
THE ROLES OF CLIENT AND COUNSEL IN LIMITING AND FORGOING MITIGATING EVIDENCE IN A CAPITAL CASE

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I. INTRODUCTION

Mitigating evidence comes into play during the penalty phase of a capital punishment trial.¹ If the “judge or jury has found [the] defendant guilty of an offense that is punishable by” death during the first trial, often called the guilt/innocence phase, then a second trial, often called the penalty phase, is conducted to determine the appropriate sentence.² “[E]very jurisdiction that authorizes capital punishment now requires two trials.”³ During this second trial, mitigating evidence may be presented and is weighed against the aggravating factors found during the earlier guilt/innocence trial to determine whether the defendant should be sentenced to life without parole or death.⁴

“The Supreme Court has never explicitly held that a bifurcated proceeding

1. LINDA E. CARTER ET AL., UNDERSTANDING CAPITAL PUNISHMENT LAW § 7.02, at 76, § 9.01, at 129 (3d ed. 2012).

2. *Id.* § 7.01, at 75.

3. *Id.*

4. *See id.* § 9.01, at 129 (noting that aggravating and mitigating evidence is considered during the penalty phase).

is constitutionally required” in capital cases, although it was a significant reason the Court reinstated death penalty statutes.⁵ In 1972, the Supreme Court invalidated death penalty statutes under the Cruel and Unusual Punishment Clause of the Eighth Amendment in *Furman v. Georgia*,⁶ primarily based on the determination that sentences were being imposed in an arbitrary manner and needed some element of quality and consistency.⁷

“State legislatures responded by enacting new death penalty statutes.”⁸ Four years after *Furman*, the Supreme Court upheld the constitutionality of a Georgia capital punishment law in *Gregg v. Georgia*.⁹ The statute required bifurcated trials, in which the trial judges and juries were permitted to sentence a defendant to death only for homicides having certain aggravating factors and only when there were insufficient mitigating factors.¹⁰ Because the statute permitted the jury to focus on the particularized nature of the crime and the particular characteristics of the individual defendant, it addressed the basic concern of *Furman* that defendants may be “condemned to death capriciously and arbitrarily.”¹¹

In *Lockett v. Ohio*, the Supreme Court addressed the issue of what mitigating evidence is admissible.¹² The Ohio statute at issue only provided for three mitigating circumstances that could be considered by the sentencer.¹³ The Court held that

the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, 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.¹⁴

5. *Id.* § 7.01, at 75–76.

6. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam).

7. *Id.* at 305 (Brennan, J., concurring) (“The function of these principles is to enable a court to determine whether a punishment comports with human dignity.”); *see also* *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion) (“*Furman* held that [the death penalty] could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.”).

8. CARTER ET AL., *supra* note 1, § 7.01, at 75.

9. *Gregg*, 428 U.S. at 207.

10. *Id.* at 206–07.

11. *Id.* at 206.

12. *Lockett v. Ohio*, 438 U.S. 586, 589 (1978).

13. *Id.* at 607.

14. *Id.* at 604 (footnote omitted).

Again, the Court focused on individualized consideration in sentencing.¹⁵ The Supreme Court has interpreted the holding in *Lockett* broadly and “has liberally construed when evidence is relevant.”¹⁶

Empirical evidence shows that death sentences are more successfully avoided in cases in which mitigating evidence is presented, as opposed to cases in which no mitigating evidence is presented. One study using mock jurors found that, on average, the mock jurors imposed a life sentence 52.2 percent of the time when mitigating evidence was presented.¹⁷ That number went down to 26.5 percent when no mitigating evidence was presented.¹⁸ It is unsurprising that the study concluded there was a greater overall likelihood of a defendant receiving a life sentence when psychological or psychosocial mitigating evidence was present as opposed to when it was absent.¹⁹

However, despite the noted success of presenting mitigating evidence, there are cases in which counsel and the defendant disagree over what mitigating evidence to present, or the defendant may not want to present any mitigating evidence at all.²⁰ The reasons for this vary. Often the evidence is of an embarrassing or traumatizing nature to the defendant, such as evidence of low mental function, mental illness, or sexual abuse as a child. It is not surprising to learn that “[p]sychiatrists have observed that defendants are often hesitant to disclose to a psychiatrist, or in open court, that they were mentally or physically abused by a family member.”²¹ They “may experience ‘defensiveness, shame, [or] repression,’ regarding episodes of abuse.”²² For these reasons, there are cases in which defendants opt not to have these experts testify.²³

15. *See id.* at 604–05.

16. *See* CARTER ET AL., *supra* note 1, § 12.02, at 172.

17. Michelle E. Barnett et al., *When Mitigation Evidence Makes A Difference: Effects of Psychological Mitigating Evidence on Sentencing Decisions in Capital Trials*, 22 BEHAV. SCI. & L. 751, 764 (2004).

18. *Id.*

19. *See id.* at 764–66.

20. *See, e.g.*, *Schriro v. Landrigan*, 550 U.S. 465, 469–70 (2007); *Knight v. Dugger*, 863 F.2d 705, 749–50 (11th Cir. 1988); *Larette v. State*, 703 S.W.2d 37, 39 (Mo. Ct. App. 1985).

21. *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 255, 260 (2007) (citing Kenneth B. Dekleva, *Psychiatric Expertise in the Sentencing Phase of Capital Murder Cases*, 29 J. AM. ACAD. PSYCHIATRY & L. 58, 61 (2001)) (discussing *Landrigan*).

22. *Id.* (alteration in original) (footnote omitted) (quoting Alan M. Goldstein et al., *Assessing Childhood Trauma and Developmental Factors as Mitigation in Capital Cases*, in FORENSIC MENTAL HEALTH ASSESSMENT OF CHILDREN AND ADOLESCENTS 365, 373 (Steven N. Sparta & Gerald P. Koocher eds., 2006)).

23. *See* Bradley A. MacLean, *Effective Capital Defense Representation and the*

In addition to expert witnesses, lay witnesses such as family members, former teachers, neighbors, and former coworkers may be called to testify regarding the defendant.²⁴ The defendant may object to this mitigating evidence to spare friends and loved ones the experience of testifying.²⁵ For example, in the Tenth Circuit case *Battenfield v. Gibson*, the defendant's trial counsel spent little time investigating possible mitigating evidence and planned to rely on the testimony of Battenfield's parents.²⁶ However, Battenfield opted not to have his parents testify, telling the court his parents had "been through enough."²⁷

But perhaps most concerning are the cases in which the defendant may not know what mitigating evidence is available or even understand the very nature of mitigation evidence.²⁸ Most often this is a result of trial counsel's failure either to conduct an adequate investigation into available mitigation evidence or to adequately communicate with the client.²⁹ In addition to being unaware of the evidence available to him, *Battenfield* also presents an example of the second scenario.³⁰ The court found that there was no indication counsel ever explained the meaning of mitigating evidence to the defendant.³¹ As a result, when Battenfield confirmed on the record that he did not wish to present any mitigation evidence, he thought it consisted only of the testimony of his parents.³²

This Article argues that counsel should have the ultimate decision as to what mitigating evidence is presented in the event of a disagreement between counsel and client; however, there should be investigatory standards in place.³³ Furthermore, if the defendant wishes to waive the presentation of mitigating evidence altogether, this Article contends there should be a pretrial investigation rule that mandates counsel be appointed to present the mitigating evidence uncovered.³⁴

II. THE ROLE OF COUNSEL IN INVESTIGATING AND PRESENTING MITIGATION

Difficult Client, 76 TENN. L. REV. 661, 670 (2009); *id.*

24. See CARTER ET AL., *supra* note 1, § 12.04, at 185.
25. See, e.g., *Larette*, 703 S.W.2d at 39 (finding defendant did not want his father to testify out of concern for his father's health).
26. *Battenfield v. Gibson*, 236 F.3d 1215, 1227–28 (10th Cir. 2001).
27. *Id.* at 1230.
28. See, e.g., *id.*
29. E.g., *id.* at 1229.
30. *Id.* at 1229–30.
31. *Id.* at 1229.
32. See *id.* at 1231.
33. See *infra* Part II.
34. See *infra* Part III.

