[J-3-2025]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

TODD, C.J., DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, McCAFFERY, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 811 CAP
	:	
Appellee	:	Appeal from the Judgment of
	:	Sentence of the Court of Common
	:	Pleas of Bucks County, Criminal
v.	:	Division, entered on May 24, 2023,
	:	at No. CP-08-CR-0001136-2008.
	:	
ALFONSO SANCHEZ,	:	ARGUED: March 4, 2025
	:	
Appellant	:	

OPINION

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

In this capital case, Alfonso Sanchez ("Appellant") challenges the judgment of sentence of death imposed by the Court of Common Pleas of Bucks County for the first-degree murder of Lisa Diaz, as well as related charges stemming from the shooting death of Mendez Thomas on October 16, 2007, and the solicitation of Rey Curbello-Rodriguez and Anthony Sparango to murder Jessica Ann Carmona in 2021. In this direct appeal, Appellant challenges the sufficiency of the evidence for these convictions, the legality of the sentence imposed, and issues relating to Appellant's choice to waive the presentation of new mitigation evidence during the penalty phase of his trial. After careful review, and for the reasons set forth below, we affirm as to Appellant's guilt-phase issues. However, while it was abundantly clear that Appellant wished to waive the presentation of any new evidence during the penalty phase of his trial, we are constrained to agree with him that our sentencing statute mandates that his counsel be permitted to argue against the

sentence of death. *See* 42 Pa.C.S. § 9711(a)(1), (3), (e). For the reasons that follow, we vacate Appellant's sentence of death and remand to the trial court for a new penalty phase proceeding.

I. Factual and Procedural Background

A. The 2007 murders

On the evening of October 16, 2007, Appellant, then age twenty-six, and two co-conspirators, Alex Martinez ("Martinez") and Steven Miranda ("Miranda"), were smoking marijuana and drinking alcohol at various locations in Philadelphia and Bucks Counties. At some point during the night, Appellant told Miranda to call Mendez Thomas ("Thomas") to set up what the three men understood to be a pretextual marijuana deal.

In particular, Appellant asked Miranda to "call [Thomas,] th[e] person that [Miranda was] hav[ing] problems with[,] and ask him for marijuana and . . . an [eight] ball of coke." Notes of Testimony ("N.T."), 4/24/23, at 127-28. Thomas told Miranda that he had no cocaine, at which point, Appellant took the phone from Miranda, and began mimicking Miranda's voice, while repeatedly asking Thomas for cocaine. Martinez explained that, from Appellant's actions, it was his understanding that Appellant and Miranda were going to fight Thomas. Appellant drove himself and his two co-conspirators to Thomas's apartment in a tan Ford Explorer. During the drive, Appellant played a song titled "Someone's Going to Die Tonight" and, before arriving at Thomas's apartment, told Miranda, "don't bullshit; you go; you stand up; you be a man and prove yourself." *Id.* at 177.

When Appellant and his two co-conspirators arrived at Thomas's apartment complex around midnight, Thomas and his live-in partner, Jessica Ann Carmona ("Carmona"), were not home. Instead, Lisa Diaz ("Diaz"), the sister of Carmona and the

girlfriend of Miranda, was inside with Thomas and Carmona's two children.[1] When Appellant and the two co-conspirators got to the apartment, Appellant hid behind the wall so that only Miranda and Martinez were visible when Diaz opened the door. Once Miranda and Martinez were inside the apartment, Appellant followed them inside, causing Diaz to step back while looking "[s]cared, [and] terrified." *Id.* at 132.

Several minutes later, Thomas and Carmona arrived at the apartment. Thomas and Martinez then began a marijuana deal at the table. After the deal was complete, Appellant and Thomas got into a physical and verbal altercation, during which Appellant stepped on Thomas's foot, Thomas pushed Appellant, and Diaz and Carmona attempted to separate the two men. After being separated, Thomas began to walk toward the hallway, at which point, Appellant pulled a gun from his waistband, followed Thomas into the hallway and shot Thomas in the head from six to ten inches away, killing him instantly.

After the first shot was fired, Carmona screamed at Thomas that Appellant had a gun and Martinez and Miranda ran out of the apartment. Appellant then emerged from the hallway, turned, and shot Diaz in the shoulder, and she fell to the floor. Appellant then advanced to where she lay and shot her in the head. Carmona, believing she needed to choose which one of her children she needed to protect, grabbed the child who was running around the apartment and shielded him with her body. Appellant then fired a shot at Carmona while she was holding the child. The bullet passed completely through her leg. Appellant then fled the apartment.

After Appellant left the apartment, Carmona checked on Thomas, who was not breathing, and Diaz, who was choking on blood. Carmona then took both children to the neighbor across the hall and returned to the apartment, stayed with Diaz, and called 911.

[1] One of the children was sleeping on the loveseat, while the other was running around the apartment.

Carmona informed the dispatcher that numerous people had been shot, while identifying "Alfonso" as the shooter, *see* 911 Call from Jessica Carmona, at 00:01:05-00:01:07 (recorded Oct. 16, 2007), and stating that the shooting had been "a set-up." *Id.* at 00:01:47-00:01:50. While Carmona survived, Diaz later died as a result of her injuries.

At some point, Appellant, still holding the gun, caught up with Martinez and told him to start walking to Appellant's then-girlfriend's apartment, leaving Appellant's vehicle behind. When they walked into the apartment, Appellant told Martinez to sit down. Appellant then told his girlfriend that he killed Thomas and Diaz, but he was unsure whether he had successfully killed Carmona. At some point in the conversation, Appellant gave his girlfriend a cell phone and instructed her to retrieve his vehicle and bring it back to her apartment, which she did.

After that, Appellant and Martinez drove to Appellant's house in Philadelphia. When they arrived at Appellant's home, Miranda was waiting for them. The three men stayed together in Appellant's basement through the night. The next morning, the trio watched news coverage of the shooting, after which Appellant told both Martinez and Miranda to change their shoes and to get into the vehicle. At some point, Appellant stopped to park the vehicle and walked away. Miranda then jumped into the driver's seat and drove off. Eventually, Miranda and Martinez got out of the vehicle, tossed the keys, and walked off, leaving the vehicle somewhere in Philadelphia, near a location Martinez referred to as "Camel Hill." N.T., 4/24/23, at 145. The pair then made the decision to surrender themselves to police.

After turning themselves in, Martinez and Miranda gave statements that implicated Appellant as the shooter and asserted that the purpose of their collective visit to the apartment had simply been to purchase marijuana, not to assault anyone.[2] Both men

[2] During the trial, it was revealed that Martinez initially lied to the police at Miranda's (continued…)

were charged with multiple counts of criminal homicide and related offenses, including burglary and conspiracy to commit burglary, for their roles in the aforementioned crimes.[3]

Appellant, meanwhile, had fled to Altoona, Pennsylvania, but soon returned to Horsham, Pennsylvania, where, through the assistance of the United States Marshal Service Fugitive Task Force, Appellant was apprehended on October 25, 2007, while attempting to conceal himself in an upper floor bathroom of a friend's residence. Three days later, the police recovered the Ford Explorer that Appellant drove on the night of the killings from the 600 block of Erie Avenue in Philadelphia. The vehicle was registered to Appellant's mother, and a 9mm handgun, later determined to be the murder weapon, was retrieved from the rear passenger-side floor of the vehicle. Appellant was charged with multiple counts of criminal homicide and related offenses.

B. First trial and subsequent appeals

On September 30, 2008, after a seven-day jury trial at which Appellant and Miranda were tried jointly, and, importantly, where Carmona testified, Appellant was found guilty of two counts of murder in the first-degree and fifteen related counts, including burglary and criminal conspiracy. On October 2, 2008, the jury returned a sentence of

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request. Complying with Miranda's request, Martinez initially told the police that the reason he and Miranda went to Diaz's residence was to purchase marijuana and not to start a fight. However, Martinez did inform police that Appellant was the shooter. At trial, Martinez testified that he initially lied to police, and then testified to the events as described *supra*, and specified that he understood that the purpose of their collective visit was to start a fight.

[3] Martinez was initially charged with criminal homicide; however, in exchange for testifying at Appellant's trial, that charge was dropped and he ultimately pled guilty to conspiracy to commit burglary and burglary. Martinez was sentenced to four to ten years' incarceration.

Miranda was charged with criminal homicide, conspiracy to commit several offenses, burglary, and recklessly endangering another person. He was found guilty of these charges, and sentenced to life imprisonment for criminal homicide.

death for the murder of Diaz.[4] Appellant appealed his sentence of death, this Court affirmed, and the United States Supreme Court denied his later petition for writ of *certiorari*. *See Commonwealth v. Sanchez*, 82 A.3d 943, 985 (Pa. 2013), *cert. denied*, *Sanchez v. Pennsylvania*, 574 U.S. 860 (2014).

Then, on January 30, 2015, Appellant filed a petition pursuant to the Post Conviction Relief Act[5] ("PCRA"), and a hearing was scheduled. After some delay, a PCRA hearing was held on January 26, 2017, at which time the Commonwealth informed the PCRA court and defense counsel that it was in receipt of a DNA analysis report from the Pennsylvania State Police Laboratory. The DNA report, dated October 28, 2008, six days after Appellant's conviction, indicated that DNA samples found under Diaz's fingernail clippings matched the DNA of Appellant's co-defendant, Miranda.

Given these circumstances, and in consideration of the defense's argument that the DNA match with Miranda may have been exculpatory evidence, the Commonwealth agreed that the PCRA court should enter an order vacating Appellant's judgment of sentence. An order, granting Appellant a new trial, was entered on January 26, 2017.

Shortly thereafter, the lower court considered Appellant's *pro se* motion to dismiss on double jeopardy grounds. Therein, Appellant alleged that

> [t]he [C]ommonwealth intentionally suppressed evidence in the form of the DNA report and the evidence itself revealed that [Miranda's] DNA was under [] Diaz's fingernails when she was killed.
>
> The prosecutor knew or should have known both pretrial and during trial that multiple pieces of physical evidence – including the fingernail clippings – had been submitted to the State Police Crime Lab for DNA analysis. The presence of a defendant's DNA under the fingernails of a murder victim is a powerful piece of inculpatory evidence, and here it inculpated [] Miranda. Where DNA was found under only one hand, as here,

[4] Appellant was also given a consecutive life sentence for the murder of Thomas.

[5] *See generally* 42 Pa.C.S. §§ 9541-9546.

> it suggests that Diaz scratched Miranda to defend herself against him as her aggressor[.]

Pro Se Mot. to Dismiss, 2/21/17, at 1. After finding Appellant's *pro se* motion not frivolous on its face, the trial court held a motion hearing over the course of two days. Ultimately, Appellant's motion was denied, after which he appealed to the Superior Court. On direct review, the Superior Court affirmed the trial court's order, explaining that it did not find that the circumstances involving the laboratory report were the product of intentional misconduct by the Commonwealth. *See Commonwealth v. Sanchez*, No. 3368 EDA 2017, 193 A.3d 1124 (Pa. Super. June 28, 2018) (unpublished memorandum). Appellant's petition for allowance of appeal to this Court and later petition for writ of *certiorari* submitted to the United States Supreme Court were likewise denied. *See Commonwealth v. Sanchez*, No. 584 MAL 2018, 203 A.3d 211 (Pa. Feb. 26, 2019) (*per curiam*), *cert. denied*, 589 U.S. 1036 (2019).

Appellant's new trial was scheduled to begin in March of 2020 but was delayed by the Covid-19 pandemic. On June 5, 2020, Appellant filed a second motion to dismiss based on double jeopardy, citing this Court's decision in *Commonwealth v. Johnson*, 231 A.3d 807, 826 (Pa. 2020) (holding that under the Pennsylvania Constitution, "prosecutorial overreaching sufficient to invoke double jeopardy protections includes misconduct which not only deprives the defendant of his right to a fair trial, but is undertaken *recklessly*, that is, with a *conscious disregard* for a substantial risk that such will be the result" (emphasis added)). In particular, Appellant argued that the Commonwealth's "failure to adequately monitor the submission of physical evidence . . . amount[ed] to a reckless disregard of consequences and a lack of thoroughness[.]" Def's Mot. to Dismiss, 6/5/20, at 5, ¶ 30. After a hearing, the trial court denied Appellant's motion, at which point, Appellant appealed.

The Superior Court again affirmed the trial court's order, concluding that "[n]otwithstanding the Commonwealth's unfortunate errors in this case, they d[id] not rise to the level of recklessness displayed in *Johnson*." *Commonwealth v. Sanchez*, 262 A.3d 1283, 1294 (Pa. Super. 2021). Appellant again sought discretionary review from this Court, which we denied on May 18, 2022. *See Commonwealth v. Sanchez*, No. 597 MAL 2021, 278 A.3d 853 (Pa. May 18, 2022) (*per curiam*).

