

Mitigation Evidence and Capital Cases in Washington: Proposals for Change

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I. INTRODUCTION

On August 28, 2001, at 12:52 a.m., the state and citizens of Washington executed James Elledge.¹ Mr. Elledge had been convicted and sentenced to die for murdering Eloise Fitzner in the basement of a church in Lynnwood, Washington.² The State of Washington previously convicted Mr. Elledge of homicide after he bludgeoned a motel clerk to death in 1974 over a dispute about a bill.³ Prior to that incident, Mr. Elledge had attacked a Western Union clerk in New Mexico and poured gasoline over her.⁴ At the sentencing hearing for the murder of Eloise Fitzner, the jury was made aware of Mr. Elledge's history of serious criminal behavior.

In making its decision, however, the jury was not provided any mitigation information about James Elledge that may have merited imposing the more lenient sentence of life in prison without parole. For example, the jury did not know that James Elledge's childhood was so brutal that he once asked to be kept in a reform school rather

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1. Rebekah Denn & David Fisher, *Execution Leaves a Trail of Unease*, SEATTLE POST-INTELLIGENCER, Aug. 29, 2001, available at http://seattlepi.nwsourc.com/local/36916_elledge29.shtml.

2. *Id.*

3. *Id.* Mr. Elledge was convicted of first-degree murder and sentenced to life in prison with eligibility for parole. Mr. Elledge was on parole for this killing when he murdered Ms. Fitzner. See Verbatim Report of Proceedings at 1719, vol. XII, *State v. Elledge* (Superior Court of the State of Washington, County of Snohomish 1998) (No. 98-1-00798-7)).

4. *Id.*

than return home.⁵ The jury never learned that James Elledge was married, that he had two daughters, and that he had grandchildren.⁶ The jury was unaware that James Elledge had many friends within his church and community. The jury was ignorant of the fact that James Elledge had pleaded insanity in the prior homicide case.⁷ More important, the jury was never told that Mr. Elledge had saved the life of a prison guard.⁸ The jury that sentenced James Elledge knew only part of the story about a man it condemned to die.

The death penalty is qualitatively different from any other penalty in our system of criminal justice.⁹ Therefore, it must be applied in a manner that is not arbitrary or capricious.¹⁰ Death sentences should be reliably imposed on an individualized basis.¹¹ The presentation of mitigation evidence is essential to meet these requirements.¹² Accordingly, Washington's legislature enacted a death penalty statute that specifically provides for the presentation of mitigation evidence and relies on this evidence for proper operation of the death penalty scheme.¹³

The Washington statutory scheme, however, contemplates an adversarial process wherein defendants and their attorneys will vigorously oppose the imposition of a death sentence. In situations where mitigation evidence is not presented, the structure of Washington's

5. David Fisher, *Elledge Set to Die August 28*, SEATTLE POST-INTELLIGENCER, July 18, 2001, available at http://seattlepi.nwsource.com/local/31712_ellege18.shtml.

6. Rebekah Denn, *Dispute Embroils Killer's Request to Die*, SEATTLE POST-INTELLIGENCER, July 7, 2001, available at http://seattlepi.nwsource.com/local/30451_elledex07.shtml.

7. *Id.*

8. See Speedy Rice et al., *Clemency Petition Seeking Commutation of the Death Sentence of James Elledge to Life Without Parole at 9* (hearing date Aug. 6, 2001). Mr. Elledge assisted a guard during a prison riot, placing himself between rioting prisoners and the guard. As the guard later stated: "When there was no one else there to help us, I'm thankful that Inmate Elledge was there to assist, as that could have proved fatal for all of us." *Id.* at Exhibit 3 (Letter of Appreciation for Inmate Elledge from Lt. C.G. Parsons).

9. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long."). The "death is different" argument was first offered by Justice Brennan to support abolition of the death penalty but has metamorphosed into a reformist argument to support rationality-based sentencing. Jeffrey Levinson, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 A. CRIM. L. REV. 147, 161-62 (2001).

The authors support abolition of the death penalty. While recognizing that political capital can be squandered by settling for less than the ultimate goal, we are willing accept alternative strategies short of complete abolition in the interim. By correcting death penalty process deficiencies, we hope some lives will be spared.

10. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (summarizing the holding of *Furman v. Georgia*, 408 U.S. 238 (1972)).

11. *Woodson*, 428 U.S. at 305.

12. *Lockett v. Ohio*, 438 U.S. 586, 602-05 (1978).

13. WASH. REV. CODE § 10.95.070 (2002).

death penalty statute fails.¹⁴ These situations arise when a defendant opts not to put on a defense and is a “volunteer”¹⁵ for the death penalty, when the defendant’s attorney provides ineffective assistance of counsel, or when the defense is forced to make a strategic choice to withhold mitigation evidence. The underlying legislative assumption that defendants will vehemently fight for their lives no longer applies. In these circumstances, the state imposes death sentences in an arbitrary and capricious manner, and juries are forced to impose unreliable and nonindividualized sentences.

Part II of this article examines the United States Supreme Court’s recognition of the importance of mitigation evidence in capital cases. Part III then focuses on the role of mitigation evidence in Washington’s death penalty scheme. The following section, Part IV, addresses the public policy implications when mitigation evidence is not presented. Finally, Part V proposes changes to the current sentencing procedure in Washington involving capital crimes.

II. THE ROLE OF MITIGATION IN A CONSTITUTIONALLY SOUND DEATH PENALTY STATUTE

For three decades, beginning with *Gregg v. Georgia*,¹⁶ the Supreme Court has provided states with direction regarding use of the death penalty. The foundation of the Court’s concern regarding the death penalty is that it not be “inflicted in an arbitrary and capricious manner.”¹⁷ In *Gregg*, the Court informed the states that they could meet the Court’s constitutional concerns with “a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.”¹⁸ The Court then upheld a death penalty statute that provided procedures permitting “the jury to consider the circumstances of the crime and the criminal before it recommends sentence.”¹⁹ The Court specifically mentioned that the information that could be provided to the jury included “special facts . . . that mitigate against imposing capital punishment.”²⁰

The same day it announced the *Gregg* decision, the Court also handed down a ruling invalidating a mandatory death penalty

14. See *infra* Part III.

15. The use of the term “volunteer” seems somewhat inapt, but it is the characterization commonly used to describe those defendants who do not contest their cases at trial or during the appeals process.

16. 428 U.S. 153 (1976).

17. *Id.* at 188 (summarizing the holding in *Furman v. Georgia*, 408 U.S. 238 (1972)).

18. *Id.* at 195.

19. *Id.* at 197.

20. *Id.*

scheme.²¹ In *Woodson*, the Court found that North Carolina's statute prevented consideration of the relevant character aspects and the record of a convicted defendant before imposition of a death sentence.²² Justice Stewart's plurality opinion stated:

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind

[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.²³

This individual assessment creates a certain amount of reliability that a particular sentence is the most appropriate.²⁴

Two years after the *Gregg* and *Woodson* decisions, the Court provided explicit instructions in *Lockett v. Ohio*²⁵ regarding what "relevant facts" should be considered in capital sentencing. Indeed, the Court sought to furnish "the clearest guidance that the Court can provide" regarding the substance of a death penalty statute.²⁶ As a fundamental aspect of this guidance, the Court concluded that

the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.²⁷

21. *Woodson*, 428 U.S. at 305. The Court's decisions in both *Gregg* and *Woodson* were announced on July 2, 1976.

22. *Id.* at 303.

23. *Id.* at 304 (citation omitted).

24. *Id.* at 305.

25. 438 U.S. 586 (1978).

26. *Id.* at 602.

27. *Id.* at 604 (emphasis in original; footnote omitted). The "rarest kind of capital case" refers to the possibility of the need to deter certain kinds of homicide, such as "when a prisoner—or escapee—under a life sentence is found guilty of murder." *Id.*, n.11. The Court did not express an opinion about these types of cases. However, this type of sentence (where no mitigation was provided) was viewed as presenting a situation where a mandatory death sentence

The presentation of mitigation evidence is essential to provide the adequate information a jury needs to reliably make an individualized assessment regarding the application of the death penalty.²⁸

In *Buchanan v. Angelone*,²⁹ the Court further clarified its imperative to the states. In considering the constitutional sufficiency of jury instructions regarding mitigation evidence, the Court pointed to the demarcation between the eligibility phase and the selection phase of the capital sentencing process.³⁰ Whether a person is eligible for the death penalty is constrained by a requirement that the death penalty is a proportionate penalty for a particular crime and is thus not imposed arbitrarily and capriciously.³¹ At the selection phase, there is a "need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination [that a death sentence is appropriate]."³² Therefore, "[i]n the selection phase . . . the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence."³³ In formulating death penalty statutes, the states "may shape and structure the jury's consideration of mitigation as long as [they do] not preclude the jury from giving effect to any relevant mitigating evidence."³⁴

The presentation of mitigation evidence is indispensable in ensuring an individualized sentence determination.³⁵ Consequently, juries may not be prevented from considering any relevant mitigation

would be imposed. *Id.* In addition, the "rarest kind of capital case" was not merely one where a defendant wished to be executed. *Id.*

28. *Lockett*, 438 U.S. at 602–05.

29. 522 U.S. 269 (1998).

30. *Buchanan*, 522 U.S. at 275–76. The eligibility phase comports with the guilt phase of a bifurcated capital trial. "To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment." *Tuilaepa v. California*, 512 U.S. 967, 971 (1994). The selection phase (sentencing phase) is "where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence." *Id.* at 972. "What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879 (1983).

31. *Buchanan*, 522 U.S. at 275–76.

32. *Id.* at 276.

33. *Id.*

34. *Id.*

35. See Linda E. Carter, *Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death*, 55 TENN. L. REV. 95, 104–06 (1987). This article remains the definitive work on the importance of mitigation evidence in capital cases. See also Laura A. Rosenwald, Note, *Death Wish: What Washington Courts Should Do When a Capital Defendant Wants To Die*, 68 WASH. L. REV. 735, 750–52 (1993). The author urges the use of neutral parties to present mitigation evidence in the Washington death penalty process on behalf of defendants who refuse to offer such evidence.

evidence presented in a case.³⁶ Respect for human dignity—central to our system of criminal justice—requires the consideration of mitigating circumstances as an essential part of the process of inflicting the death penalty. The presentation of mitigation evidence is a fundamental requirement for a sound death penalty statute.

III. THE WASHINGTON STATUTE AND MITIGATION

The capital sentencing process intertwines individual rights of the accused, societal interests, ethical obligations of counsel, and social policy concerns. The presentation of mitigating evidence raises important constitutional questions and affects the overall integrity of the imposition of the death penalty.

The Washington State Legislature enacted a death penalty statute that not only specifically provides for the presentation of mitigation evidence but also relies on this evidence for proper operation of the entire capital scheme.³⁷ In the eligibility and selection phases, as well as through mandatory review, the legislature sought to promote a system that is neither arbitrary nor capricious and that allows for more individualized sentencing determinations.³⁸ Under Washington's death penalty scheme, prosecutors, jurors, judges, and the governor depend upon mitigation evidence to constrain and guide their decisionmaking.³⁹

Mitigation evidence is a crucial aspect of both the eligibility and the selection phases of Washington's death penalty scheme.⁴⁰ Accord-

36. *Lockett*, 438 U.S. at 604.

37. See WASH. REV. CODE §§ 10.95.010–.900 (2000). There are twenty-two sections within WASH. REV. CODE § 10.95. The presence of mitigation evidence directly affects the operation of nine of these sections: § 10.95.030(2) (the sentence for aggravated first-degree murder is death when a special sentencing proceeding finds that there are not sufficient mitigating circumstances to merit leniency); § 10.95.040 (the prosecution's decision regarding whether to seek the death penalty is affected by mitigating circumstances); § 10.95.060(4) (the question presented for the jury's sentencing determination); § 10.95.070 (factors that the jury may consider in deciding whether leniency is merited); § 10.95.080 (sentence of death imposed when jury finds that there was not sufficient mitigating evidence to merit leniency); § 10.95.110 (the verbatim report of the record from the trial court (containing any mitigating evidence presented) to be supplied to the Washington Supreme Court for consideration on mandatory appeal); § 10.95.120(2) (the presentation of the questionnaire report to the Washington Supreme Court containing the trial court's answers regarding mitigation evidence); § 10.95.130(2)(a) (the Washington Supreme Court must review the sufficiency of the evidence regarding the jury's determination that there was not sufficient mitigating evidence to merit leniency); § 10.95.140 (the Washington Supreme Court must invalidate a death sentence where it finds that there was sufficient evidence to merit leniency).

38. See *infra* notes 46–77 and accompanying text.

39. See WASH. REV. CODE § 10.95.040; WASH. REV. CODE § 10.95.060; WASH. REV. CODE § 10.95.070; WASH. REV. CODE § 10.95.130; WASH. REV. CODE § 10.95.140.

40. See discussion *infra* notes 45–62 and accompanying text.

ing to the statute, mitigation evidence is a significant consideration in determining whether a person is potentially eligible for the death penalty at all.⁴¹ In the selection phase, the legislature explicitly gave effect to mitigating evidence presented in the sentencing phase of a capital trial.⁴² Thus, Washington's death penalty is imposed only in a particular case after a person has been convicted of aggravated first-degree murder and "the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency"⁴³ In addition, mitigation evidence is pivotal to the accuracy of the Washington Supreme Court's mandatory review and is essential for presentation in the event of a clemency petition as well.⁴⁴

A. *The Eligibility Phase*

The presence or absence of mitigation evidence in a particular case is a significant factor in the prosecutor's decision to seek the death penalty.⁴⁵ A prosecutor in Washington must give written notice to a defendant charged with aggravated first-degree murder that the death penalty option will be pursued in the defendant's case.⁴⁶ According to the statute, the guiding force behind the decision to give this notice occurs "when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency."⁴⁷ Thus, the presentation

41. WASH. REV. CODE § 10.95.040.

42. *Id.* § 10.95.060.

43. *Id.* § 10.95.030.

44. *See id.* §§ 10.95.100, 9.94A.885.

45. *See id.* § 10.95.040. A more cynical view might be that the entire death penalty apparatus is controlled by political actors (prosecutors and judges) who are constantly aware of the effect on their re-election prospects. Stephen Bright, a renowned capital defense lawyer and abolitionist, concurs in this assessment: "Defending a poor person accused of crime will usually be bad for a lawyer's business, but prosecuting or presiding over a celebrated murder case is almost always good for a prosecutor's or judge's political career." Stephen J. Bright, *In Defense of Life: Enforcing the Bill of Rights on Behalf of Poor, Minority, and Disadvantaged Persons Facing the Death Penalty*, 57 MO. L. REV. 849, 864 (1992).

46. WASH. REV. CODE § 10.95.040(3). If this notice is not properly given, the prosecution may not request that the death penalty be imposed in a particular case. *Id.*

47. *Id.* § 10.95.040(1). The decision as to whether to seek the death penalty appears to be more complicated and at least partially dependent upon other nonstatutory factors such as financial considerations. *See* Lise Olsen, *One Killer, Two Standards*, SEATTLE POST-INTELLIGENCER, Aug. 7, 2001, available at http://seattlepi.nwsourc.com/local/34283_prosecute07.shtml. The article describes the different decisionmaking processes of two prosecutors in determining whether to seek the death penalty for serial killer Robert Yates. Spokane County Prosecutor Steve Tucker declined to pursue the death penalty for thirteen murders, while then-Pierce County Prosecutor John Ladenburg announced his intention to seek the death penalty for two murders in his jurisdiction. A mitigation packet was submitted by Yates's defense attorneys in the Pierce County prosecution, but a court ruled that this information would not be released publicly. *Yates Documents Won't Go Public*, SEATTLE POST-INTELLIGENCER, May 6, 2002, available at <http://seattlepi.nwsourc.com/>

of mitigation evidence has a substantial impact from the very start of a potential death penalty case. Indeed, according to the statute, the extent of mitigation should control whether a case triggers the application of the death penalty at all.

