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Maintaining System Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death

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MAINTAINING SYSTEMIC INTEGRITY IN CAPITAL CASES: THE USE OF COURT-APPOINTED COUNSEL TO PRESENT MITIGATING EVIDENCE WHEN THE DEFENDANT ADVOCATES DEATH

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The defendant raped and then strangled a young woman. Charged with a capital offense, he has announced to his attorney and to the press that he wants to die. He pleads guilty to the capital offense. The time has come for the penalty phase—will he live or die? He refuses to agree to the introduction of any mitigating evidence on his behalf. Should death automatically be the penalty at the defendant's request? Are there competing societal interests which require a determination of whether death is the only appropriate punishment for this defendant regardless of his choice? If so, who should present mitigating evidence against the defendant's wishes?

This article focuses on the dilemma faced by the courts and by counsel when a defendant chooses not to introduce mitigating evidence in a penalty proceeding deciding life or death.[1] The fundamental issue is whether the consideration of mitigating evidence at the trial-level penalty phase is required by the eighth amendment's prohibition against cruel and unusual punishment,[2] regardless of the defendant's willingness to waive the amendment's protection. If mitigating circumstances must be introduced to avoid rendering the penalty unconstitutional for arbitrariness, the question of who should present the evidence then arises. Although the defense attorney would

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1. Defendants can assert their acquiescence to the death penalty in several procedural postures. They can decline to pursue appeals or seek to waive a mandatory appeal. They can move to dismiss an appeal filed by an interested third party or to dismiss an appeal or petition for certiorari filed by the defendant's attorney without the defendant's permission. At the trial level, defendants can insist upon pleading guilty to a capital charge and then refuse to present mitigating evidence on the issue of penalty or permit a trial in the guilt phase and then refuse to introduce mitigating evidence when convicted. This article addresses the predicament of the courts and the attorneys at the penalty phase of trial.

2. U.S. CONST. amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

appear the likely candidate, this approach raises ethical and constitutional issues. The ethical question is whether defense counsel, who ordinarily presents mitigating evidence on behalf of the defendant, is bound by the standards of professional conduct[3] to advocate zealously his client's request for death or whether counsel, as an "officer of the court," may proceed in opposition to his client's position. The constitutional issue is whether the defendant is denied his sixth amendment guarantee[4] of effective assistance of counsel when counsel adheres to the defendant's goal and declines to introduce mitigating evidence. Because the purpose of the guarantee of effective counsel is to ensure a fair trial, the question becomes whether a defendant is denied a fair trial due to counsel's failure to present mitigating evidence regardless of the defendant's wishes. The purpose of this article is to explore these complex, troublesome issues and to suggest a resolution.

The article begins with an overview of a capital trial. Whether the eighth amendment's prohibition against cruel and unusual punishment requires the consideration of mitigating evidence is then discussed. The conclusion is reached that the presentation of mitigating evidence, not merely the opportunity to present it, is constitutionally required. The article then explores the question of whether or not an individual defendant may waive the protection of the eighth amendment. After concluding that society's interest in the integrity of the process of imposing death outweighs an individual defendant's interest in free choice, the article then examines whether the defense attorney is the appropriate vehicle. This discussion encompasses both the standards of professional ethics and the sixth amendment's guarantee of effective assistance of counsel. After concluding it is not appropriate to require that the defense attorney present the mitigating evidence, the article's final section proposes a system for appointment by the court of an attorney whose role is the presentation of mitigating evidence in the situation where a defendant is advocating death. This proposal leaves the underlying attorney-client relationship between the defendant and defense counsel unscathed while, at the same time, preserving the fundamental constitutional guarantee of

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3. The standards used in this article are the American Bar Association's MODEL CODE OF PROFESSIONAL RESPONSIBILITY, MODEL RULES OF PROFESSIONAL CONDUCT, AND THE STANDARDS FOR CRIMINAL JUSTICE—THE DEFENSE FUNCTION.

4. U.S. CONST. amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

non-arbitrary punishment through the consideration of mitigating evidence.

I. The Capital Case

Thirty-seven states[5] presently authorize imposition of the death penalty for certain heinous homicides.[6] Bifurcated proceedings are usual in capital cases,[7] a procedure approved by the United States Supreme Court in *Gregg v. Georgia*.[8] In the first part, often referred to as the guilt phase, the factfinder makes the typical determination of guilt or innocence. The second stage, the penalty phase, occurs only if there is a finding of guilt. It is during the penalty phase that the jury, or judge, makes the determination of life or death.[9] Although states differ in the precise language used in defining these phases, the general pattern for prescribing the parameters of each phase is discussed below. Although this article is primarily concerned with events in the penalty phase, an overview of both stages is helpful to understand fully the purposes of each proceeding.

A. Guilt Phase

The guilt phase operates in most respects as a typical criminal trial. The factfinder, judge or jury, determines the culpability of the

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5. States with a death penalty are: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wyoming. Tabak, *Capital Punishment in the 1980's*, 1 Cal. Defender 4 (1986).

6. *See infra* text accompanying note 16.

7. *See, e.g.*, Cal. Penal Code § 190.1 (West Supp. 1987); Mo. Ann. Stat. § 565.030(2) (Vernon 1986); Tex. Crim. Proc. Code Ann. § 37.071(a) (Vernon Supp. 1986); Weisberg, *Deregulating Death*, 1983 Sup. Ct. Rev. 305, 309.

8. 428 U.S. 158 (1976).

9. The defendant usually has a conditional right to waive the penalty phase jury. *See, e.g.*, Cal. Const. art. I, § 16 and Cal. Penal Code § 190.4(b) (West Supp. 1987) (defendant may waive penalty jury with consent of state where guilt determined by plea or by judge alone); Mo. Ann. Stat. § 565.006 (Vernon Supp. 1986) (defendant may waive penalty phase jury after guilt phase of trial by jury or judge with agreement of state). *Contra* Tex. Crim. Proc. Code Ann. § 1.14 (Vernon Supp. 1986) (defendant may not waive jury trial in capital case).

Often provisions allow the judge discretion to override the jury's decision. *See, e.g.*, Cal. Penal Code § 190.4(e) (West Supp. 1987) (judge must review the jury's verdict of death to determine "whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented."). A few states provide for an advisory jury only; the judge is the real decision-maker. *See, e.g.*, Fla. Stat. Ann. § 921.141(2)(3) (West 1985).

defendant.[10] Unless the defendant pleads guilty to an offense, the case proceeds to trial. The fact finder is not concerned with a penalty in this phase.[11] The types of murder for which the death penalty can be imposed are usually limited.[12] However, two major modifications of a typical criminal trial can occur in the guilt phase of a capital case.

The first exception to a typical trial is that the jury is "death-qualified" in a capital case.[13] Although a voir dire of a jury panel is conducted in all criminal cases, the voir dire of the jury panel in a capital case includes extensive questioning of the jurors on their views about the death penalty.[14] Jurors who can never impose the death penalty are excludable on the theory that they cannot follow the law.[15]

The second modification in some states is the requirement of proof of a "special" or "aggravating" circumstance in addition to proof of the murder. The special circumstances typically include murder for pecuniary gain, murder while in custody, multiple murders, murders in connection with a serious felony, and especially heinous, atrocious or cruel murders.[16] Special circumstances elevate the homicide to capital murder. The proof of both the elements of

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10. *See* CAL. PENAL CODE § 190.1 (West Supp. 1987); MO. ANN. STAT. § 565.030(2) (Vernon Supp. 1986). *But see* TEX. CRIM. PROC. CODE ANN. § 1.14 (Vernon Supp. 1986) (defendant cannot waive jury trial in capital case.).

11. The factfinder determines guilt or innocence of the murder charge and, in some states, whether a special circumstance exists which elevates the homicide to a capital crime. *See infra* text accompanying notes 16-20.

12. *See, e.g.*, CAL. PENAL CODE § 188 (West Supp. 1987) (explosives; poison; lying in wait; torture; willful, deliberate, and premeditated, felony-murder); MO. ANN. STAT. § 565.020 (Vernon Supp. 1986) (deliberation required); TEX. PENAL CODE ANN. § 19.03 (Vernon Supp. 1988) (peace officer as victim; felony murder; pecuniary gain; escaping; multiple murders).

13. *See, e.g.*, CAL. PENAL CODE § 1074(8) (West 1985) (a challenge for implied bias may be made where "the entertaining of such conscientious opinions as would preclude [the proposed juror from] finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror."); MO. ANN STAT. § 546.130 (Vernon 1983) (jurors "whose opinions are such as to preclude them from finding any defendant guilty of an offense punishable with death" are excluded); TEX. CRIM. PROC. CODE ANN. § 35.16(b)(1) (Vernon Supp. 1986) (permits challenge for cause of jurors with conscientious scruples regarding the death penalty).

14. *See* Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 325-28 (1983); Herron, *Defending Life in Tennessee Death Penalty Cases*, 51 TENN. L. REV. 681, 725 (1984).

15. Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968). The United States Supreme Court recently upheld the exclusion of jurors opposed to the death penalty despite arguments that eliminating these jurors creates a jury more likely to convict in the guilt phase. Wainwright v. Witt, 469 U.S. 412 (1985).

16. *See, e.g.*, CAL. PENAL CODE § 190.2(14) (West Supp. 1987); TEX. PENAL CODE ANN. § 19.03 (Vernon Supp. 1986) (Texas does not have a category of "atrocious" murders).

murder and special circumstances in these states is presented to the factfinder in the guilt phase.[17] The factfinder must find that the defendant is guilty of the murder alleged and must prove the existence of an aggravating circumstance in order to result in a capital conviction.[18] Should the factfinder find the defendant guilty of the murder but not of the aggravating circumstance, the result is a murder conviction without the possibility of the death penalty.[19] The degree of the homicide to which the special circumstance is added is the highest in the statutory scheme.[20] Thus, manslaughter would not become a capital crime even if the terms of a special circumstance technically existed. Penalty proceedings are triggered only after a finding of both the required degree of homicide and the aggravating circumstances.

B. The Penalty Phase

The penalty phase is a separate proceeding conducted after the conclusion of the guilt phase. The defendant usually may choose whether the penalty shall be determined by a judge or a jury.[21] This is true whether the defendant pled guilty, was tried by a jury or was tried by a judge in the guilt phase.[22] If a jury tries the guilt phase

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17. *See, e.g.*, CAL. PENAL CODE § 190.4 (West Supp. 1987); TEX. CRIM. PROC. CODE ANN. § 37.071(A) (Vernon Supp. 1986); TEX. PENAL CODE ANN. § 19.03 (Vernon Supp. 1986). In contrast, The American Law Institute proposed a system where the guilt phase would involve only a determination of guilt or innocence for murder. The aggravating circumstances would not be considered by the factfinder until the penalty phase. MODEL PENAL CODE § 210.6 (1980). For example, Mo. ANN. STAT. § 565.020 (Vernon Supp. 1986), which follows this scheme, defines first degree murder as "knowingly causes the death of another person after deliberation upon the matter" and imposes a penalty of death or life imprisonment without possibility of probation or parole (unless by act of governor). Thus, there is no finding of aggravating or special factors by the jury in the guilt phase. Death, however, cannot be imposed without a second penalty phase where the jury or judge considers aggravating or mitigating circumstances. *Id.* at §§ 565.030, 565.032.

18. *See, e.g.*, CAL. PENAL CODE § 190.1 (West Supp. 1987); TEX. PENAL CODE ANN. § 19.03 (Vernon Supp. 1986).

19. For example, the maximum penalty for first degree murder in California without a "special circumstance" is twenty-five years to life. CAL. PENAL CODE § 190 (West Supp. 1987). In Missouri, the penalty for a first degree murder conviction without pursuing aggravating circumstances in the penalty phase (*see supra* note 17) is imprisonment for life without possibility of probation or parole. Mo. ANN. STAT. § 565.020 (Vernon Supp. 1986). In Texas, the maximum sentence for murder without a special circumstance is not more than ninety-nine years nor less than five years. TEX. PENAL CODE ANN. § 12.32(a) (Vernon Supp. 1987).

20. *See, e.g.*, CAL. PENAL CODE § 190 (West 1987); TEX. PENAL CODE ANN. § 19.03 (Vernon Supp. 1986) (special circumstances part of definition of "capital murder").

21. *See supra* note 9.

22. *Id.*

and the defendant elects to have the penalty determined by a jury, the same jury determines the penalty.[23] The penalty phase is conducted much like a trial. Both sides make opening statements, call witnesses, and introduce exhibits. The jury is instructed, if the jury is not waived, and closing arguments are made.[24] The factfinder then deliberates to reach a decision of life or death. Death is to be imposed if the "aggravating factors" outweigh the "mitigating factors." [25] If the factfinder is a jury which cannot reach a unanimous verdict, life imprisonment is imposed as the penalty.[26]

State statutes generally define the factors to be considered in the penalty phase. Aggravating factors in this phase usually include the circumstances of the crime and any prior criminal history of the defendant.[27] If not considered in the guilt phase, the aggravating factors will also include the "special circumstances" previously mentioned, such as double murders or felony murders.[28] Mitigating factors

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23. *See, e.g.*, CAL. PENAL CODE § 190.3-4 (West Supp. 1988); MO. ANN. STAT. § 565.030(2) (Vernon Supp. 1987); TEX. CRIM. PROC. CODE ANN. § 37.071(a) (Vernon Supp. 1988). There are times, however, when a new jury might be impaneled. For instance, California provides that if the penalty phase jury cannot reach a unanimous verdict on the penalty, a new jury shall be impaneled to retry the penalty issue. CAL. PENAL CODE § 190.4(b) (West Supp. 1988). A new jury may also be impaneled to retry only the penalty phase after reversal of the penalty on appeal. MO. ANN. STAT. § 565.035(5)(3) (Vernon Supp. 1987).

24. *E.g.*, MO. ANN. STAT. § 565.030(4) (Vernon Supp. 1987).

25. *See, e.g.*, CAL. PENAL CODE § 190.3 (West Supp. 1988); MO. ANN. STAT. § 565.030(4) (Vernon Supp. 1987). A Missouri jury may also impose life imprisonment as the penalty if they do not find that an aggravating circumstance exists beyond a reasonable doubt; that the aggravating circumstance(s) warrant death; or if under all the circumstances they decide not to impose death. *Id.* The Texas scheme is different. Three questions are submitted to the jury. If all three are answered in the affirmative, death is to be imposed. If any one question is answered negatively, life imprisonment is to be imposed. TEX. CRIM. PROC. CODE ANN. § 37.071 (Vernon Supp. 1988). *See infra* note 53 and text accompanying notes 53-54. There is presently an undecided issue whether the burden of proof may rest on the defendant in this process and, whether imposed on the state or on the defendant, what the burden of proof should be. *See, e.g.*, Gacey v. Illinois, 470 U.S. 1037, 1038 (1985), (Marshall, J., dissenting from denial of certiorari) (unconstitutional to place burden on defendant to introduce mitigating evidence sufficient to overcome aggravating circumstance found by the jury); Teague v. Tennessee, 473 U.S. 911 (1985) (Marshall, J., dissenting from denial of certiorari) (death penalty to be imposed if defendant failed to prove mitigating factors outweighed aggravating factors unconstitutional); White v. Maryland, 470 U.S. 1062 (1985) (Marshall, J., dissenting from denial of certiorari) (state should bear burden to prove death is the appropriate punishment).

26. *E.g.*, CAL. PENAL CODE § 190.4(b) (West Supp. 1988) (after first hung jury, court is to impanel a second penalty jury; if second penalty jury cannot reach a decision, court may either impanel a third jury or impose life imprisonment without possibility of parole); MO. ANN. STAT. § 565.030 (4)(4) (Vernon Supp. 1987) (life imprisonment imposed by court if jury cannot reach decision); TEX. CRIM. PROC. CODE ANN. § 37.071(e) (Vernon Supp. 1988) (life imprisonment).

27. *E.g.*, CAL. PENAL CODE § 190.3 (West Supp. 1988).

28. *E.g.*, MO. ANN. STAT. § 565.032 (Vernon Supp. 1987).

are usually listed in the statute.[29] However, the defendant cannot be precluded from presenting evidence of unlisted mitigating factors.[30] Whether statutorily prescribed or not, mitigating factors typically include the absence of prior criminal convictions, mental or emotional distress, the age of the defendant, prior positive contributions by the defendant to society, family ties and support, and, if applicable, a reduced capacity to appreciate the crime.[31]

The most common procedure in the penalty phase is an evidentiary proceeding, culminating with arguments by both counsel.[32] The state's evidence is usually limited in the penalty phase.[33] The state may have already introduced evidence of aggravating circumstances in the guilt phase.[34] It is the defense which typically presents most of the evidence in the penalty phase.[35] The past life and character of the defendant are usually irrelevant in the guilt phase.[36] While the state has often presented the evidence in the guilt phase that arguably makes the homicide especially heinous, the penalty phase is usually the defense's first opportunity to present to the factfinder the personal aspects of the defendant's life.

If the defense fails to introduce mitigating evidence at this stage, the jury is left with little or no evidence of mitigation. Although there may be defenses raised at trial, such as intoxication or mental distress, which permit the introduction of evidence that could double as mitigating evidence in the penalty phase, the factfinder has already rejected these to a great degree in the guilt phase by finding the defendant guilty as charged. Moreover, it would be an unusual case where the defendant's family history and character were introduced in the guilt phase. Because aggravation includes the circumstances of the offense itself, it is a logical conclusion that aggravation outweighs

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29. CAL. PENAL CODE § 190.3 (West Supp. 1988); MO. ANN. STAT. § 565.032 (Vernon Supp. 1987). The Texas code does not specify circumstances except to the extent that the three questions posed to the penalty jury set forth specific factors to take into account. *See infra* note 53. However, mitigating factors are presented in this context. *See infra* text accompanying note 55.