C. Solicitation to commit murder while in jail and second trial

While Appellant was incarcerated at the Bucks County Correctional Facility awaiting retrial and the resolution of his then-pending appeals, he was in contact with several individuals, including Karrol Lloyd ("Lloyd"). At Appellant's trial on solicitation charges, as detailed below, Lloyd testified that she originally contacted Appellant to assist him with his legal issues; however, after a period of time, the two entered into a romantic relationship. Eventually, Appellant began to ask Lloyd to commit crimes on his behalf.[6]

Relevant to the instant appeal, on January 1, 2021, Appellant asked Lloyd to "do something for [him] . . . [and] help him find the girl, [Carmona], that testified against him previously." *Id.* at 435, 479. The purpose of this request was to prevent Carmona from testifying at Appellant's retrial. *Id.* at 460 ("[Carmona] couldn't testify against him if she wasn't breathing.").[7] During one call, Appellant specifically asked Lloyd to contact Rey

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[6] Appellant initially asked Lloyd to assist in a drug smuggling operation within the Bucks County Correctional Facility. N.T., 4/25/23, at 473. The operation involved smuggling Suboxone into the jail through fraudulent legal mail. Eventually, the Bucks County District Attorney's Drug Strike Force became aware of this illegal activity, at which point, officers began to arrest individuals who were involved, including Lloyd, who was arrested in November of 2020. She subsequently became a confidential informant and would report her conversations with Appellant regarding trafficking the contraband to her main point of contact, Detective Jarrod Eisenhauer ("Detective Eisenhauer"). Eventually, Lloyd pled guilty to a number of charges relating to the smuggling operation. *Id.*

[7] These conversations were often coded in football metaphors. For example, when referring to the plot to kill Carmona, Appellant used language such as "if you take out the (continued…)

Curbello-Rodriguez ("Curbello-Rodriguez")[8] and ask him to dinner to "get the details of this [plan]." *Id.* at 436. Lloyd agreed to help Appellant; however, immediately after this conversation, Lloyd contacted Detective Eisenhauer to inform him of Appellant's request. Detective Eisenhauer instructed Lloyd to keep him apprised of any further phone calls she had with Appellant, so that he could help "construct[]" the conversations and "very directly guide[] [Lloyd] as to what to say and what not to say[.]" *Id.* at 440. Additionally, Detective Eisenhauer instructed Lloyd "to be as compliant as [she] could be with [Appellant] and make sure that the information was correctly relayed to the police so that [Carmona] could be protected." *Id.* Lloyd also gave Detective Eisenhauer permission to intercept her calls with Appellant.[9] N.T., 4/26/23, at 559.

Appellant continued to contact Lloyd, and in a later phone call, informed her that Carmona had a Facebook page and gave Lloyd identifying information for Carmona, including what Carmona looked like, as well as her middle name, so that Lloyd would know which Facebook page belonged to Carmona.[10] Appellant again instructed Lloyd to meet with Curbello-Rodriguez, this time to provide information on how to locate Carmona, at which point, Curbello-Rodriguez would "take . . . out [Carmona], and . . . eliminate the problem." N.T., 4/25/23, at 438. It was later revealed that Curbello-Rodriguez agreed to "take care of [Appellant's] problem," *id.*, but would not meet with Lloyd.

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other team's quarterback, they can't win." *Id.*

[8] Appellant and Curbello-Rodriguez were a part of the same "organization[,]" which required a significant amount of loyalty. *Id.* at 439.

[9] These intercepted calls were recorded and reviewed by officers investigating the instant case. *Id.*

[10] In subsequent calls, Appellant referred to Carmona by her initials J.A.C. *See id.* at 60-61.

After Curbello-Rodriguez failed to meet with Lloyd, and was no longer answering her phone calls, she reported back to Appellant, who was "pissed and relatively shitty about it." *Id.* at 440. Eventually, Appellant instructed Lloyd to contact Anthony Sparango ("Sparango")[11] and provide him with information regarding Carmona's "locations, where she worked, [and] anything [else] that [Lloyd] was able to find to help identify where and when [Carmona] would be at . . . any locations[,]" *id.*, because Appellant "wanted her dead [and h]e wanted her not to be a problem in his life." *Id.* at 441. According to Lloyd, Sparango was supposed to use this information to "[t]ake care of [Carmona], take care of getting rid of her, [and] pick up the slack where [Curbello-Rodriguez] left off[.]" *Id.* at 442. "The sooner [it could be done, Appellant relayed,] the better[.]"[12] *Id.* at 444.

Following Appellant's instructions, Lloyd and Sparango met on several occasions and spoke about either "[g]etting rid of [Carmona] or the procedures and ways to find and kill [Carmona]." *Id.* 445. Lloyd gave Sparango information about Carmona's whereabouts.[13] While Sparango was willing to kill Carmona, he "made it very clear to [Lloyd] that . . . this was not something he was happy about or wanted to do, but if . . . it

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[11] While Lloyd was no longer in contact with Curbello-Rodriguez, she believed he was still involved in the plan to murder Carmona. *See id.* at 450 (Detective Eisenhauer testified that "[t]here was a conversation . . . where [Appellant and Lloyd] were talking to or with [] Sparango and . . . the comment was made to make sure [that Curbello-Rodriguez] d[id] his part or the statement that [Curbello-Rodriguez was] ready. [Lloyd] took that to mean [Curbello-Rodriguez and Sparango] were working together . . . to kill [] [Carmona].").

[12] At the direction of Detective Eisenhauer, Lloyd also suggested to Appellant that if Curbello-Rodriguez and Sparango failed to carry out the plan that Appellant hire a professional hitman. *Id.* Appellant instructed Lloyd to "look into" hiring a hitman and "get more information." *Id.* at 443. However, Lloyd was able to meet with Sparango, so it was not necessary to hire a hitman.

[13] While both Appellant and Sparango believed that Lloyd was assisting them in their conspiracy to murder Carmona, at Detective Eisenhauer's direction, Lloyd provided inaccurate information to ensure Carmona's protection, who had been, along with her family, placed in protective custody. *See* N.T., 4/26/23, 607-08.

[was what it took] to get [Appellant] home, that [Sparango] would do it[,]" *id.* at 446, because he was "scared [of] what would happen if [he] didn't [kill Carmona]." *Id.* at 509. After all, Appellant was "already trying to get rid of one witness." N.T., 4/25/23, at 515.

These procedures and preparation included Sparango and Lloyd going "to see the place where . . . [Carmona] live[d], [to] scope it out and put together a plan to take her out." *Id.* at 447. Additionally, Sparango wanted to "get a feel for the layout, what it was near, [and] the location." *Id.* at 449. To conceal Carmona's murder, Sparango planned to make it look like "a robbery or a mugging gone wrong." *Id.* Lloyd drove Sparango to a random apartment complex in Bucks County, *see* n.13 *supra*, where she told Sparango that Carmona lived to "gauge how far [Appellant and Sparango were] willing to go with [the plan.]" N.T., 4/24/23, at 453. At some point during the planning, Sparango told Lloyd that he did not have a gun but noted that his preferred weapon was a Glock. *Id.* at 517-18.

Based on the foregoing, Appellant was charged with, *inter alia*, four counts of criminal solicitation to commit murder and one count of conspiracy to commit murder. Shortly thereafter, the Commonwealth filed a motion seeking to consolidate these new charges with the charges stemming from the 2007 shooting deaths of Thomas and Diaz. After a pre-trial hearing, the Commonwealth's motion to consolidate was granted by the trial court. In doing so, the trial court opined that the murder and solicitation charges were "obviously and directly related[.]" Trial Ct. Op., 1/11/24, at 81. The trial court further found that the evidence related to both cases would be admissible in a separate trial for the other because the solicitation evidence was relevant to Appellant's motive in the original homicides and demonstrated Appellant's belief that, without Carmona's testimony, he would be acquitted of the charges.

Following a four-day trial, Appellant was convicted by a jury of two counts of first-degree murder, related to the shooting deaths of Thomas and Diaz.[14] Appellant was also found guilty of attempt to commit murder, related to Carmona; burglary; aggravated assault; aggravated assault with a deadly weapon; possession of an instrument of crime; recklessly endangering another person; flight to avoid apprehension; criminal solicitation of murder; criminal conspiracy to commit murder in the second-degree; criminal conspiracy to commit aggravated assault; and criminal conspiracy to commit possession of an instrument of crime.[15]

D. Penalty phase of Appellant's second trial

After completion of the guilt phase of Appellant's trial, the trial court proceeded to the penalty phase, where the Commonwealth sought the death penalty for the first-degree murder of Diaz. Prior to opening statements, Appellant's counsel explained that Appellant "would like . . . to waive mitigation in this case." N.T., 5/2/23, at 8. However, Appellant's counsel explained that he "d[id not] believe that [counsel] could either ethically or professionally [permit Appellant to] waive mitigation[.]" *Id.* The trial court initially agreed, explaining it would not hear Appellant's motion to waive the presentation of additional evidence for the penalty phase. *Id.* at 9. In response, Appellant asserted that he wanted to proceed *pro se*, which the trial court summarily denied. *Id.*

The parties then presented opening statements. During Appellant's opening statement, counsel first conceded that, based on the jury's verdict,

> there[is] no question that the Commonwealth can prove all three aggravat[ing factors] beyond a reasonable doubt. . . . [Because b]ased on [the jury's] verdict, [Appellant] committed two murders . . . , he committed

[14] *See* 18 Pa.C.S. § 2502(a).

[15] *See* 18 Pa.C.S. §§ 901; 3502(a); 2702(a)(1), (4); 907; 2705; 5126; 902; and 903, respectively.

them during the course of the burglary, and . . . he put [] Carmona, [and the two children] at great risk.

Id. at 21. Counsel then told the jury about what it considered to be the relevant mitigating factors, including Appellant's mental illness, learning disabilities, childhood abuse, family background, and his early introduction into a life of crime:

> Our witnesses are going to tell the story of his childhood. They're going to tell the story of abuse, and they're going to tell the story of neglect, of violence, domestic violence, mistreatment, addiction, crime, abandonment[,] and certainly[,] the mental illness over the course of [Appellant's] life.
>
> We're going to present evidence from [Appellant's] school records from the 1980s and [19]90s. We're going to present evidence from a psychologist. [Appellant's] first evaluation is at three years old. His first psychiatric diagnosis was at four years old. He was diagnosed with impulse control. At five years old[,] he was given an I[ndividualized]E[ducational]P[rogram] for [k]indergarten because of his mental illness.
>
> At nine years old[,] he was given his second psychiatric evaluation, impulse control and now aggressive behavior. The evidence will show that every time [Appellant] had a psychiatric evaluation[,] the symptoms, the diagnoses, keep escalating. And the doctor will explain to you how that happened and how the lack of parental responsibility in his life allowed the mental illness to expand and grow.
>
> So that by the time that [Appellant] is [eleven] years old, he's evaluated with full-fledged conduct disorder. By [fifteen] years old, he stopped attending school altogether and had a history of truancy. By [seventeen] years old[,] he dropped out of school, and now he stands before you as a full-fledged developed mental illness.
>
> So[,] the evidence will show the mental health issue, but what about his family? And in many ways, the story of [Appellant] begins even before [he] was born. His mother, Darlene Sanchez . . . first became pregnant at the age of [thirteen] years old to an unknown father. That child, Christopher, was given away to a neighbor.
>
> You're going to hear evidence from the mother that raised Christopher. When Darlene was [fourteen] years old[,] she ran away with [Appellant's] father, Raphael Sanchez. He's known as ["]Big Ralph.["] . . . They get married—well, they start dating when she's [fourteen] and he is [twenty-five].
>
> Think about that. You're going to hear evidence that [Appellant's] mother starts dating his father when she was [fourteen] and he was [twenty-

five]. They get married when she was [sixteen] and he was [twenty-seven]. You're going to hear evidence that at [sixteen,] Darlene had [Appellant's] brother[,] Ralph Jr.[,] in 1979. At [seventeen,] Darlene had his brother[,] Joseph[,] in 1980. At [eighteen,] Darleen had [Appellant]. At [twenty,] Darlene had his brother[,] David[,] in 1983, and at [twenty-one,] Darlene had his sister[,] Nilsa[,] in 1984.

[Darlene] had six children by the age of [twenty-one]. She was not equipped to handle raising six children by the age of [twenty-one]. And you're going to hear evidence that she was ill-prepared to do it, and that as a result[,] that house became a toxic home environment for [Appellant].

What about Big Ralph? Big Ralph abused Darlene. Big Ralph abused [Appellant], both verbally and physically. Big Ralph has a long history of criminal behavior. Big Ralph indoctrinated not only [Appellant], but many of the other brothers into selling drugs out of their house in Warminster.

Most parents teach their kids how to throw a football or catch a ball. Big Ralph was teaching [Appellant] how to package cocaine, package marijuana[,] and deliver it in the Lac[e]y Park section[of Warminster]. So where did that leave [Appellant]?

You're going to hear evidence that he was born damaged. He was raised by people that were not proper; that were not equipped to raise him. He had a history of special education classes, truancy, self-destructive behavior, ADHD, drug abuse[,] and alcohol. All of which [wa]s unleashed on that apartment in October of 2007.

The evidence that we're going to present doesn't make it okay for what [Appellant] did. It's not okay what he did, but it's reasons why your sentence should be life. What the evidence shows or will show is that he wasn't given a fair shake at birth. He was born different, and he wasn't dealt the hand that you and I were dealt. He wasn't dealt the hand that you would want for your children.

