.S. at 815 (Marshall, J., dissenting) ("Society's independent stake in enforcement of the Eighth Amendment's prohibition against cruel and unusual punishment cannot be overridden by a defendant's purported waiver."); *Gilmore v. Utah*, 429 U.S. 1012, 1018 (1976) (White, J., dissenting) ("[T]he consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment."); *id.* at 1019 (Marshall, J., dissenting) ("[T]he Eighth Amendment not only protects the right of individuals not to be victims of cruel and unusual punishment, but ... also expresses a

fundamental interest of society in ensuring that state authority is not used to administer barbaric punishments").[16]

---

[16] *See also* Steven A. Blum, *Public Executions: Understanding the "Cruel and Unusual Punishments" Clause*, 19 Hastings Const. L.Q. 413, 451 (1992) ("One may not consent to cruel and unusual punishment."); Carter, *supra*, at 96 (positing that a defendant cannot waive the Eighth Amendment's protection and that "society's interest in the integrity of the process of imposing death outweighs an individual defendant's interest in free choice"); Casey, *supra*, at 94-95 ("The rights created by the Eighth Amendment are not merely personal. They are guarantees to society that the integrity of the criminal justice system will be maintained, therefore, they cannot be waived. A defendant cannot give the state permission to impose a punishment that would otherwise violate the Eighth Amendment."); Christopher Q. Cutler, *Nothing Less Than the Dignity of Man: Evolving Standards, Botched Executions and Utah's Controversial Use of the Firing Squad*, 50 Clev. St. L. Rev. 335, 394-395 (2003) ("The waiver of the Eighth Amendment challenge to an otherwise cruel and unusual punishment is different in finality and unforgiveability than other waivers. The choice to die by a method that offends the dignity of man differs in magnitude and effect than the waiver of, say, the right to a jury trial. If death is different, a waiver ending in an otherwise-impermissible death also is different."); Richard W. Garnett, *Why Informed Consent? Human Experimentation and the Ethics of Autonomy*, 36 Cath. L. 455, 501 (1996) ("No defendant could ever meaningfully consent to an Eighth Amendment violation; after all, who is he to demand that we violate our moral commitments?"); Simona Grossi, *The Waiver of Constitutional Rights*, 60 Hous. L. Rev. 1021, 1034 (2023) ("[T]he waiver of Eighth Amendment rights harms not just the individual waiving those rights, but our society and the integrity of our system of justice. Thus, because neither the individual nor society benefits from those waivers and, in fact, because both are harmed by them, the waiver of those rights should not be allowed."); Tim Kaine, Comment, *Capital Punishment and the Waiver of Sentence Review*, 18 Harv. C.R.-C.L. L. Rev. 483, 514 (1983) ("The [E]ighth [A]mendment, requiring review of capital sentences to ensure their procedural and substantive fairness, cannot be waived when such waiver means imposition of a sentence violating the amendment's mandate."); White, *supra*, at 869 ("Hornbook law states that a defendant can waive rights personal to himself but not those in which the government maintains an interest. Certainly the government has a substantial interest in preventing the 'illegal execution of a citizen.'" (footnote and citation omitted)); Daniel R. Williams, *Mitigation and the Capital Defendant Who Wants to Die: A Study in the Rhetoric of Autonomy and the Hidden Discourse of Collective Responsibility*, 57 Hastings L.J. 693, 722-723 (2006) ("In a nutshell, the moral integrity of society depends on the actual enforcement of the Eighth Amendment; by contrast, that integrity is vindicated in other constitutional contexts by the mere willingness to enforce a constitutional right. Understood that way, we see that the Eighth Amendment is not an individual entitlement provision, but society's own self-observed and self-

(continued…)