30. *See* Lockett v. Ohio, 438 U.S. 586 (1978); Skipper v. South Carolina, 476 U.S. 1 (1986).

31. *See, e.g.*, CAL. PENAL CODE § 190.3 (West Supp. 1988); MO. ANN. STAT. § 565.032 (Vernon Supp. 1987).

32. *See* MO. ANN. STAT. § 565.030(4) (Vernon Supp. 1987); Goodpaster, *supra* note 14, at 334-38; Herron, *supra* note 14, at 732-63.

33. *See* Goodpaster, *supra* note 14, at 334-35; Herron, *supra* note 14, at 736-44.

34. *See* Goodpaster, *supra* note 14, at 335.

35. *See id.* at 334-38.

36. Certain "mitigating" factors, such as the lack of capacity of the defendant due to insanity or provocation, may be presented in the guilt phase. Most aspects of the defendant's life, however, would not be considered probative of a defense to the charge.

mitigation when nothing further is introduced by the defense. Therefore, the absence of mitigating evidence is tantamount to automatic imposition of the death penalty. Consequently, those involved in death penalty litigation agree that the presentation of mitigation in the penalty phase is of overwhelming importance.[37]

The practical importance of mitigating evidence in the penalty phase is matched by the Supreme Court's emphasis on the consideration of mitigating evidence as a constitutional safeguard. The next section explores the Supreme Court's opinions in this area.

II. The Requirement of Mitigating Evidence

The eighth amendment to the United States Constitution provides "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The fairly simple language of this amendment has spawned constant litigation since the early 1970s on the constitutionality of the death penalty. The Supreme Court has struck the death penalty down and built it back up. The statutes which have withstood constitutional scrutiny channel the discretion of the sentencer. Foremost among the safeguards adopted to prevent unguided discretion in imposing the death penalty has been the requirement that the factfinder consider the mitigating circumstances of each case individually. This section examines the historical development of the mitigation requirement. The seminal *Furman v. Georgia*[38] case is analyzed to provide an understanding of the source of present interpretations of the eighth amendment. The development and scope of the requirement of considering mitigating evidence subsequent to *Furman* is then discussed.

A. Furman v. Georgia

In 1972 a majority of the United States Supreme Court held that the imposition of the death penalty was unconstitutional as cruel and unusual punishment. This decision, *Furman v. Georgia*, effectively invalidated the death penalty nationwide.[39] The decision consolidated three cases, each involving a black male defendant. In two cases, the

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37. *See* Lockett v. Ohio, 438 U.S. 586, 604 (1978); Woodson v. North Carolina, 428 U.S. 280, 304 (1976). *See also* Goodpaster, *supra* note 14, at 302, 320; Herron, *supra* note 14, at 733.

38. 408 U.S. 238 (1972).

39. Justices Marshall, Blackmun, and Powell each recognized this effect of *Furman*. *Id.* at 315 (Marshall, J., concurring), 411 (Blackman, J., dissenting), 415 (Powell, J., dissenting). Justice Marshall stated that "[n]ot only does [this decision] involve the lives of these three petitioners, but those of the almost 600 other condemned men and women in this country currently awaiting execution." *Id.* at 316.

defendants were convicted of rape; in the third, murder.[40] The justices wrote nine separate opinions, differing in their interpretations of the eighth amendment and the proper role of the judiciary under the amendment. The recurring theme of five justices was that the lack of any standards guiding the factfinder resulted in complete arbitrariness in the selection of which defendants were condemned to death.

The justices agreed that the imposition of the death penalty in the cases before the Court was unconstitutional under the eighth amendment because of an arbitrary application. Both the Georgia and Texas statutes, under which the defendants were sentenced, left the decision between life and death in the hands of the factfinder without any guidelines.[41] As a result, there was no predictability regarding who would receive the death penalty even if charged with nearly identical crimes. In Justice White's often-quoted words: "[T]here is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."[42] Justice Douglas found the "uncontrolled discretion" of the factfinder to be constitutionally impermissible.[43] Justice Stewart similarly found the use of the death penalty unconstitutional because it was "so wantonly and so freakishly imposed."[44] Justices Brennan and Marshall went a step further, finding the death penalty unconstitutional per se in contemporary society. Explicitly addressed as one of the factors each justice considered in reaching his conclusion was the arbitrary or discriminatory application of the death penalty.[45]

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40. *Furman* was a murder case. The other two cases consolidated with *Furman*, Jackson v. Georgia, 171 S.E.2d 500 (Ga. 1969), *cert. granted* 403 U.S. 952 (1971) (No. 69-5030), and Branch v. Texas, 447 S.W.2d 932 (Tex. Crim. App. 1969), *cert. granted* 403 U.S. 952 (1971) (No. 69-5031), were rape cases.

41. *Furman*, 408 U.S. at 308 n.8.

42. *Id.* at 313.

43. *Id.* at 253.

44. *Id.* at 310. Justice Stewart also found that the death sentences before the court were cruel because they were excessive in terms of the punishments necesary to achieve legislative purposes and unusual because of the rarity of their imposition. *Id.* at 309.

45. *Id.* at 274-78, 281-82, 364-66. Justice Brennan examined whether the punishment by its severity was "degrading to human dignity", *id.* at 281; whether the punishment was arbitrarily imposed; whether the punishment was unacceptable to contemporary society; and whether the punishment was unnecessary to achieve the penological goal of the state and therefore excessive. *Id.* at 282. Justice Marshall also used four principles. The first two were not offended by the death penalty: whether the penalty was so inherently cruel that the framers barred it when they adopted the eighth amendment and whether the punishment was unusual in being unknown previously. *Id.* at 330-31. However, he found the death penalty unconstitutional under two additional principles: it was excessive and unnecessary in view of the suggested purposes [retribution, deterrence, prevention of repetitive criminal acts, encouragement of liability pleas and confessions, eugenics and economy and

Although the four dissenters[46] could find no eighth amendment violation where historically death had been accepted as a penalty,[47] Justices Burger and Blackmun recognized individual differences among defendants. In the context of expressing concern that the Court's decision would trigger mandatory death penalty statutes that would fail to take into account such individual differences, both Justices Burger and Blackmun commented on the tempering quality of a jury which considers the factors of a specific case.[48]

B. The Consideration of Mitigating Evidence

A recurring theme in statutory schemes withstanding constitutional challenge since *Furman* has been the requirement that the judge or jury consider mitigating evidence when deciding the penalty issue. In *Gregg v. Georgia*,[49] the Court found that state procedures adequately addressed the concerns of arbitrary and capricious imposition of the death penalty where consideration of mitigating circumstances was required along with the finding of an aggravating circumstance.[50] In *Proffitt v. Florida*,[51] a statutory system using an advisory jury decision on the penalty was upheld where "the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed."[52] A Texas capital sentencing statute was also upheld, although it presented a different type of system in which the jury was required to answer three specific questions.[53] If all were answered

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retribution], *id.* at 342-51, and it would be "morally unacceptable" to present American society if they were appropriately informed of all the details of the death penalty. *Id.* at 360.

46. Chief Justice Burger and Justices Blackmun, Powell and Rehnquist.

47. *Furman*, 408 U.S. at 375-470. The dissenters found that the eighth amendment did not prohibit the death penalty per se and, as a consequence, the mechanics of its imposition should be left to the state legislatures. Chief Justice Burger and Justice Powell specifically rejected the use of the eighth amendment to invalidate an unnecessarily excessive punishment. They viewed the eighth amendment as proscribing a form of punishment in its entirety or not at all. *Id.* at 396-405, 461-65.

48. *Id.* at 387-89 (Burger, J.); *id.* at 413 (Blackmun, J.).

49. 428 U.S. 153 (1976).

50. *Id.* at 196-98. The Court also approved of the bifurcated procedure and the appellate review of the case, including the proportionality of the sentence. *Id.*

51. 428 U.S. 242 (1976).

52. *Id.* at 258.

53. Jurek v. Texas, 428 U.S. 262 (1976). The three questions presented to the jury were:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation

affirmatively, the death penalty was imposed.[54] In finding the Texas statute constitutional the Court again relied on the admissibility of any mitigating circumstances regarding an individual defendant.[55] Mandatory death penalty statutes, on the other hand, were held unconstitutional because the sentencing authority was deprived of consideration of the individual defendant and the particular crime.[56]

In 1978 the Supreme Court specifically faced an issue involving the nature of mitigating evidence. In *Lockett v. Ohio*,[57] the Court held unconstitutional under the eighth amendment a statute that precluded the defendant from introducing evidence of her accomplice status and lack of intent to kill in the murder with which she was charged.[58] The Court in *Lockett* held that individualized consideration of mitigating factors was constitutionally required.[59] In subsequent cases the Supreme Court has continued to reiterate the teaching of *Lockett*, that a primary safeguard against arbitrary or unjust imposition of the death penalty is the consideration of any relevant mitigating evidence.[60]

In *California v. Brown*,[61] the Court elucidated eighth amendment concerns by setting forth two prerequisites which must exist before

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that the death of the deceased or another would result;
(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Id. at 269 (quoting TEX. CRIM. PROC. CODE ANN. § 37.071(b) (Vernon Supp. 1975-76)).

54. *Id.* (citing TEX. CRIM. PROC. CODE ANN. § 37.071(c), (e) (Vernon Supp. 1975-76)).

55. *Id.* at 271-76.

56. Roberts v. Louisiana, 431 U.S. 633 (1977); Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

57. 438 U.S. 586 (1978).

58. *Id.* at 602-09.

59. *Id.* at 606. *See also* Bell v. Ohio, 438 U.S. 637 (1978) (defendant should have been able to introduce evidence of his youth, cooperation with the police, and the lack of proof of his guilt).

60. *See, e.g.*, Eddings v. Oklahoma 455 U.S. 104 (1982) (error to refuse to consider the defendant's violent, troubled youth as mitigation); Skipper v. South Carolina, 476 U.S. 1 (1986) (trial court improperly excluded evidence of the defendant's good adjustment to jail life). The concurring justices disagreed that adjustment to incarceration was factually mitigating in *Skipper*. Justice White, writing for the majority, stated that it was arbitrary to execute a man or woman without considering factors showing that death was not a "just and appropriate sentence". *Id.* at 1675, *quoting* Woodson v. North Carolina, 428 U.S. 280, 304 (1976); Sumner v. Shuman, 107 S. Ct. 2716 (1987) (unconstitutional to impose mandatory death penalty without regard to any individualized circumstances, even on defendant already serving life without possibility of parole for prior conviction).

61. 107 S. Ct. 837 (1987).

a death sentence is constitutionally permissible, both of which relate directly or indirectly to mitigating evidence. The Court stated:

> First, sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses. The Constitution instead requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion. Second, even though the sentencer's discretion must be restricted, 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."[62]

The sentencers' discretion is typically structured by the requirement that they find at least one specified aggravating circumstance and that the aggravating factors outweigh mitigating factors.[63] The second prerequisite the Court stated reflects the line of cases holding that a statutory list of mitigating circumstances cannot be exclusive.[64] The Court further explained how vital it is that the sentencer consider mitigating evidence: "Consideration of such evidence is a 'constitutionally indispensable part of the process of inflicting the penalty of death.'"[65]

Because consideration of mitigating evidence is indispensable to a constitutionally imposed death penalty, defendant should not be able to waive its presentation.[66] The issue of waiving the constitu-

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62. *Id.* at 839 (quoting *Eddings*, 455 U.S. at 110) (citations omitted).

63. Pulley v. Harris, 465 U.S. 37, 46 (1984).

64. *See supra* text accompanying notes 57-60.

65. *Brown*, 107 S. Ct. at 839, *quoting* Woodson v. North Carolina, 428 U.S. at 304. *Cf.* Hitchcock v. Dugger, 107 S. Ct. 1821, 1822 (1987) (the sentencer may not refuse to consider or be precluded from considering mitigating evidence (citing *Skipper*, 426 U.S. at 1)).

66. Nor should the mere "opportunity" to present mitigating evidence be considered to meet the guarantee of the nonarbitrary imposition of the death penalty. Presenting the quarantee of the eighth amendment in this language raises the same policy issues discussed in the section on waiver. Nevertheless, as discussed *infra*, one state court has viewed the eighth amendment's guarantee as one of "opportunity" only. *See infra* text accompanying notes 146-49. Throughout the post-*Furman* cases on mitigating evidence, the Court's terminology has included both an "opportunity to present" and "the consideration of" mitigating evidence. *Brown* is a case in point. Does the eighth amendment guarantee only that the defendant have the opportunity to present mitigating evidence or does it require the actual consideration of mitigating evidence by the factfinder? Two strong arguments exist why the constitutional mandate can only be satisfied by an actual consideration of mitigating evidence.

First, the Court's language that a defendant must be "allowed" or given the "opportunity" to present mitigating evidence is dependent on its context. It stems from cases, such as *Lockett* and *Skipper*, where the defendant was not "allowed" to present mitigating evidence in his or her favor. Consequently, the factfinder was precluded from the actual consideration of that mitigating evidence in violation of the eighth amendment. Second, the first prerequisite set forth in *Brown* provides at

tionally-required consideration of mitigating evidence is discussed in the next section.

III. Waiver of the Presentation of Mitigating Evidence

Because it is unclear precisely what the eighth amendment protections entail, the possibility of a waiver of the eighth amendment is a seldom-discussed phenomenon.[67] Nevertheless, courts have been forced to tackle the waiver of appellate and trial rights in death penalty cases. As background, the first two subsections focus on the waiver of appellate and trial rights generally and on the waiver of appellate rights specifically in capital cases. The third subsection focuses specifically on the waiver of mitigating evidence at the trial level of a capital case.

A. Appellate and Trial Rights in General

Appeals in noncapital criminal cases are not constitutionally guaranteed.[68] However, the Supreme Court has held that where a state provides for an appellate proceeding from a criminal conviction, the defendant has certain due process and equal protection rights to equal access to the process. Thus, a defendant is entitled to a prepared transcript at state expense where the transcript is a prerequisite to

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least a guarantee that a state establish a procedure that prevents a non-arbitrary imposition of the death penalty. *See supra* text accompanying note 62. The primary procedure to ensure a non-arbitrary punishment in state statutes is to require that at least one aggravating factor be found and that aggravating factors be balanced with mitigating factors. The Court has stated that this procedure is not necessarily the only way to meet the constitutional requirement of a non-arbitrary punishment. Pulley v. Harris, 465 U.S. 37, 45 (1984). However, the constitutional requirement of a non-arbitrary system of capital punishment cannot be fulfilled by only affording the defendant the opportunity to present mitigating evidence. In most cases the opportunity to present the mitigating evidence will result in actual consideration of mitigation. This is true even if a strategic decision is made that the best presentation of mitigation is no hard evidence in the penalty phase. *See* Darden v. Wainwright, 477 U.S. 168 (1986); Strickland v. Washington, 466 U.S. 668 (1984). It is primarily where the defendant refuses to pursue the "opportunity" that the distinction between opportunity and actual consideration could conceivably make a difference. If the defendant were free to reject this opportunity, that individual defendant would be capable of undoing the constitutional basis of the statutory scheme. It is the individual consideration of each defendant and each case on the same bases that the Court has found sufficiently channels the factfinder's discretion to meet constitutional requirements.

67. *See* Weisberg, *supra* note 7 at 322, 354-55, 358. The Supreme Court appears willing to accept various procedures as long as they guarantee a non-arbitrary result. *Compare* Cal. Penal Code § 190.3 (West 1987) (jury compares statutory aggravating factors with mitigating factors) *with* Tex. Crim. Proc. Code Ann. § 37.071 (Vernon Supp. 1986) (jury must answer three questions affirmatively).

68. *See* Jones v. Barnes, 463 U.S. 745, 751 (1983).

perfecting an appeal.[69] The defendant is also entitled to an attorney on a first appeal by right in state court.[70] Nevertheless, a defendant ordinarily must affirmatively invoke the "right" to appeal in noncapital criminal cases by a timely filing of the appropriate petition.[71] Thus, the defendant may waive appellate rights by choice or by inaction.

In contrast, the courts refuse to permit a waiver of constitutionally guaranteed trial rights in noncapital criminal cases in certain circumstances. The defendant's ability to waive may be conditioned on consent of the State, or upon a preliminary finding by the court. Precluding a defendant from waiving a trial right does not necessarily vitiate the defendant's constitutional protections. As the Supreme Court stated in *Singer v. United States*,[72] "[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right . . ." Accordingly, in *Singer*, the Court upheld the condition of prosecutorial consent for waiver of a jury.[73] The defendant was afforded his sixth amendment guarantee of a jury; the Constitution does not guarantee the opposite, a right to a bench trial.[74] The sixth amendment similarly guarantees the right to a speedy and public trial.[75] There is no guarantee of a right to plead guilty. Although defendants routinely enter guilty pleas, many state rules, as well as the federal rules, require the court to determine the factual basis for the plea.[76] If the plea lacks a factual basis, the court must reject the plea and order that the trial proceed. Once again, the defendant is only required to undergo what the Constitution guarantees. There is no deprivation of any right.

Even where the Constitution implicitly guarantees an alternative to the stated constitutional right, waiver is not absolute. This occurs with the stated sixth amendment right to assistance of counsel which is accompanied by an implicit right to self-representation. The implied constitutional alternative of self-representation, recognized in *Faretta v. California*,[77] is based on historical facts. The early English common-law system did not permit representation by counsel in felony cases.[78] Even in early colonial times, the Court noted that such

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69. Griffin v. Illinois, 351 U.S. 12 (1956).

