Counsel's Control over the Presentation of Mitigating Evidence during Capital Sentencing

James Michael Blakemore
University of Michigan Law School

Follow this and additional works at: http://repository.law.umich.edu/mlr

Part of the Constitutional Law Commons, Evidence Commons, and the Litigation Commons

Recommended Citation
James M. Blakemore, Counsel's Control over the Presentation of Mitigating Evidence during Capital Sentencing, 111 Mich. L. Rev. 1337 (2013).
Available at: http://repository.law.umich.edu/mlr/vol111/iss7/3

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
NOTE

COUNSEL’S CONTROL OVER THE PRESENTATION OF MITIGATING EVIDENCE DURING CAPITAL SENTENCING

James Michael Blakemore*

The Sixth Amendment gives a defendant the right to control his defense and the right to a lawyer’s assistance. A lawyer’s assistance, however, sometimes interferes with a defendant’s control over his case. As a result, the Supreme Court, over time, has had to delineate the spheres of authority that pertain to counsel and defendant respectively. The Court has not yet decisively assigned control over mitigating evidence to either counsel or defendant. This Note argues that counsel should control the presentation of mitigating evidence during capital sentencing. First, and most importantly, decisions concerning the presentation of mitigating evidence are best characterized as strategic, and the Sixth Amendment right to counsel allocates strategic decisions to attorneys. Second, the criminal justice system’s need for reliable and legitimate outcomes—a need that reaches its zenith during capital sentencing—outweighs a capital defendant’s limited claims to autonomy.

TABLE OF CONTENTS

INTRODUCTION .................................................................................... 1338
I. THE DEFENDANT’S RIGHT TO CONTROL HIS CASE............... 1340
   A. The Division of Decisional Labor at Trial:......................... 1340
      Fundamental Versus Strategic Choices .............................. 1340
   B. Sixth Amendment Rights During Capital Sentencing....... 1342
II. DISTINGUISHING THE RIGHT TO PRESENT MITIGATING EVIDENCE .................................................. 1344
   A. The Right to Present Mitigating Evidence..................... 1344
   B. Schriro v. Landrigan: The Unresolved Issue of the Defendant’s Control over Mitigating Evidence........ 1346
III. MITIGATING EVIDENCE AS A STRATEGIC DECISION ............... 1349
IV. AUTONOMY, RELIABILITY, AND THE ADVERSARY SYSTEM.... 1352
   A. Rebutting the Autonomy Argument............................... 1353
   B. Reliable, Individualized Sentences.............................. 1357

*  J.D. Candidate, May 2013, University of Michigan Law School. I would like to thank my Notes Editors, Emily Huang and Margaret L. Mettler, as well as the Michigan Law Review’s Notes Office, for their helpful suggestions and many hours of editing. I would also like to thank my faculty advisor, Professor Samuel R. Gross, for his research guidance and insightful, challenging feedback. This Note is dedicated to my mom, Joan C. Watt, who gave me the idea and initial sources, and to my dad, Warren M. Blakemore.
INTRODUCTION

A guilty verdict changes the rules in a capital trial. Once a court has found a capital defendant guilty, it turns to the question of his sentence, and the trial changes form. Floyd Maestas’s trial was no different. After a jury found him guilty of aggravated murder in the strangling, stabbing, and stomping death of a seventy-two-year-old woman, as well as the aggravated burglary of an eighty-seven-year-old woman whom he punched in the face, the proceedings shifted to the penalty phase to decide whether to put Maestas to death. The shift brought with it a new array of prosecutorial possibilities. Because the rules of evidence and the Confrontation Clause often do not apply at capital sentencing, evidence relating to Maestas’s criminal record and criminal propensities, which would have been inadmissible at trial, was presented to the jury. The State likewise presented evidence of Maestas’s prior crimes that the judge had found too “weak” to admit at trial under the normal rules of evidence. Because the Supreme Court condones the use of victim-impact evidence to balance the presentation of mitigating evidence, the murder victim’s granddaughter testified, recounting how,


lacking the money to hire help, she had been forced to clean up her grandmother's blood in the days after the murder.8

Maestas's counsel, however, did not present the majority of the mitigating evidence that the victim-impact testimony was meant to balance. When Maestas learned that his counsel planned to call a witness who would testify that she had seen him at seven years old having sex with his fourteen-year-old sister, Maestas requested that his lawyers be removed and that no mitigating evidence be presented.9 He claimed that the proposed testimony was false, and he worried that it would damage his relationship with his family.10 The court found that Maestas’s waiver of counsel would not be constitutionally valid, so rather than remove his lawyers, it ordered them to respect Maestas’s decisions concerning mitigating evidence.11 As a result, not only did the jury not hear of the sexual episode but it also did not learn that Maestas, at eight years old, had seen the same sister stabbed to death by her boyfriend.12 Moreover, the jury heard nothing of the older boy who sexually abused a six-year-old Maestas or of Maestas’s significant cognitive deficiencies. It also heard very little about his childhood poverty.13 In essence, the jury heard only aggravating evidence that would have been inadmissible at trial, and then sentenced Maestas to death.14

In at least one respect, Maestas's story is not unusual. Capital defendants often object to the presentation of traumatizing or embarrassing mitigating evidence.15 It remains unsettled, however, whether courts should sustain these objections.16

This Note argues that a capital defendant's Sixth Amendment right to control his trial does not extend to strategic decisions concerning the introduction of mitigating evidence during capital sentencing. Part I explains the doctrine governing the division of decisionmaking power between defendant

13. Id. at 43–44.
14. See id. at 18.
15. See Bradley A. MacLean, Effective Capital Defense Representation and the Difficult Client, 76 TENN. L. REV. 661, 670 (2009); The Supreme Court, 2006 Term—Leading Cases, 121 HARV. L. REV. 185, 260 (2007) [hereinafter Ineffective Assistance] (“Defendants may experience ‘defensiveness, shame, [or] repression,’ regarding episodes of abuse. . . . Defendants may also want to prevent certain . . . individuals from testifying.” (first alteration in original) (footnote omitted) (quoting Alan M. Goldstein et al., Assessing Childhood Trauma and Developmental Factors as Mitigation in Capital Cases, in FORENSIC MENTAL HEALTH ASSESSMENT OF CHILDREN AND ADOLESCENTS 365, 373 (Steven N. Sparta & Gerald P. Koocher eds., 2006)));
16. See infra Part II.
and counsel at trial—a division that turns primarily on whether the decision in question is fundamental or strategic. Part II argues that although the defendant has a right to present mitigating evidence, it does not necessarily follow that he has a right to prohibit his counsel from introducing mitigating evidence. Part III argues that the decision to present mitigating evidence is strategic, not fundamental, and as a result, the introduction of mitigating evidence should be counsel’s prerogative. Part IV considers and rebuts arguments in favor of allowing a capital defendant to control the introduction of mitigating evidence, and it concludes that the State’s interest in conducting just, reliable, and efficient proceedings outweighs a convicted defendant’s diminished interest in autonomy.

