

July 2010

## Silent at Sentencing: Waiver Doctrine and a Capital Defendant's Right to Present Mitigating Evidence After *Schriro v. Landrigan*

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### Recommended Citation

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SILENT AT SENTENCING: WAIVER DOCTRINE AND A  
CAPITAL DEFENDANT'S RIGHT TO PRESENT MITIGATING  
EVIDENCE AFTER *SCHRIRO V. LANDRIGAN*

*Dale E. Ho*\*

ABSTRACT

The consideration of mitigating evidence—evidence that weighs against the imposition of the death penalty in a capital defendant's individual case—has been deemed a “constitutionally indispensable” feature of a valid capital sentencing scheme. And yet, Jeffrey Landrigan, like many capital defendants, was sentenced to death without the consideration of any mitigating evidence whatsoever. Landrigan's trial counsel failed to uncover substantial evidence of Landrigan's history of severe physical and sexual abuse as a child, and of the possible biological effects of his mother's alcohol and drug abuse. Every member of the Ninth Circuit en banc panel considering his case deemed his counsel's performance to be objectively unreasonable. But the Supreme Court, by a 5-4 vote, denied Landrigan habeas relief, on the grounds that he had “waived” his right to present mitigating evidence. In so doing, the Court ignored longstanding precedent holding that a criminal defendant's waiver of a constitutionally protected trial right can only be valid if the record affirmatively establishes that the defendant made his waiver with an understanding of the nature of the right at stake and of the consequences of waiving it. Moreover, the Court's decision in *Landrigan* raises substantial concerns under the Eighth Amendment, increasing the likelihood that capital defendants in future cases will be sentenced without the presentation of mitigating evidence, thus undermining the reliability and integrity of capital sentencing. Just as an ordinary criminal defendant must be informed of and aware of the consequences if he opts to waive the right to trial itself, so too should similar safeguards attach where a capital defendant purportedly waives his right to present a mitigation case during sentencing proceedings, which are, in essence, a second trial. Any other result would be strangely incongruous, rendering the right to present mitigating evidence as the lone trial right of criminal defendants that is not subject to a “knowing and voluntary” requirement. Given the confusion amongst the lower courts on this issue, the establishment of a knowing and voluntary requirement in this context makes sense not only from a perspective of judicial economy, but also to

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\* Assistant Counsel & Fried, Frank Fellow, NAACP Legal Defense & Educational Fund, Inc. I offer my deepest gratitude to George Kouros, Daniel Morales, Ty Alper, Christina Swarns, Michael de Leeuw, and Charlie Lord for reviewing earlier drafts of this Article and/or discussing with me the substantive issues herein, and for providing helpful suggestions. All errors are my own. The views expressed in this Article are my own and should not be attributed to the Legal Defense Fund.

minimize the number of capital defendants sentenced to death without presenting a case in mitigation, a phenomenon that is abhorrent to the Eighth Amendment's proscription against the arbitrary imposition of the death penalty.

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#### I. INTRODUCTION

In 1982, Jeffrey Landrigan was convicted in Oklahoma of second-degree murder.<sup>1</sup> In 1989, he escaped from prison and committed another homicide, and, at his subsequent trial, he was convicted of first-degree capital murder.<sup>2</sup> During the sentencing phase of his trial, the prosecution presented evidence that led the trial court to conclude that Landrigan was eligible for the death penalty based on the presence of two statutory aggravating factors: (1) Landrigan committed the murder for pecuniary gain; and (2) he had been previously convicted of two violent felonies.<sup>3</sup>

1. *Schiro v. Landrigan (Landrigan III)*, 550 U.S. 465, 469 (2007).

2. *Id.*

3. *Id.* at 470–71.

The defense, however, presented no evidence during sentencing proceedings,<sup>4</sup> and the court, with no evidence of mitigating factors as a counterweight, sentenced Landrigan to death.

During post-conviction proceedings, Landrigan claimed his counsel was ineffective by failing to investigate the possible “biological component” of his violent behavior,<sup>5</sup> through interviews of Landrigan’s father and other relatives, who could have described aspects of Landrigan’s history including the following facts:

Landrigan’s birth parents were troubled individuals who abused drugs and alcohol; Landrigan’s biological father was a violent man who, at the time of Landrigan’s trial, was on death row in Arkansas; Landrigan’s mother abandoned Landrigan when he was six months old, leaving him in a day nursery and never returning; Landrigan was later adopted, but unfortunately, his adoptive mother was also an alcoholic, at times consuming a fifth of vodka or more a day until she passed out; she would frequently slap him and once even hit him with a frying pan; his childhood was difficult—he exhibited abandonment and attachment problems, had difficulty sleeping, and had violent temper tantrums even at a very early age; Landrigan had serious drug and alcohol problems while very young, and he even overdosed in class in eighth or ninth grade; at the time he committed the murder in Arizona, he had used amphetamines for forty-two straight days and had slept on only about fourteen of those days.<sup>6</sup>

A neuropsychologist later reported that Landrigan’s experiences resulted in disordered behavior that was beyond his control, and “left him unable to ‘function in a society that expects individuals to operate in an organized and adaptive manner, taking into account the actions and consequences of their behavior and their impact on society and its individual members.’”<sup>7</sup> In his petition for habeas corpus, Landrigan alleged that his counsel’s failure to uncover and present this evidence rose to the level of ineffective assistance, and sought a new sentencing proceeding.<sup>8</sup>

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4. See *id.* at 469–70. Defense counsel did, however, submit a sentencing memorandum prior to the sentencing hearing. See *Landrigan v. Stewart (Landrigan I)*, 272 F.3d 1221, 1225 (9th Cir. 2001).

5. *Id.*

6. *Landrigan v. Schriro (Landrigan II)*, 441 F.3d 638, 644–45 (9th Cir. 2006).

7. *Id.* at 645.

8. *Id.* at 641.

The initial federal habeas court denied Landrigan's claim and a panel of the Ninth Circuit affirmed,<sup>9</sup> but an en banc panel of the Ninth Circuit ultimately reversed and ordered habeas relief.<sup>10</sup> Notably, every judge from the en banc panel, including the two dissenters, agreed that Landrigan's trial counsel—by failing to uncover the plethora of relevant mitigating evidence described above—fell below prevailing professional standards.<sup>11</sup>

On appeal to the Supreme Court, Landrigan seemed to have reasonably good odds; since 2000, the Court had granted habeas relief in three capital cases where trial counsel had failed to conduct an adequate investigation into available mitigating evidence.<sup>12</sup> This time, however, was different. By a 5-4 vote, the Supreme Court ruled that Landrigan could not make a claim for ineffective assistance of counsel.<sup>13</sup> Justice Thomas' opinion held that Landrigan had not been prejudiced by his trial counsel's failure to conduct a thorough investigation into available mitigating evidence because Landrigan himself had "interfere[d] with counsel's efforts to present mitigating evidence to [the] sentencing court."<sup>14</sup> Justice Thomas based this conclusion on the fact that trial counsel had sought to elicit testimony from Landrigan's ex-wife and biological mother, but that, at Landrigan's request, both women refused to testify.<sup>15</sup> In essence, the majority surmised that Landrigan had waived his right to present mitigating evidence, and thus, concluded that any claim for ineffective assistance of counsel based on counsel's performance during sentencing was procedurally barred. Thus, in spite of the imperative under the Eighth Amendment to consider the individual history and characteristics of a capital defendant before imposing the death penalty, Landrigan's death sentence, which had originally been imposed without the consideration of substantial evidence of Landrigan's childhood abuse, was reinstated.<sup>16</sup>

This Article argues that the *Landrigan* majority incorrectly applied waiver doctrine to a capital defendant's Eighth Amendment right to present mitigating evidence, the exercise of which represents a defendant's last line of defense against the imposition of the death penalty. Although a criminal defendant may of course waive constitutionally protected rights associated with trial—such as the right to counsel, the right to confront his accusers, and the right to a jury—the Supreme Court has established that a *valid*

9. *Landrigan I*, 272 F.3d 1221, 1223–24 (2001).

10. *Landrigan II*, 441 F.3d at 650.

11. *Id.* (Bea, J., dissenting) ("I agree with the majority's conclusion that counsel's limited investigation of Landrigan's background fell below the standards of professional representation prevailing in 1990.")

12. *See* *Rompilla v. Beard*, 545 U.S. 374, 393 (2005); *Wiggins v. Smith*, 539 U.S. 510, 538 (2003); *Williams v. Taylor*, 529 U.S. 362, 390–91 (2000).

13. *Landrigan III*, 550 U.S. 465, 481 (2007).

14. *Id.* at 475–76, 478.

15. *Id.* at 469.

16. *Id.* at 480–81.

waiver of these constitutionally protected trial rights requires an affirmative showing on the record that the defendant's choice is knowing, voluntary, and intelligent (in shorthand, a "knowing and voluntary requirement"). The Court's failure in *Landrigan* to apply a similar standard where a capital defendant "waives" his right to present mitigating evidence is incongruous with well-established waiver doctrine, and creates an unacceptable risk of error in capital sentencing. A knowing and voluntary requirement must be applied in future cases where a defendant purportedly waives the presentation of mitigating evidence during sentencing.

Part II of this Article examines the nature of Landrigan's ineffectiveness claim and the contours of the Court's ruling. Although the Court in *Landrigan* declined to establish a knowing and voluntary requirement in the context of a purported waiver of mitigation, its ruling was quite limited, leaving open the possibility of establishing such a requirement in a future case.

Part III argues that the result in *Landrigan* should have been different, contextualizing the decision within (1) waiver doctrine and (2) modern capital punishment jurisprudence. The right to present mitigating evidence during sentencing has been at the core of the Court's capital punishment jurisprudence since the restoration of the death penalty to constitutional status in *Gregg v. Georgia*.<sup>17</sup> Time and again, the Court's capital punishment decisions have emphasized the principle that, if the death penalty is to be permissible under the Eighth Amendment, it must not be meted out arbitrarily. Rather, the death penalty must be administered in such a way that each capital defendant is evaluated as an individual, and that only the proverbial "worst of the worst" offenders receive the ultimate sanction. The presentation and consideration of evidence that weighs against the imposition of the death penalty has therefore been described as a "constitutionally indispensable" part of a valid capital sentencing scheme.<sup>18</sup> Indeed, an adequate presentation of mitigating evidence is literally quite often the difference between life and death.<sup>19</sup> Given that a criminal defendant's other constitutionally protected rights associated with trial are typically subject to a knowing and voluntary requirement, the Court's failure in *Landrigan* to apply such a requirement in this particular context makes little sense.

Finally, Part IV examines how a knowing and voluntary requirement might play out in practice, and examines the prospects for the establishment of such a requirement in future litigation. To implement a knowing and voluntary requirement, clear and consistent procedures should be established in the form of a uniform colloquy requirement whereby a sentencing court can ensure that a defendant, at a minimum,

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17. 428 U.S. 153, 187, 193, 195, 197 (1976).

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

19. See *infra* text accompanying notes 24, 108.

understands the scope of the right to present mitigating evidence and the consequences of declining to exercise it.

At present, a uniform colloquy requirement remains elusive, as a split exists amongst the courts of appeals and various state courts of last resort regarding the treatment of a defendant's waiver of mitigating evidence. This situation is abhorrent to the Eighth Amendment's proscription against arbitrariness in capital sentencing. But by adopting a rule requiring that any purported waiver of mitigation must be knowing and voluntary, the Court would harmonize treatment of mitigation with its waiver jurisprudence, accord the proper respect due to a constitutional right of capital defendants, and enhance reliability in capital sentencing.

## II. *SCHIRO V. LANDRIGAN*

### A. *Landrigan's Ineffectiveness Claim*

In order to understand the *Landrigan* majority's reasoning, we must begin with a closer look at Landrigan's ineffectiveness claim. Ineffective assistance of counsel claims have been the standard vehicle for addressing situations in which a capital defendant's case at sentencing (the "mitigation case") is deficient in some way. Under *Strickland v. Washington*,<sup>20</sup> relief is available based on an ineffective assistance of counsel claim upon a showing that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, if counsel had performed adequately, the result of the proceeding—the trial, the sentencing hearing, the appeal—would have been different.<sup>21</sup>

Accordingly, an ineffectiveness claim in the mitigation context is typically structured as follows: (1) defense counsel (a) failed to conduct a reasonable investigation into available mitigating evidence (a "mitigation investigation"), thus leaving crucial evidence undiscovered, or (b) was aware of, but made an unreasonable decision not to present relevant mitigating evidence during sentencing proceedings; and (2) there is a reasonable probability that the mitigating evidence that was not presented

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20. 466 U.S. 668 (1984).

21. *Id.* at 687. The standard for relief is therefore less exacting than a preponderance of the evidence standard.

[A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. . . . The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

*Id.* at 693–94. A reasonable probability of a different result is present when an evaluation of all of the evidence that should have been before the jury is "sufficient to undermine confidence in the outcome." *Id.* at 694.

during sentencing would have altered the sentencer's decision to impose the death penalty.<sup>22</sup> These ineffectiveness claims are not uncommon.<sup>23</sup> The presentation of an adequate mitigation case is obviously of tremendous importance, involving the highest possible stakes; it is almost a cliché now to observe that "[t]he quality of counsel [in this context] is often literally a matter of life and death for the capital defendant."<sup>24</sup>

Landrigan seemed to have a good chance of success before the Supreme Court. Since 2000, the Supreme Court had issued three decisions sustaining ineffectiveness claims along the lines outlined above. The first was a 2000 decision, *Williams v. Taylor*.<sup>25</sup> Terry Williams was convicted of committing a murder in the course of a robbery.<sup>26</sup> During sentencing proceedings, defense counsel called several witnesses, but they only testified vaguely about Williams' character, stating, for instance, that he was a "nice boy" and "not a violent person."<sup>27</sup> Counsel failed, however, to present graphic and readily available evidence of Williams' childhood abuse, borderline mental retardation, and additional mental impairment resulting from repeated head injuries.<sup>28</sup> Nor did counsel present evidence that Williams, during a previous period of incarceration, cooperated with prison authorities by helping to "crack a prison drug ring."<sup>29</sup> Finally, counsel failed to uncover the fact that the State's own expert witness in the case "believed that Williams, if kept in a 'structured environment,' would

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22. *Id.* at 687, 693–94. A "reasonable probability" of a different result occurs when the full "body of mitigation evidence" that could have been presented "might well have influenced the jury's appraisal of [the defendant's] moral culpability." *Williams v. Taylor*, 529 U.S. 362, 398 (2000) (citing *Boyde v. California*, 494 U.S. 370, 287 (1990)).