70. Douglas v. California, 372 U.S. 353 (1963). This right was not extended to discretionary appeals. Ross v. Moffitt, 417 U.S. 600 (1974).

71. *See, e.g.*, FED. R. APP. P. 4(b) (10 days); CAL. RULES OF COURT 31(a) (West 1987) (60 days); MO. SUP. CT. R. 81.04(a) (10 days).

72. 380 U.S. 24, 34-35 (1965).

73. *Id.* at 37.

74. *Id.* at 34-36.

75. *See supra* note 4.

76. *See, e.g.*, FED. R. CRIM. P. 11(f).

77. 422 U.S. 806 (1975).

78. *Id.* at 823.

representation was exclusively the defendant's choice.[79] Consequently, the Supreme Court viewed the right to defend as a personal right, as distinguished from the rights listed in other amendments.[80] From a practical point of view, it would be possible to give the defendant a jury trial without his agreement, but virtually impossible to give him "assistance" of counsel without his active participation.[81] Thus, both the history and the nature of the right led the Court to imply an alternative right to the specified constitutional right to counsel that does not exist with respect to the right to a jury and to a trial itself.

Nevertheless, even in the context of the hallowed right to self-representation, the systemic interest in just proceedings prevails over the individual right. The court cannot permit a waiver unless it finds that the defendant's waiver is knowing and intelligent.[82] Standby counsel can be appointed with or without the defendant's consent.[83] A defendant's exercise of the right to self-representation may be revoked if the defendant obstructs the course of the trial.[84]

The integrity of the judicial system justifies the restrictions on waiving constitutional rights. Requiring the consent of the prosecutor or the approval of the court before a defendant may waive a jury allows the state to prevent a biased or partial hearing.[85] Requiring a factual basis for a guilty plea not only protects the defendant from a faulty conviction, but also safeguards society's interest in preventing the conviction of an innocent person.[86] The majority in *Faretta*, which so forcefully found a right of self-representation, acknowledged that a "strong" argument could be made that a defendant should be forced to accept a lawyer when the assistance of counsel is necessary for a fair trial.[87]

The three dissenting justices in *Faretta*[88] emphasized that the Court and the prosecutor have a duty to see that justice is done and that "[t]he system of criminal justice should not be available as an

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79. *Id.* at 818, 826-30.

80. *Id.* at 821.

81. *Id.* at 832.

82. *Id.* at 835-36.

83. McKaskle v. Wiggins, 465 U.S. 168, 184 (1984).

84. *Id.* at 184, *quoting* Faretta v. California, 422 U.S. 806, 835 n.46. "'The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedure and substantive law.'" *Id.* at 184.

85. Singer v. United States, 380 U.S. 24, 36 (1965).

86. McCarthy v. United States, 394 U.S. 459, 467 (1969). *Cf.* Santobello v. New York, 404 U.S. 257, 261 (1971).

87. *Faretta*, 422 U.S. at 833.

88. The dissenters in *Faretta* were Chief Justice Burger and Justices Blackmun and Rehnquist.

instrument of self-destruction."[89] The dissent of Justice Blackmun further viewed the State's interest in securing a fair system of criminal justice as an important consideration:

> True freedom of choice and society's interest in seeing that justice is achieved can be vindicated only if the trial court retains discretion to reject any attempted waiver of counsel and insist that the accused be tried according to the Constitution. This discretion is as critical an element of basic fairness as a trial judge's discretion to decline to accept a plea of guilty.[90]

The continuous theme of the Supreme Court's waiver cases is that the integrity of the system is a major concern even at the expense of an individual defendant's choice.

The integrity of the criminal justice system is similarly jeopardized if eighth amendment protections can be waived without principled limitations. The language and history of the amendment support such an interpretation. There is no alternative right to choose one's own punishment stated in the amendment. Moreover, such a right cannot be implied from the history of the amendment, which was primarily designed to preclude unlawful abusive punishment.[91] Even the right to self-representation does not guarantee an absolute right to the alternative to assistance of counsel, no representation at all.

Moreover, the societal interest in precluding arbitrary imposition of the death penalty is strong. The Court's concern with the reliability of the determination to impose death is apparent in every decision. The death penalty is irreversible. In *Woodson v. North Carolina*,[92] the Court stated: "Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."[93] A necessary part of ensuring reliability in the process is the consideration of the individual and the particular crime.[94] The consideration of mitigating evidence in the penalty phase of a bifurcated proceeding has become the standard method of meeting this requirement.[95]

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89. *Id.* at 836-39.

90. *Id.* at 840. Justice Blackmun specifically believed that the defendant's freedom of choice should yield to the system's integrity. *Id.* at 849.

91. The prohibition of cruel and unusual punishment stems from the English Bill of Rights and probably was designed to preclude the government from imposing outlawed penalties. The history of the inclusion of the eighth amendment in the Bill of Rights in this country is sparse. The major concern appeared to be the possibility of the federal government having the power to impose torturous punishments. Furman v. Georgia, 408 U.S. 238, 258-64, 316-22 (1972).

92. 428 U.S. 280 (1976).

93. *Id.* at 305.

94. *See Woodson*, 428 U.S. at 305; *Furman*, 408 U.S. at 307-08 (Stewart, J., concurring); California v. Brown, 107 S. Ct. 837, 839 (1987).

95. *See* Weisberg, *supra* note 7, at 309.

Where 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. The next two sections review how the courts have responded when a defendant sentenced to death seeks to forego trial level and appellate protections by examining first, appellate review on both a federal and state level and second, the trial level presentation of mitigating evidence.

B. Appellate Rights in Capital Cases

Defendants may try to waive appellate rights in capital cases on both the federal and state level. The United States Supreme Court has been faced with third-party petitions on behalf of sentenced defendants who do not wish to pursue legal avenues. The Court has treated these cases as issues of standing.[96] Some state appellate courts in jurisdictions with mandatory appellate review of death sentences have had to decide whether a defendant can be allowed to forego such review.[97] Generally holding that a defendant cannot waive the review, those courts have tended to base their decisions on a statutory theory. Although the accepted waiver of federal discretionary appellate review by capital defendants is disturbing, the rationale of those cases is not controlling at the trial level where the mitigating evidence must be presented or the safeguard is lost. The rationale of the state appellate cases which preclude a waiver of an automatic appeal is more applicable to the trial-level waiver issue. This case law will be discussed in two subsections: first, the few Supreme Court orders and second, the lower court decisions rejecting a waiver of mandatory review.

1. Discretionary Federal Appellate Review

The Supreme Court has not directly addressed a defendant's right to waive eighth amendment protections. The Court has permitted defendants facing the death penalty to forego review in the Supreme Court on jurisdictional grounds.[98] Implicit in these decisions which terminate review of a death sentence at the defendant's request is a finding that any discretionary post-trial federal review can be waived

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96. *See infra* text accompanying notes 98-115.

97. *See infra* text accompanying notes 116-33.

98. Hammett v. Texas, 448 U.S. 725 (1980); Lenhard v. Wolff, 444 U.S. 1301 (1979); Evans v. Bennett, 440 U.S. 1301 (1979); Gilmore v. Utah, 429 U.S. 1012 (1976).

by a competent[99] defendant. The few opinions in this area do not explicitly speak in eighth amendment terms.

The Supreme Court's order in *Gilmore v. Utah*[100] stated that Gilmore knowingly and intelligently waived "any and all federal rights he might have asserted after the Utah trial court's sentence was imposed . . . ."[101] However, the concurring opinion by Chief Justice Burger, in which Justice Powell joined, addressed only the procedural question of a lack of jurisdiction to consider the case where a competent defendant chooses to forego such review.[102] Justice Burger found that Gilmore's mother, who initiated the application for the stay as a third party, lacked standing to raise any issues on Gilmore's behalf.[103] Chief Justice Burger dismissed the possible eighth amendment challenge to Utah's death penalty statute in a footnote on the basis that no one with standing had challenged it.[104] He also declined to decide whether a defendant has a right to waive state appellate review.[105] Justice Stevens' concurrence, joined by Justice Rehnquist, similarly focused on the lack of jurisdiction where a competent defendant has chosen to forego his access to the appellate courts.[106] In dissent, Justice White, joined by Justices Brennan and Marshall, argued that a defendant could not waive a state court resolution of the constitutionality of the Utah death penalty statute.[107] In Justice White's opinion, this would mean that a defendant could

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99. A primary concern for courts faced with a defendant who wishes to forego legal recourse is the competency of the defendant to make decisions on his or her behalf. *See* Felde v. Blackburn, 795 F.2d 400, 403 (5th Cir. 1986) (remanded for determination whether competency finding supported by record and, even so, whether defense counsel should have requested a second competency hearing. Although defendant now sought habeas, he had asked for death at this trial. *See infra* text accompanying notes 163-65 for a discussion of this case); Rumbaugh v. Procunier, 753 F.2d 395 (5th Cir. 1985) (next-friend petition dismissed as defendant found competent); Hays v. Murphy, 663 F.2d 1004 (10th Cir. 1981) (dismissal of next-friend petition reversed and remanded for further competency determination); Smith v. Armontrout, 632 F. Supp. 503 (W.D. Mo. 1986) (next-friend petition dismissed as defendant found competent); Groseclose *ex rel.* Harries v. Dutton, 594 F. Supp. 949 (M.D. Tenn. 1984) (next-friend has standing where defendant is incompetent and has not voluntarily waived his postconviction remedies because of death row conditions). For a thorough commentary on standards applied to determine competency and voluntariness, see Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 876-94 (1983).

100. 429 U.S. 1012 (1976).

101. *Id.* at 1013.

102. *Id.* at 1013-17.

103. *Id.* at 1014.

104. *Id.* at 1017 n.7.

105. *Id.* at 1017.

106. *Id.*

107. *Id.* at 1018.

consent to an unconstitutional punishment.[108] Justice Marshall, also writing in dissent, stated that the eighth amendment "expresses a fundamental interest of society in ensuring that state authority is not used to administer barbaric punishments," which interest an individual defendant cannot waive.[109]

In two subsequent cases, the Court was even less explanatory. In *Lenhard v. Wolff*[110] the Court denied an application for a stay of Jesse Bishop's execution. Bishop's public defenders had filed the application without his consent. In *Hammett v. Texas*[111] the Court, in a per curiam opinion, permitted the defendant to withdraw his petition for certiorari, which had been filed by his attorney against his wishes.[112] Citing *Gilmore* and Rule 60 of the Rules of the Supreme Court, the Court found "no basis under Rule 60" for denying the defendant's motion.[113] Rule 60 required a dismissal when an appellant or petitioner moved to dismiss the proceeding in which he or she was a party.[114]

The Court has avoided the eighth amendment issue implicit in these cases. By resolving the third-party petition cases on a jurisdictional basis, the Court has left open the question of whether state appellate review is a necessary part of the eighth amendment's guarantees and, if so, whether a defendant can waive its protection. Although the Court has upheld statutory schemes with appellate review provisions, it has never explicitly held that appellate review is mandatory under the eighth amendment.[115] Although a few state appellate courts have decided whether defendants could waive appellate review of a death sentence, their decisions, too, do not reflect a clear-cut view of eighth amendment requirements. These state decisions are considered next.

2. State Appellate Review

States with a death penalty are virtually unanimous in requiring appellate review of a capital sentence. All but one of the thirty-seven

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108. *Id.*

109. *Id.* at 1019. Justice Blackmun also dissented individually. In his view, the questions of standing and constitutionality of the Utah death penalty statute were not "insubstantial" and should have been given "plenary, not summary, consideration." *Id.* at 1020.

110. 444 U.S. 1301 (1979).

111. 448 U.S. 725 (1980).

112. *Id.*

113. *Id.*

114. 28 U.S.C.A. SUP. CT. R. 53 (19) R.60(b) (1980), in effect when *Gilmore* was decided, is now codified as Rule 53.

115. *See* Pulley v. Harris, 465 U.S. 37 (1984). The Court refers to three opinions in *Furman* whose authors found meaningful appellate review necessary. *Id.* at 45. In *Pulley* itself, the Court found sufficient safeguards, including appellate review, without a proportionality review. *Id.* at 51-54. The Court never states, however, that appellate review itself is necesary. *Id.* at 50-51.

states with the death penalty have an automatic review provision.[116] The issue of a defendant's right to waive appellate review has been raised in several of those states.[117] The courts have been forced to decide whether a defendant's interest in death is outweighed by a societal interest. Several courts facing this issue have held that a defendant cannot waive automatic review required by a state statute.[118] Whether the appellate review is constitutionally mandated is not directly before the courts[119] because review of the death sentence is statutorily required. The primary issue facing these courts, therefore, is not whether waiver of the appeal is synonymous with waiving an eighth amendment protection, but whether the waiver of a statutory protection is permissible. Nevertheless, the reasoning of these courts has constitutional underpinnings.

One approach taken by the courts is to permit the defendant to waive the appeal of the conviction, but not of the death sentence. Both the Indiana[120] and Nevada[121] courts have used this approach.[122]

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116. *See* ALA. CODE § 12-22-243 (1987); ARIZ. REV. STAT. ANN. R. CRIM. P. 31.2(b) (1987); CAL. PENAL CODE § 1239 (West 1988); COLO. REV. STAT. § 16-11-103(7)(a) (1986); CONN. GEN. STAT. ANN. § 53a-46b (West 1985); DEL. CODE ANN. tit. 11, § 4209(g) (1987); FLA. STAT. ANN. § 921.141(4) (West 1985); GA. CODE ANN. § 17-10-35(a) (1982); IDAHO CODE § 19-2827(a) (1979); ILL. ANN. STAT. ch.110A, para. 606(a) (Smith-Hurd 1985); IND. CODE § 35-50-2-9(h) (1986); KY. REV. STAT. ANN. § 532.075 (Baldwin 1985); LA. CODE CRIM. PROC. ANN. art. 905.9 (West 1984); MD. CODE ANN. art. 27, § 414 (1982); MISS. CODE ANN. § 99-19-105 (1987); MO. ANN. STAT. § 565.035 (Vernon Supp. 1986); MONT. CODE ANN. § 46-18-307 (1987); NEB. REV. STAT. § 29-2525 (1985); NEV. REV. STAT. § 177.055 (1986); N.H. REV. STAT. ANN. § 630:5(vi) (1986); N.J. REV. STAT. § 2C:11-3(e) (Supp. 1987); N.M. STAT. ANN. § 31-20A-4 (1986) N.C. GEN. STAT. § 15A-2000(d)(1) (1983); OHIO REV. CODE ANN. § 2929.05 (Anderson 1987); OKLA. STAT. ANN. tit. 21, § 701.13 (West Supp. 1988); OR. REV. STAT. § 163.150(6) (Supp. 1987); 42 PA. CONS. STAT. § 9711(h) (1982); S.C. CODE ANN. § 16-3-25(A) (Law. Co-op 1985); S.D. CODIFIED LAWS ANN. § 23A-27A-9 (1979); TENN. CODE ANN. § 39-2-205(a) (1982); TEX. CRIM. PROC. CODE ANN. § 37.071(h) (Vernon Supp. 1988); UTAH CODE ANN. § 76-3-206 (1978); VT. R. APP. P. 3(b) (Supp. 1987); VA. CODE ANN. § 17-110.1 (Supp. 1987); WASH. REV. CODE ANN. § 10.95.100 (Supp. 1987); WYO. STAT. § 6-2-103 (1983).

117. There certainly may be cases where defendants do not appeal in a state without a mandatory review. In such a state it would be more perfunctory, involving a failure or choice not to perfect the appeal, the same as in any other criminal case. Even in states with a mandatory review, it is possible that some have interpreted their statutes to permit a waiver. *See, e.g.*, State v. Gilmore, No. 14852 (Utah Nov. 10, 1976) (order permitting Gilmore to withdraw any appeal and to vacate stay of execution in a state with an automatic review).

118. *See infra* text accompanying notes 120-32.

119. The Supreme Court has never directly addressed the issue of whether an automatic appeal is required by the eighth amendment. One state court has interpreted *Gilmore* to mean that the eighth amendment does not require mandatory state review because Gilmore waived his state appeal in Utah. Collins v. State, 261 Ark. 195, 548 S.W.2d 106, 112 (1977).

120. Judy v. State, 275 Ind. 145, 416 N.E.2d 95 (1981).

121. Cole v. State, 101 Nev. 585, 707 P.2d 545 (1985).

Whether the courts have necessarily based these decisions on constitutional or statutory grounds is unclear. The Indiana court, however, found that the mandatory review provision met the constitutional requirement of "assur[ing] 'consistency, fairness, and rationality in the evenhanded operation' of the death penalty statute."[123] This language implies that the appellate review is a necessary part of a constitutional death penalty statute. The Nevada court, on the other hand, more explicitly limited the basis of its decision to a statutory mandate.[124] Nevertheless, even the Nevada court reviewed the proportionality of the sentence in the case before it, a process that was usually considered an eighth amendment requirement in the past.[125]

Other courts have emphasized balancing the public's interest against the individual defendant's choices. The Supreme Court of Pennsylvania held it had jurisdiction to raise, sua sponte, the constitutionality of the state death penalty statute in *Commonwealth v. McKenna*.[126] It held that the defendant had not waived appellate review of the issue by failing to raise it below.[127] The court implicitly found that the appellate review was necessary to meet constitutional standards. It held that the court had a duty to "insur[e] that capital punishment in this Commonwealth comports with the Constitution of the United States . . . ."[128] The California Supreme Court has held that its statute requires an automatic review of the conviction and of the sentence.[129] In both California and Pennsylvania, the courts emphasized the state's interest in rendering justice and ensuring that a death sentence would not be imposed unless appropriate. As the Pennsylvania court noted, although "a defendant may normally make an informed and voluntary waiver of rights personal to himself,

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121. Cole v. State, 101 Nev. 585, 707 P.2d 545 (1985).