I. The Defendant’s Right to Control His Case

The Sixth Amendment is structurally at odds with itself. It gives the defendant the right both to control his defense and to have a lawyer’s assistance. But because the lawyer’s assistance sometimes interferes with the defendant’s control, the Supreme Court has had to delineate each party’s sphere of authority. Gradually distinguishing between fundamental and strategic decisions, the Court has allocated control over the former to the defendant and the latter to counsel. Such is the situation at trial, anyway. During capital sentencing proceedings, however, the allocation of control is less clear, as the Court has declined the wholesale application of Sixth Amendment trial rights in those proceedings. Indeed, few trial rights survive the transition to the penalty phase. The unequivocal survival of the Sixth Amendment right to counsel during this phase, however, suggests that strategic decisions during capital sentencing remain firmly in the lawyer’s province. Section I.A outlines the division of decisionmaking power the Sixth Amendment mandates at trial, while Section I.B examines the extent to which Sixth Amendment trial rights continue to apply during capital sentencing.

A. The Division of Decisional Labor at Trial: Fundamental Versus Strategic Choices

The right to represent oneself and the right to counsel sometimes conflict. The Constitution protects a defendant’s choice to represent himself, regardless of whether that choice is ultimately in his own interest.17 It is the defendant “who suffers the consequences if the defense fails,” the Supreme Court reasoned in Faretta v. California, and thus the law gives “[t]he right to defend ... directly to the accused.”18 Even as the Court delineated this right to self-representation, however, it recognized the tension in the structure of the Sixth Amendment between “the right of an accused to conduct his own

18. Id. at 819–20; see also U.S. CONST. amend. VI.
defense”19 and the requirement that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”20

This tension is particularly apparent in situations where a defendant does not choose to represent himself. The Court, in recognizing the right to self-representation, acknowledged that when the defendant is represented by counsel, “law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas.”21 The law and tradition that the Court references are significant: even before the Court recognized the right to self-representation, it had differentiated between strategic or tactical decisions and “personal choices,” allocating the former to counsel and reserving the latter exclusively for the defendant.22 The line between strategic and personal decisions is not always clear, however, leaving courts to analogize to existing precedent to determine which category decisions fall into as they arise.23

When the Court first recognized the right to self-representation, anxiety about its effect on the right to counsel quickly surfaced. Some argued that Faretta had upset the case law’s division of decisionmaking between counsel and defendant.24 These scholars read Faretta as limiting an attorney’s previously broad authority, reducing it to “‘on-the-spot’ decisions where timing considerations precluded consultation with the defendant.”25

As time went on, however, the Court dispelled any doubt about the viability of the distinction between attorney-controlled strategy and the defendant’s fundamental choices. In Jones v. Barnes, the Court made clear that the defendant has the “ultimate authority” to decide “whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.”26 Due to their “fundamental” nature, these decisions are reserved for the defendant.27 Conversely, strategic decisions that would benefit from the “professional judgment” and “superior ability of trained counsel” are better left to lawyers.28

Today, a large number of decisions fall within counsel’s broad sphere of authority. Giving counsel control over the strategic elements of a trial, in the words of the Court, “is a practical necessity,” since the “adversary process

19. Faretta, 422 U.S. at 832.
20. U.S. CONST. amend. VI.
23. See infra notes 82–85 and accompanying text. For a list of decisions the Supreme Court has thus far allocated to defendant and counsel respectively, see infra note 82.
24. LAFAVE ET AL., supra note 22, § 11.6(a).
26. 463 U.S. at 751.
27. Jones, 463 U.S. at 751.
28. Id.
could not function effectively if every tactical decision required client approval." 29 As a result, so long as counsel has discharged her duties effectively, the defendant cannot object to her decisions regarding how to cross-examine, which witnesses to call, or whether to disclose witness identities before trial. 30 Indeed, attorney control has continued to encroach on the decisional territory of defendants: in 2004 the Supreme Court ruled that a lawyer's decision to concede guilt during trial is not "the functional equivalent of a guilty plea," and thus does not require explicit consent from the defendant. 31 Even having a strong resemblance to the type of personal, fundamental decisions traditionally left to the defendant—like guilty pleas—in no way guarantees that a court will, in fact, deem a decision the defendant's to make.

The Court has made clear that the right to self-representation is not absolute, and a court must weigh a defendant's autonomy interest against the State's countervailing interest in the integrity and efficiency of the proceedings. 32 A court must balance these interests not only at trial but on appeal as well. Appellate proceedings, however, differ from trial proceedings in at least two fundamental respects: First, because the Constitution does not give defendants the right to an appeal, it necessarily cannot give them the right to self-representation on appeal. 33 Second, a court has found an appellate defendant guilty, and thus an appellate defendant no longer retains the presumption of innocence that accompanied him throughout trial. 34 Due to the latter difference, the Court found the defendant's autonomy interests following a felony conviction "less compelling" than those undergirding the right to self-representation at trial. 35 At the same time, a felony conviction does nothing to reduce the State's interest in fair and efficient proceedings. 36 In short, on appeal "the balance . . . surely tips in favor of the State." 37

**B. Sixth Amendment Rights During Capital Sentencing**

That a guilty verdict changes a defendant's status may explain the differing levels of Sixth Amendment protection at trial and sentencing. In the words of one commentator, the guilt and penalty phases are "separate uni-

31. Nixon, 543 U.S. at 188 (quoting Nixon v. Singletary, 758 So. 2d 618, 624 (Fla. 2000)).
33. Id. at 160.
34. Id. at 162.
35. Id. at 163.
36. Id.
37. Id. at 162.
verses, governed by very different rules.”38 Indeed, the transition from trial to sentencing, like the transition from trial to appellate proceedings, sees a winnowing of the defendant’s Sixth Amendment rights. To be sure, due process applies to sentencing proceedings, but in so holding, the Supreme Court simultaneously made clear that due process at sentencing does not entail “the entire panoply of criminal trial procedural rights.”39

Rather than finding due process to require the wholesale application of Sixth Amendment trial procedures to sentencing, the Court has taken a piecemeal approach.40 The Confrontation Clause, for example, floats in limbo, as it remains unclear whether a defendant can exercise the right to confrontation during the penalty phase.41 Other Sixth Amendment rights evaporate completely once sentencing begins. Specifically, the right to a jury of one’s peers does not exist at sentencing.42

Yet, in the face of this uncertainty, the Court has held one Sixth Amendment right applicable to sentencing without hesitation: the right to counsel.43 A criminal defendant enjoys the right to counsel at every proceeding in which his “substantial rights” might be affected.44 Due to its “critical nature,” the penalty phase undoubtedly qualifies.45 Furthermore, the penalty phase resembles the guilt phase enough to require essentially the same role