EVIDENCE

“The Supreme Court has yet to rule on whose decision ultimately controls the presentation of mitigating evidence in cases of disagreement between defendant and counsel.”³⁵ The analysis often is narrowed down to the issue of whether it is a fundamental decision, in which case the defendant should have control, or a strategic decision, in which case counsel should have control.³⁶ Because of the undisputed importance of mitigating evidence, and case law that evaluates it as a strategic decision by counsel,³⁷ the decision of what mitigating evidence to present and how this evidence should be presented should ultimately be left to counsel. However, in giving counsel this control, a mandatory investigation standard should be imposed to enable counsel to present the best mitigation strategy available.

A. *The Scope of the Relationship Between Attorney and Client*

Rule 1.2 of the Model Rules of Professional Conduct governs the scope of the representation and allocation of authority between a lawyer and a client.³⁸ It reads in part:

[A] lawyer shall abide by a client’s decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. *In a criminal case*, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.³⁹

Noticeably absent from this language is with whom the decision lies regarding the presentation of evidence, specifically mitigating evidence in a capital trial.⁴⁰ Traditionally, the Court has allocated matters of “strategy” or “tactics” to counsel and reserved “personal choices” for the defendant.⁴¹

35. James Michael Blakemore, Note, *Counsel’s Control over the Presentation of Mitigating Evidence During Capital Sentencing*, 111 MICH. L. REV. 1337, 1344 (2013).

36. *See id.* at 1347–49.

37. *See Strickland v. Washington*, 466 U.S. 668, 689 (1984).

38. MODEL RULES OF PROF’L CONDUCT R. 1.2 (2013).

39. *Id.* (emphasis added).

40. *See id.*

41. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §11.6(a), at 625 (5th ed. 2009).

The ruling in *Faretta v. California* caused some confusion as to the scope of authority reserved for counsel.⁴² In *Faretta*, the Court held the state courts erred in forcing the petitioner, against his will, to accept a state-appointed public defender and in denying his request to conduct his own defense.⁴³ The Court found that the right to counsel under the Sixth and Fourteenth Amendments contains an implied right to self-representation,⁴⁴ and the right to defend oneself is “fundamental” in nature.⁴⁵ Although the Court did not directly address whether defendants representing themselves have the right not to present a defense, the Court’s holding has been interpreted to allow defendants to defend themselves by choosing not to participate in their own trial.⁴⁶

But there are several distinctions between the facts in *Faretta* and the circumstances surrounding mitigating evidence. The most notable distinction between *Faretta* and death penalty cases, specifically in the sentencing phase, is that the crime in *Faretta* was not death-penalty eligible.⁴⁷ As a result, the analysis in *Faretta* was mainly based on a textual and historical interpretation of the Sixth Amendment and the defendant’s right “to make one’s own defense personally.”⁴⁸ It did not consider at all a situation in which a defendant wished to withhold parts of a defense or waive a defense altogether at the expense of the defendant’s life.⁴⁹ Such a situation actually undercuts the Sixth Amendment’s overarching purpose: “the preservation of the adversarial process.”⁵⁰ Furthermore, the Court found the defendant had “knowingly and intelligently”⁵¹ waived his right to counsel.⁵² This conclusion was based on findings that the defendant had once already represented himself, had a high school education, and did not want to be

42. *Id.*; see *Faretta v. California*, 422 U.S. 806, 832 (1975) (stating that counsel, “as an ‘assistance’ for the accused,” is an option for the defendant to choose to use or not).

43. *Faretta*, 422 U.S. at 836.

44. *Id.* at 818, 821.

45. *Id.* at 817.

46. See, e.g., *People v. McKenzie*, 668 P.2d 769, 777 (Cal. 1983), *abrogated on other grounds* by *People v. Crayton*, 48 P.3d 1136 (Cal. 2002).

47. *Faretta*, 422 U.S. at 807 (noting the defendant was charged with grand theft auto).

48. *Id.* at 819; see *id.* at 818–32.

49. See Daniel R. Williams, *Mitigation and the Capital Defendant Who Wants to Die: A Study in the Rhetoric of Autonomy and the Hidden Discourse of Collective Responsibility*, 57 HASTINGS L.J. 693, 705 (2006) (“[T]he *Faretta* right [only] gives a defendant the ability to control his own case within the parameters of the adversarial process.”).

50. *Id.*

51. *Faretta*, 422 U.S. at 835 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464–65 (1938)) (internal quotation marks omitted).

52. See *id.* at 835–36.

represented by a public defender because he believed the office had too heavy a caseload.⁵³ There is no such standard imposed upon the ability to waive mitigating evidence. It seems counterintuitive to extend the *Faretta* right to waive assistance of counsel to the waiver of mitigating evidence, the result of which may have far more severe consequences for the defendant, but not also extend the knowingly and intelligent standard required in *Faretta*.

The *Faretta* ruling is not without other limitations. In *Indiana v. Edwards*, the Supreme Court found that “the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.”⁵⁴ The majority specifically noted that the *Faretta* opinion did not consider this issue “because [*Faretta*] did not consider the problem of mental competency, and because *Faretta* itself and later cases . . . made clear that the right of self-representation is not absolute.”⁵⁵ Just as *Faretta* did not consider mental competency, it also did not consider representation in the death-penalty context.⁵⁶

Additional Supreme Court cases have continued to define the scope of the relationship between attorney and client, often resulting in the broadening of attorney authority. In *Jones v. Barnes*, the Court held that defense counsel has no constitutional duty to raise every nonfrivolous claim requested by the defendant.⁵⁷ In so holding, the Court not only “recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal”⁵⁸ but also “recognized the superior ability of trained counsel in the ‘examination into the record, research of the law, and marshalling of arguments on [the appellant’s] behalf.’”⁵⁹ Despite the fact that *Jones* involved appellate counsel, the same arguments apply to counsel in a mitigation case.⁶⁰ Trained counsel is more capable than a defendant of formulating a penalty-phase case strategy based on well-researched mitigation evidence.⁶¹

53. *Id.* at 807, 835–36.

54. *Indiana v. Edwards*, 554 U.S. 164, 178 (2008).

55. *Id.* at 171 (citation omitted).

56. *See Faretta*, 422 U.S. at 807.

57. *Jones v. Barnes*, 463 U.S. 745, 754 (1983) (citing *Anders v. California*, 386 U.S. 738, 744 (1967)).

58. *Id.* at 751.