A criminal defendant's waiver of a personal constitutional right does not automatically override society's interest in enforcing that right against his wishes. *See Singer v. United States*, 380 U.S. 24, 34-35 (1965) ("The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right."); *accord Commonwealth v. (Abraham) Sanchez*, 36 A.3d 24, 59 (Pa. 2011) (same); *see also Wheat v. United States*, 486 U.S. 153, 160 (1988) (authorizing courts to "decline a proffer of waiver" of the Sixth Amendment right to conflict-free counsel, as "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them"); Epstein, *supra*, at 27-28 (discussing how the United States Supreme Court "has barred defendant waivers of individual rights both when they conflict with a broader, societal need, and even when the right is particularly individual-focused"); *cf. McKenna*, 383 A.2d at 180-181 (stating the "general proposition that while a defendant may normally make an informed and voluntary waiver of rights personal to himself, his freedom to do so must give way where a substantial public policy is involved").

"[T]he idea that parties [ ] cannot waive rights in which the state has an interest is not novel." *McKenna*, 383 A.2d at 181 n.14 (citations omitted); *see also Massie v. Sumner*, 624 F.2d 72, 73 (9th Cir. 1980) ("[A] defendant's waiver or attempted waiver of a right is ineffective where it would also involve the renunciation of a correlative duty imposed upon the courts[.]"). For instance, although a defendant may waive his constitutional right to a jury trial, he cannot force the Commonwealth to waive its own independent right to a jury trial. *See Commonwealth v. Tharp*, 754 A.2d 1251, 1253 (Pa. 2000); *see also Singer*, 380 U.S. at 34-35 ("A defendant's only constitutional right

---

enforcing limitation on governmental action that is independent of the defendant's interest in enjoying whatever entitlement the provision grants him." (footnotes omitted)).

concerning the method of trial is to an impartial trial by jury. We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury — the very thing that the Constitution guarantees him."). Likewise, while a criminal defendant may waive "the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers[,]"[17] he "does not have an absolute right under the Constitution to have his guilty plea accepted by the court, although the States may by statute or otherwise confer such a right." *North Carolina v. Alford*, 400 U.S. 25, 38 n.11 (1970) (citation omitted).

The Eighth Amendment is not simply a guarantee of protection for criminal defendants. By its own terms, the Amendment imposes an absolute bar on "cruel and unusual punishment,"[18] which includes the arbitrary and capricious application of the death penalty. *See Gregg*, 428 U.S. at 188-189, 195, 199, 206 (reaffirming *Furman*'s core holding). It is a constitutional "limitation" on the States' power to punish persons convicted of crimes. *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) (recognizing the Eighth Amendment "limit[s] the power of those entrusted with the criminal-law function of government"); *see also Moore v. Texas*, 581 U.S. 1, 12 (2017) (stating the Eighth Amendment's ban on cruel and unusual punishments "reaffirms the duty of the government to respect the dignity of all persons" (citation omitted)).

The Eighth Amendment reflects society's considered judgment about the outer bounds of lawful punishment and denies the government the authority to impose penalties that are inconsistent with contemporary standards of decency and human dignity. *See Roper v. Simmons*, 543 U.S. 551, 561 (2005) (reaffirming that the Eighth Amendment

---

[17] *Godinez v. Moran*, 509 U.S. 389, 397 n.7 (1993) (citation omitted).

[18] U.S. Const. amend. VIII ("Excessive bail **shall not** be required, … **nor cruel and unusual punishments inflicted**." (emphases added)).

derives its meaning from "the evolving standards of decency that mark the progress of a maturing society" (citation omitted)). It thus serves both as a safeguard for the individual and as a structural restraint on sovereign power, ensuring that the administration of criminal justice remains consistent with the basic norms of our Nation's constitutional order. *See Ingraham*, 430 U.S. at 664; *see also Hall v. Florida*, 572 U.S. 701, 708 (2014) ("The Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be. This is to affirm that the Nation's constant, unyielding purpose must be to transmit the Constitution so that its precepts and guarantees retain their meaning and force."); *Gardner v. Florida*, 430 U.S. 349, 357-358 (1977) ("From the point of view of society, the action of the sovereign in taking the life of one of its citizens differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.").