23. During the 2009–2010 term, the Court heard two cases involving claims of ineffective assistance at sentencing. First, the Court granted relief in a per curiam opinion in *Porter v. McCollum*. 130 S. Ct. 447, 448 (2009). The petitioner in *Porter*, a Korean War veteran, successfully argued that his trial attorney's failure to investigate and present mitigating evidence, including evidence of his honorable military service and the possibility that he might have suffered from posttraumatic stress disorder, constituted ineffective assistance of counsel. *Id.* at 452–53, 455. Meanwhile, in *Wood v. Allen*, 130 S. Ct. 841 (2010), the Court denied a claim brought by a petitioner who argued that his counsel was ineffective for failing to present substantial evidence of petitioner's mental retardation. *Porter* and *Wood* are, respectively, the fifth and sixth cases since 2000 in which the Court has addressed a claim of ineffective assistance of counsel based on the failure to present certain mitigating evidence. *See infra* text accompanying notes 25–44.

24. Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923, 1924 (1994); *see also* Thomas W. Brewer, *The Attorney-Client Relationship in Capital Cases and Its Impact on Juror Receptivity to Mitigation Evidence*, 22 JUST. Q. 340, 342 (2005) ("[E]xperienced capital trial attorneys have long appreciated [that] effective presentation of mitigation is, in many cases, the only thing standing between the defendant and a death sentence.").

25. 529 U.S. 362 (2000).

26. *Id.* at 367–68.

27. *Id.* at 369.

28. *Id.* at 370, 395.

29. *Id.* at 396 (internal quotation marks omitted).



not pose a future danger to society.”<sup>30</sup> The Court, by a 6-3 vote, sustained Williams’ ineffectiveness claim, observing that Williams had “a constitutionally protected right—to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer.”<sup>31</sup>

The Court’s ruling was based on its conclusion that trial counsel’s failure to submit or discover the evidence described above was not a tactical decision,<sup>32</sup> but rather amounted to a simple failure to discharge his duty of representation in an objectively reasonable manner.

Next was a 2003 decision, *Wiggins v. Smith*.<sup>33</sup> Kevin Wiggins was convicted of murdering a 77-year-old woman in her home during the course of a burglary, and was sentenced to death.<sup>34</sup> At sentencing, defense counsel did not offer “any evidence of [Wiggins’] life history or family background,”<sup>35</sup> despite a wealth of available mitigating evidence. Wiggins suffered from “severe physical and sexual abuse . . . at the hands of his mother and . . . a series of foster parents.”<sup>36</sup> Wiggins’ biological mother was physically abusive (one notable example involved her burning his hand on a hot stove); his first and second foster mothers also abused him physically; the father in his second foster home raped him repeatedly; he was gang-raped on multiple occasions by the sons of another foster mother; and he spent some of his youth homeless.<sup>37</sup> But Wiggins’ trial team simply failed to uncover this evidence, having concentrated their time and resources on the guilt phase of trial. Their only argument during sentencing was based on residual doubt about Wiggins’ guilt.<sup>38</sup> Given trial counsel’s failure to uncover or present any of this evidence, the Court, by a 7-2 vote, held that Wiggins was entitled to habeas relief.<sup>39</sup>

Finally, the Court’s 2005 decision in *Rompilla v. Beard* presented substantially similar issues. Ronald Rompilla was sentenced to death for stabbing the owner of a bar in Allentown, Pennsylvania.<sup>40</sup> The jury found the presence of three aggravating factors: (1) he committed the murder in the course of another felony; (2) “the murder was committed by torture;” and (3) he had a significant history of other felony convictions.<sup>41</sup> While defense counsel presented some mitigating evidence at sentencing, it did not include substantial evidence concerning Rompilla’s troubled

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30. *Id.* at 370–71.

31. *Id.* at 393.

32. *Id.* at 396.

33. 539 U.S. 510 (2003).

34. *Id.* at 514–15.

35. *Id.* at 516.

36. *Id.* at 516–17.

37. *Id.* at 516–17.

38. *Id.* at 517.

39. *Id.* at 519.

40. 545 U.S. 374, 377–78 (2005).

41. *Id.* at 378.

childhood, his history of mental illness, and his struggle with alcoholism.<sup>42</sup> As in *Wiggins*, the Court, by a 5-4 vote, determined that Rompilla was entitled to relief based on trial counsel's inadequate mitigation investigation.<sup>43</sup>

Given the Court's holdings in *Williams*, *Wiggins*, and *Rompilla*, and the plethora of similar evidence that Landrigan's trial lawyers failed to uncover and present during his sentencing proceedings, Landrigan seemed to have a relatively persuasive claim for post-conviction relief. But this time, the Court—minus Justice O'Connor, who had retired in the interim—found that there was a factor present in Landrigan's case that the majority deemed meaningful: in the Court's view, unlike *Williams*, *Wiggins*, or *Rompilla*, Landrigan had “interfere[d] with [trial] counsel's efforts to present mitigating evidence to [the] sentencing court.”<sup>44</sup> In other words, because Landrigan himself had expressed a preference not to present certain forms of mitigating evidence that were available at the time of trial, the majority deemed Landrigan to have waived the presentation of *all* mitigating evidence, and, consequently, any subsequent claim for ineffective assistance based on his trial counsel's failure to present a mitigation case was barred.

The Court based its ruling almost entirely on the following exchange between the trial judge and Landrigan:

THE COURT: Mr. Landrigan, have you instructed your lawyer that you do not wish . . . to bring any mitigating circumstances to my attention?

THE DEFENDANT: Yeah.

THE COURT: Do you know what that means?

THE DEFENDANT: Yeah.

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42. *Id.* at 378–79.

43. *Id.* at 393.

44. *Landrigan III*, 550 U.S. 465, 478 (2007). This was, however, a dubious distinction. The *Rompilla* Court, for instance, had observed that Rompilla had been “uninterested in helping” counsel in their mitigation investigation, told counsel that his childhood and schooling had been “normal,” and “was even actively obstructive by sending counsel off on false leads.” *Rompilla*, 545 U.S. at 381. But despite Rompilla's refusal to assist in the development of a mitigation case, the Court still held that his counsel's failure to conduct an adequate mitigation investigation, including into Rompilla's mental health, constituted ineffective assistance of counsel. *Id.* at 393. Moreover, even if a defendant prefers that mitigating evidence not be presented during sentencing proceedings, this would hardly seem to excuse a failure by counsel to conduct a mitigation investigation *before* those proceedings begin. See Am. Bar Ass'n (ABA), *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 1015 (2003) [hereinafter ABA, *Guidelines*] (referencing Guideline 10.7 which states that a mitigation investigation “should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented”). The Commentary to Guideline 10.7 further notes: “The duty to investigate exists regardless of the expressed desires of a client. Nor may counsel ‘sit idly by, thinking that investigation would be futile.’” *Id.* at 1021 (footnotes omitted).

THE COURT: Mr. Landrigan, are there mitigating circumstances I should be aware of?  
 THE DEFENDANT: Not as far as I'm concerned.<sup>45</sup>

Examining this limited exchange in isolation, it is not wholly unreasonable to surmise, as the majority did, that Landrigan did not in fact wish to present any mitigation case whatsoever. But the record suggests that the situation was not quite as simple as the *Landrigan* majority suggested. At the time of trial, Landrigan's attorney had not conducted a thorough mitigation investigation, and had not discovered the full extent of the wide range of mitigating evidence described above.<sup>46</sup> Rather, Landrigan's trial counsel had spoken briefly with only two members of Landrigan's family—his ex-wife and his biological mother—and had ascertained some general information about the substance abuse of Landrigan's biological mother and of Landrigan himself, but little in the way of specifics.<sup>47</sup> Defense counsel nevertheless sought to introduce testimony from these two members of Landrigan's family, but Landrigan prevented him from doing so.<sup>48</sup> As counsel explained to the court, “[Landrigan] is adamant he does not want any testimony from his family, specifically these two people that I have here, his mother, under subpoena, and as well as having flown in his ex-wife.”<sup>49</sup>

These statements form the context for the exchange between the trial judge and Landrigan excerpted above. Although the record is clear that Landrigan was unwilling to have two particular people—his ex-wife and his biological mother—testify, “there is no mention of any other witnesses, and there is no indication that Landrigan would have precluded the introduction of mitigating evidence by other means.”<sup>50</sup> These possibilities never arose, precisely because Landrigan's attorney did not conduct a thorough mitigation investigation. Landrigan therefore never had an opportunity to make an informed decision about whether or not to present a mitigation case. At best, his words are ambiguous—it is simply unclear from the record whether Landrigan sought to prevent the introduction of certain *forms* of mitigating evidence only, or if he sought to forgo *all* mitigating evidence entirely.<sup>51</sup>

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45. *Landrigan III*, 550 U.S. at 469.

46. See *supra* text accompanying notes 4–10.

47. See *Landrigan II*, 441 F.3d 638, 644 (9th Cir. 2006).

48. *Id.* at 645.

49. *Id.*

50. *Id.* at 646 (footnote omitted).

51. Of course, as the majority pointed out in its opinion, at the conclusion of sentencing proceedings, when asked if he wanted to add anything else on his behalf, Landrigan stated, “I think if you want to give me the death penalty, just bring it right on. I'm ready for it.” *Landrigan III*, 550 U.S. 465, 470 (2007). This does not necessarily indicate, however, that prior to that point, Landrigan sought to waive all mitigating evidence or that his waiver was informed and knowing.

Nevertheless, on the basis of this ambiguous record, the majority determined that Landrigan clearly did not want to present any mitigating evidence. In so ruling, the majority also stated, “[w]e have never imposed an ‘informed and knowing’ requirement upon a defendant’s decision not to introduce evidence,” and added, “we have never required a specific colloquy to ensure that a defendant knowingly and intelligently refused to present mitigating evidence.”<sup>52</sup>

### B. *What Landrigan Did Not Decide*

Although I contend that *Landrigan* was wrongly decided, it is worth noting that *Landrigan* is not necessarily the final word on the applicability of a knowing and voluntary requirement to a purported waiver of mitigation. To be precise, *Landrigan* did *not* conclusively decide the question seemingly at the heart of the case—namely, whether Landrigan actually waived his right to present mitigating evidence. First, the Court ruled that Landrigan was barred from raising the validity of his “waiver,” by failing to present this claim in his state habeas petition.<sup>53</sup> This is a questionable proposition—after all, Landrigan could not raise the issue of the “voluntariness” of his “waiver” until *after* the state courts had already ruled that his ineffectiveness claim was barred by his purported waiver. But the majority’s ruling that Landrigan was procedurally barred from raising the voluntariness of his waiver has the effect of rendering the majority’s subsequent comments on this issue dicta.

Second, and more importantly, the question on habeas review was not, strictly speaking, whether a knowing and voluntary requirement *should* be applied in this context, but rather, whether the Court *had already* articulated such a requirement *at the time* of Landrigan’s first post-conviction hearing.<sup>54</sup> The only question on habeas review was whether the state court reasonably concluded that no such knowing and voluntary requirement was in place under *existing* federal law, not whether such a requirement should in fact exist. Viewed from that perspective, the Court’s ruling was not entirely inaccurate. When the majority stated that “[w]e

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Although Landrigan expressed a preference not to present the limited mitigating evidence that his counsel had adduced, the fact remained that, before Landrigan expressed that preference, defense counsel had not conducted a thorough mitigation investigation. *Id.* As the Ninth Circuit put it in the en banc decision below, “Landrigan’s . . . last-minute decision [not to present mitigating evidence] cannot excuse his counsel’s failure to conduct an adequate investigation *prior* to the sentencing.” *Landrigan II*, 441 F.3d at 647. These issues are addressed more fully below. *See infra* text accompanying notes 106–09.

52. *Landrigan III*, 550 U.S. at 479.

53. *Id.*

54. *See* 28 U.S.C. § 2254(d)(1) (2006). Under § 2254(d)(1), a federal court may not grant habeas relief unless the state court’s decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” at the time of the state court’s decision. *Id.*

*have never* imposed an ‘informed and knowing’ requirement upon a defendant’s decision not to introduce evidence,”<sup>55</sup> this proclamation does not have the force of a normative holding—it is merely a descriptive statement of the state of the law at that point in time.<sup>56</sup> As it is of course true that, at the time that Landrigan’s habeas petition was adjudicated in state court, a knowing and voluntary requirement had not yet been articulated in this context by the Supreme Court, it at least arguably followed that “it was not objectively unreasonable for [the state court that first heard Landrigan’s claim] to conclude” that Landrigan was not entitled to relief.<sup>57</sup>

This is not to say, however, that as a matter of first impression, that the Court—or any lower courts—could not subsequently hold that a knowing and voluntary requirement should be applied to a purported waiver of mitigation, and the Court’s opinion appears to hold out just that possibility. To the extent that the Court’s holding in *Landrigan* can and should be read as based on the non-controversial statement that the Court had not yet, at that point, imposed a knowing and voluntary requirement in this context, the door remains open for the establishment of such a requirement in a case of first impression. While the law concerning mitigation waiver at the time of Landrigan’s first post-conviction hearing was arguably unclear, this issue could still be the subject of future litigation.