122. The Indiana court referred to the *Gilmore* decision as authority that a defendant under sentence of death could constitutionally, knowingly and intelligently, waive state appellate review. *Judy*, 275 Ind. at 145, 416 N.E.2d at 97-98. This misses the point made by Chief Justice Burger in *Gilmore* that the Court was dealing only with waiver of federal appeals subsequent to the State appeal. *See supra* text accompanying note 104.

123. 275 Ind. at 145, 416 N.E.2d at 108 (citations omitted).

124. The Nevada statute required 1) an automatic filing of an appeal that could be waived within 30 days and 2) a review of the sentence regardless of the waiver. *Cole*, 101 Nev. at 589, 707 P.2d at 547-48.

125. *But see* Pulley v. Harris, 465 U.S. 37, 44-57 (1984), which held that a proportionality review is not constitutionally required if the statute adequately limits the discretion of the factfinder.

126. 476 Pa. 428, 383 A.2d 174 (1978).

127. *Id.* at 437-42, 383 A.2d 179-81 (defendant did appeal his conviction in *McKenna*, so whether or not he could waive appeal was not an issue).

128. *Id.* at 441, 383 A.2d at 181.

129. People v. Stanworth, 71 Cal.2d 820, 457 P.2d 889, 80 Cal. Rptr. 49 (1969). This procedure was upheld in a subsequent case before the Ninth Circuit Court of Appeals in Massie v. Summer, 624 F.2d 72 (9th Cir. 1980).

his freedom to do so must give way where a substantial public policy is involved . . . ."[130] The court concluded that, because the death penalty is irrevocable, society's interests supersede the individual defendant's interests.[131] The California court similarly emphasized that a defendant may not waive a right that reflects a "principle of fundamental public policy."[132]

The analysis of public policy in these state cases is important to eighth amendment jurisprudence, even if the decisions are not based on the Constitution. The statutes were drafted in response to the United States Supreme Court's decisions on the death penalty. The state courts recognized the constitutional basis of their statutes in their statements regarding the assurance of fairness in imposing the death penalty.[133] The analysis used in these state cases concerning waiver of an appeal can appropriately be applied to the trial-level penalty phase. The critical issue is the same: a balancing of the public policy against the individual defendant's choices.

C. Mitigating Evidence at the Penalty Phase of Trial

The failure to present mitigating evidence is most often raised as an ineffective assistance of counsel claim under the sixth amendment. The sixth amendment's implied guarantee that a defendant can control his own defense[134] would appear to control whether or not mitigating evidence is presented in the penalty phase. Both the defendant's right to self-representation and to make decisions which determine the merits of the case could lead to the conclusion that the defendant should control the presentation of evidence on his behalf. But this sixth amendment focus ignores the competing eighth amendment concern of whether the death penalty is unconstitutionally cruel and unusual.

The few courts which have faced the issue of a defendant who refuses to present mitigating evidence have advanced differing theories.[135] One end of the spectrum is represented by the Nevada and

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130. *McKenna*, 476 Pa. at 440, 383 A.2d at 181.

131. *Id.*

132. *Stanworth*, 71 Cal. 2d at 834, 457 P.2d at 899, 80 Cal. Rptr. at 59. The California court points out that the inability to waive a right occurs in other situations as well where a fundamental public policy is at stake, such as an invalid condition of probation or separation of a jury after commencement of deliberations. *Id.* at 833-34, 457 P.2d at 898-99, 80 Cal. Rptr. at 58-59. Stanworth was not permitted to waive the jury in the penalty phase. *Id.* at 829, 457 P.2d at 895, 80 Cal. Rptr. at 55.

133. *See supra* text accompanying notes 123-32.

134. *See supra* text accompanying notes 77-80.

135. The issue may have arisen in other cases as well which were decided on other grounds. *See, e.g.*, Commonwealth v. Davis, 479 Pa. 274, 388 A.2d 324

Louisiana courts which have held that a defendant's choice to forego presentation of mitigating evidence does not offend eighth amendment principles and is consistent with the defendant's rights under the sixth amendment.[136] At the other end of the spectrum, the California and New Jersey courts have required the presentation of mitigating evidence over the objection of the defendant.[137] The Fifth Circuit Court of Appeals took a middle-of-the-road approach by upholding a death penalty against a sixth amendment challenge, without addressing any eighth amendment issues.[138] Also on a middle ground, a Missouri appellate court has found no sixth amendment violation under similar circumstances, but raised, without resolving, the eighth amendment issue.[139]

The most direct statement by a court that there is no eighth amendment violation when the defendant chooses not to present mitigating evidence is advanced by the Nevada Supreme Court. In *Bishop v. State*[140] the Nevada Supreme Court found no constitutional error in the failure to consider mitigating evidence at the penalty phase.[141] Bishop represented himself with only standby counsel available.[142] He pled guilty to the capital charge of murdering a Las Vegas casino employee during the course of a robbery.[143] A sentencing hearing was conducted before a three-judge panel.[144] The state presented evidence of aggravating circumstances and Bishop presented nothing. His standby counsel advised the court that mitigating evidence existed, but Bishop refused to have it presented. The three-judge panel conducted no further inquiry.[145] On appeal, standby counsel[146] argued that the panel erred in failing to consider mitigating evidence.[147] The Nevada court reasoned that Bishop's sixth amendment right to self-representation would have been abrogated if he

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(1978), where the defendant, representing himself, presented no mitigating evidence and made no statement to the jury on his behalf. Because the court reversed the death sentence and imposed life imprisonment on the basis of the unconstitutionality of the sentencing legislation, it never addressed the issue of the constitutionality of a death sentence imposed without a consideration of mitigating evidence.

136. *See infra* text accompanying notes 140-65.

137. *See infra* text accompanying notes 197-242.

138. *See infra* text accompanying notes 166-73.

139. *See infra* text accompanying notes 174-94.

140. 95 Nev. 511, 597 P.2d 273 (1979) (Bishop's attorneys sought a third-party application for a stay of his execution in *Lenhard v. Wolff*).

141. *Bishop*, 95 Nev. at 517, 597 P.2d at 277.

142. *Id.* at 513-14, 597 P.2d at 274.

143. *Id.* at 511, 597 P.2d at 273.

144. *Id.* at 514, 597 P.2d at 274.

145. *Id.* at 515, 597 P.2d at 274.

146. Apparently the trial standby attorneys were asked to present the appeal. *Id.* at 516, 597 P.2d at 275.

147. *Id.* at 516, 597 P.2d at 276.

had not been allowed to control the direction of his defense, including the decision not to present one.[148] The court viewed the opportunity to present mitigating evidence as sufficient.[149] The dissenting justice recognized the systemic interest in the integrity of the criminal justice process.[150] He argued that the right to self-representation should have yielded to the state's interest and constitutional duty under the eighth amendment to assure a just sentence.[151]

In *State v. Felde*[152] the Louisiana Supreme Court relied on *Bishop* to find that a defendant could block efforts to present mitigating evidence. The aggravating circumstance in this case was the status of the victim as a police officer.[153] Felde, seated in the backseat of a squad car after being arrested on a public intoxication charge, grabbed the gun of the officer in the driver's seat and shot him three times.[154] An escapee from a Maryland prison where he was serving a sentence for manslaughter and assault, Felde claimed that he had intended to shoot himself, not the officer.[155] He claimed that the gun fired when the officer pushed him backwards.[156] Felde was convicted in the guilt phase. The defense attorney agreed, at Felde's request, to ask the jury for death if the jury failed to find Felde not guilty by reason of insanity.[157] Both Felde, as co-counsel, and his attorney asked that the death penalty be imposed on him in the penalty phase.[158]

The Louisiana court primarily focused on the sixth amendment, eliminating the eighth amendment concern by an expansion of *Gilmore*.[159] The court interpreted *Gilmore* as permitting a waiver of constitutional rights at the trial as well as at the appellate level.[160] As is typical, the issue was framed as a sixth amendment, ineffective assistance of counsel claim. Appellate counsel faulted the trial attorney for acquiescing in Felde's demand that no alternatives other than not guilty by reason of insanity or guilty of first degree murder with the death penalty be pursued.[161] The Louisiana court found no fault in the defense attorney's actions on the basis that a defendant has

148. *Id.*
149. *Id.*
150. *Id.* at 516, 597 P.2d at 278-79.
151. *Id.*
152. 422 So. 2d 370 (La. 1982), *cert. denied*, 461 U.S. 918 (1983).
153. *Id.* at 375.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 393.
158. *Id.* at 393-94.
159. 429 U.S. 436 (1976).
160. *Felde*, 422 So. 2d at 395.
161. *Id.* at 393-95.

the right to control the defense at the penalty phase.[162] In a subsequent habeas appeal, the Fifth Circuit Court of Appeals remanded the case to the federal district court for a determination whether the state court's finding that Felde was competent to stand trial and waive his right to have counsel present mitigating evidence was supported by the record.[163] The court viewed this as an effective assistance of counsel issue.[164] The Fifth Circuit did not appear to question the constitutionality of permitting a competent defendant to waive a trial-level presentation of mitigating evidence.[165]

The Fifth Circuit's focus on the sixth amendment in *Felde* is consistent with its approach in an earlier decision, *Autry v. McKaskle*.[166] In *Autry*, the court was forced to address more directly the constitutional issues faced when a defendant chooses to forego mitigating evidence. However, the court never discussed the eighth amendment. A jury convicted Autry of killing a store clerk in the course of a robbery and sentenced him to death.[167] Autry refused to permit his attorney to call witnesses on his behalf in the penalty phase.[168] In the habeas proceeding, Autry sought a certificate of probable cause and a stay of his execution.[169] Autry claimed he had

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162. *Id.* at 395. The court cited to the denial of Bishop's stay in *Lenhard v. Wolff*, as authority that a waiver of presenting mitigating evidence at the trial stage is not arbitrary punishment. *Id.* The denial of the stay, however, indicates that the Court does not believe it will grant certiorari.

163. Felde v. Blackburn, 795 F.2d 400 (5th Cir. 1986).

164. *Id.* at 401.

165. *Id.* at 401-03.

166. 727 F.2d 358 (5th Cir. 1984). The *Felde* court cited *Autry v. McKaskle* for the proposition that a defendant could direct his attorney not to argue against the imposition of the death penalty without subjecting the attorney to an ineffective assistance of counsel claim if the defendant is competent. *Felde*, 795 F.2d at 401-02.

167. Autry v. Estelle, 706 F.2d 1394, 1398 (5th Cir. 1983).

168. Autry v. McKaskle, 727 F.2d 358, 360-61 (5th Cir. 1984).

169. This was Autry's third habeas proceeding. The first one, which resulted in a denial of relief, did not raise an issue of ineffectiveness of counsel in the penalty phase. Autry v. Estelle, 706 F.2d 1394 (5th Cir. 1983). The United States Supreme Court also denied his request for a stay. Autry v. Estelle, 464 U.S. 1 (1983). He immediately filed a second habeas petition which did allege ineffective assistance of counsel. It was denied by the district court and the circuit court of appeals. However, Justice White granted a stay pending the resolution of Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982), *cert. granted*, 460 U.S. 1036 (1983), where the issue raised was whether a proportionality review was constitutionally required, an issue also raised by *Autry*. After the Supreme Court's decision in Pulley v. Harris, 465 U.S. 37 (1984), that a proportionality review was not necessarily required by the Constitution, Autry pursued only his claim of ineffective assistance of counsel and infliction of cruel and unusual punishment in this habeas proceeding. The eighth amendment claim, rejected by the Fifth Circuit, stemmed from a delay in unstrapping him from the gurney when Justice White issued the stay shortly before his scheduled execution. Autry v. McKaskle, 727 F.2d 358, 363 (5th Cir. 1984).

received ineffective assistance of counsel based on the failure to present mitigating evidence in the penalty stage.[170]

The Fifth Circuit found no constitutional error in the attorney's decision to accede to Autry's choice to block any efforts to present mitigating evidence.[171] The court did not resolve the question whether the decision to forego mitigating evidence is a personal choice of the defendant's or a tactical decision reserved to the lawyer. In the court's view, once Autry knowingly made the decision to preclude mitigating evidence, the attorney was ethically bound to honor his decision.[172] The Fifth Circuit did nothing further to address any eighth amendment issue concerning the imposition of an arbitrary punishment without consideration of mitigating evidence.[173]

In *Trimble v. State*,[174] the Missouri Court of Appeals for the Western District pointedly acknowledged the problem of reconciling the need for ensuring the non-arbitrary imposition of the death penalty through the consideration of mitigating evidence with the role of counsel in adhering to the defendant's decision to forego evidence at the penalty stage of the proceeding.[175] Trimble was convicted of strangling a fellow jail inmate to death to prevent him from revealing that Trimble had subjected him to physical and sexual abuse. He was sentenced to death by a jury.[176] At trial, at a hearing on a postconviction motion to set aside the sentence, and on appeal from a denial of that motion, Trimble tried to block his attorney's efforts to challenge the sentence.[177] At trial, Trimble had barred his attorney from either presenting mitigating evidence or making an argument on his behalf in the penalty phase of the trial.[178]

On appeal from the denial of the postconviction motion, Trimble's attorneys nevertheless argued ineffective assistance of counsel in the penalty phase.[179] They first argued that the American Bar

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170. *Id.* at 360. Autry further claimed that, if the attorney failed to gather mitigating evidence because the defendant blocked such efforts, the attorney was also ineffective in not requesting a competency determination. *Id.* The court rejected this argument. *Id.* at 362.

171. *Id.*

172. *Id.* The court did note, however, that the attorney should have made a record of disagreeing with the defendant, citing to the ABA's Defense Function Standard 5.2(c) (1979). *Id.*

173. *Autry*, 727 F.2d at 362-63.

174. 693 S.W.2d 267 (Mo. Ct. App. 1985).

175. *Id.* at 280.

176. *Id.* at 269.

177. *Id.* at 276. Defendant filed a motion pro se in a federal appeal, stating his counsel had no authority to raise issues regarding his sentencing procedure. *Id.*

178. *Id.*

179. Counsel for Trimble raised multitudinous issues regarding the sentencing phase, but the court found the issue of client decision-making dispositive. *Id.* The

Association Defense Function[180] list of client decisions was exhaustive.[181] Because the Defense Function divides trial decisions into those a client makes and those an attorney makes, they argued that the decision whether to present mitigating evidence was part of the attorney's responsibilities.[182] They then argued that the trial attorney was incompetent in not making a tactical decision to further Trimble's interests in the penalty phase by presenting mitigating evidence.[183] The State argued that it was the defendant's choice whether to pursue legal action on his own behalf, citing the cases in which the Supreme Court rejected third-party appeals[184] on behalf of a defendant.

The Missouri court dismissed the state's argument by distinguishing an appeal from a trial. The court noted that, at the point when a defendant is deciding whether or not to pursue an appeal, the "normal defense function" has already been performed.[185] The court referred to the American Bar Association's Model Code and the Defense Function in finding that a defendant has the option to make informed choices.[186] The court recognized the irony if a defendant could waive the right to counsel and represent himself and yet, could not make decisions about his defense when he was represented by counsel.[187] The court further noted that, under the current state of the law, counsel is virtually insulated from an ineffectiveness claim

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issues raised included:

> failing to present argument or evidence at sentencing or at trial and stating to the jury none would be presented; failing to raise issues concerning evidence of other crimes relating to the confinement, which was the aggravating circumstance; failing to request a separate panel for punishment after evidence of other crimes was presented; failing to request instructions on presumption of innocence, of aggravating circumstances, and requiring a finding that aggravating circumstances outweighed mitigating circumstances beyond a reasonable doubt. *Id.*

Further error was alleged in the postconviction motion hearing in "finding . . . a knowing and voluntary waiver of counsel, predicated on the movant's direction not to present evidence and argument at the sentencing hearing." *Id.* Error was also claimed in "refusing to admit expert testimony of lawyers on the issue of ineffectiveness, a claimed defect in the jury's sentencing verdict, and asserted improper proportionality review." *Id.* They also argued that Trimble had involuntarily waived his right to counsel. *Id.* at 277. This apparently arose because Trimble had a history of psychiatric problems, beginning at age five or six and continuing through his suicide attempt while in jail at an earlier time. *Id.*

180. *See infra* text accompanying note 265.

181. *Trimble*, 693 S.W.2d at 277.

182. *Id.*

183. *Id.*

184. *Id.* The State apparently raised cases such as *Gilmore v. Utah* and *Lenhard v. Wolff*, where third parties tried to prevent executions of individuals who wanted to end all attempts to save their lives. *See supra* text accompanying notes 100-114.

185. *Trimble*, 693 S.W.2d at 277.

186. *Id.* at 279.

187. *Id.*

when he or she accedes to the defendant's wishes.[188] The court consequently found no violation of the sixth amendment in the sentencing phase of this case.[189]

Although the Missouri court further appropriately defined the issue as a conflict between the eighth and sixth amendments, it failed to take its holding beyond the ineffectiveness claim. Judge Dixon, writing for the panel, recognized that mitigating evidence is essential to a constitutionally imposed death penalty. He stated that "it is the information and guidance given to the sentencing authority which enables it to exercise discretion in imposing the death penalty without random, freakish, or discriminatory results."[190] The court further commented that this concern for a just imposition of the penalty was greater than the individual rights of the defendant.[191] The court noted that the function of weighing aggravating and mitigating factors was "neglected" in this case.[192] Nevertheless, the court chose to decide the issue within the realm of the sixth amendment only and could find no fault with counsel's actions.[193] Trimble's conviction, however, was reversed on other grounds.[194]

The California Supreme Court took the concern of the Missouri court one step further, holding that mitigating evidence must constitutionally be presented even if the defendant objects.[195] Although speaking in eighth amendment terms, the California court ultimately relied on both a statutory theory and an interesting interpretation of the sixth amendment to support its requirement of mitigating evidence.[196]

In *People v. Deere*,[197] the defendant pled guilty to one charge of first degree murder, two charges of second degree murder, and the

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188. *Id.*

189. *Id.* at 280.