Even in the cases of the most depraved murderers, the Eighth Amendment prohibits the State from subjecting them, as human beings, to cruel and unusual punishment. *See Graham v. Florida*, 560 U.S. 48, 59 (2010) ("[U]nder the Eighth Amendment, the State must respect the human attributes even of those who have committed serious crimes."); *see also Brown v. Plata*, 563 U.S. 493, 510 (2011) ("Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man." (citation and internal quotation marks omitted)); *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) ("The Amendment embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency, against which we must evaluate penal measures." (citation, omission, and internal quotation marks omitted)).

Whether the State may exercise its sovereign power to execute a defendant is a profound moral question that only society, through the sentencer, may answer. *Cf. Abdul-Kabir v. Quarterman*, 550 U.S. 233, 263 (2007) ("[B]efore a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral culpability[.]"); *Saffle v. Parks*, 494 U.S. 484, 495 (1990) (explaining that the selection process centers on "whether the defendant, in the eyes of the community, is morally deserving of the death sentence"); *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968) ("[O]ne of the most important functions any jury can perform in making ... a selection (between life imprisonment and death for a defendant convicted in a capital case) is to maintain a link between contemporary community values and the penal system.").

For instance, in *McKenna*, this Court encountered a defendant who "personally prefer[red] death to spending the remainder of his life in prison." *McKenna*, 383 A.2d at 181. He "expressly refused to challenge the validity of [the death penalty] statute, or to allow his lawyer to do so." *Id.* at 179. This Court nevertheless declined to enforce his waiver of appellate review, emphasizing that "[w]hile this may be a genuine conviction on his part, the waiver concept was never intended as a means of allowing a criminal defendant to choose his own sentence." *Id.* at 181. The Court explained that allowing such a waiver "would result in state aided suicide" and concluded that "[t]he waiver rule cannot be exalted to a position so lofty as to require this Court to blind itself to the real issue the propriety of allowing the state to conduct an illegal execution of a citizen." *Id.* (footnote omitted). "[W]hile a defendant may normally make an informed and voluntary waiver of rights personal to himself, his freedom to do so must give way where a substantial public policy is involved[.]" *Id.* In short, in capital cases, "an overwhelming public interest insuring that capital punishment in this Commonwealth comports with the Constitution of the United States" may outweigh a defendant's waiver. *Id.*

Given society's overwhelming, undeniable interest in preventing "state assisted suicide," a defendant cannot waive the Eighth Amendment's ban on cruel and unusual punishment. *Id.*; *see also* Williams, *supra*, at 698 (explaining that the penalty phase "introduces into the decisional mix matters that the capital defendant ought [to] have no power to veto," as the process implicates "collective responsibility and guilt" in a manner that "enrich[es] the moral nature of the jury's decisionmaking"). "A defendant's voluntary submission to a barbaric punishment does not ameliorate the harm that imposing such a punishment causes to our basic societal values and to the integrity of our system of justice." *Whitmore v. Arkansas*, 495 U.S. 149, 173 (1990) (Marshall, J., dissenting).

Since society retains an independent interest in the constitutional application of the death penalty, it logically follows that a defendant's mitigation waiver cannot extend beyond his **personal** right to present and argue relevant mitigating evidence.[19] *See Bell*

[19] Society's interest need not arise from the Eighth Amendment itself in order to override the defendant's waiver. *See* Bonnie, *supra*, at 1377 ("Even if a capital defendant may waive his [E]ighth [A]mendment interest in individualized capital sentencing, an equivalent societal interest may be independently established by state capital sentencing statutes."). For instance, the countervailing societal interest could emerge from the Pennsylvania Constitution. *See, e.g.*, *Tharp*, 754 A.2d at 1253 (holding that "providing the Commonwealth with the right to trial by jury does not violate any constitutional right held by defendants[,]" because all criminal defendants "have a constitutional right to trial by jury but such a right simply does not include any corresponding constitutional right to be tried non-jury"); *cf. Commonwealth v. Lee*, 357 A.3d 356, 390-391 (Pa. 2026) (holding Article I, Section 13 of the Pennsylvania Constitution generally affords greater protections against disproportionate sentencing than the Eighth Amendment).