A prosecutor's initial decision regarding the eligibility of a particular defendant for the death penalty depends upon the preliminary presentation of mitigation evidence by defense counsel.⁴⁸ Without the presentation of mitigation evidence at this critical stage, a prosecutor has no ability to sufficiently and objectively distinguish among aggravated first-degree murder defendants.⁴⁹ A death sentence may be pursued not for the "worst of the worst" but rather for those who present no mitigation evidence. Therefore, the death penalty is sought in situations where it may not, in fact, be warranted, and proportionality between the crime and the punishment is lost.

When persons are charged with aggravated first-degree murder and fail to present mitigation evidence, there is no balance, as envisioned by the statute, for the prosecutor's decisionmaking. Accordingly, in the absence of any mitigation evidence, the death penalty will likely be pursued whenever a person is charged with aggravated first-degree murder.⁵⁰ Under these circumstances, eligibility for the death penalty is virtually mandatory.

local/69271_yatesrecords06.shtml; David Fisher, *Monroe Murder Trial To Begin*, SEATTLE POST-INTELLIGENCER, April 9, 2002, available at http://seattlepi.nwsource.com/local/65723_trial09.shtml ("Prosecutors considered asking for the death penalty on Fischer's aggravated murder charge, but Prosecutor Jim Krider announced last summer he would not ask for death because too many of the county's death sentences have overturned after expensive appeals. 'We know how difficult it is to sustain them, and this one we didn't think we would be able to, given our (state) Supreme Court,' Krider said at the time.").

The exercise of a prosecutor's discretion to seek the death penalty has been interpreted to be broader than the language of the statute. The Washington Supreme Court has found that the statute allows prosecutors to "exercise their discretion in a manner which reflects their judgment concerning the seriousness of the crime or insufficiency of the evidence." *State v. Rupe*, 101 Wash. 2d 664, 700, 683 P.2d 571, 593 (1984). See also *State v. Campbell*, 103 Wash. 2d 1, 26-7, 691 P.2d 929, 944 (1984) (statute is not void for vagueness); *State v. Benn*, 120 Wash. 2d 631, 667, 845 P.2d 289, 310 (1993) (the legislature has delegated authority with adequate standards to guide the prosecution).

48. See WASH. REV. CODE § 10.95.040(1). Capital defense experts urge attorneys in capital cases to begin to research this information immediately because "[t]he surest way of not receiving a death sentence is to persuade the prosecuting attorney from initially not seeking a special sentencing proceeding. The most persuasive manner in obtaining this objective is to present a thorough, thoughtful, and competent mitigation packet to the prosecuting attorney." DEATH PENALTY ASSISTANCE CENTER, CAPITAL CASE MANAGEMENT HANDBOOK, section V (titled "Mitigation"), at <http://www.defender.org/DPAC/handbook> (last visited Dec. 4, 2002).

49. WASH. REV. CODE § 10.95.040. The statute provides the prosecutor with the ability to distinguish between types of aggravated first-degree murders based upon the presence of mitigation.

50. See Olsen, *supra* note 47.

B. The Selection Phase

The presentation of mitigating evidence is most important during the selection, or sentencing, phase⁵¹ of a capital trial. Accordingly, Washington's death penalty statute focuses on mitigation evidence presented to a sentencing jury.⁵² A jury must answer the following question in the affirmative in order for a death sentence to be imposed: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"⁵³ In order to answer this question, the statute explicitly approves the introduction of *any* relevant evidence or factors for the jury to consider when deciding whether leniency is merited.⁵⁴

[Prosecutors] must review mitigating evidence. The extent of that review varies dramatically, largely because the state has no standards on what constitutes an adequate assessment Pierce County used to automatically file for the death penalty whenever they didn't receive a mitigation packet, which includes details based on a defense investigation of the defendant's mental and physical health, substance abuse issues, and family history.

Id.

51. See *supra* note 30.

52. WASH. REV. CODE § 10.95.050(2). At least one observer has divided states into what might be characterized as "balancing" states and "threshold" states with respect to mitigation evidence. Samy Khalil, Note, *Doing the Impossible: Appellate Reweighing of Harm and Mitigation in Capital Cases After Williams v. Taylor, With a Special Focus on Texas*, 80 TEX. L. REV. 193, 196 (2001). In the balancing states, the jurors are asked to balance aggravating and mitigating evidence; in the threshold states, jurors are asked to respond to a threshold question involving the impact of mitigation only. *Id.* at 195–96. The author argues that it is inappropriate in the threshold states for the jury to look at the harm because that has already been addressed. *Id.* Instead, threshold state juries are asked to focus solely on mitigation factors. *Id.* Given the structure and wording of the pertinent Washington law, the statute appears to fall into the threshold category. The author contends that in Texas, another threshold state, "[i]n cases in which the defense attorney has failed to introduce some 'threshold' amount of mitigating evidence, appellate courts should overturn Texas death sentences automatically, whatever the aggravating circumstances of the crime." *Id.* An exception could exist where failure to present this evidence is consistent with trial strategy. *Id.*

53. WASH. REV. CODE § 10.95.060(4). An affirmative answer imposes a death sentence. *Id.* § 10.95.030(2). The trial court cannot "suspend or defer the execution or imposition of the sentence." *Id.* § 10.95.080(1). In the absence of an affirmative answer, the sentence shall be life in prison without the possibility of parole. *Id.* §§ 10.95.080(2) and 10.95.030(1). The phrasing of this question is somewhat awkward and potentially confusing for jurors for two reasons. First, the inquiry is misleading because it initially appears to require the defendant to prove mitigation beyond a reasonable doubt when indeed the burden remains with the prosecutor. Second, if the issue of mitigation has not been addressed, a reasonable juror might be unable to respond to the question as presented.

54. WASH. REV. CODE § 10.95.070. There are eight factors listed in this section:

- (1) Whether the defendant has or does not have a significant history, either as a juvenile or an adult, of prior criminal activity;
- (2) Whether the murder was committed while the defendant was under the influence of extreme mental disturbance;
- (3) Whether the victim consented to the act of murder;

The Washington Supreme Court has held, in accordance with the mandate of the United States Supreme Court, that the "sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence."⁵⁵ The Court has interpreted this rule as an absolute: "It is irrelevant whether the barrier to the sentencer's consideration of mitigating evidence exists because of a statute, because of the sentencing court, or because of an evidentiary ruling."⁵⁶ In order to accurately answer the consequential question before a sentencing jury, Washington's death penalty statute may allow exposition and consideration of any relevant mitigation evidence, which might include anything that reveals information about a capital defendant's past history, present circumstances, or character.⁵⁷

Without mitigation evidence, jurors are not provided the adequate information they need to make a reliable and individualized sentencing determination.⁵⁸ States may use their death penalty statutes to structure the way juries consider mitigation, so long as there is no violation of the absolute rule that a sentencing jury may not be precluded from considering any relevant mitigating evidence and giving it effect.⁵⁹ Accordingly, Washington's legislature created a structure al-

(4) Whether the defendant was an accomplice to a murder committed by another person where the defendant's participation in the murder was relatively minor;

(5) Whether the defendant acted under duress or domination of another person;

(6) Whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect (however, a person found to be mentally retarded may in no case be sentenced to death);

(7) Whether the age of the defendant at the time of the crime calls for leniency; and

(8) Whether there is a likelihood that the defendant will pose a danger to others in the future.

Id. The list is nonexhaustive. Interestingly, the language of the aforementioned section does not mention the word "mitigation."

55. *State v. Finch*, 137 Wash. 2d 792, 863-64, 975 P.2d 967, 1008 (1999) (quoting *Buchanan*, 522 U.S. at 276).

56. *Id.* at 864, 975 P.2d at 1008 (citing *Mills v. Maryland*, 486 U.S. 367, 375 (1988)).

57. CASE MANAGEMENT HANDBOOK, *supra* note 48, section X (titled "The Penalty Phase"). The Handbook provides some examples of the so-called nonstatutory mitigation evidence to present, including good guy (isolated incident); residual doubt; remorse; childhood abuse/neglect; drug/alcohol problems; fetal alcohol syndrome; good adjustment to custody; mercy/leniency; religious (if allowed); individual juror responsibility; educational efforts in custody; potential for rehabilitation; talents; evidence mitigating the crime (lack of premeditation, did not conceal identity or crime, heat of passion); and acceptance of responsibility. *Id.*

58. Sentencing a human being to death, without any consideration of mitigating evidence, is directly contrary to the constitutional guidance of the U.S. Supreme Court. See *Gregg*, 428 U.S. at 195; *Woodson*, 428 U.S. at 303-05; *Lockett*, 438 U.S. at 602-05. When no mitigation evidence is presented, the process becomes one that "accords no significance to relevant facets of the character and record of the individual it offends." *Woodson*, 428 U.S. at 304.

59. *Lockett*, 438 U.S. at 604; *Buchanan*, 522 U.S. at 276; *Finch*, 137 Wash. 2d at 863-64, 975 P.2d at 1008.

lowing jurors to consider any relevant mitigation evidence.⁶⁰ This structure was not adopted to *prevent* jurors from considering any relevant mitigation evidence. Indeed, if Washington's scheme were designed in this manner, it would be contrary to constitutional requirements for death penalty statutes.⁶¹ When mitigation evidence is prevented from being presented to a jury, the structure of Washington's death penalty statute fails.⁶²

C. *The Mandatory Review Process*

The legislature has mandated that the Washington Supreme Court review all cases in which the death penalty is imposed.⁶³ In particular, the court must review the sentence determination made in the lower court.⁶⁴ Mitigation evidence is vital to the death penalty statute's scheme for this review of death sentences. In performing this review, the Washington Supreme Court has determined that since "the

60. WASH. REV. CODE § 10.95.070.

61. *Woodson*, 428 U.S. at 304; *Lockett*, 438 U.S. at 604; *Buchanan*, 522 U.S. at 276; *Finch*, 137 Wash. 2d at 863-64, 975 P.2d at 1008. If Washington's scheme were designed to prevent consideration of relevant mitigating evidence, such a design would unconstitutionally exclude "from consideration in fixing the ultimate punishment of death, the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." *Woodson*, 428 U.S. at 304.

62. A sentencing jury is asked the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" WASH. REV. CODE § 10.95.060(4). Without the presentation of mitigation evidence, there is only one answer: there are not sufficient mitigating circumstances to merit leniency. The defendant must be sentenced to death. *Id.* § 10.95.030(2); *see also* *Campbell v. Kinchloe*, 829 F.2d 1453, 1469 (9th Cir. 1987) (Fletcher, J., dissenting) ("To understand why it was crucial to put forth evidence in mitigation, one only need read the question put to Campbell's jury In the total absence of mitigating evidence there is only one answer to this question."); *State v. Dodd*, 120 Wash. 2d 1, 41, 838 P.2d 86, 106 (1992) (Utter, J., dissenting) ("Indeed, withholding mitigating evidence undermines the jury's ability to consider the pivotal question it is supposed to consider during its deliberations."); *Rosenwald*, *supra* note 35, at 750 ("If all available mitigating evidence is withheld, however, the jury has nothing against which to balance the aggravating circumstances and a death sentence becomes virtually automatic.").

63. WASH. REV. CODE § 10.95.100 (2002).

64. *Id.* § 10.95.130. In order for the court to perform a sufficient review, it must look to the record created in the trial court. Thus, when a judgment and sentence of death is imposed, the clerk of the trial court must prepare and transmit a verbatim report of the trial and sentencing proceedings to the clerk of the Supreme Court. *Id.* § 10.95.110. This verbatim report would contain any mitigating evidence that was presented during the lower court's proceedings. In addition, the trial court must submit a separate report in questionnaire form to the Supreme Court. This questionnaire summarizes information about the defendant, victim, trial, sentencing proceeding, defendant's representation, chronology of the case, and information regarding the potential impact of factors that may have led to passion or prejudice influencing the jury. *Id.* § 10.95.120. In particular, the trial court is asked whether there was evidence of mitigating circumstances and whether that evidence was credible, in the court's opinion. *Id.* § 10.95.120(3)(c)-(d).

death penalty qualitatively differs from all other punishments . . . capital sentencing determinations are subjected to a correspondingly higher degree of scrutiny than sentencing in noncapital cases.”⁶⁵ This heightened scrutiny means that the court should give a close and careful review of the record created during the lower court proceedings.⁶⁶ The primary inquiry for the court on review is “[w]hether there was sufficient evidence to justify the jury’s affirmative finding to the question”⁶⁷ “[h]aving in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?”⁶⁸

In parsing the trial record with heightened scrutiny, the court must therefore review any mitigating evidence presented to determine if the jury correctly imposed a reliable and individualized sentence. If the court finds that there were sufficient mitigating circumstances to merit leniency, the death sentence should be invalidated and the case remanded for resentencing.⁶⁹

Without evidence of mitigation, the Washington Supreme Court’s mandatory review is significantly flawed.⁷⁰ Despite using a

65. *State v. Lord*, 117 Wash. 2d 829, 888, 822 P.2d 177, 211 (1992).

66. *Id.* at 888, 822 P.2d at 211. Despite this mandate, there has been criticism of the Washington Supreme Court’s review of death penalty cases. In an August 2000 report that was revised in February 2001, the ACLU of Washington concluded that “Washington’s capital punishment system—particularly the Washington Supreme Court’s review of death sentences—is also fraught with error.” ACLU of Washington, *Sentenced to Death: A Report on Washington Supreme Court Rulings in Capital Cases 1-2* (2001), available at <http://www.aclu-wa.org/ISSUES/criminal/Death.Penalty.Report.8.00.html>. This report determines that seven out of eight Washington cases reviewed in the federal courts have been overturned due to error, a rate significantly higher than the 40 percent rate nationwide. *Id.* at 3 (citing James Liebman, Jeffrey Fagan, and Valerie West, *A Broken System: Error Rates in Capital Cases, 1973-1995*, available at <http://www.thejusticeproject.org> (last visited Nov. 27, 2002)).

67. WASH. REV. CODE § 10.95.130(2)(a) (2002).

68. *Id.* § 10.95.060(4). The wording of this section, combined with the language of the question the jury answered, creates an interesting inquiry for the court. The court appears to be asked to decide if there was sufficient evidence to determine that there was not sufficient evidence of mitigating circumstances. The court also must review the sentence to determine if the death penalty was brought about by passion or prejudice or whether the defendant was mentally handicapped. *Id.* § 10.95.130(2)(c)–(d). In addition, the court must review the death sentence to determine if it “is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.” *Id.* § 10.95.130(2)(b). This is seemingly intended to be a review of the eligibility phase of the process since proportionality is tied to the prohibition of an arbitrary or capricious application of the death penalty. The court, however, assesses cases “in which the judge or jury considered the imposition of capital punishment.” *Id.* This would be a review of the selection phase of those cases where the issue is one of individualized assessment, not proportionality.

69. WASH. REV. CODE § 10.95.140(1)(a) (2002).

70. *State v. Dodd*, 120 Wash. 2d 1, 42–43, 838 P.2d 86, 107 (1992) (Utter, J., dissenting) (noting that “[t]he failure to present mitigating evidence during the sentencing phase of a capital case causes additional problems. First, it undermines our statutorily mandated duty to conduct proportionality review.”).

“higher degree of scrutiny” when reviewing capital cases, the court is not able to make the assessment envisioned by the death penalty statute because it must review the record created at the lower court.⁷¹ Unfortunately, if there never was any mitigation evidence entered into that record, there is no mitigation evidence for the court to review. The same is true if the court reviews the questionnaire record from the trial court.⁷² If no mitigation evidence was presented to the trial court, the Supreme Court has nothing to examine, no matter what degree of scrutiny is utilized.⁷³

In the absence of mitigating evidence at the trial level, on mandatory review the Supreme Court must always determine that the jury finding was correct—that there was not sufficient evidence to merit leniency.⁷⁴ Thus, the principal issue for the court on review is predetermined. Just as the jury could answer the question presented to it in only one way, the court is also forced to answer the question regarding the sufficiency of the evidence one way and uphold a death sentence.⁷⁵ The court’s function to ensure the reliability of the jury’s decision is meaningless, and the legislature’s system for mandatory review is useless.