At three years old, barely able to walk, he was suffering from a mental illness, and we have the receipts to show you. At a time when kids [we]re learning to play with their dad, he was learning to do the drug business.

The evidence is going to show that [Appellant] has been punished his entire life. He carries the scars with him. And for those reasons[,] we're going to ask you to give a life sentence.

Id. at 29-33.

The Commonwealth then presented its case, which included the testimony of witnesses who gave victim impact statements, and the incorporation of the guilt phase proceedings by reference. *Id.* at 71. At the close of the Commonwealth's case, several members of the jury were visibly upset, prompting Appellant's counsel to request a brief recess, which the court granted.

During this break, the Commonwealth researched case law regarding whether a defendant has the right to waive the presentation of additional mitigation evidence during the penalty phase of a trial. When the proceeding resumed, the Commonwealth presented to the trial court several cases in which a defendant was permitted to waive the presentation of additional mitigation evidence, and the death sentence was upheld on appeal. *See, e.g.*, *Commonwealth v. Tedford* ("*Tedford II*"), 960 A.2d 1, 45-46 (Pa. 2008) (affirming defendant's sentence of death after determining the colloquy of the defendant demonstrated the defendant understood the "nature of the right and the consequences of waiving the right"); *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."). During the discussion of this case law, Appellant's counsel informed the trial court that Appellant intended to testify during the penalty phase if additional mitigating evidence was presented and he "indicate[d] that he would want a specific sentence for [the jury] to give, and that would be the death sentence." N.T., 5/2/23, at 86. Appellant's counsel further elaborated:

> [Appellant] [] said to me both last night and . . . and numerous times this morning that he does not want to proceed with the penalty phase; that he does not want us to present mitigation evidence, and that he wants the death sentence. And when he was confronted with that earlier, he then chose to ask the [trial c]ourt to [permit him to] represent himself when we proceeded in that manner.
>
> Additionally, that he wants to testify and that he wants to tell the jury that he wants the death sentence.

Id. at 90.

Based upon this explanation, the trial court determined that the appropriate course of action was to swear Appellant in and colloquy him regarding his wishes:

> The court: [Appellant,] your attorney [] has stated that your preference is that *no mitigation evidence on your behalf be introduced in this courtroom*; is that correct?
>
> Appellant: That's correct.
>
> The court: And when did you come to that decision, sir? Is that something that you came to a decision about today or prior to this moment?
>
> Appellant: No, it's been prior.
>
> The court: Since we're having a full inquiry[,] you understand that the Commonwealth is seeking a sentence of death for you, and the other alternative which your counsel is pursuing is a sentence of life in prison.
>
> Do you understand intellectually, [Appellant], that if you and your attorneys produce certain mitigation experts or witnesses or testimony, that may in and of itself convince the jury that because of that mitigation, it either outweighs or is sufficient in itself to cause them to return a sentence of life? Do you understand that?
>
> Appellant: I understand.
>
> The court: I guess the next question would be do you believe that by not introducing any mitigation evidence, that the likelihood of your being sentenced to a life sentence would be better or greater?
>
> Appellant: No.
>
> The court: Now, I heard something that is somewhat stark in its recantation, and I want to hear it from you. [Counsel], who is an [o]fficer of the [c]ourt, has said that you wish to tell this jury under oath that you prefer to be sentenced to death; is that correct?
>
> Appellant: I prefer them to follow the law.
>
> The court: Pardon?

Appellant: I prefer them to follow the law.

The court: And what would that be, in your opinion?

Appellant: As far as, you know, taking it from you and, you know, the facts in the case and the sentence should be death. That's the law. So let it be.

The court: Do you believe that should be the outcome?

Appellant: I believe that, yes.

The court: We'll have a full inquiry. You're choosing to, at least in the hypothetical, be executed rather than having a chance to serve out your term as a life prisoner, correct?

Appellant: Yup.

Id. at 91-93 (emphasis added). Appellant then clarified that he only wished to testify in the penalty phase if mitigation evidence was presented on his behalf against his wishes. *Id.* at 94-95.

Based on the above-referenced colloquy, the Commonwealth then requested that the trial court further inquire whether Appellant's choice to forgo the presentation of any mitigating evidence was voluntarily, knowingly, and intelligently made, pursuant to the directives set forth by this Court in *Tedford II*. The following colloquy occurred:

The court: All right. [Appellant], you've told me, among other things, you don't wish to have any mitigation evidence presented on your behalf; that if [counsel] chooses, nonetheless, to place mitigation witnesses, including a psychologist or psychiatrist, before the jury, that you would then choose to testify and attempt to contradict the mitigation experts and the mitigation evidence. I believe I stated your preference.

Is anybody forcing you in any way, [Appellant], to make the decisions that you're speaking of?

Appellant: No.

The court: Is anybody putting any pressure on you, whether directly or indirectly, to make that decision?

Appellant: No.

The court: Are you presently under the influence of any drugs or intoxicants which would impair your ability to reasonably understand the nature of these proceedings?

Appellant: No.

The court: Since this trial has been scheduled, are you being treated by anyone for a major mental illness?

Appellant: No.

Id. at 95-96. After this colloquy, Appellant's counsel requested a recess during which Appellant spoke to individuals who were scheduled to testify on his behalf during the penalty phase.[16] Despite these discussions, Appellant's decision to not present additional mitigation evidence remained unchanged, at which point the trial court asked Appellant "one more time" whether he "want[ed] to produce any mitigating evidence[.]" *Id.* at 104. Appellant chose to "stay firm" in his decision. *Id.*

The foregoing notwithstanding, Appellant's counsel proceeded to conduct additional questioning:

The court: You want to inquire further of [Appellant]?

Counsel: I would like to, yes.

The court: I will grant you that. You are still under oath. You may remain seated, [Appellant]. You as well.

Counsel: May I, Judge?

The court: Yes.

Appellant: You are kicking a dead horse at this time. That's not what I –

[16] *See id.* at 102 ("[O]ver the recess [Appellant] has had the opportunity to speak with his father[,] Rafael Sanchez, . . . his brother, Joseph Sanchez, . . . Heather Shield, who is his girlfriend and ex-fiance, as well as Nancy Aldred, . . . who is, more or less, a mom for him as a child, as a teenager[,] . . . [and] Michelle Treverton.").

The court: Why don't you just listen, [Appellant], and then you can respond.

. . . .

Counsel: [Appellant], you understand that we are at the penalty phase of your trial, correct?

Appellant: Correct.

Counsel: And we have had several discussions between yourself, myself, [and your other attorneys] regarding the penalty phase of the trial today, correct?

Appellant: Correct.

Counsel: And you have indicated to us that you do not wish us to go forward in presenting any evidence of mitigation on your behalf, is that correct?

Appellant: Correct.

Counsel: You understand that if we follow that course of action the jury is not going to hear any mitigating evidence on your behalf; in other words, there will be no mitigating evidence presented.

Do you understand that?

Appellant: I understand.

Counsel: And you understand that if there is no mitigating evidence presented[,] that all [counsel] will be able to say to the jury is that there is no mitigating evidence being presented and you simply want them to follow the law.

Appellant: Yup.

Counsel: And you understand that following the law would necessarily mean that in the absence of any evidence of mitigating circumstances, if there is at least one aggravating circumstance[,] then the sentence must be death.

Do you understand that?

Appellant: I understand that.

Counsel: All right. So[,] you understand that in taking your insisted course of action the realistic possibility of the death sentence being imposed is very high. You understand that?

Appellant: Absolutely.

Counsel: And that's a decision that you have made for yourself?

Appellant: Yup.

Counsel: And as you heard [counsel] indicate, you have been able to speak with your father, your brother, and several family friends in that regard; is that correct?

Appellant: Yup.

Counsel: And you have had enough time also to discuss that decision with [all of your attorneys]?

Appellant: Yes.

Counsel: And has anyone forced or threatened or coerced you into making that decision?

Appellant: No.

Counsel: You are doing that of your own free will?

Appellant: Yup.

Counsel: You have had enough time to speak with us in that regard?

Appellant: Yup.

Counsel: And you understand that the course of action that you are insisting upon us taking is against the advice of [all of your] counsel . . . ?

Appellant: Yup.

Counsel: And you understand that the course of action you are insisting on taking is over the objection of [counsel]?

Appellant: Yes.

Counsel: And you understand that there were certain witnesses here today prepared to testify and offer evidence of mitigation on your behalf?

Appellant: Yes.

Id. at 110-14.

The trial court, following the guidance of *Tedford II*, directed Appellant's counsel to place on the record the names of the mitigation witnesses and the content of their proposed testimony. *See id.* at 115-23. *See also Tedford II*, 960 A.2d at 712-14. After doing so, counsel colloquied Appellant one final time:

> Counsel: [I]s it still your decision to go forward today without presenting –
>
> Appellant: Yes –
>
> Counsel: – any evidence of mitigation?
>
> Appellant: – yes, yes, yes.
>
> The court: He's certainly adamant. We'll take note of that.
>
> Counsel: Do you have any questions of –
>
> Appellant: No, no.
>
> The court: And the inflections in his voice.
>
> Counsel: Thank you, Judge.
>
> The court: All right. One last thing, [Appellant]. I'm going to give you one last opportunity. Throughout the course of this break[,] where we've discussed your decision not to present any mitigating evidence, you alluded to the fact that you might wish to stand up and testify before this jury. Whatever you would testify to, if that was your choice, is not for me to quarrel.
>
> Do you wish to speak under oath to this jury?
>
> Appellant: Not at all. As long as you won't allow no mitigation stuff to come in, then I'm cool.
>
> The court: I ain't going to allow no mitigation stuff.

Id. at 123-24.

Consistent with the above-referenced discussion, after the jury was called back into the courtroom, the trial court, noting that no mitigation evidence would be presented,

struck Appellant's counsel's opening statement. The next day, the trial court held the charging conference, during which Appellant's counsel repeatedly requested that he be permitted to present a closing argument addressing the mitigation evidence that was presented to the jury during the guilt phase of Appellant's trial. The Commonwealth explained that, pursuant to *Tedford II*, it believed that further colloquies were necessary. As the Commonwealth conceded:

> I think that we need to colloquy [] [Appellant]. . . .
>
> I believe, Your Honor, based on the *Tedford* case, that [] [Appellant] needs to be colloqu[i]ed on one issue, and that is whether he will permit [Counsel] to argue for mitigation or not argue for mitigation. And if he permits [Counsel], even though [Appellant] said[, "]I don't want you to put on *additional mitigation evidence*,["] which is a strategy and a tactic he's permitted to employ, it's a *different question* than that which is raised now by [Counsel].

N.T., 5/3/23, at 2-3 (emphasis added).

Counsel explained that these mitigation factors were incorporated by reference from the guilt-phase of trial and would include Appellant's age,[17] as well as what is commonly referred to as the "catch-all factor."[18] During this discussion, the following exchange occurred:

> Counsel: I believe that [Appellant] during that colloquy told you, I want to follow the law; the instructions that I want or argument I want is to follow the law.
>
> I believe I'm entitled to follow the law and argue mitigation that already exists in this case based on the facts of the case themselves. I don't believe that the client can control what I argue in his best interests.

[17] 42 Pa.C.S. § 9711(e)(4) ("Mitigating circumstances shall include . . . [t]he age of the defendant at the time of the crime.").

[18] 42 Pa.C.S. § 9711(e)(8) ("Mitigating circumstances shall include . . . [a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.").

The court: It's an interesting analogy. You don't believe that [Appellant] can control, and you can argue in his best interests as his attorney, and, yet, the client is certainly controlling the proof that's going to be presented on his behalf, which is none. It's declined.

Look, I have to make a decision here. I trust your good faith. I'm not going to permit you to argue mitigating circumstances which haven't been addressed and are not before the jury.

Id. at 5-6. During the charging conference, upon reviewing the penalty phase verdict slip, the trial court, again, denied counsel's request to argue the mitigating circumstances existing in the incorporated guilt-phase record. Instead, the trial court instructed that the section of the verdict slip where parties list the mitigating circumstances to be submitted to the jury would read "[n]one [p]resented." *Id.* at 7. *See also* First-Degree Murder Sentencing Verdict Slip, 5/3/23, at 1.

Immediately thereafter, the trial court charged the jury before permitting either party to make a closing argument. This instruction included the following:

> 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.
>
> 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.
>
> . . . .
>
> 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 [Appellant's] decision there have been no mitigating circumstances for you to consider. All you have to consider are aggravating circumstances.

N.T., 5/3/23, at 12-13, 18-19. The trial court also issued a curative instruction, addressing the consolidation of the charges against Appellant:

> I'll say again, you have heard throughout the course of the guilt phase that [Appellant] . . . requested, encouraged, and solicited others to commit the crime of murder as against the surviving victim, [] Carmona.
>
> 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 [] Carmona, are not in any way indicative of an aggravating circumstance, and I want you to understand that.

