[J-35-2008]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 445 CAP
	:	
Appellee	:	Appeal from the Judgment of Sentence of
	:	the Court of Common Pleas of
	:	Philadelphia County entered December 2,
v.	:	1992 at No. 9106-0002-0013.
	:	
	:	
JOSE PAGAN,	:	
	:	ARGUED: April 4, 2006
Appellant	:	
	:	RESUBMITTED: January 11, 2008

CONCURRING OPINION

MR. JUSTICE BAER **DECIDED: JUNE 17, 2008**

I join the majority opinion in its entirety except with respect to Part VI, where it determined that Appellant's counsel waived his right to argue during his closing to the penalty-phase jury that Appellant's lesser level of participation in the murders was a mitigating factor. Like the majority, I agree that although the guilt-phase jury had determined that Appellant had the specific intent to kill Padilla, Sr., and Padilla, Jr., and was therefore responsible for the murders, his counsel had the right to argue to the penalty-phase jury that, in accord with the "catch-all mitigator," Appellant's "culpability was relatively lesser than that of his cohorts…." Majority Opinion at 28. See 42 Pa.C.S. § 9711(e)(8) ("Mitigating circumstances shall include the following: ... (8) Any other circumstance of mitigation concerning the character and record of the defendant and the circumstances of his offense.")

Indeed, the trial court seemingly agreed with this premise. Prior to the penalty-phase summations, it expressly indicated to defense counsel that he could argue that Appellant's reduced level of participation in the murders should be considered as a mitigating circumstance. N.T. 12/1/1992 at 14. However, when Appellant's counsel began to make this argument at closing, perhaps somewhat imprecisely, by noting: "Now, again, I don't know what you believed with regard to the offense you found him guilty of but, if you believed that he did not do the killings, but was a conspirator…" (N.T. 12/1/92 at 134-35), the prosecutor immediately objected and the trial court sustained the objection. Rather than breaking off his summation, counsel noted his objection on the record, and continued with his plea for his client's life, without the opportunity to make this peculiar argument.

The majority in substance holds that counsel should have interrupted his closing and engaged in extended argument with opposing counsel and the court, in the hope that he could persuade the judge to reverse his ruling. Regardless of the eventual result, counsel would have lost all emotional momentum, and may, indeed, have irritated the jury during what was, at best, a difficult task. Although with the benefit of a record to read and thoughtful hindsight, I understand the basis for the prosecutor's objection and the trial court's ruling, I believe also that they understood what defense counsel intended to argue. Moreover, counsel lodged an objection to the trial court's ruling. Under these circumstances, I would not find waiver. I do not believe it wise to articulate a rule requiring the interruption of a closing to dispute a trial court's ruling in order to preserve a question for appellate review, especially where, as here, counsel objected to such ruling.

Nevertheless, I agree with the majority that the trial court's preclusion of counsel's argument in this context was harmless for all of the reasons so ably developed by its opinion.