38. Douglass, supra note 4, at 1968.
40. Douglass, supra note 4, at 1969–70.
41. As a “general rule . . . defendants have no confrontation right during sentencing.” United States v. Mills, 446 F. Supp. 2d 1115, 1128 (C.D. Cal. 2006); see also United States v. Littlesun, 444 F.3d 1196, 1199 (9th Cir. 2006). In Williams v. New York, 337 U.S. 241 (1949), the Supreme Court declined to apply the Confrontation Clause to capital sentencing in particular, but Williams no longer clearly controls, United States v. Higgs, 353 F.3d 281, 324 (4th Cir. 2003); compare Del Vecchio v. Ill. Dep’t of Corr., 31 F.3d 1363, 1387–88 (7th Cir. 1994) (holding that in a capital case there is no exception to the long sanctioned use of hearsay at sentencing), and Bassette v. Thompson, 915 F.2d 932, 939 (4th Cir. 1990), with Profitt v. Wainwright, 685 F.2d 1227, 1254–55 (11th Cir. 1982) (finding that the Supreme Court’s emphasis on the reliability of death sentences requires that the Confrontation Clause apply during capital sentencing).
44. See Mempa, 389 U.S. at 134.
45. See id.
of counsel at both proceedings: "to ensure that the adversarial testing process works to produce a just result." 46

The Court’s piecemeal approach to adopting Sixth Amendment trial rights at sentencing, then, has produced sentencing rights that are little more than “shadows” of trial rights. 47 In spite of the Court’s reluctance to find much of the Sixth Amendment applicable to the penalty phase of criminal prosecutions, Sixth Amendment vestiges at sentencing have unequivocally, and enduringly, included the right to counsel, as well as the concomitant right to effective assistance. What the persistence of the right to counsel means for the division of decisional labor between counsel and defendant at sentencing, however, remains unclear.

II. DISTINGUISHING THE RIGHT TO PRESENT MITIGATING EVIDENCE

The Supreme Court has yet to rule on whose decision ultimately controls the presentation of mitigating evidence in cases of disagreement between defendant and counsel. Although the Court seemed to speak to the issue in a recent decision, its holding indicates the unsettled state of the law in this area. Section II.A examines the defendant’s right to present mitigating evidence and concludes that the mere existence of the right does not reveal who controls the presentation. Section II.B analyzes the most recent Supreme Court case treating control over the presentation of mitigating evidence and argues that its holding does not control the issue this Note addresses.

A. The Right to Present Mitigating Evidence

The Court has consistently found that a capital defendant has the right to present mitigating evidence and that, where the defendant has not at least had the opportunity to present such evidence, the Eighth Amendment prohibits imposing the death penalty. 48 In Woodson v. North Carolina, the Court

46. See Lafler v. Cooper, 132 S. Ct. 1376, 1385–86 (2012) ("The precedents also establish that there exists a right to counsel during sentencing in both noncapital and capital cases.") (citations omitted)); Strickland, 466 U.S. at 686–87.

47. Douglass, supra note 4, at 1968. But see Dale E. Ho, Silent at Sentencing: Waiver Doctrine and a Capital Defendant’s Right to Present Mitigating Evidence After Schriro v. Landrigan, 62 FLA. L. REV. 721, 743 (2010) ("The sentencing proceeding in a capital case is, in essence, a second trial. . . . The same rights and constitutional protections . . . apply . . . ."). One might reconcile these two views by thinking of capital sentencing as a cross between trial and sentencing, the trial portion consisting in a determination of whether the State has proven aggravating factors beyond a reasonable doubt. See Jules Epstein, Mandatory Mitigation: An Eighth Amendment Mandate to Require Presentation of Mitigation Evidence, Even When the Sentencing Trial Defendant Wishes to Die, 21 TEMP. POL. & CIV. RTS. L. REV. 1, 31 (2011).

found that the Constitution requires the opportunity to present mitigating evidence to ensure that capital cases produce sentences that are both reliable and individualized.

The Court has emphasized the importance of presenting available mitigating evidence in the context of capital sentencing. Capital punishment is "qualitatively different" from a prison term of any length, and thus it follows that a court must give individualized consideration to each particular defendant before it can impose a death sentence. The Constitution requires that a sentencer be given the opportunity to balance aggravating factors against mitigating evidence to ensure a reliable, individualized sentence in a capital case. The failure to present mitigating evidence undermines this "delicately balanced protection" in a manner that some would argue is unconstitutional. A sentencer cannot, of course, consider evidence that has not been presented, and a jury cannot properly assess the appropriateness of a death sentence when no one is making the case for life. There can be little doubt that death sentences imposed without the benefit of mitigating evidence are both impersonal and unreliable.

Nevertheless, despite its recognized importance to reliability and individualization, current capital-sentencing jurisprudence does not require that


49. 428 U.S. 280, 305 (1976) (plurality opinion) (noting "the need for reliability in the determination that death is the appropriate punishment in a specific case"). The Eighth Amendment reserves the death penalty for "the worst of the worst," Kansas v. Marsh, 548 U.S. 163, 206 (2006) (Souter, J., dissenting), and requires reliable sentencing procedures in order to avoid "a substantial risk that the death penalty [will] be inflicted in an arbitrary and capricious manner." Lockett, 438 U.S. at 601 (plurality opinion) (alterations in original) (quoting Gregg, 428 U.S. at 188) (internal quotation marks omitted). A sentence is "reliable," then, when based on a "consideration of the character and record of the individual offender and the circumstances of the particular offense." Id. (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976)). Sentences rendered without adequate consideration of the individual being sentenced are unreliable in that they leave room for doubt as to whether "death is the appropriate punishment in a specific case." Id. (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)) (internal quotation marks omitted).


51. Id. at 305.


53. See, e.g., Epstein, supra note 47, at 19-20.


55. Impersonal because they fail to respect the defendant’s dignity by considering fully his individual character and circumstances, see Ho, supra note 47, at 741, and unreliable because without such consideration one cannot be certain whether the offender qualifies as one of the "worst of the worst," see id.; see also supra note 49.
mitigating evidence be presented. As a result, a defendant, or his lawyer, is often free to forgo the presentation of mitigating evidence. But the fact that a defendant or his lawyer can, with certain limitations, choose not to exercise the defendant’s right to present mitigating evidence does not reveal who actually has the authority to make the decision.

Similarly, the fact that the Constitution protects the defendant’s right to present mitigating evidence provides little guidance as to whose decision it is to present this evidence, as the Constitution can protect a defendant’s right without affirming his control over it. A defendant, for example, has the right to a trial but when represented does not have the right to control every aspect of his case. He has the right, under the Sixth Amendment, to be confronted with the witnesses against him, but his counsel ultimately decides whether to cross-examine those witnesses. Even the decision to concede guilt during the guilt phase of a capital trial does not require the defendant’s explicit consent. That the defendant enjoys a constitutional right, then, does not necessarily mean that he controls the manner in which it is exercised. A capital defendant has the constitutional right to contest the appropriateness of a death sentence, but once he decides to do so he yields control to counsel over the argument for life.