Id. at 14-15. During this charge, counsel yet again reiterated his desire, as part of his closing argument, "to argue mitigation under the specific facts of the case, just to the facts that are already in evidence." *Id.* at 22. However, the trial court denied this request, to which counsel objected, arguing that the trial court was essentially instructing the jury to issue "a directed verdict for [death.]" *Id.* at 23.

After the court finished charging the jury, counsel reasserted that he wished to argue the mitigation evidence already existing in the record from the guilt phase of the trial. *Id.* at 37. The following discussion occurred at sidebar:

> Commonwealth: Your Honor, I ask that I would be permitted to give a closing argument to the jury.
>
> Counsel: Likewise, Your Honor.
>
> . . . .
>
> The court: I understand to the core [counsel's] desire to address the jury. I think it's well-reasoned and well-intentioned, but I denied it.
>
> Counsel: Can I add one thing to that, Judge?

The court:	Yes.
Counsel:	I also have the right to argue they didn't prove aggravating circumstances beyond a reasonable doubt.
The court:	Okay. I'll permit that, but I will limit it to that. Understood?
	. . . .
Counsel:	Am I permitted to argue that the jury can take mercy on [Appellant]?
The court:	I don't think that's fair. I've already told them not to consider that.
Counsel:	Okay.
The court:	They can do it if they wish. I already –
Counsel:	Can I argue that?
The court:	I think it's an inappropriate argument.

Id. at 37-39. The parties then made closing arguments, with Appellant's counsel arguing, in part, that the jury "c[ould] find that the Commonwealth didn't prove [its] aggravators beyond a reasonable doubt[,]" and explaining that the jury ". . . ha[d] the ability to check life, and [he was] asking [the jury] to check life in this case." *Id.* at 49-50.

Later that day, the jury returned with a sentence of death for the murder of Diaz, finding that the Commonwealth proved the following aggravating circumstances beyond a reasonable doubt; namely, that Appellant: (1) committed the killing while in perpetration of a felony; (2) in murdering Diaz, knowingly created a grave risk of death to another person in addition to the victim; and (3) had been convicted of another murder at the time of the offense.

On May 24, 2023, in accordance with the jury's verdict, the trial court imposed a sentence of death for the murder of Diaz, as well as a concurrent sentence of life imprisonment for the murder of Thomas. Additionally, the trial court sentenced Appellant to the following: ten to twenty years' incarceration on the conspiracy to commit murder

charge; ten to twenty years' incarceration for criminal attempt to murder Carmona; ten to twenty years' incarceration for burglary; two and one half to five years' incarceration for possession of an instrument of crime; ten to twenty years' incarceration for solicitation to commit murder of Carmona through Lloyd; and ten to twenty years' incarceration for solicitation to commit murder of Carmona through Sparango. Each of these sentences were ordered to be served consecutively to the previously imposed sentences.

Appellant timely filed post-trial and post-sentencing motions, which were denied by the trial court on October 13, 2023. Then, on November 8, 2023, Appellant timely filed a notice of appeal to this Court.

II. Issues

On appeal, Appellant raises the following issues pertaining to the guilt phase of his trial:

1. The evidence was insufficient to justify a conviction of first-degree murder, burglary, conspiracy to commit criminal homicide, or solicitation to commit homicide.
2. The trial court erred by granting consolidation of Appellant's homicide with the solicitation to commit murder case.
3. The trial court unlawfully sentenced Appellant consecutively for multiple inchoate offenses arising from the same criminal conduct.

Appellant Brief at 1 (rephrased and reordered for ease of discussion).

Appellant also challenges the following aspects of the penalty phase of his trial:

1. The trial court erred in terminating Appellant's penalty defense after determining he waived the presentation of additional mitigation evidence.
2. The trial court erred in striking Appellant's penalty phase opening statement.
3. The trial court erred when it failed to permit Appellant to present a closing argument focused on case-specific mitigation evidence that was present in the guilt-phase record—specifically, mitigating circumstances contemplated by 42 Pa.C.S. § 9711(e)(4) and (e)(8)—evidence of which was incorporated into the penalty phase record by the Commonwealth.
4. The trial court failed to permit Appellant to argue for mercy to the jury.

5. The trial court failed to permit the age and catch-all factors to be presented to the jury on the verdict slip.

6. The trial court's failure to instruct the jury on the balancing of mitigating and aggravating circumstances in the penalty phase of trial, despite the existence of age and catch-all mitigating circumstances in the guilt-phase record, was essentially an instruction for the jury to find a directed verdict of death.

7. The trial court erred by instructing the jury on its role in the penalty phase before each side was permitted to make closing arguments.

Id. at 1-2 (rephrased and reordered for ease of discussion).

III. Discussion

A. Guilt phase issues

i. Sufficiency of the evidence

When reviewing a challenge to the sufficiency of the evidence,[19] we must determine whether the evidence admitted at trial, and all reasonable inferences derived therefrom, when viewed in the light most favorable to the Commonwealth as verdict-winner, supports all of the elements beyond a reasonable doubt. *Commonwealth v. Cooper*, 941 A.2d 655, 662 (Pa. 2007) (citing *Commonwealth v. Bomar*, 826 A.2d 831,

[19] Preliminarily, we note that while Appellant phrases his first claim as a challenge to the sufficiency of the evidence, in reality, he is alleging that the weight of the evidence is insufficient to support his convictions. *See Commonwealth v. Widmer*, 744 A.2d 745, 751-52 (Pa. 2000) ("The distinction between these two challenges is critical. A claim challenging the sufficiency of the evidence, if granted, would preclude retrial under the double jeopardy provisions of the Fifth Amendment to the United States Constitution, and Article I, Section 10 of the Pennsylvania Constitution, whereas a claim challenging the weight of the evidence if granted would permit a second trial." (quotation marks, and some citations omitted)).

While conflation of these two distinct claims can result in waiver, *see Commonwealth v. Rivera*, 238 A.3d 482, 496-97 (Pa. Super. 2020), we decline to find waiver here, as we are "required to review the sufficiency of the evidence to sustain a conviction of first-degree murder in every case where the death penalty has been imposed." *Commonwealth v. Robinson*, 864 A.2d 460, 478 (Pa. 2004). *See also* Pa.R.A.P. 702(b) ("If an appeal is taken to t[his] Court under Pa.R.A.P. 1941 . . . , any other appeals relating to sentences for lesser offenses imposed on a defendant as a result of the same criminal episode or transaction and tried with the capital offense shall also be taken to the Supreme Court.").

840 (Pa. 2003)). In making this determination, we consider both direct and circumstantial evidence, cognizant that circumstantial evidence alone can be sufficient to prove every element of an offense. *Id.* (citing *Commonwealth v. Gorby*, 588 A.2d 902, 906 (Pa. 1991)). We may not substitute our own judgment for that of the jury's, as it is the fact-finder's providence to weigh the evidence, determine the credibility of witnesses, and believe all, part, or none of the evidence submitted. *Id.* (citing *Commonwealth v. Hawkins*, 701 A.2d 492, 501 (Pa. 1997)). Our standard of review is *de novo* and our scope of review is plenary. *Commonwealth v. Staton*, 38 A.3d 785, 789 (Pa. 2012).

a. Homicide

We begin by addressing Appellant's contention that the evidence was insufficient to support his convictions for the first-degree murders of Diaz and Thomas. Before this Court, despite conceding that "several witnesses identified [him] as the shooter[,]" Appellant argues that "no evidence was presented as to motive or plan and scheme. . . . [Further, a]ny evidence of premeditation was speculative based on innuendo, and not sufficient to establish a specific intent to kill." Appellant Brief at 38-39. In response, the Commonwealth argues that there was ample evidence to convict Appellant of first-degree murder.

First-degree murder is the intentional killing, *i.e.*, a "willful, deliberate and premeditated killing[,]" of another. 18 Pa.C.S. § 2502(a), (d). To prove first-degree murder, the Commonwealth must establish that: (1) a human being was killed; (2) the accused caused the death; and (3) the accused acted with malice and the specific intent to kill. *Commonwealth v. Le*, 208 A.3d 960, 969 (Pa. 2019). The jury may infer the specific intent to kill based upon the defendant's use of a deadly weapon on a vital part of the victim's body. *Id.*

At trial, as recounted *supra*, the Commonwealth presented uncontested forensic evidence that Diaz had been shot in the head at close range. The Commonwealth also presented evidence establishing that it was Appellant who brought a gun to the apartment. Most importantly, the Commonwealth presented the testimony of several eyewitnesses who were present during the shootings. These eyewitnesses each testified that Appellant followed Thomas down the hallway and shot him in the head, killing him instantly, before turning to Diaz and shooting her twice. The Commonwealth also played the 911 call, in which Carmona relayed that "Alfonso" was the shooter. 911 Call from Jessica Carmona, at 00:01:05-00:01:07. Altogether, this evidence was sufficient to establish that Appellant, armed with a firearm, shot and killed Thomas and Diaz. Thus, we find that the jury reasonably concluded that Appellant was guilty of two counts of first-degree murder beyond a reasonable doubt.[20] Accordingly, Appellant is not entitled to relief on this claim.

b. Burglary

We next turn to whether the evidence was sufficient to convict Appellant of burglary. On appeal, Appellant asserts that there was "no evidence of a deceptive nature of entry [onto the premises], only speculation" and insists he had permission to enter the premises. Appellant Brief at 44. In response, the Commonwealth argues that Appellant

[20] Appellant insists that because the Commonwealth did not establish a motive, the evidence was insufficient to convict him of first-degree murder. However, the Commonwealth does not need to establish a motive for the evidence to be sufficient. *See Commonwealth v. Danz*, 60 A. 1070, 1073 (Pa. 1905) ("There can be no escape from punishment for crime when all the elements of it are proved . . . simply because the motive lies hidden in the heart of the only one who knows it."); *Commonwealth v. Fugmann*, 198 A. 99, 112 (Pa. 1938) ("Proof of motive or of adequate motive is, of course, no essential part of the [C]ommonwealth's case when a conviction for crime is asked for."); *Commonwealth v. Malone*, 47 A.2d 445, 449 (Pa. 1946) ("In a trial for murder[,] proof of motive is always relevant but never necessary.").

only gained entry to the apartment through deception, thereby negating any permission Appellant purportedly had to enter the premises. Commonwealth Brief at 56.

Under the law that controlled at the time of the underlying crime, "[a] person [was] guilty of burglary if he enter[ed] a building or occupied structure, or [a] separately secured or occupied portion thereof, with intent to commit a crime therein, unless the premises [were] at the time open to the public or the actor [was] licensed or privileged to enter." *Commonwealth v. Cooper*, 941 A.2d 655, 666 (Pa. 2007) (quoting 18 Pa.C.S. § 3502(a)). Thus, to prevail on a burglary charge, the Commonwealth was required to prove beyond a reasonable doubt that the offender entered the premises with the contemporaneous intent of committing a crime, at a time when he was not licensed or privileged to enter. *Id*. (citing *Commonwealth v. Thomas*, 561 A.2d 699, 704 (Pa. 1989)). With respect to the latter element, as noted by the Commonwealth, "a license or privilege to enter a premises [can be] negated in the event it is acquired by deception." *Id.* (citing *Commonwealth v. Edwards*, 903 A.2d 1139, 1148 (Pa. 2006)). As this Court has explained,

> [i]t is true that a person who is privileged to enter a building cannot be convicted of burglary even if he intends to commit a crime once in the building. . . . The element of license and privilege, however, like that of consent, can be vitiated if they are induced by deception or from one who is intoxicated and unable to make a reasonable judgment as to the nature of the harmfulness of the situation at hand.

Edwards, *supra* (quoting *Commonwealth v. Thomas*, 561 A.2d 699, 705 (Pa. 1989) (internal citations omitted)).

In *Edwards*, the defendant went to the victim's home, claiming to have money to settle a drug-related debt. *Id.* at 1143, 1144. However, at trial, the prosecution alleged that the defendant's real purpose was to gain entry into the residence to kill the victim. *Id.* at 1144. On appeal, the defendant argued that the evidence was insufficient to establish burglary because the victim permitted him entry onto the premises. *Id.* at 1147.

This Court rejected that claim, explaining that the deceptive nature of the entry negated any license or privilege to enter. *Id.* at 1148.

As in *Edwards*, in the instant case, the Commonwealth introduced evidence establishing that Appellant set up a pretextual reason to gain access to Thomas's apartment with the intent to kill him. This evidence included the 911 call made by Carmona, in which she said that it was a "set-up." 911 Call from Jessica Carmona, at 00:01:47-00:01:50. Additionally, the Commonwealth presented evidence that Appellant asked Miranda to "call [Thomas,] th[e] person that [Miranda was] ha[ving] problems with[,] and ask him for marijuana and . . . an [eight] ball of coke." N.T., 4/24/23, 127-28. When Thomas told Miranda he had no cocaine, Appellant grabbed the phone and repeatedly asked for cocaine while attempting to mimic Miranda's voice. *Id.* at 128. Martinez testified that it was apparent that Appellant and Miranda were intent on initiating a physical confrontation with Thomas. *Id.* at 129 ("I thought [Miranda] was going to fight with [Thomas]."). Other evidence established that before the trio arrived at the apartment, Appellant told Miranda "don't bullshit; you go; you stand up; you be a man and prove yourself." *Id.* at 177. Appellant then hid behind a wall while Diaz answered the door and let Miranda and Martinez inside. *Id.* at 131. Only once Miranda and Martinez were inside the apartment did Appellant follow, at which point Diaz stepped back looking "[s]cared, [and] terrified." *Id.* at 132.

