up the Guidelines as the presumptive measure of lawfulness and requiring too little in the way of explanation from sentencing judges, the *Rita* Court undermined the strength of appellate review. To avoid a system in which unreasonable, within-Guidelines sentences go unchecked, courts should be required to explain their reasons in detail.

7. Sixth Amendment — Ineffective Assistance of Counsel. — Capital defendants are not always cooperative or repentant, even at sentencing hearings determinative of their fates. Some death penalty defendants may refuse to aid in investigation of mitigating evidence, or they may actively obstruct presentation of it during the sentencing phase. Others may flaunt the purposeful nature of their killings, their lack of remorse, or their willingness to be put to death for their crimes. Courts must be aware, however, that this behavior may be due to mental illness or caused by physical and emotional abuse, a genetic disorder, or drug addiction — characteristics that may reduce a defendant's moral culpability. Last Term, in *Schriro v. Landrigan*,[1] the Supreme Court upheld a state court's finding that a defendant who refused to allow the presentation of mitigating evidence from his family members was not prejudiced by his counsel's failure to investigate fully or to present other sorts of mitigating evidence.[2] Thus, the Court held, the defendant was not entitled to an evidentiary hearing on the claim of ineffective assistance of counsel.[3] The Court failed to analyze the context of Landrigan's refusal, including unique concerns about particular mitigating evidence and the defendant's background — factors that may have explained his statements and behavior. Moreover, the Court did not consider the defendant's refusal in the context of its waiver precedents or the importance of mitigating evidence. Courts should not expand a limited refusal to present only *some* mitigating evidence into a complete refusal to present *any* mitigating evidence, nor should they allow recalcitrant behavior at sentencing to justify eradication of a defendant's constitutional right to effective assistance of counsel.

Jeffrey Landrigan was convicted of second-degree murder in 1982. While in custody in Oklahoma, he stabbed another inmate, resulting in a conviction for assault and battery with a deadly weapon.[4] Three years later, Landrigan escaped from prison and committed a second murder.[5] An Arizona jury convicted Landrigan of theft, second-degree burglary, and felony murder. At sentencing, defense counsel attempted to present mitigating testimony from Landrigan's ex-wife and birth

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[1] 127 S. Ct. 1933 (2007).
[2] *Id.* at 1937.
[3] *Id.* at 1944.
[4] *Id.* at 1937.
[5] *Id.*

mother, but at Landrigan's request, the two witnesses refused to testify.[6] The court had the following colloquy with the defendant:

> The Court: Mr. Landrigan, have you instructed your lawyer that you do not wish . . . to bring any mitigating circumstances to my attention?
>
> The Defendant: Yeah.
>
> The Court: Do you know what that means?
>
> The Defendant: Yeah.
>
> The Court: Mr. Landrigan, are there mitigating circumstances I should be aware of?
>
> The Defendant: Not as far as I'm concerned.[7]

In explaining his client's wishes, counsel said that the defendant "is adamant he does not want any testimony from his family, specifically these two people that I have here, his mother, under subpoena, and as well as having flown in his ex-wife."[8] The court asked counsel to explain the testimony of the witnesses, but counsel was interrupted by Landrigan, who stated that "[i]f I wanted this to be heard, I'd have my wife say it."[9] Landrigan concluded his statement to the court with the following words: "I think if you want to give me the death penalty, just bring it right on. I'm ready for it."[10] After finding two statutory aggravating circumstances[11] and two nonstatutory mitigating circumstances,[12] the trial judge sentenced Landrigan to death.[13]

The Arizona Supreme Court affirmed the sentence and conviction on direct appeal.[14] Landrigan sought postconviction relief, claiming ineffective assistance of counsel. The Arizona postconviction court — presided over by the same judge who tried and sentenced Landrigan five years earlier — rejected Landrigan's claim and declined to hold an evidentiary hearing because Landrigan's "statements at sentencing belie[d] his new-found sense of cooperation."[15] After the Arizona Su-

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[6] *Id.*

[7] *Id.*

[8] *Id.* at 1951 (Stevens, J., dissenting) (emphasis omitted).

[9] *Id.* at 1937 (majority opinion). Landrigan proceeded to explain that he was "doing robberies" to support his family, that he did not murder the first victim in self-defense but just "stabbed him," and that he did not murder his second victim in self-defense but just "stabbed him 14 times." *Id.* at 1937–38.

