

CASE NO. _____
IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL ERIC BALLARD,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO
THE PENNSYLVANIA SUPREME COURT**

MARC BOOKMAN, ESQUIRE
Executive Director
Atlantic Center for Capital Representation
1315 Walnut St., Suite 1331
Philadelphia, PA 19102

Dated: March 21, 2014

- THIS IS A CAPITAL CASE -

QUESTION PRESENTED

1. Whether Pennsylvania Rules of Criminal Procedure 807(b) and 808, Combined with the State's Practice of Refusing to Individually Identify Mitigating Circumstances on the Jury Verdict Form, Deprives Capital Defendants of Their Eighth and Fourteenth Amendment Rights Under the United States Constitution.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Relevant Proceedings and Disposition in the Courts Below	2
B. Facts Related to the Question Presented	3
REASONS FOR GRANTING THE WRIT	6
I. THE PRACTICE IN PENNSYLVANIA OF REFUSING TO INDIVIDUALLY LIST NON-STATUTORY MITIGATION CIRCUMSTANCES ON THE JURY VERDICT SLIP—EMBODIED IN PENNSYLVANIA RULE OF CRIMINAL PROCEDURE 808—UNCONSTITUTIONALLY DEPRIVES CAPITAL DEFENDANTS OF THEIR RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY PROHIBITING JURORS FROM GIVING MEANINGFUL EFFECT TO NON-STATUTORY EVIDENCE OF MITIGATION	6
A. By Forcing Capital Defendants to Compact all Non-Statutory Mitigating Evidence into One “Catch-all” Mitigator on the Verdict Slip, Pennsylvania Prevents Jurors from Giving Particular Consideration to Critical Mitigation Evidence.	8

B. The Pennsylvania Supreme Court’s Distinction Between a “Mitigating Circumstance” and a “Mitigating Factor” Is Not Proper Under Current Eight Amendment Jurisprudence and Deprives Capital Defendants of Their Due Process Rights. 11

C. Pennsylvania Rules of Criminal Procedure 807(b) and 808, Along with the State’s Practice of Refusing To Individually List All Mitigating Circumstances Confuses Jurors, Raising an Impermissible Risk That Jurors Will Fail To Weigh Undisputed Mitigation Evidence merely Because It is Grouped with More Speculative Evidence. . . . 14

D. Pennsylvania’s Procedure of Including All Non-Statutory Mitigation Evidence Under the “Catch-all” Mitigator Misleads the Jury into Giving that Evidence Less Weight than Other Types of Mitigating or Aggravating Evidence. 16

CONCLUSION 18

APPENDIX Commonwealth v. Eric Michael Ballard, 80 A.3d 380 (2013))

TABLE OF AUTHORITIES

FEDERAL CASES

<u>Abdul-Kabir v. Quarterman</u> , 550 U.S. 233 (2007)	9, 15
<u>Brewer v. Quarterman</u> , 550 U.S. 286 (2007)	7
<u>Eddings v. Oklahoma</u> , 455 U.S. 104 (1982)	7, 9, 13, 14, 15, 16, 18
<u>Hitchcock v. Dugger</u> , 481 U.S. 393 (1987)	12, 18
<u>Jones v. U.S.</u> , 527 U.S. 373 (1999)	17
<u>Lockett v. Ohio</u> , 438 U.S. 586 (1978)	6, 8, 13, 15, 17, 18
<u>Rompilla v. Beard</u> , 545 U.S. 374 (2005)	10
<u>Smith v. Texas</u> , 543 U.S. 37 (2004)	7, 9, 17
<u>Tennard v. Dretke</u> , 542 U.S. 274 (2004)	17
<u>Wiggins v. Smith</u> , 539 U.S. 510 (2003)	10
<u>Woodson v. North Carolina</u> , 428 U.S. 280 (1976)	7, 8

STATE CASES

<u>Commonwealth v. Eichinger</u> , 915 A.2d 1122 (Pa. 2007)	12, 13
<u>Commonwealth v. Miller</u> , 746 A.2d 592 (Pa. 2000)	7

FEDERAL STATUTES

28 U.S.C. § 1257(a)	1
---------------------------	---

PENNSYLVANIA STATUTES

42 Pa.C.S. § 9711(d)(10) 2

42 Pa.C.S. §9711(d)(11) 2

Pennsylvania Rules of Criminal Procedure 807 7

Pennsylvania Rules of Criminal Procedure 807(b) 7

OPINION BELOW

The opinion of the Superior Court of Pennsylvania affirmed on direct appeal the convictions of murder and sentences of death. Commonwealth v. Ballard, 80 A.3d 380 (2013).