B. Schriro v. Landrigan: The Unresolved Issue of the Defendant’s Control over Mitigating Evidence

Although the Supreme Court has not spoken directly on whether the defendant or his counsel ultimately controls the presentation of mitigating evidence, it recently came close in Schriro v. Landrigan. In many respects, the facts of Landrigan were similar to those of a line of Supreme Court cases that overturned death sentences where defense counsel had failed to investigate potential mitigating evidence adequately. At Landrigan’s sentencing hearing, his counsel presented no mitigating evidence whatsoever, despite having prepared testimony from two witnesses, Landrigan’s ex-wife

---

57. See, e.g., Schriro v. Landrigan, 550 U.S. 465, 478 (2007) (finding not objectively unreasonable a court’s conclusion that a defendant’s refusal to allow the presentation of any mitigating evidence prevented him from later challenging his counsel’s failure to investigate such evidence further). But cf. Rompilla v. Beard, 545 U.S. 374, 392–93 (2005) (finding counsel’s investigation of mitigating evidence constitutionally inadequate); Wiggins, 539 U.S. at 533 (basing its holding on the principle that counsel’s strategic decision to forgo presenting mitigating evidence is reasonable only insofar as it is supported by sufficient investigation of such evidence); Williams v. Taylor, 529 U.S. 362, 396 (2000) (finding that defense counsel’s failure to investigate mitigating evidence adequately was not justified as a strategic decision).
58. See supra Section I.A.
62. See Rompilla, 545 U.S. at 392; Wiggins, 539 U.S. at 533; Williams, 529 U.S. at 396.
and his birth mother. More troubling still, this limited investigation had failed to uncover a long list of the horrors typical of mitigation cases. In his dissent, Justice Stevens emphasized that "[n]o one, not even the Court, seriously contends that counsel's investigation of possible mitigating evidence was constitutionally sufficient." In light of other factually similar cases, then, Landrigan seemed poised to have his sentence overturned.

But Landrigan differed factually from similar cases in one significant way: Landrigan instructed his lawyer not to present mitigating evidence. As a result, the Court held that where a defendant refuses to allow the presentation of mitigating evidence, a court can reasonably conclude that the same defendant cannot later base a claim of ineffective assistance of counsel on his counsel's failure to investigate mitigating evidence further.

Landrigan did not address whether the decision to present mitigating evidence is fundamental or strategic. Though it allowed the defendant to derail the presentation of evidence his counsel had prepared, his counsel did not seek to present the evidence over his objections. That is, the Court did not confront a situation in which defendant and counsel disagreed about the presentation of mitigating evidence and thus did not have to decide whose decision would ultimately control.

Landrigan is also distinguishable on procedural grounds. As a federal habeas case, Landrigan was decided under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which restricts relief to decisions that are based on an unreasonable determination of the facts or that are "contrary to, or involve[] an unreasonable application of, clearly established

63. Landrigan, 550 U.S. at 469–70.
64. See id. at 483 (Stevens, J., dissenting) ("A serious organic brain disorder ... the effects of [Landrigan's] birth mother's drinking and drug use during pregnancy ... a history of [Landrigan's] troubled childhood with his adoptive family—a childhood marked by serious substance abuse problems (including an overdose in his eighth or ninth grade classroom), a stunted education, and recurrent placement in substance abuse rehabilitation facilities, a psychiatric ward, and police custody.").
65. Id.
66. Ho, supra note 47, at 724.
67. Landrigan, 550 U.S. at 469; see Rompilla v. Beard, 545 U.S. 374, 377–80 (2005) (defendant did not instruct counsel not to use mitigating evidence); Wiggins v. Smith, 539 U.S. 510, 514–16 (2003) (same); Williams v. Taylor, 529 U.S. 362, 369–72 (2000) (same). This characterization of the facts is contested. Justice Stevens argued that "the Arizona post-conviction court's determination that respondent 'instructed his attorney not to bring any mitigation to the attention of the [sentencing] court' is plainly contradicted by the record." Landrigan, 550 U.S. at 492 (Stevens, J., dissenting) (alterations in original) (quoting Petition for Writ of Certiorari app. F at F-I, Landrigan, 550 U.S. 465 (No. 05-1575)). The Court was certainly guilty of misleadingly severing Landrigan's words from their context. Compare id. at 470 (majority opinion) (quoting Landrigan as saying, "I think if you want to give me the death penalty, just bring it right on. I'm ready for it."), with State v. Landrigan, 859 P.2d 111, 117 (Ariz. 1993) (quoting Landrigan as saying, "This never happened. I think the whole thing stinks. I think if you want to give me the death penalty, just bring it right on. I'm ready for it." (emphasis added)).
68. Landrigan, 550 U.S. at 478.
Federal law, as determined by the Supreme Court of the United States. Thus the Court asked not whether the state court’s decision was incorrect but whether it was unreasonable—a “substantially higher threshold.” Furthermore, Arizona’s postconviction court could not have applied clearly established federal law unreasonably because clearly established federal law on the issue did not exist—indeed it could not exist, as the Supreme Court “ha[d] never addressed a situation like this.” In other words, the Court’s holding in Landrigan means only that the state court’s ruling—that a capital defendant can refuse to allow the introduction of mitigating evidence—is reasonable, but not necessarily correct. And given the Court’s procedural posture, its holding could not clearly establish what before was indeterminate.

Scholars have found Landrigan striking for the ease with which it allowed a defendant to waive his right to present mitigating evidence. They worry that, in spite of the extremely deferential AEDPA standard under which the case was decided, lower courts will interpret the ruling as a guide for mitigating evidence waiver cases. These commentators find this result problematic not because they believe that mitigating evidence is not the defendant’s to waive but because they believe that it should not be waived so easily. In general, Jules Epstein notes that this “literature has been disturbingly silent on [Landrigan’s] implications and correctness”; in particular, Epstein singles out Dale E. Ho’s “uncritical acceptance of a defendant’s right to waive mitigation” as especially troubling.

If a court ultimately finds that a defendant controls the question, then the arguments in favor of requiring that the defendant’s waiver enjoy the same safeguards as other trial rights of similar magnitude seem unquestionably correct. This Note argues, however, that in cases like Maestas’s or Landrigan’s, the constitutionality of waivers of mitigating evidence should not arise at all. A defendant cannot waive what he does not control.

70. Landrigan, 550 U.S. at 473.
71. See id. at 478.
72. See, e.g., Ho, supra note 47, at 725; see also MacLean, supra note 15, at 670.
73. E.g., Ho, supra note 47, at 751 (“[T]he opinion in Landrigan creates a danger that courts, when confronted with a defendant who opposes the introduction of certain types of mitigating evidence, will find that the defendant has waived all mitigation.”); see also MacLean, supra note 15, at 671. In Floyd Maestas’s case, the Utah Supreme Court read Landrigan as “implying” that the represented defendant could waive the right to present mitigating evidence. State v. Maestas, No. 20080508, 2012 WL 3176383, ¶ 241 (Utah July 27, 2012).
74. See, e.g., Ho, supra note 47, at 725 (arguing that a valid waiver should “require[] an affirmative showing on the record that the defendant’s choice is knowing, voluntary, and intelligent”); see also MacLean, supra note 15, at 670–71.
75. Epstein, supra note 47, at 14. For Epstein, to allow a defendant to waive the presentation of mitigating evidence is to violate the Constitution, since a sentence rendered without consideration of mitigating evidence cannot be reliable and individualized in the manner mandated by Eighth Amendment jurisprudence. Id. at 2–3. In other words, for Epstein, as for those he criticizes, the correct answer to Landrigan would have had nothing to do with the Sixth Amendment’s allocation of control over mitigating evidence.
strategic decisions concerning mitigation are conclusive, regardless of her client's wishes, then a court will not have to consider the adequacy of a waiver unless counsel and her client are in agreement. In other words, in cases where counsel seeks to introduce mitigating evidence over her client's objections, whether the defendant's attempted waiver is knowing, voluntary, and intelligent will be irrelevant. Ultimately, the decision is not the defendant's to make.