Today's decision does not address whether the unreasonable failure to present available mitigation evidence constitutes a structural error under our state charter or results in an illegal sentence that must be vacated, as neither issue was raised. *See Weaver v. Massachusetts*, 582 U.S. 286 (2017) (identifying the categories of structural error); *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991); *see also Commonwealth v. Hitchner*, 360 A.3d 735, 739 (Pa. 2026) (reaffirming that an illegal sentence must be corrected); *Commonwealth v. Prinkey*, 277 A.3d 554, 560-564 (Pa. 2022) (identifying the categories of challenges implicating illegal sentences).

v. State, 336 So. 3d 211, 217 (Fla. 2022) ("A capital defendant may waive the right to present evidence, but such a waiver does not eliminate the court's responsibility to consider mitigating evidence in the record." (citation omitted)); *Koedatich*, 548 A.2d at 993 ("[W]e find persuasive policy reasons exist for not allowing a defendant in a capital case to execute even a knowing and voluntary waiver of his right to present mitigating evidence during the penalty phase. These policy reasons are based substantially on the State's interest in a reliable penalty determination." (citations and internal quotation marks omitted)).[20]

A defendant's waiver of his right to present mitigating evidence, by itself, does not trigger a waiver of any other statutory or constitutional prerequisites to the imposition of the death penalty. *Cf. Singer*, 380 U.S. at 34-35; *McKenna*, 383 A.2d at 180-181. A

[20] *Cf. Whitmore*, 495 U.S. at 175-176 (Marshall, dissenting) ("Society's interest, expressed in the Eighth Amendment, of ensuring that punishments are neither cruel nor unusual similarly justifies restricting a defendant's ability to acquiesce in the infliction of wrongful punishment. Although death may, to some death row inmates, seem preferable to life in prison, society has the right, and indeed the obligation, to see that procedural safeguards are observed before the State takes a human life." (footnote omitted)); Carter, *supra*, at 111 ("The Supreme Court has repeatedly emphasized the need to consider mitigating, as well as aggravating, factors to assure a non-arbitrary imposition of the penalty. If an individual defendant is allowed to demand death without a consideration of mitigating factors, that assurance is lost. Society's interest in the dignity of the system, as reflected in the [E]ighth [A]mendment's inherent prohibition against arbitrary punishments, is abrogated."); Casey, *supra*, at 97 ("If the requirement of allowing mitigating evidence to be presented is intended to assure that the death penalty is imposed only in certain qualifying cases then the presentation should be mandated in all cases regardless of the defendant's desire to die." (footnote omitted)); Epstein, *supra*, at 30 (positing that "where the right at issue is not a core personal autonomy right, but a right implicating the limits of society's authority, a defendant may be denied the right to 'waive' mitigation and, in effect and outcome, waive the protection against suffering a cruel and unusual sentence"); Williams, *supra*, at 755-756 ("[L]itigants have the personal power to withhold their own testimony and the potential power to influence others to do the same. But to remove from the jury's consideration the meaningful consideration of competing conceptual schemes is something altogether different.").

defendant is unable to waive a right that he does not possess. *Cf. Frias v. Asset Foreclosure Servs., Inc.*, 334 P.3d 529, 535 (Wash. 2014) ("One cannot waive a right that does not exist[.]"); *Ex parte D.J.*, 645 So.2d 303, 307 (Ala. 1994) (explaining that a litigant "cannot waive or relinquish a right that does not exist" (emphasis omitted)). Accordingly, I would hold a capital defendant's waiver of his personal right to present mitigating evidence does not override society's interest in enforcing the Eighth Amendment's ban on cruel and unusual punishment, nor Pennsylvania's statutory requirements for the imposition of the death penalty.[21]

