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 pro-
ceedings and declared that he did not want the evi-
dence 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 af-
ffirmed 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 coun-
sel should have explored additional mitigating evi-
dence. The court disagreed based on his statements
and behavior at sentencing and did not hold an evi-
dentiary 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 poten-
tially 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
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, de-
fense counsel should have investigated such evidence
before sentencing. Failure to investigate options for
mitigating evidence precluded any meaningful abil-
ity 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 Anti-
terrorism 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 evi-
dence 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 mitigat-
ing 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 inves-
tigate mitigating evidence before sentencing could
not be prejudicial as defined under Strickland v.

The Court went on to reject the Ninth Circuit’s
finding that Mr. Landrigan’s decision was not “in-
formed and knowing.” It opined that there is no
“informed and knowing” requirement for a defen-
dant 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 com-
ment, “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 Amend-
ments. 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