JURISDICTION

The Pennsylvania Supreme Court issued an opinion in this case on November 21, 2013. This petition is timely filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides in relevant part: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall ... deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. Relevant Proceedings and Disposition in the Courts Below

On June 27, 2010, Petitioner was arrested and charged with four counts of Criminal Homicide. The Commonwealth of Pennsylvania filed a Notice of Aggravating Circumstances alleging two aggravating circumstances under 42 Pa.C.S. § 9711(d)(10) (prior murder) and § 9711(d)(11) (multiple murders) exposing appellant to a potential sentence of death.¹ On April 20, 2011, appellant pleaded guilty to four counts of Murder in the First Degree.

Sentencing commenced on May 9, 2011. Petitioner presented evidence of one statutory mitigating circumstance under § 9711(e)(2) (“The defendant was under the influence of extreme mental or emotional disturbance”) and fifteen non-statutory mitigating circumstances.² Although the jury was presented 16 mitigating

¹ Initially, the Commonwealth alleged that appellant had been convicted of a previous murder, 42 Pa.C.S. § 9711(d)(10), and that appellant had been convicted of another murder committed at the time of the offense at issue, § 9711(d)(11). Later, the Commonwealth amended the Notice of Aggravating Circumstances to include the additional aggravating circumstance that one of the victims was “a prosecution witness to a murder committed by the defendant and they were killed for the purpose of preventing their testimony against the defendant in a criminal proceeding.” § 9711(d)(5) Later, the Commonwealth withdrew the aggravating circumstance listed under § 9711(d)(5).

² The non-statutory mitigating circumstances were, (1) head trauma as a youth, (2) physical abuse, (3) domestic violence, (4) poverty, (5) parental neglect, (6) familial dysfunction, (7) sexual abuse, (8) family abandonment, (9) family alcohol history, (10) adult life spent in prison, (11) acceptance of responsibility by pleading guilty, (12) amenability to life in prison, (13) prison institutional failure, (14) traumatic brain injury, and (15) high level of intoxication at the time of the offense. N.T. Vol. VI, 5/17/11 p. 203-04).

circumstances, only the one enumerated in § 9711(e)(2) was individually listed on the jury verdict slip. The verdict slip also contained the following mitigating circumstance: “Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.” § 9711(e)(8).

In regard to the first two victims, the jury found both aggravating circumstances and no mitigating circumstances. In regard to the third victim the jury found only the prior-murder aggravating circumstance and no mitigating circumstances. In regard to the final victim the jury found both aggravating circumstances and that petitioner was under the influence of extreme mental or emotional disturbance. No juror found “Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.” The jury then unanimously entered death sentences for each of the four counts.

In a timely appeal to the Pennsylvania Supreme Court, petitioner presented thirteen issues, including the issue presented herein. All issues were rejected in an opinion dated November 21, 2013. After being granted an extension to file this Petition for a Writ of Certiorari, Petitioner files this timely petition.

B. Facts Related to the Question Presented

In Pennsylvania, after a defendant is convicted of capital murder, the jury

must then decide which one of two possible sentences the defendant will serve; life in prison without the possibility of parole or be sentenced to death. To assist the jury in making this determination—and to conform to 8th Amendment requirements—the Pennsylvania death-penalty statute provides some structure for jurors.

To begin, the court instructs the jury on all aggravating and mitigating circumstance for which there is “some evidence.” The jury is then instructed that aggravating circumstances must be proven beyond a reasonable doubt and mitigating circumstances must be proven by a preponderance of the evidence. If the jury finds at least one aggravating circumstance and at least one mitigating circumstance, the jury is instructed that it must weigh the two categories of evidence against each other and come to an ultimate decision as to punishment.

Pennsylvania’s death-penalty statute lists 18 aggravating circumstances and 8 mitigating circumstances. The final mitigating circumstance allows the jury to consider “[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.” This provision is known by Pennsylvania practitioners as the “catch-all mitigator.”

