in capital cases is interesting. Should there be greater protections for waivers when the defendant's life is on the line? In the *Chapman* appeal, it was argued that Kentucky should adopt the Arkansas statute that holds that a defendant charged with capital murder is prohibited from:

> . . . waiving either a jury trial on the issue of guilt or the right to have his sentence determined by a jury unless (1) the court determines the waiver is voluntary and was made without compulsion or coercion, (2) the death penalty has been waived by the State, and (3) the State has assented to the defendant's waiver of his right to a jury trial, and such waiver has been approved by the trial court [*Newman v. State*, 106 S.W.3d 438, pp 456–57 (Ark. 2003)].

Another interesting notion raised is that a defendant may use the death penalty to commit "suicide by court." In rejecting this argument, the Kentucky Supreme Court found that because Mr. Chapman's plea was "competently, knowingly, intelligently, and voluntarily made," and because the death penalty was not a "disproportionate sentence for Chapman's heinous offenses" (*Chapman*, p 58), it is not suicide by court. In a concurring opinion, Chief Justice Lambert wrote that the "imposition of the death penalty is the ultimate expression of state outrage for criminal conduct" and therefore, "the wishes of the defendant, whether motivated by sincere remorse, desire to escape life imprisonment, or to assert control, should play no part in the penalty determination" (*Chapman*, p 71). In this light, the defendant's motivation and his intention to proceed with a death sentence is divorced from the imposition of the sentence.

Finally, the Kentucky Supreme Court considered the right to present mitigating evidence and upheld that a competent *pro se* defendant may refuse this right. However, this ruling seems contrary to that in *Gregg v. Georgia*, 428 U.S. 153 (1976), in which the U. S. Supreme Court argued that certain safeguards must be in place to prevent implementation of the death penalty in an arbitrary and capricious manner. Specifically, the majority argued:

> . . . [T]hese procedures require the jury to consider the circumstances of the crime and the criminal before it recommends sentence. No longer can a Georgia jury . . . reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die . . . . Are there any special facts about this defendant that mitigate against imposing capital punishment? [*Gregg*, p 197].

In the *Gregg* decision, the U.S. Supreme Court emphasized the need to know about the defendant via mitigating evidence before imposing the death penalty. The presentation of mitigating evidence may be viewed as more than just the defendant's optional right, but a vital safeguard in protecting the state's interest in assuring that all death sentences are applied in a consistent, nonarbitrary, and just manner.

Mitigating Evidence in a Death Penalty Case

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A Knowing and Intelligent Waiver Is Not Required to Waive Mitigating Evidence in Capital Case

In *Schriro v. Landrigan*, 127 S. Ct. 1933 (2007), the U.S. Supreme Court upheld the waiver of mitigating evidence by a capital defendant and the resulting death sentence. The Court found no requirement for a knowing and intelligent waiver of the right to present mitigating evidence and found no error in defense counsel's failure to investigate and prepare such evidence before sentencing.

Facts of the Case

Jeffrey Landrigan was convicted in Arizona of second-degree murder in 1982 and assault and battery with a deadly weapon in 1986. After escaping from prison, he was convicted of theft, second-degree burglary, and felony murder in 1989. At sentencing, his defense counsel tried to present mitigating evidence consisting of testimony from his ex-wife and birth mother, both of whom refused to testify at his request. Defense counsel advised her client against this position. When the court asked him if he had instructed his lawyer not to present mitigating evidence and if he understood the implications of refusing such evidence, he answered affirmatively. The mitigating testimony available would have demonstrated that his birth mother used drugs and alcohol, that he had abused drugs and alcohol, and that he had been

a good parent. He repeatedly interrupted the proceedings and declared that he did not want the evidence being proffered by his attorney entered. When asked if he had anything to say at sentencing, He stated, "I think if you want to give me the death penalty, just bring it on. I'm ready for it." He was sentenced to death.

The Arizona Supreme Court unanimously affirmed Mr. Landrigan's conviction and sentence. The court found the claim of ineffective assistance of counsel unsubstantiated. In 1995, he petitioned the Arizona postconviction court alleging that his counsel should have explored additional mitigating evidence. The court disagreed based on his statements and behavior at sentencing and did not hold an evidentiary hearing. In 1996 the Arizona Supreme Court denied review.

A federal *habeas* application was filed in federal district court. The district court opined that Mr. Landrigan was not prejudiced by the lack of potentially mitigating testimony. In addition, the court determined that he did not have ineffective assistance of counsel. Thus, an evidentiary hearing was denied. Although a unanimous panel of the Ninth Circuit affirmed, the *en banc* appeals court opined that he should have had an evidentiary hearing because of ineffective counsel. The decision that his counsel was ineffective was based on standards described in *Strickland v. Washington*, 466 U.S. 668 (1984), wherein defense counsel was ruled ineffective based on failure to prepare mitigating evidence. He argued that his attorney had not prepared enough for the sentencing portion of the trial, failing to investigate possible sources of mitigating evidence. The court of appeals argued that his refusal of mitigating evidence was specific to testimony by his ex-wife and birth mother and not to mitigating evidence in general. The Ninth Circuit held that even though he had refused to have mitigating evidence presented, defense counsel should have investigated such evidence before sentencing. Failure to investigate options for mitigating evidence precluded any meaningful ability to make an "informed and knowing" decision, as he remained unacquainted with the nature, quality, and extent of his potential mitigating evidence.