### III. A CRITICAL VIEW OF *LANDRIGAN*

Even assuming, however, that *Landrigan* can be read in the limited fashion outlined above, its result is largely incongruous with the Court’s decisions concerning the waiver of fundamental rights by criminal defendants. The Court has consistently held that a criminal defendant’s waiver of a constitutionally protected trial right is invalid unless there is an affirmative showing that the waiver was knowing and voluntary. This general rule is animated by a concern for fundamental fairness and a need for reliability in criminal proceedings, imperatives that resonate even more strongly in the capital context. Given the central role that mitigating evidence plays in a constitutionally valid capital sentencing scheme, courts should require that a valid waiver of mitigation be knowing and voluntary.

#### A. Waiver Doctrine

It is well-established that criminal defendants may waive constitutionally protected rights. The Fifth Amendment’s privilege against

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55. *Landrigan III*, 550 U.S. at 479 (emphasis added).

56. See *Commonwealth v. Tedford*, 960 A.2d 1, 45 (Pa. 2008) (citing *Landrigan III*, 550 U.S. at 479) (“[T]he Supreme Court has more recently noted that there is, *as yet*, no constitutional requirement that a defendant’s decision not to introduce evidence be ‘informed and knowing.’”) (emphasis added).

57. *Landrigan III*, 550 U.S. at 478.

self-incrimination,<sup>58</sup> for instance, has been described by the Supreme Court as “one of the ‘principles of a free government,’”<sup>59</sup> but a defendant is permitted to offer testimony against himself as part of the outcome of a plea bargaining process.<sup>60</sup> The Sixth Amendment, meanwhile, provides for “[t]he right to a speedy and public trial, by an impartial jury,”<sup>61</sup> which, of course, a defendant can waive by opting for a bench trial or by pleading guilty.<sup>62</sup> The Sixth Amendment also provides for a defendant’s right “to have the assistance of counsel for his defence,” a right so fundamental that, where a defendant cannot afford an attorney, the State is obligated to provide him with one.<sup>63</sup> But, just like the privilege against self-incrimination or the right to trial itself, the right to counsel can be waived, and a defendant may proceed to trial in absence of counsel if he so chooses.<sup>64</sup>

Thus, the Court has long recognized that criminal defendants may waive trial rights that are expressly guaranteed by the Constitution. But such a waiver is permitted only if it is knowing, intelligent, and voluntary. That is, a waiver of a particular right will not be found valid unless it is established that the defendant freely chose not to exercise that right with a full understanding of the scope of the right at stake and of the potential consequences of waiving it. This “knowing and voluntary” requirement has been applied to various constitutionally protected trial rights including the right to a jury,<sup>65</sup> the right to a speedy trial,<sup>66</sup> the right to counsel,<sup>67</sup> the right to confront one’s accusers,<sup>68</sup> the right to trial itself,<sup>69</sup> and the protection against double jeopardy.<sup>70</sup>

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58. U.S. CONST. amend. V (“[No person] shall be compelled in any criminal case to be a witness against himself . . .”).

59. *Malloy v. Hogan*, 378 U.S. 1, 9 (1964) (citing *Boyd v. United States*, 116 U.S. 616, 632 (1886)).

60. *See Santobello v. New York*, 404 U.S. 257, 261 (1971) (upholding the constitutionality of plea bargaining, including the outcome in which a defendant agrees to plead guilty to a lesser offense, or to one or only some of the counts of a multi-count indictment, and testify against himself in exchange for a lesser sentence). I also note that, in entering a guilty plea, a defendant simultaneously gives up his Sixth Amendment rights to a jury trial and to confront his accusers.

61. U.S. CONST. amend. VI.

62. *Singer v. United States*, 380 U.S. 24, 34 (1965) (observing that “a defendant can . . . in some instances waive his right to a trial by jury”).

63. *Gideon v. Wainwright*, 372 U.S. 335, 342–43 (1963).

64. *Faretta v. California*, 422 U.S. 806, 819 (1975).

65. *Singer*, 380 U.S. at 34 (observing that “a defendant can . . . in some instances waive his right to a trial by jury”).

66. *Barker v. Wingo*, 407 U.S. 514, 529 (1972) (noting that waiver of right to speedy trial must be made knowingly and voluntarily).

67. *Faretta*, 422 U.S. at 835 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)). A defendant seeking to waive the right to counsel must “be made aware of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’” *Id.*

68. *Brookhart v. Janis*, 384 U.S. 1, 4–5 (1966).

In each of these contexts, the Supreme Court has made clear that a valid waiver cannot be presumed from a silent record.<sup>71</sup> Rather, the presumption runs the other direction, as courts may “not presume acquiescence in the loss of fundamental rights,”<sup>72</sup> but must instead “indulge every reasonable presumption *against* waiver’ of fundamental constitutional rights.”<sup>73</sup> The Supreme Court has held repeatedly that the presumption that a waiver is not valid may be rebutted only if the record contains an affirmative showing supporting a finding that the waiver was made knowingly, intelligently, and voluntarily.<sup>74</sup> The burden is generally on a trial court to establish a record demonstrating that a defendant’s purported waiver of a constitutional right was valid.<sup>75</sup>

The rationale for this strong presumption against waiver is based on the notion that a criminal trial—with its attendant risks to the defendant’s liberty—is a forum where an individual’s rights merit uniquely robust protections. This may seem quite obvious, but it has wide-reaching practical implications. Generally speaking, there is no knowing and voluntary requirement with respect to waiver of certain constitutional rights that are frequently implicated in criminal matters but which are not directly related to trial—for instance, a person need not understand the Fourth Amendment right to be free from search and seizure before waiving it.<sup>76</sup> But a knowing and voluntary requirement has been applied “without exception” to those rights that are considered essential “to protect a fair

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69. *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (holding that a defendant may waive right to trial and plead guilty so long as there is an affirmative showing that his plea was intelligent and voluntary). The ability of a criminal defendant to waive the right to trial extends to the capital context. *Godinez v. Moran*, 509 U.S. 389, 392 (1993) (holding that a capital defendant was competent to plead guilty and waive the right to counsel).

70. *Bullington v. Missouri*, 451 U.S. 430, 437–38 (1981).

71. *See, e.g., Faretta*, 422 U.S. at 835 (1975) (holding that where a defendant waives the right to counsel, the record must establish that the defendant does so knowingly and voluntarily); *Boykin*, 395 U.S. at 243 (noting a court “cannot presume a waiver of these . . . important federal rights from a silent record”) (footnotes omitted).

72. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (quoting *Ohio Bell Tel. Co. v. Pub. Utils. Comm’n*, 301 U.S. 292, 307 (1937)).

73. *Id.* (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937); *Hodges v. Easton*, 106 U.S. 408, 412 (1882)) (emphasis added).

74. *See Boykin*, 395 U.S. at 242 (citing *Carnley v. Cochran*, 369 U.S. 506, 516 (1962)) (holding, where a defendant waives the right to trial, the record must show that the defendant “intelligently and understandingly rejected” the option to exercise his right, and that “[a]nything less is not waiver”); *see also Godinez v. Moran*, 509 U.S. 389, 401 n.12 (1993); *Brady v. United States*, 397 U.S. 742, 748 (1970); *Johnson*, 304 U.S. at 463–64. The requirement, with respect to plea bargains, of an affirmative showing on the record that the defendant’s waiver is knowing and voluntary is also codified under the Federal Rules of Criminal Procedure. *See* FED. R. CRIM. P. 11(b)(2)–(d).

75. *See, e.g., Westbrook v. Arizona*, 384 U.S. 150, 150 (1966) (per curiam).

76. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 241 (1973).

trial and the reliability of the truth-determining process.”<sup>77</sup> As the Court has explained:

A strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial. Any trial conducted in derogation of that model leaves open the possibility that the trial reached an unfair result precisely because all the protections specified in the Constitution were not provided.<sup>78</sup>

Because of the high-stakes nature of criminal trials, the procedural guarantees afforded criminal defendants by the Constitution are crucial to preserving the integrity of the trial process. Thus, unlike other constitutionally protected rights, these rights can only be waived upon a showing that a purported waiver was knowing and voluntary.

#### B. *The Right to Present Mitigating Evidence*

The issue here, of course, is whether waiver doctrine properly applies to a capital defendant's right to present mitigating evidence. As I explain below, the right to present mitigation evidence is, like all other trial rights of criminal defendants, an essential feature of a fair and reliable trial, and therefore merits robust procedural protections. In order to understand why this is the case, we must turn to an examination of the nature of the mitigation right and its jurisprudential development.

##### 1. The Origins and Scope of the Right to Present Mitigating Evidence

The fact that a capital defendant would have a constitutional right to present mitigating evidence<sup>79</sup> is by no means obvious. There is, of course, no mention of the death penalty, let alone mitigating evidence, in the text of the Eighth Amendment. One could think, for instance, that the facts adduced in demonstrating a defendant's guilt in committing capital murder would provide a sentencer with sufficient information as to whether or not to impose the death penalty.

And yet, a capital defendant's right to present mitigating evidence is grounded firmly in the Court's capital punishment jurisprudence, arising in response to the Eighth Amendment concerns identified by the Supreme Court in its seminal modern death penalty cases. These cases from the

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77. *Id.* at 236–37.

78. *Id.* at 241.

79. *See Williams v. Taylor*, 529 U.S. 362, 393 (2000).



1970s were concerned with the arbitrary imposition of the death penalty. The Court in *Furman v. Georgia*<sup>80</sup> imposed a *de facto* nationwide moratorium on the death penalty in 1972 because of the seemingly random imposition of capital punishment,<sup>81</sup> which the Court attributed to vague capital sentencing statutes that gave virtually unbounded discretion to sentencers.<sup>82</sup> When the Court restored the death penalty to constitutional status four years later in *Gregg v. Georgia*,<sup>83</sup> it did so only on the condition that the discretion of sentencers in capital cases would henceforth be guided more strictly—i.e., that procedures would be in place to ensure that only the proverbial “worst of the worst” offenders would be sentenced to death.

Chief among those procedures was the bifurcation of capital trials, dividing capital proceedings into essentially two separate trials: one trial to determine guilt or innocence (the “guilt phase”), and, in the event of a guilty verdict, a second trial to determine the sentence (the “sentencing phase”). During the sentencing phase, a defendant would presumably present evidence as in any other trial, but rather than evidence tending to prove innocence, it would be evidence weighing against the death penalty (“mitigating evidence”). Bifurcation was one of the key features of Georgia’s capital sentencing scheme that the Court cited when it restored capital punishment to constitutional status in *Gregg*,<sup>84</sup> and although the Court has never held that separate trials for guilt and punishment are constitutionally required,<sup>85</sup> today, “every jurisdiction that authorizes capital

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80. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam) (holding that imposition and carrying out of death penalty cases before court would constitute cruel and unusual punishment). After *Furman*, 860 death sentences nationwide were vacated, including 629 individuals that were on death row at the time. Jack Greenberg, *Capital Punishment as a System*, 91 *YALE L. J.* 908, 915 (1982).

81. *Furman*, 408 U.S. at 239–40 (per curiam). *Furman* did not produce a single majority opinion, but its holding can be summed up best by Justice Stewart’s statement that the death penalty was “cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.” *Id.* at 309–10 (Stewart, J., concurring).

82. *Id.* at 256–57 (Douglas, J., concurring).

83. 428 U.S. 153 (1976).

84. *Id.* at 195 (“[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. As a general proposition these concerns are 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.”).

85. The only time the Court addressed this issue directly was in a pre-*Furman* case. See *Crampton v. Ohio*, 402 U.S. 183, 221 (1971) (acknowledging the superiority of the bifurcated trial and upholding Ohio’s then unitary capital trial procedures). Subsequently, *Gregg* did not expressly hold that a bifurcated trial was constitutionally required. See *Gregg*, 428 U.S. at 195.

punishment now requires that two separate phases take place.”<sup>86</sup>

Post-*Gregg*, the death penalty can only be imposed if, during the sentencing phase, the factfinder takes into consideration “special facts . . . that mitigate against imposing capital punishment,” such as the unique characteristics of an individual capital defendant and the specific circumstances of his crime.<sup>87</sup> In the Court’s view, such an individualized assessment of a capital defendant creates a certain amount of reliability that a particular sentence is the most appropriate.<sup>88</sup>

Bifurcation of capital trials was also necessary for a second reason. In addition to its proscription against arbitrariness, the Supreme Court’s capital punishment decisions during this period also were animated by a sense that the Eighth Amendment requires a certain level of respect for human dignity. In the Court’s view, proper respect for human dignity warrants specialized procedures in capital cases that might be unnecessary in ordinary criminal trials. Thus, the Court ruled in *Woodson v. North Carolina* that it was not enough merely to banish arbitrariness in capital sentencing. While a mandatory death penalty scheme (i.e., one requiring the imposition of the death penalty on all capital offenders) might eliminate randomness from capital sentencing, the Court in *Woodson* ruled that such a scheme would be unacceptable under the Eighth Amendment because it would fail to recognize the uniqueness of each individual defendant.<sup>89</sup>

While it may make sense, as a policy matter, to take into account the individual characteristics of all criminal defendants during sentencing, such individualized evaluations rise to the level of a constitutional imperative in the capital context because “the penalty of death is qualitatively different from a sentence of imprisonment, however long.”<sup>90</sup> Thus, “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.”<sup>91</sup>

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86. LINDA E. CARTER & ELLEN KREITZBERG, UNDERSTANDING CAPITAL PUNISHMENT LAW 51 (LexisNexis) (2004).