59. *Id.* (alteration in original) (quoting *Douglas v. California*, 372 U.S. 353, 358 (1963)).

60. *Compare id.*, with *Blakemore*, *supra* note 35, at 1348–49.

61. *Blakemore*, *supra* note 35, at 1349.

The Court still has not articulated a clear standard for determining whether a decision is strategic and best left to counsel or fundamental and left with the defendant.⁶² But just because a decision has been traditionally regarded as a fundamental decision of the defendant does not mean the Court will recognize it as an absolute right.⁶³ Despite specifically stating in *Jones* that it is the right of the client to determine whether to plead guilty, the Court later narrowed the scope by ruling in 2004 that “a lawyer’s decision to concede guilt during trial is not ‘the functional equivalent of a guilty plea,’ and thus does not require explicit consent from the defendant.”⁶⁴ And despite finding in *Faretta* that a defendant has a right to self-representation, the Court in *Martinez v. Court of Appeal of California* further stated that the *Faretta* decision also recognized the right to self-representation is not absolute and concluded the government’s interests in ensuring the integrity and efficiency of the trial sometimes outweighed the defendant’s interest in acting as his own lawyer.⁶⁵ Certainly, the government’s interests in ensuring integrity and efficiency of a trial should be particularly high in the context of a capital case.

B. Examples of Fundamental Versus Strategic Decisions

Perhaps the clearest suggestion that the Court believes the investigation of mitigating evidence is a strategic tactic lies in the 1984 opinion *Strickland v. Washington*.⁶⁶ There, the defendant brought a claim for ineffective assistance of counsel against his trial attorney for failing “to request a psychiatrist report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner’s reports or cross-examine the medical experts.”⁶⁷ When concluding that counsel’s conduct was not unreasonable, the Court consistently relied on the strategy of counsel.⁶⁸ In fact, for the defendant to prevail on an ineffective assistance of counsel claim, “the defendant must overcome the presumption that . . . the challenged action ‘might be considered sound trial strategy.’”⁶⁹

Against his counsel’s advice, the defendant in *Strickland* decided to plead

62. *Id.* at 1344.

63. *See id.* at 1342.

64. *Id.* (quoting *Florida v. Nixon*, 543 U.S. 175, 188 (2004)).

65. *Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 161–62 (2000).

66. *Strickland v. Washington*, 466 U.S. 668, 689 (1984); *see Blakemore, supra* note 35, at 1352.

67. *Strickland*, 466 U.S. at 675.

68. *See id.* at 699.

69. *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

guilty to all three capital murder charges and be sentenced by the trial judge without a jury recommendation.⁷⁰ Later, in formulating a strategy for the sentencing phase, counsel based his strategy primarily on a remark by the trial judge during the plea colloquy—the judge had told the defendant “that he had ‘a great deal of respect for people who are willing to step forward and admit their responsibility’”⁷¹—and on the judge’s “reputation as a sentencing judge who thought it important for a convicted defendant to own up to his crime.”⁷²

Counsel made the calculated decision to rely on the plea colloquy for evidence of the defendant’s background and claim of emotional stress.⁷³ He declined to order a presentence report because it would have included the defendant’s criminal history, which would have undermined the defendant’s claim to the judge that he had no significant criminal history.⁷⁴ Counsel also declined to present new evidence on these subjects to prevent the state from cross-examining the defendant and putting on its own psychiatric evidence⁷⁵—evidence that would, in all likelihood, do nothing but prove the defendant did not, in fact, have psychological problems.⁷⁶ Reviewing counsel’s tactics, the Court concluded, “Counsel’s strategy choice was well within the range of professionally reasonable judgments, and the decision not to seek more character or psychological evidence than was already in hand was likewise reasonable.”⁷⁷ Thus, although the Court went on to establish the second part of the test for ineffective-counsel claims—a showing that counsel’s deficient performance prejudiced the defendant⁷⁸—the defendant was not even able to pass the first part of the test, which required a showing that counsel’s performance was deficient.⁷⁹ The entire analysis of counsel’s decisions regarding mitigating evidence is evaluated in the context of trial strategy.⁸⁰

It is a common strategic choice of capital defense attorneys to withhold mitigation evidence based on what evidence may be presented or contradicted in rebuttal.⁸¹ The defendant in *Darden v. Wainwright* asserted an ineffective

70. *Id.* at 672.

71. *Id.*

72. *Id.* at 673.

73. *See id.*

74. *Id.*

75. *Id.*

76. *See id.*

77. *Id.* at 699.

78. *Id.* at 668, 692, 699–700.

79. *See id.* at 700.

80. *See id.* at 689–91, 699.

81. *See, e.g., Darden v. Wainwright*, 477 U.S. 168, 186 (1986) (finding defense

assistance of counsel claim as a result of his trial attorney's failure to sufficiently investigate his background and the attorney's decision to rely on a simple plea for mercy during the sentencing phase.⁸² The Court found there were several reasonable reasons to rely upon counsel's strategy: defense counsel could not portray the defendant as a nonviolent man because the state could rebut with evidence of his extensive criminal history; if defense counsel had offered evidence that the defendant was incapable of committing the crimes at issue, the state could present a psychiatric report that showed he had a sociopathic personality and could very well commit the crimes; and finally, if the defense tried to portray the defendant as a family man, the state could prove he was spending the weekend with a girlfriend.⁸³ Withholding this evidence was a calculated tactic given careful consideration by the defense.⁸⁴ As such, the defendant failed to overcome the presumption that the challenged action "might be considered sound trial strategy."⁸⁵

One final example is the ineffective assistance of counsel claim brought in *Burger v. Kemp*.⁸⁶ After his own meetings with the defendant, and after considering testimony from the psychologist at the hearing on the admissibility of defendant's confession, defense counsel elected not to put the defendant on the stand.⁸⁷ Defense counsel had concluded that the defendant enjoyed talking about his crimes and, at best, would appear indifferent on the stand.⁸⁸ Counsel also decided against putting the defendant's mother on the stand because her testimony would reveal the defendant "had committed at least one petty offense," and the current record was devoid of any past criminal record.⁸⁹ Finally, counsel did not put an attorney who had once served as defendant's "big brother" on the stand because both counsel and the prospective witness agreed it would not be helpful to the defendant.⁹⁰

This is not to say, however, that the Supreme Court's decisions are devoid

counsel was reasonable in deciding not to offer character evidence of the defendant when doing so would preclude a rebuttal by the prosecution); *Strickland*, 466 U.S. at 673 ("[B]y forgoing the opportunity to present new evidence . . . , counsel prevented the State from cross-examining [defendant] on his claim and from putting on . . . evidence of its own.").

82. *Darden*, 477 U.S. at 184.

83. *Id.* at 186.

84. *See id.* at 186–87.

85. *Id.* (quoting *Strickland*, 466 U.S. at 689) (internal quotation marks omitted).

86. *Burger v. Kemp*, 483 U.S. 776 (1987).

87. *Id.* at 791.

88. *Id.* at 791–92.

89. *Id.* at 792.