I recognize that, at first blush, there is some tension between my view and this Court's precedents on mitigation waivers. *See, e.g.*, *Commonwealth v. Sam*, 635 A.2d 603, 611-12 (Pa. 1993) ("A criminal defendant has the right to decide whether mitigating evidence will be presented on his behalf."). Under longstanding precedent, a capital defendant may knowingly, intelligently, and voluntarily waive his right to present mitigating evidence during the penalty phase. *See Commonwealth v. Davido*, 868 A.2d 431, 444 (Pa. 2005). For a waiver to be valid, "the trial court should conduct a thorough on the record colloquy regarding the waiver of mitigating evidence given the consequences of such a decision." *Id.* at 443 (citation omitted).

---

[21] There are scenarios where a waiver of mitigating evidence qualifies as reasonable trial strategy due to the risk that introduction of such evidence will open the door to prejudicial rebuttal evidence that otherwise might have been excluded. *See, e.g.*, *Commonwealth v. Whitney*, 708 A.2d 471, 479 (Pa. 1998) (rejecting the defendant's contention that "because his (adult) record reveals an absence of any conviction involving the use or threat of violence, counsel should have presented this mitigating circumstance[,]" reasoning: "Had counsel presented the mitigating circumstance, such presentation would have permitted the admission of [the defendant's] prior adult convictions and fourteen juvenile adjudications and, therefore, probably negated the mitigating circumstance and harming the defense."). Such waivers should be viewed less skeptically than waivers that are based on a defendant's preference for death over life imprisonment.

This Court's precedents on mitigation waivers do not directly answer the question of whether a capital defendant may waive the Eighth Amendment's ban on cruel and unusual punishment and bar the sentencer from considering mitigation already in the record. Instead, they confirm a defendant cannot claim ineffective assistance of counsel based on his personal decision to waive his Eighth Amendment right to present mitigating evidence. *See Commonwealth v. Blystone*, 725 A.2d 1197, 1205-1206 (Pa. 1999) (explaining that if "this Court were to allow an ineffectiveness claim to succeed after appellant made a knowing, intelligent and voluntary waiver of his right to present mitigating evidence, it would have the unwanted and absurd effect of allowing appellant and other defendants to build automatic ineffective assistance claims into their case in order to guarantee themselves a new sentencing hearing should they receive the death penalty").[22] They also establish that "[t]he trial court cannot compel [a defendant] to exercise [his] right" to present mitigating evidence, and that "the trial court has no duty or obligation to, *sua sponte,* compel the production of evidence of mitigating factors on behalf of a convicted defendant at a sentencing hearing." *Commonwealth v. Tedford*, 567 A.2d 610, 627 & n.7 (Pa. 1989); *see also Commonwealth v. Birdsong*, 650 A.2d 26, 33-34 (Pa. 1994) (holding trial court did not abuse its discretion in denying capital defendant's request to reopen the penalty phase to present mitigating evidence, "because [he] had ample opportunity to present additional mitigating circumstances, yet expressly waived that right"). However, none of these precedents hold a capital defendant may waive the Eighth Amendment's ban on cruel and unusual punishment. Nor do they hold

[22] *See also Tedford II*, 960 A.2d at 52-53; *Commonwealth v. Puksar*, 951 A.2d 267, 288-292 (Pa. 2008); *Commonwealth v. Rega*, 933 A.2d 997, 1018-1019 (Pa. 2007); *Commonwealth v. Randolph*, 873 A.2d 1277, 1282 (Pa. 2005); *Davido*, 868 A.2d at 442-443; *Commonwealth v. Wilson*, 861 A.2d 919, 933-935 (Pa. 2004); *Marinelli*, 810 A.2d at 1275-1276; *Commonwealth v. Michael*, 755 A.2d 1274, 1279-1280 (Pa. 2000) (plurality opinion); *Sam*, 635 A.2d at 611-612.

that a capital defendant has the right to bar the jury from considering and giving mitigating effect to relevant evidence already in the record.