In the case below, Petitioner presented the court with evidence of 15 non-statutory mitigating factors about his character and record. N.T. Vol. VI, 5/17/11,

pp. 203-204. Prior to sending the jury back to deliberate, the court identified the 15 circumstances one time verbally. N.T. Vol. VI, 5/17/11, pp. 60, 62-64. However, on the verdict slip sent back with jurors during their deliberation the catch-all mitigator was the only indication of—and the only place to give effect to—these 15 mitigating facts. Petitioner asked the court to individually list each non-statutory mitigating circumstance, but the court declined to do so. N.T. Vol. VI, 5/7/11, pp. 61.

After deliberating, the jury did not find that the catch-all mitigator was proven by a preponderance of the evidence as to any of the four capital convictions. The jury then returned a sentence of death for each victim.

REASONS FOR GRANTING THE WRIT

THE PRACTICE IN PENNSYLVANIA OF REFUSING TO INDIVIDUALLY LIST NON-STATUTORY MITIGATION EVIDENCE ON THE JURY VERDICT SLIP—EMBODIED IN PENNSYLVANIA RULE OF CRIMINAL PROCEDURE 808—UNCONSTITUTIONALLY DEPRIVES CAPITAL DEFENDANTS OF THEIR RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY PROHIBITING JURORS FROM GIVING MEANINGFUL EFFECT TO NON-STATUTORY EVIDENCE OF MITIGATION.

There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving *independent* mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable[.]

Lockett v. Ohio, 438 U.S. 586, 605 (1978) (emphasis added).

In Lockett, the United States Supreme Court established the bedrock Eighth Amendment principle that, due to “the fundamental respect for humanity underlying the Eighth Amendment,” the “consideration of the character and record of the individual offender and the circumstances of that particular offense [is] a constitutionally indispensable part of the process of inflicting the penalty of death.” Id. It is therefore only through a process which requires the sentencer to “consider, in fixing the ultimate punishment of death[,], the possibility of compassionate or

mitigating factors stemming from the diverse frailties of humankind,” can capital defendants be treated “as uniquely individual human beings” as the Constitution requires. Woodson v. North Carolina, 428 U.S. 280 (1976).

The dictates of the Eighth Amendment have evolved since the days of Lockett and Woodson; today, a statute is constitutionally infirm if it does not allow “particular consideration” of a mitigating factor or circumstance or if it “prevents a jury from giving *meaningful effect* to mitigating evidence that may justify the imposition of a life sentence rather than a death sentence.” See Brewer v. Quarterman, 550 U.S. 286, 289 (2007) (emphasis added); see also Smith v. Texas, 543 U.S. 37, 43-44 (2004) (“[T]he jury must be given an effective vehicle with which to weigh mitigating evidence.”); Eddings v. Oklahoma, 455 U.S. 104 (1982)

Pennsylvania Rules of Criminal Procedure 807 and 808 run afoul of these constitutional mandates by preventing capital jurors from giving “meaningful effect”—or “independent mitigating weight”—to all mitigating evidence that falls outside the seven statutorily enumerated mitigating circumstances.³ Pennsylvania Rules of Criminal Procedure 807(b) and 808 are unconstitutional as interpreted by

³ The Pennsylvania Supreme Court has approved non-Rule 808 sentencing verdict slips that also do not specifically list mitigating evidence. See Commonwealth v. Miller, 746 A.2d 592, 604 (Pa. 2000). Thus, to the extent that the sample jury verdict slip provided in Rule 808 is permissive, rather than mandatory, the systemic violation of constitutional rights is not lessened.

the Pennsylvania Supreme Court. Although the rules require the trial judge to place “those aggravating and mitigating circumstances of which there is some evidence” on the verdict slip, the Pennsylvania Supreme Court’s interpretation of Lockett and its progeny render the practical administration of the rule unconstitutional.

Therefore, Rules 807(b) and 808 of the Pennsylvania Rules of Criminal Procedure as interpreted by the Pennsylvania Supreme Court deprive capital defendants of their constitutional rights under the 8th and 14th Amendments to the United States Constitution.

A. By Forcing Capital Defendants to Compact all Non-Statutory Mitigating Evidence into One “Catch-all” Mitigator on the Verdict Slip, Pennsylvania Prevents Jurors from Giving Particular Consideration to Critical Mitigation Evidence.