D. Clemency Proceedings

Under the Washington Constitution, the governor is provided the power to issue pardons.⁷⁶ Recently, the Ninth Circuit determined that gubernatorial clemency authority is a power that is “plenary and final” and immune from review by the state courts.⁷⁷ The clemency and pardons board was established by the legislature “[t]o assist the governor in gathering the facts necessary to the wise exercise of this

71. WASH. REV. CODE § 10.95.110.

72. *See id.* § 10.95.120.

73. *See Carter, supra* note 35, at 129 (“Mitigating evidence is crucial precisely because it is presented at the trial level The judgments of an appellate tribunal are of necessity limited to the record.”). But see *State v. Dodd*, where mitigation was provided by amici on appeal and the court did examine this information. Rosenwald, *supra* note 35, at 751.

74. Rosenwald, *supra* note 35, at 751.

75. *See, e.g., Dodd*, 120 Wash. 2d at 25, 838 P.2d at 98 (“Dodd chose not to present mitigating evidence at the sentencing hearing Based upon the record before us, we can only conclude that sufficient evidence supported the jury’s finding that ‘there are not sufficient mitigating circumstances to merit leniency’”). Most recently, in *Elledge*, the court stated, “[t]his case is unique in that Elledge presented no mitigating evidence Given the complete absence of any mitigating evidence, and the presence of several severe aggravating circumstances, we hold that the jury was justified in its determination that leniency was not merited.” *Elledge*, 144 Wash. 2d at 77–79, 26 P.3d at 280–81.

76. WASH. CONST. art. III, § 9.

77. *Malcolm v. Payne*, 281 F.3d 951, 960 (9th Cir. 2002).

power”⁷⁸ The board is permitted to receive clemency petitions “from individuals, organizations, and the department for review and commutation of sentences and pardoning of offenders in extraordinary cases, and shall make recommendations thereon to the governor.”⁷⁹

Because the wording of the statute provides for third-party standing to request clemency, there is an opportunity for a full review of the circumstances of death row inmates, even without the cooperation of these individuals. Evidence of mitigation may be provided to the board even where there was no information of this type given to the prosecutor or presented for consideration by the jury.⁸⁰

While it is theoretically possible for a third party to make out a case for clemency when the individual is, for example, a death penalty “volunteer,” it is certainly more challenging. Crucial medical and psychiatric records may be restricted without a signed release. Family and friends who would normally want to assist in saving the life of a loved one are conflicted about doing so against the expressed wishes of the condemned person who, even at this final stage, exerts influence over the outcome.

Current Washington Governor Gary Locke has acknowledged the formidable nature of the clemency power: “The most solemn and grave responsibility a governor has is the power to spare the life of a person sentenced to death.”⁸¹ The open-ended nature of the clemency process in Washington is totally dependent upon the good faith of the board and the governor’s office to ensure its proper functioning as a check on arbitrary and capricious sentencing.⁸² Locke, a former King

78. 1999 Wash. Laws 323, § 3.

79. WASH. REV. CODE § 9.94A.885(1) (2002).

80. One of the advantages of a broadly worded statute such as exists in Washington is the opportunity to present any information to the board that may be relevant to its determination whether to recommend clemency. Evidence of mitigation was presented to the board in both the Sagastegui and Elledge clemency petitions. See *Petition of Katie Vargas Seeking Commutation of the Death Sentence of Jeremy Sagastegui* at 1-6; also *Petition by Murder Victims’ Families for Reconciliation et al.*; *Petition Seeking Commutation of the Death Sentence of James Elledge* at 8-11, *Elledge* (No. 01-67342).

81. Press release, *Locke Will Not Intervene in Jeremy Sagastegui Case*, Oct. 12, 1998, available at <http://www.governor.wa.gov/press/press-view.asp?pressRelease=759&newsType=1>.

82. The two most recent petitions in the Sagastegui and Elledge cases that were submitted to the clemency board were based on third-party requests and relied heavily on mitigation evidence not presented previously due to the defendants’ desire to be executed. The board accepted the mitigation information and voted 2-2 in Sagastegui in October 1998 on the issue of recommending clemency to the governor. *Sagastegui Put to Death*, SEATTLE TIMES, Oct. 13, 1998, available at <http://archives.seattletimes.nwsourc.com/cgi-bin/texis.cgi/web/vortex/display?slug=saga&date=19981013>. In August 2001, the board was divided 3-2 in Elledge against making a recommendation of clemency to the governor. Janet Burkitt & Gina Kim, *Elledge Is Executed for Slaying*, SEATTLE TIMES, Aug. 28, 2001, at A1, available at <http://archives.seattletimes.nwsourc.com/cgi-bin/texis.cgi/web/vortex/display?slug=executio n28m&date=20010828>.

County prosecutor, handled homicide cases and consequently has a heightened awareness of the legal, practical, and policy implications of the death penalty.⁸³ But past experience such as his is not a job requirement. This gubernatorial clemency power—the ultimate safeguard—could be exercised by a chief executive who, no matter how well-intentioned, is not knowledgeable about the complex nuances of the capital process.

E. The Impact of Mitigation: Examples

Washington's legislature sought to follow the guidance of the United States Supreme Court in maintaining the state's death penalty statute.⁸⁴ When no mitigation evidence is presented, the careful structure created by the legislature falls apart and the state's scheme becomes a system operating contrary to its design.

Presentation of mitigating evidence in Mr. Elledge's case may have made a difference in the jury's decision. One juror commented that if he had known more about Mr. Elledge's circumstances, he may have voted for life imprisonment instead of death; the juror said, "I could have seen it changing my mind."⁸⁵ A mitigating circumstance or mitigating evidence is defined as "[a] fact or situation that does not justify or excuse a wrongful act or offense but that reduces the degree of culpability and thus may reduce . . . the punishment."⁸⁶ The Washington Supreme Court has defined mitigating evidence as "that which 'in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability.'"⁸⁷ Mr. Elledge was a "volunteer" for the death penalty. He "literally request[ed] to be put to death."⁸⁸ Because Mr. Elledge sought the death penalty, he prevented presentation of mitigating evidence in his case.

83. Ralph Thomas & David Postman, *The Case That Helped Shape Locke: Governor Draws on His Experiences as Prosecutor*, SEATTLE TIMES, Sept. 6, 2000, available at <http://archives.seattletimes.nwsourc.com/cgi-bin/texis.cgi/web/vortex/display?slug=lock06m&date=20000906>

84. See House Journal, 47th Leg. Sess. 398 (Wash. 1981). State Representative Schmidt stated that the objective of revising Washington's death penalty statute was "to provide this state with the strongest, most constitutionally sound death penalty statute that can be produced." The statute as revised at that time (1982) is the current death penalty statute in Washington (with relatively minor changes since 1982).

85. Denn, *Dispute Embroils Killer's Request to Die*, *supra* note 6.

86. BLACK'S LAW DICTIONARY 236 (7th ed. 1999).

87. *State v. Pirtle*, 127 Wash. 2d 628, 671, 904 P.2d 245, 269 (1995) (quoting *State v. Bartholomew*, 101 Wash. 2d 631, 647, 683 P.2d 1079, 1088 (1984)).

88. Matthew T. Norman, *Standards and Procedures for Determining Whether a Defendant Is Competent to Make the Ultimate Choice—Death: Ohio's New Precedent for Death Row "Volunteers"*, 13 J. L. & HEALTH 103, 105 (1999).

The introduction of mitigation evidence has not prohibited Washington juries from imposing death sentences. For example, Darold Stenson was found guilty of murdering his wife and business associate.⁸⁹ During the sentencing phase of the trial, a mitigation specialist presented mitigation evidence on behalf of Mr. Stenson.⁹⁰ In addition, Mr. Stenson was allowed to introduce “all character and background evidence . . . and any circumstances of the crime which he wished to present.”⁹¹ Despite presenting mitigation evidence, Mr. Stenson was sentenced to death.⁹²

On the other hand, offering mitigation evidence apparently has made a difference to juries in other Washington cases. In the so-called Wah Mee Massacre case, presentation of mitigating evidence by one defendant—and the failure to present mitigation evidence by another defendant—led to sentences of life for the former, and death for the latter.⁹³ In separate sentencing proceedings for the murders of thirteen people, defendant Ben Ng introduced mitigation evidence, while defendant Kwan Fai Mak presented “[e]ssentially no mitigating evidence.”⁹⁴ Ng received a life sentence without parole.⁹⁵ Mak was sentenced to death.⁹⁶ Both men were eligible to receive the death penalty for the same crimes. The presentation of mitigation evidence appears to have determined whether they were selected for a death sentence.

IV. TROUBLESOME SITUATIONS IN WASHINGTON INVOLVING MITIGATION EVIDENCE

Despite the importance of mitigation evidence in capital sentencing, there are situations where this critical evidence is not offered. Most of these involve a situation where (1) the defendant is a “volunteer” for the death penalty, (2) the defense makes a strategic or tactical

89. *State v. Stenson*, 132 Wash. 2d 668, 681, 940 P.2d 1239, 1247 (1997).

90. *Id.* at 753–54, 940 P.2d at 1282.

91. *Id.* Evidence of the impact of execution on Mr. Stenson’s family members was not permitted to be presented to the jury. *Id.* Pierce County jurors were “unswayed” by mitigation evidence in the case of Robert Yates, Jr. who was given the death penalty in October 2002 after he was convicted of aggravated murder in the deaths of two women. Christine Clarridge, *Death Sentence for Yates Elicits Tears, but None for Joy*, SEATTLE TIMES, October 4, 2002, available at <http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=yates04m&date20>.

92. *Id.* at 677, 940 P.2d at 1245.

93. See *Mak v. Blodgett*, 970 F.2d 614, 616 (9th Cir. 1992), *aff’d* 754 F. Supp. 1490 (W.D. Wash. 1991). The federal courts overturned the Washington Supreme Court’s refusal in *Mak* to set aside the conviction and the sentencing on direct review. *State v. Mak*, 105 Wash. 2d 692, 718 P. 2d. 407, *cert. denied*, 479 U.S. 995 (1986).

94. *Mak v. Blodgett*, 970 F.2d 614, 616 (9th Cir. 1992).

95. *Id.*

96. *Id.*

choice not to present mitigation evidence, or (3) defense counsel provides ineffective assistance of counsel. In all three situations, very little—or none—of the available mitigation evidence is actually presented. Thus, juries are prevented from considering mitigation evidence when making consequential decisions about the fate of defendants. Issues relating to all three situations have arisen in Washington since the death penalty was reinstated.⁹⁷

A. Death Penalty Volunteers

In 1992, faced with Washington's first volunteer since the reintroduction of the death penalty, Justice Utter stated that "we are likely to see many more cases in which capital defendants seek execution."⁹⁸ Three of the four men executed by the State of Washington have been volunteers for the death penalty: Wesley Dodd, Jeremy Sagastegui, and James Elledge all "request[ed] to be put to death."⁹⁹ All three men were executed. A fourth man currently on death row, Dwayne Woods, also volunteered for the death penalty at his trial, but has since changed his mind.¹⁰⁰

The commitment to the critical nature of mitigation evidence and its constitutional underpinnings is tested when the defendant acquiesces in the State's prosecution by pleading guilty and refusing to put on evidence that would suggest that leniency is appropriate. The U. S. Supreme Court has upheld a defendant's right to refuse to present

97. See, e.g., *Elledge*, 144 Wash. 2d at 62, 26 P.3d at 271 (volunteer); *State v. Benn*, 120 Wash. 2d 631, 665–66, 845 P.2d 289, 309–10 (1993), *habeas corpus granted and aff'd*, 283 F.3d 1040 (9th Cir. 2002). In *Benn*, the Washington Supreme Court addressed the issue of ineffective assistance of counsel relating to investigation and presentation of mitigation evidence both prior to the prosecution's decision to seek the death penalty, and during the sentencing phase. The court found there was not ineffective assistance of counsel. Habeas was granted on a separate issue relating to prosecutorial misconduct. See also *State v. Lord*, 117 Wash. 2d 829, 889–94, 822 P.2d 177, 211–14 (1991), *habeas corpus* 184 F.3d 1083 (9th Cir. 1999). In *Lord*, the Washington Supreme Court addressed the rules relating to the introduction of mitigation evidence and the strategic repercussions of introducing such evidence. On appeal regarding a separate issue related to ineffective assistance of counsel, the Ninth Circuit remanded to the District Court for reconsideration of habeas corpus.

98. *Dodd*, 120 Wash. 2d at 34, 838 P.2d 103 (Utter, J., dissenting).

99. See *Elledge*, 144 Wash. 2d at 66, 26 P.3d at 274; *State v. Sagastegui*, 135 Wash. 2d 67, 954 P.2d 1311 (1998); *Dodd*, 120 Wash. 2d 1, 838 P.2d 86. Only Charles Campbell fought his execution. See *State v. Campbell*, 103 Wash. 2d 1, 691 P.2d 929 (1984).

100. *State v. Woods*, 143 Wash. 2d 561, 611, 23 P.3d 1046, 1074 (2001). The court noted: "[W]e have Woods' statement to the jury that there was no mitigating evidence and that he desired that they vote to impose the death penalty." *Id.* at 611, 23 P.3d at 1074. And Woods asserted that "he [was] entitled to have his sentence of death vacated and the case remanded to the trial court for a new sentencing proceeding." *Id.* at 608, 23 P.3d at 1072.

mitigating evidence at the sentencing phase.¹⁰¹ Other courts, however, have considered the public's interest in allowing a defendant to waive appeals and refrain from challenging the execution, and found that it is not in the public interest for a defendant to choose death.¹⁰² One federal court explained:

The criminal defendant should not be permitted to pick and choose which issues and which avenues he wishes to pursue and when he wishes to pursue them To allow a convicted murderer . . . to decide whether the Constitution will be given effect in a particular case is unseemly and fails to treat our Constitution with the dignity and respect that it deserves.¹⁰³

The Pennsylvania Supreme Court ruled in 1978 that to allow a defendant to relinquish his right to appeal would be the same as endorsing the State's assistance in his suicide.¹⁰⁴ In Washington, Justice Utter echoed this point in *Dodd*: "To give paramount weight to Mr. Dodd's desires would, in effect, mean that the State is participating in Mr. Dodd's suicide."¹⁰⁵

James Elledge's case is the most illuminating on the problems created for Washington's death penalty statute when a defendant usurps the criminal sentencing process and volunteers for the death penalty. Washington's death penalty statute was modified in 1981 to prevent capital defendants from taking control of the system and using it for their own purposes.¹⁰⁶ Nevertheless, James Elledge did exactly that, stating, "I like to be in control of my own destiny. I don't like the idea of someone else controlling how I'm going to die or controlling whether or not I'm going to live for the next 30, 40, 50 years in prison."¹⁰⁷ At no time did Mr. Elledge introduce any of the mitigation

101. See, e.g., *Gilmore v. Utah*, 429 U.S. 1012 (1976); *Jones v. Barnes*, 463 U.S. 745 (1983); *Rees v. Peyton*, 384 U.S. 312 (1966).

102. See Christy Chandler, *Voluntary Executions*, 50 STAN. L. REV. 1897, 1909 (1998).

103. *Id.* (citing *Fairchild v. Norris*, 869 F. Supp. 672 (E.D. Ark. 1993), *rev'd*, 21 F.3d 799 (8th Cir. 1994)).

104. *Id.* at 1910 (citing *Commonwealth v. McKenna*, 383 A.2d 174, 180-81 (Pa. 1978) (holding that the defendant cannot waive any appeals)).

105. *Dodd*, 120 Wash. 2d at 30, 838 P.2d at 101 (citing *Lenhard v. Wolff*, 444 U.S. 807, 811 (1979) (Marshall, J., dissenting)).