Examining the evidence in the light most favorable to the Commonwealth, the record established that Appellant orchestrated the drug deal as a ruse to unlawfully enter the apartment. Indeed, if Appellant truly had been licensed to enter the apartment, there would have been no reason for him to disguise his voice on the phone, hide behind a wall, or wait to enter the apartment until after Diaz had already let the other men inside. Further, Diaz would not have looked "terrified" when Appellant revealed himself and

entered the apartment. *Id.* Finally, Carmona would not have said that it was a "set-up" on the 911 call. 911 Call from Jessica Carmona, at 00:01:47-00:01:50.

Accordingly, the evidence permitted the jury to properly infer that any supposed license Appellant acquired to enter the apartment was obtained through deception with the intent to commit crimes therein, and thus, Appellant unlawfully gained access. *See Edwards*, 903 A.2d at 1148 (quoting *Thomas*, 561 A.2d at 705) ("The element of license and privilege, however, like that of consent, can be vitiated if they are induced by deception[.]"). Accordingly, Appellant is not entitled to relief on this claim.

c. Conspiracy to commit criminal homicide

We next turn to Appellant's contention that the evidence was insufficient to support his conviction for conspiracy to commit second-degree murder, related to the death of Thomas. Regarding this conviction, Appellant argues that "[w]hile there was clear evidence that [] Appellant conspired with Miranda to purchase drugs from Thomas, and clear evidence of a drug deal between . . . Thomas and Miranda[,] there was no evidence of an agreement to commit murder." Appellant Brief at 42. In response, the Commonwealth argues that second-degree murder, "by its very nature, does not contemplate intent to kill[,]" and thus, Appellant's claim fails, as none of his remaining arguments are sufficiently developed. Commonwealth Brief at 50.

Criminal homicide, or second-degree murder, is defined as a killing that occurs "while [the] defendant [is] engaged as a principal or an accomplice in the perpetration of a felony." 18 Pa.C.S. § 2502(b). A conspiracy conviction requires proof of: "(1) an intent to commit or aid in an unlawful act[;] (2) an agreement with a co-conspirator[;] and (3) an overt act in furtherance of the conspiracy." *Commonwealth v. Spotz*, 756 A.2d 1139, 1162 (Pa. 2000). This agreement generally is established via circumstantial evidence, such as by the relations, conduct, or circumstances of the parties, or the overt acts on the

part of co-conspirators. *Id.* Once the trier of fact finds an agreement, that defendant may be liable for the overt acts committed in furtherance of the conspiracy regardless of which co-conspirator committed the act. *Commonwealth v. Wayne*, 720 A.2d 456, 463-64 (Pa. 1998). Further, regarding the charge of conspiracy to commit second-degree murder, we have explained that,

> [w]here the existence of a conspiracy is established, the law imposes upon a conspirator full responsibility for the natural and probable consequences of acts committed by his fellow conspirator or conspirators if such acts are done in pursuance of the common design or purpose of the conspiracy. Such responsibility attaches even though such conspirator was not physically present when the acts were committed by his fellow conspirator or conspirators and *extends even to a homicide which is a contingency of the natural and probable execution of the conspiracy, even though such homicide is not specifically contemplated by the parties*[.]

Commonwealth v. Fisher, 80 A.3d 1186, 1192 (Pa. 2013) (quoting *Commonwealth v. Eiland*, 301 A.2d 651, 653 (Pa. 1973) (emphasis added)).

As detailed extensively *supra*, there was sufficient evidence to convict Appellant of burglary, a felony. The evidence established that Appellant conspired with Miranda and Martinez to enter Thomas's apartment under the guise of a marijuana deal with the true intention of physically harming Thomas. Further, Martinez testified that he believed that the three men were going to the apartment to fight Thomas. This evidence established the existence of a conspiracy.

Additionally, a potential killing is a clear "contingency of the natural and probable execution of the conspiracy" to assault Thomas under the guise of a drug deal. *Fisher*, *supra*. It is of no consequence that "such homicide [was] not specifically contemplated by the parties[.]" *Id.* In fact, second-degree murder is a charge designed to address these exact situations. *See, e.g.*, *Commonwealth v. Mikell*, 729 A.2d 566, 569 (Pa. 1999) ("[T]he malice essential to the crime of second-degree murder is imputed to the defendant from the intent to commit the underlying felony[.]"). Where, as here, a defendant

conspires to unlawfully gain access to another's home through deceit with the true intent to physically harm that person, a killing that occurs as a result of that plan is a probable consequence of the original agreement. Accordingly, the evidence was sufficient to support a conviction for conspiracy to commit second-degree murder. Therefore, Appellant is not entitled to relief on this claim.[21]

d. Solicitation to commit homicide

Finally, we address whether the evidence was sufficient to convict Appellant of solicitating the murder of Carmona, through Curbello-Rodriguez and Sparango. Regarding these convictions, Appellant argues that the Commonwealth failed to establish that his actions constituted a substantial step toward an attempt to kill Carmona. Appellant Brief at 40. Conversely, the Commonwealth argues that Appellant misunderstands the solicitation statute, and that "[t]he inchoate crime of solicitation is the *request* of another to engage in conduct that *would* either [] constitute a crime or [] constitute an attempt to commit that crime with the requisite intent." Commonwealth Brief at 45-46 (emphasis in original).

Under Pennsylvania law,

> [a] person is guilty of solicitation to commit a crime if with the intent of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission.

18 Pa.C.S. § 902(a). In other words, the Commonwealth must prove that: (1) the

[21] In his concurring and dissenting opinion, Justice Wecht contends that "[i]t is quite possible, if not probable, that [Appellant] was convicted of a crime[—conspiracy to commit second degree murder—]that is not cognizable logically or under our Crimes Code." Concurring and Dissenting Op. at 8 (Wecht, J., concurring and dissenting). However, as Justice Wecht himself acknowledges, Appellant "does not challenge the cognizability of the crime for which he actually was convicted[.]" *Id.* Thus, this argument is waived. *See* Pa.R.A.P. 302(a) ("Issues not raised in the trial court are waived and cannot be raised for the first time on appeal.").

defendant requested that "another person [] engage in specific conduct[;]" and (2) that those acts constituted "an attempt to commit such crime." *See Commonwealth v. Von Evans*, 163 A.3d 980, 984 (Pa. Super. 2017). The Commonwealth is thus correct that the inchoate crime of solicitation is the *request* of another to engage in conduct that would either constitute a crime or constitute an attempt to commit that crime, with the requisite intent. Consequently, Appellant's focus on whether the actual crime was attempted or completed is misplaced, as no substantial step need be taken toward the commission of the requested crime for Appellant's request to constitute criminal solicitation. *Id.*

Nonetheless, as detailed above, the Commonwealth presented sufficient evidence to convict Appellant of solicitation. This included the testimony of both Lloyd and Sparango, who were directly involved in Appellant's plot. Additionally, Sparango testified that he agreed to murder Carmona in accordance with Appellant's instructions out of fear for his own safety, which Lloyd confirmed. As previously indicated, both Sparango and Lloyd explained that Appellant believed that if Carmona was killed, then the Commonwealth's case against him would collapse and the criminal charges against him would be dismissed.

Further, the Commonwealth presented evidence of an overt act in furtherance of the solicitation via testimony establishing that Lloyd, at Appellant's instruction, drove Sparango to an apartment complex so that Sparango could familiarize himself with the area around Carmona's supposed residence. Accordingly, the evidence was sufficient to support convictions for solicitation to commit criminal homicide and, therefore, Appellant is not entitled to relief on this claim.

ii. Consolidation of charges during the guilt phase

Next, we consider Appellant's contention that the trial court erred in granting the Commonwealth's motion to consolidate the charges related to the deaths of Thomas and

Diaz with the subsequent solicitation charges. In Appellant's view, the evidence of the distinct crimes should have been deemed inadmissible, as the prejudice to Appellant so far outweighed the evidence's relevance that "even the trial court acknowledge[d] the prejudice[.]" Appellant Brief at 35. Appellant contended that the prejudice included the following:

> [t]he introduction of [his] involvement in the prison drug ring which led to Lloyd's arrest . . . ; numerous [] phone calls of [] Appellant calling from prison phones were played for the jury constantly reminding the jury of [] Appellant's incarceration; [] statements by [] Appellant attempting to find Carmona and find someone to murder her; [] coded language testimony about [] Appellant's meaning in the phone calls; tainting the jury with significant additional aggravating evidence about [] Appellant's conduct that would impact any penalty phase determination despite a curative instruction; and the use of criminal activity that did not exist and was not presented or considered during the first trial.

Id.

Additionally, Appellant argues that the evidence presented by the Commonwealth was cumulative and that the potential for confusing the jury was obvious because "[t]he evidence in the solicitation case was so prejudicial that the trial court had to issue a special curative instruction that it could not be used as an aggravating circumstance in the penalty phase." *Id.* at 36 (citing N.T., 5/3/23, 14-15). In sum, Appellant insists that

> [t]rying the [murder and solicitation] cases jointly created a strong likelihood that the jury would infer that Appellant had a propensity to commit the crimes charged, and this would have influenced the jury in its determination of guilt and in deliberating in the penalty phase. It is hard to imagine a more prejudicial effect on a defendant than being convicted for a murder on the basis of compelling evidence that the defendant [solicited] a different murder.

Id. (quoting *Commonwealth v. Cousar*, 928 A.2d 1025, 1046 (Pa. 2007) (Baldwin, J., dissenting)).

In response, the Commonwealth argues that consolidation was appropriate because all the charges arose from the same act or transaction and therefore, were

subject to consolidation under Pennsylvania Rule of Criminal Procedure 582(A)(1)(b). *See* Commonwealth Brief at 30 (citing Pa.R.Crim.P. 582(A)(1)(b) (permitting consolidation if "the offenses charged are based on the same act or transaction")). While the Commonwealth concedes that there is a significant temporal gap between the offenses of nearly fifteen years, it nevertheless maintains that the logical relationship between the 2007 murders and the subsequent solicitation for murder was the primary factor used to determine whether the cases arose from the same transaction. *See generally id.* at 29-35.

Alternatively, the Commonwealth asserts that the charges would have been admissible in each trial separately without confusing the jury, and thus, consolidation was permissible under Pennsylvania Rule of Criminal Procedure 582(A)(1)(a). *See id.* at 37-38 (citing Pa.R.Crim.P. 582(A)(1)(a) (permitting consolidation if "the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion"). Along these lines, the Commonwealth insists that the solicitation evidence would be admissible in the murder trial because it shows Appellant's consciousness of guilt, specific intent to kill Carmona, and establishes the natural progression of the 2007 case. *Id.* at 36-37. Likewise, the Commonwealth claims, without the underlying murder, Appellant's solicitation of Lloyd would have had little to no context, making the murder charge incredibly probative, far above its prejudicial value and therefore, admissible. *Id.* at 37-28.

The decision "[w]hether to join or sever offenses for trial is within the trial court's discretion and will not be reversed on appeal absent a manifest abuse thereof, or prejudice and clear injustice to the defendant." *Commonwealth v. Wholaver*, 989 A.2d 883, 898 (Pa. 2010) (citing *Commonwealth v. Newman*, 598 A.2d 275, 277 (Pa. 1991)). However, the trial court "may order separate trials of offenses . . . if it appears that any

party may be prejudiced by offenses or defendants being tried together." Pa.R.Crim.P. 583. Importantly,

> [t]he general policy of law is to encourage joinder of offenses and consolidation of indictments when judicial economy can thereby be [a]ffected, especially when the result will be to avoid the expensive and time-consuming duplication of evidence. . . . But the interest in judicial economy must be balanced against the need to minimize the prejudice that may be caused to a defendant by consolidation. In determining whether the trial judge abused his discretion, the critical factor is whether the accused has been prejudiced by the court's decision.

Commonwealth v. Patterson, 546 A.2d 596, 600 (Pa. 1988) (internal citations omitted). Therefore, where a defendant moves for severance of two or more indictments not based on the same act or transaction, the court must determine whether: (1) evidence of the distinct offenses would be admissible in a separate trial for the other; (2) such evidence can easily be separated by the jury so as to avoid confusion; and (3) the defendant will be unduly prejudiced by the consolidation. *Newman*, 598 A.2d at 278 (citing Commonwealth *v. Lark*, 543 A.2d 491, 497 (Pa. 1988)).

In *Commonwealth v. Morris*, this Court held that indictments may be consolidated where the separate offenses show the unusual or distinctive *modus operandi* of the defendant. *Commonwealth v. Morris*, 425 A.2d 715, 720 (Pa. 1981). In arriving at this standard, the *Morris* Court "weighed the possibility of prejudice to the defendant and[] the injustice caused by the consolidation against the consideration of judicial economy." *Newman*, 598 A.2d at 278 (citing *Morris*, 425 A.2d at 721). Therefore, in seeking the consolidation of separate indictments, the Commonwealth is required to show more than that the crimes are of the same class. Rather, it must be shown that a high correlation in the details of the crimes exists such that proof the defendant committed one makes it very unlikely that anyone but the defendant committed the others. *Morris*, 425 A.2d at 721.