87. *Gregg*, 428 U.S. at 197 (citing *Moore v. State*, 213 S.E.2d 829, 832 (1975)). A sentencer must consider, as mitigating evidence, “the circumstances of the crime and the criminal.” *Id.*

88. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

89. *Id.* at 304. Decided on the same day as *Gregg*, *Woodson* held that North Carolina’s compulsory death penalty statute, which made the death penalty mandatory for all capital offenders, was unconstitutional due to its “failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death.” *Id.* at 303.

90. *Id.* at 305.

91. *Id.* at 304 (internal citations omitted) (emphasis added). Although this excerpt from Justice Stewart’s opinion represented only a plurality of the court in *Woodson*, the view that a

Together, these two Eighth Amendment concerns—reliability and respect for human dignity—led to the bifurcation of capital trials and to the establishment of a capital defendant’s right to present mitigating evidence. Since the resurrection of the death penalty in *Gregg*, the Court has never equivocated on the bedrock proposition that a valid capital sentencing scheme must permit a capital defendant to present mitigating evidence.<sup>92</sup>

It is worth noting that the right to present mitigating evidence is a particularly broad right, encompassing almost any evidence that a defendant might seek to introduce. Cosmetically, the test for relevance during the sentencing phase appears to be no different than the general evidentiary standard for admissibility: whether the evidence in question has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”<sup>93</sup> But the range of what might be

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sentencer must consider mitigating evidence was embraced two years later by a majority of the Court in *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (“[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 and incompatible with the commands of the Eighth and Fourteenth Amendments.”).

92. Over the past three decades, the Supreme Court has consistently reaffirmed the proposition that the ability of a capital defendant to introduce mitigation evidence and a sentencer’s consideration of that evidence are constitutional prerequisites in any capital sentencing scheme. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 393 (2000); *Buchanan v. Angelone*, 522 U.S. 269, 275–76 (1998); *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989); *California v. Brown*, 479 U.S. 538, 541 (1987); *Eddings v. Oklahoma*, 455 U.S. 104, 115–17 (1982). For instance, in *Eddings*, the Court overturned a death sentence where the trial court refused to consider evidence of the defendant’s upbringing and emotional disturbance. *Eddings*, 455 U.S. at 115–17. The Court held that, while a sentencer in a capital case need not assign any particular weight to the mitigating evidence presented, as a matter of law, the sentencer must at least *consider* the evidence presented, and that the failure to do so constitutes grounds for reversal of a sentence. *Id.* at 112. In *California v. Brown*, the Court upheld a death sentence, but noted that a “capital defendant generally *must* be allowed to introduce any relevant mitigating evidence” *Brown*, 479 U.S. at 541 (emphasis added). In *Penry v. Lynaugh*, the Court reversed a death sentence because the trial court failed to instruct the jury that it could consider mitigating evidence concerning the defendant’s mental retardation and background of abuse. *Penry*, 492 U.S. at 328. In *Buchanan v. Angelone*, the Court upheld another death sentence but once again reiterated, “our cases have established that the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence.” *Buchanan*, 522 U.S. at 275–76. And in granting habeas relief for ineffective assistance of counsel in *Williams v. Taylor*, the Court held that the defendant had “a constitutionally protected right—to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer.” *Williams*, 529 U.S. at 393,

93. *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990) (observing that the “meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding”). I note, however, that during federal capital sentencing proceedings, the Federal Rules of Evidence, including the relevance requirement under Rule 401, are inoperative. *See* 18 U.S.C. § 3593(c) (2006).

considered a fact that is “of consequence” in the mitigation context is quite broad.<sup>94</sup> Relevant mitigating evidence is understood to encompass virtually any evidence that a defendant might seek to introduce, including: evidence that the defendant played a minor role in the crime, had little or no criminal record, or suffered from lasting effects of an abusive childhood or an underlying mental disorder; or factors such as the age of the defendant, the defendant’s remorse, or that the defendant can live peaceably in prison.<sup>95</sup>

The Court has placed only two limits on the range of permissible mitigating evidence. A state or court may exclude: (1) pleas for sympathy that are entirely “divorced from the evidence,”<sup>96</sup> and (2) arguments based on residual doubt as to the defendant’s guilt.<sup>97</sup> But there is no requirement that mitigating evidence bear a nexus to the crime before it can be considered by the jury.<sup>98</sup> This “low threshold for relevance”<sup>99</sup> is consistent with the Court’s dictate that “an individualized decision is essential in capital cases” because the corrective mechanisms that are available with other forms of punishment, are of course, unavailable in the capital context.<sup>100</sup> Thus, whereas questions of admissibility on grounds of relevance are frequent concerns in ordinary criminal trials, the sentencing phase of a capital trial can be something of a free-for-all for the defense, as “the capital defendant generally must be allowed to introduce *any* relevant mitigating evidence regarding “his character or record and any of the circumstances of the offense.”<sup>101</sup> The rule that a capital defendant faces

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94. *McKoy*, 494 U.S. at 440 (holding that “relevant mitigating evidence” encompasses any “evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value”).

95. *See id.* at 437.

96. *Brown*, 479 U.S. at 542 (describing such pleas as “irrelevant evidence”).

97. *Franklin v. Lynaugh*, 487 U.S. 164, 174 (1988) (plurality opinion). The plurality opinion in *Franklin* was unclear as to whether its ruling was based on the notion that residual doubt is not appropriate mitigation or the idea that any residual doubt as to the defendant’s guilt had already been adequately considered under the Texas death penalty statute, which required the sentencer to consider causation and deliberateness in deciding to impose the death penalty. *Id.* at 169 n.3; *see also* CARTER & KREITZBERG, *supra* note 86, at 143. However, the Court has since held in dicta that, under *Franklin*, residual doubt is not appropriate mitigation evidence noting that “a majority agreed that ‘residual doubt[t]’ as to Franklin’s guilt was not a constitutionally mandated mitigating factor.” *Penry v. Lynaugh*, 492 U.S. 302, 320 (1989).

98. *See Tennard v. Dretke*, 542 U.S. 274, 286–87 (2004); *see also* *Smith v. Texas*, 543 U.S. 37, 44–45 (2004) (noting that such a nexus requirement was “never countenanced” by any of the Court’s precedent).

99. *Tennard*, 542 U.S. at 285.

100. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

101. *California v. Brown*, 479 U.S. 538, 541 (1987) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (quoting *Lockett*, 438 U.S. at 604) (emphasis added); *see also* *Payne v. Tennessee*, 501 U.S. 808, 822 (1991) (quoting *Eddings*, 455 U.S. at 114) (“We have held that a State cannot preclude the sentencer from considering ‘any relevant mitigating evidence’ that the defendant proffers in support of a sentence less than death. . . . [V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.”);

almost no limits on the range of evidence that he can present during sentencing has been referred to as the “no preclusion” principle.<sup>102</sup>

The broad scope of what courts consider to be relevant mitigating evidence has many implications. Given that, for instance, the list of aggravating factors that the prosecution can utilize in arguing for death must be circumscribed by statute, the defense typically has a wider range of admissible evidence at its disposal during sentencing. But there are less obvious consequences as well. In some cases, a capital defendant might refrain from presenting certain forms of relevant mitigating evidence. The range of material that constitutes relevant mitigating evidence encompasses everything from a defendant’s conduct during the offense to more personal matters, such as the defendant’s childhood history of abuse or record of mental illness or substance addiction—sensitive subjects for any person to reveal in open court. Moreover, introducing such matters frequently requires testimony from a defendant’s closest friends and relatives. It is perhaps unsurprising, therefore, that capital defendants sometimes seek to prevent counsel from presenting certain forms of mitigating evidence.<sup>103</sup>

When counsel fails to present relevant mitigating evidence, however, the factfinder is deprived of crucial information necessary to make a reliable sentencing determination. Thus, while the no preclusion principle is meant to provide defendants with a broad brush from which to argue against the imposition of the death penalty, defendants may sometimes fail to put on an adequate mitigation case by neglecting certain forms of relevant mitigating evidence, risking unreliable sentencing results.

## 2. Consequences When Counsel Fails to Present Mitigating Evidence

If a sentencer does not have an opportunity to hear mitigating evidence, the death penalty becomes inevitable.<sup>104</sup> If, at sentencing, the prosecution

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*Skipper v. South Carolina*, 476 U.S. 1, 4–5 (1986) (holding that a trial judge cannot exclude evidence of defendant’s good behavior in jail); *Eddings*, 455 U.S. at 113–14 (reversing, where the judge admitted into evidence, but refused to consider, testimony concerning the defendant’s upbringing, and holding that “neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence”); *Lockett*, 438 U.S. at 604 (holding that permissible mitigating evidence extends to “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”) (emphasis added).

102. CARTER & KREITZBERG, *supra* note 86, at 138–40.

103. *See, e.g.*, *Battenfield v. Gibson*, 236 F.3d 1215, 1230–31 (10th Cir. 2001). In *Battenfield*, counsel failed to present substantial evidence concerning defendant’s personal character and medical history, including a serious head injury subsequent to which he heavily abused alcohol and drugs, which would have been introduced through defendant’s parents’ testimony. The defendant refused to permit his parents to testify, stating that “they have been through enough,” and counsel subsequently presented no evidence in mitigation.

104. With respect to the balancing of aggravating and mitigating factors, there are two types of death penalty statutes: weighing statutes and nonweighing or “threshold” statutes. California, for instance, has a weighing statute, under which a sentencer weighs all evidence of aggravating factors

presents evidence of aggravating factors tending to show that a defendant “should” be put to death, but the defense does not respond with a case of its own, the prosecution’s case goes uncontested and a death sentence is the unavoidable result. Such situations raise obvious concerns under the Eighth Amendment. If a constitutionally acceptable capital punishment statute must provide for individualized sentencing determinations in order to satisfy the twin goals of (1) respect for the dignity of each individual facing the death penalty; and (2) reliability in the administration of capital punishment,<sup>105</sup> then these goals are undermined when the death penalty is imposed automatically simply because counsel fails to present mitigating evidence. In such situations, a “sentencer cannot give the defendant the individualized consideration that the Eighth Amendment requires.”<sup>106</sup> Quite obviously, if the Eighth Amendment requires that an individual capital defendant’s dignity be respected through the consideration of the defendant’s individual character and the unique circumstances of his crime, that requirement cannot be satisfied where the important evidence is omitted from the sentencing phase. As Linda Carter has argued, “[w]here society’s interest in the reliability of the decision making process in death penalty cases is manifested in an individualized determination based on aggravating and mitigating circumstances, a waiver of one part of this structure invalidates the delicately balanced protection for safeguarding against arbitrary imposition of the death penalty.”<sup>107</sup> This is not merely a theoretical matter, as empirical evidence has demonstrated that well-presented mitigating evidence can have a strong influence on a jury’s deliberations.<sup>108</sup>

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against any evidence of mitigating factors, and is required to impose the death penalty if it determines that the aggravators outweigh the mitigators. *Boyde v. California*, 494 U.S. 370, 373 (1990) (upholding instruction which stated “[i]f you conclude that the aggravating circumstances outweigh the mitigating circumstances, you *shall impose* a sentence of death”). Similarly, Kansas’ weighing statute requires imposition of the death penalty if the aggravating and mitigating factors are in equipoise. *See Kansas v. Marsh*, 548 U.S. 163, 164 (2006). Virginia, meanwhile, has a nonweighing statute, in which the presence of aggravating factors is a threshold issue to determine whether or not the defendant is death eligible; and if so, all relevant evidence is considered in determining whether or not the defendant receives the death penalty. *See CARTER & KREITZBERG, supra* note 86, at 54 n.15 (quoting 2 VIRGINIA MODEL JURY INSTRUCTIONS: CRIMINAL, Instruction No. P33.125 (2004)). Regardless of whether the statute at issue is a weighing statute or a nonweighing one, the absence of any mitigation evidence makes a death sentence inevitable.

105. *See supra* text accompanying notes 84–92.

106. Laura A. Rosenwald, *Death Wish: What Washington Courts Should Do When a Capital Defendant Wants to Die*, 68 WASH. L. REV. 735, 747 (1993); *see also* *People v. Deere*, 710 P.2d 925, 931–32 (Cal. 1985).

107. Linda E. Carter, *Maintaining Systematic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death*, 55 TENN. L. REV. 95, 111 (1987).

108. *The Supreme Court, 2006 Term, Leading Cases, Constitutional Law, Criminal Law and Procedure, Sixth Amendment—Ineffective Assistance of Counsel*, 121 HARV. L. REV. 255, 263 (2007) [hereinafter *The Supreme Court, 2006 Term, Sixth Amendment*] (citing Michelle E. Barnett

Failure to present mitigating evidence also results in an incomplete record that affects the reliability of further appellate and post-conviction proceedings. This, in turn, raises additional Eighth Amendment concerns, as reliable appellate proceedings constitute another essential feature of a constitutionally permissible death penalty scheme.<sup>109</sup> Many states require appellate courts to conduct a proportionality review in capital cases, but without the introduction of mitigating evidence during trial, a “reviewing court cannot determine whether a sentence was proportional and justified.”<sup>110</sup> In sum, trial counsel’s failure to present mitigation evidence during sentencing undermines the very safeguards that the Supreme Court has deemed essential to a constitutionally-acceptable capital punishment scheme.<sup>111</sup>

### 3. The Relationship Between the Right to Present Mitigating Evidence and Other Trial Rights

Waiver doctrine—and, more specifically, a knowing and voluntary requirement—ought to be applied to a defendant’s right to present mitigating evidence during the sentencing phase of a capital trial. Waiver

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et al., *When Mitigation Evidence Makes a Difference: Effects of Psychological Mitigating Evidence on Sentencing Decisions in Capital Trials*, 22 BEHAV. SCI. & L. 751, 764–66 (2004)); see also Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1561–67 (1998) (describing the specific types of mitigating evidence jurors tend to find persuasive); Brewer, *supra* note 24, at 342. *But see* Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse*, 66 BROOK. L. REV. 1011, 1041–53 (2002) (describing study results indicating that “mitigating factors play a disturbingly minor role in jurors’ deliberations”).