106. See discussion *infra* Part III. A. 1.

107. Verbatim Report of Proceedings, *supra* note 3, at 1722. In his desire to use the criminal process to achieve his execution, James Elledge was no different from Westley Dodd or Jeremy Sagastegui. Mr. Dodd chose to die rather "than live his life in a cell." *Dodd*, 120 Wash. 2d at 12, 838 P.2d at 91. Justice Utter's dissent in *Dodd* pointed to Mr. Dodd's statement regarding previous encounters with the legal system: "I manipulated the system to my advantage." *Id.* at 38, 838 P.2d at 105 (Utter, J., dissenting). Mr. Sagastegui also had a desire to die and correctly believed that by killing a child he would get the death penalty. Florangela Davila, *Killer's Goal from the Start: To Engineer His Execution*, SEATTLE TIMES, Oct. 11, 1998, available at

evidence available.¹⁰⁸ He refused to present evidence of his brutal childhood, previous mental health issues, the fact that he was a husband, father, and grandfather, or the fact that he had saved a man's life.¹⁰⁹ By resisting the introduction of this evidence, Mr. Elledge dominated the sentencing process, and caused Washington's death penalty statute to fail in its intended operation.

After his arrest, Mr. Elledge confessed to murdering the victim, Ms. Fitzner.¹¹⁰ Just forty days after Ms. Fitzner was murdered, Mr. Elledge pled guilty, and the special sentencing procedure was initiated.¹¹¹ Whether Mr. Elledge's attorney or the prosecutor did *any* investigation into mitigating circumstances is unclear.¹¹² It was apparent that there was absolutely no adversarial process, which virtually guaranteed that Mr. Elledge would be deemed eligible for the death penalty.¹¹³ Without being given a defense-prepared mitigation packet, which is the usual protocol in capital cases, the prosecutor concluded that there were insufficient mitigating circumstances, and the death penalty option was selected. By exercising his right to plead guilty, Mr. Elledge cemented his eligibility for the death penalty.¹¹⁴ Thus, Mr. Elledge successfully controlled this phase of the process, and

<http://archives.seattletimes.nwsource.com/cgi-bin/texis.cgi/web/vortex/display?slug=saga&date=19981011>.

108. In fact, Mr. Elledge's attorney, in closing argument to the sentencing jury, stated that "[a]lthough we have presented no evidence of mitigation, there is lots of evidence that there is not sufficient mitigating circumstances to merit leniency." Verbatim Report of Proceedings, *supra* note 3, at 1748.

109. See *supra* notes 5–8, and accompanying text.

110. *Elledge*, 144 Wash. 2d at 68–69, 26 P.3d at 276.

111. *Id.* at 69, 26 P.3d at 276. Ms. Fitzner was murdered on April 18, 1998. Mr. Elledge was charged with the crime on April 24, 1998. On May 27, 1998, the prosecution filed its notice to seek the death penalty. At the *same* hearing, Mr. Elledge pled guilty to aggravated first-degree murder. *Id.*

112. At the Washington State Clemency and Pardons hearing, Snohomish County Prosecutor Seth Fine indicated that the prosecutor's office looked simply at the statutory mitigating factors (WASH. REV. CODE § 10.95.070) only as they related to Ms. Fitzner's murder. See Audio recording: Statement of Seth Fine, Snohomish County Deputy Prosecutor, Testimony before the Washington State Clemency and Pardons Board, Aug. 6, 2001, available at <http://www.twv.org/search/eventResults.cfm?StartPage=20&CFID=720332&CFTOKEN=73193370>.

113. See Rice et al., *supra* note 8, at 11 ("It became clear that [Mr. Elledge's attorney] had not even minimally investigated Mr. Elledge's mental state issues or life history."); see also Audio recording: Statement of Seth Fine, *supra* note 112 (indicating that at the time the prosecutor's office made the decision to seek the death penalty, they "did not have a mitigation package from the defense").

114. See *Elledge*, 144 Wash. 2d at 69, 26 P.3d at 276 (Mr. Elledge pled guilty on May 27, 1998.).

made himself subject to a jury's determination as to whether or not Washington should grant his wish to die.¹¹⁵

Subsequently, in the sentencing phase, Mr. Elledge's volunteer situation further eroded the structure of Washington's death penalty statute. Not only did Mr. Elledge fail to present mitigation evidence, but his attorney actually introduced prejudicial evidence above and beyond the evidence presented by the prosecution.¹¹⁶ During closing arguments, Mr. Elledge's attorney told the jury that "there was 'lots of evidence that there is not sufficient mitigating circumstances.'"¹¹⁷ Thus, in the absence of any mitigating evidence, and after being told by the defense that there was no such evidence, the jury did what the statute mandated. In accordance with his own wishes and actions, the jury had little choice but to sentence James Elledge to death.¹¹⁸

Another potential roadblock to Mr. Elledge's plan to be executed by the State of Washington was the Supreme Court. Since there had not been even a scintilla of mitigation evidence presented at any point in the case, the court seemingly had no other option but to adhere to Mr. Elledge's wishes, and uphold his death sentence.¹¹⁹ Accordingly, the court stated: "Given the complete absence of any mitigating evidence, and the presence of several severe aggravating circumstances,

115. Mr. Elledge told the jury during his allocution, "[T]here is a very wicked part of me. And this wicked part of me needs to die." Verbatim Report of Proceedings, *supra* note 3, at 1721.

116. Verbatim Report of Proceedings, *supra* note 3, vol. X, at 1464. Mr. Elledge's attorney told the court, "[C]onsidering it is our objective that Mr. Elledge be sentenced to death, it is appropriate that from the defense standpoint that we go beyond the mere outline of the prior convictions which the State could put on to give some facts." Regarding his client's criminal history, Mr. Elledge's attorney told the following to the jury:

[w]hat you've heard already in the State's case was that he was convicted of three or four different felonies And you've heard just sort of a bare bones of that. What I'm going to present you, with my client's permission and cooperation, actually, is some evidence about what went on and a few other things having to do with his prison sentence and his parole and so on So I think this will give you some additional information about the life of Jim Elledge which will help you make your decision and answer the question about mitigating circumstances.

Id., vol. XII, at 1715. Mr. Elledge's attorney then informed the jury that in addition to the limited information the State had presented, Mr. Elledge had escaped from prison in New Mexico, broken his parole several times, been charged with attempted burglary, and that he had killed the woman in 1974 with a ball-peen hammer. *Id.* at 1717-19.

117. Rice et al., *supra* note 8, at 13 (quoting *Elledge*, 144 Wash. 2d at 62, 26 P.3d at 271; Verbatim Report of Proceedings, *supra* note 3, at 1748). This statement was made despite there being actual, solid mitigating evidence.

118. See Verbatim Report of Proceedings, *supra* note 3, at 1760.

119. *Elledge*, 144 Wash. 2d at 70, 26 P.3d at 276 ("[B]oth Elledge and the State advocate affirmance of Elledge's death sentence."); see *id.* at 79, 26 P.3d at 281 ("Given the complete absence of any mitigating evidence . . . we hold that the jury was justified in its determination that leniency was not merited."); but see discussion *supra*, note 52.

we hold that the jury was justified in its determination that leniency was not merited."¹²⁰

The waiver of mitigating circumstances by a defendant such as Mr. Elledge may make the system's decision easier. For example, if a defendant waives all appeals, the cost savings to the state can be substantial.¹²¹ Litigation costs are reduced, as well as the expense of keeping an inmate on death row.¹²² If a defendant is allowed to waive all appeals, society's interest in maintaining the integrity of the criminal justice system and upholding the law against cruel and unusual punishment is infringed. In appellate waiver situations, the safeguard against sentencing the innocent to death is rendered useless because guilt is no longer the question. If the defendant is guilty, the question of whether the circumstances of the offense together with the character of the offender merit death becomes irrelevant.¹²³ In fact, there is no question to decide whatsoever.

The same can be said if a defendant opts not to present any mitigation evidence. In this scenario, if a defendant wants to die, the prosecutor presents aggravating circumstances to merit the death penalty, and the defendant makes no counterargument in favor of life. Simply put, death is the inevitable result. No decision of death should be an easy one. The qualitative difference between death and any other sentence creates a "corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."¹²⁴ Because of the premium placed on reliability in

120. *Elledge*, 144 Wash. 2d at 79, 26 P.3d at 281.

121. See Death Penalty Information Center, *Costs of the Death Penalty*, at <http://www.deathpenaltyinfo.org/costs2.html> (last visited Dec. 4, 2002)

122. *Id.* For example, it costs California more than \$200,000 a year to keep one inmate on death row. In Okanogan County, Washington, Commissioners delayed pay raises for all 350 of its employees due to death penalty trial costs, eventually only raising their pay by 2 percent, which was the smallest increase in years. They also were forced to order a halt on all nonemergency travel, put a hold on updating computers and county vehicles, and they opted not to replace two of the four public health nurses because the death penalty cases were draining so much of their budget. *Id.* In 1999 alone, Washington State budgeted \$346,000 to seek Mitchel Rupe's death sentence for the third time, and Thurston County budgeted almost \$700,000 for one sentencing hearing. *Id.* Pierce County, which has sent the most persons to death row in Washington, spent \$1.3 million in death penalty cases in 1999. See Lise Olsen, *Unstable Marshall Is Fighting for his Life—Today*, SEATTLE POST-INTELLIGENCER, Aug. 7, 2001, available at http://seattlepi.nwsourc.com/local/33914_marshall07.shtml. Estimates are that King County could spend more than \$10 million to try Gary Ridgeway in March 2004 for four of the so-called Green River homicides. Margaret Taus, *Green River Case's Soaring Cost Stirs Debate Over Priorities*, SEATTLE POST-INTELLIGENCER, Nov. 30, 2002, available at http://seattlepi.nwsourc.com/local/97938_greenriver30.shtml.

123. See *Gregg*, 428 U.S. at 189 ("We have long recognized that 'for the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender.'")

124. *Woodson*, 428 U.S. at 305.

this context, the factfinder's ability to consider mitigating evidence is a cornerstone of a legitimate death penalty scheme.

In short, by volunteering for the death penalty, James Elledge hijacked Washington's death penalty scheme and caused it to fail in its operation. He declined to present mitigating evidence, even though it existed. Since there was no mitigation presented prior to the decision to seek the death penalty and he pled guilty to aggravated first-degree murder, Mr. Elledge was found to be eligible for the death penalty. At the sentencing phase, not only was no mitigation introduced, Mr. Elledge's attorney informed the jury that there was no such evidence. Thus, Mr. Elledge intentionally forced the jury to make an unreliable and nonindividualized decision regarding his sentence. Finally, the mandatory review of Mr. Elledge's sentence was meaningless since he had prevented the introduction of mitigating evidence in all of the previous steps in the process.

The reality is that death penalty volunteers create numerous problems that have been minimized for the most part by the Washington Supreme Court apart from Justice Utter's aforementioned prescient statements. The negative ramifications include the include: (1) frustrating the intent of the legislature; (2) creating undesirable social policy; (3) circumventing the function of the jury; (4) foreclosing options when volunteers change their minds; and (5) limiting the choices of defense counsel.

1. Frustrating the Intent of the Legislature

Prior to 1981, capital defendants in Washington could strategically control the process and prevent themselves from being subject to the death penalty.¹²⁵ By pleading guilty, a capital defendant could avoid even the consideration of the death penalty.¹²⁶ The Washington legislature was working to correct this apparent statutory lapse when the Washington Supreme Court held in *State v. Frampton*¹²⁷ that the state's death penalty statute was unconstitutional.¹²⁸ The death penalty statute signed into law in May 1981 expressed the legislature's desire to have a strong death penalty statute that prevented capital defendants from running roughshod over the process for their own purposes.¹²⁹

125. *State v. Martin*, 94 Wash. 2d 1, 8, 614 P.2d 164, 167 (1980).

126. *Id.*

127. 95 Wash. 2d 469, 627 P.2d 922 (1981).

128. *Frampton*, 95 Wash. 2d at 497, 627 P.2d at 936.

129. See House Journal, 47th Leg. Sess. 398 (Wash. 1981); see also *Martin*, 94 Wash. 2d 1, 614 P.2d 164 (1980); *Frampton*, 95 Wash. 2d 469, 627 P.2d 922 (1981).

The Washington Supreme Court, in *State v. Martin*, held that the death penalty statute did not prevent a defendant from exercising the right to plead guilty.¹³⁰ In accordance with Criminal Rule 4.2(a), a defendant could choose to plead guilty “unhampered by a prosecuting attorney’s opinions or desires.”¹³¹ In addition, the court determined that when a defendant unconditionally pleads guilty to first-degree murder, the maximum penalty he or she could face was life imprisonment.¹³² The court found that no part of the statute provides for a special sentencing proceeding when a defendant pleads guilty to first-degree murder.¹³³ According to the majority, “Clearly the legislature did not anticipate the possibility that an accused might plead guilty to a charge of first-degree murder.”¹³⁴ Thus, a defendant could choose to avoid the death penalty by pleading guilty, despite the prosecution’s desire to seek consideration of the death penalty.

In *State v. Frampton*, the Washington Supreme Court reaffirmed the *Martin* holding that, under the state’s scheme at the time, “a defendant who pleads guilty cannot be subjected to [the death penalty].”¹³⁵ In addition, the court found that “[t]he Washington statutes for the imposition of the death penalty needlessly chill a defendant’s constitutional rights to plead not guilty and demand a jury trial.”¹³⁶ Under the statute, a defendant’s choice was either to plead guilty, guaranteeing that the death penalty would not be imposed but giving up the right to a trial, or to exercise his constitutional right to a trial by pleading not guilty, and risk a capital sentence. Accordingly, the state’s procedure for imposing the death penalty violated the mandate set forth in *United States v. Jackson*,¹³⁷ wherein the United States Supreme Court held that “if the severity of the punishment is dependent upon the way guilt is determined . . . [then] this imposes an impermissible burden on the exercise of constitutional rights.”¹³⁸ The Washington Supreme Court held that Washington’s death penalty scheme was unconstitutional.¹³⁹

130. *Martin*, 94 Wash. 2d at 6, 614 P.2d at 166.

131. *Id.* at 5–6, 614 P.2d at 166. CrR 4.2(a) states that “[a] defendant may plead not guilty, not guilty by reason of insanity or guilty.” *Martin*, 94 Wash. 2d at 4, 614 P.2d at 166.

132. *Id.*

133. *Id.* at 8, 614 P.2d at 167.

134. *Id.*

135. *Frampton*, 95 Wash. 2d at 480, 627 P.2d at 927.

136. *Id.* at 479, 627 P.2d at 927.

137. 390 U.S. 570 (1968).

138. *Frampton*, 95 Wash. 2d at 480, 627 P.2d at 927.

139. *Id.*

The Washington legislature responded to the Supreme Court's decisions by reworking the state's death penalty scheme.¹⁴⁰ The process had begun prior to the *Frampton* decision as a response both to *Martin* and the possibility that the Court would find the older statute unconstitutional.¹⁴¹ The entire legislative process was complete, and the new statute was signed into law, less than a month after the *Frampton* court declared the old scheme unconstitutional.¹⁴²

The purpose of the new death penalty statute was "to provide this state with the strongest, most constitutionally sound death penalty that can be produced."¹⁴³ The very first section of the new statute made clear that a rule promulgated by the Washington Supreme Court could not "supersede or alter any of the provisions" of the chapter.¹⁴⁴ Thus, the Supreme Court was prohibited from using its court rules to defeat the intentions of the legislature and the operation of the statute.¹⁴⁵

In addition, when a defendant is adjudicated guilty, regardless of whether that adjudication was by a jury verdict, guilty plea, or bench trial, "a special sentencing proceeding shall be held."¹⁴⁶ The legislature went so far as to make a special sentencing proceeding required if "unforeseen circumstances make it impracticable to reconvene the same jury to hear" the proceeding.¹⁴⁷ The revised statute also describes the process for convening a special sentencing proceeding jury in the event that there was not an original trial jury to reconvene for the sentencing.¹⁴⁸ Indeed, the legislature expressly addressed the *Martin* holding, stating that "[n]o sort of plea, admission, or agreement may abrogate the requirement that a special sentencing proceeding be held."¹⁴⁹ This language, combined with the bar on court rules superseding the statute, ensured that a capital defendant would not be able

140. See WASH. REV. CODE § 10.95.010-900 (2002); David B. Erickson, *Refinement of Washington's Death Penalty Act*, 17 GONZ. L. REV. 715, 716 (1982).