90. *Id.* at 792–93.

of examples in which an ineffective assistance of counsel claim was upheld. Since 2000, the Court has confirmed ineffective assistance of counsel as a result of counsel's failure to properly investigate mitigating evidence in five cases.⁹¹ In *Williams v. Taylor*, the Court found trial counsel ineffective for failing to prepare the mitigation case until a week before trial and for failing to conduct an investigation into readily available mitigating evidence.⁹² In *Wiggins v. Smith*, the Court found trial counsel deficient for failing to complete a social history investigation in accordance with the original 1989 edition of the American Bar Association's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (ABA Guidelines).⁹³ In *Rompilla v. Beard*, the Court found counsel was deficient despite the defendant and his family suggesting no mitigating evidence was available and despite consulting three mental health experts.⁹⁴ This decision was based on counsel's failure to examine the file on the defendant's prior convictions for rape and assault, evidence the prosecution was going to use to demonstrate the defendant's violent character.⁹⁵ In *Porter v. McCollum*, the Court found that a "fatalistic or uncooperative [client] . . . does not obviate the need for defense counsel to conduct some sort of mitigation investigation."⁹⁶ Finally, in *Sears v. Upton*, counsel presented seven witnesses during the penalty proceedings but failed to uncover defendant's low mental functioning as a result of significant frontal lobe brain damage suffered as a child.⁹⁷ The Court found ineffective assistance of counsel, stating, "We have never limited the prejudice inquiry under *Strickland* to cases in which there was only 'little or no mitigation evidence' presented."⁹⁸

The Court evaluated all of these cases under the *Strickland* standard, which is essentially an inquiry into the reasonableness of the purported trial strategy, and found it lacking in all of these cases:

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic

91. Russell Stetler & W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation*, 41 HOFSTRA L. REV. 635, 636 (2013). See generally *Sears v. Upton*, 130 S. Ct. 3259 (2010); *Porter v. McCollum*, 558 U.S. 30 (2009); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000).

92. *Williams*, 529 U.S. at 395–96.

93. *Wiggins*, 539 U.S. at 524.

94. *Rompilla*, 545 U.S. at 377, 381, 393.

95. *Id.* at 383, 389–90.

96. *Porter*, 558 U.S. at 40 (citing *Rompilla*, 545 U.S. at 381–82).

97. *Sears v. Upton*, 130 S. Ct. 3259, 3261–62 (2010).

98. *Id.* at 3266.

choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.⁹⁹

In *Wiggins*, similar to *Strickland*, counsel claimed that their limited investigation into the defendant's background "reflect[ed] a tactical judgment not to present mitigating evidence at sentencing and to pursue an alternative strategy instead."¹⁰⁰ Counsel limited their investigation to a one-page presentence investigation report (PSI) and the Department of Social Services records, rather than pursuing the various leads these reports uncovered, to develop possible defenses.¹⁰¹ The *Wiggins* Court distinguished the case from the *Strickland*, *Darden*, and *Burger* decisions, each of which found limited investigation to be reasonable.¹⁰² Counsel in *Wiggins* failed to uncover any evidence "to suggest that a mitigation case . . . would have been counterproductive."¹⁰³ The Court found that counsel's conduct was unreasonable because counsel's "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment."¹⁰⁴

This line of cases leads to the conclusion that the presentation of mitigating evidence is viewed by the Court as a strategic decision to be left to counsel, with the condition that it must be a reasonable decision, the proper measure of which "remains simply reasonableness under prevailing professional norms."¹⁰⁵ Furthermore, the adequacy of professional norms upon which reasonableness rests can be questionable in the context in which death penalty counsel is appointed.¹⁰⁶

99. *Strickland v. Washington*, 466 U.S. 668, 690–91 (1984); *see also Upton*, 130 S. Ct. at 3264; *Porter*, 558 U.S. at 81; *Rompilla*, 545 U.S. at 390, 393; *Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *Williams v. Taylor*, 529 U.S. 362, 367 (2000).

100. *Wiggins*, 539 U.S. at 521; *see Strickland*, 466 U.S. at 673.

101. *Wiggins*, 539 U.S. at 523–25.

102. *Compare id.* at 525–26, with *Burger v. Kemp*, 483 U.S. 776, 791–92 (1987), and *Darden v. Wainwright*, 477 U.S. 168, 186–87 (1986), and *Strickland*, 466 U.S. at 689, 691, 699.

103. *Wiggins*, 539 U.S. at 525.

104. *Id.* at 526.

105. *See id.* at 521.

106. *See Stetler & Wendel, supra* note 91, at 661–63. Russell Stetler and Professor Wendel noted four reasons for this: first, "there is very little publicity when a capital defense lawyer is incompetent"; second, attorney referral networks are not an issue when most capital defense lawyers obtain clients by court appointment and many courts are desperate to maintain a roster of lawyers willing to take such appointments; third, incompetence alone is hardly ever a ground for professional discipline; and fourth, as a result of the need to maintain a good working relationship with prosecutors and judges, defense lawyers often care about their reputation for qualities other than effective service to their clients. *Id.*

C. Proposed Requirement for Investigation

If counsel is given the ultimate decision regarding what mitigating evidence to present, a rule should be implemented requiring investigation into all available mitigating factors.¹⁰⁷ Without such a requirement, defense counsel will be unable to fully utilize their expertise regarding strategic decisions.¹⁰⁸ These attorneys need all available information to make an informed decision regarding what mitigating evidence to present, if any.¹⁰⁹

The *Strickland* Court stressed the importance of counsel's duty to investigate for a sentencing trial, stating that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."¹¹⁰ The ABA makes its position on investigation even more clear. The ABA Guidelines¹¹¹ are considered the most authoritative summary of professional norms in capital defense practice.¹¹² Hundreds of courts have cited to this source.¹¹³

The U.S. Supreme Court cited to the ABA guidelines in *Wiggins*, noting the guidelines are "standards to which we have long referred as 'guides to determining what is reasonable.'"¹¹⁴ "The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'"¹¹⁵

The Court again cited to the ABA Guidelines in *Rompilla*.¹¹⁶ Despite interviewing multiple family members and mental health experts, the Court still found counsel's investigation unreasonable as a result of counsel's failure to

107. See, e.g., *Wiggins*, 539 U.S. at 524 (stating that "investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" (quoting ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES 11.4.1(C), at 93 (1989))).

108. See *id.*

109. See *Strickland v. Washington*, 466 U.S. 668, 690–91 (1984).

110. *Id.* at 691.

111. Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003).

112. See *Stetler & Wendel*, *supra* note 91, at 635.

113. *Id.*

114. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (quoting *Strickland*, 466 U.S. at 688).

115. *Id.* (quoting ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES 11.4.1(C), at 93 (1989)).

116. *Rompilla v. Beard*, 545 U.S. 374, 387 (2005).

review the defendant's prior conviction file.¹¹⁷ This finding was based on counsel's knowledge that the prosecution was going to attempt to seek the death penalty by proving Rompilla had a significant history of violent felony convictions.¹¹⁸ The Court stated no attorney could misunderstand their obligations in a situation like this and cited to the ABA Guidelines in circulation at the time, which specifically stated that "[t]he investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities."¹¹⁹

The ABA's current position regarding investigations has been even more narrowly tailored since the *Wiggins* and *Rompilla* trials. The ABA Guideline regarding investigation currently reads as follows: "Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty. . . . The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented."¹²⁰

If courts were to adopt a mandatory investigation standard, as proposed by the ABA, the number of ineffective assistance of counsel claims would significantly decrease.¹²¹ Because the most common ineffective-assistance claim is that counsel was ineffective in investigating and presenting mitigating evidence,¹²² a pretrial investigation requirement would reduce the number of overall ineffective-assistance claims. Even in cases in which trial counsel strategically choose not to present certain mitigating evidence, counsel will have a much easier time rebutting an ineffective assistance claim because they will be able to point to their knowledge of the evidence at the time of the trial and identify their strategy for not using it. And while courts often cite to the ABA Guidelines, they are still just that—guidelines. The implementation of such a standard would protect both the defendant and counsel: the defendant will have the advantage of a thorough investigation, and trial counsel will be protected from frivolous claims raised as a last attempt during a federal habeas corpus petition.