109. *Gregg v. Georgia*, 428 U.S. 153, 198 (1976) (noting that automatic appellate review in capital cases was one of the key features of the Georgia death penalty statute); see *supra* text accompanying notes 83–84.

110. Rosenwald, *supra* note 106, at 747.

111. While it is largely beyond the scope of this Article, I also note that situations where a capital defendant declines to put on mitigating evidence and essentially accedes to the death penalty raise an unrelated subsidiary policy concern: the acceptability of state-assisted suicide. An individual who “volunteers” for the death penalty not only chooses death over life, but opts for the state’s assistance in effectuating that choice. This was one of the concerns of the California Supreme Court in *People v. Deere*, when it ruled—temporarily—that defense counsel in a capital case is required to put on mitigation evidence, regardless of a defendant’s wishes. *Deere*, 710 P.2d 925, 930–31 (Cal. 1985). While I take no position in this Article on the ethics of physician- or state-assisted suicide generally, I note that death penalty volunteerism implicates these ethical issues. Given the concerns that the Court has expressed regarding society’s interest in preventing suicide, at least one commentator has argued that a capital defendant’s attempts to accede to the death penalty would raise similar policy concerns. See *Washington v. Glucksberg*, 521 U.S. 702, 710–11 (1997) (observing that “opposition to and condemnation of suicide—and, therefore, of assisting suicide—are consistent and enduring themes of our philosophical, legal, and cultural heritages,” and noting the ethical dilemmas raised by involving doctors in the process of putting individuals to death); Mary Pat Treuthart et al., *Mitigation Evidence and Capital Cases in Washington: Proposals for Change*, 26 SEATTLE U. L. REV. 241, 266–78 (2002).

doctrine should apply because this right is similar in many respects to the right to trial itself and implicates other constitutional rights of a criminal defendant that are also subject to waiver doctrine. The sentencing proceeding in a capital case is, in essence, a second trial. The penalty phase follows the same structure as a standard criminal trial, featuring opening statements, witnesses, exhibits, and closing arguments.<sup>112</sup> A defendant has the right to introduce evidence in the form of witness testimony, and to testify on his own behalf. The same rights and constitutional protections that are operative in standard criminal trials also apply to the penalty phase. A defendant has the right to counsel, a privilege against self-incrimination, the right to call witnesses, and the right to confront his accusers. The right to present mitigating evidence is, in many ways, a right to a second trial.

And just like the right to trial itself, the right to present mitigating evidence necessarily implicates a number of other constitutionally protected rights.<sup>113</sup> When a defendant in an ordinary criminal trial opts to plead guilty and waive his right to trial, he necessarily waives these other constitutional guarantees as well; waiver in that instance, therefore, carries special significance, both because a defendant is essentially acceding to punishment and because of the broad range of constitutional concerns implicated.

The only difference between a standard criminal trial and the penalty phase of a capital trial is the subject matter: whereas a standard criminal trial is concerned with whether the prosecution has, beyond a reasonable doubt, established the elements of the crime charged, the penalty phase of a capital trial is concerned with whether the prosecution has established the presence of sufficient aggravating factors, that, when weighed against mitigating factors, merit the imposition of the death penalty. Put more simply, rather than determining the defendant's guilt or innocence, the question is whether the defendant should be put to death or face some lesser penalty. But this difference has no constitutional significance meriting weaker procedural safeguards.<sup>114</sup> If anything, the additional Eighth Amendment concerns that are implicated would suggest the need for more robust procedures.

It follows, then, that a capital defendant who purportedly waives his right to present evidence during penalty proceedings should be entitled to the same protections as a defendant who waives the right to trial altogether. When a defendant seeks to waive adversary proceedings and accept

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112. CARTER & KREITZBERG, *supra* note 86, at 52.

113. *Cf. Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

114. *Cf. Ring v. Arizona*, 536 U.S. 584, 609 (2002) (holding that aggravating factors that determine a defendant's sentence are analogous to the elements of a crime, which the prosecution must prove beyond a reasonable doubt).



conviction of an ordinary crime, he can only do so upon a showing that he understands the consequences of his actions and that his decision is knowing and voluntary. It would therefore make little sense to permit a capital defendant to waive adversary proceedings and accept a sentence of death upon a lesser showing.

To be sure, this formalistic analogy is imperfect. Procedurally, a capital defendant who is sentenced without the presentation of mitigating evidence during the penalty phase could be seen as more akin to a defendant in an ordinary criminal trial who simply rests after the prosecution's case, rather than a defendant who affirmatively waives trial by entering a guilty plea.

But as a practical matter, the failure to present mitigating evidence renders the death penalty inevitable, just as surely as a guilty plea results in a conviction. Moreover, the substantive foundations of the right to present mitigating evidence and of the other constitutionally protected trial rights currently covered by waiver doctrine are essentially identical. As explained above, the chief rationale underpinning waiver doctrine is that accuracy in criminal trials demands that a strict standard be applied to the waiver of constitutionally protected trial rights.<sup>115</sup> This need for reliability is, of course, one of the principal concerns underlying Eighth Amendment capital punishment jurisprudence, and led Justice Stewart to describe the right of a capital defendant to present mitigating evidence as a "constitutionally indispensable" feature of a valid capital sentencing scheme.<sup>116</sup> While ensuring fairness and reliability is, of course, a concern that is present in any criminal trial, it is all the more pressing in the context of the ultimate sanction—the qualitatively different nature of death as a punishment creates a "corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."<sup>117</sup> Thus, if anything, the rationale for imposing a knowing and voluntary requirement is only more compelling in the mitigation context. In sum, there is no reason that the right to present mitigating evidence should not merit the same strict protections already accorded to other trial rights of criminal defendants.

#### 4. Potential Criticism

Before turning back to *Landrigan* in order to see how waiver doctrine should have been applied in that case, it is worth noting at least one potential criticism of the analysis above. One could argue that, given the importance of the constitutional rights at stake, waiver doctrine is fundamentally flawed insofar as *any* waiver—regardless of whether it is knowing and voluntary—results in unacceptable damage to the reliability of criminal trials. Such an argument has even more force in the capital

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115. See *supra* text accompanying notes 76–78.

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

117. *Id.* at 305.

context—after all, if the Eighth Amendment mandates that only the “worst of the worst” receive the ultimate sanction, why should a capital defendant be permitted to voluntarily subject himself to the death penalty by refusing to present evidence that would enable a reliable sentencing determination?

The proposition that a capital defendant should be permitted to waive mitigation is largely premised on an idealized conception of individual autonomy—i.e., that a criminal defendant, as a rationally self-interested actor, is the best judge of his own interests and should maintain authority over decisions such as whether or not to exercise certain trial rights. This idealized conception of autonomy, however, can be difficult to defend either on a practical or a theoretical level. Practically speaking, it is hard to think that any person who has just been convicted of a capital offense and is faced with two options—life imprisonment or death—is “autonomous” in the same sense that a person outside of the criminal justice system is rationally self-interested. It is difficult to see how highly-functioning individuals, let alone most capital defendants—who are frequently indigent, suffer from cognitive deficits, have histories of substance abuse, or are survivors of physical or sexual abuse<sup>118</sup>—could make life-altering decisions in a rational manner so soon after such a momentous event. And, empirically, the decisions made by capital defendants in just these circumstances reveal that, as one might expect, defendants who have been found guilty of capital murder frequently behave in ways that could hardly be described as rationally self-interested.<sup>119</sup>

Moreover, even taking this idealized conception of autonomy at face value, it is not obvious that, on a theoretical level, a defendant’s autonomy should trump the societal interests embodied in the Eighth Amendment. If the State cannot impose the death penalty arbitrarily, but only after a close examination of a defendant’s character and record, it is unclear why a defendant should be permitted to short-circuit this process by refusing to present mitigating evidence. Given that, under the Eighth Amendment’s prohibition on cruel and unusual punishment, the State has no authority to impose certain penalties because those penalties are abhorrent to society’s standards of decency, one could reasonably argue that a defendant should not be permitted to invite the State to flout those standards.<sup>120</sup> Viewed from

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118. See LEE NORTON, *Working Effectively with Capital Defendants: Identifying and Managing Barriers to Communication*, in MITIGATION INVESTIGATIONS IN CAPITAL CASES: PREVENTION STRATEGIES AND MITIGATION TRAINING (The Center for Death Penalty Litigation ed.).

119. See Richard W. Garnett, *Sectarian Reflections on Lawyers’ Ethics and Death Row Volunteers*, 77 NOTRE DAME L. REV. 795, 801 (2002) (noting anecdotal evidence that nearly all capital defendants profess a preference for death at some point, but that the vast majority change their minds).

120. The view that the State has no authority to impose certain punishments, regardless of a defendant’s consent, has found voice in the dissenting opinions of Justices White, Brennan, and Marshall. See *Whitmore v. Arkansas*, 495 U.S. 149, 173 (1990) (Marshall, J., dissenting) (“Certainly a defendant’s consent to being drawn and quartered or burned at the stake would not

this perspective, the application of a knowing and voluntary requirement in this context ends up formalizing a process whereby a defendant, at best, consents to a punishment that might otherwise be impermissible under the Eighth Amendment, or, at worst, implicates the state in his own suicide.<sup>121</sup>

I am deeply sympathetic to arguments along these lines. Realistically, however, the position that a capital defendant should *never* be permitted to waive mitigation is foreclosed for the time being, at least in federal court. Although in *Faretta v. California*,<sup>122</sup> the Court did not directly address

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license the State to exact such punishments.”); *Lenhard v. Wolff*, 444 U.S. 807, 811 (1979) (Marshall, J., dissenting) (arguing that capital defendant’s waiver of trial was invalid, on the grounds that society’s interest that certain punishments are not to be administered “cannot be overridden by a defendant’s purported waiver”); *Gilmore v. Utah*, 429 U.S. 1012, 1018 (1976) (White, J., dissenting) (stating that “the consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment”). Several commentators have also picked up on this thread. For instance, Jeffrey Kirchmeier has argued that Eighth Amendment waivers should not be permitted for three reasons: (1) society’s interest in the Eighth Amendment’s ban on cruel and unusual punishment ought not be overridden by consent; (2) waivers of other constitutional rights, such as the right to a jury trial in the process of plea bargaining, are permitted only because of the collateral benefits to society (in efficiency terms) and to the individual defendant (who presumably receives something as part of the plea bargaining process)—but there are no such collateral benefits to permitting an individual to subject himself to a cruel and unusual punishment; and (3) permitting waiver of Eighth Amendment rights logically permits absurdities—such as allowing rapists to submit to castration or thieves to having their hands chopped off in exchange for lighter sentences—that the Eighth Amendment clearly would prohibit. Jeffrey L. Kirchmeier, *Let’s Make a Deal: Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishment*, 32 CONN. L. REV. 615, 642–51 (2000). It is unclear whether the right of self-representation articulated in *Faretta v. California*, 422 U.S. 806 (1975), necessarily encompasses the right of a capital defendant to seek his own execution. Anthony J. Casey, *Maintaining the Integrity of Death: An Argument for Restricting a Defendant’s Right to Volunteer for Execution at Certain Stages in Capital Proceedings*, 30 AM J. CRIM. L. 75, 84–85 (2002) (citing *McKaskle v. Wiggins*, 465 U.S. 168, 177–78 (1984)). One might also note that the Supreme Court has excluded entire classes of individuals from receiving the death penalty, such as non-homicide offenders. *See generally Kennedy v. Louisiana*, 128 S. Ct. 2641, 2646 (2008) (holding statute authorizing the death sentence of a defendant who raped a child unconstitutional); *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding death penalties given to juveniles are unconstitutional); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding death penalties given to the mentally retarded are unconstitutional); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding that rapists cannot be sentenced to death). It hardly seems likely that a “waiver” would permit the execution of defendants belonging to these categories. Although I propose a waiver colloquy as a solution to some of the problems raised in this Article, I note that mentally retarded defendants present special challenges for the administration of a waiver colloquy. One can imagine a situation where counsel has discovered evidence that a defendant may be mentally retarded, which would categorically exclude the defendant from the death penalty, but where the client instructs counsel not to present such evidence. This scenario is particularly troublesome because *Atkins* did not establish a clear procedure for determining whether a defendant is mentally retarded. *See Atkins*, 536 U.S. at 317–18. Thus, it would seem that, even if courts were to permit a defendant to waive the presentation of mitigating evidence, this waiver should not encompass evidence of factors that would categorically exclude the defendant from the death penalty.

121. *See supra* note 111.

122. 422 U.S. 806 (1975).

whether or not a defendant, proceeding *pro se*, has the right to present *no* defense, a criminal defendant's right to be the "master of his own defense," has been interpreted to include even situations where the defendant seeks to put on no defense whatsoever, and even in the capital context.<sup>123</sup> Given that criminal defendants may generally waive trial rights expressly guaranteed by the Constitution and that the Supreme Court has already held that a capital defendant may forgo putting on a case during the *guilt* phase of trial, it is difficult to see how the Court would not also hold that the right to self-representation permits a capital defendant to forgo putting on a case during the *penalty* phase of trial. While it has not so held explicitly, the Supreme Court has, along with various lower courts, routinely upheld death sentences imposed without the consideration of any mitigating evidence.<sup>124</sup>

The basic rationale underlying these decisions is that because a defendant has a constitutional right to control the shape of his own defense, the defendant is free not to advance any arguments that he wishes to forgo.<sup>125</sup> And, indeed, an argument can be made that, in this particular context more than any other, respect for the defendant's dignity and autonomy demands that he be able to control whether evidence is presented. Not only are the stakes higher here than in any other proceeding, but as we have seen, relevant mitigating evidence frequently encompasses the most private matters in a defendant's life.<sup>126</sup> It is not hard to understand why a defendant might, in some circumstances, prefer not to present

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123. *Id.* at 836–87 & n.1 (Burger, C.J., dissenting). For instance, in *Godinez v. Moran*, the Court reversed the Ninth Circuit's determination that it was improper for a trial court to accept a guilty plea in a capital case. *Godinez*, 509 U.S. 389, 402 (1993).