Ruling and Reasoning

In a five-to-four decision, the U.S. Supreme Court reversed and remanded. The Court overturned the Ninth Circuit decision, holding that the district court did not err in denying an evidentiary hearing. Justice Thomas delivered the majority opinion of the Court. The U.S. Supreme Court held that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) places discretion for evidentiary hearings with federal district courts but limits the ability to grant federal *habeas* relief absent clear and convincing evidence that the state court's factual findings were an "unreasonable determination of the facts." The Court held that the new evidence that Mr. Landrigan wanted to present was no different in substance than that which his counsel wanted to present in his initial trial. Thus, the district court had correctly denied him an evidentiary hearing.

The Court disagreed with the Ninth Circuit's opinion regarding the scope of the mitigating evidence refused by Mr. Landrigan, interpreting his comments at trial as evidencing his choice to present no mitigating evidence at all. Thus, the Court upheld the ruling that his instructions to withhold mitigating evidence applied to all forms of such evidence as a reasonable determination of the facts. Presuming that he would have refused all mitigating evidence, the Court reasoned that his counsel's failure to investigate mitigating evidence before sentencing could not be prejudicial as defined under *Strickland v. Washington*, *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Rompilla v. Beard*, 545 U.S. 374 (2005).

The Court went on to reject the Ninth Circuit's finding that Mr. Landrigan's decision was not "informed and knowing." It opined that there is no "informed and knowing" requirement for a defendant to refuse mitigating evidence. Even if there was such a requirement, his failure to argue this claim in Arizona state courts barred the district court from entertaining the argument. The Court noted that defense counsel had informed Mr. Landrigan of the importance of mitigating evidence and met defense counsel's obligation to present mitigating evidence to the court. Finally, the Court interpreted the comment, "I think if you want to give me the death penalty, just bring it right on," as demonstrative of his appreciation for the consequences of his choice.

Discussion

Chief Justice Stevens offers a cogent dissenting opinion that the death sentence in the present capital case violates the Eighth and Fourteenth Amendments. Essential to the constitutionality of capital punishment is the jury's ability to examine individ-

ually both the crime and the defendant when determining if death is a fitting punishment. Echoed are the words of Chief Justice Burger:

> Legislatures prescribe the categories of crimes for which the death penalty should be available, and, acting as "the conscience of the community," juries are entrusted to determine in individual cases that the ultimate punishment is warranted. Juries are undoubtedly influenced in this judgment by myriad factors [*Furman v. Georgia*, 408 U.S. 238, p 388 (1972)].

In *Gregg v. Georgia*, 428 U.S.153 (1976), the Supreme Court opined that capital punishment does not violate the Eighth and Fourteenth Amendments if safeguards are in place to protect against capricious and arbitrary use of the death penalty. Justice Stewart, writing for the majority in *Gregg*, stated that a judge and jury need "accurate sentencing information" because it "is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die" (*Gregg*, p 190). Thus, mitigating evidence represents not only a right available to defendants, but a safeguard to the state's vital interest in the constitutional application of its most extreme (and controversial) form of punishment.

In *Schriro v. Landrigan*, Mr. Landrigan refused to allow mitigating testimony to be presented at trial, interfered with his attorney's efforts to present such information, and asked to "bring [the death sentence] on." Although the majority cites his behavior and words as evidence of a knowing and intelligent choice, the dissent contextualizes them as indicative of the vital and missing mitigating evidence that ought to have been scrutinized before any sentence of death.

> Significant mitigating evidence—evidence that may well have explained respondent's criminal conduct and unruly behavior at his capital sentencing hearing—was unknown at the time of sentencing. Only years later did respondent learn that he suffers from a serious psychological condition that sheds important light on his earlier actions. The reason why this and other mitigating evidence was unavailable is that respondent's counsel failed to conduct a constitutionally adequate investigation [*Schriro*, p 1944].

The Court's present opinion enables a capital defendant to waive the right to present mitigating evidence and to do so even absent a knowing and intelligent decision-making process. This position is seemingly dissonant with the high value and vital role identified for mitigating evidence in prior decisions. The reinstated death penalty, as envisioned in *Gregg v. Georgia*, was based on the addition of new procedures and safeguards to minimize ambiguity in death sentencing, and mitigating evidence seemingly played an important role in that endeavor. How then can a potentially unknowing and unintelligent waiver of mitigating evidence comport with the Court's prior rulings in relation to capital punishment? It is difficult to assimilate the Court's present ruling into the existing case law surrounding mitigating evidence and the death penalty, leaving lower courts the difficult task of synthesizing these various rulings into a workable scheme. As *Chapman v. Commonwealth*, 2007 Ky. LEXIS 178 (Ky. 2007), illustrates, state courts continue to struggle with this difficult issue and would clearly benefit from a well-defined role for mitigating evidence in capital sentencing. It is to be hoped that future opinions will resolve this existing paradox.

Mental Retardation and the Death Penalty: Addressing Various Questions Regarding an *Atkins* Claim

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An Appeals Court Holds That States Must Give a Hearing to Prisoners Who Show A *Prima Facie* Case of Mental Retardation in Death Penalty Cases

In *Rivera v. Quarterman*, 505 F.3d 349 (5th Cir. 2007), the United States Court of Appeals for the Fifth Circuit reviewed the grant of *habeas* relief from a death sentence based on a petitioner's claim of mental retardation. On appeal, the State of Texas argued that the lower court erred by not dismissing the *habeas* petition as untimely and in ruling that the petitioner was mentally retarded. The court affirmed the finding of mental retardation, but remanded the matter on the question of timeliness.

Facts of the Case

In May 1994, Jose Rivera was convicted and sentenced to death for murdering a three-year-old boy in