III. MITIGATING EVIDENCE AS A STRATEGIC DECISION

This Part argues that decisions about the presentation of mitigating evidence—how much to present and what to exclude—are strategic. Like strategic decisions during the guilt phase, these decisions benefit from the detached judgment, superior ability, and professional training of lawyers. Drawing on experience, research, and the advice of colleagues to anticipate the effect of evidence on the jury, selecting appropriate and important facts from the welter of information available about the defendant's life, and shaping those facts into a cogent narrative—such actions are fundamentally strategic and thus pertain to the role of counsel.

The Court has yet to articulate a clear legal standard for determining whether a decision is strategic or fundamental. In the context of control over mitigating evidence, this omission has generated considerable debate. Criminal law scholar Justin F. Marceau, for example, argues that the choice to present or forgo the presentation of mitigating evidence is "unquestionably a fundamental decision," and thus to be left to the defendant. Because mitigating evidence often involves tremendously personal and compromising information, the claim holds intuitive appeal; it is due to this intuition that few are surprised when defendants object to the presentation of mitigating evidence. But to use "fundamental" in this way is to confuse the word's ordinary meaning with its meaning as a term of art. More misleading still is the alternative term "personal decision." Mitigating evidence, so frequently intimate in nature, is undoubtedly personal in the lay sense and fundamental to the defendant, his life, and his self-conception. Yet it is not the goal-oriented, black-and-white type of decision meant by the Court when it uses the terms fundamental and personal.

Since first announcing the difference between fundamental and strategic decisions, the Supreme Court has continued, case by case, to divide the

78. Epstein, supra note 47, at 2 n.8 (quoting MacLean, supra note 15, at 670); Ho, supra note 47, at 740.
79. See supra notes 26–31 and accompanying text.
80. Id.
81. See infra note 82.
world of trial decisions between the two categories. Thus far, the decisions the Court has found to be fundamental, and hence for the defendant to make, include decisions like whether to plead guilty or to testify. These types of decisions are simply different from the decision to present mitigating evidence. Decisions of the former type, though by no means uncomplicated, require only that a defendant choose between two options; the same cannot be said of a carefully crafted argument for life. Deciding to plead guilty or to testify is complicated in the sense that it involves a difficult and personal decision—a decision based on intuition and gut feeling but not training. Crafting an argument for life is complicated in a different way: it involves many decisions that together form a broader strategy and that are of the kind the Court has judged best left to the training, professional judgment, and superior ability of counsel.

To be sure, a court cannot abrogate a defendant’s right to choose the goals and objectives of litigation, even after a guilty verdict. Thus, a defendant must make the decision to pursue life or death, and where the defendant chooses death, the presentation of mitigating evidence is not a strategic decision. But once a defendant has chosen to seek life, the task of designing the strategy for achieving that goal falls to his attorney. It is no answer to designate withholding mitigating evidence as a goal of litigation—to say, “I choose to seek life without parole so long as I decide what evidence the jury does and does not hear.” A criminal defendant cannot annex the exclusive province of counsel by conditioning his fundamental decisions on strategic decisions. During the guilt phase, the defendant could not gain control over a strategic decision, like the decision to call a particular witness or to forgo cross-examination, by subordinating that decision to and subsuming it under a fundamental decision, like the decision to plead not guilty. In other words, the defendant cannot say, “I choose to plead not guilty

82. LaFave et al., supra note 22, § 11.6(a). So far, the Supreme Court has found the fundamental-decisions category to include whether to plead guilty, waive the right to be present at trial, testify on one’s own behalf, and forgo an appeal. As for decisions controlled by counsel, the Court has included in the strategic category the decision to challenge the prosecution’s use of unconstitutionally obtained evidence, wear civilian clothes at trial, challenge a jury instruction, press a particular claim on appeal, forgo cross-examination, call a particular witness, and provide discovery to the prosecution. Id.

83. Id.

84. Recall, for example, that pleading guilty is a personal, fundamental decision, whereas conceding guilt as part of a trial strategy to avoid death is not. Florida v. Nixon, 543 U.S. 175, 187–93 (2004). The Court’s distinction emphasizes the form of the decision over its content when determining whether it is counsel’s or defendant’s to make.


86. See Carter, supra note 52, at 146.

so long as my mother testifies at trial," and thereby wrest control over management of the trial from his lawyer.88

A capital defendant should no more be able to distort the constitutionally mandated division of decisionmaking power during sentencing than during trial. The defendant’s consent to representation at the beginning of his trial justifies the lawyer’s control over a case’s strategic elements.89 Once the defendant has “acquiesced in such representation,” he continues to define the objectives of litigation but cedes control over strategy to his representative.90 Deciding the way in which objectives are to be reached is the essence of strategy. Courts should not allow capital defendants to reframe strategic choices as objectives by qualifying those objectives and making them dependent on questions of strategy. To do so would be to undermine the Supreme Court’s allocation of decisionmaking power and potentially the very functioning of the adversary system,91 as few decisions could resist a similar assimilation into more broadly defined goals of litigation.

In general, courts have not engaged in this analysis because they have framed the issue differently. They have tended to ask whether a defendant can waive his right to present mitigating evidence, rather than asking whether it is his right to control its presentation.92 This focus on waiver, however, is problematic because it often causes courts to conflate the situations of pro se and represented defendants.93 Logically, a pro se defendant controls all aspects of his case.94 Meanwhile, a represented defendant necessarily has less control over his case. Courts should be wary of mistaking the purported right to control the presentation of mitigating evidence for an extension

90. See id. at 820–21.
91. See Taylor, 484 U.S. at 418 (“The adversary process could not function effectively if every tactical decision required client approval.”); Jones v. Estelle, 722 F.2d 159, 165 (5th Cir. 1983) (en banc), overruled in part by McCleskey v. Zant, 499 U.S. 467 (1991) (“The consequences of the lawyer’s decisions fall squarely upon the defendant. There is nothing untoward in this circumstance. To the contrary, the lawyer as the defendant’s representative is at the core of our adversary process.”).
92. See Epstein, supra note 47, at 22–32.
93. See, e.g., St. Clair v. Commonwealth, 140 S.W.3d 510, 560 (Ky. 2004) (citing Faretta v. California, 422 U.S. 806 (1975), for the proposition that the defendant “may elect . . . to waive the presentation of mitigating evidence”); State v. Arguelles, 63 P.3d 731, 752–53 (Utah 2003) (drawing on cases involving both represented and unrepresented defendants to conclude that the defendant can waive the right to present mitigating evidence); see also Epstein, supra note 47, at 8 (“By citing to Faretta v. California . . . the Kentucky decision equated rights—the right to self-represent with the right to control a case where there is counsel, and both of those rights with the right to ‘plead guilty’ to death.” (footnote omitted)).
94. McKaskle v. Wiggins, 465 U.S. 168, 178 (1984). As far as waiver is concerned, if any defendant can waive the right to present mitigating evidence, it is the pro se defendant; with self-representation comes control of strategic as well as fundamental elements of the case. See United States v. Davis, 285 F.3d 378, 384–85 (5th Cir. 2002).
of the right to self-representation. They should disentangle the represented defendant's distinct situation from that of the pro se defendant and ask whether control over mitigating evidence is strategic or fundamental.