[10] *Id.* at 1938.

[11] The two statutory aggravating circumstances were "that Landrigan murdered Dyer in expectation of pecuniary gain and that Landrigan was previously convicted of two felonies involving the use or threat of violence on another person." *Id.*

[12] The two nonstatutory mitigating circumstances were "that Landrigan's family loved him and an absence of premeditation." *Id.*

[13] *Id.*

[14] State v. Landrigan, 859 P.2d 111, 118 (Ariz. 1993). The court made this decision in the absence of an evidentiary hearing. *Id.*

[15] *Landrigan*, 127 S. Ct. at 1938 (internal quotation marks omitted).

preme Court denied review, Landrigan petitioned for federal habeas relief, challenging the factual findings made by the state court regarding his refusal to present mitigating evidence.[16] The U.S. District Court for the District of Arizona denied Landrigan's federal habeas application, holding that Landrigan could not make out a colorable ineffective assistance of counsel claim because he could not show prejudice even if counsel's performance was deficient.[17] A unanimous panel of the Ninth Circuit Court of Appeals affirmed, reasoning that counsel for defendant was not ineffective in failing to present mitigating evidence during the penalty phase because Landrigan adamantly refused to allow such evidence to be presented.[18]

The Ninth Circuit granted rehearing en banc and reversed, holding that Landrigan was entitled to an evidentiary hearing because he raised a "colorable claim" that his counsel's performance fell below the *Strickland v. Washington*[19] standard.[20] First, it held that the state court rendered an "unreasonable determination of the facts" by finding that Landrigan instructed his attorney not to present any mitigating evidence.[21] It found that counsel failed to investigate evidence of Landrigan's mental health problems, tortured family history, and exposure to drugs and alcohol; therefore, Landrigan was objecting to the presentation of the only testimony available — testimony by his immediate family.[22] Second, it held that the state court rendered an "unreasonable application"[23] of the Supreme Court's precedent in finding that respondent's claim of ineffective assistance was "'frivolous' and 'meritless'"[24] because counsel failed to prepare for the sentencing or to conduct the constitutionally required investigation.[25] Specifically, the court reasoned that the defendant's "last-minute decision [regarding presentation] cannot excuse his counsel's failure to conduct an ade-

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[16] *See id.* According to the federal habeas statute, a habeas petitioner challenging state court factual findings must establish by clear and convincing evidence that the state court's findings were erroneous. *See* 28 U.S.C. § 2254(e)(1) (2000).

[17] *Landrigan*, 127 S. Ct. at 1938.

[18] Landrigan v. Stewart, 272 F.3d 1221, 1226 (9th Cir. 2001).

[19] 466 U.S. 668 (1984).

[20] Landrigan v. Schriro, 441 F.3d 638, 650 (9th Cir. 2006) (en banc). Judges Bea and Callahan dissented.

[21] *See id.* at 647 (quoting 28 U.S.C. § 2254(d)(2)) (internal quotation marks omitted).

[22] *Id.* at 644–46.

[23] *Id.* at 644 (quoting 28 U.S.C. § 2254(d)(1)). The "unreasonable application" provision is implicated when "the state court identifies the correct governing legal rule from [Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case." Williams v. Taylor, 529 U.S. 362, 407 (2000).

[24] *Landrigan*, 441 F.3d at 647.

[25] *See id.* at 643–44. Counsel is required to conduct a thorough investigation of mitigating evidence, *see* Wiggins v. Smith, 539 U.S. 510, 523 (2003), even if the defendant is unhelpful or obstructive to the investigation, *see* Rompilla v. Beard, 125 S. Ct. 2456, 2462–63 (2005).

quate investigation prior to the sentencing."[26] The Ninth Circuit concluded by finding "a reasonable probability that, if Landrigan's allegations are true, the sentencing judge would have reached a different conclusion," and remanded for an evidentiary hearing.[27]

The Supreme Court reversed and remanded. Writing for the Court, Justice Thomas[28] held that the state district court was not unreasonable in determining that Landrigan refused the presentation of mitigating evidence and that, as a result, Landrigan was not prejudiced under *Strickland* by his counsel's failure to investigate adequately or to present mitigating evidence.[29] Thus, the Court held, the district court did not abuse its discretion in denying Landrigan an evidentiary hearing because he could not sustain a colorable claim of ineffective assistance of counsel.[30] An evidentiary hearing is not required under the Antiterrorism and Effective Death Penalty Act of 1996[31] (AEDPA) "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief."[32] The Court agreed with the district court that the factual record could not support the defendant's contention that he would have allowed other mitigating evidence;[33] therefore, an evidentiary hearing to amass further mitigating evidence to show that his counsel was ineffective would be fruitless.[34]