117. *See id.* at 381–83.

118. *Id.* at 383.

119. *Id.* at 387 (quoting 1 ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1 (2d ed. 1982 Supp.)).

120. Am. Bar Ass'n, *supra* note 111, at 1015.

121. *See* BARRY LATZER & DAVID MCCORD, DEATH PENALTY CASES: LEADING U.S. SUPREME COURT CASES ON CAPITAL PUNISHMENT 317 (3d ed. 2011) (establishing the most common ground for ineffective assistance of counsel is ineffectiveness "in investigating and presenting mitigating evidence").

122. *Id.*

III. THE WAIVER DOCTRINE

According to one experienced capital defense attorney, every capital defendant at one point expresses a preference for execution over life in prison.¹²³ However, most change their minds.¹²⁴ Taking this into account, the sentencer should be presented with mitigating evidence, regardless of the current preference of the defendant. This is necessary to uphold the individualized nature of sentencing,¹²⁵ because there is no “knowing and intelligent” requirement for the defendant to waive a right of such magnitude,¹²⁶ and to avoid circumventing the function of the jury by ensuring it has all relevant information on the record.¹²⁷

A. Jurisdictional Trends

A defendant’s right to waive the presentation of mitigation evidence has been recognized in almost every jurisdiction that administers the death penalty.¹²⁸ Only Florida and New Jersey bar defendants from waiving their right to present mitigation evidence.¹²⁹ In *Muhammad v. State*, the Florida Supreme Court found that reversible error occurred due to the trial court’s decision to afford “great weight to the jury’s recommendation” despite the defendant’s refusal to present mitigating evidence and due to the court’s failure “to provide for an alternative means for the jury to be advised of available mitigating evidence.”¹³⁰ The New Jersey Supreme Court held in *State v. Koedatich* that without any mitigation evidence the state is unable to safeguard its “interest in insuring the reliability of death-penalty decisions.”¹³¹ Even after concluding the defendant had in fact knowingly and voluntarily waived the right, the court held mitigating evidence must be presented to preserve the constitutionality of the state’s death-penalty statute.¹³²

123. Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 855 (1987).

124. *Id.*

125. See discussion *infra* Part III.B.

126. See discussion *infra* Part III.C.

127. See discussion *infra* Part III.D.

128. Jules Epstein, *Mandatory Mitigation: An Eighth Amendment Mandate to Require Presentation of Mitigation Evidence, Even When the Sentencing Trial Defendant Wishes to Die*, 21 TEMP. POL. & CIV. RTS. L. REV. 1, 2 (2011).

129. See Williams, *supra* note 49, at 696; see also *Muhammad v. State*, 782 So. 2d 343, 361–62 (Fla. 2001); *State v. Koedatich*, 548 A.2d 939, 995, 997 (N.J. 1988).

130. *Muhammad*, 782 So. 2d at 361–62.

131. *Koedatich*, 548 A.2d at 995.

132. See *id.* at 994.

“The vast majority of courts . . . have . . . determin[ed] that a defendant’s Sixth Amendment right to represent himself and control the course of the proceedings carries with it the right to choose how much—if any—mitigating evidence is offered.”¹³³ The Fifth Circuit, in *United States v. Davis*, held that the district court’s attempt to appoint independent counsel to present mitigating evidence against the defendant’s wishes violated his Sixth Amendment right.¹³⁴ In *Singleton v. Lockhart*, the Eighth Circuit denied an ineffective assistance of counsel claim when counsel did not present any mitigating evidence at the defendant’s request because the defendant “waive[d] the right to present mitigating evidence.”¹³⁵ Similarly, the Seventh Circuit, in *Silagy v. Peters*, found that a capital defendant may forgo the presentation of mitigating evidence.¹³⁶

But most jurisdictions preserving the right to waive mitigating evidence have failed to take into account whether the waiver doctrine is compatible with a possible Eighth Amendment limitation reserving the death penalty for the “worst of the worst.”¹³⁷ Instead, courts uphold the right to waive mitigating evidence under the Sixth Amendment right to assistance of counsel or the defendant’s implied right to self-representation under the Sixth Amendment, as established in *Faretta*.¹³⁸

The Supreme Court has emphasized that the right to represent oneself is at the very core of the Sixth Amendment.¹³⁹ Courts have interpreted this right to include a defendant’s ability to waive the presentation of mitigating evidence.¹⁴⁰ “Surveying national decision law in 2003, the Utah Supreme Court found that the clear majority of cases deferred to a defendant’s choice”¹⁴¹ The Utah Supreme Court approved the stance adopted by the Fifth Circuit in *Davis* that “a defendant’s Sixth Amendment right to represent himself and control the course of the proceedings carries with it the right to choose how much—if any—mitigating evidence is offered.”¹⁴² However, the majority in both courts failed to

133. *State v. Arguelles*, 63 P.3d 731, 753 (Utah 2003).

134. *See United States v. Davis*, 285 F.3d 378, 385 (5th Cir. 2002).

135. *Singleton v. Lockhart*, 962 F.2d 1315, 1322 (8th Cir. 1992).

136. *Silagy v. Peters*, 905 F.2d 986, 1008 (7th Cir. 1990).

137. Epstein, *supra* note 128, at 12 (quoting *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting)) (internal quotation marks omitted).

138. *See Arguelles*, 63 P.3d at 753.

139. *See Faretta v. California*, 422 U.S. 806, 832 (1975).

140. *See Arguelles*, 63 P.3d at 753 (providing a thorough collection of such decisions).

141. Epstein, *supra* note 128, at 9; *see Arguelles*, 63 P.3d at 753.

142. *Arguelles*, 63 P.3d at 753 (citing *United States v. Davis*, 285 F.3d 378, 381–85 (5th Cir. 2002)).

evaluate the issue under Eighth Amendment rationale.¹⁴³

The dissent in *Davis* did apply Eighth Amendment rationale and, as a result, found that the district court was correct in its contention that the appointment of independent counsel was the most appropriate course of action when the defendant desired to represent himself and consistently stated his intention to present no mitigating evidence.¹⁴⁴ The opinion noted that by finding the Sixth Amendment right to self-representation as absolute, the majority “ignore[d] the national public interest in the fair and faithful administration of the federal capital punishment system, and convert[ed] the sentencing into a non-adversarial criminal proceeding not contemplated by the Sixth Amendment or the [Federal Death Penalty Act of 1994].”¹⁴⁵