Nevertheless, this Court in *Morris* emphasized that evidence of a distinct crime is inadmissible solely to show a defendant's propensity to commit a crime, due to its

prejudicial nature. *Id.* at 720. *See also id.* at 718 (explaining that such prejudice could include: (1) the defendant being confounded in presenting defenses; (2) the jury using the evidence of one of the offenses to infer a criminal disposition and on the basis of that inference, convict the defendant of other offenses; and (3) the jury cumulating the evidence of the various offenses to find guilt when, if the evidence of each offense had been considered separately, it would not so find). Accordingly, evidence of other crimes may be introduced for the limited purposes of showing: (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme, plan or design embracing commission of two or more crimes so related to each other that proof of one tends to prove the others; or (5) to establish the identity of the person charged with the commission of the crime on trial. *Lark*, 543 A.2d at 497. This list, however, is not exclusive, and our Court has indicated a willingness to recognize additional exceptions to the general rule where the probative value of the evidence outweighs the tendency to prejudice the jury. *Commonwealth v. Banks*, 521 A.2d 1, 17 (Pa. 1987) (citing *Commonwealth v. Claypool*, 495 A.2d 176, 179 (Pa. 1985)). *See also Morris*, 425 A.2d at 720.

In the instant case, the trial court granted the Commonwealth's motion to consolidate the charges because they were "obviously and directly related" to each other. Trial Ct. Op. at 81. For example, the court noted that the underlying motive for the solicitation to have Carmona killed was the fact that Carmona was an eyewitness to the 2007 murders and thus evidence about those crimes would have been admissible in a separate solicitation case. *Id.*

That said, the trial court acknowledged that the introduction of the charges against Appellant "was clearly prejudicial to" Appellant. *Id.* at 82. Nevertheless, the court found that the "prejudice was not outweighed by the concerns for the necessity for a second trial and judicial economy." *Id.* Finally, the trial court opined that there was

> little doubt that the jury would be able to distinguish between the actual . . . murders . . . and the evidence of the subsequent solicitation to commit [the] murder of Carmona . . . [and that] there was little concern that the evidence presented in the two cases would be cumulative in the jury's mind since the cases involved two distinct criminal actions.

Id. Thus, the court deemed consolidation appropriate. *See generally id.* at 79-82.

While the Commonwealth argues that consolidation was proper under either subsection of Rule 582(A)(1), we only need to examine whether consolidation was proper under one of the subsections. To do so, we first examine whether the evidence of the 2007 murders would be admitted in a separate trial for the 2021 solicitation. Without evidence of the 2007 murders, there would be little to no context for Appellant to refer to a woman with the initials "J.A.C." during his calls with Lloyd or his belief that taking out the "other team's quarterback" would weaken the "other team's position." Indeed, only when considered in the context of the earlier murder would Appellant's motive and intent be clear: he attempted to solicit two individuals to murder Carmona, the primary witness to the 2007 murders. Importantly, Appellant does not appear to contest the fact that the evidence of the 2007 murders would have been deemed admissible in a separate trial concerning the solicitation.

Assessing whether the evidence of the 2021 solicitation would be admitted in a separate trial for the 2007 murders, we find that such evidence would have been admissible to show Appellant's consciousness of guilt, *i.e.*, that he was aware of his wrongdoing. *Lark*, 543 A.2d at 497. This same evidence would also be admissible to establish the identity of the shooter. *Id.* Here, this evidence was probative in establishing that it was indeed Appellant, not Miranda, who carried out the 2007 murders with the intent to kill all three victims. Thus, the evidence for each crime—the 2007 murders and the 2021 solicitation—would have been admissible at a trial for the other.

Moving on to whether the evidence was capable of separation by a jury, we agree with the trial court's conclusion that there was little doubt that the jury in this case would

be able to distinguish the evidence of the murders of Thomas and Diaz and attempted murder of Carmona, from the subsequent solicitation. Not only did the crimes take place nearly fifteen years apart, but they involved separate factual findings, as discussed *supra*. Further, there was no danger that the evidence presented in the two cases would be cumulative because the cases involved two distinct criminal actions. Accordingly, the evidence of the two crimes was capable of separation by a jury, and therefore, posed no danger of confusion.

Finally, we examine whether Appellant was unduly prejudiced by the consolidation of the charges. *See Morris*, 425 A.2d at 719 (recognizing the potential that a jury may "properly find[] the defendant guilty of one crime but [improperly] consider[] th[at] finding [of guilt] probative of his guilt of another [charge]" (citation omitted)). Here, Appellant argues, and the trial court acknowledged, that there was prejudice stemming from the consolidation of charges. *See, e.g.*, Trial Ct. Op. at 82. However, the lower court ultimately determined that the "prejudice was not outweighed by the concern for the necessity for a second trial and judicial economy." *Id.* More importantly, because there was little doubt that the jury would be able to distinguish between the evidence for the two crimes, and there was little concern that the evidence would be cumulative, the court permitted consolidation.

While this Court has explained that "the conservation of judicial resources and the efficient administration of justice, while estimable goals, [cannot alone] justify the exposure of an accused to [] a higher probability of prejudice[,]" *Morris*, 425 A.2d at 719, we have also explained that

> [t]he "prejudice" of which Rule 1128[22] speaks is not simply prejudice in the sense that the appellant will be linked to the crimes for which he is being

[22] Former Rule 1128 was renumbered and is now codified as Rule 583. *See* Pa.R.Crim.P. 583, Official Note.

> prosecuted, for that sort of prejudice is ostensibly the purpose of *all* Commonwealth evidence. [Rather, t]he prejudice of which Rule 1128 speaks is . . . *that which would occur if the evidence tended to convict appellant only by showing his propensity to commit crimes, or because the jury was incapable of separating the evidence or could not avoid cumulating the evidence.*

Newman, 598 A.2d at 279 (emphasis added) (quoting *Lark*, 543 A.2d at 499).

After carefully reviewing the trial court's reasoning alongside the complete record, we find the potential prejudice was outweighed by the enormous probative value of the evidence. This is because, in our view, the jury was perfectly capable of separating the evidence and not unduly cumulating the evidence. Further, the evidence of the solicitation did not "only . . . show[] his propensity to commit crimes[.]" *Id.* Rather, this evidence demonstrated Appellant's consciousness of guilt related to the 2007 murders. Thus, the trial court did not abuse its discretion in consolidating the charges.[23]

iii. Unlawful sentence

Finally, we review Appellant's contention that the trial court imposed an unlawful

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[23] As part of his argument related to the consolidation issue, Appellant claims that the prejudice he suffered extended to the penalty phase of his trial. *See generally* Appellant Brief at 35-37 ("The evidence in the solicitation case was so prejudicial that the trial court had to issue a special curative instruction that it could not be used as an aggravating circumstance in the penalty phase[.]").

While Appellant is correct that the jury's knowledge of Appellant's solicitation to murder Carmona was, in fact, prejudicial, this prejudice was cured by the trial court's instruction. As the trial court aptly instructed, "the solicitation of one or more parties to kill or murder [] Carmona, [is] not in any way indicative of an aggravating circumstance, and I want you[, the jury,] to understand that." N.T., 5/2/23, at 14-15. As we have often explained, the jury is presumed to have followed the trial court's instructions, thereby alleviating any prejudice that would have come from the statements. *See Commonwealth v. Brown*, 786 A.2d 961, 971 (Pa. 2001) ("The law presumes that the jury will follow the instructions of the court."). More importantly, there is no evidence that the jury considered the solicitation as an improper aggravating factor. *See* First Degree Murder Sentencing Verdict Slip, 5/3/23, at 2 (determining that the Commonwealth proved the following aggravating circumstances beyond a reasonable doubt: Appellant committed the killing while in perpetration of a felony; in committing the killing, Appellant knowingly created a grave risk of death to another person in addition to the victim; and Appellant had been convicted of another murder at the time of the offense).

sentence when it ordered Appellant to serve consecutive terms of incarceration for multiple inchoate offenses arising from the same criminal conduct. The offenses in question are the criminal solicitation to commit the murder of Carmona through Lloyd and the criminal solicitation to commit the murder of Carmona through Sparango. Notably, in his brief, Appellant declines to develop this issue, instead choosing to concede that the claim is without merit. *See* Appellant Brief at 41.

Assuming, *arguendo*, the argument in support of this issue had been fully developed, Appellant would not be entitled to relief, as this Court has held that 18 Pa.C.S. § 906, which states that "[a] person may not be convicted of more than one of the inchoate crimes of criminal attempt, criminal solicitation[,] or criminal conspiracy for conduct designed to commit or to culminate in the commission of the same crime[,]" operates horizontally, rather than vertically. *See Commonwealth v. Kingston*, 143 A.3d 917, 924-25 (Pa. 2016). *See also id.* at 927 (explaining that Section 906 "operates only horizontally . . . to foreclose convictions for combinations of *different* inchoate crimes, but not vertically to preclude convictions for *multiple instances* of any one of the named inchoate offenses." (Saylor, J., dissenting) (emphasis added and omitted)). Here, Appellant was convicted of two separate counts of solicitation, and therefore, Section 906 was not implicated. No relief is due.

B. Penalty phase issues

i. Issues relating to Appellant's choice to waive the presentation of additional mitigation evidence

Turning to the penalty phase of Appellant's trial, it is beneficial to explain our relevant precedent regarding a defendant's right to waive the presentation of additional mitigation evidence during the penalty phase of trial. We have previously held that the trial court has no duty to compel the introduction of additional mitigating evidence at the penalty phase of a trial where a defendant has specifically instructed counsel not to

present such evidence. *Commonwealth v. Tedford* ("*Tedford I*"), 567 A.2d 610, 627 n.7 (Pa. 1989). We also have held that a criminal defendant has the right to decide whether additional mitigation evidence will be presented on his behalf. *See Commonwealth v. Sam*, 635 A.2d 603, 611-12 (Pa. 1993); *Commonwealth v. Crawley*, 526 A.2d 334, 340 n.1 (Pa. 1987), *abrogated on other grounds by Commonwealth v. Appel*, 539 A.2d 780 (Pa. 1988) (finding that ineffectiveness of counsel will not be presumed simply because no additional mitigating evidence was introduced at the sentencing phase of a capital case). Further, this Court has never found waiver of the presentation of additional mitigation evidence to be a violation of the default constitutional requirement that such evidence be presented.[24] *See, e.g.*, *Commonwealth v. Randolph*, 873 A.2d 1277, 1282 (Pa. 2005) (holding that a capital defendant has the right to waive the presentation of mitigation evidence, so long as the waiver is knowing, intelligent, and voluntary). *See also Commonwealth v. Mallory*, 941 A.2d 686, 697 (Pa. 2008) ("A waiver colloquy is a procedural device; it is not a constitutional end or a constitutional 'right.'").

Additionally, we observe that a challenge to the validity of a waiver of the presentation of mitigation evidence is assessed by examining the thoroughness of the colloquy, so as to ensure that the defendant fully understood the nature of the right and the consequences of waiving that right. *Commonwealth v. Puksar*, 951 A.2d 267, 288 (Pa. 2008). In other words, here, we must discern whether "the absence of mitigation evidence was at [A]ppellant's specific and unequivocal direction." *Tedford II*, 960 A.2d at 45. In assessing his "specific and unequivocal direction[,]" *id.*, we must examine the colloquy to determine, *inter alia*, if counsel "made clear that [Appellant] understood the nature of the penalty proceeding, his right to present mitigation evidence, the aggravating

[24] Notably, in the instant case, Appellant did not raise any constitutional challenge to a defendant's right to waive the presentation of such mitigation evidence.

circumstances the Commonwealth was to pursue, and the differing burdens of proof."[25] *Id.*

a. Prohibiting the presentation of additional mitigation evidence during the penalty phase

Presently, Appellant questions whether the trial court erred by following Appellant's explicit request to prohibit his counsel from presenting additional evidence of mitigating circumstances during the penalty phase. Appellant cursorily argues that it was error for the court to terminate his penalty defense because the trial court initially denied his motion to waive the presentation of mitigation evidence. In response, the Commonwealth argues that *stare decisis* "greatly favors adherence to precedent. . . . Just as an [a]ppellant has the right to enter guilty pleas and waive . . . other right[s] . . . , so too may a defendant choose to refrain from contesting a death sentence through [the] presentation of mitigating circumstances." Commonwealth Brief at 68.

As explained extensively *supra*, Appellant made his desire to forgo the presentation of additional mitigation evidence abundantly clear via several extensive colloquies conducted by both the trial court and his own counsel. *See, e.g.*, N.T., 5/2/23, at 124. Consequently, the only inquiry left for our Court to decide is whether Appellant's waiver was made knowingly, intelligently, and voluntarily.