141. The new statute was presented in the House of Representatives on March 4, 1981, during the first session. House Journal, 47th Leg. Sess. 398 (Wash. 1981). *Frampton* was decided over a month later on April 16, 1981. In addition, the house passed the bill on March 18, 1981 (House Journal at 454) and the senate passed the bill just ten days after the court's decision. Senate Journal, 47th Leg. Sess. 2163 (Wash. 1981).

142. Erickson, *supra* note 140, at 715-16.

143. House Journal, 47th Leg. Sess. 398 (Wash. 1981) (statement of Rep. Schmidt, who was the sponsor of the new statute, on March 11, 1981).

144. WASH. REV. CODE § 10.95.010 (2002).

145. Leonie G. Hellwig, Comment, *The Death Penalty in Washington: A Historical Perspective*, 57 WASH. L. REV. 525, 548 (1982).

146. WASH. REV. CODE § 10.95.050(1).

147. *Id.* § 10.95.050(3).

148. *Id.* § 10.95.050(4).

149. *Id.* § 10.95.050(1).

to take control of the system by pleading guilty to avoid the death penalty.

Prior to *Frampton*, Washington's death penalty scheme enabled a defendant charged with a capital offense to govern the process and prevent the State from pursuing a death sentence.¹⁵⁰ The defendant could plead guilty to first-degree murder, against the desires of the prosecution, and avoid even the possibility of a death sentence since the statutes had no provision to allow for its consideration.¹⁵¹ The legislature was responding both to this problem and to the possibility that the court would find the state's death penalty statute unconstitutional when *Frampton* was decided.¹⁵² Thus, the legislature enacted a statute that they considered to be unassailable to prevent a defendant from dictating his or her sentencing determination.¹⁵³

But now the state legislature's intention to deny capital defendants the absolute right to determine their own sentences is being nullified yet again. Rather than to *avoid* the death penalty, capital defendants under the current statute are directing the process to ensure that they will face the death penalty.¹⁵⁴ Indeed, seventy-five percent of those executed in Washington since reinstatement of the death penalty post-*Frampton* have commandeered the system to their own ends by refusing to provide any mitigating circumstances at their special sentencing proceedings.¹⁵⁵

These defendants made the choice to not present any mitigating evidence in order to make certain that they were executed.¹⁵⁶ Using the death penalty statute in this manner is not in accordance with the United States Supreme Court's decisions requiring that "the sentencing authority is given adequate information and guidance."¹⁵⁷

When a defendant chooses to not present mitigating evidence, that defendant is able to frustrate not only the express guidance of the U.S. Supreme Court, but also the intent and operation of Washington's death penalty statute.¹⁵⁸ Refusing to present mitigating evidence creates a *per se* preclusion of that evidence from the sentencing author-

150. See *Martin*, 94 Wash. 2d at 2, 614 P.2d at 165.

151. *Id.* at 3, 614 P.2d at 165.

152. See *supra* notes 135-139 and accompanying text.

153. See *supra* notes 140-142 and accompanying text.

154. See, e.g., *Elledge*, 144 Wash. 2d at 75, 26 P.3d at 279.

155. See *Elledge*, 144 Wash. 2d at 77, 26 P.3d at 280; *Sagastegui*, 135 Wash. 2d at 89, 954 P.2d at 1319; *Dodd*, 120 Wash. 2d at 25, 838 P.2d at 98; see also *supra* notes 99-100.

156. See *supra* notes 98-100 and accompanying text.

157. *Gregg*, 428 U.S. at 195.

158. See *supra* Parts III, IV, V.

ity.¹⁵⁹ The jury is prevented from receiving adequate information on which to make a decision about whether to impose the death penalty or not. If jurors were to receive the mitigating evidence, they would not be prevented from finding that a death sentence is warranted.¹⁶⁰ The inclusion of the mitigating evidence simply gives the jury the information required to make a reliable, individualized sentence determination.¹⁶¹

The legislature clearly vested control of the scheme with the prosecutors, jurors, and judges. These are the actors who are responsible to ensure that Washington's death penalty is not inflicted in an arbitrary and capricious or unreliable and nonindividualized manner. Domination of the process by defendants who prevent presentation of mitigating evidence is not what the legislature intended.

2. Creating Undesirable Social Policy

Defendants who choose not to defend themselves against death, or who ask for death as a penalty because they openly have a desire to die, are committing suicide. These volunteers for execution violate the intrinsic statewide and federal policy against suicide. In Washington, this policy is evidenced by pertinent statutory language that states nothing is to be construed as to "condone, authorize, or approve mercy killing or physician-assisted suicide, or to permit any affirmative or deliberate act or omission to end life other than to permit the natural process of dying."¹⁶² The law also provides: "Promoting a suicide attempt is a class C felony."¹⁶³

In *Washington v. Glucksberg*, the Supreme Court of the United States underscored this policy against suicide by upholding the Washington statute that prohibits "promoting a suicide attempt" against a challenge by terminally ill individuals and their physicians.¹⁶⁴ An analysis of the case opinion confirms that suicide and assisted suicide, in any form, are inherently against public policy.¹⁶⁵

159. This is particularly true in light of the Washington Supreme Court's rulings refusing to "adopt a position whereby 'special counsel' would be appointed to investigate and present mitigating evidence." *Elledge*, 144 Wash. 2d at 76, 26 P.3d at 280 (quoting *Sagastegui*, 135 Wash. 2d at 87, 954 P.2d at 1311).

160. See, e.g., *Stenson*, 132 Wash. 2d 759–60, 940 P.2d at 1285.

161. E.g., *Woodson*, 428 U.S. at 304.

162. WASH. REV. CODE § 70.122.100 (2002).

163. *Id.* § 9A.36.060(2).

164. 521 U.S. 702 (1997).

165. *Glucksberg*, 521 U.S. at 710–11. The Court declared that "[i]n indeed, opposition to and condemnation of suicide—and therefore, of assisting suicide—are consistent and enduring themes of our philosophical, legal, and cultural heritages." *Id.* at 711. The Court further acknowledged that "[a]ttitudes toward suicide itself have changed . . . but our laws have consistently condemned, and continue to prohibit, assisting suicide. Despite changes in medical tech-

According to the *Glucksberg* Court, there are many reasons to support a public policy against suicide. First, the people who try to commit suicide, whether terminally ill or not, "often suffer from depression or other mental disorders."¹⁶⁶ By examining relevant research, the Court concluded that a number of people who receive treatment for their pain and depression withdraw their desire to die.¹⁶⁷ Accordingly, research indicated that legal, physician-assisted suicide may

make it more difficult for the state to protect depressed or mentally ill persons, or those who are suffering from untreated pain, from suicidal impulses. The state also has an interest in protecting the integrity and ethics of the medical profession . . . the American Medical Association, like many other medical and physicians' groups, has concluded that 'physician-assisted suicide is fundamentally incompatible with the physician's role as healer.'¹⁶⁸

The *Glucksberg* Court found that physician-assisted suicide could "undermine the trust that is essential to the doctor-patient relationship by blurring the time-honored line between healing and harming."¹⁶⁹ To ask a physician to kill a patient would be unfair, and inconsistent with the requirement that the doctor medically do what is best for the patient.

nology and notwithstanding an increased emphasis on the importance of end-of-life decision making, we have not retreated from this prohibition." *Id.* at 719.

166. *Id.* at 730 (See New York Task Force 13–22, 126–128 (more than 95% of those who commit suicide had a major psychiatric illness at the time of death; among the terminally ill, uncontrolled pain is a "risk factor" because it contributes to depression); *Physician-Assisted Suicide and Euthanasia in the Netherlands: A Report of Chairman Charles T. Canady to the Subcommittee on the Constitution of the House Committee on the Judiciary*, 104th Cong., 2d Sess., 10–11 (Comm. Print 1996); cf. Back, Wallace, Starks, & Pearlman, *Physician-Assisted Suicide and Euthanasia in Washington State*, 275 JAMA 919, 924 (1996) ("[I]ntolerable physical symptoms are not the reason most patients request physician-assisted suicide or euthanasia.")).

167. *Glucksberg*, 521 U.S. at 730 (citing HERBERT HENDIN, *SEDUCED BY DEATH: DOCTORS, PATIENTS AND THE DUTCH CURE* 24–25 (1997) ("suicidal, terminally ill patients 'usually respond well to treatment for depressive illness and pain medication and are then grateful to be alive.'"); New York Task Force 177–78.)

168. *Glucksberg*, 521 U.S. at 730 (citing AMERICAN MEDICAL ASSOCIATION, *CODE OF ETHICS* § 2.211 (1994); see *Council on Ethical and Judicial Affairs, Decisions Near the End of Life*, 267 JAMA 2229, 2233 (1992) ("The societal risks of involving physicians in medical interventions to cause patients' deaths is too great."); New York Task Force 103–09 (discussing physicians' views.))

169. *Glucksberg*, 521 U.S. at 730; *Assisted Suicide in the United States, Hearing before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 104th Cong., 2d Sess., 355–56 (1996) (testimony of Dr. Leon R. Kass) ("The patient's trust in the doctor's wholehearted devotion to his best interests will be hard to sustain.")

The *Glucksberg* Court also recognized that the state has an interest in “protecting vulnerable groups—including the poor, the elderly and disabled persons—from abuse, neglect, and mistakes.”¹⁷⁰ The fear is that if physician-assisted suicide were permitted, “many might resort to it to spare their families the substantial financial burden of end-of-life health care costs.”¹⁷¹

This same analysis is applicable to death penalty volunteers. In the case of Westley Allan Dodd, Justice Utter noted the following in his dissent:

It is common for those on death row to express a will to stop their appeals and proceed with execution. Most change their minds and agree to continue the appeals process. Given the physical and psychological pressures felt by those on death row, the lure of ceasing to resist the death penalty may be as great for the innocent as for the guilty.¹⁷²

Death penalty volunteers are often mentally unstable, if not clinically mentally ill. Consequently, there is now a typical profile of volunteers: they have a record of some mental illness, were abused as children, and have already served time in jail.¹⁷³ A prosecutor in Florida, where the volunteer phenomenon has also been a problem, said, “I think that if the people who ask for death were given psychological exams, they would likely be diagnosed as severely depressed.”¹⁷⁴

Many volunteers for execution suffer depression and mental disorders stemming not only from the psychological effects of the crime they committed, but also from the living conditions that come with their sentences.¹⁷⁵ Death row inmates are purposely deprived of freedoms that other citizens enjoy and these losses contribute to their mental and physical states. Those awaiting execution are disconnected from the rest of the prison populace, refused admission to rehabilitative curriculums, denied regular exercise and physical activity, and secluded in their cells for exceptionally long periods.¹⁷⁶

170. *Glucksberg*, 521 U.S. at 732.

171. *Id.* at 732.

172. *Dodd*, 120 Wash. 2d at 34–35, 838 P.2d at 103 (Utter, J., dissenting) (citing Richard C. Dieter, Note, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799, 800 (1990), and G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third-Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 869 (1983)).

173. Reuters, *The Death Penalty as a Means of Assisted Suicide* (Dec. 14, 2000), at <http://www.againstdp.org/assistedsuicide.html>.

174. *Id.*

175. Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 871 (1987).

176. *Id.*

Psychiatric research suggests that “long-term isolation causes humans to suffer anxiety, confusion, a sense of unreality, and depression.”¹⁷⁷ One Harvard psychiatrist has concluded that many death row inmates “already feel so spiritually dead that they long for physical death as well . . . in some cases, [execution] gratifies the suicidal wishes of those who are prone to committing murders in the first place.”¹⁷⁸ Another commentator found that when

barren conditions are combined with the psychological stress that results from ‘being forced to live with the spasmodic certainty and uncertainty of being sentenced to die,’ it is not surprising that many prisoners find existence on death row intolerable. Indeed, several inmates have stated that these conditions gave rise to their preference for the death penalty.¹⁷⁹

This mental instability that is common in defendants who have committed violent crimes and who are facing their own death is the same type of mental instability that could be found in any person considering suicide. Thus, the state policy that protects vulnerable people from being able to make a choice of suicide should apply to all people, criminals and noncriminals alike.¹⁸⁰

Mental illness and depression are not the only reason why defendants become volunteers for the death penalty. Other reasons include “physical illness, remorse, bravado, religious belief . . . pessimism about appeal prospects, a quest for notoriety, or simply . . . a way for the prisoner to gain a semblance of control over a situation in which they are otherwise helpless.”¹⁸¹ These characteristics, like depression and mental instability, are also distinctive in suicidal noncriminals, who, because of state policy, are protected by the State.

Once on death row, the inmate, like any other prisoner, is protected to the fullest extent by the state. States will keep suicidal death row inmates alive up until even hours before their execution so that they will be available for their execution, because that is the state policy—no suicide. In Texas, David Martin Long attempted suicide by

177. Reuters, *Harsh Prisons Prompt Inmates to Opt for Execution* (Jan. 8, 2001), at <http://www.againstdp.org/optfor.html>. See also Katherine van Wormer & Chuk Odiah, *The Psychology of Suicide-Murder and the Death Penalty*, paper presented at the World Conference on Violence and the Future of Society, Dublin, Ireland (August 20–23, 1997), at <http://www.angelfire.com/fl3/starke/psychology.html>.

178. Reuters, *Death Penalty*, *supra* note 173 (citing to JAMES GILLIGAN, VIOLENCE: OUR DEADLY EPIDEMIC AND ITS CAUSES (1996)).

179. White, *supra* note 175, at 871.

180. See generally van Wormer & Odiah, *supra* note 177.

181. Amnesty International, *The Illusion of Control: “Consensual” Executions . . . and the Brutalizing Futility of Capital Punishment 5*, available at <http://www.amnestyusa.org/abolish/reports/amr510532001.html> (last visited Dec. 5, 2002).

drug overdose before his execution date.¹⁸² The State flew him to a hospital in Huntsville accompanied by a full medical team, and injected him with a charcoal solution to “detoxify” his body, only to inject him with a lethal dose of poison a few hours later.¹⁸³

Suicide on death row in Washington has occurred once in the cell and three times in the death chamber.¹⁸⁴ It is against state policy to allow death row inmates to commit suicide, or even die a natural death.¹⁸⁵ To uphold a policy of suicide prevention in the cell and not in the death chamber is inconsistent. Whether the inmate himself or a doctor administers death should not be distinguished in a case where the accused has purposefully chosen the penalty.

The situation involving death row volunteers may be also analogous to the so-called suicide-by-police or suicide-by-cop phenomenon that has become familiar to law enforcement officers as a situation where individuals deliberately try to get the police to kill them.¹⁸⁶ This usually involves a premeditated plan by persons who want to die but cannot quite end their own lives.¹⁸⁷ These individuals commit a crime, and then deliberately do something that will prompt a police officer to shoot at them, such as taking hostages, brandishing weapons, threatening the police officer, or making sudden moves.¹⁸⁸

These suicide-by-cop strategies have been carried out all over the country and are now more easily recognized by police. The usual approach among law enforcement agencies is to take the necessary steps to prevent the suicide-by-cop killings in compliance with the public policy denouncing suicide:

[P]olice are being trained today to exercise restraint by learning to recognize the characteristics that may help them avoid engag-

182. *Id.* at 12.

183. *Id.*

184. See generally Washington Coalition to Abolish the Death Penalty, at http://www.abolishdeathpenalty.org/wcadp_resources.html (last visited Dec. 5, 2002).

185. See Death Penalty Information Center, *supra* note 121. When Mitchell Rupe was on death row, he was dying of liver disease. The State made every effort it could to keep him healthy just so that it could execute him. *Id.* His sentence has since been commuted to life without parole. Washington Coalition to Abolish the Death Penalty, Spring Newsletter 2000, available at <http://www.abolishdeathpenalty.org/newsletters/spring00.pdf> (last visited Dec. 31, 2002).

186. Timothy P. Flynn & Robert J. Homant, *Suicide By Police in Section 1983 Suits: Relevance of Police Tactics*, 77 U. DET. MERCY L. REV. 555 (2000). In the academic literature, the term characterizes a situation where “[i]ndividuals, bent on self-destruction, engage in life-threatening and criminal behavior in order to force the police to kill them.” *Id.* (citing Vernon J. Geberth, *Suicide-by-Cop: Inviting Death from the Hands of a Police Officer*, LAW & ORDER 105 (July 1993)).