The United States Constitution requires that any evidence of the character and record of a capital defendant be given individual consideration by a jury in its deliberations. See Lockett, 438 U.S. at 606; Woodson, 428 U.S. at 304 (“[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of

death.). Not only must a state's death-penalty scheme allow for the presentation of mitigation evidence, but it must also provide a mechanism that allows the jury to give meaningful consideration to the evidence. See Eddings, 455 U.S. at 113 (“The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.”); see also Abdul-Kabir v. Quarterman, 550 U.S. 233, 264 (2007) (“when the jury is not permitted to give meaningful effect or a ‘reasoned moral response’ to a defendant's mitigating evidence—because it is forbidden from doing so by statute or a judicial interpretation of a statute—the sentencing process is fatally flawed.”); Smith, 543 U.S. at 43-44.

Rule 807(b), as interpreted by the Pennsylvania courts, prevents the individual consideration of mitigating factors by grouping all mitigating circumstances into one category on the verdict sheet. See Smith, 543 U.S. at 43-44 (finding Texas' death-penalty scheme unconstitutional because jurors were not able to “consider and give effect to a defendant's mitigation evidence in imposing [the] sentence.”).

Here, the court read fifteen mitigating circumstances to the jurors prior to sending them back to deliberate. Unlike the aggravating circumstances that were

listed on the jury verdict form, the non-statutory mitigating circumstances were not listed on the verdict slip. The only presence the fifteen non-statutory mitigators had on the form was one line that allowed the jurors to consider “[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.” Therefore, in order to give any effect at all to these fifteen potentially mitigating circumstances, each juror would have to recall what each of the fifteen were. This places an undue burden on the defense to prove the existence of proffered mitigation evidence.

The kind of evidence that falls outside the statutorily enumerated mitigating factors is substantial and includes lack of parental involvement, physical, emotional, and sexual abuse, traumatic brain injury, organic brain damage, mental illness, mild mental retardation, poverty, drug abuse, and more. This Court has held that this kind of mitigation evidence is critically important to the capital-sentencing decision. See Wiggins v. Smith, 539 U.S. 510, 534-35 (2003); see also Rompilla v. Beard, 545 U.S. 374, 392-93 (2005) (finding that the evidence of poverty, early incarceration, mental health issues, alcoholic and abusive parents, and organic brain damage “might well have influenced the jury's appraisal of Rompilla’s culpability”) (internal quotations omitted).

In the present case, Petitioner presented evidence of fifteen non-statutory

mitigating circumstances: (1) head trauma as a youth, (2) physical abuse, (3) domestic violence, (4) poverty, (5) parental neglect, (6) familial dysfunction, (7) sexual abuse, (8) family abandonment, (9) family alcohol history, (10) adult life spent in prison, (11) acceptance of responsibility by pleading guilty, (12) amenability to life in prison, (13) prison institutional failure, (14) traumatic brain injury, and (15) high level of intoxication at the time of the offense. All fifteen of these circumstances were read only once to the jury prior to their deliberation. The jury was not able to give this evidence the thoughtful consideration required by the United States Constitution.

Therefore, by preventing capital jurors from considering important mitigating evidence, the Pennsylvania Rules of Criminal Procedure, as well as the general state practice of listing all non-statutory mitigation evidence under one catch-all provision on the jury verdict slip, violates capital defendants' 8th Amendment and Due Process rights under the Fourteenth Amendment.

B. The Pennsylvania Supreme Court's Distinction Between a "Mitigating Circumstance" and a "Mitigating Factor" Is Not Proper Under Current Eighth Amendment Jurisprudence and Deprives Capital Defendants of Their Due Process Rights.

In rejecting Petitioner's claims below, the Pennsylvania Supreme Court

explained that “[n]ot all ‘factors’ amount to independent statutory ‘circumstances.’” Along these lines, the Pennsylvania High Court has held that,

[T]he holding of Lockett does not require that the verdict slip in capital cases list each non-statutory mitigating factor individually. . . . We have held that Lockett and Eddings stand only for the proposition that a state may not bar relevant mitigating evidence from being presented and considered during the penalty phase of a capital trial. Our statutory framework concerning the death penalty allows a defendant to present to the jury “any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.” We have specifically held that we believe that the presentation of that mitigating factor to the jury as a part of the judge’s charge satisfies the requirements of Lockett.