The Court then rejected the two alternative reasons that the Ninth Circuit gave for its holding. First, the Court found that the state court did not unreasonably apply Supreme Court precedent because no Supreme Court case dealt with the question of what should be done when a defendant refuses to present mitigating evidence.[35] Second, the Court held that the state court did not have to find that Landrigan's decision not to present mitigating evidence was "informed and knowing" because that requirement was never imposed on a defendant's decision not to introduce evidence.[36] Moreover, it found that

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[26] *Landrigan*, 441 F.3d at 647.

[27] *Id.* at 650.

[28] Justice Thomas was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito.

[29] *Landrigan*, 127 S. Ct. at 1941–42.

[30] *Id.* at 1937.

[31] Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

[32] *See Landrigan*, 127 S. Ct. at 1940.

[33] The Court found that "the language of the colloquy plainly indicates that Landrigan informed his counsel not to present *any* mitigating evidence." *Id.* at 1941 (emphasis added).

[34] *See id.* at 1940.

[35] *See id.* at 1942. The Court distinguished *Wiggins v. Smith*, 539 U.S. 510, 523 (2003), on the ground that it dealt with counsel's — not the defendant's — decision not to present mitigating evidence, and *Rompilla v. Beard*, 545 U.S. 374, 381 (2005), on the ground that the defendant obstructed the development — but not the presentation — of mitigating evidence.

[36] *Landrigan*, 127 S. Ct. at 1942 (quoting Landrigan v. Schriro, 441 F.3d 638, 647 (9th Cir. 2006) (en banc)) (internal quotation marks omitted).

counsel properly explained to Landrigan the importance of mitigating evidence and that Landrigan understood the consequences of his actions.[37] Describing Landrigan's mitigating evidence as "weak," the Court found that Landrigan would not be entitled to habeas relief even if he proved all his claims in the evidentiary hearing; thus, the district court did not abuse its discretion in denying the hearing.[38]

Justice Stevens dissented,[39] arguing that because "[s]ignificant mitigating evidence . . . was unknown at the time of sentencing," the Ninth Circuit's en banc decision should be affirmed.[40] Justice Stevens pointed out that all reviewing courts had conceded that counsel's investigation of mitigating evidence was constitutionally deficient, given that counsel failed to complete a psychological evaluation that would have uncovered Landrigan's organic brain disorder, consult experts regarding his possible fetal alcohol syndrome, develop the history of physical and emotional abuse and neglect by his adoptive parents, or examine the effects of his serious substance abuse problem.[41] He found that the state court's application of federal law to the question of waiver was unreasonable in light of the Supreme Court's "longstanding precedent . . . [that] requires that any waiver of the right to adduce [mitigating] evidence be knowing, intelligent, and voluntary."[42] Because Landrigan — due to the failure of his counsel to investigate — was unaware of the later-discovered neurological evidence, "he could not have made a knowing and intelligent waiver of his constitutional rights."[43] Further, Justice Stevens found that Landrigan's waiver was limited to testimony of his birth mother and his ex-wife because he knew only of this evidence.[44] Finally, Justice Stevens admonished the majority for minimizing and distorting the relevant mitigating evidence and exaggerating aggravating circumstances in order to come to its conclusion that Landrigan could not establish prejudice under *Strickland*.[45]

The Court failed to pay attention to the *context* of Landrigan's statements, rejecting the possibility that the defendant had refused to

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[37] *Id.* at 1943. The Court also noted that Landrigan failed to develop this claim properly before the Arizona courts. *Id.* at 1942–43.

[38] *Id.* at 1944.

[39] Justice Stevens was joined by Justices Souter, Ginsburg, and Breyer.

[40] *Landrigan*, 127 S. Ct. at 1944–45 (Stevens, J., dissenting).

[41] *Id.* at 1945.

[42] *Id.* at 1947 (finding also that "[f]or a capital defendant, the right to have the sentencing authority give full consideration to mitigating evidence that might support a sentence other than death is of paramount importance — in some cases just as important as the right to representation by counsel").