187. van Wormer & Odiah, *supra* note 177.

188. *Id.*

ing people in suicidal show-downs [Characteristics include] suicidal motivation . . . [they] may seem distressed or, contrarily, act as if they do not care whether or not the officers kill them.¹⁸⁹

This same ideology is inherent in many criminals' plans to volunteer for execution. There are cases among the volunteers where criminals have killed in order to be killed. This was true in Washington with triple-murderer Jeremy Sagastegui. In an interview before his death, Sagastegui explicitly said, "[I]f the State wouldn't have had the death penalty, those people would still be alive."¹⁹⁰ Thomas Akers of Virginia walked around wearing an electric chair pendant around his neck.¹⁹¹ He promised his family that one day he would be executed by the State.¹⁹² His plan worked out perfectly: one day he beat a man to death, and once apprehended, he demanded the death penalty for it. He was executed on March 1, 2001.¹⁹³ If his "plan" had involved being shot by a police officer rather than execution in a death chamber, the State would have put a stop to it.

The idea that some volunteers kill to be killed is clinically called "suicide murder," and this occurs when suicide "will not be viewed not as the consequence of the murder, but rather, as its cause."¹⁹⁴ The psychoanalytical literature has "long proposed a link between homicidal and suicidal tendencies."¹⁹⁵ The murder-suicide connection, according to this conceptualization, then becomes the "expression of an extended suicide."¹⁹⁶ Murder-suicide is another pathway to assisted suicide, only it is a newfound pathway; it is not physician-assisted, or

189. *Id.*

190. Amnesty International, *supra* note 181, at 8. The issue of Sagastegui's mental competency was an issue before the clemency board. See Petition of Katie Vargas, *supra* note 80.

191. *Id.*

192. *Id.*

193. *Id.*

194. van Wormer & Odiah, *supra* note 177.

195. *Id.* Professor van Wormer gives the example of Menninger, who argued, "[S]uicide involves the wish to kill, to be killed, and to die. Those prone to suicide . . . are immature individuals fixated at early stages of development." *Id.* (citing generally KARL A. MENNINGER, *MAN AGAINST HIMSELF* (1938)). She also references the writings of Palermo, who argued the following:

It is plausible to assume that the murderer, who is usually depressed and paranoid, harbors a primary suicidal thought. Such a man does not feel, therefore, that he is killing an autonomous entity but, rather, an extension of himself. The murder-suicide, according to this conceptualization, then becomes the expression of an extended suicide.

Id. (citing G.B. Palermo, *Murder-Suicide—An Extended Suicide*, INT'L J. OF OFFENDER THERAPY AND COMP. CRIMINOLOGY 38 (3), 205, 216 (1994)).

196. *Id.* (citing G.B. Palermo, *Murder-Suicide—An Extended Suicide*, INT'L J. OF OFFENDER THERAPY AND COMP. CRIMINOLOGY 38 (3), 205, 215 (1994))

cop-assisted, but it is state penalty-assisted. This new pathway, like the others, is profoundly against public policy.

It is increasingly apparent that there are additional reasons why volunteers may decide to choose death before their crimes are even committed: bravado and martyrdom. In this era of terrorist attacks, this should be an area of growing concern. This issue was a factor in the execution of Timothy McVeigh. Many feared that McVeigh dropped his appeals so that he would appear to be a "Martyr figure."¹⁹⁷

A former National Security Council member recently wrote that there is a risk that "executing people who commit acts of political violence may incite further violence."¹⁹⁸ Amnesty International has also expressed a concern that "executions for politically motivated crimes may result in greater publicity for acts of terror, thus drawing increased public attention to the perpetrators' political agenda. Such executions may also create martyrs whose memory becomes a rallying point"¹⁹⁹

This "martyrdom" phenomenon could present a chilling future for the capital punishment system in the United States as more and more terrorists are captured and brought before the courts. If all the terrorists are like the suicide bombers of September 11, there is a good chance they will not fight death. If they were then put to death, their executions would mean a memorable legacy among their co-conspirators for having performed acts of courage and made a mockery of the United States criminal justice system.²⁰⁰

If a prisoner asks to be executed and the State complies with that request, "in reality, the State is taking to refined, calculated heights what it seeks to condemn—the deliberate taking of human life."²⁰¹ Moreover, if "volunteers" are continually allowed to sentence themselves, the deterrence element of capital punishment will be com-

197. Amnesty International, *supra* note 181, at 7.

198. *Id.* (comments of Jessica Stern).

199. *Id.*

200. For example, Mohamed Rashed Daoud Al-'Owhali was sentenced to life imprisonment for the bombing of the United States Embassy in Kenya because ten of the twelve jurors feared that sentencing him to death would only glorify his cause and make him a martyr. CBS News, *No Martyrdom for Embassy Bomber*, June 13, 2001, available at <http://www.cbsnews.com/stories/2001/05/30/national/main293880.shtml>. See also Julian Borger, *Death Row Diaries Reveal McVeigh's Goal of Martyrdom*, THE GUARDIAN, June 9, 2001, at 22. Diaries of death row inmates associated with Timothy McVeigh revealed that McVeigh took measures such as starving himself so that his postmortem pictures would reveal a man resembling a "concentration camp victim." *Id.*

201. Amnesty International, *supra* note 181, at 18.

pletely invalidated. Many defendants at one time say that they would rather choose death than life imprisonment.²⁰² This indicates that

potential murderers as a group do not view the death penalty in the same way as the general populace If it is assumed that potential murderers take into account possible punishments before deciding whether to commit murder, for them a system of punishment that includes the death penalty will be a less effective deterrent than one that does not.²⁰³

The current capital punishment system in the State of Washington is a perfect example of the fallacy of deterrence. The fact that three of the four men executed by Washington State were volunteers makes it clear that the system needs modification. Obviously, criminals in Washington do not view the death penalty as deterrence, or even a punishment, for that matter. They *choose* it as if it is their saving grace, or path to freedom—to do the one thing they could never do themselves.

One commentator argues that

[s]tate interests in the context of volunteering include an interest in preventing suicide; an interest in upholding the Eighth Amendment to the U.S. Constitution . . . ; an interest in ensuring that innocent persons not be executed; an interest in ensuring the validity of the conviction and sentence through the appellate process; and an interest in not allowing inmates to choose their own sentencing.²⁰⁴

If prisoners are allowed to premeditate their own deaths through that system, it is not working properly. Physician-assisted suicide, suicide in a jail cell, and suicide-by-cop should not be distinguishable from suicide by the death penalty. They are all forms of suicide or assisted suicide that are against the law and against public policy. A person's suicidal premeditated strategy to kill in order to be killed through capital punishment does not give carte blanche to the State to automatically invoke the death penalty. Furthermore, it is not in the state's interest to yield to the suicidal missions of a murderer or terrorist. No assisted suicide is permitted under Washington law; death penalty volunteers should not receive any more rights than what the law provides in this respect.

202. White, *supra* note 175, at 876–77.

203. *Id.*

204. C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 851 (2000).

The state interest, or fear, that suicidal individuals will make clouded choices as a result of mental incapacity is a reality, not only in the medical field but also in the legal field. A state interest that condemns suicide should be consistent throughout the law, no matter who the suicidal party is. To indicate otherwise would give a right to deadly criminals that no other innocent or guilty person has, no right that any terminally ill, elderly, healthy, or vulnerable person has. Steps must be taken to ensure that the criminals who are put to death are the ones who have committed the harshest crimes and who deserve to die, not those who reserve the right to die because this right does not exist in our state or in our country.

3. Circumventing the Function of the Jury

Where the defendant refuses to allow mitigating evidence to be presented during the sentencing phase of the trial, the function of the jury is circumvented. One observer has noted the following with regard to the jury's right to hear mitigating evidence:

Social histories in this context, then, are not excuses, they are explanations. An explanation does not necessarily dictate an outcome, not even a penalty trial outcome. Some explanations lead to life verdicts, and some do not. But no jury can render justice in the absence of an explanation.²⁰⁵

American jurisprudence involving capital punishment and its constitutional foundation in the Eighth Amendment emphasizes that "death is different."²⁰⁶ The United States Supreme Court has acknowledged that because "there is a qualitative difference between death and any other permissible form of punishment, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."²⁰⁷ Measures such as the presentation of mitigation evidence are vital functions in a death penalty case because they are designed to ensure reliability if death is determined to be the appropriate punishment.²⁰⁸

Other constitutional criminal protections afforded by the Bill of Rights explicitly refer to the rights of a "person" or of "the accused";

205. Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 560-61 (1995).

206. See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Thompson v. Oklahoma*, 487 U.S. 815 (1988). The Eighth Amendment to the U.S. Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend.VIII.

207. *Woodson*, 428 U.S. at 305.

208. Cf. *Whitmore v. Arkansas*, 495 U.S. 149, 171-72 (1976).

however, the Eighth Amendment's prohibitions seem crafted to protect individual rights and to safeguard the public interest as well.²⁰⁹

One scholar has identified that "[t]he societal interest at stake is respect for the criminal justice system and a society which only imposes such a severe penalty as death under controlled, fair circumstances."²¹⁰ She further advises that "[p]ermitting a defendant to waive or forego the presentation of mitigating evidence defeats the public's interest inherent in the eighth amendment."²¹¹

There is a fundamental societal interest involved in the presentation of both aggravating and mitigating evidence. This balanced presentation helps to ensure that the appropriate punishment is being used, protects a defendant's interest against experiencing cruel and unusual punishment, and guards against a possibility that a state will shock the community's conscience or undermine the integrity of our criminal justice system.²¹² If a defendant is allowed to forego the presentation of mitigating evidence for purposes of self-interest, the question then must be: what happens to society's interest and the jury's critical role in safeguarding that interest?

Denying the jury the opportunity to consider substantial mitigation evidence is fundamentally unfair to the jury. These twelve citizens are asked to represent the conscience of society, and a heavy burden is placed on them to weigh the evidence and decide on the life or death of another person.²¹³ As one prosecutor put it, they are the "people we call upon to make the most horrendous decision we can ask anyone to make about another human being."²¹⁴ Jurors look to the fairness of the process to assuage their doubts and ease the weight of their decision. If a defendant stops the presentation of mitigation, the jury never hears the whole story, and the fairness necessary for them to alleviate their doubts is consequently taken away.

If there are no mitigating circumstances brought forth to merit leniency for a criminal defendant, the usual sentence will be death, as opposed to life imprisonment. Without any other evidence, the State can easily prove beyond a reasonable doubt that the criminal defendant is among the most terrible of criminals, and that the crime com-

209. The Fifth Amendment uses the term "person," and the Sixth Amendment focuses on "the accused." U.S. CONST. amend.V and amend.VI.

210. Carter, *supra* note 35, at 128.

211. *Id.* at 127-28.

212. See generally *Whitmore*, 495 U.S. 149.

213. Political science professor Jeffrey Abramson has stated: "Deliberating death, then, is the premier contemporary example where old invocations of the jury as the conscience of the community live on." JEFFREY ABRAMSON, *WE THE JURY* 212 (1994).

214. *Denn & Fisher*, *supra* note 1 (statement of Snohomish County Deputy Prosecutor John Adcock).

mitted was a horrendous evil. This makes it acceptable for the jury to then invoke the ultimate punishment. The most important function of a jury is to consider all the important factors prior to choosing an appropriate penalty. This burden upon the jury is why the presentation of mitigating evidence is such a fundamental part of maintaining justice—it ensures that the death penalty is not imposed in an arbitrary manner.²¹⁵ Although the introduction of this evidence does not guarantee a sentence of life rather than death, it does provide the necessary statutory and constitutional equilibrium in the sentencing process.

4. Foreclosing Options When Volunteers Change Their Minds

In *Dodd*, Justice Utter hypothesized that a “serious dilemma” would arise when a capital defendant “changes his or her mind about desiring the death penalty.”²¹⁶ He suggested that “[e]ither we must conclude that the defendant is stuck with an unfavorable trial record, or require a new trial.”²¹⁷ Recently, in *State v. Woods*, Washington’s Supreme Court faced the precise dilemma predicted by Justice Utter in *Dodd*.²¹⁸ The court decided that the former option was more appropriate for Washington.²¹⁹ This conclusion, however, runs contrary to the constitutional mandate of the United States Supreme Court, to the intent of the Washington legislature, and to the effective operation of Washington’s death penalty statute.²²⁰

The majority determined that at trial, “Woods made a voluntary, intelligent, and knowing choice not to present mitigating evidence.”²²¹ The court found that the waiver of the right to present mitigating evidence should be evaluated in a manner similar to the waiver of the right to testify on one’s own behalf.²²² Accordingly, “the judge may assume a knowing waiver of the right from the defendant’s conduct.”²²³ Defense counsel retains “[t]he responsibility for informing the defendant of this right [to present mitigation] and discussing the merits and demerits of the decision”²²⁴

215. See *Woodson*, 428 U.S. 280 (1976); *Gregg*, 428 U.S. 153 (1976).

216. *State v. Dodd*, 120 Wash. 2d 1, 43, 838 P.2d 86,107 (Utter, J., dissenting).

217. *Id.* Utter continued, “The first option seems unfair; the second, too costly. Requiring presentation of mitigating evidence at the outset would be preferable.” *Id.*

218. *State v. Woods*, 143 Wash. 2d 561, 23 P.3d 1046 (2001).

219. *Id.* at 615, 23 P.3d at 1076.

220. See discussion *supra* Parts III, IV, V.

221. *Woods*, 143 Wash. 2d at 609, 23 P.3d at 1073.

222. *Id.*

223. *Id.* (quoting *State v. Thomas*, 128 Wash. 2d 553, 559, 910 P.2d 475, 479 (1996)).

224. *Id.* Interestingly, the court found that defense counsel was able to accomplish this “discussion” and Mr. Woods was able to come to a competent decision over the weekend follow-

The Supreme Court determined that trial courts are not required to meet any other standard in assessing a waiver of the presentation of mitigation evidence.²²⁵ In dicta, the majority did acknowledge that “other states have adopted specific procedures that must be followed by a trial court when a defendant desires to forgo the presentation of mitigating evidence.”²²⁶ The court found that common to these procedures were two requirements: “[T]he trial court must: (1) apprise the defendant of what mitigation evidence is and its role in the capital sentencing process, and (2) inquire whether the defendant desires to waive the right to present such evidence.”²²⁷

The court concluded that the *Woods* trial judge met this non-mandatory standard by first conducting a brief colloquy with Mr. Woods.²²⁸ The court also determined that Mr. Woods “was informed of what mitigation evidence is and what its role is in the capital sentencing process.”²²⁹ Second, the trial court was informed by Mr. Woods’ attorney, during arguments for his motion for a continuance after the guilty verdict, that Mr. Woods “wished, at least as far as expressed most recently to me, that we not put on any mitigation at all.”²³⁰ In addition, the court surmised that the very fact that Mr.

ing his conviction. *Id.* at 604–06, 23 P.3d at 1070–72. Defense counsel had asked for, and had been denied, a week’s continuance to have Mr. Woods’ competence evaluated after the guilty verdict was returned and Mr. Woods stated his intent to preclude presentation of mitigation evidence. *Id.*

225. *Woods*, 143 Wash. 2d at 611, 23 P.3d at 1074.

226. *Id.* at 610, 23 P.3d at 1073.

227. *Id.* In forming this “standard,” the court looked to Oklahoma (*Fitzgerald v. State*, 972 P.2d 1157 (Okla. Crim. App. 1998)), Ohio (*State v. Ashworth*, 706 N.E.2d 1231 (1999)), and Florida (*Chandler v. State*, 702 So.2d 186 (Fla.1997)). Justice Sanders, in dissent, criticized the majority’s test, stating that “[t]he majority’s nonmandatory two-part test is a far cry from the procedures employed in the very cases it cites for support.” *Id.* at 632, 23 P.3d 1084 (Sanders, J., dissenting).

228. *Woods*, 143 Wash. 2d at 611, 23 P.3d at 1074.