190. *Id.* at 278 (citation omitted).

191. *Id.*

192. *Id.*

193. *Id.* at 278, 280. The court indicated that, without the Missouri precedents on effective assistance of counsel, it might have rendered a decision that "[gave] precedence to the principle of *Gregg*." *Id.* at 280.

194. The court found ineffective assistance of counsel in the guilt phase because the trial counsel failed to pursue knowledge that the victim's mother paid two of the State's witnesses. *Id.* at 275.

195. People v. Deere, 41 Cal. 3d 353, 710 P.2d 925, 222 Cal. Rptr. 13 (1985).

196. *Id.*

197. *Id.* People v. Burgener, 41 Cal. 3d 505, 714 P.2d 1251, 224 Cal. Rptr. 112 (1986) applied *Deere* to a similar situation where defendant precluded the introduction of any mitigating evidence on his behalf, and his attorney read a statement to the jury in which he stated that the defendant wanted to die, and the death penalty was imposed. The California court reversed. The State conceded error in another post-*Deere* case, *People v. Bloyd*, 43 Cal. 3d 333, 729 P.2d 802, 233 Cal. Rptr. 368 (1987), where defense counsel failed to present mitigating evidence

multiple-murder special circumstance.[198] The addition of the special circumstance[199] elevated the charge of first degree murder to capital homicide.[200] Deere had killed the husband and two daughters of his girlfriend's sister. He waived, with the consent of his counsel as required by the California Constitution,[201] the penalty phase jury.[202] He offered no evidence of mitigation to the judge.[203] Although the attorney apparently explained why he acquiesced in his client's wishes, he did make an argument to the court that life imprisonment should be imposed because aggravating circumstances did not outweigh mitigating circumstances.[204] The attorney's decision to accede to Deere's position was based on his belief that Deere felt that pursuing mitigating evidence would "'cheapen' his relationship with his family and remove 'the last vestige of dignity he has'".[205] The attorney further concluded that he had "no right whatsoever to infringe upon [Deere's] decisions about his own life".[206] Deere made a statement himself to the court that death was appropriate.[207] The trial court imposed the death penalty.[208]

California has a mandatory appeal from a sentence of death that cannot be waived by the defendant.[209] On appeal, Deere's new

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because the defendant "expressly informed [defense counsel] that he didn't want this kind of evidence to be presented." 43 Cal. 3d at 364, 729 P.2d at 821, 233 Cal. Rptr. at 386.

198. 43 Cal. 3d at 356, 710 P.2d at 926, 222 Cal. Rptr. at 14-15. In California, the defense counsel must consent to the plea to a capital charge. CAL. PENAL CODE § 1018 (West 1985).

199. CAL. PENAL CODE § 190.2(a)(3) (West Supp. 1988) was charged in *Deere*. It reads:

> (a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:
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> . . .
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> (3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree.

200. *See supra* text accompanying notes 16-20.

201. *Deere*, 41 Cal. 3d at 359-60, 710 P.2d at 928, 222 Cal. Rptr. at 17. CAL. CONST. art. I, § 16 provides: "A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel."

202. *Deere*, 41 Cal. 3d at 357, 710 P.2d at 926, 222 Cal. Rptr. at 15.

203. *Id.* 710 P.2d at 926, 222 Cal. Rptr. at 15

204. *Id.* at 360-61, 710 P.2d at 929, 222 Cal. Rptr. at 17-18. The attorney also told the court that family members were willing to testify on Deere's behalf. *Id.* at 361, 710 P.2d at 929, 222 Cal. Rptr. at 18.

205. *Id.* at 361, 710 P.2d at 929, 222 Cal. Rptr. at 18.

206. *Id.*

207. *Id.*

208. *Id.* at 357, 710 P.2d at 926, 222 Cal. Rptr. at 15.

209. *Id.* (citing CAL. PENAL CODE § 1239(b) (West Supp. 1988). *See also supra* text accompanying note 129.

attorneys argued, inter alia,[210] ineffective assistance of counsel for the failure to offer mitigating evidence.[211] The California Supreme Court affirmed the convictions, but reversed the penalty.[212]

The California court emphasized the public's interest in assuring a just punishment.[213] The court acknowledged that, if the only question were whether a defendant could choose to die, the answer would be affirmative.[214] However, the court recognized a "fundamental public policy against misusing the judicial system to commit a state-aided suicide."[215] The court reasoned that the absence of mitigating information before the sentencer also injected unreliability into the process of imposing the death penalty.[216] This created the spectre of an unconstitutionally arbitrary punishment.[217] Moreover, the failure to introduce mitigating evidence left the record blank on appeal.[218] The statutorily required appellate review[219] also safeguarding the public's interest in assuring a fair trial and just punishment, would be meaningless without a record to review.[220] This eighth amendment and statutory analysis recognized society's interest, but the court still had to solve the question of who should present the mitigating evidence.

The California court found the defense attorney to be the appropriate vehicle for introducing the required mitigating evidence.[221] The court relied on the sixth amendment to hold that Deere had received ineffective assistance of counsel when his attorney failed to present mitigating evidence.[222] The court sidestepped the ethical conflict in requiring counsel to present evidence against the defendant's wishes by using the concept of an attorney as an "officer of the court."[223] This status, according to the court, requires the attorney to bring all relevant mitigating information before the court so that the sentencer

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210. The appeal also claimed error in failing to conduct a competency hearing and ineffective assistance of counsel in concurring in the waiver of the penalty phase jury. The court rejected both of these claims. *Deere*, 41 Cal. 3d at 357-59, 710 P.2d at 926-28, 222 Cal. Rptr. at 15-17.

211. *Id.* at 360-61, 710 P.2d at 929, 222 Cal. Rptr. at 17.

212. *Id.* at 368, 710 P.2d at 934, 222 Cal. Rptr. at 23.

213. *Id.* at 363-64, 710 P.2d at 930-31, 222 Cal. Rptr. at 19-20.

214. *Id.* at 361, 710 P.2d at 929, 222 Cal. Rptr. at 18. Suicide is not illegal in California, although aiding in a suicide is prohibited. CAL. PENAL CODE § 401 (West 1970).

215. *Deere*, 41 Cal. 3d at 363, 710 P.2d at 930, 222 Cal. Rptr. at 19.

216. *Id.* at 363-64, 710 P.2d at 930-31, 222 Cal. Rptr. at 19-20.

217. *Id.*

218. *Id.*

219. CAL. PENAL CODE § 1239(b) (West Supp. 1988).

220. *Deere*, 41 Cal. 3d at 363-64, 710 P.2d at 930-31, 222 Cal. Rptr. at 18-19.

221. *Id.* at 366, 710 P.2d at 933, 222 Cal. Rptr. at 21.

222. *Id.* at 365, 710 P.2d at 932, 222 Cal. Rptr. at 21.

223. *Id.* at 367 n.5, 710 P.2d at 933-34 n.5, 222 Cal. Rptr. at 22 n.5.

can fulfill its duty to impose a just sentence.[224] The court expressed the opinion that the decision of what evidence to put on in the penalty phase is the attorney's, not the defendant's.[225] The court stated that a reasonable, competent attorney will introduce available mitigating evidence.[226] Although acknowledging tactical decisions by attorneys to introduce some and exclude other possible mitigating evidence,[227] the court found the total abdication in this case unacceptable. The court did not accept the distinction between cases where a defendant wants to live and cases where the defendant wants to die.[228] In fact, the court cited as authority cases which held there had been ineffective assistance of counsel for failing to present mitigating evidence on behalf of defendants who wanted to live.[229]

Justice Broussard, with whom Justice Grodin joined, concurred in the reversal of the penalty on the grounds the defendant did not receive a "fair and balanced" hearing, but did not agree with the ineffectiveness of counsel grounds.[230] Justice Broussard recognized

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224. *Id.*

225. *Id.* at 364, 710 P.2d 931, 222 Cal. Rptr. at 20. The court quotes an earlier California case which uses language comparable to the American Bar Association Defense Function definition of the attorney's decisions. Part of the attorney's authority under this language is to determine "what witnesses to call." *See infra* text accompanying notes 263-66.

226. *Deere*, 41 Cal. 3d at 364-65, 710 P.2d at 931-32, 222 Cal. Rptr. at 20-21.

227. *Id.* at 364 n.3, 710 P.2d at 931 n.3, 222 Cal. Rptr. at 20 n.3.

228. The court defines the role of counsel without regard to the position of the defendant. *See id.* at 364, 710 P.2d at 93, 222 Cal. Rptr. at 20.

229. For example, the court cites People v. Frierson, 25 Cal. 3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (1979), where the defense counsel introduced no mitigating evidence but apparently argued for life. The court reversed the conviction on the grounds of ineffective assistance of counsel in the penalty phase. *See Deere,* 41 Cal. 3d at 364-65, 710 P.2d at 931-32, 222 Cal. Rptr. at 20-21.

230. *Deere*, 41 Cal. 3d at 368-70, 710 P.2d at 934-35, 222 Cal. Rptr. at 23-24. Justice Lucas similarly disagreed with the majority on the ineffectiveness of counsel claim, but would not have found any denial of a fair hearing as in Justice Broussard's opinion. *Id.* at 370-72, 710 P.2d at 935-37, 222 Cal. Rptr. at 24-25. Justice Lucas concurred with affirming the convictions, but dissented on reversing the penalty. *Id.* His view was based on the theory that mandating mitigating evidence impinged on the defendant's rights to due process, privacy and self-representation. *Id.* at 370, 710 P.2d at 935, 222 Cal. Rptr. at 24. He pointed out that compelling evidence against a defendant's wishes may violate his right to represent himself. *Id.* at 371, 710 P.2d at 936, 222 Cal. Rptr. at 25. He expressed the view that the reliability of the punishment could be preserved without mitigating evidence by "assuring the accuracy of the guilt and penalty determinations . . . . " *Id.* at 371-72, 710 P.2d at 936, 222 Cal. Rptr. at 25. However, he did not explain how the accuracy would be safeguarded. *Id.* at 371-72, 710 P.2d at 936-37, 222 Cal. Rptr. at 25. Justice Lucas further noted that Deere's attorney had, in fact, asked for life on behalf of Deere. *Id.* at 371, 710 P.2d at 936, 222 Cal. Rptr. at 25. In his view, presenting no mitigating evidence could have conceivably been the result of a strategy decision by the attorney to rely on defendant's statement of remorse alone to support a plea for life. *Id.* at 371-72, 710 P.2d at 936-37, 222 Cal. Rptr. at 25.

the dilemma in the need for the mitigating evidence to ensure a fair sentence and the intrusion into the attorney-client relationship which occurs if the defense attorney is required to present evidence in contravention of his client's wishes.[231] He suggested several alternatives, including appointing an additional attorney to introduce mitigating evidence, permitting the defendant to speak on his own behalf, having the court call the mitigating witnesses, and having the defense attorney present both defendant's position and the mitigating evidence.[232] These alternatives, he believed, could assure both "the fairness and reliability of the penalty determination, and the defendant's rights to personal choice and dignity."[233]

The Appellate Division of a Superior Court of New Jersey has also concluded that mitigating evidence must be presented regardless of the defendant's position. In *State v. Hightower*,[234] the court granted a leave to appeal by the defense attorney after the guilt phase of the trial but before the penalty phase.[235] The attorney was appealing a ruling by the trial judge that Hightower's refusal to present mitigating evidence was conclusive.[236] The attorney wanted to present six witnesses to mitigate the circumstances of the crime which involved the murder of a grocery store employee during a robbery.[237] The court noted the conflict between "the desires of the client" and "the constitutional necessity to insure that the ultimate penalty is not extracted in a 'wanton and freakish manner.'"[238] The court made note of the professional conduct rules which would require an attorney to further the client's position.[239] Reference was also made to *Gilmore* for the proposition that a defendant could waive federal review.[240] Ultimately, however, the New Jersey court held that the defense attorney should be permitted to present the mitigating evidence in order for the appellate court to conduct a meaningful mandatory review of the proportionality of the sentence.[241] The individual choice of the defendant has to yield because

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231. *Id.* at 369, 710 P.2d at 935, 222 Cal. Rptr. at 23-24. "The defense of a capital case often requires a close and trusting relationship between counsel and client; yet our decision requires counsel to violate that trust, to take a position against his client, and perhaps to present evidence revealed to him in confidence by his client." *Id.*

232. *Id.* Ultimately, the trial court in *Deere* did appoint an attorney whose sole purpose was to present mitigating evidence. *See infra* note 357.

233. *Deere*, 41 Cal. 3d at 369, 710 P.2d at 935, 222 Cal. Rptr. at 24.

234. 214 N.J. Super. 43, 518 A.2d 482 (N.J. Super. Ct. App. Div. 1986).

235. *Id.* at 482.

236. *Id.*

237. *Id.*

238. *Id.* at 483 (quoting Furman v. Georgia, 408 U.S. 238, 309-10 (1972)).

239. *Id.*

240. *Id.*

241. *Id.*

"there are higher values at stake here than a defendant's right to self-determination."[242]

The New Jersey court's reasoning is consistent with the rationale advanced by the California court that mitigating evidence on the trial level is necessary to enable a meaningful mandatory review process. Without a record containing mitigating evidence, the courts cannot conduct more than a pro forma review of the balance between aggravating and mitigating circumstances in an individual case. The California court's reasoning is broader, however, than the New Jersey court's analysis because it explicitly relies on the eighth amendment as well. California's decision also has more far-reaching effects on the defense attorney's role. The New Jersey court's opinion simply provides that the defense attorney in Hightower's case, who wanted to present mitigating evidence, must be allowed to do so. There is no direct guidance from the New Jersey court on what the trial judge should do when the defense attorney believes he or she must accede to the defendant's choice to forego mitigating evidence. The California court in *Deere* was forced to meet this issue directly since the defense attorney refused to present mitigating evidence.

The reliance on the sixth amendment in Nevada, Louisiana, and the Fifth Circuit[243] which focuses directly on the defendant's choice to forego mitigating evidence in the penalty phase, has resulted in permitting death sentences to stand without any guarantee of a non-arbitrary imposition of the death penalty. The courts have correctly found that an individual defendant may personally waive sixth amendment protections. This is further discussed later as a reason why the defense counsel should not be required to present the mitigating evidence. However, an exclusive focus on the sixth amendment ignores the importance of the eighth amendment protection of the public interest in non-arbitrary imposition of sentences of death. The Nevada and Louisiana decisions are examples of the minimization of the eighth amendment interest. Those courts held that an individual defendant could waive the presentation of mitigating evidence.[244] The Missouri and Fifth Circuit decisions similarly avoided the eighth amendment implications by exclusively addressing the sixth amendment.[245] Only the California and New Jersey courts have attempted to accommodate both sixth and eighth amendment values.[246]

The eighth amendment values should not be compromised. Permitting a defendant to waive or forego the presentation of mitigating evidence defeats the public's interest inherent in the eighth amend-

242. *Id.* at 484 (quoting Mayberry v. Pennsylvania, 400 U.S. 455, 468 (1971)).
243. *See supra* text accompanying notes 140-73.
244. *Id.*
245. *Id.*
246. *See supra* text accompanying note 198-242.

ment. In *Furman*, the majority of the justices viewed the eighth amendment as precluding the imposition of arbitrary punishments.[247] Justices Brennan and Marshall emphasized that the protection of the eighth amendment is grounded in preserving the dignity of every individual, even those convicted of heinous crimes.[248] The societal interest at stake is respect for the criminal justice system and a society which only imposes such a severe penalty as death under controlled, fair circumstances. The emphasis of the Court since *Furman* has been on the necessity of considering mitigating circumstances of the individual defendant as a means of preventing an arbitrary imposition of the death penalty.[249] Because not all murders warrant death in any state, mitigating evidence is necessary to prevent a return to pre-*Furman* days. If the defendant waives presentation of mitigating evidence,[250] there is no guarantee that there is a meaningful distinction between those chosen to live and those chosen to die.

Limits on an individual defendant's ability to waive constitutional rights are warranted when society's interests are balanced against those of the defendant. The magnitude of both the societal interest and the penalty in capital cases calls for valuing the interest in non-arbitrariness above the choice of an individual defendant. There is no correlative right to choose a penalty. The balancing of interests is based on the same analysis engaged in by the Court in *Singer* in requiring the consent of court and counsel to waive a jury.[251] The fairness of the proceeding is paramount to the defendant's free choice.[252] Constitutional protections are maintained by affording a defendant the consideration of mitigating evidence just as constitu-

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247. *See supra* text accompanying notes 41-45.

248. Justice Brennan states: "The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings." *Furman*, 408 U.S. at 270.

Justice Marshall states: "The criminal acts with which we are confronted are ugly, vicious, reprehensible acts. Their sheer brutality cannot and should not be minimized. But, we are not called upon to condone the penalized conduct; we are asked only to examine the penalty imposed . . . and to determine whether or not it violates the Eighth Amendment." *Id.* at 315. More recently, in Ford v. Wainwright, 106 S. Ct. 2595, 2600 (1986), Justice Marshall, speaking for the majority which held it unconstitutional to execute a defendant who is presently insane, stated that the Court must determine "whether a particular punishment comports with the fundamental human dignity that the Amendment protects."