[43] *Id.* at 1950.

[44] *Id.*

[45] *See id.* at 1953–54.

present only a small subset of the total potential mitigating evidence.[46] More specifically, it ignored that capital defendants have numerous compelling reasons to refuse to present some — but not all — mitigating evidence. Defendants may experience "defensiveness, shame, [or] repression,"[47] regarding episodes of abuse. Psychiatrists have observed that defendants are often hesitant to disclose to a psychiatrist, or in open court, that they were mentally or physically abused by a family member.[48] Defendants may also want to prevent certain — but not all — individuals from testifying.[49] The Court, however, entirely disregarded that the undiscovered mitigating evidence was different not only in degree, but also in kind from the evidence that could have been offered by defendant's ex-wife and mother, and that it would have been presented by different witnesses. In addition to testimony regarding Landrigan's exposure to alcohol and drugs *in utero*, his abandonment by his birth parents, his biological family's history of violence, and his own alleged genetic predisposition to violence,[50] the undiscovered evidence included proof of his organic brain disorder,[51] evidence that would have been presented by a forensic psychologist.[52] Justice Thomas chose not to mention the undiscovered evidence of the defendant's brain disorder most likely because he, like the state court,

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[46] Indeed, Landrigan's counsel told the trial judge that Landrigan "is adamant he does not want any testimony from his family, specifically these two people that I have here." Petition for Writ of Certiorari at 11–12, *Landrigan*, 127 S. Ct. 1933 (No. 05-1575), 2006 WL 1594038.

[47] Alan M. Goldstein et al., *Assessing Childhood Trauma and Developmental Factors as Mitigation in Capital Cases*, *in* FORENSIC MENTAL HEALTH ASSESSMENT OF CHILDREN AND ADOLESCENTS 365, 373 (Steven N. Sparta & Gerald P. Koocher eds., 2006) (describing why defendants' testimony regarding their childhoods may be unreliable).

[48] Kenneth B. Dekleva, *Psychiatric Expertise in the Sentencing Phase of Capital Murder Cases*, 29 J. AM. ACAD. PSYCHIATRY & L. 58, 61 (2001); *see also* Knight v. Dugger, 863 F.2d 705, 749–50 (11th Cir. 1988) (finding that the defendant did not want his mother to testify about sexual abuse because he wished to avoid public knowledge of the matter.).

[49] *See, e.g.*, Larette v. State, 703 S.W.2d 37, 39 (Mo. Ct. App. 1985) (finding that the defendant did not want his father to testify out of concern for the father's health).

[50] *See Landrigan*, 127 S. Ct. at 1943. The majority assumes that the undiscovered evidence would have been cumulative — that the "birth mother would have offered testimony that overlaps with the evidence Landrigan now wants to present." *Id.* at 1941. This approach, however, sorely underestimates the role of mental health experts who are able to explain to a jury in scientific terms how a defendant's traumatic history — including physical and mental abuse, drug use, and cycles of violence — led to the commission of the crime. *See* Karen L. Salekin, *Capital Mitigation from a Developmental Perspective*, *in* EXPERT PSYCHOLOGICAL TESTIMONY FOR THE COURTS 149 (Mark Costanzo et al. eds., 2007).

[51] *Landrigan*, 127 S. Ct. at 1949 (Stevens, J., dissenting).

[52] This investigative failure is particularly egregious because evidence of mental abnormality is a mitigating factor that substantially influences juries' decisions regarding death, *see* John H. Montgomery et al., *Expert Testimony in Capital Sentencing: Juror Responses*, 33 J. AM. ACAD. PSYCHIATRY & L. 509, 516 (2005), especially when, along with other "explanatory or counterbalancing" factors, the psychologist is able to present a life story that "cohere[s] to explain how the present events unfolded," Mary A. Connell, *A Psychobiographical Approach to the Evaluation for Sentence Mitigation*, 31 J. PSYCHIATRY & L. 319, 326 (2003) (emphases omitted).

determined that Landrigan would have refused to present that evidence.[53] Had the Court considered in detail the undiscovered psychobiographical evidence and the witnesses that could have presented it, it would have been much more difficult for the Court to maintain that Landrigan's refusal of in-court testimony from his immediate family regarding abuse was also a refusal to present expert testimony regarding his organic brain disorder.