124. *See, e.g., Landrigan III*, 550 U.S. 465, 472–73 (2002); *Blystone v. Pennsylvania*, 494 U.S. 299, 306–08, 306 n.4 (1990) (upholding death sentence where defendant "decided not to present any proof of mitigating evidence during his sentencing proceedings"); *Singleton v. Lockhart*, 962 F.2d 1315, 1322 (8th Cir. 1992) (holding that defendant's competent waiver of mitigating evidence during penalty phase foreclosed challenge to the constitutionality of the death penalty statute); *People v. Bradford*, 939 P.2d 259, 344–45 (Cal. 1997) (finding that the trial court did not abuse its discretion by allowing defendant to proceed *pro se* even though defendant made clear that he would offer no mitigating evidence at the penalty phase); *Akers v. Commonwealth*, 535 S.E.2d 674, 676, 678 (Va. 2000) (upholding sentence where defendant pled guilty, told his lawyers not to put on mitigation evidence, and argued for death); *State v. Elledge*, 26 P.3d 271, 276 (Wash. 2001) (upholding sentence where defendant pleaded guilty, and, during penalty phase, made a statement to the jury asking for the death penalty); *see also* *Treuthart et al., supra* note 111, at 241–42 (describing the *Elledge* decision and noting that the jury imposed a death sentence without hearing relevant mitigation evidence including Elledge's family background, his insanity plea in a previous murder trial, and the fact that he saved a prison guard's life while incarcerated).

125. *See* Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363, 1377 (1988) (arguing that a "prisoner's dignity" outweighs "the dignity of the law."). I note, however, that if a decision concerning whether or not to present certain forms of evidence is best characterized as a strategic decision rather than as the exercise of a fundamental right, then it may properly be within the purview of counsel's authority, rather than the client's.

126. *See infra* text accompanying notes 130–31.

mitigating evidence, and that compelling a defendant to present such evidence against his will could be viewed as a serious affront to his dignity.

On the other hand, many forms of mitigating evidence can be understood, in a broad sense, as evidence that tends to show that a defendant is not autonomous. That is, the very purpose of many forms of mitigating evidence is to show that, because of a defendant's background and history, he is not sufficiently culpable so as to merit a death sentence, as opposed to, for instance, a defendant who committed a similar crime but with deliberation and calculation. Viewed from this perspective, permitting a waiver of mitigation allows a capital defendant to exercise his "autonomy," but only to the extent that he would withhold evidence that his autonomy may have itself have been compromised.

While these philosophical issues are undoubtedly interesting, they are, as a practical matter, simply moot. At present, there is not a single jurisdiction in which, regardless of a defendant's wishes, mitigating evidence must be heard during every capital sentencing.<sup>127</sup> The autonomy of a criminal defendant is deemed so inviolable, that, for instance, the Fifth Circuit has held that, where a defendant opts not to present mitigating evidence, even the appointment of independent mitigation counsel would

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127. I note several caveats. At various times, two states did have such a requirement in place. New Jersey, prior to abolishing the death penalty in 2007 required mitigating evidence to be heard in all capital trials. See Jeremy W. Peters, *Death Penalty Repealed in New Jersey*, N.Y. TIMES, Dec. 17, 2007; see also *State v. Koedatich*, 548 A.2d 939, 993 (N.J. 1988) (holding that, because "the state and its citizens have an overwhelming interest in insuring that there is no mistake in the imposition of the death penalty," mitigating evidence must be heard in all capital sentencing trials). Rather than requiring defense counsel to present mitigating evidence in all cases, a member the New Jersey Supreme Court concluded that a more proper solution would be the "'appoint[ment of independent] . . . counsel to call [witnesses with knowledge of mitigating evidence], and thereby place on the record the mitigating evidence essential to a careful, balanced penalty determination.'" *Koedatich*, 548 A.2d at 997 (Broussard, J., concurring) (quoting *People v. Deere*, 710 P.2d 925, 369 (Cal. 1985) (Grodin, J., concurring)). Meanwhile, the California Supreme Court ruled in the 1985 decision of *People v. Deere* that defense counsel in all capital trials must present a case in mitigation because, separate and apart from a defense attorney's obligations to his or her client, a defense attorney is an "officer of the court . . . with a duty to assure that the court has all relevant information to be able to perform its mandatory consideration of mitigating circumstances." *Deere*, 710 P.2d at 933 n.5 (internal citation omitted). *Deere* had a short run as the law of California; it was overruled a mere four years later in *People v. Bloom* on the grounds that, ethically, defense counsel cannot work directly against his or her client's wishes. *Bloom*, 774 P.2d 698, 718 (Cal. 1989); see also *People v. Lang*, 782 P.2d 627, 653 (Cal. 1989) (observing that requiring counsel to present mitigating evidence in all cases "would be inconsistent with an attorney's paramount duty of loyalty to the client and would undermine the trust, essential for effective representation, existing between attorney and client."). Last, I note that, in Florida, although there is no requirement that mitigating evidence be heard in open court during every sentencing, there is a requirement that a comprehensive pre-sentence investigation report be prepared by the State Department of Probation in every case where a defendant refuses to present a mitigation case. See *Muhammad v. State*, 782 So. 2d 343, 363–64 (Fla. 2001).

constitute an impermissible infringement on the defendant's dignity.<sup>128</sup> It would seem, therefore, that whatever the theoretical and practical drawbacks there are to applying waiver doctrine in the context of the right to present mitigating evidence, courts would be unwilling to go so far as to hold that a capital defendant may not engage in a valid waiver of mitigation. At best, one could argue that, in many individual cases, there may be competency grounds on which to challenge a defendant's purported waiver of mitigation.<sup>129</sup> But a general rule prohibiting a defendant from ever waiving his right to present mitigating evidence in any context appears out of reach given existing precedent. The issue, therefore, is how to thread the needle by respecting existing precedent concerning a capital defendant's autonomy, while also establishing procedures to make a mitigation waiver less likely. In this context, a next best solution is to ensure that any such waiver be restricted by an appropriately rigorous knowing and voluntary requirement.

### C. Landrigan Revisited

Turning back to *Landrigan* with this discussion in mind, at least two flaws in the majority opinion become apparent: it failed to appreciate the ambiguity of the record, and it ignored the basic principle that a waiver of a constitutional right can only be valid if the defendant knows what he is waiving. First, although the record showed that Landrigan did not want two particular people—his mother and his ex-wife—to testify, it was far from clear that he sought to waive his right to present any and all mitigating evidence. Admittedly, the record is ambiguous—the majority's conclusion that the record tended to show that Landrigan sought to forgo all mitigating evidence is not entirely implausible. But given the rule that courts should indulge every presumption *against* the waiver of constitutionally protected trial rights, it seems a mistake to convert what was, at most, a clear decision not to present the testimony of two witnesses into a general waiver of all evidence at sentencing. The very ambiguity of Landrigan's words highlights the need for clear standards and uniform procedures in this context.

As we have seen, relevant mitigating evidence encompasses an almost limitless range of information about a defendant's character and personal history. Oftentimes, the presentation of an adequate mitigation case can

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128. *United States v. Davis*, 285 F.3d 378, 381–82 (5th Cir. 2002) (holding that the district court has no authority to appoint independent counsel to present mitigation evidence, on the grounds that independent counsel's presentation of mitigation evidence would deprive a defendant of the right to control his own case); *cf. Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942) (holding that the Constitution does not require the appointment of an attorney for a defendant who does not want the assistance of counsel, and noting that "the Constitution does not force a lawyer upon a defendant").

129. *See infra* text accompanying notes 166–67.

require the disclosure of highly personal, extremely private information—for instance, evidence of childhood abuse, mental illness, or substance dependency. It is not difficult to see why a defendant—particularly one who has only recently been found guilty of capital murder—might not want to disclose information of such a personal nature in open court, or might prefer not to ask witnesses such as close family members to testify about such matters.<sup>130</sup> In many cases,

capital defendants have numerous compelling reasons to refuse to present some—but not all—mitigating evidence. Defendants may experience “defensiveness, shame, [or] repression,” regarding episodes of abuse. Psychiatrists 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. Defendants may also want to prevent certain—but not all—individuals from testifying.<sup>131</sup>

Thus, although some capital defendants might seek to prevent the introduction of certain forms of mitigating evidence, it does not necessarily follow that all such defendants should be deemed to have waived their right to contest the death penalty altogether. *Landrigan* illustrates why a knowing and voluntary requirement is absolutely essential—if a defendant is not informed about the possible consequences of waiver, he might fail to present a mitigation case, not because he wishes to waive all evidence or because he actually seeks the death penalty, but merely because he would simply prefer that, all things being equal, certain forms of evidence not be presented.

Second, even if the record were clear that Landrigan had in fact sought to waive the presentation of *all* mitigating evidence, Landrigan could not have made a *valid* waiver precisely because his counsel had failed to conduct a thorough mitigation investigation beforehand. Due to his lawyer’s substandard investigation, Landrigan was not made aware of the broad scope of relevant evidence that he could present at sentencing.<sup>132</sup> This was the basic flaw at the center of Landrigan’s sentencing: his counsel’s performance fell short of acceptable professional standards. It is the responsibility of defense counsel not only to conduct a thorough

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130. See Christopher Johnson, *The Law’s Hard Choice: Self-Inflicted Injustice or Lawyer-Inflicted Indignity*, 93 KY. L.J. 39, 83 (2004) (citing *Grim v. State*, 841 So. 2d 455, 459 (Fla. 2003); *Chandler v. State*, 702 So. 2d 186, 191 (Fla. 1997)) (“Some defendants try to keep any mitigating witnesses from testifying, while still opposing imposition of a death sentence.”).

131. *The Supreme Court, 2006 Term, Sixth Amendment*, *supra* note 108, at 260 (internal citations omitted).

132. See *supra* text accompanying notes 50–51.

mitigation investigation, but to inform a defendant about the choices with which he is faced, and about the possible consequences of those choices. As stated in the American Bar Association's Guidelines for representation in capital trials, defense counsel in a capital murder trial has an obligation to conduct a mitigation investigation, regardless of the client's stated wishes.<sup>133</sup> And here, Landrigan was unable to make an intelligent decision because his defense attorney failed to fulfill his obligations adequately.

Yet the majority's reasoning produced a result that can only be described as circular: Landrigan's counsel performed deficiently; Landrigan, however, was barred from subsequently challenging his sentence based on his counsel's ineffectiveness because he did not, during trial, indicate a desire to present certain forms of mitigating evidence. And yet, Landrigan could not have done so in the first place; he lacked the information necessary to make such a decision, precisely because his counsel's performance was deficient. His "waiver" of mitigation can hardly be understood as knowing and intelligent because he did not know what it was that he was waiving.<sup>134</sup>

Ultimately, the opinion in *Landrigan* creates a danger that courts, when confronted with a defendant who opposes the introduction of certain types of mitigating evidence, will find that the defendant has waived all mitigation.<sup>135</sup> Indeed, several lower courts have already cited *Landrigan* for the proposition that, where a defendant interferes with counsel's presentation of mitigating evidence in some way, that defendant has waived any subsequent claim to ineffective assistance based on deficient performance at sentencing.<sup>136</sup> This presents an intolerable risk that defendants will be sentenced to death based on an incomplete record. If we are to take seriously the rule that waivers of constitutionally protected trial rights should not be assumed from an ambiguous record, then some sort of procedural safeguards are necessary to ensure that, consistent with existing constitutional standards, a purported waiver of mitigation is valid.

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133. See ABA, *Guidelines*, *supra* note 44, at 1015 (providing Guideline 10.7, regarding counsel's obligation to conduct a mitigation investigation).

134. Cf. *United States v. Wood*, 57 F.3d 733, 737 (9th Cir. 1995) (citing *Brewer v. Williams*, 430 U.S. 387, 404 (1976)) (holding that defendant cannot waive access to *Brady* materials without knowing to what evidence he would be waiving access).

135. See *The Supreme Court, 2006 Term, Sixth Amendment*, *supra* note 108, at 264 (footnotes omitted) ("Before the *Landrigan* ruling, some appellate courts would not have allowed a defendant's limited refusal to present certain testimony to convert into a blanket waiver, nor would they have read such a refusal to justify counsel's failure to investigate.").

136. See *Bishop v. Epps*, 265 F. App'x 285, 292 (5th Cir. 2008) ("Because the district court reasonably concluded that Bishop had instructed his counsel not to present mitigating evidence on his behalf, the district court did not abuse its discretion in finding that Bishop could not meet statutory requirements for granting habeas relief."); *Newland v. Hall*, 527 F.3d 1162, 1205 (11th Cir. 2008) ("[W]e follow the Court in drawing a distinction between a defendant's passive non-cooperation and his active instruction to counsel not to engage in certain conduct," and finding ineffectiveness claims precluded in the latter case).