249. *See supra* text accompanying notes 50-65.

250. The Court has recognized instances where the defendant and his or her attorney have made a tactical decision not to present mitigating evidence at the penalty proceeding. However, the tactical decision was based on believing the jury would be more likely to find mitigating circumstances outweighing aggravating circumstances on the basis of evidence already heard. *See* Darden v. Wainwright, 106 S. Ct. 2464 (1986).

251. 380 U.S. 34, 36 (1965).

252. *See supra* text accompanying notes 85-86.

tional protections are furthered by affording a defendant a jury. The Supreme Court's strong protection of the right to present mitigating evidence reflects its recognition that the eighth amendment safeguards are preserved primarily through a factual presentation.[253] As in a rejected plea bargain, there is no factual basis on which the death penalty may be imposed without consideration of mitigating as well as aggravating circumstances.

Moreover, courts in states with a mandatory review of capital sentences have totally precluded a waiver of the appeal by the defendant largely on the basis of the public interest at stake.[254] Although these courts had a statutory basis on which to rely in lieu of a constitutional theory, the balancing of society's interests against the interest of an individual defendant was still the central issue.[255] Permitting a waiver of the presentation of mitigating evidence at the trial level not only precludes a meaningful review by an appellate court, but strips the criminal justice system of any possibility of guaranteeing non-arbitrariness in determining who dies. This is tantamount to permitting the waiver of an appellate review.

Mitigating evidence is crucial precisely because it is presented at the trial level. Society's interest in preventing arbitrary imposition of the death penalty can be protected most effectively at the trial level. It is in the trial court where evidence is heard; and where the factfinder makes judgments from observation of witnesses. The appellate process is a review of alleged errors of law, not a factfinding process. The judgments of an appellate tribunal are of necessity limited to the record. Where society's interest is met by an affirmative consideration of mitigating facts, the proceedings in the trial court are critical to effective protection of that interest.

The practical dilemma is deciding who should present the evidence of mitigating circumstances. Because the most likely candidate is the defendant's attorney, issues of both professional ethics and constitutional considerations of effective assistance of counsel arise. The next section focuses on 1) whether professional ethical obligations permit or require a defense attorney to present mitigating evidence over the objection of the defendant and 2) whether the defendant is denied effective assistance of counsel if the defense attorney fails to present mitigation in accordance with the defendant's wishes.

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253. *See supra* text accompanying notes 50-65.

254. *See supra* text accompanying notes 120-33.

255. *See, e.g.*, Commonwealth v. McKenna, 476 Pa. 428, 383 A.2d 174, 181 (1978) (waiver is not designed to block giving effect to a strong public interest which is itself a jurisprudential concern; waiver is not a means for allowing defendant to choose his own sentence); Judy v. State, 275 Ind. 145, 416 N.E.2d 95 (1981); People v. Stanworth 71 Cal. 2d 820, 457 P.2d 889, 80 Cal. Rptr. 49 (1969) (state has an interest which the defendant cannot extinguish).

IV. Should the Defense Attorney Present Mitigating Evidence?

A. Professional Ethics Considerations

An attorney is bound to follow the ethical principles established by the legal profession. Each state has adopted its own code of professional ethics. Most[256] follow some version of the American Bar Association's Model Code of Professional Responsibility.[257] The American Bar Association recently adopted a new code, the Model Rules of Professional Conduct.[258] The ABA has also promulgated Standards Relating to the Administration of Criminal Justice which include a section on the role of the criminal defense attorney, entitled The Defense Function.[259] Although individual states may vary in adoption of these rules,[260] the ABA standards provide an overall view of the underlying ethical values and obligations involved in representing a criminal defendant. The criminal defense attorney's obligations to a client who wishes to forego mitigating evidence will thus be analyzed using the ABA guidelines.

Three interrelated ethical concerns arise when the defendant wants to forego mitigating evidence. First, to what extent are decisions regarding tactics and the presentation of evidence the defendant's? Second, as a "zealous advocate," what is the attorney's obligation to the defendant? Third, is the obligation to represent one's client zealously tempered to any extent by virtue of the lawyer's status as an "officer of the court"? Although the language varies in the two Codes and the Defense Function, the principles are the same. The attorney's ethical obligations compel allegiance to the client's decision whether or not to present mitigating evidence.

The thrust of the ethical guidelines requires an attorney to abide by the client's decisions on the goals of the representation. Although the attorney maintains control of how to present the client's case, it is the client who determines the objectives. The Model Rules explicitly provide that an attorney must accept the client's choice of goals: "[a] lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued."[261] The ABA Code states

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256. Over forty states adopted a version of the ABA Code. *See* The Lawyer's Handbook A1-2 (1975).

257. Model Code of Professional Responsibility (1979).

258. The model rules were adopted August 1983 by the ABA.

259. The standards were approved in 1979.

260. *See, e.g.*, Mo. Sup. Ct. R. 4; Tex. Stat. Ann. § 8 (Vernon 1973).

261. Model Rules of Professional Conduct Rule 1.2 (1983). This obligation is subject to three qualifications: that the objectives may be limited if the client

the same obligation by providing that the lawyer may decide non-substantive matters and courses to take, but that the ultimate decisions on matters affecting the merits belong to the client.[262]

Unfortunately, the ethical codes inadequately define what constitutes an "objective" or a decision on the "merits." The only specific examples that the ABA Code gives are the client's decisions on what plea to enter and whether to take an appeal.[263] The Model Rules, following the standards of The Defense Function, state that it is the defendant's decision "as to a plea to be entered, whether to waive jury trial and whether the client will testify."[264] The Defense Function lists certain decisions that are exclusively the attorney's, such as "what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions . . . ."[265] No examples are given of a decision on the merits or of an objective in a sentencing context. The Defense Function merely provides that an attorney must advise the defendant of the alternatives and their consequences as well as presenting any information "favorable" to the defendant.[266]

The decision to pursue a life sentence or to acquiesce in the death penalty is properly made by the defendant. This decision establishes

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consents; that no criminal or fraudulent activity is condoned; and that the client be told if the expected assistance cannot be ethically or legally pursued by the lawyer. *Id.* at (c)-(e). Although the comments to this rule again reiterate that "[t]he client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations," it also states without much explanation "[a]t the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2, Comments (1983). I doubt that the drafters of the rules envisioned a lawyer superseding his or her client on a fundamental question such as guilt or innocence, life or death.

262. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1979): "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer."

263. *Id.*

264. MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.2 (1983); ABA STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION STANDARD 4-5.2 (Approved 1979). It has been argued that the list of client decisions in The Defense Function is exhaustive. Trimble v. State, 693 S.W.2d 267, 279 (Mo. Ct. App. 1985). This does not seem likely in light of the more general statements regarding client determination of objectives in the main body of rules. Moreover, THE DEFENSE FUNCTION STANDARD 4-3.1(b) states: "[t]he technical and professional decisions must rest with the lawyer without impinging on the right of the accused to make the ultimate decisions on certain specified matters, as delineated in [4-5.2 quoted in the text]".

265. The Defense Function Standards 4-5.2(b).

266. The Defense Function Standard 4-8.1.

the objective of the penalty phase as certainly as a decision in a noncapital trial to plead, to waive a jury, or to testify is a decision on the merits. Although the defense counsel may decide whether to present witnesses in the penalty phase of a capital case, that tactical decision must be based on furthering the client's chosen course of action. Even when the client may be making a substantive decision on a legal alternative which is counter to the attorney's better legal advice, the client's decision is final. The ABA Code voices this when it states: "the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself."[267] It would not be consistent to interpret The Defense Function's language requiring presentation of information "favorable" to the defendant to support presentation of evidence in favor of life when the defendant chooses death. "Favorable" undoubtedly is meant to refer to bettering the defendant's position and assumes the defendant wants the least sentence possible. Moreover, The Defense Function itself is a more specialized description of an attorney's role under the Codes. Where the Codes' major proposition is that the attorney should advocate the defendant's decisions on the merits, it is only logical to interpret The Defense Function consistently with the premise. The attorney's role then is to further the defendant's objective of obtaining the death penalty.

The obligation to present a client's case as effectively as possible further compels the attorney's allegiance to the client's position on a substantive issue. The lawyer's role as advocate is essential to the functioning of an adversary system of justice.[268] This role is commonly expressed as being a "zealous advocate" for the client.[269] An attorney may even encounter ethical problems by failing to present

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267. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1983).

268. *Id.* at EC 7-19. This ethical consideration speaks of the role of the lawyer in an adversary system. It provides:

> An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known; the advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments. The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-23 further provides that "[t]he adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client.

269. THE MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1983) states "[t]he duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law . . . . " The Preamble to the newer Model Rules provides that "[a]s advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."

available evidence furthering the client's position. ABA Code Disciplinary Rule 7-101 prohibits a lawyer from intentionally failing "to seek the lawful objectives of his client through reasonably available means . . . ."[270] This command is softened by subsection B of 7-101 which releases the lawyer from this obligation where the anticipated conduct is unlawful or "where permissible."[271] If the defense attorney is required to present mitigating evidence, he or she arguably acts unethically not only for failing to advocate the defendant's position of death, but also for affirmatively opposing the defendant's position.[272]

An attorney has the additional responsibility of preserving the confidences of the client.[273] There are very few circumstances in which an attorney may reveal such confidences. For example, the Model Rules provide for disclosure only to prevent a crime likely to cause death or substantial bodily harm or to defend against a claim by the client relating to the attorney's conduct.[274] If the defense attorney in a capital case must present mitigating evidence in derogation of the client's choice, it is inevitable that some of the information directly or indirectly will be derived from statements made by the defendant to the attorney in confidence. By presenting mitigating evidence based on that information, the attorney is then revealing confidential information without the consent of the client. Unless a new category for mandatory or permissible revelation of a client's confidence is created, the attorney is presented with an ethical dilemma.[275] Once again the ethical guidelines pose an obstacle to a system which requires the attorney to present mitigating evidence in cases where the defendant chooses to die.

Could the defense attorney be required to present mitigating evidence against the defendant's wishes because the attorney is an "officer of the court"? The idea that an attorney is an "officer of

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270. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101.

271. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(B).

272. This apparently was the attorney's position in *People v. Deere* where upon remand he still refused to present mitigating evidence. *See infra* text accompanying note 356.

273. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1986); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1970).

274. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1981); The ABA Code provides for discretionary disclosure where the client consents; disclosure is required under disciplinary rules, court order, or by law; it is necessary for prevention of crime; and in the attorney's defense against misconduct claims or affirmatively to collect fees. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1970).

275. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1970) requires the preservation of confidences and secrets, a confidence being information protected by the attorney-client privilege, and a secret being any information gained in the relationship either requested by the client to be held confidential or disclosure of which would be embarrassing or detrimental.

the court" is inherent in our legal system, although the term is not used specifically to impose an obligation on the attorney in the professional conduct rules. The ABA Code does not use the term. The Model Rules, in its Preamble, refer to the lawyer as "an officer of the legal system."[276] The Defense Function addresses the need to be respectful of the court because the attorney is an officer of the court.[277]

What are the ramifications of being an officer of the court? The term is primarily applied when an attorney is disciplined or criticized for unprofessional conduct.[278] It is derived from common law and connotes the high standards an attorney must maintain while pursuing his or her client's interests.[279] A typical aspirational use of the term by the Supreme Court is found in *Hickman v. Taylor*:[280] "Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients."[281] Except to the extent of prohibiting an attorney from perpetrating a fraud upon the court, such as through testimony known to the attorney to be perjured,[282] the standards of professional conduct do not place an affirmative burden on an attorney regarding the content of a case.[283] Thus, the concept of an attorney as an officer of the court is a regulatory one. It is not designed to interfere with the representation of a client except for certain prohibitions, such as subornation of perjury, which offend the integrity of the judicial process.[284]

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276. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble (1970).

277. THE DEFENSE FUNCTION Standard 4-7.1.

278. *See, e.g.*, State v. Olwell, 64 Wash. 2d 828, 833, 394 P.2d 681, 684 (1964) (attorney as an officer of the court should not be a depository for criminal evidence and should turn over the evidence to the prosecution); *Ex parte* Wall, 107 U.S. 265, 274 (1882) (disbarment for leading, advising, and encouraging the lynching of a prisoner upheld—Wall's action, for an officer of the court, manifested a "want of fidelity to the system of lawful government"). The Preamble to the Model Code speaks of the self-governing nature of the legal professions, where the courts ultimately regulate the profession. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble (1970).

279. *See, e.g.*, *In re* Griffiths, 413 U.S. 717, 724 n.14 (1973).

280. 329 U.S. 495 (1945).

281. *Id.* at 510.

282. MODEL CODE OF PROFESSIONAL RESPONSIBLITY DR 7-102(A)(4) (1970). MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1981).

283. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1970) also prohibits advancing suits for harassment purposes or claims and defenses unsupportable in law or engaging in any other conduct in violation of the Disciplinary Rules. However, these do not, potentially, dictate the contents of the lawsuits to the extent prohibiting evidence does.

284. Also in keeping with a regulatory purpose, although an affirmative obligation, was requiring an attorney to represent a criminal defendant. Powell v. Alabama, 287 U.S. 45, 73 (1932) (attorneys are officers of the court and are bound to render service when appointed by the court to do so).

It would be blazing new trails to use the officer of the court concept to impose a duty on an attorney to present evidence which is not in the client's interest.[285] For example, suppose the client's goal is seeking acquittal. Introducing perjured testimony in pursuit of that goal would be an inappropriate means to that end. In contrast, failure to introduce mitigating evidence in furtherance of a goal of gaining imposition of the death penalty is not an inappropriate means. Although it might be possible to argue that death is not a legitimate goal, a majority of the Supreme Court has approved of this penalty under certain conditions. The ethical constraints and aspirations for lawyers thus cannot be rationalized with an obligation to present mitigating evidence in contravention of the defendant's legitimate position.

The adversary system is adversely impacted if an attorney must conduct him or herself other than as a loyal advocate for a legitimate position of the defendant. To present evidence against the objectives of the defendant creates ethical problems for the attorney in zealously representing the client and in preserving confidentiality of communications. The attorney is compromised by a conflict of interest between the duty owed to the client and the duty owed to the court. The Model Rules address the situation where a lawyer has a conflict with another client, a third person, or the lawyer's own interests.[286] The exception to barring a lawyer from representing the client under these conditions arises only when the lawyer has a reasonable belief that the client will not be adversely affected and the client consents to continued representation.[287] Neither condition is likely to be met when the defendant wishes to preclude mitigating evidence. The attorney's loyalty is split between the court, as a third person, and the client. Although one could argue that the client is not adversely affected by his attorney arguing for his life, we are still confronted with the issue of an attorney advocating a position diametrically opposed to his client. Moreover, in cases where a defendant decides to acquiesce in death, consent is not forthcoming.[288] These divisions

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285. THE DEFENSE FUNCTION Standard 4-1.6 provides: "The duties of a lawyer to a client are to represent the client's legitimate interests . . . . " Similarly, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1970) states that each person is entitled "to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense." EC 7-9 also states that "a lawyer should always act in a manner consistent with the best interests of his client."

286. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1981).

287. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b)(1-2) (1981). *See also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(B) (1977).

288. *See supra* text accompanying notes 177-78 (the continuous efforts of Trimble to end all efforts on his behalf).

of the attorney's loyalties and responsibilities are anathema to the attorney-client relationship.[289]

Without a massive overhaul of the professional ethical rules and our perception of the role of a defense attorney in an adversary system of justice, the defense counsel should be precluded from advocating life by presenting mitigating evidence against the defendant's wishes. The argument has been advanced that a defendant is denied the constitutional right to effective assistance of counsel when the defense attorney fails to introduce mitigating evidence, despite the defendant's adamant position rejecting such evidence. The next section considers the constitutional issue.

B. Effective Assistance of Counsel

The right to counsel, and effective counsel, not only stems from the sixth amendment but also from other constitutional provisions. The sixth amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[290] Its terms are applicable to the States through the fourteenth amendment.[291] The right to an attorney, retained or appointed, applies after the initiation of adversary proceedings.[292] This right continues through the sentencing of the defendant.[293] Prior to the application of the sixth amendment to the states, the United States Supreme Court held that defendants had a right to appointed counsel in a capital case pursuant to the due process clause of the fourteenth amendment in order to

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289. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1981) comment reflects this concern: "Loyalty is an essential element in the lawyer's relationship to a client." Similarly MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1 (1970) states: "The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties." Although the Disciplinary Rules do not specifically address this situation, DR 5-105 (B) prohibits representation in light of a conflict between two clients unless the attorney is capable of adequately representing each interest and has the consent of each party. This type of procedure, requiring the attorney to act counter to his or her client's interests, reflects the standards which pertain to an ex parte proceeding. The Model Rules, for example, provide that in such a proceeding, "[a] lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(d) (1981).

290. U.S. CONST. amend. VI.

291. Gideon v. Wainwright, 372 U.S. 335, 340 (1963).

292. United States v. Gouveia, 467 U.S. 180, 187-89 (1984). The adversary proceedings are usually initiated by an information or an indictment, although arraignment on an arrest warrant has also been considered sufficient. Brewer v. Williams, 430 U.S. 387, 398 (1977).