Additionally, this Court has never addressed the key antecedent question whether, under the Sixth Amendment, the right to present mitigating evidence is "so personal and fundamental that counsel implements it subject to defendant's veto power." *Commonwealth v. Mason*, 130 A.3d 601, 670 (Pa. 2015); *see also McCoy v. Louisiana*, 584 U.S. 414, 423 (2018) (holding that, under the Sixth Amendment, "[w]hen a client expressly asserts that the objective of '**his** defence' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt" (emphasis in original; citations omitted)); Elizabeth M. Klein, Note, McCoy v. Louisiana's *Unintended Consequences for Capital Sentencing*, 71 Stan. L. Rev. 1067, 1079-1086 (2019); *cf. State v. Reddish*, 859 A.2d 1173, 1203-1204 (N.J. 2004) ("Although a pro se defendant is entitled to maintain control over his defense strategy, waiver of the presentation of mitigating evidence is simply not subject to the defendant's discretion."). This Court should consider that issue in a future case, for it may require us to reassess our case law on mitigation waivers.[23]

In any event, to my knowledge, this Court has never held that a trial court lacks the discretion to "appoint an independent, special counsel to represent the public interest in bringing forth all available mitigation for the benefit of the jury, the trial court, and this

[23] *See* Williams, *supra*, at 706 ("[O]nce we scrutinize the concept of autonomy, rather than deploy it rhetorically, we can see that it holds far less power in the mitigation-waiver analysis. Analyzing the law's rapid and expansive embrace of waiver, we see that wrapping waiver in the philosophical garb of autonomy is a myth — in this context, a myth in the service of suppressing destabilizing conversations about capital jurisprudence, and … about individualized versus collective responsibility and guilt."). *See generally* James Michael Blakemore, Note, *Counsel's Control over the Presentation of Mitigating Evidence During Capital Sentencing*, 111 Mich. L. Rev. 1337 (2013) (arguing defense counsel should have control over whether to present mitigation during capital sentencing).

Court, in order to assist the judiciary in performing its statutory and constitutional obligations in death penalty cases." *Marquardt v. State*, 156 So.3d 464, 490 (Fla. 2015) (*per curiam*); *see also id.* at 491 (holding that "the trial court has the discretion either to call its own witnesses or … to appoint an independent, special counsel, who can call witnesses to present mitigation evidence"). By comparison, the Florida Supreme Court adopted this approach to "ensure that available mitigation evidence is placed in the record at the time of the original sentencing proceeding," without "prevent[ing] the defendant himself or herself from arguing in favor of the death penalty." *Id.* at 490. Similarly, long before New Jersey abolished the death penalty, the New Jersey Supreme Court held that mitigating evidence "must be introduced, regardless of the defendant's position," because, *inter alia*, "[a] defendant who prevents the presentation of mitigating evidence withholds from the trier of fact potentially crucial information bearing on the penalty decision no less than if the defendant was himself prevented from introducing such evidence by statute or judicial ruling." *Koedatich*, 548 A.2d at 994-995, 997 (internal quotation marks and citation omitted). As our sister state court explained,

> It is self-evident that the state and its citizens have an overwhelming interest in insuring that there is no mistake in the imposition of the death penalty. Accordingly, we have the constitutional and statutory duty to review every judgment of death. Without any evidence in the record of mitigating factors we are missing a significant portion of the evidence that enables us to determine if the imposition of the death penalty was appropriate. Hence, we would be unable to discharge our constitutional and statutory requirement to review a judgment, and, therefore, we would fail to safeguard the state's interest in insuring the reliability of death penalty decisions. On this ground alone, there must be a new penalty trial.

Id. at 995. Given the mandatory language of Pennsylvania's death penalty statute, the Commonwealth's interest in the reliable and fair imposition of capital punishment, and the patent absurdity of promoting death volunteerism, I see no reason why Pennsylvania's death penalty regime should require a different conclusion.