229. *Id.* at 610, 23 P.3d at 1073–74. The extent of the trial court’s questioning found relevant by the supreme court was:

THE COURT: . . . Do you understand that in the death penalty sentencing phase, this next phase we’re talking about, you have a right to make an unsworn statement to the jury that is your right of allocution?

MR. WOODS: Yes.

THE COURT: You also understand that in this phase of the trial you have the right to present mitigation testimony?

MR. WOODS: Yes.

THE COURT: Testimony to persuade the jury that the right choice is leniency, from your perspective?

MR. WOODS: Yes.

Id. (quoting Verbatim Report of Proceedings, *State v. Woods*, at 5737).

230. *Id.* at 611, 23 P.3d at 1074. It is interesting that the court would seize upon Mr. Woods’ attorney’s remarks made during argument for a continuance in order to have Mr. Woods’ competency evaluated, as determinative of Woods’ wish to volunteer for the death pen-

Woods wanted to volunteer for the death penalty, by asking the jury to impose it, "unequivocally evidences his intent to waive his right to present mitigating evidence."²³¹ Accordingly, Mr. Woods' decision to volunteer not only exceeded the "voluntary, intelligent, and knowing" standard, it also complied with the enhanced procedures that surpass what the Constitution requires.²³²

Between the time of his sentencing hearing and the mandatory appeal to the Washington Supreme Court, Mr. Woods changed his mind and no longer wished to volunteer for the death penalty.²³³ After applying the above standards, the court focused on the trial record created at the sentencing hearing and held that "there is sufficient evidence to support the jury conclusion that leniency was not merited."²³⁴

The *Woods* majority, when faced with the dilemma of a volunteer who changes his mind, chose to institute a rule that Justice Utter previously characterized as an "unfair" option.²³⁵ In addition, the *Woods* solution to the dilemma highlights a central concern with volunteers. When a volunteer dominates the process, the death penalty scheme does not operate as intended; however, when the volunteer attempts to return control of the process back to those who the legislature intended to vest control, it is too late. By making the volunteer's initial choice determinative of the entire path taken by Washington's death penalty scheme, Washington runs the risk of realizing another of Justice Utter's predicted problems: the possibility of executing an innocent person.²³⁶

5. Limiting the Choices of Defense Counsel

When defendants volunteer for execution, their lawyers are placed in an unfair predicament. Most lawyers who choose to represent capital defendants are opposed to capital punishment; thus, in the

alty. The court also found that Mr. Woods' resistance to the continuance was equally indicative of his desire to waive mitigation. *Id.*

231. *Id.*

232. *Id.*

233. *Woods*, 143 Wash. 2d at 603, 23 P.3d at 1070 ("Woods argues that the trial court abused its discretion in denying his defense counsel's motion for a one-week continuance between the guilt and penalty phases. Woods now asserts that this continuance was necessary in order for his counsel to have his competency addressed. He claims that because of this error, his death sentence should be vacated." (emphasis added)).

234. *Woods*, 143 Wash. 2d at 615, 23 P.3d 1046. The court emphasized Mr. Woods' volunteer status during the penalty phase, stating, "Woods essentially implored the jury to impose the death penalty." *Id.*

235. *Dodd*, 120 Wash. 2d at 43, 838 P.2d at 107 (Utter, J., dissenting).

236. *Id.* at 34, 838 P.2d at 103 ("Given the physical and psychological pressures felt by those on death row, the lure of ceasing to resist the death penalty may be as great for the innocent as for the guilty.").

case of a volunteer, there is a forced choice between the attorney's own interests in opposing the death penalty and counsel's obligation to "seek the lawful objectives of her client."²³⁷ As one commentator has observed, in reality, the capital defense attorney who represents a volunteer is faced with four options:

First, the attorney can try to have her client deemed incompetent, thereby eliminating the client's authority to decide what is in his best interests. Second, the attorney can acquiesce to the client's wishes by complying with his requests or withdrawing from the case. Third, the attorney can outright defy her client's wishes and act without the client's consent, which will likely lead to discharge. Lastly, the attorney can use persuasive or coercive tactics to try to convince her client to change his mind.²³⁸

It is next to impossible to find that a defendant is incompetent. The standard is a strict one:

The defendant's inability to recognize facts that might make his punishment unlawful or unjust was of no consequence as long as he understood that he was to be executed and why he was being punished . . . [S]hort of rabid insanity, incompetence is a difficult burden to meet and mental disability rarely precludes a finding for competent decision-making.²³⁹

The second option, to completely defy a client's plea for death and present the mitigating evidence anyway, is not appropriate either.²⁴⁰ Defying a client's wishes goes against an attorney's pledge to "seek the lawful objectives of his client through reasonably available means."²⁴¹ This puts the defending attorney in an ethical quandary because the attorney who does not comply with the client's wishes could be fired, leaving the defendant without representation.²⁴² With-

237. White, *supra* note 175, at 855-56 (citing MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101(A)(1) (1982)).

238. Chandler, *supra* note 102, at 1913.

239. *Id.* at 1914; *see also* Dusky v. United States, 362 U.S. 402 (1960) (concluding that a client must be nearly catatonic before he is actually considered incompetent). But *see* State v. Marshall, 144 Wash. 2d 266, 27 P.3d 192 (2001), where the Washington Supreme Court determined that the trial court erred in failing to conduct a mandatory full-blown competency hearing after the defendant made a motion to withdraw his guilty plea in a capital prosecution on the basis that he was not mentally competent at the time the plea was entered. *Id.* at 281. On remand to the trial court, the same judge who declared Marshall competent initially found him incompetent after a formal hearing on the issue. Olsen, *supra* note 122. The prosecutor decided not to seek the death penalty after remand to the trial court.

240. *Id.* at 1916.

241. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101(A)(1) (2001); *see also* MODEL RULES OF PROF'L CONDUCT R.1.3 cmt. 1 (2001) ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

242. Chandler, *supra* note 102, at 1916.

drawal by the attorney is yet another alternative for defense counsel; however, appointed attorneys must get a court's approval to withdraw, and are usually discouraged from withdrawing from a case despite their predicament.²⁴³

Counsel who attempt to change a volunteer's mind find an additional struggle. Many defense attorneys who choose to put pressure on their clients to fight for life think that they are acting in the defendant's best interests.²⁴⁴ These attorneys believe that because of the many psychological factors that affect a prisoner on death row, a capital defendant may be unable to make a competent decision.²⁴⁵ Other attorneys feel that they have an obligation to the defendant's family members who will suffer if there is an execution, and that they have an obligation to society to make sure that the death penalty is not imposed inappropriately.²⁴⁶ This persuasion, however, could be construed as coercive, as the attorney is frequently the capital defendant's only meaningful contact from the outside.²⁴⁷

Beyond an initial attempt to talk the client out of electing execution, there is no monolithic voice among experienced capital defenders about how to handle the question of clients who seek death. According to one assessment, the greatest numbers of attorneys who do death penalty work "acknowledge the ethical problems inherent in opposing a client's wishes," but none could "imagine a case in which he would voluntarily allow a capital defendant to submit to execution."²⁴⁸

In an article published about a series of focused in-depth interviews conducted in 1998 with twenty lawyers for death row inmates, there was wide disagreement about the appropriate approach in dealing with volunteers.²⁴⁹ The author indicates that the interviews "suggest that there are no hard-and-fast rules for determining the ethics of volunteering; instead it is a fluid, ongoing, and uniquely individualized process."²⁵⁰ The divergent approaches to volunteering include "respect the client's wishes" to "unavoidable triage" to "question his competency" to "withdraw immediately" to "fight it every step of the way."²⁵¹

243. *Id.* at 1916; see also MODEL RULES OF PROF'L CONDUCT R. 1.16(c) (2001).

244. White, *supra* note 175, at 858.

245. *Id.*

246. *Id.* at 859.

247. Chandler, *supra* note 102, at 1917.

248. White, *supra* note 175, at 861.

249. Harrington, *supra* note 204, at 849.

250. *Id.* at 873.

251. *Id.* at 877.

A lawyer is representative, advisor, advocate, negotiator, intermediary, evaluator, officer of the legal system, and a public citizen.²⁵² A lawyer, as a citizen, has a particular responsibility to preserve the quality of justice.²⁵³ A lawyer is precluded from doing a good job if the attorney must choose to act in one capacity, but not another. It is in the public interest to keep a lawyer from having to make such a decision, because whether a lawyer chooses to defy the client, or help the client achieve death, the attorney cannot, in the meantime, preserve the quality of justice.

B. Strategic Choices and Presentation of Mitigation Evidence

Mitigation evidence is not presented when a defense team is forced to make a strategic or tactical decision regarding presentation of such evidence. There may be justifiable reasons, based on existing law, for a defense team to be forced to make this “strategic choice.” For example, a common reason why such evidence may not be presented is the existence of rebuttal evidence more prejudicial to the defendant than the mitigating evidence. This strategic choice is, at least in part, a result of the way Washington has structured the rules with regard to the presentation of mitigation evidence in the sentencing phase of a capital trial.

According to Washington’s death penalty statute regarding the sentencing hearing in a capital trial, any relevant evidence shall be admitted which the court “deems to have probative value *regardless of its admissibility under the rules of evidence.*”²⁵⁴ The Washington Supreme Court has limited this broad rule only to evidence of mitigating factors.²⁵⁵ Thus, mitigation evidence may be presented in a manner guided only by the standard of relevance.

During the sentencing hearing, the prosecution’s presentation of evidence of the statutory aggravating factors is “restricted to meet the evidentiary, and state and federal constitutional standards [articulated by the court].”²⁵⁶ In addition, “evidence of nonstatutory aggravating factors must be limited to the defendant’s criminal record, evidence that would have been admissible at the guilt phase, and evidence to

252. MODEL RULES OF PROF’L CONDUCT pmbi., scope, and terminology (1998).

253. *Id.*

254. WASH. REV. CODE § 10.95.060(3) (2002) (emphasis added).

255. *State v. Bartholomew*, 101 Wash. 2d 631, 642, 683 P.2d 1079, 1086 (1984) (known as *Bartholomew II*); *State v. Clark*, 143 Wash. 2d 731, 780, 24 P.3d 1006, 1030–31 (2001).

256. *Bartholomew II*, 101 Wash. 2d at 642, 683 P.2d at 1087. The statutory aggravating factors are those of WASH. REV. CODE § 10.95.020.

rebut matters raised in mitigation by the defendant.”²⁵⁷ The prosecution’s use of rebuttal evidence is allowed to be admitted

only if it is relevant to a matter raised in mitigation by the defendant. Evidence might be relevant, for instance, if it casts doubt upon the reliability of defendant’s mitigating evidence. [The supreme court does] not intend, however, that the prosecution be permitted to produce any evidence it cares to so long as it points to some element of rebuttal no matter how slight or incidental. The court in determining whether to admit the prosecution’s evidence should apply a balancing test similar to that contemplated by [Evidence Rule] 403.²⁵⁸

Thus, the prosecution is limited in its case in chief to presenting evidence of the facts and circumstances of the crime and the defendant’s criminal record. According to the rules of evidence, the defendant may then introduce any relevant mitigation evidence. After the defendant’s presentation, the prosecutor may rebut. The court must then perform a balancing test, weighing the relative probative and prejudicial values of the proposed rebuttal evidence before allowing presentation of such evidence.

An example of how this strategic choice might work is when the defendant introduces evidence relating to the likelihood that he or she “will pose a danger to others in the future.”²⁵⁹ If a defendant presents mitigation evidence indicating that he or she will not pose a danger in the future, the prosecution can rebut with evidence indicating the contrary. As long as the prosecution’s evidence does not unfairly prejudice the defendant, such rebuttal is permitted. If the defense believes that the rebuttal evidence would be more harmful to the defendant than the benefit of presenting future dangerousness evidence, then the defense may decide not to present the mitigating evidence at all. Therefore, this “strategic choice” prevents the presentation of mitigating evidence. This weakness in Washington statutory wording creates a Hobson’s choice for the defendant concerning mitigation. If the statute more clearly enumerated other possible mitigation factors, defendants would not have to decide whether to open the door to a broader character assassination by the prosecutor in response to an attempt to show that the defendant poses no future danger.

257. *Bartholomew II*, 101 Wash. 2d at 642, 683 P.2d 1087.

258. *Id.* at 643, 683 P.2d at 1047 (quoting *State v. Bartholomew*, 98 Wash. 2d 173, 197-98, 654 P.2d 1170 (1982)).

259. WASH. REV. CODE § 10.95.070(8). The “likelihood that the defendant will pose a danger to others in the future” is often referred to as “future dangerousness.”

While there are justifiable reasons for a defense team to decide not to present certain mitigating evidence, the use of “strategic choice” should not be abused or misconstrued. For example, at one point in the litigation surrounding James Elledge’s decision to volunteer for the death penalty, his attorney argued that the choice was made not to introduce mitigation evidence because the strategy was to have Mr. Elledge be executed.²⁶⁰ Pursuing such a “strategy” is inconsistent with the proper function of Washington’s death penalty statute, is contrary to the intent of the legislature in creating that statute, is against public policy, and is a disingenuous way to approach a difficult problem of legal representation.²⁶¹ Indeed, framing the tactics used by a death penalty volunteer as “strategic choices” is actually a methodology that confuses and blurs the issue in an attempt to give volunteering for the death penalty an appearance of legitimacy.

The choice not to present a *particular piece* of mitigating evidence should not be confused with the failure to present *any* such evidence. An attorney should not let the mere presence of rebuttal evidence determine the presentation of mitigation information. When a jury has both aggravating and mitigating evidence before it, jurors are able to make an individualized and reliable sentence determination. It has been suggested that “mitigating circumstances are almost always discoverable and their effective enumeration and presentation almost guarantees the defendant will be spared execution in all but the most grisly crimes.”²⁶²

While choosing not to present a portion of mitigating evidence may be strategically sound, confusing this ability to choose with failure to present mitigation is hazardous.²⁶³ The complete failure to present mitigation evidence is arguably only a result of a volunteer client or ineffective assistance of counsel. When a false “strategic choice” is made, the outcome is the same as the volunteer or ineffective assistance of counsel scenarios. This is an arbitrary and capricious application and nonindividualized and unreliable imposition of Washington’s death penalty.

260. See Defendant’s Response to the Motion of Kathryn Ross for Reconsideration of the Trial Court’s Denial of Her Request to Appear as Amicus Curie, No. 98-1-00798-7, at 4 (“The fact that the defendant [Elledge] wishes to receive the death penalty provides strong strategic reasons to forgo putting on mitigating evidence.”).

261. See discussion *infra* Part V.

262. Levinson, *supra* note 9, at 173 (citing to Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 342, and 365 (1993)).

263. This would be true just as the prosecution may decide for strategic reasons not to present a particular aspect of aggravation or a portion of the circumstances of the crime.

C. *Ineffective Assistance of Counsel and Presentation of Mitigation Evidence*

Ineffective assistance of counsel sometimes prevents the introduction of mitigation evidence. The importance of effective assistance of counsel in the adversarial process is heightened in a capital trial.²⁶⁴ Ineffective assistance of counsel prevents the adversarial nature of the criminal justice process from occurring.

The issue of ineffective assistance of counsel in death penalty litigation is not a novel one. The current standard for determining whether an attorney has provided ineffective assistance of counsel is set forth in *Strickland v. Washington*, a case involving the sentencing phase of a capital case.²⁶⁵ Defense counsel, whose client was uncooperative most of the time, had conducted only a minimal amount of investigation into possible mitigating circumstances and ultimately declined to present any mitigation evidence.²⁶⁶ In denying the ineffective assistance of counsel claim, the Court adopted a two-pronged test to apply when analyzing this type of case.²⁶⁷ First, the defendant must show that the defense counsel's performance was deficient, and thus not the "counsel guaranteed the defendant by the Sixth Amendment."²⁶⁸ Second, the defendant must demonstrate that there is a "reasonable probability" that the attorney's deficient performance prejudiced the outcome.²⁶⁹

The same day the *Strickland* rule was announced, the Court announced its decision in *United States v. Cronic*.²⁷⁰ In *Cronic*, the Court considered a "check-kiting" case where defense counsel had only twenty-five days to prepare and was inexperienced in handling complex criminal trials.²⁷¹ The Court proclaimed that the Sixth Amendment right to effective assistance of counsel is "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing."²⁷² Thus, "if the process loses its character as a confrontation between adversaries, the constitutional guarantee [of counsel] is violated."²⁷³ Accordingly, where defense counsel is defi-

264. Simply put, "[t]he quality of counsel is often a matter of life or death for the capital defendant." Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923, 1924 (1994).