Courts that have considered the role of the Eighth Amendment have applied a less than thorough analysis or dismissed the argument due to lack of precedent.¹⁴⁶ In *Silagy*, the petitioner argued that the imposition of the death penalty “constitute[d] a violation of the [E]ighth [A]mendment’s guarantee against cruel and unusual punishment” when the petitioner represented himself and offered no mitigating evidence.¹⁴⁷ The court found that because the only restriction imposed on the defendant’s right to refuse the assistance of counsel was that it must be knowingly and intelligently waived, there was no reason the *Faretta* right did not extend to capital cases.¹⁴⁸ But such a conclusion still only involves a Sixth Amendment analysis, and an “informed and knowing” waiver has not been imposed for mitigating evidence.¹⁴⁹ The court also found that the decision not to present mitigating evidence did not undermine the reliability of sentencing under the Eighth Amendment because the “jury was expressly instructed by the court that it could consider ‘any other facts or circumstances that provide reasons for imposing less than the most severe sentence.’”¹⁵⁰ The court somehow concluded this jury instruction adequately met the standard established in *Blystone v. Pennsylvania*, that “[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence,”¹⁵¹ despite the fact that no mitigating evidence had

143. See *id.*; *Davis*, 285 F.3d at 385.

144. *Davis*, 285 F.3d at 397–98 (Dennis, J., dissenting). See generally *id.* at 390–97.

145. *Id.* at 398.

146. See, e.g., *Blystone v. Pennsylvania*, 494 U.S. 299, 306 (1990); *Silagy v. Peters*, 905 F.2d 986, 1007–08 (7th Cir. 1990).

147. *Silagy*, 905 F.2d at 1007.

148. *Id.* (quoting *Faretta v. California*, 422 U.S. 806, 835 (1975)).

149. *Schriro v. Landrigan*, 550 U.S. 465, 479 (2007).

150. *Silagy*, 905 F.2d at 1008.

151. *Blystone*, 494 U.S. at 307.

been considered by the jury.¹⁵²

Other courts have based their decision allowing the defendant to waive mitigating evidence on the assumption that required mitigation would be impossible to enforce without the defendant's cooperation.¹⁵³ In *State v. Ashworth*, the Ohio Supreme Court admitted "the Eighth Amendment does impose a high requirement of reliability on the determination that death is the appropriate penalty in a particular case."¹⁵⁴ However, the *Ashworth* court dismissed the possibility that the reliability of sentencing may require the presentation of mitigating evidence due to the lack of United States Supreme Court precedent.¹⁵⁵ Instead, the court adopted the position also taken in Texas, that requiring "mitigating evidence would be impossible to enforce."¹⁵⁶ However, these courts failed to consider alternatives such as those proposed by the Florida Supreme Court in *Muhammad*.¹⁵⁷ The *Muhammad* opinion noted the possibility that the defendant may continue to refuse to put on mitigating evidence during presentencing procedures.¹⁵⁸ To address situations such as this, the Florida Supreme Court adopted a policy requiring "the preparation of a PSI in every case where the defendant is not challenging the imposition of the death penalty."¹⁵⁹ The Florida court required that the PSI include "previous mental health problems, . . . school records, and relevant family background."¹⁶⁰ The trial court also has the discretion to call its own witnesses with mitigating evidence.¹⁶¹ New Jersey also requires the preparation of a presentence investigation prior to the imposition of any sentence and includes an extensive list of what is required in the report, including family situation, financial resources, any history of civil commitment, medical history, history of substance abuse, and a psychological evaluation in certain circumstances.¹⁶²

152. See *Silagy*, 905 F.2d at 1008.

153. *State v. Ashworth*, 706 N.E.2d 1231, 1237–38 (Ohio 1999); *Shore v. State*, No AP-75049, 2007 WL 4375939, at *10 (Tex. Crim. App. Dec. 12, 2007); see Epstein, *supra* note 128, at 10.

154. *Ashworth*, 706 N.E.2d at 1238.

155. See *id.*

156. *Id.* at 1237–38; see *Shore*, 2007 WL 4375939, at *10.

157. Compare *Ashworth*, 706 N.E.2d at 1237–38, and *Shore*, 2007 WL 4375939, at *10, with *Muhammad v. State*, 782 So. 2d 343, 363–64 (Fla. 2001), and *State v. Koedatich* 548 A.2d 939, 992 (N.J. 1988).

158. *Muhammad*, 782 So. 2d at 363.

159. *Id.*

160. *Id.*

161. *Id.* at 364.

162. N.J. STAT. ANN. § 2C:44-6 (West 2005 & Supp. 2013).

B. *Consideration of Mitigating Evidence Is Necessary for Individualized Sentencing*

Supreme Court cases have long emphasized the importance of the judge's ability to consider all relevant information when sentencing in capital cases, beginning with the Court's 1976 decision to reinstate the death penalty in *Gregg*.¹⁶³ As previously noted, the Court put great emphasis on the existence of bifurcated trials in which mitigating evidence could be presented during the sentencing phase because the court would ensure the sentence was not imposed arbitrarily.¹⁶⁴ Specifically the Court held:

[T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance[,] . . . concerns . . . best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.¹⁶⁵

Failing to present mitigating evidence during the sentencing phase of the bifurcated trial arguably renders the sentencing phase useless. It was because the jury was required to consider the individualized circumstances of the defendant that the Court was convinced that death sentences would no longer be imposed in an arbitrary manner.¹⁶⁶ Without the existence of this bifurcated system, it is unlikely the Georgia statute would have been upheld.¹⁶⁷

In *Woodson v. North Carolina*, the Court struck down a mandatory death sentence statute because it did not allow for an individualized consideration of the defendant.¹⁶⁸ The Court stated:

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from

163. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion); *see, e.g.*, *Porter v. McCollum*, 558 U.S. 30, 41 (2009); *Wiggins v. Smith*, 539 U.S. 510, 535 (2003); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

164. *Gregg*, 428 U.S. at 195.

165. *Id.*

166. *See id.* at 206–07.

167. *See id.*

168. *Woodson v. North Carolina*, 428 U.S. 280, 304–05 (1976) (plurality opinion).

the diverse frailties of humankind.

....

... [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.

... Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.¹⁶⁹

Once again in 1978, the Court emphasized the importance of individualized analysis in *Lockett v. Ohio*.¹⁷⁰ The Court acknowledged that it was its duty to provide guidance to the states to assist them with the revisions to their death-penalty statutes in response to the various Court decisions.¹⁷¹ The majority went on to state, “Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases.”¹⁷² The Court invalidated the statute because “[t]he limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.”¹⁷³

Eddings v. Oklahoma addressed the situation presented when, rather than being precluded by statute, the sentencer simply refuses to give any weight to relevant mitigating evidence.¹⁷⁴ In that case, the trial judge found the defendant’s youth as a mitigating factor but refused to consider circumstances of the defendant’s “unhappy upbringing and emotional disturbance.”¹⁷⁵ Finding that the only mitigating factor did not outweigh the aggravating factors, the judge

169. *Id.* (citation omitted).

170. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion).

171. *Id.* at 602.

172. *Id.* at 605.

173. *Id.* at 608.

174. *Eddings v. Oklahoma*, 455 U.S. 104, 113–14 (1982).