Commonwealth v. Eichinger, 915 A.2d 1122, 1146 (Pa. 2007).

Thus, if a defendant is under “extreme mental or emotional disturbance” the jury may record that finding on the verdict sheet accordingly. However, if the defendant was raped as a child, the jury will only be told it may consider the “character and record” of the defendant on the verdict slip. Thus, Pennsylvania treats the two kinds of mitigation evidence differently.

Nowhere in Lockett or Eddings does this Court indicate that there are different tiers of mitigation evidence. In fact, this Court has indicated the opposite. See Hitchcock v. Dugger, 481 U.S. 393, 398-99 (1987) (“We think it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and

that the proceedings therefore did not comport with the requirements of [the 8th and 14th Amendments.]”); see also Eddings, 455 U.S. at 112 (“*any* relevant mitigating factor” must be given full consideration) (emphasis added); Lockett, 438 U.S. at 604 (“[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, *any* aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death”) (footnote omitted) (emphasis added). It is clear, whether statutory or non-statutory, all mitigation evidence must be considered by a capital jury before returning a verdict of death.

Even under the Pennsylvania Supreme Court’s own interpretation of Lockett and Eddings, the State’s process does not meet constitutional muster. The court acknowledges that “a state may not bar relevant mitigating evidence from being presented and considered during the penalty phase of a capital trial.” Eichinger, 915 A.2d at 1146. However, by failing to list non-statutory mitigation evidence on the jury verdict slip, this is exactly what the court does.

When non-statutory mitigation evidence is presented to the jury, it should be given the same effect that other mitigation evidence is given. Calling non-statutory evidence of mitigation a “factor” rather than a “consideration” creates a distinction without a purpose and violates defendants’ due process rights under the Eighth and

Fourteenth Amendments.

C. Pennsylvania Rules of Criminal Procedure 808, Along with the State’s Practice of Refusing To Individually List All Mitigation Evidence Confuses Jurors, Raising an Impermissible Risk That Jurors Will Fail To Weigh Undisputed Mitigation Evidence merely Because It is Grouped with More Speculative Evidence.

When multiple types of mitigation evidence are presented to a jury in an all-or-nothing fashion, as it is in Pennsylvania, a juror may erroneously reject finding—and weighing—*all* non-statutory mitigating evidence despite believing much of the evidence is mitigating solely because the juror believes just one of the proffered mitigating circumstances is unfounded. In such a situation that juror is prevented from giving weight to all the mitigation evidence under the “catch-all” provision despite truly believing that much of it had substantial weight.

In the instant case, the jury was presented with 15 mitigating circumstances under the “catch-all” mitigator. Several of these mitigating circumstances were presented to the jury through un rebutted expert testimony. Therefore, these mitigating circumstances should have at least been weighed by the jury. See Eddings, 455 U.S. at 112 However, the jury failed to find that the “catch-all” mitigator even existed, preventing the jury from giving any of the circumstances any weight.

The jurors were likely confused by the fact that all 15 mitigating

circumstances were combined under one title and not individually listed, leading them to believe that they needed to engage in some sort of weighing process, or that they needed to find all—or perhaps a majority—of the mitigating circumstances in order to find the single “catch-all” mitigator. This is not the law. See Abdul-Kabir v. Quarterman, 550 U.S. at 264 (“when the jury is not permitted to give meaningful effect or a ‘reasoned moral response’ to a defendant’s mitigating evidence—because it is forbidden from doing so by statute or a judicial interpretation of a statute—the sentencing process is fatally flawed.”); see also Eddings, 455 U.S. at 112; Lockett, 438 U.S. at 604.

In Pennsylvania, if just one juror finds just one of the mitigating circumstances listed under the “catch-all” provision, then the “catch-all” mitigator should be weighed against the aggravating evidence. See Pennsylvania Suggested Standard Criminal Jury Instructions § 15.2502H(3) (2006) (“[Y]ou are to regard a particular aggravating circumstance as present only if you all agree that it is present. On the other hand, each of you is free to regard a particular mitigating circumstance as present despite what other jurors may believe.”). Therefore, in order for the jury to reach the result it did here it means that no juror found that any of the 15 mitigating “factors” existed. Given that much of Petitioner’s mitigation evidence went unrebutted by the Commonwealth, this seems near impossible.