The majority interpreted the defendant's obstinate behavior at sentencing[54] as further evidence that Landrigan would have refused to allow his counsel to present any mitigating evidence,[55] and therefore was not prejudiced by his counsel's failure to do so.[56] It quoted in detail Landrigan's proclamations of his robberies, his repudiation of his counsel's characterization of his first murder and the prison stabbing as self-defense, and his volunteering for the death penalty.[57] The Court, quoting the words of the Ninth Circuit panel, approached this case as a particularly clear example of a defendant's refusal of mitigating evidence: "In the constellation of refusals to have mitigating evidence presented . . . this case is surely a bright star. No other case could illuminate the state of the client's mind and the nature of counsel's dilemma quite as brightly as this one."[58]

The Court ignored that many defendants in the mitigation phase of a capital sentencing trial are prone to impulsive behavior and oscillating preferences, especially those with preexisting mental illness.[59] Defendants in capital cases commonly suffer from a variety of mental vulnerabilities. Many defendants are poor[60] and a large percentage are victims of physical and sexual abuse.[61] Capital defendants who opt to forego appeals or not to present mitigating evidence are espe-

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[53] *See Landrigan*, 127 S. Ct. at 1949 (Stevens, J., dissenting).

[54] Unlike the Supreme Court, the state court did not discuss the defendant's behavior at sentencing as a factor in its decision to sentence the defendant to death. *Id.* at 1954 n.13.

[55] *See id.* at 1941 (majority opinion) ("[Landrigan's] behavior confirms what is plain from the transcript of the colloquy: that Landrigan would have undermined the presentation of any mitigating evidence that his attorney might have uncovered.").

[56] *Id.* at 1944.

[57] *Id.* at 1937–38.

[58] *Id.* at 1941 (omission in original) (quoting *Landrigan*, 272 F.3d at 1226) (internal quotation mark omitted).

[59] *See* Sandra B. McPherson, *Psychosocial Investigation in Death Penalty Mitigation: Procedures, Pitfalls and Impact*, *in* PSYCHOLOGY, LAW, AND CRIMINAL JUSTICE 286, 289–91 (Graham Davies et al. eds., 1995).

[60] *Cf.* Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 563–68 (1995) (arguing that poverty primes children for delinquent and antisocial behavior as adults).

[61] *See* Pamela Y. Blake et al., *Neurologic Abnormalities in Murderers*, 45 NEUROLOGY 1641, 1644 (1995).

cially likely to suffer from severe mental illness.[62] These death penalty "volunteers" often change their minds about their course of action.[63] As a consequence, courts must be extremely careful to consider the context of a defendant's recalcitrant or obstructive behavior or apparent willingness to be put to death before deciding that it constitutes an informed and competent decision to waive the right to present mitigating evidence. While capital defendants must retain control over the proceedings and must be able to waive their constitutional rights when they have come to an informed and stable decision,[64] the state's obligation to invoke the ultimate punishment only on those deserving of it supports an especially high burden before a court concludes that a defendant has made a rational decision to "volunteer" for death.[65]

The majority failed to consider the context of Landrigan's statements in another sense: it did not analyze his refusal to present evidence under the Court's own precedent regarding "waiver" of constitutional trial rights.[66] Even when the Court found that the state court did not unreasonably apply clearly established Supreme Court precedent because the Court has "never imposed an 'informed and knowing' requirement upon a defendant's decision not to introduce evidence,"[67] the Court did not hold that Landrigan's statement constituted a proper waiver. In fact, the Court fastidiously avoided using the word "waiver" to refer to Landrigan's refusal. The distinction between refusing to introduce evidence and "waiving" a constitutional right appears purely semantic and is easily missed.[68] Avoiding the word "waiver," however, allowed the majority to forego engagement with waiver precedent and ignore the narrow circumstances under which a capital defendant's rights may be waived. The majority thus sidestepped the well-established principle that courts are supposed to "'indulge every reasonable presumption against waiver' of fundamen-

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[62] *See* John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939, 962–63 (2005); *see also* C. Lee Harrington, *Mental Competence and End-of-Life Decision Making: Death Row Volunteering and Euthanasia*, 29 J. HEALTH POL. POL'Y & L. 1109, 1132–34 (2004).

[63] *See* Blume, *supra* note 63, at 940.

[64] *See* Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363, 1390–91 (1988).