175. *Id.* at 108–09.

sentenced the defendant to death.¹⁷⁶ The Court remanded, finding that “[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.”¹⁷⁷

The 1998 case *Buchanan v. Angelone* further emphasized the importance the Court continues to place upon mitigating evidence.¹⁷⁸ The Court noted, “[T]he state may shape and structure the jury’s consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence. Our consistent concern has been that restrictions on the jury’s sentencing determination not preclude the jury from being able to give effect to mitigating evidence.”¹⁷⁹ It was because the jury was presented with mitigating evidence that the Supreme Court determined that the death penalty was no longer cruel and unusual punishment under the Eighth Amendment.¹⁸⁰ Allowing the defendant to waive this evidence would bring the sentence back into the cruel and unusual form of punishment.¹⁸¹ Thus, waiving the presentation of mitigating evidence essentially waives the defendant’s right against cruel and unusual punishment.¹⁸²

C. The Lack of a Knowing and Intelligent Waiver Standard

One proposition is that the defendant should be able to waive the presentation of mitigating evidence only as long as it is a “knowing, voluntary, and intelligent” waiver.¹⁸³ Such is the standard for a defendant to waive constitutionally protected rights “such as the right to counsel, the right to confront his accusers, and the right to a jury.”¹⁸⁴ These rights are all associated with trial, and this standard “has been applied ‘without exception’ to those rights that are considered essential ‘to protect a fair trial and the reliability of the truth-determining process.’”¹⁸⁵ However, the Court has “never required a specific

176. *Id.* at 109.

177. *Id.* at 113–14.

178. *Buchanan v. Angelone*, 522 U.S. 269 (1998).

179. *Id.* at 276 (citations omitted).

180. *See Blystone v. Pennsylvania*, 494 U.S. 299, 307 (1990).

181. *See Williams*, *supra* note 49, at 720.

182. *See id.*

183. Dale E. Ho, *Silent at Sentencing: Waiver Doctrine and a Capital Defendant’s Right to Present Mitigating Evidence After Schriro v. Landrigan*, 62 FLA. L. REV. 721, 725 (2010).

184. *Id.* at 724–25.

185. *Id.* at 734–35 (quoting *Schneekloth v. Bustamonte*, 412 U.S. 218, 236–37 (1973)).

colloquy to ensure that a defendant knowingly and intelligently refused to present mitigating evidence.”¹⁸⁶

The closest the Supreme Court has come to ruling on whether a defendant may knowingly waive mitigation evidence was in *Schriro v. Landrigan*, in which the Court held the defendant waived his right to present mitigating evidence; however, it was not determined whether Landrigan had knowingly and intelligently done so.¹⁸⁷ “At sentencing, Landrigan’s counsel attempted to present the testimony of Landrigan’s ex-wife and birth mother as mitigating evidence.”¹⁸⁸ However, both refused to testify at Landrigan’s request.¹⁸⁹ The two witnesses were going to testify that his “birth mother used drugs and alcohol (including while she was pregnant with Landrigan), that Landrigan abused drugs and alcohol, and that Landrigan had been a good father.”¹⁹⁰ This was the only mitigating evidence of which Landrigan was aware when he confirmed to the court that he did not want any mitigating circumstances brought to the attention of the court.¹⁹¹ A reading of the sentencing transcript revealed that his answers referred only to the testimony of these two individuals.¹⁹²

“[B]oth the majority and dissenting judges on the en banc Court of Appeals agreed that ‘counsel’s limited investigation of Landrigan’s background fell below the standards of professional representation prevailing’ at the time of his sentencing hearing.”¹⁹³ As a result, it was only after he was sentenced to death that an alarming amount of further mitigating evidence was discovered.¹⁹⁴ The trial counsel had failed to complete a psychological evaluation of Landrigan, which “would have uncovered a serious organic brain disorder.”¹⁹⁵ Counsel failed to look into the medical consequences of his mother’s drinking and drug use during pregnancy.¹⁹⁶ Counsel also failed to develop “a history of respondent’s troubled childhood with his adoptive family—a childhood marked by physical and emotional abuse, neglect[,] . . . serious substance abuse problems . . . , a stunted education, and recurrent placement in substance abuse

186. *Schriro v. Landrigan*, 550 U.S. 465, 479 (2007).

187. *See id.* at 478–79.

188. *Id.* at 469.

189. *Id.*

190. *Id.* at 470.

191. *Id.* at 469–70.

192. *Id.* at 494 (Stevens, J., dissenting).

193. *Id.* at 483 (quoting *Landrigan v. Schriro*, 441 F.3d 638, 650 (9th Cir. 2006) (Bea, J., dissenting)).

194. *See id.* at 483–84.

195. *Id.* at 483.

196. *Id.*

rehabilitation facilities, a psychiatric ward, and police custody.”¹⁹⁷ The sentencing judge, after delivering Landrigan’s sentence, “later stated under oath that if she had known about [this additional evidence], she would not have pursued the death penalty.”¹⁹⁸

Despite these findings, the Court still found Landrigan “could not demonstrate prejudice under the Strickland standard.”¹⁹⁹ This was mainly a result of the defendant’s interference with counsel’s attempt to present the evidence,²⁰⁰ distinguishing it from previous cases such as *Wiggins* and *Rompilla*, in which the Court found counsel’s failure to uncover and present mitigating evidence amounted to ineffective assistance of counsel.²⁰¹ In *Landrigan*, the Court noted that it had never addressed “a situation in which a client interferes with counsel’s efforts to present mitigating evidence to a sentencing court.”²⁰² In *Rompilla*, although the defendant refused to assist in the development of the mitigation case, he did not directly inform the trial court he did not want mitigating evidence presented.²⁰³ Despite the defendant’s refusal to assist in the development of the evidence, the Supreme Court upheld the ineffective assistance of counsel claim based on counsel’s inadequate mitigation investigation.²⁰⁴ What has not been addressed is a case that falls between *Landrigan* and *Rompilla*, in which the defendant affirmatively states he or she does not want mitigating evidence presented but does not directly interfere with counsel’s attempts to introduce evidence during the trial.

The imposition of a knowing and intelligent waiver standard would prevent cases such as *Landrigan*, in which a defendant is unable to knowingly waive the presentation of mitigating evidence for the very reason that the defendant does not know it exists.²⁰⁵ Furthermore, the requirement of a presentence investigation report would ensure the sentencer is still informed of this evidence even in cases

197. *Id.*

198. Epstein, *supra* note 128 (citing A. Bates Butler III, *Man on Death Row Deserves Life Term: Trial Judge Never Was Told of His Brain Damage*, ARIZ. REPUBLIC, Oct. 21, 2010, <http://www.azcentral.com/arizonarepublic/opinions/articles/2010/10/20/20101020butler21.html>).

199. *Landrigan*, 550 U.S. at 477.

200. *See id.*

201. *Rompilla v. Beard*, 545 U.S. 374, 390, 393 (2005); *Wiggins v. Smith*, 539 U.S. 510, 525–26, 538 (2003).

202. *Landrigan*, 550 U.S. at 478.

203. *See Rompilla*, 545 U.S. at 381.

204. *Id.* at 390, 393.