The Supreme Court has suggested that decisions concerning the investigation of mitigating evidence are best thought of as strategic.95 In Strickland, the Court excused a less-than-complete investigation of mitigating evidence as part of a "strategy choice . . . well within the range of professionally reasonable judgments."96 And in subsequent decisions, the Court has continued to apply the Strickland standard to cases involving incomplete investigation of mitigating evidence, asking whether truncated investigations could be excused as strategic.97 Because decisions about the investigation of mitigating evidence often implicate the presentation of that evidence—that is, the decision not to investigate mitigating evidence is also the decision not to present it—the presentation of mitigating evidence should also be thought of as strategic. Given the suggestion that the investigation of mitigating evidence is a strategic decision, to read Landrigan as allocating control over mitigating evidence to criminal defendants would ultimately work to their detriment. In that scenario, whether counsel or her client chooses to forgo presenting mitigating evidence, the lost opportunity to have that evidence heard could elude Strickland safeguards, but on contradictory bases in each case: in one case the mistake would be justified as a strategic decision, left to counsel, and in the other as a fundamental choice squarely within the defendant's province.98 It may be to the advantage of prosecutors to have it both ways,99 but unreliable, unjust sentences come at a cost both to defendants and society.

IV. AUTONOMY, RELIABILITY, AND THE ADVERSARY SYSTEM

The characterization of trial decisions as either strategic or fundamental in current Sixth Amendment jurisprudence militates for counsel's control

97. See Wiggins v. Smith, 539 U.S. 510, 534 (2003); Williams v. Taylor, 529 U.S. 362, 395 (2000); Burger v. Kemp, 483 U.S. 776, 794 (1987). These cases suggest that control over mitigating evidence involves strategic decisions but also that decisions to forgo further investigation of mitigating evidence must themselves be based upon a good deal of investigation, in spite of the extremely deferential posture of the Strickland standard.
98. This situation is already apparent to, and exploited by, prosecutors: "On the one hand, prosecutors call for deference to the failed strategies of trial counsel, where the client had virtually no understanding or input; and on the other hand, prosecutors claim a defendant waived the right to argue [ineffective assistance of counsel] when the client himself" made the decision. Marceau, supra note 77, at 184.
99. Id. at 183–84.
Counsel's Control over the presentation of mitigating evidence. This Part argues that counsel's control is not only mandated under the law but also makes for good policy. Section IV.A responds to the argument that allocating control to counsel is paternalistic and deprives a defendant of his autonomy. Section IV.B contends that assigning control to lawyers will serve both the defendant—by reducing the likelihood of a death sentence—and the State—by helping ensure that any sentence rendered is reliable, individualized, and legitimate. Finally, Section IV.C acknowledges the worry that attorney control over mitigating evidence will sow discord between defendants and attorneys but suggests that such discord inheres in the nature of the adversary system. The system's functioning depends on advocates, and an advocate's relationship with her client depends not on which powers she wields but on how she wields them.

A. Rebutting the Autonomy Argument

Paternalism is the most persuasive worry one must confront when considering whether to deny a defendant control over any portion of his case. Writing for the majority in *Faretta*, Justice Stewart saw the Court as confronted with "a nearly universal conviction" that forcing counsel on a defendant violates his right to control his case.100 To be sure, the *Faretta* situation differs markedly from the one examined here—*Faretta* delineated a trial right, not a right at sentencing, and a defendant's right to represent himself reveals nothing about his rights when represented. But the visceral rejection of paternalism underlying the "nearly universal conviction" identified by Justice Stewart is the first and most deeply felt argument against overriding a defendant's evidentiary decisions at sentencing. Indeed, the Framers themselves were highly suspicious of paternalism, and this distrust likely informed the first Congress's construction of the Sixth Amendment.101 Not only did the Framers distrust the government to act always in the best interest of the defendant but the very "idea of counsel as master of the defendant's case would have been inconceivable to them."102 The first Congress crafted the Sixth Amendment to provide a defendant with counsel to assist in his defense, not to wrest control over it from his hands.103

While the Framers might not have conceived of counsel as master, they also did not conceive of sentencing or appellate procedure as practiced today—a distinction not lost on the heartiest of originalists. In *Martinez v. Court of Appeal*, Justice Scalia emphasized the Framers' suspicion of governmental power and argued that they would not have accepted compulsory assignment of counsel.104 Yet he nevertheless concurred in the Court's

100. *Faretta* v. California, 422 U.S. 806, 817 (1975).
102. *Id.* at 1169.
103. *Id.* at 1168–69.
ruling, reasoning that no constitutional right to self-representation could exist on appeal, as there exists no constitutional right to appeal in the first place.\footnote{Martinez, 528 U.S. at 165.} For its part, the majority balanced the defendant's autonomy interest—diminished by a guilty verdict—against the government's interest in fair and efficient judicial proceedings and found that the former could no longer outweigh the latter.\footnote{Id. at 162–63 (majority opinion).} Lawyers, then, are forced on unwilling defendants after conviction, and one might contend, at least provisionally, that this action represents a greater intrusion on a defendant's autonomy than restricting a convicted, represented defendant's control over one aspect of the penalty stage of his trial.

Following the Supreme Court's announcement of the right to self-representation, commentators generally have advocated transferring more control from defendants to their lawyers, and lower courts have increasingly done just that.\footnote{Hashimoto, supra note 101, at 1148–50.} But scholars writing on the specific issue of control over mitigating evidence have increasingly emphasized a defendant's right to control his case.\footnote{Epstein, supra note 47, at 12–13.} Richard J. Bonnie argues that the notion that an attorney should act against her client's wishes so as to avoid the death penalty conflicts directly with counsel's traditional duty to respect her client's autonomy.\footnote{Richard J. Bonnie, The Dignity of the Condemned, 74 VA. L. REV. 1363, 1368 (1988).} For Bonnie, because the autonomy interest is "heightened, not diminished, when choices are made in the shadow of death," the competent defendant should control the presentation of mitigating evidence.\footnote{Id. at 1387, 1391.} One might even argue that a defendant's dignity and autonomy interests are strongest at sentencing, where the stakes are highest and the relevant evidence is most personal.\footnote{Ho, supra note 47, at 747–48.}

Not only do these arguments ignore the legal distinction, discussed in Part III, between fundamental and strategic decisions but they also give too much weight to dubious claims about client autonomy, and they undervalue a defendant's right to a fair trial—the paramount right in our system and one where the defendant's interests converge with those of the State. For, without a doubt, "the ideal of client autonomy" at times "may conflict with the client's right to effective assistance of counsel," and this conflict may be clearest when an attorney and her client disagree about strategy during capital sentencing. When a defendant asserts his autonomy to preclude the presentation of mitigating evidence, his autonomy right conflicts with another of his constitutionally guaranteed rights: the right to a fair trial. In this scenario, the right to a fair trial—a right that "ranks higher" than any

\begin{itemize}
\item \footnote{Id. at 1387, 1391.}
\item \footnote{Ho, supra note 47, at 747–48.}
\item \footnote{Marceau, supra note 77, at 208.}
\end{itemize}
Counsel's Control

other—must prevail, and the defendant's autonomy right must yield to the integrity of the system.