[65] *See* Anthony J. Casey, *Maintaining the Integrity of Death: An Argument for Restricting a Defendant's Right To Volunteer for Execution at Certain Stages in Capital Proceedings*, 30 AM. J. CRIM. L. 75, 105–06 (2002).

[66] *Compare Landrigan*, 127 S. Ct. at 1941–42, *with id.* at 1947 (Stevens, J., dissenting).

[67] *Id.* at 1942 (majority opinion).

[68] In fact, the dissent interprets the majority opinion as arguing that "respondent waived his right to present any and all mitigating evidence." *Id.* at 1946 (Stevens, J., dissenting). The phrasing of the majority opinion is especially odd given that Justices in the majority repeatedly spoke of the "waiver" question at oral argument. *See generally* Transcript of Oral Argument, *Landrigan*, 127 S. Ct. 1933 (No. 05-1575), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-1575.pdf.

tal constitutional rights."[69] A stringent standard for waiver is warranted especially in the context of the death penalty sentencing phase.[70] It is unreasonable for a court to allow a defendant to waive the right to present mitigating evidence unless the waiver expressly and unambiguously extends to all potential mitigating evidence.[71]

The majority further ignored the contextual importance of the right being waived.[72] Mitigating evidence is one of the most important checks ensuring that the state imposes the death penalty only when it "has adequate assurance that the punishment is justified."[73] Evidence of a defendant's background and character fulfills that function because "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."[74] Further, mitigating evidence has been empirically shown to be extremely influential on juries' decisions about life or death,[75] and the Supreme Court itself held last Term that "sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence."[76] By ignoring the context of Landrigan's statements and behavior, the *Landrigan* majority failed to acknowledge the consequences of Landrigan's refusal to present certain mitigating evidence at the sentencing phase.

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[69] Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937)); *see also* Iowa v. Tovar, 541 U.S. 77, 88 (2004) (holding that waiver of right to counsel at plea hearing must be knowing and intelligent); Schneckloth v. Bustamonte, 412 U.S. 218, 237–38 (1973) (listing fair trial rights to which the Court has applied the "knowing and intelligent" waiver standard).

[70] *See* Rees v. Peyton, 384 U.S. 312, 314 (1966) (holding that if a defendant has elected to forego legal proceedings that could avert the imposition of the death penalty, then a court must determine "whether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity").

[71] Indeed, some scholars even argue that under the Eighth Amendment, capital defendants may not refuse to present mitigating evidence because such refusal "invalidates the delicately balanced protection for safeguarding against arbitrary imposition of the death penalty." 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, 111 (1987); *see also* Casey, *supra* note 66, at 105.

[72] *See* California v. Ramos, 463 U.S. 992, 998–99 (1983) ("[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.").

[73] Whitmore v. Arkansas, 495 U.S. 149, 173 (1990) (Marshall, J., dissenting).

[74] Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (quoting California v. Brown, 479 U.S. 538, 545 (1987)) (internal quotation mark omitted). Specifically, evidence of physical and sexual abuse, privation, and diminished mental capacity is "the kind of troubled history . . . relevant to assessing a defendant's moral culpability." Wiggins v. Smith, 539 U.S. 510, 535 (2003) (citing *Penry*, 492 U.S. at 319).

[75] *See* Michelle E. Barnett et al., *When Mitigation Evidence Makes a Difference: Effects of Psychological Mitigating Evidence on Sentencing Decisions in Capital Trials*, 22 BEHAV. SCI. & L. 751, 764–66 (2004).

[76] Abdul-Kabir v. Quarterman, 127 S. Ct. 1654, 1664 (2007).

Considering together the Court's precedents on waiver and on the importance of mitigating evidence, it is clear that waiver of the right to present any mitigating evidence cannot be implied lightly. The Court's approach is not only disingenuous in its semantic avoidance of the term "waiver," but is also disruptive of the autonomy and dignity of defendants. Before the *Landrigan* ruling, some appellate courts would not have allowed a defendant's limited refusal to present certain testimony to convert into a blanket waiver, nor would they have read such a refusal to justify counsel's failure to investigate.[77] After the Court's decision, however, defendants face powerful pressures to allow their counsel to present all possible mitigating evidence — including evidence they do not want presented in a public court such as sexual abuse by family members — lest they be deemed to have excused their counsel from any obligation to discover other potentially mitigating evidence. If the Court had been more faithful to its own applicable precedent, it would have had to confront the tension between a defendant's autonomy rights in controlling the defense and the judicial presumption against waiver. It would have had to engage more seriously with the dissent's argument that the right to present mitigating evidence is akin to other trial rights that are waivable only if waiver is "knowing, intelligent, and voluntary"; it would have analyzed the defendant's colloquy with the trial judge in light of that standard; and it might have had to recognize that Landrigan was prejudiced by counsel's ineffective assistance because he never waived his right to a full investigation and presentation of mitigating evidence.