205. *Landrigan*, 550 U.S. at 478–79.

in which the defendant attempts to interfere, as was the case in *Landrigan*.²⁰⁶ The Tenth Circuit, for example, has already implemented a clear and extensive colloquy requirement for situations in which a capital defendant intends to forgo the presentation of mitigation evidence.²⁰⁷

The Tenth Circuit case *Battenfield v. Gibson* is another example of an attorney's deficient performance that resulted in a waiver by the defendant; however, the court held the waiver was invalid.²⁰⁸ In this case, the attorney not only failed to investigate mitigating evidence but also failed to inform the defendant of the nature of mitigating evidence.²⁰⁹ As a result, the defendant waived the presentation of any mitigation.²¹⁰ The trial counsel's only mitigation strategy "was to invoke the jury's sympathy and mercy" through the testimony of the defendant's parents.²¹¹ Counsel never even interviewed the parents about Battenfield's background.²¹² He also failed to uncover, among other mitigating factors, that Battenfield had been "in a serious car accident at age 18, during which he sustained a serious head injury and after which he heavily used alcohol and drugs," as well as his family history of alcoholism and possible drug use.²¹³

The court stated that counsel's "failure to investigate clearly affected his ability to competently advise Battenfield regarding the meaning of mitigation evidence and the availability of possible mitigation strategies."²¹⁴ Under the impression that mitigating evidence only encompassed his familial testimony, Battenfield waived the presentation of mitigating evidence and was subsequently sentenced to death by a jury.²¹⁵ However, the Tenth Circuit found Battenfield's waiver was invalid because there was no indication from the record that he had been apprised of "the meaning of mitigation evidence or what particular mitigating evidence was available in his case."²¹⁶

Defendants are unable to knowingly waive the presentation of mitigating evidence when they know neither what it means nor what specific mitigating

206. See *id.* at 469–70.

207. See Ho, *supra* note 183, at 755–57 (describing the on-the-record colloquy required in the Tenth Circuit).

208. *Battenfield v. Gibson*, 236 F.3d 1215, 1230–31 (10th Cir. 2001).

209. See *id.* at 1229–30.

210. *Id.* at 1230–31.

211. *Id.* at 1228.

212. *Id.*

213. *Id.* at 1226, 1228, 1231.

214. *Id.* at 1229.

215. *Id.* at 1219; see *id.* at 1230–31.

216. *Id.* at 1232.

evidence is available in their own case.²¹⁷ The majority in *Landrigan* expressly acknowledged that the Court has never imposed an informed and knowing requirement upon a defendant's decision not to introduce evidence.²¹⁸ This is especially disconcerting given that other trial rights—as well as other constitutional rights—require a knowing and voluntary waiver, none of which have the possibility of an outcome with such magnitude as a capital case.²¹⁹

D. Waiver Circumvents the Role of the Jury and Appellate Review

A consensus of state appellate review procedures clearly shows the importance placed upon a fair trial result. At the end of 2005, of the 38 states that authorized the death penalty, 37 states required automatic review after a sentence of death “regardless of the defendant’s wishes.”²²⁰ Most of these states automatically review both the conviction and sentence, while five require review of only the sentence.²²¹ The purpose of this appellate review is to “assur[e] that the sentence is legal, proportional, or constitutional, which the states . . . view as at least a statutory, if not a constitutional, requirement.”²²²

But without any mitigating evidence to review, it is impossible to ensure the penalty will be proportional. For example, in Washington state, despite the heightened degree of scrutiny the Washington Supreme Court has held applies in these mandatory reviews, the court still only has the trial record to review.²²³ This means that in the absence of any mitigating evidence, the Washington Supreme Court must always find that the jury determination was correct—that there was insufficient evidence to merit leniency.²²⁴

In addition to frustrating the appellate review process, allowing the defendant to waive the presentation of mitigating evidence circumvents the role

217. *See id.* at 1231–32.

218. *Schiro v. Landrigan*, 550 U.S. 465, 479 (2007).

219. *See, e.g., Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (“[W]aivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege”); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (“The defendant may waive effectuation of [*Miranda*] rights, provided the waiver is made voluntarily, knowingly and intelligently.”).

220. Tracy L. Snell, *Capital Punishment, 2005*, BUREAU JUST. STAT. BULL. (Office of Justice Programs, Washington, D.C.), Jan. 30, 2007, at 3, available at <http://www.bjs.gov/content/pub/pdf/cp05.pdf>.

221. *See id.*

222. *See CARTER ET AL., supra* note 1, § 22.03, at 382 (footnote omitted).

223. Mary Pat Treuthart et al., *Mitigation Evidence and Capital Cases in Washington: Proposals for Change*, 26 SEATTLE U. L. REV. 241, 252–53 (2002).

224. *See id.* at 253.

of the jury.²²⁵ Most death-penalty statutes provide that the same jury sits as fact finder during both the guilt phase and the sentencing phase of the trial.²²⁶ When a defendant waives the presentation of mitigating evidence, this process assures that the jury hears all the aggravating factors implicated during the guilt phase but no mitigating evidence during the sentencing phase.²²⁷ In these cases, the jury will often have no choice but to sentence the defendant to death. This is hardly a reliable or consistent manner in which to apply sentencing.

By asking members of the public to sit on the jury in a capital murder trial, we are calling upon them “to make the most horrendous decision we can ask anyone to make about another human being.”²²⁸ “Jurors look to the fairness of the process to” assist and comfort them in making such a decision.²²⁹ It is fundamentally unfair to jurors to deprive them of the information that ensures a fair outcome.²³⁰

IV. CONCLUSION

There are and will be cases in which trial counsel and the defendant disagree over what mitigating evidence to present and what strategy is best. The scope of a defendant’s right to self-representation is not without limits, and the decision to forgo a defense in a capital case should be one of these limits. Because the Court has consistently viewed the investigation and presentation of mitigating evidence as a strategic decision, which has consistently been determined to lie within the purview of counsel,²³¹ defense counsel should have the ultimate decisionmaking authority. In giving counsel such control, a mandatory investigatory standard should be implemented. This will benefit defendants by ensuring they are entitled to the best defense strategy available, and it will reduce ineffective assistance of counsel claims.²³²

A review of the Supreme Court decisions over the years shows that the importance of mitigating evidence in a capital case is undisputable. It was a primary reason the Court reinstated the death penalty, finding that

225. *Id.* at 274.

226. *See* CARTER ET AL., *supra* note 1, § 7.01, at 76.

227. *See id.* at 75–76.

228. Treuthart et al., *supra* note 223, at 275 (quoting Rebekah Denn & David Fisher, *Execution Leaves a Trail of Unease*, SEATTLE POST-INTELLIGENCER, Aug. 29, 2001, http://seattlepi.nwsourc.com/local/36916_elligence29.shtml) (internal quotation mark omitted).

229. *Id.*

230. *See id.*

231. *See* Blakemore, *supra* note 35, at 1348–49.

232. *See* LATZER & MCCORD, *supra* note 121.

individualized sentencing prevented death sentences from being automatically classified as cruel and unusual punishment under the Eighth Amendment.²³³ Removing mitigating evidence from the equation brings capital punishment back into the realm of cruel and unusual punishment.²³⁴ Because waiving mitigating evidence conflicts with Eighth Amendment jurisprudence requiring individualized sentencing, because there is no standard that requires defendants be knowledgeable about the right they are waiving, and because it circumvents appellate review and the role of the jury, defendants in a capital case should not be able to waive the presentation of mitigating evidence.

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233. *See* Blystone v. Pennsylvania, 494 U.S. 299, 307 (1990).

234. *See* Williams, *supra* note 49, at 720.

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