As for the judges and commentators who ask not whether a defendant properly controls the presentation of mitigating evidence but whether he can waive the right completely, the notion of a mitigation waiver, properly considered, is paradoxical. Our criminal justice system is predicated on the assumption that people are autonomous actors—that they have, and can exercise, free will—and thus are responsible for their actions. Advocates use mitigating evidence to belie this assumption and thereby demonstrate that a defendant does not deserve the full weight of the law's punishment. It would be strange and illogical to claim to protect a defendant's autonomy by allowing him to suppress evidence of his lack of autonomy.

The jurisprudential view of a defendant's autonomy at sentencing notwithstanding, doubts will assuredly linger about his autonomy in a philosophical sense. But a philosophical condemnation of paternalism does not withstand scrutiny. On the one hand, a represented defendant has already compromised his autonomy by the fact of his representation. On the other, even the staunchest advocates of a criminal defendant's right to control his case concede that the government can legitimately impinge on


114. E.g., Carter, supra note 52, at 109 ("[E]ven in the context of the hallowed right to self-representation, the systemic interest in just proceedings prevails over the individual right"); see, e.g., Casey, supra note 54, at 94–95 ("A defendant cannot give the state permission to impose a punishment that would otherwise violate the Eighth Amendment."); Epstein, supra note 47, at 25–30 (arguing that the Eighth Amendment requires mitigating evidence be heard in all cases); see also Indiana v. Edwards, 554 U.S. 164, 176–78 (2008) (holding that courts may force a lawyer on a defendant found competent to stand trial but not competent to conduct it, in part to further "the most basic of the Constitution's criminal law objectives, providing a fair trial").

115. See, e.g., Atkins v. Virginia, 536 U.S. 304, 319 (2002) (holding that the Eighth Amendment forbids the execution of the "mentally retarded," in part because cognitive and behavioral impairments make such individuals less than fully autonomous and therefore less culpable).

116. Ho, supra note 47, at 748 ("[M]any forms of mitigating evidence can be understood, in a broad sense, as evidence that tends to show that a defendant is not autonomous."); see also Melody Dickson, Comment, Dismantling the Free Will Fairytale: The Importance of Demonstrating the Inability to Overcome in Death Penalty Narratives, 77 UMKC L. REV. 1123, 1130 (2009) ("[M]itigating] evidence ‘challenges jurors’ perceptions about the choices available to the defendant and explains why his ‘choice’ to commit a crime may really have been no choice at all.'" (quoting Francine Banner, Rewriting History: The Use of Feminist Narratives to Deconstruct the Myth of the Capital Defendant, 26 N.Y.U. REV. L. & SOC. CHANGE 569, 585 (2001))).

117. See Ho, supra note 47, at 748. See generally Robert E. Toone, The Incoherence of Defendant Autonomy, 83 N.C. L. REV. 621, 650 (2005) (arguing that, in the context of a criminal trial, the idea of individual autonomy makes no sense).

118. Hashimoto, supra note 101, at 1179 ("One could argue ... that defendants waive any autonomy interest they might have by accepting assistance of counsel.").
a defendant’s autonomy once a court finds him guilty.119 As a result, the State’s interest proves heftier at sentencing, and the government can legitimately impinge on a defendant’s autonomy. Thanks to the bifurcation of capital trials, sentencing takes place after a court has found a defendant guilty, and the considerations that make a defendant’s autonomy interest nearly absolute during the guilt stage no longer apply.120 A defendant and his counsel are also more likely to agree on the best possible result of litigation once conviction reduces potential outcomes to two: life without parole or death.121

Furthermore, depriving a defendant of his autonomy is less of an affront to his dignity than it might seem, since the use of mitigating evidence is intended to ensure that the judicial process respects the dignity of the defendant by producing an individualized and reliable sentence in conformity with the Eighth Amendment.122 Denying a criminal defendant the full exercise of his autonomy at sentencing may infringe on his dignity, but surely less so than putting him to death without hearing mitigating evidence that, if ultimately unable to save his life, would at least ensure that he was treated and considered as an individual. It is difficult to defend coherently the stance that would have courts protect a defendant’s dignity only to lay greater indignities on him.

Some have argued that “autonomy” is little more than a “rhetorical flourish,” bandied about by prosecutors to the clear detriment of defendants.123 Many have questioned whether courts should consider a criminal defendant’s autonomy interests at any point during his encounter with the criminal justice system, since doing so is more likely to hurt than to help the defendant.124 Defenders of autonomy counter that (1) no empirical evidence

---

119. *Id.* at 1170; see also Ho, *supra* note 47, at 745 (“[I]t is hard to think that any person who has just been convicted of a capital offense and is faced with two options—life imprisonment or death—is ‘autonomous’ . . . .”).

120. Compare Hashimoto, *supra* note 101, at 1148 (arguing that because the guilt phase precedes a guilty verdict, the government cannot legitimately curtail a defendant’s autonomy there), with Martinez v. Court of Appeal, 528 U.S. 152, 163 (2000) (noting that “the autonomy interests that survive a felony conviction are less compelling than” a defendant’s autonomy interests at trial).

121. Lawyers and defendants have different considerations, and the defendant and his lawyer might disagree about which risks are worth taking or about how to define the “best possible result” of litigation. See Hashimoto, *supra* note 101, at 1178. For example, a defendant may find any possibility of acquittal, however remote, more valuable than a sentence discount, or even more valuable than the difference between a life and death sentence. See id. To be sure, it is the defendant who will suffer from the exposure of painful or embarrassing mitigating evidence, and thus he may calculate its value vis-à-vis the risk of receiving the death penalty differently than counsel. See, e.g., Battenfield v. Gibson, 236 F.3d 1215, 1230–31 (10th Cir. 2001).