With "no personal history, no human relationships, and no social context," there is no way to explain what criminals do — "except for their own personal evil."[78] Without proper consideration of the context of a defendant's statements and behavior, a capital sentencing court cannot come to an accurate interpretation of a defendant's actions. If society holds fast to the moral principle that a criminal defendant's troubled life and mental health are relevant to moral culpability, the Court should hesitate before affirming a state court's determination that a defendant has refused completely the right to present mitigating evidence when the defendant instead may have refused limited testimony or experienced an outburst of impulsive behavior.

The Court, before the addition of Chief Justice Roberts and Justice Alito, issued two opinions in the last four years that significantly ad-

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[77] *See, e.g.*, Summerlin v. Schriro, 427 F.3d 623, 637 (9th Cir. 2005) (en banc) (holding that when defendant "spontaneously objected to the presentation of one witness . . . [, he did not indicate] that he was instructing his attorney not to present any mitigating evidence"); Carter v. Bell, 218 F.3d 581, 596 (6th Cir. 2000) (holding that "reluctance on Carter's part to present a mental health defense or to testify should not preclude counsel's investigation of these potential factors").

[78] Haney, *supra* note 61, at 550.

vanced its penalty phase jurisprudence by protecting the right to a meaningful mitigation defense.[79] *Landrigan*, in sharp contrast, represents a considerable departure from this trend that, if continued, will have deplorable consequences for the rights of capital defendants.

C. Due Process

1. Abortion Rights — "Partial Birth" Abortion. — Constitutional adjudication in the shadow of scientific debate raises serious questions regarding how courts should respond when the legislature creates the possibility — but not the certainty — of an outcome the Constitution seeks to prevent. Last Term, the Supreme Court in *Gonzales v. Carhart*[1] upheld the federal Partial-Birth Abortion Ban Act of 2003[2] against a facial challenge, announcing that when there is no scientific consensus as to whether an abortion procedure can ever be medically necessary, a ban on the procedure that does not include a health exception is not facially invalid.[3] Although it may sometimes be appropriate for the Court to countenance constitutional harms that are probabilistic or uncertain, *Carhart*'s rule of blanket deference to Congress in the face of medical disagreement was inadequately theorized and swept too broadly. When the probability of harm is ascertainable, courts should intervene to prevent those potential harms that have a sufficiently high "expected value." When the probability of harm is not ascertainable, courts should consider the institutional roles of Congress and the courts, as well as the competing constitutional values at stake, in crafting an appropriately nuanced response.

In 2000, in *Stenberg v. Carhart*,[4] the Supreme Court struck down on facial challenge Nebraska's "partial-birth" abortion ban for failing to provide an exception allowing the procedure when necessary to protect the health of the mother.[5] The Court also found that the law unduly burdened the right to an abortion by encompassing not only "dilation and extraction" ("D & X"), but also "dilation and evacuation" ("D & E"), the most common second-trimester abortion procedure.[6]

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[79] *See* Rompilla v. Beard, 125 S. Ct. 2456, 2462–63 (2005); Wiggins v. Smith, 539 U.S. 510, 523 (2003).

[1] 127 S. Ct. 1610 (2007).

[2] Pub. L. No. 108-105, 117 Stat. 1201 (codified at 18 U.S.C. § 1531 (Supp. IV 2004)).

[3] *Carhart*, 127 S. Ct. at 1638.

[4] 530 U.S. 914 (2000).

[5] *Id.* at 937–38.

[6] *Id.* at 945–46. In a D & E procedure, a woman's cervix is dilated and the doctor uses forceps to evacuate the fetus, which breaks apart in the process. *Carhart*, 127 S. Ct. at 1620–21. In a D & X procedure, also called "intact D & E," the cervix is dilated enough that the entire fetus can be removed from the uterus without breaking apart, and the doctor crushes or punctures the fetus's skull before the whole body passes the cervix. *Id.* at 1621–23.