265. 466 U.S. 668 (1984).

266. *Strickland*, 466 U.S. at 672-73.

267. *Id.* at 687.

268. *Id.*

269. *Id.*

270. 466 U.S. 648 (1984) (both decisions were announced on May 14, 1984).

271. *Cronic*, 466 U.S. at 649.

272. *Id.* at 655-56.

273. *Id.* at 656-57.

cient and fails to subject the prosecution's case to worthwhile adversarial testing, the prejudicial effect on the defendant can be presumed and counsel is ineffective.²⁷⁴

The United States Supreme Court has recently handed down decisions that revisit issues relating to the guidelines for ineffective assistance of counsel.²⁷⁵ In a case from the 2000 term, *Williams v. Taylor*, the Court remanded the matter for a new sentencing hearing after determining that trial counsel's failure to introduce available evidence in mitigation constituted ineffective assistance of counsel under *Strickland*.²⁷⁶ For a brief period, it appeared as though the Supreme Court might have "raise[d] the floor for effective assistance of counsel in the sentencing phase of a capital trial."²⁷⁷ But a mere two years later, in *Bell v. Cone*, the Court reversed the Sixth Circuit's holding that a defense attorney's failure to present mitigation evidence and a closing argument amounted to ineffective assistance of counsel.²⁷⁸ In considering the imposition of Tennessee's death penalty, the Sixth Circuit had applied both *Strickland* and *Cronic*.²⁷⁹ The Supreme Court disagreed that *Cronic* applied.²⁸⁰ This was a rejection of the Sixth Circuit's determination that "[w]here mitigating evidence was available, but not adequately investigated and not presented at sentencing, this 'does not reflect a strategic decision, but rather an abdication of advocacy.'"²⁸¹ Instead, the Court applied a traditional *Strickland* analysis and refused to disturb the state court's finding that counsel had not performed deficiently.²⁸² Unfortunately, the Supreme Court's ruling in *Cone* does not provide the needed clarification regarding the circumstances under which the Sixth Amendment effective assistance of counsel requirement entails the presentation of mitigation evidence.

In the last decade, three death sentences in Washington have been overturned by the federal courts based on ineffective assistance of counsel claims that involved, at least in part, failure or neglect regarding mitigation evidence.²⁸³ Since mitigation is essential to Washing-

274. *Id.* at 658-59.

275. *Williams v. Taylor*, 529 U.S. 362 (2000); *Bell v. Cone*, 535 U.S. 685 (2002).

276. *Williams*, 529 U.S. at 398-99.

277. Bill Christman, *Chandler v. United States: Does the Defense Attorney Have a Legal Obligation to Present Mitigation Evidence in Eleventh Circuit Death Penalty Cases?* 18 GA. ST. U. L. REV. 563, 580 (2001).

278. *Bell v. Cone*, 535 U.S. 685, ___ (2002).

279. *Cone v. Bell*, 243 F.3d 961, 977 (6th Cir. 2001).

280. *Bell v. Cone*, 535 U.S. at ___.

281. *Id.* at 978 (quoting *Austin v. Bell*, 126 F.3d 843, 848 (6th Cir. 1997)).

282. *Bell v. Cone*, 535 U.S. at ___.

283. ACLU of Washington, *supra* note 66, at 9-12 (citing to *State v. Harris*, 106 Wash. 2d 784, 725 P.2d 975 (1986), by and through *Ramseyer v. Blodgett*, 853 F. Supp. 1239 (W.D. Wash. 1994), *aff'd* 64 F. 3d 1432 (9th Cir. 1995); *Jeffries v. Blodgett*, 771 F. Supp. 1520 (W.D.

ton's death penalty scheme, the adversarial process that provides for its presentation is equally vital.

V. PROPOSALS FOR CHANGE TO THE WASHINGTON STATUTORY SCHEME

The following proposals all advocate for a proportional, rational consideration to seek the death penalty, to maintain an adversarial balance once the death penalty is sought, and to ensure that if the death penalty is finally imposed, it comports with the intent of the legislature.

First, for the purpose of assisting both in the collection and presentation of mitigation evidence, the court should appoint a mitigation specialist in every case where the death penalty is a possible sentence. A mitigation specialist has been described as "an individual, who specializes in compiling potentially mitigating information about the accused in a capital case," who is appointed to present favorable evidence about the defendant to the factfinder in the penalty phase of a trial.²⁸⁴ One commentator came up with an appropriate definition: "A person qualified by knowledge, skill, experience, or training as a mental health or sociology professional to investigate, evaluate, and present psychosocial and other mitigating evidence to persuade the sentencing authority in a capital case that a death sentence is an inappropriate punishment for the defendant."²⁸⁵

A mitigation specialist can investigate maternity and birth records, school records, military records, medical records, prison records, employment history, physical and psychological testing, evidence of alcohol and drug abuse, and agencies.²⁸⁶ The mitigation specialist can conduct interviews with the defendant's immediate fam-

Wash. 1991), *aff'd* 974 F.2d 1179 (9th Cir. 1992); *Mak v. Blodgett*, 754 F. Supp. 1490 (W.D. Wash. 1991), *aff'd* 970 F.2d 614 (9th Cir. 1992), *cert. denied*, 507 U.S. 951, 122 L. Ed. 2d 742, 113 S. Ct. 1363 (1993)). Each of these cases had survived mandatory review by the Washington Supreme Court. ACLU of Washington, *supra* note 66, at 9-12. The U.S. District Court opinion setting aside the death sentence states that "[i]t is clear that the Washington Supreme Court did not fulfill the essential function of ensuring even-handed, rational, and consistent imposition of death sentences under Washington law." *Id.* at 9 (citing to *Harris* by and through *Ramseyer v. Blodgett*, 853 F. Supp. 1239, 1291 (W.D. Wash. 1994)). In *Mak* and then in *Harris*, the Ninth Circuit made reference to a "cumulative effect" principle in assessing attorney errors that prejudiced the defendant. Levinson, *supra* note 9, at 166-67.

284. *State v. Langley*, 839 P.2d 692, 697 (Or. 1992); see also Jonathan P. Tomes, *Damned If You Do, Damned If You Don't: The Use of Mitigation Experts in Death Penalty Litigation*, 24 AM. J. CRIM. L. 359, 365 (1997).

285. Tomes, *supra* note 284, at 367.

286. *Id.* at 369.

ily, extended family, friends, teachers, neighbors, and others who may help with the development of a file on the defendant's character.²⁸⁷

This proposal suggests that the Washington statute provide a means for the court to order the appointment of mitigation specialists in capital cases. The practice of other states could serve as a model. Virginia allows for the appointment of an expert to determine "whether there are any other factors in mitigation relating to the history or character of the defendant or the defendant's mental condition at the time of the offence."²⁸⁸ Ohio directs the court to provide a mitigation specialist to any indigent defendants charged with aggravated murder, as long as the services are reasonably necessary for suitable representation.²⁸⁹ Ohio sets out factors for the court to consider in deciding if the appointment of a mitigation specialist is necessary: "(1) the value of the expert assistance to the defendant's proper representation at either the guilt or the sentencing phase of the trial, and (2) the availability of alternative devices that would fulfill the same functions as the expert assistance sought."²⁹⁰

Second, after a person is charged with aggravated first-degree murder, there should be a mandatory period where mitigation evidence is collected to assist the prosecution in deciding whether to seek the death penalty. This mandatory period would also allow time for defendants to cool off, to consider their defenses, and to weigh the consequences of evidence that they may or may not present.²⁹¹ This would prevent reoccurrence of what happened to a defendant such as James Elledge, who was able to fast-track his execution.

A decision to seek the death penalty should be an informed one. It should consider not only the heinousness of the crime but also of the circumstances of each individual defendant.²⁹² The decision should be

287. *Id.*

288. VA. CODE ANN. § 19.2-264.3:1 (Anderson 2002); *see also* Tomes, *supra* note 284, at 373.

289. OHIO REV. CODE ANN. § 2929.024 (Michie 2002); *see also* Tomes, *supra* note 284, at 372-73.

290. Tomes, *supra* note 284, at 373 (citing *State v. Jenkins*, 473 N.E.2d 264, 291 (Ohio 1984)).

291. This allows time for defense counsel to develop trust and rapport with the client in order to provide effective representation and to gather the sometimes sensitive information that might be used to prepare a mitigation packet. CASE MANAGEMENT HANDBOOK, *supra* note 48, section V. C. (entitled "Mitigation: Length of Time Required to Conduct Investigation").

292. The Constitution Project, *Mandatory Justice: Eighteen Reforms to the Death Penalty* 53-54 (2001). *See also* Report of the Illinois Commission on Capital Punishment (2002) [hereinafter *Illinois Commission Report*], which suggests that the Attorney General and the State's Attorneys Association "should adopt recommendations as to the procedures State's Attorneys should follow in deciding whether or not to seek the death penalty." *Id.* at 82. In Washington, where prosecutors are elected, guidelines seem critical. There are noticeable differences between the approach of prosecutors in the state. For example, Pierce County, Washington, has pushed for the death

compared to other cases of the same charge and crime to see if the penalty is fair in that particular case. Information about a defendant may take time to surface, as it did in Mr. Elledge's case.²⁹³ In that case, because the defendant was able to expedite the process and cloud the jury's vision of who he really was, none of that information surfaced; if properly considered early on by the prosecuting attorney, that information could have warranted a life sentence.²⁹⁴

If there were a mandatory time period during which the prosecuting attorney is compelled to analyze the case itself, it would alleviate any fears that the process to take a person's life is being rushed. In New York, there is a 120-day period specified for just such an analysis.²⁹⁵

Part of this analysis must involve the court's proportionality review. In New Jersey, the Supreme Court established a database that contained judicial and other relevant information on death-eligible cases and how they compare to each other.²⁹⁶ However implemented, as long as the information has the time and the means to reach those who make the decision to seek the death penalty, the system can proceed to function as intended.

Third, if a competent defendant refuses to present mitigation evidence, the mitigation specialist should present that evidence under the court's direction. The need for mitigation specialists is indispensable in volunteer cases. This input should be as integral to the process as is the mandatory appellate review stage, because in the volunteer context it is the only way that the evidence will be heard.²⁹⁷ A mitigation specialist would be an important step to maintaining a proportional and adversarial environment.

Fourth, the language of the statute, rather than a separate jury instruction, should include a provision that sets forth the jury's re-

penalty in more than twenty cases (including the recent Robert Yates case) in the past fifteen years, prompting a Seattle newspaper to characterize the county as "a capital-punishment machine." See Lise Olsen, *Pierce County Known for Toughness in Capital Cases*, SEATTLE POST-INTELLIGENCER, Nov. 1, 2000, available at <http://seattlepi.nwsourc.com/local/ser01.shtml>. An August 2001 article also noted that of the eight men sentenced to death, five had their sentences reversed, one of the five was actually released, and only three remain on death row, with two of those still going through the appeals process. Olsen, *supra* note 47.

293. See Olsen, *supra* note 47.

294. See *supra* notes 108-09 and accompanying text.

295. N.Y. CRIM. PROC. LAW § 250.40.

296. David Baldus & George Woodworth, *Proportionality: The View of the Special Master*, 6 CHANCE: NEW DIRECTIONS FOR STATISTICS AND COMPUTING 9-17 (1993). An in-depth examination of proportionality is beyond the scope of this article. For a critique of comparative proportionality review in Washington, see Bruce Gilbert, Comment, *Comparative Proportionality Review: Will the Ends, Will the Means*, 18 SEATTLE U. L. REV. 593 (1995).

297. See generally Carter, *supra* note 35.

sponsibility to assess any information presented about the defendant or the crime that suggests that life without parole is the appropriate disposition.²⁹⁸ The scope of prosecutorial rebuttal after presentation of mitigation evidence should be narrow and limited only to contesting the falsity of defense allegations.

Fifth, the clemency board should be vested with specific authority to receive information in mitigation that bears on commutation of a death sentence.²⁹⁹ One panel of experts recommends that “the clemency decisionmaking process should take into account all factors that might lead the decisionmaker to conclude that death is not the appropriate punishment.”³⁰⁰

Finally, in the sentencing phase of a capital trial, defense counsel, or independent counsel on behalf of the court, should be held to a duty to argue for the defendant’s life. The American Bar Association provides this guidance: “The goal at the sentencing phase is to help the jury see the client as someone they do not want to kill.”³⁰¹ If any balance is to be preserved in the implementation of a penalty of death, the lawyer will not be asked to advocate for that which the State will be requesting already. This would make the defense lawyer’s advocacy useless. The presentation of mitigation evidence and the closing argument are the only opportunities to really “humanize” the defendant and explain to the jury why this person’s life should be spared.³⁰²

The attorney is an officer of the judicial system. To put the attorney in a position where advocacy contradicts proportionality and totally eviscerates the adversarial process contravenes not only public

298. WASH. REV. CODE § 10.95.070 (2002). The Illinois Commission also recommended that two items be added to the list of five specifically enumerated statutory factors: “6. Defendant’s background includes a history of extreme emotional or physical abuse; 7. Defendant suffers from reduced mental capacity.” *Illinois Commission Report*, *supra* note 292, at 141. An ABA Report addresses this issue by focusing on enhancing clarity in jury instructions and includes the provision that “[t]rial courts should instruct jurors that a juror may return a life sentence, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt, if the juror does not believe that the defendant should receive the death penalty. ABA Section of Individual Rights and Responsibilities, *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* 35 (2001).

299. We offer this suggestion with some reluctance because the operation of the current clemency process under the auspices of Governor Gary Locke has allowed presentation of all pertinent information to the board and to the Governor’s office. Unless this procedure is memorialized, however, that may not always be the case.

300. ABA Section of Individual Rights and Responsibilities, *supra* note 298.

301. American Bar Association, *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, cmt. 11.8 (1989).

302. See Brief of the National Association of Criminal Defense Lawyers (NACDL) as Amicus Curiae in Support of Gary Bradford Cone 6 (2002) (citing to Tennessee Association of Criminal Defense Lawyers, *Tools for the Ultimate Trial: The TACDL Death Penalty Defense Manual* 14.94 (1992)).

policy but also judicial policy. When there is a sentencing phase involving death, someone must argue for life; otherwise, the sentencing phase is useless. Removing the heavy burden of a defense lawyer, who may be forced to decide between appropriate advocacy and the suicidal will of the client, would help to maintain the balance that is needed to avoid arbitrariness.

VI. CONCLUSION

The presentation of mitigation evidence is a crucial requirement for any death penalty statute. Washington's legislature has recognized this and has crafted such a statute. Legislative intent is undermined in situations where mitigation is not presented. When a defendant volunteers, when ineffective assistance of counsel occurs, or when a strategic choice is compelled that prevents the presentation of mitigation evidence, Washington's death penalty statute fails to operate properly. In particular, the situation of the death penalty volunteer is contrary to Washington's established public policies of disallowing suicide and giving effect to the rights of jurors. Washington must lift the stamp of "suicide-by-penalty" that it has awarded itself and implement a reformed death penalty statute that protects both societal interests and the interests of capital defendants.

In order to prevent the breakdown of Washington's death penalty statute, several proposals should be implemented. Mitigation specialists should be appointed in every potential capital case. A mandatory waiting period before the decision to seek the death penalty should ensue after the prosecutor charges aggravated first-degree murder. Where a defendant "volunteers," the mitigation specialist should testify at the direction of the court regarding any relevant mitigation evidence. Relevant statutes should be amended to clarify the responsibilities of jurors and the clemency board. Finally, defense counsel should be held to a standard requiring a duty to argue for the life of the client. By adopting these proposals, crucial mitigating evidence will be presented in a manner that will allow Washington's death penalty statute to operate as it was intended.