293. Mempa v. Rhay, 389 U.S. 128, 134, 137 (1967).

ensure the fundamental fairness of the trial.[294] Where the Constitution does not guarantee assistance of counsel, the Court has at times used a due process or equal protection theory to find a right to appointed counsel.[295] The right to an attorney on the first appeal by right, not guaranteed by the sixth amendment, is an example of a fourteenth amendment guarantee. Because the issue of effectiveness of counsel in the penalty phase involves the trial stage, it is the sixth amendment's guarantees that the courts have addressed.[296]

How do we judge effective assistance of counsel? Prior to the 1984 Supreme Court decisions in *United States v. Cronic*[297] and *Strickland v. Washington*,[298] courts struggled to find an appropriate standard. *Cronic* and *Strickland* approved the use of two approaches, depending on the type of alleged ineffective assistance. The Court distinguished cases where the right to counsel is infringed by an error that pervades the entire trial, such as actual or constructive denial of counsel or conflict of interest,[299] from cases where the error alleged is incompetence in the actual performance by the attorney.[300] In the former cases of pervasive error, the Court set forth a categorical, per se error standard for failures to meet specific duties. In such cases, a defendant need not show any prejudice resulting from the error.[301] In cases regarding an attorney's performance, the Court established a judgmental, two-pronged test.[302] The first prong applies a reasonable objective standard of whether the attorney's actions were outside the range of a competent attorney.[303] If the attorney's conduct falls outside of the range of competence, the defendant must meet the second prong, a showing of prejudice defined as a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[304]

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294. Powell v. Alabama, 287 U.S. 45, 69-70 (1932).

295. Douglas v. California, 372 U.S. 353, 355-58 (1963). The Court has not extended this to further appeals. Wainwright v. Torna, 455 U.S. 586, 589 (1982); Ross v. Moffitt, 417 U.S. 600, 606-608 (1974).

296. *See, e.g.*, Darden v. Wainwright, 106 S. Ct. 2464 (1986); Strickland v. Washington, 466 U.S. 668 (1984).

297. 466 U.S. 648 (1984).

298. 466 U.S. 668 (1984).

299. *Cronic*, 466 U.S. at 659 nn.25, 26. "The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Id.* at 659 n.25 (citations omitted). Conflict of interest was further addressed in *Strickland*, 466 U.S. at 686 (*citing* Cuyler v. Sullivan, 446 U.S. 335, 344 (1980)) (actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective).

300. *Strickland*, 466 U.S. at 686.

301. *Cronic*, 466 U.S. at 659; *Strickland*, 466 U.S. at 692.

302. *Strickland*, 466 U.S. at 687.

303. *Id.*

304. *Id.* at 694. The Court specifically denies that this test is an outcome-

In *Cronic*, the Court held that the per se approach was improperly applied where the allegations of ineffective assistance of counsel involved the attorney's lack of time to prepare and lack of trial experience in a complex "check-kiting" case.[305] This type of situation, according to the Court, did not rise to the level of a presumptively unreliable proceeding.[306] The Court did not address specific alleged errors in performance which would call for a judgmental approach.[307] The case was remanded to the lower court to determine whether the two prong analysis for performance errors was met.[308]

In *Strickland*, the Court applied the two prong test to assess an attorney's conduct during the penalty phase of a capital trial.[309] In the Court's view, the role of counsel was comparable in both trial and capital sentencing procedures "to ensure that the adversarial testing process works to produce a just result under the standards governing decision."[310] The defendant in that case pled guilty to three capital murder charges and waived Florida's advisory jury in the penalty phase.[311] At the time of his plea, the defendant told the judge he had "no significant prior criminal record" and that he had been under extreme emotional distress from failing to support his family.[312] His attorney presented no evidence at the penalty hearing before the judge, but did argue for his client's life.[313] The Court found that the reliance on the defendant's statements to the judge when entering his plea[314] was a competent strategy decision.[315] Evidence of a more extensive criminal record than alluded to by the defendant and possibly adverse psychiatric testimony could not be presented by the State as a result of the attorney's tactic.[316] The

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determinative standard or means that the outcome more likely than not would have been different. *Id.* A "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Id.*

305. Defense counsel, a real estate attorney with no jury experience, was given twenty-five days to prepare for trial. *Id.* at 649.

306. *Cronic*, 466 U.S. at 666 n.40.

307. *Id.* at 666.

308. *Id.*

309. *Strickland*, 466 U.S. at 700.

310. *Id.* at 687.

311. *Id.* at 672.

312. *Id.*

313. *Id.* at 674.

314. *Id.* at 677. The plea would have been handled on a different day, possibly even weeks, before the penalty hearing. *Id.*

315. *Id.* at 699.

316. *Id.* at 700. Besides not introducing evidence or putting the defendant on the stand, the attorney also did not request a pre-sentence report. Evidence from that source or from the State was thus precluded. *Id.* at 676. There was also an allegation of a failure to investigate in the attorney's failure to follow up on a meeting with the defendant's wife and mother. *Id.* at 672-73. The attorney also apparently relied upon the reputation of the judge as one who was more lenient

Court further found that the defendant would also fail to meet the second prong of *Strickland* because there was no "reasonable probability" that mitigating circumstances would have outweighed the aggravating circumstances.[317]

The basis of the Court's opinions is that effective counsel is needed in order to ensure the fundamental fairness of a trial. Justice O'Connor, writing for the majority in *Strickland*, stated:

> The sixth amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.[318]

The Court repeatedly stressed the need to judge whether a breakdown in the adversarial process, of which an attorney is an integral part, had caused an unjust result.[319] The Court in *Strickland*, however, was not facing the issue of a calculated effort to preclude the consideration of mitigating circumstances.

The Court's emphasis on the fairness of the trial through a right to counsel creates analytical confusion in defining the role of the defense attorney. It becomes a viable argument that a procedure which is fundamentally unfair because it lacks adversarial input violates the sixth amendment. Thus, the California court in *People v. Deere* reasoned that the failure to consider mitigating evidence

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when defendants accepted responsibility for their actions, which the defendant had done at the time of his plea. *Id.* In fact, the attorney argued, because the defendant had surrendered and confessed, he should be given life. *Id.* at 673. The Court found all of these decisions to be within the range of a competent strategy decision. *Id.* at 699.

317. *Id.* at 699-700. The specific question to answer with regard to the penalty phase of a capital case under this analysis was "whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." The aggravating factors found by the judge pursuant to the Florida statutory scheme were 1) the murders were "especially heinous, atrocious, and cruel"; 2) the murders occurred during the course of a "dangerous and violent" felony; 3) the murders were committed for "pecuniary gain"; and 4) the murders were committed "to avoid arrest for the other crimes [kidnapping, extortion and theft]". *Id.* at 674, 675. The judge also found none of Florida's statutorily prescribed mitigating factors, except the lack of prior criminal conduct. *Id.* at 674-75.

318. *Id.* at 685.

319. *Id.* at 684-86, 696. Justice Marshall, in dissent, did not focus on the result. He asserted that the right to effective counsel not only safeguards the innocent from conviction but also ensures fundamentally fair procedures leading to a conviction. He stated that "[a] proceeding in which the defendant does not receive meaningful assistance in meeting the forces of the state does not, in my opinion, constitute due process." *Id.* at 711 (Marshall, J., dissenting).

made the proceeding fundamentally unfair.[320] Because this evidence is ordinarily introduced by the defense counsel, the California court logically concluded that this lack of evidence was due to ineffective assistance of counsel, regardless of the defendant's position that no such evidence be presented. However, a sixth amendment analysis will not lead to the conclusion of ineffective assistance of counsel under either the per se error or the two-pronged approach.

The problem with using the per se approach is the defendant not only has an attorney, but also has one advocating the defendant's legitimate position. Although the Court has stressed the reliability of the proceedings as the basis for the sixth amendment,[321] and an argument can be made that sentencing is unreliable without mitigating evidence, the unreliability is not due to a violation of the right to counsel. To raise a sixth amendment issue, the unreliability must stem from the court's interference with the attorney's representation and not from the defendant's decision.[322] Thus, if a defendant wants all mitigating evidence introduced and the court refuses to appoint an attorney to represent the defendant or refuses to allow the attorney to present the evidence, there would be a denial of the right to effective counsel as a means of participation in the adversary system.[323] When the defendant opposes the introduction of mitigating evidence and his attorney accedes to this decision, one would have to argue that a complete denial of the assistance of counsel occurs where an attorney assists the defendant in his chosen objective. Yet, the court has properly provided counsel for the defendant and the attorney has represented the position of the defendant. If there is no error in either the court's or the state's actions in interfering with representation, or no conflict of interest for the defense attorney, there can be no per se error under the sixth amendment.[324]

Similarly, no sixth amendment violation exists under the two-prong *Strickland* test for attorney performance. The first prong is not met. It is not outside the range of competent attorney actions to fail to present mitigating evidence when the defendant adamantly endorses that position. In order to find incompetent conduct, the attorney would have to be under a duty to present mitigating evidence

320. People v. Deere, 41 Cal. 3d 353, 710 P.2d 925, 222 Cal. Rptr. 13 (1985).

321. *See supra* text accompanying notes 318-19.

322. Strickland v. Washington, 466 U.S. 668, 686 (1984).

323. The Court in *Strickland* states that "[t]he right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendmant, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." 466 U.S. at 685; *quoting* Adams v. United States *ex rel.* McCann, 317 U.S. 269, 275-76 (1942).

324. This situation is simply not analogous to cases where an attorney has a conflict of interest or is precluded from effective cross-examination. *See, e.g.*, Cuyler v. Sullivan, 446 U.S. 335 (1980); Davis v. Alaska, 415 U.S. 308 (1974).

regardless of the defendant's view.[325] If such a duty exists pursuant to the sixth amendment, it will conflict with the ethical considerations of representing the defendant's objectives previously discussed. Although the Supreme Court has indicated that it separates the sixth amendment issue from state ethical rules,[326] the Court's cases on effective assistance of counsel reflect its view that the essence of the attorney's role under the sixth amendment is identical to the role described in the ethical rules.[327] The attorney is to function as a loyal advocate of the defendant's chosen objectives.[328]

The Court repeatedly emphasized the attorney's advocacy role. In *Strickland*, for example, Justice O'Connor, writing for the majority, noted that an attorney's actions are based on the informed choices of the defendant.[329] In reiterating the principle that there is ineffective assistance of counsel justifying a presumption of prejudice when an attorney has a conflict of interest in representing a defendant, she noted that "[i]n those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties."[330] When discussing the need to defer to attorney judgments, Justice O'Connor also commented that too great a scrutiny of attorney performance could "undermine the trust between attorney and client."[331] In *Cronic*, the majority quoted with approval a similar statement by Justice Brennan: "'To satisfy the Constitution, counsel must function as an advocate for the defendant, as opposed to a friend of the court.'"[332] The Court further noted in *Cronic* that "the Sixth Amendment does

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325. Certainly where there is no conflict with the defendant's chosen course of action, a failure to present any mitigating evidence without a tactical reason to withhold the evidence should be deemed incompetent representation. *See, e.g.*, Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Pickens v. Lockhart, 714 F.2d 1455 (8th Cir. 1983).

326. *See, e.g*, Nix v. Whiteside, 106 S. Ct. 988, 994 (1986). The *Nix* Court stated:

> Under the *Strickland* standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel. When examining attorney conduct, a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the State's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts.

Id.

327. *See supra* notes 268-72 and accompanying text.

328. See discussion of the role of counsel in United States v. Cronic, 466 U.S. 656 & nn.15-19.

329. Strickland v. Washington, 466 U.S. 668, 691 (1984).

330. *Id.* at 692.

331. *Id.* at 690.

332. United States v. Cronic, 466 U.S. 648, 656 n.17 (1984) (*quoting* Jones v. Barnes, 463 U.S. 745, 758 (1983) (Brennan, J., dissenting)).

not require that counsel do what is impossible or unethical."[333] In light of the Court's view of counsel's role under the sixth amendment, it does not seem plausible to interpret the sixth amendment to require the defense attorney to present mitigating evidence against his client's wishes.[334]

The attorney's decisions must be given great deference in a sixth amendment analysis. Thus, the attorney's decision not to present mitigating evidence will be treated as presumptively competent under *Strickland's* test.[335] In *Strickland*, the Court noted that "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."[336] Given this deference to the defense attorney,[337] it does not seem likely that the Court will be receptive to interpreting the sixth amendment guarantee of a fair trial to prohibit a strategy of failing to introduce evidence in accordance with a defendant's wishes or, as a corollary, to mandate a strategy of presenting evidence in contravention of the defendant's position.

Although the sixth amendment is inapplicable in this context, mitigating evidence must be presented to meet eighth amendment guarantees. The trial court, however, is still faced with a dilemma. If the defense attorney fails to present the evidence, he or she is following the ethical requirements of representing the defendant. Without the mitigating evidence, however, there is a breakdown in the protections designed to ensure the non-arbitrary application of the death penalty. The final section addresses the trial court's dilemma and proposes a solution.

V. Accommodating the Need for Mitigating Evidence and the Adversary System

The criminal justice system is troubled with many difficult questions involving the death penalty. It is an onerous burden to devise

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333. *Id.* at 656 n.19. This of course raises an interesting question whether any state bar would or could discipline an attorney for being an effective attorney for constitutional purposes but not for ABA purposes.

334. *See also* Jones v. Barnes, 463 U.S. 745 (1983). In *Jones* the Court found that the attorney's tactical decision to brief only the best issues on appeal and to exclude certain issues that defendant wanted raised did not amount to ineffective assistance of counsel. Justice Blackmun took the view that an attorney *ethically* must argue all nonfrivolous issues on appeal urged by the defendant, but a breach of that duty did not amount, under the circumstances of *Jones*, to a sixth amendmant violation. *Id.* at 754-55 (Blackmun, J. concurring).

335. *See infra* note 337.

336. Strickland v. Washington, 466 U.S. 668, 689 (1984).

337. In *Strickland*, the Court stated: "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* The Court further stated it would apply "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," a presumption the defendant must overcome. *Id.*

a system where imposition of the ultimate penalty of death is done in a non-arbitrary manner. Victims' rights, defendants' rights, strain on court time and resources, and underlying moral questions are all part of the equation which the judicial scales must balance.[338] The fundamental question which can never be escaped is who should live and who should die.

While no one resolution of the question of who lives and who dies will ever satisfy all diverse interest groups, the judicial system cannot afford to subordinate the integrity of the process to a result desired by a vocal segment of society. The Supreme Court recognized the critical need for impeccable integrity in the decision making process in capital cases throughout the post-*Furman* years when the Court began to uphold statutory schemes with multiple safeguards against arbitrary imposition of the death penalty. Every case emphasized the necessity of considering mitigating evidence about the individual defendant in a specific case.[339] Mandatory death penalty statutes were declared unconstitutional.[340] Implicit was the idea that no person could be put to death unless it was deemed to be the appropriate punishment because aggravating circumstances outweighed mitigating circumstances for *this* defendant.

Some defendants want no efforts made on behalf of life. One may be tempted to say that an individual who is accused of a brutal murder can accede to death as the appropriate punishment. One argument advanced is that any capital murderer deserves to die;[341] therefore, why not kill those murderers the jury has condemned as well as those murderers who save us the trouble of impaneling the jury.

Problems arise, however, when the system of justice is scrutinized to determine if justice is in fact being dispensed evenhandedly. For example, most state statutes would characterize a murder intentionally committed during the course of a robbery as a capital offense.[342] To say that all defendants convicted of such a murder shall die, appears evenhanded on the surface. However, most would agree a 30-year-

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338. Moreover, the toll on the attorneys who give of their training, skill, and emotions in representing an individual accused of a heinous crime is often overlooked. These attorneys face a herculean task in preparing, trying, and appealing capital cases.

339. *See supra* discussion of cases in text accompanying notes 50-65.

340. *See supra* text accompanying note 56.

341. *See* Van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1663 (1986) (arguing that it is appropriate to execute an individual whether or not others similiarly situated are given life imprisonment). Van de Haag's argument ignores the reality of our system and the moral values underlying the legal concepts of the eighth and fourteenth amendments. *See* Greenberg, *Against the American System of Capital Punishment*, 99 HARV. L. REV. 1670, 1678-79 (1986).

342. *See supra* text accompanying note 16.

old, recidivist defendant who demands money, forces the victim to lie face down on the floor, and then executes the victim with a bullet in the back of the head is more culpable than a 17-year-old defendant who demands money, panics, and then fires a gun. Imposing the death penalty on both of these defendants solely on the basis that each has been convicted of the same statutory elements of the crime is an approach rejected by the Supreme Court.[343]

The determination of life or death is dependent upon the balance between aggravating circumstances and mitigating circumstances for a particular defendant. If a defendant refuses to present mitigating evidence, the critical safeguard of individual case-by-case determination of the appropriate penalty is lost. Without the mitigating evidence, the defendant forces the judicial system to equate the culpability of the panicky teenager to that of the recidivist executioner. The integrity of the criminal justice system in the non-capricious imposition of the death penalty is subverted if a defendant can choose the penalty regardless of the merits.

Arguments have been made that respect for the dignity of the individual justifies an exception to the non-arbitrary application of the death penalty and demands that the defendant be allowed to choose death over life imprisonment.[344] There appears to be a trend to allow individuals to choose death over life in noncriminal contexts such as where the individual wishes to forego life-saving medical treatment.[345] Moreover, the Supreme Court has permitted capital defendants to forego further appeals urged by third parties.[346]

Despite permitting an individual to choose death by foregoing further appeals in a capital case or by refusing medical treatment in a noncriminal context, the eighth amendment issue raised when no mitigating evidence is presented to the factfinder at trial cannot be resolved as easily. It is true that the eighth amendment ban on cruel and unusual punishment in a criminal context is founded on the preservation of human dignity.[347] However, inherent in the concept of human dignity is an assurance that a penalty is not imposed which offends the dignity and integrity of society.[348] The eighth amendment

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343. *See supra* text accompanying notes 52-60.