Instead, it is more likely that the evidence, although un rebutted, was not weighed at all by the jury because they were unsure how to consider the evidence. See Eddings, 455 U.S. at 112.

By keeping mitigation evidence off the jury verdict form, Pennsylvania creates an impermissible risk that jurors will reject undisputed “catch-all” mitigation in error, merely because it is grouped with more speculative mitigating evidence. This denies capital defendants in Pennsylvania their Eighth and Fourteenth Amendment rights to present all relevant mitigation evidence to the sentencing jury and have it considered.

D. Pennsylvania’s Procedure of Listing All Non-Statutory Mitigation Evidence Under the “Catch-all” Mitigator Misleads the Jury into Giving that Evidence Less Weight than Other Types of Mitigating or Aggravating Evidence.

By grouping all non-statutory mitigation evidence together under one “mitigating circumstance” the jury is misled as to how to weigh such evidence. Rather than allowing jurors to consider the mitigation evidence individually, Pennsylvania procedure requires the jurors determine—on their own—a method to combine, in this case fifteen, mitigating “factors” into one “mitigating circumstance; combine that single mitigating circumstance with the statutorily enumerated mitigating circumstances; and then weigh them all against the

aggravating factors. This confusing process works against capital defendants and deprives them of their right to have all mitigation evidence fairly considered and weighed. See Tennard v. Dretke, 542 U.S. 274, 285 (2004) (“[T]he ‘Eighth Amendment requires that the jury be able to consider and give effect to’ a capital defendant's mitigating evidence.”); see also Smith, 543 U.S. at 43-44.

Aside from confusing the jury as to their ultimate task, this decreases the perceived importance of non-statutory mitigation evidence in the eyes of the jury. While Petitioner acknowledges that it is not the number of mitigators and aggravators that is important, see Jones v. U.S., 527 U.S. 373, 399 (1999), the number of mitigating circumstances found by the jury certainly has some effect on the weighing process. Thus, when it comes to weighing the mitigating versus aggravating circumstances, the Pennsylvania capital defendant is at a disadvantage because his mitigation case is hamstrung by the Commonwealths requirement that much of his mitigation evidence fit within one “mitigation circumstance.” This prevents the jury from “considering, as a mitigating factor, *any* aspect of a defendant's character or record.” Lockett, 438 U.S. at 604 (emphasis added).

In addition, the procedure in question creates an uneven playing field because the Commonwealth's evidence in aggravation is all specifically listed on the jury verdict form. Every alleged aggravating circumstance is listed individually

on the jury slip. However, despite the importance of non-statutory mitigation evidence, see Hitchcock, 481 U.S. at 398-99, that evidence is lumped into one nondescript category that requires a juror to recall what the evidence was in order to effectively consider it. Such treatment of mitigation evidence essentially sweeps it under the rug where it cannot be considered by the jury. See Eddings, 455 U.S. at 114 (death-penalty scheme cannot prevent, as a matter of law, the consideration of relevant mitigating evidence).

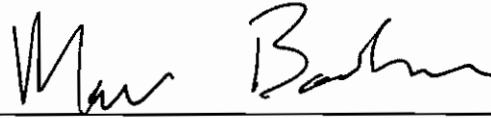
Such unequal treatment of mitigating and aggravating circumstances also denies capital defendants of their right to have the jury give their evidence of mitigation individual weight by conveying the idea to the jury that this evidence is less important than evidence that gets its own category on the jury verdict slip. See Lockett, 438 U.S. at 605 (“The Ohio death penalty statute does not permit the type of individualized consideration of mitigating factors we now hold to be required by the Eighth and Fourteenth Amendments in capital cases.”).

CONCLUSION

For all the foregoing reasons, this Court should grant this petition for Writ of Certiorari to the Pennsylvania Supreme Court to determine whether the application of Rules 807(b) and 808 deprives capital defendants of their Eighth and Fourteenth Amendment right to have mitigation evidence presented and considered by the jury

and, if so, reverse Petitioner's sentence.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Marc Bookman". The signature is written in a cursive, flowing style.

MARC BOOKMAN, ESQUIRE

Executive Director

Atlantic Center for Capital Representation

1315 Walnut St., Suite 1331

Philadelphia, PA 19102

Dated: March 21, 2014