Here, after reviewing the record, it is clear that Appellant understood the consequences of waiving the presentation of additional mitigation evidence. *See id.* at 112 (confirming that Appellant understood that "following the law would necessarily mean that in the absence of any evidence of mitigating circumstances, if there [wa]s at least one aggravating circumstance[,] then the sentence [had to] be death"); *id.* at 113

[25] Although there exists no constitutional right to a colloquy before a defendant waives the presentation of mitigating evidence, *Puksar*, 951 A.2d at 288 n.11, the colloquy is meant to ensure that these protections remain in place.

(confirming that Appellant understood that choosing not to present additional mitigation evidence meant that "the realistic possibility of the death sentence being imposed [was] very high"). In fact, after numerous colloquies and a brief recess in which Appellant spoke with family and friends who were willing to testify on his behalf, he reaffirmed his intent to waive the presentation of additional mitigation evidence, stating, "I stay firm in my decision." *Id.* at 104. In light of the foregoing, and acknowledging that there was no challenge to the substance or adequacy of the waiver colloquies, which appear, on their face, to have been thorough, we must presume that the waiver was knowing, voluntary, and intelligent. *Id.* at 96, 113-14. *See also Puksar*, 951 A.2d at 292. Thus, Appellant is not entitled to relief on this issue.[26]

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[26] We briefly address an alternative argument raised by Appellant in his brief, *i.e.*, that were this Court to conclude that he is not entitled to relief on the aforementioned issue, we should consider overturning the line of cases establishing and reaffirming a defendant's right to waive the presentation of additional mitigation evidence during the penalty phase. *See* Appellant Brief at 52 ("Appellant is requesting that this Court review the current scope and application of the prior waiver of mitigation cases."); *id.* at 53 ("Even assuming that [this Court's waiver of mitigation precedents] continue as valid law in this Commonwealth . . . ."); *id.* at 55 ("To allow a defendant to waive all mitigation and all arguments for life and submit to a death sentence is contrary to the entire premise of the death penalty statute, and itself should violate ethical obligations."). In essence, Appellant requests, without providing any meaningful argument, that we should abandon *stare decisis* in favor of a result that would arguably benefit him.

The doctrine of *stare decisis* "declares that for the sake of certainty, a conclusion reached in one case should be applied to those which follow, if the facts are substantially the same, even though the parties may be different." *Estate of Fridenberg v. Commonwealth*, 33 A.3d 581, 589 (Pa. 2011) (citation omitted). "Without *stare decisis*, there would be no stability in our system of jurisprudence." *Flagiello v. Pa. Hosp.*, 208 A.2d 193, 205 (Pa. 1985). To ensure certainty and finality, overturning precedent requires a "special justification, over and above the belief that the precedent was wrongly decided." *Commonwealth v. Alexander*, 243 A.3d 177, 196 (Pa. 2020) (quoting *Allen v. Cooper*, 589 U.S. 248, 249 (2020) (internal quotations omitted)). Further, "[t]he appropriateness of overruling a past decision depends on a number of factors, including the age and lineage of the decisions, as well as the 'quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions, . . . and reliance on the decision.'" *Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs.*, 309 A.3d 808, 850 (Pa. 2024) (quoting *Alexander*, 243 A.3d at 196 (internal citations omitted)). As Appellant (continued…)

b. Striking Appellant's opening statement

Next, we consider whether the trial court erred in striking Appellant's opening statement after Appellant made it clear that he did not want any additional mitigating evidence presented on his behalf. On appeal, Appellant argues that the trial court's reversal of its initial ruling—denying Appellant's request to waive the presentation of additional mitigation evidence—severely prejudiced Appellant in two ways. First, if the initial ruling was correct, Appellant was prejudiced because his opening statement was struck in error, and he was not permitted to present additional mitigation evidence. Appellant Brief at 56. Second, in the alternative, Appellant argues that because his counsel detrimentally relied on the trial court's original ruling permitting the presentation of additional mitigation evidence, counsel gave an opening statement conceding that the Commonwealth could prove its aggravating circumstances, which he was later unable to refute. *Id.* at 57 (internal citation omitted). In response, the Commonwealth argues that "[t]hese two conflicting points make little sense. Appellant cannot argue that the trial court erred in striking the opening statement" solely because counsel conceded the Commonwealth could prove its aggravating circumstances. Commonwealth Brief at 71.

We begin with the relevant standard of review. A trial court's ruling that affects opening statements is governed by an abuse of discretion standard. *Commonwealth v. Parker*, 919 A.2d 943, 949 (Pa. 2007). "An abuse of discretion may not be found merely because an appellate court might have reached a different conclusion, but [instead] requires a result of manifest unreasonableness, or partiality, prejudice, bias, or ill-will, or such lack of support so as to be clearly erroneous." *Id.* at 949-50 (quoting *Commonwealth*

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has failed to identify any "special justification" to overturn decades of this Court's precedent, we decline his invitation and reaffirm our holding in *Sam*: "[a] criminal defendant has the right to decide whether mitigating evidence will be presented on his behalf. We will not remove that right and compel admission of such evidence." *Sam*, 635 A.2d at 611-12.

v. Dengler, 890 A.2d 372, 379 (Pa. 2005)). "The purpose of an opening statement is to apprise the jury how the case will develop, its background and what will be attempted to be proved; but it is not evidence." *Id.* at 950 (quoting *Commonwealth v. Montgomery*, 626 A.2d 109, 113 (Pa. 1993)).

Here, Appellant's counsel gave an opening statement outlining the mitigating evidence he intended to prove during the penalty phase, and conceded that, based on the jury's verdict during the guilt phase of the trial, the Commonwealth would be able to prove its aggravating factors. *See* Appellant Brief at 57. However, after substantial discussions on the record, and multiple extensive colloquies, it became clear that Appellant did not wish to present any of the additional mitigation evidence that Appellant's counsel discussed in his opening statement. In other words, Appellant chose to waive his right to present such evidence which, as noted, he was permitted to do under the law. *See Sam*, 635 A.2d at 611-12; *Tedford I*, 567 A.2d at 627 n.7. Comporting with this Court's precedents, the trial court held that it was bound to honor Appellant's request and accordingly, struck Appellant's opening statement and issued a curative instruction, explaining that the jury must disregard Appellant's opening statement, as it was made by defense counsel in reliance on Appellant's original intent to present mitigation evidence.

Under these circumstances, it would have made little sense for the trial court to abide by Appellant's wishes regarding the presentation of additional mitigation evidence, while also permitting counsel's opening statement to be considered by the jury, in which he set forth the mitigating circumstances the jury was no longer permitted to consider. *See* Trial Ct. Op. at 93 (emphasizing that Appellant "repeatedly and steadfastly invoked his right to prevent his [c]ounsel from presenting any [additional] mitigati[on] evidence"). Indeed, by striking counsel's opening statement, the trial court ensured that it was

deferring to Appellant and his right to waive the presentation of additional mitigation evidence during the penalty phase of his trial. *See Puksar*, 951 A.2d at 288.

This aside, importantly, any potential prejudice faced by Appellant was cured by the trial court's instruction, which the jury is presumed to have followed. *See Brown*, 786 A.2d at 971 ("The law presumes that the jury will follow the instructions of the court."). Thus, Appellant is not entitled to relief.

ii. Argument regarding mitigation evidence already admitted during the guilt phase of Appellant's trial

Having found that the trial court did not err in denying counsel's request to present additional mitigation evidence, we next address Appellant's contention that the lower court erred when it prevented defense counsel from arguing existing mitigation evidence that had already been presented to the jury during the guilt phase of trial, which was incorporated into the penalty phase of trial by the Commonwealth.[27] Specifically, Appellant insists that counsel should have been permitted to address the jury regarding Appellant's age and the catch-all factor. *See* 42 Pa.C.S. § 9711(e)(4), (e)(8). Appellant

[27] Appellant alleges that this evidence includes:

> [(]a) [the y]oung age of the Appellant; [(]b) [the a]lcohol and drug intoxication of the Appellant . . . ; [(]c) [the h]omicides occur[ing] during a drug deal at the kitchen table . . . ; [(]d) [the i]mpulsive decisions by a young, immature, intoxicated Appellant . . . ; [(]e) [the fact that a]ll parties were involved with guns and drugs . . . ; [(]f) [] Thomas was known to have a gun in his bedroom closet . . . ; [(]g) [] Carmona yelled for [] Thomas to get his gun, and Thomas was running down the hallway toward his gun when the shooting occurred . . . ; [(]h) [] Thomas was an active drug dealer . . . ; [(]i) [a]ll parties had drugs and [*sic*] in their system . . . ; [(]j) [t]he [c]o-[d]efendants helped and encouraged Appellant, hid evidence, lied to police, and were just as responsible . . . ; [(]k) [c]o-[d]efendant [] Martinez was given a [four] [to] [ten] year sentence . . . ; and [(]*l*) Appellant was stepped on by [] Thomas and had to be separated which directly preceded the shooting . . . among many others.

Appellant Brief at 50.

presents this argument while, at the same time, acknowledging that he was intent on not having new mitigation evidence and testimony be presented on his behalf during the penalty phase of trial. Appellant Brief at 47.

Nevertheless, he contends that prohibiting counsel's intended argument regarding mitigation evidence already admitted in the guilt phase of Appellant's trial constituted a violation of the Eighth and Fourteenth Amendments to the United States Constitution. In particular, Appellant, citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality) (holding that fact finders "[can]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 as the defendant proffers as a basis for a sentence less than death" (emphasis removed)), and *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (applying *Lockett*'s holding, explaining that "[b]y requiring that the sentencer be permitted to focus 'on the characteristics of the person who committed the crime,' . . . the rule in *Lockett* recognizes that 'justice . . . requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender"), argues that a court is required to permit argument in support of mitigation.

In reply, the Commonwealth argues that "Appellant was clear that he did not want the jury to consider *any* mitigating circumstances, regardless of whether evidence of those circumstances theoretically existed within the guilt phase record." Commonwealth Brief at 66 (emphasis in original).

We are constrained to agree with Appellant.[28] A brief explanation of the mechanism of the procedure of a penalty phase hearing is instructive. Relevantly, Section 9711 of the Sentencing Code, 42 Pa.C.S. § 9711, provides, that "[a]fter a verdict

[28] Because the resolution of this issue provides Appellant with relief, we need not address his remaining claims.

of murder of the first degree is recorded and before the jury is discharged, the court shall conduct a separate sentencing hearing in which the jury shall determine whether the defendant shall be sentenced to death or life imprisonment." 42 Pa.C.S. § 9711(a)(1). Additional evidence may be presented "on the question of the sentence to be imposed[,] . . . includ[ing information] relating to any of the aggravating or mitigating circumstances specified" in the Sentencing Code. *Id.* § 9711(a)(2). Importantly, however, neither the Commonwealth nor a defendant is required to present any new evidence during the penalty phase, and, as reaffirmed *supra*, either party may waive the presentation of any additional evidence. This is because the evidence from the guilt phase of a defendant's trial is incorporated into the penalty phase for the jury's consideration by default, as it is a "purely procedural matter carried out pursuant to [Section 9711]." *Commonwealth v. Wharton*, 607 A.2d 710, 722 (Pa. 1992) (citing *Commonwealth v. Albrecht*, 511 A.2d 764, 777 (Pa. 1986)).

Relevantly, after the conclusion of the presentation of evidence—whether it is solely via incorporation or by the presentation of additional evidence—the trial court "*shall* permit counsel to present argument for or against the sentence of death." 42 Pa.C.S. § 9711(a)(3) (emphasis added). *See also* Pa.R.Crim.P. 806 ("After the presentation of evidence at the sentencing hearing, each party *shall* be entitled to present one closing argument for or against the sentence of death." (emphasis added)). During closing argument, attorneys are permitted to summarize the evidence that exists in the record and draw inferences therefrom. *Commonwealth v. Bishop*, 413 A.2d 1031, 1033 (Pa. 1980) ("Any representation of fact . . . which is made by (counsel) in the argument must . . . be based solely upon those matters of fact of which evidence has already been introduced[.]" (citation omitted)). *See also Commonwealth v. Stoltzfus*, 337 A.2d 873, 882 (Pa. 1975) (referring to closing argument as a "summation" of the evidence and

discussing what was permissible for a district attorney to infer from such evidence); *Commonwealth v. Ross*, 307 A.2d 898, 902 (Pa. 1973) (noting with approval that remarks during closing argument "were legitimate inferences from facts previously presented at trial").

The right to a closing argument by counsel is a substantive right enshrined in both the United States Constitution and the Constitution of our Commonwealth. *See Herring v. New York*, 422 U.S. 853, 864 (1975) ("[T]he appellant . . . ha[s] a right to be heard in summation of the evidence from the point of view most favorable to him."); Pa. Const. art. I, § 9 ("In all criminal prosecutions the accused hath a right to be heard by himself *and his counsel*[.]" (emphasis added)). Denial of that right is an abridgment of a defendant's constitutional right to full representation by counsel. *Stewart v. Commonwealth*, 11 A. 370, 370 (Pa. 1887); *Herring*, 422 U.S. at 865 (holding that prohibiting the presentation of a closing argument resulted in a denial of the "assistance of counsel that the Constitution guarantees"). In fact, we have previously held that the defendant is not only entitled to be heard by counsel but also to have the arguments of his counsel considered by the jury in passing upon the evidence. *Commonwealth v. Polichinus*, 78 A. 382, 382 (Pa. 1910). Importantly, "[a]ny material abridgment or interference with this right constitutes reversible error."[29] *Commonwealth v. Thacker*, 194 A. 924, 926 (Pa. 1937) (citing *Stewart*, *supra*).