#### IV. THE IMPLEMENTATION OF A KNOWING AND VOLUNTARY REQUIREMENT

While it is clear that a knowing and voluntary requirement should be applied to a purported waiver of mitigation, it is less clear how such a requirement would operate in practice. For instance, once a knowing and voluntary requirement has been established, courts could simply determine after the fact on a case-by-case basis whether a defendant who purportedly waived the right to present mitigating evidence did so validly. Such a practice, however, would be burdensome and would risk producing inconsistent results. *Landrigan* illustrates the inherent difficulties in applying a case-by-case approach: even if a knowing and voluntary standard were operative in *Landrigan*, the record was not at all clear whether Landrigan sought to waive some mitigating evidence only, or whether he sought to waive his mitigation case entirely. In sum, a case-by-case approach would be difficult to administer in practice, and would do little to produce more consistent results.

A better solution would be for courts to adopt uniform procedures for situations where a defendant indicates an affirmative desire not to present mitigating evidence, or where counsel simply fails to present a mitigation case altogether. More specifically, trial courts in capital cases should conduct an on-the-record colloquy with a capital defendant in such situations, modeled after a guilty plea colloquy, to ensure that the defendant's waiver is knowing and voluntary. Such a uniform requirement would conform with procedures used in analogous situations, make efficient use of judicial resources, and reduce the risk of arbitrary imposition of the death penalty.

##### A. *A Colloquy Procedure*

In any ordinary criminal matter, when a defendant indicates an intention to plead guilty and accept a conviction, he waives the right to a jury trial. In such situations, it is a universal practice for a trial court to conduct an on-the-record colloquy with the defendant, not only to ensure that the defendant understands that he has a right to proceed to trial and the consequences of waiving that right, but also to establish a clear record for appeal. In the event that the waiver's validity is subsequently raised as an issue, it is easier to resolve where such a record exists. It would make sense to adapt this practice to situations where a defendant indicates a desire to forgo the presentation of evidence during the penalty phase of trial.

##### 1. *Battenfield v. Gibson*

The Tenth Circuit, in *Battenfield v. Gibson*,<sup>137</sup> has already articulated a clear and extensive colloquy requirement for situations where a capital

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137. 236 F.3d 1215 (10th Cir. 2001).

defendant indicates an intention to forgo the presentation of mitigating evidence. A brief recap of that case is instructive. Billy Ray Battenfield was convicted of beating Donald Cantrell to death, and subsequently presented no mitigating evidence during the sentencing phase of his trial.<sup>138</sup> Battenfield's trial counsel had spent very little time investigating possible mitigating evidence or developing a strategy for the penalty phase; unprepared once that phase began, his counsel planned to rely simply on an appeal for mercy and on the testimony of Battenfield's parents concerning his childhood.<sup>139</sup> Battenfield, however, refused to let his attorney put his parents on the stand, and, without any other forms of mitigating evidence at hand, defense counsel ultimately presented no real case at sentencing.<sup>140</sup> Unlike a death penalty "volunteer," Battenfield did not seek the death penalty; he simply wanted to spare his parents further grief from having to testify,<sup>141</sup> telling the court that his parents had "been through enough."<sup>142</sup>

After the penalty phase, the jury found the presence of two aggravating factors: (1) that Battenfield's crime was "heinous, atrocious, or cruel;" and that (2) "Battenfield was a continuing threat to society."<sup>143</sup> The jury found no mitigating factors. The trial court subsequently sentenced Battenfield to death.<sup>144</sup> On habeas review, Battenfield raised several claims, including a claim of ineffective assistance of counsel during the sentencing phase<sup>145</sup> based on his trial counsel's failure to investigate and present mitigating evidence, including Battenfield's substance abuse and mental health history.<sup>146</sup> The state district court, in a ruling subsequently echoed by the federal habeas court, held that Battenfield's ineffectiveness claim was procedurally barred based on a finding that he had voluntarily waived his right to present mitigating evidence by opting not to have his parents testify.<sup>147</sup>

The Tenth Circuit, however, reversed and remanded for a new sentence.<sup>148</sup> The court took no issue with the mere fact that Battenfield failed to present mitigation evidence; to the contrary, the court presumed that a defendant could validly waive the right to present a mitigation case.

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138. *Id.* at 1219.

139. *Id.* at 1227–28.

140. *Id.* at 1233–34.

141. *Id.* at 1230.

142. *Id.*

143. *Id.* at 1219.

144. *Id.*

145. *Id.* at 1220.

146. *Id.* at 1233–35.

147. *Id.* at 1226–27 (quoting *Battenfield v. State*, 953 P.2d 1123, 1127 (Okla. Crim. App. 1998) (noting that the state trial court held that Battenfield's "allegations of ineffective assistance of trial counsel are a direct result of Battenfield's own refusal to testify and allow his parents to testify.")).

148. *Battenfield v. Gibson*, 236 F.3d 1215, 1235 (10th Cir. 2001).

The court held, however, that to the extent that Battenfield could be described as having “waived” his right to present mitigating evidence, his purported waiver was invalid, as there was no indication from the record that he had ever been apprised of “the meaning of mitigation evidence or what particular mitigation evidence was available in his case.”<sup>149</sup> The court’s holding was thus premised on the basic rule that when a defendant waives the right to present mitigating evidence, the trial court must ensure, as it must when a defendant seeks to waive other fundamental trial rights, that the defendant has “sufficient information to *knowingly* waive his right.”<sup>150</sup> Because there was no such showing during Battenfield’s trial, his so-called “waiver” was invalid, and his sentence was vacated.<sup>151</sup>

*Battenfield* illustrates that the reach of traditional ineffectiveness claims in this arena is limited. In situations where defense counsel has failed to investigate available mitigating evidence, one’s natural inclination might be to say that defense counsel has been ineffective. But, without more stringent guidelines for waiver in this context, it will be difficult to sustain a claim of ineffectiveness unless the defendant actively takes issue with counsel’s failure to perform an adequate mitigation investigation. Without a clear rule requiring strict application of waiver doctrine, courts may understand the defendant’s failure to do so as a “waiver,” thus precluding an ineffectiveness claim, as the district court and state appellate courts did in Battenfield’s case, and as the Supreme Court essentially did in *Landrigan*.

But the inquiry should not end there. Where trial counsel has not performed a thorough investigation, a defendant will be unable during trial to dispute the adequacy of his counsel’s mitigation investigation if he has not been adequately informed about the nature and scope of permissible mitigation evidence (i.e., if he does not understand what types of evidence might be considered relevant in mitigation). And even armed with such an understanding, a defendant cannot make an intelligent decision about what mitigating evidence to present unless counsel has actually performed a reasonable investigation and informed the defendant of his various options.

In the view of the Tenth Circuit, therefore, the district court put the cart before the horse; it held that trial counsel was not ineffective because Battenfield had waived his right to present mitigating evidence, but the record did not establish that Battenfield knew that he even had a right to present mitigating evidence during sentencing beyond his parent’s testimony. This was precisely *because* Battenfield’s trial counsel failed to inform him as to what evidence might be considered relevant, and did not perform an adequate mitigation investigation. Without understanding what mitigating evidence actually *is*, the role it plays in sentencing proceedings, what mitigating evidence might actually be available in his particular case,

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149. *Id.* at 1232.

150. *Id.* (emphasis added).

151. *Id.* at 1233–34.

a defendant cannot be said to knowingly and voluntarily waive his right to present mitigating evidence. Battenfield's alleged "waiver" of mitigation, therefore, was invalid.

Notably, the Tenth Circuit reversed Battenfield's sentence despite the fact that the sentencing court, upon being informed that counsel would not present mitigating evidence, asked Battenfield a few questions about this choice:

THE COURT: It was my understanding that from visiting with [defense counsel] Mr. Shook that you don't even want to put on any evidence as to mitigation; is that correct?

THE DEFENDANT: You mean my parents and stuff?

THE COURT: Yes.

THE DEFENDANT: No, sir, they have been through enough.

THE COURT: You're not going to present any testimony as to mitigation?

THE DEFENDANT: No, sir.

THE COURT: You understand you have that right?

THE DEFENDANT: Yes, sir.

THE COURT: All right, then we will proceed.<sup>152</sup>

The Court held that this limited questioning was insufficient to establish that Battenfield's waiver was valid; "[m]y parents and stuff" did not translate into an adequate understanding of the right to present mitigating evidence.<sup>153</sup> Rather, the Tenth Circuit concluded that the transcript revealed that Battenfield "did not have a proper understanding of the general nature of mitigating evidence or the specific types of mitigating evidence that might be available for presentation."<sup>154</sup>

The Tenth Circuit then held that when a defendant announces an intention not to present mitigating evidence, a trial court must engage in a much more extensive colloquy to ensure that the defendant's waiver is

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152. *Id.* at 1230–31.

153. *Id.*

154. *Id.* at 1231.

truly knowing and voluntary,<sup>155</sup> endorsing a procedure first outlined by the Oklahoma Court of Criminal Appeals in *Wallace v. State*.<sup>156</sup> *Wallace* held that a trial court, when confronted with a capital defendant who fails to present mitigating evidence or indicates an intention not to put on such evidence, must: (1) inform the defendant of his right to present mitigating evidence and explain what mitigating evidence is; (2) inquire both of the defendant and his attorney whether he or she understands these rights; (3) inquire of the attorney if he or she has attempted to determine whether any mitigating evidence exists; (4) inquire what that mitigating evidence is; (5) inquire of the defendant and make a determination on the record whether the defendant understands the role of mitigating evidence in a capital sentencing scheme; (6) inquire whether the defendant desires to waive his or her right to present mitigating evidence; and (7) make findings on the record regarding the defendant's understanding and waiver of rights.<sup>157</sup>

Given the fundamental importance of mitigating evidence, each of these steps is a matter of "little more than commonsense."<sup>158</sup> Steps (1) and (2) are meant to inform the defendant of his right to present evidence that weighs against the imposition of the death penalty, and to probe the defendant's basic understanding that he has that right. Steps (3) and (4) drill down a bit deeper to determine whether defense counsel has actually conducted an adequate mitigation investigation.<sup>159</sup> A defendant, after all, cannot knowingly waive his right to present mitigating evidence unless he knows what evidence he is actually waiving. And counsel has an initial responsibility to conduct a reasonable mitigation investigation regardless of the client's ultimate decision about whether to go forward with such evidence.<sup>160</sup> These steps will also help clarify the appellate and post-conviction record in the event that the thoroughness of counsel's

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155. *Id.* at 1233 (citing *Wallace v. State*, 893 P.2d 504, 512–13 (Okla. Crim. App. 1995)).

156. *Wallace*, 893 P.2d at 512–13.

157. *Battenfield*, 236 F.3d at 1232–33 (citing *Wallace*, 893 P.2d at 512).

158. *Id.* at 1233.

159. I note that, in situations where a defendant truly wishes that certain forms of mitigating evidence not be presented (for example, if a defendant prefers not to disclose information concerning his history of sexual abuse), there is some tension between this stage of the colloquy and the defendant's wishes. After all, if the defendant prefers not to air certain facts in open court, this may necessarily limit the amount of detail with which counsel can describe their mitigation investigation during the colloquy.

160. See ABA, *Guidelines*, *supra* note 44, at 1015 (providing Guideline 10.7 regarding counsel's obligation to conduct a mitigation investigation). I further note that the Guidelines state that a competently performed mitigation investigation must encompass issues regarding the client's mental health. See *id.* at 951–52; see also *id.* at 952 (providing Guideline 4.1(A)(2) which provides that "The defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments."). The need for an independent mental health investigation is particularly important in the context of a waiver colloquy, because evidence concerning mental health issues would be relevant to any competency determination if such a determination becomes necessary.

investigation subsequently becomes an issue. That is, if the trial record establishes that trial counsel conducted a thorough mitigation investigation, resolution of any subsequent ineffectiveness claim during post-conviction proceedings will be less difficult. On the other hand, if habeas counsel later determines that a plethora of mitigating evidence existed that trial counsel failed to uncover, or that trial counsel's representations about the extent of their mitigation investigation were inaccurate, the defendant's waiver colloquy would not serve to bar the defendant from bringing a subsequent claim for ineffective assistance of counsel. Finally, steps (5), (6), and (7) allow the defendant to make his intentions with respect to the penalty phase clear and further clarify the record for appellate and post-conviction review. While there are, undoubtedly, other ways to inquire about a defendant's supposed wish to forgo mitigation, a uniform procedure along these lines would clarify whether the defendant's purported waiver is truly valid.

I note, of course, that there may be sound policy and even jurisprudential reasons for skepticism towards any situation where a defendant essentially accedes to the death penalty. Regardless, a more sweeping prohibition of the waiver of mitigation seems unlikely given the state of waiver jurisprudence, as discussed, above.<sup>161</sup> A much more realistic solution to this problem would be to acknowledge that, although a waiver of mitigation is permissible, the validity of any such purported waiver must be verified along the lines outlined above.

## 2. Additional Policy Justifications

Beyond the obvious doctrinal considerations, a rule requiring an on-the-record colloquy along the lines sketched out in *Battenfield* would have additional benefits. By helping ensure that a waiver of mitigation is voluntary, knowing, and intelligent, such a rule would likely reduce the number of instances in which a defendant is sentenced without the consideration of mitigating evidence, thus avoiding the attendant Eighth Amendment concerns raised in such situations. Moreover, such a rule would also promote accuracy and judicial economy.