122. See, e.g., Ho, *supra* note 47, at 741.


Counsel's Control

May 2013]

1357

supports the claim that represented defendants fare better than defendants who make their own decisions, (2) the Court's jurisprudence allocates at least some decisions to defendants' control, and (3) defendants and their attorneys often define "best possible outcome" differently.125

In the case of capital sentencing, the special circumstances of the proceedings resolve the debate.126 First, mitigating evidence is frequently a defendant's best hope for life, and empirical studies have shown its influence on jury determinations.127 Second, as I have demonstrated, because decisions concerning mitigating evidence are best characterized as strategic and thus are of the type typically controlled by counsel, the Court's jurisprudence supports allocating such decisions to attorneys. Finally, a defendant who has set life as the goal of litigation agrees with his attorney that the best possible outcome of his trial is to not be put to death by the State.128

B. Reliable, Individualized Sentences

Once one has addressed these typical objections to curtailing a client's putative autonomy, the advantages of attorney control are clear and unqualified. Mitigating evidence is the best means by which to achieve both the client's goals—life without parole—and the goals of the State—a nonarbitrary, reliable, individualized, and legitimate sentence.129 And the realization of both goals depends not just on the existence of mitigating evidence but also on its presentation by counsel.130

In the aggregate, more lawyer control would likely mean that juries and judges hear more—and, crucially, better-presented—mitigating evidence. This is because cases of disagreement between counsel and client would more likely see counsel advocating for the presentation of evidence and the client hoping to suppress it. For defendants, the frequently intimate nature of

125. Id. at 1176–79.
126. See Epstein, supra note 47, at 10 (questioning "how securing a sentence of life imprisonment, rather than death, could ever be an act that 'harms the client'"); Hashimoto, supra note 101, at 1176 ("The combination of the threatened death penalty and the fact that the defendant appears to be making a very unwise decision by foregoing the presentation of mitigating evidence has led some to question why the defendant's autonomy should be considered at all.") (citing Casey, supra note 54, at 104–05, and Williams, supra note 123, at 698).
128. See supra note 121.
129. See Abdul-Kabir v. Quarterman, 550 U.S. 233, 260 (2007); Lockett v. Ohio, 438 U.S. 586, 605 (1978); see also Epstein, supra note 47, at 21 ("[Lockett's] core notion that death-worthiness cannot be assessed without considering mitigating factors remains vital.").
130. A presentencing report, for example, is less effective than attorney-presented mitigating evidence, since it "may include highly detrimental (or poorly explained or contextualized) information" and because it "divorces mitigation from the trial context, rather than structuring the presentation in light of the nature of the crime and the conduct of the accused." Epstein, supra note 47, at 34.
mitigating evidence causes many to object to some if not all of it. As for lawyers, Supreme Court precedent pressures lawyers to err on the side of investigating and presenting mitigating evidence or risk the embarrassment of future claims of ineffective assistance of counsel.

Certainly, some cases will arise in which the defendant insists on the sentencer hearing information that his lawyer believes or knows is time-consuming or irrelevant or distracting or, worse, has been shown to cause juries to think less of defendants. In such cases, if the lawyer is correct, society and the defendant will benefit from her superior strategy. If, however, she is mistaken and forgoes the presentation of potentially helpful mitigating evidence in the face of her client’s objections, her client will have recourse to already-existing procedures for claims of ineffective assistance of counsel.

Promoting the presentation of mitigating evidence is desirable because mitigating evidence greatly reduces the likelihood that a sentencer will impose the death penalty, while it simultaneously helps to ensure the reliability of whichever decision the sentencer ultimately reaches. Whether effective or not, mitigating evidence offers a convicted capital defendant his only opportunity to make his case for life to his sentencer. And mitigating evidence is, in fact, effective. Defendants who exercise their right to present mitigating evidence fare better than those who do not—so much so that some have argued that the death penalty becomes “inevitable” without it.

Mitigating evidence does more than save lives. Through the presentation of mitigating evidence, the criminal justice system can realize its basic underlying premise. Our system is based on the assumption that truth emerges from the crucible of adversarial testing. The Constitution requires “access to counsel’s skill and knowledge”—that is, the right to counsel—during capital sentencing because the adversarial system fails without it. Counsel’s role, during both the guilt and penalty phases of a capital trial, is “to ensure that the adversarial testing process works to produce a just result.” Our concern for just results should nowhere be higher than where one of two possible results is death.

When no one argues the case for life, a jury is not only less likely to spare the defendant’s life but is also less likely to produce a reliable result.

133. Rompilla, 545 U.S. at 377, 383.
136. *Id.* at 740.
138. *Id.*
139. *Id.* at 686–87.
Courts and the State need the opportunity to consider an argument for mitigation in order to be sure that the sentence imposed is appropriate for the particular defendant. The advocate brings to the case the emotional detachment needed to make clearheaded decisions as to strategy and the expertise needed to present the evidence effectively, highlighting information known to affect juries favorably and downplaying or excluding harmful or unhelpful facts. Counsel organizes the evidence into a narrative that at once enlivens the facts and contextualizes the crime, mitigating the defendant’s culpability to the extent possible—all the while serving the interests of both the State and the accused.

C. A Final Objection

Logic, the Court’s jurisprudence, and a proper consideration of a defendant’s autonomy may support counsel’s control over mitigating evidence, but a final worry persists: Having reached an impasse with his lawyer, will an unhappy client not simply fire his attorney and proceed pro se? Is this result not more damaging than even the lost opportunity to present mitigating evidence?

Practically speaking, a trial court is unlikely to allow a defendant to dismiss his attorney when a conflict arises over the introduction of mitigating evidence. Should this prove not to be the case, however, the argument for attorney control remains strong. The danger that a defendant and his counsel will find themselves unable to reach a consensus on matters of trial strategy is no doubt a great one. But it is a danger that plagues every stage of the criminal process and a problem that goes beyond the question of how the law allocates decisionmaking authority. As with questions of strategy during the guilt phase of a trial, counsel has a moral and a professional duty to do her best to develop a strategy that will not only achieve the best possible outcome for her client but will also be one with which her client is comfortable. Obstinate clients and obdurate lawyers will always exist, but

141. Id. at 97.
142. Marceau, supra note 77, at 188.
143. See Epstein, supra note 47, at 34 (describing how the absence of counsel in the presentencing report process can allow the presentation of “highly detrimental (or poorly explained or contextualized) information” and prevent the defendant from “structuring the presentation in light of the nature of the crime and the conduct of the accused”).
144. Id.
145. See Casey, supra note 54, at 90.
146. Hashimoto, supra note 101, at 1156 (“[M]any lower courts have held that defendants waive their right of self-representation if they do not invoke the right prior to the start of the trial.”).
147. See Uphoff, supra note 96, at 798–834 (arguing that counsel should weigh four factors to decide whether to respect a client’s strategic choice: (1) defendant’s capacity, (2) defendant’s reasons, (3) harm facing the defendant, and (4) likelihood defendant will suffer that harm if counsel respects his choice).
their existence says nothing about the appropriate allocation of decisionmaking authority at any part of the trial.

CONCLUSION

Counsel should control the presentation of mitigating evidence during capital sentencing. Despite the personal nature of many forms of mitigating evidence, decisions concerning its presentation—including whether to present it, how much to present, and how to present it—are best characterized as strategic. The Sixth Amendment right to counsel allocates strategic decisions to attorneys, and although many Sixth Amendment rights wither or fall away completely at sentencing, the right to counsel retains all its vitality. A defendant’s claims to autonomy, however, do not. While a guilty verdict reduces a defendant’s autonomy, the criminal justice system’s need for reliable and legitimate sentences remains the same. Mitigating evidence benefits from a lawyer’s skill and training, and well-presented mitigating evidence helps promote reliability and legitimacy. Courts should not allow dubious claims about autonomy to suppress evidence that undermines the very autonomy a defendant seeks to exercise, especially since the defendant’s exercise of autonomy will likely result in death.