344. *See* People v. Deere, 41 Cal. 3d 353, 370, 710 P.2d 925, 936, 222 Cal. Rptr. 13, 25 (1985) (Lucas, J., dissenting).

345. *See, e.g.*, Bouvia v. Superior Court of Los Angeles County, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986) (right of individual to discontinue feeding by nasogastric tube recognized).

346. *See supra* discussion of cases in text accompanying notes 100-14.

347. *See* Ford v. Wainwright, 106 S. Ct. 2595, 2600 (1986).

348. *See supra* note 45. Justice Marshall recently stated in the context of prohibiting the execution of the insane: "Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment." *Ford*, 106 S. Ct. at 2602.

represents a societal interest above and beyond that of the individual.[349] The same issue does not exist in noncriminal contexts where the judicial system is not forcing the individual into the situation of choosing life or death.[350] The defendant's free will in a criminal capital case is honored if there is no requirement that the defendant's attorney present mitigating evidence in contravention of the defendant's wishes. The defendant thus chooses to take a position personally favoring death over life. However, the eighth amendment requires that society's interest in not imposing cruel and unusual punishments also be protected.[351] This can only be met by presenting mitigating evidence to the factfinder.

The defense attorney is not the appropriate vehicle for introducing mitigating evidence when the defendant's position is acquiescence in death. Neither professional ethics standards nor the sixth amendment can tolerate such a split of the attorney's loyalties. The concern is real. In *Judy v. State*,[352] for example, the attorneys appointed to pursue the appeal against the defendant's wishes notified the court that they were confronted with conflicting duties.[353] The attorneys asked the court to resolve the "'insoluble professional and ethical problem'" they faced.[354] Another example is *People v. Deere*.[355] The California Supreme Court held that the defense attorney had an ethical obligation as an "officer of the court" to present mitigating evidence.[356] On remand the defense attorney again refused to present mitigating evidence. The trial court ultimately appointed both an investigator and another attorney to "assist" the defense attorney.[357]

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349. Justice Marshall recognized this in Furman v. Georgia, 408 U.S. 238, 345-46 (1972) (Marshall, J. concurring). In the course of discussing whether the death penalty serves the purpose of retribution, Justice Marshall addressed the position that life imprisonment is more severe than death. He rejected this view and added: "But, whether or not they should be able to choose death as an alternative is a far different question from that presented here—i.e., whether the State can impose death as a punishment." *Id.* at 345-46 (Marshall, J., concurring).

350. For a discussion of the balancing of governmental and individual interests in each context *see* Strafer, *Volunteering for Execution: Competancy, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 895-908 (1983).

351. The Court has recognized that both substantive and procedural guarantees stem from the eighth amendment. *See* Ford v. Wainwright, 106 S. Ct 2595, 2600 (1986).

352. 275 Ind. 145, 416 N.E.2d 95 (1981).

353. *Id.*, 416 N.E.2d at 97.

354. *Id.*

355. 41 Cal. 3d 353, 710 P.2d 925, 222 Cal. Rptr. 13 (1985).

356. *See supra* text accompanying notes 221-29.

357. *See* People v. Deere, No. ICR-7552 (Cal. filed May 14, 1986 and June 27, 1986) (orders appointing attorney and investigator because of counsel's continuing refusal to present mitigating evidence).

Whether reported in the cases or not, the attorneys in these cases are placed in a difficult ethical situation.[358]

The defense attorney is an advocate and an advisor only; the defendant must choose the goals and objectives of the litigation. The decision to seek life or death is a fundamental decision in a capital case. Although an attorney makes strategic decisions in litigation, the questions of the objectives of the litigation are the client's to make.[359] To say that the decision to live or die is a strategic decision is a difficult stretch of the term. The professional conduct codes provide for few curbs on the client's choices. The ethical standards permit limiting the objectives where the client consents, the objective is criminal or fraudulent activity, or the goal cannot be ethically or legally pursued by the lawyer.[360] The legitimacy of accepting the death penalty is apparent from the Supreme Court's decisions permitting defendants to forego further appeals or other efforts on their behalf.[361] Whether or not to call specific witnesses to further this goal may be a tactical decision, but to introduce evidence supportive of life imprisonment when the defendant's objective is death is not a tactical decision. Mitigation evidence is in direct abrogation of the defendant's objective in the case. The fact that nonlegal, moral issues are part of the defendant's choice cannot sanction preemption of what is the defendant's decision. The rules of professional conduct

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358. The opposite moral dilemma exists for individual defense attorneys as well. *See* Massie v. Summer, 624 F.2d 72, 73 (9th Cir. 1980), where the Federal Public Defender was appointed to represent Massie, but asked leave to withdraw on the ground that he could not ethically present Massie's arguments to forego California's automatic review of a death sentence. As a former criminal defense attorney, the author knows that most defense lawyers could not advocate death for a human being. Assuming that the attorney was unable to dissuade the defendant from pursuing death, most would probably opt to let the defendant speak on his or her own behalf. Deere, for example, made a statement himself to the court asking for death. People v. Deere, 41 Cal. 3d 357, 710 P.2d 926, 222 Cal. Rptr. 13, 17 (1985). To either require or permit the defense lawyer to act against the defendant's wishes, however, by presenting unwanted mitigating evidence would undermine the development at the beginning of the case of the trusting relationship necessary to the overall defense of the client. Although the need for such a relationship at the time of the penalty hearing would seem to be minimal compared to saving the defendant's life, the defendant's knowledge at the outset of the relationship that the defense attorney will act contrary to a significant decision the defendant has made or may make will seriously threaten the development of any trust between attorney and client. Consequently, despite the difficult moral situation of the defense lawyer, the underpinnings of the adversary system of justice are eroded if the defense attorney becomes an advocate against the client's position. The appointment of an independent attorney to present mitigating evidence alleviates this problem.

359. *See supra* text accompanying notes 261-67.

360. *See supra* text accompanying notes 269-72.

361. *See supra* text accompanying notes 100-14.

specifically provide for the attorney's advice to include relevant nonlegal factors.[362]

To impose an obligation on the attorney to contradict the wishes of the defendant raises other ethical problems as well. The unquestioned loyalty of the attorney to the client, recognized as the bulwark of the adversary system by the Supreme Court,[363] would be lost. The attorney also faces a conflict of interest in representing the defendant's interest and the court-required interest of the public. There further is a problem in revealing the confidences of the client if the attorney uses information gained from discussions with the defendant to find and introduce mitigating evidence. The defendant who wants to die is unlikely to forego this confidentiality to permit evidence to be introduced that he or she opposes.

It is also not appropriate to impose on the attorney-client relationship the mask of "officer of the court." That term refers to a regulatory process by the courts. Attorneys are, and should be, held to the highest of standards regarding their conduct and it is appropriate that the judicial branch police attorneys. However, requiring an attorney to present evidence in abrogation of a client's chosen position denigrates the adversary system. Defendants will not trust an attorney who advises them that, although the attorney is an advocate for the defendant, he or she intends to present evidence contravening the defendant's wishes. The impact on the openness and trust necessary to an attorney-client relationship will be devastating.

Regardless of the ethical concerns, is there constitutionally inadequate representation of an accused when the defense attorney fails to present mitigating evidence? Although the constitutional guarantee could conceivably be inconsistent with professional ethical standards,[364] effective assistance of counsel is based on assisting the defendant in presenting a position chosen by the defendant. Ineffective assistance of counsel arises when the attorney inadequately furthers the defendant's objectives, not when the attorney fails to act in opposition to those interests. Although the Supreme Court has indicated that the purpose of effective assistance of counsel is to ensure the fairness of the trial,[365] which certainly is infringed when no mitigating evidence is considered, it does not follow that counsel is necessarily ineffective every time a trial is unfair. A proceeding may be fundamentally unfair for reasons that have nothing to do with the attorney's performance. The fundamental unfairness is the

362. *See supra* text accompanying note 267.
363. *See supra* text accompanyng notes 329-31.
364. *See supra* text accompanying note 326.
365. *See supra* text accompanying notes 317-19.

result of an eighth amendment, or possibly a due process, issue, not the conduct of the defense attorney.

The responses of the courts facing the issue of a defendant who wants to forego mitigating evidence have been inadequate. The Nevada and Louisiana courts reached the disturbing conclusion that a defendant could trigger the death penalty whether or not it was appropriate in that case.[366] Although the Fifth Circuit and Missouri courts appropriately found no ineffective assistance of counsel in failing to present mitigating evidence against the defendant's wishes, they failed to reach or resolve the eighth amendment issue of arbitrary imposition of the death penalty when there is no consideration of mitigating evidence.[367] The California court properly found that mitigating evidence must be presented to the factfinder, but floundered on the appropriate vehicle.[368] In finding the defense attorney to be the appropriate vehicle, the court had to strain both constitutional and ethical concepts.[369] Constitutionally, the California court had to find ineffective assistance of counsel in failing to act against the objectives of the defendant. In order to resolve the ethical problem of not giving complete loyalty to the defendant, the court was compelled to give a questionable interpretation to the "officer of the court" concept.[370] The New Jersey court authorized the defense attorney to present mitigating evidence against his client's wishes,[371] but has not yet faced the situation in which the defense counsel refuses to act against his client's position.

The confusion is apparent in cases involving the waiver of state appellate review as well. Most hold that a statutorily required review cannot be waived,[372] which appears on its face to be a sound safeguard for the nonarbitrary imposition of the death penalty. Certainly the balancing of the public's interest in a just penalty with the individual defendant's control of his defense[373] is an appropriate analysis. And yet, Nevada and Louisiana, while permitting no waiver of the appeal,[374] maintain the inconsistent position that mitigating evidence need not be presented in the penalty phase at trial.[375] The mandatory

366. *See supra* text accompanying notes 140-65.
367. *See supra* text accompanying notes 166-94.
368. *See supra* notes 197-233 and accompanying text.
369. *See supra* notes 224-29 and accompanying text.
370. *See supra* text accompanying notes 223-29.
371. *See supra* text accompanying notes 234-42.
372. *See supra* text accompanying notes 120-32.
373. *See supra* text accompanying notes 126-32.
374. Cole v. State, 101 Nev. 585, 589, 707 P.2d 545, 548 (1985); State v. Felde, 422 So. 2d, 370, 395 (La. 1982).
375. The Indiana court similarly gave implicit approval to a death sentence where no mitigating evidence was presented or argument made at the defendant's request in the course of conducting a mandatory review. Judy v. State, 275 Ind. 145, 416 N.E.2d 95, 109-10 (1981). *Cf.* Vandiver v. State, 480 N.E.2d 910 (Ind. 1985) (penalty phase evidence presented only by state).

review is virtually meaningless when it is based on a record containing evidence only of aggravating factors.[376] The California and New Jersey courts recognized and relied on this inconsistency.[377] Part of the basis for ordering the consideration of mitigating evidence in those states against the defendant's chosen course was to assure a meaningful appellate review.

The inconsistent responses of the courts initially addressing the issue are not surprising. The scope of both the sixth and eighth amendments is an unsettled issue; their interpretation is a constant topic in the Supreme Court. Moreover, the practical problem of who should present the mitigating evidence will necessitate innovations in the usual adversary system.

The best accommodation of interests would be achieved by appointing an attorney whose specific role is to present mitigating evidence. Other possibilities include the defense attorney, the court, or the prosecutor. The appointment of an independent attorney would avoid the conflicts in loyalties and roles inherent in requiring the defendant's attorney to present evidence counter to the defendant's position. It would further preserve the roles of the other players in the courtroom.

If the court proceeded to call witnesses on its own to present mitigating evidence, two problems arise. The first is that the appearance of impartiality is lost; the jurors would inevitably be influenced by the fact that the judge called the witnesses. However, perhaps an even greater problem would be how the court would fulfill the investigative function of discovering the witnesses, interviewing them, and preparing their testimony.

It is arguable that the prosecutor, who is obligated to seek justice, should present both mitigating and aggravating circumstances.[378] However, despite the laudatory aspirations of securing justice, a prosecutor must function as an advocate in a criminal trial. The prosecutor's role, after a determination that the death penalty is appropriately sought in a case, is to advocate that penalty to the factfinder. If a prosecutor were obligated to present mitigating as well as aggravating evidence, the system would falter. Either the adversary system would lose a necessary advocate where the prose-

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376. This is recognized easily in cases where the defendant does not wish to die. For example, the Louisiana court remanded a case for a determination of whether counsel was ineffective for failing to present mitigating evidence or to argue on defendant's behalf in the penalty phase. State v. Fuller, 454 So. 2d 119, 125 (La. 1984). There is no indication that Fuller requested that his attorney forego the evidence or argument as in *Felde*. The Louisiana court's concern was the adequacy of its appellate review of the sentence for excessiveness. *Id.* at 124.

377. *See supra* text accompanying notes 219-20 and 241-42.

378. This procedure was used in State v. Wilkins, 736 S.W.2d 409, 42 Crim. L. Rep. 2003 (Mo. 1987).

cutor presented evidence without taking a position on that evidence or the presentation by a prosecutor actively advocating the death penalty would vitiate the importance of the mitigating evidence. An investigative problem exists as well. Witnesses willing to testify in favor of the defendant's life are unlikely to trust the state's advocate. Thus, the most rational solution is to appoint an attorney whose sole role is to present mitigating evidence concerning the defendant to enable the factfinder to assess the balance of aggravating and mitigating factors.

The courts, as a practical matter, appoint attorneys to assist the court in meeting eighth amendment concerns. This was ultimately the course taken by the California trial court in *People v. Deere*, as mentioned earlier.[379] Similarly, in *Cole v. State*[380] the trial-level three-judge panel appointed an "amicus" attorney to present mitigating evidence. The defendant represented himself with standby counsel available.[381] Attorneys appointed to present the defendant's case on a mandatory appeal, where the defendant wants to forego the appeal, are also serving the public's interest at the behest of the court. In a case upholding mandatory state appellate review of a death sentence against the defendant's wishes, the Ninth Circuit Court of Appeals in *Massie v. Sumner*[382] noted that the California Supreme Court had appointed the State Public Defender to represent Massie. The court further stated that the defendant's right to self-representation was "limited and a court may appoint counsel over an accused's objection in order to protect the public interest in fairness and integrity of the proceedings."[383] *Cole* is also an example of a court appointing an attorney to present an appeal on "behalf" of a defendant.[384] In reality, these courts were preserving society's interest in the integrity of the criminal justice system by appointing counsel, not furthering the defendant's interests. Appointing attorneys to present evidence or prepare and argue a case is, thus, not an unknown or difficult solution to the problem of presenting mitigating evidence.

How should this procedure work? There are investigative and courtroom logistics to orchestrate. The investigative function often involves a substantial amount of time. Consequently, at the point where the defendant or his attorney first indicate the defendant's position will be to present no mitigating evidence, the court should appoint an attorney to begin investigation of possible witnesses and

379. *See supra* text accompanying note 357.
380. 101 Nev. 585, 707 P.2d 545 (1985).
381. *Id.*, 707 P.2d at 546.
382. 624 F.2d 72 (9th Cir. 1980).
383. *Id.* at 74.
384. Cole v. State, 101 Nev. 585, 597, 707 P.2d 545 (1985) (counsel appointed to address issue of validity of waiver of appellate review).

other evidence in favor of mitigation. If the attorney believes that an investigator is needed to assist in discovering witnesses or other evidence, this should be authorized as soon as it is requested. The appointments should be at state expense. Although obvious concerns with cost can be raised, the expense is likely to be minimal compared to the cost already involved in capital cases due to the need for extensive preparation, investigation, lengthy trials, and multiple appeals, generally all borne by the state for an indigent defendant. If a state has chosen to impose a death penalty, it cannot shrink from the cost at the expense of constitutional guarantees. Some defendants may cooperate with the court-appointed attorney; others will not. The court-appointed attorney should have access to any information regarding the defendant and location of family in the possession of the state. A record should be made of the avenues pursued.

The courtroom procedure should include a presentation of the evidence in an adversary style. The court-appointed attorney should call the witnesses and conduct direct examination. The prosecution, as well as the defense, should have an opportunity to cross-examine the witnesses. The jury should be instructed as usual to consider aggravating and mitigating circumstances. In addition, the jury should be instructed to make their decision on the basis of the evidence; that the death penalty cannot be imposed without the consideration and appropriate determination of whether aggravation outweighs mitigation, regardless of the defendant's position. The court-appointed attorney should also be permitted to argue the case to the jury along with the prosecution and the defense.

Although the appointment of an attorney to present mitigating evidence is an unusual step, it accommodates the need for the evidence and the preservation of an adversary proceeding. The defense attorney is not asked to compromise loyalties and the state is not asked to compromise its position or advocacy. The court is not asked to assume a partial role. Protection against an arbitrary punishment is achieved by the consideration of both aggravating and mitigating evidence. Thus, society's interest in punishments proportional to culpability is protected in the context of an adversary proceeding.

VI. Conclusion

The heart of the problem when a defendant in a capital case refuses to present mitigating evidence is ensuring the non-arbitrary imposition of death. Because the penalty of death is so absolute, the reliability of the decision becomes a paramount issue. The Supreme Court has repeatedly emphasized the need to consider mitigating, as well as aggravating, factors to assure a non-arbitrary imposition of the penalty.[385] If an individual defendant is allowed to demand death

385. *See supra* text accompanying notes 50-60.

without a consideration of mitigating factors, that assurance is lost. Society's interest in the dignity of the system, as reflected in the eighth amendment's inherent prohibition against arbitrary punishments, is abrogated. To the extent that society continues to consider death a valid punishment, the appointment of an attorney to present mitigating evidence when a defendant refuses to do so is a step towards preserving the integrity of the criminal justice system.