As an initial matter, if a colloquy requirement were established, at least some capital defendants who might otherwise be sentenced without presenting mitigation evidence would have an opportunity to present such evidence during the penalty phase. For those defendants who are not sufficiently informed by trial counsel as to the scope of admissible mitigation evidence, or whose trial counsel has not conducted an adequate mitigation investigation, a colloquy will provide the defendant with an opportunity to evaluate his options more intelligently or to direct his attorney to conduct a more thorough mitigation investigation. For those

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161. See *supra* text accompanying footnotes 123–28.

defendants who at some point profess a desire to volunteer for the death penalty, a colloquy will provide them with a last opportunity to reconsider their decision before sentencing.<sup>162</sup> I harbor no illusions; if we acknowledge that defendants have a *choice* in this arena, some will undoubtedly *exercise* the choice not to present mitigating evidence. Nevertheless, a colloquy requirement might at least reduce the number of instances in which capital defendants are sentenced without the consideration of mitigating evidence, avoiding—in those cases, at least—the Eighth Amendment concerns discussed previously.<sup>163</sup>

Second, a simple colloquy requirement would promote efficiency and conserve judicial resources in several ways. For appellate courts reviewing claims based on inadequate representation at sentencing, a uniform colloquy requirement would clarify the trial record, by clearly establishing the extent of defense counsel's mitigation investigation. Furthermore, where the adequacy of waiver is an issue, a standard colloquy could resolve in each case whether a defendant's waiver of mitigation was truly valid, which would be substantially more efficient than requiring appellate courts to make such determinations *ex post* on a case-by-case basis. Whereas the current reliance on ineffectiveness claims to address inadequate mitigation investigations by counsel works only retrospectively, a colloquy requirement would work prospectively. Generally speaking, it is far better to try to ensure that a trial record is accurate in the first place, rather than to

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162. See *The Supreme Court, 2006 Term, Sixth Amendment*, *supra* note 108, at 262 (“[D]eath penalty ‘volunteers’ often change their minds . . . [C]ourts must be extremely careful to consider the context of a defendant’s recalcitrant or obstructive behavior or apparent willingness to be put to death before deciding that it constitutes an informed and competent decision to waive the right to present mitigating evidence.”). While a colloquy requirement will not, of course, prevent a defendant who is intent on dying from being sentenced to death, it will at least establish another procedural hurdle for a purported death penalty volunteer relatively early in the capital punishment process, when, arguably, society’s interest in preventing death penalty volunteerism is greatest. See generally *Casey*, *supra* note 120, at 101–02 (“If there is little or no danger that an execution will be inappropriate the state has a very weak interest in preventing that execution. On the other hand, where there is a large danger that an execution will be inappropriate the state has a very strong interest in preventing that execution . . . . The defendant’s interest in having her waiver accepted becomes stronger the longer she awaits her uncertain execution and is faced with undue and burdensome delays or the psychological punishment of being brought to the brink of death on numerous occasions.”). *Casey* argues that it is later in the criminal justice process—i.e., on appeal—where a defendant’s autonomy interest is strongest, and when—if ever—a defendant’s waiver of the right to contest a death sentence is entitled to the most deference. *Id.* Prior to sentencing, however, one cannot argue that a capital defendant has a unique “right to die”—a defendant who has not yet been sentenced has not been “condemned” like a terminally ill patient, but rather is like anyone else, with no right to demand death or to choose the type of punishment endured. *Id.* at 100. Thus, even those who would argue that a capital defendant has an autonomy interest that encompasses a right to opt for death must concede that the State’s interest in preventing volunteerism weighs most strongly earlier in the capital process, justifying higher procedural barriers to volunteerism than perhaps can be justified later in the process. *Id.*

163. See *supra* text accompanying notes 104–11.

attempt to correct errors retrospectively. If a mistake is not caught early, particularly a factual error due to the incomplete development of the trial record, it is unlikely to be discovered later.<sup>164</sup>

There are two possible criticisms of this view. On one hand, the use of a standard waiver colloquy might be *too efficient*. That is, reviewing courts might come to rely rigidly on the existence of a waiver colloquy as an airtight mechanism to choke off any potential ineffectiveness claims. This is certainly a legitimate concern, but one to which there are several responses. First, in the wake of *Landrigan*, there is already a risk that where the record is ambiguous, courts will too readily find a waiver.<sup>165</sup> This ad hoc status quo hardly seems preferable to a standardized plea colloquy. But more importantly, a defendant's waiver of mitigation should never be understood as knowing and voluntary if he was unaware of the extent of available mitigating evidence at the time of sentencing. If, on habeas, a petitioner can show that there existed substantial mitigating evidence that his trial counsel had failed to uncover, this would have the effect of invalidating a purported waiver. And if there is a dispute between the defendant and trial counsel about the full extent of trial counsel's mitigation investigation, that issue could be probed during the post-conviction hearing. This is all to say that a waiver colloquy, if employed properly, should not choke off legitimate ineffectiveness claims.

On the other hand, a colloquy might not be *efficient enough*. A colloquy requirement could result in an extended, resource-consuming inquiry, not only to explore the issues directly raised during the colloquy itself, but also subsidiary issues such as the defendant's competence to engage in a waiver. Given the stakes, however, a waiver of mitigation should not be taken lightly, and there may be good reasons in many cases for doubting the validity of a defendant's purported wish to waive mitigation.<sup>166</sup> Courts should therefore not shy away from a competency evaluation when necessary. I note, however, that in other contexts where a defendant seeks to waive a fundamental constitutional right, a colloquy does not always result in an unduly burdensome process; a court can usually conduct a simple colloquy to determine the validity of a waiver without necessarily engaging in an extensive competency evaluation each time (absent, that is, any request for such an evaluation from counsel or other indication of the defendant's incompetence).<sup>167</sup> Thus, a competency evaluation may not be necessary in every case. This is not to say that the threshold for finding indicia of incompetence need be particularly high, particularly in this context.

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164. See Casey, *supra* note 120, at 104.

165. See *supra* text accompanying note 136.

166. See *supra* text accompanying notes 130–62.

167. See, e.g., State v. Ashworth, 706 N.E.2d 1231, 1237 (Ohio 1999).



Some would, no doubt, argue that anyone who wishes to waive mitigation must, *a fortiori*, be incompetent. But, for reasons stated previously, it is highly unlikely that courts would adopt a blanket rule to prohibit the waiver of mitigation. Given that limitation, to argue that a waiver of mitigation should be permitted only upon an affirmative showing that the waiver is knowing and voluntary is merely to acknowledge the reality that courts are unlikely to renounce the talismanic quality currently accorded a capital defendant's autonomy, and to seek a next best solution.

### B. *The Lower Court Split*

Given the strong doctrinal and policy justifications, other courts should follow the Tenth Circuit's decision in *Battenfield* and establish a knowing and voluntary requirement and an accompanying colloquy procedure for situations in which a capital defendant purportedly waives the right to present mitigating evidence. In absence of a clear ruling from the Supreme Court, however, the lower courts have issued widely varying rulings on this particular issue and have applied inconsistent standards in determining when the right to mitigation has been validly waived.

On the one hand, a number of lower courts have sided with the Tenth Circuit, holding that trial courts should conduct some sort of colloquy to ensure that a waiver of mitigation is valid. But even amongst these rulings, there is wide variation. The Third and Fourth Circuits, for instance, have stopped short of requiring a specific colloquy, but have held that a lengthy colloquy is generally sufficient to establish that a capital defendant's waiver of mitigation was knowing and voluntary.<sup>168</sup> Meanwhile, the Sixth and Seventh Circuits have gone slightly farther, by affirmatively holding that a defendant's purported mitigation waiver is always invalid in the absence of some sort of colloquy with the trial court.<sup>169</sup> Finally, a number of state courts of last resort, including those of Kentucky, Ohio, Oklahoma, and Tennessee, have gone even farther, holding that a waiver of mitigation can *only* be valid after a trial court has conducted an extensive colloquy with the defendant where the trial court: (1) informs the defendant of his

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168. See *Taylor v. Horn*, 504 F.3d 416, 456 (3d Cir. 2007) ("It is clear from Taylor's many colloquies with the trial court that he understood the consequences of not presenting mitigation evidence."); *Chandler v. Greene*, No. 97-27, 1998 WL 279344, at \*4, 8 (4th Cir. May 20, 1998) (holding defendant knowingly waived right to mitigation after "careful, lengthy questioning by the court" regarding his right to present mitigation and the importance of mitigation as a literal "matter of life and death").

169. See *Coleman v. Mitchell*, 268 F.3d 417, 446-47 (6th Cir. 2001) (holding that, absent an extensive, on-the-record colloquy, the record could not "not support finding either that Petitioner instructed his counsel not to present evidence at mitigation, or, even assuming such an instruction, that Petitioner had any understanding of competing mitigation strategies"); *Emerson v. Gramley*, 91 F.3d 898, 906 (7th Cir. 1996) (finding that, where the trial judge failed to warn a defendant "of the fell consequences of failing to establish some mitigating circumstances, without which . . . a sentence of death was certain," the defendant's purported a "waiver" of mitigation was invalid).

right to present mitigating evidence; (2) explains the importance and role of mitigation; (3) conducts an inquiry regarding the defendant's understanding of his rights and the nature of mitigation; and (4) makes findings on the record establishing that the defendant's waiver is knowing, intelligent, and voluntary.<sup>170</sup>

In contrast to the courts mentioned above, however, a number of circuit courts and state courts of last resort have rejected a colloquy requirement. The Eighth and Eleventh Circuits, for instance, have found that a defendant's waiver of mitigation is valid, even where the trial court did not extensively question the defendant about his decision.<sup>171</sup> Meanwhile, the Supreme Court of Washington has expressly held that "a trial court need not conduct a 'colloquy' to ensure that a capital defendant's decision to waive the right to present mitigating evidence is a voluntary, intelligent, and knowing choice." The court reasoned that the choice as to whether or not present mitigating evidence is, like any other decision made during the course of a trial, a strategic choice within the defendant's purview, and that it is the responsibility of counsel, not the court, to advise a capital defendant with respect to such strategic decisions.<sup>172</sup> Similarly, the Supreme Court of California has held that a defendant may waive mitigation without any substantial colloquy before the trial court.<sup>173</sup>

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170. *See, e.g.*, *St. Clair v. Commonwealth*, 140 S.W.3d 510, 560–61 (2004); *Ashworth*, 706 N.E.2d at 1237 ("[I]n a capital case, when a defendant wishes to waive the presentation of *all* mitigating evidence, a trial court must conduct an inquiry of the defendant on the record to determine whether the waiver is knowing and voluntary."); *Wallace v. State*, 893 P.2d 504, 512–13 (Okla. Crim. App. 1995); *Commonwealth v. Tedford*, 960 A.2d 1, 44 (Pa. 2008) (noting that precedent established that "a properly preserved challenge to the validity of a waiver of mitigating evidence is generally assessed by examining the thoroughness of the colloquy to ensure that the defendant fully understood the nature of the right and the consequences of waiving the right"); *Zagorski v. State*, 983 S.W.2d 654, 660–61 (Tenn. 1998); *see also* *Koon v. Dugger*, 619 So. 2d 246, 250 (Fla. 1993) (holding that when a defendant seeks to waive mitigation, a trial court must ensure that the defendant's waiver is valid by confirming on the record that counsel advised the defendant concerning the right to present mitigating evidence and the importance of mitigation in a capital sentencing scheme).

171. *See, e.g.*, *Gilreath v. Head*, 234 F.3d 547, 549–50, 552 (11th Cir. 2000) (upholding a capital sentence despite a capital defendant's limited knowledge of mitigation and the absence of instruction on the issue from the trial court, because "no evidence showed that 'Petitioner would have changed his directions to his counsel had he been more fully informed about mitigating evidence'"); *Snell v. Lockhart*, 14 F.3d 1289, 1302-03 (8th Cir. 1994) (finding waiver of mitigation to be knowing and intelligent after only very limited questioning by the trial judge, during which the trial judge did not explain what mitigation is or its importance in a capital trial).

172. *State v. Woods*, 23 P.3d 1046, 1073 (Wash. 2001).

173. *See* *People v. Bloom*, 774 P.2d 698, 709–10 (Cal. 1989) (upholding death sentence imposed after counsel failed to present evidence during sentencing, where trial court did nothing more than warn the defendant that it was "an enormous mistake" to waive mitigation, but did not instruct the defendant concerning his right to present mitigation evidence, the extent of that right, or the consequences of waiving that right).

The wide variation amongst the lower courts with respect to this issue is highly problematic. If there is a central idea behind the Supreme Court's modern death penalty jurisprudence, it is that arbitrariness in the imposition of capital punishment is intolerable. The right to present mitigating evidence is a key constitutional safeguard against arbitrariness in capital sentencing. Surely, whether a defendant is able to exercise his right to present mitigating evidence should not be subject to the vagaries of geography.

## V. CONCLUSION

Given the obvious doctrinal and policy justifications, and the confusion amongst lower courts, the Supreme Court should (1) establish a requirement that, in order for a capital defendant's waiver of mitigation to be valid, there must be an affirmative showing on the record that the defendant's waiver was knowing, voluntary, and intelligent; and (2) require an accompanying uniform colloquy procedure to ensure the validity of the purported waiver. As with other fundamental trial rights, a valid waiver should not be presumed from a silent record. Given the close analogy of the right to present mitigating evidence to other trial rights of defendants, and the essential role that mitigating evidence plays in a constitutionally permissible capital punishment scheme, any other result would be incongruous with well-established case law. The absence of more stringent procedural safeguards surrounding the right to mitigation would render that right as the lone constitutionally guaranteed trial right of a criminal defendant that is not subject to a knowing and voluntary requirement. In absence of such a ruling from the Supreme Court, lower courts should follow the Tenth Circuit's decision in *Battenfield*.

From a perspective of judicial economy alone, stronger procedural safeguards make a great deal of sense: such safeguards will establish uniformity amongst the lower courts' treatment of this fundamental right, and will clarify trial records for appellate and post-conviction review. But most importantly, although a knowing and voluntary requirement and a colloquy procedure will not ensure that mitigating evidence is presented in all capital cases, they could reduce the number of capital defendants sentenced to death without presenting a mitigation case, a phenomenon abhorrent to the Eighth Amendment's proscription against the arbitrary imposition of the death penalty.