This constitutional and statutory requirement therefore requires that the trial court not limit either party's penalty phase argument to solely the evidence presented during the penalty phase, as "all evidence admitted at trial . . . [is] admissible for the penalty

[29] With that said, trial judges may, of course, "properly instruct the jury that the arguments of counsel are not binding upon them, and that they are only to be guided by such arguments in so far as they are *supported by the evidence* and appeal to their reason and judgment." *Id.* (emphasis added) (quoting *Polichinus*, *supra*).

phase as part of the 'circumstances' to be considered by the jury." *Commonwealth v. Travaglia*, 467 A.2d 288, 298 (Pa. 1983). *See also Commonwealth v. Cox*, 686 A.2d 1279, 1292 (Pa. 1996) (observing that the trial court permitted the incorporation of guilt-phase evidence into the penalty phase to prove a mitigating factor).

More importantly, we have repeatedly held that "[t]he law is clear that the task of determining the existence of mitigating factors is for the jury ***alone***." *Commonwealth v. Walter*, 966 A.2d 560, 568 (Pa. 2009) (emphasis added) (citing *Commonwealth v. Treiber*, 874 A.2d 26, 30-31 (Pa. 2005), *cert. denied*, 547 U.S. 1076 (2006) ("The question of the existence of a mitigating factor is for the jury.")). *See also Commonwealth v. Fahy*, 516 A.2d 689, 698 (Pa. 1986) ("[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."). Moreover, the United States Supreme Court has repeatedly affirmed 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, 276 (1998) (citations omitted). *See also Commonwealth v. Rizzuto*, 777 A.2d 1069, 1089 (Pa. 2001), *abrogated on other grounds by Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003) ("[T]he jury is *required* to find the existence of any mitigating circumstances that have been proven by a preponderance of the evidence." (emphasis added) (citation omitted)). It has emphasized that its concern has been that "restrictions on the jury's sentencing determination not preclude the jury from being able to give effect to [any and all] mitigating evidence." *Id. See also Blystone v. Pennsylvania*, 494 U.S. 299, 305 (1990) (holding Pennsylvania's capital sentencing scheme constitutional because it permitted a capital sentencing jury to "consider and give effect to *all relevant* mitigating evidence" (emphasis added)).

Given these constitutional and statutory protections, we are constrained to conclude the trial court erred in prohibiting Appellant's counsel from presenting a closing argument that included evidence from the guilt phase of the trial. As stated *supra*, the sentencing statute provides that the trial court "*shall* permit counsel to present argument for or against the sentence of death[,]" 42 Pa.C.S. § 9711(a)(3) (emphasis added), regarding evidence that was presented during the trial. This evidence "shall include matters relating to *any* of the . . . mitigating circumstances specified in subsection[] . . . (e)[.]" 42 Pa.C.S. § 9711(a)(2) (emphasis added). These mitigating circumstances include both the defendant's age and, importantly, "[*a*]*ny other evidence of mitigation* concerning the character and record of the defendant and the circumstances of his offense." 42 Pa.C.S. § 9711(e)(4), (8) (emphasis added).

Under the Statutory Construction Act, "[t]he object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. [Moreover, e]very statute shall be construed, if possible, to give effect to *all* its provisions." 1 Pa.C.S. § 1921(a). Further, when the words of a statute are "clear and free from all ambiguity," our analysis concludes. 1 Pa.C.S. § 1921(b). As we have repeatedly made clear, "[b]y definition, 'shall' is mandatory." *Oberneder v. Link Computer Corp.*, 696 A.2d 148, 150 (Pa. 1997) (quoting *Coretsky v. Bd. of Comm'rs*, 555 A.2d 72, 74 (Pa. 1989)). Accordingly, there is no room to overlook the statute's plain language to reach a different result in this case. *See Coretsky*, *supra*.

To hold otherwise would make it impossible for the jury to execute its function as the sole determiner of the existence of aggravating and mitigating factors. *See Herring*, 422 U.S. at 864 ("There is no way to know whether these or any other appropriate arguments in summation might have affected the ultimate judgment in this case. Th[at] credibility assessment [i]s solely for the trier of fact[: the jury].") . After all, to effectuate its

duty, a jury must be provided with sufficient information to make its determination. In fact, in non-death penalty litigation, defendants frequently present little to no evidence during trial or sentencing, yet defense counsel is permitted and even encouraged to present argument regarding existing information. Pa.R.Crim.P. 604(B) ("When the evidence is concluded, each party shall be entitled to present one closing argument to the jury[, r]egardless of the number of defendants, and *whether or not a defendant has presented a defense*[.]" (emphasis added)). It makes little sense to permit non-capital defendants more protection than capital defendants. *See Blystone*, 494 U.S. at 305 (holding Pennsylvania's capital sentencing scheme constitutional because it permitted a capital sentencing jury to "consider and give effect to *all relevant* mitigating evidence" (emphasis added)). Therefore, the trial court's denial of a closing argument denied the jury the ability to fully understand Appellant's view of the case, including any mitigating evidence that existed and was presented during the guilt phase of the trial. *See Herring*, *supra* (holding that, before the jury's determination is made, the defendant has "a right to be heard in summation of the evidence from the point of view most favorable to him").

While it is well-settled that Appellant is able to waive the presentation of additional mitigation evidence, it is equally well-determined that a defendant is unable to waive a right that he does not know exists.[30] *See In re Bank of Pennsylvania's Estate*, 60 Pa.

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[30] In his concurring and dissenting opinion, Justice Wecht contends that Appellant "expressly and unambiguously waived his right to present mitigation evidence *and argument*[.]" Concurring and Dissenting Op. at 1 (Wecht, J., concurring and dissenting) (emphasis added). *See also id.* at 8 ("My review of the record demonstrates that [Appellant] made a complete and total waiver of his right to argue mitigation to the jury in any capacity."). Despite this, Justice Wecht acknowledges that Appellant was never "explicitly asked whether he wanted to waive" argument regarding mitigation evidence already existing in the guilt-phase record. *Id.* at 10. Nevertheless, Justice Wecht views Appellant's waiver as "binding and all-encompassing." *Id.* at 11.

While we agree with Justice Wecht that Appellant was "apprised of 'the nature of the penalty proceeding, his right to present [additional] mitigation evidence, the (continued…)

471, 479 (1869) ("No one is held to have waived a right unless it appears that he knew his rights and intended a waiver of them."); *Commonwealth ex rel. Corbett v. Griffin*, 946 A.2d 668, 679 (Pa. 2008) ("A waiver in law is the act of intentionally relinquishing or abandoning some *known* right, claim or privilege. To constitute waiver of legal right, there must be a clear, unequivocal and decisive act of the party with knowledge of such right and an evident purpose to surrender it." (emphasis added) (citation omitted)).

Here, while Appellant was colloquied extensively about the presentation of additional mitigation evidence, he was *never asked* if he wished to waive his right to make an argument as to the mitigating evidence introduced during the guilt phase.[31] *See* N.T., 5/2/23, at 91 (confirming that Appellant's preference "[wa]s that no mitigation *evidence*" be "*introduced* in th[e] courtroom" on Appellant's behalf (emphasis added)); *id.* at 123 (confirming, after hearing all of the "witnesses and the *evidence* that would have been presented" on Appellant's behalf that Appellant wished to go forward without presenting "any *evidence* of mitigation" (emphasis added)).

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aggravating circumstances the Commonwealth was to pursue and the differing burdens of proof[,]'" *id.* at 10 (quoting *Tedford II*, 960 A.2d at 45), the simple fact of the matter is that argument is not evidence, and mitigating circumstances existed in the penalty-phase record due to the incorporation of the guilt-phase record which counsel was not permitted to argue. *See supra* n.27; *Puksar*, 951 A.2d at 280 ("It is well-settled that arguments of counsel are not evidence[.]"); *Blystone*, 494 U.S. at 305 (holding Pennsylvania's capital sentencing scheme constitutional solely because it permitted a capital sentencing jury to "consider and give effect to *all relevant* mitigating evidence" (emphasis added)). A waiver of constitutional rights is only permissible if it is a "knowing, intelligent act[] done with sufficient awareness of [all of] the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970) (citations omitted).

[31] Indeed, in summarizing its understanding of Appellant's waiver, the trial court itself never mentioned the presentation of argument. *See* N.T., 5/2/23, at 95-96 ("[Y]ou've told me, among other things, you don't wish to have any mitigation *evidence* presented on your behalf; that if [defense counsel] chooses, nonetheless, to place mitigation *witnesses*, including a psychologist or psychiatrist, before the jury, that you would choose to testify and attempt to contradict the mitigation *experts* and the mitigation *evidence*." (emphasis added)).

"It is well-settled that arguments of counsel are not evidence[.]" *Puksar*, 951 A.2d at 280. In fact, the Commonwealth conceded during the penalty phase that Appellant's waiver of the presentation of additional mitigation evidence was a "different question than" whether Appellant wished to waive argument of mitigating evidence already existing in the record. N.T., 5/3/23, at 3. The Commonwealth even argued that Appellant should be further colloquied regarding argument to confirm his wishes. *Id.* at 2-3 ("I believe . . . that the defendant needs to be colloqu[i]ed on one issue, and that is whether he will permit [counsel] to argue for mitigation or not argue for mitigation."). Moreover, while Appellant threatened to get on the stand to rebut the presentation of any new mitigation *evidence*, *see* N.T., 5/2/23, at 95 (answering in the affirmative that "whatever the mitigation *testimony* might be, [Appellant] would choose to testify . . . to rebut what was *said* on [his] behalf" (emphasis added)), and interrupted the trial court repeatedly, he made no such effort when defense counsel asked to argue for a life sentence based on the evidence existing in the record from the guilt phase of the trial. *See generally* N.T., 5/3/23, at 2-8. Thus, it is clear that Appellant did not object to defense counsel arguing for a life sentence based on the mitigation evidence existing in the guilt-phase record.

Importantly, Appellant was never asked whether he understood that the guilt-phase evidence was incorporated into the penalty phase of the trial and thus new evidence did not have to be presented at all. *See* N.T., 5/2/23, at 50 (trial court granting Commonwealth's motion "to incorporate the *entire trial proceeding* by reference" into the guilt phase of the trial "*for the jury's consideration*" (emphasis added)). *See Wharton*, 607 A.2d at 722 (affirming a death sentence based on the evidence in the existing guilt record that the Commonwealth argued constituted aggravating factors during the penalty phase). Significantly, Appellant was also not asked whether he knew or understood that the standard jury instruction instructs the jury to consider guilt-phase evidence. *See* Pa.

Suggested Standard Criminal Jury Instructions § 15.2502F.1 ("In deciding whether aggravating circumstances exist and whether aggravating outweigh mitigating circumstances, you should consider the evidence and arguments offered by both the Commonwealth and the defendant. This includes the *evidence that you heard during the earlier trial* to the extent that it bears upon the issues now before you." (emphasis added)).

In short, there is simply nothing in the record that demonstrates that Appellant knew he had the option to argue for a sentence less than death based upon the mitigating evidence already contained in the record without being required to present new evidence. Without this knowledge, Appellant could not have knowingly, intelligently, and voluntarily waived his right to argue for a life sentence.[32]

IV. Conclusion

While the trial court was placed in the unenviable position of having to make a determination regarding whether to permit defense counsel to present a penalty phase argument regarding any mitigation evidence already existing in the record, we are constrained to determine its well-intentioned decision was in error. Despite Appellant's thorough colloquy regarding the waiver of the presentation of any additional mitigation evidence, Appellant simply was not asked whether he wished to waive argument regarding the mitigation evidence already in the record, despite both parties' request for such a colloquy. N.T., 5/3/23, at 2-3 (Commonwealth arguing that "the defendant needs to be colloqu[i]ed on one issue, and that is whether he will permit [counsel] to argue for mitigation or not argue for mitigation."). In the absence of a waiver of argument colloquy,

[32] We make no determination as to whether defendants can waive the presentation of argument in all cases. However, in the future, trial courts seeking to avoid this issue should thoroughly colloquy the defendant about the waiver of both the presentation and argument of mitigation evidence. A colloquy on both issues would avoid an appellate court being forced to determine the scope of a defendant's waiver without the benefit of a clear statement regarding a defendant's intention.

the trial court's well-meaning ruling resulted in the denial of Appellant's constitutional and statutory right to present argument regarding any mitigating factors supported by the record. Thus, we are constrained to vacate Appellant's sentence of death and remand to the trial court for a new penalty phase.

Chief Justice Todd and Justices Donohue, Dougherty and Brobson join the opinion.

Justice McCaffery files a concurring opinion.

Justice Wecht files a concurring and dissenting opinion in which Justice Donohue joins Part I.